MINUTES FOR THE MEETING
JUDICIARY COMMITTEE
MONTANA STATE
HOUSE OF REPRESENTATIVES

February 1, 1985

The meeting of the Judiciary Committee was called to order by Chairman Tom Hannah on Friday, February 1, 1985 at 8:00 a.m. in Room 312-3 of the State Capitol.

ROLL CALL: All members were present.

CONSIDERATION OF HOUSE BILL NO. 476: Rep. Spaeth, sponsor of HB 476, testified before the committee. This bill expands the jurisdiction of the district court in the case of all misdemeanors. At the present time, there are some misdemeanors that are handled only in district court. They are referred to as "high misdemeanors" in the legal profession. The rest of the misdemeanors are handled in the justice of the peace court. This bill would allow the justice of the peace court to handle all misdemeanors. The major impact that will be felt from this bill would be as far as third DUI's. Third DUI's are now handled in district court as opposed to J.P. court. This bill was not designed to lower the type of penalties or the impact of third DUI's. In fact, he feels that it will have the contrary type of approach. He feels the bill will force a stiffer penalty and will allow the J.P. court a little more time and effort to continue to work with those people who have a third DUI.

Jim Jensen, representing the Montana Magistrates Association, testified in support of the bill. He feels that justice courts have a tendancy to take their work a little more seriously in these areas and work more closely with people in order to correct some of their problems.

There being no further proponents or opponents, Rep. Spaeth closed.

The floor was opened to questions from the committee.

Rep. Addy suggested striking on page 1, line 22 the rest of of the paragraph after misdemeanors. He feels that this would yield the same result that Rep. Spaeth is looking for. Rep. Spaeth agreed with that proposal.

Rep. Spaeth pointed out that this bill would provide the prosecutor with more discretion as to where he wishes to file a particular case. It doesn't necessarily take it away from district court but rather puts it in the hands of the prosecutor to use his discretion.

There being no further discussion, hearing closed on HB 476.

CONSIDERATION OF HOUSE BILL NO. 521: Rep. Spaeth, co-sponsor of this piece of legislation, testified in support of its passage. He told members that this bill is a different type of approach to the problem of DUI. It grew out of Rep. Spaeth's frustration with this problem.

Presently, we don't have a system that deals with people who are committing the fourth DUI offense within a five year period. This bill would make conviction of a fourth DUI a felony. By the time a person has committed his fourth DUI, everyone has given up hope in dealing with his problem. Rep. Spaeth feels that we are not dealing adequately with this type of person by just allowing him to go back out in the streets again. He feels that we are playing "Russian Roulette". Rep. Spaeth informed members that individuals who have been convicted of a fourth DUI are not that uncommon. He feels that this bill is an approach to deal with this problem.

There were no further proponents or opponents. Rep. Spaeth made a brief closing comment.

Rep. Gould stated his frustrations with the judicial system in that he feels that judges do not uphold the law in these DUI cases by not requiring these convicted people to serve their time in jail.

Rep. Spaeth stated that he is not critical of the judges at all. He pointed out that judges deal with different kinds of problems. He said that sometimes misdemeanor DUI's are not the most serious kinds of cases that the judges decide.

Rep. Montayne suggested that local work camps be adopted somehow into the language of this bill. He pointed out some of the problems of the overcrowded prison and the overcrowded jails counties are faced with.

Rep. Spaeth agreed that this is a major problem to be concerned with.

Rep. Keyser asked Rep. Spaeth if he had any figures available that would give the committee an idea as to how many people have actually been convicted of fourth and subsequent DUI's. Rep. Spaeth said that he did not have any such figures, but he did call a few counties and asked them the same question. In Carbon County last year, there were three cases. In Yellowstone County, there were approximately 20 cases. Rep. Spaeth stated that we're looking at approximately 100 cases that fall into this category per year.

There being no further discussion, hearing closed on HB 521.

CONSIDERATION OF HOUSE BILL NO. 498: Rep. Orval Ellison, chief sponsor of HB 498, testified before the committee. He called the committee's attention to page 33 of the 1984 Subcommittee's Interim Report where it says, "'the capability of use of the waters for recreational purposes determines whether the waters can be so used.'" He suggested that the committee keep this sentence in mind throughout the hearing.

Phil Strope, a Helena lawyer representing the Sweetgrass County Protective Association, testified in support of this bill. Mr. Strope said that HB 498 is much closer to HB 16 than are the other two water access bills -- HB 265 and HB 275. He feels that HB 265 may have outlived its usefulness. Strope discussed the difference between HB 498 and HB 265 stating that HB 498 is a bill that fleshes out what the supreme court said about the use of public waters as they travel through private lands. It also says in HB 498 where the public's right to use that water begins and ends and where it is that the abiding property owner's rights begin and end. In HB 265, there is an effort to extend the privilege of getting on water to be a privilege that allows someone who has a right to get on water to then go on to land and do things on land because of that water right. He feels that there is an effort of the proponents of HB 498 to go far beyond the supreme court case. Mr. Strope reviewed some of the sections of the supreme court's opinion and commented accordingly. He pointed out that the court's opinion states only that the use of state waters is dictated by the actual water level. So as long as there's water, the right exists. Mr. Strope further stated that he doesn't see anything in Judge Haswell's opinion that indicates the public's right to use water should include with it an additional right to use vehicles, to use the shore line to camp, etc. What Judge Haswell is saying is that the public has a right to water so long as there is water.

Richard Josephson, appearing on behalf of the Sweetgrass County Protective Association, offered testimony in suport of HB 498. A copy of his testimony was marked Exhibit A and is attached hereto. He feels that HB 498 expands HB 16. HB 498, however, makes no mention of portaging.

George M. Rossetter appearing from Fishtail in Stillwater County, offered testimony in support of HB 498. He informed the committee that members of the agricultural alliance of Stillwater County do not support HB 265.

However, Mr. Rossetter further stated that HB 498 is a bill that he can personally support. He feels that many of the faults of HB 265 have been remedied in HB 498.

Hank Goetz, appeared on behalf of himself and Land Lindberg, to state his support for HB 498. He said that both he and Mr. Lindberg are residents of the Blackfoot River Valley in western Montana. He said that they prefer HB 498 for the following reasons. We think that this bill follows very closely the supreme court's intent in defining the recreational use of surface waters. The bill specifically states that the recreational use must be water related as does the use of land between the high watermarks. He feels that any classification of recreation and water use in Montana should be based on this type of concept as compared to navigability standards. He stated his strong support for section 7 of the bill. However, he did mention a few areas in HB 498 that may require some attention. He specifically referred to section 2, subsection 3 and section 10, line 12. We suggest that "judicially" be inserted before the word "perfected" to define it a little more clearly.

Bob Saunders, appearing on behalf of himself, stated his support for HB 498 and also mentioned that he did not support any of the previous bills on this subject.

Charles Howe, a rancher from Gallatin County, urged passage of HB 498.

Jack Salmond from Choteau, stated his support for HB 498 and his opposition to HB 265.

Franklin Grosfield, a rancher from Sweetgrass County, stated his support for HB 498.

David Freeman, from Augusta, stated his support for HB 498. A copy of his written testimony was marked as A-1 and attached hereto.

Norm Starr stated his support for HB 498. A copy of testimony was marked as A-2 and is attached hereto.

Windsor Wilson, a rancher from McLeod, Montana, appeared before the committee and offered testimony in support of HB 498. He feels that HB 498 is the bill that will better satisfy all the people of Montana and will not expand the supreme court decision. A copy of his written testimony was marked as A-3 and attached hereto.

Mike Micone, representing the Western Environmental Trade Association, stated that the association has taken a strong position on private property rights, and for that reason they support HB 498.

Ted Lucas from Highwood, Montana, stated his support for HB 498.

Terry Carmody, representing the Montana Association of Realtors, wishes to go on record as supporting HB 498.

Paul Brunner, rancher from Powell County, feels that HB 498 is the only tool that really addresses what a person may or may not do on private property. The only question he really has with the bill is the question of what is really open to the public in terms of water. He feels that this needs to be addressed. He feels that HB 498 does a better a job of protecting the landowner's rights than does any of the other bills.

Lorents Grosfield, cattle rancher from Big Timber, Montana, appeared before the committee and offered testimony in support of HB 498. He feels that this particular bill is a much more reasonable approach to the stream access issue than HB 16 or HB 275 or especially HB 265. A copy of his written testimony was marked as Exhibit C-1 and attached hereto.

Paul Hawks from Melville, Montana, wishes to go on record as supporting HB 498. His written testimony was marked C-2.

Pehr Anderson, rancher, stated his support for HB 498. He said he feels this bill has the least problems of any of the water access bills before the committee. He stated that he doesn't feel that big game hunting should be allowed to go on.

Dick Russell from Wilsall stated his support for HB 498 saying that this bill is very clear and understandable.

Also testifying in support of HB 498 was Chuck Rein, a rancher from Melville, Montana. A copy of his testimony was marked as Exhibit B and attached hereto.

OPPONENTS: Jim Flynn, director of the Fish, Wildlife and Parks Department, testified in opposition to HB 498. He informed the committee that the department supports HB 265 because they feel it strikes a reasonable balance between both landowners and recreationalists.

First of all, HB 498 would adopt a test of public access which is essentially a federal test and would restrict public use of the banks and beds of all streams which

have not met that test. As a result, it would appear to be in conflict with the supreme court's reliance on Article 9, section 3 of the constitution. Mr. Flynn also stated that the standard by which a stream can be declared closed because of damage is so broad as to be almost indefinable. Any level of use may result in a trespass. He stated that this situation is largely similar to the public use of county roads. A copy of his written testimony was marked Exhibit B-1.

Mary Wright, spokesperson for the Montana Council of Trout Unlimited, spoke in opposition to HB 498 for the reasons outlined in her written testimony which was marked as Exhibit C.

Jim McDermand, representing the Medicine River Canoe Club, spoke in opposition to HB 498. A copy of his testimony was marked as Exhibit D and attached hereto.

Walt Carpenter, representing himself, spoke in opposition to HB 498. He further stated that he supports passage of HB 265 as originally drafted. A copy of his testimony has been marked as Exhibit E and is hereby attached.

Gene Cantly who spoke on behalf of an ever increasing group of sportsmen stated that he and others cannot support any legislation which attempts to restrict the recreational use of our rivers and streams. A copy of his testimony was marked as Exhibit F and is hereby attached.

Hal Price, representing the Montana Wildlife Federation, spoke in opposition to HB 498, but he stated that he does support the compromise bill, HB 265.

Ron Waterman, representing the Montana Stockgrowers Association and members of the agricultural industry alliance, spoke against HB 498. He feels that the bill benefits few and those few for not very long. He feels the bill should be recommended to the subcommittee for further investigation. He stated his concern in particular of section 3 of the bill. He feels that the passage of HB 498 is almost the promise of the passage of no legislation at all.

Allan Eck, appearing on behalf of the Montana Farm Bureau Federation, stated that they do not oppose HB 498 in its entirety. He does, however, feel that HB 498 should be considered in the subcommittee studying these water access bills. A copy of his testimony was marked as Exhibit G and attached hereto.

Jo Brunner, representing the Montana Cattlefeeders, the Montana Cattlemen, and the Montana Grange, appeared and stated her opposition to HB 498. A copy of her testimony was marked as Exhibit H and is attached hereto.

Chris E. Jauert testified in opposition to HB 498. He feels the bill is one-sided and favors the landowners. A copy of his testimony was marked as Exhibit I and is attached.

Rep. Robert Marks also appeared before the committee and stated that although he doesn't particularly oppose HB 498, he feels that the bill should be considered in the subcommittee. He feels the best parts of HB 498 should be preserved and incorporated in the final bill to be considered.

Kevin Krumvieda, spokesman for the Missouri River Fly-fishers, stated his opposition to HB 498. A copy of his testimony is attached as Exhibit J.

There being no further opponents, Rep. Ellison closed. Rep. Ellison stated that a lot of people represented by Mr. Waterman have not seen HB 498. He submitted a letter written by Mr. Waterman to Bill Asher which was marked as Exhibit K. He pointed out language in particular which was referred to in this particular exhibit.

The floor was opened to questions at this time.

Rep. Hannah asked Mr. Josephson to explain the practical difference of the effect of the definitions of the high water marks between HB 498 and HB 265.

Rep. Grady asked Mr. Carmody what effect will this whole area have on real estate prices. Mr. Carmody stated that the realators are concerned with the erosion of property rights. He stated that anytime there is a property right erosion, a reduction in the cost of property follows.

There being no further questions, the hearing closed on HB 498.

Rep. Rapp-Svrcek commented that the committee understands the problems involved here and they are doing everything possible to address the issue. However, he doesn't feel threats from any particular person or group will contribute a thing to their cause.

