MINUTES FOR THE MEETING
JUDICIARY COMMITTEE
MONTANA STATE
HOUSE OF REPRESENTATIVES

January 22, 1985

The meeting of the Judiciary Committee, the Fish and Game Committee and the Agriculture Committee was called to order by the Chairman of the Judiciary Committee, Tom Hannah, on Tuesday, January 22, 1985, at 7:30 p.m. in Room 325 of the State Capitol.

ROLL CALL FOR THE JUDICIARY COMMITTEE: All members of the Judiciary Committee were present with the exception of Rep. Budd Gould, who had been previously excused by the chairman.

ROLL CALL FOR THE FISH & GAME COMMITTEE: Rep. Marjorie Hart was absent and excused by the chairman; Rep. Lloyd McCormick was absent; all other members were present.

ROLL CALL FOR THE AGRICULTURE COMMITTEE: All members were present.

Acting as chairman for the combined committees, Rep. Tom Hannah outlined the procedure the meeting was to follow. Testimony was to be given on House Bills 16, 265 and 275 -- the stream access bills.

CONSIDERATION OF HB 16: Rep. Bob Marks, chief sponsor of HB 16, testified on the bill. He outlined the history of HB 16. Rep. Marks served as chairman of the joint interim subcommittee No. 2, which submitted a report on the recreational use of Montana's waterways. Also serving on that subcommittee were Reps. Keyser and Ream. The report of the subcommittee describes: (1) the facts, issues, and legal concepts concerning the subject of recreational use of state waters; (2) the public sentiment on the subject, as gathered from public input at the committee's meetings; and (3) the reasons for and meanings of the committee's legislative recommendations. The report was marked as Exhibit T. Rep. Marks briefly described each section of HB 16 and the subjects addressed in each. Rep. Marks submitted a proposed amendment, marked as Exhibit A.

CONSIDERATION OF HB 265: Rep. Robert Ream, sponsor of HB 265, said this bill is a compromise bill put together by agricultural and recreational groups. He said HB 265 is a workable bill and provides a good

starting point. He briefly reviewed the five sections of HB 265.

Rep. Bob Marks, co-sponsor of HB 265, said he hopes the issue of stream access is resolved in this legislative session because all Montanans will be losers if legislation is not adopted. He said he has high regard for both landowners and recreationists.

CONSIDERATION OF HB 275: Rep. John Cobb, sponsor of HB 275, said his proposed bill is a good one, and that he would submit some amendments to it at a later date. Rep. Cobb said he felt the Supreme Court ruling on stream access was very poorly written, and did not clearly explain the idea of public trust. He said his bill is similar to HB 16 and HB 265, but differs in the restrictions it places on water classes. Under 275, the following classes are set forth: Class I meets the federal test for state ownership; Class II is any river that can be floated; and Class III includes small streams that cannot be floated. Rep. Cobb said that although the Fish and Game Commission is doing a creditable job, it is understaffed and therefore is not able to enforce stream use laws. He said Montana contains approximately 23,000 miles of streams or rivers. Of that total, approximately 9,000 miles of streams on public lands cannot be floated, but at the same time they are open to public use without restriction. He said HB 275 would add approximately 4,700 to 6,500 miles of floatable streams to the 9,000 miles of unfloatable streams. Rep. Cobb admonished the committee to carefully consider the issue of stream access to avoid possible closure of all the state's streams to future access.

PUBLIC TESTIMONY ON HB 16, HB 265 & HB 275:

Ron Waterman, an attorney representing the Montana Stockgrowers Association and members of the agricultural industry alliance, urged passage of HB 265. (His testimony was submitted and marked as Exhibit C.) He said that it is time to end the long debate and public controversy over stream access. He said the legislation sponsored by Reps. Ream and Marks addresses the major concerns of landowners. He said that landowners support the bill because it recognizes their property rights, protects them from liability, provides for portage routes around stream barriers, defines a high-water mark, prevents prescriptive easements and limits some types of recreational use. He

stated that the other two bills would not pass a constitutional test before the Supreme Court. He said this bill addresses all of the concerns within the limitations imposed by the decision of the Supreme Court. House Bill 265 divides Montana streams into Class I and Class II, and the recreational uses permitted are tied to the character of the water, with recreational activities that are not directly water related being prohibited on Class II streams without landowner permission.

Mr. Waterman called the measure a cooperative effort of agriculture, recreationists and state agencies. It deals with the concerns of landowners and defines the rights and responsibilities of landowners and recreationists.

Mary Wright, representing Trout Unlimited of Montana, testified in support of HB 265. She said she feels the legislation is balanced and fair and the bill is the least likely of the three proposed to result in protracted litigation. She further stated her opposition to HB 16 and HB 275. Her testimony was submitted and marked as Exhibit D.

Jim Flynn, director of the Dept. of Fish, Wildlife and Parks, also stated support for HB 265. He said HB 275 would narrow the scope of rivers available to recreation by establishing a floating standard. He feels it is highly vulnerable to constitutional question because of that limitation. A copy of his testimony was submitted and marked as Exhibit E.

Dennis Hemmer testified in support of HB 265 on behalf of the Dept. of State Lands. A copy of his testimony has been marked as Exhibit F.

Rep. William "Red" Menahan stated his support for HB 265. He stated that his hope was to get on with fine-tuning a bill that would benefit both rural communities and city people.

Robert VanDerVere of Helena, spoke in support of HB 265. He said he was glad the matter was "coming to a head." He said the bill could use a little work, but was basically a good approach.

Lavina Lubinas, a representative of Women In Farm Economics (WIFE), said that group supports HB 265, and urged its passage.

Gene Van Oosten, representing the Montana Cattlemen's Association, testified in support of HB 265. His testimony is attached as Exhibit G.

Jo Brunner, of WIFE, testified in support of HB 265. A copy of her testimony is attached as Exhibit H.

James Goetz, of Bozeman, representing the Montana Coalition for Stream Access, said he did not think HB 16 and HB 275 meet the intent of the language in the Supreme Court decision. He said HB 265 is a carefully tailored and considered compromise.

Dan Heinz, representing the Montana Wildlife Federation, testified in support of HB 265. He said the bill clearly defines boundaries left nebulous by the Supreme Court. It also provides protection for the landowners against abuses of those rights granted by the Court. Both HB 16 and HB 275 prohibit use on some waters where use was allowed by the Supreme Court decision. A copy of his testimony was marked as Exhibit I.

Jim McDermond, director of the Coalition for Stream Access, spoke in favor of HB 265 in its present form. He told the committees that he strongly opposes both HB 16 and HB 275. A copy of his testimony was marked as Exhibit J.

Craig Madsen stated that HB 265 does little to protect landowner rights. He said he thought HB 16 needed changes in some areas, but should be considered by the committee. He also suggested that the committee look at Rep. Ellison's proposed bill by itself or as a reasonable means of amending HB 16.

Andrea Billingsley, representing the Montana Cowbelles, testified in support of HB 265. A copy of her testimony was submitted.

Jim Wilson, president of the Montana Stockgrowers Association, stated the main concern he has is being able to work together to preserve the legislation now before the legislature.

Don McKamey, president of the Montana Woolgrowers Association, testified in support of HB 265. A copy of his testimony was marked as Exhibit K.

Richard C. Parks, president of the Fishing and Floating Outfitters Association of Montana, testified

in support of HB 265. He said he opposes HB 16 and HB 275. A copy of his testimony was marked as Exhibit L.

Gene Chapel, representing the Montana Farm Bureau Federaion, testified in support of HB 265. His testimony is marked as Exhibit M.

John Thorson, a Helena attorney, testified in support of HB 265. A copy of his testimony is attached as Exhibit M-1.

Dave Donaldson, executive vice president of the Montana Association of Conservation Districts, said that organization takes no stand relative to the substantive portions of the stream access bill, HB 265. He did, however, want to make the committee aware of areas of concern to that organization. A copy of his testimony is attached as Exhibit N.

Kevin Krumvieda, representing the Missouri River Flyfishers, testified in support of HB 265. He said his organization feels HB 265 is the best of the three bills proposed. His testimony was submitted and marked as Exhibit O.

Richard Josephson expressed his opinion on the three bills. A copy of his testimony is attached as Exhibit P.

Scott Hibbard, area rancher, said he is concerned with the invasion of landowners' privacy, and feels the water access bill infringe on the rights and responsibilities of landowners.

Ralph Holman, a landowner, outfitter and sportsman, appealed to the legislators not to turn over control of private property to non-owners. He said he does not favor any of the three proposed bills in their present form. He said there is room to compromise. A copy of his testimony is attached as Exhibit Q.

Lowell Hildreth, landowner, said he was tired of compromising with sportsmen. He opposes HB 265.

Norm Starr, rancher, testified in support of HB 16. His testimony is attached as Exhibit R.

Lawrence Grosfield, a rancher from Big Timber, said all three bills should be amended. He said HB 265 and HB 275 are unnacceptable because they both codify too much of the Supreme Court decision. In addition, both bills

go substantially beyond the Supreme Court decision in some areas and are unnecessarily complex and cumbersome. He said HB 265 does little to protect landowner rights. He said HB 16 needs changes in some areas, especially concerning fishing access and resource protection. He encouraged the committee to look closely at Rep. Ellison's draft bill by itself or as a reasonable means to amend HB 16. A copy of his testimony is marked as Exhibit S.

Rep. Keyser said HJR 36 was passed to get landowner and sportsman agreement on the stream access issue. He said that no member of the interim subcommittee approved of HB 16 in its entirety. He warned against the possibility that the legislature could not reach an agreement on some form of stream access legislation. Failure to agree on a bill, he said, would mean allowing the Supreme Court to make all stream access decisions.

DISCUSSION: Rep. Grady asked Mr. Flynn if the Dept. of Fish, Wildlife and Parks was prepared to handle the cost of providing portage around all the natural obstructions in Montana waters. Mr. Flynn said that at this time his department could not handle that expense.

Rep. Grady asked Mr. Donaldson if he had been consulted when HB 265 was drafted regarding the duties of the Montana Association of Conservation Districts, and was told that the group had not been contacted.

Rep. Ellison asked Mr. Waterman to clarify page 3, line 14 of HB 265, concerning recreational use of Class II waters. Mr. Waterman said that on Class II streams, overnight camping, big game and bird hunting, and use of all-terrain vehicles would be prohibited except by permission of the landowner.

In response to a question from Rep. Patterson, Mr. Flynn said the Dept. of Fish, Wildlife and Parks has no priorities set to implement any specific program regarding any rivers or streams. However, Mr. Flynn said the department does have some river management plans at this time.

There being no further questions or discussion before the committee, the meeting was adjourned at 10:30 p.m.

Tom Hannah

Rep. TOM HANNAH, Chairman

DAILY ROLL CALL

HOUSE JUDICIARY COMMITTEE

Tues. Evening

49th LEGISLATIVE SESSION -- 1985

Date 1-22-85

NAME	PRESENT	ABSENT	EXCUSED
Tom Hannah (Chairman)	✓		
Dave Brown (Vice Chairman)	✓		
Kelly Addy	✓		
Toni Bergene	✓		
John Cobb	✓		
Paula Darko	✓		
Ralph Eudaily	✓		
Budd Gould			✓
Edward Grady	✓		
Joe Hammond	✓		
Kerry Keyser	✓		
Kurt Krueger	✓		
John Mercer	✓		
Joan Miles	✓		
John Montayne	✓		
Jesse O'Hara	✓		
Bing Poff	✓		
Paul Rapp-Svrcek	✓		

DAILY ROLL CALL

Fish and Game COMMITTEE

49th LEGISLATIVE SESSION -- 1985

Date 1-22-85 M.P

NAME	PRESENT	ABSENT	EXCUSED
Bob Ream, Chairman	✓		
Orval Ellison, Vice Chairman	✓		
John Cobb	✓		
Ralph Eudaily	✓		
Edward Grady	✓		
Marian Hanson	✓		
Marjorie Hart			✓
Loren Jenkins	✓		
Lloyd McCormick		✓	
John Montayne	✓		
Janet Moore	✓		
Bob Pavlovich	✓		
John Phillips	✓		
Paul Rapp-Svrcek	✓		

DAILY ROLL CALL

~~Agriculture~~ COMMITTEE

49th LEGISLATIVE SESSION -- 1985

Date 1-22-85

- Water Right Access - -

NAME	PRESENT	ABSENT	EXCUSED
James Schultz, Chairman	X		
Gay Holliday, V-Chairman	X		
Bob Bachini	X		
Dorothy Cody	X		
Duane Compton	X		
Gerry Devlin	X		
Robert Ellerd	X		
Orval Ellison	X		
Harry Fritz	X		
Ramona Howe	X		
Loren Jenkins	X		
Vernon Keller	X		
Francis Koehnke	X		
John Patterson	X		
Bing Poff	X		
Paul Rapp-Svrcek	X		
Gary Spaeth	X		
Dean Switzer	X		

Please attach to minutes.

Exhibit A

Submitted by Rep Marks

PROPOSED AMENDMENTS TO HOUSE BILL 16

1. Page 2, line 12.
Following: "waters"
Insert: ": (a) in a stock pond or other impoundment fed by an intermittently flowing natural watercourse; or (b)"

Exhibit B
HB 265
1-22-85

REPRESENTATIVE BOB REAM

HOUSE BILL 265

House Bill 265 is a bill put together by citizen groups interested in the issue of recreational use of state waters which cross private land. Agricultural groups and recreational groups participated in developing this compromise bill, and they deserve much credit for working together to come up with a workable bill, one that is acceptable to both sides.

Section 1
This section defines recreational use, barriers (both natural and artificial), and differentiates, between Class I and Class II rivers. Class I rivers are those that have been meandered, that have been judicially determined, as they flow through public lands, or support or have been capable of supporting commercial activity. They are the larger rivers of the state. Class II waters are all other surface waters.

Section 2
Class I waters may be used for fishing, hunting, swimming, floating in small craft or motorized craft and related incidental uses. On Class II waters, without permission of landowners, recreationists may not camp overnight, hunt big game or upland birds, operate all-terrain vehicles, place any permanent structures, or engage in non water-related recreation. In both cases the recreational activity must be below the high-water mark. This section also excludes any right to cross private land to get to recreational waters. Lease rights on ~~private~~ lands are not affected.

Section 3

Recreational users may, above the high-water mark, portage around barriers in the least intrusive manner possible. This may be to avoid fences or other artificial barriers constructed (and allowed) by landowners, or to avoid natural barriers. Either the user or the landowner may make a request to the supervisors of a conservation district, directors of a grazing district or county commissioners to establish a portage route. They shall examine the site with the landowner and a department representative to determine the most feasible route. Cost of establishing a route around an artificial barrier will be borne by the landowner,

around a natural barrier by the department. Costs of maintaining and signing either type of portage route after that, will be borne by the department. If there is still disagreement on a route, there is a provision to go to the district court, which will have an arbitration panel to settle the dispute.

Section 4
This section restricts liability of landowners or supervisors to only willful or wanton misconduct.

Section 5
Prescriptive easement cannot be acquired through recreational use of surface waters, the streambed up to the high-water mark, or of portage routes.

This bill may not be the final word on this issue. We may have to do some fine-tuning in future sessions. But it does get us started in managing surface waters for public use while protecting rights of private landowners. I believe the department has the authority and the interest in working with all parties concerned. Montana has some good examples of splendid cooperation in river recreation.

Exhibit C
HB 265
1-22-85

Ron Waterman

TESTIMONY SUPPORTING HOUSE BILL 265

The Montana Stockgrowers Association and members of the agricultural industry alliance, consiting of the Montana Stockgrowers Association, Montana Wool Growers Association, Montana Association of State Grazing Districts, Montana Cowbelles, Montana Farmers Union, Montana Cattlemens' Association, Montana Cattle Feeders Association, Montana Farm Bureau Federation, Montana Water Development Association, Women Involved in Farm Economics, and the Agricultural Preservation Association, support passage of House Bill 265. These members of the agricultural community believe this bill is the most effective piece of proposed legislation addressing the stream access issue under consideration during this session and urge passage of the bill. The bill strikes a balance between the protection of private landowner rights and the identification of public recreational uses of the surface waters, beds and banks of the steams and rivers of Montana. This legislation identifies the responsibilities of both sectors affected by the stream access issue and proposes a fair and reasonable approach which accommodates the concerns of the landowner and the recreationalist.

A brief history of the events which brought the parties to their present position underscores the ineffectiveness of confrontation as a problem-solving procedure.

Several landowners, on two streams which receive significant public recreational pressures, sought to restrain and deny access to floaters and fishermen. After negotiations sponsored and encouraged by the Department of Fish, Wildlife and Parks failed, two suits were filed. In each the district court held in favor of the public and denied the landowner the relief sought.

While the suits were pending on appeal to the Supreme Court of Montana, the 1983 Legislature considered a variety of stream access legislation. Those efforts failed in deference to the appellate process. In May and June of 1984, the Supreme Court of Montana rendered two broad, sweeping decisions which allowed the public the right to use all state waters for any recreational and incidental uses. The use right was extended to the high water mark on all streams regardless of size. The decisions did not attempt to provide definition to many of the terms and rights extended, inviting a legislative response.

Fortunately the 1983 Legislature had created an interim study committee to receive testimony and propose legislation. The interim committee met both before and after the Supreme Court of Montana decisions and studied and considered primary and collateral issues raised by the decided cases.

The interim committee gave thoughtful deliberation to the issue and developed House Bill 16 which became the

catalyst for the remaining legislation being considered by this committee. It is fair to say that absent these actions the later activities of the agricultural community, working in conjunction with recreationalists and the Department of Fish, Wildlife and Parks, would have never occurred.

As the interim committee's action drew to a close, landowner groups met to outline the goals for upcoming legislation and to plan for this session. All groups agreed that it was critical to pass legislation this session, both to define areas left unclear by the Supreme Court of Montana's decisions, to allay the fears of landowners and recreationalists, and to avoid conflict as the newly won rights were tested and applied to specific streams other than the streams subject to the litigation.

To pass legislation which would be sustained in the event of a court challenge required an analysis of the limits of the Supreme Court of Montana decisions and a determination to propose legislation within those limitations. Six major goals were identified as being the subject of any proposed legislation. Those goals were:

(1) Recognition of private property rights;

(2) Restriction of landowner liability;

(3) Identification of the right of portage around barriers;

(4) Limitation upon prescriptive easement to avoid

the loss of land ownership through recreational use activity;

(5) A definition of high water to demonstrate it was equivalent to the "ordinary high water mark" of the Natural Streambed Preservation Act; and

(6) Limitation upon the public's use to follow and recreate upon diverted waters.

House Bill 265 addresses all of these concerns within the limitations imposed by the decisions of the Supreme Court of Montana. While the result reached in those decisions were not to the liking of most landowners, it is irresponsible to ignore those decisions or to propose legislation which is not cognizant of the opinions of the court. The Supreme Court of Montana, the third branch of state government, construing the Constitution of Montana, has declared rights to exist in the public which protect the continued recreational use of all waters of the state. Absent passage of a constitutional amendment restricting those rights, legislation which failed to abide by those decisions and the Montana Constitution would probably be declared void. There is little gained in passing legislation which is constitutionally flawed and likely to be declared void if challenged. Thus, while landowner groups appreciated the sincere efforts brought to the debate and drafting of both House Bill 16 and House Bill 275, they concluded alternative legislation was needed

which addressed the major goals identified and did so in a vehicle which would likely pass court challenge.

House Bill 265 defines "barrier;" "Class I waters;" "Class II waters;" "diverted away from a natural water body;" "ordinary high-water mark;" and "recreational uses for the Class I and Class II waters" as well as other terms used within the act. A barrier is a natural or artificial obstruction which totally or effectively obstructs the recreational use of a water course. The barrier is determined at the time of use and the right of portage arises only if a barrier exists. Stream fluctuations may cause barriers to exist at some time of the year but not at others.

Waters have been divided into Class I and Class II streams and the recreational uses permitted have been tied to the character of the water, with recreational activities not directly water related prohibited on Class II waters without landowner permission.

The right of the public to use the surface waters does not include the right to use waters diverted into a stock pond, if the stream has intermittent flows, and does not allow the public to follow the water diverted away from the natural water body and conveyed by canal, ditch or flood control channel.

The public's right to portage around barriers is preserved, as is the landowners' right to fence across

streams; however, a fence constructed consistent with designs approved by the Department of Fish, Wildlife and Parks and which does not interfere with the recreational use of the water will provide an alternative to portage. A landowner can create a portage--typically a gate or ladder. The bill contains provisions which create a problem solving procedure for developing a portage route should conflict arise, an unlikely event. The bill initially relegates the fact finding to the Board of Supervisors of a soil conservation district or other appropriate local board. These people were chosen because they have excellent knowledge of landowner issues and are knowledgeable of stream conditions in the county where they serve. Alternative fact finders are identified with an arbitration panel created to review unsatisfactory decisions.

Limitations upon landowner liability and prescriptive easement legislation is included. The proposed bill will be effective on passage.

There are distinctions between House Bill 265 and the other two bills before this Committee and the distinctions favor passage of House Bill 265. House Bill 16 uses navigability to measure the public's right to use surface waters without landowner permission. This approach was specifically rejected by the Supreme Court of Montana in

its two opinions and is unlikely to be upheld if challenged and reviewed on a third occasion. Moreover, using navigability alone to measure the public's rights would lead inevitably to extensive and extended litigation throughout the state, litigation which neither the landowner, the recreationalist nor the state can afford. At present few streams have been determined to be navigable and many which have enjoyed high public use--the Smith, Big Hole, and the Blackfoot--never have been declared navigable by any court.

House Bill 275, Representative Cobbs' bill, obviously proceeds on good intentions. It is modeled upon and carries forward many of the provisions of House Bill 265 with several exceptions. First, it creates a Class III stream which are streams too small to allow floating. Second, it eliminates the portage route determination found in House Bill 265. The bill, if adopted, would prohibit the public from making recreational use of waters in the smaller streams of the state, perhaps 35% of all state waters. This restriction is too narrow and it contradicts the Supreme Court of Montana decisions which rejected the ability to float a craft as the measure of the public's right and it ignores the reality that water recreation means something other than merely floating in a water craft.

Landowners are here today because of the persistent

controversy of stream access. Many landowners feel their rights have been hampered because of the unreasonable actions of a few individuals who have affected all of the agricultural community. Looking back and finding explanations for the present controversy, however, is not a positive means to resolve these issues.

Landowners are here today to support House Bill 265. They are not alone. Rather, this bill before this committee is a cooperative effect, the result of hours of work by dedicated landowners, recreationalists and the Department of Fish, Wildlife and Parks. Without this joint cooperation the present proposed legislation would not have developed. It is this type of continued cooperation which will yield benefits beyond the present legislation as these parties continue to work toward better relations between these differing communities which share common interests and goals.

The work and effort which resulted in the present bill cannot end here. The Department of Fish, Wildlife and Parks has powers already extended through Section 87-1-303, MCA, to regulate recreational activities on all streams available to public access and to consider protection of private property in that regulation. The Department has already experimented with different options to accommodate public and landowner interests on the Smith, Big Hole and the Blackfoot. These programs, and perhaps

others, must be considered to address future pressures and the needs of the landowner and the public.

It is time to end the long debate and public controversy concerning stream access. The appropriate resolution and one which warrants your support is found in House Bill 265. We encourage your support and the passage of this bill.

Ronald F. Waterman
Agricultural Alliance

7075R

Exhibit D
Water Access Bills
1-22-85

TESTIMONY OF MARY WRIGHT
MONTANA COUNCIL, TROUT UNLIMITED
H.B. 16, H.B. 265, H.B. 275
January 22, 1985

Mr. Chairman, Chairman Schultz, Chairman Ream, and Members of the Committees:

My name is Mary Wright, and I represent the Montana Council of Trout Unlimited. TU is a national non-profit fishing conservation organization with over 37,000 members in over 330 chapters. The Montana Council is the statewide governing body representing ten TU chapters and one affiliated organization with a total membership of approximately 1100. I am testifying this evening in support of H.B. 265 and in opposition to H.B. 16 and H.B. 275.

H.B. 265

Background. As many of you know, H.B. 265 represents an agreement in principle reached by a number of agricultural and sportsmen's organizations in a series of joint meetings held in December and January. A list of individuals and organizations that were invited to participate in these meetings is attached to this testimony as Appendix I. The agricultural groups initiated the talks by inviting the sportsmen's groups to the table, an action for which they deserve a great deal of credit. The Department of Fish, Wildlife and Parks also played an extremely useful part in the discussions.

The subsequent meetings showed that, working within the framework of the Montana Supreme Court decisions in the Dearborn and Beaverhead cases, we could agree on all the major issues raised by the Court's decisions as embodied in H.B. 265. After reaching agreement on these issues and circulating them as widely as possible among the participants, we presented our

proposal to Chairman Ream and Representative Marks.

Trout Unlimited and the other sportsmen's groups who have participated in this process generally agree that H.B. 265 presents a balanced, fair and reasonable articulation of rights and responsibilities of landowners and sportsmen within the framework of the Supreme Court decisions. We believe that it clarifies the issues not determined by the Court, such as the meaning of ordinary high-water mark and recreational use, and also provides certain protections to landowners in the context of public use of lakes and streams, including a limitation of liability and a declaration that recreational use of streams will not in the future result in acquisition of prescriptive easements. H.B. 265 provides for a right to portage and a procedure for establishing exclusive portage routes.

Provisions of H.B. 265. Chairman Ream has described the provisions of H.B. 265, and this testimony will not repeat his description. For the convenience of the committees, a brief outline of the bill is attached as Appendix II. TU would like to comment on specific portions of the bill.

First, we support H.B. 265's basic access provisions in section 2 as an accurate restatement of current law as articulated by the Supreme Court, subject to certain reasonable limitations. A legislative statement that any surface waters capable of recreational use may be so used by the public, including the beds underlying them and the banks up to the ordinary high-water mark, is essential for our support of any stream access legislation.

Second, with respect to defining recreational use, the Montana Supreme Court stated in the Beaverhead case,

> As we held in Curran,...the capability of use of the waters for recreational purposes determines whether the waters

> can be so used...Under the 1972 Constitution, the only possible limitation of use can be the characteristics of the waters themselves.

H.B. 265 does attempt to define recreational use according to the characteristics of the class of waters in that it would prohibit certain activities on class II, or small, streams. We believe that the restrictions on small streams, such as the prohibition on operating all-terrain vehicles and big game and upland bird hunting without permission, are reasonable. We also believe that they would withstand a court challenge because although the prohibited activities are recreation, they are not primarily water-related.

Third, TU would like to note that the definition of class I waters refers to a number of tests traditionally used by the courts to determine title to streambeds and public access. The Montana Supreme Court has stated that these tests are irrelevant to the issue of public access to surface waters. H.B. 265 cites the tests not for the purpose of deciding access, but only of selecting the proper definition of recreational use for a particular stream.

Finally, TU supports H.B. 265 as the bill least likely among the 3 bills under consideration this evening to result in protracted litigation. Although there may be some uncertainty with respect to whether a certain stream is class I or II, the practical effect is extremely limited. This is because the distinctions between class I and II streams result only in the prohibition of limited, non-water related uses on class II streams, thereby greatly reducing the potential for litigation.

Trout Unlimited has among its objectives the protection, identification and special management of our quality fishing waters, protection of trout

habitat, and protection of water quality. TU works to achieve these objectives in a number of ways, from participating in conducting and financing research projects to physically cleaning up streams and restoring degraded habitat. TU also supports enactment of laws and regulations in support of its objectives.

The Montana Fish and Game Commission has broad authority under 87-1-303 (b), M.C.A., to adopt and enforce rules governing recreational use of all lakes, rivers and streams which are legally accessible to the public. The Commission may regulate swimming, hunting, fishing, boating and other recreational activities in the interest of public health, public safety and protection of land. We would support the Commission and the Department of Fish, Wildlife and Parks in an aggressive management program to protect our water-related resources and to resolve land-related problems that may arise.

TU also supports programs, whether formal or informal, public or private, to educate both landowners and the public on their respective legal responsibilities accompanying their rights in the area of recreation. We believe that progress can be made by educating our members in the ethics of the sports we engage in.

We will strongly support any efforts to continue the dialogue between sportsmen's and landowner-agricultural interests. It has served us well and should be continued. It could help to promote reasonable interpretations to H.B. 265, which in turn would help reduce the potential for conflicts.

