

Representative Kay L. McIff proposes the following substitute bill:

RECREATIONAL USE OF PUBLIC WATER ON

PRIVATE PROPERTY

2010 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Kay L. McIff

Senate Sponsor: Dennis E. Stowell

LONG TITLE

General Description:

This bill addresses public use of public waters on public and private property.

Highlighted Provisions:

This bill:

- ▶ makes legislative declarations concerning constitutional protections for private property and related matters;
- ▶ provides liability protection for owners of private property beneath or adjacent to public waters;
- ▶ defines terms;
- ▶ outlines circumstances under which the public may acquire recreational access to public water on private property;
- ▶ provides a process for the declaration of the right to certain public recreational access based on historical adverse use;
- ▶ provides for injunctions;
- ▶ addresses the chapter's effect on other uses of public waters;
- ▶ requires a person using a public access area to remove refuse and personal property;
- ▶ addresses fences across public water; and



26 ▶ makes technical and conforming amendments.

27 **Monies Appropriated in this Bill:**

28 None

29 **Other Special Clauses:**

30 None

31 **Utah Code Sections Affected:**

32 AMENDS:

33 **57-14-4**, as last amended by Laws of Utah 1997, Chapter 62

34 **73-1-1**, Utah Code Annotated 1953

35 ENACTS:

36 **73-29-101**, Utah Code Annotated 1953

37 **73-29-102**, Utah Code Annotated 1953

38 **73-29-103**, Utah Code Annotated 1953

39 **73-29-201**, Utah Code Annotated 1953

40 **73-29-202**, Utah Code Annotated 1953

41 **73-29-203**, Utah Code Annotated 1953

42 **73-29-204**, Utah Code Annotated 1953

43 **73-29-205**, Utah Code Annotated 1953

44 **73-29-206**, Utah Code Annotated 1953

45 REPEALS AND REENACTS:

46 **57-14-1**, as last amended by Laws of Utah 1997, Chapter 62



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

49 Section 1. Section **57-14-1** is repealed and reenacted to read:

50 **57-14-1. Legislative purpose.**

51 This chapter's purpose is to limit the liability of public and private land owners toward a
52 person entering the owner's land as a trespasser or for recreational purposes, whether by
53 permission or by operation of Title 73, Chapter 29, Public Waters Access Act.

54 Section 2. Section **57-14-4** is amended to read:

55 **57-14-4. Use of private land without charge -- Effect.**

56 (1) Except as provided in Subsection 57-14-6(1), an owner of land who either directly

57 or indirectly invites or permits without charge or for a nominal fee of not more than \$1 per year
58 any person to use the land for any recreational purpose, or an owner of a public access area
59 open to public recreational access under Title 73, Chapter 29, Public Waters Access Act, does
60 not thereby:

61 [~~(1)~~] (a) make any representation or extend any assurance that the premises are safe for
62 any purpose;

63 [~~(2)~~] (b) confer upon the person the legal status of an invitee or licensee to whom a
64 duty of care is owed;

65 [~~(3)~~] (c) assume responsibility for or incur liability for any injury to persons or property
66 caused by an act or omission of the person or any other person who enters upon the land; or

67 [~~(4)~~] (d) owe any duty to curtail the owner's use of his land during its use for
68 recreational purposes.

69 (2) This section applies to the relationship between an owner of land and a trespasser.

70 Section 3. Section **73-1-1** is amended to read:

71 **73-1-1. Waters declared property of public.**

72 (1) All waters in this state, whether above or under the ground are hereby declared to
73 be the property of the public, subject to all existing rights to the use thereof.

74 (2) The declaration of public ownership of water in Subsection (1) does not create or
75 recognize an easement for public recreational use on private property.

76 (3) The right of the public to use public water for recreational purposes is governed by
77 Chapter 29, Public Waters Access Act.

78 Section 4. Section **73-29-101** is enacted to read:

79 **CHAPTER 29. PUBLIC WATERS ACCESS ACT**

80 **Part 1. General Provisions**

81 **73-29-101. Title.**

82 This chapter is known as the "Public Waters Access Act."

83 Section 5. Section **73-29-102** is enacted to read:

84 **73-29-102. Definitions.**

85 As used in this chapter:

86 (1) "Division" means the Division of Wildlife Resources.

