

MONTANA STATE SENATE  
JUDICIARY COMMITTEE  
MINUTES OF THE MEETING

March 27, 1985

The sixty-first meeting of the Senate Judiciary Committee was called to order at 7:29 p.m. on March 27, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members were present.

ACTION ON HB 265: Chairman Mazurek called upon Subcommittee Chairman Bill Yellowtail to present the subcommittee's report to the Senate Judiciary Committee as a whole. Senator Yellowtail began by presenting the subcommittee meeting minutes (Exhibit A, March 13, 1985, meeting; Exhibit B, March 18, 1985, meeting; Exhibit C, March 20, 1985, meeting; and Exhibit D, March 25, 1985, meeting). [The April 10, 1985, conference committee minutes on HB 265 were later added to these minutes for ease of locating them (Exhibit E).] He then identified the documents which would be referred to over the course of the evening. First were the proposed subcommittee amendments to HB 265 (Exhibit 1). Next was a grey bill which contained the proposed subcommittee amendments to the bill (Exhibit 2). Third were the issues of deadlock, which are matters that the subcommittee members could not agree on (Exhibit 3). Fourth are proposed amendments which would implement the deadlock issues reached by the subcommittee (Exhibit 4). Fifth is a set of amendments labeled "alliance proposed amendments" (Exhibit 5). This set of amendments was offered by Senator Towe on behalf of an alliance group of individuals represented by Ron Waterman. Exhibit 6 was a grey bill including the alliance proposed amendments offered as Exhibit 5. Next is a set of amendments proposed by Senator Crippen on behalf of a group of landowners represented by Phil Strobe, Conrad Fredricks, and Dick Josephson (Exhibit 7). Exhibit 8 is a third grey bill which includes the amendments offered on Exhibit 7. Exhibit 9 is a set of amendments proposed by Senator Towe. Senator Yellowtail clarified that the amendments offered by Senator Towe, by the alliance group, and by Senator Crippen were not part of the subcommittee report.

Chairman Mazurek then allowed the committee to recess for 15 minutes in order that those in attendance and the committee members might have an opportunity to review the alliance and Crippen proposals which had not been available before the meeting began this evening.

The meeting then reconvened. Before explaining the sub-

committee amendments, Senator Yellowtail gave a little background into HB 265. He explained that HB 265 arose out of the supreme court decisions in the Curran and Hildreth cases. The supreme court decisions set out some questions that need to be addressed, and, in addition, some clarification that needs to be made, principally for landowners, as to what their protections are relative to stream use by recreationists. Senator Yellowtail stated that the subcommittee addressed HB 265 in great detail and allowed considerable input from the public.

Senator Yellowtail then moved adoption of the proposed amendments by the subcommittee (Exhibit 1). Amendment No. 1 prohibits all recreation on private impoundments which have been licensed for private use. Amendment No. 2 allows Fish and Game to address the issue of hunting.

Amendment No. 3 relates to natural barriers; natural barriers are not addressed in this bill. The subcommittee felt the supreme court had not clearly addressed the issue of natural barriers, and, therefore, it was unnecessary to do so in this bill. Amendment No. 4 again relates to natural barriers.

Regarding amendment No. 5, the original HB 265 had streams classified as Class I and Class II with definitions of what those streams might be. The definition of Class I and Class II streams centers around navigability. The subcommittee proposes to use a definition which relates to the actual criteria by which the streams are being classified and, therefore, has changed the name of Class I streams to navigable streams. Amendment No. 6 changes one of the criteria for classification of streams. Amendments No. 7 and 8 change nomenclature away from Class I and Class II.

It was necessary to define the term "occupied dwelling" in amendment No. 9 because that term is used later in the bill. At this point Senator Shaw asked if "occupied dwelling" had anything to do with calving barns. Senator Yellowtail explained "occupied dwelling" was used to get away from the term "habitable building."

Senator Yellowtail then went on to explain that amendments No. 10 and 11 relate to the matter of the definition of ordinary high water mark. Amendment No. 12 is the definition of recreational use. It outlines many recreational uses that might be conducted on streams. The committee modified "swimming" to say it is allowable as a recreational use except within 100 yards of an occupied dwelling. The subcommittee also added the term "hiking" in this subparagraph. The reason for that is there is a fishing statute that has been on the books and which refers to traversing up

and down the stream within the high water mark for fishing purposes. Amendment No. 13 prohibits the recreational use of surface waters in a stock pond or other private impoundment fed by an intermittently flowing natural water course. Amendments No. 14 and 15 are non-substantial, grammatical corrections. Amendment No. 16 is where the subcommittee poses to remove the differentiation between larger and smaller streams. Amendment No. 17 prohibits overnight camping within 500 yards of any occupied dwelling for the purposes of all streams. Senator Galt questioned whether this applied to all waters. Senator Yellowtail responded that as the proposal reads right now, yes.

Amendment No. 18 is a relettering correction. Amendment No. 19 strikes the word "permanent." This word is redundant in this section. Amendment No. 20 is a grammatical correction. Amendment No. 21 is a relettering correction. Amendment No. 22 is a punctuation correction. Amendment 23 prohibits the use of a streambed for any purpose when water is not flowing therein. Amendment No. 24 is a nomenclature change. Amendment No. 25 is renumbering change.

Amendment No. 26 begins getting into the matter of portage. A change is necessary to refer specifically to an artificial barrier. Senator Mazurek questioned why. Senator Yellowtail responded simply for clarity. Amendment No. 27 struck the word "natural" and inserted the word "artificial." Amendment No. 28 inserted the words "not owned by the landowner on whose land the portage route will be placed." Amendment No. 29 inserted the words "within 30 days of the decision." Amendments No. 30 and 31 inserted the words "his agent or his tenant" with regard to the liability of the landowner and the supervisor. Amendment No. 32 inserted the words "any member of the artitration panel." Amendment No. 33 essentially is a disclaimer and says that this act has nothing to do with the issue of title or ownership of the surface waters or the beds or banks of the streams.

Following Senator Yellowtail's explanation of the proposed subcommittee amendments, the Judiciary Committee reverted to his motion to adopt the same. The motion carried unanimously.

Senator Towe then addressed the issue of the proposed alliance amendments. He indicated the alliance members have by and large indicated they would accept the subcommittee amendments; however, they have requested a few more rather insignificant changes. Senator Towe stated that if in fact the committee were to accept the alliance amendments, he would withdraw several of the deadlock issues which he proposed.

Senator Towe moved that the alliance proposed amendments be adopted.

Senator Crippen stated that the committee had before it two sets of amendments. He felt the committee should be aware the amendments he has proposed were worked up by members of the Stillwater Protective Association and by representatives of the landowners. In addition, Senator Galt has had an opportunity to look at these amendments. They are far more extensive, but they were done for a reason. These amendments will be at odds with those of the alliance. Senator Crippen stated that he did not want the committee to be in a position where it would be voting on one set of amendments and then voting on the other.

Chairman Mazurek stated that it was his suggestion that Senator Towe would walk the committee through his amendments and then Senator Crippen would have an opportunity to walk the committee through his.

Senator Towe then began his explanation of the alliance amendments. He believes amendment No. 1 is a change with little substance but which might have some emotion. It proposes that the definition of classifications not be changed but that the nomenclature would be. One of the concerns is that using the word "navigable" carried with it a lot of baggage. There are a lot of definitions of navigable water. By using that word, we risk another court's coming in and saying navigable means something different than what the legislature has spelled out in this bill.

Amendment No. 2 effectively removes lakes from the bill. Senator Towe stated he sees no choice in adopting this amendment. He believes there is no realistic opportunity of getting this bill passed unless they exclude lakes from the operation of the bill.

Amendment No. 3 strikes government meander line, which Senator Towe believes is really unnecessary. Amendment No. 4 is a nomenclature change. Amendment No. 5 takes lakes out of all classes of waters discussed by this bill. Amendment No. 6 is the diversion exclusion. In other words, if you have a municipal water reservoir, you can't stop recreation on that reservoir. Amendment No. 7 exempts lakes from the water definition. Amendment No. 8 prohibits overnight camping within 500 yards of an occupied dwelling. This applies to all classes of water. Amendment No. 8 also prohibits the placement or creation of any permanent structure or object which is a permanent duck blind or boat moorage.

Amendments No. 9, 10, 11, 12, 13, and 14 state which uses would be prohibited on Class I and Class II streams. Amendment No. 15 is a nomenclature change. Amendment No. 16 leaves portage around natural barriers for the court to decide.

Amendment 17 states that this act does not address "lakes." Senator Galt asked if he were proposing to take "lakes" out of the bill. Senator Towe responded affirmatively. Senator Galt asked if the supreme court used "lakes" in its opinions. Senator Towe said that they did not refer to "lakes." However, he believed if the issue of "lakes" were squarely put before the courts, it would probably include them. Senator Galt asked if the supreme court decisions included the angling statute. Senator Towe stated he did not see any reference to the angling statute in the opinions. Senator Crippen stated the committee should remember the questioning period when HB 265 was first heard before the committee. At that time, Senator Crippen asked Ron Waterman if HB 265 and the supreme court opinions, as interpreted by HB 265, applied to "lakes." Mr. Waterman responded yes at that time. There was some concern about Flathead Lake. The committee then discussed Flathead Lake, Whitefish Lake, and Seeley Lake. The implication was clear. Lakes were intended to be included in HB 265 and have been included in the bill. Senator Crippen stated removing lakes from the bill is an illusory compromise at the best. He believes what we are doing, by doing this, is we are leaving the lakefront owners high and dry. There are no guarantees as to what will be allowed. His proposed amendments address this issue. Senator Daniels stated there is difference between lakes and rivers. One bounded by riparian rights, and one is bounded by littoral rights. Senator Pinsoneault stated when the question arose concerning the applicability of this bill to lakes, he was stunned. He thinks the cases talk about stream access and streambeds. He believes lakes should be excluded. Senator Crippen stated even though we have two supreme court cases that deal with this, it is his contention he would support the dissent in both of those cases that the supreme court overstepped its bounds and was legislating. Senator Crippen feels it is the legislature's responsibility to enact laws and the supreme court's responsibility to interpret those laws in light of the constitution.

Senator Crippen then explained his proposed amendments. Senator Crippen stated the committee has before it the subcommittee issues of deadlock. His amendments propose to

go through these issues of deadlock and try to find ways to compromise. They looked at the water we have and tried to categorize it. They have come up with two or three categories. They looked at it first from the standpoint of the stream running from the mountain through the rancher's yard into a larger river or stream. They feel there ought to be very little, if anything, allowed in those areas. The next category is large rivers that have by custom and by use been used by recreationists to float, duck hunt, stop and have a beer, etc. Those he would classify as the mainstream rivers of the state. The third classification are those rivers that are in between. They call those the Stillwater River, the Boulder River, etc. These are areas where you have a little more limitation as far as custom and use. There are a larger number of property owners hunting these streams. That is the rationale that went through their minds. Senator Crippen agreed with the alliance that the subcommittee's intent to classify the waters as navigable and non-navigable will not hold water. There has been talk by some that the committee should just kill HB 265. The House has killed all of the Senate bills relating to water. Senator Crippen agreed with Senator Yellowtail that they did not want to do something by which they were going to abrogate their authority as a legislature and put this issue back in the hands of the court, not having accomplished anything. That would not be good for the legislature or for the sportsmen.

There are amendments to define the term "navigable." Proposed amendment No. 6 is where they get into the three definitions of water. The whole point was to keep lakes in the bill. They did not know how to treat different types of lakes, so they tied them into the different types of streams feeding them. As far as the definition of the bigger rivers, there may be some the committee would want to add or some that they would want to take out. In addressing the larger rivers, there are certain things by usage and custom that have been allowed on these rivers. The definition of Class C waters permits activities, including fishing below the ordinary high water mark, waterfowl hunting, and big game hunting with long bow or shotgun except within 500 yards of any occupied dwellings or other structure impounding domestic livestock or used for agricultural purposes. This is a significant compromise on the part of the landowners in that area. It would also allow swimming except within 300 yards of any occupied dwelling. The definition includes hiking below the ordinary high water mark; camping below the ordinary high water mark, except within 500 yards of an occupied dwelling, or any other uses that are allowed on those that are more restrictive will also be allowed on these streams. They also allow related

unavoidable or incidental uses for purposes of safety. The point there is with persons floating down, we don't feel we can restrict them from getting out for purposes of safety.

Amendment No. 12 relates to Class A waters, which for the most part would be non-navigable waters. It is defined by the title definition, the title belongs to the landowners to the centerline of the bed. They felt the areas in amendment No. 13 are redundant because we are going back in and defining the use of the waters and in certain cases the banks in the three classifications. They have used them as they relate to use and feel that is a more proper way.

Senator Crippen stated they forgot to strike lines 4 and 5 on page 6, "fed by an intermittently flowing natural watercourse." They also want to eliminate any use of a stock pond "without the consent of a landowner".

Amendment No. 16 is getting into the area of portage. Amendments No. 23 and 24 are attempts to reach some type of a compromise to avoid taking without compensation. Senator Galt stated, this refers to the constitution where you can't take public land without compensation. Senator Crippen then asked that for purposes of clarification, amendment No. 28 be stricken.

Following Senator Crippen's explanation of his proposed amendments, Senator Towe stated he felt the proposal was essentially unworkable. His first objection was a technical one. He stated as they have now defined navigable and non-navigable, all lakes are non-navigable, and, therefore, all motorboat activity is banned on all lakes. Even if they correct that, they have classified Class C waters and have allowed various items to take place on certain lakes. If you use those lakes, you will be limited to a few lakes such as Canyon Ferry, Flathead, and Fort Peck. There are still bans on motorboats on Whitefish Lake, Seeley Lake, and others. Senator Towe felt there was an insurmountable problem of banning motorboat activity on some lakes. Senator Crippen stated as he had in his opening statement, lakes have caused them a great deal of problems. He did not say this is the best way of handling lakes, but the banning of motorboats can be addressed. He reminded the

committee that they are attempting to reach some sort of compromise. If some points are unworkable, they should be analyzed. Senator Towe stated when they classify Class C waters, they say the mainstream of certain rivers. He believes this definition has left out the Clark Fork, the Beaverhead, the Dearborn, the Madison, the Jefferson, and the Gallatin. He also asked how they solved the problem of the mainstream. It is not clear whether the Middle Fork or the South Fork of the Flathead is the mainstream. He thinks they will have no end of problems dealing with that classification system. Senator Crippen stated the Clark Fork should be in there. He also believed that Senator Towe brought up a good point as to the classification of the mainstream. He felt the committee may or may not want to put some of these things in. He was trying to get in waters that by custom and usage these things in Class C will be allowed by law. He stated the compromise the subcommittee had reached the other night is one side would keep the streams wide open and the other side would close them entirely. His group felt two classifications of streams would not work.

Senator Crippen stated they had allowed some things like fishing and hiking below the ordinary high water mark, but they don't say anything about waterfowl hunting. By using day camping below the ordinary high water mark, it appears they have actually banned overnight camping. He does not believe that is a good idea, because there has traditionally been overnight camping along these areas. Senator Crippen stated they have especially excluded overnight camping. He believes most of it is done on islands or on public access. If it is not done on these lands, he believes you should ask permission.

Senator Towe then addressed amendment No. 12. He said he had some concerns about fishing. It is permitted by Section 87-2-305, MCA, and the angling statute says you can angle on the banks. With this proposal you can't do that on Class C waters. That is inconsistent. By striking surface waters altogether, not only have they raised a question about compliance with the Hildreth and Curran decisions, they have specifically authorized use of the bed and the banks by some. He believes this means you can only hunt if you are in a boat because of the way surface waters has been taken out. Senator Crippen stated he disagreed. It is clear how you can do it on Class C waters. The intention was to use the definition of surface water as it pertains to these types of streams. It is redundant and inappropriate.

Senator Towe stated on page 6 they leave undefined the words "private impoundment." Senator Galt explained that means not a public impoundment. Senator Towe stated he thinks it is pretty narrow to say the only other activities allowed are water-related pleasure activities, and these amendments have limited that further by saying only those determined by the commission. Senator Crippen stated big game hunting is not allowed except by approval of the landowner. They are expanding that. They are trying to open up some of these areas to big game hunting. He feels this is quite a substantial step from what the subcommittee talked about the other night.

Senator Towe said he had problems with the portage question. He thinks we cannot limit it as severely as that. He is not certain what public health and safety means. Senator Crippen asked Senator Towe what he felt the reason for a portage would be. Senator Towe responded it would be to get around a barrier. He stated the supreme court cases have used the word "barrier," and when you have a barrier, you have a right to portage around it. As far as he can determine it has nothing to do with public health and safety. Senator Crippen stated he did not see any problem with that definition. Senator Towe stated he thinks you are suggesting portage around natural barriers with that language. Senator Towe stated he has concerns with amendment No. 26. They have already said where the landowner agrees with the portage route, he has to pay for it, but if he does not agree, then the state will pay for it. Senator Towe believes the only thing the landowner will have to do is disagree in order to get the state to pay for the portage route.

Senator Towe stated amendment No. 26 says the department may condemn an easement. The bill says the department has no power of condemnation, and, therefore, we will have to give them those powers. Senator Crippen stated that in requiring a landowner to put up a portage around a barrier that is in existence, the landowner must be compensated. If condemnation is not what the committee feels would be the proper way, it will have to find another way. Senator Towe stated they may have a point with regard to natural barriers, and that is why he was willing to take natural barriers out of the effect of this act. Senator Crippen stated again, he agrees as far as putting up a barrier, the landowner must pay for the portage route. Senator Towe did not believe that is what his amendment stated. Mr. Petesch stated it referred to the establishment of an exclusive route.

Senator Towe urged adoption of his amendments. He didn't think the Crippen amendments would work. He thinks his

amendments are proper. He does not agree 100% with the amendments he proposes, but he thinks it is the best possible way out of this dilemma. Senator Yellowtail stated the amendments proposed by Senator Crippen do not constitute a middle ground in any manner. He thinks there are serious flaws that tread on the supreme court decisions. Regarding the issue of portage, Senator Yellowtail referred the committee to the language on page 18 of the Curran decision and page 5 of the Hildreth decision, which contain explicit language as to the public's right to portage. He thinks to limit the matter of portage as suggested essentially to the matter of condemnation of an exclusive route goes beyond what is reasonable and rational and beyond any compelling state interest. He stated the use of land between the high water mark in Class A proposes prohibitions against the use of the bed and the bank. He reminded the committee they have a fishing statute, Section 87-2-305, MCA, which permits treading on the beds and the banks up to the high water marks. He also stated the Hildreth decision on page 5 says the public has the right to use the waters and beds and banks up to the high water mark. Senator Galt stated that refers to the ability to tread on the bed and bank. That infers navigable streams, and in that case, the bed up to the low water mark belongs to the state. He believes navigable streams are entirely different than non-navigable streams. Senator Yellowtail referred to the words of the supreme court in the Hildreth decision on page 9 which referred to the public trust doctrine and the constitution. Senator Galt stated he agrees the constitution gives them the water of the state of Montana and anyone can recreate on the surface of the water, but that doesn't give the people using the surface of the water the right to intrude on the beds and banks of non-navigable streams. Senator Crippen stated as Senator Yellowtail seems to read these cases that this language constitutes a taking without due process of the law of private property. Senator Towe stated in the Hildreth case that is extremely clear. In the event Mr. Hildreth lost the case, he was seeking inverse condemnation. Senator Crippen suggested the committee look at Justice Gilbrandson's dissent in the Curran case. He believes that has potential statewide application. He believes the supreme court went beyond the bounds of its authority, and it is the obligation and duty of the legislature to let the supreme court know that. The legislature should keep in mind that the supreme court is an equal body with the legislature.

Senator Blaylock referred to the Hildreth decision at page 11. As discussed previously, ownership of the streambed is irrelevant to the determination of the use of waters for recreational purposes. Senator Galt stated you are shaping this bill on the supreme court's decision. They mentioned all waters. You can't separate some waters from other waters as to ownership or use of them for any purpose.

Senator Crippen moved as a substitute motion that his amendments be adopted. Senator Towe spoke against that motion. The motion failed as evidenced by a roll call vote (Exhibit 10). Chairman Mazurek stated the committee would then revert to Senator Towe's motion to adopt his amendments. Senator Crippen stated on page 6 they are going to allow overnight camping within 500 yards of any occupied dwelling. Senator Towe explained this is on the bed and the banks under the high water mark. Senator Crippen asked if overnight camping would be allowed on all classes of rivers. Senator Towe responded no; overnight camping is banned on Class II waters.

Senator Crippen stated you are not allowing the placement of any permanent structure. He asked if that were restricted on both classes of water. Senator Towe responded yes, it was restricted on both classes of water. Senator Crippen asked if by this they were allowing a semi-permanent duck blind. Senator Towe responded yes, on Class I waters. Senator Crippen stated his objection to this is the same as Senator Galt's and Senator Shaw's. Senator Towe's compromise eliminates lakes entirely. He does not think that will make Senator Himsl happy, because he agrees that if we don't address the problem of lakes, they are left wide open. The landowner who has a cabin on a lake will have the same problem as a landowner on a river. To make a distinction between the two is highly improper and will be subject to future lawsuits.

Senator Galt asked if they are now allowing overnight camping on any rivers at all. Senator Towe responded it would be allowed on Class I rivers so long as they are not within 500 yards of an occupied dwelling. Senator Galt asked if it would be between the high and low water marks. Senator Towe responded affirmatively. Senator Galt stated you are depriving the landowner of his own rights to control his own lands. That is taking without just compensation. Senator Mazurek stated the department would have

the ability to adopt rules and regulations regarding camping. Mr. Petesch directed the committee's attention to Section 87-1-303, MCA. Senator Galt asked if the word "public" were in there. Mr. Petesch stated the statute refers to legally accessible to the public. He interprets that as applying to all waters. Senator Galt stated you are still allowing intrusion on private land. Senator Towe referred to camping. He thinks that while it may be true the landowner owns the land between the low and high water marks, the supreme court has made it clear that in fact the recreational right extends to the bed and bank up to the high water mark. He thinks we can step in with limitations, but feels the supreme court will throw any other limitations out immediately.

Senator Towe stated he would like to make lakes as a third class and allocate specific uses. However, for purposes of compromise, that issue should be left to another day. At this point, and at this late hour, he did not feel it could be addressed. Senator Brown stated the lake issue has been fundamental matter to him all along because both supreme court cases arose out of streams and not lakes. The cases did not talk about lakeshores or the ownership patterns of lakes, which are entirely different matters than streams. If it happens that sometime in the future the court deals with lakes, then so be it, but he stated he would not vote for anything that included lakes. Senator Daniels stated there is a difference between littoral rights, which involve lakes and seashores, that are not applicable to streambeds and streams. The motion to adopt Senator Towe's proposed amendments labeled Exhibit 5 failed, with Senators Crippen, Galt, Pinsonneault, Shaw, and Daniels voting in opposition. (See roll call vote attached as Exhibit 11.)

Senator Crippen stated in the proposals he had, they were trying to protect the lakes as well as the streams. Senator Crippen moved that HB 265 be amended as follows:

Page 5, lines 4 and 5.

Following: "body" on line 4  
Strike: remainder of line 4 through "MARK" on line 5

Senator Crippen stated if this bill passes in any form whatsoever, we are making sure it includes lakes as the Curran and Hildreth cases could be expanded to so include them. By accepting this amendment, you are assuring the fact that you can go around in a motorboat and waterski, but you cannot go up on the beds. You can use the water, but not use the banks at all. Senator Towe stated he is not sure that addresses the entire concern, because we use the other

uses throughout the bill. Senator Yellowtail objected to the motion. He referred to pages 5 and 9 of the Hildreth case, which states the public can use the water and the beds and banks up to the ordinary high water mark. Senator Mazurek stated he thinks the language being deleted is right out of the supreme court opinions. Senator Crippen stated even though it may be out of the opinion, he believe the supreme court was overstepping its bounds. By including the banks, they are taking private property as we have talked about before. Senator Towe stated by making this adjustment, we have destroyed all of the landowner protections that have been built into this bill. Under the court cases, we will have the recreational use of the water up to the high water mark. Senator Pinsonault stated he agrees with Senator Crippen about the high and low water marks. It is a taking that is improper. It is repugnant to the property owner. The motion to amend the bill on page 5 failed, with Senators Blaylock, Daniels, Mazurek, and Yellowtail voting in opposition. (See roll call attached as Exhibit 12.)

Senator Brown then asked that the committee address the deadlock issues and consider them one at a time. Senator Daniels stated he is in favor of a bare-bones bill which basically embodies the four matters we have sent out of the Senate in earlier bills (SB 418, 421, 434, and 435) and eliminates a lot of this detail stuff. He thinks we should take such things as camping out of the bill. He could accept the bare-bone things that we have sent out of the Senate. He thinks other things should be set by policy and city ordinance.

Chairman Mazurek then addressed deadlock issue No. 1. Senator Crippen moved the committee adopt amendment No. 1 on Deadlock Issue No. 1, Exhibit 4. Mr. Petesch explained this will prohibit all recreational use of navigable waters without the permission of the landowner. Senator Blaylock asked if you could fish on them. Senator Towe responded yes. Senator Daniels stated this means you couldn't fish on them without permission. Senator Crippen stated that yardage requirement was a compromise. Senators Crippen & Galt recommended that on non-navigable waters, the public has no right to make use of them without permission. Senator Towe stated he would oppose the amendment because it would prohibit fishing on those streams. These are all of the streams that have not been declared navigable waters. He did not think the supreme court would permit it or it is what the public expects. Senator Crippen stated, we are talking about the stream that comes through the farmer's yard. These would be streams such as Fishtail Creek. It is tough to get into these streams, and there are very few access points. To do

anything else will just start a long series of closing the gates to the recreationists and areas where we have built up much rapport between the landowners and the recreationists. Senator Yellowtail referred the committee to the supreme court decision in Hildreth on page 5. It refers to the capability of the use of the waters for recreation. When a small stream can be used for fishing, then it is capable of such use. Senator Crippen stated if you take that conclusion, there will be parts of these non-navigable streams on which you can float and camp, as well as fish, and he thinks that is the wrong way to go. He believes the angling statute refers to navigable streams. A motion to amend the bill as indicated on Deadlock Issue No. 1 (Exhibit 4) carried with Senators Blaylock, Mazurek, Towe and Yellowtail voting in opposition.

Senator Towe moved that the suggested amendments indicated on Deadlock Issue No. 2 (Exhibit 4) be adopted. His preference would be to exclude lakes from the current definition of navigable and non-navigable, create a third definition, and define "lakes." That would solve the lake situation. It also makes it possible for the Fish and Game Commission to make further regulations. Senator Galt asked if that meant you could not swim within 100 yards of a house on Whitefish Lake. Senator Towe responded yes. Senator Mazurek asked if you can't set the regulations, do you want the lakes in or out? Senator Towe stated 100 yards is from an occupied dwelling; some dwellings may be on the shoreline and others may be set back from the shore. Senator Crippen stated the Senators Brown and Pinsoneault were concerned about "lakes." If we adopt this amendment, what Senator Towe is saying is outside the 100-yard mark, you can shoot ducks and camp as well, as overnight camp and other types of recreational activities. Senator Brown asked if Deadlock Issue No. 2, Amendment No. 4, is interpreted to mean someone can't camp on public property or private property. Senator Towe stated that this would not affect public property under any circumstances. Senator Blaylock asked if you would be in violation of the law if on Flathead Lake you were to run your motorboat 75 yards within an occupied dwelling. Senator Towe stated that he thinks that is correct. It says that there cannot be any recreational use within 100 yards of an occupied dwelling. He doesn't feel that comfortable about coming that close to a dwelling. He believes there is a certain amount of privacy we should protect. Senator Brown asked if this will get lakes out of his proposal. Senator Mazurek stated no. Senator Towe stated this puts lakes in the bill, but prohibits uses within 100 yards of an occupied dwelling. The motion to accept the proposed amendments to Deadlock Issue No. 2 failed with Senator Towe voting in favor of the motion.

Senator Brown moved that the committee accept Amendments No. 1, 2, and 3 shown on Deadlock Issue No. 2 (Exhibit 4) and proposed alliance amendment No. 17 (Exhibit 5). He stated that would take lakes out of the bill. Senator Crippen stated as a compromise, he would support the proposed amendment. The motion carried with Senator Galt and Shaw voting in opposition.

The committee then addressed Deadlock Issue No. 3. Senator Towe moved that proposed Deadlock Issue No. 3 be adopted. He said that makes it clear we are not addressing natural barriers. Senator Mazurek asked what the rationale was about not allowing portage around waterfalls. Senator Towe stated that is why we need this language. By taking out references to natural barriers, we did not want to speak to the issue one way or the other. You are saying it is beyond the scope of this bill. Senator Mazurek asked why it is beyond the scope of this bill. Senator Towe stated it was for the same reason lakes are beyond the scope of this bill. Senator Mazurek submitted that question has been answered, and we are just ducking it in this bill. Senator Crippen stated the concern the subcommittee had was by not mentioning natural barriers, it would leave in future issues before the supreme court. Because the legislature did not mention it, we asked why you didn't just leave it out entirely. Senator Towe responded when we made the motion to take it out entirely, the newspaper said the subcommittee banned entirely portage around natural barriers. This will stop that type of comments. Senator Daniels felt what the newspapers say isn't important. He asked if the supreme court addressed it in the Curran decision. Senator Towe stated he thought if the question were fairly presented to the court, it would probably say there is a right to portage around barriers, and there is a right of compensation, but that question has yet to be faced. Rather than to get into some sticky issues of eminent domain, he thinks it is best we eliminate the issue from the bill, because we can't resolve all of the problems at this time. Senator Pinsoneault felt we are a policy-making body, and if we don't address it, we may be shirking our responsibility. The motion to accept Deadlock Issue No. 3 failed with Senators Crippen, Galt, Mazurek, Shaw, and Yellowtail voting in opposition. Senator Yellowtail asked why they were voting no. Senator Towe stated some of those were voting no so they could argue before a court that in fact you cannot portage around natural barriers.

Senator Crippen moved that the grey bill be amended as follows:

Page 10, line 8.

Following: line 7

Insert: "(4) Nothing contained in [this act] addresses the issue of natural barriers or portage around said barriers. Nothing contained in [this act] makes such portage legal."

Senator Crippen stated he feels that makes it clear. Senator Towe felt the amendment should state "lawful or unlawful." Senator Yellowtail moved as a substitute motion for all motions pending that natural barriers and portage around them be reinserted in HB 265. He thinks this will clarify where the committee stands on that issue. He believes the motion has merit and referred the committee to the Curran decision, page 18. He stated as a matter of common sense, you will run into bridges and dams and fences. These are man-made barriers. You will also run into trees, waterfalls, and rocks. These are natural barriers. He does not believe it is unreasonable to traverse around natural barriers. Senator Crippen stated the facts in the Hildreth case addressed artificial barriers. He has two concerns with leaving natural barriers in the bill, first he thinks the bill will be lost. Second, what you are requiring now of the landowner is to ensure that the entire length of the stream will be navigable. He can see where the landowner has erected a barrier himself, because that is a man-made act, but he feels it is improper and wrong for the legislature to say to the landowner that in order to preserve the recreationist' right, you have to provide navigability along that stream, and it is his responsibility to provide portage around all natural barriers. There may be situations on natural barriers where you may have to go inland a fair distance to get around that natural barrier, so you may have to take a bigger bite out of the landowner's property to do that. Senator Mazurek suggested they look at the historical basis of this issue. If a trapper were floating his canoe down the stream and there was a rock jam, he could get out and portage around it. Senator Crippen stated we are not talking about the trapper, because in those days most of the land was not private land but was public. He agreed that in cases where there is a hazard and a danger, we should allow that they should be able to get out and around the barrier. The motion to

reinsert natural barriers in the bill failed with Senators Crippen, Daniels, Galt, Pinsoneault, Shaw and Towe voting in opposition.

Senator Towe made a substitute motion for all motions pending that Deadlock Issue No. 3 amendment No. 1, be adopted, and the bill be further amended by adding the words at the end of the sentence "and nothing contained in this act makes such portage lawful or unlawful." Senator Crippen stated he thinks by making it illegal, we are opening up the door. He would prefer to see the language as it presently is in Deadlock Issue No. 3 before this amendment. Senator Towe stated he doesn't like the language, because any other language would imply natural barriers are illegal in some manner. The motion to adopt Deadlock Issue No. 3 as amended carried with Senators Crippen, Galt, and Shaw voting in opposition.

Senator Towe moved that the words "navigable" and "non-navigable" be replaced with the words "Class I" and "Class II" wherever they appear in the bill. Senator Brown stated you have to base your definition of Class I and Class II on some definition of navigable and non-navigable, so we aren't getting away from the problem of a court's coming in at a later point and defining navigable as something other than what is in the bill. Senator Mazurek stated when you use the terms "navigable" and "non-navigable," you start to get into the issue of title. Senator Towe stated what we are saying is we are fixing the judicial determination as of this moment to these and no more, so some judge cannot say he thinks this can be brought in. The motion to replace navigable and non-navigable with Class I and Class II carried with Senators Brown, Crippen, Galt, and Shaw voting in opposition.

Senator Crippen moved the committee adopt the amendments suggested on Deadlock Issue No. 4, including the technical amendments located at the bottom of the deadlock issue which are necessary to conform the bill. Senator Galt stated the purpose of these amendments is to conform with the constitution of the state of Montana that you can't take private property for public use without eminent domain. Mr. Petesch explained this removes the arbitration panel and supervisor provision from the bill and makes the suggested subparagraphs (a), (b), & (c) the exclusive ways by which portage routes may be acquired. Senator Yellowtail felt the committee had already rejected this in substance when it rejected Senator Crippen's earlier amendment. Senator Galt stated he didn't think this committee wanted to get into taking private property without compensation. He believes you can't take private property for public use without compensation according to the constitution of the state of Montana. Senator

Towe asked if when you put a fence across a stream, were you in fact impeding the recreational use of the public to use the waters. Senator Galt responded he supposed so. Senator Towe asked if in fact you were doing so, should we provide you can't put a fence up. Senator Galt felt he didn't think you could do that on a navigable stream now without permission. You can do anything you please with the land you own under a non-navigable stream. Senator Towe suggested if you put up an artificial barrier, he thinks the court has spoken and you have to allow a little trespass around that barrier so you can continue to use that stream as the public has the right to do. Senator Crippen stated he thinks we are talking about artificial barriers that were established legally. We should not assume the supreme court said something that was legal at one time is now illegal; they just said provide portage. Now we are taking the Curran and Hildreth cases a little further. We are providing for portage, and we will pay you for providing the access around the barrier which was legal to begin with. Senator Brown addressed Senator Galt. He stated that without regard to the supreme court decisions, if the constitution says the public has the right to use the water and they come to a barrier, then they don't really have the right to use the water beyond the barrier. How can the public enjoy the constitutional right without getting around the barrier? Senator Crippen said you are providing a method for them to do that. Senator Daniels replied when you read the Curran opinion, it says, in the case of barriers, the public is allowed to portage around such barriers in the least intrusive manner possible, avoiding damage to the private property holders' rights. He suggested that you either avoid damage or pay the landowner for it. Senator Mazurek stated the Hildreth decision stated you can portage in order to cross barriers. Senator Pinsoneault suggested that a period be placed after the word portage in the suggested subparagraph (3). Senator Towe suggested we are not saying, as Senator Crippen proposed, that the portage or would just have to be around the barrier already in existence. It also applies to any barriers that may be put up in the future.

Senator Peinsoneault moved as a substitute motion that the proposed amendment on Deadlock Issue No. 4 be adopted with the following corrections:

The brackets be removed in each place that they appear and a period be placed after the word "portage" in subparagraph (3).

Senator Towe stated this language was written to cover all portage, not just that around barriers in existence at the time. Senator Crippen stated we are talking about barriers that are in existence now. Senator Yellowtail felt portage was not a terrible land grab. You do not want to portage any further than possible. He believes people will portage

in the least energy-expended manner possible.

Senator Towe moved as a substitute motion for all motions pending the HB 265 be concurred in as amended. The motion failed with Senators Blaylock, Shaw, and Towe voting in favor. (See roll call vote attached as Exhibit 17.)

Senator Mazurek then reverted to Senator Pinsoneault's motion regarding Deadlock Issue No. 4 and his proposed amendments to that issue. Senator Mazurek asked how that amendment ties in with the court opinion if you have barrier in place and the court says you have to provide portage. Mr. Petesch responded he doesn't think a lot of the amendments that have been offered to this bill are in keeping with the Hildreth and Curran decisions. If you wanted to just follow Hildreth and Curran, you would not need this bill. Senator Towe stated he thinks the motion violates both the spirit and the letter of the decisions to ban portage unless it is paid for in this manner. He thinks it is an interesting and intriguing argument. He has some problems with natural barriers. On artificial barriers, he doesn't think there is any question or doubt or Hildreth would have been paid for the barrier he put up. Senator Crippen stated it was his understanding the Hildreth bridge is still there, and Hildreth still hasn't provided portage around it. He does not believe in either of these cases the responsible landowners would have done what they did. Again, the bridge is still there; it may stay there until he gets compensation. The motion regarding Deadlock Issue No. 4 carried with Senators Blaylock, Towe, and Yellowtail voting in opposition (see roll call vote sheet attached as Exhibit 18).

Senator Brown moved the adoption of the proposed amendments relating to Deadlock Issue No. 5. Mr. Petesch explained this amendment would have the effect of prohibiting hunting of any sort without the landowner's permission. Senator Brown stated he doesn't think hunting had anything to do with the Hildreth and Curran decisions. Senator Towe stated his objection is now you are talking about all hunting, whether on big streams or on smaller rivers. There are some places where that river is very, very wide. He thinks it is outside the scope of the Curran and Hildreth decisions to ban hunting from these streams. Senator Yellowtail replied in Hildreth, the court said the capability of the use of the waters for recreational purposes will determine whether the waters can be used. He believes waterfowling is a recreational use. Senator Mazurek asked if this in effect meant you couldn't go down the Yellowstone River and hunt ducks.

Senator Crippen stated that is why he tried to go into three classes of streams. The motion regarding Deadlock Issue No. 5 failed with Senators Brown, Crippen, Galt, and Shaw voting in favor (see roll call vote attached as Exhibit 19).

Senator Towe moved adoption of amendment No. 2 set forth on Deadlock Issues No. 6 and 7. We have not defined water-related pleasure activities. He presumes they are the same activities as defined in recreational use with respect to surface waters. It is not clear without this amendment that what was referred to in this point in the bill is that other activities which are not water-related are banned at this sentence. He presumes what we mean by water activities that are not banned are not recreational uses. He thinks we need to clarify it. By passing this amendment, we will define water-related pleasure activities to be the same as recreational uses with respect to surface waters. Senator Crippen pointed out there are two amendments relating to Deadlock Issues No. 6 and 7. Senator Towe said he would accept amendment No. 1 if Senator Crippen would accept amendment No. 2. Senator Crippen replied one of the problems he sees if you keep in the definition the beds and the banks to the high water banks, then we are talking about surface waters where you are allowing some of these activities up to the high water mark. Mr. Petesch replied what you are doing is adding this into the list of things you can't do without permission of the landowner. Senator Towe said without this, there is a strong possibility the other activities that are not water-related may include some of the recreational uses.

Senator Crippen moved as a substitute motion that the committee not adopt either one of the amendments listed under Deadlock Issues No. 6 and 7. The motion carried with Senators Blaylock, Pineseault, Towe, and Yellowtail voting in opposition (see roll call vote attached as Exhibit 20).

Senator Galt moved the amendments listed under the Deadlock Issue No. 8 be adopted. Senator Yellowtail stated we are using navigability as a means of separating classes of streams. Subsection (c) includes activities which essentially are tests that have been defined by published judicial opinions, so they essentially reinforce and describe what those streams are. Senator Galt replied we are now off navigability and on to Class I. He is concerned about the language "or have been capable." Senator Towe stated he

thinks this amendment is unworkable, because if you left just subsections (a) and (b) in the bill, you would have defined some rivers that have government survey meander lines. That includes some large and some rivers, but not all rivers. There are a number that would have been judicially determined in this state. There have been some that have been determined to meet the federal navigability tests. Lots of others do meet the test but have not been adjudicated. You have some large rivers and some small rivers included, but some medium size ones are not included. The activities listed in subsection (c) enumerate court decisions on what establishes navigability and by limiting them to the definitions arrived at on the effective date and is an attempt to set further those bases for deciding federal navigability. Senator Mazurek stated he thinks this is a particularly dangerous amendment in light of the fact we have adopted Deadlock Issue No. 1 which prohibits activities on Class I streams. Senator Crippen asked if there have been any judicial determinations involving the Clean Water Act that could effect us here when you talk about judicial opinions and where you were talking about supporting activities under the federal navigability test. Mr. Petesch stated he is unaware of how this would be effected by the Clean Water Act. These are the federal navigability for commercial tests and not ownership tests. The motion to adopt Deadlock Issue No. 8 failed with Senators Crippen, Galt, and Shaw voting in favor (see roll call vote attached as Exhibit 21).

Senator Towe stated he would like to address Discussion Topic No. 9 relating to hiking. By rejecting Deadlock Issue No. 6, he thinks you have effectively banned hiking along the Yellowstone River and have, in fact, banned hiking at all rivers at this point. Mr. Petesch referred to the definitions of recreational use, surface water, and the area below the high water mark. The right to make recreational use of surface waters does not include, without the permission of the landowner, those that are not water-related. Senator Towe asked if someone could come in and say hiking is not water-related. Mr. Petesch stated that it is a recreational use by definition. Senator Towe suggested if you carry a fishing pole, you are all right.