In another area of landowner-sportsmen cooperation, TU chapters have in the past conducted clean-up efforts on streams and participated in projects to restore and enhance trout habitat. We would commit to continue these

efforts in the future, and also volunteer to help landowners to install barriers that do not interfere with recreational use of surface waters as provided for in section (3) (2) of H.B. 265.

Finally, we fully support H.B. 265 as it is currently drafted, and believe that it is the best approach to take at this time toward resolving differences on the issue of stream access. As indicated before, Trout Unlimited's continued support of H.B. 265, or of any stream access legislation, depends upon the Legislature's adopting a measure that basically restates current law on public recreational use of surface waters as articulated by the Montana Supreme Court.

H.B. 16

Trout Unlimited opposes enactment of H.B. 16 on 2 bases. First, section 3 prohibits public use of the land underlying rivers that do not satisfy the federal test for navigability unless that use is unavoidable and incidental to use of the surface waters. This is an attempt to codify for Montana the case law of Wyoming, and limits recreational uses to those which involve floating to the exclusion of all other recreational uses. "Unavoidable and incidental" refer to activities involving use of the bed only to "push, pull or carry over shoals, riffles and rapids."

This restriction is a far cry from the rights of the public to use the State's waters currently in existence under Montana law. The Court specifically based its Beaverhead and Dearborn decisions on the 1972 Constitution, limiting the areas which can be changed by legislation. The Court also specifically rejected the use of the federal navigability test to determine the public's right to use Montana's streams. H.B. 16 ignores the standard

adopted by the Court, that is, capability for recreational use. As such, Trout Unlimited does not believe that H.B. 16 would survive a constitutional challenge on this point, and then we would be back where we started. This Legislature would have missed an opportunity to solve this problem.

The second reason for TU's opposition to H.B. 16 also relates to litigation. H.B. 16 maintains the distinction between historically navigable and nonnavigable streams for purposes of determining what recreational uses are permitted on specific streams. Furthermore, the difference between the uses permitted on navigable streams and those permitted on nonnavigable streams is so great that both landowners and recreational users of streams would have a significant incentive to litigate. There are many streams in Montana that if tested might be judicially declared to be navigable under the federal test. No certainty as to recreational use would exist until a large number of cases were settled in court.

H.B. 275

Trout Unlimited opposes enactment of H.B. 275 on the grounds previously offered with respect to H.B. 16, that is, that it employs a test for recreational access, the federal navigability test, expressly rejected for that purpose by the Montana Supreme Court on constitutional grounds. Further, its restrictions on recreational use are unacceptable and would not, we believe, survive a constitutional challenge. We also believe that its provisions regarding recreational use of class II and class III streams are not consistent with the Court's declaration that recreational use is only limited by the character of the waters involved.

In addition, section 4, relating to the rulemaking proceeding to

classify streams and provide authority for closing streams because of public use are objectionable. The laudable purpose of the bill, the protection of the resource, should include means to deal with damage caused by private as well as public use if it is to accomplish its goal.

More important is the need for this section. Almost all the powers granted by section 4 of H.B. 275 already are granted in 87-1-303, M.C.A., to the Department of Fish, Wildlife and Parks. We see no need for the creation of a new system in the executive department, or for the costs involved, to duplicate existing legislative authority.

Conclusion

Trout Unlimited urges the committee to act favorably on H.B. 265. We appreciate the opportunity to testify this evening. Thank you.

APPENDIX I

December 19, 1984 - Stream Access Meeting - Helena, Montana

Montana Stockgrowers Association
- Jimmie Wilson - Trout Creek
- Fred Johnston - Agusta
- Mons Teigen - Helena

Montana Woolgrowers Association
- Gordon Darlinton - Three Forks
- Bob Gilbert - Helena

Montana Association of Conservation Districts
- Lorents Grosfield - Big Timber
- Dave Donaldson - Helena

Montana Association of State Grazing Districts
- Joe Etchart - Glasgow
- Stuart Doggett - Helena

Western Environmental Trade Association
- Norm Starr - Melville
- Mike Micone - Helena

Montana Cow Belles
- Carol Mosher - Agusta
- Audir Billingsley - Glasgow

Montana Farmers Union
- Terry Murphy - Great Falls

Sweetgrass County Preservation Association
- Windsor Wilson - McLeod

Park County Legislative Association
- Nancy McIlhattan - Livingston

Montana Cattlemen's Association
- Senator Ray Lybeck - Kalispell

Montana Cattle Feeders Association
John Conter - Billings

Montana Farm Bureau Federation
Gene Chapel - Lewistown
Lorraine Gillis - Phillipsburg
Pat Underwood - Bozeman

Montana Grain Growers Association
Randy Johnson - Great Falls

Montana Water Development Association
Bob LeProwse - Milltown

Montana Dairymen's Association
Ken Kelly - Helena

Women Involved in Farm Economics
Joyce Spicher - Hingham
Lavina Lubinus - Lewistown
Jo Brunner - Power
Yvonne Snider - Lewistown

Agricultural Preservation Association
Sam Hofman - Manhattan
Tom Milesnick - Belgrade
Bill Asher - Bozeman

****

Ron Waterman, Attorney - Helena
Rep. Bob Marks - Clancy
Rep. Kerry Keyser - Ennis
Rep. Jim Jenson - Billings
Rep. Bob Ream - Missoula
Sen. Jack Galt - Martinsdale
Sen. Paul Boylan - Bozeman

Sen. George McCallum - Plains
Sen. Max Conover - Broadview
James Silva - Butte
Larry Dodge - Helmville
James Kehr - Helena

****

Montana Department of FISH, WILDLIFE & PARKS

Jim Flynn, Director
Ron Marcouex, Associate Director

Montana Wildlife Federation

Jim Richard - East Helena
Emily Stonington - Bozeman

Montana Trout Unlimited

Pete Test - Helena
Mary Wright - Livingston

Montana Outfitters and Guides Association

Craig Madsen - Great Falls

Medicine River Canoe Club

Jim McDermand

Montana Coalition for Stream Access

Tom Bugni - Butte

Montana Dude Ranchers Association

Max Barker - Agusta

Montana Floating Outfitters & Guides Association

Dave Kumlien - Bozeman

Skyline Sportsmen

Tony Schoonen - Ramsey

Federation of Flyfishermen

Greg Lilly - Bozeman
Bob Jacklin - West Yellowstone

Walleyes Unlimited

Scott Ross - Wolf Point

APPENDIX II

SUMMARY OF PROVISIONS
H.B. 265

1. General Rule

a. All surface waters capable of recreational use, including the beds underlying them and the banks up to the ordinary high-water mark, may be so used by the public without regard to the ownership of the land underlying the waters.

b. "Ordinary high-water mark" means the line that water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it. Characteristics of the area below the line include, when appropriate, but are not limited to, diminished terrestrial vegetation or lack of agricultural crop value.

Uses of Large and Small Streams

a. Class I Waters

* Defined as all waters which

- have been meandered, or
- have been judicially determined to be owned by the state, or
- flow through public lands, or
- are or have been capable of supporting commercial activity, or
- have been capable of supporting commercial activity under the federal navigability test.

* Recreational use means fishing, hunting, swimming, floating in small craft or other flotation device, boating in motorized craft (unless otherwise prohibited by law), or craft propelled by oar or paddle, and uses unavoidable or incidental thereto.

b. Class II Waters

* Defined as all waters which are not class I waters.

* Recreational use does not include overnight camping, upland bird or big game hunting, operation of all-terrain vehicles or snowmobiles, creation of permanent or semipermanent objects such as permanent duck blinds or boat moorages.

c. Exceptions

* Recreational use of diverted waters not permitted.

* No right to enter private lands to make recreational use of surface waters.

2. Other Issues

a. Right to Portage

* Provides right to portage around natural or artificial barriers in least intrusive manner possible.

* If landowner erects a barrier designed and located, as approved by the Department of Fish, Wildlife and Parks, which does not interfere with recreational use of surface waters, there is no right to portage.

* Provides a procedure for establishing exclusive portage routes.

b. Restriction on Landowner Liability

Landowner liable only for an act or omission that constitutes willful or wanton misconduct toward persons making recreational use of surface waters or using portage routes.

c. Prescriptive Easements

May not be acquired through recreational use of surface waters or portage routes after effective date.

d. Effective Date

Effective upon passage and approval.

Exhibit E
HB. 265
1-22-85

HB 265

Testimony presented by Jim Flynn, Department of Fish, Wildlife & Parks

At the outset, I would commend the Interim Committee on Stream Access for its efforts in attempting to resolve the concerns between landowners and recreationists on this subject. That committee was faced with a difficult task as a result of court action on the matter of public use of public waters, and in meeting that task they served as a valuable and necessary sounding board for the various concerns on both sides of the issue. Although the Interim Committee has addressed many concerns in HB 16, the department feels that HB 265 is the preferred bill and supports its passage.

Our fundamental concern with HB 16 is that it diverges from the Supreme Court's reliance upon Article IX, Section 3 of the Constitution. It attempts to set up the "narrow and restrictive test" that the court in the Hildreth case said was not permissible under the Constitution. HB 16 attempts to confine recreational activities on waters other than those which are navigable under the federal test by barring the use of the bed on those waters for all except safety, health, and portage purposes. That provision effectively precludes use of any waters which are not floatable. Because of that defect, the statute would likely be found unconstitutional.

In HB 275, the sponsor has attempted to address concerns about adverse impacts from floater use. Although the concern is well intended and focuses on certain problem areas, we believe that current statutes provide the opportunity to address the concerns expressed in Section 4 of HB 275.

For example, Section 87-1-303, MCA, appears to give the Montana Fish and Game Commission sufficient authority to address the problems raised. That section says, in part: "The Commission may adopt and enforce rules governing recreational uses of all...public lakes, rivers, and streams which are legally accessible to the public....These rules should be adopted in the interest of public health, public safety, and protection of property in regulating swimming, hunting, fishing, trapping, boating, including but not limited to boating speed regulations, the operation of motor driven boats, water skiing, surfboarding, picnicking, camping, sanitation and the use of firearms on the reservoirs, lakes, rivers and streams...."

As you can see, this statute gives the commission broad authority to address the problems that might be raised by floaters and recreationists on a stream. The commission also has the authority to regulate fishermen and hunters to preserve aquatic and wildlife populations. In fact, the commission has successfully used current authorities to address public use problems in the Blackfoot Corridor so we have some history of using this section to address the problems that heavy recreational use might cause.

House Bill 275 also attempts to narrow the scope of rivers available to recreation by establishing a floating standard. Like HB 16, it is highly vulnerable to constitutional question for that limitation. As a result, the department feels that HB 265 is the preferred proposal.

The department has recognized following meetings of the legislative interim committee and contacts with both agricultural and recreational groups that several areas of concern existed. Prescriptive easement, landowner liability, ordinary high water mark definition, landowners' rights to fence streams for livestock control and portage requirements were issues that needed clarification following the court's decision. HB 265 provides clarification of these issues.

The process of agricultural groups meeting with recreational groups to address these concerns and develop HB 265 is very noteworthy and significant. Although everyone may not be completely satisfied with all provisions, accommodations have been made to deal with the primary issues raised. We stand in support of HB 265 and the effort that has been made to address the concerns that were raised by the court process.

I would like to emphasize what I believe the positive impacts of the bill are.

First, in the definition section, the bill provides clarification to a number of terms which the Supreme Court declined to define. For example, the terms "barrier" and "ordinary high water mark" have been defined. In both cases, both sides attempted to find language which would allow reasonable people to understand the limits of their rights. Short of an exhaustive survey of every body of flowing water in the state and of every obstacle on every body of water, we feel that these definitions are as specific as can reasonably be drawn.

In addition, the bill identifies the kinds of recreational uses which will be allowable on the streams in the state. This has been done by defining permissible recreational use on Class II (small streams) to specifically water related activities. The bill both addresses landowner concerns about overly broad and abusive recreational use and at the same time remains consistent with the spirit of the constitutional aspects of the Supreme Court decision which recognizes legitimate recreational uses of the state's waters which will support those uses.

Likewise, the bill would not allow prescriptive easements to be taken on waterways nor would it allow the public to use diverted waters. The bill also addresses liability protection for landowners.

The bill has successfully recognized the legitimate concerns expressed by landowners throughout the state, but at the same time has kept intact the core principle of the Montana Supreme Court decisions - waters of the state are open to legitimate water related recreational uses which they are able to support.

Another significant provision of the bill concerns the matter of portage. Even with the Supreme Court decisions, differences may continue on certain rivers as to what constitutes a legitimate portage. Since the court has recognized the right of the public to portage around barriers, it is reasonable to expect that differences may, from time to time, arise. Currently there is no expeditious and fair way of resolving those differences. It is in this area that the department's presence may be most significant.

Under the bill, we would participate and cooperate with landowners in developing portage routes and maintaining them. Where the portage is caused by a natural object, the department would bear the cost of establishing a route and maintaining it. In addition, the department would assist landowners in developing fencing - where fencing is necessary - that may in some instances preclude the need for a portage around the fence. It provides a reasonably informal method of resolving differences over portage routes, and therefore promotes discussion and cooperation instead of confrontation.

Finally, it is important to continue to recognize the spirit in which this bill was born. It is a product of cooperation between two significant Montana interest groups. The bill itself is representative of what reasonable people can achieve when they sit down and listen to each other's concerns.

I hope that the process which gave birth to this bill is the start of continuing and improving cooperation between landowners and recreationists. Because of the spirit of cooperation embodied in this bill and its responsiveness to the concerns on both sides of the issue, the department wholeheartedly endorses its passage.

Exhibit F
H.B. 265
1-22-85

TESTIMONY - HOUSE BILL 265

DENNIS HEMMER - COMMISSIONER OF STATE LANDS

HOUSE JUDICIARY COMMITTEE

January 22, 1985

On behalf of the Department of State Lands, I support H.B. 265. It is my understanding that the purpose of paragraph (5) of Section 2 is to ensure that the bill does not give the public rights on school trust lands that are inconsistent with trust status and to ensure that no state lessee's rights are diminished. However, the phrase "under lease on [the effective date of this act]" reads like a grandfather clause and implies that only current and not future lessees are protected. There is no reason for excluding new lessees or existing lessees upon renewal of their leases. I therefore recommend that this phrase be deleted and I support the bill with this amendment.

DEPARTMENT OF STATE LANDS'
PROPOSED AMENDMENT TO H.B. 265

1. Page 5, line 13
Following: "lands"
Strike: "under lease on [the effective date of this act]"

Exhibit G
H.B. 265
1-22-85

TESTIMONY CONCERNING HOUSE BILL 265
Introduced by Ream and Marks

Presented for the Montana Cattlemen's Association
by Gene Van Oosten, President

We do indeed have before us a remarkable piece of legislation. House Bill No. 265 was created by a loose alliance of agriculture organizations in order to codify what Montana agricultural landowners felt should be the proper relationship between them and the recreational and sporting users of navigable waters located on private land. This alliance wrote a bill which received almost unanimous approval from agriculture interests. We then began meetings with recreationist groups in order to discover whether this legislation could be modified sufficiently to gain their approval before its introduction as a bill. These people, quite naturally see landowners' rights from an opposing point of view. What a landowner sees as his right of ownership, a recreationist considers to be a restriction upon his freedom to enjoy the great outdoors. Nevertheless, the determination to agree was strong. Both sides made painful concessions. This bill is not perfect. But, many hands have participated in its fashioning, from both sides of the issue. Here lies its greatest strength.

The Montana Cattlemen's Association, after close study of this and other proposed legislation on the issue of recreational use of state waters, supports this bill as the nucleus of much needed legislation. A recent Supreme Court decision has placed the ownership of all surface water in the hands of the State. Therefore, new rules and new boundaries need desperately to be established.

Let us, very quickly, show you how this legislation will answer the concerns of many recreationists while at the same time protecting an individual rancher's right of ownership within the meaning of the Supreme Court case law. In Section 1 we find definitions of terms used in rule-making. Of these, "ordinary high water mark" stands out. This definition must,in any legislation that comes out of this committee, be perfect, for it constitutes a boundary line. Therefore, we do suggest amending the second sentene of this definition to read: "Characteristics of the area below the line include, when appropriate, but are not limited to a lack of terrestrial vegetation or a lack of value for agricultural purpose." We also suggest adding the Following sentence: " Flood plains or flood channels shall not be considered to lie between the ordinary high water mark, for recreational purposes, except when they carry suffieient water to support fishing or floating." We feel that this clearer and more complete wording will be as useful to recreationists and sportsmen as it is to our landowner members.

We ask the legal minds on this committee to examine the definition of "Class I waters" The alliance has tried to be thorough here. The difference between Class I and II waters is essential to this bill. It must be right. If it is not, then fix it.

Section 3 represents the level best of both recreationists and ranchers to establish guidelines for portaging around barriers. Just plain common sense was used as a reference for these provisions.

Section 4 takes care of the question of liability.very adequately.

Section 5 eliminates the possibility of the public acquiring an easement through its use of portage routes, or the waters themselves.

In Section 1 we have a definition of just what recreational use means with regard to both Class I and Class II waters. Section 2 deals with the right of the public

to make that recreational use. The mainstream of sportsmen and recreationists accepts these provisions. The rules on Class II streams are especially significant. They represent the manner in which responsible sportsmen would use these small, delicate streams even without rules.

The Montana Cattlemen's Association, in view of the tremendous loss of control over their land that our members have suffered as a result of recent Supreme Court action on surface waters, proposes that the following statement of intent be added to House Bill 265 or to any legislation on the subject: "This legislation does not, in and of itself, intend to provide the basic authority for public use of Class II surface water. These parts intend only to regulate and define public recreational use of surface waters decreed by other authority to belong to the State of Montana."

This bill will work. We ask for one amendment to clarify a definition. We ask you to make sure these definitions can be understood by all.when this bill leaves your committee. We suggest a statement of intent. But we do not want to lose any parts or sacrifice any of the concepts contained within. Months of study and negotiation have accomplished what years of conflict will not.

Exhibit H
HB 265
11-22-85

Jo Brunner

AGRICULTURE LEGISLATIVE WORK

MR. CHAIRMAN, members of the committees, my name is Jo Brunner. I am the water chairman for the Montana Women Involved in Farm Economics organization and I speak tonight in that capacity and also as a representative of the Montana Cattle Feeders Association and of the Montana Grange.

Mr. Chairman, it is the desire of our organizations to be recognized as participants in the months of discussions, consultations, drafting and re-drafting that finally rssulted in the legislation offered here tonight as HB 265.

We believe that working with the alliance of agriculture organizations we have found common meeting grounds for the concerns of our landowners whose properties hold the waters of our state and for those responsible recreationists who have an honest desire to use those waters without infringing on the rights of the landowners.

It is the intent of the three organizations I speak for tonight to support HB 265 on its way through the various aspects of legislative progress, studying the amendments and any changes, and striving for a continued cooperative effort between all the citizens of the state of Montana to foster understanding and good faith efforts to work our our problems.

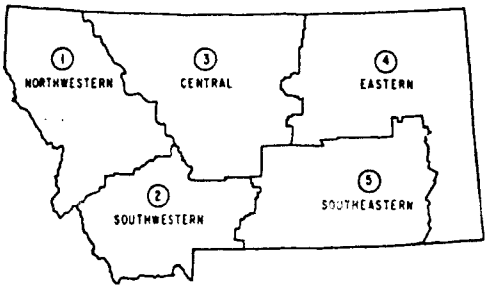
Thank you.

Exhibit I
H.B. 265
1-22-85

EDUCATION – CONSERVATION

Montana Wildlife Federation

AFFILIATE OF NATIONAL WILDLIFE FEDERATION



MONTANA WILDLIFE FEDERATION.
TESTIMONY IN FAVOR OF HB 265

Mr. Chairman and members of the committee:

My name is Dan Heinz. I am here on behalf of the Montana Wildlife Federation. Our organization represents 17 affiliated sportmen's clubs across the state. In addition there are over 4000 individual members. Our interests include waterfowl and upland hunters as well as floaters and fishermen.

We have been deeply involved in the stream access issue since its inception.

We share landowners concern that the court decision left ill defined boundaries that leave the open for abuse by uncaring recreationists.

We participated in interim efforts to negotiate commonground. HB 265 is a product of those efforts.

We strongly support compromise bill 265. This bill clearly defines boundaries the supreme court left nebulous. It also provides protection for the landowners against abuses of those rights granted by the court.

Both HB 16 and HB 275 prohibit use on some waters where use was allowed by the Supreme Court decision.

A lot of work from diverse interests has gone into HB 265. We urge you to give it favorable consideration.

Exhibit J
Water Access Bills
1-22-85

JAN. 22, 1985

House Judiciary Committee
State Capitol
Helena, Montana

Chairman Hannah & Members of the Committee:

My name is Jim McDermand. I am the Great Falls Director of the Coalition For Stream Access and a past president of the Medicine River Canoe Club. I am speaking this evening as a representative of the Canoe Club.

My wife and I have been involved with the stream access issue for over four years. Beginning with the last legislative session, we have attended all committee hearings on this issue including those of Interim Subcommittee #2. We have also participated in many other meetings on this subject too numerous to mention.

We would much prefer to spend our time canoeing or fishing, and sincerely hope that a fair and equitable bill for both the landowners and recreationists can be passed by this legislature. However, we will continue our involvement as long as it is necessary to assure that the rights of the recreationists are preserved.

Following is the Medicine River Canoe Club's stand on the three bills before the committee tonight.

We OPPOSE H.B. 16. It contains sections that are in direct conflict to the recent Supreme Court ruling. Because it denies the public the use of the beds and banks on most rivers in the state, it will surely be challenged in the courts again. Instead of providing solutions and absolving conflicts, it would create more and greater controversy between the landowners and recreationists. Passage of this bill would only lead to prolonged and expensive litigation.

We OPPOSE H.B. 275. This bill, while incorporating all of the concessions made by recreationists in H.B. 265, then goes on to restrict their rights on most of the rivers and streams in the state. Some landowners have expressed concern over the environmental impact of public use. Representative Cobb's bill presents an extreme over-reaction to this concern by giving broad and virtually unrestricted powers to the Department of Natural Resources and Conservation. This department would determine which streams we could use and under what conditions. It should be recognized that organized recreational groups are probably the best allies the landowners have on environmental issues. We care equally as much about stream habitat and preserving the scenic value as they do.

H.B. 275 subjects the recreationists to bureaucratic judgements totally beyond our control. We cannot condone the creation of this bureaucracy or accept the unfair restrictions it puts on the recreating public.

We SUPPORT H.B. 265. (In its present Form)

This bill is the result of a sincere and intense effort between an alliance of agricultural groups and a coalition of recreational groups brought together through the perserverance of Bill Asher. We commend the efforts of Ron Waterman and Mary Wright who, in consultation with these groups have drafted this bill; a true compromise which protects the rights of each.

Some groups or individuals may attempt to ammend this bill by introducing further restrictions on Stream use. To do so would certainly jeopardize passage of H.B. 265. We must not loose sight of the fact that to reach this compromise, the recreationists have already made concessions from the Supreme Court ruling.

In summary, we strongly OPPOSE H.B. 16 and H.B. 275.

We SUPPORT H.B. 265 in its PRESENT FORM.

Your consideration of our views will be greatly appreciated.

James W. McDermand

James W. McDermand
Medicine River Canoe Club
3805 4 Ave. South
Great Falls, MT 59405

Exhibit K
H.B. 265
1-22-85

DON MC KAMEY, GREAT FALLS
PRESIDENT OF MONTANA WOOL GROWERS ASSOCIATION
HB 265; STREAM ACCESS - JANUARY 22,1985

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE. FOR THE RECORD I AM DON MC KAMEY, A SHEEP AND CATTLE RANCHER ON THE SMITH RIVER SOUTH OF GREAT FALLS. I AM PRESIDENT OF THE MONTANA WOOL GROWERS ASSOCIATION. OUR RANCH HAS TEN MILES OF A HISTORIC RECREATIONAL WATERWAY FLOWING THROUGH THE PROPERTY UPON WHICH I AND MY FAMILY MAKE OUR LIVING. THE SMITH RIVER HAS FOR YEARS PROVIDED COUNTLESS FLOATERS AND FISHERMEN A WATERWAY FOR SPORT. I AM VERY FAMILIAR--DUE TO THE TEN MILES OF STREAM--WITH THE RECREATIONAL USE OF THE SMITH. I CAN TRUTHFULLY SAY THAT BY AND LARGE WE HAVE HAD FEW PROBLEMS WITH THE FLOATERS OR FISHERMEN. A LARGE FACTOR ON THE SMITH, HOWEVER, IS THAT FISH, WILDLIFE AND PARKS RECOGNIZES THE LARGE USE BY THE PUBLIC AND DURING THE MONTHS THE SMITH CAN BE FLOATED ASSIGNS A FULL TIME "RIVER WARDEN" TO POLICE THE AREA. IN MY OPENING, I ALSO WANT TO STATE CLEARLY THAT THE MC KAMEY RANCH HAS ALWAYS BEEN AVAILABLE TO THE HUNTING AND FISHING PUBLIC AS LONG AS PERMISSION FOR THOSE ACTIVITIES WAS FIRST OBTAINED. WE HAVE HAD TO TURN DOWN SOME HUNTING REQUESTS WHEN THE PRESSURE IS TOO MUCH. I THINK THAT IS ONLY REASONABLE IN THE INTEREST OF NOT ONLY SAFETY FOR THE HUNTERS BUT FOR THE RESOURCE THE SPORTSMAN IS ATTEMPTING TO HARVEST.

OUR ASSOCIATION MEMBERSHIP IS GREATLY CONCERNED ABOUT THE TWO SUPREME COURT RULINGS ON STREAM ACCESS THAT BROUGHT US TO THE THREE BILLS WE ARE HEARING TONIGHT. SERIOUS QUESTION IS RAISED OVER THE RIGHTS OF A PROPERTY OWNER AS A RESULT OF THOSE RULINGS. AT OUR ANNUAL MEETING THERE WAS NOT THE FINAL LANGUAGE FOR ANY BILLS ON STREAM ACCESS. THUS, I CAN NOT TESTIFY THAT EVERY MEMBER OF THE ASSOCIATION HAS SEEN THE PROPOSED BILLS. OUR BOARD OF DIRECTORS WHICH ARE ELECTED BY THE MEMBERSHIP HAVE ALL BEEN GIVEN COPIES FOR COMMENT. I APPEAR THIS EVENING TO TESTIFY IN FAVOR OF HOUSE BILL 265, THE BILL PRESENTED BY REPRESENTATIVE REAM AND REPRESENTATIVE MARKS AND COMMONLY REFERRED TO AS THE "AGRICULTURAL ALLIANCE-SPORTSMEN BILL". NUMEROUS MEETINGS HAVE BEEN HELD ON THE BILL AND WHAT YOU HAVE BEFORE YOU IS THE RESULT OF GIVE AND TAKE ON BOTH SIDES.

WE BELIEVE THAT A BILL MUST COME OUT OF THIS SESSION ADDRESSING: 1) A DEFINITION OF HIGH WATER MARK. 2)ADDRESSING LIABILITY OF THE LANDOWNER. 3) THE QUESTION OF BEING ABLE TO FENCE STREAMS IN ORDER TO CONTROL LIVESTOCK AND THEN SUBSEQUENTLY THE ISSUE OF PUBLIC PORTAGE 4) A BILL TO PROTECT AGAINST PRESCRIPTIVE EASEMENT RIGHTS.

HB 265 ADDRESSES THOSE AND OTHER ISSUES REGARDING STREAM ACCESS. WE BELIEVE THIS IS THE BILL AGREED TO BY NEARLY ALL OF THE AGRICULTURAL ORGANIZATIONS AND BY SEVERAL SPORTSMEN ASSOCIATIONS. I URGE YOUR APPROVAL.

Exhibit L
Water Access
1-22-85

Parks' Fly Shop
GARDINER
MONTANA
59030

Richard C. Parks, President
FISHING and FLOATING OUTFITTERS
ASSOCIATION of MONTANA

To: House Judiciary Committee
Ref: HB-16, HB-265 and HB-275

Mr. Chairman, members of the Committee, I appreciate the chance to appear on behalf of the Fishing and Floating Outfitters of Montana. My name is Richard Parks, owner of Parks' Fly Shop in Gardiner and president of FFOAM.

