

HOUSE BILL NO. 498

1/26 Introduced
1/26 Referred to Judiciary
1/30 Fiscal Note Required
2/01 Hearing
2/05 Fiscal Note Received
Died in Committee

1 HOUSE BILL NO. 498
 2 INTRODUCED BY E. Ellison
 3
 4 A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY DEFINE
 5 LAWS GOVERNING THE RIGHTS AND RESPONSIBILITIES OF PROPERTY
 6 OWNERS AND THE PUBLIC RELATED TO RECREATIONAL USE OF STATE
 7 WATERS; PROVIDING DEFINITIONAL TERMS; PROHIBITING
 8 RECREATIONAL USE OF DIVERTED WATERS; RESTRICTING THE
 9 LIABILITY OF LANDOWNERS WHEN WATER IS BEING USED FOR
 10 RECREATION OR LAND IS BEING USED AS AN INCIDENT OF WATER
 11 RECREATION; PROVIDING THAT A PRESCRIPTIVE EASEMENT CANNOT BE
 12 ACQUIRED BY RECREATIONAL USE; GRANTING POWERS TO PROTECT
 13 AQUATIC ECOSYSTEMS THROUGH LIMITATIONS OF PUBLIC USE UPON
 14 SURFACE WATERS; AMENDING SECTION 70-19-405, MCA; AND
 15 PROVIDING AN IMMEDIATE EFFECTIVE DATE."
 16
 17 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
 18 NEW SECTION. Section 1. Definitions. For purposes of
 19 [sections 2, 3, 5, and 7], the following definitions apply:
 20 (1) "Department" means the department of fish,
 21 wildlife, and parks provided for in 2-15-3401.
 22 (2) "Ordinary high-water mark" means the line that
 23 water has impressed on soil by covering it for sufficient
 24 periods of time to deprive the soil of its vegetation and to
 25 destroy its value for agricultural purpose. Floodplains or

1 flood channels are not considered to lie within the ordinary
 2 high-water mark, for the purpose of determining recreational
 3 use, except when they carry sufficient water to support
 4 fishing or floating.
 5 (3) (a) "Recreational use of surface waters" means
 6 fishing, swimming, floating in small craft or other
 7 flotation devices, boating in motorized craft or craft
 8 propelled by oar or paddle, or coincidental picnicking, all
 9 within the ordinary high-water mark of a stream.
 10 (b) Except on public land or when otherwise authorized
 11 by state and federal law, in the interest of public health
 12 and safety and for the protection of water resources,
 13 recreational use of surface waters does not include:
 14 (i) hunting other than waterfowl hunting;
 15 (ii) overnight camping;
 16 (iii) operation of all-terrain vehicles or other
 17 motorized vehicles not primarily designed for operation upon
 18 the water; or
 19 (iv) other activities that are not primarily
 20 water-related pleasure activities.
 21 NEW SECTION. Section 2. Recreational use of surface
 22 waters permitted -- exception. (1) Except as provided in
 23 subsection (2), any surface waters that are capable of
 24 recreational use may be so used by the public without regard
 25 to ownership of the land underlying the waters.

1 (2) The right of the public to make recreational use
2 of surface waters that are capable of recreational use does
3 not include the right to make recreational use of waters
4 while they are diverted away from a natural water body for
5 beneficial use pursuant to Title 85, chapter 2, part 2 or 3.

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

11 NEW SECTION. Section 3. Use of land between ordinary
12 high-water marks -- when permissible -- when prohibited.

13 (1) A member of the public may use the land between the
14 ordinary high-water marks of surface waters that are capable
15 of recreational use and that satisfy the federal
16 navigability test for state streambed ownership.

17 (2) A member of the public may not use land between
18 the ordinary high-water marks of surface waters capable of
19 recreational use that do not satisfy the provisions of
20 subsection (1), except when:

21 (a) such use is unavoidable and incidental to the
22 right of the public to make recreational use of the surface
23 water; or

24 (b) the owner of the land or his authorized agent
25 grants permission to use the land.

1 (3) For purposes of this section, use of the land is
2 unavoidable and incidental only when the use is temporarily
3 necessary:

4 (a) to accomplish the recreational use of the surface
5 waters; or

6 (b) for purposes of safety.

7 NEW SECTION. Section 4. Restriction on landowner
8 liability during recreational use of waters or land. No
9 person who makes recreational use of surface waters, as
10 defined in [section 1], flowing over or through any land in
11 the possession or under the control of another, pursuant to
12 [section 2], or land while portaging around or over barriers
13 or as an unavoidable or incidental use of the waters,
14 pursuant to [section 3], has the status of invitee or
15 licensee; nor is he owed any duty by a landowner other than
16 the duty to avoid willful or wanton misconduct.

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

22 (2) A prescriptive easement cannot be acquired through
23 use of land or water for recreational purposes.

24 Section 6. Section 70-19-405, MCA, is amended to read:
25 "70-19-405. Title by prescription. Occupancy Except as

1 provided in [section 5], occupancy for the period prescribed
 2 by this chapter as sufficient to bar an action for the
 3 recovery of the property confers a title thereto,
 4 denominated a title by prescription, which is sufficient
 5 against all."

