

HOUSE BILL NO. 265

INTRODUCED BY REAM, MARKS

IN THE HOUSE

January 18, 1985	Introduced and referred to Committee on Judiciary.
February 13, 1985	Committee recommend bill do pass as amended. Report adopted. Statement of Intent attached.
February 14, 1985	Bill printed and placed on members' desks.
February 16, 1985	Second reading, do pass.
February 18, 1985	Considered correctly engrossed.
February 19, 1985	Third reading, passed. Transmitted to Senate.

IN THE SENATE

February 21, 1985	Introduced and referred to Committee on Judiciary.
March 28, 1985	Committee recommend bill be concurrent in as amended. Report adopted. Statement of Intent amended.
March 30, 1985	Second reading, concurred in as amended.
April 1, 1985	Third reading, concurred in. Ayes, 41; Noes, 7. Returned to House with amendments and with amended Statement of Intent.

IN THE HOUSE

April 2, 1985	Received from Senate.
April 5, 1985	Second reading, amendments and amended Statement of Intent not concurred in.
April 8, 1985	On motion, Conference Committee requested.
April 9, 1985	Conference Committee appointed.
April 11, 1985	Conference Committee reported.
April 12, 1985	Second reading, Conference Committee report adopted. Third reading, Conference Committee report adopted.
April 13, 1985	Conference Committee report adopted by Senate.
April 15, 1985	Sent to enrolling. Reported correctly enrolled.

1 HOUSE BILL NO. 265
2 INTRODUCED BY Resm Marks

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY DEFINING LAWS
5 RELATING TO RECREATIONAL USE OF STATE WATERS; PROHIBITING
6 RECREATIONAL USE OF DIVERTED WATERS; RESTRICTING THE
7 LIABILITY OF LANDOWNERS WHEN WATER IS BEING USED FOR
8 RECREATION; ESTABLISHING THE RIGHT TO PORTAGE; PROVIDING
9 THAT A PRESCRIPTIVE EASEMENT CANNOT BE ACQUIRED BY
10 RECREATIONAL USE OF SURFACE WATERS; AMENDING SECTION
11 70-19-405, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE
12 AND AN APPLICABILITY DATE."

13
14 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

15 NEW SECTION. Section 1. Definitions. For purposes of
16 [sections 2 through 5], the following definitions apply:

17 (1) "Barrier" means an artificial obstruction located
18 in or over a water body, restricting passage on or through
19 the water, or a natural object which totally or effectively
20 obstructs the recreational use of the surface water at the
21 time of use. A barrier may include but is not limited to a
22 bridge or fence or any other manmade obstacle to the natural
23 flow of water or a natural object within the ordinary
24 high-water mark of a stream.

25 (2) "Class I waters" means surface waters that:

1 (a) lie within the officially recorded federal
2 government survey meander lines thereof;

3 (b) flow over lands that have been judicially
4 determined to be owned by the state by reason of application
5 of the federal navigability test for state streambed
6 ownership;

7 (c) flow through public lands;

8 (d) are or have been capable of supporting commercial
9 activity; or

10 (e) are or have been capable of supporting commercial
11 activity within the meaning of the federal navigability
12 test.

13 (3) "Class II waters" means all surface waters that
14 are not class I waters.

15 (4) "Department" means the department of fish,
16 wildlife, and parks provided for in 2-15-3401.

17 (5) "Diverted away from a natural water body" means a
18 diversion of surface water through a manmade water
19 conveyance system, including but not limited to:

20 (a) an irrigation or drainage canal or ditch;

21 (b) an industrial, municipal, or domestic water
22 system;

23 (c) a flood control channel; or

24 (d) a hydropower inlet and discharge facility.

25 (6) "Ordinary high-water mark" means the line that

1 water impresses on land by covering it for sufficient
 2 periods to cause physical characteristics that distinguish
 3 the area below the line from the area above it.
 4 Characteristics of the area below the line include, when
 5 appropriate, but are not limited to diminished terrestrial
 6 vegetation or lack of agricultural crop value.

7 (7) (a) "Recreational use" means with respect to class
 8 I waters: fishing, hunting, swimming, floating in small
 9 craft or other flotation devices, boating in motorized craft
 10 unless otherwise prohibited or regulated by law, or craft
 11 propelled by oar or paddle, and related unavoidable or
 12 incidental uses, within the ordinary high-water mark of the
 13 waters.

14 (b) Recreational use means with respect to class II
 15 waters all of the uses set forth in subsection (7)(a),
 16 except that it does not include, without permission of the
 17 landowner:

18 (i) overnight camping;

19 (ii) big game hunting or upland bird hunting;

20 (iii) operation of all-terrain vehicles or other
 21 motorized vehicles not primarily designed for operation upon
 22 the water;

23 (iv) the placement or creation of any permanent or
 24 semipermanent object such as a permanent duck blind or boat
 25 moorage; or

1 (v) other activities which are not primarily
 2 water-related pleasure activities.

3 (8) "Supervisors" means the board of supervisors of a
 4 soil conservation district, the directors of a grazing
 5 district, or the board of county commissioners if a request
 6 pursuant to [section 3(3)(b)] is not within the boundaries
 7 of a conservation district or if the request is refused by
 8 the board of supervisors of a soil conservation district or
 9 the directors of a grazing district.

10 NEW SECTION. Section 2. Recreational use permitted --
 11 limitations -- exceptions. (1) Except as provided in
 12 subsection (3), all class I waters that are capable of
 13 recreational use as defined in [section 1(7)(a)], including
 14 the beds underlying them and the banks up to the ordinary
 15 high-water mark, may be so used by the public without regard
 16 to the ownership of the land underlying the waters.

17 (2) Except as provided in subsection (3), all class II
 18 waters that are capable of recreational use as defined in
 19 [section 1(7)(b)], including the beds underlying them and
 20 the banks up to the ordinary high-water mark, may be so used
 21 by the public without regard to the ownership of the land
 22 underlying them, except that recreational use does not
 23 include those activities excluded in [section 1(7)(b)].

24 (3) The right of the public to make recreational use
 25 of surface waters does not include the right to make

1 recreational use of waters:

2 (a) in a stock pond or other impoundment fed by an
3 intermittently flowing natural watercourse; or

4 (b) while diverted away from a natural water body for
5 beneficial use pursuant to Title 85, chapter 2, part 2 or 3.

6 (4) The right of the public to make recreational use
7 of surface waters does not grant any easement or right to
8 the public to enter onto or cross private property in order
9 to use such waters for recreational purposes.

10 (5) The provisions of this section do not affect any
11 rights of the public with respect to state-owned lands that
12 are school trust lands or any rights of lessees of such
13 lands under lease on [the effective date of this act].

14 NEW SECTION. Section 3. Right to portage --
15 establishment of portage route. (1) A member of the public
16 making recreational use of surface waters may, above the
17 ordinary high-water mark, portage around barriers in the
18 least intrusive manner possible, avoiding damage to the
19 landowner's land and violation of his rights.

20 (2) A landowner may create barriers across streams for
21 purposes of land or water management or to establish land
22 ownership as otherwise provided by law. If a landowner
23 erects a barrier pursuant to a design approved by the
24 department and the barrier is designed not to and does not
25 interfere with the public's use of the surface waters, the

1 public may not go above the ordinary high-water mark to
2 portage around the barrier.

3 (3) (a) A portage route around or over a barrier may
4 be established to avoid damage to the landowner's land and
5 violation of his rights as well as to provide a reasonable
6 and safe route for the recreational user of the surface
7 waters.

8 (b) A portage route may be established when either a
9 landowner or a member of the recreating public submits a
10 request to the supervisors that such a route be established.

11 (c) Within 45 days of the receipt of a request, the
12 supervisors shall, in consultation with the landowner and a
13 representative of the department, examine and investigate
14 the barrier and the adjoining land to determine a reasonable
15 and safe portage route.

16 (d) Within 45 days of the examination of the site, the
17 supervisors shall make a written finding of the most
18 appropriate portage route.

19 (e) The cost of establishing the portage route around
20 artificial barriers must be borne by the involved landowner,
21 except for the construction of notification signs of such
22 route, which is the responsibility of the department. The
23 cost of establishing a portage route around natural barriers
24 must be borne by the department.

25 (f) Once the route is established, the department has

1 the exclusive responsibility thereafter to maintain the
 2 portage route at reasonable times agreeable to the
 3 landowner. The department shall post notices on the stream
 4 of the existence of the portage route and the public's
 5 obligation to use it as the exclusive means around a
 6 barrier.

7 (g) If either the landowner or recreationist disagrees
 8 with the route described in subsection (3)(e), he may
 9 petition the district court to name a three-member
 10 arbitration panel. The panel must consist of an affected
 11 landowner, a member of an affected recreational group, and a
 12 member selected by the two other members of the arbitration
 13 panel. The arbitration panel may accept, reject, or modify
 14 the supervisors' finding under subsection (3)(d).

15 (h) The determination of the arbitration panel is
 16 binding upon the landowner and upon all parties that use the
 17 water for which the portage is provided. Costs of the
 18 arbitration panel, computed as for jurors' fees under
 19 3-15-201, shall be borne by the contesting party or parties;
 20 all other parties shall bear their own costs.

21 (i) The determination of the arbitration panel may be
 22 appealed within 30 days to the district court.

23 (j) Once a portage route is established, the public
 24 shall use the portage route as the exclusive means to
 25 portage around or over the barrier.

1 NEW SECTION. Section 4. Restriction on liability of
 2 landowner and supervisor. (1) A person who makes
 3 recreational use of surface waters flowing over or through
 4 land in the possession or under the control of another,
 5 pursuant to [section 2], or land while portaging around or
 6 over barriers or while portaging or using portage routes,
 7 pursuant to [section 3], does not have the status of invitee
 8 or licensee and is owed no duty by a landowner other than
 9 that provided in subsection (2).

10 (2) A landowner or tenant is liable to a person making
 11 recreational use of waters or land described in subsection
 12 (1) only for an act or omission that constitutes willful or
 13 wanton misconduct.

14 (3) No supervisor who participates in a decision
 15 regarding the placement of a portage route is liable to any
 16 person who while making recreational use of the surface
 17 waters is injured while using the portage route except for
 18 an act or omission that constitutes willful and wanton
 19 misconduct.

20 NEW SECTION. Section 5. Prescriptive easement not
 21 acquired by recreational use of surface waters. (1) A
 22 prescriptive easement is a right to use the property of
 23 another that is acquired by open, exclusive, notorious,
 24 hostile, adverse, continuous, and uninterrupted use for a
 25 period of 5 years.

1 (2) A prescriptive easement cannot be acquired through
2 recreational use of surface waters, including the streambeds
3 underlying them and the banks up to the ordinary high-water
4 mark, or of portage routes over and around barriers.

5 Section 6. Section 70-19-405, MCA, is amended to read:

6 "70-19-405. Title by prescription. ~~Occupancy~~ Except as
7 provided in [section 5], occupancy for the period prescribed
8 by this chapter as sufficient to bar an action for the
9 recovery of the property confers a title thereto,
10 denominated a title by prescription, which is sufficient
11 against all."

12 NEW SECTION. Section 7. Severability. If a part of
13 this act is invalid, all valid parts that are severable from
14 the invalid part remain in effect. If a part of this act is
15 invalid in one or more of its applications, the part remains
16 in effect in all valid applications that are severable from
17 the invalid applications.

18 NEW SECTION. Section 8. Applicability. Sections 5 and
19 6 apply only to a prescriptive easement that has not been
20 perfected prior to [the effective date of this act].

21 NEW SECTION. Section 9. Effective date. This act is
22 effective on passage and approval.

-End-

APPROVED BY COMMITTEE
ON JUDICIARY

STATEMENT OF INTENT

HOUSE BILL 265

House Judiciary Committee

A statement of intent is required for House Bill 265 because section 2(5) directs the fish and game commission to adopt rules governing recreational use of surface waters.

In its implementation of this bill, the long-range goal of the commission must be to preserve, protect, and enhance the surface waters of this state while facilitating the public's exercise of its recreational rights on surface waters. The commission shall strive to permit broad exercise of public rights, while protecting the water resource and its ecosystem. In adopting the procedural rules required by section 2, the commission shall emphasize that in close cases the decision must be to protect the environment by restricting or continuing to restrict recreational use, since it is easier to prevent environmental degradation than it is to repair it.

In developing the rules implementing House Bill 265, the commission shall make every effort to make the process uncomplicated and clear. As provided in subsection (5)(b), the commission must issue written findings and an order whenever a request is made for restrictions on recreational use of a surface water or for the lifting of previously

imposed limitations on recreational use of a surface water. The commission may adopt rules providing for summary dismissal of requests when a substantially similar request has been received and acted upon within a brief time prior to the second or subsequent requests if, during the time period since the first request, it is unlikely that there has been a change in the situation upon which the commission based its earlier decision.

In developing the rules establishing criteria for determination upon a request made under subsections (5)(a) or (5)(b), the commission shall require that each of the following factors that is relevant to the decision must be considered in the determination:

- (a) whether public use is damaging the banks and land adjacent to the water body;
- (b) whether public use is damaging the property of landowners underlying or adjacent to the water body;
- (c) whether public use is adversely affecting wildlife or birds;
- (d) whether public use is disrupting or altering natural areas or biotic communities;
- (e) whether public use is causing degradation of the water quality of the water body; and
- (f) any other factors relevant to the preservation of the water body in its natural state.



1 In making its decision after a request has been made
2 for restrictions of recreational use, the commission may
3 impose any reasonable limitation on the recreational use of
4 surface waters including complete prohibition of a
5 particular type of recreation, prohibition of a particular
6 type of recreation in certain specified areas, such as
7 within a specified distance of a residence or other
8 structure, or in an appropriate case, prohibition of all
9 recreation.

