MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

March 8, 1985

The forty-fourth meeting of the Senate Judiciary Committee was called to order at 10:05 a.m. on Friday, March 8, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol Building. The Senate Fish and Game Committee was in attendance.

ROLL CALL: All Senate Judiciary Committee members were present. In addition, all Senate Fish and Game Committee members were present, with the exception of Senator Judy Jacobson.

CONSIDERATION OF HB 265: Representative Bob Ream, sponsor of HB 265, introduced the bill to the committee and traced a bit of its history. There were a variety of bills on stream access last legislative session. Because of the uncertainty regarding the Hildreth and Curran Supreme Court decisions at that point in time, Representative Keyser sponsored a resolution requesting an interim study. The interim committee provided a public forum for this issue. People began to realize it wasn't a black and white situation; there were areas of grey in between on which people were going to have to compromise. Both sides realized they would have to come up with a bill to ameliorate some of their concerns. This is not a committee bill, but a bill on which the two sides got together in the months before the session began and hammered out. The bill was before the House Judiciary Committee, which appointed a subcommittee headed by Representative Keyser. There was an attempt to involve both sides in the decisionmaking on the amendments made by the subcommittee. Representative Ream then suggested the committee read the interim study (Exhibit 1).

PROPONENTS: Representative Bob Marks, co-sponsor of HB 265 and chairman of the interim committee, testified in support of HB 265. He carried HB 888 last session, which covered many of the same things. Last session, people protested passage of that bill until the Supreme Court cases had been decided because they thought they could win those cases. If they had won the cases, there would have been no need to come back this session with HB 265. There has been some inference that if the bill is tinkered with, it will be killed in the Senate or on the House floor. Representative Marks hoped the committee would not get spooked from killing this bill without carefully considering what this bill does to the people who say it does things to them, who are both landowners and recreationists. He suggested the committee carefully consider a comparison between what this state would have with just the Supreme

Court decisions or what the state would have with some sort of legislation. He did not say the bill was perfect, but he suggested if the committee did not feel it were, they should try to improve it. Representative Marks felt that when we come right down to the management of our streams and properties in the state, there is going to have to be a compromise, and that compromise was forced on us by the court decisions.

Representative Kerry Keyser testified for two main reasons: (1) He served on the joint interim committee which dealt with the recreational use of Montana waters. (2) He was appointed chairman of the House Judiciary Subcommittee which took under consideration the many water bills dealing with recreational use and the landowners' rights of our state waters. The goal of the subcommittee was to keep HB 265 within the bounds of the Supreme Court decisions and to express the legislature's desire to tie down and define the areas that were left very broad in those decisions. The bill defines: (1) diverted away from natural water bodies; (2) ordinary high water mark (puts the definition back in the banks of the stream and does not include any floodplain); (3) off-water storage and off-waterways which cannot be used; (4) surface waters and limitations of these waters; (5) rights of portage; (6) right to appeal; (7) restriction of liability of landowners and supervisors as far as recreational use of the water; and (8) prescriptive easement (not acquired by the recreational use of surface water). Had HB 888 passed and been on the statutes last session, it would have had to have been considered in the Hildreth and Curran Supreme Court decisions. The federal Court of Appeals and the United States Supreme Court have told Montana time and again it will decide its own water problems as they will not take them. He hopes this legislature will adopt a law which will set some guidelines. The statement of intent states the commission shall strive to permit broad exercise of public rights while protecting water resources and the ecosystem. Representative Keyser then referred to the statement of intent, page 1, lines 12-19, and page 2, line 9 through page 3, line 9. The Fish and Game Commission presently has the right to control the use of present streams in the state of Montana as to use of floaters, fisherman, catch and release, and where you can float and where you cannot. As the constitution has a separation of powers provision, it allows the Supreme Court to take these cases and make decisions. The constitution also mandates upon the legislature the right to take care of these problems. Representative Keyser proposed an amendment that was talked about in the House Judiciary Committee, but it was their decision not to change the bill as it went into the House and instaed they would bring this before the Senate (Exhibit 2).

Ronald F. Waterman, an attorney from Helena, appeared on behalf of Montana Stockgrowers Association, Montana Woolgrowers Association, Montana Association of State Grazing Districts, Montana Cowbelles,

Montana Farmers Union, Montana Cattle Feeders Association, Montana Farm Bureau Federation, Montana Water Development Association, Women Involved in Farm Economics, Montana Grain, Montana Irrigators, Inc., Montana Dairymen, Montana Cattlemen's Association, Park County Preservation Association, and the Agricultural Preservation Association Mr. Waterman presented written testimony to the committee (Exhibit 3). This written testimony included several amendments. In addition, Mr. Waterman testified that SB 418, previously passed by the Senate Judiciary Committee, deals with the ordinary high water mark. The contention of those who propose to kill HB 265 is the definition of ordinary high water mark which should be used is that given by and within the Natural Streambed Preservation Act regulations. It speaks in terms of where vegetation is absent from a stream as a way of defining the ordinary high water mark. By regulation, the Department of Natural Resources and Conservation found a device under which it could extend its jurisdiction as far into the stream as possible, and it has done that by calling the low water mark, the high water mark. HB 265 has a definition that defines the high water mark where it is--where there is diminished vegetation, diminishment caused by the presence of water over that vegetation. All of those who live in Montana can conceptualize where that is as being within the beds and banks of a stream; it is not a corridor several hundred yards wide through which the public can trespass through landowners' property. It is in fact a clearly defined stream area and a fair and balanced definition. Mr. Waterman also found trouble with the way floodplains have been dealt with in SB 418. SB 418 says the floodplains can be used so long as there is water on them, and that means the flood irrigated waters of this state would have recreationalists into hay meadows during the spring and summer during irrigation season. That is not what was intended. That is not what landowners want or recreationalists seek. Mr. Waterman feels HB 265 properly deals with floodplains by saying simply the use is prohibited for all reasons and all seasons. Mr. Waterman testified that the definition of surface water does not open the corridors of the dry waterways for public use. The reason for that is simple. Class I--the large rivers, do not dry except in a drought year. Class II streams will dry. With respect to Class II streams, we have said those streams can only be used for water-related pleasure activities. Recreational use is defined in section 2 in the manner in which the court said the streams can be used. Then we go on to say those things that are inconsistent with a water-related activity, of which big game hunting is one. You will hear some testimony suggesting big game hunting should be allowed within the ordinary high water mark. Mr. Waterman testified there are a number of reasons why that language is there and why the proposed amendment should not be followed: (1) Big game hunting needs permission on all private property, whether within or outside the ordinary high water mark. (2) Big game hunting with high powered rifles is a danger to those people who live along the streams. (3) Big game

hunting is using high powered rifles to knock down deer and elk within that waterway. For those times when they are not successful and the deer and elk get outside the high water mark, you are then encouraging the incidental trespass. That is why big game hunting is a flat prohibition and that is why all terrain vehicle operation is an absolute prohibition absent the caveat if you have the landowner's permission. We are trying to encourage the recreationalists to ask first and encourage the landowners who are asked to give permission. Some of the proposed amendments address the creation of permanent structures and prohibiting them without the landowner's permission. We have defined two segments of the land into Class I and Class II, large rivers and smaller streams, and on smaller streams, there are some other things that are inconsistent with landowner use and cannot be used. We have addressed prescriptive easement and talked about the fact you cannot follow diverted waters, pointed out that landowner liability must be addressed, have addressed portage route. Portage the Supreme Court said is a right to go around barriers in the least intrusive manner without damaging private property rights, and we have reiterated that, but then they have provided a mechanism whereby if excessive portage on all sides of the stream becomes an abuse or an inconvenience, landowners have a device under which they can restrict portage to a single, exclusive route. The portage route is a definitional way of problem solving without using access to the courts. They have spoken in terms of prescriptive easement to assure that the public does not have a right through use to obtain a prescriptive easement of the water, beds, banks, portgage routes, or any other progression over the land. Mr. Waterman testified that the Senate bills are not adequate to cover the problem. There have been some arguments advanced that this is a compromise, and if there is a compromise at all, it is a compromise against an uncertain future where litigation can and will further erode landowner rights in exchange for the certainty of a bill which is balanced and fair and which considers all of the elements of a complex subject.

Mary Wright, representing the Montana Council of Trout Unlimited, which participated in the process that is now embodied in HB 265, testified they fully support HB 265 as a fair, balanced, and reasonable treatment of all the issues raised by the Montana Supreme Court in the Hildreth and Curran decisions. They believe it clarifies the issues that were not decided by the Supreme Court; it states clearly the rights and responsibilities of the sportsmen, and it protects the landowners. It integrates all of the issues surrounding stream access; it has many strengths; and because of these strengths, they ask the committee's support of the legislation. One of the strengths lies in its comprehensive treatment of the issues. At the same time it is a focused treatment. It provides a suitable vehicle for the legislature to address all of the stream access issues. It classifies streams and preserves reasonable landowner control over smaller streams by preserving

in a reasonable way the rights granted by the court to sportsmen. It provides the means for sportsmen/landowners to join together with the Department of Fish, Wildlife and Parks to regulate uses of streams on a site-specific basis to accomplish the stated goals of all the parties that our resources be protected. In addition, Ms. Wright submitted written testimony to the committee (Exhibit 4). Ms. Wright concurred in the previous testimony and the amendments presented by Mr. Waterman.

The following testified in support of HB 265 and, where indicated, presented written testimony or made additional testimonial remarks:

Jim Flynn, on behalf of the Department of Fish, Wildlife and Parks (Exhibit 5). Jimme L. Wilson, rancher from Trout Creek and President of the Montana Stockgrowers Association (Exhibit 6). Dan Heinz, on behalf of the Montana Wildlife Federation (Exhibit 7). Richard Parks, owner of Parks' Fly Shop and President of the Fishing and Floating Outfitters Association of Montana (Exhibit 8). Paul F. Berg, representative of the Billings Rod and Gun Club and the Southeastern Sportsman Association (Exhibit 9). They believe it should allow big game hunting below the high water mark on Class I streams without the necessity of the private property owners' permission. Robert Vandevere, a registered concerned citizen lobbyist from Helena, testified in support of the bill. He stated that if the bill needs a touchup, it should be worked out two years from now. Jo Brunner, representing the Montana Grange, the Montana Cattlefeeders Association, and the Montana Dairymen's Association, asked for the committee's full support of HB 265 with the amendments submitted by Mr. Waterman (Exhibit 10). Mike Mcone, of the Western Environmental Trade Association, stated they support legislation that protects the private property rights. They believe if modications are made to HB 265 they can support the legislation and offered amendments to the committee (Exhibit 11). Gene Chapel, President of the Montana Farm Bureau Federation, stated they represent 38 organized counties throughout the state, and only one of those county farm bureaus dissented from the position in support of the bill, namely Sweetgrass County Farm Bureau (Exhibit 12). Mack Quinn, rancher from Big Sandy and immediate past President of the Montana Farm Bureau (Exhibit 13). Don McKamey, President of the Montana Woolgrowers Association who lives south of Great Falls on the Smith River (Exhibit 14). He stated the majority of his membership is in support of this legislation. Jerry Manley, President of the Montana Coalition for Stream Access (Exhibit 15). Lorraine Gillies, of Granite County (Exhibit 16). Jim McDermand, spokesman for the Medicine River Canoe Club in Great Falls, testified HB 265 in its present form is an equitable bill that will satisfy the wishes of the majority on both sides (Exhibit 17). Lavina Lubinus, representing Women Involved in Farm Economics (Exhibit 18). Joe Etchart, President of the Montana Association of State Grazing Districts, supported the passage of HB 265 with Mr. Waterman's amendments (Exhibit 19).

Maynard Smith, from Glen, supported the bill but asked for a change (Exhibit 20). As a supervisor on the Beaverhead Conservation District, they have been working with the Streambank Act for the past eight years (SB 310). He personally has been on about 50 streambank inspections, consisting of a member of the conservation district, the landowner, and a member of the Fish and Game Department. They have dealt with the mean high water mark, which is just about the same described in HB 265, but it is a little different. He asked that the committee change the definition in HB 265 to coincide with the description of the ordinary high water mark in SB 310. Kevin Krumvieda, representing the Missouri River Flyfishers, stated his membership fully supports HB 265 (Exhibit 21). Walter McNaney, President of the Big Horn County Farm Bureau (Exhibit 22). Don Jones, a member of the Gallatin County Farm Bureau and former member of the Montana State Board of Directors of the Farm Bureau, appeared in support of HB 265 as it is now written but was concerned that there may be an amendment to get big game hunting, which he opposed (Exhibit 23). Carl Hope, member of the Big Horn County Farm Bureau (Exhibit 24). Dave McClure, President of the Fergus County Farm Bureau (Exhibit 25). Roy Voltkamp, President of the Gallatin County Farm Bureau, stated they feel the people who put this bill together found a workable solution to this problem (Exhibit 26). Tony Schoonen, President of the Skyline Sportsmen Club in Butte affiliated with the Coalition for Stream Access, urged the committee's support of HB 265 and proposed that the bill be amended (Exhibit 27). R. A. Ellis, representing the Helena Valley Irrigation District and the Lewis and Clark County Farm Bureau (Exhibit 28). Walt Carpenter, representing himself and many friends and recreationists, appeared in support of HB 265 without any amendments (Exhibit 29).

In addition, the following written testimony was submitted in support of HB 265, although not presented orally to the committee: Jack Hayne, representing the Teton-Pondera Farm Bureau (Exhibit 30); Patty Busko, President of the Wildlands & Resources Association (Exhibit 31); James Kemr, D.D.S., who requested the bill not be changed to eliminate duck blind construction on Class I streams or to allow seasonal blinds that can be removed at the end of the season (Exhibit 32); Tom Milesnick (Exhibit 33); and Bruce R. McLeod, President of the Park County Legislative Association (Exhibit 34).

OPPONENTS: Former senator Ben Stein appeared in opposition to the bill (Exhibit 35) and testified that in the situation where there is a hunter on his property, his hunting license states he must have permission of the landowner. If the hunter does not, Mr. Stein can call the game warden. However, Mr. Stein testified that in the case of a fisherman, the Supreme Court has opened the whole situation. He'd have to call his lawyer instead of the game warden. He feels this legislation will make a bad situation between the landowners and the sportsmen. He feels that without regard to what the Supreme Court has done, until they can print

in a few words in plain English on the fishing license how the fisherman stands in relation to the landowner, this verbage is junk.

Phil Strope, a Helena attorney, appeared representing people from the land and livestock community who were either members of the Stockgrowers, Woolgrowers, or Farm Bureau who are not in support of the agricultural coalition's position as enunciated by Mr. Waterman who initially represented all of those people. He testified that they did not feel, as Representative Marks contended, that the court decisions forced any sort of compromise. Mr. Strope addressed Mr. Waterman's statement that it was a broad, sweeping decision. Mr. Strope stated they had a witness here who had visited with Judge Haswell where he spoke pubicly about it and told the people assembled not to read too much into the decision, to read the decision in terms of what it decided--it was a water decision and not a land use decision. Mr. Strope touched on the two areas they felt the committee should think about in the decision as to whether or not to pass this bill. (1) Definition of surface water (refer to Exhibit 36 for extensive discussion of this point). HB 265 recommends that the definition of surface water is mandated by the Supreme Court. Mr. Strope states this definition is not. He stated a statute which has been on the books since 1898 says the abutting property owner owns the land down to the low water mark subject to the right of a fisherman to use the water when it is up to the high water mark. If you take the definition of HB 265 for surface water, what you are creating is a right in the public to use those dry streambeds when there's no water on them. Admittedly in HB 265, they have written out of the law a number of areas where the public would like to use the rights to get on public property. But if this legislation is passed, you are setting into statute the right of the public to use the dry streambeds for whatever purpose successive sessions of this legislature decides is a public use. (2) Exercising the most awesome power of government. In the U.S. Constitution and the Montana Constitution there is not one phrase that says anything about the right of the sovereign to take by right of eminent domain. All it says in those constitutions is what the government has to do if it exercises those rights, in which case it has to pay just compensation. In this state, you have to go to court to determine that what the government is proposing to do is in the best interests of the public. In the federal system, all you have to do is get an appropriation. Here, in this bill, the language about portgage leaves out what he considers is the most important thing for a property owner or citizen--what's missing in the portage issues of HB 265 is any provision to pay the landowner anything if the public exercises its right to create a portage route around natural barriers. Mr. Strope stated that it was at this legislature that they have had a chance to speak up because at all of the previous forums they were summarily relegated to the back of the bus. They have tried to get them to realize what Judge Haswell says in his opinion, where he cites the statute that says

landowners have the right to own the land down to the low water mark subject to the fishermen's right. HB 265 takes that right away. Judge Haswell, eight times in the Hildreth case, cites Curran as the fountainhead opinion. When he quotes the right of the public to use the beds and the banks, what he means is when there's water on it. When there's no water on it, those beds and banks are governed by the statute passed in 1898 that says the landowner owns it. Mr. Strope referred to Senator Blaylock's question a week ago when he asked what you did when the bank of the stream is straight up and down. Mr. Strope says the answer to that is whether you pass HB 265 or SB 418, you will not change one bit the public's right to get on somebody's property above the high water mark. If the bank is straight up and down, the high water mark and the low water mark are essentially the same vertically; and so in those areas, the public will be precluded. HB 265 deals with those areas where a gentle slope exists and creates a general access corridor for the public to use to travel up and down for such uses as the legislature puts on it.

Dick Josephson, an attorney from Big Timber, appeared representing himself and the Sweet Grass Preservation Association (Exhibit 37). He testified that Mr. Strope covered many of his concerns. He stated that under this bill, the public can camp between the high and the low water marks. Under this bill, they can come in and put in permanent structures. Mr. Waterman has finally agreed to amend out permanent structures, but the amendment allows them to put in semi-permanent structures, which to him means boat docks or overnight camps. Class I waters are defined as anything that will float a two-person boat or a log. He believes the state of Montana must project an image of protecting private property rights, and while maintaining our environment, we want to attract business. He believes the value of property rights will go down if HB 265 passes. Mr. Josephson testified that allowing portage above the high water mark at the request of the recreationist on the landowner's land and at the landowner's expense is costly for the landowner and the soil conservation people that have to administer it. Then the landowner can drag this guy into an arbitration proceeding, who if he doesn't like the portage route has equal standing with the landowner as to how it ought to be changed; and then if they don't like that, they go to district court. He does not agree this will save court costs. He testified the state of Montana must have a reputation of protecting private property rights.

Representative John Cobb appeared on his own behalf and presented written testimony (Exhibit 38). He stated there are parts of the bill he really likes: the statement of intent and the procedure about challenging if there's an abuse on the stream. He stated the best way to understand stream controversy is to think of a highway going down through your land and think of it as water. Before the private landowner

controlled who could use that highway. The court took that away and said now the state can control that use and the legislature can do anything it wants as long as it's for a beneficial use. No matter what is done this session, you could end up in court because there could always be judicial review of what is done in the legislature. Representative Cobb stated he would like the committee to consider some amendments. There are already existing rules which most people don't realize about the public's use on waters (pages 68, Exhibit 38). Although they were just for a few designated places, he feels the Senate ought to decide if those rules should apply to all of these waters. They take care of nuisances, disorderly conduct, hunting, camping, etc. The second thing he would like taken out of the bill is the placement of semi-permanent or permanent objects. The Supreme Court says the landowner doesn't have any control over that recreation, but neither does the recreationist have the right to put private property on that recreational area. Only the Fish and Game has been given the authority to allow those placements of objects. If the landowner can't do it, neither can the recreationist. The Supreme Court said waters capable of recreational use can be used without regard to ownership. That implied to him there were some waters out there that weren't capable of recreational use. He is asking that the legislature tell the Fish and Game to go down and list waters like other states have done and the types of recreation you can use on them or the types of substantial use. The public trust doctrine that other states use is an environmental protection doctrine, not a recreational doctrine. Recreation is just a tiny part of the public trust doctrine. He requests that if we're going to have this bill without change, the legislature first tell the Fish and Game to go out and list waters and the types of uses that can be done on them and, secondly, keep these rules still in effect so they apply to all waters and people know what they can do on them, and thirdly, keep that part about the right to challenge that is already in HB 265 that says if there's a problem, any person can ask the Fish and Game to do something about it. The problem in the Supreme Court in this case was they said you can use all waters capable of recreational use. You can use the bed and the bank is what they are trying to say. The other states say you can only use the bed and the bank for an incidental use and kept all of the recreation on floatable rivers. You can always argue whether the Supreme Court knew what it was saying by leaving those few words out about you can use the bed and the banks except for incidental use. If you put the overall rules in ahead of time as to what you can do on these rivers and creeks, and then consider those restrictions on a case-by-case basis; no matter what happens in court, at least there's going to be a lot more water opened up anyway.

The following testified in opposition to HB 265 and, where indicated, presented written testimony or made additional testimonial remarks:

Ted Lucas, a rancher from Highwood, a member of the Montana Stockgrowers Association who served on the landowner recreation committee, and a board member of the Western Environmental Trade Association (Exhibit 39). Tack Van Cleves, a rancher and dude rancher from Big Timber, representing the state members of The Dude Ranchers' Association (Exhibit 40). They feel its passage may very well be the end of the dude ranching industry in this state.

Bill Morse, attorney from Absarokee, representing the Stillwater County Association of Taxpayers and Madison County ranchers (Exhibit 41), testified it is not the time for the type of compromise this bill suggests. He believes if you do not pass HB 265, we will see what the Supreme Court meant, because he believes a careful reading of those cases will show that they are directed to the facts in those cases. Mr. Morse felt we should also bear in mind what will happen to those people who own land along streams. When someone buys a piece of property with a stream on it, they pay a tremendous price as opposed to buying a piece of dryland. If this state takes away the incidence of ownership of those streams, he questioned what that will do to the ad valorem value of that land when the owners talk to their assessors. He believes they have a tremendous case to show if they don't have those incidents of ownership, they don't have to pay taxes on them, and if they don't have to pay taxes on it, that value is going to plummet and those extra bucks are going to have to come from some other place. He believes this is far-reaching legislation, and does not believe there is any state in the union or the free world that has gone as far as we are suggesting that HB 265 ought to take us or that the Supreme Court has already taken us.

Dr. Clayton Marlow, a research scientist with the Montana Agricultural Experiment Station (Exhibit 42). He asked that the committee consider several grey areas within the bill which are enumerated on his exhibit. Roger Koopman, a businessman and sportsman from Bozeman and former Field Representative for the National Rifle Association, testified in opposition to HB 265 (Exhibit 43). Paul Hawks, on behalf of the Stillwater Protective Association, an affiliate of the Northern Plains Resource Council, presented written testimony and proposed amendments to the bill (Exhibit 44). Mr. Hawks also submitted for the record the testimony of Chuck Rein (Exhibit 45). Steve Aller, operator of a guest ranch in Park County, a fly fisherman, and a past member of Trout Unlimited, appeared in opposition to HB 265 believing it expands the two Supreme Court decisions (see written testimony and samples of letters of some of the concerns that are being expressed by fishermen from other parts of the country (Exhibit 46). Byron Grosfield testified that he would support HB 265 if amended by SB 418, SB 421, and SB 224. Failing that, he heartily opposed the bill (Exhibit 47). Mr. Grosfield also presented written testimony on behalf of Robert W. Janett (Exhibit 48). Ralph Holman concurred with all of the previous testimony to HB 265 and

submitted additional written testimony (Exhibit 49). Bill Phillips, life member of the National Rifle Association and most of the trapping associations in the country (Exhibit 50). He testified that Mr. Waterman mentioned people with fishing rods won't be able to fish on these dry gulches, but people from out of state will be able to come in with their hunting dogs. He can't use dogs to run lions and cats on places where sheepmen have sheep because the dogs will disturb the sheep, and he has to be careful that he picks up his traps. Some people will not even try to pick up their traps. Jean Parsons testified HB 265 gives the landowner very little ability to be custodians of their land (Exhibit 51). Phil Rostad, representing the Meagher County Preservation Association (Exhibit 52). He felt SB 418, SB 421, SB 424, and SB 435 adequately address the problems. Lorents Grosfield, cattle rancher from Big Timber (Exhibit 53). Charles W. d'Autremont, from Alder, testified his property's value is directly proportional to its private river rights, and without the same, the value of his land is negligible (Exhibit 54). He was concerned about land values and safety. He thought it was presumptuous of the state to seek more land and access when the Fish and Game Commission cannot maintain adequate control over the land and waters currently under their jurisdiction. If the state demands an easement through his property, then he demands the same protection from trespass and hunters, etc. Bud Pile, rancher from Greycliff (Exhibit 55). He reminded the committee that the four Senate bills which it has already passed are simple and clear and do not need a lawyer to be interpreted. He feels HB 265 is unnecessary and complicated and is subject to interpretation. He stated he had brought a boat paddle along with him because he wanted to remind them that when the Supreme Court access ruling came about, he went down the creek and he wouldn't need it. Mr. Pile then presented the paddle to Chairman Mazurek. Mrs. Arch Allen, of Livingston, testified she recognized the Supreme Court decisions and felt they have taken from the legislature their checks and balances of government. She hoped the committee would restore this to our Montana form of government by amendments to HB 265 so we have the legislative, the executive, and the judicial, not one-sided government. In addition, Mrs. Allen presented written testimony (Exhibit 56). Sharon Welin, representing the Boulder Valley Association, an affiliate of the agriculturally based Northern Plains Resource Council, appeared in opposition to HB 265 but supported the four Senate bills (Exhibit 57). Mrs. Joan Langford, representing five local people from Reedpoint (Exhibit 58). John McDonald, rancher from Flint Creek, member of the Stockgrowers Association and the Farm Bureau, testified that in the mining business, there are several questions that have arisen out of this bill (Exhibit 59). In his area, there are some rather large bodies of water which have traditionally been closed to public use for reasons of safety, and they would like to see some clarification of how that will fit into this bill. John Willard, a landowner in Lewis and Clark County, asked that the committee take a look at the other states with more experience that have handled

this (Exhibit 60). He asked that the rights of the landowner be protected, that the public trust be confined to water, and that the responsibilities for those trespassing on the land be fully specified in the law. Robert Burns, of Big Timber, stated he is opposed to HB 265 because there is no compromise to private ownership (Exhibit 61). Bob Saunders, representing the Meagher County Preservation Association (Exhibit 62). Charles Howe, of Belgrade, stated this bill would affect him as a rancher and as a businessman (Exhibit 63). Bud Hansen, representing the ranchers up and down his creek in Ekalaka (Exhibit 64). David Howe, Park County rancher (Exhibit 65). Kelly Flynn, representing Hidden Hollow Ranch in Broadwater County, testified this bill will adversely affect their ranch. J. N. Saunders, Ennis, objected to HB 265 on the basis it confiscates his ground (Exhibit 66). Walt Lineberger, Madison County (Exhibit 67). Neva Lydeard, Cascade, testified there are two points in opposition to the bill which no one had brought out yet (Exhibit 68). One is the problem of knapweed. The other thing that has not been mentioned is one-third of the state is owned by federal and state governments and why can't the recreationists use that instead of private land. Windsor Wilson, McLeod, opposed HB 265 but supported the four Senate bills (Exhibit 69). Pam Reim, Melville (Exhibit 70). Bob Daggett, Laurel, appeared against HB 265 and stated he thinks it is an attempt to build something on a foundation that was wrong in the first place (Exhibit 71). Peggy Ferster, representing some ranchers from Carbon County (Exhibit 72). Dave Moore, dryland farmer and Vocational Agriculture teacher from Big Timber (Exhibit 73). Wes Henthorne (Exhibit 74). Elaine Allestad, Big Timber (Exhibit 75). Verna Lou Landis, Wilsall (Exhibit 76). Virge Holliday, Wilsall (Exhibit 77). John DeCock, Melville (Exhibit 78). George Rossiter, representing the Bear Tooth Stock Association, testified they would like to see any number of amendments to this bill and presented a resolution from the association (Exhibit 79). Jack Salmon, landowner from Salmon, opposed the bill.

Conrad Fredricks, representing the Sweet Grass County Preservation Association (Exhibit 80), stated Mr. Waterman in his written testimony listed six goals that the landowner coalition had in proposing necessary legislation. He submitted that five of those are currently addressed in the three Senate bills already heard before the committee or in Representative Grady's HB 520 which makes it clear that waters diverted away from the natural water course are not subject to use. The only one that is not covered is portage. The portage issue has now gone from Hildreth's bridge, which Judge Shanstrom says you could go around, the narrow right given by the Supreme Court, to the extended right now in HB 265, where in the case of artificial barriers, not only does the landowner have to furnish the land, but he has to pay for establishing a portage route out of his pocket. In the case of natural barriers, this is not necessarily limited to if it is his barrier. It makes no distinction between the county bridge, the state bridge, The Montana Power Company power line,

or a diversion structure put in by his neighbor to irrigate his adjacent lands. Another point he mentioned is Mr. Wilson, the President of the Stockgrowers Association, is worried about what might happen if the Supreme Court got this case again. He passed out Delegate Proposal No. 2 (Exhibit 80), discussed at the Constitutional Convention, which has the language of the public trust doctrine and which proposal was rejected by the Constitutional Convention (Exhibit 80). He believes if that is brought to the attention of the Supreme Court in future litigation, we might get a different result on the constitutional basis that the Supreme Court hung its decision on.

In addition, the following written testimony was submitted in opposition to HB 265, although not presented orally to the committee: Kermit Anderson, Melville (Exhibit 81); Lucille Anderson, Melville (Exhibit 82); Dolores Anstett and Arthur Anstett, of The Tall Timber, McLeod (Exhibit 83); J. R. Cleveland, Melville (Exhibit 84); William Dunham, Executive Director, Montana Land Reliance, Helena (Exhibit 85); Everett Hicks, L Y Ranch, Wolf Creek (Exhibit 86); Clarence Keough, Wilsall (Exhibit 87); Dick Klick, Sun Butte Outfitters and Ranchers and Associates, August (Exhibit 88); David Lackman, Lobbyist, Montana Public Health Association (Exhibit 89); William Larson, Alder (Exhibit 90); Linda Larson, Alder (Exhibit 91); Mary Lineberger, Ennis (Exhibit 92); Bill Maloney, Alder (Exhibit 93); Rosabelle Maloney, Alder (Exhibit 94); Rose Maloney, Alder (Exhibit 95); Sam Maloney, Alder (Exhibit 96); Barbara Hollman Morse, Absorokee (Exhibit 97); Duane Neal, Black Otter Guide Service, Pray (Exhibit 98); Mary Jane Rickman, Fishtail (Exhibit 99); John Rittel, Blacktail Ranch, Wolf Creek (Exhibit 100); Margery Rossetter (Exhibit 101); Mary Saunders, Ennis (Exhibit 102); L. J. Schieffert, McLeod (Exhibit 103); Norm Starr, Melville (Exhibit 104); Barbara Van Cleve, Big Timber (Exhibit 105); Channing Welin, McLeod (Exhibit 106); Ralph Holman, McLeod (Exhibit 107); landowners from Nye (Exhibit 108); and Andrew Dana, Livingston (Exhibit 109).

QUESTIONS FROM THE COMMITTEE: Senator Crippen asked several questions revolving around the term "barrier" and how it relates to portage. Although the two Supreme Court cases referred only to barriers, HB 265 goes on to include man-made barriers. Senator Crippen asked Mr. Waterman if he read into the two Supreme Court cases natural barriers as well as man-made barriers. Mr. Waterman responded that he read at least the Hildreth case to refer to man-made barriers, and because they did not restrict it to man-made barriers only, they are thereby in their definition and in their extension of it, the right to portage around those barriers. Senator Towe pointed out that the court was not dealing with a natural barrier in these decisions; they were dealing with an obstruction in one case and in the other with harrassment by a landowner. He asked if it followed if the court were to be talking about both man-made and natural barriers, it would have alluded to all barriers. Senator

Crippen felt it was an important point because the thing that concerned him somewhat is if we include natural barriers and allow portage around natural barriers, there may be a situation where a natural barrier is going to extend for quite a length. If we require by the legislation that there be portage around those barriers, then are we not requiring that the landowner provide navigability for recreational purposes down the entire length of any stream covered by this bill. Mr. Waterman responded that the Curran case referred specifically to barriers. Even though Curran did not deal with man-made barriers, the Curran case dealt with a stream some 30 miles in length, the Dearborn River, which has natural barriers in it. The question which Curran raised is whether or not the public in the course of floating that stream had the right to go up onto the banks or even to touch the bed of the river as they attempted to portage through or over low water marks. From that context, he saw Curran first addressing natural and Hildreth addressing man-made. Within the context of the two cases, the court has said the right of the public to portage is a right to portage around all barriers in a least intrusive manner. Senator Crippen clarified that the court did not say "all." Mr. Waterman stated they did not distinguish barriers, but they have clearly defined portage, and they have stated the right of portage exists coincidental to the right of the use of the underlying surface waters. Senator Crippen stated that in the context of this legislation, when you are talking about a man-made barrier like a fence or a diversion dam, you require the landowner to provide a reasonable and safe route for the recreational use of the surface water. He has no problem with that. His concern is that it may be too broad of a requirement in the case of a natural barrier, especially in the case where the barrier could be a swamp that extends for a great length, since we are talking about all rivers. Mr. Waterman did not believe a swamp would be a barrier as it has been defined and stated a barrier would be an artificial or natural object over or in the water body which restricts recreational use. A swampy area is an inconvenience the recreationist must abide by. Returning to Curran, if that is a barrier the court says can be portaged around, the question becomes whether or not the public has a right to portage around that barrier, be it natural or artificial. With reference to the natural barrier, if there is a request for a portage route, then the Department of Fish, Wildlife and Parks has the responsibility of placing that route and the like--putting the responsibility for the natural barrier where it should rest, on the public's shoulders.

Senator Towe asked Mr. Strope to clarify who he represented. Mr. Strope responded he represented the Sweetgrass Preservation Association. Senator Towe asked if when this legislation is passed, the right of the public to use dry streambeds and the property below the high water mark would be affected, how that is squared with the Hildreth decision which is clear on that point and says "No owner of property adjacent to state

owned waters has the right to control the use of those waters as they flow through his property. The public has the right to use the waters and the beds and the banks up to the ordinary high water mark." Mr. Strope answered that both of the opinions are water opinions, not land-use opinions. Mr. Strope stated that it is very clear in Curran, Judge Haswell did not find the 1895 statute unconstitutional. On the contrary, he cited it very approvingly. That statute gives the abutting landowner the right to the beds and banks down to the low water when there's no water on them. Mr. Strope stated HB 265 attempts to convert a water right into a land-use right, and that's the opposition of his group. They don't want the opinions expanded. Senator Towe questioned why if we are bound to have further clarification from the Supreme Court we rush into it at this time until we really know what the Supreme Court is saying. Mr. Waterman responded you must read Curran and Hildreth together and not isolate Curran out. Hildreth came down a month after Curran and clarified areas in Curran that were vague. From the perspective of future litigation, Mr. Waterman stated we do not know the issues, or the case, or the time lines under which that issue will reach the court. He felt that if we do not address through legislative enactment now, the stream access issues, we invite the court to say that this body cannot act in this area and you, the court, should write the rules.

Senator Yellowtail asked Dr. Marlow about his concern with the difficulty of defining high water mark in terms of riparian vegetation. He asked if he could offer a workable alternative that will define the question posed by the court. Dr. Marlow stated the suggestions made earlier that the old Streambed Preservation statute is a very workable one that has lasted eight years.

Senator Pinsoneault asked Mr. Morse if he would restate his concerns about the tax consequence. Mr. Morse responded he is concerned about ad valorem land values. Tremendous values are allocated to this entire concept of running streams. If we pull away from the landowner the rights that are inherent in connection with those running streams, such as privacy and all that, he doesn't see how we can avoid the absolute certainty the value is diminished tremendously. Mr. Waterman responded Mr. Morse is correct in that there would be a diminishment of values, but he felt the diminishment came about through the two Supreme Court cases, and if we provide certainty and clarity of definition, we address many of the rights that have been lost as a consequence of those Supreme Court decisions. Senator Towe addressed the same issue and stated the decisions were not made in a vacuum. There is a lot of background with regard to the enabling act which limits how much Montana can and can't do in terms of providing protection for private and public property. We must be cognizant of the fact the same issue is also present on oceans. They have had the same decision. The ocean and the shoreline belong to the public. No one has private ownership of that ocean or shoreline.

That has clearly diminished the value of the property. Mr. Morse stated the point he was making was if anything happened to diminish market value, the ad valorem value should be assessed accordingly. If taxes go down, somebody else is going to pay the bill.

Senator Blaylock asked Mr. Strope where we would be better off relying on just the Supreme Court decisions and not passing HB 265. Mr. Strope responded in the context that these are water decisions, you are converting a water right into a land-use right, and he doesn't feel the court would go that far without just compensation being paid to the landowners for that right.

Senator Mazurek asked Mr. Flynn if the Department through its present regulations controlled pets. Mr. Flynn stated if a private landowner normally controls dogs on his property, that would be a normal land management practice, and he would continue doing that. Senator Mazurek stated the question is whether a pet traveling with a recreationist going from the stream or a bed or banks onto the landowner's property. Mr. Flynn responded that with the authority outlined in HB 275 and with the authority the Department or Commission has, they could implement those regulations, and in those areas where necessary, they could prohibit the accompaniment of a recreationist by a dog or require that the dog be leashed.

Senator Crippen stated he has struggled while reading these two bills as to the definition of "capable." The only test the Supreme Court seems to have put out is in one case that the recreational use of the water is without limitation. Senator Crippen asked Mr. Waterman if he felt Flathead Lake would fall into the definition of surface water by the two court cases. Mr. Waterman responded affirmatively. Senator Crippen asked if the use of the water would be restricted between the high water and low water mark. Senator Crippen referred to a lake which had a lot of waterfront useage. Using Swan Lake as an example, Mr. Waterman stated yes, he felt the decisions would apply and grant the public broad use of that water. Senator Crippen stated the statement of intent gave rather broad authority to the Department to define what waters are capable and to define the characteristics of the water involved to conform to the two Supreme Court cases. He asked Mr. Flynn if they feel they can effectively manage all of the waters in the state of Montana with the personnel and moneys they have been requested be appropriated and do what it says they will do in the statement of intent. Mr. Flynn responded appropriations has authorized $50,000 additional moneys in each of the next two years of the biennium in anticipation that the Department will be required to do some additional legal work and monitoring work as far as the stream access legislation. Mr. Flynn stated they do not agree that they will deal with all lakes and streams within the next two years. He stated the process for rules and

regulations needed to be established first before they address actual portages around barriers, which process is described in the statement of intent.

Senator Towe said, assuming Mr. Strope is correct in saying these two decisions really address only the use of water and not the underneath land ownership, how do you address the question of Mr. Josephson and some of the other persons raised that while you are prohibiting overnight camping and placement of duck blinds on Class II waters, you are not prohibiting that on Class I waters, and isn't that beyond the scope of the Supreme Court decisions. Mr. Waterman responded that as he reads the cases, the cases, while they tie a right to public use of the water, they allow incidental use of the adjacent land, and they allow incidental use for recreational purposes. There is nothing in the Supreme Court cases that defines recreation. HB 265 puts realistic limitations on those recreational uses. Senator Towe if he were suggesting that without this statute there would be presently under the Supreme Court cases permission to use all-terrain vehicles, recreational use of stock ponds, recreational uses of water diverted away from natural bodies, and big game hunting below the high water mark. Mr. Waterman stated those are all potential areas where through confrontation courts could rule, because there is no limitation on those statutes; those statutes in reference to recreational use allow the full and broad gambit of those uses. He believes that is a potential consequence of allowing the Supreme Court cases to go unregulated by appropriate legislation. Senator Towe asked Mr. Strope if this bill wouldn't really help everyone by at least limiting those four areas. Mr. Strope responded no, because if you do not pass HB 265, you are not creating a statute which gives the public a right to the land below high and low water marks. If you never give the public the right to those lands, then they can never make any use of it. It is their contention the Supreme Court preserved that statutory right of an abutting property owner to own it down to the low water mark when there's no water on it. He is burdened by the water uses when there's water on it. If HB 265 passes and this legislature says the public now owns the land between the high and low water marks, you are in effect repealing the old 1895 statute that Judge Haswell quoted. If you repeal that and create the public's right to use the land between the high and low water marks, then it is true you may authorize the public to make some use of it or no use of it.

Senator Brown stated he was concerned that one unintended consequence of HB 265 would be to allow the general public access for recreational purposes to beach front property. He asked Mr. Waterman if the bill would apply to lakefront property. Mr. Waterman responded he believes the Supreme Court cases apply to lake front property, and the bill does nothing with reference to improve, enhance, or expand those rights. What the bill does do, however, is, through the regulation process,

direct the Department to address those areas of concern. Senator Brown stated both the Curran and Hildreth decisions applied to navigable streams that were being used for recreational purposes. He believes the definition contained in the bill would apply to lakes. He's not sure the Supreme Court decisions would allow the public to camp on someone's lake front. Mr. Waterman responded that as he reads Curran, it speaks of the fact of all public waters within the state. He believes the Supreme Court did not consider the ramifications of this, and that is why he feels legislatively we should approach the problem.