As a substitute motion, Senator Towe moved to adopt the Deadlock Issue No. 6 and 7. The motion carried with Senators Brown, Crippen, Galt, and Shaw voting in opposition.

Senator Towe moved adoption of his proposed Amendment No. 1 with the following amendment thereto: The proposed inserted material with the following: "except by longbow or shotgun as specifically authorized by the commission." He stated this is not limited to certain size streams. Senator

Crippen pointed out that on non-navigable water, you are saying there will be no hunting. Senator Mazurek pointed out that on non-navigable waters, we have banned all recreational use. As a practical matter, he asked if he anticipated the commission would designate specific streams. Senator Towe stated it might even designate a particular area on the stream. He commented he is not asking for all hunting, just longbow and shotgun because they don't carry as far. He also pointed out the commission may say "no hunting," and we would have to go along with that. Senator Crippen stated his problem is with subsection (b) of the definition. We say in subsection (b) "that are or have been capable of supporting commercial activities." He asked why we need subsection (d). Senator Towe responded he did not know. Senator Crippen asked if that activity be classified as a commercial activity under this definition if you had a dude ranch. Senator Yellowtail responded he hardly thought so, as it relates to the water, unless it involves a commercial use of the water. Senator Crippen contended teaching them how to fish might be a commercial use. Senator Crippen was concerned if by doing that you were really spreading it out to the smaller streams. Senator Towe pointed out subsection (d) is essentially subsection (c) before 1889. The motion to adopt Senator Towe's proposed amendment No. 1 (Exhibit 9) as amended carried with Senators Brown, Crippen, and Shaw voting in opposition.

Senator Mazurek pointed out that parts of the statement of intent dealt with portage, and we will have to go back and correct those areas. Hearing no objections, he left that to Mr. Petesch to fix. Senator Shaw moved that

New Section, Section 8, page 12, lines 9 - 14, be stricken. He felt that if one section were invalid, the rest of this bill should also be invalid. The motion failed with Senators Daniels and Shaw voting in favor.

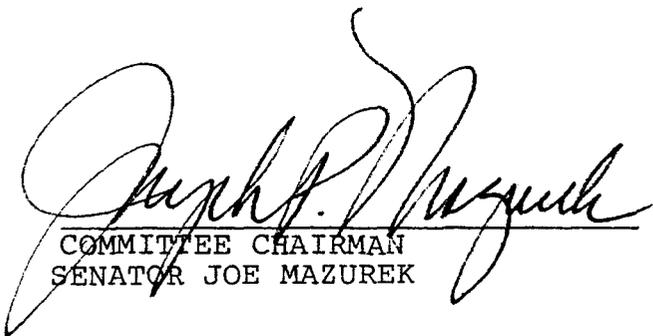
Senator Pinsoneault stated that when you were talking about establishing a route and making a judicial process out of it, he wondered if the landowners ever heard of the section in the civil code about submission of a controversy without action. He felt that that may be a possible alternative solution that would save a lot of bucks for those trying to get portage. Senator Towe pointed out portage is now gone.

Senate Judiciary Committee  
March 27, 1985  
Page 23

Senator Crippen stated he would like to compliment Senator Yellowtail for the job he did as chairman of the subcommittee. He knows that it was difficult and that he is not happy about the outcome. He also pointed out to the committee that by doing what it did with Senator Towe's suggestions, with the exception of the permanent duck blind, the committee has passed the alliance amendments.

Senator Towe moved that HB 265 be recommended [BE CONCURRED IN AS AMENDED]. The motion carried with Senators Crippen, Galt, and Shaw voting in opposition. (See roll call vote attached as Exhibit 23.)

There being no further business to come before the committee, the meeting was adjourned at 1:26 a.m.



COMMITTEE CHAIRMAN  
SENATOR JOE MAZUREK

CS



VISITORS' REGISTER

| NAME                     | REPRESENTING  | BILL # | Check One                           |                                     |
|--------------------------|---|--------|-------------------------------------|-------------------------------------|
|                          |   |        | Support                             | Oppose                              |
| JAMES KANE               | SELF  | 265    | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| JERRY MANLEY             | COMLUTION FOR <sup>STREAM</sup> ACCESS<br>MT. WATER DEVELOP. ASSN | " "    | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| K.M. Kelly               | MT. IRRIGATORS  | 265    | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| <del>David O. Egan</del> | <del>Rancher</del>  | 265    | <input type="checkbox"/>            | <input checked="" type="checkbox"/> |
| David O. Egan            | Rancher   | 265    | <input type="checkbox"/>            | <input checked="" type="checkbox"/> |
| B. H. MORSE              | STILLWATER COUNTY ASSN<br>OF TRAVELERS                            | 265    | <input type="checkbox"/>            | <input checked="" type="checkbox"/> |
| Wifona Lee Johnson       | Rancher   | 265    | <input type="checkbox"/>            | <input checked="" type="checkbox"/> |
| Megna Studiar            | Cascade   | 265    | <input type="checkbox"/>            | <input checked="" type="checkbox"/> |
| Bob [unclear]            | Cascade - Self  | 265    | <input type="checkbox"/>            | <input checked="" type="checkbox"/> |
| Anthony A. Skoerger      | Montana Wildlife Federation                                       | 265    | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| DM [unclear]             | Self  | 265    | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| Margery Rosseter         | Self  | 265    | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| Jim McDemmond            | Medicine River Canoe Club   | 265    | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| Malt Carpenter           | Self  | 265    | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| James A. Sisemore        | Self  | 265    | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| Tom Brownlee             | Great Adventures West   | 265    | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| Dianne McDemmond         | Self  | 265    | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| Ucheli Mitchell          | Self  | 265    | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| Lorna Frank              | Mt. Farm Bureau   | 265    | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| Paul [unclear]           | Mt. Wildlife Fed  | 265    | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| Bill Asher               | APA + PMA   | 265    | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| Mons Teger               | Mt Stockgrowers Assn  | 265    | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| Dwight Keller            | Rancher - self  | 265    | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| Nancy Mauld              | Rancher self  | 265    | <input type="checkbox"/>            | <input type="checkbox"/>            |
| Don S. Brown             | Self  |        | <input type="checkbox"/>            | <input type="checkbox"/>            |
| Carol Mosher             | Montana Snow Belles   | 265    | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |

(Please leave prepared statement with Secretary)

MONTANA STATE SENATE  
JUDICIARY SUBCOMMITTEE ON STREAM ACCESS  
MINUTES OF THE MEETING

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. A

March 13, 1985

DATE 032785

BILL NO. HB 265

The first meeting of the Senate Judiciary Subcommittee on Stream Access was called to order at 7:25 p.m. on March 13, 1985, by Chairman Bill Yellowtail in Room 325 of the Capitol.

ROLL CALL: All subcommittee members were present.

CONSIDERATION OF HB 265: Chairman Yellowtail opened the subcommittee meeting by stating the Senate Judiciary Committee as a whole has had comprehensive and extensive testimony on this bill. The subcommittee is to consider the amendments which have been proposed. Senator Towe suggested that since Greg Petesch, the staff attorney, has a good handle on the amendments, he should walk the subcommittee through the bill. Senator Crippen felt the subcommittee should highlight some of the issues raised during this hearing so that when we are dealing with particular amendments, we will know that we are dealing with a particular issue. Senator Galt felt Mr. Petesch should explain the amendments. Senator Towe questioned whether it would make more sense to go through the amendments one at a time as to who presented them or to go through the bill. Mr. Petesch felt going through the bill would be the best. Chairman Yellowtail instructed him to do so.

Mr. Petesch stated he would skip the statement of intent for now. Once the subcommittee decided what it wanted to do with the bill, it should then address the statement of intent. The Stillwater Protective Association and the Western Environmental Trade Association (hereinafter referred to as WETA) have proposed amendments to the definition of barrier on page 1. They are essentially limiting barriers to artificial barriers. The first issue then becomes whether the subcommittee should address the bill to all barriers or simply artificial barriers. Senator Towe moved that the subcommittee strike natural barriers out of the definition, leaving us with artificial barriers. The subcommittee will have to address portage around artificial barriers, but the bill will not say anything about portage around natural barriers. Senator Crippen felt the supreme court cases were really dealing with artificial barriers. Senator Galt referred the subcommittee to the Hildreth decision addressing artificial barriers. Senator Towe stated neither case addresses the question of natural barriers or objects, and we don't know how the court will decide that issue. Senator Galt agreed. Senator Yellowtail stated as a practical matter, in floating down a stream, it is very likely there will be cases where there will be natural barriers. That will necessitate that a recreationist will have to get out and traverse around the barrier. Senator Towe stated we cannot solve all of the world's problems tonight. Somebody, someday will have to address that. If we try to address that in this bill, we will

possibly lose the bill, and he wouldn't want to do that. Senator Crippen stated his concern is by the inclusion of natural barriers, we are placing the burden of providing navigability from the source to the mouth. The motion to eliminate natural barriers from the bill carried unanimously.

Mr. Petesch explained that there are two proposals on how to do this. They both related to page 1 beginning at line 19 following the word "water." WETA has proposed striking the remainder of line 19 through the period on line 21. The Stillwater Protective Association has proposed striking only a portion of the language found on line 19, "or a natural object IN OR OVER A WATER BODY."

Senator Galt moved that HB 265 be amended as follows:

1. Page 1, line 19.  
Following: "water,"  
Strike: "or a natural object IN OR OVER A WATER BODY"
2. Page 2, lines 23 and 24.  
Following: "water" on line 23  
Strike: remainder of line 23 through "stream" on line 24

The motion carried unanimously.

Mr. Petesch stated that will have some implications when the subcommittee gets to the issue of portage. He then stated the next issue was proposed by WETA. They propose to eliminate the classification of waters into classes. You would have surface waters only under their proposal. There is some basis for that in the decision of the court where they referred to the recreational use test. The court opinion said we cannot define the use because the waters themselves do so. Senator Towe commented that raises the question of the implication that is left in the bill that Class II waters prohibit camping, and the bill provides then by implication Class I waters allow camping. The problem is we can clearly, within the confines of the decision, put a limit on some waters, but if we do that, by implication we are permitting it on others. A substantive question that needs to be decided is if we combine the two classes, we are not going to prohibit any of those other things that are prohibited on Class II waters. We are going to leave that alone. Senator Galt replied that is the heart of this thing. He asked how can you allow anyone to put a camp on any of these waters when the landowner owns the water down to the low water mark. Senator Crippen suggested the subcommittee define Class I waters. Mr. Petesch stated Class I waters are essentially the bigger rivers. The federal navigability test is the major test under this definition. There is a

restatement of the federal navigability test two or three times and the other criteria is those streams flowing through public lands. We are talking about such rivers as the Missouri, the Yellowstone, and the Dearborn. Senator Towe stated using the definition we have in the bill, subparagraph (d) seems to be the real key. Mr. Petesch stated what the test comes down to is the log floating test, so the rest are not terribly significant. Senator Yellowtail replied subparagraph (c) may be significant because it may include a smaller stream. Senator Galt asked if state lands were public lands. Senator Yellowtail responded affirmatively. Senator Galt questioned small streams going through school lands. Senator Crippen asked if they became Class I and Class II as they went through the public land. Senator Towe responded it could be several different classes as they go down the stream. Mr. Petesch stated some of the definitions have been taken from Section 87-2-305, MCA.

Senator Towe suggested the subcommittee come up with a definition of what is navigable. Senator Galt replied everything that isn't navigable belongs to the people paying the taxes. Senator Towe asked what the subcommittee intended to prohibit on navigable streams. Senator Galt replied anything it wanted to except the surface use of the water. Senator Towe asked about confining this bill to the surface use of the water. Senator Galt responded that would be a very good idea in his opinion. Senator Crippen stated the subcommittee needed to define recreation. He asked if the subcommittee would then run into the problem of the high and low water marks. Senator Yellowtail reminded the committee that the supreme court opinions stated the surface and the bed and banks up to the ordinary high water mark are available for public recreational use. That poses the question of capability of recreational use. Senator Galt contended the supreme court used the Wyoming decision as one of its reasons for allowing these uses. The Wyoming decision prohibits the use of the bed and the banks except for incidental uses. Outside of that, the recreationists cannot use the streambeds. Unfortunately the Montana supreme court never went that far in its decisions. Senator Crippen agreed that if we could contain this bill to use of the surface of the water, then we would surely solve the problem that was raised about the dry creek beds. Senator Yellowtail agreed and stated the supreme court has clearly stated that between the high water marks is the usable definition. Senator Towe stated page 15 of the Curran case and page 5 of the Hildreth decision seem to be talking about surface waters. He thinks there is support for the concept we are talking about waters; however, there is that statement the public has the right to use the waters and the beds and the banks up to the ordinary high water mark. He believes someone could argue when it says the bed and the banks, they are saying if there is water over the bed and the banks, but he is not sure if (the supreme court decisions would apply)

if there were no water. He thinks we should just address the question of surface waters. Senator Crippen responded that would solve Senator Brown's problems with the lakes. Mr. Petesch responded you have also solved a lot of the issues of controversy.

Senator Towe questioned whether the supreme court meant something more than that or are we going to say the supreme court is talking about water and underneath the water is the bed and the bank, and if you put your foot on it, then you have the right to use it. Ron Waterman pointed out the debate that has gone on here is similar to the debate which went on before. He tends to believe the full language and import of the cases reach in terms of the utilization of the land to the high water mark whether or not it is covered with water. Because of the specific language which Senator Towe noted and also because of the underlying factual situation, he believes this is true. In Curran, specifically, there was an extended discussion of the boating activity relative to the dry portions of the streambed. That was a substantial issue in the Curran case, which dealt with natural barriers. Looking at how those cases developed at the trial court level, if we talk just about the surface waters, that does away with the need to address the issue of dry streambeds which would leave us with a bill addressing only surface waters and inviting litigation over the issue of the high water mark which is uncovered by water. This invites further litigation in a meaningless manner.

Mr. Waterman referred to Judge Bennett's Memorandum Regarding Motions for Summary Judgment in the district court decision in Curran, Cause No. 45148, page 4. Senator Galt asked why the supreme court didn't continue its research into the Wyoming decision where the Wyoming supreme court declared the streambeds private property. Mr. Waterman responded he urged that position on behalf of the Montana Stockgrowers Association. Their position was essentially set forth in Judge Gilbrandson's dissent. Phil Strobe stated Ron Waterman has brought up Judge Bennett's decision. Mr. Strobe said he has talked with Judge Bennett, and it was Judge Bennett's off-the-cuff comment that what the supreme court did is limit the decision to the water, and he decided in his own mind the two things that have been discussed here. The supreme court went to the Wyoming decision that says it was a water use and you could use it incidental to the water use and nothing further. In Curran, the supreme court cited the 1895 statute that says the abutting property owner owns the beds down to the low water mark. In the Hildreth decision, it was a water decision because of the fact that the court did not in any way find the

statute out of order. The supreme court cited the statute with approval. What should be done in HB 265, if at all, is to confine the bill to the water issue.

Senator Crippen asked if you confined to the water issue how would you handle the question of between the low and high water marks. Mr. Strobe stated he didn't think there was any comment in the supreme court opinions that would indicate the court said a member of the public essentially has a recreational privilege and has the right to intrude on private property. Mr. Strobe responded if all the banks are straight up and down, then there is no issue. Mr. Strobe stated that has been a tolerated trespass in society, but there is also a legal right for a property owner to go to that person who is exercising the trespass and say he shouldn't do it anymore.

Mr. Strobe also said one other issue is if HB 265 were to die and then the question is raised about regulation of recreational use of water, there currently is a whole body of law to rely on. Senator Crippen commented if the courts got us into this mess with those regulations in existence, he doesn't have that much faith in the supreme court that it may not come back in and do something more disastrous. He has more faith in the legislature than in the supreme court and believes that is why we should not kill this bill.

Mr. Petesch disagreed with Ron Waterman and Phil Strobe. He doesn't think the Curran case was that unclear in what it meant by high water mark because of the reference to the angling statute. Senator Towe stated he doesn't think we know yet how the supreme court will decide some of these cases, like putting up a duck blind. Maybe we can limit the bill and get it passed and do some good. If you don't do something about the bed and the banks and make some restriction on them, more litigation is going to result. We can sit here now and do something and prevent those problems. Mr. Strobe stated there is no way of knowing how much litigation will come up whether you pass or do not pass the bill. The prospect of another case or two in this area is extremely high. One group or the other will look for a fact situation to go again to the court. The makeup of the court has changed. The prospects of lawyers' fees being generated is very realistic. Senator Towe stated we should not shirk our responsibilities and not try to make some policy decisions so the supreme court has to.

Senator Galt stated he wants to get it clear and in the record there is no argument that navigable streams and the streambeds and banks belong to the state of Montana to the high water mark. Senator Yellowtail asked if he meant to suggest fishermen may tread on the banks. Senator Galt responded yes, on navigable streams. Mr. Petesch stated Senator Galt is referring to navigability for title purposes. Senator Galt responded that is correct. Senator Crippen stated that should not include the right to camp, even on the navigable streams.

Senator Yellowtail referred the subcommittee back to the capability of use. Senator Galt responded he felt the supreme court made a mistake, as ownership goes to the low water mark. From the low water mark to the high water mark belongs to the adjoining landowners (on navigable streams). Senator Yellowtail replied the Big Horn case contradicts that. Dick Josephson stated according to the patent and title, the states were allowed a choice because they controlled that issue. Montana passed a statute stating the low water mark. Other states passed a statute stating the high water mark. Senator Yellowtail suggested the United States Supreme Court spoke in the Big Horn case about ownership of the beds and the water. He believes that will probably prevail over our state's statutes. Mr. Petesch stated the state has the right to determine ownership level. Senator Yellowtail responded he's fairly sure the supreme court granted the use of the Big Horn River to the high water mark. Senator Yellowtail went on to state the question at hand is should there be a distinction between Class I and Class II waters and then accordingly to find uses for these waters. Senator Crippen pointed out if you keep the classification you have now, you have to change subsection (c), because that says any little stream that might go through a school section would be included.

Mr. Waterman called the subcommittee's attention to page 7, line 8, of the bill, which indicates school trust lands are not affected one way or the other. He felt that although they may have chosen the wrong words with public lands, they tried to assure school lands would not be included. Senator Towe did not feel it made any difference whether they were defined as navigable versus non-navigable or Class I versus Class II. He then referred to page 6 of HB 265 relating to the things you could not do on Class II streams. He suggested we just simply say we are going to prohibit those three items listed there on all waters. Mr. Petesch stated there are proposed amendments which do that. So long as you are not regulating the use of the water, you are on safe ground and can do that. On public lands along navigable waterways, the state in effect does those very things on the waters that are currently public waters.

Senator Towe suggested why if we were to do that, we would have no reason for a distinction or Class I and Class II waters. Senator Galt suggested going back to line 15 on page 5. Senator Towe suggested deleting lines 4 - 6 on page 6 of the bill. Senator Galt felt that would be fine. Senator Yellowtail asked what must a duck hunter do to set up a duck blind (on state-owned Class I waters). Senator Towe responded he must get permission. If it is a state land it will be listed. If it is a park, you automatically

have permission. Senator Yellowtail pointed out that if it's the Big Horn River, that would be anywhere below the high water mark. Senator Yellowtail replied if you are going to camp, you are dealing with something you cannot do on the water. The legislature has the right to say it doesn't want camping on any state parks. It has the power to do that, even though it doesn't want to. Senator Towe stated the legislature can say you can put up a duck blind. It can also say you can do it with the permission of the landowner. Mr. Petesch pointed out it could well be that if you allow duck blinds to be placed on private property without permission, you would have a taking problem. Senator Towe replied that problem could be solved if we made it clear you need permission of the landowner before you do anything. He felt that they now needed a definition of surface water. Mr. Petesch referred the committee to page 4, lines 21 - 24.

Senator Towe moved that the subcommittee strike from the bill page 1, line 25, through line 20 on page 2, the definition of Class I and Class II. Senator Yellowtail commented he really thinks what we are doing in this case has serious implications for not only customary use of waters in this state, but for the intent of the supreme court decisions. Especially as articulated in Hildreth. It would be a far better use of our obligation as a legislature to be as inclusive as possible to avoid future litigation. If we prohibit that, we are inviting further losses. It is hard to avoid the bed and the banks language of the Hildreth decision and the reference to the fishing language and the Bennett language. He thinks we are reaching beyond the intention of the supreme court in being so narrow minded. Senator Galt replied the decisions were based on the water use. This isn't depriving anyone from floating. They can do anything they want to on navigable streams. Senator Yellowtail stated by this amendment what we are doing is prohibiting it on all streams, navigable or not. He thinks we are inviting a real disaster in that case. Senator Crippen stated a lot will depend on how you define high water mark. What we are doing with this is defining recreational use. By adopting the amendment, we say they mean that, but they do not pertain to these things. Senator Yellowtail replied overnight camping has been a part of recreational use, as floaters camp overnight on streams. People also put up duck blinds. Senator Galt stated they could even overnight camp on public grounds without permission. Director Jim Flynn explained they allow overnight camping on all of the lands they control. Senator Galt asked if they had authority to control overnight camping on all state lands. Director Flynn stated they have the right to control all activities on state lands. Senator Yellowtail replied they are proposing to outlaw overnight camping on all lands. Mr. Petesch explained that the prohibition is without permission. Senator Towe

stated as a practical matter, in many cases the landowner won't insist, but he should have the right to come down any say you are intruding on my personal property rights at this point. At the point when the recreationist says there is a spot here that is below the high water mark, I will not get up on the bank, and I have that right, he probably will take it to the supreme court, and they will have to decide that case.

Senator Yellowtail asked how they should address the question of the capability of use. Senator Galt replied that is the surface water. Anyone can use it for any purpose. The water itself that is. The motion to eliminate the differentiation between Class I and Class II streams carried with Senator Yellowtail voting in opposition. Senator Towe moved to strike all of the lines 4 through 6 on page 6 and reletter the remaining subparagraphs (along with any necessary clerical changes which would need to be made.) Senator Galt asked why they should not just strike Class II. Senator Towe responded that is the effect of his motion. Senator Towe added to his motion striking Class I and Class II on line 20 and putting in surface instead. The motion carried with Senator Yellowtail voting in opposition.

Senator Crippen stated he had a question about page 6, lines 8 and 9. He asked if the word "permanent" should be deleted. He stated what we are doing here is saying if you are going to put a duck blind up, you need permission. Senator Crippen moved to delete the word "permanent" on page 6, line 9. The motion carried unanimously.

Mr. Petesch stated the next issue was the controversy concerning ordinary high water mark. Senator Towe stated he wants to use the definition of diminished vegetation. Senator Galt replied he did not want that. Senator Galt stated he would like to adopt Mr. Petesch's proposed amendment No. 3. Senator Crippen questioned whether the Senate Judiciary Committee had not already defined high water mark. Senator Towe replied that had a caveat on it: If we pass this bill, that one is no good. He believes this is an unworkable definition. With that definition, he can bring you down to the actual water every single time because there is vegetation. Senator Galt stated if it floods, it diminishes the vegetation on it. Senator Towe stated the diminished terrestrial vegetation is to help you identify the line. You can usually see it on any bank. If you say absolutely no vegetation, he disagrees. Senator Galt stated he would go with the Department of Natural Resources and Conservation in its great wisdom in adopting this rule. Senator Towe

asked if he would agree there is vegetation below the high water mark. Senator Galt replied there is even vegetation under the water. Senator Towe stated with your definition, you have come down to the water. Senator Towe disagreed. He stated "value for agriculture purposes" doesn't mean value for crop purposes. Senator Crippen stated if you were talking about the surface water, it wouldn't make any difference because you are keeping them on the surface. Senator Towe stated there is vegetation on the vertical bank. Senator Towe felt we ought to do something other than state absolutely no vegetation. Mr. Josephson stated that definition was picked for lack of something better. Lorents Grosfield stated the conservation districts have used that definition for ten years. They have had no problem with it. In deliberations with conservation district supervisor, it never occurred that they were talking about anything but lack of terrestrial vegetation. They never assumed aquatic vegetation. If you are talking about looking at vegetation with a microscope, he doesn't know how to address that. Senator Towe suggested if the language in the bill that offends you most is page 3, line 12, they limit it to lack of substantial vegetation and total destruction of its value for agricultural purposes. Dan Hines, Montana Wildlife Federation, stated the intent of their definition is to define the ordinary high water mark as the annual water mark that did not include the floodplain. Senator Crippen stated if you have a stream that is going through a farmer's meadow land, he can see where every year the high water mark will be right up to the banks and the low water mark would be just a trickle of water in there. If we can't get something with which the landowners can live, you will probably end up with the biggest lockout you have ever seen. By being too broad, we will be doing a greater dis-service to the recreationist. Mr. Grosfield stated if you are defining a line where nobody understands where it is, you are going to have confrontations. When discussing diminished vegetation versus lack of vegetation, he asked what diminished would mean. Senator Yellowtail stated it would be difficult to find a definition that will suit all types of streams and all situations. Senator Towe suggested we still have the definition of ordinary high water mark, which means the line the water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it. Senator Towe moved as a substitute motion that the definition of ordinary high water mark be amended as follows:

Page 3, lines 13 and 14.

Following: "2" on line 13

Strike: remainder of line 13 through "value" on line 14

Insert: "deprivation of the soil of substantially all  
terrestrial vegetation and destruction of its value for  
agricultural purposes"

The motion carried with Senator Crippen voting in opposition.

Mr. Petesch stated the next issue is the definition of recreational use. A suggestion was made to strike "hunting" entirely and another suggestion struck "hunting" and inserted "water-fowling." Mr. Petesch reminded the committee it had already prohibited these uses without landowner permission. Senator Crippen stated if you ban hunting, then you are banning hunting on the Big Horn, Yellowstone, and the Missouri. Mr. Petesch stated the Wyoming case included hunting within recreational uses. Senator Galt moved that hunting be struck from line 18, page 3. His motion was made on the grounds it is not a water sport. Senator Crippen stated you are then eliminating hunting on the lakes. The motion failed, with Senator Galt voting in favor.

Mr. Petesch stated in the same definition there are suggestions to reinsert the stricken language on page 3, lines 23 and 24. Senator Towe stated that is unnecessary, because it is in the definition of surface waters. Mr. Petesch stated the committee still had to deal with the issues of portage and prescriptive easement problems. Chairman Yellowtail then suggested the subcommittee recess and reconvene its hearing on another evening.

There being no further business to come before the subcommittee, the meeting was adjourned at 9:30 p.m.

  
Subcommittee Chairman



SENATE JUDICIARY COMMITTEE

EXHIBIT NO. A-2

DATE 032785

BILL NO. HB 265

HB 0265/si

HB 0265/si

49th Legislature

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.



SENATE JUDICIARY COMMITTEE

EXHIBIT NO. A-2

DATE 032785

BILL NO. HB 265

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.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. A-2

DATE 032785

BILL NO. HB 265

HB 0265/02

HB 0265/02

49th Legislature

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, ~~for 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 ~~for 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



SENATE JUDICIARY COMMITTEE

EXHIBIT NO. A-2  
DATE 032785  
BILL NO. HB 265

HB 0265/02

HB 0265/02

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 (f)(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 ~~the~~ soil for of  
Substantially  
all the  
veg +  
destruction  
of its value  
for agric  
purposes  
~~the~~ 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 (f)(8) (a) "Recreational use" means with respect to  
18 class-1 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--if

(f)(9) "Supervisors" means the board of supervisors of a soil conservation district, the directors of a grazing district, or the board of county commissioners if a request pursuant to [section 3(3)(b)] is not within the boundaries of a conservation district or if the request is refused by the board of supervisors of a soil conservation district or the directors of a grazing district.  
(10) "SURFACE WATER" MEANS, FOR THE PURPOSE OF DETERMINING THE PUBLIC'S ACCESS FOR RECREATIONAL USE, A NATURAL WATER BODY, ITS BED, AND ITS BANKS UP TO THE ORDINARY HIGH-WATER MARK.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. A-2

HB 0265/02

HB 0265/02

DATE 032785

BILL NO. HB 265

1 limitations -- exceptions. (1) Except as provided in  
2 subsection (3) SUBSECTIONS (2) THROUGH (4), all class-  
3 SURFACE waters that are capable of recreational use as  
4 defined in section (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-  
9 waters that are capable of recreational use as defined in  
10 section (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 (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;

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. A-2

DATE 032785

BILL NO. HB 265

HB 0265/02

HB 0265/02

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 ~~white-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

EXHIBIT NO. A-2  
DATE 032785  
BILL NO. HB 265

1 through: 1 effective on passage and approval.

-End-

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

# NORTHERN PLAINS RESOURCE COUNCIL

Field Office  
Box 858  
Helena, MT 59624  
(406) 443-4965

Main Office  
419 Stapleton Building  
Billings, MT 59101  
(406) 248-1154

Field Office  
Box 886  
Glendive, MT 59330  
(406) 365-2525

March 13, 1985

Senator Joe Mazurek, Chairman  
Senate Judiciary Committee  
Capitol Station  
Helena, MT 59620

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. A-3  
DATE 032785  
BILL NO. HB 265

Dear Senator Mazurek and Members of the Committee,

On Friday, March 8, representatives from two NPRC affiliates testified in opposition to HB265. One affiliate, the Stillwater Protective Association (SPA), offered amendments in four areas: portage, surface water definition, land-based activities, and ordinary high-water mark definition.

Since that hearing, NPRC's executive committee voted to support, as a Council position, the position of the affiliates and the amendments offered by SPA. Our members are deeply concerned about how any bill coming from this legislature will affect the relationship between landowner and recreationist. It is essential that we maintain that good relationship by taking steps to protect the privacy and safety of the landowner, and the landowner's ability to do business, while at the same time allowing recreationists to enjoy the use of the waters in the state.

The fundamental disagreements over HB 265 seem to revolve around the interpretations of the Supreme Court decisions, and the breadth of activities allowed under those decisions, including the distinction between land-based and water-based activities. These amendments reflect our members concerns and interpretations of the decisions. These concerns are not isolated to a particular group within NPRC, but have been expressed by members throughout the state, including eastern Montana.

These amendments reflect a sincere desire on the part of our Council to avoid conflict, and to address the areas where we see the potential for misunderstanding or abuse. We know that the road to this point has been difficult, and we appreciate your time and work on this bill. It's an important issue for many of our members, and we would be glad to work with you on the bill, and particularly on the suggested amendments.

Sincerely,

Jeanne-Marie Souvigney  
NPRC Staff

AMENDMENTS TO HB 265

submitted by the Stillwater Protective Assn;  
and the Northern Plains Resource Council

1. Portage

Section 1 (1), page 1, line 19

"the water, ~~or a natural object in or over a water body which...~~"  
and lines 23-24

"obstacle to the natural flow of water ~~or a natural object within the  
ordinary high water mark of a stream.~~"

Section 3 (1), page 7, line 15

"ordinary high-water mark, portage around artificial barriers in the"  
Section 3 (3)(a), page 8, line 1

"a portage route around or over a an artificial barrier may"

Section 3 (3)(c). page 8, lines 12-13

"the barrier and the adjoining land to determine if a ~~reasonable and  
safe~~ portage route is necessary

Section 3 (3)(d), page 8, line 15-16

"Supervisors shall make a written finding of ~~the most appropriate  
whether a~~ portage route is needed and the most appropriate route if  
if one is necessary"

Section 3 (3)(e), page 8, line 21

"cost of establishing a portage route around ~~natural~~ existing artificial  
barriers"

2. Surface Water

Section 1 (10), page 4, lines 21-24 strike

Section 1(8), page 3, lines 23-24

"or incidental uses, within the ordinary high water mark of the waters"

3. Land-based Activities

Section 1 (8), page 3, line 18

"surface waters: fishing, ~~hunting~~, swimming, floating"

Section 2 (2)(d), page 6, line 3

"~~big-game~~ hunting"

Section 2 (1), page 5, line 2

"Subsections (2) ~~through-(4)~~ and (3)"

Section 2 (3), page 6, line 4-6, strike

line 7 - change (A) to (E)

line 8 - change (B) to (F)

line 11 - change (C) to (G)

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. A-3

DATE 032785

BILL NO. HB 265

line 13 - change (4) to (3)

line 17 - change (5) to (4)

Section 2 (2)(b), page 5, line 23-24

"pond or other private impoundment fed-by ~~an~~-intermittently-flowing  
natural-watercourse"

4. Ordinary High-Water Mark

Section 1(7), page 3, lines 8-16, strike and substitute with the language  
of Senate Bill 418 in its entirety.

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. A-3  
DATE 032785  
BILL NO. HB 265

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. B  
DATE 032785  
BILL NO. HB 265

MONTANA STATE SENATE  
JUDICIARY SUBCOMMITTEE ON STREAM ACCESS  
MINUTES OF THE MEETING

March 18, 1985

The second meeting of the Senate Judiciary Subcommittee on Stream Access was called to order at 7:07 p.m. on March 18, 1985, by Subcommittee Chairman Bill Yellowtail in Room 325 of the State Capitol.

ROLL CALL: All subcommittee members were present.

FURTHER CONSIDERATION OF HB 265: Senator Crippen suggested the subcommittee return to the area of classification of waters. As was testified in the Judiciary Committee's initial hearing, this bill not only pertains to the rivers and streams in the state, but also to all surface waters and that includes lakes. That fact really isn't known all that well to the general public. He asked as the original bill came out what it would do to the property owner who might have a cabin fronting a lake. Did the supreme court intend someone could pull up with a boat onto a beach and camp? That is an area that has to be addressed. We also have a custom and usage situation. We have a number of large rivers in the state. On the other end of the spectrum is a smaller stream that meanders through a farmland or ranchland area and is primarily for angling, where there is very little distinction between the high water mark and the low water mark. Senator Towe suggested the subcommittee return to Class I and Class II waters. Senator Crippen stated he even has a question with the Class I and Class II waters. He doesn't know if the public wants a broad use of surface waters. Class I waters by their definition included all navigable lakes. Senator Galt stated there is no doubt but that Class I waters includes lakes because most have already been declared navigable. Senator Yellowtail stated the definition of surface waters as read literally probably would include lakes. Senator Towe felt much of the need for doing as Senator Crippen has suggested depends on how we handle what is or is not prohibited. He has a number of suggestions he wants to present in that area. Senator Galt asked if we were then saying that we don't start where we left off the other evening and you are suggesting we start all over again. Mr. Petesch replied we had just finished the recreational use section on the bottom of page 3. Senator Towe stated he wants to go back, because it has been called to his attention there may be an unintentional problem in the

Senate Judiciary Subcommittee  
Stream Access Meeting Minutes  
March 18, 1985  
Page 2

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B

DATE 032785

BILL NO. HB 265

definition of ordinary high water mark. In the definition of "and destruction of its value for agricultural purposes," someone said it could mean cattle coming down to the bank and using the water for purposes of watering the stock. Senator Galt replied he had not thought of it that way. Cattle is a different thing than agriculture. Agriculture is growing something from the ground. Senator Towe asked if there were any objection to clarifying the language, such as stating "the destruction of its value for agricultural purposes except for watering livestock." Ron Waterman pointed out with reference to the language you are struggling with, he would turn the subcommittee back to the language that was amended and addresses very realistically the issues you raised. Senator Galt stated when you talk about an agricultural crop, you are talking about something that is grown from the land, and the watering of cattle is an entirely different science. Crop means something that can be harvested from the land. Senator Towe stated the comment you used was growing things. Why can't we use the word "crop." Senator Galt stated it is an economic thing from the land; it is something you sell. Senator Towe suggested "destruction of the land for growing any agricultural produce." Mr. Waterman stated since we are searching for words to substitute for "agricultural crop value," it was pointed out by the Cowbells that for many members of the livestock industry, stock is a crop. He suggested the words "lack of agricultural vegetative values." Senator Towe moved that the definition be amended to strike the words "agricultural purposes" and insert "destruction of its agricultural vegetative value." Senator Crippen stated that may be fine for us to figure out, but it will take a Philadelphia lawyer to figure out ordinary high water mark. Let's use that as a guideline and then come back and redefine it later. The motion to amend the definition of ordinary high water mark carried unanimously.

Senator Towe then suggested the subcommittee start on section 2, which is the use section itself. He wanted to make a suggestion on big game hunting. He wants to add the words "except longbow and shotgun, provided it is not within 500 feet of habitable buildings." Mr. Petesch stated an amendment was suggested that would include black powder guns. Senator Crippen responded you are going to have to have permission. He asked Director Jim Flynn if we include big game hunting in here or made that exclusion, would he feel the sportsmen would still have to obtain permission from the adjoining landowner, because you are on the landowner's property. Senator Crippen stated we have a law on the books that says you must get permission now. He asked if the recreationists would be

violating it if they stepped on the bank now. Jim Flynn, Director, Department of Fish, Wildlife and Parks, responded if the individual were on the streambed and were hunting with a longbow or muzzleloader, he would assume they were not in trespass. Senator Crippen asked what the difference was if you are hunting, you are hunting. Mr. Flynn responded if you excluded hunting between the high water mark except with the use of a longbow or muzzleloader then you are saying it illegal to use anything else except those two weapons.

Senator Galt pointed out the present law says the land is owned between the low water marks of a navigable river by the state. Mr. Flynn stated that is correct. Senator Galt asked how you justify someone's hunting up to the high water mark not being trespass. Mr. Flynn stated it is his understanding that is what the supreme court decisions addressed. Without HB 265 and the language amended at the first subcommittee meeting, it is highly debatable, and it would seem to him the supreme court decisions would allow big game hunting within the high water marks. Senator Galt stated on non-navigable streams, it says the landowner owns the land to the middle of the stream. He then asked if they could hunt on that property. Mr. Flynn stated it is his understanding the court said between the high water marks recreational use was allowed, and it had no relationship to who owned the land under the stream. Senator Galt asked if this meant he would have to hunt and retrieve big game between the high water marks. Mr. Flynn responded yes; anything that happened above that would have to be with the landowner's permission. Senator Galt asked if a hunter got game and it went on private property and he couldn't retrieve it, would he be guilty of abusing game. Mr. Flynn stated if the individual went to the landowner and was refused permission, that would impact the situation.

Senator Crippen asked if the department had embarked on a program to try and create an atmosphere of good will between the landowners and the sportsmen. Mr. Flynn responded yes, that has been an effort that has been occurring for the last four years of this administration. Senator Crippen stated that program is beginning to bear some fruit. His concern is if we allow big game hunting on all waters, that will include Fishtail Creek and the smaller streams going through a farmer's pasture. If we allowed that, we would be doing a great disservice to the sporting public, and that would go a long way to destroying a relationship we are attempting to build.

Senator Crippen stated getting into the area of classification of waters, on the Yellowstone River, if you are on the bank, during hunting season, there is a lot of space between the low water mark and the high water mark. In that area, maybe you could say you can allow this type of hunting. But using that instance on a smaller stream such as the Rosebud River, where there are cabin sites around, he felt would be a different situation. One could apply in one, and we would be better off not to have hunting on the others. Mr. Flynn stated it is his understanding that is the way HB 265 was eight or nine days ago. Dan Heinz, Montana Wildlife Federation, wanted to allow hunting on larger streams with short range weapons.

Mr. Waterman stated a great deal of effort has gone into finding a compromise. This issue was one which consumed four or five hours one evening, and it was finally resolved in the manner HB 265 came across to the Senate committee--the two classifications with no big game hunting on smaller streams. There was a recognition there were a number of problems with it, but there was no need to create additional problems. Allowing these types of weapons to be used, even on the larger streams, ends up with the likelihood of incidental trespass. It is an invitation to trespass which should not be extended under the circumstances.

Conrad Fredericks stated the Curran and Hildreth decisions said the waters of this state that are capable of recreational use can be used for that purpose. To say that those decisions contemplated or implied big game hunting is going outside the decisions. People don't hunt big game animals in the water like they do ducks.

Senator Towe went one step further and asked about one other exception. He asked if we should just restate the current law, big game hunting "except on surface waters adjacent to publicly owned islands or other lands where hunting is permitted." Mr. Waterman responded the language that Senator Towe is proposing is substantially a restatement of present law, because if these were public lands, the permission is extended. However, if you do that emphatically, what you are doing is saying as a matter of law, those waters can never be closed by the department, which has regulatory authority over them. Senator Towe asked about using the land between the high water mark and the low water mark. He asked if there were any question or doubt about it at the present time in the existing law, that there were a right to hunt on adjacent lands and publicly owned islands. Mr. Waterman did not think so.

Senate Judiciary Subcommittee  
Stream Access Meeting Minutes  
March 18, 1985  
Page 5

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. B  
DATE 032785  
BILL NO. HB 265

Phil Strobe stated he would like to see the subcommittee refer to Section 70-16-201, MCA. The public already owns the land, such as an island. If it's the decision of the committee that public land should be open to big game hunting for bow and arrow, then it is under the old law, the old 1895 statute, open. In the area where private persons own the land adjacent to the waters, Section 70-16-201, MCA, states a private person adjacent to any stream or lake has the right to control it down to the low water mark. In the case where the public owns it, they can determine how they want to control it. Mr. Strobe thinks the committee should go to page 4 and make its determination as to the definition of surface water. Without deciding what surface water means, you don't know what can be done between the high and low water marks. Senator Towe stated there may be some merit in adding it for clarification purposes. Senator Crippen felt the Curran and Hildreth decisions pertain to those. Senator Towe felt the issues were hotly disputed at this point. Senator Crippen moved that we leave it as it and have big game hunting excluded. Senator Towe suggested that issue be set aside and the subcommittee come back to it later. Senator Crippen withdrew his motion.