HOUSE BILL NO. 265

INTRODUCED BY REAM, MARKS

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY DEFINING LAWS RELATING TO RECREATIONAL USE OF STATE WATERS; PROHIBITING RECREATIONAL USE OF DIVERTED WATERS; RESTRICTING THE LIABILITY OF LANDOWNERS WHEN WATER IS BEING USED FOR RECREATION; ESTABLISHING THE RIGHT TO PORTAGE; PROVIDING THAT A PRESCRIPTIVE EASEMENT CANNOT BE ACQUIRED BY RECREATIONAL USE OF SURFACE WATERS; AMENDING SECTION 70-19-405, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Definitions. For purposes of [sections 2 1 through 5], the following definitions apply:

(1) "Barrier" means an artificial obstruction located in or over a water body, restricting passage on or through the water, or a natural object IN OR OVER A WATER BODY which totally or effectively obstructs the recreational use of the surface water at the time of use. A barrier may include but is not limited to a bridge or fence or any other manmade obstacle to the natural flow of water or a natural object within the ordinary high-water mark of a stream.

(2) "Class I waters" means surface waters that:

(a) lie within the officially recorded federal government survey meander lines thereof;

(b) flow over lands that have been judicially determined to be owned by the state by reason of application of the federal navigability test for state streambed ownership;

(c) flow through public lands, WHILE WITHIN THE BOUNDARIES OF SUCH LANDS;

(d) are or have been capable of supporting THE FOLLOWING commercial activity ACTIVITIES: LOG FLOATING, TRANSPORTATION OF FURS AND SKINS, SHIPPING, COMMERCIAL GUIDING USING MULTIPERSON WATERCRAFT, PUBLIC TRANSPORTATION, OR THE TRANSPORTATION OF MERCHANDISE, AS THESE ACTIVITIES HAVE BEEN DEFINED BY PUBLISHED JUDICIAL OPINION AS OF [THE EFFECTIVE DATE OF THIS ACT]; or

(e) are or have been capable of supporting commercial activity within the meaning of the federal navigability test.

(3) "Class II waters" means all surface waters that are not class I waters.

(4) "COMMISSION" MEANS THE FISH AND GAME COMMISSION PROVIDED FOR IN 2-15-3402.

{4}(5) "Department" means the department of fish, wildlife, and parks provided for in 2-15-3401.

{5}(6) "Diverted away from a natural water body" means

1 a diversion of surface water through a manmade water
2 conveyance system, including but not limited to:

- 3 (a) an irrigation or drainage canal or ditch;
- 4 (b) an industrial, municipal, or domestic water
5 system;
- 6 (c) a flood control channel; or
- 7 (d) a hydropower inlet and discharge facility.

8 ~~(6)~~(7) "Ordinary high-water mark" means the line that
9 water impresses on land by covering it for sufficient
10 periods to cause physical characteristics that distinguish
11 the area below the line from the area above it.
12 Characteristics of the area below the line include, when
13 appropriate, but are not limited to diminished terrestrial
14 vegetation or lack of agricultural crop value. A FLOOD
15 PLAIN ADJACENT TO SURFACE WATERS IS NOT CONSIDERED TO LIE
16 WITHIN THE SURFACE WATERS' HIGH-WATER MARKS.

17 ~~(8)~~ (a) "Recreational use" means with respect to
18 ~~the~~ SURFACE waters: fishing, hunting, swimming, floating
19 i. small craft or other flotation devices, boating in
20 motorized craft unless otherwise prohibited or regulated by
21 law, or craft propelled by oar or paddle, OTHER
22 WATER-RELATED PLEASURE ACTIVITIES, and related unavoidable
23 or incidental uses, ~~within-the-ordinary-high-water-mark-of
24 the-waters.~~

25 ~~(b)---Recreational-use-means-with-respect--to--class--if~~

1 ~~waters-all-of-the--uses--set--forth--in--subsection--(7)(a),
2 except--that--it--does--not--include,--without--permission--of--the
3 landowner;~~

- 4 ~~(i)---overnight-camping;~~
- 5 ~~(ii)---big-game-hunting-or-upland-bird-hunting;~~
- 6 ~~(iii)---operation--of--all-terrain--vehicles---or---other
7 motorized-vehicles-not-primarily-designed-for-operation-upon
8 the-water;~~
- 9 ~~(iv)---the--placement--or--creation--of--any-permanent-or
10 semipermanent-object-such-as-a-permanent-duck-blind-or---boat
11 moorage;---or~~
- 12 ~~(v)---other---activities---which---are---not---primarily
13 water-related-pleasure-activities;~~

14 ~~(8)~~(9) "Supervisors" means the board of supervisors of
15 a soil conservation district, the directors of a grazing
16 district, or the board of county commissioners if a request
17 pursuant to [section 3(3)(b)] is not within the boundaries
18 of a conservation district or if the request is refused by
19 the board of supervisors of a soil conservation district or
20 the directors of a grazing district.

21 (10) "SURFACE WATER" MEANS, FOR THE PURPOSE OF
22 DETERMINING THE PUBLIC'S ACCESS FOR RECREATIONAL USE, A
23 NATURAL WATER BODY, ITS BED, AND ITS BANKS UP TO THE
24 ORDINARY HIGH-WATER MARK.

25 NEW SECTION. Section 2. Recreational use permitted --

1 limitations -- exceptions. (1) Except as provided in
 2 subsection--(3) SUBSECTIONS (2) THROUGH (4), all class-I
 3 SURFACE waters that are capable of recreational use as
 4 ~~defined--in--{section-1(7)(a)}--including--the--beds--underlying~~
 5 ~~them--and--the--banks--up--to--the--ordinary--high--water--mark,~~ may
 6 be so used by the public without regard to the ownership of
 7 the land underlying the waters.

8 ~~{2}--Except--as--provided--in--subsection--(3),--all--class--II~~
 9 ~~waters--that--are--capable--of--recreational--use--as--defined--in~~
 10 ~~{section--1(7)(b)},--including--the--beds--underlying--them--and~~
 11 ~~the--banks--up--to--the--ordinary--high--water--mark,--may--be--so--used~~
 12 ~~by--the--public--without--regard--to--the--ownership--of--the--land~~
 13 ~~underlying--them,--except--that--recreational--use--does--not~~
 14 ~~include--those--activities--excluded--in--{section-1(7)(b)}--~~

15 {3}(2) The right of the public to make recreational
 16 use of surface waters does not include ~~the--right--to--make~~
 17 recreational--use--of--waters, WITHOUT PERMISSION OF THE
 18 LANDOWNER:

19 (a) THE OPERATION OF ALL-TERRAIN VEHICLES OR OTHER
 20 MOTORIZED VEHICLES NOT PRIMARILY DESIGNED FOR OPERATION UPON
 21 THE WATER;

22 (B) THE RECREATIONAL USE OF SURFACE WATERS in a stock
 23 pond or other impoundment fed by an intermittently flowing
 24 natural watercourse; or

25 ~~tb}{C) THE RECREATIONAL USE OF WATERS while diverted~~

1 away from a natural water body for beneficial use pursuant
 2 to Title 85, chapter 2, part 2 or 3; OR

3 (D) BIG GAME HUNTING.

4 (3) THE RIGHT OF THE PUBLIC TO MAKE RECREATIONAL USE
 5 OF CLASS II WATERS DOES NOT INCLUDE, WITHOUT PERMISSION OF
 6 THE LANDOWNER:

7 (A) OVERNIGHT CAMPING;

8 (B) THE PLACEMENT OR CREATION OF ANY PERMANENT OR
 9 SEMPERMANENT OBJECT, SUCH AS A PERMANENT DUCK BLIND OR BOAT
 10 MOORAGE; OR

11 (C) OTHER ACTIVITIES WHICH ARE NOT PRIMARILY
 12 WATER-RELATED PLEASURE ACTIVITIES.

13 (4) The right of the public to make recreational use
 14 of surface waters does not grant any easement or right to
 15 the public to enter onto or cross private property in order
 16 to use such waters for recreational purposes.

17 (5) THE COMMISSION SHALL ADOPT RULES PURSUANT TO
 18 87-1-303, IN THE INTEREST OF PUBLIC HEALTH, PUBLIC SAFETY,
 19 OR THE PROTECTION OF PUBLIC AND PRIVATE PROPERTY, GOVERNING
 20 RECREATIONAL USE OF CLASS I AND CLASS II WATERS. THESE RULES
 21 MUST INCLUDE THE FOLLOWING:

22 (A) THE ESTABLISHMENT OF PROCEDURES BY WHICH ANY
 23 PERSON MAY REQUEST AN ORDER FROM THE COMMISSION:

24 (I) LIMITING, RESTRICTING, OR PROHIBITING THE TYPE,
 25 INCIDENCE, OR EXTENT OF RECREATIONAL USE OF A SURFACE WATER;

1 OR
 2 (II) ALTERING LIMITATIONS, RESTRICTIONS, OR
 3 PROHIBITIONS ON RECREATIONAL USE OF A SURFACE WATER IMPOSED
 4 BY THE COMMISSION; AND
 5 (B) PROVISIONS REQUIRING THE ISSUANCE OF WRITTEN
 6 FINDINGS AND A DECISION WHENEVER A REQUEST IS MADE PURSUANT
 7 TO THE RULES ADOPTED UNDER SUBSECTION (5)(A).

8 ~~(5)(6)~~ The provisions of this section do not affect
 9 any rights of the public with respect to state-owned lands
 10 that are school trust lands or any rights of lessees of such
 11 lands ~~under lease on the effective date of this act.~~

12 NEW SECTION. Section 3. Right to portage --
 13 establishment of portage route. (1) A member of the public
 14 making recreational use of surface waters may, above the
 15 ordinary high-water mark, portage around barriers in the
 16 least intrusive manner possible, avoiding damage to the
 17 landowner's land and violation of his rights.

18 2) A landowner may create barriers across streams for
 19 purposes of land or water management or to establish land
 20 ownership as otherwise provided by law. If a landowner
 21 erects a barrier STRUCTURE pursuant to a design approved by
 22 the department and the barrier ~~is designed not to and~~
 23 STRUCTURE does not interfere with the public's use of the
 24 surface waters, the public may not go above the ordinary
 25 high-water mark to portage around the barrier STRUCTURE.

1 (3) (a) A portage route around or over a barrier may
 2 be established to avoid damage to the landowner's land and
 3 violation of his rights as well as to provide a reasonable
 4 and safe route for the recreational user of the surface
 5 waters.

6 (b) A portage route may be established when either a
 7 landowner or a member of the recreating public submits a
 8 request to the supervisors that such a route be established.

9 (c) Within 45 days of the receipt of a request, the
 10 supervisors shall, in consultation with the landowner and a
 11 representative of the department, examine and investigate
 12 the barrier and the adjoining land to determine a reasonable
 13 and safe portage route.

14 (d) Within 45 days of the examination of the site, the
 15 supervisors shall make a written finding of the most
 16 appropriate portage route.

17 (e) The cost of establishing the portage route around
 18 artificial barriers must be borne by the involved landowner,
 19 except for the construction of notification signs of such
 20 route, which is the responsibility of the department. The
 21 cost of establishing a portage route around natural barriers
 22 must be borne by the department.

23 (f) Once the route is established, the department has
 24 the exclusive responsibility thereafter to maintain the
 25 portage route at reasonable times agreeable to the

1 landowner. The department shall post notices on the stream
2 of the existence of the portage route and the public's
3 obligation to use it as the exclusive means around a
4 barrier.

5 (g) If either the landowner or recreationist disagrees
6 with the route described in subsection (3)(e), he may
7 petition the district court to name a three-member
8 arbitration panel. The panel must consist of an affected
9 landowner, a member of an affected recreational group, and a
10 member selected by the two other members of the arbitration
11 panel. The arbitration panel may accept, reject, or modify
12 the supervisors' finding under subsection (3)(d).

13 (h) The determination of the arbitration panel is
14 binding upon the landowner and upon all parties that use the
15 water for which the portage is provided. Costs of the
16 arbitration panel, computed as for jurors' fees under
17 3-15-201, shall be borne by the contesting party or parties;
18 all other parties shall bear their own costs.

19 (i) The determination of the arbitration panel may be
20 appealed within 30 days to the district court.

21 (j) Once a portage route is established, the public
22 shall use the portage route as the exclusive means to
23 portage around or over the barrier.

24 NEW SECTION. Section 4. Restriction on liability of
25 landowner and supervisor. (1) A person who makes

1 recreational use of surface waters flowing over or through
2 land in the possession or under the control of another,
3 pursuant to [section 2], or land while portaging around or
4 over barriers or while portaging or using portage routes,
5 pursuant to [section 3], does not have the status of invitee
6 or licensee and is owed no duty by a landowner other than
7 that provided in subsection (2).

8 (2) A landowner or tenant is liable to a person making
9 recreational use of waters or land described in subsection
10 (1) only for an act or omission that constitutes willful or
11 wanton misconduct.

12 (3) No supervisor who participates in a decision
13 regarding the placement of a portage route is liable to any
14 person who ~~while-making--recreational--use--of--the--surface~~
15 ~~waters--is--injured--while--using~~ IS INJURED OR WHOSE PROPERTY
16 IS DAMAGED BECAUSE OF PLACEMENT OR USE OF the portage route
17 except for an act or omission that constitutes willful and
18 wanton misconduct.

19 NEW SECTION. Section 5. Prescriptive easement not
20 acquired by recreational use of surface waters. (1) A
21 prescriptive easement is a right to use the property of
22 another that is acquired by open, exclusive, notorious,
23 hostile, adverse, continuous, and uninterrupted use for a
24 period of 5 years.

25 (2) A prescriptive easement cannot be acquired

1 through;

2 (A) recreational use of surface waters, including;

3 (I) the streambeds underlying them; and

4 (II) the banks up to the ordinary high-water mark; or

5 of

6 (III) ANY portage routes over and around barriers; OR

7 (B) THE ENTERING OR CROSSING OF PRIVATE PROPERTY TO

8 REACH SURFACE WATERS.

9 Section 6. Section 70-19-405, MCA, is amended to read:

10 "70-19-405. Title by prescription. Occupancy Except as
 11 provided in [section 5], occupancy for the period prescribe
 12 by this chapter as sufficient to bar an action for the
 13 recovery of the property confers a title thereto,
 14 denominated a title by prescription, which is sufficient
 15 against all."

16 NEW SECTION. Section 7. Severability. If a part of
 17 this act is invalid, all valid parts that are severable from
 18 the invalid part remain in effect. If a part of this act is
 19 invalid in one or more of its applications, the part remains
 20 in effect in all valid applications that are severable from
 21 the invalid applications.