87 (2) "Floating access" means the right to access public water flowing over private

88 property for floating and fishing upon the water.

89 (3) "Impounded wetlands" means a wetland or wetland pond that is formed or the level
 90 of which is controlled by a dike, berm, or headgate that retains or manages the flow or depth of
 91 water, including connecting channels.

92 (4) "Navigable water" means a water course that in its natural state without the aid of
 93 artificial means is useful for commerce and has a useful capacity as a public highway of
 94 transportation.

95 (5) "Private property to which access is restricted" means privately owned real
 96 property:

97 (a) that is cultivated land, as defined in Section 23-20-14;

98 (b) that is:

99 (i) properly posted, as defined in Section 23-20-14;

100 (ii) posted as described in Subsection 76-6-206(2)(b)(iii); or

101 (iii) posted as described in Subsection 76-6-206.3(2)(c);

102 (c) that is fenced or enclosed as described in:

103 (i) Subsection 76-6-206(2)(b)(ii); or

104 (ii) Subsection 76-6-206.3(2)(b); ~~H→~~ or ~~←H~~

105 (d) that the owner or a person authorized to act on the owner's behalf has requested a
 106 person to leave as provided by:

107 (i) Section 23-20-14;

108 (ii) Subsection 76-6-206(2)(b)(i); or

109 (iii) Subsection 76-6-206.3(2)(a) ~~H→~~ [~~;~~ or

110 ~~(e) that is not the bed of a navigable water] ~~←H~~ .~~

111 (6) "Public access area" means the limited part of privately owned property that:

112 (a) lies beneath or within three feet of a public water or that is the most direct, least
 113 invasive, and closest means of portage around an obstruction in a public water; and

114 (b) is open to public recreational access under Section 73-29-202; and

115 (c) can be accessed from an adjoining public access area or public right-of-way.

116 (7) "Public recreational access" means the right to engage in recreational access
 117 established in accordance with Section 73-29-202.

118 (8) (a) "Public water" means water:

- 119 (i) described in Section 73-1-1; and
- 120 (ii) flowing or collecting on the surface:
- 121 (A) within a natural or realigned channel; or
- 122 (B) in a natural lake, pond, or reservoir on a natural or realigned channel.
- 123 (b) "Public water" does not include water flowing or collecting:
- 124 (i) on impounded wetland;
- 125 (ii) a migratory bird production area, as defined in Section 23-28-102;
- 126 (iii) on private property in a manmade:
- 127 (A) irrigation canal;
- 128 (B) irrigation ditch; or
- 129 (C) impoundment or reservoir constructed outside of a natural or realigned channel; or
- 130 (iv) on a jurisdictional wetland described in 33 C.F.R. 328.3.
- 131 (9) (a) "Recreational access" means to use a public water and to touch a public access
- 132 area incidental to the use of the public water for:
- 133 (i) floating;
- 134 (ii) fishing; or
- 135 (iii) waterfowl hunting conducted:
- 136 (A) in compliance with applicable law or rule, including Sections 23-20-8, 73-29-204,
- 137 and 76-10-508; and
- 138 (B) so that the individual who engages in the waterfowl hunting shoots a firearm only
- 139 while within a public access area and no closer than 600 feet of any dwelling.
- 140 (b) "Recreational access" does not include:
- 141 (i) hunting, except as provided in Subsection (9)(a)(iii);
- 142 (ii) wading without engaging in activity described in Subsection (9)(a); or
- 143 (iii) any other activity.
- 144 Section 6. Section **73-29-103** is enacted to read:
- 145 **73-29-103. Declarations.**
- 146 The Legislature declares that:
- 147 (1) the Utah Constitution's specific private property protections, including recognition
- 148 of the inalienable right to acquire, possess, and protect property and the prohibition on taking
- 149 or damaging private property for public use without just compensation, protect against

150 government's indiscriminate recognition or granting of a public recreation easement to access
151 or use public water on private property;

