

HOUSE BILL NO. 309

INTRODUCED BY J. WELBORN

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A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THE PROHIBITION ON RECREATIONAL USE OF WATER DIVERTED FROM A NATURAL WATER BODY BY A CONSTRUCTED WATER CONVEYANCE SYSTEM; CLARIFYING THE DESCRIPTION OF A CONSTRUCTED WATER CONVEYANCE SYSTEM; REMOVING PROVISIONS OF STREAM ACCESS LAWS THAT HAVE BEEN DECLARED INVALID; AMENDING SECTIONS 23-2-301, 23-2-302, AND 23-2-310, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

Section 1. Section 23-2-301, MCA, is amended to read:

"23-2-301. Definitions. For purposes of this part, the following definitions apply:

(1) "Barrier" means an artificial obstruction located in or over a water body, restricting passage on or through the water, that 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 artificial obstacle to the natural flow of water.

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

- (a) lie within the officially recorded federal government survey meander lines of the waters;
- (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) 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 April 19, 1985; or

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

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

(4) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

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



1 (6) "Diverted ~~away~~ from a natural water body" means a diversion of surface water for a beneficial use
 2 as defined in 85-2-102 and allowed by Title 85, chapter 2, through a ~~constructed~~ water conveyance system
 3 constructed by humans, including but not limited to:

4 (a) an irrigation or drainage canal or ditch system that may include natural features incorporated into the
 5 water conveyance system in conjunction with constructed features, devices, or structures to convey water for
 6 irrigation, including but not limited to diversion structures, channels, water distribution devices and locations,
 7 return flow capacities, laterals, bilaterals, head gates, flumes, spillways, and boxes;

8 (b) weirs, channel excavations, lifts, and drops;

9 ~~(b)(c)~~ an industrial, municipal, or domestic water system, excluding the lake, stream, or reservoir from
 10 which the system obtains water;

11 ~~(e)(d)~~ a flood control channel; or

12 ~~(d)(e)~~ a hydropower inlet and discharge facility.

13 (7) "Lake" means a body of water where the surface water is retained by either natural or artificial means
 14 and the natural flow of water is substantially impeded.

15 ~~—— (8) "Occupied dwelling" means a building used for a human dwelling at least once a year.~~

16 ~~(9)(8)~~ "Ordinary high-water mark" means the line that water impresses on land by covering it for sufficient
 17 periods to cause physical characteristics that distinguish the area below the line from the area above it.
 18 Characteristics of the area below the line include, when appropriate, but are not limited to deprivation of the soil
 19 of substantially all terrestrial vegetation and destruction of its agricultural vegetative value. A flood plain adjacent
 20 to surface waters is not considered to lie within the surface waters' high-water marks.

21 ~~(10)(9)~~ "Recreational use" means, with respect to surface waters, fishing, hunting, swimming, floating
 22 in small craft or other flotation devices, boating in motorized craft unless otherwise prohibited or regulated by law,
 23 or craft propelled by oar or paddle, other water-related pleasure activities, and related unavoidable or incidental
 24 uses.

25 ~~(11)(10)~~ "Supervisors" means the board of supervisors of a soil conservation district, the directors of a
 26 grazing district, or the board of county commissioners if a request pursuant to 23-2-311(3)(b) is not within the
 27 boundaries of a conservation district or if the request is refused by the board of supervisors of a soil conservation
 28 district or the directors of a grazing district.

29 ~~(12)(11)~~ "Surface water" means, for the purpose of determining the public's access for recreational use,
 30 a natural water body, its bed, and its banks up to the ordinary high-water mark."

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Section 2. Section 23-2-302, MCA, is amended to read:

"23-2-302. Recreational use permitted -- limitations -- exceptions. (1) Except as provided in subsections (2) through (5), all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters.

(2) The right of the public to make recreational use of surface waters does not include, without permission or contractual arrangement with the landowner:

(a) the operation of all-terrain vehicles or other motorized vehicles not primarily designed for operation upon the water;

(b) the recreational use of surface waters in a stock pond or other private impoundment fed by an intermittently flowing natural watercourse;

~~(c) the recreational use of waters while diverted away from a natural water body for beneficial use pursuant to Title 85, chapter 2, part 2 or 3, except for impoundments or diverted waters to which the owner has provided public access;~~

~~(d) big game hunting except by long bow or shotgun when specifically authorized by the commission;~~

~~(e) overnight camping within sight of any occupied dwelling or within 500 yards of any occupied dwelling, whichever is less;~~

~~(f) the placement or creation of any permanent duck blind, boat moorage, or any seasonal or other objects within sight of or within 500 yards of an occupied dwelling, whichever is less~~

(c) except for impoundments or water diverted from a natural water body where the owner has provided public access, the recreational use of water diverted from a natural water body, including:

(i) the diverted water from the point of diversion to the point where the waters return to the natural water body from which the waters were diverted;

(ii) water bodies created at least in part by waters diverted from a natural water body where the diverted water is the principal source of water in the water body; or

(iii) water diverted to access points of ditches and other conveyances for the principal purpose of facilitating irrigation; or

~~(g)(d)~~ use of a streambed as a right-of-way for any purpose when water is not flowing therein in the streambed.

(3) The right of the public to make recreational use of class II waters does not include, without permission

1 of the landowner:

2 (a) big game hunting;

3 (b) overnight camping;

4 (c) the placement or creation of any seasonal object; or

5 (d) other activities ~~which that~~ are not primarily water-related pleasure activities that constitute recreational
6 use as defined in ~~23-2-301(10)~~ 23-2-301.

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

10 (5) The commission shall adopt rules pursuant to 87-1-303, in the interest of public health, public safety,
11 or the protection of public and private property, governing recreational use of class I and class II waters. These
12 rules must include the following:

13 (a) the establishment of procedures by which any person may request an order from the commission:

14 (i) limiting, restricting, or prohibiting the type, incidence, or extent of recreational use of a surface water;

15 or

16 (ii) altering limitations, restrictions, or prohibitions on recreational use of a surface water imposed by the
17 commission;

18 (b) provisions requiring the issuance of written findings and a decision whenever a request is made
19 pursuant to the rules adopted under subsection (5)(a); and

20 (c) a procedure for the identification of streams within class II waters ~~which that~~ are not capable of
21 recreational use or are capable of limited recreational use; and a procedure to restrict the recreational use to the
22 actual capacity of the water.

23 (6) The provisions of this section do not affect any rights of the public with respect to state-owned lands
24 that are school trust lands or any rights of lessees of ~~such~~ those lands."

25

26 **Section 3.** Section 23-2-310, MCA, is amended to read:

27 "**23-2-310. Lakes.** Nothing contained in this part addresses the recreational use of surface waters of
28 lakes, including lakes that impound water to facilitate irrigation."

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30 NEW SECTION. **Section 4. Severability.** If a part of [this act] is invalid, all valid parts that are severable

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

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

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