22 NEW SECTION. Section 8. Applicability. Sections 5 and
 23 6 apply only to a prescriptive easement that has not been
 24 perfected prior to [the effective date of this act].

25 NEW SECTION. Section 9. Effective date. This act is

1 effective on passage and approval.

-End-

1 STATEMENT OF INTENT

2 HOUSE BILL 265

3 House Judiciary Committee

4
5 A statement of intent is required for House Bill 265
6 because section 2(5) directs the fish and game commission to
7 adopt rules governing recreational use of surface waters.

8 In its implementation of this bill, the long-range goal
9 of the commission must be to preserve, protect, and enhance
10 the surface waters of this state while facilitating the
11 public's exercise of its recreational rights on surface
12 waters. The commission shall strive to permit broad exercise
13 of public rights, while protecting the water resource and
14 its ecosystem. In adopting the procedural rules required by
15 section 2, the commission shall emphasize that in close
16 cases the decision must be to protect the environment by
17 restricting or continuing to restrict recreational use,
18 since it is easier to prevent environmental degradation than
19 it is to repair it.

20 In developing the rules implementing House Bill 265,
21 the commission shall make every effort to make the process
22 uncomplicated and clear. As provided in subsection (5)(b),
23 the commission must issue written findings and an order
24 whenever a request is made for restrictions on recreational
25 use of a surface water or for the lifting of previously

1 imposed limitations on recreational use of a surface water.
2 The commission may adopt rules providing for summary
3 dismissal of requests when a substantially similar request
4 has been received and acted upon within a brief time prior
5 to the second or subsequent requests if, during the time
6 period since the first request, it is unlikely that there
7 has been a change in the situation upon which the commission
8 based its earlier decision.

9 In developing the rules establishing criteria for
10 determination upon a request made under subsections (5)(a)
11 or (5)(b), the commission shall require that each of the
12 following factors that is relevant to the decision must be
13 considered in the determination:

14 (a) whether public use is damaging the banks and land
15 adjacent to the water body;

16 (b) whether public use is damaging the property of
17 landowners underlying or adjacent to the water body;

18 (c) whether public use is adversely affecting wildlife
19 or birds;

20 (d) whether public use is disrupting or altering
21 natural areas or biotic communities;

22 (e) whether public use is causing degradation of the
23 water quality of the water body; and

24 (f) any other factors relevant to the preservation of
25 the water body in its natural state.

1 In making its decision after a request has been made
2 for restrictions of recreational use, the commission may
3 impose any reasonable limitation on the recreational use of
4 surface waters including complete prohibition of a
5 particular type of recreation, prohibition of a particular
6 type of recreation in certain specified areas, such as
7 within a specified distance of a residence or other
8 structure, or in an appropriate case, prohibition of all
9 recreation.

HOUSE BILL NO. 265

INTRODUCED BY REAM, MARKS

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY DEFINING LAWS RELATING TO RECREATIONAL USE OF STATE WATERS; PROHIBITING RECREATIONAL USE OF DIVERTED WATERS; RESTRICTING THE LIABILITY OF LANDOWNERS WHEN WATER IS BEING USED FOR RECREATION; ESTABLISHING THE RIGHT TO PORTAGE; PROVIDING THAT A PRESCRIPTIVE EASEMENT CANNOT BE ACQUIRED BY RECREATIONAL USE OF SURFACE WATERS; AMENDING SECTION 70-19-405, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Definitions. For purposes of [sections 2 through 5], the following definitions apply:

(1) "Barrier" means an artificial obstruction located in or over a water body, restricting passage on or through the water, or a natural object IN OR OVER A WATER BODY which totally or effectively obstructs the recreational use of the surface water at the time of use. A barrier may include but is not limited to a bridge or fence or any other manmade obstacle to the natural flow of water or a natural object within the ordinary high-water mark of a stream.

(2) "Class I waters" means surface waters that:

(a) lie within the officially recorded federal government survey meander lines thereof;

(b) flow over lands that have been judicially determined to be owned by the state by reason of application of the federal navigability test for state streambed ownership;

(c) flow through public lands, WHILE WITHIN THE BOUNDARIES OF SUCH LANDS;

(d) are or have been capable of supporting THE FOLLOWING commercial activity ACTIVITIES: LOG FLOATING, TRANSPORTATION OF FURS AND SKINS, SHIPPING, COMMERCIAL GUIDING USING MULTIPERSON WATERCRAFT, PUBLIC TRANSPORTATION, OR THE TRANSPORTATION OF MERCHANDISE, AS THESE ACTIVITIES HAVE BEEN DEFINED BY PUBLISHED JUDICIAL OPINION AS OF [THE EFFECTIVE DATE OF THIS ACT]; or

(e) are or have been capable of supporting commercial activity within the meaning of the federal navigability test.

(3) "Class II waters" means all surface waters that are not class I waters.

(4) "COMMISSION" MEANS THE FISH AND GAME COMMISSION PROVIDED FOR IN 2-15-3402.

(5) "Department" means the department of fish, wildlife, and parks provided for in 2-15-3401.

(6) "Diverted away from a natural water body" means

1 a diversion of surface water through a manmade water
2 conveyance system, including but not limited to:

- 3 (a) an irrigation or drainage canal or ditch;
- 4 (b) an industrial, municipal, or domestic water
5 system;
- 6 (c) a flood control channel; or
- 7 (d) a hydropower inlet and discharge facility.

8 ~~(6)~~(7) "Ordinary high-water mark" means the line that
9 water impresses on land by covering it for sufficient
10 periods to cause physical characteristics that distinguish
11 the area below the line from the area above it.
12 Characteristics of the area below the line include, when
13 appropriate, but are not limited to diminished terrestrial
14 vegetation or lack of agricultural crop value. A FLOOD
15 PLAIN ADJACENT TO SURFACE WATERS IS NOT CONSIDERED TO LIE
16 WITHIN THE SURFACE WATERS' HIGH-WATER MARKS.

17 ~~(7)~~(8) ~~(a)~~ "Recreational use" means with respect to
18 ~~class-I~~ SURFACE waters: fishing, hunting, swimming, floating
19 in small craft or other flotation devices, boating in
20 motorized craft unless otherwise prohibited or regulated by
21 law, or craft propelled by oar or paddle, OTHER
22 WATER-RELATED PLEASURE ACTIVITIES, and related unavoidable
23 or incidental uses, ~~within-the-ordinary-high-water-mark-of
24 the-waters.~~

25 ~~(b)--Recreational-use-means-with-respect--to--class--II~~

1 ~~waters-all-of-the--uses--set--forth--in--subsection--(7)(a),
2 except--that--it--does--not--include,--without--permission--of--the
3 landowner:~~

- 4 ~~(i)--overnight-camping;~~
- 5 ~~(ii)--big-game-hunting-or-upland-bird-hunting;~~
- 6 ~~(iii)--operation--of--all-terrain--vehicles---or---other
7 motorized-vehicles-not-primarily-designed-for-operation-upon
8 the-water;~~
- 9 ~~(iv)--the--placement--or--creation--of--any-permanent-or
10 semipermanent-object-such-as-a-permanent-duck-blind-or--boat
11 moorage--or~~
- 12 ~~(v)--other---activities---which---are---not---primarily
13 water-related-pleasure-activities;~~

14 ~~(8)~~(9) "Supervisors" means the board of supervisors of
15 a soil conservation district, the directors of a grazing
16 district, or the board of county commissioners if a request
17 pursuant to [section 3(3)(b)] is not within the boundaries
18 of a conservation district or if the request is refused by
19 the board of supervisors of a soil conservation district or
20 the directors of a grazing district.

21 (10) "SURFACE WATER" MEANS, FOR THE PURPOSE OF
22 DETERMINING THE PUBLIC'S ACCESS FOR RECREATIONAL USE, A
23 NATURAL WATER BODY, ITS BED, AND ITS BANKS UP TO THE
24 ORDINARY HIGH-WATER MARK.

25 NEW SECTION. Section 2. Recreational use permitted --

1 limitations -- exceptions. (1) Except as provided in
 2 subsection--(3) SUBSECTIONS (2) THROUGH (4), all class-I
 3 SURFACE waters that are capable of recreational use as
 4 defined--in--{section-1(7)(a)}--including--the--beds--underlying
 5 them--and--the--banks--up--to--the--ordinary--high--water--mark, may
 6 be so used by the public without regard to the ownership of
 7 the land underlying the waters.

8 {2}--Except--as--provided--in--subsection--(3)--all--class--II
 9 waters--that--are--capable--of--recreational--use--as--defined--in
 10 {section--1(7)(b)}--including--the--beds--underlying--them--and
 11 the--banks--up--to--the--ordinary--high--water--mark, may--be--so--used
 12 by--the--public--without--regard--to--the--ownership--of--the--land
 13 underlying--them,--except--that--recreational--use--does--not
 14 include--those--activities--excluded--in--{section-1(7)(b)}:

15 {3}(2) The right of the public to make recreational
 16 use of surface waters does not include the right to make
 17 recreational--use--of--waters, WITHOUT PERMISSION OF THE
 18 LANDOWNER:

19 (a) THE OPERATION OF ALL-TERRAIN VEHICLES OR OTHER
 20 MOTORIZED VEHICLES NOT PRIMARILY DESIGNED FOR OPERATION UPON
 21 THE WATER;

22 (B) THE RECREATIONAL USE OF SURFACE WATERS in a stock
 23 pond or other impoundment fed by an intermittently flowing
 24 natural watercourse; or

25 {b}(C) THE RECREATIONAL USE OF WATERS while diverted

1 away from a natural water body for beneficial use pursuant
 2 to Title 85, chapter 2, part 2 or 3; OR

3 (D) BIG GAME HUNTING.

4 (3) THE RIGHT OF THE PUBLIC TO MAKE RECREATIONAL USE
 5 OF CLASS II WATERS DOES NOT INCLUDE, WITHOUT PERMISSION OF
 6 THE LANDOWNER:

7 (A) OVERNIGHT CAMPING;

8 (B) THE PLACEMENT OR CREATION OF ANY PERMANENT OR
 9 SEMIPERMANENT OBJECT, SUCH AS A PERMANENT DUCK BLIND OR BOAT
 10 MOORAGE; OR

11 (C) OTHER ACTIVITIES WHICH ARE NOT PRIMARILY
 12 WATER-RELATED PLEASURE ACTIVITIES.

13 (4) The right of the public to make recreational use
 14 of surface waters does not grant any easement or right to
 15 the public to enter onto or cross private property in order
 16 to use such waters for recreational purposes.

17 (5) THE COMMISSION SHALL ADOPT RULES PURSUANT TO
 18 87-1-303, IN THE INTEREST OF PUBLIC HEALTH, PUBLIC SAFETY,
 19 OR THE PROTECTION OF PUBLIC AND PRIVATE PROPERTY, GOVERNING
 20 RECREATIONAL USE OF CLASS I AND CLASS II WATERS. THESE RULES
 21 MUST INCLUDE THE FOLLOWING:

22 (A) THE ESTABLISHMENT OF PROCEDURES BY WHICH ANY
 23 PERSON MAY REQUEST AN ORDER FROM THE COMMISSION:

24 (I) LIMITING, RESTRICTING, OR PROHIBITING THE TYPE,
 25 INCIDENCE, OR EXTENT OF RECREATIONAL USE OF A SURFACE WATER;

1 OR
 2 (II) ALTERING LIMITATIONS, RESTRICTIONS, OR
 3 PROHIBITIONS ON RECREATIONAL USE OF A SURFACE WATER IMPOSED
 4 BY THE COMMISSION; AND
 5 (B) PROVISIONS REQUIRING THE ISSUANCE OF WRITTEN
 6 FINDINGS AND A DECISION WHENEVER A REQUEST IS MADE PURSUANT
 7 TO THE RULES ADOPTED UNDER SUBSECTION (5)(A).

8 ~~(5)~~(6) The provisions of this section do not affect
 9 any rights of the public with respect to state-owned lands
 10 that are school trust lands or any rights of lessees of such
 11 lands under lease-on ~~{the-effective-date-of-this-act}~~.

12 NEW SECTION. Section 3. Right to portage --
 13 establishment of portage route. (1) A member of the public
 14 making recreational use of surface waters may, above the
 15 ordinary high-water mark, portage around barriers in the
 16 least intrusive manner possible, avoiding damage to the
 17 landowner's land and violation of his rights.

18 (2) A landowner may create barriers across streams for
 19 purposes of land or water management or to establish land
 20 ownership as otherwise provided by law. If a landowner
 21 erects a barrier STRUCTURE pursuant to a design approved by
 22 the department and the barrier ~~is designed not to and~~
 23 STRUCTURE does not interfere with the public's use of the
 24 surface waters, the public may not go above the ordinary
 25 high-water mark to portage around the barrier STRUCTURE.

1 (3) (a) A portage route around or over a barrier may
 2 be established to avoid damage to the landowner's land and
 3 violation of his rights as well as to provide a reasonable
 4 and safe route for the recreational user of the surface
 5 waters.

6 (b) A portage route may be established when either a
 7 landowner or a member of the recreating public submits a
 8 request to the supervisors that such a route be established.

9 (c) Within 45 days of the receipt of a request, the
 10 supervisors shall, in consultation with the landowner and a
 11 representative of the department, examine and investigate
 12 the barrier and the adjoining land to determine a reasonable
 13 and safe portage route.

14 (d) Within 45 days of the examination of the site, the
 15 supervisors shall make a written finding of the most
 16 appropriate portage route.

17 (e) The cost of establishing the portage route around
 18 artificial barriers must be borne by the involved landowner,
 19 except for the construction of notification signs of such
 20 route, which is the responsibility of the department. The
 21 cost of establishing a portage route around natural barriers
 22 must be borne by the department.

23 (f) Once the route is established, the department has
 24 the exclusive responsibility thereafter to maintain the
 25 portage route at reasonable times agreeable to the

1 landowner. The department shall post notices on the stream
2 of the existence of the portage route and the public's
3 obligation to use it as the exclusive means around a
4 barrier.