Ever since this issue came up several years ago there has been a lot of paranoia exhibited by recreationists and property owners alike. None of that was abated by the Supreme Court decision in the Dearborn and Beaverhead cases which ruled in the broadest possible terms in favor of the recreational users. I believe that those decisions were correct but they left behind a legacy of loose ends and undefined terms that people of ill-will could use to trample another's rights - nor would that have all been one sided. The actual problems that arose last summer clearly indicate that those who were looking for trouble could find it but that by and large the vast majority of people - sportsmen and landowners alike - are reasonable people.

We support the compromise bill HB-265 in prefrence to HB-16 and HB-275 because we believe that it does the best job of tying up those loose ends. Property owners are justifiably concerned that high water could mean flood water, that ditches would become highways and that recreational use would become a means of establishing a prescriptive easement across their land to access the water. Recreationists are concerned that fencing provisions could be used to harass the water user and more particularly that some property owners either do not understand the basis of the court decision or do not accept the ruling as what it is - the law of Montana.

HB-16 fails because it makes a clear effort to limit the effect of the court decision to such a narrow list of waters that the Court would be obliged to strike it down. It does not in my view address adequately the legitimate concerns of either land owners or recreationists. HB-275 fails for the same basic reason. Its major differences from HB-265 are in its effort to create a class of water which the Supreme Court has already ruled can't exist. Its alleged concern for the potential damage of aquatic eco-systems by recreational users is clearly a case of setting the fox to guard the hen-house. Worst of all it leaves in its wake a train of further undefined terms differentiating between class II and class III waters that will create endless additional trouble both in and out of court.

The advantages of HB-265 are many. It is necessary to define the terms used in the court decisions so that all parties can know what their rights and responsibilities are. This bill is the product of extensive discussion with a cross-section of interests and we believe it does that. The definition of "barrier" is so straight forward that virtually everyone has been able to agree on that. The definition of what is "recreational use" is much less clear. Left untouched the court decision could be read in such a way as to assert that if my feet were wet I could do anything. We do not believe that that is what the Court really meant and as a consequence differentiate two classes of water. In the smaller waters the definition of recreational use is restricted to water based activity - which after all is what started the issue in the first place. Notice that this is not the same as denying recreational use however defined as HB-16 would do-- or requiring permission which implys the right to deny as HB-275 would do. It does eliminate the objectionable uses that concern people - particularly the use of a stream bed as a highway.

Another major area of legitimate concern was the definition of "high water" which the court did not spell out. Reasonable people have been able to agree that what the court probably meant, being reasonable people, was the "ordinary high water mark". This term has a considerable history to support its continued use. By not addressing the question in the decision the court opened up irrigation ditches and other diversionary works to discussion. The basis for the court ruling is the Constitutional provision that the waters of the state are public waters. An argument could be drawn that therefore so are ditches. We do not subscribe to that view because the diversions are carried out by license of the state to convert the water to a private but benificial use and once legally diverted the water has lost its public character. HB-265 clearly states this principle.

When the Supreme Court declared that recreational users had the right to portage around barriers some people apparently believed that water craft operators were simply waiting for such a license to invade stream-side property. No one who has actually had to make such a portage believed that. By defining portage routes and the means to establish them HB-265 should remove the fear from the landowner and the temptation from irresponsible members of the public. Property owners are legitimately concerned that the court decision might open them to liability to recreational users of the water running through their property. Again HB-265 clearly removes their responsibility to the extent that it can be removed. Finally property owners were legitimately concerned that recreational use of waterways would be used to expand via prescriptive easement public access to their lands. for other purposes. Again HB-265 lays that issue to rest.

In conclusion we ask the Committee to recognize that much of the recreational public are also land owners and would not support a proposal that we believed was inimical to our rights as land owners. The FISHING and FLOATING OUTFITTERS ASSOCIATION of MONTANA believes that HB-265 correctly addresses the issues left unresolved by the Supreme Court decisions and supports its passage intact.

Thank you.

Exhibit M
1-22-85

MONTANA FARM BUREAU FEDERATION

502 South 19th
Bozeman, Montana 59715
Phone (406) 587-3153

TESTIMONY BY: Gene Chapel, Montana Farm Bureau Fed.

BILL #S265 DATE 1/22/85

SUPPORT _____ OPPOSE _____

Mr. Chairman and members of the committee:

For the record my name is Gene Chapel and I own and operate a cattle ranch in Fergus County. I am president of the Montana Farm Bureau, which has a membership of approximately 4000 families. Our membership is broad-based, both from the standpoint of being statewide and also representing every commodity or endeavor that attempts to generate a living from working the land.

Water and its use along with the management of crops and livestock as it pertains to our streams and rivers in Montana are the very life blood of agriculture. Our delegates have outlined a set of policies pertaining to stream bed access that they feel are essential if they are to continue to manage their properties in a manner that is good for their families and the public.

Farm Bureau members (and god bless their wisdom) are not so naive as to hide their heads in the sand and not recognize and address the fact that the two Supreme Court cases did in fact, take away some very basic and assumed property rights, and that we will have to live within the parameters set up by these decisions. You all realize this was done under the Public Trust Doctrine that someday this legislature will have to address before all property rights are undermined.

Okay, we have the court cases and we can't go back and change them, so now it is up to the legislature to define those areas that are open to conflict or interpretation, so the recreating public can use the streams and we in agriculture can manage

our lands and do what we know best with as little interference as possible.

Farm Bureau is convinced that the areas that need definition and direction are:

1. Define a high water mark.
2. Give landowners the right to erect barriers such as fences, water diversions, bridges, etc, and help us come up with a management tool to allow water users portage around them.
3. Protect landowners from unfair liabilities.
4. Protect and allow Diverted waters.
5. Prevent prescriptive easement, obtained thru recreational use.

Believe me, distinguished members of the House, Farm Bureau has worked long and hard on this issue. We were involved in the court cases, worked with the last legislature, met with virtually every agriculture group, met with many recreation groups and many individuals.

In comparing our policy, listening to our delegates at our Annual Convention, and talking to attorneys, Farm Bureau feels that House Bill 265 is the most viable and workable bill that you have before you.

You must realize that Farm Bureau would like to have more for agriculture, but in reality, house bill 265 addresses most concerns and the recreation people feel that they can live with it. We realize that this is a tough decision, but please don't leave us hanging out there with nothing because agriculture, with all of its problems, cannot afford the costs or loss of important management tools if we are to continue to form the tax base and economy for Montana that everybody has enjoyed up t o now.

As I have said before, if you see a storm coming, don't turn tail and run, because more than likely you will get wet anyhow -- instead slicker up and get the job done.

We in Farm Bureau ask your support in getting House Bill 265 enacted.

Thank You,

Gene Chapel,
President, Montana Farm
Bureau Federation

EXHIBIT M-1
Water Access Bills
1/22/85

JOHN E. THORSON
643 DEARBORN
HELENA, MONTANA 59601
(406) 449-6498

January 22, 1985

I have been asked to testify on my personal legal opinion of the several bills pending before the 49th Legislature on the issue of the public's rights to recreational use of the waters of the state. These bills include HB 16, introduced upon the request of Joint Interim Committee No. 2; HB 265 (Ream and Marks); and HB 275 (Cobb).

While I am not a member of the Montana bar, I feel I have the necessary qualitifications to offer an formed judgment on the legal merits of these bills. I am a member of the New Mexico, California, and U.S. Supreme Court bars. For the last three years, I was Director of the Conference of Western Attorneys General and editor of that organization's legal journal, Western Natural Resource Litigation Digest. Western water rights, including public rights in those waters, was the most important interest of that 14-state organization. Finally, I have studied Montana's law on this subject in preparation for papers delivered on the topic to the Select Committee on Water Marketing and to Joint Interim Committee No. 2 last July.

I thank you for the opportunity to speak on some of the issues raised in these pending bills. In these remarks, I first describe an analogy that may help understand the concept and workings of public rights in water. Second, I address a general concern that I have about HB 265 and HB 275. Third, I specifically identify some of the problems or attributes of each of the bills.

I. An Analogy

A useful analogy is to compare public and private rights around a waterway to similar rights and responsibilities involving an urban street and sidewalk. After all, the streams and rivers of our country were the original streets and highways for all types of commercial and social activity. Understood in this fashion, these public rights in waters may not seem to be such a radical notion.

In this analogy, the street substitutes for the waters of the stream or river; and the sidewalks on both sides represent the banks up to the high water mark. The property beyond the sidewalk is privately owned; and, while the property underlying the road or sidewalk may also be privately owned, the private ownership is subject to a perpetual easement for public transit. At certain locations along the roadway, there is no sidewalk. At other locations, vehicles in driveways block the sidewalks.

In this street analogy, certain commonly accepted rights, responsibilities, and behaviors automatically follow. The street is used for a range of social activities from commercial trucking to recreational motoring. Motorists commonly park their vehicle at the curb -- even overnight.

The sidewalk is used by pedestrians for a similar range of commercial and social purposes. The adjoining property owner owes a duty of care to the pedestrians he knows will be there: he can't break glass on the sidewalk in an effort to injure those who pass. Neither can he fail to remove broken glass that he knows is likely to cause harm.

Likewise, the pedestrian owes certain duties to the adjoining landowners. He may go onto their property when specifically or implicitly invited, but he is guilty of trespass when he is not invited and knows the property is private property and not a park. Yet, the pedestrian commonly crosses on to private land or into the street when the sidewalk ends or to avoid those cars parked in driveways; and the landowner is rarely heard to complain.

The local government has certain authority in this analogy. It can condition the use of a popular street (for instances, limitations on load weight) and sidewalk but would be hard pressed to permanently close either. [In our stream access cases, the Court has also conditioned use by allowing <u>recreational, not commercial</u>, use of the surface water of the state.] The local authorities can, however, proscribe the littering of the street and the establishment of a permanent residence on the sidewalk.

Of course, there are limitations to any analogy -- including this one. For one, monitoring the safety of several miles of stream frontage is very different from monitoring the sidewalk outside the store. For another, camping on the river bank is an integral part of the normal float trip while

camping on an urban sidewalk would not be allowed. Most importantly, however, this analogy from one area of our life does suggest the commonly accepted rules by which public and private rights are balanced.

II. General Concern

I appreciate the fact that each of the bills attempts to reach the difficult balance between public rights in water and private rights in the appurtenant land. In particular, I commend the efforts of the sponsors of HB 265 to reach a workable accord between agricultural and recreational users. I think such negotiations between the parties most knowledgeable and affected are more likely to result in a harmonious solution than what can be accomplished by a court attempting to invoke general principles on the basis of the "cold" record of a case.

Yet, to the extent each of these bills attempts to classify the waters of the state for different recreational usage (e.g., Class I, II and III) on the basis of title or ownership of the underlying lands, I think there is a real danger of walking where the Montana Supreme Court has already tread. For example, while HB 265 may be the best political solution, it may not be the best legal solution. There are many good reasons why this legislature might wish to choose a practical compromise that has been artfully fashioned. My job is only to make you aware of its legal uncertainties.

The Court in Montana Coalition for Stream Access v. Hildreth said "the question of title to the underlying streambed is immaterial in determining navigability for recreational use . . . ."(No. 83-174, p. 6). The Court indicated in the Curran decision that this holding is based on both the Montana constitution and the public trust doctrine (No. 83-164, p. 14). Unless the Court changes its mind (which is not impossible given new membership), such a holding does not allow the Legislature much room to act. The supporters of HB 265 and 275 may argue that title is not being used in their bills to determine recreational usage but only to describe physical differences between streams. If that is the argument, I think it approaches splitting hairs.

With reference to HB 265, which is the bill of the three I prefer, I think the essential difference between class I and class II waters is

minor. I would recommend providing only one class of waters and include overnight camping (which I believe to be integrally related to water-based recreation) below the high water mark as a permissible recreational use on any of the waters of the state. I would prohibit big game hunting, upland bird hunting, the operation of vehicles not designed for water, permanent structures, or other activities unrelated to the water. After all, we don't approve of throwing rocks from the street into private yards; nor do we allow the building of a flower stand in the middle of a street or the operation of a tractor on a sidewalk.

Comments on HB 16:

Section 1:

(1) The definition of "barrier" is too narrow in that it does not include a natural or artificial obstruction located on the banks of a stream below the high water mark. Section 3(1) of this bill allows public use of this zone when streams are navigable for purposes of state title; thus, the public's portage rights should extend to barriers on the bank.

(2) The reference to "lack of terrestrial vegetation" is too narrow. The "diminished" standard in HB 265 is a more realistic test.

Section 2:

(1) This is a correct statement of Montana law as interpreted by the Montana Supreme Court in Montana Coalition for Stream Access v. Curran. The Court indicated that this principle is founded in both the state's constitution and the public trust doctrine.

(2) While the issue of public access to waters diverted away from a natural water way for beneficial use has not been addressed by the Court, this subsection seems quite reasonable. Montana's constitution indicates that, while the waters are the property of the state, they are "subject to appropriation for beneficial use." The public trust doctrine, which seeks to protect longstanding public uses and to preserve natural values, is not jeopardized by legal appropriation and diversion through an artificial waterway.

In Curran, the Court is clear that the public's right of access extends to the high water mark . The Court is not clear as to its legal basis for this holding. The holding is probably a more specific application of constitutional and public trust principles. If so, the Legislature would be unable to limit the right in the case of streams not navigable under the federal test.

Section 4:

This is generally a correct statement of the law as set forth in Curran.

Section 5:

(1) In "fine-tuning" the public's rights in water, the Legislature probably does have the authority to establish rules of liability. As the section now reads, it seems to limit liability only as against persons in possession of land. The Legislature may wish to extend this limitation to actions against the property owner.

Section 6:

(2) Prohibiting the establishment of prescriptive easements "through the use of land . . . for recreational purposes" would extend to many situations other than those encountered around waterways. The ramifications of such a broad prohibition have not been studied by the Committee.

Comments on HB 265:

Section 1:

(1) I feel the intent of the Court was to allow portage rights around barriers, either natural or artificial, which are located anywhere between the high water marks. This definition seems to exclude artificial barriers not actually in the water but on the banks within the high water marks.

(2), (3), and (7) See comments under "General Concern," supra.

Section 2:

(1) and (2) See comments under "General Concern," supra.

(3)(a) I agree that stock ponds were probably not contemplated by the Court's decisions. There may be, however, some sizeable, publically owned impoundments within the state which, though fed intermittently, should be available for public recreational use.

(3)(b) I believe this to be a proper restriction on public access [see comments on HB 16, Section 2(2), supra].

(4) This is a correct statement of the law (subject, of course, to the public's portage rights).

Section 3:

(1) I believe this to be a correct statement of the law.

(2) line 24 & 25: I believe the approved barrier also should not interfere with the public's right of the stream bank up to the high water mark.

(3) Generally, I feel that the formal establishment of a portage route is an innovative way to meet legitimate landowners' concerns. Several concerns, however:

(c) Do you really want to haul all the supervisors out to the stream to determine portage routes? Isn't this more appropriately handled by a departmental representative?

(e) What will be the cost to the department?

(h) Perhaps there should be a provision for the arbitration award to be incorporated into a judgment of the district court. Such a judgment would aid in enforceability.

Section 4:

(1) As previously mentioned, the Legislature may wish to specifically

provide that property owners share in the limited liability.

(2) A "willful or wanton misconduct" standard may be too restrictive. I would suggest adding "gross negligence."

(3) The limited protection against liability should also extend to members of the arbitration panel.

Section 5:

(2) This subsection is unnecesary as the Court has essentially created a public easement through its decisions. I suspect the language is included to provide for the possibility the Court might change its mind.

Comments on HB 275:

Section 2:

(1) Same comments about definition of "barrier" as expressed concerning HB 265 [Section 1(1), supra].

(2), (3), and (4) See comments under "General Concern," supra.

(8) See comments under "General Concern," supra.

Section 3:

(1), (2), and (3) See comments under "General Concern," supra.

(4) This is a confusing sentence. Perhaps break into a series: "The right of the public . . . does not include the right to make recreational use of (a) waters in a stock pond; (b) waters in an impoundment fed by an intermittently flowing natural watercourse; or (c) waters diverted away from a natural water body for beneficial use . . . ."

Section 4:

While setting forth the issues and criteria to be met by the department in developing rules, the section is extremely vague as to how and when the procedure is to be invoked.

Section 6:

(2) Again, I suggest including a "gross negligence" standard.

Section 7:

(2) Again, the Court has essentially created a public easement in water. This provision seems irrelevant.

Exhibit N
1-22-85
HB. 265

January 22, 1983

TO: The Honorable Tom Hannah, Chairman, House Judiciary Committee

TESTIMONY ON HOUSE BILL 265 ON STREAM ACCESS BY THE MONTANA ASSOCIATION OF CONSERVATION DISTRICTS

The Montana Association of Conservation Districts takes no stand relative to the substantive portions of the stream access bill. However, there are two areas of concern we wish to express tonight.

1. Page 6, lines 3 through 7 describes the establishment of portage route over a barrier. We recognize that relative to the potential damage to landowners land, the supervisors have expertise to recognize possible damage to land and stream banks as a result of portage.

Our concern is whether the supervisors can determine whether the landowners rights will be violated. This responsibility is outside the normal mission of Conservation Districts.

The Association has concerns about obligating the supervisors because the supervisors are unpaid volunteers. There is a fear of overloading the districts.

2. Page 8, lines 14 through 19. We would suggest an amendment that would strike on line 16, after the word "person" all of line 16 and 17 to the word "except."

This would assure that the supervisors would not be liable to any person whether they be recreationists or landowners.

Thank you for the opportunity to express our views.

Dave Donaldson, Executive Vice President
Montana Assn. of Conservation Districts
7 Edwards Street
Helena, Montana

Exhibit O
HB 265
1-22-85

MISSOURI RIVER
FLYFISHERS

P.O. Box 6398
Great Falls, MT 59406

January 22, 1985

Statement
to the
House Judiciary Committee
concerning
Stream Access

The Missouri River Flyfishers of Great Falls, Montana, supports HB 265 in its present form. We feel it is the best bill of the three, and it seems to have the spirit of compromise begun with HB 888 of the last session. We would hope that this committee, and ultimately the legislature, will see the wisdom of a good compromise bill, and pass HB 265 into law.

It is time we started working together rather than continue the fear-based legal fighting that drains resources best used elsewhere.

We feel that HB 16 and HB 275 are not good faith bills, and fall short of a workable compromise. We ask that you vote against sending these bills to the House.

Thank you.

Kevin L. Romweber
Secretary

Exhibit P
Water Access Bills
1-22-85

TO: House of Representatives
Montana 1985 Legislature
Written Testimony on House Bill 16
(and other bills)

FROM: Richard W. Josephson
34 Spring Drive
Mallard Springs Subdivision
Big Timber, Montana 59011
Occupation: Attorney

At the time this testimony was prepared it was unclear whether Rep. Ellison's bill would be before the Legislature, or whether I would be testifying in favor of the Interim Committee's bill, House Bill 16.

My testimony can be summarized as follows:

ORDINARY HIGH-WATER MARK:

The definition of "ordinary high-water mark" that I favor is contained in Rep. Ellison's bill:

> "'Ordinary high-water mark' is the line which water has impressed on soil by covering it for sufficient periods of time to deprive the soil of its vegetation and to destroy its value for agricultural purposes. Flood plains or flood channels shall not be considered to lie between the ordinary high-water mark, for recreational purposes, except when they carry sufficient water to support fishing or floating."

The first sentence of the above definition is from the Soil Conservation Districts' definition used for a number of years to administer the Streambed Preservation Act, apparently without objection. Rep. Ellison has added to this definition a sentence excluding the flood plain and flood channels.

House Bill 265 uses the term "diminished" terrestrial vegetation. During spring flood stages or winter ice and snow jams, streams can cause "diminished" vegetation outside of the ordinary high-water mark. It is submitted that this Legislature should not expand the concept of the ordinary high-water mark.

The exclusion of dry flood channels and the flood plain is important, expecially under House Bill 265. Under House Bill 265, on "Class 1" waters, the area between the ordinary high-water marks may be used by the public to camp overnight, hunt, use firearms, operate motorized vehicles or create permanent or semi-permanent objects (like duck blinds, camps or docks).

Under House Bill 265, it is my opinion, that the right to conduct these activities arises by implication because these activities are not permitted in Class 2, and hence by implication are permitted in Class 1 waters.

Under House Bill 265, because of the broad definition of Class 1 waters, almost any stream in the state usable by a commercial guide would be Class 1 waters.

RECREATIONAL USE DEFINITION:

House Bill 16 does not define what activies constitute "recreational use".

Rep. Ellison's bill does define recreational use of surface waters to include:

- fishing;
- swimming;
- floating;
- boating in motorized craft;
- boating in a craft propelled by oar or paddle; and
- coincidental picnicing,

all within the ordinary high-water mark.

Rep. Ellison's bill also provides that, for waters that have not satisfied the federal navigation test for streambed ownership, recreational use of surface water does not include:

- overnight camping;
- operation of all-terrain vehicles or other motorized vehicles;
- hunting; and
- activities not primarily related to water related expeditions.

Rep. Ellison's bill also might imply, by implication, that the above items, because they are enumerated, are allowed on all streams that do satisfy the federal navigation test for streambed ownership.

House Bill 265 allows, by implication, the following activities, by the public, on Class 1 waters between the ordinary high-water marks:

- overnight camping;
- big game hunting;
- upland game bird hunting;
- operation of all-terrain vehicles or other motorized vehicles not primarily designed for operation upon the water;
- placement or creation of permanent or semi-permanent objects such as duck blinds or a boat moorage.

Under House Bill 265, because of the broad definition of Class 1 waters, almost all waters usable by a commercial guide could be used for the activities outlined above.

For example, there are springs and sloughs that flow into major rivers. Many such springs and sloughs are excellent duck hunting areas. Could a commercial guide build a duck blind on such a slough or spring, without permission from the landowner or without regard for the land ownership?

Does the use by a commercial guide, of this spring or slough, convert the property into Class 1 under House Bill 265?

I question whether any legislation should allow overnight camping or structures on stream and river banks without the permission of the landowner. What impact would stream bank camping have on landowners, fire danger, and sanitary conditions?

PORTAGE:

I am pleased that House Bill 16 has only codified the Supreme Court's portage language.

I am impressed by the arguments that portage should be left out of all legislation.

I am further concerned that any portage allowed above the ordinary high-water mark is a "taking" of private property without due process, and may subject the State of Montana to inverse condemnation actions.

BARRIER:

If this Legislature does not codify the issue of portage, the definition of barrier can be omitted.

QUESTIONS:

Is a waterfall a barrier?

Are long stretches of rapids a barrier?

Can the public portage several miles by vehicle?

Is a strong current, in a stream, a barrier which prohibits upstream portage?

There are numerous other and similar questions that we can all think of when addressing the issue of barriers.

RESTRICTIONS ON RECREATIONAL USE OF WATERS:

House Bill 16 and Rep. Ellison's bill preserve, to some degree, the Supreme Court's limitation of recreational use to "waters capable of recreational use". Are there some waters not "capable of recreational use"?

House Bill 16 and Rep. Ellison's bill provide that the public may not make use of surface waters which are diverted away from a natural water body for beneficial use pursuant to Title 85, Chapter 2, parts 2 or 3.

Everyone seems agreed on this issue.

TECHNICAL POINT:

The references to Title 85 should be re-checked to be sure they refer to the proper sections of the existing water law codes.

A. Waters that satisfy the federal test of navigability for purposes of state ownership.

House Bill 16 and Rep. Ellison's bill allow the public to use the land between the ordinary high-water marks on these larger streams.

B. Other waters:

House Bill 16 allows the public's use of the land between the ordinary high-water marks on these "other waters" as follows:

[When] such use is unavoidable and incidental to the use of the waters [recreational use]; or

[When] the owner of the land or his authorized agent grants permission to use the land.

Use of the land between the high-water marks is limited to use which is unavoidable and incidental to the use of the waters permitted under [Section 2] only when the use is temporarily necessary for purposes of safety, health, or by-passing barriers.

Rep. Ellison's bill follows House Bill 16, except, on "other waters". Rep. Ellison's bill allows use of land between the high-water marks when: "such use of the land is unavoidable and incidental to the right of the public to make recreational use of the surface water only when use is temporarily necessary for accomplishing the recreational use of the surface waters."

C. House Bill 265: House Bill 265, in my opinion, constitutes a "taking" of private property rights under the United States and Montana Constitutions.

MONTANA HAS ALWAYS RECOGNIZED PRIVATE OWNERSHIP TO THE LOW-WATER MARK ON NAVIGABLE STREAMS AND TO THE CENTER OF THE STREAM ON ALL OTHER STREAMS. THE OWNERSHIP ON NAVIGABLE STREAMS TO THE LOW-WATER MARK HAS ALWAYS BEEN SUBJECT TO SOME KIND OF A NAVIGATION EASEMENT. ANY EXPANSION OF THIS EASEMENT MAY BE A "TAKING" OF PRIVATE PROPERTY RIGHTS WITHOUT JUST COMPENSATION AND DUE PROCESS.

LAND-OWNER LIABILITY:

House Bill 16 and Rep. Ellison's bill and the "other bills" before the House attempt to solve the problem created by the Montana Supreme Court cases regarding landowner liability to the public. I am not an expert on the issue, however, I would hate to think that dangerous rocks on the bank, a steep bank, livestock or a hanging branch would constitute a "willful" hazard that would cause the landowner to become liable if a member of the public were injured.

PRESCRIPTIVE EASEMENT:

A. House Bill 16 and Rep. Ellison's bill contain basically the same provisions. Both of these bills provide that a prescriptive easement cannot be acquired by the recreational use of land or water.

This is very important. It is important to preserve the remaining good relations between landowners and the public. The landowner would hate to think that by acquiescing to people crossing private property to reach a stream or to hunt creates a prescriptive easement in the public.

B. House Bill 265 deletes "land" and only provides limited protection against the establishment of prescriptive easements. House Bill 265 provides that a prescriptive easement cannot be acquired through recreational use of surface waters, including the streambeds underlying them and the banks up to the ordinary high-water mark or of portage routes. HOUSE BILL 265 DOES NOT EXEMPT THE RECREATIONISTS USE OF LAND GETTING TO THE WATER OR HUNTING. Does the landowner have to lock up his land to prevent the public from acquiring an easement?

STATE MANAGEMENT:

Rep. Ellison's bill is the only bill that affirmatively attempts to put some duty on the state to step in and protect a resource if the public is damaging the resource.

In my opinion, the State of Montana should limit the exercise of the "public trust" doctrine until its impact or potential impact on our waters can be studied and necessary regulations and/or laws enacted to protect the resources. The State of Montana has the power and the obligation to protect these resources from "over-use" by the public. The state could, in my opinion, restrict overnight camping and placement of structures on the streambank, for example, in the name of public health and safety.

What about protecting the wild trout and critical wildlife areas? What about protecting the rancher during calving and at other times? What about protecting the residential owner from hunting in the "front yard" next to a creek? Et cetera.

CONCLUSION:

The "floating and fishing" aspect of the public trust doctrine can be understood by most people of this state. When boating, you may have to stop along the bank for various reasons. While fishing, the fisherman goes onto the bank and occasionally around a log or rock.

To construe the Montana Supreme Court cases to include all of these other things suggested by House Bill 265 is not proper. Nor is it proper for this Legislature to codify and expand the Montana Supreme Court decisions. Your final decision will have great impact on property rights and values; and upon the relations between landowners and recreationists.

If some of the existing property rights have been taken improperly, which remains to be seen, codification of this taking in legislation is only exonerating the thief. Some degree of trust should be placed on the courts to clarify their own rulings as they apply to the various cases that may come before them.

Respectfully submitted,

Richard W. Josephson

Exhibit Q
Water Access Bills
1-22-85

January 22, 1985

House of Representatives Judiciary Committee
State Capitol
Helena, Montana 59601

Mr. Tom Hannah; Chairman

As a Landowner, Outfitter, sportsman and recreationist (most of us qualify) I sincerely appreciate efforts of the Legislature to negotiate and establish reasonable controls that protect property rights and clarify decisions that could detrimentally effect every rancher, farmer, urban lot and cabin site owner and future owner of Montana land, as a result of the 1984 Supreme Court decision. Do not make the mistake of believing you are not effected. We may well find ourselves all in the same boat.

Where will we be without reasonable controls? How much future litigation do we face? How much will all land values, stream side, urban lots or ranches depreciate? Will land ownership become a detriment? Unquestionably in my opinion water is a public assett, however, so are all forms of wildlife, snow, rain and the air we breathe that exists in our homes. Is there a difference?

