

HOUSE BILL NO. 275

1/19 Introduced
1/19 Referred to Judiciary
1/21 Fiscal Note Requested
Cancelled
1/22 Hearing
Died in Committee

1 HOUSE BILL NO. 275
 2 INTRODUCED BY Lobb

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. Purpose. The purpose of [this
 16 act] is to generally define the use, rights, and
 17 restrictions relating to recreational use of surface waters
 18 while implementing the provisions of Article IX of the
 19 Montana constitution by establishing a means for the
 20 protection of the water and other natural resources on,
 21 below, and adjacent to surface waters.

22 NEW SECTION. Section 2. Definitions. For purposes of
 23 [sections 3 through 7], the following definitions apply:

24 (1) "Barrier" means an artificial obstruction located
 25 in or over a water body, restricting passage on or through

1 the water, or a natural object which totally or effectively
 2 obstructs the recreational use of the surface water at the
 3 time of use. A barrier may include but is not limited to a
 4 bridge or fence or any other manmade obstacle to the natural
 5 flow of water or a natural object within the ordinary
 6 high-water mark of a stream.

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

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

10 (b) satisfy the federal test of navigability for
 11 purposes of state ownership.

12 (3) "Class II waters" means all surface waters that:

13 (a) are capable of being floated by a craft propelled
 14 by oar or paddle, during periods of time other than the
 15 period of seasonal high water; and

16 (b) are not class I waters.

17 (4) "Class III waters" means all surface waters that
 18 are not class I or class II waters.

19 (5) "Department" means the department of natural
 20 resources and conservation provided for in 2-15-3301.

21 (6) "Diverted away from a natural water body" means a
 22 diversion of surface water through a manmade water
 23 conveyance system, including but not limited to:

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

25 (b) an industrial, municipal, or domestic water

1 system;

2 (c) a flood control channel; or

3 (d) a hydropower inlet and discharge facility.

4 (7) "Ordinary high-water mark" means the line that

5 water impresses on land by covering it for sufficient

6 periods to cause physical characteristics that distinguish

7 the area below the line from the area above it.

8 Characteristics of the area below the line include, when

9 appropriate, but are not limited to lack of terrestrial

10 vegetation or lack of agricultural crop value.

11 (8) (a) "Recreational use" means with respect to class

12 I waters: fishing, hunting, swimming, floating in small

13 craft or other flotation devices, boating in motorized craft

14 unless otherwise prohibited or regulated by law or craft

15 propelled by oar or paddle, and related unavoidable or

16 incidental uses, within the ordinary high-water mark of the

17 waters.

18 (b) "Recreational use" means with respect to class II

19 waters all of the uses set forth in subsection (8)(a),

20 except that it does not include, without permission of the

21 landowner:

22 (i) overnight camping;

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

24 (iii) operation of all-terrain vehicles or other

25 motorized vehicles not primarily designed for operation upon

1 the water;

2 (iv) the placement or creation of any permanent or

3 semipermanent object such as a permanent duck blind or boat

4 moorage; or

5 (v) other activities which are not primarily

6 water-related pleasure activities.

7 (c) "Recreational use" means, with respect to class

8 III waters, any use of surface waters and the beds

9 underlying them that is permitted by the landowner or his

10 authorized agent.

11 (9) "Supervisors" means the board of supervisors of a

12 soil conservation district, the directors of a grazing

13 district, or the board of county commissioners if a

14 determination pursuant to [section 4] concerns an area that

15 is not within the boundaries of a conservation district or

16 grazing district.

17 NEW SECTION. Section 3. Recreational use permitted --

18 limitations -- exceptions. (1) Except as provided in

19 subsection (4), all class I waters that are capable of

20 recreational use as defined in [section 2(8)(a)], including

21 the beds underlying them and the banks up to the ordinary

22 high-water mark, may be so used by the public without regard

23 to the ownership of the land underlying the waters.

24 (2) Except as provided in subsection (4), all class II

25 waters that are capable of recreational use as defined in

1 [section 2(8)(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 2(8)(b)].

6 (3) Class III waters, including the beds underlying
 7 them and the banks up to the ordinary high-water mark, may
 8 be used only in the circumstances set forth in [section
 9 2(8)(c)].

10 (4) The right of the public to make recreational use
 11 of surface waters does not include the right to make
 12 recreational use of waters in a stock pond or other
 13 impoundment fed by an intermittently flowing natural
 14 watercourse while they are diverted away from a natural
 15 water body for beneficial use pursuant to Title 85, chapter
 16 2, part 2 or 3.

17 (5) The right of the public to make recreational use
 18 of surface waters does not grant any easement or right to
 19 the public to enter onto or cross private property in order
 20 to use such waters for recreational purposes.

21 (6) The provisions of this section do not affect any
 22 rights of the public with respect to state-owned lands that
 23 are school trust lands or any rights of lessees of such
 24 lands under lease on [the effective date of this act].

25 NEW SECTION. Section 4. Determination of class II and

1 class III waters -- department of natural resources and
 2 conservation. (1) The department shall adopt rules governing
 3 and standards to be applied in the following determinations:

4 (a) conflicts over whether a water body or portion of
 5 a water body is class II or class III;

6 (b) the geographical point, if any, at which a class
 7 II water body becomes class III; and

8 (c) when and why class II waters may be declared class
 9 III waters for limited and temporary periods of time to
 10 prevent degradation of the water body and its ecosystem.

11 (2) In developing the rules implementing subsection
 12 (1)(c), the department shall require that each of the
 13 following factors that is relevant to the decision must be
 14 considered in the determination:

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

17 (b) whether public use is creating a visual impact
 18 discordant with scenic values;

19 (c) whether public use is damaging the property of
 20 landowners underlying or adjacent to the water body;

21 (d) whether public use is adversely affecting wildlife
 22 or birds;

23 (e) whether public use is disrupting or altering
 24 natural areas or biotic communities;

25 (f) whether public use is causing degradation of the

1 water quality of the water body; and

2 (g) any other factors relevant to the preservation of
3 the water body in its natural state.

4 (3) The supervisors shall administer the rules.

5 NEW SECTION. Section 5. Right to portage. A member of
6 the public making recreational use of surface waters may,
7 above the ordinary high-water mark, portage around barriers
8 in the least intrusive manner possible, avoiding damage to
9 the landowner's land and violation of his rights.

10 NEW SECTION. Section 6. Restriction on liability of
11 landowner during recreational use of waters or land. (1) A
12 person who makes recreational use of surface waters flowing
13 over or through land in the possession or under the control
14 of another, pursuant to [section 3], or land while portaging
15 around or over barriers, pursuant to [section 5], does not
16 have the status of invitee or licensee and is owed no duty
17 by a landowner other than that provided in subsection (2).

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

22 NEW SECTION. Section 7. Prescriptive easement not
23 acquired by recreational use of surface waters. (1) A
24 prescriptive easement is a right to use the property of
25 another that is acquired by open, exclusive, notorious,

1 hostile, adverse, continuous, and uninterrupted use for a
2 period of 5 years.

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

7 Section 8. Section 70-19-405, MCA, is amended to read:

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

14 NEW SECTION. Section 9. Severability. If a part of
15 this act is invalid, all valid parts that are severable from
16 the invalid part remain in effect. If a part of this act is
17 invalid in one or more of its applications, the part remains
18 in effect in all valid applications that are severable from
19 the invalid applications.

20 NEW SECTION. Section 10. Applicability. Sections 7
21 and 8 apply only to a prescriptive easement that has not
22 been perfected prior to [the effective date of this act].

23 NEW SECTION. Section 11. Effective date. This act is
24 effective on passage and approval.

-End-