5 (g) If either the landowner or recreationist disagrees
6 with the route described in subsection (3)(e), he may
7 petition the district court to name a three-member
8 arbitration panel. The panel must consist of an affected
9 landowner, a member of an affected recreational group, and a
10 member selected by the two other members of the arbitration
11 panel. The arbitration panel may accept, reject, or modify
12 the supervisors' finding under subsection (3)(d).

13 (h) The determination of the arbitration panel is
14 binding upon the landowner and upon all parties that use the
15 water for which the portage is provided. Costs of the
16 arbitration panel, computed as for jurors' fees under
17 3-15-201, shall be borne by the contesting party or parties;
18 all other parties shall bear their own costs.

19 (i) The determination of the arbitration panel may be
20 appealed within 30 days to the district court.

21 (j) Once a portage route is established, the public
22 shall use the portage route as the exclusive means to
23 portage around or over the barrier.

24 NEW SECTION. Section 4. Restriction on liability of
25 landowner and supervisor. (1) A person who makes

1 recreational use of surface waters flowing over or through
2 land in the possession or under the control of another,
3 pursuant to [section 2], or land while portaging around or
4 over barriers or while portaging or using portage routes,
5 pursuant to [section 3], does not have the status of invitee
6 or licensee and is owed no duty by a landowner other than
7 that provided in subsection (2).

8 (2) A landowner or tenant is liable to a person making
9 recreational use of waters or land described in subsection
10 (1) only for an act or omission that constitutes willful or
11 wanton misconduct.

12 (3) No supervisor who participates in a decision
13 regarding the placement of a portage route is liable to any
14 person who ~~while making recreational use of the surface~~
15 ~~waters is injured while using~~ IS INJURED OR WHOSE PROPERTY
16 IS DAMAGED BECAUSE OF PLACEMENT OR USE OF the portage route
17 except for an act or omission that constitutes willful and
18 wanton misconduct.

19 NEW SECTION. Section 5. Prescriptive easement not
20 acquired by recreational use of surface waters. (1) A
21 prescriptive easement is a right to use the property of
22 another that is acquired by open, exclusive, notorious,
23 hostile, adverse, continuous, and uninterrupted use for a
24 period of 5 years.

25 (2) A prescriptive easement cannot be acquired

1 through:

2 (A) recreational use of surface waters, including:

3 (I) the streambeds underlying them; and

4 (II) the banks up to the ordinary high-water mark; or

5 of

6 (III) ANY portage routes over and around barriers; OR

7 (B) THE ENTERING OR CROSSING OF PRIVATE PROPERTY TO

8 REACH SURFACE WATERS.

9 Section 6. Section 70-19-405, MCA, is amended to read:

10 "70-19-405. Title by prescription. Occupancy Except as

11 provided in [section 5], occupancy for the period prescribed

12 by this chapter as sufficient to bar an action for the

13 recovery of the property confers a title thereto,

14 denominated a title by prescription, which is sufficient

15 against all."

16 NEW SECTION. Section 7. Severability. If a part of

17 this act is invalid, all valid parts that are severable from

18 the invalid part remain in effect. If a part of this act is

19 invalid in one or more of its applications, the part remains

20 in effect in all valid applications that are severable from

21 the invalid applications.

22 NEW SECTION. Section 8. Applicability. Sections 5 and

23 6 apply only to a prescriptive easement that has not been

24 perfected prior to [the effective date of this act].

25 NEW SECTION. Section 9. Effective date. This act is

1 effective on passage and approval.

-End-

SENATE STANDING COMMITTEE REPORT

Page 1 of 5

March 27 19 85

MR. PRESIDENT

We, your committee on JUDICIARY
having had under consideration HOUSE BILL No. 265

third reading copy (blue)
color

(Senator Yellowtail)

STREAM ACCESS

Respectfully report as follows: That HOUSE BILL No. 265

be amended as follows:

1. Statement of Intent, page 3, line 9.
Following: "recreation."
Insert: "The commission shall prohibit all recreation on private impoundments that have been licensed for a private use."
2. Statement of Intent, page 3.
Following: line 9
Insert: "The commission shall protect the safety of the public by prohibiting hunting within a specified distance of occupied dwellings."
3. Page 1, line 19.
Following: "water,"
Strike: "or a natural object IN OR OVER A WATER BODY"
4. Page 1, lines 23 and 24.
Following: "water" on line 23
Strike: remainder of line 23 through "stream" on line 24
5. Page 1, line 25.
Following: "waters"
Insert: ", other than lakes,"

XXXXXX

XXXXXXXXXX

CONTINUED *JM*

Chairman.

March 27 19 85

Page 2 of 5

HOUSE BILL NO. 265

6. Page 2, lines 7 and 8.
Strike: subsection (c) in its entirety
Renumber: subsequent subsections
7. Page 2, line 20.
Following: "waters"
Insert: ", except lakes"
8. Page 3, line 8.
Following: line 7
Insert: "(7) "Lake" means a body of water where the surface water is retained by either natural or artificial means and the natural flow of water is substantially impeded.

(8) "Occupied dwelling" means a building used for a human dwelling at least once a year."
Renumber: subsequent subsections
9. Page 3, line 13.
Following: "to"
Strike: "diminished"
Insert: "deprivation of the soil of substantially all"
10. Page 3, line 14.
Following: "vegetation"
Strike: "or lack of"
Insert: "and destruction of its"
Following: "agricultural"
Strike: "crop"
Insert: "vegetative"
11. Page 3, line 18.
Following: "swimming"
Insert: "(except within 100 yards of any occupied dwelling), hiking"
12. Page 3, lines 21 and 22.
Following: "paddle," on line 21
Strike: remainder of line 21 through "ACTIVITIES," on line 22
13. Page 4, lines 14 through 20.
Strike: subsection (9) in its entirety
Renumber: subsequent subsection

CONTINUED *JM*

Page 3 of 5
HOUSE BILL NO. 265

14. Page 5, line 2.
Following: "THROUGH"
Strike: "(4)"
Insert: "(5)"

15. Page 5, line 23.
Following: "other"
Insert: "private"

16. Page 6, line 2.
Following: "3;"
Strike: "OR"

17. Page 6, line 3.
Following: "HUNTING"
Strike: "."
Insert: "except by long bow or shotgun when specifically authorized by the commission;"

18. Page 6, lines 4 through 6.
Strike: lines 4 through 6 in their entirety
Re-number: subsequent subsections

19. Page 6, line 7.
Following: line 6
Strike: "(A)"
Insert: "(e)"
Following: "CAMPING"
Insert: "within sight of any occupied dwelling or within 500 yards of any occupied dwelling, whichever is less"

20. Page 6, line 8.
Following: line 7
Strike: "(B)"
Insert: "(f)"

21. Page 6, line 9.
Following: "A"
Strike: "PERMANENT"

22. Page 6, line 10.
Following: "MOORAGE;"
Strike: "OR"

Page 4 of 5
HOUSE BILL NO. 265

23. Page 6, line 11.
Following: line 10
Strike: "(C)"
Insert: "(g)"

24. Page 6, line 12.
Following: "ACTIVITIES"
Strike: "."
Insert: "as defined in [section 1 (10)]; or"

25. Page 6, line 13.
Following: line 12
Insert: "(h) use of a streambed as a right-of-way for any purpose when water is not flowing therein.

(3) The public has no right to make recreational use of Class II waters without the permission of the landowner."
Re-number: subsequent subsections

26. Page 7, line 18 through line 20, page 9.
Following: "(2)" on page 7, line 18
Strike: remainder of line 18 through line 20 on page 9 in their entirety
Insert: "Portage routes around existing barriers may only be acquired by:

(a) landowner permission;

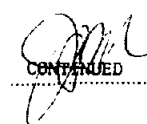
(b) purchase; or

(c) eminent domain, as provided in Article II, section 29, of the Montana constitution.

(3) If a landowner places an artificial barrier across a water body after [the effective date of this act], he must provide portage."

27. Page 9, line 21.
Following: line 20
Strike: "(j)"
Insert: "(4)"


CONTINUED


CONTINUED

..... March 27 19 85

Page 5 of 5

HOUSE BILL NO. 265

28. Page 9, line 24.

Following: line 23

Insert: "(5) Nothing contained in [this act] addresses the issue of natural barriers or portage around said barriers, and nothing contained in [this act] makes such portage lawful or unlawful."

29. Page 9, line 25.

Following: "landowner"

Strike: "and supervisor"

30. Page 10, line 6.

Following: "landowner"

Insert: ", his agent, or his tenant"

31. Page 10, line 8.

Following: "landowner"

Insert: ", his agent,"

32. Page 10, lines 12 through 18.

Strike: subsection (3) in its entirety

33. Page 11, line 16.

Following: line 15

Insert: "NEW SECTION. Section 7. Land title unaffected. The provisions of [this act] and the recreational uses permitted by [section 2] do not affect the title or ownership of the surface waters, the beds, and the banks of any navigable or nonnavigable waters or the portage routes within this state.

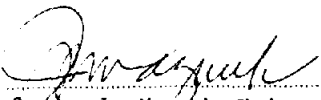
NEW SECTION. Section 8. Lakes. Nothing contained in [this act] addresses the recreational use of surface waters of lakes."

Renumber: subsequent sections

J
AND AS AMENDED

BE CONCURRED IN

(Statement of intent amended)


.....
Senator Joe Mazurek, Chairman

SENATE COMMITTEE OF THE WHOLE AMENDMENT

Page 1 of 2

Mar 30, 1985
DATE

8:00
TIME

MR. CHAIRMAN: I MOVE TO AMEND _____ HOUSE BILL _____ No. 265

third reading copy (blue) as follows:
Color

1. Page 2, line 18.
Following: "test"
Insert: "for state streambed ownership"
2. Page 6, lines 4 through 12.
Following: line 3
Strike: subsection (3) in its entirety
Insert:
 "(e) overnight camping within sight of any occupied dwelling or within 500 yards of any occupied dwelling, whichever is less;
 (f) the placement or creation of any permanent duck blind, boat moorage, or any seasonal or other objects within sight of or within 500 yards of an occupied dwelling, whichever is less; or
 (g) use of a streambed as a right-of-way for any purpose when water is not flowing therein.
 (3) The right of the public to make recreational use of class II waters does not include, without permission of the landowner:
 (a) big game hunting;
 (b) overnight camping;
 (c) the placement or creation of any seasonal object;
or
 (d) other activities which are not primarily water-related pleasure activities as defined in [section 1(10)].
3. Page 7, line 4.
Following: "COMMISSION;"
Strike: "AND"
4. Page 7, line 7.
Following: "(A)"
Strike: "2"
Insert: "; and"
5. Page 7, line 8.
Following: line 7
Insert: "(c) a procedure for the identification of streams within class II waters which are not capable of recreational use or are capable of limited recreational use, and a procedure to restrict the recreational use to the actual capacity of the water."

ADOPT
REJECT

(CONTINUED)

WY

Page 2 of 2
HB 265

March 30, 1985

6. Page 7, lines 21 through 23.
Following: "STRUCTURE" on line 21
Strike: remainder of line 21 through "STRUCTURE" on line 23
Insert: "which"

7. Page 8, line 21.
Following: "around"
Strike: "natural"
Insert: "artificial"

8. Page 8, line 22.
Following: line 21
Insert: "not owned by the landowner on whose land the portage route will be placed"

9. Page 10, line 12.
Following: "supervisor"
Insert: "or any member of the arbitration panel"

10. AMEND SENATE JUDICIARY COMMITTEE REPORT OF 3/27/85 ON HOUSE BILL NO. 265 AS FOLLOWS:

Strike: Amendment Nos. 13, 19 through 27, 29, and 32 in their entirety

PC3HB265.691

ADOPT
REJECT

William P. Yellowtail, Jr.
YELLOWTAIL

COMMITTEE OF THE WHOLE AMENDMENT

SENATE

Mar 30, 1985

DATE

8:05

TIME

MR. CHAIRMAN: I MOVE TO AMEND HOUSE BILL

No. 265

third reading copy (blue) as follows:
Color

Page 4, lines 23 through 24.

Following: "BODY" on line 23

Strike: remainder of line 23 through "MARK" on line 24

PC3HB265.692


ADOPT
REJECT


GALT

1 STATEMENT OF INTENT

2 HOUSE BILL 265

3 House Judiciary Committee

4
5 A statement of intent is required for House Bill 265
6 because section 2(5) directs the fish and game commission to
7 adopt rules governing recreational use of surface waters.

8 In its implementation of this bill, the long-range goal
9 of the commission must be to preserve, protect, and enhance
10 the surface waters of this state while facilitating the
11 public's exercise of its recreational rights on surface
12 waters. The commission shall strive to permit broad exercise
13 of public rights, while protecting the water resource and
14 its ecosystem. In adopting the procedural rules required by
15 section 2, the commission shall emphasize that in close
16 cases the decision must be to protect the environment by
17 restricting or continuing to restrict recreational use,
18 since it is easier to prevent environmental degradation than
19 it is to repair it.

20 In developing the rules implementing House Bill 265,
21 the commission shall make every effort to make the process
22 uncomplicated and clear. As provided in subsection (5)(b),
23 the commission must issue written findings and an order
24 whenever a request is made for restrictions on recreational
25 use of a surface water or for the lifting of previously

1 imposed limitations on recreational use of a surface water.
2 The commission may adopt rules providing for summary
3 dismissal of requests when a substantially similar request
4 has been received and acted upon within a brief time prior
5 to the second or subsequent requests if, during the time
6 period since the first request, it is unlikely that there
7 has been a change in the situation upon which the commission
8 based its earlier decision.

9 In developing the rules establishing criteria for
10 determination upon a request made under subsections (5)(a)
11 or (5)(b), the commission shall require that each of the
12 following factors that is relevant to the decision must be
13 considered in the determination:

14 (a) whether public use is damaging the banks and land
15 adjacent to the water body;

16 (b) whether public use is damaging the property of
17 landowners underlying or adjacent to the water body;

18 (c) whether public use is adversely affecting wildlife
19 or birds;

20 (d) whether public use is disrupting or altering
21 natural areas or biotic communities;

22 (e) whether public use is causing degradation of the
23 water quality of the water body; and

24 (f) any other factors relevant to the preservation of
25 the water body in its natural state.