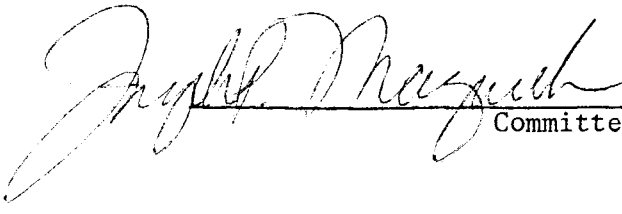
Senator Crippen asked about compensation for portage. The bill states if portage is required by means of an artificial barrier, it be paid for by the landowner, while if portage is required by a natural barrier, it be paid for by the state. His concern is for artificial barriers. He asked if there were precedent in the law to require compensation to a landowner where the state requires an easement for a third party to venture through the landowner's property (to get on to a mining claim for example). Senator Crippen asked how you square that with the requirement in the bill that only in the case of natural barriers will the landowner be compensated. Mr. Waterman addressed what the bill did that the Curran case did not. Curran said only that the landowner can diminish by appropriation the flow of the stream. Curran does not speak specifically that the landowners are allowed to create an artificial barrier across a public way which the court found implicit in the public trust. As a consequence, they addressed that in HB 265 and said the public's right can be compromised by the right of landowners for management purposes to fence. We then said there are alternatives. They recognize the right of the public, which the court said is there to portage around in any way in any fashion that barrier in the least intrusive manner. They have also created a way to limit that public right, so if you will, the party who loses a portion of the right by reason of the exercise of the creation of a portage route is the public, not the landowner, because the landowner is going from the situation where there is unlimited and total portage to having that portage placed into a specific, limited, exclusive area. Senator Crippen asked if we were correct in saying through this bill we are limiting the rights of the public insofar as their access to get from one spot to another spot when confronted by an artificial barrier. Mr. Waterman stated we are doing that only if by reason of the exercise of the portage rights of the public, landowners request that a portage route be established to restrict unlimited portage rights of the public.

Mr. Wilson, President of the Montana Stockgrowers Association, testified he is more concerned with the ability of a Montana rancher's making a living off the land. The trap we have been caught in is watching the value of the land inflate and loan agencies lending money on the land on the value of the land and not on the ability of the landowner to make a

viable living on that ranch and pay that money back. He does not think the issue is whether this will have some effect on the value of your land; they are interested in protecting their rights on their land to make a living raising cattle.

CLOSING STATEMENT: Representative Ream closed by stating some comments were made by opponents that were inaccurate. He stated this is a complex issue. He stated at the outset HB 265 will not solve everyone's problems; it simply cannot, and no piece of legislation can, because we have constraints as lawmakers; we have the U.S. and Montana Constitutions to deal with. The state of Montana must protect both public and private rights. Much of statutory law is taken up with trying to balance those two, and he believes HB 265 is trying to balance those two. The last issue is there are fears, and those fears are real. He is sympathetic to those fears. Many of those fears have dissolved as they've tried to reach some kind of common understanding. We have not reached the endpoint of this legislation; we're going to have to continue to work together on it. Representative Ream stated one small amendment needed to be made on page 5, line 2, wherein the number 4 should be changed to number 5. Representative Ream's closing remarks stated you are now up the creek with a paddle; HB 265 is your canoe or vessel; he hoped the committee would dip its paddle carefully and warned them to watch out for the rocks and don't get out of the boat until it is safely ashore unless they can walk on water.

There being no further business to come before the committee, the meeting was adjourned at 1:05 p.m.



Committee Chairman

ROLL CALL

SENATE JUDICIARY COMMITTEE

49th LEGISLATIVE SESSION -- 1985 Date

NAME	PRESENT	ABSENT	EXCUSED
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Bruce D. Crippen	X		
Senator Jack Galt	X		
Senator R. J. "Dick" Pinsoneault	X		
Senator James Shaw	X		
Senator Thomas E. Towe	X		
Senator William P. Yellowtail, Jr.	X		
Vice Chairman Senator M. K. "Kermit" Daniels	X		
Chairman Senator Joe Mazurek	X		

DATE ______________

COMMITTEE ON ______________________________

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
Dave Donaldson	Mt. Assoc. of Cons. Dist.	265	—	—
[illegible]	Rancher [illegible]	265	X	
Jerry Dodd	Rancher	265	X	
Pat Underwood	MT. Farm Bureau	265	X	
Mary [illegible]	Mt. Farm Bureau	265	X	
Gordon [illegible]	APA. rancher	265	X	
George [illegible]	Mt. Dairymen's assn.	265	X	
[illegible]	—	265	X	
Mrs. Pauline [illegible]	Ranching - Ruby River	265	X	
Carol [illegible]	—	265		
Bruce M. Cady	Meagher Co Rancher	265		X
[illegible] Hancock	Ashland Rancher	265	With Amendment	
Nan Stevens	Ashland rancher	265		
Marcia [illegible]		265	X	
[illegible]	Fishtail Rancher	265		
Arthur [illegible]	Fishtail Rancher	265		X
Syd [illegible] & sons	Ranching - [illegible]	265		X
Virgil Denson	Rancher	265		
Leah M. Fasnacht	"	265		
[illegible] Shortridge	Cascade [illegible]	265		X
Bill Shortridge	Cascade [illegible]	265		X
[illegible]	Sportsman	265		X
[illegible]	—			
[illegible]	[illegible] - Rancher	265		X

(Please leave prepared statement with Secretary)

DATE 3/6

COMMITTEE ON Judiciary HB 265

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Jim England	citizen - recreationist	265	?	--
Mark Norem	Rancher	265		X
W.S. Steudemmeyer	Rancher Beaverhead	265		X
Marguerite L. Fulker	Rancher - Gallatin Co	265	X	
H. O. Fulker	Rancher Gallatin	265	X	
DON VALITON	RANCHING-OVANDO, MT	265		
Dianne L McDermand	self	265	X	
Likon				

(Please leave prepared statement with Secretary)

DATE 3/8

COMMITTEE ON

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
Val Price	Montana Wildlife Fed.	HB265	X	
Tonya Cattmill	United Meth. Youth	HB265		X
Tracie Davies	United Methodist Church	HB265	X	
Laurie Atkinson	Senate Page	HB265		X
Caitlin Hill	Senate Page	HB265		X
Mary Kaggdale	Landowners Coalition	HB265	X	
Frank Kegler	Landowners - Coalition	HB265	X	
Channing W. Delaney	individual	HB265		X
Elli Hawks	myself	HB265		X
Jeanne-Marie Sompsey	NPRC	HB265	—	
Courtney Jamieson	United Methodist Youth	HB265		
Paul Hunsaker	myself	HB265	X	
[illegible]	myself	HB265		X
[illegible]	myself	HB265	X	
Suzanne Neal	Crazy	HB265		X
Jane A. Moe	Selkirk Angus Ranch	HB265	X	
Andrew C. Dana	myself	HB265		X
Thomas A. Brook	myself	HB265	—	
Jack Eidel	MSGA	HB265	X	
Betty J. Eidel	MCBA	HB265	X	
Peggy (Nichols)	Self	HB265	X	
Gordon Vaagen	Self	HB265		
Steve Sandefur	Self	HB265	X	
[illegible]	Self	HB265	X	
[illegible]	Self	HB265	X	

(Please leave prepared statement with Secretary)

DATE _____

COMMITTEE ON _____

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Virgil Holliday	myself	HB265		X
Ester Ott	myself	HB.265		X
Eunice Goodland	myself	HB 265		X
Vera Lou Linden	myself	HB.265		X
Margery Bassetter	myself	HB 265		X
Mildred Simmons	myself	HB265		X
Kitchell Copelson	Sweet Grass Co. Pres. Assoc. & self	HB.265		X
Chauncey Davis	[illegible]	HB 265		X
Ted Olson	self	265		X
Mrs. Rich Gilbert	Self	265		X
Sharon Wolin	Boulder Valley Association	265		X
Virginia VanAlen	Myself	HB265		X
Jack VanAlen	Duke Ranchers	HB 265		✓
Jewell Cunningham	Ranches	HB265		✓
Permit Jefferson	Rancher	H.B. 265		X
Richard Jensen	Rancher	HB 265		X
Lil Campbell	Ranches	HB265		X
Jeanne Gutierrez	WTFE	HB265	X	
Walter F. Nindorger, Jr.	Rancher self	HB265		X
Jay S. Nindorger	Rancher	HB 265		X
Jackie Jackson	Sweet Grass Co.	HB 265		X
Bill Woodland	Rancher	HB265		X
John Woodland	Rancher	HB265		X
Linda M. Gutierrez	self	HB 265		X
Wm. J. Larson	self	HB 265		X
Linda J. Larson	self	HB265		X

(Please leave prepared statement with Secretary)

DATE _____

COMMITTEE ON _____

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
Carol Mosher	Montana Cowbelles	265	X	
Arvil Kiles	Mt. Cow-Belles Ranches	265	X	
Bill Maloney	Rancher	265		X
Bill Maloney	Farm Bureau / Cow Belle	265		X
[illegible] Maloney	Alberton	265		X
John B Langfus	Landowner / Delegate	265		X
[illegible] Lassmann	LAND OWNER	265		X
Virgil Tilley	LAND OWNER	265		X
L. J. Schaefer	RANCHER	265		X
MARVIN DUNCAN	Landowner	265		X
K.M. Kelly	MONT. WATER DEVEL. ASSN / MT. IRRIGATORS	265	X	
D M Rossetti	Beaverhead Stock Assn.	265		X
Elaine Hansen	Eskalaka Val. Ranches	265		X
Bud Hansen	Eskalaka Val. Ranches	265		X
Tom Milesnick	Self	265	X	
Jim Wilson	Montana Stockgrowers	265	X	
Dave Hanna	PCLA	265		X
Charles Hood	Self	265		X
Kenneth Sears	Ranch Foreman	265		X
Franklin Crossfield	Rancher	265		X
Bill PHILLIPS	SPORTSMAN	265		X
Roger Koopman	businessman/sportsman	265		X
[illegible] Haggerty	rancher	265		X
Robert Daggett	rancher	265		X
Kay Eckman	Rancher	265		X
Wes Hardin	Ranch Manager	265		X

(Please leave prepared statement with Secretary)

DATE _____

COMMITTEE ON _____

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Clayton Marbas	Landowner	265		X
Wayne Lehman	Sweet Grass Co. Farm Bureau	265		X
Bill MARSE	Stillwater Co Assn Taxpayers	265		X
Bob Saunders	Livingston Co Preservation	265		X
Donald. Saunders	Myself from County	265		X
Peggy Turner	The Stillwater County	265		X
Clayton Veich	Also, Stillwater County			X
Opal Fuller	Absarokee " "			X
Mary Jane Rickman	Fishtail " "			X
Gary Gladstone	Absarokee " "	265		X
Jack Brennan	Granger - Cattlewoman	265	X	
Donald B Fredricks	Sweet Grass Co. Preservation Assn	265		X
Andrea Billingsley	Montana Land Reliance	265	X	
Jack Billingsley	MSGA	265	X	
Bill Ashton	APA + PCLA	265	X	
Mark Lumin	MFBF	265	X	
Gene Chapel	MFBF	265	X	
Walt McManey	MFBF	265	X	
Carl B Hope	MFBF	265	X	
Jack B Davis	APA	265	X	
[illegible]	APA	265	X	
[illegible]	[illegible]	265		X
[illegible]	[illegible]	265		X
[illegible]	MSGA	265	✓	
[illegible]	Landowner			X
[illegible]	"			X

(Please leave prepared statement with Secretary)

DATE

COMMITTEE ON

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
Lorraine Stor	self	265		+
Lorraine Gilbert	self - rancher	265	/	
[illegible]	Trout Unlimited	265	x	
Pam Rein	self - rancher	265		X
Lorna Frank	MT. Farm Bureau	265	X	
John DeCock	Self farmer	265		X
Dave Moore	self - farmer, vo-ag teacher	265		X
Robert Noe	~~Self~~ Self	265		X
Robert Pelton	Self	265		X
Evelyn Dodd	Ruby Valley CowBelles	265	X	
Elaine Hessel	Ruby Valley CowBelles	265	X	
Lorents Grosfield	Self	265		X
Don Gilbert	Montana Wool growers	265	X	
Don McKamey	Mont. Wool growers	265	X	
Ralph Holman	Rancher-cattleman	265		X
[illegible]	[illegible]	265		X
John Conte	Mont. Cattle Trade	265		X
Elaine Allestad	self	265		X
Debbie Camp	self	265		X
Paul F. Berg	Billings Rod & Gun Club Southeastern Sportsmen Ass	265	X	
Tary A Schoonen	Mont. Wildlife Federation	265	X	
Norm Teigen	Mont Stockgrowers Assn	265	X	
Bud Pike	Self	265		X
[illegible]	[illegible]	265		X
R.A. Ellis	self	265	X	
[illegible]	self			X

(Please leave prepared statement with Secretary)

DATE _____

COMMITTEE ON _____

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
John E. Lutnes	Self	265	X	
Dave McClure	Fergus Co Farm Bureau	265	X	
H. Kennedy	Fergus Co.	265		
Ronald E. Lowe	Lfco Farm Bureau	265	X	
Ray Williamson	Golf. Co Farm Bureau	265	X	
Julie Fitzthorp	Self	265	X	
Jodie Bud	self	265		X
Oscar Wilson	self	265		X
Jack Ewell	MSGA	265	X	
Bert Oneid	CC	265	X	
John Willmert	Lewis and Clarke Co. Resident			X
R. H. Bingham	Big Timber			X
Ivan Hawkins	Stillwater Protective Assn			X
Jane W. Fawcett	Big Timber, Mont			X
Horace Morcom	Belgrade Mt.			
Ac Callentine	"		?	
Anne Ellen Greenstreet	Big Timber			X
Lori Tappan	Big Timber, Mont	265		X
Don Allen	Natural Trout Unlimited	265	X	
David C. Erwin	Augusta			X
Nora Lydane	Cascade			
Donald Hicks	Trout Unlimited	265		X
Ed V. Hyatt	" "	265		X
Robert Hydeard	Cascade	265		X
Lenny Huffy	MONTANA COALATION FOR STREAM ACCESS	265	X	
Chuck Lemmon	Manhattan	265		X

(Please leave prepared statement with Secretary)

DATE _____

COMMITTEE ON _____

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
Jan Hofman	A.P.A.	265	✓	
Tony Schoonen	Skyline	265	✓	
Dan Heinz	Montana Wildlife Fed.	265	✓	
David P. Roehm	MT Farm Bureau	265	✓	
Claire Roehm	Mt. Farm Bureau	265	✓	
Warren J Vick	Mt. Farm Bureau	265	✓	
Dolores Vick	Mt Farm Bureau	265	✓	
Lee Freeman	Responsible Landowners	265		✓
Leroy Campbell Jr	Landowner	265		✓
Walt Carpenter	Great Falls - self	265	✓	
Greg Mittel	Wolf Creek MT self	265		✓
Donna Bonner	Holy Cow Self	265		✓
Hap Peterson	Lobbyist	265	✓	
Nancy McClelland	Livingston - self	265	✓	
Kevin L. Krumvieda	Missouri River Anglers Great Falls	265	✓	
Jim McDermand	Medicine River Canoe Club Great Falls	265	✓	
Richard C. Parks	~~FFA~~ FFOAM - self	HB-265	✓	
Joe Etchart	MT. Assn of State Grazing Dists	265	✓	
JACK HAYNE	TETON PONDERA F.B.	265	✓	
Nancy Kluth	Augusta	265		✓
Dick Kluth	Augusta	265		✓
Rupert E & Jan Farrow	Cascade MT.	265		✓
E. Maynard Smith	GLEN MT	265	✓	✓
Pamela Kelly	Helena	265	✓	
Stuart Doggett	Ass of Conservation Districts - Helena	265	✓	
Bud & Irene Watson	Cascade Mont	265		✓

(Please leave prepared statement with Secretary)

DATE _____

COMMITTEE ON _____

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
David LACKMAN	MT Public Hlth Assn	265	X	
Frank C. Thompson	Self	265		X Amend
Hyle Flowers	Self	265	X	
Chuck Rein	Self			X
Jerry Crawford	Prickly Pear Sportsmen	265	X	
John McDonald	Self	265		X
David Cole	self	265	X	
Art Compton	Helena Self	265	X	
LARRY CURRAN	Self	265	X	
Mike Meloy	WETA	265	Amend	Support ~~Amend~~
Kelly Flynn	Self Hidden Hollow Ranch - Townsend	265		X Amend

(Please leave prepared statement with Secretary)

DATE _____

COMMITTEE ON _____

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
Ted Thompson	Myself	265		Amend
Annette Hoppe	Myself	265		✓
Jo Lahti	Myself	265	✓	
Jim Brunson	Self	265		✓
Connie Nudell	Beaver County Commissioners	265		✓
[illegible]	Visitor			
[illegible]	Visitor			
[illegible]	Visitor			
[illegible]		265		✓
[illegible]		265		✓
William H. Dunham	Visitor - Mutual Reliance			
Bill Gross	Sandhill Ranch	265		AMEND
Bob Peck	Jack Creek Ranch	265		Amend
[illegible]	Visitor	265		
K.L. Sears	Ranch Foreman	265		X
[illegible]	Self	265		✓
[illegible]	Visitor			
[illegible]	United Methodist Church	265		
[illegible]	United Methodist Church	265	✓	
[illegible]	[illegible]	265	Amend	
[illegible]	Self	265	Amend	
[illegible]	[illegible]	265		✓
[illegible]	[illegible]	265		X
[illegible]	[illegible]	265		X
[illegible]	[illegible]	265		✓

(Please leave prepared statement with Secretary)

DATE ______________________

COMMITTEE ON ______________________________________

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Bruce R. McLeod	Self & Park Co. Legis. Assn.	HB 265	✓ (amend)	
Mrs Bill Langford	Self + 5 property owners	HB 265		X

(Please leave prepared statement with Secretary)

Recreational Use Of Montana's Waterways

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

December 1984

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

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Researcher	Anne Brodsky
Attorney	Brenda Desmond
Secretary	Ellen Garrity

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SUMMARY OF RECOMMENDATIONS

Joint Interim Subcommittee No. 2, in its study of recreational use of state waters under HJR 36, recommends that the 1985 Montana Legislature:

1. Enact a bill to generally define laws governing recreational use of state waters, including:

(a) permitting recreational use of any surface waters, except waters while they are diverted;

(b) prohibiting, with certain exceptions, use of land beneath surface waters that do not satisfy the federal test of navigability for purposes of state ownership;

(c) confirming the right of the public to use the land between the ordinary high-water marks of surface waters that satisfy the federal test of navigability for purposes of state ownership;

(d) permitting the public to portage, above the high-water mark, around barriers in the least intrusive manner possible;

(e) restricting the liability of landowners when water is being used for recreation or land is being used as an incident to water recreation; and

(f) providing that a prescriptive easement cannot be acquired by recreational use of land or water.

2. Enact a bill to:

(a) eliminate the requirement that notice be posted or otherwise communicated for the commission of the offense of criminal trespass to land;

(b) impose absolute liability for certain criminal trespasses to land; and

(c) expand the authority of wardens to enforce the criminal mischief, criminal trespass, and litter laws on private lands being used for recreational purposes.

HOUSE JOINT RESOLUTION NO. 36

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING AN INTERIM STUDY TO IDENTIFY AND PROVIDE FOR PRESERVATION OF THE RIGHTS OF LANDOWNERS ADJACENT TO PUBLIC LAND AND WATERWAYS AND TO IDENTIFY AND PROVIDE FOR RIGHTS OF THE PUBLIC TO ACCESS AND USE PUBLIC LAND AND WATERWAYS; REQUIRING A REPORT OF THE FINDINGS OF THE STUDY TO THE LEGISLATURE.

WHEREAS, the right of the public to use waterways for recreational and other purposes and the related issue of navigability are unsettled in law; and

WHEREAS, ownership rights in land underlying waterways and rights of adjacent landowners to place obstacles in waterways or to restrict use of streambanks are also unsettled; and

WHEREAS, the right of the public to use public land is being inhibited by restrictions of access across private adjoining land; and

WHEREAS, there is an increasing number of disputes between private landowners and public users concerning the use of public land and waterways; and

WHEREAS, both the adjacent private landowners and the public have substantial interests involved in the resolution of these conflicts.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That an appropriate interim committee be assigned to study ways to identify and preserve rights of landowners adjacent to public land and waterways and to identify and provide for rights of the public to access and use public land and waterways. The study committee shall cooperate with all interested persons to the fullest extent possible to:

(1) identify possible methods of acquiring and maintaining access across private land to public land and waterways;

(2) clarify the right of the public to use waterways, including:

(a) identification of waterways that may be used by the public;

(b) further legislative definition of navigability, if necessary;

(c) clarification of when a prescriptive use or easement may exist; and

(d) use of adjacent uplands in conjunction with the right to use the waterway;

(3) identify use rights and title interests of adjacent landowners in land under and adjacent to waterways, including:

(a) the right to place fences, bridges, flumes, or other obstacles in the waterway;

(b) consequent taxation liabilities; and

(c) mineral rights;

(4) establish the liabilities of landowners for impeding the right of the public to use public land or waterways and the liabilities of public users with respect to violations of rights of adjacent landowners; and

(5) determine appropriate methods of enforcement.

BE IT FURTHER RESOLVED, that the committee report its findings and recommendations to the 49th Legislature.

INTRODUCTION

Much of government revolves around deciding what is a public good and a private right and in finding ways to mitigate the inevitable conflicts that arise between them. Courts and legislatures play the lead role in deciding and mitigating these conflicts. Montana's waters are made available to the people of the state for their use. Our waterways provide water for us and our animals to drink and to water our crops; they also provide routes of navigation for trade, travel, and recreation. This study of the recreational use of Montana's waterways resulted from the tangible fears of the loss of ways of life and livelihood that arose among Montanans using waterways for recreation and those using them for agriculture and from demands made upon the courts and the Legislature to soothe those fears.

In December 1982, less than 1 month before the 48th Montana Legislature was to convene, the public's right to make recreational use of two Montana waterways -- the Dearborn and Beaverhead Rivers -- was affirmed by two Montana District Courts in separate cases.[1] The legal bases for the decisions were to some extent new to Montana and to the degree that the fears of some were relieved, the fears of others were further aroused.[2] Reaction to court action was reflected in petitions for legislative mitigation.

The 1983 Legislature considered seven bills related to the matter.[3] The bills failed due to a lack of consensus among those interested and uncertainty in the minds of the legislators as to the ramifications of the proposed pieces of legislation. Uncertainty was fueled

by the very fundamental nature of the controversy and the potential effect of any resolution of it on the way of life of so many people. Lack of consensus was promoted by the fact that hundreds of people and dozens of organizations presented different views on what should be done.

Complicating the ability of the Legislature to decide what to do (and complicating, during the interim, the committee's work) was the fact that in February and March 1983 in the midst of legislative deliberation, the Beaverhead and Dearborn River cases, respectively, were appealed to the Montana Supreme Court. Was it possible that the need for legislative action would be removed by the court?

Soon after it became evident that HB 888, the last remaining bill on the recreational use of waterways, was to die in committee, the Legislature passed HJR 36, a resolution calling for an interim committee to study the subject during the 1983-84 interim and make recommendations to the 1985 Legislature. When polled after the session, the legislators placed this study high on the priority list of interim studies to be conducted. In June 1983, the Legislative Council assigned Joint Interim Subcommittee No. 2 to study both the subject of water recreation under HJR 36 and fire suppression on state lands under HJR 40.

The resolution creating the interim study committee clearly asked that the interests and concerns of landowners and recreationists as related to recreational use of Montana waterways be addressed equally. Issues to be considered by the committee included: access to waterways; identifying waterways

subject to public use; understanding and defining, if necessary, the term "navigability"; clarifying when a prescriptive easement exists; clarifying the propriety of using adjacent uplands in conjunction with using a waterway; understanding title interests and consequent taxation liabilities; identifying the rights of landowners to place fences and other obstacles in waterways; identifying mineral rights of landowners; identifying landowners' and recreationists' liabilities; and studying appropriate methods of enforcing laws governing the resolution of these issues.

The subcommittee pursued its work diligently over the interim by delving into the legal intricacies of the dispute as well as by cooperating with and listening to the concerns of interested persons. The subcommittee pursued solutions that promised reconciliation of the concerns of interested parties within the constitutional framework available. But what seemed available changed considerably when on May 15 and June 21, 1984, the Montana Supreme Court handed down their decisions on the appeals of the cases[4/5] that had sparked the Legislature's involvement in the issue. Suddenly the options for Legislative redress were fewer. The subcommittee's task became one of understanding the nature of available options and framing a response within available limits. The recommendations reflected in this report represent the result of this work.

This report describes: (1) the facts, issues, and legal concepts concerning the subject of recreational use of state waters; (2) the public's sentiment on the subject, as gathered from public input at the

committee's meetings; and (3) the reasons for and meanings of the committee's legislative recommendations.

The committee wishes to thank Professor Al Stone for an informative presentation at the first meeting, which provided the committee with a good start in studying the complex legal issues before it. The committee also thanks John Thorson and Professor Margery Brown for their straightforward presentations on the public trust doctrine and their perseverance in presenting this judicial holding to a perhaps frustrated legislative audience. Finally, the committee gives special thanks to the many interested persons who spent long hours preparing for, patiently attending, and providing valuable commentary at the committee's meetings. This commentary and the public's attentiveness to the issues was invaluable to the committee's solid understanding of the subject matter and the range of views on it.

CHRONOLOGY OF COMMITTEE'S WORK

Much of this report summarizes the substantive findings of the committee, reviews details of public comment, and outlines the committee's recommendations. All of that was developed through a long and sometimes frustrating process. This chapter presents a brief outline of the committee's five meetings held between August 1983 and September 1984, to give the reader a feel for the context in which the balance of the report developed.

The Committee held its first meeting on August 30-31, 1983,[6] at which time it adopted a study plan to organize its work for the interim. The study plan directed the committee to answer four main and many subsidiary questions in order to study satisfactorily the issues raised in HJR 36 and to make recommendations to the next Legislature. The following are the main questions contained in the study plan:

> (1) What are the rights and responsibilities of the public related to recreational use of Montana waterways, including rights and responsibilities peripheral to the use of the waterways?
>
> (2) What are the rights (including title interests) and responsibilities of landowners of land under and adjacent to Montana waterways, related to recreational use of the waterways?
>
> (3) What is the nature of the conflict: who are the parties, what are the issues, and what is its extent?

(4) What can be done to resolve the conflict, and what is the best forum for resolution (i.e., judicial, legislative, executive, voluntary cooperation, education)?

At the first meeting, the committee plunged into the core of the complex legal issues before it by hearing a presentation by Al Stone, Professor of Law, University of Montana, of his paper entitled "Origins and Meanings of 'Navigable' and 'Navigability'."

Because of its difficulty, the legal notion of navigability was reviewed again for emphasis and expanded upon by committee staff, with presentations of their papers, "Understanding the Term 'Navigability'" and "Significant Cases on Navigability" at a meeting in January 1984.

At the same meeting, committee members listened to oral arguments presented to the Montana Supreme Court in the Dearborn River case. At the meeting, Gary Williams, a Missoula-based consultant and coauthor of the 1974 reports of the U.S. Army Corps of Engineers on the status of the navigability of Montana's eastern slope waterways, told the committee about the work done for the Corps on the question of stream navigability in the Missouri River basin.

A public hearing took up most of the committee's next meeting, held on March 31, 1984; the committee received testimony from interested persons for nearly 8 hours. After public testimony, the committee, with encouragement from the audience, recommended that interested groups and individuals organize on the local level to attempt to identify the floatable and nonfloatable

waterways in their areas. The conservation districts agreed to help organize and facilitate these meetings. The committee requested that the local meeting groups submit reports of their findings to the committee no later than June 30, 1984.

Staff developed a checklist of items to be considered at the local meetings, which were beginning to be organized in early May. However, before any of the meetings occurred, the Montana Supreme Court, on May 15, issued its decision in the Curran case, involving ownership and use of the Dearborn River and its bed. Soon thereafter, on June 21, the Court issued its decision in the Hildreth case, involving use of the Beaverhead River.

In these decisions, the Court affirmed broad recreational use rights of the public on Montana's waterways. Of special import to the committee was the Court's use of the Montana Constitution and the public trust doctrine as bases for its decisions. Since the Constitution and the public trust doctrine take precedence over statutory law, the decisions seemed to narrow significantly the policy choices available to the Legislature. The decisions burst the bubble of hope for cooperation and compromise that was carrying the local public meeting idea forward, and they were never held.

The committee held two meetings following the issuance of the decisions. At the first on July 30, John Thorson and Margery Brown presented papers on the public trust doctrine which had played a major role in the court's decisions and a major role in limiting legislative options. Also, staff reported on the

following: prescriptive easements; issues of landowner liability; terms and activities associated with recreational use of waterways, including access, trespass, litter, criminal mischief, and public nuisance laws; and the Department of Fish, Wildlife, and Parks' authority regarding recreational use of state waters.

The committee began formulating a legislative response by requesting bills that would include:

(1) a definition of "ordinary high-water mark";

(2) the elimination of recreational use of land as a basis for the acquisition of a prescriptive easement;

(3) a prohibition of public recreational use of waters while they are being diverted;

(4) the criminalization of any trespass action, whether or not prohibition of entrance to the land is expressly stated and whether or not the act is committed "knowingly";

(5) the elimination of a cause of action for civil trespass; and

(6) the prohibition of public use of the beds of waterways, except as unavoidably and incidentally necessary while using the waters (modeled after the Day v. Armstrong[7] decision of the Wyoming Supreme Court).

At the committee's fifth and final meeting on September 28, after receiving explanations of the bill drafts

from staff and comments from the public, the committee amended the bill drafts and recommended that they be introduced in the 49th Legislature. These amendments included:

(1) striking the material requested at the July 30 meeting which would have eliminated a cause of action for civil trespass;

(2) inserting a provision to restrict the liability of landowners when water or land is used pursuant to uses authorized under the bill; and

(3) inserting a provision to expand the circumstances under which wardens must enforce the criminal mischief, criminal trespass, and litter laws.

With that the committee's work was concluded and its recommendations entrusted to the wisdom of the 49th Legislature.

UNDERSTANDING THE TERM "NAVIGABILITY"[8]

Introduction

An ordinary person discussing with a lawyer the question of whether a particular body of water is navigable is in a position remarkably like that in which Alice found herself when attempting a friendly conversation with Humpty Dumpty as reported by Lewis Carroll in Through the Looking Glass:

> "When I use a word, it means just what I choose it to mean -- neither more nor less," said Humpty Dumpty.
>
> "The question is," said Alice, "whether you can make words mean so many different things."

"Navigability" has been labeled "chameleon in character"[9] as its meanings vary like the colors of the popular lizard depending on the surroundings in which it is found.

A policymaker concerned with recreational use of Montana's waterways must confront a baffling dialog surrounding this multifaceted word. It is applied by courts to justify conclusions that reach well beyond whether the body of water is wide or deep enough, or free enough from obstructions to be traveled on by a vessel of some sort. The basis of a right to run a barge business, a demand for a state share in oil royalties, the establishment of regulatory authority by the Army Corps of Engineers, or the opportunity for a carefree day floatin' down the river on a Sunday afternoon may all be tied to establishing a link between the word "navigable" and the water.

Most commonly, when a court describes a waterway as navigable, it does so to determine a basis to establish:

> (1) title to streambeds under the federal test;
>
> (2) federal constitutional authority under the Commerce Clause, federal court admiralty jurisdiction, and other federal authority; or
>
> (3) recreational and other public and private rights involving surface use of waters, use of the beds of waterways, and use of land adjacent to waterbodies under various state tests.

Clearly, a policymaker concerned with recreational use of waters is most concerned with what "navigability" may mean when applied to the third purpose above.[10] But applications are not always distinct and clear-cut. Confusion is more the rule than the exception. It will serve one well to try to understand the term in its several meanings and to understand how those meanings are rooted in our American history. Application of the term to recreational use may then be more clear and one may not feel compelled as Alice did to walk away frustrated and feeling conversation was impossible. Such is the goal of this chapter on understanding the term "navigability".

First Use: "Navigability" for Purposes of Title

Who owns the land under a creek, river, or lake? How does it relate to the term "navigability"? How did it come to be? The cultural roots to the answers to these questions twist their way into the deep soil of English common law. Here we can trace its path and show what

has grown from it but not follow every twist and turn. In England all title to lands traces back to the King. Lands were either granted by the King for private ownership or retained. It developed that lands under the sea up to high tide and other waters influenced by the tides were found to have been retained by the Crown. Incidentally those waters -- waters that ebbed and flowed with the tide -- were known in English law as "navigable" waters.

When English people colonized the eastern shore of America they carried with them their notions of English law. Among those notions was a presumption that the tidelands remained in the possession of the Crown rather than being passed to any private person.[11]

Well after the revolution and formation of the United States, when a dispute arose an American vine was grafted to the old English root. Our Supreme Court, asked to settle a dispute regarding the ownership of an oyster bed off the New Jersey shore, determined that the land, as tidal land, had been retained by the Crown. As a consequence of the revolution all such tidal lands, lands under "navigable waters", succeeded to the adjacent state as successor to the sovereignty formerly held by the Crown.[12] That was in 1842.

Three years later the court faced a dispute over the ownership of land under Mobile Bay in Alabama. Alabama was not one of the colonies, so Alabama did not succeed the King as sovereign and thus couldn't be found to own the land on the same basis as New Jersey or the other 12 original states. So a new doctrine, the "equal footing doctrine", was announced to allow Alabama to own the beds of its navigable waters the same as New Jersey did.[13]

The next major problem to be faced on the ownership question, to move us along in history, was faced in 1876: what about ownership of land under navigable inland waters? In a case involving the ownership of land under the Mississippi River at Keokuk, Iowa, the Supreme Court straightforwardly dismissed any lingering distinction history may have left between navigable and tidal waters. It used the rules adopted in the coastal cases governing ownership of the beds of navigable waters to determine that the state owned the bed of an inland navigable waterway. The reason of the rule applied equally in their view, namely: "that the public authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for public advantage and convenience."[14]

While the question of how to determine ownership was growing in one direction, the question of how to determine navigability on a continental land mass using principles established in an island nation was growing toward it. As indicated above, the two grew together in Keokuk, but they developed separately.

As has been indicated, "navigability" in England was specifically related to tidal waters, and it was related to the floating of boats as might be expected. In general, "navigability" in England did not apply to inland waters. In early America, the English concept was adopted. There is a body of law known as "admiralty law", which is federal law, that governs relationships among navigators on navigable waters. Originally admiralty jurisdiction only covered tidal waters, for they were the only "navigable" waters in America, as in England. Extensive commercial navigation on inland waters in the United States,

however, gave rise to disputes analagous to those covered under admiralty law and caused the courts to be questioned as to whether many inland waters, such as the Great Lakes and their major tributaries, shouldn't be regarded as navigable in law as well as in fact. Two very important cases regarding what are legally navigable waters are our legacy from such disputes: The Genesee Chief and The Daniel Ball.[15]

It was The Genesee Chief that extended the concept of waters navigable in law to inland waters and The Daniel Ball that gave us the enduring federal test for identifying those waters.

So "navigability" was first extended to inland waters in 1851 for purposes of admiralty jurisdiction. The extension was adopted in the Keokuk case for property law purposes in 1876. That is how the old seacoast concepts from England became entwined as they grew inland in the United States. It is also interesting to note that through these cases, the federal courts have established rules to determine navigability for federal title purposes that establish state, not federal, ownership. Well, how do we do that?

It is important at this point to consider the legal test for navigability outlined in The Daniel Ball. This test, which has come to be known as "the federal title test", reads:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. (at 563)

The imprecision of this language (particularly with respect to the conduct of "trade and travel") is evident. Since The Daniel Ball ruling, the Court has provided more specificity to the definition of navigability as it is applied for title purposes. Yet the definitions that have evolved continue to lead to the conclusion that is implicit in The Daniel Ball quote that the ownership of the bed of a waterway is a question of fact particular to that waterway alone.

Despite this caution, some rules, with a fair degree of certainty, can be said to apply to the federal title test. These rules help answer when and how state ownership of streambeds is settled.

First, it is firmly established that title determinations are made by consideration of the waterway's characteristics at the time of statehood, since this is the time that title would have passed to the state.[16] Confusion may arise because courts determine questions of title at times much later than statehood. However, what must be remembered is that the court determination is of a condition which existed at statehood. Thus, a determination of state ownership of the bed of a waterway settles a preestablished fact and does not constitute an unconstitutional "taking". It is noted that the difficulties in obtaining accurate historical data regarding a waterway's characteristics will only increase with the passage of time.

Second, active use at the time of statehood need not be proved; rather, susceptibility of use is the standard.[17]

Third, intrastate (as opposed to interstate or foreign) commerce is sufficient for a finding of navigability.[18]

Fourth, impediments to navigation do not preclude a finding of navigability.[19]

Fifth, the U.S. Supreme Court has firmly stated that meandering done by federal surveyors does not "settle questions of navigability."[20]

Sixth, use of the federal test to determine title is mandatory. State courts have jurisdiction to decide title questions, but they must use the federal test as enunciated by the federal courts (The Daniel Ball test). Neither the state nor the state courts may establish a standard for title determination that differs from the federal standard.[21]

There is one important aspect of settling a title question that the federal test does not clearly address: the location of the boundary delineating public ownership. Courts have generally used the high-water mark as the boundary,[22] but no rule requiring that standard of states has been enunciated. In Montana, the low-water mark has been adopted by statute (§70-16-201, MCA) to delimit the boundary of state ownership.

This section has described the meaning and application of the term "navigability" in relation to its use in settling title questions. There are some consequences significant to the floating of boats and related activities when a title question is settled based on navigability. The public may use navigable waters and their beds to the ordinary high-water mark for certain purposes including recreation.[23] Additionally, in Montana, a statutory easement for fishing exists on the strip of land between the low- and high-water mark on a navigable stream.[24]

Second use: "Navigability" for Purposes of Federal Jurisdiction under the Commerce Clause and Other Federal Jurisdiction

Article I, Section 8, of the U.S. Constitution contains the Commerce Clause:

> "The Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes, . . ."

It is in furthering the implementation of this constitutional provision that federal concepts of navigability have been most fully developed. A finding of navigability for Commerce Clause purposes or for other federal jurisdiction may bring federal agency activity onto a stream, but it has no direct effect on the ownership of the bed and banks.

Gibbons v. Ogden,[25] decided in 1824, was the first case to establish congressional authority over navigation affecting interstate commerce. Not until the 1870 decision in The Daniel Ball did a widely used specific definition of navigability for federal purposes first appear. The test developed in this case -- that of "trade and travel" -- not only relates to the authority of Congress under the Commerce Clause but also reflects the historical uses of waterways.

A U.S. Supreme Court case often recognized as having delineated different tests for determining navigability under the Commerce Clause as opposed to navigability for purposes of title is United States v. Appalachian Electric Power Co.,[26] decided in 1940. The distinctions made by the Court are twofold. (1) Under the

Commerce Clause, navigability of a waterway "may later arise."(at 408) (It need not be determined as of the time of statehood, as required under title navigability.) (2) "Artificial aids" and "reasonable improvements" made on a waterway do not preclude a finding of navigability.(at 407, 409) (Title navigability, however, is probably based on the consideration of a waterway in its natural condition.)[27]

Another distinction between navigability for title and navigability for purposes of federal authority under the Commerce Clause is the requirement, under the latter purpose, that the waterway serve as a link in interstate or foreign (as opposed to intrastate) commerce.[28]

The navigability of waterways for Commerce Clause purposes is indelible: "When once found to be navigable, a waterway remains so."[29]

Other aspects of waterways navigable for title are similar to aspects of waterways navigable for purposes of federal authority under the Commerce Clause. This is especially true because the courts, with regularity, have decided both title and Commerce Clause cases by intertwining theories from each, as was described in relation to the important Keokuk case.

Finally, it should be noted that federal powers over waterways under the Commerce Clause can extend beyond navigable waterways. For example, the nonnavigable tributaries of waters involving interstate commerce may fall under federal control.[30]

In sum, the test of navigability for purposes of federal authority under the Commerce Clause only subtly

differs from the test for determining navigability for federal title purposes. Under each, it is the "trade and travel" standard that is the basis from which the tests develop.

Federal authority over navigable waters is most frequently exercised under the Commerce Clause. However, this authority is also based in other constitutional provisions, such as admiralty jurisdiction, treaty and war powers, the General Welfare Clause, and the Property Clause. Since these bases for authority so infrequently arise, they are mentioned here but not discussed.[31]

Once again, as with waters navigable for title, when a navigability standard is used to determine federal authority for various purposes, a corollary outcome is sufferance of public surface use of waters that are "public highways."[32]

Third Use: "Navigability" for Recreational and Other Public Uses

"Navigability" has been used in some states to establish public use rights including recreational use rights.[33] Control over the meaning and application of the term in these additional cases is a matter for the states to determine. (More will be said about this later.) State courts and state legislatures have developed a variety of definitions, tests, and meanings for the term. It is thus not surprising that there are conflicts among meanings and applications between states and between the state and various federal meanings. A stream that is "nonnavigable" for federal title purpose may be "navigable" for certain public use

purposes under a state test. "Navigability" in this third context is thus virtually synonymous with "usable by the public." Recreational use is the most common use by the public affirmed when a state standard of navigability is involved.

These state-based applications of "navigability" to settle questions of the right to use waters do not have anything to do with conferring title to the bed or banks of the waterway. Traditional property law tells us that whoever owns the land owns all above it.[34] Yet we are familiar with exceptions to that rule. City streets and county roads commonly pass through private property by easement. Mineral rights are often severed from the surface ownership. State findings that a waterway is usable by the public establish a kind of easement across private property with no transfer of title.