Landowners and sportsmen know the problems and potential problems from experience, to potential and future landowners, to the youth of Montana who will some day own your own lot, acre or tract, do you want a reasonable right to control, to invite guests to enter or do you want the public to have free use of your property? What incentive will there be to obtain property for agricultural or other purposes that you have little right to control? How much would your urban lot, your lawn or your home be worth if you lost the right to control? What if you couldn't even lock your door? Every man, woman and youth who own or hope to own urban or rural property desperately need the protection of reasonable controls.

I do believe there is room for compromise and negotiation of Boaters-Landowners agreements similar to those in effect on the Blackfoot, Smith and other streams. That permit qualified boating, boating gates, etc. however many small creeks are 80 to 90 per cent obstructed by brush and 10 to 20 per cent accessable. To allow ingress to these creeks is to allow 80 to 90 per cent use of Landowner's private property.

For over 100 years Landowners have made agriculture number one in Montana, the protection of property rights have been a significant factor. To reverse this course could well result in a dangerous trend. If we leave the door open where will it stop and will it stop?

A look at history will show that the oldest and strongest systems of Government are those that protectthe rights of the people, not dilute them. We have seen other countries confiscate private property and turn it into public communes.

If the same concept used as a basis for the 1984 Supreme Court Stream Access decision is applied to wildlife, rain, snow, and the air we breathe it could well establish a socialistic trend, the opposite of what made America the greatest Nation on earth. I appeal to you; Do not turn the control of private property over to non-owners.

Ralph M. Holman

Exhibit P
Water Access
Bills
1-22-85

TESTIMONY TO THE HOUSE JUDICIARY, FISH & GAME AND AGRICULTURE COMMITTEES

January 22, 1985

For the record I am Norm Starr. I am a native Montanan whose address is Melville, Montana. I am in the livestock business and some small grains. I have no investments other than land, cattle and machinery.

The reason I am here and not home getting my work done is I have a duty to protect my private property rights to the best of my ability. The Supreme Court decisions of 1984 have presented a dilemma to myself as a rancher and I suspect to you as a legislator - simply because so many questions were left unanswered.

In trying to sort things out I have finally come to the conclusion that in the beginning of the white mans activity in Montana the waterways were used as roads. I also now understand our Montana Constitution says the people of the state own the water. I have been told by people who were delegates to said Constitutional Convention that the intent was to use it as a tool to keep down stream states from claiming our water. I can understand the reasoning.

I know that there is water flowing over my deeded land. I know there is a county road leading to my ranch - I own the land and pay taxes on that land- my neighbors pay taxes on the rest of it. The road was established because the inhabitants of the area needed a way to get to town - it was a necessity. I imagine in those days landowners were glad to let the county build a road and still pay taxes on the land because they needed the road. Now I am getting into some areas I can't sort out- on public roads there are rules and regulations. You can't get out of the boundary of the designated road, you can only travel at certain speeds, you have restricted weight limits, you can't use firearms from a public road, you can't camp on them or build fires on them or litter them, nor can you build structures on them. You have state people enforcing those rules and regulations and maintaining those roads. I think it is only fair the public be regulated on the waterways which flow over my deeded land, much as they are on the highways. And if there is a taking the property owner be compensated just like they are on todays taking in highway matters.

Some people don't feel the same way. You as legislators are being squeezed into making some decisions.

If you go onto national forest land during fire season you are required to have a bucket and an ax. If you camp you have to camp a certain distance from a stream to avoid degradation. In many cases you pay a camping fee and need permits for fires. If you start a fire on national forest lands and it gets away you can be billed for it.

If these rules and regulations are in effect on public lands doesn't it seem reasonable that private landowners should be given at least as much respect?

Time is short and I believe the points on the various bills will be covered. I will say I think the interim committee gave HB 16 a good shot and I like the conservation districts definition of the ordinary high water mark - it's in place and it is fair.

Finally, I hope when the smoke clears away, those of us who have allowed hunting and fishing on our private property will be treated in a manner that we will still feel comfortable in maintaining that practice.

Thank you.

Exhibit 5
Water Access
Bills 1-22-85

TESTIMONY before the House Judiciary Committee, January 22, 1984, Helena, Montana, by Lorents Grosfield, cattle rancher from Big Timber, Montana.

TESTIMONY before the House Judiciary Committee, January 22, 1985, Helena, Montana, by Lorents Grosfield, cattle rancher from Big Timber, Montana.

STREAM ACCESS---

A Landowners Viewpoint

Last hunting season, we hosted 863 hunters on our ranch. This number was approximately an average representation of the annual number of hunters we have hosted on our ranch over the last ten years. In addition we have hosted well over one hundred days annually for other recreational uses such as fishing, hiking, picnicing, and camping, not to mention several hundred days of horseback riding. In other words, over the past ten years, we have hosted well over 10,000 total recreation days on our ranch, NONE of which were charged for. On the contrary, if anything, I have donated a tremendous amount of time and energy (not to mention money) toward the recreating public--- consider that if each recreation day demands only 5 minutes of my time, I have donated over 50,000 minutes or 833 hours or 104 working days or nearly one-half of an average working year to the recreating public (and let me tell you, I rarely get off with only 5 minutes by the time I've explained where to go, where not to go, where the deer are, where the other hunters are, where the "big ones" are, where the cattle are, and so on). In fact when you think about it, what I've done, and what most ranchers do, is to subsidize the recreating public to the extent of the time and expense it takes me to accomodate that public.

I don't remember any year when I was so glad that hunting season was finally over. Not that we had so many more problems than usual or that there were so many more hunters than usual. I suppose that like most people, I become more conscious of my time as I get older and realize that I have less and less of it left, and one of the questions I have to ask myself is "Do I really want to continue to donate the tremendous amounts of time that it takes to accomodate to a hunting season?" This seems especially pertinent in light of the kind of thanks that I get as an agricultural landowner from my state's government in the form of things such as the stream access court decisions, based as they were on the Montana Department of Fish, Wildlife, and Park's proposal to grant the public an easement for recreational use of all the state's waters (since our constitution says that all waters belong to the state for the beneficial use of its people).

The point is that now some recreational users would have you believe that unless they are guaranteed the full extent of the easement granted them by the court, they have nothing. This is simply not true. It is essential to remember that, statewide, recreational access is widely available on private land when asked for--- the important ingredient is the asking or otherwise negotiating for access permission. To the landowner this is an essential private property right that is vital to efficient management. To the recreational user it is a matter of common courtesy as well as, in many cases, of law. Of course there are those social reformers who feel they should not have to get permission to use private property. Some even believe there shouldn't be any private property and I won't even pretend to try to satisfy them. But, although there are exceptions, most people respect private property and appreciate and enjoy the privilege to use it, and they are careful. And every year I get letters of thanks from all over Montana and many other states--- this year one hunter wrote, "I just wanted you to know how much I appreciated being able to hunt this year on your property. Your hospitality makes me glad I live in Montana." That represents a substantially different attitude from the one that my state's government has been taking.

Are landowners concerned about the stream access court decisions? You bet they are. Landowners across the state are deeply concerned about the kind of politics that these stream access decisions represent--- the kind of politics that seeks to confiscate private property. They're concerned about the increased expenses, worries, and liability exposure that they face because of being forced to accomodate to uncontrolled recreational use of portions of their lands. And they're worried about those who will take advantage of these decisions for their own purposes.

For example, in counties all over Montana, there are farms and ranches that were settled some generations ago, and the farmsteads--- buildings, corrals, etc.--- were built near the water and the protection from the elements that is provided by riparian ecosystems. Along some rivers and streams, many of these ranching families are now exposed to duck hunters who float down these streams and blast away, without regard, in many cases, to their proximity to farmsteads or farming or ranching active worksites. Granted, in many cases these hunters are not purposefully shooting in the vicinity of these circumstances--- because of the nature of the riparian environment, it is often difficult to see out from the stream area well enough to determine such circumstances, and not having had to secure permission

to be on these portions of private land a hunter wouldn't necessarily know when he was near a farmstead. But the point is that there now is apparently nothing the landowner can do to control these situations. Some county attorneys have even gone so far as to tell landowners faced with this kind of predicament that there's nothing they can do, not even if the hunters send their dogs beyond the high water mark to retrieve game. Picture yourself out in your corrals early some cold morning doing some chore when suddenly you are confronted with a deafening "Blam, blam, blam" that shatters the morning--- would you be pleased with that situation? This landowner shudders to think of having to put up with such a problem--- I'm sorry to say that I'm glad we don't have any ducks!

From a landowner's perspective, the primary issue here is not one of recreational opportunity but of private property and the confiscation of private property rights. Now some people will try to tell you that there has been no confiscation of rights because landowners have never had these rights to begin with--- that is simply not true. Not only have landowners actively controlled access on stream portions of their property for generations, but the public has recognized, respected, and abided by the exercise of that control; in other words, historically there certainly has been a right, a widely recognized right.

At the base of the access to private lands issue is the distinction between "right" and "privilege", that is, should recreational access on private land be a "right"? And is it in the best interests of landowner-sportsmen relations, of protection of riparian ecosystems, and of the agricultural economy, that the public should be able go as it pleases upon private land and do what it pleases regardless of the interests of the landowner? Should the Department of Fish, Wildlife, and Parks continue to practice the politics of confrontation and side with forced access interests in pursuing access as a matter of public right as it did in the stream access cases? Or should it rather pursue access as a matter of privilege as has recently been exemplified by their "ASK FIRST to hunt and fish on private land" bumper stickers. Landowners across Montana see the latter effort as a giant step in the right direction. Part of the question should concern whether it is even necessary or consistent with our Montana heritage to pursue access as a matter of right in a sparsely populated state as large as Montana when nearly 40% of the land in our state is already publically owned. We already have, by far, one of the highest per capita ratios of public land to population.

I said the primary aspect of the stream access issue is private property rights. Another aspect extremely important to agriculture involves water rights. In light of the use of the public trust doctrine in the recent Mono Lake case in California where long-established water rights were lost in the name of improvement of a riparian ecosystem, the judicial introduction of the public trust doctrine in Montana in the stream access cases serves as a precedent that might be used to jeopardize our entire appropriation water rights system. In fact, some lawyers are recommending that very thing--- even the Assistant Dean of our University of Montana Law School recognizes this as, at the very least, a real possibility.

And then we come to the recreational aspect, which, practically speaking, is really a resource management aspect. The bottom line question here that the Legislature should concern itself with goes something like this: "Of the total stream mileage in Montana, under what conditions and during which seasons should what stretches of which streams be available to the public for what forms of recreation and other uses, and who should control it?" Now that may sound like a mouthful, but each segment is very important when you consider the extreme broadness of these court decisions. For example, consider the duck hunting referred to above, including the use of dogs; consider the use of three-wheelers which is just beginning in popularity as a recreational vehicle (if you'll stop by any three-wheeler dealer, you'll note that the entire industry is engaged in an advertising campaign promoting the use of three-wheelers on and along waterways--- these companies are not stupid--- they're not spending their advertising dollars on something they think won't sell); consider the many conflicts that will arise between the various recreational users (for example, the Director of the Department of Fish, Wildlife, and Parks has stated that there have already been instances of bank fishermen throwing rocks at floating fishermen on the Madison River--- inject, if you will a three-wheeler into that situation); consider the potential effects on some of the more fragile fisheries or ecosystems. The real question here is "Who is going to control it?" The point is that <u>the extreme broadness of these court decisions simply must be trimmed down.</u>

Most landowners are realist enough to know that they are never going to recover some of what's been lost by virtue of these court decisions. For example, they are just going to have to absorb the resulting property devaluation that goes along with the granting of any easment on property.

They realize that they are not going to stop the steadily increasing public recreational demands, especially involving water-based recreation. They accept that the public does have some constitutional rights to the recreational use of water. But landowners are not about to just lie down and die and accept without question the extreme broadness of what's been lost here. Those recreational users who may well have had legitimate problems and were seeking forced access in two very specific sets of circumstances on two specific stream segments would do well to admit that they got far more than they ever expected. And in the spirit of attempting to improve landowner-sportsmen relations in general while remembering that they (floaters and fishermen) are not the only recreational users that these court decisions have opened Montana streams up to, these people should be working with the landowner community and the Department of Fish, Wildlife, and Parks to try to effectively deal with some of the unacceptable problems, both present and future, that these decisions have perpetrated upon landowners, and upon the riparian resource.

One other item of significant interest serves to illustrate the intensity of concern over this issue by landowners. Last August, a two-week protest closure of private land was organized in Sweet Grass County, the protest being against the effects of the stream access court decisions on landowners. The organizers decided at the outset that if they couldn't get at least 50-60% of the total landowners in the county to participate, they would not proceed with the closure. Much to their surprise after they had approached nearly all rural landowners in the county, they found that they had over a 99% participation and agreement. This means that Republicans, Democrats, Independents, and non-politically active, as well as farmers, ranchers, cabin owners, hobby farmers, cattlemen, sheepmen, and so on--- a broad spectrum of society--- all felt strongly enough about this issue that they agreed to participate in an active protest demonstration. This is especially powerful when you consider that most of these people had probably never before participated in an active protest agreement that actually required them to take overt action, namely to deny access for two weeks to all comers, and to explain why.

It remains the Legislature's responsibility to legislate, and to address this issue fairly and decisively, consistent with our constitution and laws. I submit that this can be done while respecting the rights of BOTH landowners and recreational users.

TESTIMONY before the House Judiciary Committee, January 22, 1985, Helena, Montana, by Lorents Grosfield, cattle rancher from Big Timber, Montana.

THE PUBLIC TRUST DOCTRINE

Common sense tells me that the implications of the Montana Supreme Court stream access decisions are far-reaching and go well beyond recreational stream access. Evidently for the first time in Montana history, our Court has recognized what is called the "public trust doctrine". Until the past few months, most Montanans hadn't even heard of the public trust doctrine and now all of a sudden we find ourselves saddled with it. Although it is recognized as a legal mandate, it is not the result of any act of the Legislature even though the Montana Constitution says, "The legislative power is vested in a legislature consisting of a senate and a house of representatives." Our Constitution further states, "The power of the government of this state is divided into three distinct branches--- legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others...." Common sense tells me that a reasonable question to ask is, "Shouldn't the Legislature have some say in this matter?" We are talking about something that could well determine the direction that Montana law and litigation will take from now on, one that may be quite different from directions the Legislature has used in the past. And not just on recreational issues--- once the public trust doctrine is recognized in a state, as I understand it, it can apply to <u>all</u> water issues, and some even advocate that it be used beyond water issues on any natural resource or environment issue. For example, John E. Thorson, in a paper presented to the Montana Select Water Marketing Committee recently, states: "Historically, the doctrine has been applied to protect public uses and access to and upon navigable waters.... These roots ... should not mislead policymakers as to how the essential purpose of the principle may be applied in contemporary situations ... to other natural resources." What "OTHER NATURAL RESOURCES"? I've heard ranchers worry that if the Supreme Court can say that since the state owns the water, the public therefore has the right to follow the paths that the water takes, it can use the same logic to say that since the state owns the wildlife, the public therefore has the right to follow the paths that the wildlife takes. Is this the kind of application of the public trust doctrine that this advocate is referring to?

The origins of the public trust doctrine somehow predate our Montana Constitution. Therefore it can be and has been used to justify decisions that would probably not be possible under the Constitution alone--- it almost looks as if it is a tool to be used to achieve a desired result that is otherwise unconstitutional. The real point that I am trying to make here is that this issue is much too important

and far-reaching to be instituted in Montana in such a manner. The question of adopting the public trust doctrine in Montana needs the understanding, participation, and scrutiny of the people through the legislative process. Let me give you just a couple of examples of the kinds of things that can be done with this doctrine and I think you'll agree.

First, by using the public trust doctrine, the Montana stream access decisions deprive landowners of the ability to control who uses portions of their lands, namely all those portions within the ordinary high water marks of any surface waters and those portions outside the ordinary high water mark adjacent to any barrier in the water. Never mind that traditionally landowners have exercised these rights and that the public has abided by that exercise. Never mind that many properties (such as retirement homes along streams) have been paid dearly for precisely because of these rights. Never mind the taxes, the patents, or the investments. It's very hard for the layman to understand the Court's statement that there has not been an unconstitutional "taking" when the justification for the taking lies in a doctrine which is not even spelled out in the constitution, much less by the Legislature. The most distinctive thing about private property that distinguishes it from public property is the right to exclude others. Without this right, property can hardly be called "private" in any traditional sense. It is this right and the opportunity to achieve it that is the basis of an individualist society. Realizing the resultant challenges is the incentive that makes free enterprise work, and it is one of the most important attributes that has made this country perhaps the best country on earth in which to live. If the public trust doctrine is used as a tool to assist the continuation of a free individualistic society that is one thing, but if it is used as an instrument of social change, an instrument that would deprive individuals of their rights in favor of some centralized social values, then that is quite another thing. The same author quoted above, John Thorson, wrote further that "In both recent (Montana stream access) decisions, the Court has carefully and explicitly pointed out that its recognition of the public trust doctrine does not thereby grant public access over private property to reach state-owned waters used for recreational purposes. THIS POSITION RUNS COUNTER TO THE GENERAL TREND OF PUBLIC TRUST CASES TO ALLOW SUCH REASONABLE ACCESS." (EMPHASIS ADDED.) Can you expect me as a property owner not to be scared to death at the prospect of such a radical departure from traditional constitutional values?

The second example of what can be done with the public trust doctrine is that it can be used to invalidate prior water rights. One of the places this has been done

is in California just last year when the California Supreme Court determined in the Mono Lake case that "the public trust doctrine applies to constrain ... the extraction of water that destroys navigation and other public interests," including scenic beauty and recreational and ecological values. This wasn't just the case of some rancher losing a water right. This was a 1940 water right held by the city of Los Angeles for domestic purposes in which the city over the years had invested millions of dollars and come to depend on for a source of municipal water. The reason for the lawsuit was essentially to attempt to guarantee a minimum instream flow in a basin that, from an environmental viewpoint, was over-appropriated, in order to protect and perpetuate riparian habitat for birds and other wildlife. I submit to you that if the public trust doctrine can be used to divest a city of prior rights for drinking water, then rural agricultural water rights are tenuous indeed. Unless the Legislature gets a handle on this, can you tell me that the same tactic won't be used in Montana, especially in fully- or over-appropriated streams? Margery H. Brown, the Associate Dean of the University of Montana Law School, recently wrote a paper for the Montana Select Water Marketing Committee entitled "... The Doctrine Is Out There Awaiting Recognition." In it she says, "It is clear that ... the Montana Supreme Court (in the stream access cases) has set the stage for both legislative deliberations and additional judicial decisions on ... taking the public trust into account in the planning and allocation of water resources, and reconsidering allocation decisions on the basis of their effect on the public trust." "RECONSIDERING!" What is she advocating when she uses the word "reconsidering"? John Thorson uses the same word in his paper when he says, "Water rights ... can and should be reconsidered on a public interest basis." Further he says, "The state as public trustee, has a continuing duty to protect the people's common heritage of streams and lakes through continuing administration of the trust--- INCLUDING POSSIBLE REVOCATION OF EXISTING RIGHTS WITHOUT COMPENSATION." (EMPHASIS ADDED.) Is this what we agricultural property owners in Montana have to look forward to? Is this the legacy that our Montana Legislature is going to leave for our children?

Left unchecked, a grant of public access to private property along streams is likely only the beginning of public trust doctrine application in Montana. I SUBMIT TO YOU THAT THIS SHOULD BE THE BUSINESS OF THE LEGISLATURE, AND NOT OF THE COURTS. It is up to the Legislature to determine the policies that will decide the directions and quality of our heritage. Are you ready to condone such a radical departure from traditional respect and constitutional support for private property rights?

TESTIMONY before the House Judiciary Committee, January 22, 1985, Helena, Montana, by Lorents Grosfield, cattle rancher from Big Timber, Montana.

THE BILLS: HB16, HB 265, and HB 275

I am one of those landowners who was very active in the interim and attended most of the interim subcommittee meetings as well as a number of other meetings on the issue. I congradulate the subcommittee and its staff on an excellent research and drafting effort as well as on making themselves very available to the public during the interim. The result, HB 16, is well-thought-out, well-drafted, simple and straightforward, and deals with nearly all the important aspects of the issue. Although it may need some amendments, it is an excellent effort and starting point.

I don't think anyone can deny that landowners across Montana have lost a great deal in the Supreme Court stream access decisions, decisions shich dramatically expanded the determinations of two specific cases on two specific stream segments to cover all Montana landowners. It's hard to argue that these decisions were not policy determinations--- policy that affects all Montana. It needs to be noted that in the past it has been the responsibility of the Legislature and not of the courts to determine state policy.

At any rate, considering what course the Legislature should now take on the stream access issue, it should be helpful to keep conscious of the question "How much of the Supreme Court decision should be codified and why, and is there any good reason to codify things that go further than the decisions go with regards to expanding the rights of the public over the rights of landowners?" This is really the bottom line of the issue before you this session.

Personally, I maintain there is no essential reason to codify the more extreme areas of the Supreme Court decisions--- they are presently the law anyway and codification would be largely superfluous besides which the final language worked out in the legislative process would likely not be any simpler or easier to understand than

the Court's language. I am referring especially to the portaging around barriers issue.

How do the three bills compare as far as codifying the decisions, or going beyond codifying? In general, HB 16 codifies only the most basic ingredients and language. HB 265 codifies virtually all the decision and goes much further than the Court in some areas. HB 275 attempts to "fix" HB 265 from a property rights and resource quality viewpoint, but still goes farther than the decisions in some areas. A bill drafting request by Rep. Orval Ellison would codify only the bare essentials, less than HB 16, although it goes much further than HB 16 in some areas towards meeting the needs of recreational users and the resource itself. I would like to compare some specific areas by subject matter and point out some problem areas.

1. WHAT WATERS ARE AVAILABLE FOR PUBLIC USE? The problem with "classes" of waters is in determining which class a stream fits.

HB 16 solves this question by essentially saying that all floatable waters are available to the public for that use, and most other uses are dependent on who owns the streambed and whether permission is granted.

HB 265 solves it by defining Class 1 water so broadly that it includes virtually all waters capable of recreation such that the public can essentially use most all waters for most everything. (I submit that very few waters "capable of recreational use" would not be "capable of supporting commercial activity" in the form of guided or outfitted use. Note that the language does not say "have been used for"--- it says "are capable of".)

HB 275 injects a class of waters where the landowner retains control in order to protect the resource. The concept of protecting the resource and maintaining private control on smaller streams is laudable and I support it, but the method here proposed is complex and cumbersome.

Rep. Ellison's draft solves it much like HB 16 except that all waters are available to the public for both floating and fishing and uses incidental thereto. Other uses would depend on ownership and permission.

It might be helpful to note that Professor Stone, in his amicus brief to the Court, recommended that the court consider those waters capable of "significant and substantial" use by the public.

2. PORTAGE AND BARRIERS

All the bills define barriers is such broad terms that they may include such things as long stretches of shallow waters or of rapids, as well as deep holes. Consider a stream running bank full during high water that's high enough so as not to be wadeable--- Is a portage "buffer zone" easement above the high water mark for the length of the stream (on both sides) established?

Rep. Ellison's draft leaves it up to the Supreme Court language which is simple and straightforward: "portage around barriers in the water in the least intrusive manner possible". This is the law now. Why codify it?

3. PORTAGE ROUTES

HB 16 says only "in the least intrusive manner".

HB 265 and 275 go much further and include provision for conservation district supervisors to require a specific route at the landowner's expense (or public expense in the case of natural barriers). Aside from the problems that I have with this as a conservation district supervisor, this goes substantially beyond the Supreme Court decisions which say that the public can portage--- they do not say that a landowner must provide (donate) a means and route of portage.

4. MANAGEMENT

HB 16 doesn't really address management. One would assume that it is up to either the public or private landowner, as the case may be

HB 265 only talks about management in terms of the conservation districts determining and requiring where and how a means of portage be established.

HB 275 uses that same idea plus it gives the Dept. of Natural Resources some rule-making authority for distinguishing between Classes of waters. This would be administrated and somehow, presumably, adjudicated by conservation districts.

Rep. Ellison's draft gives the Dept. of Fish, Wildlife, and Parks some authority wherever the resource is threatened from overuse.

5. LIABILITY

HB 16 relieves the landowner of liability if he doesn't charge for recreational use. Liability to a floater where the landowner charges for, say, hunting or some other use, is unclear.

HB 265 and 275 contain the same provision that relieves landowners of liabili and supervisors of liability from the recreational user (but not from the landowner

Rep. Ellison's draft relieves the landowner from liability in any case (except where willful or wanton misconduct can be shown--- all drafts have this language).

6. PRESCRIPTIVE EASEMENT

HB 16 and Rep. Ellison's draft both provide that a prescriptive easement cannot be acquired through recreational use of "land or water".

HB 265 and 275 both say only that it can't be acquired through use of water on the bed and banks. Given the Supreme Court decisions, I'm not sure where this language gives the landowner any protection at all.

7. TITLE TO LANDS UNDER STREAMS

Under Montana law, the landowner owns to the low water mark or the thread of a stream depending on whether the stream meets the federal navigability for title test, subject to a few easements such as the angling easement for licensed

fishermen on navigable streams.

HB 265, by using identical wording under Section 1, subsection 2c and 2d, comes dangerously close to equating the federal test to a commercial use for recreational activities test which would affect all Class 1 waters, which, as I've noted, could be most waters of the state. In other words, HB 265 may result in attempts to gain state ownership of title to lands under most waters--- this also clearly goes substantially beyond the Supreme Court decisions.

8. ORDINARY HIGH WATER MARK

HB 16 and 275 use the same definition. I feel the use of the word "crop" will be misleading.

HB 265 substantially changes the definition by using the word "diminished" terrestrial vegetation instead of "lack of". Landowners and recreational users alike need a simple, readily understandable and identifiable definition.

Rep. Ellison's draft uses the conservation district's definition that has been successfully used for nearly 10 years under the Streambed Preservation Act. It is much simpler and more straightforward.

IN SUMMARY, I find both HB 265 and HB 275 unacceptable because I believe they both codify too much of the Supreme Court decisions. In addition, they both go substantially beyond the decisions in some areas, and are both unnecessarily complex and cumbersome. HB 265 especially does little to protect landowner rights.

Although HB 16 is a result of a remarkable study and research effort by the interim committee and staff, and is simple and straightforward in its language, essentially addressing all the vital issues, I feel it needs changes in some areas, especially the areas of fishing accessibility and resource protection. I would hope that the Committee would look closely at Rep. Ellison's draft by itself or as a reasonable means of amending HB 16, and would recommend tabling both HB 265 and HB 275.

Exhibit T

1/22/85

Recreational Use Of Montana's Waterways

A Report to the 49th Legislature Joint Interim Subcommittee No. 2

December 1984

Published by
MONTANA LEGISLATIVE COUNCIL
Room 138
State Capitol
Helena, Montana 59620
(406) 444-3064

1317 14 th St. S.W.
Great Falls, Mt. 59404
Jan.22,1985

Rep.Hannah
House of Rep.
Capitol Station
Helena, Mt. 59620

Dear Sir:

Please support house bill# 265 in its PRESENT Form. I have studied this bill and feel that it is an excellent COMPROMISE BILL, that will benifit both the landowners and the recreationalist.

Sincerly,

Karen E. Cantley

Karen E. Cantley

1317 14th St S.W.
Great Falls, MT 59404
Jan 22, 1995

Rep. Tom Hannah
House of Representatives
Capitol Station
Helena, Montana 59620

Dear Sir:

As a fisherman, canoeist, and hunter I would like to express my strong support for the Compromise bill---(HB 265) in its present form.

Landowner rights are well defined and protected. As are those of the general public

Thank you,

Gene Cantley III

1/21/85

Please record our support of HB265 on stream access. We are opposed to the Cobb's bill. HB265 has been a compromise with landowners and recreationalists and is the fairest alternative to date.

Sincerely,

Maurice + Jill Bakke
3417 3 Ave. So.
Great Falls, MT. 59405

John Pool
2706 Arvin Rd
Billings, MT 59102

Mr. Thomas Hannah
2228 Beloit Drive
Billings, MT 59102

Dear Mr. Hannah,

House Bill No. 16 is considered an important bill by both landowners and sportsmen. The outcome of action on this bill has the potential to significantly impact the use of the vast majority of Montana's rivers and streams.