Rep. Hannah informed the committee that HB 498 is referred to the subcommittee for further consideration.

EXECUTIVE SESSION: An executive session was called at 10:45 a.m.

ACTION ON HOUSE BILL NO. 476: Rep. Keyser moved that HB 476 DO PASS. The motion was seconded by Rep. Hammond.

Rep. Keyser moved to adopt the amendment proposed by Rep. Addy during earlier discussion. Rep. Addy pointed out that he didn't think the amendment was appropriate any longer. After further discussion, Rep. Keyser withdrew his motion.

There being no further discussion, and the question having been called, the motion for HB 476 to pass carried with Rep. Mercer dissenting.

ACTION ON HOUSE BILL NO. 521: Rep. Hannah moved that HB 521 DO PASS. The motion was seconded by Rep. Gould and discussion followed.

Rep. Keyser stated his concern for the number of people who would be sent to the state prison if the bill passed. He said 100 people would be added to the state prison, and he doesn't feel that there is appropriate room to accomodate them. He stated that the county jails are also packed.

Rep. Brown stated that he is also concerned with the prison overcrowding. These people would have to be provided with "protective custody." He feels that certainly will place a substantial burden on the Department of Institutions.

Rep. O'Hara moved that the bill be amended to restrict imprisonmen to county jails instead of the state prison. The motion was seconded by Rep. Hannah.

Rep. Kruegar stated his opposition to the amendment. He said that the amendment will change the whole intent of the bill.

Rep. Hannah addressed this bill as a co-sponsor. He informed members of the committee that there is a large number of non-compliant DUI offenders. They are definitely a threat to society and must be dealt with.

Rep. Brown stated that he feels we are getting way out of line by placing a person who has been convicted of a fourth DUI in the state penitentiary.

Rep. Darko said that alcoholics suffer enough without sending them to prison, too. She doesn't think that

sending them to prison will benefit anyone.

Rep. Brown made a substitute motion to kill HB 521. He also stated that he doesn't think it would be worth the committee's time to look at what is on the books concerning mandatory rehabilitative programs. The motion for a DO NOT PASS was seconded by Rep. Hammond.

Rep. Rapp-Svrcek feels strongly that punishment is warranted with these habitual offenders.

Rep. Gould commented that a judge cannot sentence a person directly to a pre-release center. There were other suggestions and comments made pertaining to pre-release centers.

Rep. Grady spoke in favor of Rep. Brown's motion to kill the bill. He doesn't feel that jail will benefit habitual offenders.

It was Rep. Miles' suggestion that the committee should look into other areas to help solve this problem.

Following further discussion, the question was called and the motion was voted upon. Rep. Hannah and Gould voted against the motion. The motion for a DO NOT PASS was carried 16-2.

Rep. Brown moved that a subcommittee be appointed to draft legislation dealing with the fourth and subsequent DUI statute. The motion was seconded by Rep. O'Hara. The subcommittee would be required to look into pre-release centers and any other kind of corrective measure that would benefit people with drinking problems. The motion carried unanimously.

Rep. Hannah officially appointed Reps. Bergene (chairperson), Darko, O'Hara, Grady, Rapp-Svrcek and Miles to this subcommittee.

Also, Rep. Mercer moved that a joint resolution be drafted requesting the Montana Supreme Court to look into the child abuse issue and review the rules accordingly. (This motion arose out of interest for Rep. Bradley's bill -- HB 69 which was killed on the floor.)

ADJOURN: Rep. Keyser moved that the meeting adjourn. The motion was seconded, and the meeting adjourned at 11:20 a.m.

Tom Hannah

REP. TOM HANNAH, Chairman

DAILY ROLL CALL

HOUSE JUDICIARY COMMITTEE

49th LEGISLATIVE SESSION -- 1985

Date 2/1/85

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	✓		

STANDING COMMITTEE REPORT

February 1 19 85

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration HOUSE Bill No. 521

FIRST reading copy (WHITE color)

INCREASE PENALTY FOR FOURTH OR SUBSEQUENT DUI CONVICTION

Respectfully report as follows: That HOUSE 521 Bill No.

DO NOT PASS

~~DO PASS~~

REP. TOM HANNAH Chairman.

STATE PUB. CO.
Helena, Mont.

COMMITTEE SECRETARY

STANDING COMMITTEE REPORT

February 1 19 85

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration HOUSE Bill No. 476

FIRST reading copy (WHITE color)

GIVING JUSTICES' COURTS JURISDICTION WITH DISTRICT COURTS IN MISDEMEANORS

Respectfully report as follows: That HOUSE Bill No. 476

DO PASS.

REP. TOM HANNAH Chairman.

STATE PUB. CO.
Helena, Mont.

COMMITTEE SECRETARY

Exhibit A
2-1-85
HB 498

DATE: February 1, 1985

TO: House of Representatives, Judiciary Committee
Montana 1985 Legislature
Written testimony in favor of House Bill 498

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

House Bill 498 (Ellison) was drafted at the request of Rep. Ellison (Rural Park and Sweet Grass Counties). This testimony is in favor of House Bill 498.

ORDINARY HIGH-WATER MARK:

The definition of "ordinary high-water mark" in House Bill 498 uses the definition from the Soil Conservation Districts, which definition has been used successfully, the past several years, in administering The Natural Streambed and Land Preservation Act of 1975. [Sec. 75-7-101, M.C.A. and following sections.]

To this definition is added a sentence excluding flood plains and flood channels from being within the ordinary high-water mark except when they carry sufficient water to support fishing or floating.

RECREATIONAL USE OF SURFACE WATERS.

The definition of "recreational use of surface waters" emphasizes the water related recreational activities and confines the activity within the ordinary high-water mark of the stream.

The definition of recreational use of surface waters prohibits [except on public land or when authorized by state or federal law] the following:

(i) hunting other than waterfowl hunting;

(ii) overnight camping;

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

(iv) other activities that are not primarily water related pleasure activities.

These provisions are in the bill to protect the resource. The Department of Fish, Wildlife and Parks could open certain areas where

hunting was safe or where overnight camping would not cause harm to the land or water.

Many areas of the floatable rivers are technically open to big game hunting. In many residential areas or in areas where ranchhouses exist and livestock graze the river bottoms, hunting with a high-powered rifle is dangerous. There are some areas where, following a proper study, the Department could safely open hunting.

OVERNIGHT CAMPING SHOULD TAKE PLACE OUT OF THE STREAMBED. Many of the streams and rivers of this State are sources of water for our communities. Extreme care should be taken to protect these water sources and the beds and banks of the streams from the litter and pollution often evidenced from overnight camping.

Section 2 of House Bill 498 provides:

Landownership: This section allows recreational use of surface waters without regard to ownership of the land underlying the waters. This concept was affirmed in the Supreme Court cases and is presently with us, for better or worse.

Diverted Waters: The public's right to make recreational use of surface waters that are capable of recreational use does not include the right to make recreational use of waters while they are diverted away from a natural water body for beneficial use.

This provision, in some form, appears in all of the bills before the House and apparently is agreed upon by those following the legislation.

Access: This provision also provides the right of the public to make recreational use of surface water, that are capable of recreational use, and does not grant any easement or right to the public to enter into or cross private property in order to use the waters for recreational purposes.

The Hildreth case held: "The public does not have the right to trespass over private property in order to reach State-owned waters."

The Curran case held: "That the public does not have the right to enter into or trespass across private property in order to enjoy the recreational use of State-owned waters."

Section 3 of House Bill 498 provides for the use of land between the ordinary high-water marks.

Brief Summary: Sec. 70-16-201, M.C.A., provides as follows:

> "Except where the grant under which the land is held indicates a different intent, the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

The Curran and Hildreth cases affirmed an easement in the public between the ordinary high-water marks to use the surface waters for water related recreation.

In Curran the Supreme Court held: "That the public's right to use the State-owned waters is restricted to the area between the high-water marks and may only cross private property in order to portage around barriers in the water; the right to portage must be accomplished in the least instrusive manner."

In Hildreth the Supreme Court held: "The Beaverhead River is navigable for recreational purposes and the public has the right to use its beds and banks up to the ordinary high-water mark with limited right to portage across private property in order to by-pass barriers in the waters."

The District Court's findings of fact and conclusions of law in the Hildreth case stated, ".... Plaintiff [The Montana Coalition for Stream Access, Inc.] is entitled to the entry of a permanent injunction declaring the Beaverhead River subject to public access up to the high-water mark as it passes through lands of Defendant [Hildreth] and restraining Defendant [Hildreth] from interfering with members of the public in floating, so long as members of the public stay within the ordinary high-water mark. This is subject to the right of the public to portage over or around the bridge located on Defendant's [Hildreth's] property in the least intrusive manner." (Emphasis supplied.)

Section 3(1) of House Bill 498 allows the public to use the land between the ordinary high-water mark of surface waters that are capable of recreational use and that satisfy the federal navigability test for State streambed ownership.

Section 3(2) of House Bill 498 restricts the use of the land between the ordinary high-water mark on all other streams to the following:

(a) The public may use the land between the high-water mark on other streams when such use is unavoidable and incidental to the right of the public to make recreational use of the surface water; or

(b) The owner of the land or his authorized agent grants permission to use the land.

This section goes on to define "use of the land is unavoidable and incidental" only when the use is temporarily necessary.

(a) To accomplish the recreational use of the surface waters. [i.e. fishing, boating, etc. See, Section 1(3) above.]

(b) Purposes of safety.

In my opinion, these sections codify what is really intended, by most people, and these provisions do not significantly change the "Public Trust" easement discussed in the Hildreth and Curran cases.

Portage: House Bill 498 does not discuss portage.

The Hildreth and Curran cases may be limited to their facts on the portage issue. Any expansion of the portage right, above the high-water mark, may be a "taking" of private property without just compensation.

Article II, Section 29, of the Montana Constitution provides:

> Eminent Domain: Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails."

The 1979 edition of Nichols on Eminent Domain, Section 5.7913, is attached to this testimony. Please note that there is authority for the proposition that there is no right in individual citizens, as members of the public, to enter upon riparian land as incidental to navigation. The article states: "Consequently, such right cannot be established by law except by the exercise of eminent domain."

LAND-OWNER LIABILITY:

House Bill 498, 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 was injured.

PRESCRIPTIVE EASEMENT:

A. House Bill 498 contains basically the same provisions as House Bill 16. This bill provides 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 RECREATIONIST'S 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:

House Bill 498 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 expand the Montana Supreme Court decisions. House Bill 498 keeps the uses water related and is worthy of your consideration. House Bill 498 preserves much of the hard work of the Interim Committee and preserves the format used by the Interim Committee. Your final decision will have great impact on property rights and values; and upon the relations between landowners and recreationists.

Respectfully submitted,

Richard W. Josephson

Attachment: Nichols on Eminent Domain, §5.7913 (1979)

exercise of these rights conditional upon the issuance of a license and the payment of a fee, merely for the purpose of raising revenue.[12]

§ 5.7913 Public rights do not extend above high water mark.

By the civil law, banks of a navigable river are private property, but are subject to an easement or servitude in favor of navigation almost as completely as the river itself, in that all persons may lawfully tie their vessels to the bank, unload their cargo thereon, or use the bank for a tow-path. Under common law, the public has no right to enter upon riparian land above the high water mark even for the purposes of landing, towing, tieing up, or other objects incidental to navigation.[1] In the state of Louisiana the civil law doctrine is retained to its full extent, and the riparian owner cannot lawfully erect structures above high water that will interfere with the exercise of the public rights.[2] In some other states which were formed from the territory acquired by the Louisiana Purchase, the civil law rule has been considerably modified, and the right to touch or make fast to the bank is based upon reasonable necessity and is incidental to navigation and for temporary purposes only.[3] In the rest of the

Gilbert, 160 Mass. 157, 35 N.E. 454, 22 L.R.A. 439.

Wisconsin—Bittenhaus v. Johnston, 92 Wis. 588, 66 N.W. 805, 32 L.R.A. 380.

[12] North Carolina — Hutton v. Webb, 124 N.C. 749, 126 N.C. 897, 33 S.E. 169, 36 S.E. 341, 59 L.R.A. 33.

Wisconsin — Rosmiller v. State, 114 Wis. 169, 89 N.W. 839, 58 L.R.A. 93, 91 Am. St. Rep. 910.

See, also:

Oregon—Wilson v. Welch, 12 Or. 353, 7 P. 341.

[1] Ball v. Herbert, 3 TR 255.

[2] Shepherd v. Third Municipality, 6 Rob. (La.) 349, 41 Am. Dec. 269; Pickles v. McLellan Dry Dock Co., 38 La. Ann. 412; Pecot v. Police Jury, 41 La. Am. 706, 6 So. 677; Sweeney v. Shakespeare, 42 La. Ann. 614, 7 So. 729, 21 Am. St. Rep. 400.

