

HOUSE BILL NO. 490

INTRODUCED BY A. REGIER, G. OBLANDER, K. ZOLNIKOV, T. FRANCE

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING LAWS RELATING TO WILDFIRES AND UTILITIES; ~~ALLOWING~~ REQUIRING CERTAIN ENTITIES TO ~~SUBMIT AN APPROVED~~ PREPARE A WILDFIRE MITIGATION PLAN; PROVIDING DEFINITIONS; PROVIDING REQUIREMENTS FOR THE WILDFIRE MITIGATION PLAN; PROVIDING FOR APPROVAL OF THE WILDFIRE MITIGATION PLAN; REQUIRING UPDATED REPORTS RELATING TO THE WILDFIRE MITIGATION PLAN AND SUBMISSION OF AN UPDATED WILDFIRE MITIGATION PLAN; PROVIDING THAT CERTAIN ENTITIES THAT HAVE ~~FILED A SUBSTANTIALLY FOLLOWED AN APPROVED~~ WILDFIRE MITIGATION PLAN ~~ARE MAY NOT BE~~ CIVILLY LIABLE ARE AFFORDED CERTAIN CIVIL LIABILITY PROTECTIONS FOR INJURY OR DAMAGES CAUSED BY WILDFIRE; REVISING THE STANDARD OF CARE RELATING TO CERTAIN ENTITIES AND WILDFIRE; PROVIDING RULEMAKING AUTHORITY TO THE PUBLIC SERVICE COMMISSION RELATING TO WILDFIRE MITIGATION PLANS; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

WHEREAS, the Legislature finds that electric facilities providers of Montana have an obligation to serve customers and extend services, which is different from typical businesses, and that they provide a necessary and beneficial public service for the supply, transmission, and delivery of electricity to the people of Montana as well as a fundamental basis of economic growth and development of all sectors of Montana's economy; and

WHEREAS, there is a growing threat of wildfires in the United States and within the state of Montana; and

WHEREAS, in recognition of electric facilities providers' obligation to serve their customers and in order to secure and sustain Montana's reliable provision of electricity and services associated with it at just and reasonable rates, electric facilities providers must be encouraged and have the right to deliver and transmit electricity throughout the state without fear or risk of being held strictly liable for wildfire losses under the common law theory of ultrahazardous activity or being held liable for wildfires caused by factors beyond their control; and

THEREFORE, the intent of the Legislature to protect electric facilities providers from strict liability and

uncertain common law standards of care in the event of an unintentionally or negligently caused wildfire and to provide a standard of care for electric facilities providers that choose to affirmatively undertake wildfire mitigation efforts.

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

NEW SECTION. Section 1. Definitions. As used in [sections 1 through 3], the following definitions apply:

(1) "APPROVAL AUTHORITY" MEANS THE COMMISSION FOR A REGULATED UTILITY, THE BOARD OF TRUSTEES FOR AN ELECTRIC COOPERATIVE, THE CITY COUNCIL OR CITY COMMISSION FOR A MUNICIPAL UTILITY, OR THE APPROPRIATE BODY RESPONSIBLE FOR CORPORATE GOVERNANCE OF ANY OTHER TYPE OF ELECTRIC FACILITIES PROVIDER.

~~(1)(2)~~ "Commission" has the same meaning as provided in 69-1-101.

(3) "DEPARTMENT" MEANS THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, AS PROVIDED IN 2-15-3301.

~~(2)(4)~~ "Electric cooperative" means a cooperative organized under Title 35, chapter 18, or a similar state law for providing electricity to the public in Montana.

~~(3)(5)~~ "Electric facilities" means any equipment used for the transmission or distribution of electricity to the public, including but not limited to generation and energy storage resources, substations, switchyards, poles, towers, transformers, conductors, and relaying, sectionalizing, and protective equipment, such as arrestors.

~~(4)(6)~~ "Electric facilities provider" means ANY OF THE FOLLOWING THAT ENGAGES IN ELECTRIC TRANSMISSION AND DISTRIBUTION ACTIVITIES AS DEFINED IN THIS SECTION:

(A) a AN OPERATOR, regulated utility, or electric cooperative, ~~as well as~~

(B) a municipally owned utility; ~~or~~

(C) AN entity, owning electric facilities in the state without regard to the jurisdiction of the commission; ~~OR~~

(D) ANY ELECTRIC-A TRANSMITTING UTILITY UNDER THE JURISDICTION OF THE FEDERAL ENERGY

REGULATORY COMMISSION, ~~which engages in electric transmission and distribution activities as defined in this~~
section.

~~(5)(7)~~ "Electric transmission and distribution activities" means a condition, activity, or facility directly
related to the conveyance and distribution of electrical energy to a person, facility, transmission, or distribution
system in the state.