6 NEW SECTION. Section 7. Protection of aquatic
 7 ecosystems -- procedures. (1) The legislature finds that
 8 streams and other surface water ecosystems are subject to
 9 damage when the rate of public recreational use of surface
 10 waters exceeds the limits and capacities of surface water
 11 ecosystems. The legislature further finds that excessive
 12 public recreational use of surface waters can result in
 13 damage to aquatic life and wildlife or can result in damage
 14 to or trespass upon adjacent public and private lands.

15 (2) Upon complaint to the department by any individual
 16 that a stream or other surface water ecosystem has been
 17 subjected to a rate of public recreational use that has
 18 caused, is causing, or will cause damage to the ecosystem
 19 and to its aquatic life and wildlife or that will result in
 20 damage to or trespass upon adjacent or underlying public or
 21 private lands, the department shall:

22 (a) gather information through a reasonable
 23 investigation; and

24 (b) contact the landowner and solicit his cooperation
 25 regarding the complaint.

1 (3) If the department determines as a result of the
 2 investigation that there is reasonable cause for the
 3 complaint, it shall hold a hearing under Title 2, chapter 4,
 4 part 6, to determine whether substantial evidence exists to
 5 support the complaint.

6 (4) If as a result of the hearing the department
 7 concludes that there is substantial evidence to support the
 8 complaint, it may:

9 (a) close to recreational use by the public the waters
 10 or any portion thereof exposed to the damage;

11 (b) restrict the public's right to such surface waters
 12 by limiting the number of recreational users upon the
 13 surface waters at a given time;

14 (c) restrict the length of time the surface waters may
 15 be used by the public for recreational use;

16 (d) restrict the types of recreational uses allowed
 17 upon the surface waters; or

18 (e) impose such other regulations or restrictions
 19 which would prevent damage to the water ecosystem, aquatic
 20 life, or wildlife or damage to or trespass upon adjacent or
 21 underlying public or private lands.

22 (5) Nothing in this section grants the department
 23 authority to require, prohibit, or otherwise regulate lawful
 24 land management decisions, activities, or practices by the
 25 landowner, manager, or agent.

1 NEW SECTION. Section 8. Codification instruction.
2 Section 4 is intended to be codified as an integral part of
3 Title 27, chapter 1, part 7.

4 NEW SECTION. Section 9. Severability. If a part of
5 this act is invalid, all valid parts that are severable from
6 the invalid part remain in effect. If a part of this act is
7 invalid in one or more of its applications, the part remains
8 in effect in all valid applications that are severable from
9 the invalid applications.

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

13 NEW SECTION. Section 11. Effective date. This act is
14 effective on passage and approval.

-End-

STATE OF MONTANA
FISCAL NOTE

REQUEST NO. FNN290-85

Form BD-15

In compliance with a written request received January 30 19 85, there is hereby submitted a Fiscal Note for H.B. 498 pursuant to Title 5, Chapter 4, Part 2 of the Montana Code Annotated (MCA). Background information used in developing this Fiscal Note is available from the Office of Budget and Program Planning, to members of the Legislature upon request.

DESCRIPTION OF PROPOSED LEGISLATION:

Define the laws governing the rights and responsibilities of property owners and the public related to recreational use of state waters; provide definitional terms; prohibit recreational use of diverted waters; restrict the liability of landowners when water is being used for recreation or land is being used as an incident of water recreation; providing that a prescriptive easement cannot be acquired by recreational use; granting powers to protect aquatic ecosystems through limitations of public use upon surface waters.

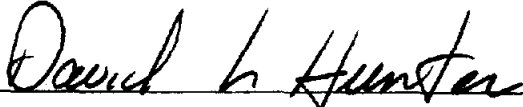
ASSUMPTIONS:

1. The number of trespass and revenue damage complaints to the Department of Fish, Wildlife and Parks would increase by 3½ times.
2. Currently about 100 complaints per year are received and will increase 5% per year.
3. Each trespass complaint would require ten man days to investigate and process through the courts and a hearing. Each resource damage complaint would require ten man days to investigate.
4. 90% of the complaints would be trespass related and 10% associated with resource damages.
5. The bill is effective upon passage. April 1, 1985 has been used to calculate costs.

FISCAL IMPACT:

		FY 1985	FY 1986	FY 1987
<u>Expenditures:</u>	<u>Current</u>	<u>Increased Cost</u>	<u>Increased Cost</u>	<u>Increased Cost</u>
Personal Services	\$ 35,190	\$ 27,665	\$110,659	\$117,952
Operating Expenses	11,970	23,933	95,735	101,120
TOTAL	\$ 47,160	\$ 51,598	\$206,394	\$219,072
Earmarked Special Revenue Fund	\$ 47,160	\$ 51,598*	\$206,394*	\$219,072*

*These are in addition to the current level cost.



BUDGET DIRECTOR
Office of Budget and Program Planning

Date: Feb 5, 1985
HB 498