However, see Nagle v. Police Jury, 175 La. 704, 144 So. 425.

[3] Arkansas—Hunter v. Moore, 44 Ark. 184, 51 Am. Rep. 589.

Missouri—O'Fallon v. Daggett, 4 Mo. 343, 29 Am. Dec. 640.

Propinquity to the French dominions appears to have affected the law of Kentucky and Tennessee, so that the right to enter upon or tie up to riparian land is recognized in those states to a certain extent.

Kentucky—Harvie v. Cammack, 6 Dana. 242; Thurman v. Morrison, 17 B. Mon. 249, 66 Am. Dec. 153.

Tennessee — Memphis v. Overton, 3 Yerg. 387.

See, however, Smith v. Atkins, 110 Ky. 119, 60 S.W. 930, 53 L.R.A. 790, 96 Am. St. Rep. 424, which seems to bring Kentucky under the common law rule.

United States the common law rule prevails, and no right in individual citizens as members of the public to enter upon riparian land as incidental to navigation is recognized.[4] Consequently, such a right cannot be established by law except by the exercise of eminent domain.[5]

[1] Flooding.

In the states in which the mill acts are justified, not as an exercise of the power of eminent domain, but as a regulation of the conflicting rights of the various riparian owners in a particular watercourse, running waters and all land adjacent thereto, so far as it can be flooded for any useful purpose, are treated as a single tract subject to common interests and necessities. It is held in such jurisdictions that lands adjacent to a watercourse and owned by one proprietor may be permanently submerged as the consequence of the erection of a dam by another proprietor, not indeed without compensation, but without the existence of any public use to justify such an in-

[4] United States—United States v. K. C. Life Ins. Co., 339 U.S. 779, 94 L.Ed. 1277, 70 S.Ct. 885.

Alabama—Compton v. Hankins, 90 Ala. 411, 8 So. 75, 9 L.R.A. 387, 24 Am. St. Rep. 823.

Illinois—Ensminger v. People, 47 Ill. 384, 95 Am. Dec. 495.

Indiana—Bainbridge v. Sherlock, 29 Ind. 364, 95 Am. Dec. 644.

Michigan—Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; Reimold v. Moore, 2 Mich. N.P. 15.

Mississippi—Morgan v. Reading, 3 Sm. & M. 366; The Magnolia v. Marshall, 39 Miss. 109.

New York—Ledyard v. Ten Eyck, 36 Barb. 102; Wetmore v. Atlantic White Lead Co., 37 Barb. 70.

Ohio—Pollock v. Cleveland Ship Building Co., 56 Ohio St. 655, 47 N.E. 582.

Oregon—Haines v. Hall, 17 Or. 165, 20 P. 831, 3 L.R.A. 609.

Texas—Butt v. Colbert, 24 Tex. 355.

West Virginia — Ravenswood v. Fleming, 22 W.Va. 52, 46 Am. Rep. 485.

Wisconsin—Chambers v. Furry, 1 Yeates 167; Olson v. Merrill, 42 Wis. 203.

[5] United States—United States v. K. C. Life Ins. Co., 339 U.S. 799, 94 L.Ed. 1277, 70 S.Ct. 885.

Colorado—Hartman v. Tresise, 36 Colo. 146, 84 P. 685, 4 L.R.A. (N.S.) 872.

Idaho — Mashburn v. St. Joe Imp'v'm't Co., 19 Idaho 30, 113 P. 92.

New York—Schenectady v. Furman, 145 N.Y. 482, 40 N.E. 221, 45 Am. St. Rep. 624.

Vermont—New England T. & S. Club v. Mather, 68 Vt. 338, 35 A. 323, 33 L.R.A. 569.

Wisconsin—Cohn v. Wausau Boom Co., 47 Wis. 314, 2 N.W. 546.

A D D E N D U M

RE: Portage

The stream in its natural state certainly limits whether the stream is "capable of recreational use", a term used by the Supreme Court. By establishing an unlimited portage route, above the high-water mark, around barriers, what are we doing? Are we expanding the streams that are capable of recreational use?

Natural Streams. Natural barriers, such as waterfalls, rapids, swift currents, brush, rocks and log jams, certainly affect the stream's capability to sustain recreational use and the type of recreational use. Recreational use of a stream should be limited to the types of recreational pursuits that can be conducted on the stream in its natural state. The Legislature should not expand the capability of the river to be used by the public by legislating portage routes around natural barriers across private property above the high-water mark.

Artificial Barriers. Artificial barriers fall into two main categories. The first category includes public structures, such as dams and public bridges, and the second category includes barriers constructed by the rancher or landowner, such as fences and irrigation structures.

If a rancher/landowner puts a new barrier across a boatable river, it certainly would be reasonable to require the rancher/landowner to provide a portage route. Anything built before the Supreme Court decisions should be exempt.

However, if the public puts in a dam or bridge on a boatable stream, then the public should purchase the land from the adjoining landowner and maintain the portage route.

Respectfully submitted,

Richard W. Josephson

Richard W. Josephson

A D D E N D U M

RE: Montana's obligation to manage the rights held in the "Public Trust".

The State has an affirmative obligation to manage the waters and waterways of the State of Montana. This obligation stems from the "Public Trust" doctrine itself and from the Montana Constitution.

Article II, Section 3, of the Montana Constitution provides:

> "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities."

Article IX, Section 1, of the Montana Constitution provides:

> "(1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
> (2) The legislature shall provide for the administration and enforcement of this duty.
> (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."

Article IX, Section 3, of the Montana Constitution provides:

> "(1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
> (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.
> (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.
> (4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records."

Our water, and its quality, our fishing, and its quality, our beaches, and their quality, our environment, and its quality, are valuable resources and must be protected.

The use by agriculture of appropriated waters must be protected.

Private property rights, including the value of private property, must be protected and maintained.

"PUBLIC TRUST" DOCTRINE.

Dean Margery H. Brown, in her paper presented to the Select Water Marketing Committee in July, 1984, said:

> "As for the reach of the state powers to protect the public interest under the public trust doctrine, an early United States Supreme Court decision held that the state 'may forbid all such acts as would render the public right less valuable, or destroy it altogether.' [Citing: Smith v. Maryland, 18 How. 71,75 (1855).]"

It is a duty of the State of Montana to protect the public interest. You may find that this public interest is best served by retaining stewardship in the hands of private landowners, especially on non-boatable streams. For example, House Bill 275 (Cobb) provides "Recreational Use" is limited and means, with respect to Class III waters, any use of surface waters and the beds underlying them that is permitted by the landowner or his authorized agent.

Under House Bill 275, Class III waters are all surface waters that are not Class I or Class II waters.

Class I waters are defined in House Bill 275 as follows:

(a) Lie within the officially recorded federal government survey meander lines thereof; or

(b) Satisfy the federal test of navigability for purposes of state ownership.

Class II waters means all surface waters that:

(a) Are capable of being floated by a craft propelled by oar or paddle during periods of time other than the period of seasonal high water; and

(b) Are not Class I waters.

It would seem that the State of Montana will have its hands full protecting and managing all Class I and Class II waters as defined in House Bill 275, and should consider returning the stewardship of Class III waters to the private landowners.

Respectfully submitted,

Richard W. Josephson

Exhibit A
2-1-85
H.B. 498

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January 31, 1985

Judiciary Committee
Montana House of Representatives
State Capitol
Helena, Montana 59620

Dear Committee Members:

As a landowner with about a mile of very small stream which runs through the middle of my land, within yards of residential buildings, I have followed, with considerable interest, legislation dealing with the stream access problems created by the Curran and Hildreth decisions of the Supreme Court of Montana.

I understand that your committee has before it at the present time at least four bills attempting to deal with the problem. Among these, of which I am familiar, are House Bills Nos. 16, 265, 275 and 498.

I have seen newspaper and television accounts of the hearing before your committee and the House Fish and Game and Agriculture Committees held on January 22, 1985.

I note that the account of this hearing as it appeared in the Helena Independent Record contained the following (referring to Ron Waterman, an attorney "representing a coalition of farm and ranch groups"):

"The other two bills, HB16 and HB275, would not pass a constitutional test before the Supreme Court, Waterman warned.

"HB16, a product of an interim study committee, would illegally limit recreation use to waters passing the federal test of navigability - a process rejected by the Supreme Court in its decisions, Waterman said.

"He also said HB275, introduced by Rep. John Cobb, R-Augusta, attempts to prohibit recreational use of some smaller streams that cannot be floated - another test outlawed in the court's sweeping ruling."

The newspaper account then went on, later in the article, to state:

"James Goetz, a Bozeman attorney who won the two Supreme Court cases for the Coalition for Stream Access, agreed with Waterman's view of HB275 and HB16."

I gather from the foregoing that Messrs. Waterman and Goetz are either stating or giving the impression that the Legislature of the State of Montana is constitutionally prohibited from regulating the use by the public of the surface waters of the State, and that this is what the Supreme Court said in the Curran and Hildreth decisions.

If such is the case, I must disagree, for the following reasons:

1. The Supreme Court did not say, in either decision, that the Legislature could not regulate the use by the public of the surface waters of the State. The Supreme Court said that the landowner could not limit the use of surface waters to waters which passed the federal test of navigability and that the landowner could not prohibit the recreational use of some smaller streams that cannot be floated, even though the landowner owned the bed and the banks of such streams. The Supreme Court said in Curran [41 St. Rep. at 914]: "If the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people. The Constitution and the public trust doctrine do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters." (Emphasis supplied.) The Supreme Court said that a private party could not regulate the use of the surface waters regardless of navigability under the federal test and regardless of ownership of the bed and the banks. Again, the Supreme Court did not say that the Legislature could not regulate the use, for recreational purposes, of the surface waters of the State.

2. The use of the surface waters of the State are currently regulated by laws passed by the Legislature for a number of purposes, including recreation. Some examples of this are (references are to M.C.A. sections):

a. 23-2-523. Regulates operation of motorboats, vessels, water skis, surfboards, or similar devices and contrivances.

b. 23-2-524. Regulates passing and right-of-way of vessels upon the waters.

c. 23-2-525. Establishes restricted areas for anchoring or operating vessels upon the waters.

d. 23-2-529. Regulates water skis and surfboards.

e. 87-1-301. Gives the Fish and Game Commission power to establish the rules of the Dept. of Fish, Wildlife and Parks governing the use of waters under the jurisdiction of the department and to establish the fishing rules of the department.

f. 87-1-303. Allows the Fish and Game Commission to adopt and enforce rules governing recreational use of all public fishing reservoirs, public lakes, rivers, and streams which are legally accessible to the public. Allows regulation of swimming, hunting, fishing, trapping, boating, waterskiing, surfboarding, picnicking, camping, sanitation, and use of firearms, on the reservoirs, lakes, rivers, and streams or at designated areas along the shore of the reservoirs, lakes, rivers and streams. (Has the latter ever been done?)

g. 87-1-304. Allows the Fish and Game Commission to fix seasons, bag limits and possession limits on any species of fish.

h. 87-1-305. Allows the Fish and Game Commission to close streams, lakes, or parts of them to hunting, trapping or fishing.

There are a number of other statutes, whereby the Legislature has restricted the public's right to use the surface waters of the State for recreational purposes, but the foregoing demonstrates clearly that the Legislature has the right to do so. I am sure that neither Mr. Waterman nor Mr. Goetz would seriously contend that all of the foregoing statutes are unconstitutional under the Supreme Court's decisions.

3. Logic dictates that the Legislature has the right to regulate use of the public waters of the State, just as it regulates the use of other public property of the State. The Legislature, in Title 77, Montana Code Annotated, has enacted numerous statutes regulating the use of state lands. There are numerous statutes in Title 2, Chapter 17, Montana Code Annotated, regulating the use of State property. Certainly, it is inconceivable that the Legislature cannot also regulate the use of the waters of the State, which are also, under the constitutional provision relied upon by the Coalition for Stream Access and the Supreme Court [Art. IX, Sec. 3(3)], "the property of the state".

4. There is ample constitional authority, and, it is submitted, mandate, in the 1972 Montana Constitution for the Legislature to regulate the use of the surface waters of the State for recreational purposes. For example:

a. Art. IX, Sec. 1 provides that: "The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." It is submitted that this mandates legislative

action to prevent recreational use of the waters, and the beds and banks thereof, within the State from degrading the resource.

b. Art. IX, Sec. 3(4) provides that the legislature shall provide for the administration, control and regulation of water rights. It is submitted that this includes rights to use the waters for recreational purposes.

c. Art. V, Sec. 1 provides that the legislative power is vested in a legislature consisting of a senate and a house of representatives. It would appear appropriate for the Legislature to exercise this power and not abdicate it to the judicial branch of State government. Personally, I think that it unfortunate that a "coalition of farm and ranch groups" is advocating, and the Legislature is considering, codifying the apparent legislating (*) of the Supreme Court of Montana, in the Curran and Hildreth decisions, and thus giving it statutory legitimacy. This is particularly true with regard to the "portage" aberration.