~~(8)~~ "JOINTLY OWNED ELECTRIC FACILITY" MEANS AN IDENTIFIED SET OF ELECTRIC FACILITIES THAT IS
JOINTLY OWNED BY MULTIPLE PARTIES AND OPERATED BY A DESIGNATED OPERATOR.

~~(9)~~ "OPERATOR" MEANS THE PERSON OR ENTITY DESIGNATED BY THE OWNERS OF A JOINTLY OWNED
ELECTRIC FACILITY AS DEFINED IN THIS SECTION AS RESPONSIBLE FOR THE OPERATION AND MAINTENANCE OF JOINTLY
OWNED ELECTRIC FACILITIES.

~~(6)(8)(10)~~ "Regulated utility" means a public electric utility regulated by the commission under
Title 69, chapter 3.

~~(7)(9)(11)~~ "Wildfire" has the same meaning as "forest or range fire" as defined in 50-63-104 and,
for the purposes of [sections 1 through 3], a fire ignited by electric facilities or activities associated with electric
transmission and distribution activities, regardless of whether the fire's ignition occurs within an incorporated
municipality.

~~(8)(10)(12)~~ "Wildfire mitigation plan" means an electric facilities provider's written plan, including
any related components, that identifies risks associated with wildfire and strategies to mitigate or reduce those
risks.

NEW SECTION. Section 2. Electric facilities provider -- wildfire -- wildfire mitigation plan
approval. (1) An electric facilities provider ~~may~~ SHALL prepare a wildfire mitigation plan in accordance with this
section AND SUBMIT THE PLAN TO ITS APPROVAL AUTHORITY AND COMMENCE IMPLEMENTATION OF ITS WILDFIRE
MITIGATION PLAN NO LATER THAN DECEMBER 31, 2025. AN ELECTRIC FACILITIES PROVIDER SHALL RESUBMIT AN
UPDATED OR SUBSEQUENT WILDFIRE MITIGATION PLAN TO ITS APPROVAL AUTHORITY AT LEAST EVERY 3 YEARS.

(2) A wildfire mitigation plan must include a description of:

(a) areas in which the electric facilities provider has electric facilities or electric transmission and
distribution activities that may be subject to a heightened risk of wildfire;

- (b) the strategies and programs that the electric facilities provider will use to inspect, MAINTAIN,
REPAIR, and operate its electric facilities;
- (c) the strategies and programs that the electric facilities provider will use to perform vegetation management;
- (d) the strategies for modifications or upgrades to electric facilities and preventative programs that the electric facilities provider ~~may~~ WILL employ to reduce the risk of its electric facilities igniting a wildfire;
- (e) the strategies and methods for de-energizing power lines and modifying electric facility operations to mitigate potential wildfires taking into consideration the ability of the electric facilities provider to reasonably access the proposed electric facility to be de-energized, the balance of the risk of wildfire with the need for continued supply of electricity to a community, and any potential impact to public safety, first responders, and health and communications infrastructure;
- (f) the methods the electric facilities provider intends to use to restore its electrical system in the event systems are de-energized for the prevention of a wildfire;
- (g) the estimated incremental costs associated with implementing the plan, including system improvements and upgrades for a regulated utility;
- (h) community outreach and public awareness efforts before and during a wildfire season; and
- (i) potential participation, if applicable, with state or local wildland fire protection plans or wildfire mitigation plans.
- (3) An electric cooperative must present incremental costs associated with implementing a wildfire mitigation plan to its ~~board of trustees~~ APPROVAL AUTHORITY for consideration when reviewing the plan; ~~however,~~ HOWEVER, those costs may not be a part of the wildfire mitigation plan itself.
- (4) For the purposes of [sections 1 through 3], the ~~commission for a regulated utility, the board of trustees for an electric cooperative, or the governing body of any other type of~~ APPROVAL AUTHORITY FOR AN electric facilities provider ~~must~~ PROVIDER'S WILDFIRE MITIGATION PLAN SHALL:
- (a) initially review an electric facilities provider's wildfire mitigation plan; and
- (b) consider any input from a federal, tribal, state, or local entity, or other interested persons during a public comment period not to exceed 45 days; AND
- (C) AFTER A PUBLIC MEETING AND NO MORE THAN 60 DAYS AFTER THE CLOSE OF PUBLIC COMMENT:

(i) APPROVE THE WILDFIRE MITIGATION PLAN OR IDENTIFY ANY DEFICIENCIES IN THE PLAN; AND
(ii) PROVIDE REQUIRED MODIFICATIONS IN WRITING WITH THE OPPORTUNITY FOR THE ELECTRIC FACILITIES PROVIDER TO CORRECT THE DEFICIENCIES AND RESUBMIT THE PLAN FOR APPROVAL.