Senator Crippen asked if subsection (B) on page 5 took into consideration stock ponds being flooded by an underground stream or by a canal property dug by an owner and is being fed by that. Mr. Petesch suggested the sentence be amended to include the word "private"; it would then read "or other private impoundment." Mr. Waterman stated they put this language in with respect to the intermittently flowing water-course-- the stream that was not flowing on a year-round basis. They did not contemplate a pond fed by a spring or a canal if it were done in an intermittent manner. By inserting private impoundment, it seems you may have a problem with reference to those impoundments on the Missouri River behind The Montana Power Company dams. He doesn't think it was the intention the public could not use the waters behind the Power Company dams. Their licenses required those open usages. Mr. Waterman suggested it be amended by stating "private impoundments except those licenses by the Federal Power Use Act." Senator Towe asked how you then address the question that the Martinsdale reservoir is a public impoundment fed by a dam. It doesn't say private unless we put the word in. Mr. Strobe stated he is not sure whether it has improved it or not. He would have to do some research into this problem.

Senate Judiciary Subcommittee  
Stream Access Meeting Minutes  
March 18, 1985  
Page 6

Mr. Fredericks asked if there was some way the subcommittee could address the situation of off stream storage. That would be covered under the diverted away language. Senator Towe responded yes. Bill Morris wondered about the small streams that are just a dribble but not enough to be called intermittent. They have spent a lot of money to build a private dam. He would be perplexed to have them opened up for public fishing. Mr. Waterman replied with reference to the issue of the small stream that is consistently flowing and not intermittent, the language of the court is the language we must give credence to and that is the definition of surface waters. The impoundment would be acceptable. With respect to those ponds which have been separately licensed, that is an issue which they have not addressed. He felt the language could go on to say "or ponds licensed by the commission." Mr. Morris felt that addresses that issue, but also felt it went beyond, in his view, the supreme court's posture on this. Senator Towe stated what he was suggesting was trying to protect what you are asking for. Mr. Morris stated it is not removed from the watershed; you could have trouble with water rights. Senator Galt moved that the sentence be amended to read "the recreational use of surface waters in a stock pond or other private impoundment fed by an intermittent or flowing natural watercourse." Mr. Waterman replied if you accept that language, you are at odds with the concept of public water in Curran and Hildreth. That language would not address the issue raised by Mr. Morris. Mr. Strobe commented if you would look on page 4 to the definition as it now stands under surface water, it uses the words " a natural water body." If you retain surface water in your definition then when you go to your prohibition section, you would come very close to Senator Galt's proposal on page 4 if you say that one of the ingredients of the surface water definition is it must be a natural water body. Then a continuously flowing stream would be a natural water body. Mr. Petesch commented that if this were a very small stream, in order to get access, you have to stay within the high water mark to get to the stream to begin with. He also pointed out you can petition the Fish and Game Commission to restrict use of waters. Senator Towe replied he would oppose that. He would not have any objection to leaving "or one licensed for private use by the commission" or just put in "private" so Mr. Morris could get a restriction for his use.

Senator Crippen suggested that the sentence be amended to read "the recreational use of surface waters in a stock pond or other private impoundment fed by an intermittent or continuously flowing natural or man made water course."

Senator Galt stated he would withdraw his amendment if Senator Crippen made his. Senator Towe commented the natural watercourse on a flowing stream is restricting it further than you want it to. He asked what "private" meant in that case. Does it mean the stream were open to the public for recreational purposes before he put a dam in, could he keep the public off by putting a dam up? He doesn't think you want to do that. He thinks you should go to the Fish and Game Commission and say you want to put up a dam and close it to the public. The landowner has the right to go to the Fish and Game Commission and ask that because there is a private impoundment that it be closed. If it is intermittent, then you can go ahead and close it. Senator Towe stated the existing definition perhaps with the addition of impoundment includes stock ponds. Most of these kinds of impoundments are stock ponds. Senator Towe moved, as a substitute motion, to insert the word "private" between the words "other" and "impoundment" on line 23 of page 5. The motion carried unanimously. Senator Towe went on to state one person has raised the suggestion of putting in the Statement of Intent at this point, since we are relying on the regulations of the commission, that the commission should liberally look at requests by individuals for private impoundments of water. Senator Towe stated he would like to add after overnight camping "except within 500 yards of any habitable building." On the bigger streams, we might have a bigger problem prohibiting camping altogether. Senator Galt asked if they realized they are talking about private property on which people are paying taxes. He asked if they would allow these campers on their private property. Senator Towe stated if it is below the high water mark, he suspects they don't have a choice.

Senator Yellowtail stated he would like to try to grasp once again, in the case of navigable streams, whether the state owns the bed of the navigable streams. Senator Galt responded, "Let them camp on the bed." Senator Yellowtail asked if the state owned the bed of the stream to the high water mark. Senator Galt responded no; it owned the bed to the low water mark. Senator Yellowtail asked what the effect would be of the Big Horn case. Mr. Fredericks responded the court of appeals decided the United States, in trust for the Crow Tribe, owns to the high water mark because of the nature of the treaty, and based on that particular set of circumstances, the court of appeals decided the federal government does in fact own to the high water mark in trust for the tribe. It is with regard to only that particular river on that particular reservation. Senator Galt asked if it reverted to the state. Mr. Fredericks responded he didn't know. The government owns between the low and the high water marks because of the treaty.

Senate Judiciary Subcommittee  
Stream Access Meeting Minutes  
March 18, 1985  
Page 8

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B

DATE 032785

BILL NO. HB 265

Senator Yellowtail stated the Big Horn is a special and unique case and the only case in which the state of Montana controls to the high water mark.

Senator Towe asked if they had any problems with at least going back to the definition of Class I waters in subsections (a), (b), or (c). Senator Towe asked if the camping provision proposed would be acceptable to (a), (b), and (c) kinds of waters. Senator Galt replied the landowner owns to the low water mark even on (a) and (b) waters. Senator Crippen stated he tends to agree on some of the smaller streams. We are trying to find a compromise everyone can live with. This is an area we might have to compromise on. We should keep an open mind on what Senator Towe has stated, which may be part of a compromise situation. Senator Galt asked about (c). Senator Crippen stated we are talking about sections (a) and (b).

Senator Towe moved that the bill be amended as follows:

Page 6, line 7.

Following: "CAMPING"

Insert: "within 500 yards of any habitable building"

Senator Galt pointed out in the context of the bill that means on any streams in Montana. Senator Towe stated we have to address that. Senator Crippen stated we can recognize that as a legitimate purpose on some bodies of water. Senator Galt stated he will resist putting that into the bill without any definitions. Senator Galt suggested before voting on the motion we go back to subsections (a) and (b). Senator Crippen commented, if we cannot distinguish those streams, we will take that out. The motion carried, with Senator Galt voting in opposition.

Senator Towe stated he thinks we have to address the dry streambed provision. Senator Towe moved that we add an additional subparagraph (H), which would state "use of a streambed as an avenue for any purpose when it is dry." Senator Galt felt it should be qualified not only as a dry streambed with water on it, it must also have enough water on it to have fish habitat. Senator Yellowtail asked if that wouldn't be covered, because there are no water-related activities feasible on that stream. Mr. Waterman stated as a point of proposal to make this fit it in, it would be better as a separately numbered section. You would not have to come back later if you put the classification back in. Senator Towe asked that the researcher make a note of that. Mr. Waterman stated the idea

is in concurrence with the idea the public cannot use a streambed as a right-of-way for any purpose when it is dry. Mr. Strobe asked if it would be appropriate to add the words "substantially dry." Under the proposed definition, each time it rains, the prohibition wouldn't apply. Senator Towe responded what we are talking about in the sense of dry is that it is not flowing. Maybe we should say that. If the flow is arrested, that is what we are really talking about. Mr. Waterman stated with reference to the fishing habitat issue, there are other recreational uses that can be made with water. Senator Galt asked what they were. Mr. Waterman responded among other things, he would touch upon swimming. Senator Galt responded if the fish could not live in it, you could not swim in it. Mr. Waterman felt fish may be absent because the habitat has not been populated with fish. The absence of flow will effectively deprive the fish of a habitat. Senator Towe asked that his motion be corrected to reflect "not flowing" instead of "dry." Senator Yellowtail thought "dry" was sufficient. If we say not flowing, we will open up a worse situation. There might be substantial standing water in a section of a stream. Senator Galt asked how would they get to that point of water if the stream were dry. Senator Yellowtail suggested the lower end of the pond may be a bridge. The motion carried unanimously.

Senator Towe drew the subcommittee's attention to subparagraph (G) on the white bill. By putting that as a restriction for all waters without classifying the waters, we may have gone too far, and there may be some legitimate nonwater-related activities on streams, such as hiking or rockhounding. Mr. Petesch stated with regard to hiking, you have to go back to what recreational use of surface waters is on page 3. The only one of those that isn't specifically water-related is hunting. This comes back to how you define surface waters. Judge Bennett specifically enumerated hiking as a recreational right within the high water mark. Senator Galt replied in that decision, they also called the Dearborn a navigable river. That applies to navigable waters. Mr. Petesch responded the problem with limiting that to navigable waters is you are ignoring the Hildreth decision. Senator Towe asked how what we have outline in recreational use fits into subparagraph (G). Mr. Petesch replied subparagraph (G) tries to tie things in to the water. There is something that was added to "recreational use" which is "other water-related pleasure activities." Subparagraph (G) says those that are not water-related are prohibited. Mr. Petesch stated what you have said with respect to hunting is the public has the right to make recreational use of surface waters except as limited by the exclusion

of big game hunting. Senator Towe asked if they wanted to put hiking and rockhounding in, should they add it as a recreational use or add it to subparagraph (G)? Mr. Petesch replied it should be put in recreational use if they want it there. Subparagraph (G) is intended to be a catch-all exclusion of other things you don't want done. Senator Towe asked how they got from recreational use. He asked where the language was that brings that in. Mr. Petesch referred him to page 5, line 15. Senator Towe stated if that were the case, then we have to add that to the definition of recreational use. Senator Towe moved that page 3, line 18, be amended to add the words "hiking" and "rockhounding" following the word "hunting." Senator Galt stated he would like to insert "within 500 yards of any habitable building." Mr. Waterman replied if it is meant to address only the hunting, it should follow the word "hunting." Mr. Waterman felt that by putting in rockhounding, you may be removing valuable minerals under the guise of this. Senator Towe withdrew everything in his motion except the part relating to hiking and the part relating to within 500 yards of any habitable buildings. Senator Crippen did not think that should be allowed even within a few yards. Dan Heinz stated they wouldn't object to prohibitions within 500 yards of a residence. Floating and fishing would have to remain. Mr. Fredericks said the thing that bothers him is the hiking on smaller streams. A big game hunter will say he is not big game hunting, he is just going through. He believes you are opening a corridor. Senator Yellowtail said we must rely on the court language and what the court wished to be specifically allowed.

Chairman Yellowtail asked that the motion be divided. He believed the matter of hiking is fairly clear, but the matter of a 500-yard limitation on this or on that would soon allow most activities on most streams. Senator Crippen stated he didn't think we should rely totally on the Curran and Hildreth cases to open usage carte blanche. Senator Yellowtail stated we needed to know how far number two shot carried. How in practicable terms is that enforceable? Senator Towe stated it is pretty clear if someone discharges a weapon ten yards away. He doesn't think that is a terribly difficult thing. Senator Towe asked if that existed somewhere in law. He asked if there weren't protection for the poor, innocent bystander. Mr. Flynn stated there seems to be some thought there is a law or rule within the department that may address that. There is believed to be a zone of safety. Senator Towe asked if it were 100 yards. Stan Bradshaw, Attorney, Department of Fish, Wildlife and Parks, stated the department and commission had fairly broad authority in regulating hunting, and it extends to regulating safety features. There is not, to his knowledge,

anything that presently prohibits hunting within a specific distance of habitations, but authority is there to address that if it is necessary to do so. Mr. Petesch stated Section 87-1-303, MCA, gives the commission authority to enforce rules governing recreational uses of streams. He believes you could address that issue in a statement of intent on distance restrictions. Senator Towe stated you could also address swimming. Senator Crippen believes they addressed it as it was limited to the facts. Mr. Petesch stated you can limit Curran to its facts, but in Hildreth, the court, in its conclusion, says they have not limited recreational use. Senator Towe suggested we leave the hunting issue out of the bill, ask the Fish and Game Commission to address the issue, and put in a 100-yard limitation for swimming. Senator Crippen stated both Curran and Hildreth broaden the right of the sportsman to float down the river and step on the bank within 100 yards or 100 feet of a house that is on the river and shoot ducks. Are you saying the scope of that decision is to do that? Mr. Petesch stated he is not sure it refers to ducks, but the Yellowstone is a navigable river, and you can fish on it, and now you have the right to hunt ducks for purposes of recreational use.

Senator Crippen stated the legislative body is to make the law and it's the court's responsibility to interpret it. While we pay attention to the Curran case and to the scope of its facts, if we go beyond that, we recognize we are going beyond that as a legislative body. Senator Towe asked if he had problems with leaving any distance out of the bill as far as hunting and putting it in a statement of intent. Senator Crippen stated yes, he did. Senator Towe asked what he proposed. Senator Crippen stated he didn't know. Senator Towe then withdrew his motion and made a new motion-- insert "swimming (except within 100 yards of any habitable building)". Senator Crippen stated he wanted to leave it up to the department to decide if we can hunt within 50 or 500 yards. The motion to allow swimming within 100 yards of any habitable building carried with Senator Yellowtail voting in opposition.

Senator Towe moved that the word "hiking" be added to the language which was just adopted. Senator Galt stated he would be opposed to it. Senator Yellowtail stated anyone that is determined enough to hike up any stream very far should be allowed to do so. Senator Towe stated if he puts a fishing pole in his hand, then he can do it, but if he doesn't, then he can't. The motion carried with Senator Galt voting in opposition.

Senate Judiciary Subcommittee  
Stream Access Meeting Minutes  
March 18, 1985  
Page 12

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B

DATE 032785

BILL NO. HB 265

Chairman Yellowtail then suggested that the subcommittee recess and convene on Wednesday evening, March 20, 1985, at 7:00 p.m.

There being no further business to come before the subcommittee, the meeting was adjourned at 10:00 p.m.

*William P. Yellowtail, Jr.*  
Subcommittee Chairman

CS



COMMITTEE ON

HB 265

DATE

March 18 - 85

SENATE JUDICIARY COMMITTEE

B-2

EXHIBIT NO.

DATE

032785

## VISITORS' REGISTER

HB 265

Check One:

NAME

REPRESENTING

BILL NO.  
BILL #

Support Oppose

Jim McDermott

Medicine River Canoe Club

265

✓

CHRIS KRONBERG

Missoula Chapter Trout Unlimited

265

UNAMENDED

✓

PAUL ROSENTHAL

BUTTE TROUT UNLIMITED

265

✓

Bob Otten

Butte

265

✓

Bob McDonough

Butte

265

✓

Elizabeth Rice

Butte TU

265

unamended

✓

Robert (Tim) Sullivan

Butte TU

265

unamended

✓

John S Miller

Butte TU

265

unamended

✓

Dick Rice

Butte T.U.

265

unamended

✓

Dennis Hall

Gt. Falls

265

unamended

✓

Barb Murphy

Shear Falls

265

unamended

✓

Sam O'Leary

830 Sagamore Butte

265

unamended

✓

Bill Haldorf

2610 State St Butte

265

unamended

✓

Lans Schaefer

Skyline Sportsmen Butte

265

unamended

✓

L.P. Thomas

ANACONDA SPORTSMEN

265

" "

John C. Overton

Anconda Montana

265

67

Rock Cronson

" " "

265

"

Craig Madsen

Great Falls MT

265

"

Linda Madsen

Great Falls mt

265

✓

Greg Gould

Helena, MT

265

unamended

✓

Paul Johnson

913 Hudson, Helena, MT

265

unamended

✓

Horley Horris

220 Adams, Helena mt.

265

unamended

✓

Bruce Kelly

\_\_\_\_\_

265

✓

Mark Kelly

528 S. Parkway

"

✓

Jeff Holm

\_\_\_\_\_

265

unamended

✓

Mary Nielsen

Medicine Lake, MT

265

unamended

✓

DATE

March 18 - 1965  
SENATE JUDICIARY COMMITTEE

COMMITTEE ON

HB 265 - ~~4000~~

EXHIBIT NO. B-2

DATE 032785

## VISITORS' REGISTER

BILL NO. HB 265

| NAME              | REPRESENTING                                     | BILL # | Check One        |        |
|-------------------|--|--------|------------------|--------|
|                   |  |        | Support          | Oppose |
|                   |  | 265    |                  |        |
| Tom Bugni         | skyline Sportsmen<br>Condition for Stream Access |        | ✓                |        |
| Diana McDonald    | Self   |        | House<br>Version |        |
| Mary Hooks        | Valley Unlimited                                 | 265    | ✓                |        |
| J. P. Bender      | SELF   | 265    | House<br>Version |        |
| Steve Guster      | SELF   | 265    | House<br>Version |        |
| Ray Dugby         | Valley Unlimited                                 | 265    | ✓                |        |
| Richard Thomas    | Valley Unlimited                                 | 265    | ✓                |        |
| LeRoy Schellby    | Anderson Soc                                     | 265    | ✓                |        |
| Al A. Wil         | Self   | 265    | ✓                |        |
| SUNAN WILSON      | SELF   | 265    | ✓                |        |
| James A. Disemore | SELF   | 265    | HOUSE<br>VERSION |        |
| Marlene Bahlert   | Self   | 265    | ✓                |        |
| Cindy Javert      | Self   | 265    | ✓                |        |
| Chris Javert      | Self   | 265    | HOUSE<br>VERSION |        |
| Hector Tacke      | Self   | 265    | House<br>Version |        |
| Shirley Tacke     | Self   | 265    | "                |        |
| Paul Suggs Jr     | Self   | 265    | House<br>Version |        |
| Walt Carpenter    | Self   | 265    | House<br>Version |        |
| Chuck Kohut       | SELF   | 265    | HOUSE<br>VERSION |        |
| Karen Kohut       | Self   | 265    | House<br>Version |        |
| Barbara J. Teber  | Self   | 265    | House<br>Version |        |
| Tom Brownlee      | Great Adventures West                            | 265    | House<br>Version |        |
| Robert A. Willits | Self   | 265    | House<br>Version |        |
| Thel Willits      | Self   | 265    | House<br>Version |        |

(Please leave prepared statement with Secretary)

VISITORS' REGISTER

SENATE AND HOUSE COMMITTEE

BILL HB 265

DATE \_\_\_\_\_

SPONSOR \_\_\_\_\_

| NAME                  | REPRESENTING               | RESIDENCE                   | SUPPORT                             | OPPOS                           |
|-----------------------|----------------------------|-----------------------------|-------------------------------------|---------------------------------|
| <i>W. H. ...</i>      | <i>Self</i>                | <i>2020 St. Runse Bz</i>    | <input checked="" type="checkbox"/> |                                 |
| <i>Tom McClelland</i> | <i>"</i>                   | <i>705 S. 67</i>            | <input checked="" type="checkbox"/> |                                 |
| <i>B. ...</i>         | <i>PT 11</i>               | <i>349 Mayhew</i>           | <input checked="" type="checkbox"/> |                                 |
| <i>Orville Lewis</i>  | <i>Self</i>                | <i>5285 Kent Helena</i>     | <input checked="" type="checkbox"/> |                                 |
| <i>Ma. ...</i>        | <i>Self</i>                | <i>503 W. R. ... Helena</i> | <input checked="" type="checkbox"/> |                                 |
| <i>Joni ...</i>       |                            | <i>1721 Virginia, Mo</i>    | <input checked="" type="checkbox"/> |                                 |
| <i>Bob O. ...</i>     | <i>BILLINGS</i>            | <i>HD 96</i>                | <input checked="" type="checkbox"/> |                                 |
| <i>Rae ...</i>        | <i>MISGA</i>               | <i>Helena</i>               | <input checked="" type="checkbox"/> |                                 |
| <i>George ...</i>     | <i>Self</i>                | <i>Helena</i>               | <input checked="" type="checkbox"/> | <i>Remove senate membership</i> |
| <i>Gordon ...</i>     | <i>APA</i>                 | <i>Three Forks</i>          | <input checked="" type="checkbox"/> |                                 |
| <i>Tom ...</i>        | <i>AM</i>                  | <i>Bozeman</i>              | <input checked="" type="checkbox"/> |                                 |
| <i>Quill ...</i>      | <i>APA</i>                 | <i>Bozeman</i>              | <input checked="" type="checkbox"/> |                                 |
| <i>Robert ...</i>     | <i>PCLA</i>                | <i>Lewistown</i>            | <input checked="" type="checkbox"/> |                                 |
| <i>Ken ...</i>        | <i>APA</i>                 | <i>Bozeman</i>              | <input checked="" type="checkbox"/> |                                 |
| <i>P. J. ...</i>      | <i>APA</i>                 | <i>Bozeman</i>              | <input checked="" type="checkbox"/> |                                 |
| <i>Bill ...</i>       | <i>APA + PCLA</i>          | <i>Bozeman</i>              | <input checked="" type="checkbox"/> |                                 |
| <i>Ed ...</i>         | <i>M. F. B.</i>            | <i>Helena</i>               | <input checked="" type="checkbox"/> |                                 |
| <i>Art ...</i>        | <i>M. F. B.</i>            | <i>Helena</i>               | <input checked="" type="checkbox"/> |                                 |
| <i>Gene ...</i>       | <i>Montana Farm Bureau</i> | <i>Lewistown</i>            | <input checked="" type="checkbox"/> |                                 |

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

As of 03-13-85

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B-3

DATE 032785

BILL NO. HB 265

HB 0265/02

HB 0265/02

49th Legislature

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, while within the  
 8 boundaries of such lands;  
 9 (d) are or have been capable of supporting the  
 10 following commercial activity activities: log floating,  
 11 transportation of furs and skins, shipping, commercial  
 12 guiding using multiperson watercraft, public transportation,  
 13 or the transportation of merchandise, as these activities  
 14 have been defined by published judicial opinion as of [the  
 15 effective date of this act]; or  
 16 (e) are or have been capable of supporting commercial  
 17 activity within the meaning of the federal navigability  
 18 test.  
 19 (1) "Class I waters" means all surface waters that  
 20 are not class I waters.  
 21 (2) (A) "COMMISSION" means the fish and game commission  
 22 provided for in 2-15-3402.  
 23 (3) (A) "Department" means the department of fish,  
 24 wildlife, and parks provided for in 2-15-3401.  
 25 (4) (A) "Diverted away from a natural water body" means

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, ~~of 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 ~~of a natural object~~  
 24 ~~within the ordinary high-water mark of a stream.~~  
 25 (2) ~~"Class I waters" means surface waters that~~

M

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B-3

DATE 032785

BILL NO. HB 265

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 (5) (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 <sup>as provided in the so-called substantially</sup> ~~diminished terrestrial~~  
 14 ~~all terrestrial vegetation and desirable habitat for agricultural purposes~~ ~~vegetative value~~ ~~value~~  
 15 ~~vegetation or lack of agricultural crop value. A. FLOOD~~  
 16 PLAIN ADJACENT TO SURFACE WATERS IS NOT CONSIDERED TO BE  
 17 WITHIN THE SURFACE WATERS' HIGH-WATER MARKS. ~~(except within 100 yds of any~~ ~~habitable bldgs)~~  
 18 (6) (7) (8) (9) "Recreational use" means with respect to ~~with respect to~~  
 19 ~~class-1 SURFACE waters: fishing, hunting, swimming, floating~~ ~~hiking~~  
 20 in small craft or other flotation devices, boating in  
 21 motorized craft unless otherwise prohibited or regulated by  
 22 law, or craft propelled by oar or paddle, OTHER  
 23 WATER-RELATED PLEASURE ACTIVITIES, and related unavoidable  
 24 or incidental uses, within the ordinary-high-water-mark-of  
 the waters.

1 waters all of the uses set forth in subsection (7) (a) (7)  
 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 (7) (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 (8) (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.

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

NEW SECTION. Section 2. Recreational use permitted --

SENATE JUDICIARY COMMITTEE

EX. NO. B-3

DATE 032785

BILL NO. HB 265

HB 0265/02

HB 0265/02

1 limitations -- exceptions. (1) Except as provided in  
 2 subsection (1) THROUGH (4), all class-  
 3 SURFACE waters that are capable of recreational use as  
 4 defined in section 17(1) 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-  
 9 waters that are capable of recreational use as defined in  
 10 section 17(1) 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 17(1)(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 <sup>of man-made</sup> waters licensed by the commission

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 (E) OVERNIGHT CAMPING <sup>upon 200 yds of any habitable</sup>  
 8 (F) THE PLACEMENT OR CREATION OF ANY PERMANENT OR  
 9 SEMIPERMANENT OBJECT, SUCH AS A PERMANENT DUCK BLIND OR BOAT  
 10 MOORAGE; OR

11 (3) OTHER ACTIVITIES WHICH ARE NOT PRIMARILY  
 12 WATER-RELATED PLEASURE ACTIVITIES <sup>the right of way</sup>  
 13 (4) THE RIGHT OF THE PUBLIC TO MAKE RECREATIONAL USE <sup>not</sup>  
 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 (4) 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;

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B-3

DATE 032785

BILL NO. HB 265

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) (b) 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 or 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

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B-3

DATE 032785

BILL NO. HB 265

HB 0265/02

HB 0265/02

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 ~~white-making--recreational--use--of--the--surface-~~  
15 ~~waters--is--injured--white-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

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B-3

DATE 032785

BILL NO. HB 265

HB 0265/02

HB 0265/02

1 through: 1 effective on passage and approval.

-End-

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

# Montana Land Reliance

107 W. Lawrence, upstairs

Helena, Montana 59624

P. O. Box 355

(406) 443-7027

March 18, 1985

Senate Judiciary Committee  
Montana State Legislature  
Helena, MT 59620

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B-4

DATE 032785

BILL NO. HB 265

Dear Senator Mazurek and Committee Members:

We commend the committee for deleting "natural objects" as barriers from HB 265, as we urged you to do ten days ago.

As a nonprofit conservation organization holding conservation easements on 38,000 acres in Montana, we are responsible for enforcing fishing restrictions on many miles of high quality, small stream fisheries. In the interest of long-range fishery conservation landowners have legally promised to maintain the quality of their fisheries, restricting fishing methods, numbers of fish permitted to be killed, and numbers of people allowed to fish. In light of the court decisions, the Reliance and landowners will now be unable to enforce these restrictions.

Virtually all small streams are fragile fisheries that will undergo rapid decline as a result of unlimited access. This, in turn, has impacts on tourism, recreation, and local economies. Your help is needed to provide small streams with as much protection as possible while staying within the boundaries of the court decisions. Removing "natural objects" will certainly help.

The other step you can take is, as you are doing, to make certain the "high water mark" is defined as narrowly as possible. The court seems to give the legislature a good deal of latitude in this regard. At least on water where the level does not fluctuate, i.e., spring creeks, the current water level should be the high water mark.

It is important that 265 passes and passes in such a way that it will stand up in the courts. The landowners need to be able to define these terms, not the courts, which sided so strongly with recreationists. Landowners need the certainty these definitions provide, and finally 265 provides an important avenue of appeal should usage by the public result in deterioration of habitat or fisheries. We urge you to clearly spell out that such deterioration is damage to private property.

Thank you for your consideration of these matters.  
Please call upon us if we can be of further help with respect  
to protection of small stream fisheries.

Sincerely,

*William H. Dunham*

William H. Dunham  
Executive Director

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B-4

DATE 032785

BILL NO. HB 265

NAME: Orville Lewis DATE: 3-8-85

ADDRESS: 5285 Kew Dr.

PHONE: 458-5637

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: HR-265

DO YOU: SUPPORT?  AMEND? NO! OPPOSE?

COMMENTS: Please support HB-265 as  
it was introduced in the House.  
In that form it serves the interest  
of both residents & landowner.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. B-5  
DATE 032785  
BILL NO. HB 265

NAME: MIKE LEWIS DATE: 3-18-85

ADDRESS: P.O. Box 158 E. Helena MT.

PHONE: 227-5385

REPRESENTING WHOM? Myself

APPEARING ON WHICH PROPOSAL: HR 265

DO YOU: SUPPORT? X AMEND? NO OPPOSE? \_\_\_\_\_

COMMENTS: Support + HB 265 as proposed

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. B-6  
DATE 032785  
BILL NO. HB 265

NAME: JAMES KEHR DDS DATE: 3/18/85

ADDRESS: 1721 Virginia Dale

PHONE: 442-FO83

REPRESENTING WHOM? SELF

APPEARING ON WHICH PROPOSAL: 265

DO YOU: SUPPORT?  AMEND?  OPPOSE?

COMMENTS:

PLEASE ALLOW SEASONAL  
BLIND CONSTRUCTION ON CEI  
STREAMS.

WE ARE ALLOWED TO HUNT  
ANY DOGS & BIRDS ACCORDING TO YOUR  
BIRD GAME PROPOSAL SO LETS MAKE  
IT REASONABLE.

PLEASE

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. B-7  
DATE 032785  
BILL NO. HB 265

(This sheet to be used by those testifying on a bill.)

*Senator Wolf*

NAME: DAVID LACKMAN DATE: 3/18/85

ADDRESS: 1400 Winne Avenue, Helena, Montana 59601

PHONE: (406) 443-3494

REPRESENTING WHOM? Montana Public Health Association (Legislative Lobbyist)

APPEARING ON WHICH PROPOSAL: HB 265 (Ream) Stream Access

*No* Public Hearing ? 7:00 P.M. 3/18/85 Place ? Old Supreme Ct, Executive  
DO YOU: SUPPORT? \_\_\_\_\_ AMEND? XXX OPPOSE? Action

Our Environmental Category

COMMENT: 1. We feel that the Montana Supreme Court went too far with its

decision. 2. The definition of "ordinary high water mark" originally in the

bill is too ambiguous. Broadly interpreted, it could result in confiscation of

private property without due compensation. It would also result in opening add-

itional areas to pollution by recreationists. (Our family tries to clean up  $\frac{1}{4}$  of

a mile of river bank used by fishermen and others - it is quite a task.)

3. The definition of high-water mark which is most workable is that

used by the Soil Conservation Service- "means that line that water has impressed on

soil by covering it for sufficient periods of time to deprive the soil of its

vegetation ; or to destroy its value for agricultural purposes. Flood plains or

flood channels are not ordinary high-water marks for recreational purposes, except

when they carry sufficient water to support fishing or floating." This definition

would seem to afford adequate protection for the land owner.

(Also, the importance of restricting firearms in residential areas along streams.)

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

THANK YOU  
SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. B-8  
DATE 032785  
BILL NO. HB 265

URGENT NOTICE TO SPORTSMEN AND WOMEN

The Montana State Supreme Court, during 1984, rendered decisions on two separate cases (Hildreth and Curran) which defined among other things, the rights of individuals to utilize the streams in Montana.

Several groups of Montana sportsmen and agricultural interests have been working to draft legislation which clarifies certain areas not made clear by the Supreme Court decision while maintaining the basic principle in this decision. The result of this effort is House Bill 265.

House Bill 265 was passed by the Montana House of Representatives by a vote of 91 in favor and 6 opposed. House Bill 265 has now gone to the Senate, where it was assigned to the Senate Judiciary Committee. This Committee has assigned it to a Subcommittee of four members:

|                 |   |             |
|-----------------|---|-------------|
| Tom Towe        | - | Billings    |
| Bruce Crippen   | - | Billings    |
| Bill Yellowtail | - | Hardin      |
| Jack Gault      | - | Martinsdale |

The Senate Subcommittee proposes to substantially amend the Bill. So far, the changes are:

1. The definition of barrier has been changed to exclude natural obstacles. This means the public could not portage around obstacles such as fallen trees.
2. The distinction between Class 1 and Class 2 streams has been eliminated so that landowner permission will be necessary for virtually all types of recreation on virtually all Montana streams.

These restrictions are not consistent with the Montana Supreme Court decision and should substantially reduce the ability of the public to utilize surface waters within the state.

If you are concerned about your continued recreational use of Montana's rivers, please write each member of the Senate Judiciary Subcommittee today! A sample letter and their addresses are attached. Your letters must reach Helena no later than Monday, March 18.

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. B-9  
DATE 032785  
BILL NO. HB 265

Joe Mayurek

PETITION

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B-9

DATE 032785

BILL NO. HB 265

TO: Montana Senate Judiciary Committee Members

SUBJECT: House Bill 265

The undersigned individuals favor House Bill 265 in the form which was passed by the Montana House of Representatives. We are opposed to the March 13 Amendments being considered by the Senate Judicial Subcommittee.

John Smith

Phil Telling 2515 Harvard - Butte

Tommy Hunt 2540 Harvard Butte

Mike Cripp 4899 Utah Butte

Dary Shipp 929 California Butte

Louise McCarter 602 California "

Helen Thompson #416 Columbus Ky "

Connie Williams 627 W. Silver - Butte

Jill Dwyer

Mary Kohn

Gene Blankenship

Lawrence Tull

416 W Broadway

Jay Buckley

Approved 260  
Signature

PETITION IN SUPPORT OF HB 265

We, the undersigned, express our support for HB 265 as it passed the House of Representatives and without the amendments adopted by the Senate Judiciary Subcommittee on March 13. HB 265 as it passed the House is a fair bill for sportsmen and landowners. The amendments ignore the Supreme Court's stream access rulings and will lead to more conflict.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B-9

DATE 032785

BILL NO. HB 265

We urge support for HB 265 without changes in its concept.

| Name                          | Address                                |
|-------------------------------|--|
| <u>Ed Bink</u>                | <u>1949 Lowell Butte</u>               |
| <u>Bill Haugan</u>            | <u>1500 17th St. Ft Falls MT</u>       |
| <u>Barbara Robertson</u>      | <u>114 Lapidab Lane Suite 3111</u>     |
| <u>Nora A. Aioy</u>           | <u>3710 Hanna Butte</u>                |
| <u>Paul R. Miller</u>         | <u>1905 Monroe Butte</u>               |
| <u>Pauletta Muller</u>        | <u>1905 Monroe Butte</u>               |
| <u>Shirley H. Miller</u>      | <u>6609 Helena Helena MT</u>           |
| <u>Shawn Richardson</u>       | <u>2020 Elk View Dr Helena</u>         |
| <u>Ed Metzger</u>             | <u>583 N Grand Dr</u>                  |
| <u>Janice J. Janderich</u>    | <u>846 W Quartz Butte 59701</u>        |
| <u>J. Ronald J. Janderich</u> | <u>846 W Quartz Butte Helena 59701</u> |
| <u>Richard J. Janderich</u>   | <u>3012 Richardson Dr</u>              |
| <u>Marianne Richardson</u>    | <u>3012 Richardson Butte MT</u>        |
| <u>Ellen Kasper</u>           | <u>2912 W. 2nd Butte</u>               |
| <u>Bruce Martin</u>           | <u>2020 Florida Butte</u>              |
| <u>Connie Stoe</u>            | <u>9128 Hamet Butte</u>                |
| <u>Margie Kimmel</u>          | <u>3700 W. Taylor Butte MT</u>         |
| <u>Johny Canyon</u>           | <u>3116 Bayard Butte MT</u>            |
| <u>Luigi J. Campora</u>       | <u>" " " "</u>                         |
| <u>Jenni Johnson</u>          | <u>226 W. Silver #22</u>               |

IN SUPPORT OF HB 265

|                       |                                      |
|-----------------------|--------------------------------------|
| Andy Cannon           | 1501 22 <sup>nd</sup> Ave NE         |
| Charles Cannon        | 1211 1 <sup>st</sup> St NE           |
| John Kelly            | 1211 1 <sup>st</sup> St NE           |
| John Kelly            | " "                                  |
| Harold Kelly          | " "                                  |
| Fate Kelly            | 1300 1 <sup>st</sup> St NE           |
| Erma Kelly            | " "                                  |
| Arthur Kelly          | 200 Florida                          |
| Jack Kelly            | 200 Florida                          |
| John J. Powers        | 21130 Missouri                       |
| Ben Roshak            | 1000 W. Broadway                     |
| Charles Roshak        | 1125 W. Broadway                     |
| Bubba Maloney         | 300 W. Broadway                      |
| Walter Maloney        | 1500 W. Broadway                     |
| Walter Maloney        | 1500 W. Broadway                     |
| Nethy Walsh           | 1500 W. Broadway                     |
| Walter Maloney        | 2704 Franklin St                     |
| Thomas G. Rawles      | 2120 Whitman Bldg                    |
| Walter Maloney        | 1300 W. 2 <sup>nd</sup> St, Missouri |
| Walter Maloney        | 2000 1 <sup>st</sup> St. Billings MT |
| Gov. Curtis Davenport | 333 Crosby St MISSOULA MT 59801      |
| Devin Edwards         | 1300 S. 4th St #2 Missoula           |
| Jim A. Gaven          | 323 Crosby Missoula MT 59801         |
| Leslie O'Neill        | 954 Palmdale                         |
| Bob Knudson           | 205 Williams Drive                   |
| Bene O'Neill          | 4635 Warren                          |
| Jim Merrill           | 308 Van Buren                        |
| Paul O'Neill          | 941 W. Quartz                        |
| Mark O'Neill          | 954 Palmdale                         |

PETITION

TO: Montana Senate Judiciary Committee Members

SUBJECT: House Bill 265

The undersigned individuals favor House Bill 265 in the form which was passed by the Montana House of Representatives. We are opposed to the March 13 Amendments being considered by the Senate Judicial Subcommittee.

NAME

Address

Phone

|                        |                          |                  |
|------------------------|--------------------------|------------------|
| <i>Rich Buchanan</i>   | <i>430 Mahoney</i>       | <i>764-4250</i>  |
| <i>[Signature]</i>     | <i>500 [unclear]</i>     | <i>[unclear]</i> |
| <i>[Signature]</i>     | <i>[unclear]</i>         | <i>[unclear]</i> |
| <i>[Signature]</i>     | <i>Bob Payne</i>         | <i>[unclear]</i> |
| <i>[Signature]</i>     | <i>Robert McLaughlin</i> | <i>[unclear]</i> |
| <i>[Signature]</i>     | <i>DAVE CARLSON</i>      | <i>[unclear]</i> |
| <i>[Signature]</i>     | <i>Ken Richards</i>      | <i>[unclear]</i> |
| <i>[Signature]</i>     | <i>Wicki [unclear]</i>   | <i>[unclear]</i> |
| <i>Marlene Telling</i> | <i>3518 THURVARD</i>     | <i>[unclear]</i> |
| <i>Marta [unclear]</i> | <i>Gawnya L Mack</i>     | <i>[unclear]</i> |
| <i>Ed [unclear]</i>    | <i>Kevin Frasz</i>       | <i>[unclear]</i> |
| <i>Mark Mikulovich</i> | <i>Molly Lazari</i>      | <i>[unclear]</i> |
| <i>[unclear]</i>       | <i>2502 Angyle</i>       | <i>[unclear]</i> |
| <i>[unclear]</i>       | <i>2502 Angyle</i>       | <i>[unclear]</i> |

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B-9

DATE 032785

BILL NO. HB 265

PETITION

TO: Montana Senate Judiciary Committee Members

SUBJECT: House Bill 265

The undersigned individuals favor House Bill 265 in the form which was passed by the Montana House of Representatives. We are opposed to the March 13 Amendments being considered by the Senate Judicial Subcommittee.

| Name               | Address                              |
|--------------------|--------------------------------------|
| George Everett     | 705 13th St. Butte MT                |
| John Charles Karem | 1313 Mockingbird Lane                |
| Annis R. Brown     | 317 Esplanade, Missoula              |
| Annie L. White     | 415 Baker Creek Butte MT             |
| Vivian Duggan      | 815 9th St. Butte MT                 |
| Marian White       | 815 W. Park Ave. Butte               |
| Susan K. Jensen    | 1985 Oriole Dr. Missoula             |
| Stephen Blazina    | 1129 5th Ave Helena MT               |
| John Walker        | P.O. Box 2292 Missoula MT            |
| Harriet Burt       | 1405 Kensington Missoula MT 59801    |
| Layne Summers      | 419 Madison 59202 Missoula MT        |
| Sandy Comes        | 204 E. Pine Ns/2, MT 59802           |
| Margo Ericson      | 1131/2 W. Bell #9, Glendive MT 59733 |
| Caryabelle         | 2700 Selma Blvd. Butte MT            |
| Joy Rachel         | 2500 Selma Blvd. Butte               |
| Blair Fodge        | 812 W. Granite                       |
| Linda Kane         | 1210 Monroe Butte                    |
| Maudie Robin       | 75 N. Jackson Butte                  |
| Christie Beck      | 819 Kentucky Ave. Deer Lodge         |

PETITION

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B-9

DATE 032785

BILL NO. HB 265

TO: Montana Senate Judiciary Committee Members

SUBJECT: House Bill 265

The undersigned individuals favor House Bill 265 in the form which was passed by the Montana House of Representatives. We are opposed to the March 13 Amendments being considered by the Senate Judicial Subcommittee.

Nike Paschke

1547 Mineral Rd.  
Helena, Mt.

Steve Hoffacker

4825 Wagon Pass Butte, MT.

Jack Bikoore

Box 2 Stanley

John Metz

525 N Montana Butte, MT

John Williams

2614 Bayard Butte, Mont.

Wally Farris

103 Stewart St. Summit

Sandy Pierce

" " "

Thomas H. Jones

2710 OTTAWA BUTTE MT

Kaysti Jones

814 S. Jackson Butte

Eden Alwood

1260 W. PLATINUM Butte

Bob Anderson

2310 Cortland Butte

Sarah Simmons

237 Edith #4

Susan Simmons

234 Edith #4

PETITION IN SUPPORT OF HB 265

We, the undersigned, express our support for HB 265 as it passed the House of Representatives and without the amendments adopted by the Senate Judiciary Subcommittee on March 13. HB 265 as it passed the House is a fair bill for sportsmen and landowners. The amendments ignore the Supreme Court's stream access rulings and will lead to more conflict.