5. The public trust doctrine mandates that the Legislature exercise some control over the use of the waters of this State for recreational purposes. The general concept of a trustee has traditionally been that the trustee owes a duty to act in the highest good faith with regard to the property entrusted to him. (See, e.g., Section 72-20-201, MCA.) It is submitted that the Legislature, as the trustees, so to speak, of the waters of this State under the public trust doctrine, have an obligation to see that the use of these waters is regulated at least to the extent which will insure that the water resource is not degraded or destroyed by unlimited and unrestricted recreational use thereof.

I appreciate the opportunity to express my views on the power of the Legislature to regulate the use of the surface waters of this State for recreational purposes and appreciate any consideration you might give to these views during your deliberations on the various bills which may come before you on this subject.

Respectfully submitted,

Conrad B Fredricks

Conrad B. Fredricks

cbf/aw

* See dissent of Mr. Justice Gulbrandson in Curran [41 St. Rep. at 918].

EXHIBIT A-1
2/1/85
HB 498

House Judiciary Fish and Game and Agriculture Committee
HB # 498 Ellison Feb. 1, 1985

This is the first time I have ever testified before a Legislative Committee, whether this gives my testimony more credibility or not I don't know, but it does show that I am concerned.

The most important issue regarding these "Stream Access" bills is the good relationship between landowner and sportsman, not the "ands" and "wherefore's" that you people put on paper. A relationship that can be improved or totally destroyed by the passage of the wrong bill. The previous bills that have been intoduced so far this session concerning the use of Montana's streams have nothing but confrontation built into them. These bills were not compromises but were sacrifices by the landowner.

Our experience with recreationists up to this point has been a pleasant one with 95% of the people respecting the landowner's rights and property. This good relationship has come about by personal contact with each other and we hope that this can continue.

I wish to compliment Mr. Ellison on his efforts in trying to be fair to all parties concerned. Therefore I support this bill and hope that the major farm groups and organizations will open their eyes and look at this bill seriously and support it also.

David O. Freeman

EXHIBIT A-2
2/1/85

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE HB 498
February 1, 1985

Mr. Chairman, committee members, for the record my name is Norm Starr. I am a native Montanan engaged in the cow business at Melville, Montana.

I am fully aware of the recent Supreme Court decision regarding stream access and am not here to argue the merit or lack of merit of those decisions. I would again like to express my appreciation for the fairness and the diligence put forth by the Interim Legislative Committee towards trying to solve the problems created by those decisions. House Bill 16 is a good expression of their effort.

In my opinion, Rep. Ellison's Bill 498 is a refined version of House Bill 16.

When faced with an adverse situation it is just human nature to analyze your situation and how to cope with it. I am faced with House Bill 265 after this session is over with, there is no way I can exist in the cow business.

Some of the things I will have to consider are: 1) to try to sell the ranch at a very poor time to do so, especially when we have planned for years how to carry on this family operation - it will certainly have to be considered; 2) one thing we will do for sure is close our property to all types of recreation just to protect ourselves - this would go against a tradition of always having been open; 3) for twenty five years I have been against subdividing our good agricultural land, that's a matter of record. If House Bill 265 goes through I'll subdivide my creek bottoms if I have to do it in order to survive. If we are going to impact our streams with a non-managed public we might as well impact them all the way.

House Bill 265 is loaded with problems for me as a landowner. I'll give you one example. Ordinary high water mark - lines 4-6, I quote, characteristics of the area below the line include - <u>when appropriate</u> - <u>but are not limited to diminished</u> terrestrial vegetation or lack of <u>agricultural crop value</u>. Even a dumb rancher can see red flags sticking out all over that kind of language. The whole bill is laced with red flags.

Rep. Ellison's Bill 498 goes a long way towards jerking those red flags. Compare them for yourselves point by point. One little word can change a good intent to a bad one.

In closing allow me to make a comparison. A couple of years ago my wife talked me into taking up golf. We bought clubs and a cart, we took some lessons, then we went to the golf course. The first thing we had to do was sign in. Then we had to pay some money. I noticed some areas were real green and well kept up and some were a little more diminished if you will. My ball seemed to want to get out in those fringe areas and it didn't take me long to figure out that I was penalized in one way or another every time it did. I also noticed they had people hired to keep things in shape and to make sure all the rules and regulations were obeyed. I checked things out a little farther and discovered this was a public golf course.

I enjoy the game, it is good recreation. The recreation we're dealing with today certainly is taking a different twist. It looks like the user isn't going to have to pay for maintenance, litter clean up, and someone to see that the rules and regulations are obeyed. He is asking his neighbor the landowner to do that. I wonder if my neighbors would consider paying my green fees.

Give me House Bill 498 and a fair trespass bill and I'll try to live with it. Give me House Bill 265 and you'r kicking me when I'm down.

EXHIBIT A-3
2/1/85
HB 498

TO: HOUSE JUDICIARY COMMITTEE
CHAIRMAN: TOM HANNAH
FROM: Windsor Wilson
McLeod, Montana 59052
Occupation: rancher
Proponent for HB 498

Mr. Chairman and committee members, this is the fourth bill you have had before you on the stream access issue. In my opinion HB 498 is a refined and better version of HB 16. I favor HB 498.

ORDINARY HIGH WATER MARK

In Representative Ellison's bill it is defined by the Soil Conservation Districts definition which has been used without question. Representative Ellison has excluded flood plains and flood channels which I feel needed to be done. The word diminish in HB 265 is not clear in it's meaning. Diminish has been deleted from HB 498.

RECREATION USE

In HB 265 it states that overnight camping, big game hunting, upland bird hunting, all terrain vehicles and placement of permanent structures cannot be done or used without permission in Class 11 waters. This implies, to me, all of that type of recreation activity can be done in class 1 waters. I don't think in their wildest dreams the Supreme Court thought their decision would include this type of recreation.

WHAT IS THE BEST USE

I understand the Public Trust Doctrine to mean the best use for the people. The opening of small streams in the state cannot possibly be for the best use of the people. In time, it will ruin the fishing, disturb bird population and endanger small game which rear their young in close proximity to the small streams. The relationship between landowner and true sportsmen established over the years would be in jeapordy. Some of my best friends are the true sportsmen, people who don't mind asking permission to use private property. I sincerely believe the best use is not to open all our streams to all the people.

CONCLUSION

HB 498 is the bill that will better satify all the people of Montana and will not expand the Supreme Court Decision. I ask you to consider and pass HB 498.

Exhibit B.
2-1-85
HB 498

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE
FEBRUARY 1, 1985

My name is Chuck Rein. I am a rancher from Melville, Montana. As a director of the Sweet Grass Preservation Association, I speak on behalf of the membership of that organization.

The Sweet Grass Preservation Association wholeheartedly supports HB 498. We feel it is the only bill to be brought before you that does not attempt to expand the Supreme Court decisions. It does however leave intact the conditions imposed by those decisions while clarifying some of their vague terms and definitions.

As farmers and ranchers whose industry is suffering badly we cannot stand another blow, especially one which would further weaken our property rights. This is the legislation that the grassroots farmers and ranchers need to help them survive. It is the legislation that property owners and sportsmen who really care for the eco-systems want. I hope our major agricultural organizations as well you, our elected representatives, will be responsive to our wants and needs.

I will not attempt to comment on this bill section by section but will touch on the areas which are most necessary and important to farmers and ranchers. As a conservation district supervisor who has helped administer the Natural Streambed and Land Preservation Act for over eight years I think the definition of ordinary high water mark is easy to understand and provides a definite line that the sportsman and landowner can determine without conflict.

The bill further provides that the sportsman can fish, swim and float within the ordinary high water mark of a stream. This is basically what the Supreme Court decisions do. It does however preclude them from hunting big game or operating three wheelers or snowmobiles, except by permission, within the ordinary high water marks.

Restricting landowner liability is absolutely essential. Ranchers are aware of most of the hazards of their occupation. Sportsmen however are not. Should a rancher be held liable if a fisherman is injured by a charging cow protecting her newborn calf?

The section addressing prescriptive easement is especially appropriate since the Supreme Court decisions provide that recreationists have the right to portage around barriers. It is imperative that prescriptive easement cannot be acquired through use of land or water for recreational use.

One area that is not addressed by this legislation but is definitely affected by it, is landowner-sportsman relations. Sportsmen have used private property for recreation for many years by simply asking permission. Many will continue that policy. But because access to most streams is now a right instead of a privilege abuse of private property will occur much more often. Landowners and sportsmen will benefit by the passage of HB 498 in two ways:

1) Landowners will be given simple, understandable definitions of the vague terms handed down by the Supreme Court as well as necessary protection clauses.

2) Sportsmen who wish not to ask permission have definite guide lines to follow when recreating within the ordinary high water. These guide lines will prevent potential abuse by those not asking permission and help preserve a necessary relationship between sportsmen who always have, and probably always will, ask permission from the landowner.

The purpose of the Sweet Grass Preservation Association, as defined by Article two of our by-laws, is to preserve, protect and improve the way of life, business and property rights, including land and water, of persons engaged in agricultural production in the State of Montana.

Members of the committee I urge you to help us further our purpose and pass HB 498.

Thank you.

EXHIBIT B-1
2/1/85
HB 498

HB 498

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

February 1, 1985

In testimony to date addressing the stream access issue, the department has taken a position in support of HB 265 because it strikes a reasonable balance between recognizing legitimate landowner concerns while accepting the Supreme Court decisions on stream access.

HB 498 would not appear to offer the opportunity to strike a better balance.

It adopts a test of public access which is essentially a federal test and would restrict public use of the banks and beds on all streams which have not met that test. As a result, it would appear to be in conflict with the Supreme Court reliance upon Article IX, Section 3 of the Constitution.

The legislation proposes a regulatory program which permits complaint and closure of a river on a variety of findings, one of which is a finding that a given level of use will result in trespass. That standard is so broad as to be almost indefinable. Any level of use may result in a trespass. This situation is largely similar to public use of a county road. The existence of a county road may subject adjacent private lands to trespass. Nonetheless, we do not close down public roads simply because of the possibility that those roads may be used as a way of committing trespass on private lands.

In addition, the bill proposes the institution of a contested case proceeding if the department finds that a person's complaint has merit. The difficulty with the contested case proceeding here is that the statute provides no adversarial context in which to hold a contested case proceeding. By definition, a contested case proceeding is a contest between two adversaries. If the department is simply finding that there is cause for complaint, this bill does not designate who will provide the opposing views. This kind of proceeding may simply be inappropriate for a contested case proceeding.

Of particular concern with this legislation is that it would prohibit prescriptive easement over all lands and waters for recreational uses. We feel it is more appropriate at this time to confine the prescriptive easement discussion to the use of waters and the lands beneath waters. The intent of this legislation would be to address the concern that this prohibition is needed for recreational use of lands so that people do not use private lands in order to get to waterways. Both the Supreme Court case and HB 265 adequately meet that concern. They simply prohibit the crossing of private lands to reach the state's waters. In addition, the crossing of private lands to reach a waterway is not, in and of itself, a recreational use. Instead, it is simply an access way to get to an area to be used for recreational purposes.

Finally, this legislation provides no mechanism to address the problems caused by a landowner who improperly obstructs the public right of travel or portage. To date, most of the department's regulatory problems have fallen into that category. Only HB 265 attempts to address that problem.

There appears to be a general concern expressed in this legislation that all streams will be grossly overrun and badly abused within the near future. Experience to date would indicate that this is not the case.

As an example, during the 1983 fishing season our surveys indicate that approximately 3 million angler days took place on waters in the State of Montana. This represents an increase of approximately 200,000 over 1976 figures and 900,000 over 1969 figures.

Our survey is not complete for 1984, but it is reasonable to assume the count will equal and may surpass 1983.

With those figures in mind, we conducted an informal survey of the county attorneys and sheriffs in the state this past fall. This survey was well after the court decisions were announced and after the normal season for maximum fishing pressure.

We found that 16 reported incidents or problems were noted involving stream access. Five took place on the Beaverhead River, of which four involved the same landowner. Six were filed by other landowners on other streams who complained about the acts and presence of recreationists. Four were reported by fishermen who complained about the actions of landowners, and one proved to be a dispute between a landowner and a trapper over trapping rights.

Although these cases cannot be considered an absolute reflection of the activity last summer, they would indicate that a dramatic shift has not occurred in the public use of streams because of the court action.

To assume that such a shift will occur and occur suddenly is not supported by what we have seen to date.

