

SENATE BILL NO. 232

INTRODUCED BY F. MOORE

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  
26  
27  
28  
29  
30

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING STREAM ACCESS LAWS ONLY TO REFLECT THE MAJORITY OPINION OF THE SUPREME COURT IN THE 1987 GALT DECISION; AMENDING SECTIONS 23-2-302 AND 23-2-311, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

WHEREAS, in 1985, in response to court decisions on stream access, the Legislature enacted laws governing the recreational use of streams; and

WHEREAS, in 1987 the Montana Supreme Court declared unconstitutional certain provisions of the laws governing the recreational use of streams in the case of Galt v. St. No. 86-178; and

WHEREAS, these unconstitutional provisions remain as part of the Montana Code Annotated; and

WHEREAS, amendments to the law are necessary to remove these unconstitutional provisions.

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

**Section 1.** 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;~~



1 (e) overnight camping ~~within sight of any occupied dwelling or within 500 yards of~~ unless it is necessary  
 2 for the enjoyment of the surface water and the campsite is not within sight of any occupied dwelling or the  
 3 campsite is more than 500 yards from any occupied dwelling, whichever is less;

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

6 (g) the placement or creation of any seasonal object, such as a duck blind or boat moorage, unless  
 7 necessary for the enjoyment of that particular surface water and unless the seasonal objects are placed out of  
 8 sight of any occupied dwelling or more than 500 yards from any occupied dwelling, whichever is less;

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

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

13 (a) big game hunting;

14 (b) overnight camping;

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

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

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

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

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

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

26 or

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

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

1 (c) a procedure for the identification of streams within class II waters ~~which~~ that are not capable of  
 2 recreational use or are capable of limited recreational use, and a procedure to restrict the recreational use to the  
 3 actual capacity of the water.

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

7 **Section 2.** Section 23-2-311, MCA, is amended to read:

8 **"23-2-311. Right to portage -- establishment of portage route.** (1) A member of the public making  
 9 recreational use of surface waters may, above the ordinary high-water mark, portage around barriers in the least  
 10 intrusive manner possible, avoiding damage to the landowner's land and violation of the landowner's rights.

11 (2) A landowner may create barriers across streams for purposes of land or water management or to  
 12 establish land ownership as otherwise provided by law. If a landowner erects a structure that does not interfere  
 13 with the public's use of the surface waters, the public may not go above the ordinary high-water mark to portage  
 14 around the structure.

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

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

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

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

25 (e) The cost of establishing the portage route around artificial barriers must be borne by the ~~involved~~  
 26 ~~landowner, except for~~ department, including the cost of construction of notification signs of the route, ~~which is the~~  
 27 ~~responsibility of the department. The cost of establishing a portage route around artificial barriers not owned by~~  
 28 ~~the landowner on whose land the portage route will be placed must be borne by the department.~~

29 (f) Once the route is established, the department has the exclusive responsibility to maintain the portage  
 30 route at reasonable times agreeable to the landowner. The department shall post notices on the stream of the

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

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

7 (h) The determination of the arbitration panel is binding upon the landowner and upon all parties that use  
8 the water for which the portage is provided. Costs of the arbitration panel, computed as for jurors' fees under  
9 3-15-201, must be borne by the contesting party or parties. All other parties shall bear their own costs.

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

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

13 (4) This part does not address the issue of natural barriers or portage around the barriers, and this part  
14 does not make the portage lawful or unlawful."

15  
16 **NEW SECTION. Section 3. Severability.** If a part of [this act] is invalid, all valid parts that are severable  
17 from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part  
18 remains in effect in all valid applications that are severable from the invalid applications.

19

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

21

- END -