We urge support for HB 265 without changes in its concept.

| Name             | Address                         |
|------------------|---------------------------------|
| Mike Salom       | 425 W Meany                     |
| Bob [unclear]    | 500 [unclear]                   |
| Gary [unclear]   | [unclear] St                    |
| Peter [unclear]  | 2200 4th Ave CO                 |
| [unclear]        | [unclear]                       |
| Dawn [unclear]   | [unclear]                       |
| Randy [unclear]  | 2107 Pine Ave                   |
| Daryl Bowser     | 327 Quartz                      |
| Cindy [unclear]  | 910 Evans D-3                   |
| Bethel Vail      | 314 Basin CK Rd                 |
| Carol Thomas     | 115 E. Broadway                 |
| Patti [unclear]  | 1410 Brauning                   |
| Lori [unclear]   | 1621 Yale                       |
| Jim [unclear]    | 1832 Whitman                    |
| Ed [unclear]     | 3531 WARDEN                     |
| Nancy [unclear]  | 1035 1/2 BRECKENRIDGE - HELENIA |
| Mike [unclear]   | 805 11th Butte                  |
| Diana [unclear]  | 2511 Parrot Butte               |
| [unclear]        | 2511 Parrot Butte               |
| Rooney [unclear] | 3206 Sawmill Dillon             |

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B-9

DATE 032785

BILL NO. HB 265

PETITION IN SUPPORT OF HB 265

We, the undersigned, express our support for HB 265 as it passed the House of Representatives and without the amendments adopted by the Senate Judiciary Subcommittee on March 13. HB 265 as it passed the House is a fair bill for sportsmen and landowners. The amendments ignore the Supreme Court's stream access rulings and will lead to more conflict.

We urge support for HB 265 without changes in its concept.

| Name               | Address                           |
|--------------------|-----------------------------------|
| <i>[Signature]</i> | 2219 W Colby                      |
| Linda Satterly     | 2031 Apple                        |
| <i>[Signature]</i> | 603 5th                           |
| David Webb         | Box 6 Hidden Valley Mt, Greenwood |
| <i>[Signature]</i> | Greenwood, MT                     |
| <i>[Signature]</i> | 1211-145th - Bozeman MT           |
| Joe E. Farber      | 1335 Sampson - Butte, mt          |
| Rich Gilman        | 708 LEWIS OASIS                   |
| <i>[Signature]</i> | 1114 MARYLAND AVE                 |
| Lee Chadwick       | 2505 W College Park, Boz          |
| William Johnson    | 909 Delaware, Butte, mt           |
| Terry Erickson     | 2145 North W Pine                 |
| <i>[Signature]</i> | 316 Miller Hall (Missoula MT)     |
| Margaret DeBerry   | 205 S 5th (Missoula)              |
| Myra Thimer        | " "                               |
| Pam Carter         | 420 E. Front #1 Missoula          |
| Steven Zoussi      | 415 E. Sussex Missoula MT         |
| <i>[Signature]</i> | P.O. Box 1076 E. Helena, MT       |
| <i>[Signature]</i> | 15 Cedar Ln In Butte MT           |
| <i>[Signature]</i> | 104 Plaza                         |

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B-9

DATE 032785

BILL NO. HB 265

PETITION

TO: Montana Senate Judiciary Committee Members

SUBJECT: House Bill 265

The undersigned individuals favor House Bill 265 in the form which was passed by the Montana House of Representatives. We are opposed to the March 13 Amendments being considered by the Senate Judicial Subcommittee.

James D. Redmond - Butte

X Tim Bennett - Butte

Dawn Redmond - Butte

Mark Coley J St C 32

Walter J. Coley

John Coley

Frank Walsh Butte

Mary Walsh - Butte

Gene F. Lewis Butte.

Daniel E. Rodham

PETITION IN SUPPORT OF HB 265

We, the undersigned, express our support for HB 265 as it passed the House of Representatives and without the amendments adopted by the Senate Judiciary Subcommittee on March 13. HB 265 as it passed the House is a fair bill for sportsmen and landowners. The amendments ignore the Supreme Court's stream access rulings and will lead to more conflict.

We urge support for HB 265 without changes in its concept.

| Name              | Address                           |
|-------------------|-----------------------------------|
| John R. Kelle     | 7250 Z AUG DR #211 M=1e           |
| Rich Moe          | at #2 Parker Montana 59701        |
| Sam M. Crosby     | 2021 1/2 BRIDGTON, MONTANA 59800  |
| Dan Kame          | 2140 Amhurst St Butte MT "        |
| Jim J. Williams   | 627 W. Silver St. Butte, MT       |
| Francis W. Uitzel | RT3 Box 247 Butte MT 59701        |
| Franklin Uitzel   | RT3 Box 247 Butte MT 59701        |
| Bill Diet         | Box 661 Manhattan MT 59724        |
| Robert Murphy     | 400 Brown's Gulch                 |
| Alan M. Walker    | 781 Cha. Street Anaconda MT 59711 |
| Margaret Richens  | 2217 Harvard - Butte              |
| John J. Miller    | RR3 Box 216 Rocker MT 59701       |
| Steve Jones       | 2810 Klau Road Butte              |
| Butt Coffey       | 108 County Club Lane              |
| John Kozzog       | 2008 Banks Butte                  |
| John J. Frank     | 4425 Highway Dillon MT            |
| Tom Barr          | 3310 Center Butte 59701           |
| Joe Walsh         | 2716 Harvard St Butte             |
| David Rich        | 195 Montana                       |

IN SUPPORT OF HB 265

Don Jean The Master 803 1/2 W. ...  
 Thomas P. Gump 8351 Starling Dr. Broomfield, CO 80020  
 Steve L. G. (Beaver) 1941 Lou & Beaver  
 Holly Peterson 317-85, Arapahoe  
 Jim Bergery 7008 Parkside Falls  
 Mary Daily 835 Emma  
 Bill Daily 835 Emma  
 Bob Daily 835 Emma  
 Dan O'Keefe 835 Emma  
 Harry Peterson  
 Leonard Coffey 120 S. ...  
 W. J. O'Connell 1148 N. ALABAMA  
 David Brandenburg 81 W. ...  
 James Fowler 701 1/2 W. Park, Boulder  
 Ron ... 308 W. ...  
 Martin Keane 7 Lan ...  
 Robin Kearney 7126 Carter  
 ...  
 ...  
 Daniel J. Cooley 425 W. Mercury  
 Jim ...  
 Jim Caff 4 ... 494, 11113

SENATE JUDICIARY COMMITTEE  
 EXHIBIT NO. B-9  
 DATE 032785  
 BILL NO. HB 265

123623 Bernice ... BC T1407

IN SUPPORT OF HB 265

John P. Walsh 2716 Harvard Bt.  
Jim Clary 3410 Paxon Bt  
John Budge 806 1/2 BRECKENRIDGE HELENA  
Larry Hoegan 1632 Phillips Ave  
Jimmy Holman 1632 Phillips Ave  
Rody Holman 1632 Phillips Ave  
Jerry Hoegan 1632 Phillips Ave  
Mary Jo Hoegan 1632 Phillips Ave  
Shirley Hoegan 1632 Phillips Ave  
Larry Campana 1632 Phillips Ave  
Winfred Holman 1632 Phillips Ave  
Scott Coffey 808 Country Club Lane  
Mark Quack 1444 East 1st St  
Tom Stajcar 3330 Burlington  
Nana Carbarino 1632 Phillips Ave  
Garry Bayliss 3500 Wilkeson  
Linda Joy 167 Lowell Ave  
Nancy Joy 2214 Princeton  
Anthony Joy 2214 Princeton  
Paul Thomas 2935 Moulton  
Pat O'Brien 3001 Wharton  
Nanuel M Hoan 1921 S. MONTANA  
Peggy Ohser 103 11th St. S.W. Great Falls, MT.  
Jim Brummett 1232 7th Ave. N.W. G.F. MT. 59404  
Diana Gubanski 1419 E14th SPOKANE, MT.  
Shelly Afe 701 Whitaker #2 MSLA  
Page Lehou 1103 Cooper MSLA MT.

IN SUPPORT OF HB 265

|                  |                            |                    |
|------------------|----------------------------|--------------------|
| Robert Thomas    | 1000 S. Wyoming            | Butte, MT          |
| Raren Quinn      | 1005 Hornet                | Butte, MT          |
| Phyllis Manning  | 449 N. Idaho               | Butte MT           |
| Mary Ann Quinn   | 510 S. 7 <sup>th</sup>     | Boreman, MT        |
| Michael Cole     | 2200 FAWA                  | Butte              |
| Peggy Newman     | Box 1458                   | Columbia Falls, MT |
| Katie Walsh      | P.O. Box 410               | Shelby, MT         |
| John Walsh       | P.O. Box 440               | Shelby, MT         |
| Jim Humphrey     | 449 N. 4 <sup>th</sup> St. | Butte, MT          |
| John Walsh       | 107 S. CLYDE               | BUTTE              |
| Nebbia White     | 101 S. Crystal St.         | Butte, MT          |
| John Walsh       | 1541 Elm.                  | Butte, MT          |
| Tom La Fleur     | "                          | "                  |
| Edna La Fleur    | 1611 Elm                   | " "                |
| W. La Fleur      | 1541 Elm                   | Butte              |
| Cliff Riskey     | 1512 N. Main               |                    |
| Bob Casperson    | Star Route Two             | Beaver             |
| Pat Riskey       | 93 Blue Wing               |                    |
| Joe Casperson    | Star Route                 | Thin Bridge        |
| Kathie Larson    | 1315 Diamond               |                    |
| Jay's Larson     | 1315 DIAMOND               |                    |
| Kathy Foley      | 300 So Colorado            | 44                 |
| James Quinn      | 507 1/2 S. Fallon          |                    |
| Don Long         | 2170 Quincy                |                    |
| Lady Ford        | 803 So. Wash               |                    |
| Dan Leach        | 803 So. Wash               |                    |
| Lorrie Leach     | 803 So. Wash               |                    |
| Ann O'Connor     | 425 No. ALABAMA            |                    |
| Jimmie Bransburg | 61 Watters                 |                    |

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. B-9  
DATE 032785  
BILL NO. HB 265

PETITION

TO: Montana Senate Judiciary Committee Members  
SUBJECT: House Bill 265

The undersigned individuals favor House Bill 265 in the form which was passed by the Montana House of Representatives. We are opposed to the March 13 Amendments being considered by the Senate Judicial Subcommittee.

Jack Keller  
Joe Soun  
Margie Soun  
John Barsanti  
Alvin Barsanti  
Ralph Hochberg  
Bud Mattem  
Jim Hoover  
Tom M...  
Edna M...  
Not  
in the name of Henry  
Henry McHenry  
Mildred Ignatowicz

Sam Holmberg,  
Dennold Parize  
Leo Hanson

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. B-9  
DATE 032785  
BILL NO. HB 265

PETITION

TO: Montana Senate Judiciary Committee Members

SUBJECT: House Bill 265

The undersigned individuals favor House Bill 265 in the form which was passed by the Montana House of Representatives. We are opposed to the March 13 Amendments being considered by the Senate Judicial Subcommittee.

Nancy Cooley 2801 Queen St.  
Missoula, Montana  
543-6212

Scott Sholey 59801  
2003 Wood Street Butte, MT  
782-3337

Steve Sholey

Pat Sampson 2416 S. Main Butte  
775 Manual, Missoula

Tamie Rosemond

Kellie C. Byrne 300+ 3100 Washburn

Nanette Lynn Frazier 106 Jennie Ct. Missoula, MT  
Missoula, MT 59701

Ronald W. Miller 1109 West Park St. Butte MT

Brian Niebeck " " "

Boyd A. Kent 1321 S. 5th Bozeman, MT

Lutz J. Srdzi 204 East Riggs - East Helena, MT

Emil Ozanek 1941 E. Elm Butte

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B-9

DATE 032785

BILL NO. HB 265

PETITION

TO: Montana Senate Judiciary Committee Members

SUBJECT: House Bill 265

The undersigned individuals favor House Bill 265 in the form which was passed by the Montana House of Representatives. We are opposed to the March 13 Amendments being considered by the Senate Judicial Subcommittee.

- Bill TRAYNOR 606 Calabornia PH. 782-67
- Rick LAIRD 333 E. GALENA PH 782-1045
- BOB RICHARDS BUTTE
- Carol McCann Boreman III Sullivan Montana
- Paul McCann Great Falls
- Kathleen McCann 413 N Boyer
- Alan Miller 1302
- Kate Halverson 2506 Nettie Butte 782-1386
- Dutch Hepler
- Ray O. Nelson 5855 Farrington Butte
- Tom McCURLEY 207 W. PARK BUTTE
- Kimberly Bengtson 27 Butte
- Tony Kone Butte Mont
- Jerry Lynch BUTTE MT
- TERRY HARRINGTON Butte MT
- Linnet ... Butte MT.
- Paul ... Butte MT.



SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B-9

DATE 032785

BILL NO. HB 265

PETITION

TO: Montana Senate Judiciary Committee Members

SUBJECT: House Bill 265

*Robert W. ...*

*Alan ...*

The undersigned individuals favor House Bill 265 in the form which was passed by the Montana House of Representatives. We are opposed to the March 13 Amendments being considered by the Senate Judicial Subcommittee.

*Mary Frankberg  
Melvin Frankberg*

*Al ...  
Steve ...*

*Peter A. Paimin  
Billy Mireu  
William L. Doano*

*Bob Robinson  
Gary Segna*

*Robert ...  
George ...*

*Dave ...  
Randy ...*

*Kurt R. Blain  
Calvin S. Hall*

*Larry A. Seybert*

*Karen M. Wickersham  
Scott J. Petrus*

*Paul E. ...*

*Roger ...  
John B. Nordberg*

*Paul ...  
Paul ...*

*Dan L. Gustafson*



PETITION

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. B-9  
DATE 032785  
BILL NO. HB 265

TO: Montana Senate Judiciary Committee Members  
SUBJECT: House Bill 265

The undersigned individuals favor House Bill 265 in the form which was passed by the Montana House of Representatives. We are opposed to the March 13 Amendments being considered by the Senate Judicial Subcommittee.

*Mike Johnson*  
*John C. Mitchell*  
*Robert*  
*Kay Carpenter*  
*Stacy Terrell*  
*Lee Manning*  
*Doug Duhamie*  
*Lauren Duhamie*  
*Dave Hays*  
*Gary Clark*  
*Rebecca Samuels*

*Public Hearing*  
*Ben Rapch*  
*Tammy Brothers*  
*Kari McEllynn*  
*Holly Brothers*  
*Kelly Clark*  
*Kelly Justice*  
*Douglas M. Abbott*  
*Michael Wade*  
*Steve Johnson*



IN SUPPORT OF HB 265

Stan Klockner Klockner  
 Don Klockner Klockner  
 William Klockner Klockner  
 Shari Klockner Klockner  
 Dan Klockner Klockner  
 Annette Peidue 22028 California  
 Tony Peidue Korea  
 Gale Peidue 22028 California  
 Paul Peidue 10 South Hill Blvd. Norfolk  
 Al Cuth 221 Clark Deedwood Mt  
 Scott Cuth 3400 Hillview Ave 903  
 Walter O'Neill 951 W. Quartz  
 Elsie Sullivan 951 W. Quartz  
 John O'Neill 951 California  
 Bruce Richards 2212 Gladstone  
 David Richards 2212 Gladstone  
 Bill Marklund 2212 Gladstone  
 Reed Marklund  
 Bob Richards 3560 Hawthorn  
 Judd Kristow 3450 Gladstone  
 Jeff Kiffin 2009 Thompson  
 Ken Kiffin " "  
 Ken Kiffin " "  
 Shirley Kiffin " "  
 Joan Kiffin " "  
 Joan Kiffin 114 Marsh Hill Dr  
 Alice DeJong 1728 Burlington St  
 Mimi Tucker 3712 Bradford Meadows  
 Michele Murray 3400 Vista Lane

IN SUPPORT OF HB 265

|                      |                                  |
|----------------------|----------------------------------|
| Jami Johnson         | 77 12 <sup>th</sup> Street Falls |
| Lisa Peterson        | Dragon, MT                       |
| Mike Haney           | Box 14 Divide, MT. 59721         |
| Vicki Haney          | 217 N Emmett Butte               |
| Tom Wern             | 1032 W. Brooks Butte             |
| Don Van              | 17 Circle Lake Butte             |
| Marie Prince         | " " "                            |
| Karna E. Murto       | 2027 Illinois - Butte MT.        |
| John St. John        | 2032 Florida Butte MT.           |
| Al Varas             | 3924 Kansas Butte MT.            |
| Ways Allen           | 2523 Grand W Butte               |
| Gene Ann Gray        | 2032 Florida - Butte             |
| Val Aldred           | 3011 Kossuth                     |
| Walter Aldred        | 3011 Kossuth Butte               |
| Walter Johnson       | 21 Low 101 Butte                 |
| Ben Becker           | R1 105 Low                       |
| Jan Valens           | 1701 Grand Ave Butte             |
| George M. Richardson | 1415 W. Aluminum, Butte MT.      |
| Bob Renfrew          | 411 1/2 W. Granite Butte MT.     |
| Dennis Johnson       | 420 North St. Butte, MT          |
| Tom Kelly            | 1301 W. Copper Butte             |
| John H. Wharton      | 201 S. Copper Butte, MT.         |
| Curt Kirk            | 1142 Lewisdon Butte              |
| Mike Schaffner       | 1142 Lewisdon Butte              |
| Mark Eberling        | 501 W Granite, Butte             |
| Paul Downey          | 2509 S Main Butte                |
| Ellen Downey         | 2509 S Main Butte                |

IN SUPPORT OF HB 265

|                           |                                    |
|---------------------------|------------------------------------|
| Jan Matz                  | 910 Kansas D-5                     |
| Ed Kane                   | 3040 Bannock                       |
| Tom Kane                  | 3050 Bannock                       |
| Kathy Stephens            | 3050 Bannock St.                   |
| Charles Miller            | 5 Fairview Avenue                  |
| W.G. Bartholomew          | 2006 CHASE                         |
| Mel Mason                 | 2460 ST. ANNE                      |
| Beth & Carl               | 3451 Hillside, Box 1               |
| Larry Sullivan            | 3490 ST ANNE                       |
| <del>Joe McLaughlin</del> | <del>1017 No. Kansas</del>         |
| Dan Shea                  | 4646 Utah St.                      |
| Kare Burt                 | 2900 Archway                       |
| Chris Williams            | 1017 No. Kansas                    |
| Maxine Alexander          | 104 Pennsylvania Blvd. Ft. Collins |
| RPT Moody                 | 1921 Adams Butte Mt.               |
| Bob Adams                 | 2816 Marlton Butte                 |
| Scott & Carol             | 2645 Ottawa Butte                  |
| Walter Shea               | 11116 Utah - Butte                 |
| Donald J. Kelly           | 700 Pennsylvania Ave. Fort.        |
| Lawrence Kelly            | 1300 N. Aspen                      |
| Gene Kelly                | 1301 W. Cobble                     |
| Bill Moran                | 513 Granite St. Ft.                |
| Earlene Clark             | 120 S. Alameda                     |
| Wayne Gaper               | 1915 Charlotte, Mesa               |
| Bob Shea                  | 535 Idaho St.                      |
| Tommy Kelly               | 1814 Canyon Butte, MT              |
| Joe Schuler               | 1835 Street Butte                  |
| Sheila Richardson         | 1835 Street                        |

PETITION IN SUPPORT OF HB 265

We, the undersigned, express our support for HB 265 as it passed the House of Representatives and without the amendments adopted by the Senate Judiciary Subcommittee on March 13. HB 265 as it passed the House is a fair bill for sportsmen and landowners. The amendments ignore the Supreme Court's stream access rulings and will lead to more conflict.

We urge support for HB 265 without changes in its concept.

| Name                       | Address                           |
|----------------------------|-----------------------------------|
| <u>Bone</u>                | <u>3000 [unclear]</u>             |
| <u>Manly</u>               | <u>100 W Park</u>                 |
| <u>Keen Wood</u>           | <u>Phoenix, Ariz. HCU</u>         |
| <u>Thom Pech</u>           | <u>Helen mt.</u>                  |
| <u>Anty Dumas</u>          | <u>P. Morris Amy A 51</u>         |
| <u>Chickler</u>            | <u>1199 Klamath</u>               |
| <u>Debbie Elm</u>          | <u>320 W. [unclear]</u>           |
| <u>James Puffy</u>         | <u>2426 Pine Street</u>           |
| <u>Jerry Roberts</u>       | <u>927 [unclear]</u>              |
| <u>Walter Schelin</u>      | <u>2426 Pine Street</u>           |
| <u>Katherine [unclear]</u> | <u>409 So Excelsior Butte</u>     |
| <u>William [unclear]</u>   | <u>245 W. [unclear]</u>           |
| <u>Thom H. [unclear]</u>   | <u>1034 [unclear] Butte</u>       |
| <u>Don [unclear]</u>       | <u>105 Lemons RT 1 Butte</u>      |
| <u>William Patrick</u>     | <u>1018 So Wyoming St Butte</u>   |
| <u>Cindy Becken</u>        | <u>105 Lemons RT 1 Butte</u>      |
| <u>Yourd [unclear]</u>     | <u>535 So. [unclear] Mula, MT</u> |
| <u>John [unclear]</u>      | <u>1006 W. Granite Butte, MT</u>  |
| <u>John [unclear]</u>      | <u>1530 [unclear]</u>             |
| <u>Janet [unclear]</u>     | <u>1330 Diamond Butte</u>         |
| <u>Karen [unclear]</u>     | <u>2720 [unclear]</u>             |

PETITION IN SUPPORT OF HB 265

We, the undersigned, express our support for HB 265 as it passed the House of Representatives and without the amendments adopted by the Senate Judiciary Subcommittee on March 13. HB 265 as it passed the House is a fair bill for sportsmen and landowners. The amendments ignore the Supreme Court's stream access rulings and will lead to more conflict.

We urge support for HB 265 without changes in its concept.

| Name                | Address             |
|---------------------|---------------------|
| Dean E. Johnson     | 1211 West Quetz     |
| Michael A. Johnson  | 2224 S. Gaylord St. |
| Michelle B. Johnson | " " " "             |
| Alta B. Bune        | 524 1/2 Edison      |
| Lynne Buzi          | 524 1/2 Edison      |
| Leonard Perry       | 2923 Phillips       |
| Jerry Perry         | 2923 Phillips       |
| Joe J. Jara         | 3717 Augusta        |
| Kevin B. B...       | 2031 FLA            |
| ...                 | 313 Hampton         |
| ...                 | 3113 Hampton        |
| Julie W. Albaugh    | 1900 Simpson        |
| ...                 | 1900 Simpson        |
| ...                 | 3717 Augusta Ave    |
| ...                 | 2051 Elm            |
| ...                 | 1716 Garbick        |
| Tom Khima           | 436 S. MAIN ST      |
| Sue Worthington     | 1020 W Silver       |
| Ann Sarlingstone    | 1524 Thomas         |
| Haase Alley         | 1835 Whitman        |

IN SUPPORT OF HB 265

|                  |                               |
|------------------|-------------------------------|
| Frank            | 1111 N. 1st                   |
| Sam Adams        | 825 Adams Ave. 2              |
| Jimmy Adams      | 1910 Jackson Ave. Helena, MT  |
| John Adams       | 727 Legion Bldg. Helena       |
| Charles Bennett  | 2020 Sherman St               |
| Richard Bennett  | 3020 Sherman St. Butte 59701  |
| Robin Bennett    | 107 Sanson Butte 59701        |
| John Bennett     | 107 Knight St. Butte 59701    |
| Ed M. Bennett    | 1700 W. Cooke Butte           |
| Robert W. Page   | 5777 Butte 59701              |
| Bill Bennett     | 306 W. 2nd Butte 59701        |
| Robert Ballenger | 205 Williams                  |
| James Ballenger  | 18 South 1st Butte            |
| KRISTEN BOYD     | 1099 COLE BLVD                |
| Clare K. Bennett | 4039 Kaiser                   |
| Alan K. Bennett  | 11634 Kaiser                  |
| James K. Bennett | 3304 Kaiser                   |
| Rachel Bennett   | 3304 Kaiser                   |
| Alan Bennett     | 2556 Matten                   |
| Mike Bennett     | 3370 Spalding                 |
| Mike Bennett     | " "                           |
| Ted Wenzel       | 420 Roosevelt Dr. BIA         |
| Debra Olson      | 1124 Boulder Ave - Helena     |
| Black M. Smith   | 2250 NORTH RIVE               |
| Mike Bennett     | 1914 N. 1st St.               |
| James Bennett    | 937 Union St. Butte, MT 59701 |
| Lori Bennett     | 116 Star Ln. Butte            |
| David W. Bennett | 1121 So. Wyoming              |
| Dave Bennett     | D.P.O. Box 3733               |
| ...              | ...                           |

PETITION IN SUPPORT OF HB 265

We, the undersigned, express our support for HB 265 as it passed the House of Representatives and without the amendments adopted by the Senate Judiciary Subcommittee on March 13. HB 265 as it passed the House is a fair bill for sportsmen and landowners. The amendments ignore the Supreme Court's stream access rulings and will lead to more conflict.

We urge support for HB 265 without changes in its concept.

| Name               | Address               |
|--------------------|-----------------------|
| Tom Miller         | 2700 East             |
| Mark Palmer        | 3405 Hill Ave         |
| Brett Bauer        | 1350 Hamwood          |
| Mark Miller        | 2700 East             |
| Bob DeFazio        | 3451 Hamwood          |
| Travis Bickford    | 3005 Ottawa           |
| Therese Stinson    | 119 Hamwood           |
| William J. Stinson | 3451 Hamwood          |
| Bob R. Stinson     | 3451 Hamwood          |
| Monica Bickford    | 3005 Ottawa           |
| James Bickford     | 3005 Ottawa           |
| Steven Logan       | 7816 Hamwood          |
| John DeSoyz        | Box 2112 Lot 13A      |
| Tommy Keyser       | 611 Hobson Butte      |
| Jack Keyser        | 611 Hobson Butte      |
| Gene Lorenzen      | 125 STAR LANE         |
| Gene Lorenzen      | 611 Hobson Butte      |
| John Michael       | 1110 W Corvante Butte |
| Randy Dotson       | 1116 W Caledonia      |
| Jo Ann Dotson      | 1116 W Caledonia      |
| John Stinson       | 1804 3234 Butte       |

IN SUPPORT OF HB 265

- Melinda Amick 161 W Broadway
- Fred L. Quinn 701 W. BROADWAY
- Carrie Palmer 1029 S WYMING
- Anna Jordan 210 N Clark
- David L. ... 275 S. ...
- ... Box 275 Rocker
- ... 2124 Yale Bldg Ct
- ... 100 Helman Ct. Missoula MT 59701
- ... 1039 Missoula, Butte, MT
- ... 503 S. ...
- ... 111 E. ... St
- ... 617 W. ...
- ... 2221 South ave Missoula
- ... 3466 ST. ANN
- ... 3400 ...
- ... 735 5th St.
- ... 919 Lewisohn
- ... 1, 221 ...
- ... 3409 ...
- ... 3176 CARTER
- ... 125 N. ... St
- ... East Ridge
- ... East ...
- ... 975 Harriet
- ... 521 N. ...
- ... 515 17th St.
- ... 27 ... St.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B-9

DATE 032785

BILL NO. HB 265

PETITION

TO: Montana Senate Judiciary Committee Members

SUBJECT: House Bill 265

The undersigned individuals favor House Bill 265 in the form which was passed by the Montana House of Representatives. We are opposed to the March 13 Amendments being considered by the Senate Judicial Subcommittee.

TRACY FISHER 2696 Placer

Chris Dixon 3028 Wharton

Dora Idicks 3215 So. Dakota (a)

Keith Dixon ↓

Carl Lary

Ray L Decker

LAURIE SECCOMTS

Samuel Patton

Kelle C. Byrne

Tamie Joseph

Nanette Lynette

Steve Furever

Jami Jura

~~\_\_\_\_\_~~

IN SUPPORT OF HB 265

|                    |                                 |
|--------------------|---------------------------------|
| James M. [unclear] | 1131 [unclear]                  |
| Steve Willis       | 981 [unclear]                   |
| [unclear]          | 551 [unclear]                   |
| [unclear]          | 720 [unclear]                   |
| Tom Higgins        | 1357 W Copper                   |
| Tom Higgins        | 1357 W Copper                   |
| [unclear]          | 3712 Augusta                    |
| Patricia [unclear] | 501 W [unclear]                 |
| Billie [unclear]   | 701 [unclear]                   |
| Debra Anne         | 743 [unclear] Whitefish Mt 5993 |
| Bob O'Leary        | 1476 [unclear] Whitefish Mt     |
| Chris [unclear]    | [unclear]                       |
| [unclear]          | 407 [unclear]                   |
| [unclear]          | 1000 W Gold                     |
| [unclear]          | 1015 W [unclear]                |
| William McGinnis   | 1015 W Broadway                 |
| [unclear]          | 2925 NIVE Lane                  |
| [unclear]          | 1118 Diamond                    |
| Julie F. [unclear] | 623 W [unclear]                 |
| [unclear]          | 3108 6th Street                 |
| VM [unclear]       | [unclear]                       |
| Bill Blackwood     | 310 Wallace [unclear]           |
| [unclear]          | [unclear]                       |
| [unclear]          | 1301 W Copper                   |
| Dave [unclear]     | 1301 W Copper                   |
| Frank [unclear]    | 1301 W Copper                   |
| Bill Blackwood     | 1301 W Copper                   |
| Bill [unclear]     | 1301 W Copper                   |
| [unclear]          | 1301 W Copper                   |

SENATE JUDICIARY COMMITTEE

... T NO. B-9

DATE 032785

BILL NO. HB 265

PETITION

TO: Montana Senate Judiciary Committee Members

SUBJECT: House Bill 265

The undersigned individuals favor House Bill 265 in the form which was passed by the Montana House of Representatives. We are opposed to the March 13 Amendments being considered by the Senate Judicial Subcommittee.

*Bus with [unclear] [unclear]*

*Dave [unclear]*

*[unclear] [unclear] [unclear]*

*[unclear]*

*[unclear]*

*[unclear]*

*Paul J. McCamy  
Great Falls, MT*

*[unclear]*

*[unclear]*

*[unclear]*

*Col [unclear]*

*[unclear]*

*[unclear]*

*[unclear]*

*[unclear]*

*[unclear]*

*[unclear]*

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. C  
DATE 032785  
BILL NO. HB 265

MONTANA STATE SENATE  
JUDICIARY SUBCOMMITTEE ON STREAM ACCESS  
MINUTES OF THE MEETING

March 20, 1985

The third meeting of the Senate Judiciary Subcommittee on Stream Access was called to order at 7:27 p.m. on March 20, 1985, by Chairman Bill Yellowtail in Room 325 of the Capitol.

ROLL CALL: All subcommittee members were present.

FURTHER CONSIDERATION OF HB 265: Representative Bob Ream, sponsor of the bill, addressed the subcommittee. He stated he did not tell the media the bill should not be tampered with. He believes the committee and subcommittee process are necessary. He does believe the bill will require some fine tuning now and in the future. Representative Ream believes HB 265 or any other legislation is a narrowing down of the supreme court decisions, particularly in this area of portage and barriers. With the portage language we put in the bill, we're defining what the public can't do in its pursuit of recreation. The language "the least intrusive manner possible" means just that. If we want to get more specific, we can say the portage route can only be used for the time necessary, or it can only be the shortest route. The portage is clearly not ten or twenty miles up a stream.

Representative Ream was concerned about the action the subcommittee took on natural barriers. He thinks there is a reason for it and thinks as floaters are going down a stream, if they come to a waterfall, they need to get around it. He thinks we have to have some possibility for getting around natural barriers. He can't think of many situations where you would in fact have to go above the high water mark to get around a barrier. As to the taking question, the more he thinks about condemnation, the more he thinks it would be a disadvantage. They would be giving up a lot of rights to control how that portage would be used. He feels somehow or another natural barriers have to be included in the bill. He referred to the Curran decision. He believed the subcommittee should consider reinstating in some form, natural barriers in the bill. It seemed the subcommittee had been wrestling again with differentiating between the different kinds of streams. He believes we should go back again to some kind of Class I and Class II situation. The reason they did that was to limit some

of the uses on some streams in Montana. On those streams where there are controversies, we may have to adopt further rules that would deal with the problems at hand.

Senator Towe stated two things concerned him. First, Representative Ream's comments about natural barriers. There is no question that in some instances portage around a natural barrier seems clear and obvious. In deference to the argument about the issue of taking, it occurs we have not heard the final word on that subject from the supreme court, so he questioned whether we should say anything on that issue one way or another until the supreme court has so decided.

Representative Ream stated we could avoid that language, but if so, we would be right back into court very soon. If a recreationist brought suit on that issue, they would prevail. He thinks there is a precedent in other states and on the boundary waters treaty between the United States and Canada, that makes the boundary waters as well as portage routes on either side, open to citizens of either nation. By doing that, they recognize there are natural barriers that have to be gotten around one way or another.

Senator Towe went on to say his second question concerned classification of waters. He asked if Representative Ream thought they needed separate classifications in terms of referring to them, or is it helpful to have a classification in the bill to have a better understanding of stream access in general.

Representative Ream stated he thought so. He didn't like the classification system at first. The more he thought about it, he thought it was a tool that could be used conceptually to see the difference between those smaller streams and the larger streams. The grey area in between will be a problem. It helps conceptually and it provides a framework for the rule-making process that comes later.

Mr. Petesch then reviewed what the subcommittee had done in its past meetings. They eliminated natural barriers and classification of waters; defined high water mark; added some restrictions on recreational use and added hiking to the concept; added other private impoundments to the prohibition of the public's right to use surface waters; proposed overnight camping within 500 yards of a habitable building; modified the definition of duck blinds; and provided a person no right to use a dry streambed as an access corridor. The major areas

Senate Judiciary Subcommittee  
Stream Access Meeting Minutes  
March 20, 1985  
Page 3

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. C  
DATE 032785  
BILL NO. HB 265

still to be examined would be to address the proposed changes to the definition of surface water and the area of portage.

Senator Towe commented we spoke about this last time, and the further we get into the bill, if we are going to change the subcommittee's initial determination on classification of waters, we should do that now. Senator Galt thinks doing away with it was a good motion. Senator Towe stated the problem is people have suggested that, as Representative Ream just did, even if we don't use it, it has some helpfulness in understanding the system, and it puts in some language in the statute that may be a drop-off point for further regulation. It might also be helpful in taking up some other questions such as overnight camping. Senator Towe commented Ron Waterman indicated he had some refinement of the proposal and the bill. Senator Towe referred to page 3, line 17, of the bill defining recreational use. He thinks we are putting some things in there that we're allowing on all waters that he thinks on certain waters shouldn't be in there at all. He doesn't know how to handle that without getting into some classification system.

Senator Galt stated he still thinks waters are waters, no matter where they are. If you want to do it, go back to page 2 and add lines 1-6 back in. Ron Waterman stated with reference to the Class I water definition, their suggestion is they find themselves in agreement to dropping out subsection (c), which is a redundancy. Also subsection (a) has some problems. It does catch some streams thought to be navigable. If you drop out subparagraphs (a) and (c), then you are left with three alternative definitions of navigable. If you just go to subparagraph (b), you don't even reach the headwaters of the Missouri River. Subparagraph (d) is every description of what navigable means, and subparagraph (e) is a reiteration of the federal navigability test without looking to its consequence of a judicial degree.

Senator Galt asked if he would admit that on any navigable stream, the state owns the streambed to the low water mark. Mr. Waterman responded that is correct. Senator Galt asked if it were true that before the state could own the streambed, it had to be declared navigable. Mr. Waterman replied he did not think so. Senator Galt asked if the supreme court ever changes its mind. Mr. Waterman replied, on occasion.

Senator Crippen suggested we approach it with more classifications. Class I would be the broadest term where we would allow the most. Class II would be more restrictive. Classes III and IV would be totally restricted. On Fishtail Creek, you don't want anyone swimming in it because it goes through the farmer's pasture land. Hunting would be inappropriate. We should take that and try to define it. Then we would go up one step further where you may allow some of the things we have allowed, maybe hiking. You might have to include some of the lakes. He realized Mr. Strobe would say it is private land no matter where it is. Mr. Waterman stated he thinks the idea you have tossed out is conceptually a good idea. The reason is the statement of intent guides the commission to consider a number of other alternatives. Those give the commission the authority and direction to look specifically at where recreational uses can be considered. That is why we put in the statement of intent. Senator Galt asked which are Class I and which are Class II. Mr. Waterman replied the Missouri and the Yellowstone could be Class I. Tributaries to the Big Hole would be Class II. Senator Galt asked who made those determinations. Senator Towe replied the courts would. Senator Towe believes there is merit to do so, even though we may not actually use the definitions, although he suspects we may. There is merit in making a simple classification determination, then leave the details to the hierarchy. He likes the new idea of using three widely accepted definitions of navigable and limit Class I waters to navigability and all other waters are non-navigable. He believes that would be subsections (b), (d), and (e).

Senator Crippen had some concerns about leaving it up to the Fish, Wildlife and Parks. He would just as soon have the legislature be more involved in it. He was going to suggest we might have to inventory every one of them and put them in a classification. He has a problem with navigable. If you apply subparagraph (d) to the broadest category, he asked where that will put the largest lakes and rivers like the Stillwater and Boulder Rivers. Senator Towe asked if he wanted to separate classifications of navigable waters. Senator Crippen replied we may have to. Mr. Waterman referred to the language in subparagraph (d). He went through every case he could find that dealt with what was navigable under the federal test and pulled from that the activity that they said was commercial activity and rolled those into this definition.

Senate Judiciary Subcommittee  
Stream Access Meeting Minutes  
March 20, 1985  
Page 5

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. C  
DATE 032785  
BILL NO. HB 265

Mr. Waterman stated they have a proposal to take lakes out of the impact of this bill. Senator Crippen asked how they can do that when they are talking about all surface waters. Mr. Waterman did not suggest that the lakes and the waters in the lakes are not public waters, but he did suggest there is a way to limit this bill only to the stream access issue and set aside the issue of lake frontage for another time. It may be justified to say this bill applies only to the streams and leave the lakes to another day. He recognizes the lakes are public waters. For the most part, lakes already have public access, and members of the public have the ability to reach the surface waters. They propose this as a way to address a problem by not addressing the problem. Senator Crippen felt this would leave us open for another decision from the supreme court, and he felt they didn't show a lot of thought for these others. They are usurping the legislature's responsibility as a legislative body. Senator Crippen wants to get a message to them to keep their hands off and to do the jobs they are elected to do and be judges and not legislators.

Mr. Petesch pointed out that by eliminating the classification, all you have changed is overnight camping and semi-permanent objects.

Senator Towe replied that is probably right. The question that was bothering him the first night is where are we using them. Representative Ream said there are two additional benefits. First, there is a better understanding of the whole situation even though we don't actually use it. Second, we do establish the groundwork for further refinement of this issue. The Fish and Game Commission may well decide to utilize that distinction. We may, as we go through the bill, decide that it is helpful. He is interested in suggesting to Senator Galt that in doing that, we might be able to eliminate some of these things we do not want to happen on those dinky streams that flow near the farmer's house. Senator Galt stated he thinks we should do away with the classification and deal with all of the waters of the state. Conrad Fredericks stated Senator Galt's suggestion is probably the simplest one. The federal meanderings are already laid out. If they need further refinement, you can get the Fish and Game to decide that. Using subparagraph (b), as a practical matter, that will be simple. If you use subparagraphs (d) and (e), the only way you are going to determine if they are applicable is through a court case. If you want to simplify things, then logically Senator Galt's suggestion has a lot of merit -- by just using subparagraphs (a) and (b) and leaving off (c), (d), and (e).

Senator Towe asked about subparagraphs (d) and (e) and then all others. Mr. Fredericks stated subparagraphs (d) and (e) will determine what they are. Senator Galt moved that we classify the waters Class I, which would be all of those listed under subparagraphs (a) and (b) on page 2.

Senator Crippen addressed subparagraph (a). He asked if it should not really read that they actually have been officially recorded. Senator Galt replied it says that. Senator Towe stated his thought was that maybe the use of the words, Class I and Class II, would get us off base. Maybe we should use the words navigable and non-navigable, with navigable waters including subparagraphs (a), (b), (d), and (e). People seem to understand that better. Whereas what does Class I mean? Senator Galt stated navigability is what these cases are about. Senator Towe pointed out that Conrad Fredricks said subparagraph (b) is judicially determined to be state owned by the federal navigability test. If these streams are judicially recognized, they will move from one class to another. He asked why we should not just say navigable streams. Senator Towe moved as a substitute motion that we define in section 1 navigable waters and say navigable waters mean 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, (d) are or have been capable of supporting the following commercial 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), and (e) are or have been capable of supporting commercial activity within the meaning of the federal navigability test; and non-navigable waters mean all surface waters that are not navigable. Senator Crippen pointed out you are then going to have two classifications. Senator Towe replied we might want to say a Class I navigable and Class II navigable and a Class I non-navigable. Senator Towe replied he would ban all overnight camping and all placement of permanent or semi-permanent objects and all non-water related activities. Senator Crippen asked about swimming and hiking. Senator Towe replied yes to swimming but no to hiking. Ron Waterman stated, only as an example, in Class II waters you would be banning the use of the dry streambeds. Senator Galt pointed out the Smith River, which will be classified as navigable, goes dry. Mr. Waterman stated that also gives the regulatory framework in

Senate Judiciary Subcommittee  
Stream Access Meeting Minutes  
March 20, 1985  
Page 7

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. C  
DATE 032785  
BILL NO. HB 265

which to work.