In conclusion, HB 265 still represents the most reasonable approach to resolving the uncertainties raised by the court decisions. In addition, the spirit of cooperation which gave rise to HB 265 needs to be recognized by considering this matter. HB 265 is the offspring of landowner-recreationists' cooperation, and as such deserves support.

Accordingly, the department opposes House Bill 498.

EXHIBIT C
2/1/85
HB 498

TESTIMONY OF THE MONTANA COUNCIL, TROUT UNLIMITED
H.B. 498
FEBRUARY 1, 1985

Mr. Chairman and members of the Committee:

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 about 330 chapters. The Montana Council is the statewide governing body representing 10 chapters and one affiliated organization with a total membership of about 1100. I am speaking this morning in opposition to H.B. 498 on behalf of Trout Unlimited, the Montana Coalition for Stream Access, Skyline Sportsmen, the Floating and Fishing Outfitters Association of Montana, the Medicine River Canoe Club and the Missouri River Fly Fishers.

We testified at the January 22 hearing of this committee that we, along with the agricultural and landowner organizations represented by Mr. Waterman, fully support H.B. 265 as a balanced, fair and reasonable articulation of rights and responsibilities of landowners and sportsmen within the framework of the Supreme Court decisions. We also spoke of our support for H.B. 265's basic access provisions 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, including the beds underlying them and the banks up to the ordinary high-water mark, may be so used by

the public, is essential for our support of any stream access legislation.

For this reason, we must oppose the restriction in section 3 of H.B. 498, which states that the public may only use the streambeds and banks up to the ordinary high-water mark on streams that satisfy the federal navigability test. The Court specifically rejected the use of this test for determining the public's right to use Montana's streams, streambeds and banks. H.B. 498 ignores the standard adopted by the Court, that is, capability of recreational use. As such we do not believe that H.B. 498 could survive a constitutional challenge on this point. We cannot support legislation which would without question result in litigation and which in the end would be futile.

We also oppose the provisions in section 7 of H.B. 498 providing a procedure for the protection of aquatic ecosystems. In our discussions that led to the fashioning of H.B. 265 we considered several approaches to this question. We ultimately rejected them because we believe that the Fish and Game Commission has the authority in 87-1-303, MCA, to accomplish the stated purpose of section 7. We oppose the creation of a new regulatory system in the executive branch, and the added costs involved, simply to duplicate existing authority.

There are some themes that many sportsmen perceive in proposals such as section 7 of H.B. 498 that I would like to address. One is that the Fish and Game Commission and

the Department of Fish, Wildlife and Parks are unable, or perhaps unwilling, to manage our aquatic resources. The other is that sportsmen somehow do not care as deeply as landowners about the protection of streams and fisheries. I submit that neither of these propositions is correct.

The Commission and the Department can and do regulate our aquatic resources by means of special protective regulations and in some cases by closing streams to fishing entirely. In fact, Montana is considered the leader among the states in management of wild fisheries. Attached to this testimony is a copy of the current Montana fishing regulations, which the Department publishes annually and distributes widely. A few minutes' study of this publication will provide some understanding of the Department's fisheries management activities.

With respect to sportsmen, I suggest that they do feel strongly about streams and fisheries. That is why they organize. That is why they volunteer their time and resources to clean-up campaigns on streams and to habitat improvement projects, such as the project of the Bozeman chapter of TU on Darlinton Ditch. That is why they volunteer their time and resources to assist the Department's shocking crews to gather data to support special protective regulations where they are needed. The special regulations adopted by the Fish and Game Commission in the past two years in the Bob Marshall Wilderness and on the Yellowstone, the Smith, and the Livingston spring creeks are due to the efforts of individual sportsmen

and sportsmen's organizations, as well as the Department. Sportsmen will continue to express their support for streams and fisheries in these ways in the future.

Finally, I would like to mention the question of density of public use. A relatively small geographic area that receives intense public use is Yellowstone Park. Before the Park Service instituted special protective regulations in the Park, the quality of the fishery was declining. About ten years ago, the Park Service began a program of fisheries management that includes closing streams during spawning periods, reduced limits or catch and release fishing only, a ban on bait fishing and in many cases, fly fishing only. Protection of the Park's aquatic resources is achieved in challenging circumstances through management.

Overall, density of public use on Montana streams is far less than that which occurs in the Park. The Dearborn and Beaverhead decisions were handed down very early in last year's fishing season, and they were widely publicized. Yet the rate of increase in the use of Montana's streams in 1984 was about the same as it was before those desicions. We do not believe that the fear of greatly increasing use of Montana's streams is justified, nor does it justify at this time enactment of changes in the Department's regulatory authority. Management under the existing authorities and procedures is the appropriate mechanism to protect our streams.

Mr. Chairman, we urge that the Committee not support H.B. 498 and that it take favorable action on H.B. 265. Thank you.

EXHIBIT C-1
2/1/85
HB 498

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE, FEBRUARY 1, 1985, HELENA, MONTANA, by Lorents Grosfield, cattle rancher from Big Timber, Montana.

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE:

I appear here today in support of HB 498 on recreational use of water because I believe it is a much more reasonable approach to the stream access issue than HB 16 or HB 275 or especially HB 265.

I believe that the definition of "ordinary high-water mark" in HB 498 is much clearer and more readily understandable than the definitions in the other bills. It has been successfully used by Montana Conservation Districts for nearly 10 years in administration of their responsibilities under the "Natural Streambed and Land Preservation Act". What is really needed here is a definition that is readily recognizable by both the landowner and the recreationist. Practically speaking, along a stream somewhere, who is going to say what the phrase "diminished terrestrial vegetation" in HBs 265 and 275 means? And who is going to say how far from a stream one might have to go before reaching lands with "agricultural crop value"? The addition, in HB 498, of the provisions regarding dry channels and the flood channels is wholely consistent with the Supreme Court decisions which repeatedly talked about "surface waters capable of recreational use"--- certainly one can't make "recreational use of surface waters" where there is no water.

I believe that the definition of "recreational use of surface waters" in HB 498 represents exactly what most reasonable people would assume the Montana Supreme Court meant in the Curran and Hildreth cases. Other bills before this committee attempt to expand this definition to include such things along Montana's rivers and streams as the construction of duck blinds and other permanent structures, the hunting of big game with high-powered rifles, and so on. These attempts go substantially beyond the facts of the two cases before the Court, and therefore also beyond what most reasonable people would think that the Court meant. The definition in HB 498 provides that except on public lands and where otherwise authorized by law or regulation, the public cannot engage in other than "recreational use of surface waters" without permission of the landowner. It should be obvious that this is not meant to imply that HB 498 either permits or precludes any activity on federal lands, such as Forest Service or BLM lands, contrary to Forest Service or BLM regulation. In fact, it is not likely that any of the bills before the Committee, nor even the Montana Constitution, would have priority over federal regulation of federal lands. On the other hand, it should be just as obvious that there may be streams where for example, controlled big game hunting may not be adverse to the public interest. Where regulated as provided for under this definition, it or other uses could then be permitted.

In the past the Legislature, in exercizing its public trust responsibilities, has seen fit to pass laws on and to regulate all other beneficial uses of water. There is NO good reason not to do the same with regard to that beneficial use known as "recreational use". IN FACT, THE MONTANA CONSTITUTION MANDATES EXACTLY THAT, in Article IX. I believe that to say that the public trust doctrine precludes the Legislature from limiting the definition of "recreational use of surface waters" is to misrepresent the public trust concept. Certainly the Legislature has not only the right but the obligation to legislate concerning the protection of our natural resources--- that is the essence of the public trust concept, and that is the mandate of Article IX of our Montana Constitution. Likewise, the Legislature has the right and responsibility to legislate concerning public health and safety--- these too are inherent in the very reason for the existence of government in the first place, and therefore in the public trust concept.

This leads naturally to the need for some means of protecting the fragile riparian ecosytems from degradation by the public. Many of our laws relate to protection of resources from private degradation, for example the Natural Streambed and Land Preservation Act. Many others relate to protection from the public--- for example, we have detailed laws and regulations regarding hunting and fishing and the use of public lands for a variety of public uses. There is no reason to assume that just because we are talking here about "public recreational use" that that implies something sacred that by its very nature cannot possibly degrade the ecosystem. History has shown otherwise. When the Forest Service for example, rules that a recreational user cannot camp within 100 feet of a stream, the Forest Service certainly is making a judgement regarding potential degradation by the public.

HB 499 provides for a means of such protection where public use or overuse threatens the ecosystem. HB 265 is, in my opinion, short-sighted in not addressing this issue. Now some will argue that the Fish and Game Commission already has this authority and there is no need to duplicate it. But I would argue that although it is true that the Commission does have such power, it is discretionary and has been little used in this regard. In fact, the Commision has demonstrated a reluctance to use this power, claiming budget and staffing inadequacies. The "may" in the present statutes needs to be stronger if the public trust responsibilities of protecting the ecosystems from degradation by the public are to be realized. Certainly a project that a private person might want to engage in along a stream requires a permit--- the word is "shall". In other words, while protection from degradation by the private sector is addressed in many sections of law and is most generally adequate, degradation by the public in pursuit of its newly acquired general easement along surface waters is NOT presently adequately addressed in our statutes.

IN CONCLUSION, I would like to reiterate two things that I stated to this Committee on a previous occasion. First, landowners across Montana lost a great deal in the Supreme Court stream access decisions, decisions which have been interpreted by some to dramatically expand the determinations of two specific cases on two specific stream segments. There is no good reason to codify things that go further than these decisions in expanding the rights of the public to the further detriment of the private rights. Secondly and coincidentally, it is essential to remember that in the vast majority of cases statewide, recreational access has been available for the asking. I submit that HB 498 represents a fair, reasonable, and workable answer to the stream access problem.

APPENDIX: ARTICLE IX OF THE MONTANA CONSTITUTION, Section 1-3

"Environment and Natural Resources"

Section 1. Protection and improvement. (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.

(2) The legislature shall provide for the administration and enforcement of this duty.

(3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

Section 3. Water rights. (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.

(2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.

(3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

(4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

EXHIBIT C-2

TESTIMONY FOR HB 498 FEBRUARY 1, 1985

Members of the Committee: My name is Paul Hawks and I am a rancher from Melville. I am currently serving as assistant secretary of the Northern Plains Resource Council, however, I am presenting testimony today on behalf of myself and our family-owned ranch corporation.

To me, the issue here is the public's right to recreational use of the state's waters vs. the protection of existing property owner's rights. HB 498 seeks to uphold the recent Supreme Court rulings regarding stream access while protecting existing landowner rights. I think it is the fairest of the so-called "stream access" bills introduced this Legislative session.

The public retains the right of recreational use of state waters yet the landowner is protected by a strict definition of the "ordinary high water mark". The public is allowed to fish, swim, float, or boat, and the landowner retains the right of controlling other activities on his property by requiring consent for such uses. Big game hunting has no place in the definition of "recreational use of waters" and I don't think any reasonable person would expect it to. This stricter definition is necessary and only fair.

HB 498 adequately addresses the question of landowner liability, upholds the trespass laws of this state, and prevents prescriptive easements through recreational use.

Most agricultural landowners view themselves as stewards of the land. Although they hold title to the land, they know that if they are to make a living from the land and pass it on to their children, they have to respect the limits of their ownership. The privilege of owning land carries responsibilities. These responsibilities not only include using sound conservation management, but also allowing

an opportunity for those who don't own land to enjoy its resources. We have always allowed the public to hunt deer and antelope and to fish on our ranch. We will continue to do so, but in return, we expect that sprtsmen accept their responsibilities to respect our property rights and the integrity of the land.

I urge the passage of HB 498 because it is fair and reasonable. It allows public access to the state's waters while assuring the property rights of those who know the land best.

EXHIBIT D
2/1/85
HB 498

Medicine River Canoe Club

Great Falls, Montana

FEB. 1, 1985

House Judiciary Committee
State Capitol
Helena, Montana

Chairman Hannah & Members of the Committee:

My name is Jim McDermand and I am the spokesman for the Medicine River Canoe Club in Great Falls. Beginning with the 1983 legislative session, I have attended all hearings on the stream access issue including those of Interim Subcommittee #2. I have presented testimony at most of those hearings on behalf of the canoe club, the most recent being before this committee on Jan. 22, 1985.

We wish to express our strong opposition to HB 498.

This bill uses the "old" definition of ordinary high water mark which simply is not accurate. The soil is not necessarily deprived of vegetation below the ordinary high water mark. Aquatic vegetation can grow below this point. The most accurate and, therefore, the best definition is that used in HB 265.

(HB 498 is so restrictive of the right to hunt on rivers that this would immediately be challenged in a court of law.) One of the reasons big game and upland bird hunters are interested in retaining the right to pursue their sport is so that they may float the larger rivers and hunt the islands which are the habitat of whitetail deer and pheasants. This is a common and popular practice on such rivers as the Yellowstone, Missouri, Madison and Jefferson.

