RECREATIONAL USE OF PUBLIC WATERS

2009 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Ben C. Ferry

Senate Sponsor: ____________

LONG TITLE

General Description:

This bill enacts provisions relating to the recreational use of public waters that flow over privately owned beds.

Highlighted Provisions:

This bill:

- defines terms;
- clarifies a provision relating to fencing;
- establishes a criminal penalty for:
  - cutting a fence; and
  - violating a provision in a part;
- authorizes a person to engage in certain recreational activities in specified public waters;
- authorizes a person in certain circumstances to touch certain private beds beneath specified public waters;
- specifies the public waters in which a person may engage in a recreational activity;
- creates a Recreational Access Board;
- establishes membership and duties for the Recreational Access Board; and
- establishes procedures for applications to the Recreational Access Board.

Monies Appropriated in this Bill:

None
Other Special Clauses:

This bill coordinates with H.B. 153, Trespass Law Amendments, by modifying language.

Utah Code Sections Affected:

AMENDS:

4-26-4, as enacted by Laws of Utah 1979, Chapter 2
63-34-3, as last amended by Laws of Utah 1996, Chapter 159
63I-1-273, as last amended by Laws of Utah 2008, Chapters 148, 311 and renumbered and amended by Laws of Utah 2008, Chapter 382

ENACTS:

73-6a-101, Utah Code Annotated 1953
73-6a-102, Utah Code Annotated 1953
73-6a-201, Utah Code Annotated 1953
73-6a-202, Utah Code Annotated 1953
73-6a-203, Utah Code Annotated 1953
73-6a-301, Utah Code Annotated 1953
73-6a-302, Utah Code Annotated 1953
73-6a-303, Utah Code Annotated 1953
73-6a-304, Utah Code Annotated 1953
73-6a-401, Utah Code Annotated 1953
73-6a-402, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 4-26-4 is amended to read:

4-26-4. Failure to close entrance to enclosure -- Class "C" misdemeanor -- Damages.

[Any person who willfully]

(1) A person is guilty of a class C misdemeanor if the person willfully:

(a) throws down a fence; or
(b) (i) opens bars or gates into any enclosure [other than] that is not:

(A) the person's own enclosure; or [into any]
(B) an enclosure jointly owned or occupied by [such] the person and others[;]; and
(ii) leaves [it] the enclosure open [is guilty of a class "C" misdemeanor, and is].

(2) A person is guilty of a class B misdemeanor if the person willfully cuts a fence.
(3) A person who performs an act described in this section is also liable in damage for any injury sustained by any person as a result of [such an] the act.

Section 2. Section 63-34-3 is amended to read:

63-34-3. Department of Natural Resources created -- Boards, councils, and divisions within department.
(1) There is created within state government the Department of Natural Resources.
(2) The Department of Natural Resources comprises the following boards, councils, and divisions:
(a) Board of Water Resources;
(b) Forestry, Fire and State Lands Advisory Council;
(c) Board of Oil, Gas and Mining;
(d) Board of Parks and Recreation;
(e) Wildlife Board;
(f) Riverway Enhancement Advisory Council;
(g) Board of the Utah Geological Survey;
(h) Water Development Coordinating Council;
(i) Division of Water Rights;
(j) Division of Water Resources;
(k) Division of Forestry, Fire and State Lands;
(l) Division of Oil, Gas and Mining;
(m) Division of Parks and Recreation;
(n) Division of Wildlife Resources; [and]
(o) Utah Geological Survey[;]; and
(p) Recreational Access Board, created in Section 73-6a-301.

Section 3. Section 63I-1-273 is amended to read:

63I-1-273. Repeal dates, Title 73.
(1) Title 73, Chapter 27, State Water Development Commission, is repealed December 31, 2018.
(2) The instream flow water right for trout habitat established in Subsection 73-3-30(3) is repealed December 31, 2018.

(3) Title 73, Chapter 6a, Part 3, Recreational Access Board, is repealed July 1, 2015.