Mr. Strobe stated what is not spoken here but is implied is the effort made by Mr. Waterman and his group is to create a recreational use in property without compensation. If you want to get down to how to define those waters, you should read the language in the Curran decision. He suggested the subcommittee take advantage of that language. This committee should make up its mind whether or not it is going to confirm Section 70-16-201, MCA. He does not think this committee should ignore that. Senator Towe asked if he were suggesting that we concur in the idea there are two classes of waters: one navigable and one non-navigable. Mr. Strobe suggested they leave it with one class of water and then define navigable by using the decision cited by the court. Senator Towe asked if they were to stay with the definition of the supreme court, does that cover all of the waters contemplated in Class I as it was passed through the House. Mr. Strobe asked what is Class I and II -- they are artificial creatures devised in the minds of people. By leaving Class I and II out and merely defining navigable and confirming that statute, you say where the rights of the landowners begin and end and where the rights of the public begin and end. The minute you get a stream that cannot support commerce of a pecuniary nature, you have a non-navigable stream. Senator Crippen asked what recreational uses he felt should be allowed on the Yellowstone River. Mr. Strobe replied then you say what you want as water-related uses on a navigable stream. Senator Crippen asked what he would envision. Mr. Strobe replied the landowner community would prefer that it would be confined to the fly fisherman with his creel. Senator Crippen asked if they felt that way in view of the decisions. Mr. Strobe replied under the decisions, if you want to restrict it, you say the only recreational use is fishing. But he thinks you will say it includes not only that, but two or three other things. When you get into land-related uses, you have stepped well beyond Curran, and you are in the area where you are taking private property for a public use, for which you had better prepare for the just compensation these people will demand. Mr. Strobe didn't think the landowners have to fear the courts of this state will take private property for public use without just compensation. Senator Crippen stated in his reading of the Curran and Hildreth cases, you could interpret those to imply they did just that, because they related to not only surface water-related activities, but some other activities. Mr. Strobe disagreed with his reading. Senator Towe stated the best

Senate Judiciary Subcommittee  
Stream Access Meeting Minutes  
March 20, 1985  
Page 8

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. C

DATE 032785

BILL NO. HB 265

thing to do is use the definition in the Curran case and stop with that. Mr. Waterman believed the problem is it doesn't take into consideration that in both Curran and Hildreth, the supreme court said the recreational use of water is limited by their use.

Senator Towe asked why we shouldn't just say navigable is as subparagraph (c) says it is. Then we don't have to go through the long laundry list. He felt we would have less dispute and less problems in making our classifications that way. Senator Yellowtail referred the subcommittee to the Hildreth case, page 12. Ron Waterman referred to page 12 of the Curran decision and stated if you take that smaller portion of that case out of context, you buy into the litigation. Senator Towe reverted to his substitute motion. Senator Crippen asked if it were his intention to use subclassifications. Senator Towe responded we could do that. Senator Yellowtail suggested we leave that to the rule-making authority. Senator Towe replied he didn't want to do that at all. Senator Galt suggested subparagraph (d) be taken out. Senator Towe responded, on that issue, after Mr. Strobe and Mr. Waterman started talking about what the court says is navigable, maybe we should have even said in subparagraph (d) such things as a sailboat. Senator Towe was satisfied to leave it that way. Senator Galt stated subparagraph (d) must be determined in court, so why put them in there. Senator Towe stated that is what it says as these activities have been defined. Senator Galt stated they have been defined by not referring to a specific stream. Senator Galt asked who would make that decision. Senator Towe replied the courts of this state would do that.

Senator Crippen stated rather than making a motion, let's assume we have that. Let's say if you have it that way, take the Missouri River and the Yellowstone River. Senator Towe stated those would be navigable Class I streams. Senator Crippen stated you are going to have a criteria of allowed uses set up under that. Then you might have navigable Class II, which may be part, but not all, of the others. We are reducing it. Ben Stein thinks you are wrestling with nitpicking. We created a state system of recreational waterways. Why can't rivers be named specifically by the full river or segments, and you don't have to define anything. Senator Crippen replied we are getting to that. Mr. Petesch pointed out that was done by resolution. Senator Crippen stated on a navigable water, the owner owns it down to the low water mark. He asked what we would be allowing on Class I and Class II. Senator Yellowtail stated the original bill approached it in a similar way,

but not in the direction of prohibiting, rather in what would be allowed. Maybe that makes more sense than exhaustively listing what will be prohibited. Senator Crippen stated prior to that, it says recreational use means so much, and then we went on to say what we prohibit. Senator Yellowtail assumed that means on navigable streams, all of those recreational uses are allowed with the following exceptions. Mr. Waterman stated when we first drafted this bill, it did exactly as you proposed. Class I waters means the following; Class II waters means the following. They found that cumbersome and went back to what you say. When they first talked about it, waters were classified as public and private. They took that out and then put in Class I and Class II. Senator Crippen said if we could subdivide it any further, you are including navigable streams. You should put in fishing and eliminate hunting, swimming, and hiking; you should add floating; and you should strike other water-related activities. In those streams you shouldn't allow any type of hunting whatsoever. If we broaden the uses and broaden hunting, you are going to see ranchers and landowners in that area saying fine, forget it; I won't let you in on my land to do anything; you have to get on by public access. Senator Yellowtail stated he thinks we are probably getting toward an understanding of needing a classification system of some sort. The question now before us is shall we have a classification system. We have one proposal. Senator Crippen stated we are only going to allow fishing and floating. All we have to do is discuss portage and natural barriers and go on. If we go on the definition of navigable, you are taking those streams into consideration. He can see where you will allow duck hunting on the Yellowstone River, because you don't have the hazard problem, but you have it on the entire stretch of Rock Creek and other similar streams.

Senator Towe stated it occurs to him we discussed that question of hunting and swimming and other uses that are not as clearly related to water as fishing and boating, and then we were not talking about any classification, so we would have allowed it on any river. Senator Galt stated he had not gotten back to that. Senator Towe replied he doesn't have any problem of further going in and simply saying navigable Class I rivers are the Missouri, Yellowstone, and Clark Fork Rivers. Navigable Class II are defined in subsections (a) and (b), and navigable Class III are all the rest. Senator Yellowtail suggested an alternative might be to provide further classifications. Senator Towe commented maybe it is

Senate Judiciary Subcommittee  
Stream Access Meeting Minutes  
March 20, 1985  
Page 10

SENATE JUDICIARY COMMITTEE  
LEGISLATIVE NO. C  
DATE 032785  
BILL NO. HB 265

not wise to do that until we decide how we're going to do that. Mr. Petesch stated he thinks the court opinions say the waters determine their use. You can put restrictions on them. If you think Class I and Class II help the department when someone requests a closure, it does not expand their authority one way or another. He saw no problem with either the motion or the bill the way they were at that point. The motion to define surface waters as navigable and non-navigable, with subsections (a), (b), (d), and (e), carried with Senator Galt voting in opposition.

Senator Yellowtail suggested we now apply that to use. He suggested we take a serious look at what was done before us and see if it holds any realistic merit. The approach was to prohibit certain activities rather than taking the other approach and trying to allow all activities. Senator Towe commented he didn't think we wanted to eliminate those things we have already decided, such as overnight camping. Senator Towe moved we add a new subparagraph (3) stating: "The right of the public to make recreational use of non-navigable waters does not include, without permission of the landowner, (a) overnight camping; (b) the placement or creation of any permanent or semipermanent object such as a duck blind or boat moorage; or (c) other activities which are not water-related. Mr. Petesch stated the way subsection (2) currently applies, those activities listed in (b) and (c) are already prohibited on all surface waters.

Senator Towe moved as a substitute motion that we insert a subparagraph (3) stating: "The right of the public to make recreational use of non-navigable waters does not include, without permission of the landowner, overnight camping, unless the camping is clearly out of sight of occupied dwellings." Senator Crippen stated he would like to add swimming. Senator Towe stated he thinks that is reasonable. Senator Crippen asked about hiking. Mr. Waterman stated he has no problem with swimming, but he does have a problem with hiking because of the language in subparagraph (c). Mr. Petesch stated you have to stay below the high water mark to hike on it. Senator Crippen commented the landowner owns to the center of the stream on these non-navigable waters. Senator Towe pointed out that under subparagraph (c), you can use it for recreational use. He believes swimming is okay. Dan Hines stated it has never been their intention to invade the privacy of the homestead. He asked how they could harm the landowner by swimming. Mr. Strobe stated if you go back to subparagraph (c), they say the division of waters into navigable and non-navigable

Senate Judiciary Subcommittee  
Stream Access Meeting Minutes  
March 20, 1985  
Page 11

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. C  
DATE 032785  
BILL NO. HB 265

is but a way of defining them into public and private waters. Senator Yellowtail asked that Mr. Strobe please respond to the language in the Hildreth decision on page 5. He felt Mr. Strobe was reading selectively. Mr. Strobe replied if you will read on from that opinion, it says Curran, supra, that means the court in rendering the Hildreth decision was citing Curran as the authority for the statement Senator Yellowtail just read. Therefore, you must read Curran to fully understand the brief statement you just read. And if you read Curran, that is a requirement, because they put in Curran, supra. The same judge rendered both opinions, and Mr. Strobe is confident he knew what he was saying. Senator Towe referred to page 15 of the Curran decision and the language that began "in sum we hold that . . . ." He suggested that is the law of the land. Mr. Strobe responded no, he is going to suggest that in citing Curran eight times in the second opinion, Curran is the dominate opinion. Mr. Fredricks stated he thinks the legislature is not bound by the Curran and Hildreth decisions and has the power constitutionally and otherwise to regulate the surface waters of the state. Senator Towe stated his motion is to ban camping on non-navigable waters. Senator Crippen moved as a substitute motion to include along with camping, swimming and hiking. The motion failed on a tie vote with Senators Crippen and Galt voting in favor and Senators Towe and Yellowtail voting in opposition.

Chairman Yellowtail then reverted to the original motion. Senator Crippen felt that with reference to swimming, even though you may be quite a ways away from the landowner, those are the waters he would submit are the ones the landowners are very concerned about because they don't want people swimming and doing other recreational activities other than perhaps fishing. That is fine, and he wants to keep it just that way. This is the lowest classification of water now because there isn't any lower. Senator Galt stated we are talking about non-navigable waters, but we have left overnight camping allowed on the navigable waters. Senator Crippen suggested we keep it to the non-navigable streams. He stated we have agreed upon overnight camping. Senator Crippen feels on the facts of the Curran and Hildreth cases, they are not talking about somebody that was denied his right to swim, they were talking about people floating and fishing. He thinks for a non-navigable stream, it should be restricted. Hunting, swimming, and hiking should be excluded. Mr. Waterman stated with reference to hunting, last time the subcommittee met, there was a direction placed in the statement of intent that referred to non-big game hunting on the smaller streams. He

stated the proposal we have before us and the reason we are sponsoring this particular language is because of the indication we have in Curran and what Curran said approvingly about this. In reference to waters, he referred to pages 9 - 13. Senator Crippen stated the supreme court exceeded its bounds. It was legislating. It went beyond where it should have gone. He will not accept that from the court. If we did, he questioned why the legislature would be here. He wants to say you can write all the decisions you want, but we will come back and write our laws and you can interpret them. Hiking is a trespass, because on those small streams, the landowner owns not to the low water mark but to the center of the stream, and you have to be restrictive. Senator Galt stated on line 4, page 6, we are talking of non-navigable waters. Mr. Petesch pointed out the things listed from page 5, line 15, through subparagraph (h) on page 6 cannot currently be done without permission of the landowner. We haven't adopted anything on the non-navigable streams yet. Senator Crippen stated we are to some extent making a concession on fishing. He believes that is a large concession. Senator Galt commented that the public, outside of the use of the surface water, has no right on non-navigable streams.

As a substitute motion, Senator Galt moved that we insert a new paragraph stating the right of the public to make recreational use of non-navigable waters does not include, without permission of the landowner, overnight camping or any use other than use of the surface water. He asked if they could accept the fact that according to the state law, the landowner owns to the middle of the stream, and according to the decisions, the people own the waters, so give them the waters and keep the land. Senator Crippen agreed. Senator Yellowtail stated the court was pretty clear about the beds and banks. The motion failed with Senators Crippen and Galt voting in favor and Senators Towe and Yellowtail voting in opposition.

The subcommittee then reverted to Senator Towe's motion. Senator Towe withdrew his motion and suggested the subcommittee move on to another subject. He suggested they go to section 3, page 7, dealing with portage. He suggested subparagraph (1) is just general language and doesn't say anything one way or the other as it is just restating the decision. He did not see any problem with subparagraph (2). Senator Crippen suggested inserting the word "artificial" on line 15. Senator Towe suggested the word "artificial" should also be

Senate Judiciary Subcommittee  
Stream Access Meeting Minutes  
March 20, 1985  
Page 13

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. C  
DATE 032785  
BILL NO. HB 265

inserted on page 8, line 1. Senator Crippen stated we have defined barriers and may not need to put "artificial" in there.

Senator Towe responded he will go with putting it in on page 8, line 1, but suggested we leave it alone on page 7, line 15. Senator Crippen felt we were then by implication including all barriers. Senator Towe moved that the words "an artificial" be inserted on page 8, line 1. He stated that if you are going to build a barrier some compensation is going to have to be taken in terms of route.

Senator Crippen stated it was the problem in the Hildreth case that caused all of this to begin with. A landowner should have the right to put a barrier up for good cause, but if he does, it should be incumbent upon him to provide a method of portage around it. We are talking about artificial barriers.

Mr. Petesch pointed out that other proposed amendments were suggested by the Stillwater Protection Association which were adding the word "artificial" in the two places suggested. Western Environmental Trade Association also suggested removing the supervisors entirely. They would also strike on page 8, subsections (b), (c), and (e) in their entirety. With what the subcommittee has done so far, it needs to strike on page 8 the last sentence of subparagraph (e), and if it strikes subparagraphs (b), (c), and (e), there are suggestions on subparagraph (c) to strike "reasonable and safe" and on subparagraph (d) to strike "of the most appropriate" and insert new language. On page 8, as an alternative, it is suggested that they just strike "natural" and put in "existing artificial." Mr. Petesch went on to say that Mr. Waterman has a suggestion at the end of subparagraph (e) which is No. 5 on his amendments. Senator Crippen felt that was a good amendment. Mr. Petesch stated he didn't think it added anything to the bill because artificial barriers are the only barriers you are addressing right now. Senator Towe agreed with Mr. Petesch, but he thinks there is some merit in re-enforcing that we are talking about artificial barriers. His rationale for not putting it in the other one is we're just picking up the supreme court language. Senator Crippen stated he would go along with that if they would add the caveat of "nothing contains." The motion carried with Senators Crippen and Towe voting in favor, Senator Yellowtail voting in opposition, and Senator Galt not voting.

Senator Towe moved that the following language be added to the end of page 1, following line 24: "Nothing contained in this act addresses the issue of natural barriers or portage around said barriers. Nothing contained in this act makes it lawful or unlawful." Mr. Waterman suggested putting that language at the end of section 3 as a new subparagraph (4) rather than in the definition. You are speaking in terms of substantive matters at that point. Senator Crippen agreed. Senator Towe amended his motion to state that it would follow line 23 on page 9 as a new subparagraph (4).

Senator Crippen commented that he could see the need for lawful, but he did not see the need for unlawful. As a substitute motion, Senator Crippen moved that we strike the phrase "or unlawful" from the Senator Towe's motion. Mr. Petesch suggested it should say "portage around said barriers lawful or unlawful." Senator Crippen stated it should say "Nothing in this act will be construed to make portage around natural barriers lawful." Senator Towe stated the supreme court may well come down and say it is lawful. Senator Crippen moved as a substitute motion to strike "unlawful" in the suggested motion by Senator Towe. The motion failed with Senators Crippen and Galt voting in favor and Senators Towe and Yellowtail voting in opposition.

Chairman Yellowtail then reverted to the main motion with Senator Towe's amended language. Senator Yellowtail stated as a practical matter, it is unwise for the legislature to outlaw portage around any manner of barrier. That is by implication what we do by doing this. The motion failed with Senator Towe voting in favor and Senators Crippen, Galt and Yellowtail voting in opposition. Senator Towe moved that we insert on page 9, following line 23, a new subparagraph (4) which would read "Nothing contained in this act addresses the issue of natural barriers or portage around said barriers." Senator Crippen replied that is a neutral statement. We took natural barriers out. He would like to leave it as the intent of the committee that we reject anything as far as the Curran and Hildreth cases pertaining to natural barriers so far as we want them to apply to artificial barriers. If we take out natural barriers, we should have a pretty specific statement of law that there is no right to go around natural barriers. Senator Towe stated it was his intent to exclude that issue from the bill, that is too volatile an issue to get into in this bill. Senator Crippen asked if we were really accomplishing anything then. We are accomplishing

something as far as artificial barriers. We may end up with a new set of laws foisted upon us by the supreme court regarding natural barriers. Senator Towe thinks that is too hot an issue. He thinks if we put in portage around natural barriers, we are not likely to get the bill passed through the Senate. If we take all references to barriers out, he thinks that is more important. No matter what we decide, he is convinced it will go back to the court. Let's not give the court any hint of how the legislature feels. The motion failed with Senator Towe voting in favor and Senators Crippen, Galt, and Yellowtail voting in opposition.

Senator Towe suggested the subcommittee then consider Mr. Waterman's amendment No. 5 on page 8. Mr. Waterman stated for consistency, the subcommittee should strike the last line on page 8, which entails lines 21-22 of the bill. Senator Yellowtail asked that they clarify what such costs might be. Mr. Petesch stated the costs would be where you have requested the department and the supervisors to establish a specific route, there could be some improvements, and the bill further provides the landowner has to bear those costs. The department then provides signs.

Senator Galt asked if we were talking about the supervisors' getting in on this decision. Mr. Petesch stated yes, at this point. Ron Jackson, President, Montana Association of Conservation Districts, stated the supervisors around the state do not feel this is a conservation issue and do not feel they should be involved in this bill. They would recommend the definition of supervisors be removed from the bill and where the name of supervisor is, add the department's name in its place. As long as the arbitration is still there, there is protection of the landowner that is sufficient. Senator Crippen stated it's not that the department of Fish, Wildlife and Parks could do a good job, it is funding it. He asked about the county commissioners. Mr. Jackson asked why you needed anybody other than the landowner and the person from the Fish, Wildlife and Parks. Senator Crippen stated the final decision is made by the supervisors. Mr. Jackson stated as he understands it, it is a decision made by the supervisors, the landowner, and a person from the Department of Fish, Wildlife and Parks. Mr. Petesch stated the supervisor makes the decision. If someone objects, the three-member panel comes in. Senator Galt asked if his association has taken a stand on this bill one way or the other. Mr. Jackson responded, no. Senator Towe moved that

Senate Judiciary Subcommittee  
Stream Access Meeting Minutes  
March 20, 1985  
Page 16

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. C

DATE 032785

BILL NO. HB 265

the subcommittee adopt Mr. Waterman's amendment No. 5 and strike the last line on page 8 encompassing lines 20-22 of the bill. Director Flynn stated the discussion that centered around the portage issue and eventually got to the conservation district supervisors was the discussion that he personally feels stimulated this whole process, which turned a portage issue into a navigability issue. That problem and that question still exist on that river. It was the concern of the department that we needed to set up some mechanism for a decision-making process where a decision could be arrived at that could be accepted and not have to get into the supreme court. That mechanism is what we see before us in section 3 as it was presented. That did not seem to be acceptable. The board of county supervisors has a very fine and deserved reputation as being fair, and that was the reason that body was suggested. It has also been pointed out there was a concern some supervisors may not want to accept that responsibility, and that is why the county commissioners are in there. The amendment would be acceptable. Mr. Petesch stated he thinks the other thing this amendment does is if you were putting the portage route on another person's land, you were taking. Therefore, you must take by eminent domain. Mr. Jackson stated the conservation districts do have a good rapport with the landowners, and this is what they are trying to keep. Senator Crippen stated if you are that concerned and don't want to get involved, you just refuse. Mr. Jackson thinks in most cases that is what will happen, so why should they not just take them out completely. He thinks Director Flynn is just looking for a scape goat. Senator Crippen stated he doesn't think he would do that. Mr. Jackson stated this is not part of their charge. Senator Towe thinks they do have a good reputation for not only representing landowners, but also persons concerned about conservation measures. That is the kind of perspective the bill wanted. Senator Crippen commented the supervisors came in and asked for money, now we are going to give them a responsibility and a way out. The motion carried unanimously.

Mr. Petesch pointed out one suggestion was to delete subparagraphs (b) and (c) and take supervisors out of the bill. Senator Crippen moved on page 8, line 12, following "determine", the following language be inserted, "to determine if a portage route is necessary." Mike Micone, Western Environmental Trade Association, stated he wants to strike the arbitration procedure and inasmuch as they had recommended the deletion of natural barriers. The bill provides the landowner has the right to create an artificial barrier and when he does, he has to

Senate Judiciary Subcommittee  
Stream Access Meeting Minutes  
March 20, 1985  
Page 17

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. C  
DATE 032785  
BILL NO. HB 265

provide portage. They don't argue with that. But if the landowner can build a barrier and the public can portage around it, there is no need for an arbitration process. Senator Towe asked why there would be no need; obviously there is a need if there is a right to portage. Mr. Micone responded the public has the right to portage around barriers. If they have a right to portage, there is no need for a recreationist to go to a board of supervisors to request where they are going to portage. Senator Towe asked who will determine what is the least intrusive manner. Mr. Micone responded if the landowner does not determine that, the recreationist will. Senator Crippen suggested you may be putting the landowner in a little bit of a risk. He doesn't know if he were a landowner whether he would want the public to determine the portage route. Mr. Micone responded what he is saying is put the responsibility on the landowner to provide a gate or ladder for the recreationist to cross that barrier.

Mr. Micone stated he doesn't think writing a piece of legislation will resolve the situations that are experienced with the landowner that you mentioned. If the department cannot resolve that with a supreme court decision, he doubts the legislature can resolve that. We are talking about a piece of legislation that affects every landowner and every recreationist in the state of Montana. He believes a landowner putting in a barrier will provide a means for the recreationist to get around it. Senator Crippen suggested taking the situation where they have to portage around the barrier that was placed there by a party. He asked who will make the determination exactly what that portage route will be so that the compensation will adequately be given to the landowner. Mr. Micone replied he doesn't believe so, because he believes if the state of Montana wanted to put some type of barrier on his land, it will have to pay for it and should have to go through a condemnation procedure. Senator Crippen replied they may already have in fact taken an easement, put the barrier in, but didn't provide any way to get around it. Mr. Micone stated it would be short sighted for the state to do that, but it should be worked out with the landowner. Everything doesn't have to be put in a bill every step of the way. Senator Towe replied he felt that was correct. The question might be whether one is necessary. He asked what do we do about the reasonable and safe route of several different routes; if a portage route is necessary and if so a reasonable and safe portage route. Mr. Petesch pointed out

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. C

DATE 032785

BILL NO. HB 265

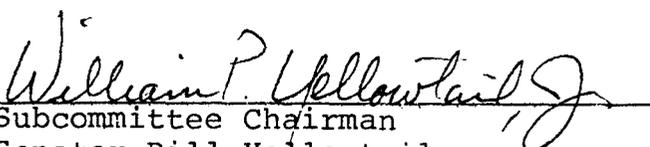
Senate Judiciary Subcommittee  
Stream Access Meeting Minutes  
March 20, 1985  
Page 18

Senator Towe's concern is addressed in subparagraph (d). He also stated there is a companion amendment to subparagraph (d).

Mr. Strobe stated it is his view the whole elaborate procedure for this arbitration would be unconstitutional. Private property shall not be taken or damaged for public use without just compensation for the full extent of the loss. Just compensation shall include necessary expenses of litigation. Mr. Waterman stated with reference to this specific language proposed which would require not only a finding as to the location of the reasonable route, but also whether or not one is needed, they did not put that former language in because of the concerns of the supervisors of fact-finding. Mr. Morris thinks this whole system is geared to something you may find troublesome, and that is arbitration. Senator Crippen withdrew his motion.

In view of the lateness of the hour, the subcommittee adjourned its meeting and agreed to reconvene on Monday at 7:00 p.m.

There being no further business to come before the subcommittee, the meeting was adjourned at 11:08 p.m.

  
Subcommittee Chairman  
Senator Bill Yellowtail

ROLL CALL

EXHIBIT NO. C-1

DATE 032785

SENATE JUDICIARY SUB COMMITTEE  
ON STREAM ACCESS

BILL NO. HB 265

49th LEGISLATIVE SESSION -- 1985

Date 032085

| NAME                              | PRESENT | ABSENT | EXCUSED |
|-----------------------------------|---------|--------|---------|
| Senator Bruce Crippen             | X       |        |         |
| Senator Jack Galt                 | X       |        |         |
| Senator Tom Towe                  | X       |        |         |
| Senator Bill Yellowtail, Chairman | X       |        |         |
|                                   |         |        |         |
|                                   |         |        |         |
|                                   |         |        |         |
|                                   |         |        |         |
|                                   |         |        |         |
|                                   |         |        |         |
|                                   |         |        |         |
|                                   |         |        |         |
|                                   |         |        |         |
|                                   |         |        |         |
|                                   |         |        |         |

Meeting #2

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. C-2

DATE 032785

BILL NO. HB 265

HB 0265/02

HB 0265/02

49th Legislature

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 51, 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 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 apportionment  
5 of the federal navigability test for state streambed  
6 ownership;

7 (c) flow through public lands, while within the  
8 boundaries of bush lands;

9 (d) are or have been capable of supporting the  
10 following commercial activity activities: egg floating,  
11 transportation of furs and skins, building, commercial,  
12 guiding using multiperson hirecraft, public transportation,  
13 or the transportation of merchandise, as these activities  
14 have been defined by published judicial opinion as of the  
15 effective date of this act; or

16 (e) are or have been capable of supporting commercial  
17 activity within the meaning of the federal navigability  
18 test;

19 (2) "Class II waters" means all surface waters that  
20 are not class I waters.

21 (2) (1) "COMMISSION" MEANS THE FISH AND GAME COMMISSION  
22 PROVIDED FOR IN 2-15-3402.

23 (3) (1) (2) "Department" means the department of fish,  
24 wildlife, and parks provided for in 2-15-3401.

25 (4) (1) (2) "Diverted away from a natural water body" means

X



SENATE JUDICIARY COMMITTEE

EXHIBIT NO. C-2

DATE 032785

BILL NO. HB 265

HB 0265/02

HB 0265/02

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 <sup>(5)</sup>(6) "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 <sup>deprivation of the soil of substantially all</sup>  
 14 ~~the presence of vegetation or the presence of agricultural crops~~ <sup>terrestrial</sup>  
 15 ~~vegetation or lack of agricultural crops~~ <sup>with a FLOOD</sup>

16 PLAIN ADJACENT TO SURFACE WATERS IS NOT CONSIDERED TO LIE  
 17 WITHIN THE SURFACE WATERS' HIGH-WATER MARKS.

18 (6) (7) (b) "Recreational use" means with respect to  
 19 <sup>(except with respect to any floating habitat buildings)</sup>  
 20 class-1 SURFACE waters: fishing, hunting, swimming,  
 21 in small craft or other flotation devices, boating in  
 22 motorized craft unless otherwise prohibited or regulated by  
 23 law, or craft propelled by oar or paddle, OTHER

24 WATER-RELATED PLEASURE ACTIVITIES, and related unavoidable  
 25 or incidental uses, within the ordinary-high-water-mark-of  
 26 the waters.

27 (b) "Recreational use" means with respect to class-1

1 waters all of the uses set forth in subsection (7) (a) <sup>(a)</sup>  
 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 (7) (b) "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 (8) "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 --

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. C-2

DATE 032785

BILL NO. HB 265

HB 0265/02

HB 0265/02

1 limitations -- exceptions. (1) Except as provided in  
 2 subsection (3) SUBSECTIONS (2) THROUGH (4), all class-1  
 3 SURFACE waters that are capable of recreational use as  
 4 defined in section 17(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-1  
 9 waters that are capable of recreational use as defined in  
 10 section 17(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 17(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 <sup>private</sup> impoundment fed by an intermittently flowing  
 24 natural watercourse; or  
 25 (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-1 WATERS DOES NOT INCLUDE, WITHOUT PERMISSION OF  
 6 THE LANDOWNER:  
 7 (E) OVERNIGHT CAMPING; <sup>any</sup> Within 500 yards of habitable buildings  
 8 (F) THE PLACEMENT OR CREATION OF ANY PERMANENT OR  
 9 SEMIPERMANENT OBJECT, SUCH AS A PERMANENT DUCK BLIND OR BOAT  
 10 MOORAGE; OR  
 11 (G) OTHER ACTIVITIES WHICH ARE NOT PRIMARILY  
 12 WATER-RELATED PLEASURE ACTIVITIES; OR  
 13 (H) USE OF A STRIP AS A RIGHT-OF-WAY FOR ANY PURPOSE OTHER THAN FLOWAGE;  
 14 (3) (1) The right of the public to make recreational use  
 15 of surface waters does not grant any easement or right to  
 16 the public to enter onto or cross private property in order  
 17 to use such waters for recreational purposes.

18 (4) (B) THE COMMISSION SHALL ADOPT RULES PURSUANT TO  
 19 OR THE PROTECTION OF PUBLIC HEALTH, PUBLIC SAFETY,  
 20 RECREATIONAL USE OF SURFACE CLASS-1 AND CLASS-2 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;

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. C-2

DATE 032785

BILL NO. HB 265

Handwritten circled text: "Handwritten" with an arrow pointing to the word "barrier" in the text below.

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) 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 if a portage  
13 route is necessary 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 on 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. REV 5 9

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

SENATE JUDICIARY COMMITTEE

HB 0265/02

EXHIBIT NO. C-2

DATE 032785

BILL NO. HB 265

HB 0265/02

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 ~~white-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

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. C-2

DATE 03 27 85

BILL NO. HB 265

1 effective on passage and approval.

-End-

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

MONTANA STATE SENATE  
JUDICIARY SUBCOMMITTEE ON STREAM ACCESS  
MINUTES OF THE MEETING

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. D

March 25, 1985

DATE 032785

BILL NO. HB 265

The fourth meeting of the Senate Judiciary Subcommittee on Stream Access was called to order at 7:30 p.m. on March 25, 1985, by Subcommittee Chairman Bill Yellowtail in Room 325 of the State Capitol.

ROLL CALL: All subcommittee members were present.

FURTHER CONSIDERATION OF HB 265: Greg Petesch began by stating where the bill presently stood. The bill now only deals with artificial barriers; waters have been classified into two classes: navigable and non-navigable; in the navigable area, any stream flowing through public lands has been eliminated from former Class I; high water mark has been redefined; recreational use has been limited for swimming purposes to within 100 yards of habitable buildings; hiking has been added to recreational uses; using a stream as a right-of-way has been prohibited; and the subcommittee has just gotten into the portage area.

Senator Crippen had suggested the subcommittee have the proponents and opponents come in with their own recommendations pertaining to navigable streams and waters. In response to this Exhibit 1 was submitted to the subcommittee by Conrad Fredricks. Senator Bob Brown addressed the subcommittee and stated during the Judiciary Committee hearing on the bill, in spite of the fact both court cases pertain to problems that arose concerning disagreements over access to streams, the bill as drafted includes access to lakes. The ownership is different around lakes than streams. Chuck Abell, of Whitefish, stated he was surprised the press didn't make it more known this bill includes lakes. He's concerned about the implications there may be in this bill to their rights in front of their property on lakes. He stated Whitefish Lake fluctuates six feet a year. His front yard is the lake. He has a few feet of grass and then the lake. He is willing to share the lake with anybody, but he is not sure he wants to share his front yard. Senator Matt Himsl asked whether the stream access bill referred to lakes. Senators Towe and Galt responded yes. Senator Himsl stated then they are very concerned what happens to the shore line. The beach of Flathead Lake may go down 75 feet. They didn't worry about someone's camping on the beach in the summer, but a good share of the year it is dropped down. The value of lake property is because of the beach. That is what they paid for. Land on the lake is sold by the foot that has beach frontage. He would be up-

set if someone put a duck blind on his beach when the water was down. They fish off the breakwaters, and they have no problem with that if they don't abuse it. Senator Hims1 hoped the subcommittee could eliminate the lake shores from the stream access bill.

Ron Waterman addressed the subcommittee and stated a general overview with respect to what the supreme court said is the origin of the problem. The supreme court in its language gave the public the right to use all of the waters in the state and the adjacent lands up to the high water mark. We are brought to the language by the court. In light of Senator Brown's concern, they agree to exclude lakes from the consideration of HB 265 and say nothing in this act controls one way or another the public's right to use the waters, beds and banks of natural lakes. They will allow litigation to determine that. It was his understanding this subcommittee did not have a majority concensus to proceed in that fashion. Senator Crippen said you say there is a difference between the lake front property and stream banks. Say you have a series of cabins or residences that have a streambed as their front yard. He was interested in knowing his rationale why you can take out lakes and related that to cabin sites and home sites, and yet leave in similar property with people with smaller concerns and yet make a distinction with those and not invite a lawsuit. Mr. Waterman replied he is not suggesting by taking out lakes we do not avoid another lawsuit. He is suggesting from a practical point of view lakes and lake access are different than stream access. There is little use on most streams. On our lakes, the Department of Fish, Wildlife and Parks over the years has had a program which has been funded and has acquired a great deal of access to assure the public has a right to the waters. He will submit that the language of the supreme court would suggest lakes are public waters. The question is whether there is a real problem with respect to the lakes and if we can avoid for a period of time the lake issue and pass a piece of legislation which addresses only stream access. Senator Crippen replied if we did that, and we limited the scope of this bill to just streams and not lakes, and if we made some definitions and then down the line some group of individuals brings a lawsuit pertaining to lakes, wouldn't the court be able to look at what the legislature did with respect to very similar property. They could then say, the legislature has addressed that, and this situation regarding lakes is no different. If the legislature has a rule in relation to those situations, it would be easy for them to legislate and say the legislature really intended to deal with lakes. Mr. Waterman replied if we leave the bill silent as to lakes, the supreme court might say you intended to

deal with lakes as well. His suggestion is to be clear the purpose of the bill is neutral in respect to the lake issue. Would what the body does be seen as a legislative direction?

Senator Towe stated he is inclined to accept what Mr. Waterman says and would like to propose that but would like to hear Mr. Abell's comment. He asked about lakes. He asked if he would consider the public has any access rights at all to the beach below the high water mark. Mr. Abell replied when he purchased the property it was indicated his rights to the property followed the water line. Senator Towe stated that is ancient history. Mr. Abell said once it becomes dry land, it comes under the jurisdiction of himself as a landowner. Senator Towe commented that he sympathized with him, and he thought most people would accept that. But realistically, we will probably have to treat it like ocean property, and while you have very expensive property, it is public property. Mr. Abell questioned how Washington would do it. Senator Towe stated we might be able to address it on a lake-by-lake process, but like Mr. Waterman says, we should probably leave lakes out for now.

Senator Crippen asked Mr. Abell, assuming you own that same amount of frontage on a river, would you feel any different than you do now with your lake front property on Whitefish lake? Mr. Abell responded we have already addressed that question many times. In front of his house, he would feel strongly about it. But on the east shore where he owns property there is access, and the public uses it all of the time, although they have not put it in the paper they have not put it in the paper they are welcome to use it. They have some concern about it, but they do not restrict public access to that area. Senator Crippen said let's assume your home is on that river. Mr. Abell responded if his home faced the river, he would be concerned about public access to that, although he would allow public access to an undeveloped piece of land along the river just as he does to his undeveloped land on the lake. Senator Towe questioned what kind of use he saw as acceptable to any of the lake front below the high water mark. Senator Himsl responded a stream has a bed and a bank and a lake has beach. Virtually every foot along the lake is owned by someone. Water isn't flowing by, and nobody is going up and down it. As far as deeds are concerned, they go to the low water mark. He has no objection to someone's boating up to the beach. He has problems with someone's having the right to occupy that beach.

Senator Crippen stated the constitution provides all surface, underground, flood, and atmospheric waters within the state are the property of the people of the state. Senator Himsl replied that would be taking without due process. He asked if it were reasonable, sensible, and practical to do that. Senator Towe responded that is what Senator Galt has been saying on the rivers. Senator Himsl replied they cannot take that unless it is reasonable and proper to use that. Senator Towe felt we should address the problem. Senator Towe moved the bill be amended as follows:

1. Page 5, line 3.

Following: "MARK"

Insert: ", see, however, section 7 as it relates to lakes"

2. Page 11.

Following: line 24

Insert: "NEW SECTION. Section 7. Lakes. Nothing contained in this act addresses the issue of the use of surface waters, as defined herein, on lakes."

Senator Galt contended you cannot separate some waters from other waters. We have the same problem on streams as on lakes. If we are dealing with the waters of the state of Montana, let's deal with all of them. Senator Towe replied it's the exact same thing he proposed for natural barriers for the same reason. There are some things we will not be able to solve in this piece of legislation or in this legislative session. He thinks if we leave lakes in, we may not have a bill. He thinks Senators Brown and Himsl have raised some very bonafide points that lakes and the consideration of ownership thereon are a little different than streams. There are some similarities, and he would guess that the supreme court eventually will require the same thing on lakes as it is requiring on streams. But until it does, prudence says we should stay out of the issue. Senator Crippen pointed out that is why he asked Mr. Abell what his thoughts would be if he owned property on a lake compared to owning property on a river. He expressed they would be the same. He doesn't see how we can say as a legislative body that we will sacrifice those people on streams and say there is a difference between them and those on a lake. That is not the way this legislative body should go. If we cannot address the problem of lake ownership, he would object to that, because we are leaving them high and dry and leaving them open to a lawsuit so they will have to come back in.

Senator Yellowtail pointed out that at the last meeting Senator Crippen was adamant about the fact we had to focus on the facts of the case. He asked how he related that issue with lakes. Senator Crippen replied then we should deal only with barriers. In one case we should talk about artificial barriers and in the other solely with rapids. Unfortunately, the supreme court mentioned all surface waters. Conrad Fredericks stated there has been a considerable amount of wrestling with the lake problem. His approach would be to treat the lake with the same restrictions as the stream that flows in and out of it. He suggested changing the definition of navigable waters and using the current statutory definition of navigable rivers and streams, but substituting the federal test of navigability for navigability. Using this test, there are approximately 1,900 streams in the state of Montana which have been identified by the Corps of Engineers by that test, so there would be generally little non-navigable water in the state of Montana. Class A would be all non-navigable. Class B are all navigable waters except those in Class C, including lakes. Class C waters are specifically named rivers. Senator Crippen asked from what main stream of what river did the Flathead derive its waters. Mr. Fredericks replied the Flathead River. Some other rivers like the Swan also flow into it. Senator Crippen asked if Flathead Lake would fall into Class C waters. Mr. Fredericks responded yes. The lake would be treated the same as the river. Senator Towe asked about fishing. Mr. Fredericks responded yes, definitely. Senator Crippen stated they could put up their boat, stop, fish, and camp for the day. Mr. Fredericks replied yes, where the use is temporarily necessary to accomplish the permitted recreational use of the waters or for purposes of safety.

Phil Strobe stated he would like to suggest to the committee that the concerns of Senators Brown and Himsl are addressed in the Curran opinion and were not overruled in the Hildreth decision. The Curran decision cited the 1895 statute that says the landowner owns the property down to the low water mark. In the Hildreth decision, the court quoted the Curran decision with approval. If you adopt 1895 statute, you would take care of the concerns of the lake people and his people. Then all of these things where you are trying to accommodate these recreational purposes seem to violate the constitutional right of just compensation. If this subcommittee wants to bring out any kind of bill at all, it should affirm the language of the Curran decision rather than trying to override it. He referred to page 4, line 25, through page 5, line 3, of the decision,

except for the exclusion of the beds and the banks provided for in Section 70-16-201, MCA. Senator Towe did not feel that addressed the issue. That begs the question, because the supreme court very clearly stated in both Curran and Hildreth that they are speaking to the ownership. They didn't care who owns below the high water mark. They are saying the public has the right to use it to the high water mark. Mr. Strope responded the language is always couched in the public's right to use the water, irrespective of the beds and the banks. What he is saying is the person who pays the taxes can do whatever.

