

1 State of Arkansas
2 82nd General Assembly
3 Regular Session, 1999

A Bill

HOUSE BILL 2256

4
5 By: Representatives Hathorn, Milligan
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For An Act To Be Entitled

8
9 "AN ACT TO ESTABLISH STREAMBED OWNERSHIP AND
10 RECREATIONAL USE OF STREAMS."

Subtitle

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13 "AN ACT TO ESTABLISH STREAMBED OWNERSHIP
14 AND RECREATIONAL USE OF STREAMS."

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17 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
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19 SECTION 1. Definitions. For purposes of this act, the following
20 definitions apply:

21 (1) "Barrier" means an artificial obstruction located in or over
22 a water body, restricting passage on or through the water, which totally or
23 effectively obstructs the recreational use of the surface water at the time of
24 use. A barrier may include but is not limited to a bridge or fence or any
25 other manmade obstacle to the recreational use of surface waters;

26 (2) "Diverted away from a natural water body" means a diversion
27 of surface water through a manmade water conveyance system, including but not
28 limited to:

29 (A) An irrigation or drainage canal or ditch;

30 (B) An industrial, municipal, or domestic water system,
31 excluding the lake, stream, or reservoir from which the system obtains water;

32 (C) A flood control channel; or

33 (D) A hydropower inlet and discharge facility;

34 (3) "Federal navigability test for state streambed ownership"
35 means when streams were used or were susceptible to being used, in their
36 ordinary condition, as highways for commerce, over which trade and travel was

1 or could have been conducted in the customary modes of trade and travel on
 2 water as of June 15, 1836;

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

11 (5) "Recreational use" means with respect to surface waters
 12 only: fishing, swimming, floating in small craft or other flotation devices,
 13 boating in motorized craft unless otherwise prohibited or regulated by law, or
 14 craft propelled by oar or paddle, other water-related pleasure activities, and
 15 related unavoidable or incidental uses;

16 (6) "Surface water" means, for the purpose of determining the
 17 public's access for recreational use, a natural water body, and its bed; and

18 (7) "Trade", "travel", and "commerce" mean commerce or modes of
 19 travel which were common in 1836 and do not include recreational uses.

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 21 SECTION 2. Streambed ownership.

22 (a) Title or ownership of the surface waters, the beds, and the banks
 23 of any navigable or non-navigable streams shall not be affected by any
 24 recreational uses permitted under this chapter or under any decree of any
 25 court within this state related to public use for recreational purposes of any
 26 such stream.

27 (b) Streambed ownership in this state shall be determined in
 28 accordance with the federal navigability test for state streambed ownership.

29 (1) The title to streambeds of all streams meeting the federal
 30 navigability test for state streambeds ownership on June 15, 1836 is vested in
 31 the state.

32 (2) The title to streambeds of all streams not meeting the
 33 federal navigability test for state streambed ownership on June 15, 1836 is
 34 vested in the adjoining landowners.

35 (c) Clear and convincing proof shall be required of the party having
 36 the burden of proof on the issue of federal navigability for state streambed

1 ownership.

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3 SECTION 3. Recreational use permitted – limitations – exceptions.

4 (a) Except as provided in subsections (b) and (c), only surface waters
5 that were regularly used for recreational use prior to the effective date of
6 this act may be so used by the public without regard to the ownership of the
7 land underlying the waters.

8 (b) The right of the public to make recreational use of surface waters
9 in streams where title to the streambed is not owned by the state does not
10 include, without permission or contractual arrangement with the landowner or
11 landowners:

12 (1) The operation of all-terrain vehicles or other motorized
13 vehicles not primarily designed for operation upon the water;

14 (2) The recreational use of surface waters in a stock pond or
15 other private impoundment fed by an intermittently flowing natural
16 watercourse;

17 (3) The recreational use of waters while diverted away from a
18 natural water body for beneficial use, except for impoundments or diverted
19 waters to which the owner has provided public access;

20 (4) Overnight camping;

21 (5) The placement or creation of any permanent duck blind, boat
22 moorage, or any seasonal or other objects;

23 (6) Use of a streambed as a right-of-way for any purpose when
24 water is not flowing therein; or

25 (7) Other activities which are not primarily water-related
26 pleasure activities as defined in Section 1, subsection (5).

27 (c) The right of the public to make recreational use of surface waters
28 does not grant any easement or right to the public to enter onto or cross
29 private property in order to use such waters for recreational purposes.

30 (d) Except as provided in section 4(b), this act does not grant any
31 right of use beyond the ordinary high water mark.

32 (e) Hunting from boats shall not be considered a recreational use for
33 purposes of this act.

34 (f) This act is supplemental to and does not repeal any law of this
35 state pertaining to the posting of inundated lands.

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1 SECTION 4. Right to portage.

2 (a) A landowner may erect reasonable barriers across streams for
 3 purposes of land or water management or to establish land ownership as
 4 otherwise provided by law. If a landowner erects a structure which does not
 5 interfere with the public's use of the surface waters, the public may not go
 6 above the ordinary high-water mark to portage around the structure. Portaging
 7 boaters shall be liable for damage to the landowner's barriers and damages
 8 resulting from the failure to close a gate.

9 (b) If a landowner erects a barrier which interferes with the public's
 10 use of surface waters, a member of the public making recreational use of
 11 surface waters may, above the ordinary high-water mark, portage around
 12 barriers in the least intrusive manner possible, avoiding damage to the
 13 landowner's land and violation of his rights. Portaging boaters shall be
 14 liable for damage to the landowner's barriers and damages resulting from the
 15 failure to close a gate.

16 (c) Landowners who erect barriers across streams must provide
 17 reasonable portage routes.

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 19 SECTION 5. Restriction on liability of landowner.

20 (a) A person who makes recreational use of surface waters flowing over
 21 or though land in the possession or under the control of another, or land
 22 while portaging around or over barriers or while portaging or using portage
 23 routes, is owed no duty by a landowner, his agent, or his tenant other than
 24 that provided in subsection (b).

25 (b) A landowner, his agent, or tenant is liable to a person making
 26 recreational use of waters or land described in subsection (a) only for an act
 27 or omission that constitutes willful or wanton misconduct.

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 29 SECTION 6. Prescriptive easement not acquired by recreational use of
 30 surface waters.

31 (a) A prescriptive easement cannot hereafter be acquired through
 32 recreational use of surface waters, including:

33 (1) The streambeds underlying them;

34 (2) The banks up to the ordinary high-water mark; or

35 (3) Any portage over and around barriers.

36 (b) Nothing in this act shall be construed as abrogating any persons

1 right to access to that person's property.

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3 SECTION 7. Authority of Arkansas Department of Environmental Quality.
4 The provisions of this chapter shall in no way abrogate the power of the
5 Arkansas Department of Environmental Quality to regulate water quality in any
6 surface water under provisions of the Arkansas Water and Air Pollution Control
7 Act (Act 472 of 1949, as amended), the Arkansas Open-Cut Land Reclamation Act
8 (Act 827 of 1991, as amended) or under authority delegated to the state under
9 provisions of the Federal Clean Water Act.

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11 SECTION 8. All provisions of this act of a general and permanent nature
12 are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code
13 Revision Commission shall incorporate the same in the Code.

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15 SECTION 9. If any provision of this act or the application thereof to
16 any person or circumstance is held invalid, such invalidity shall not affect
17 other provisions or applications of the act which can be given effect without
18 the invalid provision or application, and to this end the provisions of this
19 act are declared to be severable.

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21 SECTION 10. All laws and parts of laws in conflict with this act are
22 hereby repealed.