This bill is not designed to please or accomodate any special interest group, but rather to define some reasonable codes of conduct for persons legally using surface water bodies. It includes some very important provisions for limiting landowner liability and protection from unauthorized trespass.

I am sure you are aware of the role fishing, floating and tourism in general plays in our state's economy. As with hunting, the rights of property owners must be protected, while at the same time preserving this great source of outdoor recreation. Montana needs a law like HB-16 to help accomplish this goal.

On behalf of riverbank landowners and river sportsmen I urge your support of this bill.

Very truly yours,

John Pool

INTERNAL MEDICINE
F. J. ALLAIRE, M.D.
D. E. ANDERSON, M.D.
R. D. BLEVINS, M.D.
PULMONARY DISEASE
G. A. BUFFINGTON, M.D.
NEPHROLOGY
S. J. EFFERTZ, M.D.
RHEUMATOLOGY
J. D. EIDSON, M.D.
K. A. GUTER, M.D.
ONCOLOGY
T. J. LENZ, M.D.
W. N. MILLER, M.D.
GASTROENTEROLOGY
W. N. PERSON, M.D.
T. W. ROSENBAUM, M.D.
NEPHROLOGY
J. D. WATSON, M.D.
CARDIOLOGY

OBSTETRICS AND GYNECOLOGY
R. E. ASMUSSEN, M.D.
P. L. BURLEIGH, M.D.
F. J. HANDWERK, M.D.
R. J. MCCLURE, M.D.
G. K. PHILLIPS, M.D.

NEURO-SCIENCES
D. E. ENGSTROM, M.D.
PSYCHIATRY
W. H. LABUNETZ, M.D.
NEUROLOGY—EEG
E. E SHUBAT, PH. D.
PSYCHOLOGY

PEDIATRICS
J. A. CURTIS, M.D.
J. M. EICHNER, M.D.
N. C. GERRITY, M.D.
J. R. HALSETH, M.D.
J. P. HINZ, M.D.

SURGERY
W. P. HORST, M.D.
UROLOGY
R. E. LAURITZEN, M.D.
GENERAL AND VASCULAR
J. E. MUNGAS, M D.
VASCULAR SURGERY
L. M. TAYLOR, M.D.
GENERAL AND THORACIC
W. C. VASHAW, M.D.
GENERAL AND VASCULAR

ADMINISTRATION
W. D. TAYLOR
M. D. MISSIMER

GREAT FALLS CLINIC
P. O. BOX 5012
1400 TWENTY-NINTH STREET SOUTH
GREAT FALLS, MONTANA 59403
PHONE (406) 454-2171

January 21, 1985

Representative Tom Hannah
House of Representatives
Capitol Station
Helena, MT 59620

Dear Representative Hannah:

This letter is written to support passage of House Bill 265, Stream Access Bill that came about as a result of compromise between agricultural groups and a coalition of recreational groups throughout the state of Montana.

Since living in Montana for the last eight years, I have enjoyed canoeing and fly fishing on many of Montana's smaller streams. I therefore, support the need for access to Class I and Class II streams to float fish and hunt water foul. The last two years I have had a small ranch near the Little Belt Moutains and therefore can certainly see the need for protection for land owners. I believe this protection is provided in the compromise bill which limits camping, hunting big game or building semi-permanent structures on Class II rivers.

The other two bills, HB 16, and the bill being introduced by Representative John Cobb are basically bad bills and not only unreasonably limit recreation for many streams in the state but also would provide a lot of gray areas of interpretation. This Bill 265 is a result of fair compromise between agricultural groups and recreational groups and appears to satisfy most people who have taken interest in this issue. I believe it should be passed without any alteration.

Best wishes,

David E. Anderson, M.D.

Representative Tom Hannah
House of Representatives
Capitol Station
Helena, Mt 59620

January 21, 1985

Dear Representative Hannah

We the undersigned hearby SUPPORT HB265 in its present form without any added amendments.

At the same time we OPPOSE HB16 and HB275 (Cobb) as stated.

SIGNATURE	ADDRESS (optional)
[illegible]	RR4259 Gt. Falls, MT 59401
James Doland	1404 2nd Ave. N.W., Great Falls 59404
Susan Warren	1504 2ND AVE. S. GREAT FALLS 59405
[illegible]	1124 8th AVE N.W. Great Falls 59404
[illegible]	RR 4 [illegible] Great Falls
[illegible]	700 [illegible] Lake Rd Florence AH.
Charles [illegible]	2709 Evergreen Dr Gt Falls Mt. 59[illegible]
James [illegible]	610 9th St So Great Falls MT 594[illegible]
[illegible]	[illegible] 594[illegible]
George Meyer	683 - Sacajawea Drive 59404
Bill Pate	3012 Delmar, Gt Falls, Mt. 59404
Charles Bauer	RR 2424 Gt Falls MT 59401
Greg D. Gilbert	R.R. 1254 Gt. Falls Mont 59401
Randy Turner	162 [illegible] Gt Falls Mt. 59[illegible]
Bill Bauch	620 Central AV. Vaughn
Roger [illegible]	613 - 9th AVE S.W. GT. FALLS
Carmen Hidalgo	606 - 53rd St So Gt Falls Mont 59405
Dale A. Sargent	813 3RD Ave S[illegible] Gt Falls MT 59[illegible]
[illegible]	4232 4th Ave North Great Falls, Mt 5940[illegible]
Michael D. [illegible]	3400 3RD Av N Great Falls, Mt. 59401

B **THE LAZY B RANCH** B

Scott G. Hibbard 6013 Hwy 12 W Helena, MT 59601

January 22, 1985

STREAM ACCESS TESTIMONY --~~DRAFT~~

Chairman Hannah and Committee Members, my name is Scott Hibbard. I'm a rancher west of Helena, and though I am not prepared to comment on the bills at hand, I would like to offer some observations on the question of stream access.

Our family owns and operates a ranch on Ten Mile Creek, a superb fishing stream that is quite wadeable, and with recent Supreme Court rulings, apparently very accessible by foot traffic since it is bridged by Highway 12. The stream passes seventy-five yards from my front door. It passes ten yards from the bunk house. It passes through our corrals and hay meadows. I am understandably concerned about the stream access issue.

My concerns are several. One: it's an invasion of privacy. Among other reasons, we live and work in the country because we value our privacy. With no control over who or how many persons can travel up or down the stream, and consequently who passes through our corrals and within speaking distance of the house, part of our reason for being ranchers is lost.

Two: it infringes on my responsibility as a land steward. As do many landowners I take my responsibility seriously. I can not hope to maintain a healthy fish population if I have no control over impact by people. Imagine a sign posted on the Ten Mile bridge that reads: This Stream Protected By Public Access. I'm sure some of the healthiest fishing streams in the West have open public access, but I can't help but wonder if, in all cases, it is the best thing for the fish. Ask anyone who knew the Smith River twenty years ago and knows it now and you'll see my point.

Three: as it now stands, the stream access issue breeds ill-will and paranoia. The Supreme Court rulings perhaps unjustly call the motives of various sportsmen's organizations into question. One could easily ask, "Why cooperate if they're going to take it anyway?" One can easily ask, "What's next? Will I lose control over access to my property?"

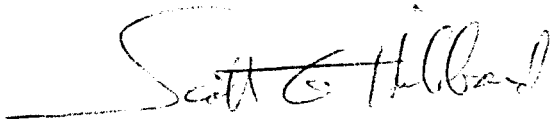
Nothing needs be said about the economics of the present-day family farm. Paranoia about the erosion of landowner private

rights could foreseeably force the subdivision of agricultural lands. A landowner facing a break-even proposition at best could, projecting today's current trends, think he should subdivide now while he still has the right to do so.

It is not illogical to see corollaries between the stream access rulings and the Dakota Sioux and Nez Perce reservation treaties. In each case, following the discovery of gold on reservation lands, the treaties were renegotiated. The Nez Perce reservation was reduced to one-quarter of its initial size. The Sioux were forced to cede the Black Hills. In Montana, the gold of the 1980s is recreation. As were the treaties, law is being changed against us.

One can ask, "Why should the sportsman care about the landowner?" To state the obvious, most landowners are preservers of wildlife and their habitat. With the continued cooperation of sportsmen and with the cooperation of the law we can remain so.

* * * * *



JAN 22 '85 10:27 WU PTLD OR 8005471371 P01

western union

Telegram

1585 JAN 22 AM 9:35

1-010191A022 01/22/85
ICS IPMPTUF PTL
00711 01-22 0936A PST PTUE
ICS IPMPTUZ MT LEGISLATURE
4-0150076022 01/22/85
ICS IPMRNCZ CSP
4066651111 TDRN GREAT FALLS MT 10 01-22 1013A MST
PMS CONGRESSMAN TOM HANNAH, POMST
HOUSE OF REPRESENTATIVES
HELENA MT 59620
URGENTLY REQUEST YOU SUPPORT HB-265 DEFEAT HB-16 AND COBB BILL
LEROY SCHELLY
1917 5 ST NORTHWEST
GREAT FALLS MT 59404

1221 EST

1238 EST

13015 Old Hwy. 93
Florence, Mt. 59833
January 25, 1985

Mr. Tom Hannah
Chairman, Judiciary Committee
Montana House of Representatives
Helena, Mt.

Dear Sir:

My wife and I attended the legislative hearing on stream access on Jan. 22nd. We are concerned about this situation because several streams run through our 350 cow ranch in the Bitterroot Valley where my family has been in the cattle and livestock business for just over 100 years.

Public access to streams opens the door for public trespass on private property. The landowner immediately becomes a policeman in order to guard against the many damages and losses that can occur by the public having access to his property such as theft, vandalism, molesting and shooting of livestock, disposing

of stolen property as well as trash and dead animals and the driving of vehicles through fields. Besides, the landowner has lost the privacy of his place. You may think this is a alarming list of problems to come from a public access corridor through private property but it is a realistic assessment. I speak from experience.

In 1904 the U.S. Forest Service built four miles of a forest access road through our woods to reach Forest Service property and timber. We could understand the need for the Forest Service to manage the property, but we strongly opposed the idea that the public had access to that road through our property. We were able to negotiate a Forest Service sign at the beginning of the road stating that the public was requested to stay on the right-of-way through private property (our woods).

The result has been that we have experienced the theft of cattle and wood, smaller tools and fuel from our woodlands. We have experienced

vandalism of fences and gates and having vehicle windows broken and tires ruined. There has been injury and death from the crash of vehicles. There have been confrontations with motorcyclists and snowmobilers, hunters and target shooters in our fields. There has been disposal of dead animals and stolen property. Trash has been dumped. Fires have been set. Deer kills have occurred. Livestock has been molested. We have become the defenders of our land more ~~than~~ the stewards of our land. We have lost a lot of privacy and satisfaction from owning the land. We have lost a degree of control in the operation of our ranch. Our liability is greatly increased.

I have written this letter to give you legislators some examples of what has happened when a public access road was put through private property, in this case a ranch.

Many of the stream problems and some additional ones would result from public access to a stream corridor.

Since the Montana court decision on stream access opening the gate for public usages on private property. Since the court decision on creating an intolerable situation for the private land holder and a great injustice to him - an injustice which should not be tolerated by the Montana Legislature.

Sincerely,

A Dana Mackey

Jan 25, 1985

Representative Sam Hannah
House of Representatives
Capitol Station
Helena, MT 59620

Mr. Hannah,

I very strongly oppose Mr Cobbs bill and also bill HB 16. I do support bill HB 265 in its present form.

Thank you.

Darlene J Babbitt
1600 20th st So #8
Great Falls, MT 59405

Representative Tom Hannah
House of Representatives
Capitol Station
Helena, MT 59620

Jan 25/198

Mr. Hannah -

I strongly oppose bill HB16 and Representative Cobbs bill, and support bill HB 265 in its present form.

Vincent L Santoro
1600 20th St So #8
Great Falls MT 59405

Mr. Chairman and Members of the Committee:

My name is Craig Madsen.

I am a licensed Montana Outfitter and Secretary/Treasure of the Montana Outfitters and Guides Association.

Tonight I have been asked to testify on behalf of the Montana Outfitters and Guides Association.

The Montana Outfitter and Guide Association is a diverse group composed of both land and river outfitters and landowners and non- landowners. Our Association represents outfitters who NOT ONLY are members of such organizations as the Montana stockgrowers Association but our Association itself is a member of the Montana Stockgrowers Association.

The Montana Outfitters and Guide Association urges your support on House Bill 265 as it presently stands. Our feelings are this bill clarifies many questions resulting from the recent Supreme court decisions. It seems to be a reasonable compromise between land owner and recreational interests, and it is a step in the right direction towards mending the strained relations between landowners and sportsmen.

Although this bill clearly requires giving of ground for our river outfitter members, the opinion of the Montana Outfitters and Guides Association is that this bill deserves merit and support due to the wide ranging and collective agreement of both agricultural and recreational interests and associations.

R. Craig Madsen
Secretary/Treasure
Montana River Outfitters and
Guide Association

820 Central Avenue
Great Falls Mt 5940

Cowbelles
c/o Saca Hilzer
Wolf Creek MT 59640

Jan. 24, 1985

Rep. Tom Hannah
Chairman, Judiciary Committee
House of Representatives
Helena, Montana 59620

Dear Rep. Hannah and Judiciary Committee:

This letter is in response to the public hearing on the stream access bills HB 16, 265, and 275. Several members of our organization were present at the public hearing, and due to the time limitations and orchestration ~~at~~ involved, were not able to make our voices heard.

We were, and continue to be, extremely disturbed by the supposed "representation" of agricultural groups who "support" HB 265. We believe those people who spoke for the agricultural groups did not truly reflect the consensus of the grass-roots agricultural people; many of us hold different opinions.

We respectfully request your committee to carefully, cautiously consider any action on any and all stream access bills, including HB 265. Slow down passage on any stream access legislation! We people who are ranchers and farmers, who must live with whatever legislature passes, want a fair and just law to live under, one that we can live with.

Respectfully submitted,

Cheryl Lacy – Helena, Montana
Beth Nail – Wolf Creek, Montana
[illegible] – [illegible]
Sally Bradley – Wolf Creek
Pat Chevallier – Canyon Creek
Mabel E. Murphy – Wolf Creek.
Bobbi Levine – Wolf Creek, Mont.
Tina Seaman – Augusta, Mt.
Lee Seaman – Augusta Mt.
Terry Packman – Wolf Creek, Mt
Betty Murphy – Wolf Creek, Mt
Glynn Ingersoll – Augusta, Mt.
Helen D. Brown – Wolf Creek
Agnes E. Hedges – Wolf Creek
Shirley D. Locke – Wolf Creek

1410 Boston Road
Helena, Montana
January 24, 1985

Representative Tom Hannah
House of Representatives
Capitol Station
Helena, Montana 59620

Dear Mr. Hannah:

It was gratifying to be at the Tuesday, Jan 22nd hearing on H B's 16, 265, and the bill presented by Rep John Cobb, and to see the almost whole hearted support given to H B 265.

Montana needs to mai ntain i ts image as a state where recreation is given a high priority, where the old "Out where the West begins" feeling still runs strong, where problems arising from population pressures can be solved by compromise and agreement.

It is my hope that this to was and is your reaction to house bill 265 and that you will give the bill 265 your support.

Very truly yours,

A E Barnes

A. E. Barnes
Teacher (retired)

January 23, 1985
Greenough, MT 59836

Lindbergh Cattle Co.
Star Route, Box 337
Greenough MT 59836

Representative Tom Hannah
Chairman, House Judiciary Committee
Capitol Station
Helena, MT 59620

Dear Representative Hannah:

This letter is in reference to House Bill No. 265, which is under consideration by the House Judiciary Committee. As members of the Blackfoot River Recreation Management Advisory Council, we participated in the hearings of Joint Interim Subcommittee No. 2 and are very interested in the issue of the recreational use of state waters.

We attended the House Judiciary Committee hearing last evening, January 21, on House Bills 16, 265 and 275. We intended to support House Bill 16 with changes to Section 3, which would have hopefully made the legislation acceptable to both the Supreme Court and the recreational interests. This bill appeared to address the major concerns of all parties in a clear and concise manner without unduly limiting or expanding the Supreme Court decisions. However, during the course of the hearing it became apparent that House Bill 265 had the united support of a wide coalition of individuals and organizations representing landowner, agricultural and recreational interests. In a spirit of cooperation and compromise we offer the following suggestions which, in our opinion, will strengthen and clarify House Bill 265.

Section 1(2)(c) page 2 - line 7 "flow through public lands;" Change this to read "while they flow through public lands." As stated by Representative Ream, the new wording will clarify the intent of this portion of the bill. In addition, we have a concern regarding the meaning of the words "public lands." Is it the intent of this phrase to include both federal and state land?

Section 1(2)(d) page 2 - lines 8 & 9 "are or have been capable of supporting commercial activity; or" Our concern is that this phrase could possibly be interpreted in such a broad manner as to include virtually all surface waters within the "Class I" category and effectively preclude the classification of many small creeks and streams into the more logical "Class II" category.

Section 1(6) page 3 - lines 5 & 6 ".....," but are not limited to diminished terrestrial vegetation or lack of agricultural crop value." Change this to read "....., but are not limited to lack of terrestrial vegetation or lack of agricultural crop value." We believe that the words "lack of" in this definition, as contained in House Bill No. 16, are more clear and precise than "diminished."

Section 1(7)(a) page 3 - lines 8-10 "....fishing, hunting, swimming, floating in small craft or other flotation devices, boating in motorized craft unless otherwise prohibited....." We suggest that the word "hunting" be deleted and that the words "and waterfowl hunting" be inserted following "motorized craft." All the other items in the "recreational use" category for "Class I" waters are water-related, with the exception of hunting. With the suggested change, all the items will be water-related, which we believe is more consistent with the intent of the Supreme Court decisions.

Section 1(7)(b) page 3 - lines 19-25 - subsections (ii),(iii) & (iv)

(ii) "big game hunting or upland bird hunting;"

(iii) "operation of all-terrain vehicles or other motorized vehicles not primarily designed for operation upon the water;"

(iv) "the placement or creation of any permanent or semipermanent object such as a permanent duck blind or boat moorage; or"

We suggest that these three subsections be deleted and replaced with the following subsections:

(ii) building of fires;

(iii) waterfowl hunting; or

These changes are consistent with those recommended for section 1(7)(a) in that they are all water-related.

Section 1(7)(b)(v) page 4 - line 1 The number of the subsection would be changed to (iv).

Section 3(3)(c) page 6 - lines 11-15 "Within 45 days of the receipt of a request, the supervisors shall, in consultation with the landowner and a representative of the department, examine and investigate the barrier and the adjoining land to determine a reasonable and safe portage route." We suggest that after the word "department" on line 14, the following phrase be added: "determine if a barrier exists, and if such a determination is made, examine and investigate the barrier and the adjoining land to determine a reasonable and safe portage route." We feel that this addition is necessary because nowhere in section 3 is there a provision for determining the need for a portage route. Although the Supreme Court decision gives right of portage, we do not believe that this necessarily extends to a right of portage for convenience compared to a right of portage for necessity.

Section 4(2)(2) page 8 - lines 12 & 13 ".....only for an act or omission that constitutes willful or wanton misconduct." We feel that the words "or omission" should be deleted. Once the portage route has been established, it will be maintained by the department and we do not see how the landowner could be involved in an act of omission.

Section 8 page 9 - lines 18-20 "Sections 5 and 6 apply only to a prescriptive easement that has not been perfected prior to [the effective date of this act]." To futher clarify the word "perfected", we suggest that the word "judicially" be inserted before "perfected."

In conclusion, we share the concerns of Attorney John Thorson as he outlined them in his testimony. We feel that any application of the federal test of navigability for purposes of determining the recreational use of state waters may, in fact, be contrary to the Supreme Court decisions and the public trust doctrine. Sometime in the future it may be necessary to classify the surface waters of the State based on their capacity to sustain various types and amounts of recreational use.

Thank you for the opportunity to comment on House Bill No. 265 and be assured that we are committed to helping solve the issue of the recreational use of State waters. We would appreciate any comments concerning our perceptions of this issue and our suggested revisions to this bill from members of the committee, its staff or other interested individuals or organizations.

Sincerely,

Land M. Lindbergh
Lindbergh Cattle Company
Star Route, Box 337
Greenough, MT 59836

Hank Goetz
Lubrecht Forest, Box 1
Greenough, MT 59836

cc: Rep. Ream
Rep. Moore
Rep. Keyser
Mary Wright
Ron Waterman
Jim Flynn
Stan Bradshaw
Brenda Desmond
Jimmie Wilson

W.R. Felton
Rt 1 box 15
Jefferson SD 57038

Rep. Tom Hannah
Capitol Station
Helena, Mont.

Dear Rep. Hannah:

I was recently alerted to the Montana Legislative Crisis concerning stream access for recreational use.

Being a native son that sort of keeps one foot in Montana Im much concerned about this. For several years I have spent most of the summer on the Madison river from Hebgen dam on down some 20 miles. I have paid Frank Shaw for a spot to park and didnt like it but appreciate the fact he doesnt try and keep anyone off the stream . I fully realize the mess must clean up, and other acts of stupididty by thetless people on his land.

The term RECREATION needs defining to keep unrestricted meter travel, beer busts and Rock concerts from stream side.

I love free access to land and waters but the land owners side of the question and his interest in maintaining a fishable water is surely as imperative as free access.

Please consider that the above sentiments come from one whose roots in Montana go back to 1878. Im a landowners of rural land in Iowa and So Dakota was in the farm seed business for 60 years and in recent years have spent four to five months of the year in Montana.

Respectfully yours

W.R. Felton

Rhoda G. Cook
Executive Secretary

MONTANA OUTFITTERS & GUIDES ASSOC.

P.O. Box 631
Hot Springs, MT 59845
Ph. (406) 741-2811

Jamuary 28, 1985

Mr. Tom Hannah, Chairman
House Judiciary Committee
Capitol Building
Helena, Montana

Dear Mr. Hannah:

For your information, the Board of Directors of Montana Outfiggers and Guides Association agreed not to support any bill on the stream access issue until such time as the bill is in final form and reviewed again by the Board. We would then determine what action to take, if any.

Sincerely,

Henry Barron

Henry Barron, President

JB/rgc

cc: Ralph Holman
R. Craig Madsen
Tag Rittel
Smoke Elser

Boulder River Ranch
McLeod, MT 59052

TO: House of Representatives
Montana 1985 Legislature
Re HB(s) 16, 265 and 275
Testimony by Steve Aller
Big Timber, Montana 59011

I attended the hearings on HB(s) 16, 265 and 275 last Tuesday evening, January 22nd. I did enter written testimony at that time, but would like to expand on that testimony. Most of what follows is in reference to HB 265 and the problems I see with it. HB 275, HB 16 and Rep. Orville Ellison's bill have many merits and should be looked at closely.

I am in a rather unique position in regards to most landowners affected by the recent Montana Supreme Court decisions, as I make my living on a dude ranch that offers quality fishing; fishing that we have regulated on our own as fly fishing/ catch and release.

These self-imposed regulations have given us excellent fishing, and because of our work with the stream, our business has been secure and growing.

With the Court's rulings on stream access, I am now concerned about the quality of our fishing that we will have to offer in the future.

The Public Trust Doctrine and the Court's rulings make it very clear that the public has the right to use the surface waters in the state, but do these documents go further in giving the public the liberty to use the banks, stream bed and portage rights of unlimited distance? If they do, this is clearly an illegal taking of property.

I had many people coming in last summer from above our property, below our property, and from government lands and wadding into our private property section. None of these people were fly fishermen and none were inclined to respect our self-imposed catch and release rules. These people can wade in on my private stream bottom and catch and keep five (5) rainbow trout and ten (10) pounds of brooktrout.

Under this situation, how long will I be able to offer quality fishing? If only three people came onto my property in one day and killed their limit of fish (15 rainbow, 30 pounds of brooktrout), that would be more fish taken in a day than are taken from the stream by our own people in one year!

You may think this is a problem for the Fish & Game department, but the real problem is that we've lost control of our streambed, private property rights, and we will eventually lose our business. What will I do when people no longer come to my dude ranch to fish because of poor fishing? What do I do, subdivide my property and move to town?

Please consider my individual case when drafting the upcoming bill on stream access. HB 265 could be a reasonable bill if lines 17 through 22 in Section 2 gave the people who own and pay taxes on their streambed and banks their rightful control. I'll say again, that I believe this right was taken illegally by the Court's broad ruling.

The Public Trust Doctrine, together with the Montana Supreme Court's decisions, give the public the undeniable right to the surface water, but the Public Trust Doctrine should not be interpreted to take in the streambeds and banks. If my memory is correct, Margery Brown, Associate Dean of the University of Montana Law School, remarked in earlier committee hearings that she did not read the Doctrine to give recreational use of the streambeds and banks.

Any legislation that comes from your committee should put non-meandered, privately owned streambeds back under the control of the rightful owners. This opens another question, however; how do you handle recreational use of rivers where the beds are privately owned, but there has been no conflict of use? I believe recreationists should be able to use these streams where there has been no conflict, and something could be done with 'historical use' or some related concept.

The other problem I see with HB 265 is the language pertaining to 'portage' and 'barrier'. The language covering these two sections should be simplified in some manner and you could do no better than to refer to Rep. Ellison's draft on this issue.

Going back, I hope that any bill that comes from your committee gives me control of who uses my streambed. Was it legal for the Montana Supreme Court to take control from me? I believe not! Should I be forced, if the legislature doesn't act on my concerns, to go through an expensive court case that I cannot afford? I hope not.

Respectfully submitted,

Steve Aller

Steve Aller

Mr. & Mrs. Chris Jauert
640 34th Ave. N.E.
Great Falls, Mt. 59404

January 20, 1985

Representative Tom Hannah
House of Representatives
Capitol Station
Helena, Mt. 59620

Dear Representative Hannah:

We are writing to you in support of H.B. 265, the compromise stream access bill between landowners and recreationists. This bill has received a lot of work from both the agricultural-landowner and recreation sides and is the best and most carefully thought out of the stream access bills. We feel that the other access bills such as H.B. 16 are in conflict with the recent Supreme Court ruling and are very limiting as to the streams and rivers in Montana that fishermen, boaters, and hunters could enjoy. H.B. 16 allows the public to the use of the stream bed and banks on only those rivers that meet the federal test of navigability, that is, the Missouri river, Bighorn river, part of the Yellowstone river, the lower Gallatin and the lower Dearborn river. The bill introduced by Rep. John Cobb-R, Augusta, would put many streams in Montana off limits and in addition gives unrestricted powers to the DNRC to determine which streams the public may use.

Please use your vote to support H.B. 265 and to oppose H.B. 16 and the Cobb bill. Passage of either H.B. 16 or the Cobb bill will only prolong the litigation needed to open most major waterways to citizens of Montana.

Sincerely

Mr & Mrs Chris Jauert

John E. Soreng
2800 FAIRMOUNT BOULEVARD
EUGENE, OREGON 97403
(503) 344-6666

Jan.18, 1985

Representative Tom Hanna,
Chairman House Judiciary Committee
Capitol Station
Helena, Mt. 59620

Dear Mr. Hanna:

My wife Betty and I are out-of-state anglers; and spend a substantial part of the summer in our cabin near Livingston. We neither own nor intend to own any private fishing water, and so our angling activity is, with the exception of pay to fish spring creeks, spent on one of the many streams historically open to the public, but also on streams like the Boulder above Big Timber and others where most of the access is only available by crossing private property to the river.

At first(about six years ago) we approached ranchers & other property owners as strangers, and with rare exception were granted access and permission to drive through gates so that we could park close to the river. We remember that these courtesies as given with a glad heart. It was understood, and only rarely spoken, that gates would be closed, litter removed and generally the property and resource respected or we needn't ask again. We understood that guest ranches and the like were reserved for paying guests, but even then refusals were always courteous, sometimes with the invitation to return when the season was over.

Angling friends we have made in Montana have had very similar experiences: and with them we have discussed the current controversy about "right of Access" once anglers have been able to get to the river at a bridge or some other point. The conclusion has consistantly been that we could not enjoy the prospect of fishing from private property unless the owner both knew we were there and approved of our presence. We very much hope that the majority of Montana anglers feel the same way.

Now, Having said that, we do appreciate thatin specific situations involving boating and where sportsmen and landowners have been unable to work amicably, legal decisions may be required, but we feel strongly that the Supreme Court's recent indescriminate ruling has thrown the baby out with the bathwater.