Senator Crippen asked how he would handle the comments that were made in those cases about portage around barriers. Mr. Strope stated it would be his view that the committee should handle portage and do nothing more than the court said. It said there was a right to portage around barriers, but it did not say they could do it free. If you want to reaffirm the concepts of creating a portage route, you should reaffirm the other statute by saying you must pay for it. You should pay for the taking. Senator Crippen replied taking that theory, he can see it if we are dealing with natural barriers. If you had a natural barrier, there would be a taking because that barrier was there through no fault of the landowner. Then the landowner should be compensated. Where you have a stream and an owner has a fence across the stream, that property owner is essentially restricting the right of the public to recreate on the surface of the water, and as a compromise, the landowner should be required to provide portage as close to the high water mark as possible. If that can't be done and you extend it beyond that, there would be some compensation. Mr. Strope replied there is no question in the case of the natural barrier that if it is the desire of the public to acquire a portage route, then they can acquire it by purchase or by eminent domain and pay just compensation. In the case of the Hildreth bridge, there isn't any doubt that the Hildreth bridge is not the subject of the lawsuit. What was the subject is Mr. Hildreth's actions on the water. The bridge is above the water. If it is the desire of society to take it out, they are going to have to condemn it out. He put it there in good faith. You had to buy that access if they were using it. Senator Crippen asked about future impediments. Mr. Strope responded that would be your function as a legislature to say. Senator Towe stated it occurs that is a pretty good indication how streams and rivers are different than lakes. You wouldn't have various portage problems, different uses, different high water marks, more land ownership devoted to homes and home use. He thinks the whole thing is different, and we should stay out of it right now. Senator Galt felt this was a political ploy.

If this bill gets to the Senate floor, that will buy a few senators from western Montana. It should be rejected out of hand. Water is water. The motion failed with Senator Towe and Yellowtail voting in favor and Senators Crippen and Galt voting in opposition.

Senator Towe commented that navigable and non-navigable waters are defined. He asked what a lake was. Senator Galt replied either one or the other. Senator Towe stated it doesn't appear lakes fit into navigable or non-navigable. His suggestion is a third alternative: lakes. Senator Galt stated lakes have huge log floats. There is no doubt Flathead lake is a navigable body of water. Senator Towe suggested making a third category. Then we can say what does or doesn't apply to it. Senator Yellowtail responded we have two classifications now to which we cannot assign any usefulness. Senator Towe moved that HB 265 be amended as follows:

1. Page 1, line 25.  
Following: "waters"  
Insert: ", other than lakes,"

2. Page 2, line 21.  
Following: "waters"  
Insert: ", except lakes"

3. Page 3.  
Following: line 9  
Insert: "(7) "Lake or lakes" means a body of water where the surface water is retained either by natural or artificial means and the natural flow of water is substantially impeded."  
Renumber: subsequent subsections

Mr. Fredericks asked about beaver dams. There is a definition of lakes in the statutes, Section 75-7-202, MCA. Senator Towe replied the only thing that is helpful is it refers to is as standing water. We have talked about non-navigable and navigable waters, and this would be a third category. Then the impact of that is that when we get into recreational use, use is permitted in section 2 and it says the right of the public to make recreational use of surface waters does not include without permission of the landowner a bench of prohibition on all three classes. Senator Crippen replied if we talk about that, he would say lakes would have a highly restricted use. He asked that he define what he would permit on it. Senator Towe responded all terrain vehicles, big game

hunting, overnight camping within 500 yards of an occupied dwelling, permanent and semi-permanent objects, other activities which are not water related, and the use of the streambed when it is not flowing. Senator Towe suggested the following amendment:

1. Page 6.

Following: line 19

Insert: "(4) The right of the public to make recreational use of lakes does not include, without permission of the landowner:

- (a) any use of the land below the high water mark; or
- (b) any use of the surface of the water within 100 yards of an occupied dwelling."

Renumber: subsequent subsections

Senator Galt stated that would apply to all waters. Senator Crippen asked what he was doing with lakes that make them more restrictive than navigable waters. Would he allow fishing, hunting, swimming, and biking? Senator Towe replied yes, except within 100 yards of any occupied dwelling. Dick Josephson stated he would suggest that everyone understands the concept of historically boatable waters. If you get away much from that, you will end up in a morass. You could apply that standard initially. He is concerned about overnight camping in our public watershed. At this late night, we should not try to reinvent the wheel. Chairman Yellowtail stated this is an executive session, but not a public hearing. We must complete our work tonight. Mr. Waterman stated he has no problem with the proposal. Mr. Strobe responded as recreationists, they have no problem with that. The constitution says all surface, underground, and flood waters are subject to the public, and it is irrational to break them out. The lake owners have the same rights as the stream owners. Bill Morris stated they feel sympathy for the lake owners, but it wouldn't make any difference.

Senator Towe reminded the subcommittee it had a motion before it. Senator Crippen asked if it were Senator Towe's intention to redefine the uses of navigable streams and rivers to conform to the uses you have now suggested for lakes. Senator Towe stated, it was not his intention to add anything further, but he might support something that might be proposed. Senator Crippen asked if it were his intention to leave the uses as we have them in here now for navigable streams. Senator Towe stated it was always his hope we would be able to prohibit certain activities on non-navigable waters. He had proposed to prohibit overnight camping, swimming, and hiking. Senator Crippen asked if he would intend to have the same restrictions on non-

Senate Judiciary Subcommittee  
Stream Access Meeting Minutes  
March 25, 1985  
Page 9

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. D  
DATE 032785  
BILL NO. HB 265

navigable streams as on lakes. Senator Towe responded he is not proposing to prohibit the uses within 100 yards of occupied dwellings on navigable streams. The motion failed with Senators Towe and Yellowtail voting in favor and Senators Crippen and Galt voting in opposition.

Senator Crippen stated it should be noted that to make a distinction between the two really then is setting up a different class and an arbitrary one where he feels there is not any rational reason for doing that. He would submit he would feel the same on a navigable river as a person would on a lake. For us to do any different is repugnant to him. Senator Yellowtail asked if he meant to say he read Hildreth as meaning lakes as well as streams. Senator Crippen replied you are going to go back to the facts of the case. We have heard about the angling statute.

Mr. Petesch stated on navigable rivers or streams, as used at that time, meaning navigability for title, the public has the right on those waters to fish and go upon the banks to fish between the ordinary high water flow lines or within the meandering lines. Along the Missouri River, you can angle between the high water marks or from the top of a vertical bank. State ownership is the result of the federal test for navigability. Senator Crippen stated you were talking about navigable from the basis of title not use. Senator Galt stated if the supreme court says it is navigable, the stream bed goes back to the state. Senator Crippen said starting there, we obviously have one class. Mr. Petesch responded navigable for federal title purposes. Senator Yellowtail stated it is consistent. Senator Crippen asked if the definition of subsection (c) on page 2 would cover the federal test. Mr. Petesch responded no; it is much broader. The federal test is essentially log floating. The question is are we talking about commercial activity for the federal test. Senator Crippen said let's assume we cross subsection (c) out entirely. Now we have one classification everyone would agree on, and the angling statute applies to that. Then we could put in fishing, because they right now have the right to go up to the high water mark. If we did put in fishing, we would have to look at some of the other areas and see if we want to include them. Based on your definition, there should not be that many rivers on the title test. Mr. Petesch replied he is not sure how many streams are capable of supporting the test. Senator Crippen stated that would handle the problem on the Yellowstone River. The angling statute does not apply to hunting.

Senator Towe suggested the subcommittee use the words occupied dwelling instead of habitable property. He felt it should be used for human dwelling once a year. He would propose we prohibit all uses except fishing, floating, and boating within 100 yards of such an occupied dwelling. He would put that in section (I) on page 6, following line 19. Senator Towe suggested the following amendment:

Page 6.

Following: line 19

Insert: "(I) any use other than fishing, floating, or boating within 100 yards of an occupied dwelling."

Mr. Petesch suggested that might be put on page 3 by defining recreational use. Senator Crippen stated on any non-navigable stream, he will resist the right to do anything, because he does not think that is what the Hildreth case said. He will not allow that. Senator Towe replied that was not the intent of his suggestion. It is to make the navigable water use and lake water use the same. Senator Crippen stated he would say as we defined non-navigable, that would be all rivers and streams which are not navigable waters, and he supposes the angling statutes don't apply on any non-navigable lakes; therefore, he doesn't think the Curran or Hildreth cases really apply to those in his opinion, and none of this should be allowed without consent of the landowner. Senator Towe suggested we leave that issue out of it. Instead of making it a new subsection (I), let's make it a new subsection (4), which is not covered by the introductory language. Senator Towe suggested it be new subsection (3), which would say for navigable waters and for lakes, all uses, including all recreational uses, except fishing, floating, and boating within 100 yards of any occupied dwelling, are prohibited. Senator Crippen asked how he would define navigable. Senator Towe replied the same way it is defined in the bill. Senator Crippen asked if that were excluding subparagraph (c). Senator Towe responded no, because that is the definition of federal navigability. Mr. Petesch stated he is not sure everything in subparagraph (c) has been held to be federally navigable for title test but seems to apply to navigable for commerce. Senator Crippen stated he wouldn't allow any recreational use on non-navigable waters without the consent of the landowner. Senator Yellowtail also stated he couldn't agree.

Senator Towe asked if he wanted to declare an impasse and dissolve the subcommittee. Senator Crippen replied maybe

that would be the way to go about doing it. He stated he would not go along with those things that really were not allowed by the angling statute or by any other law. He doesn't think either case went to that point. He thinks we can easily eliminate non-navigable streams. He stated if you are willing to work on this bill, you will have to lay that issue aside, because we have an impasse. We should see if there are some areas we can work on. Senator Galt stated let's decide what is allowed or not allowed on the non-navigable waters. On non-navigable waters, there is no use outside floating on the water. Senator Towe asked if Senator Crippen were willing to allow floating. Senator Crippen asked if they can't float, would we be allowing them to portage. Senator Towe thinks you should say "fishing."

Senator Galt stated the supreme court stated the waters belong to the state of Montana. Mr. Fredericks said Senator Crippen wants a definition limited to navigability for title purposes. By changing the definition that was suggested in those amendments so it is clear, it is navigable for title and not navigable for commerce, and subsection (d) seems to apply. Senator Towe asked if there were a difference. He suggested one thing we might be able to do is to agree on those issues we disagree on and let the Judiciary Committee vote on each of them separately. Senator Crippen stated that would be inherent in the subcommittee role. Chairman Yellowtail stated we would agree at least to alternatives and then present them to the whole committee, or if we can reach some agreement here to some amendment, that would be presented to the whole committee. Senator Crippen replied he had no problem submitting alternative approaches to the committee. Senator Towe stated he would suggest one of the alternatives we would present to the committee is the banning of all uses on non-navigable waters. Another would be the definition of lakes and prohibiting all uses within 100 yards of occupied dwellings. A third would be barriers stating "Nothing contained herein addresses the issue of portage around natural barriers." The question for the Judiciary Committee would be the second sentence stating "Nothing contained in this act makes portage around natural barriers lawful or unlawful." Senator Towe moved HB 265 be amended as follows:

Page 10.

Following: line 7

Insert: "Nothing contained in this act addresses the issue of natural barriers or portage around said barriers. Nothing contained in this act makes portage around natural barriers lawful or unlawful."

Senator Galt replied his concern is it implicitly implies portage is a viable thing on streams. Personally, he thinks you need compensation. You need due process for condemnation or taking of private property. Senator Yellowtail stated it is essentially a disclaimer. He opposed that originally because he hoped we would be reasonable and hoped we would get natural barriers covered. Senator Crippen stated we have two different approaches on portage, and they are clear and distinct on that. Senator Towe stated we agreed on artificial barriers. Our bill now only addresses portage around artificial barriers. He wants to make it clear that by not mentioning it, we don't ban it. Senator Crippen stated we are saying that by implication we are allowing it. Senator Crippen asked why we should even mention it. It is already prohibited. Senator Crippen stated if we did that we are still talking about artificial barriers and portage around artificial barriers. What Senator Galt is saying is if we talk about those at all, the portage route should be paid for by the state. Senator Crippen stated he will resist the placing of subsection (4) in there. He agrees with Senator Galt that by placing that language in there, it would be indicative we discussed the issue, while the issue is actually still in doubt and up in the air. By mentioning natural barriers, we have considered it. The motion failed with Senators Towe and Yellowtail voting in favor and Senators Crippen and Galt voting in opposition. Senator Towe suggested that it be a deadlock issue to be given to the committee as a whole.

Senator Crippen stated going on with the portage issue, Mr. Strope has no objection to portage around an artificial barrier as long as it is established compensation is given to the landowner for that portage. Mr. Strope stated it would be their opinion that if public policy were to create an access for recreational purposes, it could create that policy, but the policy would carry with it just compensation. Mr. Strope suggested the following amendment:

Page 7, line 25, through line 4, page 10.

Strike: line 25, page 7, through line 4, page 10, in their entirety

Insert: "Portage routes shall be acquired in the following manner and no other, to-wit:

- (1) by securing the approval of the affected landowner to use a portage route;
- (2) by purchase from the affected landowner of the portage route; or
- (3) by condemning in the court pursuant to the provisions of Article II, section 29, of a portage route."

Mr. Strope went on to say if you did that, you would clearly establish in the law the public policy that society can make a recreational use of property. You would also affirm the right of the property owners who would bear that burden to be paid for it. Senator Towe asked if he were suggesting that if a farmer were to put a fence across the water, we will have to pay for portage around that. Mr. Strope responded any farmer who has a fence in place now has the right to be compensated for it. If you do not enact something there is nothing in another section of the law that prohibits landowners who own property on both sides of the stream from putting up a fence next summer, and next fall it is the desire of the public to take it out. Senator Towe thought the suggestion was a much too restrictive reading of the Curran and Hildreth cases. He didn't think one could interpret that into the cases at all. Senator Crippen stated he is willing to put that as an alternative, but he is not willing to say that once this act is passed the landowner should be compensated unless that fence or barrier was put up because of a state action or local action for some reason or another. We are going to get back to navigable streams, and there is a good argument for saying the public can float down navigable streams. There are barriers there now, and they are legal, and if we provide portage, landowners should be paid for that portage. If they are put up afterwards, then he has a question about it and is not willing to go that far. Senator Galt stated on the non-navigable streams where the owner owns the bank and the bed, he should be able to do whatever he wants to, but he would agree on navigable streams.

Mr. Strope addressed the just compensation issue. It is quite generally accepted that unless the adequate easement is acquired and unless there is a prohibition for the public to build within the corridor for traffic, then they have a right to complain about the airport that was there before they put it up. He asked if that analogy wouldn't apply to this situation. Is there a burden to compensate the property owner who would deliberately put up a fence? Mr. Waterman referred to Section 45-8-111, MCA, defining public nuisance. Senator Towe referred to page 5 of the Hildreth case. With the use of the words "possible limitation of use" and "control of use," you are controlling or limiting the use and he would agree. Mr. Strope stated he finds that argument very reasonable. Mr. Petesch pointed out the supreme court held Judge Shanstrom properly dismissed Hildreth's counterclaim for inverse condemnation. Senator Galt moved the amendment suggested by Mr. Strope. The

motion failed with Senators Crippen and Galt voting in favor, and Senators Towe and Yellowtail voting in opposition. Senator Galt asked that that issue be brought before the committee for its consideration as one of the subcommittees deadlock issues.

Senator Crippen also asked that there should be some discussion of the fact that the landowner has to provide for the portage between the low and the high water marks for any artificial barriers placed subsequent to the enactment of this act, but if it is beyond that, then you flip a coin. As a possible compromise, the landowner be required to provide portage between the low and the high water marks for any future artificial barriers, and if it is beyond the high water mark, then we need to discuss that area.

Senator Towe moved that on page 3, line 22, and on page 6, line 12, we strike the words "habitable building" and insert the words "occupied dwelling." He further proposed the following definition of occupied dwelling: "Occupied dwelling means a building used for human dwelling at least once a year." The motion carried with Senator Crippen voting in opposition.

Senator Towe moved that on page 6, line 7, we insert before the semicolon the words "except by bow, shotgun, and muzzle loader, provided it is not within 100 yads of an occupied dwelling." The motion failed with Senator Towe voting in favor and Senators Crippen, Galt, and Yellowtail voting in opposition.

Senator Crippen referred to page 10 which deals with liability of the landowner. He wants to be sure that language is the same as that Senator Story had in the Senate bill. Mr. Petesch stated it is not the same. Senator Story's bill has "agents" included, which this bill doesn't. Senator Towe moved that the bill be amended as follows:

1. Page 10, line 15.  
Following: "landowner"  
Insert: ", his agent, or his tenant"
2. Page 10, line 17.  
Following: "landowner"  
Insert: ", his agent,"

He explained the only change is putting in "his agent," and he thinks the testimony given by Senator Story pertaining to that use of agent was persuasive. He doesn't think you are making any particular difference. The motion carried unanimously.

Senator Crippen referred to page 11, line 3, section 5, which deals with prescriptive easements. Senator Yellowtail stated SB 424 relates to use of land or water for recreational purposes, while this one is limited to water. Mr. Petesch suggested they look at subparagraph (b). Senator Crippen asked if that were the same. Senator Yellowtail responded it accomplishes the same for your purposes. Senator Crippen asked if they were satisfied. Senator Crippen moved the following amendment:

Page 9, line 16.

Following: "court"

Insert: "within 30 days of the decision"

Mr. Petesch commented that is the same time frame in the bill to appeal the arbitration panel's decision, so it is consistent. The motion carried with Senators Crippen, Towe, and Yellowtail voting in favor and Senator Galt not voting.

Senator Galt moved the adoption of the following amendment:

Page 10, line 21.

Following: "supervisor"

Insert: "or any member of the arbitration panel"

The motion carried unanimously.

Senator Towe moved that a new section entitled "Land Title Unaffected" be inserted on page 11, following line 24. Senator Galt stated you are not giving the title away; you are giving everything else away. The motion carried with Senators Crippen, Towe, and Yellowtail voting in favor and Senator Galt voting in opposition. Senator Galt stated we are taking everything away from the landowner except the title.

Mr. Petesch stated the subcommittee had reserved two questions on the statement of intent, one related to limiting access to private impoundments (certain ones had been granted a license) and the other referred to the distance on hunting limits. Senator Crippen stated that private impoundments is a non-navigable point. Senator Towe stated that is not excluded at the present time. Mr. Petesch stated because of intermittent flow. Senator Towe still thinks that is appropriate and moved the amendment to the statement of intent stating that we are suggesting that without putting it in the statute they address that question by regulation. Senators Crippen and Galt wanted it in the statute. The motion carried unanimously.

Mr. Petesch stated the distance limits on hunting near occupied dwellings had not yet been addressed. Senator Towe moved we ask Mr. Petesch to draft language for the statement of intent which would request that the commission address the question of distance from occupied dwellings for prohibiting hunting if it is addressed at all. The motion carried unanimously.

Mr. Petesch stated when we prohibited uses of streambeds as corridors, the streambed doesn't actually flow. Senator Towe moved the following amendment:

Page 6, line 19.  
Following: "WHEN"  
Strike: "~~IF~~"  
Insert: "water"  
Following: "FLOWING"  
Insert: "therein"

The motion carried unanimously.

Senator Galt asked why hunting was in there when we were talking about water. Senator Crippen moved that we eliminate hunting on navigable streams. Senator Towe state when you eliminate all hunting, there are some rivers in which there are substantial areas between the high water marks in which there is a substantial amount of space available and what you are saying is you can't hunt on those areas even though it might be a quarter mile away from any adjoining landowner. Senator Crippen didn't have any problem with people deer hunting on the islands. He asked who they belong to. If they belong to the state, there is no problem. Senator Towe stated islands crop up above the high water mark. If it belongs to the state or federal government, it is the public's, and then you can hunt on it in any event. The other kind is that which is below the high water mark. It is those areas we are now addressing. He thinks it is a mistake to ban hunting on those areas. Senator Yellowtail pointed out you have effectively eliminated waterfowl hunting on all waters of the state. Senator Crippen responded that is without permission of the landowner. Senator Yellowtail begged to differ. You need to put it elsewhere. By removing hunting from the definition of recreational use, then you have banned all hunting. Senator Crippen moved that on page 3, line 21, you strike the word "hunting" and on page 6, line 7, you strike the words "big game." Then as a matter of courtesy, hunters will get permission. The motion failed with Senators Crippen and Galt voting in favor and Senators Towe and Yellowtail voting in opposition.

Senator Crippen stated the definition of navigable waters may be much broader than we think. He wants this bill as narrowly interpreted as we reasonably can because that will be the only way we can continue our good relationship between the landowner and the recreationist. He would prefer the more restrictive, because that will protect the recreationists from more than opening it up. Senator Galt questioned what subparagraph (G) on page 6 meant. He thinks we had in mind that that would be on non-navigable waters. Senator Yellowtail stated as we stand now, we have defined two classes of waters but have done nothing with them. Senator Towe stated he would add non-navigable waters after activities on line 17. Senator Galt stated that implies they have them on navigable waters. Senator Towe commented that if everything is included in recreational use, that is not needed, then we will have moved that more restrictive concept to non-navigable waters. Senator Galt stated then you open it up to navigable waters. Senator Yellowtail replied it will be hard to itemize every possible use. Senator Crippen stated he would oppose that. Senator Towe still questioned what we meant by subparagraph (G). Senator Yellowtail responded anything not water-related. Senator Crippen asked if that included gather asparagus. Senator Towe suggested we wither strike line 16 and 17 on page 6 or limit it to non-navigable waters. Senator Galt stated he would disagree with that. Senator Towe stated from a technical standpoint, he still did not know what that meant. Senator Galt replied if you put your caveat in about non-navigable waters, it still means the same thing. Senator Towe suggested that subparagraph (G) be deleted. Senator Yellowtail asked if we strike that if it implied we allow those activities without landowner permission. Senator Towe replied we have recreational uses of surface water defined elsewhere in the bill. If we are not going to use the non-navigable category, we should strike it from the bill. Recreational use the way the bill is structured appears to mean something beyond what water-related pleasure activities means. Therefore, we have prohibited some recreational uses with respect to surface waters. Mr. Petesch pointed out recreational uses as defined are water-related things, and the prohibitions are those that are not water-related. He doesn't think there is any redundancy there. Senator Towe stated everything we have defined in recreational use is included in water-related activities. Senator Towe moved that the words "as defined in subsection (8)" be added on page 6, line 17, after the word "activities." Senator Galt stated you put hunting in everywhere with that, and it is not a water-related activity. The motion failed with Senator Towe and Yellowtail voting in favor and Senators Crippen and Galt voting in opposition.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. D

DATE 032785

BILL NO. HB 265

Senate Judiciary Subcommittee  
Stream Access Meeting Minutes  
March 25, 1985  
Page 18

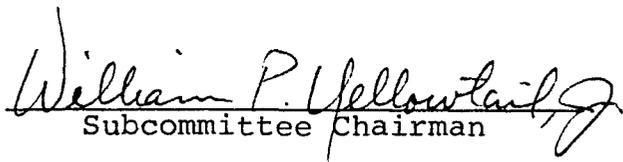
Senator Crippen moved that on page 3, line 25, the words "other water-related" be stricken. The motion failed with Senators Crippen and Galt voting in favor and Senators Towe and Yellowtail voting in opposition.

Senator Crippen asked that hiking and swimming on navigable streams be submitted to the committee as a whole as a discussion topic only. It is allowed in recreational use when talking about navigable streams.

Chairman Yellowtail then stated that the subcommittee would report as follows: First, those items the subcommittee could agree on; second, the cover items on which it could not reach full consensus, third, the one discussion point suggested by Senator Crippen. His concern is that we not carry on at the committee meeting as extensively as we have in the four subcommittee meetings. He would ask that the subcommittee members exercise whatever restraints are within their powers to exercise. Chairman Yellowtail stated he would present the items discussed.

Senator Crippen pointed out Senator Towe also had an issue to present to the committee as a whole. Senator Crippen moved that we eliminate subsection (c) and (d) on page 2. The motion failed with Senators Crippen and Galt voting in favor and Senators Towe and Yellowtail voting in opposition. Chairman Yellowtail stated that would then also become a deadlock issue to be presented to the committee as a whole.

There being no further business to come before the subcommittee, the meeting was adjourned at 11:17 p.m.

  
Subcommittee Chairman





SENATE JUDICIARY COMMITTEE

EXHIBIT NO. D-3

DATE 032785

BILL NO. HB 265

49th Legislature

HB 0265/02

As of 8/8/85  
03-27-85

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~~ <sup>Non-navigable</sup> 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, white within the~~  
8 ~~boundaries of such lands;~~

9 ~~(c) (4) are or have been capable of supporting the~~  
10 ~~following commercial activity activities: log floating,~~  
11 ~~transportation of furs and skins, shipping, commercial,~~  
12 ~~guiding using multiperson watercraft, public transportation,~~  
13 ~~or the transportation of merchandise, as these activities~~  
14 ~~have been defined by published judicial opinion as of [the~~  
15 ~~effective date of this act]; or~~

16 ~~(d) (1) are or have been capable of supporting commercial~~  
17 ~~activity within the meaning of the federal navigability~~  
18 ~~test.~~

19 (3) "~~Class~~ <sup>Non-navigable</sup> waters" means all surface waters that  
20 are not ~~class~~ <sup>class</sup> waters.

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

23 ~~(4) (5) "Department"~~ means the department of fish,  
24 wildlife, and parks provided for in 2-15-3401.

25 ~~(5) (6) "Diverted away from a natural water body"~~ means



SENATE JUDICIARY COMMITTEE

EXHIBIT NO. D-3

DATE 032785

BILL NO. HB 265

HB 0265/02

HB 0265, 02

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 (f)(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 <sup>deposition of the soil of substantial</sup> ~~diminished~~  
 14 <sup>removal, vegetation and destruction of its agricultural/vegetative value.</sup> ~~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 (f)(8) (a) "Recreational use" means with respect to  
 18 <sup>(except within 100 yards of any habitation building)</sup> ~~any~~  
 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 a class of

1 waters that does not include, without limitation, of the  
 2 except that it does not include, without limitation, 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  
 7 motorized vehicles not primarily designed for operation upon  
 8 the water;  
 9 (iv) the placement of a permanent duck blind or boat  
 10 moorage; or  
 11 (v) other activities which are not primarily  
 12 water-related pleasure activities;  
 13 (f)(9) "Supervisors" means the board of supervisors of  
 14 a soil conservation district, the directors of a grazing  
 15 district, or the board of county commissioners if a request  
 16 pursuant to (section 3(3)(b)) is not within the boundaries  
 17 of a conservation district or if the request is refused by  
 18 the board of supervisors of a soil conservation district or  
 19 the directors of a grazing district.  
 20 (10) "SURFACE WATER" MEANS, FOR THE PURPOSE OF  
 21 DETERMINING THE PUBLIC'S ACCESS FOR RECREATIONAL USE, A  
 22 NATURAL WATER BODY, ITS BED, AND ITS BANKS UP TO THE  
 23 ORDINARY HIGH-WATER MARK.

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

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. D-3

DATE 032785

BILL NO. HB 265

HB 0265/02

HB 0265/02

1 limitations -- exceptions. (1) Except as provided in  
 2 subsection (3) SUBSECTIONS (2) THROUGH (4), all class-  
 3 SURFACE waters that are capable of recreational use as  
 4 defined in section (1)(f) 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 (f) Except as provided in subsection (3), all class-  
 9 waters that are capable of recreational use as defined in  
 10 section (1)(f) 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)(b).  
 15 (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 <sup>private</sup> impoundment fed by an intermittently flowing  
 24 natural watercourse; or  
 25 (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 (F) (A) OVERNIGHT CAMPING; <sup>within 500 yards of any habitable buildings</sup>  
 8 (F) (B) THE PLACEMENT OR CREATION OF ANY PERMANENT OR  
 9 SEMIPERMANENT OBJECT, SUCH AS A PERMANENT DUCK BLIND OR BOAT  
 10 MOORAGE; OR

11 (F) (E) OTHER ACTIVITIES WHICH ARE NOT PRIMARILY  
 12 WATER-RELATED PLEASURE ACTIVITIES; OR  
 13 (H) Use of a stream as a right-of-way for any purpose when it is not flowing.  
 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 ~~stream and non-navigable~~ <sup>Navigable and Non-navigable</sup> 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;



SENATE JUDICIARY COMMITTEE

EXHIBIT NO. D-3

DATE 032785

BILL NO. HB 265

HB 0265/02

HB 0265/02

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 ~~white-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

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. D-3

DATE 032785

BILL NO. HB 265

HB 0265 '02

HB 0265/02

1 effective on passage and approval.

-End-

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

EXHIBIT NO. D-4

DATE 032785

BILL NO. HB 265

As of  
032085

stmt of intent  
hunting  
D  
P

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-1~~ NAVIGABLE waters" <sup>(B) other than lakes,</sup> means surface waters

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. D-4

DATE 032785

BILL NO. HB 265

1 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 (4) ~~(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]; or

17 ~~(e)(D)~~ are or have been capable of supporting  
18 commercial activity within the meaning of the federal  
19 navigability test.

20 (3) ~~Class of~~ NONNAVIGABLE waters" means all surface  
21 waters that are not ~~class of~~ NAVIGABLE 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.

(B)

~~(7) "ordinary high-water mark" means the~~

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

20            ~~(7)~~(8) ~~(a)~~ "Recreational use" means with respect to  
21 ~~class--f~~ SURFACE waters: fishing, <sup>(P)</sup> hunting, swimming (EXCEPT  
22 WITHIN 100 YARDS OF ANY ~~HABITABLE BUILDINGS~~), <sup>acc dwelling</sup> HIKING,  
23 floating in small craft or other flotation devices, boating  
24 in motorized craft unless otherwise prohibited or regulated  
25 by law, or craft propelled by oar or paddle, OTHER (T)

1 WATER-RELATED PLEASURE ACTIVITIES, and related unavoidable  
2 or incidental uses, ~~within the ordinary high water mark of~~  
3 ~~the waters.~~

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

8 ~~(i) overnight camping;~~

9 ~~(ii) big game hunting or upland bird hunting;~~

10 ~~(iii) operation of all terrain vehicles or other~~  
11 ~~motorized vehicles not primarily designed for operation upon~~  
12 ~~the water;~~

13 ~~(iv) the placement or creation of any permanent or~~  
14 ~~semipermanent object such as a permanent duck blind or boat~~  
15 ~~moorage; or~~

16 ~~(v) other activities which are not primarily~~  
17 ~~water-related pleasure activities.~~

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

25 (10) "SURFACE WATER" MEANS, FOR THE PURPOSE OF

1 DETERMINING THE PUBLIC'S ACCESS FOR RECREATIONAL USE, A  
2 NATURAL WATER BODY, ITS BED, AND ITS BANKS UP TO THE  
3 ORDINARY HIGH-WATER MARK. <sup>(K) except for the exclusion of the beds</sup>  
<sup>+ the banks provided for in 70-12-20</sup>

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

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

19 (3)(2) The right of the public to make recreational  
20 use of surface waters does not include the--right--to--make  
21 recreational--use--of--waters, WITHOUT PERMISSION OF THE  
22 LANDOWNER:

23 (a) THE OPERATION OF ALL-TERRAIN VEHICLES OR OTHER  
24 MOTORIZED VEHICLES NOT PRIMARILY DESIGNED FOR OPERATION UPON  
25 THE WATER;

1           (B) THE RECREATIONAL USE OF SURFACE WATERS in a' stock  
2 pond or other PRIVATE impoundment fed by an intermittently  
3 flowing natural watercourse; or

4           ~~(b)~~ (C) THE RECREATIONAL USE OF WATERS while diverted  
5 away from a natural water body for beneficial use pursuant  
6 to Title ~~85~~, chapter 2, part 2 or 3; OR

7           ~~(D) BIG GAME HUNTING;~~

8           ~~(3) -- THE -- RIGHT -- OF -- THE -- PUBLIC -- TO -- MAKE -- RECREATIONAL -- USE~~  
9 ~~OF CLASS III WATERS DOES NOT INCLUDE, WITHOUT PERMISSION OF~~  
10 ~~THE LANDOWNER;~~

11           ~~(A)~~ (E) OVERNIGHT CAMPING WITHIN 500 YARDS OF ANY  
12 HABITABLE BUILDINGS;

13           ~~(B)~~ (F) THE PLACEMENT OR CREATION OF ANY PERMANENT OR  
14 SEMIPERMANENT OBJECT, SUCH AS A PERMANENT DUCK BLIND OR BOAT  
15 MOORAGE; OR

16           ~~(C)~~ (G) OTHER ACTIVITIES WHICH ARE NOT PRIMARILY  
17 WATER-RELATED PLEASURE ACTIVITIES; ~~OR~~ <sup>as defined in subsec (2)</sup> (S)

18           (H) USE OF A STREAMBED AS A RIGHT-OF-WAY FOR ANY  
19 PURPOSE WHEN <sup>water</sup> IT IS NOT FLOWING. <sup>the right</sup>

20           (C) (4).... (D) (1).... (E) (3)....  
21           (4) The right of the public to make recreational use  
22 of surface waters does not grant any easement or right to  
23 the public to enter onto or cross private property in order  
24 to use such waters for recreational purposes.

24           (5) THE COMMISSION SHALL ADOPT RULES PURSUANT TO  
25 87-1-303, IN THE INTEREST OF PUBLIC HEALTH, PUBLIC SAFETY,

1 OR THE PROTECTION OF PUBLIC AND PRIVATE PROPERTY, GOVERNING  
2 RECREATIONAL USE OF ~~CLASS--I--AND--CLASS--II~~ NAVIGABLE AND  
3 NONNAVIGABLE WATERS. THESE RULES MUST INCLUDE THE FOLLOWING:

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

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

8 OR

9 (II) ALTERING LIMITATIONS, RESTRICTIONS, OR  
10 PROHIBITIONS ON RECREATIONAL USE OF A SURFACE WATER IMPOSED  
11 BY THE COMMISSION; AND

12 (B) PROVISIONS REQUIRING THE ISSUANCE OF WRITTEN  
13 FINDINGS AND A DECISION WHENEVER A REQUEST IS MADE PURSUANT  
14 TO THE RULES ADOPTED UNDER SUBSECTION (5)(A).

15 ~~(5)(6)~~ The provisions of this section do not affect  
16 any rights of the public with respect to state-owned lands  
17 that are school trust lands or any rights of lessees of such  
18 lands ~~under-lease-on-{the-effective-date-of-this-act}~~.

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

25 (2) A landowner may create barriers across streams for

G

1 purposes of land or water management or to establish land  
2 ownership as otherwise provided by law. If a landowner  
3 erects a barrier STRUCTURE pursuant to a design approved by  
4 the department and the barrier--is--designed--not--to--and  
5 STRUCTURE does not interfere with the public's use of the  
6 surface waters, the public may not go above the ordinary  
7 high-water mark to portage around the barrier STRUCTURE.

8 (3) (a) A portage route around or over a AN ARTIFICIAL  
9 barrier may be established to avoid damage to the  
10 landowner's land and violation of his rights as well as to  
11 provide a reasonable and safe route for the recreational  
12 user of the surface waters.

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

16 (c) Within 45 days of the receipt of a request, the  
17 supervisors shall, in consultation with the landowner and a  
18 representative of the department, examine and investigate  
19 the barrier and the adjoining land to determine a reasonable  
20 and safe portage route.

21 (d) Within 45 days of the examination of the site, the  
22 supervisors shall make a written finding of the most  
23 appropriate portage route.

24 (e) The cost of establishing the portage route around  
25 artificial barriers must be borne by the involved landowner,

1 except for the construction of notification signs of such  
 2 route, which is the responsibility of the department. The  
 3 cost of establishing a portage route around ~~natural~~  
 4 ARTIFICIAL barriers NOT OWNED BY THE LANDOWNER ON WHOSE LAND  
 5 THE PORTAGE ROUTE WILL BE PLACED must be borne by the  
 6 department.

7 (f) Once the route is established, the department has  
 8 the exclusive responsibility thereafter to maintain the  
 9 portage route at reasonable times agreeable to the  
 10 landowner. The department shall post notices on the stream  
 11 of the existence of the portage route and the public's  
 12 obligation to use it as the exclusive means around a  
 13 barrier.

14 (g) If either the landowner or recreationist disagrees  
 15 with the route described in subsection (3)(e), he may  
 16 petition the district court <sup>within 30 days of the decision</sup> to name a three-member  
 17 arbitration panel. The panel must consist of an affected  
 18 landowner, a member of an affected recreational group, and a  
 19 member selected by the two other members of the arbitration  
 20 panel. The arbitration panel may accept, reject, or modify  
 21 the supervisors' finding under subsection (3)(d).

22 (h) The determination of the arbitration panel is  
 23 binding upon the landowner and upon all parties that use the  
 24 water for which the portage is provided. Costs of the  
 25 arbitration panel, computed as for jurors' fees under

SENATE JUDICIARY COMMITTEE

COMMITTEE NO. D-4

DATE 032785

BILL NO. HB 265

1 3-15-201, shall be borne by the contesting party or parties;  
2 all other parties shall bear their own costs.

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

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

8 <sup>(F) (4)...</sup>  
NEW SECTION. Section 4. Restriction on liability of  
9 landowner and supervisor. (1) A person who makes  
10 recreational use of surface waters flowing over or through  
11 land in the possession or under the control of another,  
12 pursuant to [section 2], or land while portaging around or  
13 over barriers or while portaging or using portage routes,  
14 pursuant to [section 3], does not have the status of invitee  
15 or licensee and is owed no duty by a landowner <sup>(J) his agent or tenant</sup> other than  
16 that provided in subsection (2).

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

21 <sup>(M) or any member of the arbitration panel</sup>  
(3) No supervisor <sup>^</sup> who participates in a decision  
22 regarding the placement of a portage route is liable to any  
23 person who while--making--recreational--use--of--the--surface  
24 waters-is-injured-while-using IS INJURED OR WHOSE PROPERTY  
25 IS DAMAGED BECAUSE OF PLACEMENT OR USE OF the portage route

1 except for an act or omission that constitutes willful and  
2 wanton misconduct.

3 NEW SECTION. Section 5. Prescriptive easement not  
4 acquired by recreational use of surface waters. (1) A  
5 prescriptive easement is a right to use the property of  
6 another that is acquired by open, exclusive, notorious,  
7 hostile, adverse, continuous, and uninterrupted use for a  
8 period of 5 years.

9 (2) A prescriptive easement cannot be acquired  
10 through:

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

12 (I) the streambeds underlying them; and

13 (II) the banks up to the ordinary high-water mark; or  
14 of

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

16 (B) THE ENTERING OR CROSSING OF PRIVATE PROPERTY TO  
17 REACH SURFACE WATERS.

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

19 "70-19-405. Title by prescription. Occupancy Except as  
20 provided in [section 5], occupancy for the period prescribed  
21 by this chapter as sufficient to bar an action for the  
22 recovery of the property confers a title thereto,  
23 denominated a title by prescription, which is sufficient  
24 against all."

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

(A)  
(N)

1 this act is invalid, all valid parts that are severable from  
2 the invalid part remain in effect. If a part of this act is  
3 invalid in one or more of its applications, the part remains  
4 in effect in all valid applications that are severable from  
5 the invalid applications.

6 NEW SECTION. Section 8. Applicability. Sections 5 and  
7 6 apply only to a prescriptive easement that has not been  
8 perfected prior to [the effective date of this act].

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

-End-

SENATE JUDICIARY <sup>sub</sup> COMMITTEE  
EXHIBIT NO. 1  
DATE 032585  
BILL NO. HB 265

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. D-5  
DATE 032785  
BILL NO. HB 265

Amend House Bill No. 265 by striking all language, from the beginning of line 25, page 1 of the current (March 21) draft to and including line 20, page 2, and inserting, in lieu thereof, the following language:

"(2) 'Navigable waters', for purposes of this act, means all rivers and streams which have been meandered and returned as navigable by the surveyors employed by the government of the United States and all rivers and streams which satisfy the federal test of navigability for purposes of state ownership, including all lakes or reservoirs located therein.

(3) 'Nonnavigable waters', for purposes of this act, means all rivers and streams which are not navigable waters, including all lakes and reservoirs located therein."

Amend House Bill No. 265 by striking all language, from the beginning of line 15, page 5 of the current (March 21) draft to, but not including, line 13, page 6, and inserting, in lieu thereof, the following language:

"(2) The waters of the state are classified as follows and the recreational uses permitted on each class of water, without permission of the landowner, are as follows:

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. 1  
DATE 032585  
BILL NO. HB 265

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. D-5  
DATE 032785  
BILL NO. HB 265

(a) Class A waters are all nonnavigable waters, including any lakes or reservoirs located therein regardless of whether such lakes or reservoirs are navigable. The recreational use permitted on Class A waters is floating in small craft or other flotation devices, together with use of the land underlying such waters when such use is temporarily necessary for purposes of safety.

(b) Class B waters are all navigable waters, including any lakes or reservoirs located therein, except those waters specifically designated as Class C waters in subsection (2)(c) hereof. The recreational uses permitted on Class B waters are the use permitted in Class A waters, boating in craft propelled by oar or paddle, and angling where permitted by 87-2-305, together with use of the land underlying such waters when such use is unavoidable and incidental to the permitted use of the water. Use of such land is unavoidable and incidental only when the use is temporarily necessary to accomplish the permitted recreational use of the waters or for the purposes of safety.

(c) Class C waters are the main stem of the Yellowstone River, the main stem of the Missouri River, the main stem of the Flathead River, and the main stem of the Kootenai River, including any lakes or reservoirs located therein, but excluding the tributaries of any of those rivers. The recreational uses

SENATE JUDICIARY <sup>SUB</sup> COMMITTEE  
EXHIBIT NO. 1  
DATE 032585  
BILL NO. HB 265

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. D-5  
DATE 032785  
BILL NO. HB 265

permitted on Class C waters are those uses permitted in Class A and Class B waters, boating in motorized craft unless otherwise prohibited or regulated by law, swimming except within 100 yards of any habitable buildings, overnight camping except within 500 yards of any habitable buildings, and fishing below the ordinary high-water mark, together with the use of the land between the ordinary high water marks when the use is temporarily necessary to accomplish the permitted recreational use of the waters or for purposes of safety.