Section 4. Section 73-6a-101 is enacted to read:

CHAPTER 6a. RECREATIONAL USE OF PUBLIC WATER


73-6a-101. Title.
This chapter is known as "Recreational Use of Public Water."

Section 5. Section 73-6a-102 is enacted to read:

73-6a-102. Definitions.
As used in this chapter:

(1) "Bed" means an area that is:
   (a) adjacent within five feet of a water body; and
   (b) beneath the ordinary high water mark.

(2) "Board" means the Recreational Access Board created in Section 73-6a-301.

(3) "Navigable water body" means a natural watercourse that is useful for commerce in the water body's ordinary condition in the customary modes of trade and travel as of January 4, 1896.

(4) "Ordinary high water mark" means the line that a water body impresses on the soil:
   (a) by covering the soil long enough to ordinarily deprive the soil of terrestrial vegetation; and
   (b) at the level where the water body would normally stand during the high water period when the water body is not affected by a flood or drought.

(5) "Permission" is as defined in Section 23-20-14.

(6) "Private bed" means the bed of a water body that is not a navigable water body.

(7) "Private water" means water that a person, with a valid right to use the water, has reduced to actual, physical possession and exclusive control by placing the water in a receptacle for storage or conveyance.

(8) "Property to which access is restricted" means real property:
   (a) that is cultivated land, as defined in Section 23-20-14;
   (b) that is:
(i) properly posted, as defined in Section 23-20-14; or
(ii) posted as described in Title 76, Chapter 6, Part 2, Burglary and Criminal Trespass;
(c) that is fenced or enclosed as described in Title 76, Chapter 6, Part 2, Burglary and
Criminal Trespass; or
(d) that the owner or a person authorized to act on the owner's behalf has requested a
person to leave as provided by:
(i) Section 23-20-14; or
(ii) Title 76, Chapter 6, Part 2, Burglary and Criminal Trespass.
(9) (a) "Public water" means water:
(i) described in Section 73-1-1; and
(ii) flowing on the surface:
(A) within a natural channel; or
(B) ponded in a natural lake or reservoir on a natural channel.
(b) "Public water" does not include private water.
(10) "Recreational activity" means an activity that is:
(a) lawful;
(b) engaged in:
(i) for a recreational purpose; or
(ii) a commercial purpose if a person is guiding or outfitting another person who is
engaging in an activity listed in Subsection (10)(c) for a recreational purpose; and
(c) one of the following:
(i) fishing;
(ii) swimming; or
(iii) floating on a vessel.
(11) (a) "Single family dwelling" means a structure constructed and customarily
occupied by one or more persons for the principle use as a single unit of residential housing.
(b) "Single family dwelling" does not include a:
(i) mobile home;
(ii) trailer;
(iii) duplex;
(iv) multi-unit apartment building;
(v) commercial structure;
(vi) outbuilding;
(vii) barn;
(viii) shed; or
(ix) structure with a purpose similar to the structures listed in Subsections (11)(b)(i)
through (viii), regardless of human occupancy.

(12) "Vessel" means a watercraft capable of floating and transporting a person on the
surface of the water, including a:
(a) boat;
(b) raft;
(c) canoe; or
(d) kayak.

Section 6. Section 73-6a-201 is enacted to read:

Part 2. Recreational Use of Private Beds

73-6a-201. Recreational use of public waters over private beds.
(1) Except as provided by Subsection (2), a person who touches a private bed is subject
to liability for trespass under:
(a) Section 23-20-14;
(b) Title 76, Chapter 6, Part 2, Burglary and Criminal Trespass; and
(c) a civil action for a claim arising out of touching the private bed.
(2) Except as provided by Subsection (5), a person may engage in a recreational
activity:
(a) on or within a public water:
(i) listed in Section 73-6a-202; and
(ii) located on or adjacent to property to which access is restricted; and
(b) by incidentally touching the bed of a public water described in Subsection (2)(a).
(3) While engaging in a recreational activity as authorized by Subsection (2), a person
may leave the bed if:
(a) the person has permission to leave the bed; or
(b) (i) an obstruction materially interferes with the recreational activity; and
(ii) the person walks or portages around the obstruction in the most direct and least
obtrusive manner to re-enter the public water at the nearest safe point above or below the
obstruction.