John E. Soreng
2800 FAIRMOUNT BOULEVARD
EUGENE, OREGON 97403
(503) 344-6666

What we fear most has already begun to happen, erosion of the historic host-guest relationship between land owners and sportsmen. The end result of this, I fear, will not only be diminished angling pleasure, but refusal of access across private property. This will likely lead to a net loss of angling opportunity. The worst probable effect will be alienation and polarization between two classes of citizens that have historically had good relationships.

I would say to those who for some reason are dissatisfied with the old system: be careful of what you wish for, you might get it."

Most importantly, consider in your legislative deliberations thatall rivers and streams and their land ownership situations are markedly different. Wild fish populations in many waters are delicately balanced; and when disrupted by increased pressure may take years to recover. It will , of course, be easy to shift responsibility for this loss to the game regulation agency which unfortunately is prone to act too late with too little because of political pressure for fish harvest rather than conservative wild fish management.

Whatever the larger outcome, special consideration should be given to protecting the status quo for the fine spring creeks, that would most certainly be the worse for unrestricted public access. Many of these spring creeks and also other rivers like the Boulder are in effect hatcheries for the Yellowstone as well as other large rivers with well established public access. It will be important to understand that many very high quality fisheries are that way precisely because land owners are careful about the number of anglers that cross their property. As you know the State has no mechanism for limiting angling pressure per se.

Finally, if you will permit an older angler one bit of philosophy: Citizens rights should be a golden mean, and not an end in themselves lest mischief be done to society's tranquility and always limited resources.

We thank you for your consideration of our viewpoint on the important question of stream access before you.

Very truly yours,

John & Betty Soreng

new address
SORENG, JOHN & BETTY
3550 BLACK OAK ROAD
EUGENE, OREGON 97405

Jan. 20, 1995

To the Honorable Tom Hannah,

I am a rancher and I am in favor of passage of the compromised Bill (HB #265) in its present form.

I am against HB #116 and Cobbs Bill. I feel that bills would not be good for the state of Montana.

Please pass HB #265, the Compromise Bill.

Sincerely,
Cheryl Willits
2916 2nd Ave
Great Falls 59401

James H Freibert
R.R 2095
Great Falls, MT
59405

Representative Tom Hannah
House of Representatives
Capitol Station
Helena, MT 59620

Dear Representative Hannah,

I am an active sportsman, recreationist and outdoor enthusiast who has spent many enjoyable hours in Montanas scenic outdoors. On the bills concerning stream access. I strongly urge you to support HB 265 which is a compromise bill between agriculture groups and recreationists. Consequently I strongly urge you to disregard HB 16 and the bill introduced by Rep. John Cobb of Augusta. Thank you for considering my views.

Sincerely
James H Freibert

1/20/85

To the Honorable Tom Hannah,

As a avid canoeist and kayaker I'm in favor of passage of the Compromise Bill, H.B. #265 in its present form.

I'm against H.B. #116 and the so called Cobbs Bill. These bills would not be fair to all the parties involved.

Please give your support to H.B. #265 the Compromise Bill!

Thank you,

Robt A. Willits
2916 2ND. Ave. N.
Great Falls, MT.
59401

THE RIVER'S EDGE

Greg Lilly
2012 N. 7th Ave.
Bozeman, MT 59715

My name is Greg Lilly. I am co-owner of the River's Edge, a specialty fly fishing business and outfitting service in Bozeman. I am a native Montanan and I have earned a living through recreational fishing for 15 years.

I would like to testify in support of house bill 265. As I have stated, I've been in the fishing business for many years. The major thrust of our business is to help people experience, successfully, the tremendous wild trout fishing available on Montana's streams and rivers. We do that with our guided programs and through our store where we equip them with the right gear and dispense a million dollars of advice and information free. In a season we visit with thousands of anglers and in those conversations I hear the same thing over and over again. We Montanans do not realize how fortunate we are to have the staggering number of miles of trout streams we enjoy. Anglers from the rest of the U.S. have seen their home trout waters degraded or destroyed. They now look to Montana to obtain the quality of angling experience they no longer can find at home because of industrial pollution, voracious energy appetites that are satisfied to the detriment of rivers and streams, acid rain, improper mining practices urban sprawl, etc.

These thousands of non-resident anglers bring a lot of money to Montana, but of equal importance is the fact that they are vitally concerned that Montana's wild trout fishing, some of the finest in the world, remains at the level they experience today. Because of this concern they are strong allies of all of us in the state who are also fiercely anxious to see that the rivers and streams remain as good or better than we currently enjoy. I think that means they are allies to landowners and recreationists alike and I think this is the very important point about house bill 265. The effort to draft a bill that would address both landowner and recreationists concerns was undertaken with the thought that the two groups should be allies and not adversaries. When the supreme court determined that recreationists had basic access rights to streams, we all were delighted but at the same time we empathized with the concerns the landowners had over ambiguous definitions, portage rights, liability and so on. I feel that house bill 265 does a good job addressing all these concerns and in the process it is has proven that agicultural,landowner and recreational interests can work together. Hopefully it is a start towards an alliance that insures that in the future when are rivers and streams are truly threatened we will have the strength to preserve them.

I urge you to recommend a do pass on house bill 265.

17015 Old Highway 93
Florence, Mt 59833
January 24, 1985

Tom Hannah,
Montana State House of Representatives
Helena, Montana
(capitol Rm. 312-3)

Dear Mr. Hannah,

The hearing concerning the bills for stream bank access was conducted in a way that allowed public opinion to be judged by a raise of hands from the audience. The audience was not a duly constituted legislative body nor was it representative of people whose property and other rights were concerned.

Considering how many additional duties, regarding hunters, for example, that the ranchers and their wives have been required to endure, with no compensation and with tremendous

waste of formerly productive time, it is no wonder that many people were not aware of the hearing or that they were unable to afford the time or money to attend.

As owner of our cattle ranch, with my husband, I would have testified at the hearing if I had known about it in time, concerning the right to privacy on my land. Our ranch, four miles south of Lolo, has changed from a private paradise, when we were married in 1952, to that of an area that people feel they have a right to use for their park, or target range, or snowmobile playground, or beerbust and picnic ground. Hunting has even taken place in

our barnyard. We saw a man pursue a deer from the highway and shoot it in our barnyard, where we had cattle!

I used to enjoy being able to walk freely without fear of danger from intruders. Now my freedom has become a farce. There is no area on our ranch on which I can walk alone. The area adjacent to one stream has become subject to a long season of bow and arrow hunting, so that I cannot feel safe to walk in an area where I used to enjoy observing nature.

Now, upon further consideration, I realize that granting stream access on ~~private~~ land to the

public will interfere with the right of the landowner (who is the tax payer on that land) to own and retain the minerals in his stream bank and bed without fear that intruders will remove them from the premises.

In addition, the right of the landowners to decide who shall do mineral or oil prospecting, using seismic, electromagnetic or other methods upon their lands, is a valuable right and can be considered a type of property right in that whoever possesses such technical information as would be so developer can use it in

negotiating for ~~mineral~~ leases to the disadvantage of the land-owner. This information would be accessible to anyone using the stream or banks through private land, without the knowledge of the landowner. This is clearly a way that ranch-owners will suffer material damage, for no lease fee would have to be paid for the exploration, but in addition, the landowner, who does not have the exploration equipment, nor does he know how to use it, will always be at a disadvantage, and should be able to prevent such exploration if he so chooses. In that sense, without the ~~benefit~~ of an exploration

fee, the landowner should not have to permit a prospector to remove privileged information from his property.

In our case, as well as with other ranchers, we have leased our lands, including stream banks and beds, for oil and gas exploration. We leased in good faith, but now the law may interfere with the right of the oil company to have exclusive information about our ranch and exclusive access for that purpose.

So why are we ranching? Certainly not to give away what we own!

very truly yours,

(Mrs. H. Bruce) Mary B. Macfay

Statement to the House Judiciary Committee
Regarding Stream Access Legislation
January 22, 1985

Franklin Grosfield - Rancher - Big Timber

My viewpoint on the stream access issue is that of an owner and operator of land and water resources which I manage for purposes of agricultural production. The public also uses the land and water resource for recreational purposes.

The resource management problem that arises is that we need to produce food and fiber at a profit which is plenty tough, and at the same time accommodate public recreational use as decreed under the Montana Supreme Court's Curran and Hildreth decisions.

I submit to you that we do not at present have the management tools available to us to deal with the problem at hand. About the only tool that we have is to close private property to public recreational use. We discovered last summer in Sweet Grass County that this is still quite effective, even under the Court cases.

Closure is not something that most ranchers enjoy doing, however, and it has obvious disadvantages to the recreational user.

I hope that the Montana Legislature gives us some tools to work with so that we can get back to managing the land and water resources for the best interests of all of us. Toward that end, I would suggest that any legislation coming from this body contain the following:

1. High Water Mark Definition - We need a practical and understandable definition of ordinary high water mark. The definition used by Conservation Districts in administration of the Natural Streambed and Land Preservation Act meets this requirement and has withstood the test of time.

2. Liability Protection - Since the property owner cannot exclude the public from certain portions of his property, he should have immunity from any liability that should arise as a result of public use under the Supreme Court Cases.

3. Prescriptive Easement - It should be clear that prescriptive easement cannot be acquired by recreational use so that the property owner has no reason to exclude public use because he is concerned about this possibility.

4. Trespass - We need a better trespass law so that we have an effective way of dealing with that small minority who abuse their use of the resource. In keeping with Fish, Wildlife and Parks excellent advertising campaign to Ask First, perhaps an expansion of the current Big Game law to include all recreational use would be in order.

5. Structures - There appears to be some question under the Court cases whether or not the property owner still has the right to build and maintain structures such as fences and headgates within the ordinary high water marks. The Legislature should clarify that this right has not been diminished, and may have to amend some laws such as the nuisance laws which could be interpreted this way in light of the Court cases.

6. Public Trust Doctrine - The Legislature should clarify, within its ability under the Constitution, how the public trust doctrine is to be applied in the future. Property owners are deeply concerned about application by the Courts of the public trust doctrine along the same lines seen in Hildreth and Curran in reference to such things as water rights, fencing, grazing, hunting and title. We need to head off the potential stripping away of pieces of private property rights to the point where that term no longer has any meaning.

Finally, the Legislature should neither expand nor codify the Hildreth and Curran decisions.

Certainly there is no reason to expand on the Court cases either from a property owner's viewpoint or a recreational user's viewpoint. It appears, however, that the Legislature will be under a great deal of pressure to pass a bill of some kind on the subject. I would hope that in our rush to do something about stream access, we don't do something to make a bad situation worse.

In that same light, I would urge that you not codify the Court cases.

As you know, our system of government has built into it a system of checks and balances known as the Doctrine of Seperation of Powers. Under this system, it is the function of the Legislative Branch to make the laws, the Executive Branch to enforce the laws, and the Judicial Branch to interpret the laws. I would respectfully suggest that it is time for the Montana Legislature to re-assert its lawmaking function.

KNIGHT & MACLAY
ATTORNEYS AT LAW

ROBERT M. KNIGHT
HELENA S. MACLAY
DAN G. CEDERBERG

300 GLACIER BUILDING
111 NORTH HIGGINS AVENUE
P. O. BOX 8957
MISSOULA, MONTANA 59807
(406) 721-5440

January 22, 1985

Honorable Robert Ream
Chairman, Fish and Game Committee
Montana House of Representatives
State Capitol
Helena, Montana 59620

RE: Recreational Use of State Waters

Dear Bob:

It is my understanding that three bills regarding the issue of recreational use of state waters, are to be considered this evening by a joint committee composed of the House Judiciary, Fish and Game, and Agricultural Committees. The bills are House Bill No. 265, House Bill No. 275, and the bill of the Interim Subcommittee No. 2. I received a copy of House Bill No. 265 on Saturday, January 19th, and a copy of House Bill No. 275 on Sunday, January 20th. I am unable to attend this evening's hearing. However, I would like to provide my written comments, particularly with reference to House Bill No. 265.

I have serious problems with a number of the provisions of House Bill 265 from the perspective of clients of our firm who are owners of agricultural land. I will attempt to address my concerns, with a reference to the applicable sections of House Bill 265 in sequential order.

It is my opinion that the definition "barrier" which appears at Section 1(1) will expand, to some degree, the parameters of the applicable court decisions. This bill appears to include barriers that either restrict passage or "recreational use". Additionally, reference is made to natural objects which "effectively obstructs" recreational use. Effective obstruction is an allusory and subjective test. Additionally, it is tied to the "time of use". The bill seems to include

boating and motorized craft as a permissible recreational use [see Section 1(7)(a)]. The presence of banks, shoals, or other natural features at low water, constitutes a "barrier", albeit that the water course would be susceptible to other forms of recreational use. I believe this is an expansion of the mandate of the Supreme Court.

I have a particular problem with the definition of Class I waters. Five standards are established for determining whether a water course is a Class I surface water. I believe that at least three of the five standards are subject to question as to whether they are consistent with the Supreme Court decision. Section 1(2)(a) includes lands which lie within the officially recorded government survey meander lines. I would submit that not all lands bordering on waterways which are meandered are navigable streams for purposes of state ownership of the streambed. Paragraph (c) of the same section includes lands which flow through public lands. Most waterways in western Montana flow through public lands. I gather that the intention may have been to include such water courses "while they flow through public lands". This presents problems, as well, in light of the fact that many ranches in Montana include small tracts of BLM, Forest, or State lands within the exterior boundaries of private property. I have particular problems with subparagraph (d) of this section. Subparagraph (d) includes surface waters which are or have been capable of supporting commercial activity. Arguably, any commercial guide could contend that the water course is capable of supporting commercial fishing activity. Furthermore, any guest ranch which has utilized waters which flow through its property and used by its guests, would have its waters classified as Class I under this definition. Mining activity, long since abandoned on the headwaters of many water courses, would also give rise to Class I treatment.

I believe that the definition of Class I water should be narrowed so as to include only those surface waters described in subparagraphs (b) and (e).

The significance of an overbroad Class I definition, notwithstanding the effect of expanding the import of the Supreme Court's decisions, is demonstrated in an examination of the treatment of Class II waters under this bill. I frankly have difficulty identifying a waterway which would be classified as ClassII under the proposed definition. I will discuss the broad definition of "recreational use" later in this letter, but it should be noted that Section 1(7)(b) provides that all recreational uses permitted in Class I waters are permitted in Class II waters, with certain exceptions,

those exceptions including the operation of all terrain vehicles or other motorized vehicles not primarily designed for operation upon the water [subsection (iii)] and the placement or creation of any permanent or semi-permanent object such as a permanent duck blind or boat moorage (iv). By clear implication, those uses which would be excluded from Class II waters would be included as permissible uses in Class I waters. I would submit that this is an expansion of the limits of recreational use afforded by the Supreme Court decision and the effect of permitting such uses could have a significant and unwarranted impact on agricultural landowners, particularly in light of the broad definition of Class I waters.

I likewise have some problems with the definition of "ordinary high water mark" [Section 1(6)]. In particular, I have difficulty with the reference to "diminished terrestrial vegetation or lack of agricultural crop value". The presence or absence of "agricultural crop value" is another vague and illusory standard. For example, is native wild grass an agricultural crop. A more appropriate standard is destruction of value for agricultural purposes. Additionally, rather than utilizing a standard of diminution of terrestrial vegetation, a more readily identifiable standard would be the deprivation of the land of such vegetation.

Additionally, the suggested provision does not seem to take into account flood plains or flood channels. I believe that the definition should clearly reflect that recreational activities are not permitted on flood plains or dry flood channels.

The next area of concern which I have with respect to House Bill 265 is the definition of recreational use [see Section 1(7)(a)]. All of the categories of recreational use appear to be water oriented with one major exception, to-wit: hunting. The Supreme Court may have envisioned the hunting of water fowl within the confines of the water course, but I do not believe that it is a proper expansion of the recreational use doctrine to include big game hunting, upland bird hunting, and the hunting of non-game animals such as coyotes and gophers as permissible recreational uses on Class I waters. Additionally, reference is made to boating and motorized craft unless otherwise prohibited or regulated by law. This legislation is absent any express designation of authority in the Department of Fish, Wildlife and Parks or other entity regarding regulation of hunting, boating and motorized craft, or other forms of recreational use which obviously could have a substantial detrimental affect on a water course or the lands which it abuts. In the absence of such express regulation or recognition by the legislature that public use can create adverse effects on wildlife, disruption of natural areas, damage of banks and lands adjacent to water bodies, this bill affords an overly broad statement of rights to the recreational user.

Additionally, reference is made to "related, unavoidable or incidental uses". Clarification of what is intended to be a permissible act within the parameters of unavoidable or incidental use would be of substantial assistance in determining whether the particular act is proper or improper within the scope of the definition.

I have referred earlier to recreational uses permitted under Class II. I would reiterate that the inclusion of certain activities, by a clear implication, includes those activities as permissible uses in Class I surface waters, and that the activities identified are not, in my opinion, consistent with the parameters of recreational use envisioned by our Supreme Court.

I have a slight problem with Section 2(3)(a). This section excludes recreational use of stock ponds or other impoundments fed by intermittently flowing natural water courses. A number of stock ponds are fed by other than intermittently flowing water courses. I would hope that such impoundments, utilized for that purpose, could be excluded from recreational use on the basis of the use made by the landowner and not the nature of the flow of the water course which services the pond.

I have some difficulty understanding the provision which appears at Section 2(5). I gather, perhaps incorrectly, that State owned lands which are school trust lands and which are subject to agricultural leases, have been administered on the basis of permitting the lessee to make decisions regarding the nature and extent of public use and access, the overriding concern being the non-interference with the conduct of the agricultural enterprise. I gather that some members of the recreating public may disagree with this management principle. At any rate, it appears to me that the provision in question does nothing more than codify the uncertainties which may exist as to the respective rights of the lessee and the public and the assertion of its recreational use rights.

I have a particular problem with the provisions relating to establishing the right to portage. The title of House Bill 265 provides, among other things, that the enactment will "establish the right to portage". Although the Supreme Court gave recreationalist the right to portage around barriers, they also mandated that this right be exercised in the least intrusive manner. The language clearly appears to place the burden primarily on the recreationalist. The portage provision (Section 3) in my opinion shifts the burden from the recreationalist to the landowner, and reduces or eliminates the ability of the landowner to deal with specific situations on a case by case basis. I believe that the attempt at codifying portage rights evidenced by House Bill 265 demonstrates the problems inherent in endeavoring to legislate beyond the scope of the Supreme Court mandate.

For example, nowhere in Section 3 is there a requirement that "need" for a portage route be established. On the contrary, a portage route may be established when a member of the recreating public submits a request that such a route be established, and leads, within 45 days, to determination of a reasonable and safe portage route. See Section 3(b) and (c). Furthermore, the entire section engenders a detailed expensive administrative process for establishment and maintenance of such routes, all of which become obligatory, upon the landowner once the request is made that a route be established. This provision also has significant fiscal implications. Paragraph 3(f) reflects that once the route is established, the Department of Fish, Wildlife and Parks has the exclusive responsible thereafter to maintain the portage route at reasonable times agreeable to the landowner. I gather that the obligation of maintenance is intended to extend beyond assuring that the route is open, and is inclusive of regular maintenance responsibility. I believe that this is a reasonable obligation to impose upon some public agency, but not the landowner, as it appears that the designation of such a corridor will effectively preclude the continuation of agricultural endeavors which would be difficult to continue in light of the public's right to use the designated strip for access purposes. It also raises the question of whether the designation of the route is a taking without compensation. The question of "maintenance" of the designated portage route also raises issues with respect to the liability of the landowner. The landowner's liability does appear to be limited to acts or omissions that constitute willful or wanton misconduct, while the public recreationalist portages or uses portage routes. It does not appear to me, however, that there should be any requirement of responsibility for "omissions" under those circumstances. Once designated, a landowner should not have the responsibility for continued maintenance of the way.

I additionally feel that the rights of the public with respect to portage are adequately set forth in the Supreme Court decision. If that feeling is not shared, at a maximum, the portage right should not be expanded beyond the provision evidenced by ~~objection~~ Section 4 of the Interim Subcommittee No. 2 bill.

I also have some concerns regarding the prescriptive easement section. The Subcommittee's bill clearly provides that prescriptive easements be acquired through use of "land or water for recreational purposes". The specific reference to "land" has been eliminated in House Bill 265. While some land related categories have been designated, in addition to "surface waters", I believe that the general designation and reference to land should be included in any bill passed by the legislature. Additionally, the new Section 8 of House Bill 265 provides that the prohibitions against acquisition of a prescriptive easement do not apply to prescriptive easements that have not been "perfected" prior to the effective date of the act.

I am not sure what is meant by the word "perfected". Some parties with whom I have discussed this provision suggest that this involves a judicial determination of the existence of a prescriptive easement or evidence of agreement by the parties affected by a prescriptive easement, of the existence of such an easement. I would be more comfortable with that standard. I believe it would be improper to adopt a loose standard which is not conclusive as of the effective date of the act. I am concerned that parties may, armed with the legislative enactment, claim the existence of prescriptive rights based upon the recreational use rights afforded by the legislative enactment, when in fact, no such right was intended to be obtained predicated upon former use.

I have some of the same problems with House Bill 275, to the extent that that bill incorporates comparable language to House Bill 265 with regard to the matters which I have specifically addressed. I believe, however, that House Bill 275 has some provisions which are beneficial and which merit further scrutiny. In particular, I believe that the provisions of Section 4(2) regarding the development of rules regulating water courses are helpful. Representative Cobb's bill contains a good statement of the relevant considerations which should bear on the issue of regulation of public use. Statements of overriding public concerns regarding the use of water courses, recreational rights notwithstanding, are well stated in subparagraphs 2(a)-(g). Here again, however, I believe that there is a serious question of determining the appropriate classifications of the State's water. The Class I water standard established in House Bill 275 may contain the same problems heretofore noted with respect to those waters which lie within the officially recorded federal government survey meander lines, but classification is nevertheless more appropriately restrictive and, I think that all of us can more clearly determine Class II and Class III waters under the definitions provided by Representative Cobb.

I believe that the enactment proposed by the Interim Subcommittee No. 2, may come closer to the format of an appropriate bill than either of the aforementioned proposals. I recognize that there is serious concern with regard to the standard of the "federal test of navigability" contained in the Interim Subcommittee bill. I think, however, that that standard can be appropriately modified.

I have obviously addressed in more detail House Bill 265. In part, that is because House Bill 265 is a more detailed attempt to resolve the issue of the parameters of recreational use. In part, that more detailed analysis has occurred because of the understanding that this bill represents an endorsed compromise between recreational and agricultural interests. I believe that there are serious problems

with the bill principally from the standpoint of its potential impact upon agricultural landowners.

I also believe that the format of House Bill 265 demonstrates a flaw in the overall approach to the resolution of this problem. I would respectfully submit that the endeavors to provide detailed answers to unanswered questions have, in many instances, raised new and more thorny questions. It also appears that in endeavoring to answer some of the unanswered questions, the authors of the bill have attempted to conjecture as to the posture of the Supreme Court. It is obviously my opinion that in some instances they have erred on the side of expanding rights which the Court did not intend to afford. Obviously that point may be disputed. I would suggest that the initial efforts at addressing the impacts of the Curran and Hildreth decisions by the legislature be exercised with caution, and for that reason I lean toward enactment of a bill, if a bill is to be enacted, more in accord with that proposed by Interim Subcommittee No. 2. Any legislation which is enacted will fail to address all of the issues which might come up during the next biennium. I would prefer, however, to address particular problems once they become reality rather than to create problems in an anticipatory manner.

I suspect that recreational interests would, in many instances, contend that the Court's interpretations have arisen by virtue of denial of legitimate rights by certain landowners. In the same vein, I am positive that many agricultural landowners feel that overly broad legislative enactment will create the same kind of problems from their perspective if individual recreational users attempt to exercise their rights in an overly aggressive manner, armed with broad legislative pronouncements.

This is an issue which has not been created overnight, and which is not subject to speedy resolution. I believe many citizens of the State of Montana would be more comfortable addressing some of the issues which are detailed in House Bill 265 after there has been greater experience from both the agricultural and recreationalist's standpoint in dealing with the general issue.

Very truly yours,

KNIGHT & MACLAY

ROBERT M. KNIGHT

RMK/bab

P.S.
I have enclosed a number of copies which hopefully will be sufficient for circulation to the other members of the Joint Committees.

RMK

J. S. Solberg Company
108 McLEOD ST. - BOX 817 - BIG TIMBER, MONTANA 59011 - PHONE 932-2393

January 20, 1985

House Judiciary Committee
Helena, Montana

Honorable Chairman and Committee Members:

The following testimony is offered in regard to the hearing on recreational use of State waters.

My name is Bernie Hedrick, P.O. Box 817, Big Timber, Montana. I have resided in Big Timber since May of 1983. My wife and I own and operate J. S. Solberg Company, the oldest retail clothing store in the state of Montana. Our store is a small business which is located in Big Timber.

I first became interested in the issue this summer (1984) when a customer, who resides in California and summers in Big Timber, told me that he had been denied the right of access across a rancher's land to fish an area that he had been fishing for quite sometime. The rancher was participating in an organized effort among Sweet Grass County landowners to close their land to public use for a period of time as a means of protesting the recent Montana Supreme Court rulings and to draw attention to the fact that the matter of recreational use of State waters was still not resolved.

My customer was very irrate and indicated that he probably would not return to Big Timber and as a result, would not be carrying on any business with any of the local merchants. Fortunately, a rancher's wife was in the store at the same time as my customer. She took the time to explain the rationale of the landowners actions and expanded on some of the problems that landowners experience as a result of owning property which has a stream flowing through it. She explained that gates were often left open, stock was lost, fences torn down, their land was often littered, crops were destroyed by vehicles, problems with trespass, etc.

As a result of their conversation, my customer had a better understanding of the landowners problems. He agreed that the landowner should not be open to such abuse but affirmed his right, as a responsible sportsman, to fish the public waters. The ranch wife left my store with the knowledge that the sportsman did not want to infringe on the landowner's right to own and manage his own land, but merely wanted to exercise his right to fish in public waters.

After that day in the store, I became interested in the whole issue. I read the Supreme Court Rulings, attended the Interim Subcommittee's hearing concerning the recreational use of water on July 30, 1984, have reviewed all the information available from the Legislative Council, have read articles concerning the Public Trust Doctrine and, most recently, read three rough drafts of proposed legislation.

After reading the above referenced information, I believe good legislation would address the following issues or define the following words in a manner in which any prudent man could understand.

A. Barrier
B. Ordinary High Water Mark
C. "Waters that are Capable of Recreational Use"
D. Diverted water
E. Recreational Use
F. Portaging
G. Landowner Liability
H. Prescriptive Easement

After reading other proposed legislation, I believe that the bill (LC0069/01), drafted by the Interim Subcommittee, is probably the clearest and easiest to understand. It would be my bill of preference if the following areas could be clarified:

(1) On page -2- of LC0069/01, reference is made on line 8 to "any surface waters that are capable of recreational use may be so used by the public without regard to ownership of the land underlying the waters".

How does one distinguish a surface water that is "capable of recreational use" from a surface water that is not capable of recreational use or does a distinction need to be made?

(2) Is there a general agreement or definition as to what "recreational use" means or is it even important?

3) On page -3-, line 7 through line 11, reference is made to portaging. It would appear to me that the reason for portaging is that the surface waters would be too shallow or else there would be some type of barrier which would pose a risk to the public using that water. It would therefore appear to me that some of the language should be the same as in Section 3. For example, New Section. Section 4. Portaging when permissible. A member of the public may, above the ordinary high water mark, portage around barriers in the least intrusive manner possible, avoiding damage to the landowner's land and violation of his rights.

One might add to this section by stating that "Portaging should be used by the public only for purposes of safety, health or bypassing barriers".

Other than the areas I have mentioned, I think LC0069/01 is the result of a lot of hard work on the part of the Legislative Council, Subcommittee members and all those individuals who have taken the time to give you input.

I appreciate the opportunity to offer my views and am sure you will arrive at a that everyone will find satisfactory.

Yours truly,

Bernie Hedrick

Bernie Hedrick

To the Streambank Committee.

I support the testamony of Mr. Grossfield and Mr. Norm Stan.

I am concerned about fires and structures being built.

You cannot shoot from highways - so why from streams.