(d) All other recreational uses of the waters of the state, except those specifically permitted herein, are prohibited, without the permission of the landowner. Prohibited recreational uses include but are not limited to the following: (i) the operation of all-terrain vehicles or other motorized vehicles not primarily designed for operation upon the water; (ii) the recreational use of surface waters in a stock pond or other private impoundment fed by an intermittently flowing watercourse; (iii) the recreational use of waters while diverted away from a natural water body for beneficial use pursuant to Title 85, chapter 2, part 2; (iv) big game hunting; (v) the placement or creation of any permanent or semipermanent object, such as a duck blind or boat moorage; and (vi) the use of a stream bed as a right-of-way for any purpose when water is not flowing therein."

MONTANA STATE SENATE  
CONFERENCE COMMITTEE ON HB 265  
MINUTES OF THE MEETING

April 10, 1985

The Conference Committee on HB 265 was called to order at 2:55 p.m. on April 10, 1985, by Senate Chairman Fred VanValkenburg in Room 325 of the State Capitol.

ROLL CALL: The following conference committee members were present: Senator VanValkenburg, Senate Chairman; Senator Yellowtail; Senator Galt; Representative Keyser, House Chairman; Representative Krueger; Representative Mercer; and Representative Ream.

CONSIDERATION OF HB 265: Senator VanValkenburg stated the procedure he felt would be best to follow would be to ask the House Chairman to make some opening statements as to the reasons they rejected the Senate amendments and where they would like this conference committee to go. Representative Keyser stated rather than referring to the amendments, he would rather just refer to the page in the salmon colored bill. He then referred to page 5, lines 14 and 15, which in effect are Senator Galt's committee of the whole amendment. That was the first amendment he wanted to address. Senator VanValkenburg asked if there were other issues they intended to raise with respect to the bill as it came out of the Senate other than Senator Galt's committee of the whole amendment. Representative Keyser responded yes, the other problem occurred at page 4, line 1. The House would like to have its language put back in. Senator VanValkenburg asked if that included the language on page 4, lines 5 and 6, which in effect would add the stricken language back in and strike after swimming, "except within 100 yards of any occupied dwelling, and hiking." Representative Keyser replied yes. Senator VanValkenburg asked that he explain why. Representative Keyser replied they had some problems with the hiking language, but they would like to take out some of the objectionable language. However, since this is not a free conference committee, they have to reject the Senate amendment that was adopted and go back to the way the House presented it to the Senate to start with.

Senator VanValkenburg commented this particular language was never an issue on the floor of the Senate. Senator Yellowtail stated the language "except within 100 yards of

Conference Committee on House Bill 265  
Minutes of the Meeting  
April 10, 1985  
Page 2

any occupied dwelling" related to swimming. The Senate felt it was inappropriate for swimmers to carry on such activities in close proximity to someone's house. Hiking should be included to cover the case where the fisherman were fishing up the stream and his small child were along for the trip. Senator Galt pointed out the 100-yard distance was accepted in the committee unanimously. Representative Keyser stated they had no problem with the 100-yard language, but the whole amendment was thrown in with one amendment, and they didn't feel hiking was a water-related activity. They don't like the word hiking, and they don't feel it refers to water-related activities.

Representative Mercer felt Senator Yellowtail's concern about a child's hiking around with a fisherman would be covered by the language on lines 6 and 7 that speaks to related incidental uses, and, therefore, they would not need hiking in the bill. Representative Ream believes what happened was the words "other water-related activities" were struck and then hiking was inserted to cover the kinds of concerns Senator Yellowtail referred to and that is why the two together were important. They would like to see the original language in that portion restored. Senator Galt asked if the conference committee could address the standing committee amendments. Senator VanValkenburg responded yes, as the vote in the House was to reject the Senate amendments.

Representative Krueger stated if we start opening it into other areas, that would also include natural barriers. Representative Keyser didn't mind the language "except within 100 yards of an occupied dwelling" if it had swimming in, but hiking should be out.

Senator VanValkenburg commented he said the House language got in on a split vote. He asked if Senator Galt supported hiking. Senator Galt responded no. Senator VanValkenburg stated if we strike the Senate language and put in other water-related pleasure activities, that would have the effect of taking hiking out, but it would not provide the 100-yard protection for swimming. He asked if that would be acceptable. Senator Galt responded it is an improvement. He asked what other water-related pleasure activities might include.

Representative Krueger stated it would include the very situation outlined. It was intended to have some corresponding relationship to the water. Representative Ream thought the language is consistent with the supreme court and that is

Conference Committee on House Bill 265  
Minutes of the Meeting  
April 10, 1985  
Page 3

probably why it went in originally. He doesn't think there are any other water-related activities. Senator Galt asked if duck hunting would be a water-related activity. Representative Krueger stated it would be. Representative Keyser assumed it would be included also.

Senator VanValkenburg stated one of two motions would be in order. Either the Senate recede from amendments 11 and 12 and that they accede in the amendments of the House that correlate to that same area, or that the House accede in Senate amendments 11 and 12. The first motion would have the effect of taking the House language, and the second would have the effect of taking the Senate language. Representative Kreuger stated he would prefer to take the other amendment first before we vote. Chairman VanValkenburg felt that the bulk of the conference committee's discussion would take place with Senator Galt's amendment, and this one is no big deal.

Senator Yellowtail moved that the Senate recede from standing committee amendments 11 and 12. The motion carried with Senator Galt voting in opposition. Senator VanValkenburg then moved to Senator Galt's committee of the whole amendment. Representative Keyser stated the supreme court in its decision talked about the beds and the banks up to the high water mark. Senator Galt's amendment handled first class streams. In effect, something which has been taking place for 100 years all of a sudden cannot take place. Senator Galt responded it does not apply to any streams that are navigable because the fishing statute which is on the books is still there. Representative Keyser stated you set up a conflict between this law and the fishing statute. That would mean the floaters that we have had on the Madison River could no longer step out of that boat, they would basically have to stay on the water. If you can't use the bank up to the high water mark, then you take that away from every floater. Senator Galt disagreed.

Representative Krueger stated he would like to hear the Senator's basis for striking the beds and the banks. Senator Galt replied in all of the rivers not declared navigable, the beds and the banks belong to the adjoining landowners, and by not striking this, you are taking away property rights. Justice Haswell stated they should not misconstrue these things; the court was talking about two separate cases. Representative Krueger replied they addressed a good portion of that concern with regard to the prescriptive easement. When they applied a stronger prescriptive easement, they were

Conference Committee on House Bill 265  
Minutes of the Meeting  
April 10, 1985  
Page 4

not changing the ownership of this land. Senator Galt replied you are not taking the ownership, but you are taking the use of it. The supreme court decisions just related to the Dearborn and the Beaverhead Rivers. They admonished not to overanalyze the case in terms of what the court might do in the future. Senator VanValkenburg asked if that were a transcript of some remarks Justice Haswell made last December to some public gathering. Senator Galt replied yes, and Justice Haswell is also the judge who wrote the decisions. Senator VanValkenburg pointed out he is not on the court any longer. Representative Krueger stated there was some concern with relation to smaller streams and their usage. We effectively addressed that issue by allowing the Fish and Game to promulgate rules and making provisions for individuals to have hearings. We may have problems, but by doing this, we are especially addressing those types of concerns on how those smaller streams will be addressed. Senator Galt stated the average landowner doesn't want the Fish and Game promulgating rules about those streams. That is where their corrals and pens are. Representative Keyser asked if the Fish and Game can make restrictions on the streams now. Senator Galt replied they probably could.

Senator VanValkenburg stated as he reads this legislative directive, page 8, lines 10 on, and in particular page 9, lines 1-5, the legislature already said these rules would be to give the commission the authority to limit the public use to protect the landowners' use. Senator Galt asked who protects the landowner and the use he wants to make of it. Senator VanValkenburg responded without any rules, it is really a case-by-case determination in the courts. Representative Krueger stated an individual landowner would have the right of redress through the Fish and Game Commission, although there might be problems in terms of timeframes. That was their attempt, which was to give some protection to landowners and give them some ability to have some input. Senator Galt stated it was nice to allow them to have some input into the land that they paid taxes on and they own. Representative Mercer thought one of the big problems they were running into is the difference between Class I and Class II streams.

Senator Galt's amendments don't work on Class I, but they would on Class II. As broad as the definition of Class I waters is, that means Class II waters are pretty small creeks. Something that is that small should always require the landowner's permission to use the creek. Senator VanValkenburg asked if he meant to use the water itself. Representative Mercer stated or the bed or the bank. Senator VanValkenburg asked if they thought you could have the legislature prohibit the use of Class II streams under the Curran and Hildreth

Conference Committee on House Bill 265  
Minutes of the Meeting  
April 10, 1985  
Page 5

decisions. Representative Mercer replied if the Fish and Game can, the legislature can. It is unconstitutional for any individual landowner to prevent someone from recreating on a stream. All waters are owned in trust for the public. That makes the state the trustee. That means if it is in the best interests of the landowner to prohibit use, they can do that. He does not think it would be unconstitutional. Representative Keyser agreed, but stated Senator Galt's amendment did not do that. The amendment applies to both Class I and Class II waters. Representative Krueger disagreed with Representative Mercer's analogy. Senator Galt was saying the House, in establishing the Fish and Game procedure was saying it was very generous to allow input. The purpose was to try to establish a means of regulating those types of uses that would not be appropriate on those streams. They spent a long time examining that type of procedure. There was a consensus it was an equitable means of regulating those types of streams. By excluding beds and banks, you are effectively managing them. Senator VanValkenburg pointed out two problems with Senator Galt's arguments. In reading Hildreth in particular, but also Curran, the court says public use of the waters and the bed and the banks of the Beaverhead was not determined by title. The word "and" causes him to say the court is saying something further than just the water. Senator Galt's amendment doesn't conform to the court's decisions. All it does is create a lot of confusion. Second, it in many cases conflicts with Senator Yellowtail's floor amendments. He is not sure what happened in the Senate the day they voted on these amendments. The Senate had a lengthy debate on Senator Yellowtail's amendments, to which Senators Crippen and Galt were opposed. Thereafter, the Senate had a short discussion about Senator Galt's amendment. Going back and reading one against the other, there are conflicting portions. Senator Galt stated in Hildreth, the court held navigability for recreational purposes is limited. It refers to the Curran case as authority for that rule. Curran gave them authority to only use the surface waters. Therefore, Hildreth was referring to surface waters. Senator Van Valkenburg asked if that were Mr. Bottomly's opinion. Senator Galt replied yes. Representative Ream stated Representative Keyser mentioned something that is important and that is the angling statute. If there were any taking of property, it goes back to 1933. He thinks we are also flying in the face of the angling statute read. Representative Ream then read the text of the statute. Senator Galt stated the statute talks about the high water marks on navigable streams, lakes, and sloughs. Representative Mercer agreed with what Senator Van Valkenburg said in that the supreme court decisions speak of the water, the beds, and the banks. The amendment has to come out. If we were free to do what we wanted to do,

Conference Committee on House Bill 265  
Minutes of the Meeting  
April 10, 1985  
Page 6

we would be able to restrict the uses. Unfortunately, we must deal only with the amendments. The bill says the commission may regulate the use of surface waters, and they would not be able to restrict the use of the bed and the banks. It is critical Senator Galt's amendment come out, but he would like to address Senator Galt's concern. Tied into a non-free conference committee, there is not much this conference committee can do.

Senator Galt asked for one of two motions: that the House accede to Senator Galt's floor amendment or the Senate recede from that amendment. Representative Ream moved that the Senate recede from Senator Galt's floor amendment. The motion carried with Senator Galt voting in opposition.

Senator Yellowtail then pointed out that what remained would be the Senate standing committee amendments and his floor amendments. He gathered from the earlier discussion that the House would be inclined to accede to the remainder of the Senate amendments. If not, the House needed to speak to those to which it would not agree. Representative Keyser responded they don't agree with the lake amendments, but they would not get into that now because he realizes the political ramifications. Senator Galt moved that lakes be reinserted in the bill -- in other words, everything that took lakes away from this bill would be placed back in it. Mr. Petesch stated the Senate standing committee amendments No. 5, 7, and 8 would be affected. However, amendment No. 8 also includes the definition of occupied dwelling. Senator VanValkenburg stated the motion would be that the Senate recede from Senate standing committee amendments No. 5, 7, and 8.

Mr. Petesch stated that a portion of Senate amendment No. 33 also deals with lakes. Senator VanValkenburg interpreted Senator Galt's motion to be the Senate would recede from amendments No. 5, 7, and 8, and 33. Senator Galt stated that was correct. Representative Mercer stated since Flathead Lake sits in his district, he is concerned about this. The supreme court talked about surface waters, and Flathead Lake is surface water. The public has the right to use the beds and banks, and that gives him some concern. By excluding lakes from the bill, that leaves lakes under the supreme court decisions, and there are no regulations. By including lakes, there are some rights. Senator Yellowtail commented the feeling of the Senate Judiciary Committee was that lakes present a bit of a different situation and a new set of problems. HB 265 is tailored to streams and ownership patterns that surround the streams. To address lakes in HB 265

## SENATE JUDICIARY COMMITTEE

EXHIBIT NO. E.DATE 03 27 85BILL NO. H. B. 265

Conference Committee on House Bill 265  
Minutes of the Meeting  
April 10, 1985  
Page 7

would have necessitated substantial reworking of the bill to accommodate some special situations, and perhaps HB 265 was not the appropriate place to do that. Rather than do anything with HB 265 in terms of trying to mix streams and lakes, it was felt it would be best to avoid that issue. Senator Galt addressed the political implications. He felt that if you got the western legislators involved, the bill would die. He felt that if we were so devoted to the supreme court decisions and they say surface waters, we should put all surface waters into this. Senator Yellowtail suggested perhaps another bill might be the vehicle with which to do that. He thinks there is a realistic problem and situation that does arise under the Curran and Hildreth. He asked what the difference would be between one riparian owner and another. Representative Mercer stated he has a hard time seeing the difference between streams and lakes. The main distinction he sees is in July and August of the summertime when rivers and streams are down and there is a big area for recreation, but lakes tend to always be kept at a full level. That is a major distinction, and they really do need to be dealt with separately. He is satisfied with the issue. The motion to put lakes back into the bill failed with Representative Keyser and Senator Galt voting in favor of the motion. Representative Ream moved that the House accede to all of the remaining Senate amendments. Senator VanValkenburg replied that would be a proper motion and would deal with all of the remaining issues before the conference committee if it were to pass.

The motion carried with Senator Galt voting in opposition. Chairman VanValkenburg stated that completed the matters that would be before this conference committee. Representative Keyser moved that the conference committee be adjourned.

The motion carried unanimously.

There being no further business to come before the conference committee, the meeting was adjourned at 3:45 p.m.

---

Chairman, Senator VanValkenburg

PROPOSED SUBCOMMITTEE AMENDMENTS TO HB 265:

1. Statement of Intent, page 3, line 9.

Following: "recreation."

Insert: "The commission shall prohibit all recreation on private impoundments which have been licensed for a private use."

2. Statement of Intent, page 3, line 10.

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: "(2)"

Strike: "Class I"

Insert: "Navigable"

6. Page 2, lines 7 and 8.

Strike: subsection (c) in its entirety

Re-number: subsequent subsections

7. Page 2, line 19.

Following: "(3) ""

Strike: "Class II"

Insert: "Nonnavigable"

8. Page 2, line 20.

Following: "not"

Strike: "class I"

Insert: "navigable"

9. Page 3, line 8.

Following: line 7

Insert: "(7) "Occupied dwelling" means a building used for a human dwelling at least once a year."

Re-number: subsequent subsections

10. Page 3, line 13.

Following: "to"

Strike: "diminished"

Insert: "deprivation of the soil of substantially all"

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 1

DATE 032785

BILL NO. HB 265

11. Page 3, line 14.  
Following: "vegetation"  
Strike: "or lack of"  
Insert: "and destruction of its"  
Following: "agricultural"  
Strike: "crop"  
Insert: "vegetative"
12. Page 3, line 18.  
Following: "swimming"  
Insert: "(except within 100 yards of any occupied dwelling), hiking"
13. Page 5, line 23.  
Following: "other"  
Insert: "private"
14. Page 6, line 2.  
Following: "3;"  
Strike: "OR"
15. Page 6, line 3.  
Following: "HUNTING"  
Strike: "."  
Insert: ";
16. Page 6, lines 4 through 6.  
Strike: lines 4 through 6 in their entirety  
Renumber: subsequent subsections
17. Page 6, line 7.  
Following: line 6  
Strike: "(A)"  
Insert: "(e)"  
Following: "CAMPING"  
Insert: "within 500 yards of any occupied dwelling"
18. Page 6, line 8.  
Following: line 7  
Strike: "(B)"  
Insert: "(f)"
19. Page 6, line 9.  
Following: "A"  
Strike: "PERMANENT"
20. Page 6, line 10.  
Following: "MOORAGE;"  
Strike: "OR"
21. Page 6, line 11.  
Following: line 10  
Strike: "(C)"  
Insert: "(g)"

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. 1  
DATE 032785  
BILL NO. HB 265

22. Page 6, line 12.  
Following: "ACTIVITIES"  
Strike: "."  
Insert: "; or"
23. 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."
24. Page 6, line 20.  
Following: "OF"  
Strike: "CLASS I AND CLASS II"  
Insert: "navigable and nonnavigable"
25. Page 7, line 7.  
Following: "SUBSECTION"  
Strike: "(5)"  
Insert: "(4)"
26. Page 8. line 1.  
Following: "over"  
Strike: "a"  
Insert: "an artificial"
27. Page 8. line 21.  
Following: "around"  
Strike: "natural"  
Insert: "artificial"
28. Page 8. line 22.  
Following: line 21  
Insert: "not owned by the landowner on whose land the portage route  
will be placed"
29. Page 8. line 7.  
Following: "court"  
Insert: ", within 30 days of the decision,"
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, line 12.  
Following: "supervisor"  
Insert: "or any member of the arbitration panel"

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. 1  
DATE 032785  
BILL NO. HB 265

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."

Renumber: subsequent sections

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. 1  
DATE 032785  
BILL NO. HB 265

*Subcommittee*

## 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

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 2DATE 032785BILL NO. HB 265

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.

SENATE JUDICIARY COMMITTEE  
 EXHIBIT NO. 2  
 DATE 032785  
 BILL NO. HB 265

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 WHICH 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.

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. 2  
DATE 032785  
BILL NO. HB 265

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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~~ NAVIGABLE waters" means surface waters

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 2

DATE 032785

HR 215



1 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]; or

17 ~~(e)~~(D) are or have been capable of supporting  
18 commercial activity within the meaning of the federal  
19 navigability test.

20 (3) "~~Class-#~~ NONNAVIGABLE waters" means all surface  
21 waters that are not ~~class-#~~ NAVIGABLE waters.

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.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 2

-2- DATE 032785

BILL NO. HB 265

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) "OCCUPIED DWELLING" MEANS A BUILDING USED FOR A  
 10 HUMAN DWELLING AT LEAST ONCE A YEAR.

11            ~~(6)~~(7)(8) "Ordinary high-water mark" means the line  
 12 that water impresses on land by covering it for sufficient  
 13 periods to cause physical characteristics that distinguish  
 14 the area below the line from the area above it.  
 15 Characteristics of the area below the line include, when  
 16 appropriate, but are not limited to ~~diminished-terrestrial~~  
 17 ~~vegetation-or-lack-of-agricultural-crop-value~~ DEPRIVATION OF  
 18 THE SOIL OF SUBSTANTIALLY ALL TERRESTRIAL VEGETATION AND  
 19 DESTRUCTION OF ITS AGRICULTURAL VEGETATIVE VALUE. A FLOOD  
 20 PLAIN ADJACENT TO SURFACE WATERS IS NOT CONSIDERED TO LIE  
 21 WITHIN THE SURFACE WATERS' HIGH-WATER MARKS.

22            ~~(7)~~(8)(9) ~~(a)~~ "Recreational use" means with respect to  
 23 ~~class--f~~ SURFACE waters: fishing, hunting, swimming (EXCEPT  
 24 WITHIN 100 YARDS OF ANY OCCUPIED DWELLING), HIKING, floating  
 25 in small craft or other flotation devices, boating in

1 motorized craft unless otherwise prohibited or regulated by  
 2 law, or craft propelled by oar or paddle, OTHER  
 3 WATER-RELATED PLEASURE ACTIVITIES, and related unavoidable  
 4 or incidental uses, ~~within the ordinary high water mark of~~  
 5 ~~the waters.~~

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

10 ~~(i) overnight camping;~~

11 ~~(ii) big game hunting or upland bird hunting;~~

12 ~~(iii) operation of all-terrain vehicles or other~~  
 13 ~~motorized vehicles not primarily designed for operation upon~~  
 14 ~~the water;~~

15 ~~(iv) the placement or creation of any permanent or~~  
 16 ~~semipermanent object such as a permanent duck blind or boat~~  
 17 ~~moorage; or~~

18 ~~(v) other activities which are not primarily~~  
 19 ~~water-related pleasure activities.~~

20 ~~(8)(9)(10)~~ "Supervisors" means the board of supervisors  
 21 of a soil conservation district, the directors of a grazing  
 22 district, or the board of county commissioners if a request  
 23 pursuant to [section 3(3)(b)] is not within the boundaries  
 24 of a conservation district or if the request is refused by  
 25 the board of supervisors of a soil conservation district or

SENATE JUDICIARY COMMITTEE

-4- EXHIBIT NO. 2 HB 265

DATE 032785

118 265

1 the directors of a grazing district.

2 {±0}(11) "SURFACE WATER" MEANS, FOR THE PURPOSE OF  
 3 DETERMINING THE PUBLIC'S ACCESS FOR RECREATIONAL USE, A  
 4 NATURAL WATER BODY, ITS BED, AND ITS BANKS UP TO THE  
 5 ORDINARY HIGH-WATER MARK.

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

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

21 {3}(2) The right of the public to make recreational  
 22 use of surface waters does not include the-right-to-make  
 23 recreational--use--of--waters, WITHOUT PERMISSION OF THE  
 24 LANDOWNER:

25 (a) THE OPERATION OF ALL-TERRAIN VEHICLES OR OTHER

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 2

DATE 032785

1 MOTORIZED VEHICLES NOT PRIMARILY DESIGNED FOR OPERATION UPON  
 2 THE WATER;

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

6 ~~(b)~~(C) THE RECREATIONAL USE OF WATERS while diverted  
 7 away from a natural water body for beneficial use pursuant  
 8 to Title 85, chapter 2, part 2 or 3; OR

9 (D) BIG GAME HUNTING;

10 ~~(3)--THE-RIGHT-OF-THE-PUBLIC-TO-MAKE--RECREATIONAL--USE~~  
 11 ~~OF--CLASS--II-WATERS-DOES-NOT-INCLUDE,-WITHOUT-PERMISSION-OF~~  
 12 ~~THE-LANDOWNER;~~

13 ~~(A)~~(E) OVERNIGHT CAMPING WITHIN 500 YARDS OF ANY  
 14 OCCUPIED DWELLING;

15 ~~(B)~~(F) THE PLACEMENT OR CREATION OF ANY PERMANENT OR  
 16 SEMIPERMANENT OBJECT, SUCH AS A PERMANENT DUCK BLIND OR BOAT  
 17 MOORAGE; OR

18 ~~(c)~~(G) OTHER ACTIVITIES WHICH ARE NOT PRIMARILY  
 19 WATER-RELATED PLEASURE ACTIVITIES; OR

20 (H) USE OF A STREAMBED AS A RIGHT-OF-WAY FOR ANY  
 21 PURPOSE WHEN WATER IS NOT FLOWING THEREIN.

22 ~~(4)~~(3) The right of the public to make recreational  
 23 use of surface waters does not grant any easement or right  
 24 to the public to enter onto or cross private property in  
 25 order to use such waters for recreational purposes.

SENATE JUDICIARY COMMITTEE

1           †5†(4) THE COMMISSION SHALL ADOPT RULES PURSUANT TO  
2           87-1-303, IN THE INTEREST OF PUBLIC HEALTH, PUBLIC SAFETY,  
3           OR THE PROTECTION OF PUBLIC AND PRIVATE PROPERTY, GOVERNING  
4           RECREATIONAL USE OF ~~CLASS--I--AND--CLASS--II~~ NAVIGABLE AND  
5           NONNAVIGABLE WATERS. THESE RULES MUST INCLUDE THE FOLLOWING:

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

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

10          OR

11           (II) ALTERING LIMITATIONS, RESTRICTIONS, OR  
12           PROHIBITIONS ON RECREATIONAL USE OF A SURFACE WATER IMPOSED  
13           BY THE COMMISSION; AND

14           (B) PROVISIONS REQUIRING THE ISSUANCE OF WRITTEN  
15           FINDINGS AND A DECISION WHENEVER A REQUEST IS MADE PURSUANT  
16           TO THE RULES ADOPTED UNDER SUBSECTION †5†(4)(A).

17           †5††6†(5) The provisions of this section do not affect  
18           any rights of the public with respect to state-owned lands  
19           that are school trust lands or any rights of lessees of such  
20           lands ~~under-lease-on-{the-effective-date-of-this-act}~~.

21           NEW SECTION. Section 3. Right to portage --  
22           establishment of portage route. (1) A member of the public  
23           making recreational use of surface waters may, above the  
24           ordinary high-water mark, portage around barriers in the  
25           least intrusive manner possible, avoiding damage to the

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 2

-7- DATE 032785

HB 265

RH NO HB 265

1. landowner's land and violation of his rights.

2 (2) A landowner may create barriers across streams for  
 3 purposes of land or water management or to establish land  
 4 ownership as otherwise provided by law. If a landowner  
 5 erects a barrier STRUCTURE pursuant to a design approved by  
 6 the department and the barrier--is--designed--not--to--and  
 7 STRUCTURE does not interfere with the public's use of the  
 8 surface waters, the public may not go above the ordinary  
 9 high-water mark to portage around the barrier STRUCTURE.

10 (3) (a) A portage route around or over a AN ARTIFICIAL  
 11 barrier may be established to avoid damage to the  
 12 landowner's land and violation of his rights as well as to  
 13 provide a reasonable and safe route for the recreational  
 14 user of the surface waters.

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

18 (c) Within 45 days of the receipt of a request, the  
 19 supervisors shall, in consultation with the landowner and a  
 20 representative of the department, examine and investigate  
 21 the barrier and the adjoining land to determine a reasonable  
 22 and safe portage route.

23 (d) Within 45 days of the examination of the site, the  
 24 supervisors shall make a written finding of the most  
 25 appropriate portage route.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 2

-8- DATE 032785 HB 265

BILL NO. HB 265

1 (e) The cost of establishing the portage route around  
 2 artificial barriers must be borne by the involved landowner,  
 3 except for the construction of notification signs of such  
 4 route, which is the responsibility of the department. The  
 5 cost of establishing a portage route around ~~natural~~  
 6 ARTIFICIAL barriers NOT OWNED BY THE LANDOWNER ON WHOSE LAND  
 7 THE PORTAGE ROUTE WILL BE PLACED must be borne by the  
 8 department.

9 (f) Once the route is established, the department has  
 10 the exclusive responsibility thereafter to maintain the  
 11 portage route at reasonable times agreeable to the  
 12 landowner. The department shall post notices on the stream  
 13 of the existence of the portage route and the public's  
 14 obligation to use it as the exclusive means around a  
 15 barrier.

16 (g) If either the landowner or recreationist disagrees  
 17 with the route described in subsection (3)(e), he may  
 18 petition the district court, WITHIN 30 DAYS OF THE DECISION,  
 19 to name a three-member arbitration panel. The panel must  
 20 consist of an affected landowner, a member of an affected  
 21 recreational group, and a member selected by the two other  
 22 members of the arbitration panel. The arbitration panel may  
 23 accept, reject, or modify the supervisors' finding under  
 24 subsection (3)(d).

25 (h) The determination of the arbitration panel is

1 binding upon the landowner and upon all parties that use the  
 2 water for which the portage is provided. Costs of the  
 3 arbitration panel, computed as for jurors' fees under  
 4 3-15-201, shall be borne by the contesting party or parties;  
 5 all other parties shall bear their own costs.

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

8 (j) Once a portage route is established, the public  
 9 shall use the portage route as the exclusive means to  
 10 portage around or over the barrier.

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

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

24 (3) No supervisor OR ANY MEMBER OF THE ARBITRATION  
 25 PANEL who participates in a decision regarding the placement

SENATE JUDICIARY COMMITTEE

1 of a portage route is liable to any person who while--making  
 2 recreational--use--of--the--surface--waters-is-injured-while  
 3 using IS INJURED OR WHOSE PROPERTY IS DAMAGED BECAUSE OF  
 4 PLACEMENT OR USE OF the portage route except for an act or  
 5 omission that constitutes willful and wanton misconduct.

6 NEW SECTION. Section 5. Prescriptive easement not  
 7 acquired by recreational use of surface waters. (1) A  
 8 prescriptive easement is a right to use the property of  
 9 another that is acquired by open, exclusive, notorious,  
 10 hostile, adverse, continuous, and uninterrupted use for a  
 11 period of 5 years.

12 (2) A prescriptive easement cannot be acquired  
 13 through:

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

15 (I) the streambeds underlying them; and

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

17 of

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

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

20 REACH SURFACE WATERS.

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

22 "70-19-405. Title by prescription. Occupancy Except as  
 23 provided in [section 5], occupancy for the period prescribed  
 24 by this chapter as sufficient to bar an action for the  
 25 recovery of the property confers a title thereto,

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 2

DATE 032785

LLR 2/15

HB 265

1 denominated a title by prescription, which is sufficient  
2 against all."

3 NEW SECTION. SECTION 7. LAND TITLE UNAFFECTED. THE  
4 PROVISIONS OF [THIS ACT] AND THE RECREATIONAL USES PERMITTED  
5 BY [SECTION 2] DO NOT AFFECT THE TITLE OR OWNERSHIP OF THE  
6 SURFACE WATERS, THE BEDS AND BANKS OF ANY NAVIGABLE OR  
7 NONNAVIGABLE WATERS, OR THE PORTAGE ROUTES WITHIN THIS  
8 STATE.

9 NEW SECTION. Section 8. Severability. If a part of  
10 this act is invalid, all valid parts that are severable from  
11 the invalid part remain in effect. If a part of this act is  
12 invalid in one or more of its applications, the part remains  
13 in effect in all valid applications that are severable from  
14 the invalid applications.

15 NEW SECTION. Section 9. Applicability. Sections 5 and  
16 6 apply only to a prescriptive easement that has not been  
17 perfected prior to [the effective date of this act].

18 NEW SECTION. Section 10. Effective date. This act is  
19 effective on passage and approval.

-End-

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. 2  
DATE 032785  
BILL NO. HB 265

SENATE JUDICIARY SUBCOMMITTEE ON STREAM ACCESS

*excluded lakes*

Issues of Deadlock

*carried*

- 1. Prohibit all recreational use on non-navigable streams without the consent of the landowner.

*Failed & then part passed*

- 2. Definition of lake - prohibit all recreational uses on lakes within 100 yards of an occupied dwelling.

~~Failed~~  
~~Failed~~  
~~Failed~~  
~~Failed~~

- 3. Statement in the bill that natural barriers and portage around them is not addressed. *Carried as amended*

*carried*

- 4. a. Method of determining portage route - as in bill or only through permission, purchase, or condemnation.

- b. Barriers subsequent to effective date of act - landowner must provide portage between low and high water marks.

*Failed*

- 5. Deletion of hunting as a recreational use.

~~Failed~~

- 6. Insertion, p. 6, line 12, "as defined in (section 1[8])."

~~Failed~~

- 7. Remove "other water-related pleasure activities" from definition of recreational use.

*Failed*

- 8. Definition of navigable - remove subsections (c) and (d).

- 9. Discussion topic -- Whether to include hiking and swimming in recreational use.

*reinserted  
Class I + II*

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 3

DATE 032785

BILL NO. HB 265

DEADLOCK ISSUE #1 - AMENDMENT TO GREY BILL:

1. Page 6, line 22.

Following: line 21

Insert: "(3) The public has no right to make recreational use of  
nonnavigable waters without permission of the landowner."

Renumber: subsequent subsections

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. 4  
DATE 032785  
BILL NO. HB 265

DEADLOCK ISSUE #2 - AMENDMENTS TO GREY BILL:

- 135 x  
1. Page 2, line 1.  
Following: Page 1, line 25.  
Insert: ", other than lakes,"
- 427 x  
2. Page 2, line 21.  
Following: "NAVIGABLE waters"  
Insert: ", except lakes"
- 427 x  
3. Page 3, line 9.  
Following: line 8  
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."
4. Page 6, line 22.  
Following: line 21  
Insert: "(3) The right of the public to make recreational use of  
lakes does not include any use within 100 yards of an occupied  
dwelling, without the permission of the landowner."  
Renumber: subsequent subsections

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. 4  
DATE 032785  
BILL NO. HB 265

DEADLOCK ISSUE #3 - AMENDMENT TO GREY BILL:

1. Page 10, line 8.

Following: line 7

Insert: "(4) 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 ~~legal~~  
lawful or  
unlawful*

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 4

DATE 032785

BILL NO. HB 265

DEADLOCK ISSUE #4 - AMENDMENTS TO GREY BILL:

1. Page 8, line 2 through page 10, line 7.

Following: "(2)" on line 2

Strike: remainder of line 2 through page 10, line 7, in its 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 between the low and high water marks."

2. Page 10, line 8.

Following: line 7

Strike: "(j)"

Insert: "(4)"

TECHNICAL AMENDMENTS TO CONFORM BILL:

1. Page 9, line 20 through line 1 on page 5.

Strike: subsection 10 in its entirety

Renumber: subsequent subsection

2. Page 10, line 12.

Following: "landowner"

Strike: "and supervisor"

3. Page 10, line 24 through line 5 on page 11.

Strike: subsection (3) in its entirety

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. 4  
DATE 032785  
BILL NO. HB 265

DEADLOCK ISSUE #5 - AMENDMENTS TO GREY BILL:

1. Page 3, line 23.  
Following: "fishing,"  
Strike: "hunting,"

2. Page 6, line 9.  
Following: "(D)"  
Strike: "BIG GAME"

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 4

DATE 032785

BILL NO. HB 265

DEADLOCK ISSUES #6 AND #7 - AMENDMENTS TO GREY BILL:

1. Page 4, lines 2 and 3.

Following: "paddle," on line 2

Strike: remainder of line 2 through "ACTIVITIES," on line 3

2. Page 6, line 19.

Following: "ACTIVITIES"

Insert: "as defined in [section (9)]"

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 4

DATE 032785

BILL NO. HB 265

DEADLOCK ISSUE #8 - AMENDMENTS TO GREY BILL:

1. Page 2, line 3.

Following: "thereof;"

Insert: "or"

2. Page 2, line 7.

Following: "ownership"

Strike: ";

Insert: "."

3. Page 2, lines 10 through 19.

Strike: subsections (c) and (D) in their entirety

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 4

DATE 032785

BILL NO. HB 265

DISCUSSION TOPIC - AMENDMENT TO GREY BILL:

1. Page 3, lines 23 and 24.

Following: "hunting," on line 23

Strike: remainder of line 23 through "HIKING," on line 24

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. 4  
DATE 032785  
BILL NO. HB 265

ALLIANCE PROPOSED AMENDMENTS

1. Page 1, line 25.  
Strike navigable waters  
Insert Class I
2. Page 2, line 1.  
Before that, insert "other than lakes"
3. Page 2, lines 2 & 3.  
Strike & reletter subsections.
4. Page 2, line 20.  
Insert Class II, strike nonnavigable
5. Page 2, line 21.  
Before that, insert "other than lakes"  
Insert Class I, strike nonnavigable.
6. Page 3, line 6.  
After system, insert "at the point where the waters  
are subjected to treatment"
7. Page 5, line 5  
After mark, insert "except lakes"
8. Page 6, line 9  
After ; insert:  
(E) OVERNIGHT CAMPING WITHIN EITHER SIGHT OF OR  
WITHIN 500 YARDS OF ANY OCCUPIED DWELLING;  
(F) THE PLACEMENT OR CREATION OF ANY PERMANENT  
STRUCTURE OR OBJECT SUCH AS A PERMANENT DUCK  
BLIND OR BOAT MOORAGE.
9. Page 6, lines 10-12, reinsert.
10. Page 6, line 13  
Strike (E), insert (A) and after "camping", strike  
remainder of sentence
11. Page 6, line 15  
Strike (F), insert (B) and after any, strike  
"permanent or"
12. Page 6, line 16  
After semipermanent, insert "or seasonal"  
After object strike remainder of sentence.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 5

DATE 032785

BILL NO. HB265

13. Page 6, line 18  
Strike (G), insert (C)
14. Page 6, line 20  
Strike (H), insert (D)
15. Page 7, line 4  
Insert "Class I and Class II"  
Strike navigable and nonnavigable
16. Page 10, line 10  
Insert:  
(k) Nothing contained in this act addresses the issue of natural barriers or the portage around natural barriers and nothing contained in this act makes such portage legal or illegal.
- yes 17. Page 12, line 8  
Insert:  
NEW SECTION. Section 9. Lakes. Nothing in this act addresses the recreational use of surface waters upon lakes as such water bodies are defined in 75-7-202.
- Renumber remaining sections.

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. 5  
DATE 032785  
BILL NO. HB 265

*Alliance Proposed Amendment*

HOUSE BILL NO. 265

INTRODUCED BY REAM, MARKS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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.*

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. 6  
DATE 032785  
BILL NO. HB 265



1 (2) "Class I waters" means surface waters other than  
2 lakes that:

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

14 (c) are or have been capable of supporting commercial  
15 activity within the meaning of the federal navigability  
16 test.

17 (3) "Class II waters" means all surface waters other  
18 than lakes that are not class I waters.

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

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

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

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 6

DATE 032785

BILL NO. HB 265



1 WATER-RELATED PLEASURE ACTIVITIES, and related unavoidable  
2 or incidental uses, /wAtəR/ /rɪleɪtɪd/ /plɛʒər/ /æktɪvɪtɪz/, and related unavoidable  
3 or incidental uses, /wAtəR/ /rɪleɪtɪd/ /plɛʒər/ /æktɪvɪtɪz/.

4 (B) // Recreation / use / means / with / respect / to / boats / on  
5 waters / any / of / the / uses / set / forth / in / subsection / (7) / is  
6 except / that / it / does / not / include / without / the / permission / of / the  
7 landowner /

8 (I) // overfishing / camping /

9 (II) // big game / hunting / or / upland / bird / hunting /

10 (III) // operation / of / all / motor / vehicles / or / other  
11 motorized / vehicles / not / primarily / designed / for / operation  
12 upon / water /,

13 (IV) // the / placement / of / a / structure / or / other / permanent / or  
14 semi-permanent / object / such / as / a / permanent / dock / or / other  
15 boat / storage / or

16 (V) // other / activities / which / are / not / primarily  
17 water-related / pleasure / activities /

18 (B)(9) (10) "Supervisors" means the board of superviso  
19 rs of a soil conservation district, the directors of a grazing  
20 district, or the board of county commissioners if a request p  
21 ursuant to [section 3(3)(b)] is not within the boundaries of a  
22 conservation district or if the request is refused by the boa  
23 rd of supervisors of a soil conservation district or the direc  
24 tors of a grazing district.

25

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. 6  
DATE 032785  
BILL NO. HB 265



1            1207 (11) "SURFACE WATER" MEANS, FOR THE PURPOSE OF  
2 DETERMINING THE PUBLIC'S ACCESS FOR RECREATIONAL USE, A  
3 NATURAL WATER BODY, ITS BED, AND ITS BANKS UP TO THE  
4 ORDINARY HIGH-WATER MARK, EXCEPT LAKES.

5            NEW SECTION. Section 2. Recreational use permitted --  
6 limitations -- exceptions. (1) Except as provided in  
7 subsection 1(7) SUBSECTIONS (2) THROUGH (4), all class  
8 I SURFACE waters that are capable of recreational use as  
9 defined in 1(7)(a), including the beds  
10 underlying the banks up to the ordinary high  
11 water mark, may be so used by the public without regard to  
12 the ownership of the land underlying the waters.

13            121 // Except as provided in subsection 1(7), all class  
14 II waters that are capable of recreational use as defined  
15 in subsection 1(7)(a), including the beds underlying them  
16 and the banks up to the ordinary high water mark, may be  
17 so used by the public without regard to the ownership of  
18 the land underlying them, except that recreational use  
19 does not include activities excluded in subsection  
20 1(7)(b)].

21            122 (2) The right of the public to make  
22 recreational use of surface waters does not include the  
23 right to make recreational use of waters, WITHOUT  
24 PERMISSION OF THE LANDOWNER:

25            (a) THE OPERATION OF ALL-TERRAIN VEHICLES OR OTHER

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 6

DATE 032785

BILL NO. HB 265



1 MOTORIZED VEHICLES NOT PRIMARILY DESIGNED FOR OPERATION UPON  
2 THE WATER;

3 (B) THE RECREATIONAL USE OF SURFACE WATERS in a stock  
4 pond or other PRIVATE impoundment fed by an intermittently  
5 flowing natural watercourse; ~~or~~

6 ~~(B)~~ (C) THE RECREATIONAL USE OF WATERS while diverted  
7 away from a natural water body for beneficial use pursuant  
8 to Title 85, chapter 2, part 2 or 3; OR

9 (D) BIG GAME HUNTING;

10 (E) OVERNIGHT CAMPING WITHIN EITHER SIGHT OF OR WITHIN  
11 500 YARDS OF ANY OCCUPIED DWELLING;

12 (F) THE PLACEMENT OR CREATION OF ANY PERMANENT STRUCTURE  
13 OR OBJECT SUCH AS A PERMANENT DUCK BLIND OR BOAT MOORAGE.