Extensive recreational use of waterways, other than for purposes of fishing, is a recent historical occurrence. Therefore, state statutory and case law regarding recreational use of waterways is not yet fully developed. One matter that is firmly settled, however, is that, apart from federal limitations already discussed, public use rights are a matter of state law and may be defined in ways not dependent on the federal tests. As stated by one author:

> . . . the federal test for land-title and federal jurisdiction does not have to be the test for state determinations of the waters that are public for various state purposes.
>
> The public opportunity and demand for water use is no longer so limited as it was during the period of development of the test for public waters for federal purposes . . . .[35]

However, before the U.S. Supreme Court held that the question of navigability for title was an exclusively federal question in 1926, the courts did not always distinguish between title navigability and navigability for public recreational purposes. Instead, courts simply concluded that if a water body was navigable for title, it was open to public use; conversely, if the water body was not navigable under the title test, public use was not allowed.[36]

Further confusing the issue was the fact that state courts were inventing their own tests for navigability for title as well as for other purposes. Courts on occasion defined state ownership of the beds of waters by using a test less restrictive than The Daniel Ball test. For example, in the Minnesota case of Lamprey v. Metcalf,[37] decided in 1893, the Minnesota Supreme Court adopted what has been referred to as the "pleasure boat" test, in a case brought to determine title. In 1926 it was clarified that this is an improper test to determine title, but the case is often cited as an authority on questions of public recreational use rights.

> Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit . . . . To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated. (at 1143)

Although the courts, subsequent to 1926, have not always adhered to correct distinctions between title and recreational use tests, such distinctions have become increasingly recognized and more firmly founded.

There is a clear trend in the states today to affirm public use rights on waterways other than those navigable under the federal title test. Colorado is a rare exception to this trend.[38] Although the general results of court decisions may be the same, these courts use many diverse bases in reaching their results. As one author writes:

> There are probably few areas of law in which similar problems have arisen in the several states where the courts have split so widely, or based their decisions on such diverse theories.[39]

Three primary bases are used by courts in upholding public use rights. They include: (1) interpretation of constitutional language that waters of the state belong to the public; (2) defining riparian rights so as to allow for public use of the waters; and (3) the public trust doctrine. The courts often intertwine all three. And the term "navigable" may or may not be associated with the result.

In Montana, the Supreme Court based its decisions recognizing public use rights on language in the state constitution and on the public trust doctrine. (The Montana decisions will be discussed in detail later in this report.)

The first basis, the state constitution, was relied upon by the state Supreme Courts in New Mexico,[40] Wyoming,[41] and others[42] in deciding for public use of waters. The New Mexico Constitution states: "The unappropriated water of every natural stream . . . is hereby declared to belong to the public and to be subject to appropriation for beneficial use . . . ."[43] The Wyoming Constitution reads: "The water of all

natural streams, springs, lakes or other collections of still water . . . are hereby declared to be the property of the state."[44]

In a Wyoming case, Day v. Armstrong, the state Supreme Court reasoned:

> The title to waters within this state being in the state, in concomitance, it follows that there must be an easement in behalf of the state for a right of way through their natural channels . . . . (at 145)

In contrast to the above decision, the Colorado Supreme Court expressly rejected the argument that the state's constitutional language declaring waters "to be the property of the public"[45] applied to recreational use rights. Instead, the Court held in People v. Emmert[46] that this constitutional provision applies to water appropriations (about which the constitutional language does speak). The Court stated:

> Constitutional provisions historically concerned with appropriation, therefore, should not be applied to subvert a riparian bed owner's common law right to the exclusive surface use of waters bounded by his lands. (at 1029)

This ruling, while illustrative of the breadth of variance found in applying state tests, is recognized as being the exception to the general rule allowing public use of waters over privately owned beds.[47]

The second basis for court findings of public recreational use rights -- that of defining and thereby limiting riparian rights so as to allow for public use -- has been used in Minnesota and Washington. Its use may take on different forms. For example, some courts speak of a "public easement" to use the waters flowing

over privately owned lands. Another situation is one in which courts have concluded that, practically speaking, exclusive private use rights of the waters over a pie-shaped portion of a lake's bottom have little meaning. In these cases, the riparian owners on the lakes in question were held to have mutual easements to use the entire surface of the lakes.[48] In one case the public benefited in the easement, as the state was a riparian owner with a park on the lake.

The limited nature of riparian rights is stated by one author:[49]

> It is to repeat the obvious to state that riparian rights vary from time to time and from place to place, depending on social, economic, and political needs of society as viewed by its judiciary. The courts in this . . . group of states believe that society's needs require the recognition of a public right of use . . . even where the beds of the waters were privately owned. These courts define riparian rights so as to deny riparians the right to exclude others from the use of the water.

For example, the court in Day v. Armstrong reasoned:

> The waters not being in trespass upon or over the lands where they naturally appear, they are available for such uses by the public of which they are capable. (at 145)

In J.J.N.P. Company v. State of Utah,[50] the state Supreme Court ruled on the limited nature of riparian rights:

> Private ownership of the land underlying natural lakes and streams does not . . . defeat whatever right the public has to be on the water. (at 1137)

The third basis used by courts in affirming public use rights of waters is the public trust doctrine. It was used explicitly in Montana in the Curran and Hildreth decisions, and Professor Stone has argued that all the other court cases are really "inarticulated public trust cases". He points out that "[t]he interesting aspect of [them] is that only a slight difference exists in the result of any of them, although they employ diverse theories as the mechanism for reaching the result."[51]

Because of its breadth and power, the public trust doctrine has earned its own chapter in this report and so will not be discussed further here.

In conclusion, we see that "navigability" is indeed "chameleon in character" with meanings changing in every different situation. We must thus be ever careful to note precisely what is meant to be shown or accomplished by the use of the term.

> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master -- that's all."

THE PUBLIC TRUST DOCTRINE[52]

The public trust is a longstanding doctrine having its roots in both civil and common law. According to the doctrine, as an inherent aspect of sovereignty, government must preserve and protect particular resources within its jurisdiction for the public good and the good of the resource. Historically, in America, the doctrine has been applied to protect the public uses of commerce, navigation, and fishing upon navigable waters and their beds. (Thus, there is seen a relationship between the traditional applications of the public trust doctrine and the public purposes behind the trade and travel test of the The Daniel Ball.) In recent times, application of the doctrine has expanded both beyond federally navigable waters and to include the protection of uses other than commerce, navigation, and fishing. Its evocation by the Montana Supreme Court in the finding of a public right to the recreational use of Montana's waterways makes an understanding of the doctrine vital to understanding the subject of this report.

The Institutes of Justinian, in restating Roman law, provide the civil law origins of the public trust doctrine: "By the law of nature these things are common to man -- the air, running water, the sea and consequently the shores of the sea."[53] The same trust principles were recognized under and adapted to English common law, where ownership of public trust resources was in the King. Thus, "all things which relate peculiarly to the public good cannot be given over or transferred . . . to another person, or separated from the Crown."[54]

In this country, public trust principles are found in Massachusetts' "great pond" ordinance of 1641,[55] which guaranteed the right to fish and fowl in ponds of 10 acres or more, and in the Northwest Ordinance of 1787, in which Congress guaranteed that the "navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free . . . ."[56] In 1821, the New Jersey Supreme Court recognized the public importance of certain waters and said:

> [T]he sovereign power itself . . . cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common rights.[57]

The leading public trust case in this country is Illinois Central Railroad Co. v. Illinois,[58] decided in 1892. In 1869, the Illinois Legislature granted to the Illinois Central Railroad virtually the entire waterfront of Chicago: 1,000 acres of tide and submerged land. The Legislature later rescinded the grant, extending nothing more than incidental compensation to the railroad. The U.S. Supreme Court upheld the legality of the recision and stated:

> The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. (at 453)

The Illinois Railroad case provides the essence of the theories that are applied by courts to determine whether a particular state action is in compliance with the public trust doctrine. The general rule is that state action cannot absolutely convey or adversely affect public trust property, except in limited instances.

In determining whether a state action is in compliance with the public trust doctrine, the courts generally consider: (1) whether the property in question is within the public trust; (2) whether a state action has alienated or somehow adversely affected property held within the public trust; and (3) whether, if there has been an alienation or limitation of public trust property, it is permissible because it was done for a public trust purpose (or whether, if not done for a public trust purpose, the resource conveyed is of little value and the conveyance can be made without impairing the public interest in the property that will remain in the public trust).

Courts have invoked the public trust doctrine with increasing frequency. Two significant developments recently have occurred. First, the doctrine has been held to apply to waterways not navigable under the federal title test.[59] Second, public purposes protected by the public trust doctrine have expanded beyond commerce, navigation, and fishing to include not only recreational use of waters but also the broader modern day concerns of environmental nondegradation.[60]

Another application of the public trust doctrine that has received recent attention is its interrelationship with the prior appropriative system of water rights, as

discussed by the California Supreme Court in the case of National Audubon Society v. Department of Water and Power of the City of Los Angeles, otherwise known as the Mono Lake case.[61]

The California Supreme Court has described the public uses subsumed by the public trust doctrine as "sufficiently flexible to encompass changing public needs."[62] Broadly speaking, however, the rationale behind the doctrine is the same now as it was under Roman and English common law: to provide protection of publicly important resources for public purposes.

In short, the public trust doctrine provides basic prohibitions upon the state (or legislature) of unrestrained alienation of public trust property or disregard of public trust principles. Yet beyond establishing a framework for protection of the public interest, there exists within the public trust doctrine broad legislative prerogative to manage the public trust resource.

How the doctrine was applied in recent Montana cases is the subject of the next chapter.

THE CURRAN AND HILDRETH DECISIONS[63]

In cases decided May 15 and June 21, 1984, the Montana Supreme Court relied on the public trust doctrine and the 1972 Montana Constitution to hold that "any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes." The Supreme Court also ruled that the public has the right to use the bed and banks of public waters to the ordinary high-water mark and is allowed to portage above the high-water mark around barriers in waterbodies in the least intrusive manner possible. In each case, the Supreme Court affirmed the results of District Court decisions while using different means from those used by the lower courts to reach these results.

Montana Coalition for Stream Access v. Curran

The Montana Supreme Court, on appeal, affirmed the District Court's application of the federal title test for navigability, ruling that the state of Montana had owned the bed of the Dearborn River since 1889, the time of statehood. Consistent with the District Court, the Supreme Court drew a sharp line between the federal test for navigability and the state's test for determining public recreational use rights.

Unlike the District Court, the Supreme Court used the public trust doctrine and the 1972 Montana Constitution as the bases for its decision. (The District Court had used statutory interpretation and a "recreation craft" test, i.e., if the waterway can be floated by a craft, it can be used for aquatic recreation, to determine public recreational use rights of waters.)

Central to the discussion of the public trust doctrine in the Supreme Court's decision is the proposition that when, at the time of statehood, the states acquired title to the beds of navigable waters, such title was held "in trust for the public benefit." However, the Court did not confine its application of the public trust doctrine to waters found navigable under the federal title test. The Court interwove the public trust doctrine with the language of Article IX, Section 3(3), of the Montana Constitution, which states:

> 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.

From this, the Court reasoned:

> 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.
>
> If the waters are susceptible to public recreational use, they may be so used by the public.

Drawing on both statutory and case law, the Supreme Court further held that the public has a right to use state-owned waters to the point of the high-water mark. (Although the Court did not specifically articulate a public right to use the beds of the waters, such right is implied in this case and is clearly enunciated in the Hildreth decision.) In case of barriers in the water, the Court ruled that the public is allowed to portage around them "in the least intrusive way

possible." The Court stated unequivocally that the public does not have the right to enter private property in order to enjoy the recreational use of state-owned waters.

The Supreme Court dismissed Curran's contention that property was being taken without compensation because the Court found that Curran had no claims to the waters of the Dearborn, and hence there could be no taking.

Montana Coalition for Stream Access v. Hildreth

As in the Curran case, the Montana Supreme Court in the Hildreth case affirmed the result of the District Court's decision while significantly modifying that Court's conclusions of law. Unlike the District Court, the Supreme Court expressly declined to adopt a specific test for the meaning of "recreational use," saying that to do so would be "unnecessary and improper." (The District Court had adopted a "pleasure-boat test of navigability" to determine public recreational use rights.)

The Supreme Court explained that it would not devise a test for determining the meaning of recreational use since "the capability of use of the waters for recreational purposes determines whether the waters can be so used." Because the Constitution does not limit the waters' use, the Supreme Court ruled that it cannot "limit their use by inventing some restrictive test."

Finally, the Court stated:

> Under the 1972 Constitution, the only possible limitation of use can be the

> characteristics of the waters themselves. Therefore, no owner of property adjacent to State-owned waters has the right to control the use of those waters as they flow through his property.

The Supreme Court also cited Curran and mentioned the public trust doctrine as a factor in its determination affirming public recreational use rights.

The Supreme Court in Hildreth clearly enunciated the public's right to use the bed and banks of state waterways to the ordinary high-water mark. Again, the Court affirmed the right to portage around barriers in a manner that avoids damage to the adjacent landowner's property. Again, too, the Supreme Court declared that the public has no right "to enter upon or cross over private property to reach the State-owned waters held available for recreational purposes."

Unlike the decision on the Dearborn River, the Beaverhead decision did not include a determination as to the ownership of the river's bed. Thus, the Supreme Court decision in Hildreth established public recreational use rights on a stream which has not been adjudicated for title purposes. In both cases, the Court emphasized that the question of title to the underlying bed is "immaterial" to the question of the public's rights of recreational use of the waters.

In reaching the two decisions, the Montana Supreme Court tied the public trust doctrine to the provision in the state's fundamental law, the 1972 Constitution, declaring that all waters within the boundaries of the state are the property of the state for the use of its people. A doctrine, which traditionally has been linked to waters (and the beds of waters) declared to

be navigable under the federal test for title determination, was here held applicable to all surface waters in the state. The decisions affirm the public's right to make recreational use of waters in Montana capable of such use.

PUBLIC COMMENTARY

Much of the committee's activities centered on eliciting public opinion with regard to both the general issues of public recreational use of waters and their underlying beds and the peripheral issues of litter, trespass, liabilities, and others. Public testimony was largely divided into that presented by recreationists and that offered by landowners. Each group expressed fears that rights they traditionally had assumed to have held were being threatened by the will of the opposing group. All recognized that public recreational use of waterways is an activity that has burgeoned in a relatively short amount of time.[64]

Recreationists pointed to the economic benefits to the state of this expanding industry.[65] They spoke convincingly of the need of the public to be able to enjoy and make use of Montana's public trust resource.

Landowners, on the other hand, told the committee that their management practices were being adversely affected by the influx of water recreationists. Litter problems are increasing. Weeds are rapidly spreading as a result of increased stream use, erosion of land will occur, and calving and other livestock operations will be disrupted. One landowner asserted that what used to be an asset, owning land under and adjacent to waterways, is now a landowner liability.[66]

Despite the polarization between landowners and recreationists, at one point in the interim (at the March 1984 public hearing) the groups seemed to agree that "90%" of both the landowners and recreationists cooperate, create no problems for the other, and have

mutual respect for the other's rights, as well as the resource. It was the "10%" who cause problems that provided the reason for the committee's existence and who have created hardships and hostilities amongst all.

The Curran and Hildreth decisions distinctly altered public testimony to the committee. Specifically, discussion of the general issue of use of waterways and their underlying beds changed from public discussion in search of establishing policy in this area to public discussion as a reaction to the Supreme Court's decisions. Another difference in public input pre- and post-Curran and Hildreth was in the notable absence, with only a few exceptions, of participation by recreationists following the decisions. Discussion of the secondary issues (e.g., litter, trespass, etc.) took place throughout the interim.

This chapter attempts to summarize the public's comments to the committee. It is divided into public opinion with regard to recreational water use rights, generally, and with regard to the issues that are incidental to water use. The chapter concentrates on the issues incidental to water use, as those were the ones about which the committee ultimately could set policy. The summary of the public's sentiment with regard to public recreational use of waters is provided primarily for historical purposes.

Use of the Waters and their Underlying Beds

The committee received an exhaustive array of proposals for establishing policy on which waters and to what extent the beds of waters over privately owned land should be open to public use.

At one end of the spectrum was a proposal to allow public use of only those waters and beds of waters that satisfied the federal title test of navigability. Under this proposal, waterways and their beds which did not satisfy the federal title test could be used on a permission-only basis. This would be similar to the rule established in the Colorado case of People v. Emmert. The argument in support of this policy is similar to the one used by the Colorado court: whoever owns the land, owns all above it and all below it. The landowner pays taxes on the land; therefore the landowner should have complete control of the activities over his land. There is no recognition of an easement on the waters.

At the other end of the spectrum was the rule established by the Montana Supreme Court. Any surface waterways and their beds to the ordinary high-water mark that are capable of recreational use may be so used by the public.

Across the spectrum were a variety of options. However, one of the greatest problems faced by the committee (prior to the Supreme Court decisions) was that of defining a rule for recreational use of waters that would be suitable in all its applications. As stated by one person, "One river is 100 rivers."[67] Not only was it difficult to establish a test to determine floatability, the committee also faced the task of establishing the rule to be used with regard to use of the beds. Should the boundary of use rights be the low-water mark or the high-water mark? Should the floater be allowed to wade? Push off from shore? Picnic? Camp? Make repairs? Eliminate human waste? Anchor the craft? Portage?

The committee's last action before the Montana Supreme Court decided the Curran and Hildreth cases was to recommend that local meetings be organized whose goal would be to bring together recreationists and landowners, county by county, to determine which waterways were floatable, which were not floatable, and which were the "gray" waterways on which a consensus as to their floatability did not exist. This approach of the committee evolved at the March 31, 1984, hearing, at which it appeared that general agreement among those participating was emerging and perhaps could be solidified in specific terms, if the participants were given more time and the opportunity to continue dialogue.

However, before the local meetings were held, the Supreme Court issued its decisions, placing significant restraints on the Legislature. The committee therefore cancelled the local meetings and pursued the study of those issues peripheral to the use of waters and their beds.

During the course of the study, the public made the following suggestions with regard to setting the general policy on recreational use of surface waters and their beds:

-- Establish a "craft" test, similar to the one in HB 888 (from the 1983 Legislature), and authorize use of waters and their beds to the ordinary high-water mark if they can be floated by a craft.

-- Allow public recreational floating on waterways that have an established history of such floating.

-- Allow use of waters, but prohibit use of beds that are privately owned unless permission is granted by the landowner. (This proposal is similar, though not identical, to the committee's LC 69.)

-- Develop conservation easements and recreational corridors, as has been done on the Blackfoot River.

-- Place the responsibility for deciding which waterways are floatable on the navigator and minimize the state's involvement.

-- Establish a water recreation test based on the volume of water in or the width of the waterway. (An obvious drawback to this approach is that a watercourse beginning as a narrow trickle may be a federally navigable waterway at its mouth.)

-- Determine where on the course of a floatable waterway the capacity to float begins.

-- Establish a permit system. The heavy recreational use of Montana's waterways seems to demand this be done. (The Department of Fish, Wildlife, and Parks states that it does not have statutory authority at present to establish a permit system. Also, the Department believes that the present situation does not "warrant this type of dramatic approach, although it may be needed at a later time."[68])

-- Do not establish a permit system because this would create as many problems as it solves.

-- Establish regional floating seasons, recognizing the seasonal fluctuations of the waterways and the needs of recreationists and landowners (e.g., calving seasons, hunting seasons.)

-- Place responsibility for management of the public trust resource on those who are closest to the resource: the landowners, the traditional stewards of the land. Such management would aid in protecting soil erosion and in the control of weeds, for example. (This alternative was mentioned by a committee member, not a member of the public.)

-- Protect the resource by prohibiting recreation that creates environmental damage, such as deterioration of the water quality.

-- Consider the presence of obstacles in the waterway when establishing floatability.

-- Prohibit public use of waters while they are being diverted away from a natural water body. (The committee has recommended this proposal in LC 69.)

-- Quiet title to all the state's waterways within a given time, for example, by the end of the century.

-- Establish recreational use rights by distinguishing between creeks and streams, and allowing public use of streams but not creeks.

Peripheral Issues

Members of the public raised the following peripheral issues during the course of the interim as problems, either existing or anticipated, and solutions to those problems created by public recreational use of waters. It was the responsibility of the committee -- and now is the responsibility of the Legislature and those setting policy -- to determine which of these stated problems need to or can be addressed through legislative or administrative solutions and to choose the best means for addressing them. The outline of the issues below does not attempt to weigh their relative importance, assess the merit of the recommended solutions, or measure the validity of the claims made.

-- Access. The state should sell the public access sites, and give the landowners the right of first refusal. It was argued that if all land adjacent to streams were privately owned, the recreationist would not have difficulty knowing if he were trespassing. Also, elimination of public common areas would help reduce the problem of litter. (Arguments were made against this recommendation and as testimony to the success of access sites, particularly in reducing the responsibilities of landowners already burdened by the right of the public to make recreational use of water.)

-- Compensation. The Legislature should establish a property damage reimbursement program, funded by a recreationists' user fee, aimed particularly at reimbursing landowners for damages resulting from water recreation activities. (There was much testimony during the interim that landowners'

property was in danger of being damaged, as a result of the increase in public water recreation. Fires and broken fences are examples of such damage mentioned.) A similar proposal was recommended by the landowner-sportsman advisory council, appointed in 1977, and introduced as HB 575 in the 1979 Legislature, which applied to any damage caused by hunters, fishermen, or trappers.

-- Criminal Mischief. Section 45-6-101, MCA, sets forth Montana's law on criminal mischief. The offense of criminal mischief is committed if a person "knowingly or purposely":

(1) injures, damages, or destroys any property of another or public property without consent;

(2) without consent tampers with property of another or public property so as to endanger or interfere with persons or property or its use; or

(3) fails to close a gate (not located in a city or town) previously unopened which he or she opened and which leads in or out of any enclosed premises.

The difficulty of proving the "knowingly or purposely" mental state was expressed by and to the committee.

-- Department of Fish, Wildlife, and Parks. Some argued to the committee that the Department's authority, particularly in the area of enforcing trespass laws, should be expanded. One person argued in favor of reducing the state's

interference with matters that are best handled by the landowners and recreationists involved. Committee members raised questions as to what, if any, increase in appropriations will be required by the Department as a result of its increased responsibilities pursuant to the Supreme Court decisions and the committee's trespass bill, LC 87.

-- Education. Education regarding public recreational use of Montana's resources is provided by the Department of Fish, Wildlife, and Parks for those activities licensed, such as hunting and fishing, and by outfitters. Dissemination of information with respect to other forms of recreation is lacking. Improved education as to the rights and responsibilities of landowners and recreationists could reduce the conflicts between these groups.

-- Fences. The committee was informed that the Supreme Court decisions, allowing the public the right to portage around barriers, implied that the landowner may place a fence on a stream whose bed is privately owned. Landowners claimed that their fences have been and will continue to be cut. Recreationists feared that landowners would place fences in waterways for purposes of harassment. Will landowners be required to place warning signs on a waterway when there is a fence? Should the Legislature require that obstructions conform to certain specifications (e.g., fence style, bridge height)? A river ranger of the Department of Fish, Wildlife, and Parks described a float gate that has been tested, and a landowner told the

committee that he was reimbursed by the Department for some materials he used in building a float gate. (See also Public Nuisance and Liabilities.)

-- High-Water Mark. There must be certainty that the Supreme Court's use of the term refers to the "ordinary" not the "flood" high-water mark.

-- Legislating by the Court. There was a feeling among some members of both the public and the committee that the Supreme Court had gone beyond its role of interpreting the law and had improperly legislated on the subject of public recreational use of waters. There was much frustration that neither the Legislature nor the public had any recourse to change the Court's decisions. Some recommended that the committee draft "a resolution to urge the Supreme Court to return to its duty of interpreting the laws."[69]

-- Liabilities. Historically, liability law is not codified because it is difficult to anticipate every situation that can arise.

A landowner cited the following as an example of a possible liability case. A landowner may have a fence that is above the water during the normal season; during times of high water, the fence may disappear below the water and injure a floater who does not see it. Is the landowner liable for the injury?

There was sentiment that landowners should not be liable to persons using waters or land incidental to water use. "Willful or wanton misconduct" on the part of the landowner was suggested as an

exception to a limitation on landowner liability; such an exception would act as a disincentive for landowner harassment of recreationists.

-- Management. Improved resource management could help preserve the water resource and reduce the conflicts between landowners and recreationists. HB 877, from the 1983 Legislature, addressed issues of water recreation management, including providing adequate access sites, assisting landowners in constructing and maintaining fences, posting signs, publishing maps, and assisting in the cleanup of litter on waterways.

-- Portaging. Recreationists wanted a guarantee of their right to portage. Landowners wanted assurance that the Supreme Court decisions did not require them to provide portage routes. Questions unanswered in the Supreme Court's decisions include whether the right to portage applies to non-floaters as well as to floaters and their boats, what a reasonable portage distance is, and whether portaging is allowed around natural and/or artificial barriers. (LC 69 answers this last question in its definition of "barriers.")

-- Public Nuisance. Section 45-8-111, MCA, defines a public nuisance under criminal law as including "a condition which renders dangerous for passage . . . waters used by the public." The committee was informed that "It is possible that a barbed wire fence across 'waters used by the public' that is difficult to see from the waters and which renders those waters 'dangerous for passage' would be considered a public nuisance

under this law. This, of course, would be a question of fact."[70] In the civil area, §27-30-101, MCA, declares that a nuisance includes anything "which unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, river, bay, stream, canal, or basin."

-- Recreational Use. "Recreation," with respect to the public's right to use the state's waters, must be related to the water resource and must not harm the resource. Can it be defined more specifically? Does "recreational use," as used by the Supreme Court, include such things as duck hunting, other forms of hunting, ice skating, the use of three-wheelers or motorcycles, snowmobiling, or the floating of toy boats?

-- Review Board. The Legislature should establish a review board, composed of landowners, recreationists, and other interested parties, to which problems could be taken and resolutions determined.

-- Taxes. It was suggested that landowners be granted a tax credit for that portion of their land subject to an easement for water recreation. Opposition to this suggestion was based on some landowners' opinions that such a tax credit would, at least implicitly, qualify their ownership of their land.

-- Trespass. Problems related to the present trespass laws are threefold:

(1) because of the posting requirement, the burden of preventing trespass is now on the landowner rather than on the person who is unauthorized to be on the land. (This problem is addressed in LC 87.)

(2) enforcement. County attorneys are not prosecuting trespassers in sufficient numbers, and wardens' enforcement authority is extremely limited (the latter problem is addressed in LC 87); and

(3) penalties.

With regard to the first problem, some argued that the posting requirement is an unfair imposition on the landowner. Signs are removed or destroyed. The opposing view is that it is sometimes difficult for an individual to know if land is public or private, particularly in light of the checkerboard patterns of land ownership. A person can enter the land of another unknowingly.

The committee considered expanding the prohibition of hunting big game animals on private property without permission (§87-3-304, MCA) to include the prohibition of any recreational activities on private property without permission. (Instead, however, the committee's recommended bill amends the general criminal trespass laws in Title 45.) It was also suggested that a trespass law be adopted that would be specific to water recreation (e.g., trespass within 100 yards of a waterway).

With regard to the second problem, county attorneys are overworked and underfunded.

Criminal trespass cases are not high enough on their list of priorities. Also, it is difficult to catch trespassers.

With regard to penalties, a particular problem mentioned is that under civil trespass cases it is difficult, if not impossible, to collect damages, unless the trespasser is found guilty of another wrongdoing, such as vandalism. Suggested remedies to the penalty problem included increasing civil penalties, as was done for bad checks in the 1983 Legislature, or establishing mandatory criminal sentences, as was done for drunk driving in the 1983 session.

-- Water Rights. If recreational use rights are protected by the public trust doctrine, will agricultural uses of water be threatened by recreational uses? Will this jeopardize the protections guaranteed Montana's water under the O'Mahoney - Millikin Amendment to the federal Flood Control Act of 1944? How will competing public trust interests be prioritized? Do recreational use rights conflict with the marketing of water?

COMMITTEE RECOMMENDATIONS

The bills that the committee will introduce in the 49th Legislature are found in Appendices A and B. Below is a summary of the bills, section-by-section, and, where appropriate, a discussion of the rationale behind the particular recommendations.

LC 69: AN ACT TO GENERALLY DEFINE LAWS GOVERNING RECREATIONAL USE OF STATE WATERS . . . .*

Section 1. Definitions. In subsection (1), the term "barrier" is defined because the word is used in subsection (3) of section 3 and in section 4 of the bill. The reason for using the particular definition is explained in the discussion of subsection (3) of section 3.

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:

* Two committee members voted against the bill, as finally amended, because they objected to the limitations of the public's right to use the beds of waters found in section 3.

(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.

Section 2. This section addresses recreational use of waters. Subsection (1) allows the public to make recreational use of surface waters capable of such use. The majority of the committee does not intend to imply that recreational use of waters under this subsection is founded in the public trust doctrine.*

Subsection (2) excepts from the waters the public is authorized to use for recreation waters while they are diverted away from a natural water body. For example, under this subsection, the committee intends that the public would not be allowed to make recreational use of waters in an irrigation ditch or stock watering pond. The legal opinions given to the committee were that the Montana Supreme Court's decisions did not apply to waters while they are being diverted, although this particular point was not at issue in the Curran or Hildreth cases.

* Two committee members hold a minority opinion with respect to this intent. It is their position that the public trust doctrine is a basis for the right of the public to use the waters that is articulated in this subsection.

Section 3. This section addresses the right of the public to use land below the ordinary high-water mark.* Subsection (1) affirms the right of the public to use the land between the ordinary high-water marks of surface waters that satisfy the federal title test of navigability. This subsection is a statement of federal law on the subject. The waters that are known to satisfy the federal title test are those that have been adjudicated as navigable for that purpose. For example, the Montana Supreme Court ruled that the Dearborn River satisfies the federal title test of navigability. The public also has the right, under subsection (1), to use the beds of waterways that are in fact navigable under the federal title test, even if they have not yet been adjudicated as such.

Subsection (2) provides that the public may not use the beds of waters that do not satisfy the federal title test of navigability unless: (1) the owner of the land or an authorized agent grants permission to use the land; or (2) such use is "unavoidable and incidental" to the use of the waters. This subsection differs from the Supreme Court decisions: in conjunction with subsection (3), defining "unavoidable and incidental" use of the land, it attempts to codify the rule for use of the land below the ordinary high-water marks that the Wyoming Supreme Court stated in Day v. Armstrong.[71]

> When so floating craft, as a necessary incident to that use, the bed or channel of the waters may be unavoidably scraped or touched by the grounding of craft. Even a

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* At its last meeting, a motion to strike section 3 of the bill was defeated on a 4-4 vote. Those voting to strike section 3 opposed the restriction regarding use of the beds.

> right to disembark and pull, push or carry over shoals, riffles and rapids accompanies this right of flotation as a necessary incident to the full enjoyment of the public's easement . . . .On the other hand, where the use of the bed or channel is more than incidental to the right of floating use of the waters, and the primary use is of the bed or channel rather than the floating use of the waters, such wading or walking is a trespass upon lands belonging to a riparian owner and is unlawful. (at 145 and 146)

Subsection (3), defining "unavoidable and incidental" use of the lands, intends to incorporate in appropriate statutory language (e.g., "bypassing barriers") the conditions described by the Wyoming Court as permissible use of the lands. This may help explain why the term "barriers" is defined as it is in subsection (1) of section 1.

Section 4. Portaging: use of the land above the ordinary high-water mark. This section is a restatement of the Montana Supreme Court's decision. It is included because the bill attempts to codify comprehensively the law on water recreation.*

Section 5. Landowner liability. This section limits the liability of landowners in instances involving public recreational use of waters pursuant to section 2, and lands, when permitted or as an incidental use of the waters, pursuant to sections 3 or 4. Landowner liability is limited under subsection (2) to acts or

* Two committee members voted against this amendment. They did not want to codify this element of the Curran and Hildreth decisions in the event that the Supreme Court is willing to reverse itself with regard to portaging if a case comes before it on this point in the future. It was their opinion that public rights in waters do not extend to rights to use privately owned land.

omissions that constitute "willful or wanton misconduct" on the part of the landowner. It is likely that this standard would be applied by a court even without such a statute. However, codifying the standard satisfies the concerns of landowners, in particular, who expressed the fear that they would be liable for injuries that might occur while members of the public make recreational use of water. This section is patterned after §70-16-301 and §70-16-302, MCA, which limit the standard for liability to "willful or wanton" acts causing injury for a landowner who permits a person to use the landowner's land for recreational purposes.

Subsection (3) does not limit the liability of a landowner or tenant who for compensation permits recreational use of the land described.

Section 6. Prescriptive easements. Subsection (1) defines prescriptive easements from well-established case law.

Subsection (2) declares that a prescriptive easement cannot be acquired through use of land or water for recreational purposes. There are presently no statutes in Montana addressing prescriptive easements. Case law regarding the acquisition of prescriptive easements through recreational use is unsettled. The committee chose to set the rule, as stated here, to satisfy the concerns of landowners.

Section 7. Amendment of §70-19-405, MCA. This amendment is made to provide conformity with section 6.

Section 8. Repeal of §87-2-305, MCA, Montana's "fishing statute." Basically,[72] this law provides anglers with the right to angle below the ordinary high-water mark on navigable streams. It is repealed under the bill because it was the opinion of staff that this law is fairly meaningless and perhaps misleading. Under federal law, as already discussed, it is firmly established that members of the public (including anglers) have the right to use the beds of navigable waters between the ordinary high-water marks. This right is affirmed in subsection (1) of section 3 of the bill. Section 87-2-305, MCA, is therefore redundant and is not reflective of the broader rights that members of the public have to recreate in ways other than angling below the ordinary high-water mark on the beds of waters navigable under the federal title test.

Sections 9-12. Codification instruction; severability; applicability; and effective date. These sections are self-explanatory.

LC 87: AN ACT ELIMINATING THE REQUIREMENT THAT NOTICE BE POSTED OR OTHERWISE COMMUNICATED FOR THE COMMISSION OF THE OFFENSE OF CRIMINAL TRESPASS TO LAND . . . .

Section 1. Amendment to §10-1-612, MCA. This statute relating to criminal trespass upon places used for military purposes is amended in order that its punishment provision be consistent with the punishment provisions contained in the amendments to §45-6-203, MCA, in section 3 of the bill.

Section 2. Amendment to §45-6-201, MCA. The amendment to this section eliminates the requirement that notice be posted or otherwise communicated in order to

establish that a person has "entered or remained unlawfully" upon land. The purpose of this amendment is to shift the responsibility for preventing the unauthorized entrance upon land of another from the landowner to the person who is not authorized to be there. (Note, the term "occupied structure" is stricken in this amendment as a drafting measure, since "premises" is defined in §45-2-101, MCA, to include "any type of structure.")

Section 3. Amendment to §45-6-203, MCA. This is the section that criminalizes the unlawful behavior (trespass to premises) described in §45-6-201, MCA, and provides a penalty for such criminal behavior.

Subsection (1) of §45-6-203, MCA, is amended in the bill to provide for two types of criminal trespass: (1) trespass to premises, including land, committed "knowingly" (this is the present law); and (2) trespass to land (not all premises) committed by the mere act of trespass, regardless of the mental state of the trespasser (this is the new provision). Eliminating the presence of a mental state as a precondition to a criminal act creates a condition termed "absolute liability," which is defined under Montana law in §45-2-104, MCA.

Subsection (2) of §45-6-203, MCA, provides the penalty provision for the trespass actions. The penalty for trespass committed "knowingly" is unchanged: a fine not to exceed $500, imprisonment for a term not to exceed 6 months, or both. The penalty for trespass committed regardless of the mental state of the trespasser conforms to the penalty required by the law defining absolute liability: a fine not to exceed $500.

Section 4. Amendment of §87-1-504, MCA. This amendment expands the type of property on which the game wardens must enforce the criminal trespass, criminal mischief, and litter laws.* Under the present law, the wardens must enforce these laws "on private lands where public recreation is permitted," a seemingly contradictory condition in reference to criminal trespass. The Department of Fish, Wildlife, and Parks interprets trespass under this section to mean actions which go beyond the limits of recreation that a landowner permits. For example, a landowner may permit hunting and require that hunters check in with the landowner before proceeding to hunt. A hunter neglecting to check in with the landowner could be a trespasser "on private lands where public recreation is permitted." However, on lands on which recreation is not permitted, wardens now do not have the authority to enforce the criminal trespass laws. For example, on these lands, a warden (or an ex-officio warden, such as a Department river patroller) who patrols a stream does not have authority to enforce trespass actions he observes while on patrol. The committee's amendment expands the type of property on which the wardens must enforce the criminal trespass, criminal mischief, and litter laws to "private lands being used for recreational purposes."

Section 5. An immediate effective date is established.

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* Three committee members opposed this amendment because they feared it might require an excessive appropriation. In addition, two of the three had reservations about extending the wardens' enforcement authority of these laws to all private lands.

FOOTNOTES

[1]Montana Coalition for Stream Access v. Curran, December 7, 1982, First Judicial District, Case No. 45148. Montana Coalition for Stream Access v. Hildreth, December 7, 1982, Fifth Judicial District, Case No. 9604.

[2]Persons and groups most involved in the conflict are reflected by those entered as Amicus Curiae in the appeals before the Montana Supreme Court. These included Professor Al Stone, as an individual, and the National Wildlife Federation, Montana Wildlife Federation, Montana Stockgrowers Association, Montana Woolgrowers Association, Montana Farm Bureau Federation, American Farm Bureau Federation, Wyoming Farm Bureau Federation (these last three organizations filed a brief in the Hildreth case only), and Montana Council of Trout Unlimited. These are in addition to the coalition of recreational water users and the ranchers they sued, who were principals in the case.

[3]HB 799, HB 801, HB 877, HB 888, SB 347, SB 348, and SB 357.

[4]682 P.2d 163, 41 St. Rep. 906 (Mont. 1984).

[5]684 P.2d 1088, 41 St. Rep. 1192 (Mont. 1984).

[6]Minutes from this and all other committee meetings are on file at the Legislative Council, Helena. In addition, a list of papers presented to the committee and other papers prepared by staff on the subject during the interim follow these footnotes in the Index of Committee Materials.

[7]362 P.2d 137 (Wyo. 1961).

[8]This chapter is a recently edited version of the paper prepared for and presented to the committee by this author. The original paper is cited in the Index of Committee Materials following these footnotes.

[9]Johnson and Austin, "Recreational Rights and Titles to Beds on Western Lakes and Streams," 7 Natural Resources Journal 1,4 (Jan. 1967).

[10]State policymakers should have an interest in navigability for title purposes since the state has an interest in the lands it owns. The state's role in title determinations is limited to applying rules developed in federal court for determining the

question. (See text on p. 15-17 and accompanying notes.) Navigability for purposes of federal authority under the Commerce Clause is of particular interest to the policymakers only in that federal powers established under this constitutional provision preempt state law, and therefore the committee should be aware of navigability in this context.

[11]Stone, "Origins and Meanings of 'Navigable' and 'Navigability,'" presentation to Interim Legislative Subcommittee #2, Aug. 31, 1983, p. 1. (On file at the Legislative Council.)

[12]Martin v. Waddel, 41 U.S. (16 Pet.) 367 (1842).

[13]Pollard v. Hagen, 44 U.S. (3 How.) 212 (1845).

[14]Barney v. Keokuk, 94 U.S. 324 (1876).

[15]The Propeller Genesee Chief v. Fitzhugh, 53 U.S. 443 (1851) and The Daniel Ball.

[16]United States v. Utah, 283 U.S. 64, 75 (1931).

[17]Ibid., at 82-83.

[18]Ibid., at 75.

[19]Ibid., at 86.

[20]Oklahoma v. Texas, 258 U.S. 574, 585 (1922).

[21]United States v. Holt State Bank, 270 U.S. 49, 55-56 (1926).

[22]Stone, Public Rights in Water Uses and Private Rights in Land Adjacent to Water, 1 Waters and Water Rights, §41.2(B) for the general rule and §42.2(B) for the exceptions to the rule, as under Montana law (Clark, editor, 1967).

[23]Illinois Central Railroad Co. v. Illinois, 146 U.S. 387, 452 (1892). See also, Stone, Public Rights in Water Uses, supra at §36.4(B), note 95 and accompanying text and §37.2(C), notes 36-40 and accompanying text.

[24]§87-2-305, MCA. Note that §87-2-305, is repealed in the committee's proposed legislation, LC 69. However, the public easement is retained in subsection (1) of section 3 of LC 69 (and is broader in scope than in §87-2-305, MCA, in that it applies to any

public use, not only angling). (See discussion of subsection (1) of section 3 and section 8 of LC 69 in the final chapter of this report and accompanying notes.)

[25]22 U.S. (9 Wheat.) 1 (1824).

[26]311 U.S. 377 (1940).

[27]The qualifier "probably" is used because the courts have not clearly settled this question. However, authorities generally draw this conclusion. An excellent discussion of this issue is found in Johnson and Austin, supra note 9, at 17-20.

[28]The Montello, 78 U.S. (11 Wall.) 411, 415 (1870); Sierra Pacific Power Company v. Federal Energy Regulatory Commission, 681 F.2d 1134, 1137-38 (9th Cir. 1982).

[29]Supra note 26, at 408.

[30]The breadth of federal powers over waterways under the Commerce Clause is illustrated by the regulations adopted by the U.S. Army Corps of Engineers as to the scope of their powers. Federal Register, Vol. 47, No. 141, July 22, 1982, part 329.