HB 0265/si

1 In making its decision after a request has been made
2 for restrictions of recreational use, the commission may
3 impose any reasonable limitation on the recreational use of
4 surface waters including complete prohibition of a
5 particular type of recreation, prohibition of a particular
6 type of recreation in certain specified areas, such as
7 within a specified distance of a residence or other
8 structure, or in an appropriate case, prohibition of all
9 recreation. THE COMMISSION SHALL PROHIBIT ALL RECREATION ON
10 PRIVATE IMPOUNDMENTS THAT HAVE BEEN LICENSED FOR A PRIVATE
11 USE.

12 THE COMMISSION SHALL PROTECT THE SAFETY OF THE PUBLIC
13 BY PROHIBITING HUNTING WITHIN A SPECIFIED DISTANCE OF
14 OCCUPIED DWELLINGS.

1 HOUSE BILL NO. 265

2 INTRODUCED BY REAM, MARKS

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY DEFINING LAWS
5 RELATING TO RECREATIONAL USE OF STATE WATERS; PROHIBITING
6 RECREATIONAL USE OF DIVERTED WATERS; RESTRICTING THE
7 LIABILITY OF LANDOWNERS WHEN WATER IS BEING USED FOR
8 RECREATION; ESTABLISHING THE RIGHT TO PORTAGE; PROVIDING
9 THAT A PRESCRIPTIVE EASEMENT CANNOT BE ACQUIRED BY
10 RECREATIONAL USE OF SURFACE WATERS; AMENDING SECTION
11 70-19-405, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE
12 AND AN APPLICABILITY DATE."
13

14 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

15 NEW SECTION. Section 1. Definitions. For purposes of
16 [sections 2 1 through 5], the following definitions apply:

17 (1) "Barrier" means an artificial obstruction located
18 in or over a water body, restricting passage on or through
19 the water, ~~or a natural object~~ IN-OR-OVER-A-WATER-BODY which
20 totally or effectively obstructs the recreational use of the
21 surface water at the time of use. A barrier may include but
22 is not limited to a bridge or fence or any other manmade
23 obstacle to the natural flow of water ~~or a natural object~~
24 within-the-ordinary-high-water-mark-of-a-stream.

25 (2) "Class I waters" means surface waters, OTHER THAN1 LAKES, that:2 (a) lie within the officially recorded federal
3 government survey meander lines thereof;4 (b) flow over lands that have been judicially
5 determined to be owned by the state by reason of application
6 of the federal navigability test for state streambed
7 ownership;8 ~~(c) flow through public lands, while within the~~
9 ~~boundaries of such lands;~~10 ~~(d)(C)~~ are or have been capable of supporting THE
11 FOLLOWING commercial activity ACTIVITIES: LOG FLOATING,
12 TRANSPORTATION OF FURS AND SKINS, SHIPPING, COMMERCIAL
13 GUIDING USING MULTIPERSON WATERCRAFT, PUBLIC TRANSPORTATION,
14 OR THE TRANSPORTATION OF MERCHANDISE, AS THESE ACTIVITIES
15 HAVE BEEN DEFINED BY PUBLISHED JUDICIAL OPINION AS OF [THE
16 EFFECTIVE DATE OF THIS ACT]; or17 ~~(e)(D)~~ are or have been capable of supporting
18 commercial activity within the meaning of the federal
19 navigability test FOR STATE STREAMBED OWNERSHIP.20 (3) "Class II waters" means all surface waters that
21 are not class I waters, EXCEPT LAKES.22 (4) "COMMISSION" MEANS THE FISH AND GAME COMMISSION
23 PROVIDED FOR IN 2-15-3402.24 ~~(4)(5)~~ "Department" means the department of fish,
25 wildlife, and parks provided for in 2-15-3401.

1 ~~(5)~~(6) "Diverted away from a natural water body" means
 2 a diversion of surface water through a manmade water
 3 conveyance system, including but not limited to:
 4 (a) an irrigation or drainage canal or ditch;
 5 (b) an industrial, municipal, or domestic water
 6 system;
 7 (c) a flood control channel; or
 8 (d) a hydropower inlet and discharge facility.
 9 (7) "LAKE" MEANS A BODY OF WATER WHERE THE SURFACE
 10 WATER IS RETAINED BY EITHER NATURAL OR ARTIFICIAL MEANS AND
 11 THE NATURAL FLOW OF WATER IS SUBSTANTIALLY IMPEDED.
 12 (8) "OCCUPIED DWELLING" MEANS A BUILDING USED FOR A
 13 HUMAN DWELLING AT LEAST ONCE A YEAR.
 14 ~~(6)~~~~(7)~~(9) "Ordinary high-water mark" means the line
 15 that water impresses on land by covering it for sufficient
 16 periods to cause physical characteristics that distinguish
 17 the area below the line from the area above it.
 18 Characteristics of the area below the line include, when
 19 appropriate, but are not limited to diminished DEPRIVATION
 20 OF THE SOIL OF SUBSTANTIALLY ALL terrestrial vegetation or
 21 lack--of AND DESTRUCTION OF ITS agricultural crop VEGETATIVE
 22 value. A FLOOD PLAIN ADJACENT TO SURFACE WATERS IS NOT
 23 CONSIDERED TO LIE WITHIN THE SURFACE WATERS' HIGH-WATER
 24 MARKS.
 25 ~~(7)~~~~(8)~~(10) (a) "Recreational use" means with respect to

1 ~~class-I SURFACE~~ waters: fishing, hunting, swimming (EXCEPT
 2 WITHIN 100 YARDS OF ANY OCCUPIED DWELLING), HIKING, floating
 3 in small craft or other flotation devices, boating in
 4 motorized craft unless otherwise prohibited or regulated by
 5 law, or craft propelled by oar or paddle, OTHER
 6 WATER-RELATED PLEASURE ACTIVITIES, and related unavoidable
 7 or incidental uses, ~~within the ordinary high-water mark of~~
 8 ~~the waters.~~
 9 ~~(b) --Recreational use means with respect to class--II~~
 10 ~~waters--all--of--the--uses--set--forth--in--subsection--(7)(a),~~
 11 ~~except that it does not include, without permission of the~~
 12 ~~landowner:~~
 13 ~~(i) --overnight camping;~~
 14 ~~(ii) --big game hunting or upland bird hunting;~~
 15 ~~(iii) --operation--of--all-terrain--vehicles--or--other~~
 16 ~~motorized vehicles not primarily designed for operation upon~~
 17 ~~the water;~~
 18 ~~(iv) --the placement or creation of any permanent or~~
 19 ~~semipermanent object such as a permanent duck blind or boat~~
 20 ~~moorage; or~~
 21 ~~(v) --other--activities--which--are--not--primarily~~
 22 ~~water-related pleasure activities;~~
 23 ~~(8)~~~~(9) --"Supervisors"--means the board of supervisors of~~
 24 ~~a soil conservation district, the directors of a grazing~~
 25 ~~district, or the board of county commissioners if a request~~

1 pursuant to ~~{section 3(3)(b)}~~ is not within the boundaries
 2 of a conservation district or if the request is refused by
 3 the board of supervisors of a soil conservation district or
 4 the directors of a grazing district.

5 (11) "SUPERVISORS" MEANS THE BOARD OF SUPERVISORS OF A
 6 SOIL CONSERVATION DISTRICT, THE DIRECTORS OF A GRAZING
 7 DISTRICT, OR THE BOARD OF COUNTY COMMISSIONERS IF A REQUEST
 8 PURSUANT TO [SECTION 3(3)(B)] IS NOT WITHIN THE BOUNDARIES
 9 OF A CONSERVATION DISTRICT OR IF THE REQUEST IS REFUSED BY
 10 THE BOARD OF SUPERVISORS OF A SOIL CONSERVATION DISTRICT OR
 11 THE DIRECTORS OF A GRAZING DISTRICT.

12 {10}(12) "SURFACE WATER" MEANS, FOR THE PURPOSE OF
 13 DETERMINING THE PUBLIC'S ACCESS FOR RECREATIONAL USE, A
 14 NATURAL WATER BODY, ITS BED, AND ITS BANKS UP TO THE
 15 ORDINARY-HIGH-WATER-MARK.

16 NEW SECTION. Section 2. Recreational use permitted --
 17 limitations -- exceptions. (1) Except as provided in
 18 subsection ~~{3}~~ SUBSECTIONS (2) THROUGH {4} (5), all class-I
 19 SURFACE waters that are capable of recreational use as
 20 defined in ~~{section 1(7)(a)}~~, including the beds underlying
 21 them and the banks up to the ordinary-high-water mark, may
 22 be so used by the public without regard to the ownership of
 23 the land underlying the waters.

24 {2} Except as provided in subsection {3}, all class-II
 25 waters that are capable of recreational use as defined in

1 ~~{section 1(7)(b)}, including the beds underlying them and~~
 2 ~~the banks up to the ordinary-high-water mark, may be so used~~
 3 ~~by the public without regard to the ownership of the land~~
 4 ~~underlying them, except that recreational use does not~~
 5 ~~include those activities excluded in ~~{section 1(7)(b)}~~;~~

6 {3}(2) The right of the public to make recreational
 7 use of surface waters does not include the right to make
 8 recreational use of waters, WITHOUT PERMISSION OF THE
 9 LANDOWNER:

10 (a) THE OPERATION OF ALL-TERRAIN VEHICLES OR OTHER
 11 MOTORIZED VEHICLES NOT PRIMARILY DESIGNED FOR OPERATION UPON
 12 THE WATER;

13 (B) THE RECREATIONAL USE OF SURFACE WATERS in a stock
 14 pond or other PRIVATE impoundment fed by an intermittently
 15 flowing natural watercourse; or

16 {b}(C) THE RECREATIONAL USE OF WATERS while diverted
 17 away from a natural water body for beneficial use pursuant
 18 to Title 85, chapter 2, part 2 or 3; OR

19 (D) BIG GAME HUNTING; EXCEPT BY LONG BOW OR SHOTGUN
 20 WHEN SPECIFICALLY AUTHORIZED BY THE COMMISSION;

21 {3} THE RIGHT OF THE PUBLIC TO MAKE RECREATIONAL USE
 22 OF CLASS-II WATERS DOES NOT INCLUDE, WITHOUT PERMISSION OF
 23 THE LANDOWNER:

24 {A}(E) OVERNIGHT CAMPING WITHIN SIGHT OF ANY OCCUPIED
 25 DWELLING OR WITHIN 500 YARDS OF ANY OCCUPIED DWELLING;

1 ~~WHICHEVER IS LESS;~~
2 ~~(B)(P) -- THE -- PLACEMENT -- OR -- CREATION -- OF -- ANY -- PERMANENT -- OR~~
3 ~~SEMI-PERMANENT OBJECT, SUCH AS A PERMANENT DUCK-BLIND OR BOAT~~
4 ~~MOORAGE; OR~~
5 ~~(C)(S) -- OTHER -- ACTIVITIES -- WHICH -- ARE -- NOT -- PRIMARILY~~
6 ~~WATER-RELATED -- PLEASURE -- ACTIVITIES; AS DEFINED IN (SECTION~~
7 ~~1(10)); OR~~
8 ~~(H) -- USE -- OF -- A -- STREAMBED -- AS -- A -- RIGHT -- OF -- WAY -- FOR -- ANY~~
9 ~~PURPOSE WHEN WATER IS NOT FLOWING THEREIN;~~
10 ~~(J) -- THE -- PUBLIC -- HAS -- NO -- RIGHT -- TO -- MAKE -- RECREATIONAL -- USE~~
11 ~~OF CLASS II WATERS WITHOUT THE PERMISSION OF THE -- LANDOWNER;~~
12 (E) OVERNIGHT CAMPING WITHIN SIGHT OF ANY OCCUPIED
13 DWELLING OR WITHIN 500 YARDS OF ANY OCCUPIED DWELLING,
14 WHICHEVER IS LESS;
15 (F) THE PLACEMENT OR CREATION OF ANY PERMANENT DUCK
16 BLIND, BOAT MOORAGE, OR ANY SEASONAL OR OTHER OBJECTS WITHIN
17 SIGHT OF OR WITHIN 500 YARDS OF AN OCCUPIED DWELLING,
18 WHICHEVER IS LESS; OR
19 (G) USE OF A STREAMBED AS A RIGHT-OF-WAY FOR ANY
20 PURPOSE WHEN WATER IS NOT FLOWING THEREIN.
21 (3) THE RIGHT OF THE PUBLIC TO MAKE RECREATIONAL USE
22 OF CLASS II WATERS DOES NOT INCLUDE, WITHOUT PERMISSION OF
23 THE LANDOWNER:
24 (A) BIG GAME HUNTING;
25 (B) OVERNIGHT CAMPING;

1 (C) THE PLACEMENT OR CREATION OF ANY SEASONAL OBJECT;
2 OR
3 (D) OTHER ACTIVITIES WHICH ARE NOT PRIMARILY
4 WATER-RELATED PLEASURE ACTIVITIES AS DEFINED IN (SECTION
5 1(10)).
6 (4) The right of the public to make recreational use
7 of surface waters does not grant any easement or right to
8 the public to enter onto or cross private property in order
9 to use such waters for recreational purposes.
10 (5) THE COMMISSION SHALL ADOPT RULES PURSUANT TO
11 87-1-303, IN THE INTEREST OF PUBLIC HEALTH, PUBLIC SAFETY,
12 OR THE PROTECTION OF PUBLIC AND PRIVATE PROPERTY, GOVERNING
13 RECREATIONAL USE OF CLASS I AND CLASS II WATERS. THESE RULES
14 MUST INCLUDE THE FOLLOWING:
15 (A) THE ESTABLISHMENT OF PROCEDURES BY WHICH ANY
16 PERSON MAY REQUEST AN ORDER FROM THE COMMISSION:
17 (I) LIMITING, RESTRICTING, OR PROHIBITING THE TYPE,
18 INCIDENCE, OR EXTENT OF RECREATIONAL USE OF A SURFACE WATER;
19 OR
20 (II) ALTERING LIMITATIONS, RESTRICTIONS, OR
21 PROHIBITIONS ON RECREATIONAL USE OF A SURFACE WATER IMPOSED
22 BY THE COMMISSION; AND
23 (B) PROVISIONS REQUIRING THE ISSUANCE OF WRITTEN
24 FINDINGS AND A DECISION WHENEVER A REQUEST IS MADE PURSUANT
25 TO THE RULES ADOPTED UNDER SUBSECTION (5)(A); AND

1 (C) A PROCEDURE FOR THE IDENTIFICATION OF STREAMS
 2 WITHIN CLASS II WATERS WHICH ARE NOT CAPABLE OF RECREATIONAL
 3 USE OR ARE CAPABLE OF LIMITED RECREATIONAL USE, AND A
 4 PROCEDURE TO RESTRICT THE RECREATIONAL USE TO THE ACTUAL
 5 CAPACITY OF THE WATER.