Define each aspect of the bill carefully as out of staters will be governed by what you put in the bill when they come here.

David C. Freeman

Freeman Ranch Inc.
Box 265
Augusta, Mont.
59410

Testimony

1-22-85

To: Chm of all 3 legislative committees
hearing the 3 bills proposed in public hearing, evening of 1-22-85.

Subject: Stream Access Proposed Legislation.

From: Bill Prewitt, ranch mgr.; ISG Timber, mgt.

Just 2 points at this time for expediency sake. I've testified before, both oral & written during the past interim period.

I I will not endorse any bill that puts natural barriers into the language w/ artificial barriers!! This plainly opens up in clear opinion, any entire river course to a surface water recreationists. That is not correct, & clearly expands the intent of the Supreme Court ruling. Completely unreasonable & is a 'Taking' of private property rights and morally, leads to much trouble w/all parties concerned, along with being a real harassment to ranching operations, and ranch management business!

II Don't people in general, sportsmen, environmentalist, and legislators realize that private ownership and control of fish, game, & outdoor recreational use, has been the largest single factor by far in conserving the hunting, fishing, & outdoor recreation pleasure that Montana has & can be enjoyed today?!!

Don't you realize that by opening up these protected & controlled and managed resources to the general public, will in fact destroy for all everyone?! It will, no question! I came from Oregon, where this is the case, and now live in Oregon, an recreationist

find the quality & quantity of fish, game, & general outdoor recreation that Montana has to offer. I know I've seen it happen in Oregon, & it will happen here, if the public is allowed to go at will on the court-ruling is in fact allow.

How very stupid & short-sighted of those who are pushing for this, based on the court ruling forecasting implications.

The landowner-sportsmen relationship has been good in Montana. What's the complaint? How it been that bad? Definitely not!! Most sensible people appreciate the superior hunting, fishing & etc. that private property rights & resource control do give to these valued assets.

We should be stewards of the land, resources, not destroyers & abusers to a destructive end for all interested parties.

I will be sorry, very sorry, if any of these 3 bills are passed & become law!

It would be for better, for sure, to not pass anything at all at this time. Leave the issue as is & work together even closer during the next interim period for a proper, fair, & equitable solution.

SB 91 Mazurek Venue

Implements SJR 24

Pro

Sam Haddon chairman of Commission on Evidence

Wm. "Duke" Crowley - Professor U.M. Law School -

Pat Melby - St. Bar

Opp.

Fisherman's Paradise

Telephone 406-932-2226

Boulder River Ranch

McLeod, Montana 59052

Members of the Committee,

At this writing, I am only vaguely familiar with most of the bills concerning stream acess that will be put before you today. However, any bill submitted that would give the general public unlimited access to the stream bed would adversly affect my business. And I could not support such a bill.

There is no doubt that the water flowing in the streams of Montana belong to the people of the state as was ruled by the recent Supreme Court decision and later affirmed by the Public Trust Doctrine.

In my opinion, the Supreme Court ruled only on the recreational use of surface waters of the state and this decision should not be interpreted to include the public's use of certain stream beds.

To take away the property owner's rights to control access on the stream bottoms that run through his lands (if the stream bottoms are taxed as his other property and if the stream bed is not meandered) is against the laws of this nation and unconstitutional.

I urge you to support a bill that will be fair to both parties. But taking away control of the stream beds from land owners is a great injustice to all property owners as future consequences will undoubtedly prove.

Sincerely,

Steve Aller

Steve Aller

Note: I support H.B. 16

cannot support 265

GLASS MASTERS UNLIMITED
524 SOUTH MOORE LANE
BILLINGS, MONTANA 59101

To the members of the Judiciary, Fish & Game, and Natural Resources Comittees:

Do to the Legislative Ruling in the spring of 1984 concerning Public access to all Montana waterways. We have found it next to impossible to enjoy some of our favorite fishing and camping retreats.

The Landowners that own the access to these retreats have taken offensive action which no longer allows us to trespass and enjoy the sport of fishing and camping on their land.

In the past the Landowner bought and paid for their property which encluded the waterways on that property. Therefore, we feel, that if the ruling that allows the public to useall Montana Waterways is not reversed to its' original state, then, the State of Montana should be forced to buy all Waterways from the Landowner instead of trying to STEAL it.

Because the State of Montana has taken the Waterways from the landowner it forces avid Sportsman like ourselves to use state owned Fishing accesses which at most times of the year these accesses are so crouded, commercialized, and littered that it is impossible to enjoy. And we don't want to see the private lands in the same condition.

The state of Montana is putting the Landowner and Sportsmans Relationship at the mercy of their own ignorance. We only hope that the responsable parties will clearly see that more problems will result, than could possibly be solved.

Thank you for hearing the views of the Montana Sportsman.

Clyd Vatt
Clint Carter
Jim Jenkins
Lonnie Carter
Mike Phillips
and
The members of New Life Assembly Church.
a Congrigation of 120 people.

Recommendations for Revisions in Venue Statutes Prepared by the Montana Supreme Court Commission on the Rules of Evidence

PREFACE

This report and the accompanying draft bill are submitted to partially fulfill the request of Senate Joint Resolution 24 of the 48th Legislature that the Supreme Court Commission on the Rules of Evidence prepare draft legislation for submission to the 49th Legislature to provide that "statutory provisions on venue . . . accurately reflect the current usages and interpretations of those laws . . . ."

The Resolution recognized that the existing statutes "no longer reflect on their face the present state of the law," and expressed a desire that new draft statutes be prepared incorporating the "logical, useful, and consistent" rules and practices which have evolved by judicial construction of the present laws.

The current venue statutes were adopted in 1864 at Bannack and are substantially the same today as when they were enacted. Throughout the 120 years of their existence these venue statutes have been the subject of dozens, perhaps hundreds, of appeals to the Montana Supreme Court. Many of the appeals were caused by the silence of the statutes on principles necessary to their operation; other appeals resulted from the ambiguity of certain fundamental language. The commands of various venue sections that particular kinds of cases "shall," "may," or "must" be tried in specified counties resulted in seemingly unending litigation. Concerning one of these sections, Justice Sheehy, writing for a unanimous court, complained in 1978:

> Possibly no statute has spawned more litigation in this state than section 93-2904 relating to the proper place of trial. Year after year we are called upon to interpret anew what are seemingly simple code provisions and to explain again the impact of our decisions under the statute. (Clark Fork Paving, Inc. v. Atlas Concrete, 178 Mont. 8, 582 P.2d 779.)

Justice Sheehy went on to extract, from what he termed "the mountain of cases which have arisen," the long-standing rules that decided the issue, and restated them for the thirtieth or fortieth time.

The Clark Fork case illustrates the fundamental problem: basic rules exist but many cannot be found in the statutes. They must be located in, and sifted from, a "mountain of cases." When attorneys have not found the applicable Supreme Court opinion in the 190-odd volumes of Montana Reports (or hope that their opponents have not), the same legal questions are hauled before the Court again and again and again.

The new statutes proposed in this draft have three objectives:

(1) to include in the Montana Code Annotated those rules which have been declared and are settled by the Supreme Court but are not now stated in the Code;

(2) to change the language, without changing the meaning, of the sections that have caused the most litigation (primarily by substituting the designation "proper place of trial" for the ambiguous command that cases "shall," "may," or "must" be tried in particular counties);

(3) to settle the few matters where there is still a seeming ambiguity, following general principles along the lines that the Court seems to feel would be best derived from what the Court has held in other situations.

NEW SECTION. Section 1. Scope of part. The proper place of trial (venue) of a civil action is in the county or counties designated in this part.

Explanation: The only purpose of this section is clarity. It is simply an expression of the fundamental principle incorporated but unstated in the present Code and its predecessors.

NEW SECTION. Section 2. Designation of proper place of trial not jurisdictional. The designation of a county in this part as a proper place of trial is not jurisdictional and does not prohibit the trial of any cause in any court of this state having jurisdiction.

Explanation: This new section is intended to codify the results of a series of cases dealing with recurrent problems caused by the form and language of the current statutes. Although intended

only to set rules of venue, the phrasing of the present statutes has caused many litigants to believe they prescribe jurisdictional requirements. The Supreme Court has had to rule repeatedly that these statutes do not in any way affect the jurisdiction of District Courts to try cases brought before them. All District Courts have equal power to try any action of which the district courts, as a group, have jurisdiction (Miller v. Miller, ___ Mont. ___, 616 P.2d 313 (1980); State ex rel. Foster v. Mountjoy, 83 Mont. 162, 271 P. 446 (1928)). Even if a court is not the proper one as designated by the venue statutes, it can try a case if there is no objection from a party through a motion for a change of venue (Miller v. Miller, supra; Bullard v. Zimmerman, 82 Mont. 434, 268 P. 512 (1928)). Unless there is a demand by one of the parties, a court is not authorized to order the case transferred to another county or to refuse to try the case (State ex rel. Gnose v. District Court, 30 Mont. 188, 75 P. 1109 (1904); Danielson v. Danielson, 62 Mont. 83, 203 P. 506 (1921)).

Since these questions have arisen repeatedly over a long period of time, it seems sensible to include this or a similar provision to prevent endless recurrences in the future.

NEW SECTION. Section 3. Power of court to change place of trial. The designation in this part of a proper place of trial does not affect the power of a court to change the place of a trial for the reasons stated in 25-2-201(2) or (3), or pursuant to an agreement of the parties as provided in 25-2-202.

Explanation: This section is simply a consolidation into a single section a principle now expressed separately and not very clearly in each statute. Every venue statute now, after designating the proper county or counties for particular purposes, includes a provision that it is "subject, however, to the power of the court to change the place of trial as provided in this code." The Supreme Court has had to state on many occasions that the clause is intended only to preserve the trial courts' discretionary power of granting changes of venue to secure impartial trials or to promote convenience of witnesses or the ends of justice. The proposed section incorporates these declarations and should make the meaning clear.

NEW SECTION. Section 4. Right of defendant to move for change of place of trial. If an action is brought in a county not designated as the proper place of trial, a defendant may move for a change of place of trial to a designated county.

Explanation: This section and section 5 specify that the right to move for a change of place of trial on the ground that the action is brought in the wrong county belongs exclusively to a defendant. It might be argued that this right should extend to some other classes of litigants, such as involuntary plaintiffs under Rule 19(a), M.R.Civ.P. or some intervenors (Rule 24, M.R.Civ.P.). The courts have always held that such parties must accept the status of the ongoing action as they find it at the time of their entry. Further, Rule 12(b)(ii), M.R.Civ.P. provides that only defendants can move for a change of venue on this ground, which is consistent with all of the Supreme Court holdings.

NEW SECTION. Section 5. Multiple proper counties. If this part designates more than one county as a proper place of trial for any action, an action brought in any such county is brought in a proper county, and no motion may be granted to change the place of trial upon the ground that the action is not brought in a proper county under 25-2-201(1). If an action is brought in a county not designated as a proper place of trial, a defendant may move for a change of place of trial to any of the designated counties.

Explanation: Present statutes do not deal with this situation.

This section codifies a number of Supreme Court holdings that do. In many cases (particularly tort and contract actions) alternative venues are authorized, but the manner of choosing between them is not stated. A sizeable amount of litigation has resulted. All of the cases have held that the plaintiff has the initial choice and, if he selects a county that is proper, the issue is closed, but that if the plaintiff files the action in a county that is not one of those designated, he has waived the right to choose, which passes to the defendant. Defendant can then decide to which of the proper counties he wants the case transferred. Of the many cases dealing with the problem, Seifert v. Gehle, 133 Mont. 320, 323 P.2d 269 (1958), a tort action, gives the clearest statement:

> In this case the statute means that either the county of defendant's residence or the county where the tort was committed is a proper county for the trial of the action, and had the plaintiff chosen either of those counties, the defendant could not have had it removed.
>
> In this case plaintiff waived his right to have it tried in one of the proper counties. Therefore, the defendant has the right upon proper demand to have the place of trial changed either to the county where he resides or to the county where the tort was committed, whichever he elects.

This proposed section will preserve the rule of Seifert and other cases. It allows the plaintiff first choice among the proper venues and provides that a correct choice by him cannot be changed. If the plaintiff's selection is not one of the designated counties, the initiative passes to the defendant. He can move for a change to the proper county of his choice, and section 25-2-201 MCA requires that the trial court grant the motion.

NEW SECTION. Section 6. Multiple claims. In an action involving two or more claims for which this part designates more than one as a proper place of trial, a party entitled to a change of place of trial on any claim is entitled to a change of place of trial on the entire action, subject to the power of the court to separate claims or issues for

trial under Rule 42(b) of the Montana Rules of Civil Procedure.

Explanation: The present statutes do not cover this situation. This section codifies the holdings of the Supreme Court in cases that have raised the question. Our statutes have no provision for the multiple claim situation in which the county where the plaintiff files is correct on one claim but not for one or more of the others. It is possible, at least since the adoption of Rule 42(b), for a court to split the action and grant a change on one or more claims, but this causes multiple trials and may be a cure worse than the disease. For a great many years our Court has ruled consistently that a defendant entitled to a change of venue on one claim should have it on the entire action. The Court feels the rule is necessary to prevent a plaintiff from controlling venue by adding spurious claims that have little or no validity, but are triable in the forum the plaintiff chooses rather than at the normal situs which would be the defendant's residence or another location more favorable to the defendant.

This new provision codifies the result of this unbroken line of opinions: Yore v. Murphy, 10 Mont. 304, 25 P. 1039 (1891); Heinecke v. Scott, 95 Mont. 200, 26 P.2d 167 (1933); Beavers v. Rankin, 142 Mont. 570, 385 P.2d 640 (1963). It makes no change in existing law, but simply enacts it into the Code where it is available.

NEW SECTION. Section 7. Multiple defendants. If there are two or more defendants in an action, a county that is a proper place of trial for any defendant is proper for all defendants, subject to the power of the court to order separate trials under Rule 42(b) of the Montana Rules of Civil Procedure. If an action with two or more defendants is brought in a county that is not a proper place of trial for any of the defendants, any defendant may make a motion for change of place of trial to any county which is a proper place of trial.

Explanation: On a few occasions, the Supreme Court has had to deal with the problem posed by multiple defendants with conflicting venue rights. Most situations involve defendants who live in different counties, but this presents no difficulty since the statutes (Section 25-2-108 MCA; amended in section 7 of this draft) have always allowed the plaintiff to file at the residence of any of them. Tort, contract, and real property actions, however, which present choices other than residence, have been troublesome. Heinecke v. Scott, 95 Mont. 200, 26 P.2d 167 (1933) raised but did not give a definitive answer to the question of possible priorities between defendants whose venue rights arise under different statutory provisions. That case involved contract, tort, and real property claims, and was brought at the plaintiff's residence where none of the defendants lived. The Court held that the action was basically one for recovery of real property, to which the tort and contract claims were subsidiary. Since all of the defendants were residents of the county where the land was situated, a change of venue to that county was awarded. The court noted that small differences in the facts might have presented much more complex questions. These questions are what this proposed section attempts to meet. The section would simply extend the same "good as to one, good as to all" principle that has always governed venue based on residence to all situations. Rule 42(b), which was not available at the time of the Heinecke case, could be used to alleviate the difficulties of a defendant placed at a real disadvantage.

This proposed section does not change existing law or establish any new principle. Like the other new provisions it simply tries to codify existing case law (although, in this instance, cases are neither plentiful nor clear-cut) so that all the fundamental principles will be gathered together in one place and stated as plainly as possible.

Section 8. Section 25-2-108, MCA, is amended to read:

"25-2-108. ~~Other--actions~~ Residence of defendant. ~~In all other cases, the action shall be tried in~~ Unless otherwise specified in this part:

(1) the proper place of trial for all civil actions is the county in which the defendants or any of them may reside

at the commencement of the action ~~or-where-the-plaintiff resides-and-the-defendants-or-any-of-them-may-be--found; or~~

(2) if none of the defendants reside in the state, ~~or, if-residing-in-the-state,-the-county-in-which-they-so-reside be--unknown--to--the-plaintiff,-the-same-may-be-tried-in-any county-which-the-plaintiff-may-designate-in--his--complaint, subject,--however,--to--the-power-of-the-court-to-change-the place-of-trial-as-provided-in-this-code~~ the proper place of trial is any county the plaintiff designates in the complaint."

Explanation: This revised section changes the location and arrangement of the most basic rules but does not alter their content significantly. Currently, section 25-2-108, which states the most fundamental of all venue rules--that the defendant has the right to have the trial in his county of residence--is the last section in Part 1, Chapter 2, Title 25, preceded by a long list of exceptions to it. The sequence is confusing and has caused much needless litigation. This revision tries to put first things first, beginning with the most fundamental proposition, and following it with the exceptions.

Subsection (1). This subsection extracts from the confusing welter of statutes what the Supreme Court has repeatedly called the "principal rule" of venue (see Hardenburgh v. Hardenburgh, 115 Mont. 46, 146 P.2d 151 (1944); Love v. Mon-O-Co Oil Corp., 133 Mont. 56, 319 P.2d 1056 (1957); Clark Fork Paving v. Atlas Concrete, 178 Mont. 8, 582 P.2d 779 (1978)) and places it at the beginning, rather than the end, of the related group of rules. The proper relationship between this principle and others that are subordinate to it has generated most of what Justice Sheehy, in Clark Fork Paving, called the "mountain of cases" that the present statutes have spawned. This new order and placement is intended to emphasize the pre-eminence of this rule and the Court's repeated insistence upon it.

The stricken material "or where the plaintiff resides and the defendants or any of them may be found" at the end of subsection (1) is part of the current rule, but, in the judgment of the Commission, should be eliminated entirely. This deletion constitutes a substantive change in current law, the only such change in the draft bill. Unlike the fundamental principle to which it

is attached, this separate method of fixing venue is legally questionable and almost never used except in domestic relations actions. As a built-in exception to the rule that a defendant is entitled to trial in his own county, it is an open invitation to subterfuge and sharp practice by plaintiffs' attorneys, and was so characterized in the single case construing it that has reached the Supreme Court. By a 3-2 decision in Shields v. Shields, 115 Mont. 146, 139 P.2d 528 (1943) the Court held that this portion of the statute permitted a plaintiff to keep a divorce case in his own home county rather than that of the defendant by serving her when she had to leave her home county and come to the plaintiff's in connection with other litigation between them. The two dissenting judges called the plaintiff's action fraudulent. They argued that the provision was intended to be used only when the defendant had no residence in Montana, or had one but could not be found there. The dissenters' contention, though it did not prevail, apparently cast so much doubt on the practice that it has never again, in over 40 years, come before the Supreme Court. The Commission recognizes that this deleted language is often used in domestic relations cases; to preserve this existing use, similar language could be incorporated into 40-4-105(3), MCA. The situation for child custody is covered in 40-4-211, MCA.
The legitimate uses of the deleted language--to set venue in the cases of non-residents or residents whose whereabouts cannot be ascertained--are substantially covered by subsection (2) of the current draft.

Subsection (2). This provision clarifies the portion of section 25-2-108 dealing with nonresident defendants. Since, by definition, a nonresident of the state is not resident in any county, the basic rule of subsection (1) cannot apply. In this situation the statute has always given the right of choosing venue to the plaintiff, and this draft contemplates no change.

Most of the litigation under this provision has dealt with nonresident corporations. An unbroken chain of decisions holds that a foreign corporation has no Montana residence for venue purposes, can be sued in any county selected by the plaintiff, and has no right to a change of venue for improper county (Pue v. Northern Pacific Ry. Co., 78 Mont. 40, 252 P. 313 (1926); Hanlon v. Great Northern Ry. Co., 83 Mont. 15, 268 P. 547 (1928); Truck Insurance Exchange v. NFU Property and Casualty, 149 Mont. 387, 427 P.2d 50 (1967); Foley v. General Motors Corp., 159 Mont. 469, 499 P.2d 774 (1972)). Since, under this statute, any county selected by the plaintiff is a proper place of trial, a nonresident is not entitled to a change even in those instances, like tort and contract actions, where alternative venues are authorized (Morgan and Oswood v. U. S. F. & G., 167 Mont. 64, 535 P.2d 170 (1975)).

All of the existing case holdings would be undisturbed by subsection (2). The law will remain just as it is.

It should be noted that subsection (2) applies only to the nonresident and does not affect the rights of a resident who may be joined as co-defendant with the nonresident. The resident retains whatever rights he may have to a venue change (Foley v. General Motors Corp., supra).

The stricken language providing for designation of a proper county by a plaintiff was deleted as redundant with section 4. A plaintiff, whether he knows the residence of the defendant or not, may file in any county subject to defendant's right to move the trial.

Section 9. Section 25-2-101, MCA, is amended to read:

"25-2-101. ~~Contract actions~~ Contracts. ~~Actions~~ (1) The proper place of trial for actions upon contracts ~~may be tried in~~ is either:

(a) the county in which the defendants, or any of them, reside at the commencement of the action; or

(b) the county in which the contract was to be performed~~, subject, however, to the power of the court to change the place of trial as provided in this code~~. The county in which the contract was to be performed is:

(i) the county named in the contract as the place of performance; or

(ii) if no county is named in the contract as the place of performance, the county in which, by necessary implication from the terms of the contract, considering all of the obligations of all parties at the time of its execution, the principal activity was to take place.

(2) Subsections (2)(a) through (2)(d) do not constitute a complete list of classes of contracts; if, however, a contract belongs to one of the following classes, the proper county for such a contract for the purposes of subsection (1)(b)(ii) is:

(a) contracts for the sale of property or goods: the county where possession of the property or goods is to be delivered;

(b) contracts of employment or for the performance of services: the county where the labor or services are to be performed;

(c) contracts of indemnity or insurance: the county where the loss or injury occurs or where a judgment is obtained against the assured or indemnitee or where payment is to be made by the insurer;

(d) contracts for construction or repair: the county where the object to be constructed or repaired is situated or is to be built."

Explanation: Present section 25-2-101 was, until the recodification of 1979, part of section 93-2904, RCM 1947, which lumped together in a single paragraph the basic rule of venue and all its major exceptions. This was the provision about which Justice Sheehy said, in Clark Fork Paving v. Atlas Concrete, 178 Mont. 8, 582 P.2d 779 (1978), "Possibly no statute has spawned more litigation in this state . . . ." The portion that has become section 25-2-101 was the focus of a major portion of that litigation.

The original intent of the "contract exception" to the general rule placing venue at the residence of the defendant was to permit an alternative place of trial. The plaintiff could, if he chose, elect to file his action in the county where the contract was to be performed rather than at defendant's residence. The

Supreme Court, however, in Interstate Lumber Co. v. District Court, 54 Mont. 602, 172 P. 1030 (1918), held that the word "may" in the statute meant "must" and construed the provision to mean that contract actions were properly triable only in the county of performance. This decision, in conjunction with the earlier case of State ex rel. Coburn v. District Court, 41 Mont. 84, 108 P. 144 (1910), which had ruled that the place of performance of all contracts calling for payment of money was at the place of the payment, effectively established the venue of practically all contract actions at the plaintiff's, rather than the defendant's, residence. The Coburn and Interstate Lumber cases were overruled in Hardenburgh v. Hardenburgh, 115 Mont. 469, 146 P.2d 151 (1944) which decided that "may" means "may" rather than "must" and set out rules for determining the place of performance of various types of contracts that have been followed down to the present.

The last sentence of subsection (1)(b) and subsection (2) through the end of the section is an attempt to codify the results of an extensive line of cases dealing with the problems created by section 25-2-101, MCA, and its predecessor, particularly those cases struggling with the meaning of the "place of performance" language of the statutes.

The contract venue statutes since their beginning have clearly intended to allow alternative venues when a contract is to be performed in a county other than the one where the defendant lives, but they have not proven easy to apply. Although the Hardenburgh case got rid of an obviously erroneous interpretation that had robbed the alternative provision of much of its benefit, the decision did not settle all the problems. Determining the place where a contract is to be performed is frequently not an easy task. Most contracts call for a monetary payment of some sort, and when, under the Coburn and Interstate Lumber cases, this was made the single determinative factor, the location was normally clear. After those decisions were changed, that certainty disappeared. The Hardenburgh court, anticipating the difficulties that could result, laid down a succession of interpretive rules which have generally been followed and developed in later cases.
This portion of the section seeks to state the case rules in a form as brief and complete as possible although, in dealing with a series of court opinions that are lengthy and diverse, and extend over a period of 40 years, the rules are not always simple and clear.

The Hardenburgh rules establish a basic framework. If a contract specifies a place of performance, the matter is settled; the courts will accept the designation. Where the contract is not specific, the court will look to see whether the contract allows performance to occur only at a particular site. If so, that is the location "by necessary implication." Some of these determinations are reasonably simple, others complex. In the uncomplicated category are such cases as Colbert Drug v. Electrical Products, 106 Mont. 11, 74 P.2d 437 (1937) where the contract, although it did not specify any county as the place of perfor-

mance, was to maintain neon signs in Butte; Thomas v. Cloyd, 110 Mont. 343, 100 P.2d 938 (1940) in which the defendant contracted to secure employment for the plaintiff in Butte; and Love v. Mon-O-Co Oil, 133 Mont. 56, 319 P.2d 1056 (1958), an action on a contract to drill an oil well on a described tract of land which lay in Fallon county. In each case the Court found a county of performance specified by necessary implication.

Where both parties have duties and obligations which must be carried out at different locations, fixing the place of performance becomes more difficult. Before Hardenburgh, place of payment was the sole determining factor in most cases. After Hardenburgh, the court, in a search for a similar touchstone, experimented with a number of factors; place of negotiation, place of execution, place of payment, or some combination of them. Ultimately, it settled on the "county of activity," that is, the county where the primary purpose of the contract was to be accomplished.

Determining "county of activity" as outlined in the series of cases which fixed this as the test, involves several steps. It begins with a consideration of all the duties and obligations of all the parties (Hardenburgh); then the court seeks to determine the ultimate purpose to be achieved and decide which of the various acts are primary and which subsidiary to that purpose. The county where the primary actions are to be performed is the county of activity. The process was most clearly demonstrated in Brown v. First Federal Savings and Loan, 144 Mont. 149, 394 P.2d 1017 (1964), which also contains the clearest expression of the principle. The plaintiffs, residents of Lewis and Clark County, received a loan from the defendant loan association to build a house in Helena. The association's office was in Great Falls; the loan was made there, payments were to be received there, the contractors and subcontractors were to be supervised and paid from there, and all the financial activities performed there. The actual construction, however, was all in Lewis and Clark County. The plaintiffs' action was for breach of defendant's obligations to supervise and pay the contractors properly. Defendants claimed venue was in Cascade County because the suit concerned duties to be performed there. Plaintiffs maintained that the contract existed primarily to build a house in Lewis and Clark County, and that was the proper county of performance. The Supreme Court held for the plaintiffs, saying, in part, "The theatre of performance, by necessary implication of what the parties intended as evidenced by the terms of the contract, is Helena."

Brown is one of a number of cases holding that it is the overall purpose of the contract, not the particular provision that is in contest in the action, which governs venue. It is also one of a series, again beginning with Hardenburgh, which have decided what what is "necessarily implied" about performance of particular

kinds of contracts. It is these rules that are set out in subsections (2)(a) through (2)(d) of the draft bill.

The lead-in to subsection (2) recognizes that the contracts named in the subsection are not an exclusive list of contracts, but merely those in which a rule has evolved. The Commission does not intend to require that all contracts somehow be pigeon-holed into one of the categories to establish venue. Contracts not within the list are subject to analysis under subsection (1)(b)(ii) to establish venue.

Subsection (2)(a) incorporates the holding of the Hardenburgh case, which involved the sale of a business and included real and personal, tangible and intangible property; McNussen v. Graybeal, 141 Mont. 571, 380 P.2d 575 (1963) dealing with sale of milk produced and gathered in Lake county but sold in Missoula (venue was held to be in Missoula county where delivery and sale was made); and Hopkins v. Scottie Homes, 180 Mont. 498, 591 P.2d 230 (1979) where a mobile home was financed and sold in Valley county for delivery and erection in Musselshell county (venue lay in Musselshell county where delivery was to be made and the home set up).

Subsection (2)(b) adopts the rule declared in Hardenburgh for employment contracts. The Hardenburgh decision specifically overruled the portion of State ex rel. Coburn v. District Court, 41 Mont. 84, 108 P. 145 (1910) which had held that the venue of any contract calling for payment of money was at the residence of the creditor, but adopted the holding of Coburn that the place of performance of a labor contract was the place where the labor or services were to be performed. No subsequent cases have dealt with the question, so the basic rule of Coburn and Hardenburgh is clearly in force and is expressed in this subsection.