[31]A thorough discussion of the extent of federal powers is found in Leighty, supra note 30, at 401-432.

[32]See, for example, Stone, "Legal Background on Recreational Use of Montana Waters," 32 Mont. Law Rev. 1, 6 (Winter 1971); Leighty, "The Source and Scope of Public and Private Rights in Navigable Waters," 5 Land and Water Law Review 391, 426 (1970).

[33]For example, in Southern Idaho Fish and Game Association v. Picabo Livestock, 528 P.2d 1295 (Idaho 1974), the Court stated: "The federal test of navigability involving as it does property title questions, does not preclude a less restrictive state test of navigability establishing a right of public passage wherever a stream is physically navigable by small craft." (at 1298)

[34]The common-law rule, translated from Latin, is: "He who owns the soil has it even to the sky."

[35]Stone, Public Rights in Water Uses, supra note 21, at §37.4(A).

[36]Johnson and Austin, supra note 27, at 36.

[37]53 N.W. 1139 (Minn. 1893).

[38]This author has not systematically reviewed case law throughout the country on this point. However, in a telephone conversation with Al Stone on November 19, 1984, his response to a question from the author as to whether any states other than Colorado limit public recreational use of waters to those navigable under the federal title test, he responded: "Particularly in the West, I don't think there are any others."

Also, although the significance of the case may be limited by its factual situation, in Bott v. Commission of Natural Resources, 327 N.W. Rep. 2d 838 (1982), the Supreme Court of Michigan explicitly refused to substitute a recreational craft test for a log floating test to determine navigability.

[39]Johnson and Austin, supra note 27, at 34.

[40]State v. Red River Valley Co., 182 P.2d 421 (N.M. 1945).

[41]Day v. Armstrong, supra note 7.

[42]See Stevens, "The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right," 14 University of California, Davis Law Rev. 195, 208-209 (1980); Leighty, "Public Rights in Navigable State Waters -- Some Statutory Approaches," 6 Land and Water Law Review 459, 474 (1971); and Knuth, "Bases for the Legal Establishment of a Public Right of Recreation in Utah's 'Non-Navigable' Waters," 5 Journal of Contemporary Law 95, 103-05 (Winter 1978). The other states cited include Missouri, Idaho, and California.

[43]N.M. Const., Art. 16, §2.

[44]Wyo. Const., Art. 8, §1.

[45]Colo. Const., Art. 16, §5.

[46]597 P.2d 1025 (Colo. 1979).

[47]See note 38.

[48]For example, Johnson v. Seifert, 100 N.W. 2d 689 (Minn. 1960) and Snively v. Jaber, 296 P.2d 1015 (Wash. 1956).

[49]Johnson and Austin, supra note 27, at 41.

[50]655 P.2d 1133 (Utah 1982).

[51]Stone, Amicus Curiae Brief, Montana Coalition for Stream Access v. Curran, Case No. 83-164, filed August 26, 1983, p. 6. (The same position is taken by Stone in his brief filed in Montana Coalition for Stream Access v. Hildreth.)

[52]To a very large extent, this chapter selectively incorporates material from John Thorson's, "The Public Trust Chautauqua Comes to Town: Implications for Montana's Water Future," and Brenda Desmond's oral presentation to the State Bar of Montana's Continuing Legal Education seminar on Water Rights Adjudication/ Stream Access for Recreational Use, held in Lewistown on November 2, 1984. (Both Thorson's paper and a written version of Desmond's oral presentation are cited in the Index of Committee Materials, following these footnotes.)

[53]Justinian: 533 A.D., Institutes.

[54]Bracton: Concerning the Laws and Customs of England, 1256.

[55]See Inhabitants of W. Roxbury v. Stoddard, 89 Mass. 158, 166-167, 171 (1863).

[56]Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52.

[57]Arnold v. Mundy, 6 N.J.L. 1, 78 (1821).

[58]146 U.S. 387 (1892).

[59]National Audubon Society v. Department of Water and Power of the City of Los Angeles, 658 P.2d 709 (Cal. 1983); Curran, supra note 4; and Hildreth, supra note 5.

[60]National Audubon Society, supra note 59; Marks v. Whitney, 491 P.2d 374 (Cal. 1971).

[61]Supra note 59. The status of the Mono Lake case, particularly with regard to the interrelationship of the public trust doctrine and the prior appropriative system of water rights, is discussed by Brenda Desmond in a letter to the committee dated August 9, 1984. (On file at the Legislative Council.)

[62]Marks v. Whitney, supra note 60, at 380.

[63]This chapter is a slightly modified version of Margery Brown's paper, ". . . The Doctrine is Out There Awaiting Recognition," which is cited in the Index of Committee Materials.

[64]For example, in written testimony to the committee at its September 28, 1984, meeting, Jim Flynn, Director of the Department of Fish, Wildlife, and Parks, provided estimates of the increase in water recreation over approximately the past 20 years. For example, speaking only of anglers, he stated, "The three million angler days figure for 1982-83 represents an increase of about 200,000 angler days over 1975-76 figures and an increase of around 900,000 angler days over 1968-69 figures." (p.2) (His testimony is on file at the Legislative Council.)

[65]For example, Mr. Flynn reported, "Figures indicate that resident and nonresident fishermen directly spent around $90 million during 1982." Ibid., p.2.

[66]Peg Allen, Committee Minutes, September 28, 1984, p. 27.

[67]Paul Roos, Committee Minutes, March 31, 1984, p. 24.

[68]Jim Flynn, Committee Minutes, September 28, 1984, p. 16.

[69]Franklin Grosfield, Committee Minutes, July 30, 1984, p. 22; written testimony to the committee at the same meeting, provided by Bill Asher, representing the Agricultural Preservation Association, the Park County Legislative Association, and the Sweetgrass County Agricultural Preservation Association (on file at the Legislative Council).

[70]Brodsky, "Terms and Activities" paper, cited in Index of Committee Materials at the end of this report, p. 9.

[71]Supra note 7.

[72]In addition to providing anglers an easement between the high- and low-water marks on federally navigable waters, §87-2-305, MCA, provides such an easement on "rivers, sloughs, and streams flowing through any public lands of the state" and "within the meander lines of navigable streams." Although the right to angle under the provisions of §87-2-305, MCA,

strictly speaking, may be slightly broader than the right created in subsection (1) of section 3 of the bill, it was staff opinion that the clarity of the provision in the bill outweighed both the confusion created by §87-2-305, MCA, and the possible rights that would be diminished by repealing that statute. Also, since a purpose of LC 69 was to codify comprehensively the law on recreation, it was felt that §87-2-305, MCA, should be repealed and its provisions placed in the comprehensive law.

INDEX OF COMMITTEE MATERIALS

Materials Prepared by Committee Staff

Understanding the term "Navigability", January 1984 (Brodsky).

Significant Cases on Navigability (and Outline), January 1984 (Desmond).

Department of Fish, Wildlife, and Parks' Authority Over Recreational Use of State Waters, July 1984 (Brodsky).

Issues of Landowner Liability, July 1984 (Desmond).

Prescriptive Easements, July 1984 (Desmond).

Terms and Activities That May Be Associated with Recreational Use of Waterways: Access, Trespass, Litter, Criminal Mischief, and Public Nuisance Laws, July 1984 (Brodsky).

Outline: The Public Trust Doctrine: Scope of Legislative Powers, October 1984 (Desmond). (Presented to State Bar of Montana, Continuing Legal Education, Seminar on Water Rights Adjudication/Stream Access for Recreational Use, Lewistown, Montana, Nov. 2, 1984.)

Outline: Summary of Legislative Subcommittee's Work During 1983-84 Interim on Recreational Use of Waters, October 1984 (Brodsky). (Presented to State Bar of Montana, Continuing Legal Education, Seminar on Water Rights Adjudication/Stream Access for Recreational Use, Lewistown, Montana, Nov. 2, 1984).

Written version of Desmond's oral presentation to the State Bar of Montana's Seminar, Nov. 2, 1984.

Materials Prepared by Experts Testifying Before Committee

". . . The Doctrine is Out There Awaiting Recognition." Margery H. Brown, School of Law, University of Montana, July 1984.

Origins and Meanings of "Navigable" and "Navigability", Albert W. Stone, Professor of Law, University of Montana.

The Public Trust Chautauqua Comes to Town: Implications for Montana's Water Future, John E. Thorson, July 1984.

Other Authorities Not Cited in Footnotes

Frank, "Forever Free: Navigability, Inland Waterways, and the Expanding Public Interest," 16 U.C. Davis 573 (1983).

Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," 68 Mich. L. Rev. 471 (1970).

Sax, "Liberating the Public Trust from Its Historical Shackles," 14 U.C. Davis L. Rev. 185 (1980).

APPENDIX A

LC 69: An Act to Generally Define Laws Governing Recreational Use of State Waters

LC 0069/01

_____ BILL NO. _____

INTRODUCED BY _____

BY REQUEST OF INTERIM SUBCOMMITTEE NO. 2

A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY DEFINE LAWS GOVERNING RECREATIONAL USE OF STATE WATERS; PROHIBITING RECREATIONAL USE OF DIVERTED WATERS; PROHIBITING, WITH CERTAIN EXCEPTIONS, USE OF PRIVATE LAND BENEATH 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; AMENDING SECTION 70-19-405, MCA; REPEALING SECTION 87-2-305, 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 3 and 4], the following definitions apply:

(1) "Barrier" means a natural or artificial obstruction located in or over a water body, restricting passage on or through the water. A barrier may include but is not limited to bridges, fences, fallen trees, rocks, shoals, or rapids.

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

NEW SECTION. Section 2. Recreational use of 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 public may not make recreational use of surface waters while they are diverted away from a natural water body for beneficial use pursuant to Title 85, chapter 2, part 2 or 3.

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 satisfy the federal test of navigability for purposes of state ownership.

(2) A member of the public may not use the land between the ordinary high-water marks of surface waters that do not satisfy the federal test of navigability for purposes of state ownership, except when:

(a) such use is unavoidable and incidental to use of the waters permitted under [section 2]; or

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

(3) Use of the land is unavoidable and incidental to use of the waters permitted under [section 2] only when the use is temporarily necessary for purposes of safety, health, or bypassing barriers.

NEW SECTION. Section 4. Portaging -- when permissible. A member of the public may, above the ordinary high-water mark, portage around barriers in the least intrusive manner possible, avoiding damage to the landowner's land and violation of his rights.

NEW SECTION. Section 5. Restriction on landowner liability during recreational use of waters or land. (1) Any person who uses for recreational purposes surface waters flowing over or through any land in the possession or under the control of another, pursuant to [section 2], or land while portaging around barriers or as an unavoidable or incidental use of the waters, pursuant to [section 3 or 4], does not have the status of invitee or licensee.

(2) A landowner or tenant is liable to a person using, for recreational purposes, waters or land described in subsection (1) only for an act or omission that constitutes willful or wanton misconduct.

(3) This section does not apply to a landowner or tenant who for compensation permits the land described in

subsection (1) to be used for recreational purposes.

NEW SECTION. Section 6. 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 7. Section 70-19-405, MCA, is amended to read:

"70-19-405. Title by prescription. ~~Occupancy~~ Except as provided in [section 6], 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 8. Repealer. Section 87-2-305, MCA, is repealed.

NEW SECTION. Section 9. Codification instruction. Section 5 is intended to be codified as an integral part of Title 70, chapter 16, part 3, and the provisions of Title 70, chapter 16, part 3, apply to section 5.

NEW SECTION. Section 10. 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 11. Applicability. Sections 6 and 7 apply only to a prescriptive easement that has not been perfected prior to the effective date of this act.

NEW SECTION. Section 12. Effective date. This act is effective on passage and approval.

-End-

APPENDIX B

LC 87: An Act Eliminating the Requirement That Notice be Posted or Otherwise Communicated for the Commission of the Offense of Criminal Trespass to Land

_____ BILL NO. _____

INTRODUCED BY _____

BY REQUEST OF INTERIM SUBCOMMITTEE NO. 2

A BILL FOR AN ACT ENTITLED: "AN ACT ELIMINATING THE REQUIREMENT THAT NOTICE BE POSTED OR OTHERWISE COMMUNICATED FOR THE COMMISSION OF THE OFFENSE OF CRIMINAL TRESPASS TO LAND; IMPOSING ABSOLUTE LIABILITY FOR CERTAIN CRIMINAL TRESPASSES TO LAND; EXPANDING THE AUTHORITY OF WARDENS TO ENFORCE THE CRIMINAL MISCHIEF, CRIMINAL TRESPASS, AND LITTER LAWS ON PRIVATE LANDS BEING USED FOR RECREATIONAL PURPOSES; AMENDING SECTIONS 10-1-612, 45-6-201, 45-6-203, AND 87-1-504, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

Section 1. Section 10-1-612, MCA, is amended to read:

"10-1-612. Arrest of trespassers and disturbers. (1) The commanding officer may arrest or authorize the arrest of a person who trespasses upon a camp or parade ground, armory, arsenal, rifle range, or any other place devoted to or used for military purposes.

(2) The commanding officer may arrest a person who:

(a) interrupts, molests, or disturbs the orderly discharge of duty by those under arms;

(b) disturbs or prevents the passage of troops going to or returning from any duty; or

(c) assaults a member of the uniformed militia while that member is performing any military duty.

(3) A person who is arrested under this section shall be transferred to the civil authorities in the county where the offense was committed.

(4) A person committing an offense for which an arrest may be made pursuant to this section is ~~guilty of a misdemeanor~~ punishable as provided in 45-6-203."

Section 2. Section 45-6-201, MCA, is amended to read:

"45-6-201. Definition of "enter or remain unlawfully". ~~(1)~~ A person enters or remains unlawfully in or upon any vehicle~~, occupied structure,~~ or premises when he is not licensed, invited, or otherwise privileged to do so. ~~A person who enters or remains upon land does so with privilege unless notice is personally communicated to him by an authorized person or unless such notice is given by posting in a conspicuous manner.~~

~~(2) In no event shall civil liability be imposed upon the owner or occupier of premises by reason of any privilege created by this section.~~"

Section 3. Section 45-6-203, MCA, is amended to read:

"45-6-203. Criminal trespass to ~~property~~ land and other premises. (1) (a) A person commits the offense of criminal trespass ~~to property~~ if he ~~knowingly~~:

LC 0087/01

~~(a)~~(i) knowingly enters or remains unlawfully in ~~an occupied--structure~~ or upon the premises, including land, of another; or

~~(b)~~(ii) enters or remains unlawfully ~~in--or--upon--the premises~~ upon land of another.

(b) Absolute liability within the meaning of 45-2-104 is imposed for the conduct described in subsection (1)(a)(ii).

(2) (a) A person convicted of the offense of criminal trespass ~~to-property~~ under subsection (1)(a)(i) shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

(b) A person convicted of criminal trespass under subsection (1)(a)(ii) shall be fined not to exceed $500.

(3) For purposes of this section, "land" has the same meaning as the definition contained in 70-15-102."

Section 4. Section 87-1-504, MCA, is amended to read:

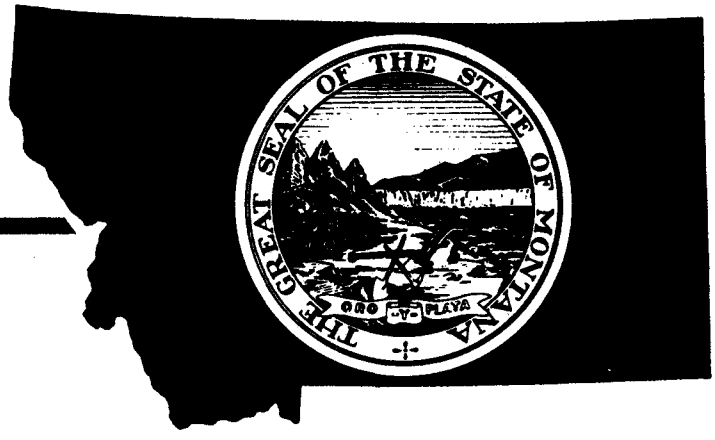
"87-1-504. Protection of private property -- wardens as ex officio fire wardens. (1) It shall be the duty of wardens (state conservation officers) to enforce the provisions of 45-6-101, 45-6-203, and 75-10-212(2) on private lands ~~where-public--recreation--is--permitted~~ being used for recreational purposes and to act as ex officio fire wardens as provided by 77-5-104.

(2) As used in this section, "recreational purposes"

has the same meaning as the definition contained in 70-16-301."

NEW SECTION. Section 5. Effective date. This act is effective on passage and approval.

-End-



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Rep. Kaiser

Proposed Amendments to HB 265

1. Page 3, line 1.
   Following: "of"
   Strike: "surface"

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DATE 030885
BILL NO. HB 265

Ron Waterman

TESTIMONY TO SENATE JUDICIARY

SUPPORTING HOUSE BILL 265

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

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A brief history of the events which brought the parties to their present position underscores the ineffectiveness of confrontation as a problem-solving procedure. Several landowners, on two streams which receive significant public recreational pressures, sought to restrain and deny access to floaters and fishermen. After negotiations sponsored and encouraged by the Department of Fish, Wildlife and Parks failed, two suits were filed. In each the district court held in favor of the public and denied the landowner the relief sought.

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

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the opportunity for a balanced legislative resolution.

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

The interim committee gave thoughtful deliberation to the issue and developed House Bill 16 which became the catalyst for the remaining legislation being considered by this committee. It is fair to say that absent these actions the later activities of the agricultural community, working in conjunction with recreationalists and the Department of Fish, Wildlife and Parks, would have never occurred.

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

To pass legislation which would be sustained in the

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event of a court challenge required an analysis of the limits of the Supreme Court of Montana decisions and a determination to propose legislation within those limitations. Six major goals were identified as being the subject of any proposed legislation. House Bill 265 appropriately addresses each element of necessary legislation. Those goals were:

(1) Recognition of private property rights;

(2) Restriction of landowner liability;

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

(4) Limitation upon prescriptive easement to avoid the loss of land ownership through recreational use activity;

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

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

House Bill 265 addresses all of these concerns within the limitations imposed by the decisions of the Supreme Court of Montana. While the result reached in those decisions were not to the liking of most landowners, it is irresponsible to ignore those decisions or to propose legislation which is not cognizant of the opinions of the

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court. The Supreme Court of Montana, the third branch of state government, construing the Constitution of Montana, has declared rights to exist in the public which protect the continued recreational use of all waters of the state. Absent passage of a constitutional amendment restricting those rights, legislation which failed to abide by those decisions and the Montana Constitution would probably be declared void. There is little gained in passing legislation which is constitutionally flawed and likely to be declared void if challenged. Recognizing this concept, the House Judiciary Committee, after hearing all the stream access bills, created a subcommittee which combined all the pending bills into a single bill, using HB 265 as the vehicle to advance these amendments. All interested landowner and recreation groups were present and had the opportunity to provide imput into the bill. The major concerns raised were appropriately addressed.

House Bill 265 defines "barrier;" "Class I waters;" "Class II waters;" "diverted way from a natural body;" "ordinary high-water mark;" and "recreational uses for the Class I and Class II waters" as well as other terms used within the act. A barrier is a natural or artifical obstruction which totally or effectively obstructs the recreational use of a water course. The barrier is determined at the time of use and the right of portage arises

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only if a barrier exists. Stream fluctuations may cause barriers to exist at some time of the year but not at others. The definition of "surface water" has been inserted to avoid repeating the directive of the Supreme Court that the water and the bed and banks to the high-water marks are available for recreational use.

Waters have been divided into Class I and Class II streams and the recreational uses permitted have been tied to the character of the water, with recreational activities not directly water related prohibited on Class II waters without landowner permission. Big game hunting has been treated the same on private land within the high-water marks as elsewhere -- landowner permission is required on private property.

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

The public's right to portage around barriers is preserved, as is the landowners' right to fence across streams; however, a fence constructed consistent with designs approved by the Department of Fish, Wildlife and Parks and which does not interfere with the recreational

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use of the water will provide an alternative to portage. A landowner can create a portage--typically a gate or ladder. The bill contains provisions which create a problem solving procedure for developing a portage route should conflict arise, an unlikely event. This procedure does not result in a taking since the public's right to portage is restricted to an exclusive route, thus landowner property rights are not limited but expanded. The bill initially relegates the fact finding to the Board of Supervisors of a soil conservation district or other appropriate local board. These people were chosen because they have excellent knowledge of landowner issues and are knowledgeable of stream conditions in the county where they serve. Alternative fact finders are identified with an arbitration panel created to review unsatisfactory decisions.

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

The Senate has already addressed the stream access issue through passage of three "insurance" bills--offered to provide landowners relief in the event HB 265 failed passage. The presence of these bills should not justify the failure of HB 265. The three bills are incomplete responses to the stream access issue. Two of the bills

addressing landowner liability, SB 421 and prescriptive easement, SB 424, approach the subject in the same general fashion. However, the liability limitation found in SB 421 is incomplete. The bill offers no relief for portage problems and extends no limitations of liability to others involved in resolving portage issues. SB 424 unfortunately attempts to address non-stream access prescriptive right questions. My clients believe the debate on stream access should not be clouded by other questions, better addressed through separate legislation. This approach will allow the full intent and affect of any legislation to be debated by both sides.

SB 418, advancing an alternative definition of high-water is perhaps the most troubling of the "insurance" legislation. Like HB 265 it follows the definitional pattern of the Natural Streambed Preservation Act but incorporates the example found in the regulation. The definition of "high water" in the 310 permitting regulations was designed to extend regulatory control over much of the stream. But it does so by adopting a definition of low, not high water. If any definition requires landowner attention, it is the definition in the regulation, not the definition found in HB 265. House Bill 265 alone gives the appropriate definition of "high water".

More troubling, however, is the alternative approach

taken in the two bills regarding the use of flood plains. HB 265 places these areas totally beyond public recreational use. SB 418 does not and allows public use when the areas are covered with water. Since SB 418 doesn't prohibit the use of water diverted away from a stream, because the bill does not comprehensively address all of the stream access issue, the result under SB 418 is recreational users would be authorized to fish and float in flood irrigated pastures during the spring and summer of each year. This unintended result is one not acceptable to landowners and not sought by recreationalists. This result should be avoided by passage of HB 265.

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

Landowners are here today to support House Bill 265. They are not alone. Rather, this bill before this committee is a cooperative effect, the result of hours of work by dedicated landowners, recreationalists and the Department of Fish, Wildlife and Parks and by the House Judiciary Committee and its subcommittee. Without this

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joint cooperation the present proposed legislation would not have developed. It is this type of continued cooperation which will yield benefits beyond the present legislation as these parties continue to work toward better relations between these differing communities which share common interests and goals.

There have been some arguments advanced suggesting that the present bill is a "compromise", suggesting this concept is contrary to the legislative process. Obviously it is not. Moreover, if a compromise has occurred, it has occurred by both parties, compromising the uncertainty of the future in exchange for the certainty of the present, a result which favors landowners but gives all concerned the ability to know what their respective rights and responsibilities are.

The work and effort which resulted in the present bill cannot end here. The Department of Fish, Wildlife and Parks has powers already extended through Section 87-01-303, MCA, to regulate recreational activities on all streams available to public access and to consider protection of private property in that regulation. HB 265 gives direction for implementation of these regulations both in Section 2(5) and in the statement of intent. The Department has already experimented with different options to accommodate public and landowner interest on the Smith,

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Big Hole and the Blackfoot. These programs, and perhaps others, must be considered to address future pressures and the needs of the landowner and the public.

Hear the voices of concern addressed by both the proponents and opponents. Those who criticize the efforts of HB 265 seek to return to the status of the law before the Supreme Court decisions. Defeat of HB 265 will not accomplish these desires, it will leave the agricultural community without the definitions, remedies and protections of HB 265. Consider the bills the Senate has already passed and you find there has been little resolved. Conversely HB 265 addresses and resolves all elements of the stream access issue. It does so fairly and with balance, protecting landowner rights while identifying and preserving public recreational interests.

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

Ronald F. Waterman
Agricultural Alliance

7246R

SENATE JUDICIARY COMMITTEE
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BILL NO. H.B. 265

NAME RONALD F. WATERMAN BILL NO. HB 265

ADDRESS HELENA MT 59624 DATE 03/08/85

WHOM TO YOU REPRESENT MONTANA STOCKGROWERS ASSOCIATION

SUPPORT XX OPPOSE AMEND XX

Comments:

1. Page 3, line 5.
   Following: "system"
   Insert: "at the point where the waters are subjected to to treatment"

2. Page 4, line 24.
   Following: "MARK"
   Insert: "OR RESERVOIRS WITHIN THE NATURAL WATER BODY"

3. Page 6.
   Following: line 3
   Insert: (E) THE PLACEMENT OR CREATION OF ANY PERMANENT STRUCTURE OR OBJECT, SUCH AS A PERMANENT DUCK BLIND OR BOAT MOORAGE.

4. Page 6.
   Strike: lines 8, 9 and 10 in their entirety
   Insert: (B) THE PLACEMENT OR CREATION OF ANY SEMI-PERMANENT OBJECT SUCH AS A SEASONAL DUCK BLIND; or

5. Page 9, line 7.
   Following: "petition the district court"
   Insert: "within 30 days of the decision"

6. Page 10, line 12
   Following: "No supervisor"
   Insert: "or any member of the arbitration panel"

7. Page 11, line 8
   Following: "REACH"
   Insert: "OR LEAVE"

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A COMPARISON BETWEEN SUPREME COURT DECISIONS AND HOUSE BILL 265

Supreme Court Decision	Result	H.B. 265	Result
Landowner has no right of control of the use of surface waters, except to satisfy prior appropriation uses. Curran 41 St.Rep.914 Hildreth 41 St.Rep. 1195	Full public use of water without regard to land ownership	Public recreational rights recognized but certain activities, i.e. vehicle operation big game hunting prohibited on all waters; other activities including camping, creation of permanent and semi-permanent structures prohibited on smaller streams Sec. 2	Public right defined and limited where recreational use would conflict with private rights
Recreational use of waters recognized, but the capacity of the water alone determines the types and availability for recreational activity. Curran, 41 St.Rep. 914	No definition of recreational use, reference to other state statutes will supply definitions	Recreational uses defined and restricted to water related activities with some restrictions, Sec.1(8)	Recreational activities of surface waters restricted to water activities
The public trust doctrine does not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters. Curran, 41 St.Rep. 914	Unlimited public use of all state water, with no interference	Limitations on public uses imposed to assure activities are water related; use of diverted and impounded waters prohibited; landowners permitted to fence across streams and rivers. Sec. 2(2)(c); 2(3); Sec. 3(2)	Landowner management options protected and preserved; recreational activities limited to stream use only
The public trust doctrine permits full recreational use of surface waters. Curran, 41 St.Rep. 914 Hildreth, 41 St.Rep. 1195	Public easements on waterways and potential prescriptive easements on private property, portage routes, and private land crossings to reach public streams	Prescriptive easements cannot be developed through use of surface waters, beds, banks, portage routes or across private land to reach surface waters Sec. 5	No potential prescriptive easements developing upon private land
The public trust doctrine permits full recreational use of surface waters. Curran, 41 St.Rep. 914 Hildreth, 41 St.Rep. 1195	Unlimited public use of all state water, with no interference	Fish & Game Commission directed to formulate rules limiting, restricting or prohibiting types and extent of recreational uses of waters. Sec. 2(5); Statement of Intent	Limitation of recreational use of water for health safety & protection of public & private property reasons
Public prohibited from crossing private property to reach waters. Curran 41 ST.Rep. 916; Hildreth 41 St.Rep. 1195	Public trespass across private land not permitted	Public prohibited from crossing private property to reach waters Sec. 2(4)	Public trespass across private land not permitted

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7. The public's use of water is, under normal circumstances, allowed to the high water mark of the waters. Curran 41 St.Rep. 916; Hildreth 41 St.Rep. 1195	No definition of high water mark and potential of including flood plains while wet or dry	High water mark defined to mean the line impressed upon land by water for sufficient periods to all distinction of areas & prohibiting recreational uses of flood plains. Sec. 1(7)	Definition which contains recreational activities to within banks of a stream
8. Public's right to use stream includes right to portage around all barriers which interfere with right, allowing portage in least intrusive manner, avoiding private property damage. Curran 41 St.Rep. 917 Hildreth 41 St.Rep. 1195	No definition of barrier. Public alone determines manner and method of portage	Barrier defined to only objects which totally or effectively obstructs recreational use of water, portage permitted avoiding damage to private land and rights; portage route determination possible to preserve landowner management needs. Sec. 1(1); Sec. 3	Public given limited right to portage around barriers and landowner can restrict portage to exclusive route for management needs
9. Public surface water user has right to make full recreational use of water without control by landowner. Curran 41 St.Rep. 917; Hildreth 41 St.Rep. 1195	Recreational user present on land as a matter of right and landowner probably owes duty of ordinary care	Landowner and supervisor liability to recreational user limited to wilful or wanton misconduct	Limited duty of care owed recreational user prohibition against intentional acts desioned to ignore
10. The public right to use the water includes a right to use the water, the bed and bank up to the ordinary high water mark and to portage around barriers. Hildreth, 41 St.Rep. 1195	The recreational use of public includes the water, beds and banks of streams	Surface waters defined to include the beds and banks of streams up to the ordinary high water mark. Sec. 1(7)	The recreational use of the public includes the water, beds and banks of stream

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HB 145

TESTIMONY OF THE MONTANA COUNCIL, TROUT UNLIMITED

BEFORE THE SENATE JUDICIARY COMMITTEE

H.B. 265

March 8, 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 nationwide in about 330 chapters. The Montana Council is the state governing board representing ten local chapters and one affiliated organization in Montana.

TU participated in the process that led to the proposal now embodied in H.B. 265. Other sportsmen's organizations taking part in that process were the Montana Coalition for Stream Access, the Montana Wildlife Federation, the Skyline Sportsmen, the Floating and Fishing Outfitters Association of Montana, the Medicine River Canoe Club, and the Missouri River Fly Fishers. The Agricultural organizations referred to by Mr. Waterman and the Department of Fish, Wildlife and Parks were also part of the deliberations on this legislation.

We fully support H.B. 265 as a reasonable, fair and balanced treatment of the issues raised by the Montana Supreme Court in its Curran and Hildreth decisions last year. It clarifies the issues not decided by the Court, states clearly the rights and responsibilities of sportsmen, and affords protection for landowners which have become important in light of the Court's decisions. Because H.B. 265 integrates all the issues surrounding stream access, it has many strengths. It is because of these strengths that we ask the Committee's support for this legislation.

One of the strengths of H.B. 265 lies in its comprehensive treatment of the issues. At the same time, it is a focused treatment. The statement of rights and responsibilities of landowners and sportsmen relates only to stream access, and does not unnecessarily go beyond those issues. Another strength of H.B. 265 is that it provides a suitable vehicle for the Legislature to address all the issues. It has been said many times that if the Legislature had expressed its will in the last session, we would not be here today engaged in yet another effort to reach the solutions we are seeking. A third strength of the bill is that it classifies streams. In doing so, H.B. 265 preserves reasonable landowner control over small streams while implementing in a reasonable way the rights afforded to sportsmen on state constitutional grounds by the Court. Finally, H.B. 265 provides the means for sportsmen and landowners to join together with the Department of Fish, Wildlife and Parks to regulate uses of streams on a site specific basis to accomplish the stated goal of all the parties that our resources be protected.

On the substantive provisions of H.B. 265, I would like to make a few comments. First, the bill divides the waters of the state into two

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categories. Although the Court did not provide for any such classification, we believe that it is reasonable to do so in order to protect the rights, including the right of privacy, of landowners on small streams that have not before been accessible to the public. On class I waters, a broad range of recreational use is permitted, consistent with the Court's decisions. On the smaller class II streams, landowners have the right to control a number of uses, including camping, use of all-terrain vehicles, big game hunting, and any other uses that are not primarily water-related. I would like to emphasize that these landowner powers to control uses of smaller streams were not provided by the Court, but are included in H.B. 265 because we favor legislation that is reasonable and that will reduce the potential for conflict in the future.

On the issue of portage, the Court stated that sportsmen have the right to portage around barriers in the least intrusive manner possible. This provision is restated in section 3 (1), which adds to the Court's language the phrase, "avoiding damage to the landowner's land and violation of his rights." The balance of section 3, the longest section of the bill, is written so as to provide landowners with protection against possible abuse of the portage rights of sportsmen. Subsection (2) states that if a landowner builds a barrier across a stream for management or ownership purposes, he may build a barrier that does not interfere with recreational use of the water. In order to do so, he may call upon the Department of Fish, Wildlife and Parks for assistance. If the barrier is properly designed and placed, and does not interfere with passage along the stream, then there is no right to portage above the ordinary high-water mark, and thus no right on the part of the sportsmen to enter the land.

Subsection (3) of section 3 provides a procedure for resolving differences as to portage routes. We do not believe that this provision will have to be used very often, and when used, it would again be for the protection of the landowner. This is because it would be used to establish an exclusive portage route, rather than multiple portage routes, once again reducing the private land available to sportsmen to use in portaging around barriers.

The remaining provisions also involve landowner protections. These relate to prescriptive easements and restrictions on landowner liability. The prescriptive easement section, section 5, states that prescriptive easements may not be acquired through use of surface waters, including the beds and banks up to the ordinary high-water mark, or the use of land while portaging or travelling to or from streams. This section is tailored to the situations that might arise after the effective date of this legislation through use of streams for recreation.

On the liability issue, H.B. 265 limits the liability of landowners as well as supervisors who participate in a decision relating to portage routes. Their liability to a sportsman injured while making recreational use of streams or while using portage routes would be limited to liability for acts or omissions that constitute wilfull or wanton misconduct.

In his testimony, Mr. Waterman referred to certain clarifying amendments. Trout Unlimited supports those amendments, and requests that this Committee take favorable action both on the amendments and on H.B. 265.

I appreciate the opportunity to testify here today, and will be happy to answer any questions. Thank you.

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HB 265

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

March 8, 1985

This bill appears before you today in large part because of the efforts of the Interim Committee on Stream Access. While it is quite different from the bill proposed by the interim committee, it was the discussion and communication spawned by that committee which led to HB 265. Both landowners and recreationists, recognizing the need for such legislation, set aside their differences to establish legislation that responds to the legitimate concerns of both as a result of the recent Supreme Court decisions.

I would like to briefly highlight the positive aspects of the bill.

The definition section clarifies a number of terms the Supreme Court did not define; these include definitions of "barrier" and "ordinary high water mark."

The bill limits landowner liability and precludes the acquisition of a prescriptive easement by the recreational use of a waterway or by use of a portage.

It defines the kinds of recreational uses to be made of the state's waterways, acknowledging those uses allowed or disallowed in other state statutes not affected by the court decisions.

The bill requires the department to draft regulations which will provide a procedure by which all members of the public will have access to a decision making body if that person is concerned that recreational use is harmful to any waterway.

And finally, I would bring to the committee's attention the one area that goes to the heart of the matter which stimulated the court decision and brought us to this point - that being the subject of portage.

In the Supreme Court cases, it was the obstruction in and on some waterways and the lack of the opportunity to portage which resulted in the court action.

The Supreme Court in both cases was emphatic in holding that the public has the right to portage around barriers in the stream. It is clear, since the court did not confine portaging to the area between the ordinary high water marks, that it recognized the right to portage over the adjacent uplands to the extent necessary to avoid barriers. The court was clear in considering the protection of private land which might be impacted by a portage. This bill adopts the Supreme Court's language on portage rights verbatim.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 5
DATE 03 08 85
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The bill takes one additional and necessary step, however, and allows for a structured process to mediate disputes, should they arise over where a proper portage route should be, and, where necessary, allows for the designation of a proper route. I want to emphasize that either the landowner or the recreationist can use this process to resolve a problem.

The bill also allocates costs for the construction of portage routes where such construction is necessary. If the barrier is created by the landowner, he must pay the cost. If it is naturally caused, the department pays for the construction. In all cases, the department will bear the cost of maintaining the route once it is established.

Finally, the act discourages the unnecessary use of portages by allowing the landowner, in consultation with the department, to construct fences which don't interfere with the use of the water. Where such fences are built, the public may not portage around such barriers above the ordinary high-water mark.

Through our observation to date, it is our concern that the question of portage as outlined in the Supreme Court decisions holds the greatest potential for disagreement in the use of streams in Montana. It was our concern that if the portage question were not addressed, Montanans would soon see the subject of stream access again before the courts.

While this legislation cannot guarantee that will not happen, it takes a major step toward lessening the possibility. Section 3 on pages 7, 8 and 9 lays out quite clearly the rights and responsibilities of both landowners and recreationists. It establishes a structured process for developing portages; it provides portage routes for responsible parties, and perhaps most importantly, provides a mechanism for the resolution of differences on the ground and among local people. Hopefully this final aspect will avoid precedent-setting court decisions in the future.

The portage provision, among others, suggests HB 265 is designed to foster communication and cooperation between the landowner and the recreationist. It is a bill born out of cooperation.

We urge the committee to keep alive that spirit of cooperation and act favorably toward HB 265.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 6
DATE 03 08 85
BILL NO. H.B. 265

MY NAME IS JIMME L. WILSON. I AM A RANCHER FROM TROUT CREEK AND THE PRESIDENT OF THE MONTANA STOCKGROWERS ASSOCIATION. WE RANCH IN A MOUNTAIN VALLEY THROUGH WHICH TWO STREAMS FLOW. THE TWO SUPREME COURT DECISIONS HAD QUITE AN EFFECT ON OUR OPERATION AS WE FENCE ACROSS THE STREAMS FOR PASTURE MANAGEMENT, THUS CREATING "MAN-MADE OBSTACLES." THE BROAD DECISIONS FORCED UPON US BY THE SUPREME COURT, WHICH AFFECTS 17,000 MILES OF RIVERS AND STREAMS IN MONTANA, TO SATISFY TWO SHORT STRETCHES OF STREAMS ON THE DEARBORN AND BEAVERHEAD RIVERS, IS VERY FRUSTRATING. EQUALLY FRUSTRATING IS TRYING TO DRAFT LEGISLATION WHICH WILL HOPEFULLY PROTECT OUR RIGHTS AS LANDOWNERS IN THE FUTURE.

ONE OF THE MEMBERS OF THE AGRICULTURE LOOSE ALLIANCE REMARKED TO ME LAST WEEK HOW DIFFICULT IT WAS TO SATISFY HIS OWN THINKING ON STREAM ACCESS. "HOW WONDERFUL IT WOULD BE IF SOMEONE WHO WAS NOT ASSOCIATED WITH THE PROB LEM COULD GIVE US ALL THE RIGHT ANSWERS ON THE ISSUE." MY ANSWER TO HIM WAS, "DON'T LOOK TOO FAR FOR THIS MAN. YOU HAVE HIM NEAR AT HAND. THIS MAN, IT IS YOU, IT IS I, IT IS ALL OF US."

THE MONTANA STOCKGROWERS ASSOCIATION HAS BEEN ADDRESSING THE STREAM ACCESS PROBLEM FOR SEVERAL YEARS. TWO YEARS AGO, WHEN WE SUPPORTED HOUSE BILL 888, THE HUE AND CRY FROM SOME OF OUR MEMBERS COULD BE HEARD ACROSS THE LAND - "YOU ARE SELLING US DOWN THE RIVER, YOU ARE TAKING AWAY OUR RIGHTS AS LANDOWNERS." SO WE WITHDREW OUR SUPPORT OF THE BILL. WELL, THE SUPREME COURT WENT FAR BEYOND WHAT HOUSE BILL 888 WAS ASKING BUT STRANGELY ENOUGH THE SAME PEOPLE WERE SILENT WHEN WE LOST THE COURT CASES UNTIL WE PROPOSED LEGISLATION TO NARROW DOWN THE BROAD SUPREME COURT DECISIONS. MANY OF THE PEOPLE HERE TODAY TESTIFYING AS OPPONENTS OF HOUSE BILL 265 IN EFFECT ARE NOT PROTESTING AGAINST HOUSE BILL 265 BUT ARE PROTESTING AGAINST THE COURT'S DECISIONS WHICH ARE NOW LAW. THE COURT'S DECISIONS CONSTITUTE A RADICAL DEPARTURE FROM THE WELL-

ESTABLISHED PUBLIC POLICY OF THE STATE OF MONTANA. PUBLIC AND PRIVATE RIGHTS TO USE OF WATER HAD BEEN ACKNOWLEDGED BY THE SUPREME COURT AND THE LEGISLATURE SINCE STATEHOOD.

WHEN I WAS A MILITARY ~~AVIATOR~~ PILOT, WE SPOKE OF "OLD PILOTS" AND "BOLD PILOTS." HOWEVER, THERE WERE NO "OLD BOLD PILOTS." LOBBYING IS MUCH THE SAME WAY. THE MONTANA STOCKGROWERS ASSOCIATION HAS REPRESENTED THE CATTLE INDUSTRY FOR OVER 100 YEARS AND WE NEVER HAVE LED OUR MEMBERS DOWN A PATH OF SELF DESTRUCTION AND WE ARE NOT NOW. SATISFYING EVERYONE IS IMPOSSIBLE. THERE IS ALWAYS THAT SMALL MINORITY YOU NEVER REACH -- HOWEVER, THEY ARE USUALLY THE MOST VOCAL.