14 (3) THE RIGHT OF THE PUBLIC TO MAKE RECREATIONAL USE OF  
15 CLASS II WATERS DOES NOT INCLUDE, WITHOUT PERMISSION OF THE  
16 LANDOWNER:

17 (A) OVERNIGHT CAMPING;

18 (B) THE PLACEMENT OR CREATION OF ANY SEMIPERMANENT OR  
19 SEASONAL OBJECT; OR

20 (C) OTHER ACTIVITIES WHICH ARE NOT PRIMARILY  
21 WATER-RELATED PLEASURE ACTIVITIES/ ; OR

22 (D) USE OF A STREAMBED AS A RIGHT-OF-WAY FOR ANY PURPOSE  
23 WHEN WATER IS NOT FLOWING THEREIN.

24 ~~(A)~~ (3) The right of the public to make recreational  
25 use of surface waters does not grant any easement or right to  
the public to enter onto or cross private property in order to  
use such waters for recreational purposes.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 6

DATE 032785

BILL NO. HB 265

1           ~~(B)~~ (4) THE COMMISSION SHALL ADOPT RULES PURSUANT TO  
2 87-1-303, IN THE INTEREST OF PUBLIC HEALTH, PUBLIC SAFETY, OR  
3 THE PROTECTION OF PUBLIC AND PRIVATE PROPERTY, GOVERNING  
4 RECREATIONAL USE OF CLASS I AND CLASS II WATERS. THESE RULES  
5 MUST INCLUDE THE FOLLOWING:

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

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

10           (II) ALTERING LIMITATIONS, RESTRICTIONS, OR PROHIBITIONS  
11 ON RECREATIONAL USE OF A SURFACE WATER IMPOSED BY THE  
12 COMMISSION; AND

13           (B) PROVISIONS REQUIRING THE ISSUANCE OF WRITTEN  
14 FINDINGS AND A DECISION WHENEVER A REQUEST IS MADE PURSUANT TO  
15 THE RULES ADOPTED UNDER SUBSECTION ~~(B)~~ (4)(A).

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

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

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 6

DATE 032785

BILL NO. HB 265



1 (2) A landowner may create barriers across streams for  
2 purposes of land or water management or to establish land  
3 ownership as otherwise provided by law. If a landowner erects  
4 a ~~Barrier~~ STRUCTURE pursuant to a design approved by the  
5 department and the ~~Barrier/Is/Designed/Not/No/and~~ STRUCTURE  
6 does not interfere with the public's use of the surface  
7 waters, the public may not go above the ordinary high-water  
8 mark to portage around the ~~Barrier~~ STRUCTURE.

9 (3) (a) A portage route around or over a AN ARTIFICIAL  
10 barrier may be established to avoid damage to the landowner's  
11 land and violation of his rights as well as to provide a  
12 reasonable and safe route for the recreational user of the  
13 surface waters.

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

17 (c) Within 45 days of the receipt of a request, the  
18 supervisors shall, in consultation with the landowner and a  
19 representative of the department, examine and investigate the  
20 barrier and the adjoining land to determine a reasonable and  
21 safe portage route.

22 (d) Within 45 days of the examination of the site, the  
23 supervisors shall make a written finding of the most  
24 appropriate portage route.

25 (e) The cost of establishing the portage route around

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 6

DATE 032785

BILL NO. HB 265

1 artificial barriers must be borne by the involved landowner,  
2 except for the construction of notification signs of such  
3 route, which is the responsibility of the department. The  
4 cost of establishing a portage route around ~~natural~~  
5 ARTIFICIAL barriers NOT OWNED BY THE LANDOWNER ON WHOSE LAND  
6 THE PORTAGE ROUTE WILL BE PLACED must be borne by the  
7 department.

8 (f) Once the route is established, the department has  
9 the exclusive responsibility thereafter to maintain the  
10 portage route at reasonable times agreeable to the landowner.  
11 The department shall post notices on the stream of the  
12 existence of the portage route and the public's obligation to  
13 use it as the exclusive means around a barrier.

14 (g) If either the landowner or recreationist disagrees  
15 with the route described in subsection (3)(e), he may petition  
16 the district court, WITHIN 30 DAYS OF THE DECISION, to name a  
17 three-member arbitration panel. The panel must consist of an  
18 affected landowner, a member of an affected recreational  
19 group, and a member selected by the two other members of the  
20 arbitration panel. The arbitration panel may accept, reject,  
21 or modify the supervisors' finding under subsection (3)(d).

22 (h) The determination of the arbitration panel is  
23 binding upon the landowner and upon all parties that use the  
24 water for which the portage is provided. Costs of the  
25 arbitration panel, computed as for jurors' fees under

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. 6  
DATE 032785  
BILL NO. HB 265



1 3-15-201, shall be borne by the contesting party or parties;  
2 all other parties shall bear their own costs.

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

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

8 (k) Nothing contained in this act addresses the issue of  
9 natural barriers or the portage around natural barriers and  
10 nothing contained in this act makes such portage legal or  
11 illegal.

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

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

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 6

DATE 032785

BILL NO. HB 265

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

8 NEW SECTION. Section 5. Prescriptive easement not  
9 acquired by recreational use of surface waters. (1) A  
10 prescriptive easement is a right to use the property of  
11 another that is acquired by open, exclusive, notorious,  
12 hostile, adverse, continuous, and uninterrupted use for a  
13 period of 5 years.

14 (2) A prescriptive easement cannot be acquired through:

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

16 (I) the streambeds underlying them; ~~and~~

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

18 ~~of~~

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

20 (B) THE ENTERING OR CROSSING OF PRIVATE PROPERTY TO  
21 REACH SURFACE WATERS.

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

23 "70-19-405. Title by prescription. ~~Occupancy~~ Except  
24 as provided in [section 5], occupancy for the period  
25

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 6

DATE 032785

BILL NO. HB 265

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

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

10 NEW SECTION. Section 8. Severability. If a part of  
11 this act is invalid, all valid parts that are severable from  
12 the invalid part remain in effect. If a part of this act is  
13 invalid in one or more of its applications, the part remains  
14 in effect in all valid applications that are severable from  
15 the invalid applications.

16 NEW SECTION. Section 9. Lakes. Nothing in this act  
17 addresses the recreational use of surface waters of lakes as  
18 such water bodies are defined in 75-7-202.

19 NEW SECTION. Section 10. Applicability. Sections 5 and  
20 6 apply only to a prescriptive easement that has not been  
21 perfected prior to [the effective date of this act].

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

24 -End-

25 7331R

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. 6  
DATE 032785  
BILL NO. HB 265

Amendments to HB 265, Grey Bill

1. Page 1, line 25.

Following: "means"

Strike: "surface waters"

Insert: "rivers and streams"

2. Page 2, line 7.

Following: "ownership;"

Insert: "or"

3. Page 2, lines 10 through 19.

Following: "(C)"

Strike: remainder of line 10 through "test" on line 19

Insert: "have been historically used for floating in canoes, kayaks, or multiperson watercraft"

4. Page 2, line 20.

Following: "all"

Strike: "surface"

5. Page 2, line 21.

Following: line 20

Strike: "waters"

Insert: "rivers and streams"

6. Page 2, line 22.

Following: line 21

Insert: "(4) "Class A waters" means all nonnavigable rivers and streams including any lakes or reservoirs located therein, regardless of whether the lakes or reservoirs are navigable.

(5) "Class B waters" means all navigable rivers and streams, including any lakes or reservoirs located therein, except those waters specifically included as Class C waters.

(6) "Class C waters" means:

(a) the main stem of the:

(i) Yellowstone river;

(ii) Missouri river;

(iii) Flathead river;

(iv) Kootenai river;

(v) Big Horn river; and

(b) any lake or reservoir located in a river enumerated in subsection (a)."

Renumber: subsequent subsections

7. Page 3, line 22.

Following: "to"

Insert: ":"

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 7

DATE 032785

BILL NO. HB 265

8. Page 3, line 23.  
Following: "~~Class-I~~"  
Strike: "SURFACE"  
Insert: "Class C"  
Following: "fishing"  
Insert: "below the ordinary high-water mark"  
Following: "fishing,"  
Insert: "waterfowl"  
Following: "hunting,"  
Insert: "big game hunting with a long bow or shotgun except within 500 yards of any occupied dwelling or other structure impounding domestic livestock or used for agricultural purposes,"

9. Page 3, line 24.  
Following: "WITHIN"  
Strike: "100"  
Insert: "300"  
Following: "HIKING"  
Insert: "below the ordinary high-water mark"

10. Page 4, lines 2 and 3.  
Following: "paddle," on line 2.  
Strike: remainder of line 2 through "ACTIVITIES," on line 3  
Insert: "day camping below the ordinary high-water mark except within 500 yards of any occupied dwelling, any use allowed on Class A or Class B waters,"

11. Page 4, line 4.  
Following: "uses"  
Insert: "of the land below the ordinary high-water mark when such use is necessary to accomplish a permitted use or for purposes of safety;"

12. Page 4, line 5.  
Following: line 4  
Insert: "(b) Class B waters: boating in craft propelled by oar or paddle, swimming except within 300 yards of an occupied dwelling, hiking below the ordinary high water mark, fishing where permitted by 87-2-305, and any use of the land underlying the water when such use is temporarily necessary to accomplish a permitted use or for purposes of safety; and  
(c) Class A waters: floating in small craft or other floatation devices, fishing from the surface of the water, and any use of the land underlying the water when such use is temporarily necessary for purposes of safety"

13. Page 5, lines 2 through 5.  
Strike: subsection (11) in its entirety.

13A. P. 6, lines 4 & 5.  
14. Page 6, line 9,

Following: "HUNTING"  
Insert: " except as provided for on Class C waters"

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. 7  
DATE 032785  
BILL NO. HB 265

15. Page 6, line 19.  
Following: "ACTIVITIES"  
Insert: "as determined by the commission"
16. Page 8, lines 4 through 9.  
Following: "law." on line 4  
Strike: remainder of line 4 through "STRUCTURE." on line 9
17. Page 8, line 10.  
Following: "(a)"  
Strike: "A"  
Insert: "An exclusive"  
Following: "route"  
Insert: "above the ordinary high-water mark"
18. Page 8, line 12.  
Following: "landowner's"  
Strike: "land"  
Insert: "property"
19. Page 8, line 15.  
Following: "(b)"  
Strike: "A"  
Insert: "The exclusive"  
Following: "route"  
Insert: ", referred to in subsection (a),"
20. Page 8, line 22.  
Following: "route"  
Insert: "when one is determined by the supervisors to be necessary in the interests of public health or safety, or for the protection of public or private property."
21. Page 8, line 24.  
Following: "Supervisors"  
Insert: "in consultation with the department"  
Following: "written"  
Strike: "finding of"  
Insert: "recommendation concerning whether a portage route is needed, and"
22. Page 8, line 25.  
Following: "route"  
Insert: "if one is determined necessary"
23. Page 9, line 1.  
Following: "(e)"  
Strike: "The"  
Insert: "Where the landowner agrees to the establishment of the recommended exclusive portage route, the"
24. Page 9, line 2.  
Following: "barriers"  
Insert: "owned by the landowner that are constructed after [the effective date of this act]"

25. Page 9, line 5.  
Following: "establishing"  
Strike: "a"  
Insert: "other"  
Following: "portage"  
Strike: "route"  
Insert: "routes"

26. Page 9, line 9.  
Following: line 8  
Insert: "(f) where the landowner refuses to agree to the establishment of the recommended exclusive portage route around an artificial barrier that the commission determines constitutes a condition dangerous to public health or safety, the department may condemn an easement for such a route. The cost of establishing such a route must be borne by the department, including the construction and maintenance of notification signs."  
Renumber: subsequent subsections

27. Page 9, line 16 through page 10, line 7.  
Strike: subsections (g), (h), and (i) in their entirety  
Renumber: subsequent subsection

28. Page 12, line 9  
Following: line 8  
Insert: "NEW SECTION. Section 8. Petition for reclassification.  
(1) Upon receipt of a petition from 100 persons for reclassification of a river or stream from Class B to Class C, the department shall conduct hearings on the petition. The department shall take testimony on the proposed reclassification and make findings. The department shall make a recommendation to the legislature if it finds that a reclassification is proper. Only the legislature may make the reclassification.  
(2) The department may adopt rules prescribing the form and content of petitions."  
Renumber: subsequent sections

*Cripps*

HOUSE BILL NO. 265

INTRODUCED BY REAM, MARKS

1  
2  
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~~ NAVIGABLE waters" means ~~surface waters~~ rivers and streams

SENATE JUDICIARY COMMITTEE

EXH'BIT NO. 8

DATE 032785

BILL NO. HR 265



1 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; or

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]; or~~

17 ~~(e) (D) are or have been capable of supporting~~  
18 ~~commercial activity within the meaning of the federal~~  
19 ~~navigability test. (C) have been historically used for floating in cano~~  
*K. 12-21 or multiperson watercraft.*

20 (3) "Class-~~II~~ NONNAVIGABLE waters" means all surface  
21 waters that are not class-~~I~~ NAVIGABLE waters. *rivers and streams.*

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.

SENATE JUDICIARY COMMITTEE

-2- EXHIBIT NO. 8

HB 265

DATE 032785

40 715

*Amended  
No. 6*

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) "OCCUPIED DWELLING" MEANS A BUILDING USED FOR A  
10 HUMAN DWELLING AT LEAST ONCE A YEAR.

11        ~~(6)~~(7)(8) "Ordinary high-water mark" means the line  
12 that water impresses on land by covering it for sufficient  
13 periods to cause physical characteristics that distinguish  
14 the area below the line from the area above it.  
15 Characteristics of the area below the line include, when  
16 appropriate, but are not limited to ~~diminished-terrestrial~~  
17 ~~vegetation-or-lack-of-agricultural-crop-value~~ DEPRIVATION OF  
18 THE SOIL OF SUBSTANTIALLY ALL TERRESTRIAL VEGETATION AND  
19 DESTRUCTION OF ITS AGRICULTURAL VEGETATIVE VALUE. A FLOOD  
20 PLAIN ADJACENT TO SURFACE WATERS IS NOT CONSIDERED TO LIE  
21 WITHIN THE SURFACE WATERS' HIGH-WATER MARKS.

22        ~~(7)~~(8)(9) (a) "Recreational use" means with respect to  
23 ~~class--I~~ <sup>CLASS C</sup> ~~SURFACE~~ waters: fishing, <sup>below the ordinary high water mark,</sup> hunting, <sup>below the ordinary high water mark,</sup> swimming (EXCEPT  
24 WITHIN <sup>300</sup> ~~100~~ YARDS OF ANY OCCUPIED DWELLING), HIKING, <sup>below the ordinary high water mark</sup> floating  
25 in small craft or other flotation devices, boating in

big game hunting with a long bow or shotgun except within 500 yards of any occupied dwelling or other structure surrounding domestic livestock or used for agricultural purposes.

SENATE JUDICIARY COMMITTEE

-3- EXHIBIT NO. 8 HB 265

DATE 032785

BILL NO. HB 265

1 motorized craft unless otherwise prohibited or regulated by  
2 law, or craft propelled by oar or paddle, <sup>day camping</sup> ~~OTHER~~  
3 ~~below the ordinary high-water mark except within 500 yards of any~~  
4 ~~WATER-RELATED PLEASURE ACTIVITIES, and related unavoidable~~  
5 ~~occupied dwelling) any use of Class A or Class B waters,~~  
6 or incidental uses, ~~within the ordinary high-water mark of~~  
7 ~~the waters.~~ <sup>of the land below the ordinary high-water mark where</sup>  
8 <sup>such use is necessary to accomplish a permitted use or for purposes of safety</sup>

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)(10) "Supervisors" means the board of supervisors  
24 of a soil conservation district, the directors of a grazing  
25 district, or the board of county commissioners if a request  
pursuant to [section 3(3)(b)] is not within the boundaries  
of a conservation district or if the request is refused by  
the board of supervisors of a soil conservation district or

SENATE JUDICIARY COMMITTEE

Handwritten notes: (12) SEE 1/10/17

1 the directors of a grazing district.

2 ~~(10)(11) "SURFACE WATER" MEANS, FOR THE PURPOSE OF~~  
 3 ~~DETERMINING THE PUBLIC'S ACCESS FOR RECREATIONAL USE, A~~  
 4 ~~NATURAL WATER BODY, ITS BED, AND ITS BANKS UP TO THE~~  
 5 ~~ORDINARY-HIGH-WATER MARK.~~

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

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

21 (3)(2) The right of the public to make recreational  
 22 use of surface waters does not include ~~the--right--to--make~~  
 23 ~~recreational--use--of--waters,~~ WITHOUT PERMISSION OF THE  
 24 LANDOWNER:

25 (a) THE OPERATION OF ALL-TERRAIN VEHICLES OR OTHER

SENATE JUDICIARY COMMITTEE

1 MOTORIZED VEHICLES NOT PRIMARILY DESIGNED FOR OPERATION UPON  
2 THE WATER;

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

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

9 (D) BIG GAME HUNTING; *except as provided for on Class C waters;*

10 (3) -- THE RIGHT OF THE PUBLIC TO MAKE RECREATIONAL USE  
11 OF CLASS II WATERS DOES NOT INCLUDE, WITHOUT PERMISSION OF  
12 THE LANDOWNER;

13 (A)(E) OVERNIGHT CAMPING WITHIN 500 YARDS OF ANY  
14 OCCUPIED DWELLING;

15 (B)(F) THE PLACEMENT OR CREATION OF ANY PERMANENT OR  
16 SEMIPERMANENT OBJECT, SUCH AS A PERMANENT DUCK BLIND OR BOAT  
17 MOORAGE; OR

18 (G) OTHER ACTIVITIES WHICH ARE NOT PRIMARILY  
19 WATER-RELATED PLEASURE ACTIVITIES; *OR as determined by the*  
*commission.*

20 (H) 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  
23 use of surface waters does not grant any easement or right  
24 to the public to enter onto or cross private property in  
25 order to use such waters for recreational purposes.

SENATE JUDICIARY COMMITTEE

1           †5†(4) THE COMMISSION SHALL ADOPT RULES PURSUANT TO  
 2           87-1-303, IN THE INTEREST OF PUBLIC HEALTH, PUBLIC SAFETY,  
 3           OR THE PROTECTION OF PUBLIC AND PRIVATE PROPERTY, GOVERNING  
 4           RECREATIONAL USE OF ~~CLASS--I--AND--CLASS--II~~ NAVIGABLE AND  
 5           NONNAVIGABLE WATERS. THESE RULES MUST INCLUDE THE FOLLOWING:

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

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

10          OR

11           (II) ALTERING LIMITATIONS, RESTRICTIONS, OR  
 12           PROHIBITIONS ON RECREATIONAL USE OF A SURFACE WATER IMPOSED  
 13           BY THE COMMISSION; AND

14           (B) PROVISIONS REQUIRING THE ISSUANCE OF WRITTEN  
 15           FINDINGS AND A DECISION WHENEVER A REQUEST IS MADE PURSUANT  
 16           TO THE RULES ADOPTED UNDER SUBSECTION †5†(4)(A).

17           †5†6†(5) The provisions of this section do not affect  
 18 any rights of the public with respect to state-owned lands  
 19 that are school trust lands or any rights of lessees of such  
 20 lands ~~under-lease-on-†the-effective-date-of-this-act†~~.

21           NEW SECTION. Section 3. Right to portage --  
 22 establishment of portage route. (1) A member of the public  
 23 making recreational use of surface waters may, above the  
 24 ordinary high-water mark, portage around barriers in the  
 25 least intrusive manner possible, avoiding damage to the

SENATE JUDICIARY COMMITTEE

1 landowner's land and violation of his rights.

2 (2) A landowner may create barriers across streams for  
3 purposes of land or water management or to establish land  
4 ownership as otherwise provided by law. ~~If a landowner~~  
5 ~~erects a barrier~~ STRUCTURE pursuant to a design approved by  
6 ~~the department and the barrier is designed not to and~~  
7 STRUCTURE does not interfere with the public's use of the  
8 surface waters, the public may not go above the ordinary  
9 high-water mark to portage around the barrier STRUCTURE.

10 (3) (a) <sup>an exclusive</sup> A portage route around or over a AN ARTIFICIAL  
11 barrier may be established to avoid damage to the  
12 landowner's <sup>property</sup> ~~land~~ and violation of his rights as well as to  
13 provide a reasonable and safe route for the recreational  
14 user of the surface waters.

15 (b) <sup>The exclusive</sup> A portage route <sup>refers to in subsection (a)</sup> may be established when either a  
16 landowner or a member of the recreating public submits a  
17 request to the supervisors that such a route be established.

18 (c) Within 45 days of the receipt of a request, the  
19 supervisors shall, in consultation with the landowner and a  
20 representative of the department, examine and investigate  
21 the barrier and the adjoining land to determine a reasonable  
22 and safe portage route, <sup>when one is determined by the supervisors to be necessary in the interest of public health or safety for the protection of public or private property.</sup>

23 (d) Within 45 days of the examination of the site, the  
24 supervisors <sup>in consultation with the department</sup> shall make a written ~~finding~~ of the most  
25 appropriate portage route, <sup>if one is determined necessary</sup>

→ recommendation concerning whether a portage route is needed

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 8

DATE 032785

FILE NO. HB 265

When the landowner agrees to the establishment of the recom me. exclusive portage route, the

~~if one is determined~~

22  
23

24

25

26  
27  
28

29

1 (e) ~~The~~ cost of establishing the portage route, around <sup>if one is determined</sup> ~~artificial~~ <sup>artificial</sup> barriers <sup>owned by the landowner that are constructed after the effective date of this act</sup> must be borne by the involved landowner, <sup>if one is determined</sup> ~~except~~ <sup>except</sup> for the construction of notification signs of such route, which is the responsibility of the department. The cost of establishing <sup>other</sup> a portage <sup>route</sup> ~~route~~ around natural ARTIFICIAL barriers NOT OWNED BY THE LANDOWNER ON WHOSE LAND THE PORTAGE ROUTE WILL BE PLACED must be borne by the department.

9 (f) Once the route is established, the department has the exclusive responsibility thereafter to maintain the portage route at reasonable times agreeable to the landowner. The department shall post notices on the stream of the existence of the portage route and the public's obligation to use it as the exclusive means around a barrier.

16 ~~(g) If either the landowner or recreationist disagrees with the route described in subsection (3)(e), he may petition the district court, WITHIN 30 DAYS OF THE DECISION, to name a three-member arbitration panel. The panel must consist of an affected landowner, a member of an affected recreational group, and a member selected by the two other members of the arbitration panel. The arbitration panel may accept, reject, or modify the supervisors' finding under subsection (3)(d).~~

25 (h) The determination of the arbitration panel is

SENATE JUDICIARY COMMITTEE

-9- EXHIBIT NO. 8  
DATE 032785 HB 265  
BILL NO. HB 265

7

1 ~~binding upon the landowner and upon all parties that use the~~  
 2 ~~water for which the portage is provided. Costs of the~~  
 3 ~~arbitration panel, computed as for jurors' fees under~~  
 4 ~~3-15-201, shall be borne by the contesting party or parties;~~  
 5 ~~all other parties shall bear their own costs.~~

6 ~~(i) The determination of the arbitration panel may be~~  
 7 ~~appealed within 30 days to the district court.~~

8 (j) Once a portage route is established, the public  
 9 shall use the portage route as the exclusive means to  
 10 portage around or over the barrier.

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

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

24 (3) No supervisor OR ANY MEMBER OF THE ARBITRATION  
 25 PANEL who participates in a decision regarding the placement

SENATE JUDICIARY COMMITTEE

1 of a portage route is liable to any person who while--making  
2 recreational--use--of--the--surface--waters-is-injured-while  
3 using IS INJURED OR WHOSE PROPERTY IS DAMAGED BECAUSE OF  
4 PLACEMENT OR USE OF the portage route except for an act or  
5 omission that constitutes willful and wanton misconduct.

6 NEW SECTION. Section 5. Prescriptive easement not  
7 acquired by recreational use of surface waters. (1) A  
8 prescriptive easement is a right to use the property of  
9 another that is acquired by open, exclusive, notorious,  
10 hostile, adverse, continuous, and uninterrupted use for a  
11 period of 5 years.

12 (2) A prescriptive easement cannot be acquired  
13 through:

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

15 (I) the streambeds underlying them; and

16 (II) the banks up to the ordinary high-water mark; or  
17 of

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

19 (B) THE ENTERING OR CROSSING OF PRIVATE PROPERTY TO  
20 REACH SURFACE WATERS.

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

22 "70-19-405. Title by prescription. Occupancy Except as  
23 provided in [section 5], occupancy for the period prescribed  
24 by this chapter as sufficient to bar an action for the  
25 recovery of the property confers a title thereto,

SENATE JUDICIARY COMMITTEE

1 denominated a title by prescription, which is sufficient  
 2 against all."

3 NEW SECTION. SECTION 7. LAND TITLE UNAFFECTED. THE  
 4 PROVISIONS OF [THIS ACT] AND THE RECREATIONAL USES PERMITTED  
 5 BY [SECTION 2] DO NOT AFFECT THE TITLE OR OWNERSHIP OF THE  
 6 SURFACE WATERS, THE BEDS AND BANKS OF ANY NAVIGABLE OR  
 7 NONNAVIGABLE WATERS, OR THE PORTAGE ROUTES WITHIN THIS  
 8 STATE. → See NEW SECTION ITEM 28

9 NEW SECTION. Section 8. Severability. If a part of  
 10 this act is invalid, all valid parts that are severable from  
 11 the invalid part remain in effect. If a part of this act is  
 12 invalid in one or more of its applications, the part remains  
 13 in effect in all valid applications that are severable from  
 14 the invalid applications.

15 NEW SECTION. Section 9. Applicability. Sections 5 and  
 16 6 apply only to a prescriptive easement that has not been  
 17 perfected prior to [the effective date of this act].

18 NEW SECTION. Section 10. Effective date. This act is  
 19 effective on passage and approval.

-End-

SENATE JUDICIARY COMMITTEE  
 EXHIBIT NO. 8  
 DATE 032785  
 BILL NO. HB 265

Proposed Amendments to Grey Bill HB 265

*carried*  
1. Page 6, line 9.

Following: "HUNTING"

Strike: " ; "

Insert: " : (i) on nonnavigable waters; or  
(ii) by any means other than long bow or shotgun  
on navigable waters; "

*carried*  
2. Page 6, line 13.

Following: "CAMPING"

Insert: "within sight of any occupied dwelling or"

*carried*  
3. Page 6, line 14.

Following: "DWELLING"

Insert: "whichever is less"

Ⓝ except by long bow or  
shotgun when specifically  
authorized by the  
commission

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 9

DATE 032785

BILL NO. HB 265

secretary and chairman. Have at least 50 printed to start.)

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time 10:40 pm

| NAME                               | YES | NO  |
|------------------------------------|-----|-----|
| Senator Chet Blaylock              |     | X   |
| Senator Bob Brown                  |     | X   |
| Senator Bruce D. Crippen           | X   |     |
| Senator Jack Galt                  | X   |     |
| Senator R. J. "Dick" Pinsoneault   |     | X   |
| Senator James Shaw                 | X   |     |
| Senator Thomas E. Towe             |     | X   |
| Senator William P. Yellowtail, Jr. |     | X   |
| Vice Chairman                      |     | X   |
| Senator M. K. "Kermit" Daniels     |     | X   |
| Chairman                           |     | X   |
| Senator Joe Mazurek                |     | X   |
|                                    | (3) | (7) |

Cindy Staley  
Secretary

Chairman

Motion: adopt Crippen's amendments

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 10

DATE 032785

BILL NO. HB 265

secretary and chairman. Have at least 50 printed to start.)

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time 10:52 pm

| NAME                               | YES | NO  |
|------------------------------------|-----|-----|
| Senator Chet Blaylock              | X   |     |
| Senator Bob Brown                  | X   |     |
| Senator Bruce D. Crippen           |     | X   |
| Senator Jack Galt                  |     | X   |
| Senator R. J. "Dick" Pinsoneault   |     | X   |
| Senator James Shaw                 |     | X   |
| Senator Thomas E. Towe             | X   |     |
| Senator William P. Yellowtail, Jr. | X   |     |
| Vice Chairman                      |     |     |
| Senator M. K. "Kermit" Daniels     |     | X   |
| Chairman                           |     |     |
| Senator Joe Mazurek                | X   |     |
|                                    |     |     |
|                                    |     |     |
|                                    | (5) | (5) |

Cindy Haley  
Secretary

\_\_\_\_\_  
Chairman

Motion: adopt Towe's amendments

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. 11  
DATE 032785  
BILL NO. HB 265

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time \_\_\_\_\_

| NAME                               | YES | NO  |
|------------------------------------|-----|-----|
| Senator Chet Blaylock              |     | X   |
| Senator Bob Brown                  | X   |     |
| Senator Bruce D. Crippen           | X   |     |
| Senator Jack Galt                  | X   |     |
| Senator R. J. "Dick" Pinsoneault   | X   |     |
| Senator James Shaw                 | X   |     |
| Senator Thomas E. Towe             |     | X   |
| Senator William P. Yellowtail, Jr. |     | X   |
| Vice Chairman                      |     | X   |
| Senator M. K. "Kermit" Daniels     |     | X   |
| Chairman                           |     | X   |
| Senator Joe Mazurek                |     | X   |
|                                    |     |     |
|                                    |     |     |
|                                    | (5) | (5) |

Cindy Staley  
Secretary

Chairman

Motion: Crippen's motion to amend p. 5  
re bed and banks

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE  
 EXHIBIT NO. 12  
 DATE 032785  
 BILL NO. HB 265

secretary and chairman. Have at least 50 printed to start.)

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 03.27.85 House Bill No. 265 Time 11:13 pm

| NAME                               | YES | NO  |
|------------------------------------|-----|-----|
| Senator Chet Blaylock              |     | X   |
| Senator Bob Brown                  | X   |     |
| Senator Bruce D. Crippen           | X   |     |
| Senator Jack Galt                  | X   |     |
| Senator R. J. "Dick" Pinsoneault   | X   |     |
| Senator James Shaw                 | X   |     |
| Senator Thomas E. Towe             |     | X   |
| Senator William P. Yellowtail, Jr. |     | X   |
| Vice Chairman                      |     |     |
| Senator M. K. "Kermit" Daniels     | X   |     |
| Chairman                           |     |     |
| Senator Joe Mazurek                |     | X   |
|                                    |     |     |
|                                    |     |     |
|                                    | (6) | (4) |

Secretary \_\_\_\_\_

Chairman \_\_\_\_\_

Motion: Deadlock issue #1

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. 13  
DATE 032785  
BILL NO. HB 265

ROLL CALL VOTE

3

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time 11:54 pm

| NAME  | YES          | NO  |
|---|--------------|-----|
| Senator Chet Blaylock                           | X            |     |
| Senator Bob Brown                               | X            |     |
| Senator Bruce D. Crippen                        |              | X   |
| Senator Jack Galt                               |              | X   |
| Senator R. J. "Dick" Pinsoneault                |              | X   |
| Senator James Shaw                              |              | X   |
| Senator Thomas E. Towe                          |              | X   |
| Senator William P. Yellowtail, Jr.              | X            |     |
| Vice Chairman<br>Senator M. K. "Kermit" Daniels | <del>X</del> | X   |
| Chairman<br>Senator Joe Mazurek                 | X            |     |
|   |              |     |
|   |              |     |
|   | (4)          | (6) |

Secretary \_\_\_\_\_

Chairman \_\_\_\_\_

Motion: reinsert natural barriers  
in the bill

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE  
EXH'BIT NO. 14  
DATE 032785  
BILL NO. HB 265

(Type in committee name, date, secretary and chairman. Have at least 50 printed to start.)

F

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time 12:00 pm

| NAME                               | YES | NO |
|------------------------------------|-----|----|
| Senator Chet Blaylock              | X   |    |
| Senator Bob Brown                  | X   |    |
| Senator Bruce D. Crippen           |     | X  |
| Senator Jack Galt                  |     | X  |
| Senator R. J. "Dick" Pinsoneault   | X   |    |
| Senator James Shaw                 |     | X  |
| Senator Thomas E. Towe             | X   |    |
| Senator William P. Yellowtail, Jr. | X   |    |
| Vice Chairman                      |     |    |
| Senator M. K. "Kermit" Daniels     | X   |    |
| Chairman                           |     |    |
| Senator Joe Mazurek                | X   |    |
|                                    |     |    |
|                                    |     |    |

(7) (3)

Secretary \_\_\_\_\_

Chairman \_\_\_\_\_

Motion: Deadlock Issue #3 as amended

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 15

DATE 032785

BILL NO. HB 265

secretary and chairman. Have at least 50 printed to start.)

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time 12:05 am

| NAME                               | YES | NO  |
|------------------------------------|-----|-----|
| Senator Chet Blaylock              | X   |     |
| Senator Bob Brown                  |     | X   |
| Senator Bruce D. Crippen           |     | X   |
| Senator Jack Galt                  |     | X   |
| Senator R. J. "Dick" Pinsoneault   | X   |     |
| Senator James Shaw                 |     | X   |
| Senator Thomas E. Towe             | X   |     |
| Senator William P. Yellowtail, Jr. | X   |     |
| Vice Chairman                      | X   |     |
| Senator M. K. "Kermit" Daniels     | X   |     |
| Chairman                           | X   |     |
| Senator Joe Mazurek                |     |     |
|                                    | (6) | (4) |

Secretary \_\_\_\_\_

Chairman \_\_\_\_\_

Motion: reinsert ~~with~~ Class I + Class II  
for navigable and nonnavigable

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 16

DATE 032785

BILL NO. HB 265

(F)

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time 12:18 am

| NAME                               | YES | NO  |
|------------------------------------|-----|-----|
| Senator Chet Blaylock              | X   |     |
| Senator Bob Brown                  |     | X   |
| Senator Bruce D. Crippen           |     | X   |
| Senator Jack Galt                  |     | X   |
| Senator R. J. "Dick" Pinsoneault   |     | X   |
| Senator James Shaw                 | X   |     |
| Senator Thomas E. Towe             | X   |     |
| Senator William P. Yellowtail, Jr. |     | X   |
| Vice Chairman                      |     | X   |
| Senator M. K. "Kermit" Daniels     |     | X   |
| Chairman                           |     | X   |
| Senator Joe Mazurek                |     | X   |
|                                    |     |     |
|                                    |     |     |
|                                    | (3) | (7) |

Secretary \_\_\_\_\_

Chairman \_\_\_\_\_

Motion: Adopt bill as amended

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 17

DATE 032785

BILL NO. HB 265

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time 12:31 am

| NAME                               | YES | NO  |
|------------------------------------|-----|-----|
| Senator Chet Blaylock              |     | X   |
| Senator Bob Brown                  | X   |     |
| Senator Bruce D. Crippen           | X   |     |
| Senator Jack Galt                  | X   |     |
| Senator R. J. "Dick" Pinsonneault  | X   |     |
| Senator James Shaw                 | X   |     |
| Senator Thomas E. Towe             |     | X   |
| Senator William P. Yellowtail, Jr. |     | X   |
| Vice Chairman                      |     |     |
| Senator M. K. "Kermit" Daniels     | X   |     |
| Chairman                           |     |     |
| Senator Joe Mazurek                |     | X   |
|                                    |     |     |
|                                    |     |     |
|                                    | (6) | (4) |

Secretary \_\_\_\_\_

Chairman \_\_\_\_\_

Motion: Deadlock Issue #4  
as amended by  
Sen. Pinsonneault

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 18

DATE 032785

BILL NO. HB 265

secretary and chairman. Have at least 50 printed to start.)

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time 12:35 am

| NAME                               | YES | NO  |
|------------------------------------|-----|-----|
| Senator Chet Blaylock              |     | X   |
| Senator Bob Brown                  | X   |     |
| Senator Bruce D. Crippen           | X   |     |
| Senator Jack Galt                  | X   |     |
| Senator R. J. "Dick" Pinsoneault   |     | X   |
| Senator James Shaw                 | X   |     |
| Senator Thomas E. Towe             |     | X   |
| Senator William P. Yellowtail, Jr. |     | X   |
| Vice Chairman                      |     | X   |
| Senator M. K. "Kermit" Daniels     |     | X   |
| Chairman                           |     | X   |
| Senator Joe Mazurek                |     | X   |
|                                    |     |     |
|                                    |     |     |
|                                    | (4) | (6) |

Secretary \_\_\_\_\_

Chairman \_\_\_\_\_

Motion: Deadlock Issue #5

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 19

DATE 032785

BILL NO. HB 265

5

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time 12:40 am

| NAME  | YES | NO  |
|---|-----|-----|
| Senator Chet Blaylock                           |     | X   |
| Senator Bob Brown                               | X   |     |
| Senator Bruce D. Crippen                        | X   |     |
| Senator Jack Galt                               | X   |     |
| Senator R. J. "Dick" Pinsoneault                |     | X   |
| Senator James Shaw                              | X   |     |
| Senator Thomas E. Towe                          |     | X   |
| Senator William P. Yellowtail, Jr.              |     | X   |
| Vice Chairman<br>Senator M. K. "Kermit" Daniels | X   |     |
| Chairman<br>Senator Joe Mazurek                 | X   |     |
|   |     |     |
|   |     |     |
|   | (6) | (4) |

Secretary \_\_\_\_\_

Chairman \_\_\_\_\_

Motion: Deadlock Issue #6 + #7  
~~pass~~ Don't adopt

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE  
 EXHIBIT NO. 20  
 DATE 032785  
 BILL NO. HB 265

secretary and chairman. Have at least 50 printed to start.)

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time 12:58 pm

| NAME                               | YES | NO  |
|------------------------------------|-----|-----|
| Senator Chet Blaylock              |     | X   |
| Senator Bob Brown                  |     | X   |
| Senator Bruce D. Crippen           | X   |     |
| Senator Jack Galt                  | X   |     |
| Senator R. J. "Dick" Pinsoneault   |     | X   |
| Senator James Shaw                 | X   |     |
| Senator Thomas E. Towe             |     | X   |
| Senator William P. Yellowtail, Jr. |     | X   |
| Vice Chairman                      |     | X   |
| Senator M. K. "Kermit" Daniels     |     | X   |
| Chairman                           |     | X   |
| Senator Joe Mazurek                |     | X   |
|                                    |     |     |
|                                    |     |     |
|                                    | (3) | (7) |

Secretary \_\_\_\_\_

Chairman \_\_\_\_\_

Motion: Deadlock Issue #8

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE  
EXHIBIT NO. 21  
DATE 032785  
BILL NO. HB 265

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time 1:15 am

| NAME                               | YES | NO  |
|------------------------------------|-----|-----|
| Senator Chet Blaylock              | X   |     |
| Senator Bob Brown                  |     | X   |
| Senator Bruce D. Crippen           |     | X   |
| Senator Jack Galt                  |     | X   |
| Senator R. J. "Dick" Pinsoneault   | X   |     |
| Senator James Shaw                 |     | X   |
| Senator Thomas E. Towe             | X   |     |
| Senator William P. Yellowtail, Jr. | X   |     |
| Vice Chairman                      | X   |     |
| Senator M. K. "Kermit" Daniels     | X   |     |
| Chairman                           | X   |     |
| Senator Joe Mazurek                |     |     |
|                                    |     |     |
|                                    |     |     |
|                                    | (6) | (4) |

Secretary \_\_\_\_\_

Chairman \_\_\_\_\_

Motion: Towes amendment #1 as changed

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE

EXH'BIT NO. 22

DATE 032785

BILL NO. HB 265

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time 1:25

| NAME  | YES | NO  |
|---|-----|-----|
| Senator Chet Blaylock                           | X   |     |
| Senator Bob Brown                               | X   |     |
| Senator Bruce D. Crippen                        |     | X   |
| Senator Jack Galt                               |     | X   |
| Senator R. J. "Dick" Pinsoneault                | X   |     |
| Senator James Shaw                              |     | X   |
| Senator Thomas E. Towe                          | X   |     |
| Senator William P. Yellowtail, Jr.              | X   |     |
| Vice Chairman<br>Senator M. K. "Kermit" Daniels | X   |     |
| Chairman<br>Senator Joe Mazurek                 | X   |     |
|   |     |     |
|   |     |     |
|   | (7) | (3) |

Secretary \_\_\_\_\_

Chairman \_\_\_\_\_

Motion: BCIAA

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 23

DATE 032785

BILL NO HB 265

# STANDING COMMITTEE REPORT

Page 1 of 5

March 27 19 85

MR. PRESIDENT

## JUDICIARY

We, your committee on.....

## HOUSE BILL

having had under consideration..... No. 265

third reading copy ( blue )  
color

(Senator Yellowtail)

## STREAM ACCESS

## HOUSE BILL

Respectfully report as follows: That..... 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~~

DO NOT PASS

~~XXXXXXXXXX~~

DO NOT PASS

CONTINUED

Chairman.

Page 2 of 5

HOUSE BILL NO. 265

6. Page 2, lines 7 and 8.

Strike: subsection (c) in its entirety

Re-number: 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."

Re-number: 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

Re-number: subsequent subsection

CONTINUED

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;"

13. Page 6, lines 4 through 6.  
Strike: lines 4 through 6 in their entirety  
Remember: 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: "(S)"

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."

Renumber: subsequent subsections

26. Page 7, line 13 through line 20, page 9.

Following: "(2)" on page 7, line 13

Strike: remainder of line 13 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