Subsection (2)(c) sets out the "insurance and indemnity" rule expressed in Hardenburgh, Hartford Accident and Indemnity Co. v. Viken, 157 Mont. 93, 483 P.2d 266 (1971), and General Insurance Co. v. Town Pump, ___ Mont. ___, 640 P.2d 463 (1982). Hardenburgh did not deal with insurance, so its discussion of the subject is technically dictum, but the Court was trying to deal with all the implications of the basic change it had made by overruling the Coburn and Interstate Lumber cases. The later Hartford and General Insurance opinions adopted Hardenburgh's rationale and applied it to the insurance contracts at issue in those cases. Using the "principal activity" test of Brown v. First Federal, supra, the Court in Hartford ruled that the performance called for in an insurance or indemnity contract is payment by the insurer on the happening of the named contingency. General Insurance made this doctrine more specific by holding that the place of performance of an insurance contract covering property in a number of different locations was in the county where the particular property involved in the claim at issue was situated.

The language of subsection (2)(c) is taken from the opinions in the Hardenburgh and Hartford cases.

Subsection (2)(d) is the rule of Brown v. First Federal, supra. Brown dealt with a contract for the original construction of a building, but the conclusion seems inescapable that its rationale is equally applicable to repair contracts, so they are included.

Note: Not all of the cases construing the contract exception to the basic venue rule, even those beginning with Hardenburgh, are totally reconcilable. Considering their numbers, it would be a miracle if they were. This proposed section is based on the large majority of the cases, which includes all of those that are most detailed and thoroughly considered, holding that contract venue lies in the county where the principal activity is to take place. A few opinions seem to state that a contract can have more than one place of performance, depending on the part of the contract sought to be enforced or the purpose of the specific litigation. These cases ignore the statutory language referring to the county in which the contract was to be performed, and are an open invitation to continue the endless round of litigation that the contract exception has spawned in the past. The proposed section therefore presumes a single place of performance of any contract, located in the county of its principal activity.

This proposal would follow and reaffirm Hardenburgh, Brown, McNussen v. Graybeal, and Hopkins v. Scottie Homes, but reject the rule of Peenstra v. Berek, ___ Mont. ___, 614 P.2d 521, which held that a contract for sale of goods was divisible into separate performances by buyer and seller. Each was to occur in a different county--the seller was to deliver the goods in the buyer's county, and the buyer was to make payments in the seller's county. Since the seller's performance was complete and he had brought the action for payment, the Court said, venue lay in the county where the buyer was to perform by making payment. Peenstra casts doubt on the entire sequence of decisions since Hardenburgh and throws the law back into uncertainty. The proposed section rejects it and any other decisions based on a "multiple performance" concept.

Section 10. Section 25-2-102, MCA, is amended to read:

"25-2-102. ~~Tort actions~~ Torts. ~~Actions for torts may be tried in the~~ The proper place of trial for a tort action is:

(1) The county in which the defendants, or any of them, reside at the commencement of the action; or

(2) The county where the tort was committed~~, subject, however, to the power of the court to change the place of trial as provided in this code~~. If the tort is interrelated with and dependent upon a claim for breach of contract, the tort is committed, for the purpose of determining the proper place of trial, in the county where the contract was to be performed."

Explanation: This section changes the form but not the substance of the tort exception to the basic venue rule, and adds, in the last sentence of subsection (2), the essence of the Supreme Court's holding in Slovak v. Kentucky Fried Chicken, 164 Mont. 1, 518 P.2d 791 (1974).

The present language of section 25-2-102, like the identical wording of the contract exception, that the action "may be tried" in the county where the tort was committed, has contributed to the "mountain of cases" that Justice Sheehy complained of in the Clark Fork Paving case. The principal case, Seifert v. Gehle, 133 Mont. 320, 323 P.2d 269 (1958) followed the Hardenburgh interpretation--that the language was permissive and created an alternative to the basic rule that venue lies at the defendant's residence. This holding has not been seriously questioned since it was handed down. It accords with the contract cases and makes the interpretation uniform.

The problems that arose after Seifert were in fixing the situs of torts that involved no physical injury. Three times in 10 years the Supreme Court had to determine the county where torts would be held to be committed if they arose from a business relationship (Brown v. First Federal, supra; Foley v. General Motors, 159 Mont. 469, 499 P.2d 774 (1972); Slovak v. Kentucky Fried Chicken, 164 Mont. 1, 518 P.2d 791 (1974)). The common factor in all the cases was the existence of a contract between the parties, out of which the tort was claimed to have sprung.

In Brown and Foley the question was not reached because other considerations were decisive, but the issue was central and squarely presented in Slovak. The Court decided that in tort actions arising from contractual relationships, the tort has the same situs, for venue purposes, as the contract.

This proposed section codifies the rules of Seifert and Slovak.

Section 11. Section 25-2-103, MCA, is amended to read:

"25-2-103. ~~Actions involving real~~ Real property. (1) ~~Actions~~ The proper place of trial for the following ~~causes must be tried in~~ actions is the county in which the subject of the action or some part thereof is situated~~, subject to the power of the court to change the place of trial as provided in this code~~:

(a) for the recovery of real property or of an estate or an interest therein or for the determination, in any form, of such right or interest;

(b) for injuries to real property;

(c) for the partition of real property;

(d) for the foreclosure of all liens and mortgages on real property.

(2) Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties and the county so selected is the proper county for the trial of such action.

(3) ~~All~~ The proper place of trial for all actions for

the recovery of the possession of, quieting the title to, or the enforcement of liens upon real property ~~must---be commenced--in~~ is the county in which the real property, or any part thereof, affected by such action or actions is situated."

Explanation: Amended only to conform with terminology and principles set forth in sections 1 through 10 of the draft.

Section 12. Section 25-2-104, MCA, is amended to read:

"25-2-104. ~~Actions--to--recover~~ Recovery of statutory penalty or forfeiture. ~~Actions~~ The proper place of trial for the recovery of a penalty or forfeiture imposed by statute ~~must--be-tried-in~~ is the county where the cause or some part thereof arose, ~~subject-to-the-power-of-the-court--to--change the--place--of--trial,~~ except that when it is imposed for an offense committed on a lake, river, or other stream of water situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream and opposite to the place where the offense was committed."

Explanation: Amended only to conform with terminology and principles set forth in sections 1 through 10 of the draft.

Section 13. Section 25-2-105, MCA, is amended to read:

"25-2-105. ~~Actions against~~ Against public officers or their agents. ~~Actions~~ The proper place of trial for an action against a public officer or person specially appointed to execute his duties for an act done by him in virtue of his office or against a person who, by his command or in his aid, does anything touching the duties of such officer ~~must be tried in~~ is the county where the cause or some part thereof arose~~, subject to the power of the court to change the place of trial~~."

Explanation: Amended only to conform with terminology and principles set forth in sections 1 through 10 of the draft.

Section 14. Section 25-2-106, MCA, is amended to read:

"25-2-106. ~~Actions against~~ Against counties. ~~An~~ The proper place of trial for an action against a county ~~may be commenced and tried in such~~ is that county unless such action is brought by a county, in which case ~~it may be commenced and tried in~~ any county not a party thereto is also a proper place of trial."

Explanation: Amended only to conform with terminology and principles set forth in sections 1 through 10 of the draft.

Section 15. Section 2-9-312, MCA, is amended to read:

"2-9-312. ~~Venue of actions~~ Against state and political subdivisions. (1) ~~Actions~~ The proper place of trial for an action against the state ~~shall be brought~~ is in the county in which the ~~cause of action~~ claim arose or in Lewis and Clark County. In ~~addition,~~ an action brought by a resident of the state, ~~may bring an action in~~ the county of his residence is also a proper place of trial.

(2) ~~Actions~~ The proper place of trial for an action against a political subdivision ~~shall be brought~~ is in the county in which the ~~cause of action~~ claim arose or in any county where the political subdivision is located."

Explanation: Amended to conform to the rest of the bill in terminology for inclusion into Title 25, chapter 2, part 1. Section was originally enacted relating to sovereign immunity actions, but the Commission believes it should properly be moved to general venue provisions.

NEW SECTION. Section 16. Specific statutes control. The provisions of this part do not repeal, by implication or otherwise, specific statutes not within this part, designating a proper place of trial, whether or not such a designation is called venue or proper place of trial.

Explanation: This section is to reaffirm that general venue statutes, even though they are later enactments, are not intended to disturb specific code sections establishing venue. In such cases the specific statute not within Title 25, chapter 2, part 1 is controlling.

NEW SECTION. Section 18. Repealer. Section 25-2-107, MCA, is repealed.

> **25-2-107. Actions in which defendant is about to depart.** If any defendant or defendants may be about to depart from the state, the action may be tried in any county where either of the parties may reside or service be had, subject, however, to the power of the court to change the place of trial as provided in this code.

Explanation: This section is redundant and repeal prevents possible confusion. A plaintiff may file an action in any county, whether or not the defendant is about to depart the state, and the defendant may move to move the place of trial. The long-arm statutes have eliminated the necessity for a quick filing for fast service in any case.

WILDLANDS & RESOURCES ASS'N

Great Falls, MT

January 22, 1985

Representatives Bergene, McCormick, & Phillips
House of Representatives
Capitol Station
Helena, Montana

At a regular meeting of the Great Falls Wildlands and Resources Association January 17, we went on record supporting HB 265, an Act Relating to Recreational Use and Access to State waters. We strongly oppose HB 16, and the Bill introduced by Representative Cobb.

HB 265 represents a compromise arrived at by Agricultural and Recreational representatives. It provides for reasonable use and access of streams by recreationists, and it protects the rights of the landowners.

HB 16 would turn back the clock several decades and would deprive the State and its residentsof the economic and recreational benefits they presently enjoy. Recreation and Tourism is a major industry in this State. Recreational use of the States streams is a significant part of that industry.

Representative Cobb's Bill needlessly complicates the Stream Access issue by assigning responsibility to a new agency and providing for arbitrary ecological damage determinations.

We urge your support of House Bill 265.

Respectfully,

George N. Engler

George N. Engler, for
Patty Busko, President
Wildlands & Resources Ass'n.
5414 4th Ave. South
Great Falls, MT 59405

320 40th Street South
Great Falls, MT 59405

January 22, 1985

MEMBERS OF THE COMMITTEES INVOLVED:

A native of Montana, and formerly the operator of a small ranch in the Eureka, Montana area, I am now retired, and have more time to spend in recreational pursuits. As a former landowner, and a recreationist, I feel I can see both sides of the present controversy over stream access in Montana. The great majority of folks in both catagories are good, fair, and reasonable people, and should be able to agree on a bill during the current session of the Legislature that will be fair to all concerned. It would seem that this matter has dragged on too long already.

HB-16 and HB-275 are not fair bills, as both are extremely restrictive as to the use of Montana's streams. Passage of either of these bills will only lead to further confrontations between fishermen, floaters, or hunters on the one hand, and landowners on the other, and to further litigation in the courts. Neither is a fair, reasonable bill.

Therefore, I strongly oppose the passage of either of these bills, as I want to have the right, for myself, and my children after me, to float and fish all Montana rivers and larger creeks, up to the ordinary high water mark, without fear of harassment, such as led up to the past legal proceedings on stream access, culminating in the 1984 Supreme Court decisions.

To require permission from adjacent landowners to use such streams is entirely impractical, as often there is a different landowner around every bend in the stream, and some are absentee landowners impossible to contact. The refusal of one landowner would effectively put a given section of a stream off limits for recreational use.

HB-265 is a compromise bill worked out in a number of meetings between representatives of the recreational and landowner groups, after the 1984 Supreme Court decisions on stream access were thought to be too liberal by members of the latter group. There has been considerable give and take by both sides, and HB-265 seems to be as fair a bill for all concerned as can be expected.

I support HB-265 in its present form, <u>provided there are no amendments thereto,</u> and respectfully urge that you give it favorable consideration.

Sincerely,

Walt Carpenter

Walt Carpenter

(This sheet to be used by those testifying on a bill.)

NAME: Jim McDermand DATE: Jan 22, 1985

ADDRESS: 3805 4th Ave South Great Falls MT 59405

PHONE: 761-0303

REPRESENTING WHOM? Medicine River Canoe Club

APPEARING ON WHICH PROPOSAL: HB-16, HB-265, HB-275

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? _____

COMMENT: Oppose HB-16

Oppose HB-275

Support HB-265 in present Form.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: Andrea Billingsley DATE: Jan 22-85

ADDRESS: B.x 4768 Glasgow

PHONE: 367-5577

REPRESENTING WHOM? Montana Coal Bills

APPEARING ON WHICH PROPOSAL: H.B 265

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENTS: M. Chairman:

My name is Andrea Billingsley and I am President of Montana Coal Bills. I represent them in support of H.B 265.

We are not speaking as opponents or proponets of H.B 16 and H.B 275.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: Robert VanDeVere DATE: 1-22-85

ADDRESS: 2300 Wilder Helena

PHONE: 442-3252

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: HB 265

DO YOU: SUPPORT? 265 AMEND? _____ OPPOSE? _____

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: Scott G. Hilbert DATE: Jan 22, 198

ADDRESS: 6013 Hwy 12 W

PHONE: 442-8276

REPRESENTING WHOM? self

APPEARING ON WHICH PROPOSAL: HB 265

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? _____

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: Craig Madsen DATE: Jan 22/1985

ADDRESS: 1401 5th Ave So Great Falls MT 59405

PHONE: W 761-1677 H 452 8459

REPRESENTING WHOM? MT Outfitters & Guides Assoc.

APPEARING ON WHICH PROPOSAL: HB 265

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENTS: I will send you a typed ~~ver~~ statement of the oral statement today — (I was asked to speak this am thus a lack of typed testimony)

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: RAY PRICE DATE: 01/22/85

ADDRESS: 1480 St. Ann

PHONE: (406) 721-5936

REPRESENTING WHOM? SELF

APPEARING ON WHICH PROPOSAL: [redacted] H.B. 265

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENT:

The best alternative available is to pass no bill at all with respect to stream access, but if you feel one is necessary, this is the only one that is acceptable.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: Richard C. Parks DATE: 1/22/93

ADDRESS: Box 196

PHONE: 848-7314

REPRESENTING WHOM? Fishing & Floating Outfitters Assoc. of MT

APPEARING ON WHICH PROPOSAL: HB-16, HB-265, HB-275

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? _____

COMMENTS: Oppose HB-16, HB-275

Favor HB-265

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: Lowell Hildreth DATE: 1-22

ADDRESS: 17500 Hwy 91 S.

PHONE: 683-2188

REPRESENTING WHOM? SELF

APPEARING ON WHICH PROPOSAL: 265

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? X

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: Donald Alley DATE: 1-22-85

ADDRESS: 321 1st Ave E Kalispell MT 59901

PHONE: 755-1911

REPRESENTING WHOM? Trout Unlimited

APPEARING ON WHICH PROPOSAL: HB 265

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: Charles Hoos DATE: 1/22/15

ADDRESS: 8360 Springhill Comm. RD

PHONE: 586-5554

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: ACA

DO YOU: SUPPORT? _____ AMEND? X OPPOSE? _____

COMMENTS: will send written testimony - non-speaking

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

1-22-85 HB-265

Statement presented by James E. Taylor
221 W. Hayes
Bozeman, Mt. 59715

I wish to go on record as being in favor of The House Bill 265 regarding Public Stream access.

I have fished and boated on montana waters more than 59 years. Have not fished any farther east than Big Timber area of Yellowstone River.

Recognizing landowners have a very grave concern on this matter of public access as causing some distinct damage possibilities, would like to kindly suggest that more public access areas be purchased so as to eliminate or at least cut down such possible damage.

The bill asking for 1.1 Million dollars to erect a visitors center and administration bldg at Giant Springs on Missouri River at edge of Great Falls seems could be held back and use that sum of money for purchasing more stream access instead.

I belong to many outdoor groups. I.E. montana Wildlife Federation, Natl WL Fed.

Natl assoc. Fish & Wildlife Game ~~Refuges~~ Refuges,

Gallatin Sportsmans assoc. – Bozem
Flathead Wildlife Inc – Kalispell
Audubon Soc, Mont Wilderness assn
Natl Wilderness Society, International
assn Fish & Game agencies, Ducks
unlimited but am only writing for
Montana Wildlife Federation at this time.

Thank you
James E. Taplin

P.S. I was born in Livingston, Mt. in 1917
and worked 41 years for BN Inc &
predecessor, NPRy as operator and
Freight & Ticket agent retiring at
Whitefish, Mont Jan 1978. Since I worked
at about 27 stations I was privilged
to fish many more streams that
the average person does and never
had any kind of contacts with
any landowner that were anything
but friendly.

(This sheet to be used by those testifying on a bill.)

NAME: Richard W Josephson DATE: 1-22-85

ADDRESS: Box 1047 Big Timber, Mt. 59011

PHONE: 932-4284 932-5440

REPRESENTING WHOM? Self + Sweet Grass Preservation Assoc.

APPEARING ON WHICH PROPOSAL: House Bill 16

DO YOU: SUPPORT? X AMEND? X OPPOSE? _____

COMMENT: See written testimony —

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: Dan Heinz DATE: 1/22/85

ADDRESS: 107 W Lawrence

PHONE: 442-9117

REPRESENTING WHOM? Montana Wildlife Federation

APPEARING ON WHICH PROPOSAL: HB 265

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENT: See prepared Statement

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: GENE VAN OOSTEN DATE: 1/22/85

ADDRESS: Box 216 Reed Point, MT. 59069

PHONE: 326-2114

REPRESENTING WHOM? Montana Cattlemen's Association

APPEARING ON WHICH PROPOSAL: H.B. 265 Reamt + Marks

DO YOU: SUPPORT? ✓ AMEND? ✓ OPPOSE? _____

COMMENTS: See prepared statement

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: Lorents Grosfield DATE: Jan 22/98

ADDRESS: Melville 1212

PHONE: 406-537-4489

REPRESENTING WHOM? Sweet Grass Preservation Association

APPEARING ON WHICH PROPOSAL: HB16, HB265, HB275

DO YOU: SUPPORT? _____ AMEND? X OPPOSE? _____

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: Norm Starr DATE: Jan 22-85

ADDRESS: Melville Mont.

PHONE: 537-4483

REPRESENTING WHOM? Stan Rench

APPEARING ON WHICH PROPOSAL: 16

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: Franklin Grosfield DATE: Jan, 22-85

ADDRESS: Box 169 Big Timber MT 59011

PHONE: 932-4149

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: HB 16, 265, 275

DO YOU: SUPPORT? _____ AMEND? X OPPOSE? _____

COMMENT: will submit written statement to secretary

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: Channing W. Welin DATE: JAN 21, 85

ADDRESS: 316 McLeod Route Big Timber

PHONE: 932 - 4360

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: Stream Access

DO YOU: SUPPORT? _____ AMEND? X OPPOSE? _____

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: Chuck Rein DATE: 1-22-85

ADDRESS: Box 174 Melville Rt. Big Timber MT 59011

PHONE: 537-4485

REPRESENTING WHOM? Sweet Grass Preservation Association

APPEARING ON WHICH PROPOSAL:

DO YOU: SUPPORT? _____ AMEND? H.B. 16 OPPOSE? 265 & 275

COMMENTS: I have submited written policy to the committee. My comments are not specific to any of the bills but deal on concept only. I do support the draft bill submited by Rep. Orval Ellison.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: Hank Goetz DATE: 1/22/85

ADDRESS: Lubrecht Forest, Greenough, MT 59836

PHONE: 244-5589

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: HB 16

DO YOU: SUPPORT? _____ AMEND? X OPPOSE? _____

COMMENTS: Support all of HB 16 with these additions

(1) define reasonable river related recreation to fishing, floating swimming and waterfowl hunting / motorized boating as authorized

(2) ~~AA~~ Amend Sec 3 to say that all land between high water marks will be open on those streams that reasonably will sustain recreational activity as described above.

(3) New Section: direct Fish & Game in conjunction with Soil Conservation Districts, landowners & recreationists to determine the streams which should be open for river related recreational activities

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: BERNIE HEDRICK DATE: 1/22

ADDRESS: Big Timber MT.

PHONE:

REPRESENTING WHOM? SELF AS SPORTSMEN

APPEARING ON WHICH PROPOSAL: 265 275 16

DO YOU: SUPPORT? _____ AMEND? ✓ OPPOSE? _____

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

DATE 1/22/05

COMMITTEE ON HOUSE JUDICIARY

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
Joel A. Shouse Box 337 Bozeman, MT 7900 Leverich Rd.	Self	265	X	
Jeffrey M. Shouse Bozeman, MT	Self	265	X	
Jerry Marley	Coalition of Forest Users	265	X	
Daniel McDermand	Self	265	X	HB 16 HB 275
Jim McDermand	Medicine River Canoe Club	265	X	HB-16 HB-275
Craig Madsen	Montana Outfitters & Guides Assoc	11	X	
JOHN THORSON	SELF	265	✓	HB 16 HB 275
ALLAN W CAMPBELL	SELF	265	265	HB 16 HB 275
James Rivers	SELF	265	X	OPOSE 16-275
[illegible]	St Council of Car	265	X	
Bob Jackson	[redacted] FEDERATION OF FLY FISHERS	265	X	
Greg Hill	SELF	265	X	
Carol Mosher	Montana Cow Belles	265	X	
BILL ASHER	APA - AGRICULTURAL PRESERVATION ASSN	265	✓	
K. M. Kelly	Mont. Water Develop. ASSN Mont IRRIGATORS, INC	265	✓	
John R Wilson	Rancher	275, 265, 16	[illegible]	
Mike Menk	Rancher	16		
Don McKinney	Rancher	265	✓	
Averill Kelley	"	265	✓	
Jeny Dodd	"	265	✓	
Gordon Clare	"	265	✓	
Richard & Debbie Anderson	"	265	✓	
TERRY WELLS	SELF	265	✓	HB 16 HB 275
ED KLEIN	SELF	265	✓	HB 16
Benjamin Goodwin	"	265	✓	HB 16
Paul S. Roos	Self	265	✓	

(Please leave prepared statement with Secretary.)

DATE 1/22/85

COMMITTEE ON HOUSE JUDICIARY

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One Support	Oppose
Steve Allen	Self	265/16/275	?	?
Charles House	Self	269/265/16	?	?
David A. Freeman	Freeman Ranch Inc.	269/265/16		✓
Don Price	Mont Wildlife Fed	265	X	
[illegible] Grosfield	SCPA	265 275 16		
Chuck Rein	SCPA	"		
[illegible]	SGPA	"		
Bill Pruitt	Self	"		
Ted Lucas	Self	265		✓
[illegible]	SWMSA	16/265/275	16	265 275 [illegible]
Frank Moritz	Self	16/265/275	16	
Land Lindbergh	Self	16, 265, 275	16 –	
Franklin Grosfield	Self	16 265 275	with Amendment	
Pete Test	T.U.	265	Yes	Oppose 16 & 27[illegible]
Michele D Mitchell	Beartooth Paddlers - Billings	265	X	Oppose 16 + 27[illegible]
Walt Carpenter	Self	265	X	Oppose 16 + 2[illegible]
Donald Alley	N.W. Montana Trout Unlimited	265	X	Oppose 16 & 2[illegible]
James A Disimore	Great Falls Self	265	X	Oppose 16 & 27[illegible]
Wayne L Lilleunt	Self	265	X	16 & 27[illegible]
Larry L. Havemann	Self	265	X	Oppose 16 + 2[illegible]
Tom Bugni	Coalition For Stream Access	265	Yes	Oppose 16 – 2[illegible]
Tom Pierce	Skyline Sportsman Assn.	265	Yes	Oppose 16-2[illegible]
[illegible]	~~[illegible]~~ W. [illegible] - Grange Cattle Feeders	265	Yes –	
[illegible] L. Michnevich	Self	265	X	16 + 275
Tony Schoonen Jr.	MWF	265	X	16 & 275
J. F. Thomas	Anaconda Sportsmen Club	265	X	
Robert Byrne	Self	265	✓	16 + 2[illegible]

DATE 1/22/85

COMMITTEE ON HOUSE JUDICIARY

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One Support	Oppose
John S Miller	Trout Unlimited - Butte	265	✓	
Bill Cain	TU Butte	265	✓	
Don Berg	Rancher	265	✓	
Ray Price	Self	265	✓	
Kevin Wagner	Self	265	✓	
[illegible]	Outfitter	265	✓	
[illegible]	TU Helena	265	✓	
William [illegible]	Butte	265	✓	
[illegible] Bugni	Butte	265	✓	
[illegible]	Butte	265	✓	
Joe [illegible]	Butte	265		
Tom Stelling	Self Rancher	265	✓	
[illegible]	Coalition Stream Access	265	✓	
[illegible]	Contact Mining Co.	265	✓	
[illegible] Markovich	Stream Access	265	✓	
[illegible] Pelini	Butte	265	✓	
R V Tilman	TU Butte	265	✓	
James E Joplin	Mont Wildlife Fed	265	✓	
Doug McClelland	Self	265	✓	
S Taylor	self	265	✓	
Frank C. Thompson	self	275	✓	
Richard [illegible]	self	265	✓	
[illegible] Holden	self	265	✓	
[illegible]	Skyline Sportsmen	265	✓	
Larry [illegible]	DNRC	275		✓
[illegible] Ross	Walleyes Unlimited	265	✓	

DATE 1/22/85

COMMITTEE ON HOUSE JUDICIARY

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One Support	Oppose
Jack Schilla	Outfitter + M.O.G.A	265	✓	
Scott G. Hibbard	rancher	265		
J W Rehberg	Citizen	265	✓	
Dennis Hemmer	Dept of State Lands	265	✓	
Tim McLean	Citizen	265	✓	
Dan Patterson	Citizen	265	✓	
Mark Merrick	"	265	✓	
Kevin D. [illegible]	Missouri River Flyfishers	265	✓	
Wm Menahan	Self -	265	✓	
R. E. Saunders	Self	265		✓
Mike Callahan	City		✓	
James F. McCarthy	City	265	✓	
Stan Moody	Montana Dream Coalition	265	✓	
Eugene Cantley	Self	265	✓	
Karen E. Cantley	Self	265	✓	
Susan Cottingham	Sierra Club - Mt. Chpt.	265	✓	
Gene Van Oosten	Montana Cattlemen's Assn.	265	✓	
Gene Chapel	Montana Farm Bureau	265	✓	
Lorraine [illegible]	Montana Farm Bureau	265	✓	
Bernie Swift	Ravalli Co. Rep Dist #64	265 & 275	✓	
Gerald A. Edwards	Self	265	✓	
Mary Wright	MT Trout Unlimited	265		
Steve Holybeck	Self	265		
Gary Swenson	Self	265	✓	

DATE 1/22/85

COMMITTEE ON HOUSE JUDICIARY

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One Support	Check One Oppose
Mrs Don Hilger	Rancher	275 265 16	✓	
Don Hilger	Rancher	"	✓	
Andrea Billingsley	Mont Cow Belles	265	✓	
Evelyn Dodd	Mont. CowBelles	265 16	✓	
Mary Clare	Montana CowBelles	265 16	✓	
Dave Donaldson	Mt. Assoc of Cons. Dist	265 275		
Jean Parsons	Rancher			
Gary J. Abel	GTF Kayaking Club	265	✓	
Barney AE	Outfitter			
Lester Wessel	Sheridan			
John Maki	John Maki Outfitters	265	✓	
Lawna Lubinus	WIFE	265	✓	
Jan Dufour	T.U. Butte	265	✓	
Harold Matthews	USGA	265	✓	
Tony Murphy	MT. Farmers Union	265	✓	
Ralph Holman	self.	16 265	✓	
F.N. GANNON	SELF	265	✓	
Shirley K. Gannon	"	"	✓	
L.F. Carson	Trout Unlimited Self	265	✓	
George Grunkfeld	Self & Prickly Pear Sportsmen	265	✓	
Jimmie E. Eldred	USGA	265	✓	
Mons Teigen	Mt. Stockgrowers	265	✓	
William E. Rudolph	Self	265		16 275 265
Steve A Kelly	Self	265		16 275 265
John Bailey	Self	265	✓	
R.J. Foukal	Self	265	✓	