WHEN I ASK SOME OF THE OPPONENTS OF HOUSE BILL 265 WHAT THEIR SUGGESTIONS FOR BETTER LEGISLATION ARE, THE ANSWERS RANGE FROM NONE AT ALL TO AMENDING A FEW WORDS OR PHRASES IN THE BILL. AS AN INDIVIDUAL WHO LIVES ON 3½ MILES OF THESE STREAMS UNDER QUESTION, I WILL NOT TAKE ANOTHER CHANCE OF LOSING MORE OF MY RIGHTS THROUGH COURT ACTIONS AS WE DID IN THE SUMMER OF 1984. I FIRMLY BELIEVE IN GOVERNING MYSELF THROUGH THE LEGISLATIVE PROCESS. I WILL NOT TAKE MY CHANCES AGAIN WITH THE COURTS. WE MUST PASS STREAM ACCESS LEGISLATION THIS SESSION. HOUSE BILL 265 IS THE BEST VEHICLE WITH WHICH TO ACCOMPLISH THIS.

NAME: Dan Heinz DATE: 3/7/85

ADDRESS: 107 W. Lawrence

PHONE: 442-9117

REPRESENTING WHOM? Montana Wildlife Federation

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: The Bill as is represents a lot of work on both sides of the issue.

The compromise is good.

Those who oppose the bill are asking the legislature to fix what they believe to be a bad decision by the Court with a law contrary to the findings of the Supreme Court

We ask the committee to carefully examine the relationship between 265 and the court findings.

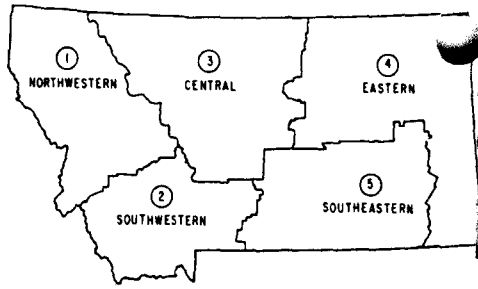
PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 7
DATE 03 08 85
BILL NO. H.B. 265

EDUCATION – CONSERVATION

Montana Wildlife Federation

AFFILIATE OF NATIONAL WILDLIFE FEDERATION



Testimony on HB265
March 7, 1985

My name is Dan Heinz. I'm testifing today on behalf of the Montana Wildlife Federation which consists of 17 affiliated clubs with 4000 members across the state.

We have been fully involed in the developement of HB265. We have, along with many others representing agriculture and recreation, spent thousands of hours on HB265, all of which have been dedicated to striking a ballance between the rights of Land Owners and recreationists. We believe the balance sought exists in HB265.

There are those who obviasly do not like 265.

To us, it is apparent their disatisfaction is really, in fact, directed at the two Supreme Court decisions which 265 is based on. They want the legislature to fix what they believe to be a bad decision with a law contrary to the findings of Supreme Court. ~~decision~~ We ask this committee to carefully examine the relationship between HB265 and court findings.

We are confident that the committee will recognize that HB265 is, in reality, a carefully taylored statue that is fully consistant with the courts findings.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 7
DATE 03 08 85
BILL NO. H.B. 265

THE WEALTH OF THE NATION IS IN ITS NATURAL RESOURCES
CONSERVATION DOES NOT END WITH CONVERSATION

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 8
DATE 03 08 85
BILL NO. H.B. 265

Parks

Parks' Fly Shop

GARDINER
MONTANA
59030

Testimony in support of
HB-265 before the Senate
Judiciary Committee and
Fish and Game Committee

Mr. Chairman, members of the Committees, for the record I am Richard Parks of Gardiner Montana, owner of Parks' Fly Shop and president of the Fishing and Floating Outfitters Association of Montana. On this matter I represent myself and our association's 100 plus outfitter members.

We support HB-265 but would like to see it amended so that section 2, D (line 3 on page 6) would allow the use of long bows, black powder firearms and shotguns for big game hunting. It is our belief that this would better conform to current practice. A number of our members are engaging in hunting floats now and would not care to have to make major changes in their operations.

I would like to discuss an area that is certain to attract adverse comment. It seems that a few people simply do not understand the provisions for portage routes as stated in the bill. To begin with the Supreme Court decisions specifically require that portage be permitted. All pretentions to the contrary are a waste of time. The question to ask then becomes, "How do we accomodate the legitimate concerns of adjacent property owners to the portage requirement?" All the court said was that portage must be in the least intrusive manner possible. This assertion is so broad that it is susceptible to conflicting interpretations and it leaves no means of resolving those conflicts short of district court. Section 3 of the bill is designed - after much intense discussion - to provide a means of reaching an equitable determination of portage rights without resorting to the court system.

Comments I have heard and seen expressed in the papers indicate that there is still a considerable misunderstanding by a few landowners about when and why portage would be resorted to by a recreationist. We do NOT want portage rights for the purpose of trespass. We would prefer not to have to portage at all. If someone doubts that I invite them to help me portage my 350 lb. boat plus its associated equipment. There exists a minimal but real possibility that occassional natural events or situations could create a portage requirement. Therefore we need the law to recognize that. The adjacent landowner who is complaining about costs should note that these are born by the recreational public through the Department of F,W & P's. The fact remains that the vast majority of portage situations are created by the adjacent property holder. From the recreationist's point of view it would be very simple to demand that the property owner in question clear the public right-of-way. Those who are complaining that HB-265 permits the use of dry streambeds should go back to the decisions and note that the bill restricts such use while the Supreme Court did not.

There is nothing whatsoever unfair about requiring the obstructor to bear that expense. The Highway department requires me to keep the roadway clear of obstructions protruding from my property at my expense for example. In HB-265 we recognize that while it might be our right to demand this standard be applied it is too rigid in practice. Part 2 (starting on line 18 of page 7) specifically recognizes that adjacent landowners may have a need to erect some structure in, on or over a waterway. Furthermore it provides an incentive for designing such structures so as to not impede the normal use of the waterway. In practice I do not expect the provisions of Part 3 (starting on page 8) will very often come into full play. It is worth noting that unlike my interaction with the Highway department the maintance costs of portage routes are to be born by the recreational public.

Let me just run through a few scenarios that illustrate how I expect things will go most of the time - and conversely why we need this section in the law. In the first instance, on a middle sized stream such as the Smith River it is fairly common for property lines to cross the river. There already exist a number of such boundries and their associated fences. Many of them have been designed with integral float gates which eliminate the need for a portage route. Another case may arise there or elsewhere and a reasonable property holder would recognize the potential problem, consult with the Department and build an appropriate fence. This is done with minimal hassle and cost and gives no right to a recreational user to enter the property owners land.

In the second instance postulate a holder who choses not to recognize the sense of this and simply throws up a regular 4 wire fence. Now recreational users are going to get from one side to the other - probably by stretching the fence to get the boat under and crossing themselves at the most convenient site which may or may not be within the ordinary high water mark. Over time this will certainly require maintance on the fence and may well break it down entirely. This cost must be born entirely by the owner. As long as the landowner doesn't object and usage is relatively light it probably won't be a problem. Once either side has become sufficiently annoyed however the portage route process gets triggered. Some have suggested scrapping this entirely. In view of the court decisions I can live with this but I don't think property owners should be obligated to do so. The consequence is to force every disagreement into adversarial and expensive proceedings in court.

In the third instance contemplate the case of a property owner who choses to barricade the river with a nest of barbed wire for purposes of harrassing the recreational user. In HB-265 we have a means of solving the problem; if not to the property owner's satisfaction at least in an administrative, case by case, site specific manner that creates no new dangerous precidents in law.

In conclusion, HB-265 is a carefully considered effort to mediate the requirements of the Supreme Court decisions and the legitimate concerns of land owners. No piecemeal approach will do as good a job. The whole portage section is designed to limit the impact that recreational users can have on private land adjacent to the waterways. We urge your favorable consideration of HB-265 with the suggested amendment. Thank you.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 8
DATE 03 08 85
BILL NO. H.B. 265

NAME: Paul F. Berg DATE: Mar 8 '85

ADDRESS: 3708 Harry Cooper Place Billings MT

PHONE: 656-2015

REPRESENTING WHOM? Billings Rod and Gun club, and Southeastern Sportsman Association

APPEARING ON WHICH PROPOSAL: H.B. 265

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

COMMENTS: We think that big game hunters should have the right to hunt below the Ordinary High Water Mark on Class I waters without adjacent landowner permission with conventional sporting weapons.

It is extremely difficult for a floater hunter to contact all landowners along the river.

We are experienced hunters and do it with utmost Safety.

Law breakers will ignore any law passed. Sportsmen will be penalized unnecessarily if this bill passes without our suggested amendment.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 9
DATE 03 08 85
BILL NO. H.B. 265

NAME: Paul F. Berg DATE: Mar 8 '85

ADDRESS: 3708 Harry Cooper Place Billings MT. 59106

PHONE: 656-2015

REPRESENTING WHOM? Billings Rod and Gun Club and Southeastern Sportsmen Association.

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: (Continued)

Sportsmen have already made many concessions to landowners. We gave up the early elk bugling season; agreed to shorter hunting seasons and to later season starts, all to protect livestock in our national forests. Also, hunting license money goes for predator control to benefit livestock operators. We already have stringent trespass laws. We find it very difficult to get permission to hunt on many ranches ~~of course~~ along the river because the landowners do not come to the door, are not home, or won't let anyone hunt.

We have conceded enough and are becoming increasingly concerned about what we will be asked to give up next.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 9
DATE 03 08 85
BILL NO. H.B. 265

656-2015

Paul F Berg
Billings Rod & Gun Club
and
Southeastern Sportsman Assn.
3708 Harry Cooper Place
Billings, MT 59106

Paul Berg
Billings Rod and Gun Club

Billings, Montana
March 8, 1985

Mr. Joe Mazurek, Chairman
Senate Judiciary Committee
Capitol Station
Helena, Montana 59620

Dear Mr. Mazurek:

Our 1,000-member Billings Rod and Gun Club and Southeastern Sportsman Association, representing 9 clubs and 5,000 sportsmen, appreciate the prodigious amount of time and effort that all of you have put into House Bill 265 (the Stream Access Bill) to satisfy both the landowners and the sportsmen of Montana.

Hunting, fishing and floating streams provide important recreational opportunities for many Montanans. Approximately one million general hunting and fishing licenses are sold in Montana each year. About 800 million dollars were generated in Montana in 1982 from expenditures made by hunters and fishermen; a significant contribution to the economy of our State.

Hunting on islands and along river banks, using boats for access, requires good outdoor skills and equipment, and only experienced hunters will cope with the adverse weather conditions common during the hunting seasons.

River hunters we know are good sportsmen who do not cause problems or create safety hazards or conflicts with landowners. We respect private property rights, always ask permission to hunt on private property, and abide by established safety rules and laws.

The islands and the area below the ordinary high water mark, as defined in H.B. 265, contain thousands of acres where hunters disperse in pursuit of their game.

We expect that a few trespass problems have occurred over the years, but we are not aware of any property damage caused by sportsmen. We police our ranks continuously.

Also, we know that there are some lawbreakers -- the ones who trespass, shoot at road signs and everything else around, and cause problems for landowners. The same people cause problems for city dwellers.

Unfortunately, they are the ones who give all sportsmen a bad reputation, and bad news travels fast and never dies or fades away.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 9
DATE 03 08 85
BILL NO. H.B. 265

Mr. Joe Mazurek, Chairman March 8, 1985

We think that denying sportsmen the privilege of hunting big game below the ordinary high water mark (as does H.B. 265) is unnecessarily restrictive, penalizes sportsmen, and favors the lawbreaker who will ignore any law.

Therefore, we urge that you amend H.B. 265 to reinstate the language that allows big game hunting with conventional sporting weapons below the ordinary high water mark on Class I waters without landowner permission.

This amendment would greatly improve sportsmen-landowner relationships in Montana.

The opportunity to testify on this important proposed legislation is appreciated.

Sincerely yours,

Larry Whitmyer, President
Billings Rod and Gun Club

C. C. (Jiggs) Stapleton, President
Southeastern Sportsman Association

Statement of the Billings Rod and Gun Club and Southeastern Sportsman Association on H.B. 265, presented by Paul F. Berg to the Senate Judiciary Committee, Montana State Legislature, Helena, Montana, March 8, 1985.

Paul F. Berg
3708 Harry Cooper Place
Billings, Montana 59106
656-2015

Billings, Montana
March 8, 1985

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Senate Judiciary Committee
Capitol Station
Helena, Montana 59620

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SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 9
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Southeastern Sportsman Association

Statement of the Billings Rod and Gun Club and Southeastern Sportsman Association on H.B. 265, presented by Paul F. Berg to the Senate Judiciary Committee, Montana State Legislature, Helena, Montana, March 8, 1985.

Paul F. Berg
3708 Harry Cooper Place
Billings, Montana 59106
656-2015

Jo Brunner

AGRICULTURE LEGISLATIVE WORK

NAME Jo Brunner COMMITTEE Senate Judiacary ~~Senate Fish and Game~~

ADDRESS 1496 Kodiak Road, Helena DATE March 8, 1985

REPRESENTS Montana Grange, Montana BILL NO. HB 265

Cattlefeeders Assoc. Montana Newspaper Association

SUPPORT X AMEND with OPPOSE

Mr. Chairman, members of these committees, for the record, my name is Jo Brunner and I will testify at this hearing on HB 265 for the Members of the Montana Grange and for the Montana Cattlefeeders Association.

These organizations wish to go on record as being in full support of, and as having participated in the drafting of House Bill 265 as requested here today. We also support the amendments offered by Mr. Ron Waterman.
It is our positions that as citizens of the state of Montana who will be affected personally by the Supreme Court decisions and by any legislation passed this session concerning our streams and our surrounding lands, we have had the opportunity to participate in the efforts to alleviate a great many of the problems brought about by the decisions and that this bill being heard today will benefit all of us.
We ask your full support of HB 265 with the amendments that Mr. Waterman proposed for the alliance.

Thank you.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 10
DATE 03 08 85
BILL NO. H.B. 265

NAME Mike Micone BILL NO. HB 265

ADDRESS 2301 Colonial Drive, Helena, MT 59601 DATE 3/08/85

WHOM DO YOU REPRESENT Western Environmental Trade Association

SUPPORT _____ OPPOSE _____ AMEND XX

Comments:

1. Title - Page 1, line 8.
   Strike: colon
   Insert: "or land is being used as an incident of water recreation"

2. Page 1, line 10
   Strike: "of surface waters"

3. Page 1, line 19
   Strike: "or natural object in or over a water body which totally or effectively obstructs the recreational use of the surface water at the time of use"

4. Page 1, line 25 and Page 2, lines 1 through 20 - Strike

5. Page 3, line 10 following "that" - through line 14 following "value"- Strike
   Insert: "deprive the soil of its vegetation and to destroy its value for agricultural purpose."

6. Page 3, line 18
   Strike: "hunting"

7. Page 3, line 23
   Following "uses"
   Strike: "period"
   Insert: "within the ordinary high water mark of the waters"

8. Page 4, line 14 through 24 - Strike

9. Page 6, line 4 through 6 - Strike
   line 7 - change (A) to (E)
   line 8 - change (B) to (F)
   line 11 - change (C) to (G)
   line 13 - change (4) to (3)
   line 17 - change (5) to (4)
   line 20 - following "recreational", strike "use of Class I and Class II

10. Page 8, line 6 through 16 - Strike

11. Page 8, line 20
    Strike: "The" and line 21 and 22 in their entirety

12. Page 9, line 5 through 20 - strike

SENATE JUDICIARY COMMITTEE
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DATE 03 08 85
BILL NO. H.B. 265

13. Page 9, line 25 - Strike: "and supervisor"

14. Page 10, line 12 through 18 - Strike

15. Page 11, line 2 following "of"
Strike: "surface"
Insert: "land or"

SENATE JUDICIARY COMM
EXHIBIT NO. 11
DATE 03 08 8
BILL NO. H.B. 265

MONTANA
FARM BUREAU
FEDERATION

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

TESTIMONY BY: Gene Chapel

BILL # HB 265 DATE March 8, 1985

SUPPORT XXXX OPPOSE

Mr. Chairman and committe members my name is Gene Chapel. I am president of the Montana Farm Bureau Federation and I represent that organization and its 4000 member families.

We are here today to support House Bill 265 as passed by the House. You have heard a lot of technical and specific testimony so I will not take your time belaboring these points. Instead, I want to take you on a trip out to my ranching operation or any one of our member's ag operations.

O.K, here we go -- An individual or group of recreationists have entered the stream or waterway where it goes under the county road for the purpose of recreating. You know they could have used that road that goes thru my pasture because I'm a nice guy and five more years of use they will have prescriptive easement anyway.

Anyhow they are recreationists and I have no idea what or how they are going to enjoy themselves today because recreating covers everything from hunting to riding their all-terrain vehicles, trapping or maybe just picking rocks. That is something that I have no control over anyhow.

I sure hope that when they reach that irrigation canal that they don't decide to go down it, but really, I guess that is their right if they want to. I wonder how they are going to go around, over or under that new fence I just put across the creek to keep the bulls out of the heifers. Boy, I

SENATE JUDICIARY COMMITTEE
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hope they don't go on the east side of the creek and make tracks thru that new seeding, but I guess its up to them how they want to do it.

Boy,speaking of those bulls, I hope the recreationists don't get scared and do something to hurt themselves, or do you suppose one of them might get hurt crossing that new fence. I sure could have a liability suit against me, but so far I've been lucky -- so best not worry.

I suppose the ground is dried out enough where the creek flooded the hay field two weeks ago so they will probably have their picnic up there. I sure would like to keep them out of that area, but I'm not sure where the highwater mark is, so, I best keep my mouth shut.

You know, one of these days, somebody is going to take the recreating public to court again and try to get this mess cleaned up, but I tell you one thing, it's not going to be me because I can't afford the costs. I saw what happened the last time and I don't believe the court was receptive to those two landowners or we wouldn't be in this jam now. So why take a chance on maybe coming out worse off than we are today?

Senators, that's where we are today. An awful lot of us cannot afford to go to court or even try to put in management practices that may cause somebody else to initiate court actions. Most of us will be forced to roll over and play dead. That's where we, as landowners, are today because of the two supreme court decisions that were handed down.

The recreating public doesn't like it either because they know we are upset and they would like some definitions so they know where to go and what to do.

H.B. 265 covers all of these areas and does it in such a manner that agriculture can go on feeding this country without worrying about what is going on, down the stream and the recreationists can enjoy themselves

SENATE JUDICIARY COMMI
EXHIBIT NO. 12
DATE 03 08 8

without worrying about whether they are in the wrong or the right.

We in the Farm Bureau ask your support of H.B. 265 here as a committee and also on the floor of the Senate.

Thank You.

Gene Chapel
President, Montana Farm
Bureau Federation

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 12
DATE 03 08 85
BILL NO. H.B. 265

MONTANA FARM BUREAU FEDERATION

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

TESTIMONY BY: _____

BILL # HB 265 DATE March 8,1985

SUPPORT XXXXXX OPPOSE _____

Mr. Chairman, members of the committee. For the record I am Mack Quinn, rancher from Big Sandy, and the immediate past President of the Montana Farm Bureau. I appreciate the opportunity to testify in support of HB 265.

Two years ago we worked very hard to get a bill passed that would address and protect the rights of the land owners and at the same time provide some accommodations to the recreationist; however, as you know that was not to be. Looking back, and hindsight is always clearer than foresight, it is my opinion that most folks would agree that not passing such a bill was a big mistake in view of the far reaching decisions of the Montana Supreme Court. I trust we don't repeat that mistake.

Farm Bureau, with many other organizations, in fact meetings were open to all groups, met many, many times over the past two years to put together a bill that would define some of the vague areas of the courts ruling, and also to re-establish some of the rights that we as ranchers have lost.

I think HB 265 does that. I know that some people are not happy with it, but you need only to study the Supreme Court decisions to realize all that we as landowners have lost, and understand that the decision is now law. This bill is the best we have been able to get accepted and it does re-establish some rights and it does define some areas in which we badly need clarification.

I would hope that emotionalism does not cloud reasonable thinking, and you would see the need to pass this bill.

Thank you for your time.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 13
DATE 03 08 85
BILL NO. H.B. 265

Mack Quinn
SIGNED

NAME: Don McKamey DATE: March 8, 1985

ADDRESS: South of Great Falls on the Smith River

PHONE: _____

REPRESENTING WHOM? President, Montana Woolgrowers Association

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 14
DATE 03 08 85
BILL NO. H. B. 265

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

NAME: Jane Marks DATE: 3/8/85

ADDRESS: 1640 WILSON BUTTE

PHONE: 723-8497 723-8587

REPRESENTING WHOM? MONTANA COALITION For STREAM ACCESS

APPEARING ON WHICH PROPOSAL: _____

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

COMMENT: ALLOW HUNTING ON CLASS I STREAMS BELOW HIGH WATER MARK, WITH SHOTGUN and BOW & ARROW

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 15
DATE 03 08 85
BILL NO. H.B. 265

Lorraine Gillies

March 8. 1985
Testimony FOR HB 265

Mr. Chairman, Members of the Committee:

For the record, I'm Lorraine Gillies--our family raises commercial cattle in Granite County, West of Philipsburg on Rock Creek. This is a widely advertised Blue Ribbon Trout Stream, and popular recreation area.

We viewed the Supreme Court Decisions in the cases on the Dearborn and Beaverhead Rivers as serious threats to our private property rights. And in view of agriculture's shakey hold on today's economy, we cannot afford time nor money for lengthy court cases. Therefore, we view legislation into which the ag community has a voice as the only way to go. In both the afore-mentioned cases, the Supreme Court invoked the Public Trust Doctrine and the 1972 Constitution in support of their decisions. These two documents are ones that private property holders will have to deal with for some time, and I feel the only recourse short of the Court System is to use the legislative process.

We must have specific definitions for all the terms that affect our livlihood--high water mark, navigability, barrier, liability, portage, and easement. These must be adequately addressed by agriculture in order that we can continue as viable operators.

It has been argued that we, as landholders are giving all our rights away with this type of legislation. Unfortunately, we were dealt a nearly fatal blow to our Constitutional Rights by the Supreme Court, and now we must rally and establish the rules of this game for our own protection. We have a chance to clarify hazy definitions and terms with HB 265, and I would hope that this bill, as a joint effort of landowners, recreationists and the Department of Fish Wildlife & Parks be given a chance.

There are some sections of this bill with which we are not really comfortable, but it is a BEGINNING. All those concerned should keep the dialogue open and reasonable. In short, we support HB 265 as a start in the right direction. It's not perfect, but it seems that me that when landowners, recreationists, and the Department can agree on something, it's time to sit up and take note.

Thank you.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 16
DATE 03 08 85
BILL NO. HB. 265

Medicine River Canoe Club
Great Falls, Montana

MARCH 8, 1985

Senate Judiciary Committee
State Capitol
Helena, Montana

Chairman Mazurek & 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 almost all of the hearings on the stream access issue including all those of Interim Subcommittee #2. Most recently I have attended the hearings in the House on House Bills 16, 265, 275 and 498. I have also participated in many other meetings on this subject too numerous to mention.

Our organization supports HB 265. This bill is the result of a sincere and intense effort between an alliance of agricultural groups and a coalition of recreational groups. It represents a true compromise which protects the rights of each.

However, we ask that you please give some consideration to one minor change. That change would be to allow big game hunting between the ordinary high water marks on Class I waters with shotgun, archery, or black powder weapons. Recreationists and landowners alike recognize that there have been some problems in the past with rifle hunters along the river corridor, but we are not aware of any incidents involving the three methods of big game hunting listed above. We believe that no major problems would arise from allowing this type of hunting. However, if there were, the Department of Fish, Wildlife and Parks, through the authority vested in them, would be able to close problem areas. Please give

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 17
DATE 03 08 85
BILL NO. H.B. 265

the sportsmen the benefit of the doubt and allow this limited type of recreational hunting. If it proved unsatisfactory, the next legislative session could certainly repeal the provision. We ask only that such a hunting provision be given just consideration and a fair chance.

The House Judiciary Committee worked intensely on HB 265 to assure that the rights of both the landowners and the recreationists were preserved. At the same time they seem to have kept most of the bill's provisions within the framework of the Supreme Court rulings - at lease to the extent that a court challenge of these provisions would be very unlikely.

We hope this committee will recognize the quality of work achieved on this bill in the House and not attempt to change its basic meaning or intent. In its present form it is an equitable bill that will satisfy the wishes of the majority on both sides. We urge you to give HB 265 a do pass recommendation

James W. McDermand.

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

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 17
DATE 03 08 85
BILL NO. H.B. 265

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

NAME: Lavina Lubinus DATE: March 8, 1985

ADDRESS: 1501 Chestnut, Helena

PHONE: 442-8723

REPRESENTING WHOM? Women Involved in Farm Economics

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT:

We are very proud of the effort put forth by the Agriculture, Bureaucracy & FW&P. It takes a cooperation and willingness to listen made it a much easier task

No one is happy with the Supreme Court decision but we realize they are the law of the land and must abide by their decision

House Bill 265 and the Amendments proposed by Ron Waterman for the Agriculture Committee

Mr Chairman & members of the Committee we urge you support of HB 265.

Thank You

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 18
DATE 03 08 85
BILL NO. H.B. 265

My name is Jimme L. Wilson. I am a rancher from Trout Creek and the President of the Montana Stockgrowers Association. We ranch in a mountain valley through which two streams flow. The two Supreme Court decisions had quite an effect on our operation as we fence across the streams for pasture management, thus creating "man-made obstacles." The broad decisions forced upon us by the Supreme Court, which affects 17,000 miles of rivers and streams in Montana, to satisfy two short stretches of streams on the Dearborn and Beaverhead Rivers, is very frustrating. Equally frustrating is trying to draft legislation which will hopefully protect our rights as landowners in the future.

One of the members of the agriculture loose alliance remarked to me last week how difficult it was to satisfy his own thinking on stream access. "How wonderful it would be if someone who was not associated with the prob lem could give us all the right answers on the issue." My answer to him was, "Don't look too far for this man. You have him near at hand. This man, it is you, it is I, it is all of us."

The Montana Stockgrowers Association has been addressing the stream access problem for several years. Two years ago, when we supported House Bill 888, the hue and cry from some of our members could be heard across the land - "You are selling us down the river, you are taking away our rights as landowners." So we withdrew our support of the bill. Well, the Supreme Court went far beyond what House Bill 888 was asking but strangely enough the same people were silent when we lost the court cases until we proposed legislation to narrow down the broad Supreme Court decisions. Many of the people here today testifying as opponents of House Bill 265 in effect are not protesting against House Bill 265 but are protesting against the Court's decisions which are now law. The Court's decisions constitute a radical departure from the well-

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 18
DATE 03-08-85
BILL NO. H B 265

ESTABLISHED PUBLIC POLICY OF THE STATE OF MONTANA. PUBLIC AND PRIVATE RIGHTS TO USE OF WATER HAD BEEN ACKNOWLEDGED BY THE SUPREME COURT AND THE LEGISLATURE SINCE STATEHOOD.

WHEN I WAS A MILITARY ~~AVIATOR~~ PILOT, WE SPOKE OF "OLD PILOTS" AND "BOLD PILOTS." HOWEVER, THERE WERE NO "OLD BOLD PILOTS." LOBBYING IS MUCH THE SAME WAY. THE MONTANA STOCKGROWERS ASSOCIATION HAS REPRESENTED THE CATTLE INDUSTRY FOR OVER 100 YEARS AND WE NEVER HAVE LED OUR MEMBERS DOWN A PATH OF SELF DESTRUCTION AND WE ARE NOT NOW. SATISFYING EVERYONE IS IMPOSSIBLE. THERE IS ALWAYS THAT SMALL MINORITY YOU NEVER REACH -- HOWEVER, THEY ARE USUALLY THE MOST VOCAL.

WHEN I ASK SOME OF THE OPPONENTS OF HOUSE BILL 265 WHAT THEIR SUGGESTIONS FOR BETTER LEGISLATION ARE, THE ANSWERS RANGE FROM NONE AT ALL TO AMENDING A FEW WORDS OR PHRASES IN THE BILL. AS AN INDIVIDUAL WHO LIVES ON 3½ MILES OF THESE STREAMS UNDER QUESTION, I WILL NOT TAKE ANOTHER CHANCE OF LOSING MORE OF MY RIGHTS THROUGH COURT ACTIONS AS WE DID IN THE SUMMER OF 1984. I FIRMLY BELIEVE IN GOVERNING MYSELF THROUGH THE LEGISLATIVE PROCESS. I WILL NOT TAKE MY CHANCES AGAIN WITH THE COURTS. WE MUST PASS STREAM ACCESS LEGISLATION THIS SESSION. HOUSE BILL 265 IS THE BEST VEHICLE WITH WHICH TO ACCOMPLISH THIS.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 18
DATE 03 08 85
BILL NO. H.B. 265

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

NAME: Jon Etchart DATE: 3-8-85

ADDRESS: Bx 429 Glasgow

PHONE: 228-4818

REPRESENTING WHOM? MT Assn. of State Grazing Districts

APPEARING ON WHICH PROPOSAL: HB 265

DO YOU: SUPPORT? 265 AMEND? _____ OPPOSE? _____

COMMENT: Ammended as Ron Waterman Suggests

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 19
DATE 03 08 85
BILL NO. H.B. 265

NAME: E. Maynard Smith DATE: March 1985

ADDRESS: Capitol

PHONE: 257 3941

REPRESENTING WHOM?

APPEARING ON WHICH PROPOSAL: 265

DO YOU: SUPPORT? X AMEND? X OPPOSE?

COMMENTS: I SEE SAME LANGUAGE IN HB 265 REGARDING ORDINARY HIGH WATER MARK AS IN SB 310.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMM.
EXHIBIT NO. 20
DATE 03 08 85
BILL NO. H.B. 26

MISSOURI RIVER
FLYFISHERS

P.O. Box 6398
Great Falls, MT 59406

March 4th, 1985

Members of the Senate Judiciary Committee:

My name is Kevin Kommedal, and I am secretary of the Missouri River Flyfishers. I am here representing my organization to speak in favor of House Bill 265.

The Missouri River Flyfishers feels that H.B 265 is a workable compromise on the stream access issue. Much thought and hard work have been brought to bear on this issue. Landowners and recreationists alike have made significant concessions so this bill would float.

Now we are hearing many "children little" statements from concerned but ill-informed landowners stating that recreationists will be "invading" their property in droves, and will even be responsible for a major spotted knapweed infestation!

Let's be realistic. This bill not only protects the rights of the property owner, it also contains a mandate to the Fish and Game commission to not use a procedure to remove any stream from public use if-

"CLEANER WATER – BRIGHTER STREAMS"

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 21
DATE 03 08 85

recreational use is proven to be detrimental to that stream environment. Members of the Missouri River Flyfishers are not interested in trespassing on someone's property; they are interested in fishing. We don't believe the fishing will be very good up a dry gulch.

This bill has the support of a broad spectrum of landowners and recreationists. We ask this committee to give support HB 265.

Kevin Z. Kownacki
Secretary

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 21
DATE 03 08 85
BILL NO. H.B. 265

NAME: Norm Mandel DATE: 3/9/95

ADDRESS: Hysham, MT. 59038

PHONE: 342-5687

REPRESENTING WHOM? Big Horn Co Hay Growers

APPEARING ON WHICH PROPOSAL: HB. 265

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

COMMENTS: H.B. 265 is a good bill and I support the Montana Land Reliance

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 22
DATE 03 08 95
BILL NO. H B. 265

NAME: Ronald E Jones DATE: 3-8-85

ADDRESS: 3500 Old Rd. Belgrade, MT. 59714

PHONE: 388-4534

REPRESENTING WHOM? Wyeth + Gallatin Co Farm Bureau

APPEARING ON WHICH PROPOSAL: H.B. 265

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

COMMENTS: I support H.B. 265 in it's new written form as long as big game hunting is not allowed. If any amendments should be made they should be beneficial to the landowner & the protection of private property rights.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 23
DATE 03 08 85
BILL NO. H.B. 265

NAME: Carl B Hope DATE: 3/8/85

ADDRESS: Box 61 Big Horn Mt. 59010

PHONE: 406-342-5634

REPRESENTING WHOM? Big Horn County Farm Bureau U.P.

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: HB 265 will make a law that both the sports River floater and land owner can live with. HB 265 defines the high water mark of streams to a reasonable point HB 265 provides the land owner opportunity a sound and reasonable way to establish portage routes.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 24
DATE 03 08 85
BILL NO. H.B. 265

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

NAME: David L McClure DATE: 3/8/85

ADDRESS: Rt 2 Lewistown Mont 59457

PHONE: 535-9574

REPRESENTING WHOM? Fergus Co Farm Bureau

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT: I am county president of Fergus County Farm Bureau. We have over 350 family memberships. I ask your support for HB 265.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 25
DATE 03 08 85
BILL NO. H.B. 265

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

NAME: Ray Voltkamp DATE: 3/8/85

ADDRESS: 3200 Voltkamp Rd Dutton 59715

PHONE: 338-4817

REPRESENTING WHOM? Gallatin County Farm Bureau

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT: We feel that the people who put this bill together found workable solution to the problem.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 26
DATE 03 08 85
BILL NO. H.B. 265

NAME: Tom Schnurr DATE: [illegible]

ADDRESS: [illegible] Hamilton 59748

PHONE: 363 - 1510

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: HB. 265

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

COMMENTS: Allow hunting in 105. I strongly feel to high water mark with exception of black powder bow & arrow.

[illegible] support [illegible] HB. 265 as written

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 27
DATE 03 08 85
BILL NO. H.B. 265

NAME: R. A. Ellis DATE: 3/8/85

ADDRESS: 1735 Sierra Rd. E. Helena Valley

PHONE: 458-5586

REPRESENTING WHOM? Self Lewis & Clark R.E.D. - Helena Valley Irrig. Dist.

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 28
DATE 03 08 85
BILL NO. H.B. 265

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

NAME: WALT CARPENTER DATE: 03-08-85

ADDRESS: 320-40 ST. So., GREAT FALLS, MT. 59405

PHONE: (406) 452-9673

REPRESENTING WHOM? MYSELF & FRIENDS

APPEARING ON WHICH PROPOSAL: HOUSE BILL 265

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

COMMENT: A GOOD REASONABLE COMPROMISE BILL. FAIR TO ALL CONCERNED

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 29
DATE 03 08 85
BILL NO. H.B. 265

Carpenter

March 8, 1985

Mr. Chairman & Members of the Committee:
Senate Judiciary Committee
Montana State Capitol
Helena, Montana

I am Walt Carpenter of Great Falls, and I represent myself and a number of friends who are interested in fishing, floating Montana's streams, and hunting.

During the 1983 Legislative session I was closely involved in the stream access issue, attended most of the meetings of Interim Subcommittee No. 2, and have followed the deliberations on stream access by the 1985 Legislature.

House Bill 265 is the product of a number of meetings between agricultural and recreational groups, during which each side made consessions, and the result is a bill that is fair to both sides as finalized by the House. It is supported by the majority of farm and ranch organizations, the Montana Department of Fish, Wildlife and Parks, and by the recreational community.

I hope the Senate will pass HB-265 without any major amendments, as it is finely tuned, and any restrictive amendments would certainly ruin it. The House amended HB-265 to prohibit big game hunting on streams below the high water mark without adjacent landowner permission. Possibly a minor change should be made in the bill to permit big game hunting below the high water mark with shotguns and bows only, as this would not be detrimental to landowner's rights or concerns. Shotguns and bows are short range weapons.

Unauthorized trespass has been a sore point with landowners. House Bill 911 strengthens trespass laws and provides for severe penalties for trespass on private lands. It also requires the landowner to do a minimum amount of posting of private land, which is certainly reasonable.

Thank you for any favorable consideration of House Bill 265 and HB-911.

Walt Carpenter

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 29
DATE 03 08 85
BILL NO. H.B. 265

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

NAME: JACK HAYNE DATE: _____

ADDRESS: DUPUYER MT

PHONE: 472-3263

REPRESENTING WHOM? TETON-POWDER FARM BUREAU

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT:

SUPPORT AND URGE THE PASSAGE OF HB 265

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 30
DATE 03 08 85
BILL NO. H.B. 265

Busko

WILDLANDS & RESOURCES ASSOCIATION

Great Falls, Montana

March 8, 1985

Senator Joseph Mazurek, Chairman
Judiciary Committee
State Senate
State Capitol
Helena, Montna 59620

Chairman Mazurek & Members of the Committee:

The Wildlands & Resources Association of Great Falls has been following the Stream Access issue since it was introduced in the 1983 legislature. We recognize that the landowners have a legitimate concern about protecting certain property rights. We also recognize that water based activity such as river floating and fishing, constitutes a very significant part of Montana's recreation and tourism industry.

We support HB 265 because we feel it protects the landowner's interests and at the same time permits the recreationist to enjoy activities associated with public waters. HB 265 represents a cooperative effort between agricultural and recreation groups, and also a lot of effort on the part of the House Judiciary Committee.

We urge that this Committee give HB 265 a do pass recommendation without changes that would alter its basic meaning or intent.

Respectfully,

Patty Busko

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

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 31
DATE 03 08 85
BILL NO. H.B. 265

NAME: James Kerr DDS DATE: 3/8/85

ADDRESS: 1721 Virginia Dale, Helena

PHONE: 442-8083

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL:

DO YOU: SUPPORT? ✓ AMEND? ✓ OPPOSE?

COMMENTS: Don't change 265 to eliminate Duck Blind construction on CoT streams. We have given enough to be eliminated on CoT.

Don't Accept the Amendment pass with No change

If worst comes: Allow Seasonal Blinds that can be removed at the end of the season. You sit out there and freeze your A off.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

Thanks

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 32
DATE 03 08 85
BILL NO. H.B. 265

NAME: Tom O Milespick DATE: 3/8 85

ADDRESS: 5805 Dry Creek Rd. Bridger, MT. 59714

PHONE: 388-4180

REPRESENTING WHOM? self

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: Definition of High water mark is very clear and leaves no question as to when the mark is. The Bitt address most of the issue that was effected By the Supreme Court. I would like you to consider the limitation of the use of all firearms without the permission of the land owner. On our canals we have 4 major water ways Tons of ditches and spring creeks. The unlimited use of firearms has placed hardships on both land and sportsmen that get permission to get on the streams other than the water way. We had many few problems when B permission was required because we could tell them when the fishermen were or when the duck hunters were.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 33
DATE 03 08 85
BILL NO. H.B. 265

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 34
DATE 03 08 85
BILL NO. H.B. 265

Testimony For House Bill 265

by

Bruce R. McLeod, President
Park County Legislative Association

Mr. Chairman, members of the committee:

I am speaking today as President of the Park County Legislative Association (PCLA), an organization made up of about sixty landowners in Park County, Montana. We are very concerned with the stream access issue since most of our members own land through which one or more streams flow. We have worked with legislators for a number of years on the issue, including the last two when stream access was being worked on in the interim study committee, and the past weeks when House Bill 265 (HB 265) was being considered in the House. We have watched, and sometimes helped, the bill change to the form being considered here today.

It is the opinion of the majority of our members, that we should support the bill in its present form. There are also some of our members who do not support the bill. In this testimony, I will briefly discuss why the majority support the bill, and then close with a suggestion for three amendments. If these three amendments were to be adopted, the PCLA would then give nearly unanimous support to the bill.

For the majority opinion, we find that HB 265, in its present form, does not, as has been repeatedly suggested in the press, extend the Hildreth and Curran Supreme Court cases. In 265, an attempt to define "barrier" has been included. While the definition may not be complete until tested in court, the two Supreme Court (SC) cases simply say "in case of barriers the public is allowed to portage around such barriers in the least intrusive manner possible".

Hildreth; Page 5, Paragraph 3
Curran; Page 19, Paragraph 6

The SC decisions did not say the public must use one and only one portage route, nor did it specify any proceedure for establishing the route. HB 265 does both. It also establishes that the landowner at least has the opportunity, when installing needed structures, to design them in such a way that no portage is necessary. Portage is not granted by HB 265 as some suggest, the SC decisions did the granting. This bill limits, not extends portage.

The description of Class I and Class II waters in HB 265 is an attempt to clarify the SC language on "navigable for title"

and "navigable for use".

Curran; Page 13, Paragraph 2

This is an advantage to the landowner since the SC rulings make no distinction at all and simply say all waters are susceptible to recreational use by the public.

Hildreth; Page 5, Paragraph 1
Curran; Page 14, Paragraph 3

In this bill waters "diverted away from a natural water body" for use such as irrigation are excluded from recreational use. That is a very positive factor for ranches that use ditches and canals to deliver water to their crops and stock.

"Ordinary high water" was mentioned extensively in the SC rulings.

Hildreth; Page 2, Paragraph 1
Page 3, Paragraph 4
Page 5, Paragraph 3
Page 9, Paragraph 4
Page 11, Paragraph 2

Curran; Page 17, Paragraph 5
Page 18, Paragraph 1
Page 19, Paragraph 6

However, these words were never defined. HB 265 offers a definition that does exclude flood plains adjacent to the surface waters. We feel the definition of the actual high water mark could be improved as will be suggested later, but it is expected that this may be a point ultimately clarified in court.

The definition of surface water in HB 265 is taken directly from the SC decisions.

Hildreth; Page 9, Paragraph 4
Page 11, Paragraph 2

Also, the words "may be used by the public without regard to the ownership of the land underlying the waters" or "streambed ownership" are used extensively in the SC rulings.

Hildreth; Page 9, Paragraph 2
Page 11, Paragraph 2

Curran; Page 14, Paragraph 3
Page 15, Paragraph 2

There are no restrictions or definitions of public use. HB 265 specifically limits certain things on all surface waters and places several limits on other activities on Class II waters. The only limitations mentioned by the SC rulings were limitations

imposed by "the characteristics of the waters themselves".