The provision eliminating overnight camping except on public lands is in contradiction to the Supreme Court ruling. John Thorson submitted testimony to this committee on Jan. 22, 1985 in which he states that overnight camping is an integral part of water-based recreation. His testimony is absolutely correct! For canoe-campers, as we are, you cannot separate one activity from the other and, under these circumstances, the camping definitely becomes a water related activity.

In HB 265 the floaters have conceded to some restrictions on their right to camp. We intend to make no other concessions in this area. The provisions in HB 498 are completely unacceptable. Even in HB 265, which is acceptable to us as it now stands, if attempts are made to further restrict camping, we are prepared to present indisputable evidence that camping is a water related activity and cannot be prohibited between the ordinary high water marks of a river. We will do this before a legislative committee or in a court of law if necessary.

HB 498 would prohibit prescriptive easement for all recreational uses. In a stream access bill this issue should be confined to water related activities and cannot be so broad as to encompass all recreational activity everywhere.

We hardly know how to address Section 7 of this bill. We are expecially confused by the recurrent phrase "trespass upon adjacent public or private land." How do you "trespass upon public land"? This entire section is very poorly written and strains the brain in an effort to derive any true understanding of it.

Any bill addressing the stream access situation must not create further conflict and potential litigation. On this basis we ask that you not only reject HB 498 but also HB's 16 and 275.

The only viable bill before you is 265. We feel that one of the most important sections of this bill is the carefully worded criteria to distinguish Class I from Class II streams. "Tinkering" with this keystone in the arch of compromise may bring the whole structure tumbling down. The meaning and intent of this entire bill must remain unchanged or we may witness the same fate as befell HB 888 of the 1983 legislature. HB 888 initially had the support of the recreationists and some of the agricultural groups but as amendments were introduced at the Senate hearing, both sides ultimately withdrew their support and the bill died.

Please do not jeopardize the passage of HB 265 by attaching amendments that would address every isolated incident that may or may not occur on a specific stream sometime or someplace. We believe that such isolated incidents, if they occur, should be treated on an individual basis through the authority already vested in the Fish, Wildlife and Parks.

This committee would seem to have two options: recommend a "Do Pass" on HB 265 in its present form or reconcile yourselves to the demise of all stream access legislation. We can then endure another two years of debate and hostilities before we deal with this in the 1987 session. We hope you will choose HB 265.

JAMES W. McDERMAND

James W McDermand

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

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

Excerpts

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.

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.

Excerpts

Recreational Use Of Montana's Waterways

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

In subsection (2), the committee defined the term "ordinary high-water mark" because this is the boundary of the public's right to use the beds of waterways. The committee intended to make it clear that the boundary is the ordinary high-water mark, not the flood mark. The committee considered defining the ordinary high-water mark similarly to the manner in which it is defined in §36.2.402, Administrative Rules of Montana (as "the line that water impresses on the soil by covering it for sufficient periods of time to deprive the soil below the line of its vegetation and destroy its value for agricultural purposes"). It was felt that this definition was imprecise for two reasons:

(1) The definition requires that the characteristics it describes be met. However, in reality, the ordinary high-water mark is distinguished by varying physical characteristics and the characteristics described in the rejected definition may not always exist. (The definition adopted by the committee is, in contrast, more flexible.)

(2) It was important to describe the lack of vegetation below the mark as terrestrial vegetation, since aquatic vegetation can grow below the mark.

EXHIBIT E
2/1/85
HB 498

Friday, February 1, 1985

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

My name is Walt Carpenter. I was born and raised on a ranch in Lincoln County, and now live in Great Falls, and I speak this morning for myself. I hunt, fish, and have floated Montana streams in various types of craft for many years.

I followed closely the deliberations concerning stream access in Montana during the 1983 Legislature, attended nearly all of the meetings of the Interim Subcommittee No. 2, and was present at the Committee hearings on stream access here in the Capitol on January 22, 1985.

My concern is that if this Legislature passes a bill on stream access, that it be fair to all Montana people. Several bills that have been introduced in the current session fall far short of meeting that criteria. Passage of a bad bill 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.

HB-16 and HB-275 are not fair bills, as both are extremely restrictive as to recreational use of Montana's streams. HB-498 is completely unreasonable, and the worst of the three bills. HB-498 would place severe restrictions on recreation on nearly all Montana streams. However Section 7, Subparagraph 5, would allow a landowner to do almost anything he pleased on a stream, and he would be entirely exempt from any action, and accountable to no one.

After the 1984 Supreme Court decisions on stream access were thought by some agricultural groups to be too liberal, and HB-16 did not provide a fair solution to the problem, a series of meetings between representatives of the landowners and recreational groups hammered out a compromise bill, HB-265. There was considerable give and take in arriving at this compromise, but HB-265, <u>in its present form</u>, appears to be as fair and reasonable a bill to protect the rights of all parties concerned as can be expected.

Testimony during the January 22, 1985 Committee Hearing indicated that HB-265 has the support of a large number of responsible Montana agricultural groups. It also has the conditioned support of the several Montana recreational organizations, <u>as originally drafted</u>.

However, the same fate can befall HB-265 that happened to a good bill, HB-888, in 1983, when it was subjected to restrictive amendments, and finally lost the support of both the agricultural and the recreational groups.

Montana promotes tourism, which brings many millions of dollars of out of state money in, to bolster the State's economy. What would be the rationale to invite outsiders to come and enjoy fishing our streams, then deny them access?

Concerning the environment and ecology, it is an established fact that none are more concerned about their protection than the recreational and

environmental organizations. The Department of Fish, Wildlife and Parks now has sufficient jurisdiction to effect protection in that field, and further legislation is not needed.

I strongly oppose HB-16, HG-275 and HB-498 for the reasons outlined above.

I support HB-265 as originally drafted, providing there are no restrictive amendments added.

RECREATIONISTS DO NOT NEED ANY BILL, AS THEY CAN LIVE WITH THE TWO 1984 SUPREME COURT DECISIONS. Thus no bill is better than a bad bill!

EXHIBIT F

February 21, 1985

HB 498

MR. CHAIRMAN AND COMMITTEE MEMBERS:

My name is Gene Cantley and I have been asked to speak on behalf of an ever increasing group of sportsmen who are extremely upset over the stream access issue.

This is our first time in Helena to testify against a bill, but it probebly won't be our last.

We have been guilty in the past of "letting George do it" but it appears that George, our more moderate recreational groups, has, in fact, not done it!

We have been told by members of the Fly Fishers, the canoe people, and by others that a moderate, reasonable approach was the way to reach an accord with the landowners. That by meeting with the various landowner groups and trying to work together to develop a bill that everyone could live with, was the best way to ensure that our rivers and streams remain open to the public. It now becomes apparent that moderation invites abuse. The landowners talk cooperation out of one side of their mouths while all the time, they work for passage of bills such as House Bill 498.

House Bill 498 is a blatent and outright insult to the sportsmen of Montana. We won the fight on the Dearborn and the Supreme Court has given us the right to hunt, fish, and float all the rivers of Montana. We feel this is our right and the landowners are now trying to take this right away. Montana is not a turn of the century "Land Baron"controlled state anymore, and it's time that the landowners realize this fact. The courts have, in the past, and have shown that they will in the future, support the "Public Trust Doctrine" and that the rivers and streams are for the use of all citizens.

Therefore, we cannot and will not support any legislation which attempts to restrict the recreational use of our rivers and streams and we are confident that the courts will support this stand.

Thank you.

Eugene H. Cantley Jr.
1317 14th. St. S.W.
Great Falls, MT 59404

EXHIBIT F

WITNESS STATEMENT

Name Eugene H. Cantley Jr. Committee On

Address 1317 14 St. S.W. Great Falls Date Feb. 1, 1985

Representing Self & Great Falls Sportsmen Support

Bill No. 498 Oppose X

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. 498 is an extreme overreaction to the stream access issue.

2. Compromise has been worked out that has been acceptable to most parties. [illegible] want to throw the compromise out the window.

3. We cannot accept restrictions as set forth in 498.

4. We feel that the Supreme Court has supported public access and will continue this support.

Please See Prepared Statement

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

EXHIBIT G
2/1/85

MONTANA
FARM BUREAU
FEDERATION

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

TESTIMONY BY: Alan Eck

BILL # HB-498 DATE 2/1/85

SUPPORT XXX OPPOSE

Mr. Chairman and Members of the committee; for the record my name is Alan Eck. I'm representing the Montana Farm Bureau Federation. Farm Bureau stands by testimony We support the way many of the concepts are addressed in House Bill #498. We realize that stream access is a complex issue and we feel that this bill should be considered with the best points of the others that are now in sub-committee. We would hope that the committee considers all the options and that you do what is best for all parties concerned. Thank You.

Alan Eck
SIGNED

EXHIBIT H

Jo Brunner

AGRICULTURE LEGISLATIVE WORK

NAME Jo Brunner COMMITTEE Judiciary

ADDRESS 1496 Kodiak Road, Helena DATE Feb. 1 1985

REPRESENTING Montana Cattlefeeders SUPPORT X

Montana Cattlemen, Montana Grange OPPOSE

BILL NO. HB 498 AMEND

Mr. Chairman, members of the committee, my name is Jo Brunner and I represent the Montana Cattle Feeders, the Montana Cattlemen and the Montana Grange at this haaring.

Mr. Chairman, the organizations I have just named wish to go on record as being in opposition to HB 498.

While we realize that a great deal of this bill is of the same substance as portions of House Bill 265 and was indeed taken from an early proposed draft of that bill, we join with other organizations, both agriculture and recreationists in seconding Mr. Watermans testimony and urge a non-concurrance of HB 498.

Thank you.

EXHIBIT I

WITNESS STATEMENT

Name CHRIS E. JAUERT Committee On Judiciary

Address 640 34th Ave NE Great Falls MT 59404 Date 2/1/85

Representing self Support

Bill No. HB498 Oppose X

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

For the record I am Chris Jauert

1. I am here with my wife to testify against HB498 because we feel the restrictions on stream access to all rivers including those that fall under the navigability
2. definition are in direct conflict with the Supreme Court decision on stream access (last year). This bill has no provision for portages. It defines high water (Section 7(2)) mark to exclude flood plains and vegetated areas inside the high water mark. It contains language about trespass on public land (Section 7(2)) which are lands open to
3. all Montanans for multiple uses including recreation.
4. We feel this bill is not a good bill because it is not a compromise at all but is completely one sided to the interest of landowners. In summary we would like to record our opposition at this hearing and would hope that a more moderate bill closer to last years Supreme Court decision would be considered.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

EXHIBIT J
2/1/85
HB 498

MISSOURI RIVER
FLYFISHERS
TROUT UNLIMITED
P.O. Box 6398
Great Falls, MT 59406

February 1st, 1985

Statement to the Judiciary Committee
concerning
HB 498

1. HB 498 reads very much like HB16 in its definitions, especially with respect to the definition of "navigable stream." One difference we see is in the incidental use, Section 3, subsection 2 (pps 3 & 4), which we read as allowing fishing on streams other than navigable streams, which we find laudable. However, the definition of Class I and Class II streams is a more specific, and workable, definition.

2. The definition of "high water mark" contained in HB 265 is a much more accurate one than the definition contained in HB498.

3. In HB498, Section 7 implies that recreationists are responsible for the damaging of aquatic habitat exclusively, and exempts landowners from practices which are ~~equally~~ damaging, such as diverting streams for irrigation purposes, overgrazing the banks of a stream, re-channeling stream beds, and sod-busting.

MISSOURI RIVER
FLYFISHERS
TROUT UNLIMITED
P.O. Box 6398
Great Falls, MT 59406

Recreationists are in fact in the forefront of conservationist efforts.

4. The right of portage is not addressed in HB 498.

5. Rather than restrict stream usage because of suspected mis-use, we should work towards better enforcement of the laws already on the books, and under the Department of Fish, Wildlife and Parks' jurisdiction. We propose a strengthening of the warden force, the formation of a crime-stoppers organization which focuses on game violations (such as already exists in Canada), and the education of the general public as to what constitutes violations.

6. Therefore, the Missouri River Flyfishers opposes HB 498 as not a valid compromise bill, and reiterates its support of HB 265.

Kevin L. Kommireddi
Secretary
Spokesperson.