152 (2) general constitutional and statutory provisions declaring public ownership of water
153 and recognizing existing rights of use are insufficient to overcome the specific constitutional
154 protections for private property and do not justify inviting widespread unauthorized invasion of
155 private property for recreation purposes where public access has never existed or has not
156 existed for a sufficient period and under the conditions required to support recognition under
157 this chapter;

158 (3) whether, or to what extent, a public easement exists for recreational use of public
159 waters on private property is uncertain after judicial decisions in the cases of *J.J.N.P. Co. v.*
160 *State*, 655 P.2d 1133 (Utah 1982) and *Conatser v. Johnson*, 194 P.3d 897 (Utah 2008), which
161 decisions fail to reconcile their respective holdings with the constitutional protections afforded
162 private property;

163 (4) in recognition of historical public recreational uses of some private property,
164 whether by permission or prescription, the Legislature encourages continued permissive use
165 while officially recognizing prescriptive use, similar to that required to establish a public
166 highway under Section 72-5-104, as a constitutionally sound and manageable basis for
167 establishing a limited right of public recreational access on private property under the
168 provisions of this chapter;

169 (5) the judicial decision of *J.J.N.P. Co. v. State*, 655 P.2d 133 (Utah 1982) is relied
170 upon in this chapter for the purpose of fixing the date on which the public was first put on
171 notice of a potential right to access public water on private property for recreational purposes
172 and the date following which the public could begin to establish a right to floating access or
173 broader public recreational access under this chapter; and

174 (6) it is necessary to:

175 (a) clarify and define the foundation and parameters of the public right that can be
176 created;

177 (b) provide a process by which a public right may be established and recognized; and

178 (c) set the date after which evidence of adverse public use is relevant.

179 Section 7. Section **73-29-201** is enacted to read:

180 **Part 2. Recreational Access to Public Water**

181 **73-29-201. General access provisions.**

182 (1) The public may use a public water for recreational activity if the public water:

183 (a) (i) is a navigable water; or

184 (ii) is on public property; and

185 (b) the recreational activity is not otherwise prohibited by law.

186 (2) A person may access and use a public water on private property for any lawful
187 purpose with the private property owner's permission.

188 (3) A person may not access or use a public water on private property for recreational
189 purposes if the private property is property to which access is restricted, unless public
190 recreational access is established under Section 73-29-202.

191 Section 8. Section **73-29-202** is enacted to read:

192 **73-29-202. Establishment of public recreational access.**

193 (1) Public recreational access is established if:

194 (a) the private property has been used by the public for recreational access requiring the
195 use of the public water for a period of at least 10 consecutive years that begins after September
196 22, 1982; and

197 (b) the public use has been:

198 (i) continuous during the season conducive to the recreational access;

199 (ii) open and notorious;

200 (iii) adverse; and

201 (iv) without interruption.

202 (2) The permissive use of a public water on private property granted by the owner is
203 not an adverse use.

204 (3) A property owner's overt act intended to interrupt uninvited recreational access is a
205 sufficient interruption to restart any period of use that may have already begun under
206 Subsection (1) if the evidence, taken as a whole, shows that the act came to the attention of the
207 public or resulted in actual interruption.

208 (4) The extent and nature of the public recreational access permitted under Subsection
209 (1) is determined by the nature of the historical recreational access during the 10 consecutive
210 years required under Subsection (1).

211 (5) If historical recreational access is limited to floating after *J.J.N.P. Co v. State*, 655

212 P.2d 133 (Utah 1982), then:

213 (a) the right acquired is limited to floating access; and

214 (b) the required proof is limited to that necessary to prove the right claimed.

215 (6) When a public water is a lake, pond, or reservoir located on a natural stream and on
216 private property, any portion that has been developed or protected for private hunting is not
217 subject to public recreational access even though the remainder of the public water qualifies for
218 public recreational access under this section.

219 (7) A right of public recreational access on private property established in accordance
220 with this section, may not be closed without authorization of other law.

221 Section 9. Section **73-29-203** is enacted to read:

222 **73-29-203. Quiet title action.**

223 (1) (a) A person, including the division, may file a quiet title action in accordance with
224 Title 78B, Chapter 6, Part 13, Quiet Title, to obtain a judicial declaration of the existence of a
225 right to public recreational access under Section 73-29-202.