Hildreth; Page 5, Paragraph 3
Page 11, Paragraph 2

Curran; Page 14, Paragraph 3

Liability and prescriptive easement issues are addressed in HB 265 and the Fish and Game Commission is specifically directed to adopt rules to protect public health, public safety, and public and private property. None of this is even mentioned in the SC cases and, hence, there are no references to cite here. It again is obvious that HB 265 has defined or limited (as opposed to extending) the SC rulings. The majority of the PCLA membership accepted HB 265 as a "good" (as opposed to an "ideal" or "everything we needed") overall package.

In closing, we would suggest three amendments be considered.

1. On page 3, line 18 of HB 265, under the definition of "recreational use", replace the word "hunting" with "waterfowling". (see Curran; Page 12, Paragraph 1 (inset))

2. On page 2, lines 9 through 15, remove all these words since they simply restate the federal navigability test for title already called out in (b) and (e) of section (2).

3. On page 3, line 13, change "limited to diminished terrestrial vegetation or lack of agricultural crop value. A FLOOD PLAIN ADJACENT TO SURFACE WATERS IS NOT CONSIDERED"

   To read: "limited to lack of terrestrial vegetation or of agricultural crop value. A FLOOD PLAIN OR DRY CHANNAL ADJACENT TO SURFACE WATERS IS NOT CONSIDERED"

We feel these changes would help clarify the meaning of the bill and perhaps help avoid unnessary confrontations between the landowners and the public making reacreational use of the waters.

Thank you for your attention.

Respectfully submitted:

Bruce R. McLeod

Bruce R. McLeod, President
Park County Legislative Association

NAME: Ben Stein DATE: 3/8/85

ADDRESS: Wilsall 59086

PHONE: 578 2347

REPRESENTING WHOM? self

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: will turn in later

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 35
DATE 03 08 85
BILL NO. H.B. 265

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HELENA, MT 59624
406/442-6570

February 19, 1985

Senator Joe Mazurek
Chairman
Senate Judiciary Committee
State Capitol
Helena, MT 59620

RE: House Bill 265

Dear Senator Mazurek:

I represent the Sweetgrass County Protective Association. It is a landowner group of citizens of the state of Montana. My people do not support HB 265 as it has been approved by the House of Representatives. I am referring to the gray copy of the bill.

The key provision of HB 265 from which most of our dispute arises is the definition of surface water as shown on page 4, line 21. The bill provides as follows:

> "(10) 'SURFACE WATER' MEANS, FOR THE PURPOSE OF DETERMINING THE PUBLIC'S ACCESS FOR RECREATIONAL USE, A NATURAL WATER BODY, ITS BED, AND ITS BANKS UP TO THE ORDINARY HIGH WATER MARK."

My people feel that the definition of surface water as set forth herein is in violation of section 70-16-201, Montana Codes Annotated, and is far in excess of the public policy doctrine for the waters of this state as laid down by the Montana supreme court in the Curran and Hildreth decisions in 1984.

The definition of surface water as set forth in HB 265 will give the public the right to use not only the water of this state but also the beds and banks with or without water on them up to the ordinary high water mark. This grant of authority will create a land corridor for public access during low water periods. The impact of this definition of surface water is that it changes a constitutionally guaranteed right of the public to use the waters of this state into a "land use" policy. There is no language in either the 1972 constitution of the state of Montana, the statutes of this state nor the opinions of the court in the Curran and Hildreth decisions that compel, obligate or direct the legislature to convert the right of the public to use the waters of this state into a new "land use" policy. On the contrary, they provide otherwise.

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The constitution of Montana provides at Article IX, Section 3 for water rights but not land use rights as follows:

> "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."

Section 70-16-201, Montana Codes Annotated, provides protection and security for private land adjacent to water. The section provides as follows:

> "70-16-201. Owner of land bounded by water. 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 Montana supreme court in its Curran decision, 41 St.Rep. 906 (1984), had the obligation of reconcilling the constitutional provision with the right of the adjacent landowner and the rights of fishermen. The courts speaking through Chief Justice Haswell and concurred in by five justices said as follows:

> "While section 70-16-201, MCA, provides for private ownership of the adjacent lands to the low water mark, the 'angling statute', section 87-2-305, MCA, recognizes a public right to access for fishing purposes to high water mark. Further, in Bigson v. Kelly (1895), 39 P. 517, 15 Mont. 417, this court recognized a public right of access for fishing and navigational purposes to the point of the high water mark. Therefore, we hold that the public has a right to use the state-owned waters to the point of the high water mark except to the extent of barriers in the waters, in case of barriers, the public is allowed to portage around such barriers in the least intrusive way possible, avoiding damage to the private property holder's rights."

The Curran decision clearly set forth the right of the public to use state-owned water but, the decision did not create a new land

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use policy. On the contrary, it affirmed the right of private ownership of the adjacent lands to the low water mark. One month later, Curran was affirmed in the Hildreth decision, 41 St.Rep. 1192 (1984). In Hildreth, Chief Justice Haswell again delivered the opinion of the court concurred in by five justices. He referred to Curran with approval eight times in that decision. Judge Haswell again enunciated the right of the public to use state-owned waters, but he did not create a new land use policy. He said, and I quote as follows:

> "As we held in Curran, supra, under the Public Trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes."

The public does have a right to use the state-owned waters up to the high water mark. But, the public does not have a right to use the beds and banks of Montana's water courses between the high and low water mark when there is no water on the land. The adjacent landowner still has the right to use the land between the high and low water mark when there is no water on the land, section 70-16-201. The public has a right to use surface water without regard to the ownership of the streambed, but, the public does not have the right to use the beds and banks between low and high water mark when there is no water on the land. The denition of surface water in HB 265 page 4, line 21 should be amended as follows:

> "(10) 'SURFACE WATER' MEANS, FOR THE PURPOSE OF DETERMING THE PUBLIC'S ACCESS FO R RECREATIONAL USE, A NATURAL WATER BODY, ITS BED AND ITS BANKS UP TO THE ORDINARY HIGH WATER MARK EXCEPT FOR THE EXCLUSION OF THE BED AND BANKS TO THE LOW WATER MARK PROVIDED FOR IN 70-16-201, MCA."

On behalf of my people, I respectfully urge the adoption of the amendment to the definition of surface water and for such additional amendments to th remainder of the body of the bill as will be necessary and probably staff-determined.

Very truly yours,

Philip W. Strope

PHILIP W. STROPE

PS/vkf

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

NAME: Richard W. Josephson DATE: 3/8/85

ADDRESS: 34 Spring Drive, Big Timber, Mt. 59011

PHONE: 932-5440

REPRESENTING WHOM? Sweet Gruss Pres. Assoc. + self.

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT: Written Comments have been delivered to the Senate members

xc attached

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 37
DATE 03 08 85
BILL NO. H.B. 265

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February 13, 1985

ANALYSIS OF HOUSE BILL 265, LAND AND WATER ACCESS BILL
(Revised version of HB 265 dated 02/09/85)

INTRODUCTION: The principal issues of concern in this version of HB 265 are as follows:

We are concerned about the broad definition of Class I waters, which, in effect, extends the scope of the Montana Supreme Court cases and their effect.

We are concerned about the definition of the ordinary high water mark which refers to "diminished" vegetation. The definition used in HB 265 supersedes and replaces the definition used by the Soil Conservation Districts the last several years in administering The Natural Streambed and Land Preservation Act of 1975. (We prefer the definition in HB 498.)

We are concerned about the definition of recreational use, and the activities that are allowed on Class I waters that are really land-based activities rather than water-based activities, such as discharge of firearms, overnight camping and construction of permanent or semi-permanent structures.

We are concerned about the definition of surface waters which appears to extend the scope of the Supreme Court cases and the 1972 Montana Constitution by defining dry land within the ordinary high water mark as "surface water".

We are concerned about the public's ability to manage every stream, river and lake in the State and what that will cost.

We are concerned about the cost to the landowner of being required to follow a time consuming administrative procedure to obtain regulations to protect his property and that cost to the landowner and the State.

We are concerned about the elaborate portage provisions of the Act that can be triggered by a request of any recreationalist for

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portage route.

We are concerned about the taking of valuable property rights by the public. Establishing portage routes above the high water mark is an infringement on private property rights. An extension of the public easement enunciated by the Supreme Court cases from water related activities to land-based activies is an intrusion on private property rights.

We are concerned about the effect this bill will have on established property values.

STATUS OF BILL: The House Judiciary Subcommittee has reported out for approval of the full Judiciary Committee and second reading this version of HB 265. Apparently, at least for now, the Judiciary Committee will table HB 16 (Interim Committee), HB 275 (Cobb) and HB 498 (Ellison).

I think we can attribute the Judiciary Committee's action on HB 265 to the recommendations for passage by the "Agricultural Alliance" represented by Ron Waterman, and Montana Trout Unlimited and other recreational oriented groups represented principally by Mary Wright.

I respectfully disagree with their position.

Hence, my comments in this analysis will be directed to the provisions of HB 265 in its present form (02/09/85 gray edition).

DEFINITION OF BARRIER: HB 265 still gives the public an elaborate portage right across private property. Therefore, the definition of "barrier" becomes important to the issue of portage. SEE, the discussion on portage below.

DEFINITION OF "CLASS I WATERS": HB 265 defines "Class I waters" and this is important because the public may do by implication all of those things on Class I waters which are prohibited only on Class II waters. Section 2(3) is the section that prohibits certain activities on Class II waters. Section 2(3) provides:

"The right of the public to make recreational use of Class II waters does not include, without permission of the landowner:
(A) Overnight camping;

(B) The placement or creation of any permanent or semipermanent object, such as a permanent duck blind or boat moorage; or

(C) Other activities which are not primarily water-related pleasure activities."

Hence, by clear implication, the public may on "Class I waters" do the following:

(A) The public may - overnight camp;

(B) The public may - place or create any permanent or semipermanent object, such as a permanent duck blind or boat moorage; or,

(C) The public may - conduct activities which are not primarily water-related activities.

"Class I waters" are defined in Section 2(2) as follows:

"'Class I Waters' means surface waters that:

(a) lie within the officially recorded government survey meander line thereof;

(b) flow over lands that have been judicially determined to be owned by the state by reason of application of the federal navigability test for state streambed ownership;

(c) flow through public lands, while within the boundaries of such lands;

(d) are or have been capable of supporting the following commercial activities: LOG FLOATING, TRANSPORTATION OF FURS AND SKINS, SHIPPING, COMMERCIAL GUIDING USING MULTIPERSON WATER CRAFT, PUBLIC TRANSPORTATION, OR THE TRANSPORTATION OF MERCHANDISE, as these activities have been defined by published judicial opinion as of (the effective date of this act); or,

(e) are or have been capable of supporting commercial activity within the meaning of the federal navigability test." (Emphasis supplied.)

CLASS II WATERS are defined by Section 1(3) as all waters which are not "Class I waters".

THIS IS AN ATTEMPT, BY THE LANGUAGE OF HB 265, to classify any natural body of water that can support floating a log, a canoe or multiperson water craft as "Class I waters". This definition, combined with the portgage provisions of this bill, virtually classifies a majority of Montana's fishable streams, sloughs and lakes, and areas that can be floated in a duck boat into "Class I waters". This, coupled with the definition of "surface waters", openly allows the public to use the land and the water between the high water marks for not only

water-related activities but also non-water related activities, such as overnight camping, all types of hunting, except big game hunting, trapping, building camps, boat docks, duck blinds, and anything else not expressly prohibited by Section 2(2).

The only items prohibited by Section 2(2) are all-terrain vehicles (not primarily designed for use on water), and big game hunting. Section 2(2) also prohibits the public from using a stock pond or other water impoundment fed by an intermittently flowing natural water course and diverted waters. This language also implies that the public is not prohibited from using a stock pond or impoundment that is fed by a steady natural water course. Further, if this stock pond or impoundment can float a log or a canoe, it would be a "Class I water" and the public would have the right to camp overnight, build boat docks, etc., between the high water marks of the pond or impoundment. This might be particularly intrusive on private property if the public can gain access by portage to the pond, or gain access from a county road, or gain access by the use of public land, or by condemnation.

We do give the Judiciary Committee that worked on this bill credit for deleting big game hunting and some all-terrain vehicles. At least some headway has been made since the Agricultural Coalition and the recreationists endorsed this bill at the public hearing on January 22, 1985.

DEFINITION OF ORDINARY HIGH WATER MARK: We would also like to give the Judiciary Committee credit for attempting to exclude the flood plain from being included within the ordinary high water mark. However, there is still substantial question under the definition used in HB 265 whether areas of the flood plain are excluded.

The definition of "ordinary high water mark" used by HB 265 still uses the terms "diminished terrestrial vegetation or lack of agricultural crop value". Any flow of water or ice could, and probably will, cause "diminished terrestrial vegetation". Crops refer to things like grain or hay and the word "crop" is, therefore, not a proper choice of

words when defining the "ordinary high water mark". WE CAN SEE SUBSTANTIAL ARGUMENTS AS TO WHAT AREA CANNOT RAISE CROPS OR WHAT AREAS SHOW SIGNS OF DIMINISHED VEGETATION.

DEFINITION OF RECREATIONAL USE: Section 2(8) provides:

> "'Recreational use' means with respect to surface waters: fishing, hunting, swimming, floating in small craft or other flotation devices, boating in motorized craft, unless otherwise prohibited or regulated by law, or craft propelled by oar or paddle, other water-related pleasure activities and related unavoidable or incidental uses." (Emphasis supplied.)

This revised definition of recreational use, except for the term "hunting" seems to define recreational uses as water-related activities. If this is the intent of the bill, why not eliminate the "overnight camping and the construction of permanent or semipermanent structures and other non-water related activities" from the bill entirely and prohibit these non-water related activites? We can see built-in conflicts between this definition of recreational uses and the definition of what cannot be done on Class II waters and by implication done on "Class I waters". Conflicting or unclear sections may cause unnecessary litigation.

DEFINITION OF SURFACE WATER: Section 1(10) defines "surface water" as follows:

> "'Surface water' means, for the purpose of determining the public's access for recreational use, a natural body of water, (and) its bed and its banks up to the ordinary high water mark." (Emphasis supplied.)

HOW CAN SOMEONE ATTEMPT TO DEFINE LAND AS WATER, FOR ANY PURPOSE? This may be one of the first attempts, since biblical times, for someone to work out a way to walk on water. (Pardon the sarcasm.)

The 1972 Montana Constitution, Article IX, Section 3(3), used the term "surface water" in the following context:

> "(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." (Emphasis supplied.)

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RE: Analysis of HB 265, Land & Water Access Bill (Cont'd.)
(Revised version of HB 265, dated 02/09/85)

The definition of "surface waters" in the present version of HB 265 expands the definition of "surface water" to include the water body, plus its bed and banks up to the high water mark. So, the definition attempts to classify land, even if dry, between the ordinary high water mark as "surface water".

THIS ATTEMPT TO DEFINE LAND AS WATER CLEARLY DEMONSTRATES THE INTENT OF THOSE SUPPORTING THE BILL TO, BY DEFINITION, TAKE AWAY THE OWNERSHIP OF LAND AND TRANSFER THE TITLE TO THE PROPERTY FROM THE LANDOWNER TO THE PUBLIC.

Section 70-16-201, M.C.A., provides:

> "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."

ARE THOSE SUPPORTING HB 265 ATTEMPTING TO REPEAL THIS STATUTE?

RECREATIONAL USE PERMITTED: Section 2 of HB 265 provides for permitted recreational use.

Section 2(1) provides that, except in subsection (2) through (4), all surface waters (as defined above) that are capable of recreational use may be so used by the public, without regard to the ownership of the land underlying the waters. Again, by defining "surface water" to include the land between the high water marks, whether or not it is covered by water, is WRONG.

Section 2(2) through (4) does prohibit the public from using: all- terrain vehicles that are not primarily designed for operation upon water; stock ponds or other impoundments fed by an intermittent flowing natural water course; diverted water and prohibits big game hunting.

PRIVATE (?) PROPERTY: Section 2(4) reaffirms the Supreme Court cases and provides:

> "The right of the public to make recreational use of surface waters does not grant any easement or right to the public to enter into or cross private property in order to use such waters for recreational purposes."

How this section relates to the rights granted to the public to portgage above the high water mark, I am not sure. I am not sure, after reading the definitions of "surface water", the "ordinary high water mark", and the portgage sections, exactly what is private property. In spite of my confusion as to the dividing line between public and private property rights, I am glad this provision is in the bill.

SUPERVISION SECTION: Section 2(5) provides that, the Commission (Fish and Game Commission) shall adopt rules pursuant to 87-1-303, in the interest of public health, public safety, or the protection of public or private property, governing the recreational use of Class I and Class II waters.

I wonder how long this will take and what it will cost, not only to the State of Montana, but how much will it cost the landowner to follow this rulemaking procedure on every stream in the State.

PERHAPS IT WOULD BE BETTER TO RESTRICT THE PUBLIC'S USE OF STREAMS AND SMALL LAKES UNTIL SUCH REGULATIONS CAN BE IMPLEMENTED TO PROTECT THE RESOURCES AND THE SURROUNDING PROPERTY RIGHTS AND VALUES. THE MAJOR RIVERS THAT HAVE BEEN HISTORICALLY BOATED COULD BE LEFT OPEN IF THINGS LIKE OVERNIGHT CAMPING, HUNTING, AND THE CONSTRUCTION OF PERMANENT AND SEMIPERMANENT STRUCTURES WERE PROHIBITED, AT LEAST UNTIL THE VARIOUS AREAS ARE STUDIED.

If the public/State is going to insist on taking over the streams, rivers and lakes and their beds and banks, I can understand the need to manage and protect these resources. I question whether the public/State can adequately protect and preserve these resources, especially the non-boatable streams, with an immediate effective date of the proposed HB 265.

RIGHT TO PORTAGE: HB 265 provides an elaborate procedure for the public to portage around "barriers". Section 1(1) defines "barrier" as follows:

"'Barrier' means an artificial obstruction located in or over a water body, restricting passage on or through the water, or a natural object in or over a water body which totally or effectively obstructs the recre-

ational use of the surface water at the time of use. A barrier may include, but is not limited to, a bridge or fence or any other man-made obstacle to the natural flow of water or a natural object within the ordinary high water mark of a stream." (Emphasis supplied.)

Section 3(1) gives the public the right to portage around barriers, above the ordinary high water mark, in the least intrusive manner possible, avoiding damage to the landowner's land and violation of his rights. WHAT RIGHTS?

I submit that, allowing the public to use the landowner's land above the high water mark, especially when portaging around natural or existing artificial barriers, is an open and notorious violation of the riparian owner's private property rights pusuant to the provisions of the Montana and Federal Constitutions.

A natural barrier in the stream includes rapids, falls, rocks, brush, deep holes, or anything that "effectively obstructs the recreational use of the surface water" under the definition of "barrier".

Section 3(2) does give the landowner certain and limited rights to create barriers. However, the act provides that if a landowner creates a structure (i.e. irrigation structure) "pursuant to a design approved by the department (Dept. of Fish, Wildlife & Parks) and the structure does not interfere with the public's use of the surface water (defined as including land), the public may not go above the ordinary high water mark to portage around the structure.

What does this mean? Does this provision mean that the Dept. of Fish, Wildlife and Parks is now going to determine specifications for every "structure" erected within the beds and banks of every stream? We have existing and adequate procedures through the Soil Conservation Districts that appear to be working well for all concerned.

Section 3(3) goes on to provide, among other things:

(a) "A portage route around or over a barrier may be established to avoid damage to the landowner's land and violation of his rights as well as to provide a reasonable and safe route for the recreational user of the surface water."

(b) "A portage route may be established when either a landowner or a member of the recreating public submits a request"

(c) "The cost of establishing the portage route around artificial barriers must be borne by the involved landowner, except for the construction of notification signs of such route, which is the responsibility of the department. The cost of establishing a portage route around natural barriers must be borne by the department."

THIS SECTION GIVES THE DEPT. OF FISH, WILDLIFE AND PARKS THE RIGHT TO GO ONTO THE LANDOWNER'S LAND, ABOVE THE HIGH WATER MARK, AND ESTABLISH PORTAGE ROUTES. THE LANDOWNER MUST PAY FOR THE PORTAGE ROUTE IF THERE IS AN ARTIFICIAL BARRIER, LIKE A DAM, BRIDGE, FENCE, OR IRRIGATION STRUCTURE IN THE STREAM. (This, apparently, applies whether the artificial barrier is public or private, and applies even though the barrier was in place prior to the Supreme Court decisions.)

If the barrier is natural, the department will build the portage route over the landowner's land. There is nothing in the bill about compensation to the landowner by the public for the use of the landowner's private property for this public facility.

This is another "boot strapping" attempt to take away private property rights without just compensation and impose a substantial expense on the private landowner. Strategically placed portage routes could become new access points for the public to enter "surface waters".

Section 3(3)(c) provides that, within 45 days of the receipt of a request (from the landowner or from a member of the recreating public) supervisors (Conservation District Supervisors) shall (must), in consultation with the landowner and a representative of the department, examine and investigate the barrier and the adjoining land to determine a reasonable and safe portage route.

Section 3(3)(d) provides, within 45 days of the examination of the site, the supervisors shall make a written finding of the most appropriate portage routes.

Section 3(3)(f) provides, once the route is established, the department has the exclusive responsibility thereafter to maintain the portage route at reasonable times agreeable to the landowner, etc.

Section 3(3)(g) provides, if either the landowner or recreationist disagrees with the route described in subsection (3)(e), [illegible]

the district court to name a three-member arbitration panel. The panel must consist of the affected landowner, a member of an affected recreational group, and a member selected by the two other members, etc.

IN SUMMARY, THIS SECTION PROVIDES:

1. That any member of the recreating public may cause to be established a portage route over the landowner's land above the high water mark.

2. That a member of the public will have equal say with the landowner where the portage route will go.

3. The landowner will have to donate the land and, in the case of an artificial barrier, whether existing or new, pay for the establishment of the portage route.

4. The landowner may be forced into court or an arbitration hearing if some recreationist is not satisfied with the portage route selected by the Supervisors.

LIABILITY: Section 4 of HB 265 attempts to give the landowner some liability protection, which attempt is appreciated, I am sure, by the landowners. I must say that the act goes further to protect the Soil Conservation Supervisor's liability than it does to protect the landowner. Will or wanton should be changed to will and wanton. Otherwise simple knowledge of a danger (natural or artificial) might be construed as "willful" where the landowner doesn't take timely action to mitigate the danger.

PRESCRIPTIVE EASEMENTS: Section 5 of HB 265 contains a convoluted attempt to solve the problem of prescriptive easements and may, because of the grandfathering provision of the section, actually give rise to lawsuits brought on behalf of the public for pre-existing prescriptive easements. The act says nothing about protecting the private landowner from common law dedication of a right of way.

All landowners should be in favor of the recently added provision in Section 5(2)(B) which prohibits future prescriptive rights from

being established by "the entering or crossing of private property to reach surface waters".

This section is one of the few "carrots" inserted in this legislation to attract landowner support. The question might legitimately be asked, why should a prescriptive easement be available for any recreational use, not just water-related recreational use.

CONCLUSION: For this bill to be acceptable, it must respect existing property rights. The definition of "ordinary high water mark" and "surface water" must be amended. Land based recreation on the river bottoms must be deleted specifically as to use of firearms, overnight camping and construction of permanent and semipermanent structures. The whole issue of portage should be deleted. It is my opinion the Supreme Court cases did not authorize unlimited portage above the ordinary high water mark and, if they did, it was and is a taking of private property without compensation.

I strongly urge that you oppose House Bill 265.

Respectfully submitted,

Richard W. Josephson

SENATE JUDICIARY COMMITTEE
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DATE 03-08-85

MONTANA CONSTITUTIONAL CONVENTION

1971-1972

DELEGATE PROPOSAL NO. 2

DATE INTRODUCED: JAN. 20, 1972 — Rejected by Constitutional Convention

Referred to Natural Resources and Agriculture Committee

A PROPOSAL FOR A NEW CONSTITUTIONAL SECTION PROVIDING FOR WATER RIGHTS.

BE IT PROPOSED BY THE CONSTITUTIONAL CONVENTION OF THE STATE OF MONTANA:

Section 1. There shall be a new Constitutional Section to provide as follows:

"Section ___. WATER. All of the water in this state, whether occurring on the surface or underground, and whether occurring naturally or artificially, belongs to the people of Montana; and those waters which are capable of substantial or significant public use may be used by the people with or without diversion or development works, regardless of whether the waters occur on public or private lands. The public has the right to the recreational use of such waters and their beds and banks to the high water mark regardless of whether the waters are navigable and regardless of whether the beds and banks are privately owned. Beneficial use of waters includes recreation and aesthetics, such as habitat for fish and wildlife and scenic waterways.

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

The legislature may provide either directly, or indirectly through administrative agencies, for the control and regulation of both existing and future rights to uses of water."

INTRODUCED BY: /s/ Earl Berthelson

judicious use and reclamation.

Because Montana has at least 500,000 acres of strippable coal land and untold acres of other natural resources, your committee believes the responsibilities of protecting and restoring the surface conditions of those lands for unborn generations should not be left to men, but rather protected by fundamental law.

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

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

Existing Article IX Section (3)(3) 1972 Constit.

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

(4) Beneficial uses include, but are not limited to, domestic, municipal, agriculture, stockwatering, industry, recreation, scenic waterways, and habitat for wildlife, and all other uses presently recognized by law, together with future beneficial uses as determined by the legislature or courts of Montana. A diversion or development work is not required for future acquisition of a water right for the foregoing uses. The legislature shall determine the method of establishing those future water rights which do not require a diversion and may designate priorities for those future rights if necessary.

(5) Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests.

(6) The legislature shall provide for the administration, control and regulation of water rights and shall establish a system of centralized records.

COMMENTS

Your committee feels that water and water rights are of crucial importance to the past history and future development of

the State of Montana. For this reason the committee feels justified in expanding the present Constitutional section which relates solely to the use of water to include provisions for the protection of the waters of the state for use by its people.

Subsection (1) guarantees all existing rights to the use of water and includes all adjudicated rights and nonadjudicated rights including water rights for which notice of appropriations has been filed as well as rights by use for which no filing is of record.

Subsection (2) is a verbatim duplication of Article III, section 15 of the present Constitution and has been retained in its entirety to preserve the substantial number of court decisions interpreting and incorporating the language of this section.

Subsection (3) is a new provision to establish ownership of all waters in the state subject to use by the people. This does not in any way affect the past, present or future right to appropriate water for beneficial uses and is intended to recognize Montana Supreme Court decisions and guarantee the state of Montana standing to claim all of its waters for use by the people of Montana in matters involving other states and the United States Government.

Subsection (4) is a new provision to permit recreation and stockwatering to acquire a water right without the necessity of a diversion. This applies only to future rights and, of course, only to waters for which there are no present water rights. This subsection further provides that future agricultural and industrial water development will not be foreclosed by recreation, as it is left up to the legislature to determine the method of establishing a future water right without a diversion and the legislature is further authorized to establish priorities of water uses for those waters where the legislature decrees priorities necessary.

Subsection (5) acknowledges a continuance of our present water law principle that the first appropriation in time is the better right and provides that no future appropriations shall be denied except in the public interest.

Subsection (6) mandates the legislature to administer, control and regulate water rights. This does not in any way change the present legislatively established system of local control of adjudicated waters by water commissioners appointed by the District Court having jurisdiction. A new requirement is added to establish a system of centralized records of all water rights in addition to the present statutory system of local filing of records. The centralized records are intended to provide a single location for water rights information and a complete record of all water rights.

Rep. Cobb

1. Place or refer to the rules now existing as to regulations of recreational use by FWP in the statement of intent or in the bill; that these rules are still applicable or not; or if any new rules should be as strict as existing rules.

The Problem

A. The court rulings dealt with whether landowners on adjacent water bodies could restrict recreational use. The answer was no. All waters according to House Bill 265 are to be regulated by FWP.

B. FWP already has existing rules regarding public recreational use.

C. Many recreationists believe they can do pretty much what they want on waters subject to restrictions in House Bill 265. Many landowners are concerned recreationists can do pretty much what they want subject to restrictions in House Bill 265. If landowners can't restrict use neither can a recreationist do what he wants without the State's permission.

1) For example - overnight camping is restricted to Class I waters. However, the regulations say they can camp only in designated areas. Many people believe one can camp almost anywhere below the high water mark if one is not causing damage. Are the current regulations still in effect or were new ones required?

2) The same problem concerns fires, pets, garbage, vehicles, etc. The rules are quite strict about the uses. When House Bill 265 says one can place objects - permanent or semi permanent - does that out-weigh the rules as they do not allow this now. Even all terrain vehicles were not allowed under existing rules.

3) The same problem is for hunting. House Bill 265 allows waterfowl and upland bird hunting. But the rules say FWP must post waters and lands they regulate for hunting. If they do not post under the rules you can't hunt. Does House Bill 265 over weigh these rules or not. only applies to non game + before Archery season.

E. The rules were made after hearings and agreement by many of the proponent groups here. They were made to protect and preserve public waters. To change them to a lower standard would be wrong. The rules were made up due to abuse in the past by some. Since the rules are working they should be used on all waters. They seem to be working on less than 1000 miles, they should be applied to over 23,000 miles of streams and the numerous lakes now included in House Bill 265.

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F. The rules should be kept or made into law with House Bill 265. They are strict and we should not allow two standards to be applied to waters in Montana (1) before courtcases and (2) after courtcases.

G. The Senate should decide if these rules are still applicable. House Bill 265 is here to write into law what the court said as well as limit certain recreational uses and define certain definitions. The rules governing recreational use are already in effect and should still apply or even be made into law to clarify public use on recreational waters.

2. Take out the placement of semi-permanent or permanent objects such as a duck blind or boat moorage.

A. If don't take out, then define.

B. Under existing FWP rules can't place these objects on Montana waters. Could place ice huts on certain waters for a limited time.

C. No other state allows this.

3. House Bill 265 should delinate between waters capable of recreational use and waters not capable of recreational use.

A. The Supreme Court rules that waters capable of recreational use may be used without regard to ownership of the land.

B. This automatically implies that there are waters out there in Montana that are not capable of recreational use.

C. House Bill 265 gives FWP power to regulate all waters in this State for recreational purposes.

1. This means
   a. run off from a house
   b. puddles in the road
   c. a one inch stream

2. This does not make sense and House Bill 265 should be clarified to say only waters capable of recreational use are regulated by FWP and open to public recreational use. If they are not capable of recreational use - one needs landowner permission to use the waters.

D. Other states use a substantial use test of recreation.

1) If a water can not be used for a substantial recreational use or a substainable recreational use then it should not be opened except by landowner permission.

F. How to give landowner control over some waters.

1) on waters not capable of recreational use

2) waters not capable of substantial recreational use. (define recreation as substantial recreation)

3) waters not capable of substainable recreational use.

4) State can allow control of use to landowner subject to right to take back due to public trust doctrine.

5) No one gave the reason why diverted waters are not open to the public except by permission of the landowner.

A. There are numerous waterbodies less capable of recreational use than diverted water bodies. The Supreme Court said waters capable of recreational use are open regardless of land ownership. Therefore we are making an exception that (1) diverted waters are not capable of use or (2) that another reason is made such as #4 above or either #2 or #3 or #1 above. If we can stop use on those waters we can do so on other waters if the legislature wants to.

4. State that FWP shall list waters as to the classes and different types of uses of recreation as well as hold hearings in different areas telling of proposed uses and gathering comments.

5. State that FWP shall limit or restrict use of waters not capable of substantial recreational use.

A. FWP's own statistics show small waters are limited in fishing ability, and can not be transplanted.

B. 1985 is last year demand meet supply of fishing.

C. Best fishing and recreation is in floatable rivers and lakes.

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DATE 03-08-85
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I. Montana Cases

1. Montana Constitution
All surface, underground, flood and atmos. waters within the boundaries of the state are the property of the state for the use of the people and are subject to appropriation for beneficial uses as provided by law.

2. The two Montana Cases
A. Curran
1. Under the public trust doctrine and the 1972 constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes.

2. The Supreme Court began its discussion of the "recreational use" issue by stating that it "found no error" in the District Court's determination that "recreational use and fishing make a stream navigable".

In this section, the Supreme Court ruled (1) navigability for use is a matter governed by state law; (2) under the Montana 1972 Constitution and the public trust doctrine, the waters of Montana are owned by the state in trust for the people; (3) the susceptibility of use of the waters for recreational purposes (rather than streambed ownership, which is irrelevant to this issue), determines their availability for recreational use by the public; and (4) therefore, "any surface waters that are capable of recreational use may be so used by the public".

3. The public does not have a right of way across private land to state owned waters.

4. The opinion does place two restrictions on the public's use of waters: first, waters may be used only to the high-water mark; and second, waters may be used only if the public has access rights to a waterbody.

3. Hildreth Case

Generally speaking, the Beaverhead decision can be viewed as a strong affirmation of the position taken by the Montana Supreme Court in the Dearborn case. The Beaverhead opinion affirmed the Dearborn ruling that under the public trust doctrine and Article IX, section

3(3) of the 1972 Montana Constitution the waters of the state are owned by the public, and the public has the right to make recreational use of water bodies up to their ordinary high-water mark. Further, the public has the right to use the bed and banks of public waters. Finally, the public has the right to portage around barriers in water bodies in the least intrusive manner possible.

Although there was basis in the Dearborn opinion for an interpretation that it authorized use of the beds and banks of a public waterway as well as the waters themselves, the court did not specifically state whether or not public use rights extended to a waterway's bed and banks. In the Beaverhead decision, this matter was settled by the statement that "The public has the right to use the waters and the bed and banks up to the high water mark."

The Beaverhead decision stated that the Supreme Court will not devise a test for determining the meaning of recreational use since "the capability of use of the waters for recreational purposes determines whether the waters can be so used". The court further explained that since the Constitution does not limit the water's use, the Supreme Court cannot "limit their use by inventing some restrictive test". Finally, the court stated:

> Under the 1972 Constitution, the only possible limitation of use can be the characteristics of the waters themselves. Therefore, no owner of property adjacent to State-owned waters has the right to control the use of those waters as they flow through his property.

II. Public Trust Doctrine

1. Longstanding doctrine. The government must preserve and protect particular resources within the jurisdiction for the public good and the good of the resource.

2. Under the doctrine, the state acting on behalf of the people, has the right to regulate, control and utilize waters for the protection of certain uses - recreation is but one of them.

3. The best way to think of the public trust doctrine as it relates to recreation on water is to think of the waterway going through private property as a highway. Before the decisions, the landowner could restrict use of the highway, now after the decisions the landowner cannot restrict use of the highway. However, the state

can restrict use and the state can close all the waters or open all the waters subject to judicial review.

4. The trust is dynamic, rather than static, concept and seems destined to expand with the development and recognition of new public uses.

   a) allows adapting such waters for changing public needs.
   b) private parties may not make the choice between navigation and commerce, between development versus conservation.
   c) the choice belongs exclusively to the state and cannot be exercised by private individuals. (Colberg - California)
   d) in short the doctrine limits extent to which private entities can acquire interests in water, but does not limit the slate regulatory control of such use.
   e) the state can choose among competing public uses and preserves the states continuing right to make the choice, but does not compel the state to make a specific substantial choice.
   f) the doctrine can strike a balance between conflicting rights - subject to judicial review.

Other states

1. Arkansas uses a recreational use test based on if a steamboat can use waters.
2. Minnesota uses a pleasure boat test.
3. California - waters capable of being navigated by oar or motor propelled small craft.
4. Idaho - any stream which in its natural state will float logs in any other commercial or floatable commodity or is capable of being navigated by oar or motor propelled small craft, for pleasure or commercial purposes is navigable.
5. Other states that use doctrine and some test.
   A. New Mexico
   B. Missouri
   C. Wyoming
   D. Michigan
   E. Ohio
   F. Illinois
6. Recreational uses of waters in neighboring states
   A. hunting (any type), overnight camping or other camping, all-terrain vehicles:
      1. No - Wyoming, Colorado, Washington, New Mexico
         Yes - Idaho, but - state of Idaho claims title to streambed, and that portion of riparian zone within the ordinary or mean average high water mark.

2. All states require permission from landowners to hunt on private property - even Idaho requires that a "reasonable attempt to contact" landholder for permission to pursue or retrieve birds or game shot in the state's reparian zone.
3. Wyoming, Colorado, and New Mexico, California hold that recreationists cannot touch or use any portion of private streambed or bank, as it belongs to landowner.
4. No state allows overnight camping except by permission.

B. Restriction of recreational uses:
1. Wyoming, Colorado, Washington, New Mexico and Idaho all use a navigability test to determine floatability and unfloatable streams.

   Property rights restrict uses in other states. In Wyoming even fishing is prohibited if the fisherman must touch any part of streambed or bank without private landowner's permission. But if it's floatable, you can use it, no matter where if flows.

C. Most tests of states use a substantial recreational use test as described by stone and other law review articles. Colorado now has 15 different types of recreation uses on their rivers. California has scenic, wild and developed rivers. Most neighboring states have listed their waters as to different recreation uses and restrict uses where a substantial use can not be sustained.

D. Portage routes
1. all states say just portage around. None have the Montana procedure.

E. Several recent federal decisions have liberally applied the title test of navigability created by the United States Supreme Court over a century ago. These decisions have found a variety of western waterways to be navigable and, therefore, owned by the respective states. Rejecting earlier suggestions to the contrary, the federal courts have determined that navigability is not precluded by a waterway's isolated location, limited seasonal utility, or capacity to support only the most modern forms of craft or timber.

California courts have adopted a different course. Rather than start from the premises that the public interest and navigability are irrevocably tied to ownership, they have focused on two principles. The first involves the public trust doctrine, recently the subject of renewed interest in California law. The second, sparked in large part by an expanding population's need for recreational opportunities, revolves around the long standing but essentially limited rule that the public has a right of recreational navigation irrespective of questions of ownership.

California courts appear to be merging these two concepts and finding that state waterways which are usable for only limited purposes are imbued with the public trust, together with all the public rights and responsibilities the trust implies.

F. (California Figh) can convey sovergn lands and waters to private interests, yet waters and lands remain subject to the trust easement.

III. Montana Law - Existing

1. We have numerous environmental laws protecting the environment.
   - A. 75-2-401 - Air Quality
   - B. 75-5-101 - Water Quality
   - C. 75-7-101 - Acquatic Ecosystem protection
   - D. 75-7-201 - Lakeshores
   - E. 75-10-101 - Waste and Litter Control

2. Recreational Use
   - A. HB 265
     1. go around barriers
     2. define high water mark
     3. 2 classes of water
     4. FWP regulate all waters as to recreation in interest of public health, public safety or protection of property
     5. Procedure for portage routes
     6. Provides overnight camping and placing of some permanent or permanent objects
     7. Upland bird hunting and hunting
     8. Can't use diverted waters without permission of landowner.
     9. Class I can use for other activities besides water related.
     10. No prescriptive easement
     11. No civil liability of landowner

3. Existing law in Montana with no bill.

A. 2 court decisions
   1) right to portage
   2) waters capable of recreational use
   3) can't trespass to gain access to water
   4) use of recreation up to high water mark
   5) waters may be used only if the public has access right to a waterbody.

B. Regulations by FWP's

Public Use Regulations

12.8.201 GENERAL POLICY (1) The following regulations shall govern the use of all lands or waters under the control, administration, and jurisdiction of the Montana department of fish, wildlife, and parks. These areas are hereinafter referred to as "designated recreation areas". Regulations governing each specific area will be posted in that area. Lands and waters controlled or administered by the department may be used for recreational or other purposes subject to the prohibitions as set forth in these or other applicable rules, or otherwise provided by law.

12.8.202 WEAPONS AND FIREWORKS (1) No person may discharge any firearm, fireworks, air or gas weapon, or arrow from a bow, on or over either land or water, from April 1 to the opening date of archery season each year, unless the designated area is otherwise posted. Other areas, or parts thereof, may be closed to shooting when the director determines there is undue hazard to human life or property.

12.8.203 PETS (1) No person may permit a pet animal to run at large in a designated public recreation area. Persons in possession of pet animals must restrain them and keep them under control on a leash in a manner which does not cause or permit a nuisance or any annoyance or dangers to others. The leash may not exceed 15 feet in length and must be in hand or anchored at all times.

(2) Pet animals may not be kept in or permitted to enter areas or portions of areas posted to exclude them. Persons in possession of pet animals who cause or permit said animals to create a nuisance or an annoyance to others or who do not restrain pet animals properly may be expelled from the area in addition to being subject to any other penalty provided.

(3) Animals owned or possessed by persons who are not staying in an area will be captured and will not be returned th the owner or possessor

until the cost of capture and holding the animal are reimbursed to the department. This rule applies from April 1 through September 15 of each year unless the area is otherwise posted.

12.8.204 VEHICLES (1) No motor vehicle may be driven at a speed greater than the posted speed.

(2) No motor vehicle may be driven off authorized roads, except onto parking areas provided.

(3) No person may park any vehicle, trailer, camper, or other vehicle except in designated parking areas, nor shall any person pitch a tent or otherwise set up camp other than in designated camping areas.

(4) No person may operate over-the-snow equipment in any area which is specifically posted against such operation.

12.8.205 CAMPING AND GROUP USE (1) No person may camp overnight in a department administered recreation area without obtaining a single use overnight camping permit or having permanently and properly affixed to his vehicle a seasonal camping permit or Montana state golden year's pass issued by the director or under his authority, when such area has been signed and posted as fee camping area.