(5) THE DEPARTMENT AND MONTANA DISASTER AND EMERGENCY SERVICES SHALL REVIEW A WILDFIRE MITIGATION PLAN SUBMITTED TO THE COMMISSION AND WITHIN THE PUBLIC COMMENT PERIOD PROVIDE COMMENTS AND RECOMMENDATIONS REGARDING ASPECTS OF THE PLAN WITHIN EACH OF THEIR JURISDICTIONS.

(6) THE APPROVAL AUTHORITY SHALL APPROVE THE WILDFIRE MITIGATION PLAN IF THE APPROVAL AUTHORITY DETERMINES THE WILDFIRE MITIGATION PLAN CONTAINS THE REQUIRED COMPONENTS IN SUBSECTION (2), IS IN THE PUBLIC INTEREST, AND REASONABLY BALANCES THE INCREMENTAL COSTS OF IMPLEMENTING THE PLAN WITH THE RISK OF A POTENTIAL WILDFIRE.

~~(5) — After a public meeting and no more than 60 days after the close of public comment, the commission for a regulated utility shall identify any deficiencies in a wildfire mitigation plan and provide written comments addressing whether the wildfire mitigation plan is reasonable, is in the public interest, and reasonably balances the incremental costs of implementing the plan with the risk of a potential wildfire.~~

~~(6)(7) If an electric facilities provider prepares a wildfire mitigation plan in accordance with this section, NO LATER THAN JUNE 1 OF EACH YEAR, the electric facilities provider shall submit to its governing body APPROVAL AUTHORITY a biennial report summarizing the electric facilities provider's wildfire mitigation efforts and compliance with the ITS CURRENTLY AUTHORIZED wildfire mitigation plan.~~

(8) FOR ANY JOINTLY OWNED ELECTRIC FACILITIES, THE OPERATOR SHALL PREPARE AND IMPLEMENT THE REQUIRED WILDFIRE MITIGATION PLAN FOR THE JOINTLY OWNED ELECTRIC FACILITIES. IF AN OWNER OF A JOINTLY OWNED ELECTRIC FACILITY IS A REGULATED UTILITY, THE COMMISSION IS THE APPROVAL AUTHORITY WHETHER OR NOT THE OPERATOR IS A REGULATED UTILITY. THE OPERATOR'S SUBMISSION AND IMPLEMENTATION OF A WILDFIRE MITIGATION PLAN AS REQUIRED BY THIS SUBSECTION SATISFIES THE OBLIGATIONS UNDER THIS SECTION FOR THE JOINTLY OWNED ELECTRIC FACILITY ONLY.

~~(7)(8)(9)~~ In accordance with the Montana Administrative Procedure Act, the commission may make any necessary rules establishing procedures for the review and comment on a regulated utility's wildfire mitigation plan, including for the appointment of a technical master to determine whether the wildfire mitigation plan contains the required components in subsection (2).

~~(9)(10) NOTHING IN THIS SECTION MAY BE CONSTRUED TO CREATE A NEW LIABILITY, BASIS FOR CLAIM, OR
SEPARATE LEGAL CAUSE OF ACTION ARISING FROM THE REVIEW OR APPROVAL OF A WILDFIRE MITIGATION PLAN WHEN
NONE WOULD EXIST OTHERWISE.~~

NEW SECTION. Section 3. Electric facilities provider -- wildfire -- cause of action -- standard of care -- damages. (1) The purpose of this section is to set statutory criteria governing the civil liability of an electric facilities provider for wildfire-related claims. An electric facilities provider has an obligation to serve the public, and a standard of strict liability may not be applied to an electric facilities provider as follows:

(a) in a cause of action alleging the electric facilities provider's electric facilities or electric transmission and distribution activities caused wildfire-related damages; or

(b) in a cause of action alleging an electric facilities provider's wildfire mitigation activities conducted in accordance with a wildfire mitigation plan caused damages.

(2) An electric facilities provider may be found civilly liable only under the provisions of this section, and may not be found civilly liable under any other statute, theory of recovery, or common law claim, for wildfire-related injury or damages arising from the electric facilities provider's electric facilities or electric transmission and distribution activities or for injury or damages arising from any act or omission of the electric facilities provider associated with implementing a wildfire mitigation plan.

(3) An electric facilities provider may be found civilly liable for:

(A) wildfire-related injury or damages arising from the electric facilities provider's electric facilities or electric transmission and distribution activities; or for

(B) injury or damages arising from an act or omission of the electric facilities provider associated with implementing a wildfire mitigation plan only if the party seeking recovery establishes:

(a)(i) the electric facilities provider failed to exercise the degree of care, skill, and learning expected of a reasonable, similarly situated electric facilities provider at the time in the state, acting under the same or similar circumstances; and

(b)(ii) the failure was an actual and ~~THE~~ proximate cause of the injury to person or property for which recovery is sought.