6 ~~{5}~~(6) The provisions of this section do not affect
 7 any rights of the public with respect to state-owned lands
 8 that are school trust lands or any rights of lessees of such
 9 lands ~~under lease on {the effective date of this act}~~.

10 NEW SECTION. Section 3. Right to portage --
 11 establishment of portage route. (1) A member of the public
 12 making recreational use of surface waters may, above the
 13 ordinary high-water mark, portage around barriers in the
 14 least intrusive manner possible, avoiding damage to the
 15 landowner's land and violation of his rights.

16 (2) ~~A landowner may create barriers across streams for~~
 17 ~~purposes of land or water management or to establish land~~
 18 ~~ownership as otherwise provided by law. If a landowner~~
 19 ~~erects a barrier STRUCPTURE pursuant to a design approved by~~
 20 ~~the department and the barrier is designed not to and~~
 21 ~~STRUCPTURE does not interfere with the public's use of the~~
 22 ~~surface waters, the public may not go above the ordinary~~
 23 ~~high-water mark to portage around the barrier STRUCPTURE.~~

24 ~~{3}~~ (a) A portage route around or over a barrier may
 25 be established to avoid damage to the landowner's land and

1 violation of his rights as well as to provide a reasonable
 2 and safe route for the recreational user of the surface
 3 waters.

4 ~~{b}~~ A portage route may be established when either a
 5 landowner or a member of the recreating public submits a
 6 request to the supervisors that such a route be established.

7 ~~{c}~~ Within 45 days of the receipt of a request, the
 8 supervisors shall, in consultation with the landowner and a
 9 representative of the department, examine and investigate
 10 the barrier and the adjoining land to determine a reasonable
 11 and safe portage route.

12 ~~{d}~~ Within 45 days of the examination of the site, the
 13 supervisors shall make a written finding of the most
 14 appropriate portage route.

15 ~~{e}~~ The cost of establishing the portage route around
 16 artificial barriers must be borne by the involved landowner,
 17 except for the construction of notification signs of such
 18 route, which is the responsibility of the department. The
 19 cost of establishing a portage route around natural barriers
 20 must be borne by the department.

21 ~~{f}~~ Once the route is established, the department has
 22 the exclusive responsibility thereafter to maintain the
 23 portage route at reasonable times agreeable to the
 24 landowner. The department shall post notices on the stream
 25 of the existence of the portage route and the public's

1 obligation--to--use--it--as--the--exclusive--means--around-a
2 barrier;

3 (g)--If--either--the--landowner--or--recreationist--disagrees
4 with--the--route--described--in--subsection--(3)(e),--he--may
5 petition--the--district--court--to--name--a--three-member
6 arbitration-panel. The-panel-must--consist--of--an--affected
7 landowner,--a-member-of-an-affected-recreational-group,--and-a
8 member--selected-by-the-two-other-members-of-the-arbitration
9 panel. The-arbitration-panel-may-accept,--reject,--or--modify
10 the-supervisors'-finding-under-subsection-(3)(d):

11 (h)--The--determination--of--the--arbitration--panel--is
12 binding-upon-the-landowner-and-upon-all-parties-that-use-the
13 water-for-which-the--portage--is--provided;---Costs--of--the
14 arbitration--panel,--computed--as--for--jurors'-fees--under
15 3-15-201,--shall-be-borne-by-the-contesting-party-or-parties;
16 all-other-parties-shall-bear-their-own-costs:

17 (i)--The-determination-of-the-arbitration-panel-may--be
18 appealed--within--30-days-to-the-district-court. A LANDOWNER
19 MAY CREATE BARRIERS ACROSS STREAMS FOR PURPOSES OF LAND OR
20 WATER MANAGEMENT OR TO ESTABLISH LAND OWNERSHIP AS OTHERWISE
21 PROVIDED BY LAW. IF A LANDOWNER ERECTS A STRUCTURE PURSUANT
22 TO A DESIGN APPROVED BY THE DEPARTMENT AND THE STRUCTURE
23 WHICH DOES NOT INTERFERE WITH THE PUBLIC'S USE OF THE
24 SURFACE WATERS, THE PUBLIC MAY NOT GO ABOVE THE ORDINARY
25 HIGH-WATER MARK TO PORTAGE AROUND THE STRUCTURE.

1 (3) (A) A PORTAGE ROUTE AROUND OR OVER A BARRIER MAY
2 BE ESTABLISHED TO AVOID DAMAGE TO THE LANDOWNER'S LAND AND
3 VIOLATION OF HIS RIGHTS AS WELL AS TO PROVIDE A REASONABLE
4 AND SAFE ROUTE FOR THE RECREATIONAL USER OF THE SURFACE
5 WATERS.

6 (B) A PORTAGE ROUTE MAY BE ESTABLISHED WHEN EITHER A
7 LANDOWNER OR A MEMBER OF THE RECREATING PUBLIC SUBMITS A
8 REQUEST TO THE SUPERVISORS THAT SUCH A ROUTE BE ESTABLISHED.

9 (C) WITHIN 45 DAYS OF THE RECEIPT OF A REQUEST, THE
10 SUPERVISORS SHALL, IN CONSULTATION WITH THE LANDOWNER AND A
11 REPRESENTATIVE OF THE DEPARTMENT, EXAMINE AND INVESTIGATE
12 THE BARRIER AND THE ADJOINING LAND TO DETERMINE A REASONABLE
13 AND SAFE PORTAGE ROUTE.

14 (D) WITHIN 45 DAYS OF THE EXAMINATION OF THE SITE, THE
15 SUPERVISORS SHALL MAKE A WRITTEN FINDING OF THE MOST
16 APPROPRIATE PORTAGE ROUTE.

17 (E) THE COST OF ESTABLISHING THE PORTAGE ROUTE AROUND
18 ARTIFICIAL BARRIERS MUST BE BORNE BY THE INVOLVED LANDOWNER,
19 EXCEPT FOR THE CONSTRUCTION OF NOTIFICATION SIGNS OF SUCH
20 ROUTE, WHICH IS THE RESPONSIBILITY OF THE DEPARTMENT. THE
21 COST OF ESTABLISHING A PORTAGE ROUTE AROUND NATURAL
22 ARTIFICIAL BARRIERS NOT OWNED BY THE LANDOWNER ON WHOSE LAND
23 THE PORTAGE ROUTE WILL BE PLACED MUST BE BORNE BY THE
24 DEPARTMENT.

25 (F) ONCE THE ROUTE IS ESTABLISHED, THE DEPARTMENT HAS

1 THE EXCLUSIVE RESPONSIBILITY THEREAFTER TO MAINTAIN THE
 2 PORTAGE ROUTE AT REASONABLE TIMES AGREEABLE TO THE
 3 LANDOWNER. THE DEPARTMENT SHALL POST NOTICES ON THE STREAM
 4 OF THE EXISTENCE OF THE PORTAGE ROUTE AND THE PUBLIC'S
 5 OBLIGATION TO USE IT AS THE EXCLUSIVE MEANS AROUND A
 6 BARRIER.

7 (G) IF EITHER THE LANDOWNER OR RECREATIONIST DISAGREES
 8 WITH THE ROUTE DESCRIBED IN SUBSECTION (3)(E), HE MAY
 9 PETITION THE DISTRICT COURT TO NAME A THREE-MEMBER
 10 ARBITRATION PANEL. THE PANEL MUST CONSIST OF AN AFFECTED
 11 LANDOWNER, A MEMBER OF AN AFFECTED RECREATIONAL GROUP, AND A
 12 MEMBER SELECTED BY THE TWO OTHER MEMBERS OF THE ARBITRATION
 13 PANEL. THE ARBITRATION PANEL MAY ACCEPT, REJECT, OR MODIFY
 14 THE SUPERVISORS' FINDING UNDER SUBSECTION (3)(D).

15 (H) THE DETERMINATION OF THE ARBITRATION PANEL IS
 16 BINDING UPON THE LANDOWNER AND UPON ALL PARTIES THAT USE THE
 17 WATER FOR WHICH THE PORTAGE IS PROVIDED. COSTS OF THE
 18 ARBITRATION PANEL, COMPUTED AS FOR JURORS' FEES UNDER
 19 3-15-201, SHALL BE BORNE BY THE CONTESTING PARTY OR PARTIES;
 20 ALL OTHER PARTIES SHALL BEAR THEIR OWN COSTS.

21 (I) THE DETERMINATION OF THE ARBITRATION PANEL MAY BE
 22 APPEALED WITHIN 30 DAYS TO THE DISTRICT COURT. PORTAGE
 23 ROUTES AROUND EXISTING BARRIERS MAY ONLY BE ACQUIRED BY:

24 ~~(A) LANDOWNER PERMISSION;~~

25 ~~(B) PURCHASE; OR~~

1 ~~(C) EMINENT DOMAIN, AS PROVIDED IN ARTICLE II, SECTION~~
 2 ~~29 OF THE MONTANA CONSTITUTION.~~

3 ~~(3) IF A LANDOWNER PLACES AN ARTIFICIAL BARRIER ACROSS~~
 4 ~~A WATER BODY AFTER THE EFFECTIVE DATE OF THIS ACT, HE MUST~~
 5 ~~PROVIDE PORTAGE.~~

6 ~~(j)(4)(J)~~ Once a portage route is established, the
 7 public shall use the portage route as the exclusive means to
 8 portage around or over the barrier.

9 ~~(5)(4) NOTHING CONTAINED IN [THIS ACT] ADDRESSES THE~~
 10 ~~ISSUE OF NATURAL BARRIERS OR PORTAGE AROUND SAID BARRIERS,~~
 11 ~~AND NOTHING CONTAINED IN [THIS ACT] MAKES SUCH PORTAGE~~
 12 ~~LAWFUL OR UNLAWFUL.~~

13 NEW SECTION. Section 4. Restriction on liability of
 14 landowner and ~~supervisor~~ AND SUPERVISOR. (1) A person who
 15 makes recreational use of surface waters flowing over or
 16 through land in the possession or under the control of
 17 another, pursuant to [section 2], or land while portaging
 18 around or over barriers or while portaging or using portage
 19 routes, pursuant to [section 3], does not have the status of
 20 invitee or licensee and is owed no duty by a landowner, HIS
 21 AGENT, OR HIS TENANT other than that provided in subsection
 22 (2).

23 (2) A landowner, HIS AGENT, or tenant is liable to a
 24 person making recreational use of waters or land described
 25 in subsection (1) only for an act or omission that

1 constitutes willful or wanton misconduct.

2 ~~(3) No supervisor who participates in a decision~~
3 ~~regarding the placement of a portage route is liable to any~~
4 ~~person who while making recreational use of the surface~~
5 ~~waters is injured while using IS-INJURED OR WHOSE PROPERTY~~
6 ~~IS-DAMAGED BECAUSE OF PLACEMENT OR USE OF the portage route~~
7 ~~except for an act or omission that constitutes willful and~~
8 ~~wanton misconduct.~~

9 (3) NO SUPERVISOR OR ANY MEMBER OF THE ARBITRATION
10 PANEL WHO PARTICIPATES IN A DECISION REGARDING THE
11 PLACEMENT OF A PORTAGE ROUTE IS LIABLE TO ANY PERSON WHO IS
12 INJURED OR WHOSE PROPERTY IS DAMAGED BECAUSE OF PLACEMENT OR
13 USE OF THE PORTAGE ROUTE EXCEPT FOR AN ACT OR OMISSION THAT
14 CONSTITUTES WILLFUL AND WANTON MISCONDUCT.

15 NEW SECTION. Section 5. Prescriptive easement not
16 acquired by recreational use of surface waters. (1) A
17 prescriptive easement is a right to use the property of
18 another that is acquired by open, exclusive, notorious,
19 hostile, adverse, continuous, and uninterrupted use for a
20 period of 5 years.

21 (2) A prescriptive easement cannot be acquired
22 through:

- 23 (A) recreational use of surface waters, including:
24 (I) the streambeds underlying them; and
25 (II) the banks up to the ordinary high-water mark; or

1 of

2 (III) ANY portage routes over and around barriers; OR
3 (B) THE ENTERING OR CROSSING OF PRIVATE PROPERTY TO
4 REACH SURFACE WATERS.

5 Section 6. Section 70-19-405, MCA, is amended to read:
6 "70-19-405. Title by prescription. Occupancy Except as
7 provided in [section 5], occupancy for the period prescribed
8 by this chapter as sufficient to bar an action for the
9 recovery of the property confers a title thereto,
10 denominated a title by prescription, which is sufficient
11 against all."

12 NEW SECTION. SECTION 7. LAND TITLE UNAFFECTED. THE
13 PROVISIONS OF [THIS ACT] AND THE RECREATIONAL USES PERMITTED
14 BY [SECTION 2] DO NOT AFFECT THE TITLE OR OWNERSHIP OF THE
15 SURFACE WATERS, THE BEDS, AND THE BANKS OF ANY NAVIGABLE OR
16 NONNAVIGABLE WATERS OR THE PORTAGE ROUTES WITHIN THIS STATE.

17 NEW SECTION. SECTION 8. LAKES. NOTHING CONTAINED IN
18 [THIS ACT] ADDRESSES THE RECREATIONAL USE OF SURFACE WATERS
19 OF LAKES.

20 NEW SECTION. Section 9. Severability. If a part of
21 this act is invalid, all valid parts that are severable from
22 the invalid part remain in effect. If a part of this act is
23 invalid in one or more of its applications, the part remains
24 in effect in all valid applications that are severable from
25 the invalid applications.

1 NEW SECTION. Section 10. Applicability. Sections 5
2 and 6 apply only to a prescriptive easement that has not
3 been perfected prior to [the effective date of this act].

