

**RECREATIONAL USE OF PUBLIC WATER ON
PRIVATE PROPERTY**

2010 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Kay L. McIff

Senate Sponsor: _____

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
- ▶ makes technical and conforming amendments.

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 Section **57-14-1** is repealed and reenacted to read: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 public may use a public water for recreational activity if the public water:

75 (a) (i) is a navigable waterway, as defined by federal law; or

76 (ii) is on public property; and

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

78 (3) The public has no right to the recreational use of public waters on private property
79 to which access is restricted, as defined in Section 73-29-102, without permission of the
80 property owner or as provided in Chapter 29, Public Waters Access Act.

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

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

83 **Part 1. General Provisions**

84 **73-29-101. Title.**

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

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

87 **73-29-102. Definitions.**

88 As used in this chapter:

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

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

93 (3) "Private property to which access is restricted" means privately owned real
94 property:

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

96 (b) that is:

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

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

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

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

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

102 (ii) Subsection 76-6-206.3(2)(b); or

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

105 (i) Section 23-20-14;

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

107 (iii) Subsection 76-6-206.3(2)(a).

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

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

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

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

113 (5) "Public recreational access" means the right to engage in recreational access
114 established in accordance with Section 73-29-202.

115 (6) (a) "Public water" means water:

116 (i) described in Section 73-1-1; and

117 (ii) flowing or collecting on the surface:

118 (A) within a natural or realigned channel; or

119 (B) in a natural lake, pond, or reservoir on a natural or realigned channel.

120 (b) "Public water" does not include water flowing or collecting:

121 (i) on impounded wetland;
122 (ii) a migratory bird production area, as defined in Section 23-28-102; or
123 (iii) on private property in a manmade:
124 (A) irrigation canal;
125 (B) irrigation ditch; or
126 (C) impoundment or reservoir constructed outside of a natural or realigned channel.
127 (7) (a) "Recreational access" means to use a public water and to touch a public access
128 area incidental to the use of the public water for:

129 (i) floating;
130 (ii) fishing; or
131 (iii) waterfowl hunting conducted:
132 (A) in compliance with applicable law or rule, including Sections 23-20-8, 73-29-204,
133 and 76-10-508; and
134 (B) so that the individual who engages in the waterfowl hunting shoots a firearm only
135 while within a public access area and no closer than 100 yards to any dwelling.

136 (b) "Recreational access" does not include:
137 (i) hunting, except as provided in Subsection (7)(a)(iii);
138 (ii) wading without engaging in activity described in Subsection (7)(a); or
139 (iii) any other activity.

140 Section 6. Section **73-29-103** is enacted to read:

141 **73-29-103. Declarations.**

142 The Legislature declares that:

143 (1) the Utah Constitution's specific private property protections, including recognition
144 of the inalienable right to acquire, possess, and protect property and the prohibition on taking
145 or damaging private property for public use without just compensation, protect against
146 government's indiscriminate recognition or granting of a public recreation easement to access
147 or use public water on private property;

148 (2) general constitutional and statutory provisions declaring public ownership of water
149 and recognizing existing rights of use are insufficient to overcome the specific constitutional
150 protections for private property and do not justify inviting widespread unauthorized invasion of
151 private property for recreation purposes where public access has never existed or has not

152 existed for a sufficient period and under the conditions required to support recognition under
153 this chapter;

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

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

165 (5) the judicial decision of *J.J.N.P. Co. v. State*, 655 P.2d 133 (Utah 1982) is relied
166 upon in this chapter for the limited purpose of fixing the date on which public recreational
167 access to public water on private property could have been judicially recognized under this
168 chapter if preceded by 10 years of continuous adverse use by the public; and

169 (6) it is necessary to:

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

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

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

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

175 **Part 2. Recreational Access to Public Water on Private Property**

176 **73-29-201. General access provisions.**

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

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

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

183 **73-29-202. Establishment of public recreational access.**

184 (1) Public recreational access is established if:

185 (a) the private property has been used by the public for recreational access requiring the
186 use of the public water for a period of at least 10 consecutive years that begins after September
187 22, 1972; and

188 (b) the public use has been:

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

190 (ii) open and notorious;

191 (iii) adverse; and

192 (iv) without interruption.

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

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

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

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

206 (6) Private property open to public recreational access in accordance with this section,
207 other than by the private property owner's permission, may not be closed without authorization
208 of other law.

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

210 **73-29-203. Quiet title action.**

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

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

216 (c) The division may not be compelled to:
217 (i) file a quiet title action; or
218 (ii) join a quiet title action filed by another person.

219 (2) The claimant in a quiet title action under Subsection (1) shall:
220 (a) name the property owner of record as a party; and
221 (b) notify the division of the suit by certified mail no later than 20 days after the day on
222 which the quiet title action is filed.

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

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

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

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

232 Section 10. Section **73-29-204** is enacted to read:
233 **73-29-204. Injunctive relief.**

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

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

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

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

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

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

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

250 **73-29-205. Effect of chapter on other uses and restrictions -- Required acts.**

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

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

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

256 (2) A person using a public water for public recreational access is subject to any other
257 restriction lawfully placed on the use of the public water by a governmental entity with
258 authority to restrict the use of the public water.

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

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

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

263 **73-29-206. Fences across public water.**

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

266 (2) A fence or other obstruction shall:

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

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

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

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

274 (b) the water is open to public recreational access by permission or under Section
275 73-29-202.

Legislative Review Note
as of 2-8-10 8:58 AM

Office of Legislative Research and General Counsel

H.B. 141 - Recreational Use of Public Water on Private Property

Fiscal Note

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.