(4) Except as provided by Subsection (3), a person engaging in a recreational activity
as authorized by Subsection (2), may only enter or exit the surface or bed of a public water:
(a) on public property as authorized by the entity with jurisdiction over the use of the
public property:
(b) on private property that is not property to which access is restricted; or
(c) on private property if an easement or other lawful access is obtained.

(5) (a) A person may not fish:
(a) in a public water:
(i) listed in Section 73-6a-202; and
(ii) located on or adjacent to property to which access is restricted; and
(b) within 500 feet of a single family dwelling that is built before May 12, 2009, and
qualifies for the residential exemption under Section 59-2-103 if the owner of the single family
dwelling posts a notice visible from the bed indicating the segment of public water in which
fishing is prohibited by this section.

(6) A person may not engage in a recreational activity authorized by Subsection (2) if
the recreational activity:
(a) destroys, damages, removes, or alters real or personal property, including a:
(i) fence, as provided in Section 4-26-4;
(ii) structure;
(iii) diversion works;
(iv) vegetation;
(v) soil; or
(vi) rock;
(b) alters or obstructs water flows;
(c) involves construction or maintenance of a structure on the bed; or
(d) is undertaken on:
(i) horseback;
(ii) a motor vehicle, as defined in Section 41-6a-102; or
(iii) an off-highway vehicle, as defined in Section 41-22-2.
Section 7. Section 73-6a-202 is enacted to read:

73-6a-202. Public waters available for recreational use.

As authorized by Section 73-6a-201, a person may engage in a recreational activity on or in the following public waters:

(1) Bear River from the Idaho state line in Cache County to the Great Salt Lake in Box Elder County;

(2) Little Bear River from the outlet of Porcupine Reservoir downstream to Highway 30;

(3) Logan River from Highway 30 upstream to the United States Forest Service boundary line in Logan Canyon;

(4) Price River from the confluence with the White River and Lower Fish Creek downstream to the State Road 10 bridge;

(5) Jordan River from Utah Lake to the Great Salt Lake;

(6) Duchesne River from the Highway 40 bridge in Myton upstream to the confluence with the North Fork of the Duchesne River;

(7) Strawberry River from the confluence with the Duchesne River upstream to the Strawberry Reservoir dam;

(8) Sevier River from the confluence with Asay Creek south of the Highway 89 bridge downstream to Yuba Reservoir;

(9) Weber River from the confluence with the Gardners Fork in Summit County near the United States National Forest Service Road 138 downstream to the confluence with the Ogden River;

(10) Bear River from the Wyoming state line east of Woodruff downstream to the Wyoming state line northeast of Sage Creek Junction;

(11) Bear River from the Wyoming state line upstream to the confluence with the East Fork of the Bear River;

(12) Provo River from Utah Lake upstream to the Soapstone Guard Station off State Road 150 in Wasatch County;

(13) Ogden River from the Pineview Reservoir dam to the Great Salt Lake;

(14) North Branch and South Branch of the South Fork of the Ogden River from Pineview Reservoir upstream to Highway 39;
(15) North Branch and South Branch of the South Fork of the Ogden River from Causey Reservoir dam downstream to county road 8700 East;

(16) Lower Sevier River from the Yuba dam downstream to Sevier Lake; and

(17) White River from the Colorado state line in Uintah County downstream to the confluence with the Green River.

Section 8. Section 73-6a-203 is enacted to read:

73-6a-203. Penalty.

A person who violates this part is guilty of a class B misdemeanor.