4 NEW SECTION. Section 11. Effective date. This act is
5 effective on passage and approval.

-End-

CONFERENCE COMMITTEE REPORT

Report No.1.....

.....April 10 19.....85

MR. SPEAKER

We, your _____ Conference Committee on

Senate Amendments to HB 265, REFERENCE COPY, salmon

met and considered _____
Senate Judiciary Standing Committee Report,

Sen. Mazurek, Chm. and Senate Committee of the

Whole Amendments - Sen. Galt & Sen. Yellowtail

We recommend as follows:

1. Page 4, lines 1 and 2.

Strike: "EXCEPT" on line 1 through "HIKING" on line 2

2. Page 4, line 6.

Following: "7"

Insert: "other water-related pleasure activities,"

3. Page 5, line 15.

Following: "MARK"

Insert: ", its bed, and its banks up to the ordinary high water mark"

And that this Conference Committee report be adopted.

FOR THE SENATE

Fred Van Valkenburg

Sen. Van Valkenburg, Chm.

William P. Yellowtail, Jr.

Sen. Yellowtail

Sen. Galt

FOR THE HOUSE

Henry Keyser

Rep. Keyser, Chm.

John A. Krueger

Rep. Krueger

John A. Mercer

Rep. Mercer

Bob Resum

ADOPT REJECT

HOUSE BILL NO. 265
INTRODUCED BY REAM, MARKS

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY DEFINING LAWS RELATING TO RECREATIONAL USE OF STATE WATERS; PROHIBITING RECREATIONAL USE OF DIVERTED WATERS; RESTRICTING THE LIABILITY OF LANDOWNERS WHEN WATER IS BEING USED FOR RECREATION; ESTABLISHING THE RIGHT TO PORTAGE; PROVIDING THAT A PRESCRIPTIVE EASEMENT CANNOT BE ACQUIRED BY RECREATIONAL USE OF SURFACE WATERS; AMENDING SECTION 70-19-405, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Definitions. For purposes of [sections 2 1 through 5], the following definitions apply:

(1) "Barrier" means an artificial obstruction located in or over a water body, restricting passage on or through the water, ~~or a natural object~~ IN-OR-OVER-A-WATER-BODY which totally or effectively obstructs the recreational use of the surface water at the time of use. A barrier may include but is not limited to a bridge or fence or any other manmade obstacle to the natural flow of water ~~or a natural object~~ within-the-ordinary-high-water-mark-of-a-stream.

(2) "Class I waters" means surface waters, OTHER THAN

LAKES, that:

(a) lie within the officially recorded federal government survey meander lines thereof;

(b) flow over lands that have been judicially determined to be owned by the state by reason of application of the federal navigability test for state streambed ownership;

~~(c) flow through public lands, while within the boundaries of such lands;~~

~~(d) (C) are or have been capable of supporting the following commercial activity activities: log floating, transportation of furs and skins, shipping, commercial guiding using multiperson watercraft, public transportation, or the transportation of merchandise, as these activities have been defined by published judicial opinion as of [the effective date of this act]; or~~

~~(e) (D) are or have been capable of supporting commercial activity within the meaning of the federal navigability test for state streambed ownership.~~

(3) "Class II waters" means all surface waters that are not class I waters, EXCEPT LAKES.

(4) "COMMISSION" means the fish and game commission provided for in 2-15-3402.

~~(5) (5) "Department" means the department of fish, wildlife, and parks provided for in 2-15-3401.~~



1 ~~(5)~~(6) "Diverted away from a natural water body" means
2 a diversion of surface water through a manmade water
3 conveyance system, including but not limited to:

- 4 (a) an irrigation or drainage canal or ditch;
5 (b) an industrial, municipal, or domestic water
6 system;
7 (c) a flood control channel; or
8 (d) a hydropower inlet and discharge facility.

9 (7) "LAKE" MEANS A BODY OF WATER WHERE THE SURFACE
10 WATER IS RETAINED BY EITHER NATURAL OR ARTIFICIAL MEANS AND
11 THE NATURAL FLOW OF WATER IS SUBSTANTIALLY IMPEDED.

12 (8) "OCCUPIED DWELLING" MEANS A BUILDING USED FOR A
13 HUMAN DWELLING AT LEAST ONCE A YEAR.

14 ~~(6)~~(7)(9) "Ordinary high-water mark" means the line
15 that water impresses on land by covering it for sufficient
16 periods to cause physical characteristics that distinguish
17 the area below the line from the area above it.
18 Characteristics of the area below the line include, when
19 appropriate, but are not limited to diminished DEPRIVATION
20 OF THE SOIL OF SUBSTANTIALLY ALL terrestrial vegetation or
21 ~~lack~~ AND DESTRUCTION OF ITS agricultural crop VEGETATIVE
22 value. A FLOOD PLAIN ADJACENT TO SURFACE WATERS IS NOT
23 CONSIDERED TO LIE WITHIN THE SURFACE WATERS' HIGH-WATER
24 MARKS.

25 ~~(7)~~(8)(10) (a) "Recreational use" means with respect to

1 class-~~f~~ SURFACE waters: fishing, hunting, swimming ~~(EXCEPT~~
2 ~~WITHIN-100-YARDS-OF-ANY-OCCUPIED-DWELLING)~~, HIKING, floating
3 in small craft or other flotation devices, boating in
4 motorized craft unless otherwise prohibited or regulated by
5 law, or craft propelled by oar or paddle, ~~OTHER~~
6 WATER-RELATED--PLEASURE--ACTIVITIES, OTHER WATER-RELATED
7 PLEASURE ACTIVITIES, and related unavoidable or incidental
8 uses, ~~within-the-ordinary-high-water-mark-of-the-waters.~~

9 ~~(b)--Recreational-use-means-with-respect--to--class--if~~
10 ~~waters--all--of--the--uses--set--forth--in--subsection--(7)(a),~~
11 ~~except-that-it-does-not-include,--without-permission--of--the~~
12 ~~landowner:~~

13 ~~(i)--overnight-camping;~~
14 ~~(ii)--big-game-hunting-or-upland-bird-hunting;~~
15 ~~(iii)--operation--of--all-terrain--vehicles--or--other~~
16 ~~motorized-vehicles-not-primarily-designed-for-operation-upon~~
17 ~~the-water;~~

18 ~~(iv)--the-placement-or-creation--of--any--permanent--or~~
19 ~~semipermanent--object-such-as-a-permanent-duck-blind-or-boat~~
20 ~~moorage;--or~~

21 ~~(v)--other--activities--which--are--not--primarily~~
22 ~~water-related-pleasure-activities.~~

23 ~~(8)(9) "Supervisors"--means-the-board-of-supervisors-of~~
24 ~~a-soil-conservation-district,--the--directors--of--a-grazing~~
25 ~~district,--or-the-board-of-county-commissioners-if-a-request~~

1 pursuant to ~~{section 3(3)(b)}~~ is not within the boundaries
2 of a conservation district or if the request is refused by
3 the board of supervisors of a soil conservation district or
4 the directors of a grazing district;

5 (11) "SUPERVISORS" MEANS THE BOARD OF SUPERVISORS OF A
6 SOIL CONSERVATION DISTRICT, THE DIRECTORS OF A GRAZING
7 DISTRICT, OR THE BOARD OF COUNTY COMMISSIONERS IF A REQUEST
8 PURSUANT TO [SECTION 3(3)(B)] IS NOT WITHIN THE BOUNDARIES
9 OF A CONSERVATION DISTRICT OR IF THE REQUEST IS REFUSED BY
10 THE BOARD OF SUPERVISORS OF A SOIL CONSERVATION DISTRICT OR
11 THE DIRECTORS OF A GRAZING DISTRICT.

12 ~~{10}~~ (12) "SURFACE WATER" MEANS, FOR THE PURPOSE OF
13 DETERMINING THE PUBLIC'S ACCESS FOR RECREATIONAL USE, A
14 NATURAL WATER BODY, ITS BED, AND ITS BANKS UP TO THE
15 ORDINARY-HIGH-WATER-MARK, ITS BED, AND ITS BANKS UP TO THE
16 ORDINARY HIGH-WATER MARK.

17 NEW SECTION. Section 2. Recreational use permitted --
18 limitations -- exceptions. (1) Except as provided in
19 subsection ~~{3}~~ SUBSECTIONS (2) THROUGH ~~{4}~~ (5), all class--f
20 SURFACE waters that are capable of recreational use as
21 defined in ~~{section 1(7)(a)}~~ including the beds underlying
22 them and the banks up to the ordinary high water mark, may
23 be so used by the public without regard to the ownership of
24 the land underlying the waters.

25 ~~{2}~~ Except as provided in subsection ~~{3}~~, all class--f

1 waters that are capable of recreational use as defined in
2 ~~{section 1(7)(b)}~~ including the beds underlying them and
3 the banks up to the ordinary high water mark, may be so used
4 by the public without regard to the ownership of the land
5 underlying them except that recreational use does not
6 include those activities excluded in ~~{section 1(7)(b)}~~;

7 ~~{3}~~ (2) The right of the public to make recreational
8 use of surface waters does not include the right to make
9 recreational use of waters, WITHOUT PERMISSION OF THE
10 LANDOWNER:

11 (a) THE OPERATION OF ALL-TERRAIN VEHICLES OR OTHER
12 MOTORIZED VEHICLES NOT PRIMARILY DESIGNED FOR OPERATION UPON
13 THE WATER;

14 (b) THE RECREATIONAL USE OF SURFACE WATERS in a stock
15 pond or other PRIVATE impoundment fed by an intermittently
16 flowing natural watercourse; or

17 ~~{b}~~ (c) THE RECREATIONAL USE OF WATERS while diverted
18 away from a natural water body for beneficial use pursuant
19 to Title 85, chapter 2, part 2 or 3; OR

20 (d) BIG GAME HUNTING, EXCEPT BY LONG BOW OR SHOTGUN
21 WHEN SPECIFICALLY AUTHORIZED BY THE COMMISSION;

22 ~~{3}~~ THE RIGHT OF THE PUBLIC TO MAKE RECREATIONAL USE
23 OF CLASS--f WATERS DOES NOT INCLUDE, WITHOUT PERMISSION OF
24 THE LANDOWNER:

25 ~~{a}~~ ~~{b}~~ OVERNIGHT CAMPING WITHIN SIGHT OF ANY OCCUPIED

1 BUBBLING OR WITHIN 500 YARDS OF ANY OCCUPIED DWELLING,
 2 WHICHEVER IS LESS;
 3 (B)(F) THE PLACEMENT OR CREATION OF ANY PERMANENT OR
 4 SEMI-PERMANENT OBJECT, SUCH AS A PERMANENT DUCK BLIND OR BOAT
 5 MOORAGE, OR
 6 (C)(G) OTHER ACTIVITIES WHICH ARE NOT PRIMARILY
 7 WATER-RELATED PLEASURE ACTIVITIES AS DEFINED IN SECTION
 8 1(10); OR
 9 (H) USE OF A STREAMBED AS A RIGHT-OF-WAY FOR ANY
 10 PURPOSE WHEN WATER IS NOT FLOWING THEREIN.
 11 (3) THE PUBLIC HAS NO RIGHT TO MAKE RECREATIONAL USE
 12 OF CLASS II WATERS WITHOUT THE PERMISSION OF THE LANDOWNER.
 13 (E) OVERNIGHT CAMPING WITHIN SIGHT OF ANY OCCUPIED
 14 DWELLING OR WITHIN 500 YARDS OF ANY OCCUPIED DWELLING,
 15 WHICHEVER IS LESS;
 16 (F) THE PLACEMENT OR CREATION OF ANY PERMANENT DUCK
 17 BLIND, BOAT MOORAGE, OR ANY SEASONAL OR OTHER OBJECTS WITHIN
 18 SIGHT OF OR WITHIN 500 YARDS OF AN OCCUPIED DWELLING,
 19 WHICHEVER IS LESS; OR
 20 (G) USE OF A STREAMBED AS A RIGHT-OF-WAY FOR ANY
 21 PURPOSE WHEN WATER IS NOT FLOWING THEREIN.
 22 (3) THE RIGHT OF THE PUBLIC TO MAKE RECREATIONAL USE
 23 OF CLASS II WATERS DOES NOT INCLUDE, WITHOUT PERMISSION OF
 24 THE LANDOWNER:
 25 (A) BIG GAME HUNTING;

1 (B) OVERNIGHT CAMPING;
 2 (C) THE PLACEMENT OR CREATION OF ANY SEASONAL OBJECT;
 3 OR
 4 (D) OTHER ACTIVITIES WHICH ARE NOT PRIMARILY
 5 WATER-RELATED PLEASURE ACTIVITIES AS DEFINED IN SECTION
 6 1(10)].
 7 (4) The right of the public to make recreational use
 8 of surface waters does not grant any easement or right to
 9 the public to enter onto or cross private property in order
 10 to use such waters for recreational purposes.
 11 (5) THE COMMISSION SHALL ADOPT RULES PURSUANT TO
 12 87-1-303, IN THE INTEREST OF PUBLIC HEALTH, PUBLIC SAFETY,
 13 OR THE PROTECTION OF PUBLIC AND PRIVATE PROPERTY, GOVERNING
 14 RECREATIONAL USE OF CLASS I AND CLASS II WATERS. THESE RULES
 15 MUST INCLUDE THE FOLLOWING:
 16 (A) THE ESTABLISHMENT OF PROCEDURES BY WHICH ANY
 17 PERSON MAY REQUEST AN ORDER FROM THE COMMISSION:
 18 (I) LIMITING, RESTRICTING, OR PROHIBITING THE TYPE,
 19 INCIDENCE, OR EXTENT OF RECREATIONAL USE OF A SURFACE WATER;
 20 OR
 21 (II) ALTERING LIMITATIONS, RESTRICTIONS, OR
 22 PROHIBITIONS ON RECREATIONAL USE OF A SURFACE WATER IMPOSED
 23 BY THE COMMISSION; AND
 24 (B) PROVISIONS REQUIRING THE ISSUANCE OF WRITTEN
 25 FINDINGS AND A DECISION WHENEVER A REQUEST IS MADE PURSUANT

1 TO THE RULES ADOPTED UNDER SUBSECTION (5)(A); AND

2 (C) A PROCEDURE FOR THE IDENTIFICATION OF STREAMS
3 WITHIN CLASS II WATERS WHICH ARE NOT CAPABLE OF RECREATIONAL
4 USE OR ARE CAPABLE OF LIMITED RECREATIONAL USE, AND A
5 PROCEDURE TO RESTRICT THE RECREATIONAL USE TO THE ACTUAL
6 CAPACITY OF THE WATER.