226 (b) The division may intervene in a quiet title action filed in accordance with
227 Subsection (1).

228 (c) The division may not be compelled to:

229 (i) file a quiet title action; or

230 (ii) join a quiet title action filed by another person.

231 (2) The claimant in a quiet title action under Subsection (1) shall:

232 (a) name the property owner of record as a party; and

233 (b) notify the division of the suit by certified mail no later than 20 days after the day on
234 which the quiet title action is filed.

235 (3) The division shall post notice of a quiet title action under this section on its Internet
236 website.

237 (4) The burden of proof for a quiet title action under this section is on the claimant to
238 prove the existence of a right to public recreational access or floating access under Section
239 73-29-202 by clear and convincing evidence.

240 (5) A quiet title action under this section is limited to a declaration concerning the
241 property and property owner joined in the action.

242 (6) (a) Multiple claimants and multiple property owners may be included in a quiet title

243 action concerning public water common to the property owners.

244 (b) In a case with multiple property owners, the court shall make a separate finding
245 concerning each property owner included in the action.

246 (7) The court may award attorney fees and costs in an action under this section if the
247 court finds that the losing party's arguments lack a reasonable basis in law or fact.

248 Section 10. Section **73-29-204** is enacted to read:

249 **73-29-204. Injunctive relief.**

250 (1) The owner of private property may obtain injunctive relief against a person who,
251 without permission, enters, remains, or persists in an effort to enter or remain on the owner's
252 property for recreational use of public water.

253 (2) An injunction under this section is in addition to any remedy for trespass.

254 (3) The existence of an easement under Section 73-29-202 is a defense in an action for
255 injunctive relief under this section or a claim of trespass under other law.

256 (4) If a person against whom an injunction is sought, or a person charged with trespass,
257 establishes by clear and convincing evidence the existence of an easement for defense
258 purposes, as described in Subsection (3), the establishment of the existence of the easement
259 applies only to the defense and does not constitute a judicial declaration of the easement's
260 existence for another purpose.

261 (5) If an owner obtains an injunction against a person under this section, the injunction
262 does not serve as a declaration that there is no public easement on the owner's property.

263 (6) The court may award attorney fees and costs in an action under this section if the
264 court finds that the losing party's arguments lack a reasonable basis in law or fact.

265 Section 11. Section **73-29-205** is enacted to read:

266 **73-29-205. Effect of chapter on other uses and restrictions -- Required acts.**

267 (1) Nothing in this chapter affects the right of the public to use public water for public
268 recreational access, including the touching of the bed beneath the public water if:

269 (a) the bed beneath the public water is public property; or

270 (b) the bed beneath the public water is private property to which access is not
271 restricted.

272 (2) A person using a public water for public recreational access is subject to any other
273 restriction lawfully placed on the use of the public water by a governmental entity with

274 authority to restrict the use of the public water.

275 (3) Nothing in this chapter limits or enlarges any right granted by express easement.

276 (4) When leaving a public access area, a person shall remove any refuse or tangible
277 personal property the person brought into the public access area.

278 Section 12. Section **73-29-206** is enacted to read:

279 **73-29-206. Fences across public water.**

280 (1) The owner of a public access area adjacent to and lying beneath a public water may
281 place a fence or obstruction across a public water for agricultural or livestock related purposes.

282 (2) A fence or other obstruction shall:

283 (a) comply with an applicable federal, state, or local law; and

284 (b) be constructed in a manner that does not create an unreasonably dangerous
285 condition to the public lawfully using the public water.

286 (3) The owner of a public access area shall allow the placement of a ladder, gate, or
287 other facility allowing portage around a fence or obstruction if:

288 (a) the owner places a fence or obstruction across a public water in accordance with
289 Subsection (1); and

290 (b) the water is open to public recreational access by permission or under Section
291 73-29-202.

Fiscal Note

**H.B. 141 1st Sub. (Buff) - Recreational Use of Public Water on Private
Property**

2010 General Session

State of Utah

State Impact

Enactment of this bill will not require additional appropriations.

Individual, Business and/or Local Impact

Enactment of this bill likely will not result in direct, measurable costs and/or benefits for individuals, businesses, or local governments.