Section 9. Section 73-6a-301 is enacted to read:

Part 3. Recreational Access Board

73-6a-301. Recreational Access Board -- Creation -- Membership.

(1) There is created within the Department of Natural Resources the Recreational Access Board consisting of seven members appointed by the governor with the consent of the Senate.

(2) The board shall consist of members nominated by the following interests:

(a) one individual from the governor's office who will act as the board chair;

(b) one individual from among nominees of the Department of Agriculture and Food;

(c) one individual from among nominees of an organization that promotes the agricultural industry;

(d) one individual from among nominees of an organization that promotes private real property interests;

(e) one individual from among nominees of the Division of Wildlife Resources;

(f) one individual from among nominees of the Division of Parks and Recreation; and

(g) one individual from among nominees of an organization that promotes sport fishing.

(3) (a) Nominating entities shall nominate at least two, but no more than four, individuals to the governor for the applicable position or vacancy that occurs on the board.

(b) The candidates nominated under Subsection (2) and the members appointed by the governor may not be:

(i) an employee of the nominating entity; or

(ii) a member of the Legislature.
(4) (a) Except as required by Subsection (4)(b), the governor shall appoint a member listed in Subsections (2)(b) through (g) to a three-year term.

(b) Notwithstanding the requirements of Subsection (4)(a), the governor shall, at the time of appointment, adjust the length of terms to ensure that the terms of board members are staggered so at least two members are appointed each year.

(c) If a vacancy occurs, the nominating entity shall submit a list of nominees as provided in Subsection (3) to the governor and the governor shall appoint a replacement for the unexpired term.

(d) A board member may serve two terms unless the governor determines an additional term is necessary due to exceptional circumstances.

(5) (a) The board shall elect a vice chair from its membership.

(b) When conducting a meeting, the chair or vice chair will vote only in the event of a tie among the other members.

(c) Five members of the board shall constitute a quorum.

(d) A vote of two-thirds of the quorum at a meeting is necessary to take action on behalf of the board.

(e) The executive director of the Department of Natural Resources or the executive director's designee shall act as secretary to the board but is not a voting member of the board.

(6) (a) The board shall hold a sufficient number of meetings each year to expeditiously conduct its business.

(b) A meeting may be called by the chair upon five days notice to the board members.

(c) A meeting may be held at the Salt Lake City office of the Department of Natural Resources or elsewhere in the state as determined by the board.

(7) (a) (i) A member who is not a government employee may not receive compensation or benefits for the member's service, but may receive per diem and expenses incurred in the performance of the member's official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

(ii) A member may decline to receive per diem and expenses for the member's service.

(b) (i) A state government officer and employee member who does not receive salary, per diem, or expenses from the agency the member represents for the member's service may receive per diem and expenses incurred in the performance of the member's official duties at
the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

(ii) A state government officer and employee member may decline to receive per diem and expenses for the member's service.

(8) The governor may remove at any time a member for:

(a) official misconduct; or

(b) habitual or willful neglect of duty.

Section 10. Section 73-6a-302 is enacted to read:

73-6a-302. Recreational Access Board -- Authority -- Responsibility.

(1) The board shall determine if an application submitted under Section 73-6a-304 satisfies the criteria listed in Section 73-6a-303.

(2) Based on the determination under Subsection (1), the board may recommend the Legislature include or exclude a public water in the list provided in Section 73-6a-202.

Section 11. Section 73-6a-303 is enacted to read:

73-6a-303. Criteria for a recommendation by the Recreational Access Board.

(1) Upon application, the board may recommend the Legislature include a public water in the list provided in Section 73-6a-202 if the public water:

(a) has a year-round water depth and flow capable of providing an opportunity to engage in a recreational activity;

(b) has historically provided significant opportunity for a recreational activity for the public;

(c) is of a nature that extending the authorization provided by this chapter will not unreasonably impair the bed owner's property rights; and

(d) does not meet the description in Subsection (2)(b).