EXHIBIT K
2/1/85
HB 498

GOUGH, SHANAHAN, JOHNSON & WATERMAN
ATTORNEYS AT LAW
301 FIRST NATIONAL BANK BUILDING
P. O. BOX 1715
HELENA, MONTANA 59624

NEWELL GOUGH, JR.
WILLIAM H. COLDIRON
WARD A. SHANAHAN
CORDELL JOHNSON
RONALD F. WATERMAN
JOSEPH P. MAZUREK
VIRGINIA A. KNIGHT
JOCK O. ANDERSON
K. PAUL STAHL
ALAN L. JOSCELYN
WILLIAM P. DRISCOLL

TAYLOR B. WEIR (1883-1962)
EDWIN S. BOOTH (1907-1976)

Telephone (406) 442-8560
Telecopier (406) 442-8675

January 7, 1985

Mr. Bill Asher
Montana Agricultural
Preservation Association
P.O. Box 3285
Bozeman, MT 59715

Re: MSGA - Stream Access
Our File 67001-016

Dear Bill:

Enclosed are 20 copies of the bill as finally agreed upon by the parties. Although the language has changed its form and I believe is simpler to understand, we have retained all of the central points we sought to preserve as we began the negotiations.

We have expanded the term barrier to reach instances where natural conditions totally or effectively prevent recreational use of the water. The subcommittee felt this was a fair compromise.

We have now defined streams into two classes and the smaller streams, those not navigable under the federal test, cannot be used for camping, operation of motorized vehicles, big game and upland bird hunting and other non-water recreational uses. Note we have inserted the concept that all land activities must be unavoidable or incidental to the water-related recreational use to be tolerated regardless of whether it occurs in a Class I or Class II stream.

We have defined the right of portage. If a landowner erects barriers of a design approved by Fish, Wildlife & Parks, there will be no right of portage at the barrier. We have set forth a means to create a portage route and retained the provision that once created, it will provide the exclusive means for the public around a barrier.

We have retained the provisions concerning the high-water mark, the limited liability of landowners and the

fact that no easement will develop incidental to a recreational use of the land or water by the public.

We have dropped the concept of protecting ecosystems from the bill. Further research showed Section 87-1-303, MCA, extended those powers to the commission already. We should encourage Jim Flynn to commence rule making after the session has ended.

At the request of Trout Unlimited, we abandoned the proposed repeal of Section 87-2-305, MCA. This angler statute duplicates the language in the present bill and is unnecessary but there is no harm in not repealing this.

I trust we can now proceed to poll the ag groups to develop their concurrence with the bill. If there needs to be a meeting, I would propose Friday, January 11, 1985, in the morning. I hope Representative Marks can be convinced HB 16 should be heard sometime during the week of January 14, 1985.

Very truly yours,

GOUGH, SHANAHAN, JOHNSON & WATERMAN

Ronald F. Waterman

RFW/lb
cc: Mons Teigen, Enc.
Jimme Wilson, Enc.

7023R

Mike Royko

Golf wins, by a landslide

CERTAIN TRENDS are beginning to emerge from the mountain of mail that has arrived in response to my Sex or Bowling Survey of American men.

Although they are a minority, a sizable number of men have said they prefer recreational sports or pastimes to sex with their wives or sweethearts.

Of these men, golfers appear the most willing to forego pleasures of the flesh for the joys of their favorite sport.

And of all the sportsmen, they tend to become the most poetic when describing its pleasures and rewards.

Some examples:

"You must be jesting to even ask. Five hours on 150 acres of perfectly manicured beauty, breathing fresh air, experiencing the excitement of pars and birdies with my best friends, compared to five minutes of subpar lovemaking with a woman who constantly complains about my income and lack of understanding? It is no contest. I will take the birdies over the old bat any day. Sign me, Two handicap in Naperville."

And from R.R.R., in Villa Park, Ill.:

"FOR ME, GOLF is more fulfilling. It provides four hours of uninterrupted pleasure in contrast to — what? You get to set your own pace without nagging for speed or performance. A golfer is guaranteed 18 opportunities for success in one round. While playing, your partners give you encouragement and praise even when you aren't doing well. I don't remember that ever happening in my bedroom."

M.H., who wrote on stationery of the Forest City (Ark.) Country Club, said: "I salute your sensitivity and insight. At least when my buddies on the links are amused by my inadequacies, inabilities and ineptness, they are laughing with me — not at me."

Pat, of St. Louis: "In responding to your survey, I mentioned to my wife that I had to put down whether I preferred sex with her or sinking a 40-foot birdie putt. She told me the odds of either happening in the near future were about the same."

A DISSENTING VIEW on golf or sex is found in a tiny poem from an elderly fellow who signs himself "Old 88 in Cleveland."

"When I was young and in my prime
"I'd rather swing my golf club any time
"But now that I am old and gray
"I'd rather have sex twice a day.

"P.S. If you print this and get deluged with fan mail, please refer my phone number to females age 70 and over."

After golfers, fishermen showed the most willingness to flee the bedroom.

Their views are reflected by John H. of Chicago, who said: "Let's face it, sex just can't compete with the feeling one gets in landing a 7-pound bass. Perhaps my feelings are screwed up because my wife looks like a 7-pound bass."

And Richard of Ashtabula, Ohio, said: "Include me as someone who thinks that a woman is only a woman, but a 6-pound bass is a trophy. Besides, a man can hire a taxidermist to mount the bass for him, whereas in the case of a woman he is pretty much stuck with that chore himself."

Most bowlers reject their sport as a substitute for carnal delights.

Shaky Jake of Cleveland said: "Any time my wife gives me the nod, I'll drop my bowling bag and stay home. I can always go bowling when we finish."

A similar view was expressed by Jim of Hoffman Estates, Ill.: "I would like to say that given a choice I would rather be having sex with my girlfriend and go bowling with my wife."

One bowler, Roy of Oak Lawn, Ill., said that my survey has caused him confusion: "I find it difficult to state my preference since I have taken to making love to my bowling ball."

Leaving sports, another trend is being predicted by a sociologist, who wrote from the Washington, D.C., area.

HE SAID THE TREND will be a result of Ann Landers' survey of women in which 72 percent of them said that they prefer cuddling with their husbands to going all the way. That survey, of course, inspired my survey.

The sociologist said that could lead to a dramatic change in American street language.

In the future, he predicted, we will hear people saying things like: "Cuddle off." "Cuddle you." "Go cuddle yourself." "You are a complete cuddle-up." "Go take a flying cuddle."

When sociologists take an interest, you know that these surveys are a serious matter. More later.

(Royko's Chicago Tribune column is distributed nationally and appears regularly on the Great Falls Tribune's editorial page.)

WILDLANDS & RESOURCES ASS'N

GREAT FALLS, MONTANA

FEBRUARY 1, 1985

Tom Hannah, Chairman
House Judiciary Committee
House of Representatives
Helena, MT

Chairman Hannah and Members of the Judiciary Committee:

At a regular meeting of the Wildlands & Resources Association of Great Falls, on January 17, we went on record supporting House Bill 265, an Act Relating to Recreational Use and Access to State Waters. We continue to support the provisions of that Bill because they represent a compromise arrived at by Agricultural and Recreational representatives. That Bill provides for reasonable use and access of the States streams, and at the same time protects the rights of the landowners.

House Bill 498, like House Bill 16, would turn back the clock several decades. It would deprive the State and its residents of the economic and recreational benefits they presently enjoy. Recreation and tourism is a major industry in Montana and recreational use of the States streams is a significant part of that industry.

House Bill 498 is unacceptable and should be defeated.

Respectfully,

George N. Engler

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

The Dude Ranchers' Association

JIM LANGSTON, PRES.
Beartooth Ranch
Nye, Mt 59061

MARK & AMEY GRUBBS, EXEC. SEC'S.
P.O. Box 471
LaPorte, Co. 80535
(303) 881-2117

KEN NEAL, VICE PRES.
Red Rock Ranch
Kelly, Wyoming 83011

BOB FOSTER JR., SEC.-TREAS.
Lost Valley Ranch
Sedalia, Colorado 80135

29 January 1985

To the members of the Judiciary Committee:

Having contacted by phone all but one of the Montana member ranches of The Dude Rancher's Association - and feeling absolutely confident that that ranch will join in our opinion, I wish to go on the record representing the said ranches in supporting House Bill 498.

Further, we strongly oppose House Bill 265!

Since almost every dude ranch, by its very nature, has a stream of some sort running through the building site of the ranch, to allow uncontrolled access to the entirety of the stream would severely compromise the security of the ranch, and would destroy, to a large part, the "atmosphere" of the ranch.

To allow this, could quite conceivably be the "kiss of death" to an important recreational industry in Montana, one which brings millions of dollars into the state annually.

Please consider very carefully the short AND long-term effects that your decision could have on an industry dedicated to preserving what is best about our Montana way of life, and sharing it with those less fortunate than we who can live here.

Sincerely,

Tack Van Cleve

TACK VAN CLEVE

Past President and currently
a director of The Dude Ranchers'
Association

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 31, 1985

Representative Orval Ellison
Montana House of Representatives
State Capitol
Helena, Montana 59620

RE: House Bill No. 498

Dear Representative Ellison:

I am writing this letter to provide my written comments in general support of House Bill No. 498. It is my understanding that this bill has been introduced by you regarding the issue of recreational use of state waters and will be the subject of a hearing of the House Judiciary Subcommittee on Friday morning, February 1st. I am unable to attend the hearing. However, I would like to provide my written comments regarding your bill.

I previously submitted written comments regarding House Bill No. 265, House Bill 275, and the bill submitted by Interim Subcommittee No. 2. I find that your proposed legislation addresses many of the concerns which I raised in my comments which I presented to Representative Robert Ream on January 22nd. One of my principal concerns with respect to House Bill 265 was that it appeared to me that it endeavored to provide detailed answers to unanswered questions and in the process of doing so, raised new and more thorny questions. It also appeared to me that the authors of that bill had attempted to conjecture as to the posture of the Supreme Court and, in my opinion, had erred on the side of expanding rights which the Court did not intend to afford. I do not have that problem with your bill. I believe it provides a proper perspective, and I believe it codifies the legitimate rights of recreational users without unnecessarily interfering with the property rights of the owners of agricultural land.

I do have a few particular comments, and for that purpose have attached a copy of the bill as received by me, as a point of reference. I assume that the bill may have been printed in

a different form, and consequently, I have directed my attention to the attached bill for reference purposes.

I believe that the definition of ordinary high water mark is a good example of tight draftsmanship. All of the concerns which I had with respect to the definition of ordinary high water mark in House Bill 265 have been addressed. I also believe that the definition of recreational use of surface waters is a more appropriate definition than appears in House Bill 265, and am pleased to see the restrictions which have been imposed upon hunting, other than water fowl hunting, overnight camping, etc.

I have one suggestion for minor modification of New Section 2(3) which appears at line 6 of page 3 of the attached bill. I believe that it would be appropriate to clarify that the right of the public to make recreational use of surface waters that are capable of recreational use, does not grant "or imply" any easement or right to the public to enter onto or cross private property in order to use such waters for recreational purposes. [redacted] I am suggesting that the words "or imply" be added, I believe that this is consistent with the thrust of the provision and provides some additional clarity.

I would also suggest at New Section 3(1) which appears at line 13 of page 3, that there be an addition of the words "for recreational purposes" so that the provision reads, "A member of the public may use, for recreational purposes, the land between the ordinary high water marks of surface waters that are capable of recreational use and that satisfy the federal navigability test for state streambed ownership."

In commenting upon House Bill 265 and related legislation, I noted that I felt that the rights of the public with respect to portage were adequately set forth in the Supreme Court decision. I am pleased to see that that is the posture of your bill. However, there is one matter relating to portage rights which I believe should be included in any legislation adopted by our legislature. As you are aware, the Supreme Court gave recreationalists the right to portage around barriers, but at the same time, mandated that the right be exercised in the least instrusive manner. I believe that it would be helpful for landowners and recreationalists to clarify the nature of a "portage" in a manner which I believe is consistent with the mandate of the Supreme Court. In the process of doing so, I would suggest a couple of minor changes to Section 3(2)(a) and (b) which appear at page 3, and the addition of a new subparagraph (3). I think that Section 3(2)(a) might perhaps be clearer if it was rewritten to provide "such use is unavoidable and directly incidental to the exercise of the right of the public to make recreational use of the surface water". I believe subparagraph (2)(b) would eliminate

the potential problem of an interpretation of a blanket grant of permission by adding the following words to the end of the sentence, "to such person".

Finally, I would recommend the inclusion of a new subparagraph 3 which would read as follows, to-wit: "A right of portage around or over barriers presupposes that there has been actual, immediately precedent use of surface waters for permitted recreational purposes which has, in fact, been obstructed by a barrier. The right of portage may not be exercised to re-enter surface waters at any distant point, or as a means of creating a new, independent point of access to the cross-lands which are not between the ordinary high water marks of surface waters." One of the concerns which has been expressed to me by agricultural landowners is that a portage does in fact presuppose that there has been actual, immediately precedent use of the surface waters which has been obstructed by a barrier. Many landowners have a concern that the exercise of what has been characterized as the "portage right" will be used by some in an effort to create new, independent access when in fact there has been no prior use of the waters nor obstruction in that use.