(2) The basic amount of fees for single use overnight camping permits or seasonal camping permits shall be as determined by the commission and posted by the director or his duly authorized agent.

(3) No group of more than 30 persons may use a department administered recreation area except with prior permission by the director or his agent. Groups may be assessed user fees by the director or his agent as determined by the commission and may be required to surrender a deposit to defray additional or unusual department expenses caused by their use of recreation areas.

(4) No person or persons may maintain occupancy of camping facilities or space in any one designated recreation area for a period longer than 14 days during any 30-day period unless the area is otherwise posted. In areas so posted said occupancy will be limited to 7 days during any 30-day period. Such 30-day periods shall run consecutively during the year commencing with the first day each person camps in a designated recreation area each year.

(5) No person may leave a set-up camp, or trailer, camper, or other vehicle unattended for

more than 48 hours unless the area is otherwise posted.

(6) No person may camp overnight in any department administered shelter building unless the shelter is posted as a camp shelter.

12.8.206 FIRES (1) No person may build or maintain a fire in any designated recreation area, except in established fireplaces and fire rings maintained for such purposes, or in portable camp stoves. Exception: Certain areas may be posted allowing fires to be built in other than the above mentioned places.

(2) No person may leave a camping area without completely extinguishing all fires started or maintained by such person.

12.8.207 PROPERTY DISTURBANCE (1) No person may destroy, deface, injure, remove, or otherwise damage any natural or improved property or willfully or negligently cut, destroy, or mutilate any tree, shrub, or plant, or any geological, historical, or archaeological feature, not including flowers, berries, cones, or fallen dead wood.

(2) No person may disturb or remove the topsoil cover or permit the disturbance or removal of topsoil cover. This prohibits digging for worms, burying of garbage, and allowing pets to dig holes.

(3) Gathering or cutting firewood for off site use is prohibited without prior written approval of the director or his agent.

12.8.208 DISORDERLY CONDUCT (1) Disorderly conduct such as drunkenness, use of vile or profane language, fighting, indecent exposure, or operation of a motor vehicle in a manner as to create a nuisance or annoyance or danger to others, or loud or noisy behavior is prohibited; and in addition to any other penalty provided, the participant may be expelled from the area.

12.8.209 RESTRICTED AREAS & NIGHT CLOSURES (1) No persons may enter upon any portion of any area that is posted as restricted to public passage.

(2) Public recreation areas as posted will be closed nightly, except for emergency ingress and egress.

(3) Checkout time for campers using fee areas is 4:00 p.m. the following day if not posted or at such other time as posted in the area.

(4) Checkout time for users not camping overnight is sundown in areas so posted.

12.8.210 WASTE DISPOSAL (1) No person may dump dead fish or animals or parts thereof, human excrement, refuse, rubbish, or wash water (except in receptacles provided for this purpose) nor pollute or litter in any other manner a public recreational area. Sewage wastes from self-contained trailers, campers, or other portable toilets shall be disposed of only in posted sanitary trailer dump stations. Wash water may be disposed of in sealed vault latrines.

(2) No household or commercial garbage or trash brought in as such from other property shall be disposed of in any designated public recreation area.

Existing Laws

A.	87-1-303	Duties of FWP as to recreation
B.	23-2-522	Discharge of Waste from vessell prohibited
C.	27-30-101	Def. of nuisance
D.	45-6-101	Criminal mischief
E.	45-6-203	Criminal trespass to property
F.	45-8-111	Public nuisance
G.	75-10-212	Disposal in unauthorized areas prohibited
H.	75-10-253	Dumping penalty
I.	87-1-102	Penalties for violation of FWP regulations
J.	87-1-504	Protection of private property wardens as ex-official fire wardens
K.	87-3-125	Restrictions on use of motor vehicles while hunting
L.	87-3-304	Landowners permission required for big game hunting
M.	23-2-523	Prohibited operation and moving
N.	85-2-223	Public recreational uses

Possible Law Suits under H265

1) taking of property under 5th and 14th amendments and Federal Civil Rights Act, Section 1983

The Civil Rights Act, 42 U.S.C. Section 1983 (1976 and Supp. IV 1980), provides that: Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction to the deprivation of any

rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper preceedings for redress.

2) violation of privacy rights
3) recreation harms environmental protection of wildlife and habitat

Miles of Streams in Montana

1. 19,168 miles of streams (Montana Water Quality - 1984)
2. FWP study (1980) - over 23,000 miles
3. recognized under the Corps of Engineers as navigable - 1900 miles
4. waters affected by HB 265 - over 23,000 miles
5. Floatable rivers in the state 6700 - 8700 miles
6. A) streams nonfloatable and have unrestricted ingress - 9000 miles
   B) streams unfloatable on private land - 7300-5300 miles
7. In 1980 FWP study only 900 miles out of 17,000 miles of streams were not allowed use for recreational purposes.
8. In 1980 FWP study on sport fishery value on Montana's streams the following statistics were found:

Sport fishery potential of stream reaches

The class of each reach was based on a point system in which points were awarded for (1) fish abundance as indicated by biomass or numbers and sizes of game or sport fish, (2) ingress (legal rights of the public to fish the reach or willingness of landowner to permit fishing), (3) esthetics and (4) use by fishermen (fishing pressure).

1 - highest value fishery resource
2 - higher priority fishery resource
3 - substantial fishery resource
4 - moderate fishery resource
5 - limited fishery resource

value	total km	floatable	non/floatable	not specified
1	1,419	1,212	80.3	127.3
2	2,778.9	2,140.0	427.5	211.4
3	4,399.6	1,346.5	1,891.8	1,161.3
4	14,905.0	2,398.4	8,723.5	3,783.1
5	3,642.1	128.6	2,616.2	897.3

Study

Overuse

	total km	floatable	non/floatable	not specified
By stock	5,077.6	1,599.2	1,814.6	1,663.8
By game	16.0	0.0	16.0	0.0
By people	75.6	0.0	75.6	0.0

Montana recreation sites		acres
Lakes	210	21,280
River	273	24,630
Land Base	503	74,594
Total Sites	987	120,504

Fishing as managed by FWP

Other Game and Sport Fish in Lakes

1) includes sauger, walleye, northern pike, largemouth bass, small mouth bass, sturgeon, burbot, channel catfish and several other species utilized by recreational fisherman, but not legally classified as game fish.
2) about 250 individual waters support these species
3) Montana residents account for 90% of the angler use
4) about 40% of nonresident use occurs in Region 7 (Miles City). This is largely due to Wyoming residents who fish the Tongue River Reservoir and nearby ponds.
5) Nearly 80% of this fishery is bordered by public land where ingress is ensured; most of the remainder is bordered by private land where public use is allowed with minimal restrictions.

Fishing

1. over 200,000 residents (35% of those over 9 years of age) participate in recreational fishing.
2. residents account for 82% of the total fishing pressure and trout waters received a major portion of the use by both residents and nonresidents. Nonresidents showed a higher preference for trout waters, especially for trout stream fishing.

Trout fishing in lakes

1. 40% of all fishing
2. most lakes are lightly fished, but each department region has some lakes that currently received the maximum use that can be sustained without degrading the quality of the fishery.
3. Approximately 55% of the fishery is on public lands where public use is insured; 30% is bordered by combinations of public and private ownership where access is incomplete. The remaining 15% occur on private land where ingress varies from uncontrolled to prohibited. Very few trout lakes are completely unavailable because of posting.
4. Trout lakes number over 1,900 individual waters
5. Each department region has some trout lakes, but a large portion of the waters and the total acreage lie in the central and western portions of the state.

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Stream Trout fishing

1. Montana streams support 5 species of trout.
2. Some 12,000 miles of stream support populations that provide most of the trout fishery.
3. Many additional smaller tributaries support the productivity of these 12,000 miles by maintaining flows and water quality and by providing spawning and nursery areas. Trout streams occur mostly in the western and central portions of the state but each fish and game region offer some stream fishing for trout.
4. The management of trout populations in these streams is based on wild trout produced naturally in the streams. Very little can be done to increase production in these streams, but a major effort will be required to maintain present production through habitat preservation.
5. Existing trout populations can support a temporary increase on days of recreational fishing through 1985 if the department implements more restrictive regulations on selected waters. This increase in days will be offset in subsequent years by expected losses of trout production due to habitat deterioration.
6. Fishing regulations have been quite liberal in the past but will become more restrictive on some waters as use a harvest approaches the supply.
7. In 1975-76 over 1/2 of the nonresident angling effort was directed to trout in streams.
8. Approximately 70% of the trout stream fishery is bordered by private lands. Public use is restricted to some degree on about 18% of the fishery.
9. Based on current fishing standards, the anticipated use on trout streams will approach the total supply in most regions by the late 1980's.
10. 1975 study

Regional Distribution of trout streams

region	miles of trout streams
1	2,710
2	1,490
3	3,100
4	3,400
5	1,350
6	180
7	10

Recreation activities as defined by FWP

ORV, bicycling, bird watching, boating, camping, cross country skiing, driving for pleasure, fishing, hiking, horseback riding, hunting (includes trapping, archery/bow and arrow hunting), motorbike riding (both on and off road vehicles), outdoor swimming, picnicking, playing outdoor games (includes golf, tennis, frisbee, softball, etc.), river floating or canoeing (includes rafting), snowmobiling, walking for pleasure, downhill skiing, other winter sports (includes sledding, tobogganing, snowshoeing, dog sledding,

etc.), rock hounding (includes prospecting and metal detection).

Statistics

1. Eastern Montana is 70% private lands
2. Western Montana is 70% public lands
3. Most of the state's blue ribbon trout streams are in Western Montana.
4. By the time the state's mountain trout streams have reached Eastern Montana, they have become warm water fisheries.
5. Private ownership in this state is 63.9%.
6. Total land area in this state is 93,271,040 acres.
7. Total water area in this state is 879,280 acres.

Montana Outdoor Recreation Survey 1980 by FWP

1. 90% wanted the department to maintain fish habitat.
2. 49% wanted regulation scheduling the use of popular recreation waters during periods of high use. Of those approving scheduling 66% favored the issuing of permits and 27% opposed permits.
3. 90% said there were conflicts between recreationists and landowners.
   A. 52% said it was serious.
   B. 17% said not too serious.
4. Recreationists perspective
   A. 24% said had a problem with landowner.
   B. 26% in urban areas said had a problem compared to 22% who live in rural areas.
   C. 31% and 39% of fishing and hunting enthusiasts respectively said they had experienced problems with landowners, compared to only 14% among nonfisherman and 16% among nonhunters.
   D. 24% said friction with landowners occurred often, 27% said sometimes and 48% said not too frequently.
5. The landowner perspective
   A. 54% said they had encountered problems with recreationists regarding access.
   B. Landowners in the eastern part of the state appeared to have had proportionately more problems than those in Western Montana.
      1. Over 60% in Region 6 and 66% in Region 7 reported problems compared to 48% in Region 1 and 46% in Region 2.
   C. 32% of landowners said problems encountered very often; 35% said sometimes and 29% said not too frequently.
6. Possible solutions
   A. 75% favored negotiating long-term easements
      1. about 81% of the persons who fished in 1979 favored this compared to 67% among those who did not fish.

2. of the respondents, 71% of landowners favored this proposal.

7. Other highlights of the survey

A. 75% of Montanans devote some of their leisure time to outdoor recreation activity.

B. The most popular activities were picnicking, driving for pleasure and walking for pleasure.

C. 58% reported fishing at least one day, medium number of days spent fishing were 14.

D. The younger age groups participated higher in more vigorous activities. Bird watching and nature study, driving or walking for pleasure and picnicking were activities which showed high participation by those 65 and over.

E. Montana fisherman overwhelmingly stated they preferred to catch a few large fish rather than many small fish.

F. In general, they favor multiple use of Montana's water. Only 8% of the respondents said that fish and wildlife should have the highest priority in water use. Almost 42% felt that agriculture should also receive first priority along with fish and wildlife. About 36% felt water should be equally available for all uses, including industrial uses.

Nonresidents spend 4.5 days in Montana and spent 72,700 activity days canoeing on rivers and lakes.

Montana shows registered 32,122 boats with an estimation of 20,537 Montana boats unregistered.

Nonresident floaters	250,990	(1979)
Resident floaters	136,500	(1979)
Total floaters	387,490	

75% of Montanan's eighteen years of age and over spend some of their leisure time participating in outdoor recreation activities. (1979)

57% report camping at least one day, medium number of days recorded was 10 and 21 activities sited. (1979)

46% favored user fees to pay for recreational facilities and services.

70% said conflicts between private landowners and people who use their land for recreation are perceived as a serious problem.

1979 Activities by residents	
Fishing	321,000
River float, canoeing	136,500
Outdoor swimming	356,500
Boating	177,500

Camping	314,500
Driving for pleasure	389,800
Motor bike riding	102,600
Picnicking	423,200
Walking for pleasure	392,600

Smith River Survey 1980 FWP

1. Visitors drove an average of 162 miles (one way) to reach the river.
2. Spent an average of 3.50 days on the rivers.
3. After floating and camping, participated most in fishing, sightseeing, rest and relaxation.
4. Saw an average of 7 other floating visitors and 7 shoreline visitors per day, but did not perceive the river as crowded.

LEWISTOWN NEWS ARGUS - SUNDAY, MARCH 3, 1985

Guest Opinion . . .

Deeply concerned about impact of HB 265

(EDITOR'S NOTE — Ted Lucas, the writer of this column, has ranched much of his life in the Highwood area. He has been a leader through the years in cattle organizations, done much in the study of weed control and is also a sportsman who loves Montana and his area. He is exceptionally well qualified to discuss the subject of House Bill 265 on stream access.)

by TED LUCAS

About three-fourths of a mile of Highwood Creek runs through my ranch. I am deeply concerned about how House Bill 265 stream access bill will affect land owners and cabin owners with streams and rivers running through or by them, or who border lakes.

I am, and have been for many years, a member of the Montana Stockgrowers Association. I have served on the Landowner Recreation Committee for many years, and was vice chairman and chairman of the committee and served two terms on the executive committee.

When the Stream Preservation Act was passed 10 years ago (Senate Bill 310), I served on the committee that worked up the model rules for that act. I also served for several years on the Montana Association of Conservation District Legislative Committee and have served one term and been appointed to another on the Lewistown District BLM Advisory Council. I am a member of WETA and am on their board.

House Bill 265 goes way beyond the Supreme Court's decisions. Here are some examples:

— House Bill 265 expands surface water to mean from high water mark to high mark (dry land becomes surface water).

The definition of the high water mark used for 10 years to administer the Stream Preservation Act (SB 310) reads: Ordinary high water mark means [illegible] it for sufficient periods of time to deprive the soil of its vegetation and destroy its value for agricultural purposes.

> ***"Highwood Creek has flooded several times over the years, and as it flows through me the high water mark, using the new definition, would make a recreation corridor 100 to 300 or more yards wide."***

— We do need to add flood plains or flood channels are not considered to be within the ordinary high-water mark. This is a very clear and understandable description.

Now HB 265 has expanded this to read: Ordinary high water mark means the line that the water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it. Characteristics of the area below the line include, when appropriate, but are not limited to: diminished terrestrial vegetation or lack of agricultural crop value.

A flood plain adjacent to surface waters is not considered to lie within the surface water's high-water marks. By using the new language ("diminished terrestrial vegetation or lack of agricultural crop value") the high water mark has been greatly extended. Who could make a decision as to where the high water mark actually is?

Highwood Creek has flooded several times over the years, and as it flows through me the high water mark, using the new definition, would make a recreation corridor 100 to 300 or more yards wide. Under HB 265 this corridor is considered to be surface waters.

— Waters have been put into two classes in HB 265: Class I and Class II. All waters not Class I are Class II.

Part of the description of Class I waters reads: Class I waters means surface waters that are or have been capable of supporting these commercial activites — log floating, transportation of furs and skins, shipping, commercial guiding using multi-person watercraft, public transportation or the transportation of merchandise.

This description does not require that this water is now being used or has ever been used for these purposes, just that it is capable of such use.

In an ordinary year on the Highwood Creek you could, for maybe a month to six weeks, float logs or multi-person water craft (rubber raft or canoe). Thus Highwood Creek would be Class I.

Recreation use on both Class I and Class II waters under HB 265 includes: fishing, hunting, swimming, floating (small craft or other flotation devices), boating in motorized craft propelled by oar or paddle, other water-related pleasure activities, and related unavoidable or incidental uses.

In Class I waters you can do, by inference, what you cannot do in Class II waters: overnight camping, construct permanent or semi-permanent objects (permanent duck blind or boat dock), other activities which are not primarily water-related pleasure activities.

No where do I see in the Supreme Court decisions any indication of a right to placing any permanent or semi-permanent object, such as a duck blind or boat moorage, below the high water mark or other activities that are not water related. This must be corrected.

> ***"No need has to be shown. The route shall be established at a very considerable cost to the landowner who is not compensated for the land taken."***

By using the new definition of surface water — the new nebulous definition of high water mark along with commercial activities defining Class I and Class II waters — totally new areas of confrontation are developed that will bring on long, bitter and costly court battles. These areas must be amended in the first two definitions and the commercial activities paragraph deleted.

— There is a section on portage. Part of this reads: a portage route may be established when either a landowner or member of the recreating public submits a request to the supervisors that such a route be established.

Within 45 days of the receipt of a request, the supervisors shall, in consultation with the landowner and a representative of the department, examine and investigate the barrier and the adjoining land to determine a reasonable and safe portage route.

> ***"By using the new definition of surface water.....totally new areas of confrontation are developed that will bring on long, bitter and costly court battles."***

Within 45 days of the examination of the site, the supervisors shall make a written finding of the most appropriate portage route. The cost of establishing the portage route around artificial barriers must be paid by the involved landowner, except for the construction of notification signs of such route, which is the responsibility of the department. The cost of establishing a portage route around natural barriers must be borne by the department.

No need has to be shown. The route shall be established at a very considerable cost to the landowner who is not being compensated for the land taken.

I urge each of you to get a copy of House Bill 265 and study it yourselves to determine how it affects you and see if it is the same as you are being led to believe. If it isn't, contact your agriculture associations and legislators and tell them so.

I am not now having problems with hunters and fisherman. I control hunting and am posted to allow fishermen access without ever asking. With HB 265, most recreationists won't create a problem for me and other landowners. For those that cause problems, there will be no recourse except through the courts.

We have three bills: SB 418 defining high water mark, SB 421 limiting landowner liability and SB 424 not requiring prescriptive easement through recreational use of land on water.

Let's make every effort to pass these three bills this session and address what, if any, problems arise in the next two years during the 1987 Legislature. If HB 265 passes, we will all regret it. This must not occur.

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

NAME: Jack Van Cleve DATE: 8 Mar '85

ADDRESS: Big Timber

PHONE: 537-4404

REPRESENTING WHOM? Montana members of The Dude Ranchers' Association

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT: After personally polling all but one Montana member ranch of The Dude Ranchers' Association, I have been authorized to represent them as opposed to this bill.

The intrusion of recreationalists on heretofore private land will destroy a great deal of the ambiance which is a large part of the dude ranch appeal. This bill could destroy a large segment of the dude ranch industry, which contributes substantially to Montana's economy every year.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 40
DATE 03 08 85
BILL NO. H.B. 265

NAME: Bill Morse DATE: 3-8-85

ADDRESS: Box 550, Absarokee

PHONE: 328-2661

REPRESENTING WHOM? ~~Stillwater County~~ Landowners in Stillwater & Carbon Co. Assn. of Taxpayers & Madison Co. Ranchers.

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: Intrusion on private property rights; would seriously depress land values & cut tax values.

Our huge acreages of public land are available for recreation.

This would be a "taking" of land without payment -- doubtful constitutionality.

High cost of implementation: design & construction of portage areas -- added Fish & Game personnel.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 41
DATE 03 08 85
BILL NO. HB 265

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

NAME: Dr. Clayton B. Marlow DATE: 8 March 95

ADDRESS: Montana State University

PHONE: 994-5572

REPRESENTING WHOM?

APPEARING ON WHICH PROPOSAL: HB 265

DO YOU: SUPPORT? AMEND? X OPPOSE?

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 42
DATE 03 08 95
BILL NO. H.B. 265

Testimony given by Dr. Clayton B. Marlow
Research Scientist, Montana Agricultural Experiment Station
to the Senate Judiciary Committee, March 8, 1985

HB 265 appears to be a workable compromise between landowner protection and public recreational access. But to adequately address the needs of both groups, it is necessary to clarify several "gray" areas within the bill.

I. Points for Clarification

A. New Section: Section 1. Subsection (2) pg. 2

1. Use of "federal government surveys" as criteria for classification of class I waters does not address recreational capacity of waters. If the "federal survey" mentioned is a U.S. Geological Survey topography map, then there is little need for class II designation because these surveys list nearly all geographic structures which carry water for all or part of the year.

2. Use of "waters flowing through public lands" as a classification criteria again does little to describe the water's recreational capacity.

3. Both the Federal Navigability and commercial activities criteria will be beneficial to both groups because they provide a measure of the water's recreational capacity.

B. New Section: Section 1. Subsection (2) pg. 2

1. The description of channel characteristics below the "ordinary high water mark" can be questioned by both landowners and recreationists.
   a. Does the phrase "diminished terrestrial vegetation" mean that the naturally occurring dense stands of willow, cottonwood or reed canarygrass indicate the individual is above the highwater mark?
   b. Is native forage an agricultural crop? Do sedge and wirerush bottoms have to be hayed before they are considered a crop?

II. Summary

A. If the answers to these questions are left up to the courts, landowners and recreationists may find both the action and the results costly.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 42
DATE 03-08-85
BILL NO. H.B. 265

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 43
DATE 03 08 85
BILL NO. SB 85 HB 265

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

NAME: Roger Koopman DATE: 3/8/85

ADDRESS: 811 S. Tracy Ave., Bozeman

PHONE: 587-7555

REPRESENTING WHOM? self

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT: I am a businessman & sportsman who has been very active over the years in various sportsmen organizations. I am a former employee of the National Rifle Assn., serving as their field rep. in this region. I firmly believe that HB265 is not supported by the vast majority of the Montana sportsman. We have everything to lose and virtually nothing to gain if this bill becomes law. This legislation goes far beyond the scope of the Supreme Court ruling and can in no way be characterized as a "compromise bill." It would have the effect of driving a wedge between the landowners & sportsmen — groups that have traditionally been friends and allies in this state. HB265 is not just a water bill — it is a land use bill. The Supreme Court did not rule on the land use issue. By antagonizing the landowner and encroaching upon his property rights, the sportsman — through this bill — will be the big loser. Any possible short term gains by the sportsman will be far outweighed by the long term devastation of the landowner-sportsman relationship. The bill would also create a powerful dis-incentive for landowners to maintain good fish & game habitat. In a few short years, the quality of

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

hunting & fishing in Montana would show a significant decline.

Above all, this is a freedom issue. Freedom is indivisible. You take it away from one man and you take it away from all. HB265 is a radical assault on the property rights of many Montanans — and therefore takes away a measure of freedom from all of us. Although living on a ¼ acre plot in Bozeman is all the "landowner" I am, this bill effect me — and my family — as much as anyone. As a [illegible] who wants to remain that way — I vigorously oppose this legislation.

I am Paul Hawks of Melville. I am presenting amendments to HB 265 on behalf of the Stillwater Protective Association, an affiliate of the Northern Plains Resource Council.

1. Our first set of amendments deals with portage. The present language vastly expands a stream's capability to sustain recreational use. We believe permitting the public to demand portage routes around natural objects or existing artificial barriers is a violation of private property rights. While our amendments would still provide for portage routes, property owners should not be penalized.

We don't assume that a portage route is necessary just because someone requests it. Our amended language allows the board of supervisors to make that determination.

2. The definition of surface water should not include land. If you want the recreationalist to have the use of land, then put the allowable use of the beds and banks up to the high water mark back in the definition of "recreational use."

3. We feel that any hunting because of concerns for safety of family and protection of property. and other land-based activities, should require landowners consent.

Our intention in amending use of stock ponds is to protect impoundments on private land fed by continually flowing water sources. We don't, in any way, want to affect the recreational use of public impoundments of water.

4. Finally, the definition of "ordinary high water mark" should be replaced with that of SB418.The language used in this bill should not create problems between the landowner and the sportsman. A good landowner-sportsman relationship has been the basis of enjoying quality recreational opportunities in our state. HB 265 should not do anything to jeopardize that relationship. If it does, we all lose.

In conclusion, we are in support of Senate bills 418, 421, 424, and 435 because they protect our concerns as landowners. However, if our amendments were accepted, we could support HB 265.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 44
DATE 03 08 85
BILL NO. H.B. 265

AMENDMENTS TO HB 265

submitted by the Stillwater Protective Assn.

1. Portage

Section 1 (1), page 1, line 19

"the water, ~~or a natural object in or over a water body~~ which..."

and lines 23-24

"obstacle to the natural flow of water ~~or a natural object within the ordinary high water mark of a stream~~."

Section 3 (1), page 7, line 15

"ordinary high-water mark, portage around artificial barriers in the"

Section 3 (3)(a), page 8, line 1

"a portage route around or over ~~a~~ an artificial barrier may"

Section 3 (3)(c). page 8, lines 12-13

"the barrier and the adjoining land to determine if a ~~reasonable and safe~~ portage route is necessary

Section 3 (3)(d), page 8, line 15-16

"Supervisors shall make a written finding of ~~the most appropriate~~ whether a portage route is needed and the most appropriate route if if one is necessary"

Section 3 (3)(e), page 8, line 21

"cost of establishing a portage route around ~~natural~~ existing artificial barriers"

2. Surface Water

Section 1 (10), page 4, lines 21-24 strike

Section 1(8), page 3, lines 23-24

"or incidental uses, within the ordinary high water mark of the waters"

3. Land-based Activities

Section 1 (8), page 3, line 18

"surface waters: fishing, ~~hunting~~, swimming, floating"

Section 2 (2)(d), page 6, line 3

"~~big game~~ hunting"

Section 2 (1), page 5, line 2

"Subsections (2) ~~through (4)~~ and (3)"

Section 2 (3), page 6, line 4-6, strike

line 7 - change (A) to (E)

line 8 - change (B) to (F)

line 11 - change (C) to (G)

SENATE JUDICIARY COMM
EXHIBIT NO. 44
DATE 03-08-85
BILL NO. H.B. 265

TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE
March 8, 1985

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 45
DATE 03 08 85
BILL NO. H.B. 265

My name is Chuck Rein. I am a rancher from Melville, Montana.

Since the Dearborn and Beaverhead river lawsuits the private property rights of many Montana citizens, whether or not they are involved in agriculture have been in jeopardy. Many questions have been raised by these cases, and now it is your turn, as our duly elected representatives to answer the questions and address the issue based on your own knowledge and by hearing and/or reading informative, well researched testimony. Some of the areas that I feel need to be addressed include but not limited to acquiring prescriptive easement by recreational use, limiting landowners liability and defining the high water mark. These issues require technical and legal analysis and terms to address them properly, thus, I won't attempt to do that in this paper. I will however describe how I, as a rancher who lives in the foothills of the Crazy Mountains, near the head of the Sweet Grass Creek, is affected by the Supreme Court decisions regarding stream access. The Rein family has owned this property for over ninety years, my grandfather having settled here in 1893. As far as I know access to this piece of stream has never been denied, except during times of extreme fire danger or when the number of fishermen using our property (free of charge) was so great we denied access to any additional sportsmen for that particular weekend. I feel that by opening most surface water in Montana to public access, many beautiful streams, such as the Sweet Grass, will become overcrowded. Such overcrowding will harm the resource in several ways. The fish population is being depleted faster than it is reproducing itself now - even with the number of fishermen being controlled. What will happen to the resource if the number of fishermen is left completely unchecked? What will happen to the ecosystem if a liberal definition of high water mark is adopted? If recreationists are allowed to use the flood plain they may be able to camp and picnic on my fields or worse yet in my backyard. The situation I just described was possibly extreme, but weren't the Supreme Court cases also extreme? As a conservation district super-

visor for over eight years, I like the definition of highwater mark used by the conservation districts to administer SB 310, the Natural Streambed and Land Preservation Act of 1975. I hope what ever version of a bill that comes out of this committee it has this definition of highwater mark.

One of the inherent problems with public access is the inability to control who uses the property. In such cases the person who abuses his rights (speaking from experience the percentage of this type of person is small) adversely affects the resource for all who want to enjoy it as well as those who depend on it for their livelihood. Strong littering and trespass laws would help protect our beautiful natural resources.

Members of the committee, seldom does an issue of such magnitude and importance come before the legislature. I urge you to carefully examine the facts and make your final decision in a manner that will strengthen private property rights, promote good landowner-sportsmen relations, and preserve and protect Montana's valuable natural resources. I urge you to kill H.B. 265.

Thank you.

SENATE JUDICIARY COMMIT
EXHIBIT NO. 45
DATE 03-08-85
BILL NO. H.B. 265

Testimony on H.B. 265

Mr. Chairman and members of the Committee,

My name is Steve Adler. I operate a guest ranch in Park County. I am a fly fisherman and a part member of Trout Unlimited.

I am opposing H.B. 265 as I believe it expands the 2 Supreme Court decisions and attempts to codify the 'taking' of private property rights.

With the help of H.B. 265 I will loose further control of my stream bed and banks. In addition to this loss I also lose the right to control public use. Consequently the quality fishing I now offer will ultimately be degraded.

This quality fishing has been the product of self-imposed catch and release rules that all our guests have complied with since the late 1950's

If the public is given open access to our streams then the future is of great concern. It is very doubtful that they will be inclined to respect our catch and release policies and my livelyhood will be at stake.

In my attempts to preserve our superior fishing I approached the dept. of Fish, Wildlife and Parks asking to have catch & release fishing made official policy.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 46
DATE 03 08 85
BILL NO. H.B. 265

Unfortunately they seem in no hurry to help me preserve our stream in its present condition.

Many of our guests are concerned that we will not be able to offer the quality fishing that we have had in the past. Some are suggesting that if our streams are to become the playground for all water related recreation then maybe there vacation dollars would be better spent elsewhere.

I am submitting two letters which appeared in Fly-Fisherman magazine as an example of some of the concerns that are being expressed by fishermen from other parts of the country.

In closing I would like to say that any bill that comes from the legislature must try to recognize the fact that there are streams in the State where the bed and banks are privately owned. Any bill that cannot address this basic concept should be looked at with suspicion.

I fully understand the situation the Supreme Court has forced on us but I respectfully submit that H.B. 265 is an attempt to eroded our rights beyond what the Courts intended.

Thank you.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 46
DATE 03-08-85
BILL NO. H.B. 265

FFM DEC 1984 Testimony: HB. 265

The Right To Float and Fish

THE ISSUE IS SETTLED. Fisherman and others have the right to float and fish boatable waters in Montana. So says the Montana Supreme Court in a recent decision reported in this issue of FLY FISHERMAN. That decision could be appealed in the U.S. Supreme Court, but a successful appeal is unlikely.

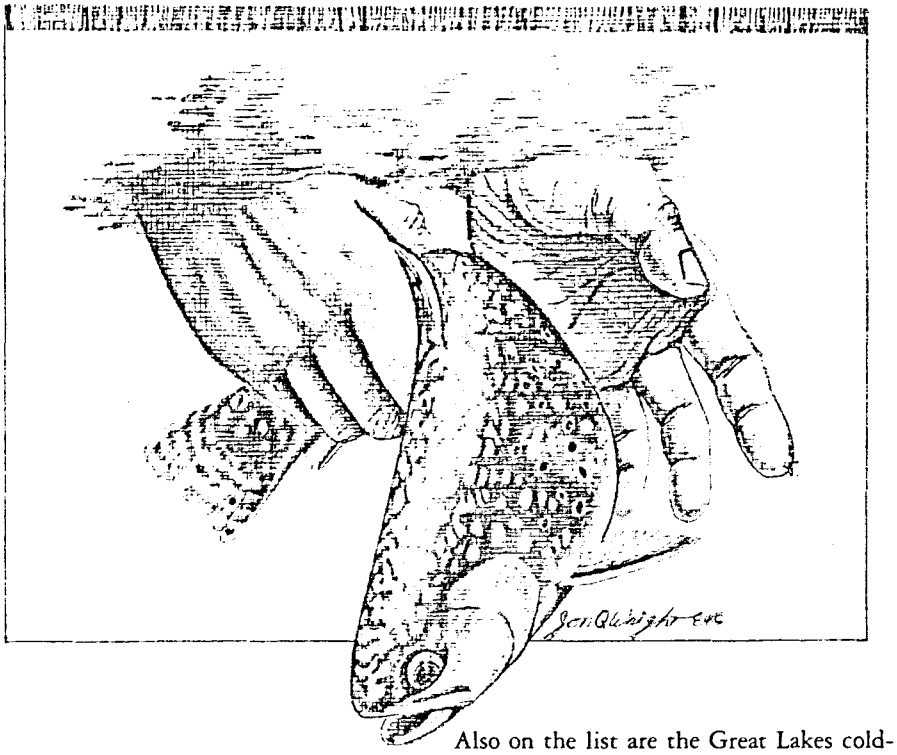
Public use of navigable water in the U.S. is as American as the Constitution. State after state has affirmed and re-affirmed the principle of law, and there is little likelihood that the American way will change. Nor is it likely that the Canadian opening of salmon rivers to the public will change either.

And the North American way of handling waters for the use of the public is a benefit to fishermen, despite some exceptions, and despite the contention by elitists that quality fishing can only exist on private waters.

Lawyers say that the original public use of waters in North America was a practical necessity: Rivers were the thoroughfares of commerce and travel in the wilderness; they were, in effect, the roads. Rivers that were navigable were part of the public domain. In most states today that principle of law maintains. It means that in most states fishermen may fish boatable waters otherwise inaccessible due to the rights of landowners.

There is more to the issue of private versus public ownership of the waters. Recent history has shown that public use of the waters may be its single best chance of salvation as quality trout water. The reason lies in the politics of water use. Fishermen, especially fly fishermen, comprise the only political force, albeit small, for conservation and preservation of quality trout waters. Their involvement comes at a time when projects threaten to take thousands of acre-feet of western water and when priceless North Coast rivers in northern California are being eyed jealously by southern California developers.

Rivers have few friends. But in the vanguard of those few are the fishermen. Their love for moving waters and the trout that thrive there is the very foundation of fly fishing itself. Initially in his youth, the fish bring the fisherman to the water and the beauty of the surroundings, the clean blue-ribbon waters and their trout, call him back.



To deny fishermen, especially fly fishermen, the use of waters is to deny the rivers their friends, the political allies who will fight destructive, ill-conceived water projects.

Does this mean that the day of the private trout club and private property is over? Each has its place. Closed private waters have been a fixture of American fishing since the beginning. But the vast majority of fishing in the U.S. is done on public waters, both stream and lake, and virtually all large-scale conservation and restoration projects are funded by the public and depend on public waters for their success.

The list of public-water conservation and restoration successes is long. On that list is the notably successful Yellowstone River cutthroat trout special catch-and-release management in Yellowstone Park. Also on the list are the Great Lakes cold-water fisheries restorations, the Columbia River salmon and steelhead maintenance projects, the Connecticut River Atlantic salmon restoration and the multi-billion-dollar clean-up projects under the Clean Waters Act that have made such rivers as the Susquehanna and the Connecticut fit once more for fishing, boating and swimming. All are publicly financed projects on publicly fishable waters. No such projects could have been sold to the Congress without the public's belief that the waters were worth saving, saving for the public's use of them.

Public fishing access to water is fundamental to the preservation of our waters and their fisheries. The Montana Supreme Court decision re-affirms that basic American way of doing things, a way that exists in few other countries of the world. We fly fishermen who travel and fish those Montana rivers, and who appreciate their rare quality, have a victory to celebrate.

JOHN RANDOLPH

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 46
DATE 03-08-85
BILL NO. H.B. 265

FFM MAR. 1985

Rebuttal

THE DECEMBER 1984 editorial "The Right To Float and Fish" (FFM, Vol. 16, No. 1) extolling the Montana Supreme Court decision to open virtually all of Montana's waters to the public for recreational use deserves comment.

This decision is not the boon to fishermen that the editorial contends. Conversely, it has the potential, over the next few years, of making much of the quality trout fishing, for which Montana is justly noted, a thing of the past.

To understand why this is the case requires a careful reading of the court's ruling in the Dearborn case (the more sweeping of the two decisions). The editorial quotes only selectively and loosely from this ruling to make its case. The impression is created that only rivers suitable for float fishing are now open. This is not true. All water which can be used for any sort of "recreational" activity is now legally open provided only that one does not gain access by trespassing over private property. This includes such things as swimming, canoeing, hunting, bird-watching, water-skiing and, presumably, even taking a jet boat upstream. None of these activities mixes very well with fly fishing. The ruling specifically makes wading legal...including wading upstream. Furthermore, if such "navigation" is difficult (between the poorly defined "high-water marks") it is now legal to "portage" around any obstacles (natural or man-made) over otherwise private property. It is only a matter of time until the word gets around and hordes of bait fishermen (who, as a class, are not noted for their conservation awareness) start walking up the fragile spring creeks, degrading the habitat and taking out their legal limits of "meat."

The editorial dismisses the issue of the rights of private owners (part of the "elitest" minority, obviously) without discussion. The quality fishing that can be found on many such "privately owned" streams is referred to as mere "contention." The fact remains that public fishing in Montana, as elsewhere, has, with but few exceptions, gone downhill over the years. Some of the best fishing to be found is on privately controlled water. Most of the owners will allow fishing if one asks permission. Such permission is refused on occasion to those unwilling to abide by limited kill rules, to those who litter or otherwise degrade the environment and to limit the fishing pressure. It can be argued that such access control is in large measure responsible for the quality fishing that these "private" waters still afford. For some of the water the owners have been charging a fee (and also spending money, time and effort to keep the water in first class condition). The court's decision leaves the question of access to places like Armstrong's and Nelson's spring creeks open to question. Do I have to pay or can I now just walk in from the Yellowstone river with my spinning rod and canned salmon eggs?

With these almost universal access rights, the owners will have little incentive to maintain the habitat and in this day of shrinking budgets, it is not likely that the state will be able to do this. They can't even handle the public waters to the degree that they would like. I have enjoyed a few weeks of good fishing in Montana each year for the past 16 years and have fished both public and private water. On no occasion have I run into a warden and have never been asked to show my license.

Tight Lines...

Unless the Montana legislature takes up this issue and corrects the court's overzealous excesses, it is likely that Montana's reputation for good fishing will deteriorate. The guide businesses that measure their success by their ability to get their clients a "wall" fish or a legal limit will do just fine for a short time while they exploit this new opportunity.

Tourism is not an inconsequential industry in Montana. Hundreds of motels and eating establishments can look forward to diminished business as the fishermen seek greener pastures. I spend a couple of thousand dollars each year going to Montana. When the fishing deteriorates too much, I can find better uses for the money. But, what will our children and grandchildren do? Take up mountain climbing and canoeing? Oh well, not to worry too much, they may never know how it was or how it could have been (unless someone tells them about it on TV) and won't miss it.

As with all rights and privileges there must be accompanying responsibility. Here we have the granting of sweeping rights to the recreationists with no concurrent action to insure commensurate responsibility. It is a sad commentary, true, that there are plenty of people who will rush in to exploit the situation...before someone else beats them to it! The reported jubilation over this "victory for sportsmen" is, I fear, premature. I hope I am wrong; but I feel far from jubilant.

D. Y. BARRER
Rockville, Maryland

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 46
DATE 03-08-85
BILL NO. H.B. 265

FFM MAY 1985

TIGHT LINES

New Right Is Wrong

I am disturbed by your recent endorsement of the Montana supreme court ruling. It is difficult to believe that a fly-fishing magazine could sink to such a low level of editorialism without at least vigorously tying the Court's decision to catch-and-release. You must realize that the court's decision may result in the gradual decline of the great wild trout fishery we know in Montana.

Isn't it a plain and simple fact that when wild trout water becomes more accessible to the general public, the sport for everyone suffers? Isn't it true that when floaters have access to big fish we waders can't reach during early season's high water, the trout become more vulnerable to meat fishermen? Those are hardly "elitist" concerns as you would describe them in your editorial.

Witness the Madison River. That river was closed for several years to give it a rest from floaters. A vigorously enforced catch-and-release program has begun to restore the Madison and Yellowstone Rivers, but Mother Nature can never be supplanted by any restoration program.

Witness the decline of the Bighorn River. That river was recently opened to the floaters you defend. Professional guides, who insist that their clients release fish, acknowledge there is already a decline in the size of fish being captured. Fishing pressure, coupled with this year's unfortunate Bighorn fish kill, may result in a further decline in the quality of fishing there.

Isn't it better, and less costly, to preserve wild trout habitats *before* restoration becomes necessary? When are we going to learn that simple fact? Why do we anglers always have to settle for less when there are so many examples of what can happen with unenlightened management of trout fisheries.

Your editorial seems to confuse public water conservation with a fundamental American right to hold property.

For instance, how will the court's decision apply to the three miles of Montana river I fish every year? The rancher owns both banks and pays taxes on the river bottom. He regulates the fishing to "flies only" and all rainbows under 20 inches must be released. It is the type of fragile water that could easily be destroyed in just one season by unprincipled floaters. Is it "the American way of doing things," as you insist, to permit floaters unbridled access to such fishing?