7 ~~(5)(6)~~ The provisions of this section do not affect
8 any rights of the public with respect to state-owned lands
9 that are school trust lands or any rights of lessees of such
10 lands under lease on ~~{the effective date of this act}~~.

11 NEW SECTION. Section 3. Right to portage --
12 establishment of portage route. (1) A member of the public
13 making recreational use of surface waters may, above the
14 ordinary high-water mark, portage around barriers in the
15 least intrusive manner possible, avoiding damage to the
16 landowner's land and violation of his rights.

17 (2) ~~A landowner may create barriers across streams for~~
18 ~~purposes of land or water management or to establish land~~
19 ~~ownership as otherwise provided by law. If a landowner~~
20 ~~erects a barrier STRUCTURE pursuant to a design approved by~~
21 ~~the department and the barrier is designed not to and~~
22 ~~STRUCTURE does not interfere with the public's use of the~~
23 ~~surface waters, the public may not go above the ordinary~~
24 ~~high-water mark to portage around the barrier STRUCTURE.~~

25 ~~(3)(a) A portage route around or over a barrier may~~

1 ~~be established to avoid damage to the landowner's land and~~
2 ~~violation of his rights as well as to provide a reasonable~~
3 ~~and safe route for the recreational user of the surface~~
4 ~~waters.~~

5 ~~(b) A portage route may be established when either a~~
6 ~~landowner or a member of the recreating public submits a~~
7 ~~request to the supervisors that such a route be established.~~

8 ~~(c) Within 45 days of the receipt of a request, the~~
9 ~~supervisors shall, in consultation with the landowner and a~~
10 ~~representative of the department, examine and investigate~~
11 ~~the barrier and the adjoining land to determine a reasonable~~
12 ~~and safe portage route.~~

13 ~~(d) Within 45 days of the examination of the site, the~~
14 ~~supervisors shall make a written finding of the most~~
15 ~~appropriate portage route.~~

16 ~~(e) The cost of establishing the portage route around~~
17 ~~artificial barriers must be borne by the involved landowner,~~
18 ~~except for the construction of notification signs of such~~
19 ~~route, which is the responsibility of the department. The~~
20 ~~cost of establishing a portage route around natural barriers~~
21 ~~must be borne by the department.~~

22 ~~(f) Once the route is established, the department has~~
23 ~~the exclusive responsibility thereafter to maintain the~~
24 ~~portage route at reasonable times agreeable to the~~
25 ~~landowner. The department shall post notices on the stream~~

1 of--the--existence--of--the--portage--route--and--the--public's
2 obligation--to--use--it--as--the--exclusive--means--around--a
3 barrier.

4 (g)--If--either--the--landowner--or--recreationist--disagrees
5 with--the--route--described--in--subsection--(3)(e),--he--may
6 petition--the--district--court--to--name--a--three--member
7 arbitration--panel. The--panel--must--consist--of--an--affected
8 landowner,--a--member--of--an--affected--recreational--group,--and--a
9 member--selected--by--the--two--other--members--of--the--arbitration
10 panel. The--arbitration--panel--may--accept,--reject,--or--modify
11 the--supervisors'--finding--under--subsection--(3)(d).

12 (h)--The--determination--of--the--arbitration--panel--is
13 binding--upon--the--landowner--and--upon--all--parties--that--use--the
14 water--for--which--the--portage--is--provided. Costs--of--the
15 arbitration--panel,--computed--as--for--jurors'--fees--under
16 3-15-2017,--shall--be--borne--by--the--contesting--party--or--parties,
17 all--other--parties--shall--bear--their--own--costs.

18 (i)--The--determination--of--the--arbitration--panel--may--be
19 appealed--within--30--days--to--the--district--court. A LANDOWNER
20 MAY CREATE BARRIERS ACROSS STREAMS FOR PURPOSES OF LAND OR
21 WATER MANAGEMENT OR TO ESTABLISH LAND OWNERSHIP AS OTHERWISE
22 PROVIDED BY LAW. IF A LANDOWNER ERECTS A STRUCTURE PURSUANT
23 TO A DESIGN APPROVED BY THE DEPARTMENT AND THE STRUCTURE
24 WHICH DOES NOT INTERFERE WITH THE PUBLIC'S USE OF THE
25 SURFACE WATERS, THE PUBLIC MAY NOT GO ABOVE THE ORDINARY

1 HIGH-WATER MARK TO PORTAGE AROUND THE STRUCTURE.

2 (3) (A) A PORTAGE ROUTE AROUND OR OVER A BARRIER MAY
3 BE ESTABLISHED TO AVOID DAMAGE TO THE LANDOWNER'S LAND AND
4 VIOLATION OF HIS RIGHTS AS WELL AS TO PROVIDE A REASONABLE
5 AND SAFE ROUTE FOR THE RECREATIONAL USER OF THE SURFACE
6 WATERS.

7 (B) A PORTAGE ROUTE MAY BE ESTABLISHED WHEN EITHER A
8 LANDOWNER OR A MEMBER OF THE RECREATING PUBLIC SUBMITS A
9 REQUEST TO THE SUPERVISORS THAT SUCH A ROUTE BE ESTABLISHED.

10 (C) WITHIN 45 DAYS OF THE RECEIPT OF A REQUEST, THE
11 SUPERVISORS SHALL, IN CONSULTATION WITH THE LANDOWNER AND A
12 REPRESENTATIVE OF THE DEPARTMENT, EXAMINE AND INVESTIGATE
13 THE BARRIER AND THE ADJOINING LAND TO DETERMINE A REASONABLE
14 AND SAFE PORTAGE ROUTE.

15 (D) WITHIN 45 DAYS OF THE EXAMINATION OF THE SITE, THE
16 SUPERVISORS SHALL MAKE A WRITTEN FINDING OF THE MOST
17 APPROPRIATE PORTAGE ROUTE.

18 (E) THE COST OF ESTABLISHING THE PORTAGE ROUTE AROUND
19 ARTIFICIAL BARRIERS MUST BE BORNE BY THE INVOLVED LANDOWNER,
20 EXCEPT FOR THE CONSTRUCTION OF NOTIFICATION SIGNS OF SUCH
21 ROUTE, WHICH IS THE RESPONSIBILITY OF THE DEPARTMENT. THE
22 COST OF ESTABLISHING A PORTAGE ROUTE AROUND NATURAL
23 ARTIFICIAL BARRIERS NOT OWNED BY THE LANDOWNER ON WHOSE LAND
24 THE PORTAGE ROUTE WILL BE PLACED MUST BE BORNE BY THE
25 DEPARTMENT.

1 (F) ONCE THE ROUTE IS ESTABLISHED, THE DEPARTMENT HAS
 2 THE EXCLUSIVE RESPONSIBILITY THEREAFTER TO MAINTAIN THE
 3 PORTAGE ROUTE AT REASONABLE TIMES AGREEABLE TO THE
 4 LANDOWNER. THE DEPARTMENT SHALL POST NOTICES ON THE STREAM
 5 OF THE EXISTENCE OF THE PORTAGE ROUTE AND THE PUBLIC'S
 6 OBLIGATION TO USE IT AS THE EXCLUSIVE MEANS AROUND A
 7 BARRIER.

8 (G) IF EITHER THE LANDOWNER OR RECREATIONIST DISAGREES
 9 WITH THE ROUTE DESCRIBED IN SUBSECTION (3)(E), HE MAY
 10 PETITION THE DISTRICT COURT TO NAME A THREE-MEMBER
 11 ARBITRATION PANEL. THE PANEL MUST CONSIST OF AN AFFECTED
 12 LANDOWNER, A MEMBER OF AN AFFECTED RECREATIONAL GROUP, AND A
 13 MEMBER SELECTED BY THE TWO OTHER MEMBERS OF THE ARBITRATION
 14 PANEL. THE ARBITRATION PANEL MAY ACCEPT, REJECT, OR MODIFY
 15 THE SUPERVISORS' FINDING UNDER SUBSECTION (3)(D).

16 (H) THE DETERMINATION OF THE ARBITRATION PANEL IS
 17 BINDING UPON THE LANDOWNER AND UPON ALL PARTIES THAT USE THE
 18 WATER FOR WHICH THE PORTAGE IS PROVIDED. COSTS OF THE
 19 ARBITRATION PANEL, COMPUTED AS FOR JURORS' FEES UNDER
 20 3-15-201, SHALL BE BORNE BY THE CONTESTING PARTY OR PARTIES;
 21 ALL OTHER PARTIES SHALL BEAR THEIR OWN COSTS.

22 (I) THE DETERMINATION OF THE ARBITRATION PANEL MAY BE
 23 APPEALED WITHIN 30 DAYS TO THE DISTRICT COURT. PORTAGE
 24 ROUTES AROUND EXISTING BARRIERS MAY ONLY BE ACQUIRED BY:

25 (A)--LANDOWNER PERMISSION;

1 (B)--PURCHASE; OR
 2 (C)--EMINENT DOMAIN, AS PROVIDED IN ARTICLE II, SECTION
 3 29 OF THE MONTANA CONSTITUTION;

4 (3)--IF A LANDOWNER PLACES AN ARTIFICIAL BARRIER ACROSS
 5 A WATER BODY AFTER {THE EFFECTIVE DATE OF THIS ACT}, HE MUST
 6 PROVIDE PORTAGE;

7 {4}{(J)} Once a portage route is established, the
 8 public shall use the portage route as the exclusive means to
 9 portage around or over the barrier.

10 {5}{(4)} NOTHING CONTAINED IN [THIS ACT] ADDRESSES THE
 11 ISSUE OF NATURAL BARRIERS OR PORTAGE AROUND SAID BARRIERS,
 12 AND NOTHING CONTAINED IN [THIS ACT] MAKES SUCH PORTAGE
 13 LAWFUL OR UNLAWFUL.

14 NEW SECTION. Section 4. Restriction on liability of
 15 landowner ~~and supervisor~~ AND SUPERVISOR. (1) A person who
 16 makes recreational use of surface waters flowing over or
 17 through land in the possession or under the control of
 18 another, pursuant to [section 2], or land while portaging
 19 around or over barriers or while portaging or using portage
 20 routes, pursuant to [section 3], does not have the status of
 21 invitee or licensee and is owed no duty by a landowner, HIS
 22 AGENT, OR HIS TENANT other than that provided in subsection
 23 (2).

24 (2) A landowner, HIS AGENT, or tenant is liable to a
 25 person making recreational use of waters or land described

1 in subsection (1) only for an act or omission that
2 constitutes willful or wanton misconduct.

3 ~~(3) No supervisor who participates in a decision
4 regarding the placement of a portage route is liable to any
5 person who while making recreational use of the surface
6 waters is injured while using IS INJURED OR WHOSE PROPERTY
7 IS DAMAGED BECAUSE OF PLACEMENT OR USE OF the portage route
8 except for an act or omission that constitutes willful and
9 wanton misconduct.~~

10 (3) NO SUPERVISOR OR ANY MEMBER OF THE ARBITRATION
11 PANEL WHO PARTICIPATES IN A DECISION REGARDING THE
12 PLACEMENT OF A PORTAGE ROUTE IS LIABLE TO ANY PERSON WHO IS
13 INJURED OR WHOSE PROPERTY IS DAMAGED BECAUSE OF PLACEMENT OR
14 USE OF THE PORTAGE ROUTE EXCEPT FOR AN ACT OR OMISSION THAT
15 CONSTITUTES WILLFUL AND WANTON MISCONDUCT.

16 NEW SECTION. Section 5. Prescriptive easement not
17 acquired by recreational use of surface waters. (1) A
18 prescriptive easement is a right to use the property of
19 another that is acquired by open, exclusive, notorious,
20 hostile, adverse, continuous, and uninterrupted use for a
21 period of 5 years.

22 (2) A prescriptive easement cannot be acquired
23 through:

24 (A) recreational use of surface waters, including:

25 (I) the streambeds underlying them; and

1 (II) the banks up to the ordinary high-water mark; or
2 of

3 (III) ANY portage routes over and around barriers; OR
4 (B) THE ENTERING OR CROSSING OF PRIVATE PROPERTY TO
5 REACH SURFACE WATERS.

6 Section 6. Section 70-19-405, MCA, is amended to read:
7 "70-19-405. Title by prescription. Occupancy Except as
8 provided in [section 5], occupancy for the period prescribed
9 by this chapter as sufficient to bar an action for the
10 recovery of the property confers a title thereto,
11 denominated a title by prescription, which is sufficient
12 against all."

13 NEW SECTION. SECTION 7. LAND TITLE UNAFFECTED. THE
14 PROVISIONS OF [THIS ACT] AND THE RECREATIONAL USES PERMITTED
15 BY [SECTION 2] DO NOT AFFECT THE TITLE OR OWNERSHIP OF THE
16 SURFACE WATERS, THE BEDS, AND THE BANKS OF ANY NAVIGABLE OR
17 NONNAVIGABLE WATERS OR THE PORTAGE ROUTES WITHIN THIS STATE.

18 NEW SECTION. SECTION 8. LAKES. NOTHING CONTAINED IN
19 [THIS ACT] ADDRESSES THE RECREATIONAL USE OF SURFACE WATERS
20 OF LAKES.

21 NEW SECTION. Section 9. Severability. If a part of
22 this act is invalid, all valid parts that are severable from
23 the invalid part remain in effect. If a part of this act is
24 invalid in one or more of its applications, the part remains
25 in effect in all valid applications that are severable from

1 the invalid applications.

2 NEW SECTION. Section 10. Applicability. Sections 5
3 and 6 apply only to a prescriptive easement that has not
4 been perfected prior to [the effective date of this act].

5 NEW SECTION. Section 11. Effective date. This act is
6 effective on passage and approval.

-End-