I believe that it is important to address this issue, as there is cognizance of the presence of the "portage right" in your bill. Specific reference is made to the restriction on landowner liability in New Section 4, arising out of the use of land while portaging around or over barriers.

I believe that New Sections 4 and 5 are well written. I am also pleased to see incorporation of your bill of a legislative expression of other relevant considerations which should bear on the issue of regulation of public use of waterways, as evidenced in New Section 7. There is one matter I believe might be appropriately added to that provision as a part of subparagraph (5) at page 6. There are many landowners who have voluntarily engaged in programs through conservation easements, cooperative public access programs, restrictive covenant or otherwise, all of which are designed to maintain or enhance fisheries or surface water ecosystems. I believe that some cognizance of those programs should be evidenced in the legislation and propose the addition of the following sentence at the conclusion of subparagraph (5), to-wit: "Additionally, in any determination by the department, it should give due and appropriate consideration to any reasonable regulations and restrictions which have been implemented by a landowner and which are designed to maintain or enhance the fishery or surface water ecosystem."

My final comment relates to New Section 10 of the proposed legislation at page 7. New Section 10 provides that the prohibition 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. As I indicated in my comments on House Bill 265, I am not sure what is meant by the word "perfected". Some parties with whom I have discussed this provision suggested 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 recreational use rights afforded by the legislative enactment, when in fact no such right was intended to be obtained predicated upon former use.

We have been endeavoring to monitor the proposed stream access legislation on behalf of clients who own agricultural land. I believe that your bill comes very close to satisfying legitimate needs of recreational users and in affording them their proper legal rights. I also firmly believe that your proposed legislation is by far the best bill which I have reviewed from the perspective of the owners of agricultural land.

Very truly yours,

KNIGHT & MACLAY

ROBERT M. KNIGHT

RMK/bab

BILL NO. 498

INTRODUCED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY DEFINE LAWS GOVERNING THE RIGHTS AND RESPONSIBILITIES OF PROPERTY OWNERS AND THE PUBLIC RELATED TO RECREATIONAL USE OF STATE WATERS; PROVIDING DEFINITIONAL TERMS; PROHIBITING RECREATIONAL USE OF DIVERTED WATERS; RESTRICTING THE LIABILITY OF LANDOWNERS WHEN WATER IS BEING USED FOR RECREATION OR LAND IS BEING USED AS AN INCIDENT OF WATER RECREATION; PROVIDING THAT A PRESCRIPTIVE EASEMENT CANNOT BE ACQUIRED BY RECREATIONAL USE; GRANTING POWERS TO PROTECT AQUATIC ECOSYSTEMS THROUGH LIMITATIONS OF PUBLIC USE UPON SURFACE WATERS; AMENDING SECTION 70-19-405, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

NEW SECTION. Section 1. Definitions. For purposes of [sections 2, 3, 5, and 7], the following definitions apply:

(1) "Department" means the department of fish, wildlife, and parks provided for in 2-15-3401.

(2) "Ordinary high-water mark" means the line that 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 purpose. Floodplains or

flood channels are not considered to lie within the ordinary high-water mark, for the purpose of determining recreational use, except when they carry sufficient water to support fishing or floating.

(3) (a) "Recreational use of surface waters" means fishing, swimming, floating in small craft or other flotation devices, boating in motorized craft or craft propelled by oar or paddle, or coincidental picnicking, all within the ordinary high-water mark of a stream.

(b) Except on public land or when otherwise authorized by state and federal law, in the interest of public health and safety and for the protection of water resources, recreational use of surface waters does not include:

(i) hunting other than waterfowl hunting;

(ii) overnight camping;

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

(iv) other activities that are not primarily water-related pleasure activities.

NEW SECTION. Section 2. Recreational use of surface waters permitted -- exception. (1) Except as provided in subsection (2), 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.

(2) The right of the public to make recreational use of surface waters that are capable of recreational use does not include the right to make recreational use of waters while they are diverted away from a natural water body for beneficial use pursuant to Title 85, chapter 2, part 2 or 3.

(3) The right of the public to make recreational use of surface waters that are capable of recreational use does not grant any easement or right to the public to enter onto or cross private property in order to use such waters for recreational purposes.

NEW SECTION. Section 3. Use of land between ordinary high-water marks -- when permissible -- when prohibited. (1) A member of the public may use the land between the ordinary high-water marks of surface waters that are capable of recreational use and that satisfy the federal navigability test for state streambed ownership.

(2) A member of the public may not use land between the ordinary high-water marks of surface waters capable of recreational use that do not satisfy the provisions of subsection (1), except when:

(a) such use is unavoidable and incidental to the right of the public to make recreational use of the surface water; or

(b) the owner of the land or his authorized agent grants permission to use the land.

(3) For purposes of this section, use of the land is unavoidable and incidental only when the use is temporarily necessary:

(a) to accomplish the recreational use of the surface waters; or

(b) for purposes of safety.

NEW SECTION. Section 4. Restriction on landowner liability during recreational use of waters or land. No person who makes recreational use of surface waters, as defined in [section 1], flowing over or through any land in the possession or under the control of another, pursuant to [section 2], or land while portaging around or over barriers or as an unavoidable or incidental use of the waters, pursuant to [section 3], has the status of invitee or licensee; nor is he owed any duty by a landowner other than the duty to avoid willful or wanton misconduct.

NEW SECTION. Section 5. Prescriptive easement not acquired by recreational use. (1) A prescriptive easement is a right to use the property of another that is acquired by open, exclusive, notorious, hostile, adverse, continuous, and uninterrupted use for a period of 5 years.

(2) A prescriptive easement cannot be acquired through use of land or water for recreational purposes.

Section 6. Section 70-19-405, MCA, is amended to read:

"70-19-405. Title by prescription. ~~Occupancy~~ Except as

provided in [section 5], occupancy for the period prescribed by this chapter as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all."

NEW SECTION. Section 7. Protection of aquatic ecosystems -- procedures. (1) The legislature finds that streams and other surface water ecosystems are subject to damage when the rate of public recreational use of surface waters exceeds the limits and capacities of surface water ecosystems. The legislature further finds that excessive public recreational use of surface waters can result in damage to aquatic life and wildlife or can result in damage to or trespass upon adjacent public and private lands.

(2) Upon complaint to the department by any individual that a stream or other surface water ecosystem has been subjected to a rate of public recreational use that has caused, is causing, or will cause damage to the ecosystem and to its aquatic life and wildlife or that will result in damage to or trespass upon adjacent or underlying public or private lands, the department shall:

(a) gather information through a reasonable investigation; and

(b) contact the landowner and solicit his cooperation regarding the complaint.

(3) If the department determines as a result of the investigation that there is reasonable cause for the complaint, it shall hold a hearing under Title 2, chapter 4, part 6, to determine whether substantial evidence exists to support the complaint.

(4) If as a result of the hearing the department concludes that there is substantial evidence to support the complaint, it may:

(a) close to recreational use by the public the waters or any portion thereof exposed to the damage;

(b) restrict the public's right to such surface waters by limiting the number of recreational users upon the surface waters at a given time;

(c) restrict the length of time the surface waters may be used by the public for recreational use;

(d) restrict the types of recreational uses allowed upon the surface waters; or

(e) impose such other regulations or restrictions which would prevent damage to the water ecosystem, aquatic life, or wildlife or damage to or trespass upon adjacent or underlying public or private lands.

(5) Nothing in this section grants the department authority to require, prohibit, or otherwise regulate lawful land management decisions, activities, or practices by the landowner, manager, or agent.

NEW SECTION. Section 8. Codification instruction. Section 4 is intended to be codified as an integral part of Title 27, chapter 1, part 7.

NEW SECTION. Section 9. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 10. Applicability. Sections 5 and 6 apply only to a prescriptive easement that has not been perfected prior to the effective date of this act.

NEW SECTION. Section 11. Effective date. This act is effective on passage and approval.

-End-

WITNESS STATEMENT

Name PETER D. ANDERSON Committee On JUDICIARY

Address HAYNOOR RANCH - LIVINGSTON MT. Date 2-1-85

Representing Self LANDOWNER Support 498

Bill No. 498 & 265 Oppose 265 IF WRITTEN

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. HUNTING ON THE STREAMS IN WESTERN MONTANA IS AS DANGEROUS AS HUNTING FROM THE ROADS & ROADS, BOTH CONTRARY TO CURRENT LAW. HUNTING FOR BIRDS
2. INDICATES USE OF SHOTGUN - HOWEVER, THIS RIGHT SHOULD BE WITH PERMISSION TO AVOID
3. LANDOWNER UNCERTAINTY, DANGER TO STOCK OR TO INHABITANTS.

4. THE USE OTHER THAN WATER USE IS BEYOND COURT DESIGNATION

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

JUDICIARY (SUB)

WITNESS STATEMENT

Name GEORGE M ROSSETTER Committee On STREAM ACCESS

Address RT#1 BOX 175 Date 2/1/85

Representing SELF Support ✓

Bill No. 498 Oppose

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. I testified in favor of 498 as opposed to H.B. 265

2.

3.

4.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

WITNESS STATEMENT

Name Hal Price Committee On

Address 107 W. Lawrence Helena Date 2/1/95

Representing Montana Wildlife Fed. Support

Bill No. HB498 Oppose X

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. oppose HB498

2. support compromise bill HB265

3. recommend HB498 be refered to stream access subcomittee

4.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

WITNESS STATEMENT

NAME Charles Howe BILL No. 498

ADDRESS 5360 Springhill Conn Rd DATE 2/1/85

WHOM DO YOU REPRESENT Self

SUPPORT X OPPOSE AMEND

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments: Subcommittee (Judiciary) hearing 2/1/85 on Stream Access HB 498.

FORM CS-34
1-81

WITNESS STATEMENT

Name John Salmond Committee On _____

Address Box 581 Choteau, Mt. 59422 Date 1-2-85

Representing _____ Support ✓

Bill No. _____ Oppose _____

Amend _____

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1.

2.

3.

4.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

WITNESS STATEMENT

Name Donavan Manuas Committee On

Address 3383 Forsyth Rd. Date 2-1-85

Representing Self Support X

Bill No. 498 Oppose

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1.

2.

3.

4.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

VISITORS' REGISTER

JUDICIARY COMMITTEE

BILL NO. 498 DATE 2/1/85

SPONSOR Rep. Ellison

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Russell F. Waterman	Helena		✓
[illegible]	Melville	✓	
Peter Anderson	Hawthorn Ranch Liv.	✓	/
Bill Asher	Bozeman	—	—
Dianne McDermand	Great Falls		✓
[illegible] McDermand	Great Falls		✓
Frank Goetz	Greenough	✓	
Dennis Hemmer	Helena		
Merlene [illegible]	Helena		
Kevin J. Krumvieda	Cascade		✓
Walt Carpenter	Gt. Falls		✓
[illegible]	MWF		✓
[illegible]	White Sulphur Spr.	X	
[illegible]	White Sulphur Springs	X	
Phil Strope	Helena	X	
Paul Brunner	Ovando	X	
[illegible] Brunner	1469 Kodiak Rd Helena		X
[illegible]	Helena	X	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

JUDICIARY COMMITTEE

HOUSE BILL NO. 476 and 521 DATE 2/1/85

SPONSOR Rep. Spaeth

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
J Spaeth	HC 84		
Jim Jensen (MAGISTRATES ASS'N)	~~HRB~~ BILLINGS	✓	
4/76 Margaret Davis	League of Women Voters of Helena	—	—

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FOR

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

CS-33

VISITORS' REGISTER

JUDICIARY COMMITTEE

HOUSE BILL NO. 498 DATE 2/1/85

SPONSOR Rep. Ellison

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Norm Stacy	Melville MT	X	
Bob Wilson	Big timber	X	
Alan Eck	Bozeman - MT Farm Bureau	X	
Richard W. Josephson	Big Timber	X	
[illegible] Wilson	McLeod	X	
Ted Lucas	Highwood	X	
David O. Freeman	Augusta	X	
Charles M. Hoover	Gallatin County	X	
Mike [illegible]	Helena	X	
Carol Mosher	Montana CowBelles		
Donovan [illegible]	GALLATIN COUNTY	X	
Chuck Rein	Sweet Grass Pres. Asso.	X	
Franklin Grosfield	Big Timber	X	
EUGENE H. CANTLEY JR	GREAT FALLS		X
Chris C. Jewett	GREAT FALLS MT		X
Cindy Jewett	Great Falls		X
Nancy McIlhattan	Livingston	X	
[illegible] Russell	[illegible]	X	
[illegible]	Bozeman	X	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

CS-33