(2) Upon application, the board may recommend the Legislature remove a public water or a segment of a public water from the list provided in Section 73-6a-202 if:

(a) the public water does not meet the criteria described in Subsection (1); or

(b) as of May 12, 2009:

(i) the public water is within the incorporated limits of a municipality;

(ii) legal public access, other than provided by this chapter, is not available on the surface or bed of the public water;
Section 12. Section 73-6a-304 is enacted to read:

73-6a-304. Application and procedures.

(1) (a) A person may submit a written, signed application with the recreational access application fee to the board petitioning to either include or exclude one public water segment on or from the list provided in Section 73-6a-202.

(b) The application shall contain the following information:

(i) the applicant's name, address, and phone number;

(ii) a detailed description of the one public water segment that is the subject of the application, including the sections, township, and range where the public water is located;

(iii) a clear and concise statement identifying the relief sought;

(iv) an explanation of the facts and circumstances justifying the relief sought based on the criteria provided in Section 73-6a-303; and

(v) the name and current address of each person or entity owning real property abutting or underlying the segment of the public water that is the subject of the application.

(2) The recreational access application fee shall consist of:

(a) the fee set by the Department of Natural Resources under Section 63-34-5; and

(b) the actual cost of notification required by Subsection (3)(a).

(3) (a) Upon receipt of an application, the board shall notify by certified mail:

(i) each county or municipality in which the segment of the public water is located; and

(ii) each person owning real property abutting or underlying the segment of the public water that is the subject of the application.

(b) The notice required by Subsection (3)(a) shall state that:

(i) the board has received an application; and

(ii) the recipient may file with the board a written response within 30 days of receipt of the notice.

(c) The board shall schedule a meeting no sooner than 45 days following mailing of the last notice required by this section where the board:
(i) shall allow the applicant to orally present facts and arguments to the board in support of the application;
(ii) may accept and consider public comment at the meeting in support or opposition to the application;
(iii) shall discuss and consider the responses submitted by a person described in Subsection (3)(a); and
(iv) shall enter a decision consistent with the requirements of this chapter either to grant, deny, or grant in part the relief requested in the application.

Section 13. Section 73-6a-401 is enacted to read:

Part 4. Miscellaneous

73-6a-401. Applicability of the chapter.
The provisions of this chapter do not affect:
(1) the title or ownership of the surface waters, beds, or portage routes of public water;
(2) sovereign lands, as defined in Section 65A-1-1; or
(3) the rights recognized in Section 23-21-4.

Section 14. Section 73-6a-402 is enacted to read:

73-6a-402. Landowner liability.
An owner with a private bed that is subject to the authorization recognized in this chapter has the liability protection afforded by Title 57, Chapter 14, Limitation of Landowner Liability - Public Recreation.

If this H.B. 187 and H.B. 153, Trespass Law Amendments, both pass, it is the intent of the Legislature that, in preparing the Utah Code database for publication, the Office of Legislative Research and General Counsel shall replace the references in:
(1) Subsection 73-6a-102(8)(b)(ii) from "Title 76, Chapter 6, Part 2, Burglary and Criminal Trespass" to ": (A) Subsection 76-6-206(2)(b)(iii); or (B) Subsection 76-6-206.3(2)(c)";
(2) Subsection 73-6a-102(8)(c) from "Title 76, Chapter 6, Part 2, Burglary and Criminal Trespass" to ": (A) Subsection 76-6-206(2)(b)(ii); or (B) Subsection 76-6-206.3(2)(b)";
(3) in Subsection 73-6a-102(8)(d)(ii) from "Title 76, Chapter 6, Part 2, Burglary and
Criminal Trespass" to "(A) Subsection 76-6-206(2)(b)(i); or (B) Subsection 76-6-206.3(2)(a)"; and

(4) Subsection 73-6a-201(1)(b) from "Title 76, Chapter 6, Part 2, Burglary and Criminal Trespass" to "Section 76-6-206 or Section 76-6-206.3".