(4) AFTER AN ELECTRIC FACILITIES PROVIDER HAS COMMENCED IMPLEMENTATION OF ITS WILDFIRE

MITIGATION PLAN, IN ~~IN~~ an action against an electric facilities provider seeking wildfire-related damages arising from the electric facilities provider's electric facilities or electric transmission and distribution activities, there is a rebuttable presumption that the electric facilities provider acted reasonably if, WITH RESPECT TO THE PLACE OF THE WILDFIRE'S IGNITION, the electric facilities provider ~~has adopted and, with respect to the place of the wildfire's ignition,~~ substantially followed a wildfire mitigation plan that contains at a minimum the elements in ~~[section 2(2)]~~ WAS APPROVED IN ACCORDANCE WITH [SECTION 2], provided that evidence related to the electric facilities provider's actual incremental costs associated with implementing a wildfire mitigation plan may not be considered in determining whether the electric facilities provider substantially followed its wildfire mitigation plan. The presumption in this subsection ~~(4)~~ may be controverted by other evidence.

~~(5) — In an action against an electric facilities provider seeking wildfire-related damages arising from the electric facilities provider's electric facilities or electric transmission and distribution activities, the absence of a wildfire mitigation plan may not be construed as evidence of or an inference that the electric facilities provider did not meet the standard in subsection (3)(a), and the fact finder may consider only acts that may have caused the wildfire's ignition and evaluate the electric facilities provider's acts and electric transmission and distribution activities in the context of the electric facilities provider's overall systems, processes, and programs.~~

~~(6)(5)~~ In an action against an electric facilities provider under this section, if a plaintiff has proved liability, as required:

(a) a plaintiff may recover for real and personal property damage pursuant to 50-63-104;

(B) IN THE EVENT OF A BODILY INJURY OR DEATH, A PLAINTIFF MAY RECOVER:

(I) ECONOMIC DAMAGES, INCLUDING MEDICAL EXPENSES AND LOST WAGES; AND

(II) NONECONOMIC DAMAGES;

~~(b)(C)~~ a plaintiff may not recover noneconomic losses unless the plaintiff suffered bodily injury or death proximately caused by the wildfire; and

~~(e)(D)~~ an electric facilities provider may not be assessed punitive damages unless there is a showing, by clear and convincing evidence, that the electric facilities provider's actions were grossly negligent or intentional. An electric facilities provider's acts or omissions may not be considered grossly negligent if the electric facilities provider substantially followed its wildfire mitigation plan with respect to the place of ignition. The availability of punitive damages is otherwise subject to the provisions of 27-1-220 and 27-1-221.

(E) A PERSON WHO OBTAINS PAYMENT PURSUANT TO A POLICY OF INSURANCE FOR DAMAGES RESULTING FROM A WILDFIRE LOSS IS DEEMED TO HAVE BEEN MADE WHOLE EXCLUSIVELY FOR PURPOSES OF AN INSURER'S RIGHT TO SUBROGATION UNDER THIS SECTION.

~~(7) — An electric facilities provider may not be liable in an action brought under this section to the extent that the electric facilities provider establishes that contact between electric facilities and trees or tree limbs originating outside an area the electric facilities provider has a legal right to access or maintain caused the wildfire's ignition, provided, however, this subsection does not alter the rights or obligations under 69-4-403.~~

~~(8)(6) A civil action against an electric facilities provider under this section must be commenced within 3 years from the date the plaintiff first incurred injury or damages, without regard to when the injury or damages are discovered. If a plaintiff commences a civil action under this section, the plaintiff shall make service of process no later than 6 months after filing the complaint. If service of process is not made within the 6-month period, the court, on motion or on its own initiative, shall dismiss the action without prejudice as to a defendant unless that defendant has made an appearance in the civil action. If service of process is not made within the 6-month period, the remaining 3-year period of limitations for a civil action under this section resumes, regardless of whether the civil action is dismissed.~~

(7) THIS SECTION DOES NOT AFFECT EXPRESS CONTRACTUAL RIGHTS OF ANY PERSON OR ENTITY IN ANY WAY INVOLVING COMMUNICATIONS FACILITIES OR THE SHARED USE OF ELECTRIC FACILITIES OR POLE ATTACHMENTS.

NEW SECTION. Section 4. Notification to tribal governments. The secretary of state shall send a copy of [this act] to each federally recognized tribal government in Montana.

NEW SECTION. Section 5. Codification instruction. [Sections 1 through 3] are intended to be codified as a new part in Title 69, chapter 2, and the provisions of Title 69, chapter 2, apply to [sections 1 through 3].

NEW SECTION. Section 6. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,

1 the part remains in effect in all valid applications that are severable from the invalid applications.

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3 NEW SECTION. **Section 7. Effective date.** [This act] is effective on passage and approval.

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