I hope that the Montana Department of Environmental Protection moves forward with a progressive form of tax incentives to prevent open land from falling into the hands of developers, private or governmental. That process, coupled with a further vigorous application of catch-and-release on all wild trout water will be the only method to preserve wild trout fishing for future generations.

The issue is not dead. There is a Sage Brush rebellion going on in Montana. I hope the court's decision is reversed and have no reason to celebrate with you your compliance with the special interests who have pushed "The Right to Float and Fish." I can only hold them in contempt of a basic sporting ethic: Respect landowner's rights.

ERWIN S. EDELMAN
Cornwall, Conn.

Regulatory powers belong to both state and federal governments. Catch-and-release fisheries management is conducted by the states (and the feds in Yellowstone Park) under regulatory powers. Fisheries management is a function of the state (and federal) wildlife agencies and has nothing to do with the constitutional rights questions dealt with by the Montana court. The Montana decision did deal directly with private property rights versus public access rights. And only a constitutional convention in Montana, not the Montana legislature, *can change the court decision.*

JOHN RANDOLPH, EDITOR

FFM MAY 1985

Tight Lines...

rather than pushing in one direction only.

Meanwhile, let's get with the program. I don't intend to burn candles at night or go back to the horse and buggy.

JIM JONES
Anaheim, Calif.

Whose Rights?

I was pleased to note the rebuttal presented by D.Y. Barrer of Rockville, Maryland to your December 1984 editorial. As an out-of-state visitor to our trout streams, he has made a better assessment of the effects of the Montana supreme court ruling to open all trout streams for recreational use than have many natives.

Perhaps the court's decision was meant to force the state legislature into action and we had better hope that it does see fit to do so. It is now common talk in coffee shops and tackle shops that "such and so of a landowner will not be able to keep me out now!" This attitude exists even in cases where the landowner interest is purely an effort to protect the resources that fly fishermen cherish.

An aspect of this decision that no one has addressed is how cattlemen will control livestock on landholdings crossing creek and river bottoms where the erection of barricades or fences, which is now forbidden, would interfere with whatever boats the so called recreationists want to put up or down that same stream? Who will pay for the special devices needed? It appears to this writer that all of us who use and enjoy wildlife and fishing are failing to see the contribution made by private landowners to these resources. Like Barrer, I am far from jubilant. All sportsmen better think this matter through carefully and support legislative efforts to overturn this decision.

ART AYLESWORTH
Ronan, Montana

The "legislative efforts" you refer to are of no legal significance in this case. Since this is a constitutional issue, the state legislature can do nothing to affect a change. Only a state constitutional congress has the legal power to amend the state constitution. THE EDITORS

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 46
DATE 03-08-85
BILL NO. H.B. 265

To the Senate Judiciary Committee, Montana Legislature, Helena, Mt.

I am Byron Grosfield from Big Timber, Mt. For 50 years I lived on ranches. The following 25 have been spent in a small town of about 1700 population. I've fished and hunted all my life and have canoed about 75 miles of the Yellowstone, 165 miles of the Missouri (in Montana) and paddled the headwaters of the Mississippi as well as a lake in Canada.

Because of these contacts and experiences I feel that I am well qualified to talk about the difference of opinions between the land owner and the recreationist alike.

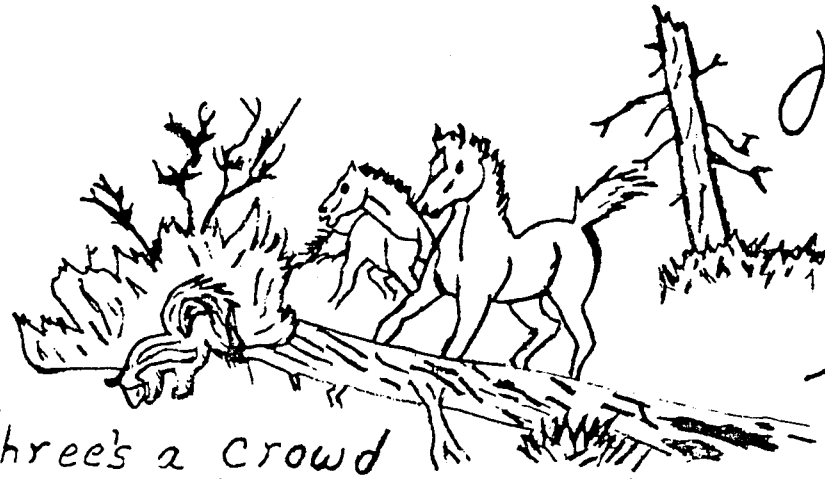
To date serious problems have been few and far between. However, if House Bill 265 is passed at its present reading, the ensuing complications will result in distrust, lack of cooperation, plus needless expense for both concerned parties.

If the bill is passed as it now stands, it will set a dangerous precedent--a precedent that can inhibit or prohibit the freedom of citizens everywhere. There is no doubt but that the rights of today's land owners would not be questioned if the Indians' rights to the bed of the Big Horn River had not been taken from them.

I support House Bill 265 if amended by Senate Bills 418, 421, and 224. Failing this, I heartily endorse killing this same bill in order that a greater number of people in the State of Montana can become more informed and knowledgeable by the next legislative session. It is of the utmost importance that a bill with such far-reaching consequences receive thoughtful and deliberate consideration. We need a bill that is palatable for the land owner and also reasonable for the recreationist.

Byron Grosfield

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 47
DATE 03 08 85
BILL NO. H.B. 265



The Hawley Mountain Guest Ranch

Three's a crowd

March 7/85

Senate Judiciary Committee;

I am opposing H.B. 265 as it will put me out of business. As a guest rancher most of our clients come to a private ranch in Montana to enjoy our great outdoors with some privacy. Once we lose the right to control that privacy; those of us in this business and the state of Montana will lose the economic benefits that the clients of such businesses have been bringing into the state.

As far as operating a ranch in general there are challenges enough so that one of the only rewards that keeps a rancher from giving up is the pride the rancher has in that land and his ability to have control over the land in the best intrest of his livelihood.

H.B. 265 will take all this away and is a setback for the state of Montana.

In place of H.B 265 I am proposing the four small bills of SB 418, SB 421, SB 424, and SB 435.

Sincerely,
Robert W. Jarrett

Robert W. Jarrett
Box 4, McLeod, MT.
59052

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 48
DATE 03 08 85
BILL NO. H.B. 265

NAME: RALPH M. HOLMAN DATE: 3/8/85

ADDRESS: THE "33" RANCH - MCLEOD, MONT. 59052

PHONE: 932-6338, 932-5928, 932-6588

REPRESENTING WHOM? SELF.

APPEARING ON WHICH PROPOSAL: H.B. 265

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

COMMENTS: Testimony Copies attached.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 49
DATE 03 08 85
BILL NO. H.B. 265

March 7, 1985

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 49
DATE 03-08-85
BILL NO. H.B. 265

Senator Joe Mazurek
Chairman
Senate Judiciary Committee
State Capitol
Helena, Montana 59620

Re: House Bill 265

Dear Chairman:

Back in the 70's a House Bill which stated "Stand in the middle of a stream and as far as the eye can see shall be open to public recreation" met a hard and fast defeat. H.B. 265 is but another attempt to accomplish the same results. The first step to obtain free and uncontrolled use of private property. I have heard a significant number of recreationists state; "We will go after the wildlife next," "Get as much as we can this time, the rest will follow," "We want unrestricted hunting too," etc. etc. If successful, God help the rancher-farmer.

H.B. 265 will open a Montana playground, not only to resident, it gives the key to our land to well over 200 million U. S. residents to indulge in free, unrestricted and unlimited water related recreation. Thousands of miles of additional rivers, creeks, trickles of water and even dry stream beds and thousands of miles of private property land corridors will become as public as a Chicago city street resulting in a multitude of landowner problems.

Most disheartening is the taking of private property from one and giving its use to another without due process and copensation, "a shocking reality."

Landowners will lose the right to control land he owns and the right to protect the stream, bank and corridor resource.

Taking will result in an overall loss of land value estimated by many to amount to between ten and fifty per cent and amounting to millions and quite possibly hundreds of millions of dollars of tax value property. "Streamside property is the most valuable" A severe blow to an already depressed agriculture economy.

Loss of land value will severely restrict, and possibly preclude, the ability of the farmer-rancher to obtain operating capitol loans. Will tax rolls reflect this depreciation of land value? Landowners will surely be entitled to and rightfully request a reduction of land taxes, another blow to our economy.

Streamside property now considered to be very valuable, will become a liability. What incentive will remain to own land that has become a detriment? All at a time when Montana searches desperately for revenue.

H.B. 265 in essence implies that landowners do not have the ability to manage and control and proposes to turn management over to the Department of Fish, Wildlife and Parks. Some landowners apparently agree and they should do so. The Department have for some time been soliciting landowners to participate in such a program currently in effect and I suggest those who desire this program contact the Department for voluntary turn over for public use. Try it on a two year trial basis. They don't need H.B. 265. Let those of us who have been gaurdians of the resource remain in control. We don't need H.B. 265 either.

The general public currently have free use of well over 30 million acres of public land and its waters. (well over 1/3 of Montana) H.B. 265 expands this decision to include thousands of miles of stream beds, banks and endless corridors through private property. A trickle of water a foot wide, running for ten miles through a ranch and choked with brush a half mile wide, even to the point of making the water inaccessible, will become a one half mile wide corridor for hunting birds, waterfoul, gophers and possibly Big game in addition to dragging a boat and providing access to a neighbors property or public lands. The brush that chokes a creek is a definite barrier as long as the creek or its bed is wide enough to put your foot in.

Free access sounds beautiful to some urban dwellers who have always wanted to fish that creek on Joe's place; the problem is that it also sounds good to California and like state residents where the resource was depleted years ago and the vast majority of inland (what little is left) is of planted fish. When the resident heads for his favorite hole on Joe's place there could well be several hundred ahead of him. If one thousand people decide to invade Joe's property for fishing, hunting or making mud balls. Men, women, children, cats and dogs, there is no protection for Joe who has lost control except for paying taxes and liability.

How long will it be before trout fingerlings that had a sanctuary on Joe's place, will be replaced by planted trout? I had a taste of planted streams during occasional visits to a construction job in California years ago. "Quite a comedy" No fish and the streams were jammed, the Department of Fish and Game under public pressure would plant streams, trucks would be followed to planting sites and dump fish in while a horde of adults and children were filling their sacks, a simple act with artificially fed trout. Two days later no fish. Will that be our tomorrow? Is Montana being taken over by Trout Unlimited, Audubon and recreationists from states where the resources were exploited to near elimination years ago?

Where will funding come from to implement the enormous additional burden placed on the Department of Fish, Wildlife and Parks and law enforcement agencies to enforce tresspass laws, to answer calls for help from landowners, to file charges, to plant hatchery trout, to build and operate hatcheries, to expand administrative personnel and office buildings, to employ additional wardens? The number of Game wardens are severely limited at this time and I have heard several complain of being severely restricted on time and mileage allowance. The resident of course will be faced with reduced limits, higher license fees (strongly opposed) possible drawings, etc. Remember all water related play and recreation (except fishing and hunting) is free, no license required, no identification and only a slight penalty, if any, for trespass.

There is little in the liability section to feel secure about. I have witnessed lawsuits where misconduct and negligence was successfully claimed because the owner of equipment, material or an excavation should have known that a child may be tempted to play on the equipment etc. and should have properly precluded entry to the area. If you are required to leave a tractor near a stream corridor or in it because of a breakdown and a child climbs on it and gets hurt or a child goes to pet a calf, or other animal, and is maimed or killed by the mother of such, you may well be liable and the recreationist could easily wind up becoming owner of your land. You may be required to fence around the corridor.

If the state wants our land for public use, let the state use due process, let the state supply landowner liability insurance to protect the landowner from the recreationist who will be using camp fires that could easily burn you out.

If the Supreme Court decision is ambiguous let them clarify it. It is their decision We can live with it until clarified, why can't the recreationist? Ask yourself why would the recreationist and the Coalition work so hard to get H.B. 265 passed if there wasn't enormous gain in it for them?

During the Coalition's lawsuit they were often quoted as stating they only wanted use of floatable streams, how quickly desires change. On or about January 26, 1985, Jerry Manley, President and Tom Bugni, Vice President and Secretary Treasurer of the Coalition for Stream Access sent out a letter threatening that if Big Game hunting is deleted from H.B. 265 the Coalition would have the bill killed. The March 1, 1985 issue of the Billings Gazette states the group have reconsidered its threat and quotes Tom Bugni; "We would not go so far as to kill the bill because of that issue" "We feel we have got too much to lose " unquote. That ladies and gentlemen proves our case that H.B. 265 gives away far more than the Supreme Court decision.

Ralph Holman, landowner, rancher
McLeod, Montana

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

NAME: BILL PHILLIPS DATE: 3-8-85

ADDRESS: 217 S. 8th BOZEMAN MT

PHONE: OFFICE 586-5405 HOME 587-7506

REPRESENTING WHOM? SELF

APPEARING ON WHICH PROPOSAL: HB 265

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? # 265

COMMENT: ALLOWING THE PUBLIC TO HAVE ACCESS TO MOST ALL WATERWAYS FOR GENERAL USE WITHOUT LANDOWNER PERMISSION GOES TOO FAR AND APPEARS TO BE LAND REFORM.

ALLOWING THE PUBLIC TO USE A BOAT IN A NAVIGABLE STREAM IS FAIR AND JUST. PLEASE, LETS NOT GO TOO FAR ON THIS ISSUE. PLEASE DON'T PASS # 235

#418, 421, 424, 435 WILL DO THE JOB FINE.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 50
DATE 03 08 85
BILL NO. H.B. 265

We oppose HB265 for the following reasons:

The landowner will no longer have control of his land which has been taken without compensation. He will still have to pay taxes on the stream beds.

He cannot police his property. He, for the most part, has kept his land free of garbage and has been concerned for the beauty of the land. No other help is evident for patroling streams.

HB265 goes far beyond the Supreme Court ruling which allows public access to navigable streams. It was not intended to allow public use of small, fragile streams.

If passed, this bill will make it necessary for landowners to fence the stream banks to indicate to the public the high water marks.

If the state would condemn this land, then the landowner would be given something for his land and also relieved of responsibility and taxes on it. As the bill reads, the land will be taken from him by force.

Jean Parsons
Rupert Parsons

Box 85
Cascade, MT 59421

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 51
DATE 03 08 85
BILL NO. H.B. 265

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

NAME: Phil Rostad DATE: 3/8/85

ADDRESS: Martinsdale Mt

PHONE: 572-3351

REPRESENTING WHOM? Meagher Co Preservation Assn

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT: I oppose HB 265 and support in Committee bill SB 414, 421, and 424 along with Senator Dolts Bill 435, because I do not want the legislature to create access Corridors for the public on every dry streambed in the State.

Further I dont believe the public has a right to free passage around homes.

For the record I am a member of the Montana Stockgrowers Assn.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 52
DATE 03 08 85
BILL NO. H.B. 265

SENATE JUDICIARY COMMITT
EXHIBIT NO. 53
DATE 03 08 85
BILL NO. H.B. 265

TESTIMONY before the Senate Judiciary Committee, March 8, 1985, Helena, Montana, by Lorents Grosfield, cattle rancher from Big Timber, Montana.

Mr. Chairman, Members of the Committee:

I appear here today in opposition to HB 265 primarily because I believe that it is not a recreational access bill, but a land reform bill. An attempt has been made in this bill to greatly expand two specific Montana Supreme Court decisions involving two specific fact scenarios on two specific stream segments.

On the afternoon of December 7, 1984, in a presentation on the stream access issue to the Water Forum held here in Helena primarily for the benefit of incoming legislators, Chief Justice Frank Haswell made the following statement: "Don't overanalyze the cases out of the context of the specific facts."

In HB 265, we see reference to all-terrain vehicles, big game hunting, other hunting, duck blinds and other permanent structures, overnight camping, and non-water related pleasure activities. While these activities may be addressed differently on Class 1 and Class 2 waters, I submit to you that none of them were in the "context of the specific facts" of either of the cases.

In HB 265, we see reference to required means of portage, easements that are to be donated and constructed at the expense of landowners, as required by Conservation Districts. This is completely out of the "context of the specific facts" of the cases. The Court said the public could portage around barriers "in the least intrusive manner possible, avoiding damage to the adjacent owner's property and his rights". That is substantially different from saying that landowners must provide and pay for portage means. One wonders how requiring a landowner to provide portage means at his own expense can be compatible with a "least intrusive manner", especially one that "avoids damage to the adjacent owner's property"--- is not a man's pocketbook, property?

In HB 265, on page 2, lines 9-18, we see Class 1 waters defined as including waters that are capable of supporting commercial activities as defined by "published judicial opinion" or "within the meaning of the federal navigability test". Which federal navigability test, the test for title or the test for commerce? The test for commerce has been used in the federal Clean Water Act to involve all waters

of the United States for purposes of controlling pollution. This has been supported by "published judicial opinion". I have a list of 1304 streams in Montana east of the Continental Divide that meet this criterion for purposes of Army Corps of Engineers jurisdiction for purposes of commerce? One wonders what the point is of defining Class 2 streams--- are there any? I submit that it would be a short list. The Court repeatedly talked about waters "capable of recreational use". Obviously the Justices felt there was a third class of waters <u>not</u> so capable. At any rate, they were only talking about two specific stream segments that did meet the test of being "capable of recreational use".

Judge Haswell said, "Don't overanalyze the cases out of the context of the specific facts." Why should the Legislature go substantially beyond the Court in deteriorating the rights of property owners along streams, as it is being asked to do in HB 265?

MARCH 8, 1985

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

(This Testimony is still pertinent.)

Part 1: STREAM ACCESS--- A Landowner's Viewpoint Pages 1-5

Part 2: THE PUBLIC TRUST DOCTRINE Pages 6-8

Part 3: THE BILLS: HB 16, HB 265, and HB 275 Pages 9-end

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 53
DATE 03-08-85
BILL NO. H.B. 265

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

STREAM ACCESS---

A Landowners Viewpoint

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

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

SENATE JUDICIARY COMMITTE
EXHIBIT NO. 53
DATE 03-08-85
BILL NO. H.B. 265

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

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

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

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

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

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

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

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

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

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

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

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

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

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 53
DATE 03-08-85
BILL NO. H.B. 265

THE PUBLIC TRUST DOCTRINE

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

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

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

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

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

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

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

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. SEN Jry 53
DATE Cattle 03-08-85
BILL NO. H.B 965

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

THE BILLS: HB16, HB 265, and HB 275

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

I don't think anyone can deny that landowners across Montana have lost a great deal in the Supreme Court stream access decisions, decisions shich dramatically expanded the determinations of two specific cases on two specific stream segments to cover all Montana landowners. It's hard to argue that these decisions were no policy determinations--- policy that affects all Montana. It needs to be noted that in the past it has been the responsibility of the Legislature and not of the courts to determine state policy.

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

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

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

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

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

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

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

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

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

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

2. PORTAGE AND BARRIERS

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

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

3. PORTAGE ROUTES

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

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

4. MANAGEMENT

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

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

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

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

5. LIABILITY

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

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

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

6. PRESCRIPTIVE EASEMENT

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

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

7. TITLE TO LANDS UNDER STREAMS

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

fishermen on navigable streams.

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

8. ORDINARY HIGH WATER MARK

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

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

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

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

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

NAME: CHARLES W. D'AUTREMONT DATE: 8 MAR 85

ADDRESS: TORE CREEK RANCH, BOX 30 ALDER, MT 59710

PHONE: (406) 842-5561

REPRESENTING WHOM? SELF

APPEARING ON WHICH PROPOSAL: H.B. 265

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

COMMENTS: MY PROPERTY'S VALUE IS DIRECTLY PROPORTIONAL TO ITS PRIVATE RIVER RIGHTS. WITHOUT SAME THE VALUE OF THE LAND IS NEGLIGABLE.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 54
DATE 03 08 85
BILL NO. H.B. 265

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 54
DATE 03-08-85
BILL NO. H.B. 265

d'

In 1978, I purchased 275 Acres of land in Madison County, MT, located 25 miles South of Alder, within the Boundries of which lies 1½ miles of the Ruby River.

I purchased this land, at such great remove from the amenities of civilization, such as are enjoyed by the majority in this country, because I sought for myself and my family: 1. Privacy, 2. Natural Beauty, 3. A Patrimony for my children, in the form of the above, as well as a location for them in which they could enjoy a sense of continuity (an exceedingly scarce resource in this country), and 4. A River to manage, conserve and enjoy with family and friends.

In searching for and obtaining this land, I expended considerable time, effort and money because I realized how rare those things I sought were becoming, not only in this country, but in the world.

My awareness was not academic, rather based on first hand experience. At the age of fourteen, I found my first employment as a fishing guide on the Brule River of Wisconsin. In subsequent years, I continued guiding and after graduate studies in Water Resource Management at the University of Wisconsin, I established a commercial river running company, operating float trips on the Green, the Colorado, and the San Juan Rivers of Utah, and the Snake River in Wyoming. During this period I operated under permits from the B.L.M., the Forest Service, the National Park Service and the States of Utah and Wyoming. Between periods of commercial guiding, I have fished and run rivers in Canada, the U.S., Mexico and South America.

During a lifetime of guiding, fishing and river running, I have observed that the public, without ownership responsibilities, and even under the tightest of government control (such as in the Grand Canyon), rarely, if ever, approach the river resource with the same concern as the private landowner.

EXHIBIT NO. 54
DATE 03-08-85
BILL NO. H.B. 265

IN POINT OF FACT, MUCH OF MY TIME ON RIVER HAS BEEN SPENT ACQUIRING A LARGE, IF TEMPORARY, COLLECTION OF BEER CANS, TOILET PAPER, TAMPAX, DISPOSABLE DIAPERS AND OTHER GARBAGE. I HAVE ALSO SPENT CONSIDERABLE TIME TRYING TO ERADICATE SPRAY PAINTER AND CARVED INITIALS AND NAMES FROM PLACES OF SUCH BEAUTY THAT THEY SHOULD HAVE BEEN NATIONAL SHRINES.

ADDITIONALLY, I HAVE OBSERVED THAT WHERE THE PUBLIC HAS BEEN ENCOURAGED BY STATE AGENCIES TO FLOAT THROUGH PRIVATE LAND, THAT LAND INVARIABLY SUFFERS. I HAVE SEEN SCREEN HOUSES AND COOK SHEDS DESTROYED, SHELTERED SPRINGS RUINED, ARTIFACTS AND HISTORICAL RELICS STOLEN.

ON PUBLIC LAND I HAVE WATCHED THE DEFACEMENT AND DESTRUCTION OF ARCHEOLOGICAL RUINS, SUPPOSEDLY UNDER THE PROTECTION OF THE FEDERAL GOVERNMENT.

IN TRUTH, WHEN EVERYONE HAS FREE ACCESS TO PROPERTY, NO ONE WILL ASSUME THE RESPONSIBILITY FOR SAME.

THE BEST EXPLANATION OF THIS IS FOUND IN BARRY COMMONER'S ARTICLE, "THE TRAGEDY OF THE COMMONS."

HOUSE BILL 265 POSES A DIRECT THREAT NOT ONLY TO THE ENVIRONMENT IN GENERAL, BUT TO MY ENVIRONMENT AND THEREFORE MY CONTINUED RESIDENCE IN MONTANA.

IF H.B. 265 PASSES THE SENATE, MY PRIVACY WILL BE DESTROYED, IN AS MUCH AS THE RIVER FLOWS THROUGH MY FRONT YARD.

I WILL SUFFER A DIRECT LOSS OF INCOME, SINCE THE PUBLIC, IN VERY LIMITED NUMBERS, IS PERMITTED TO FISH ON MY PROPERTY FOR A MODEST FEE.* (FACT! UNDER MY MANAGEMENT FISHING QUALITY HAS IMPROVED ON THE STREAM TO SUCH AN EXTENT THAT PEOPLE BOOK RESERVATIONS MONTHS IN ADVANCE FOR THE PRIVILAGE OF CATCH AND RELEASE FLY FISHING)

THE INVESTMENT VALUE OF MY LAND WILL PLUNGE, AS THE PROPERTY IS ENTIRELY RECREATIONAL. IT HAS NOT BEEN AN ECONOMICALLY SELF SUFFICIENT AGRICULTURAL UNIT SINCE THE 1930's. ITS PRIMARY VALUE IS AS A PRIVATE FISHERY.

*

SENATE JUDICIARY COMMITTEE
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ENVIRONMENTALLY, I WILL SUFFER, AS BOTH THE STREAM BANK AND THE FISHERY WILL BE DEGRADED. IT IS PRESUMPTUOUS OF THE MONTANA FISH AND GAME DEPARTMENT TO SEEK MORE LAND AND ACCESS WHEN THEIR LIMITED FINANCES AND MANPOWER ALREADY PRECLUDE ADEQUATE CONTROL OF LANDS AND WATERS CURRENTLY MANAGED.

ULTIMATELY, PASSAGE OF H.B. 265 WILL ROB MY CHILDREN OF THE VERY CONTINUITY I SOUGHT FOR THEM, FOR IF PASSED I SHALL PROMPTLY SELL THE LAND, ACCEPTING WHATEVER LOSS, AND LEAVE THE STATE. ALL CONSEQUENCES TO MY CHILDREN, I WILL LAY ON THE HEADS OF THOSE RESPONSIBLE.

LEGALLY, I BELIEVE H.B. 265 TO BE ON VERY SHAKY GROUND, IN THAT IT SEEKS TO TAKE LAND WITHOUT JUST COMPENSATION. ADDITIONALLY IT SETS DANGEROUS PRECEDENT BY PLACING LUXURY OVER BASIC CONSTITUTIONAL SAFE GUARDS, FOR INDEED RECREATION IS A LUXURY, WHEREAS PRIVATE PROPERTY HAS BEEN CONSTITUTIONALLY PROTECTED SINCE THE BIRTH OF THIS COUNTRY.

FINALLY, H.B. 265 IS UNNECESSARY AS WELL AS ENVIRONMENTALLY UNSOUND, IN AS MUCH AS EXTENSIVE PUBLIC LAND AND ACCESS ALREADY EXISTS, BEYOND THE MANAGEMENT CAPABILITIES OF THE RESPONSIBLE AGENCIES. (THE MANAGEMENT SHORTAGE WILL BE BORN OUT BY ANY HONEST AGENCY EMPLOYEE ACTIVELY INVOLVED IN THE FIELD.)

GOVERNMENT'S OBLIGATION IS NOT ONLY TO SEEK THE GREATEST GOOD FOR THE GREATEST NUMBER, BUT ALSO TO PROTECT THE RIGHTS OF MINORITIES. THE LATTER MAY BE MORE IMPORTANT FOR ULTIMATELY WE ARE ALL MINORITIES.

I OPPOSE PASSAGE OF H.B. 265 AND SUPPORT S.B.'s 418, 421, 424 + 43

RESPECTFULLY,

CHARLES W. d'AUTREMONT
JOBE CREEK RANCH, BOX 30, ALDER, MT 59710

NAME: Bud Pile DATE: 8 March 85

ADDRESS: Grey Cliff, Mt.

PHONE: 932-6595

REPRESENTING WHOM? Ranchers

APPEARING ON WHICH PROPOSAL: H.B. 265

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

COMMENTS: I am very opposed to this bill- it expands the Supreme Court ruling by definition of surface water & portages. The four small bills you have already passed accomplish our needs much better.

Thank you

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 55
DATE 03 08 85
BILL NO. H.B. 265

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

NAME: Mrs. Carl Allen DATE: 3/8/85

ADDRESS: FA Ranch Box 868 Livingston, Mt. 59047

PHONE: 333-4315

REPRESENTING WHOM? Self

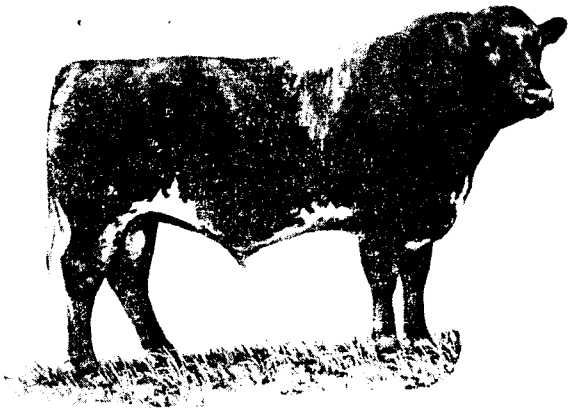
APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT: attached testimony

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 56
DATE 03 08 85
BILL NO. H.B. 265



FA RANCH

BOX 868 • LIVINGSTON, MONTANA 59047

SENATE JUDICIARY COMMITTE
EXHIBIT NO. 56
DATE 03-08-85
BILL NO. H.B. 265

HB 265

Mr. Chairman, members of the Committee -- I am Mrs. Arch Allen of Livingston speaking for myself and for my husband. We have a mountain valley ranch with a stream running down the middle of it. The land is a patented homestead from the United States Government, dated 1892, just three years after Montana became a state. The stream bed and banks are included in the metes and bounds survey.

In 1977 this stream , Mill Creek, was determined non-navigable by the Army Corps of Engineers. The above criteria would indicate that we are secure in our property rights of the land beneath the water as well as adjacent to it.

In the 43rd Legislative Assembly in January 1973, the first threat to privately held land with water flowing over it became areality in HB 133 "An act to establish a statewide System for Designation and Management of Wild, Scenic and Recreational Waterways." This reserved an easement of $\frac{1}{4}$ mile from the bank on each side of the river and its tributaries.

The 44th Legislature in 1975 introduced HB 59, "An Act authorizing the Board of Natural Resources and Conservation to administer a system of wild, scenic, and recreational river areas". This bill was to establish recreational river areas (including tributaries) of any water course in the State with

more

adjacent lands, which possess water conservation, scenic, fish, wildlife, historic, or outdoor recreation values which should be preserved. It did not include any lands more than 1,000 ft. from normal water lines of the water course. It provided for Federal assistance to acquire lands andscenic easements.

And now in 1985 we have HB 265 in the 49th Legislature, a far more sophisticated detailed piece of legislation but with the same determination "Private Property Is A Public Resource." "All surface waters (the water body, its bed and its banks) that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters." There is no mention of the taking of taking private property for public use and just compensation as there was in the previousbills. This is a bold land grab.

The water belongs to the people. The Montana Constitution so states.

MCA Section 70-16-201 provides: "Except where the grant under which 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."

HB 265 draws up guide lines and trys to clarify the Supreme Court decisions on the Curran and Hildreth cases.

The problem is with the Supreme Court decisions if left intact by the Legislative Assembly.

This action by the Supreme Court destroys the checks and balances of our form of government. These decisions

ignore Article 5 and Article 14 of the United States constitution, the Montana Code of Laws and have rendered decisions that make one man's pleasure an economic hardship on another by destroying land values.

I have spoken against HB 265 because to accept it is to endorse and codify into law the Supreme Court decisions.

Thank you.

Mrs. Archie Allen

TESTIMONY RE HOUSE BILL 265

I represent the Boulder Valley Association, an affiliate of the agriculturally based Northern Plains Resource Council.

We are opposed to HB 265, and recommend that it be killed.

We are not opposed to floating on the larger, historically used rivers in Monana.

The definition of "high water mark" in HB 265 is much too broad and vague. We feel the definition in Senate Bill 418 should be used.

We are particularly upset about the inclusion of the rights to portage around natural barriers because this right would vastly increase the recreational capabilities of most streams in the state. This portage provision expands the permissiveness of the Montana Supreme Court decisions. By portaging through privately owned lands the public is effectively gaining an easement through private property. My dictionary defines easement as:

> "an interest in land owned by another that entitles its holder to a specific limited use or enjoyment".

Furthermore, Section 70-16-201, M.C.A., provides:

> "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."

If a portage route is requested around an artificial barrier by either a landowner or a member of the recreating public, it is my understanding that the landowner has to pay the cost of establishing the portage route. This would mean the landowner would not only have to provide a portage route across his property above the high water mark, but the landowner would also have the burden of the portage cost. Who pays if the artificial barrier is a bridge on a county road, a state highway, or an irrigation diversion structure providing water for an adjacent land owner?

We support Senate Bill 424 providing that "a prescriptive easement cannot be acquired through use of land or water for recreational purposes."

Recreation on private property should be granted or denied by the property owner, and if granted, as a privilege to the recreationist rather than a right. We strongly support Senate Bill 435.

Boulder Valley Association also strongly supports Senate Bill 421 restricting the "liability of landowner or tenant during recreational use of waters or land by (the) public."

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 57
DATE 03 08 85
BILL NO. H.B. 265

Respectfully submitted

Sharon Welin

Sharon Welin

We will support amendments proposed by Stillwater Protective Assoc. will [illegible] amendments

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

Mrs Bill Langford

NAME: Joan B LANGford DATE: 3-8-85

ADDRESS: Redpoint, Mont

PHONE: 326-2171

REPRESENTING WHOM? Rancher Delegation 50 - Redpoint Mont

APPEARING ON WHICH PROPOSAL: H.B 265

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

COMMENT: We oppose House Bill 265

House Bill 265 is made out for Public Recreationist rights and the rights of the landowner are infringed upon ~~thereof~~.

Farmers & Ranchers should have more to say in regard to legislation that affects them so much, their ammi & taxes are vital to our state Montana is an Agriculture State and Agriculture its should be protected.

We do not feel that we should be the liability & responsibility of unlimited access to our property

All landowners that 2 lots 20 acres 5000 acres should be concerned about H.B 265 ~~don't you feel that you~~ They should be able to know - who is on ~~the~~ their property and regulate the happenings because ~~they~~ their are held responsible -

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

~~Senate Bill 310 defeated High water mark support~~

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 58
DATE 03 08 85
BILL NO H.B. 265

NAME: [illegible] DATE: March 4

ADDRESS: Bozeman

PHONE: 587-3554

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS:

Opposed to the use of Trust
1. To Compromise a Tax Commitment might
2. To Participate in Tax Shelter
Investments
3. Mandate to attorneys in Trust to seek tax
savings rather than investment
Purpose of Trust all Shares

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 59
DATE 03 08 85
BILL NO. H.B. 265

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

NAME: John Willard DATE: 3/8/85

ADDRESS: 3119 Country Club Circle, Billings, MT 59102

PHONE: (406) 259-1966

REPRESENTING WHOM? Self as Commissioner Clerk County Bank Owned

APPEARING ON WHICH PROPOSAL: HB 265 SB 418, 421, 424, 435

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

COMMENT: oppose HB 265 in present form.
Support principles of Senate Bills
my suggestion with HB 265

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 60
DATE 03 08 85
BILL NO. H.B. 265

NAME: Robert H. Burns DATE: _____

ADDRESS: Big Timber

PHONE: 932-4150

REPRESENTING WHOM? _____

APPEARING ON WHICH PROPOSAL: 265

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

COMMENTS: Cattle rancher in Sweet Grass
Co. Ranch Park Co.
My ranch is compromising the commutation
in taking property without just
compensation.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 61
DATE 03 08 85
BILL NO. H.B. 265

NAME: R.E. SAUNDERS DATE: 3/8/85

ADDRESS: Box 425 White Sulphur Springs

PHONE: 547-3590

REPRESENTING WHOM? Self + Meagher Co Preservation Assn

APPEARING ON WHICH PROPOSAL: 265 H.B.

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

COMMENTS: Summary:

We oppose bill in its present form. Sections of the bill granting rights to the stream bed between high and low water marks are in violation of 70-16-201 of the Code and article II Section 29 of the State Constitution, and not consistent with the Supreme Court rulings.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 62
DATE 03 08 85
BILL NO. H.B. 265

March 6, 1985

House Bill 265

This bill presents substantial problems as it is now written. It defines "surface water" for the purpose of public access as "The Natural Water Body, its bed, and its banks up to the high-water mark. Nowhere does it state that there must be water on the stream bed for purpose of public access. Thus, the bill goes much further than the Supreme Court decisions in the Curran and Hildreth cases, which state the public right is to use the "Surface Waters" up to the high water mark, and "That the public's right to use the State-owned waters is restricted to the area between the high water marks". Obviously, there must be water present in order to exercise any right to the water.

The Montana Code, 70-16-201, states: "Owners of land bounded by water except where grant under which the land is held indicated 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 the low water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream".

Sections of this bill which grant rights to recreationists for use of stream beds between the high and low water marks, including portage routes, when that portion of the stream bed is dry, are unconstitutional.

The Montana state Constitution, Article II, Section 29, states: "Private property shall not be taken or damaged for the public use without just compensation to the full extent of the loss having been first made or paid into court for the owner...".

We believe that the violations of 70-16-201 of the Code and the Montana State Constitution must be eliminated from this bill.

Additionally, the following change is suggested: Page 2, line 20, after the word "waters", add: "and contain at all times sufficient water to support fish life".

Meagher County Preservation Association

R. E. Saunders

R. E. Saunders
White Sulphur Springs

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 62
DATE 03-08-85
BILL NO. H.B. 265

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

NAME: CHARLES HOWE DATE: 3/8/85

ADDRESS: 8360 Springhill Comm. RD. Belgrade, MT.

PHONE: 586-8884

REPRESENTING WHOM? SELF

APPEARING ON WHICH PROPOSAL: SENATE HEARING HB 265

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

COMMENT: The economic impacts of this legislation would be disastrous to a state faced with shrinking economies and budgets. The costs of implementation by Fish, Wildlife and Parks would be an incredible additional expense to that department in a bi-enium in which the governor has asked the state to lower its departmental budgets by 2%.

The impacts of lost productivity, profits and state sales receipts on agriculture's behalf would lower available budgets even further - Adversely affecting all of Montana's citizens adversely.

HB 265 in its present form does not consider the damages that would result to this state's economy.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 63
DATE 03 08 85
BILL NO. H.B. 265

March 8, 1985

Senate Judiciary Committee
Public Hearing on H.B. 265
State Capitol
Helena, Montana

Mr. Chairman and Members of the Committee:

For the record, I am Charles Howe from Gallatin County, Montana. I am a rancher and a business man in Montana and am here to speak in defense of Agriculture and in opposition to H.B. 265.

Agriculture is the most important industry in the State!, contributing just over one third (1/3) of the total State cash reciepts. The value of Agricultural cash contributions is approximately One and three quarters of a Billion Dollars ($ 1,750,000,000.00) out of a total State economic production capacity of Five and a quarter Billion Dollars, ($ 5,250,000,000.00).

Land use in the State is such that Two Thirds (2/3) of the total State acreage (93.2 million acres) is held privately. Sixty Two point Three Million (62.3 million) acres are held in Farms and Ranches, and better than Two Third (2/3) of that is pasture and range land. That means approximately Fourty Two Million acres (42,000,000) is the land base from which the Livestock Industry derives its productivity.

This productivity supports a wide variety of other businesses in Montana, such as Manufacturing, Sales, and Services Industries which are all essential Industries to Agriculture as well as to their local communities.

The key to this productivity is TOTAL MANAGEMENT CAPABILITY, and that means being able to MANAGE ONES LAND TO THE THE BENEFIT OF ONES LIVESTOCK PRODUCTION AND MONETARY RETURN WITHOUT THE INTERFERENCE OF OUTSIDERS. Public encroachment would be such an interference, causing

SENATE JUDICIARY CO
EXHIBIT NO. 63
DATE 03-08-85

disruption of livestock use patterns, livestock handling practices and land use management techniques.

I quote Gov. Ted Schwinden,"Efficient agricultural management and production is not only important to the survival of Montana's Farms and Ranches, it also promotes strong local and state economies".[1]

Our University Systems,Social Services Systems, in short our entire state budget system is dependant in large part upon the success of our agricultural system. The success of the agricultural system is dependant upon total management control by the independant Farmer and Rancher.

To quote Mr. Kieth Kelly, Director of the Department of Agriculture, "The growth we have seen in agriculture is attributable to carefull planning and management decisions made by producers, bankers and researchers. The result of this growth has maintained agricultures position as 'number one' in Montana's economy."[2]

Agriculture is under attack today from many fronts and one of the most sever of th attacks is against the management capability of controlling one's own land use policy.

House Bill 265 intrudes the public into the private land use and management scene in such a way as to detract from the Farmers and Ranchers primary duties.

House Bill 265 requires that the land owner assume extra financial burden in behalf of the public. See Sec. 3, para. 3(e).

It requires that land be taken without compensation. See Sec. 3 para. 1.

It also requires that stock handling decisions be made in deference

to the public and not to the maximization of herd performance. See Sec 4 subsec. 2. (Liability)

In addition to the above, it requires allowances be made for stock harrassment which do not exhist now, ie. shelter belts and available water not being available to stock due to the presence of human pressure.

My veterinarian tells me that the value of these shelter belts and open running water can not possibly be replaced at any price. THIS BILL, H.B. #265 IS A BAD BILL BECAUSE IT JEOPRODIZES AN ENTIRE STATE AND ALL OF ITS AGENCIES AND CITIZENS, NOT JUST ITS AGRICULTURE.

As Gov. Schwinden said in his letter of introduction to the Montana Livestock and Crop Reporting Services 1983 Bulletin entitled MONTANA AGRICULTURAL STATISTICS, and I quote "Agriculture can claim a rich past and a solid presence in Montana. Lets work together to ensure an equally bright future for food and fiber production in this state."[3]

Reject H.B.265 in its entirety, and enact Senate Bills 418,421, 424 and 435. These are good tools that protect the state of Montana, its budgets, institutions, agencies, people and agriculture.

Let us not be so short sighted as to rush thru a piece of legislation , regardless of who appears to support it, that would CAUSE ANY DAMAGE TO THE STATES MOST PRODUCTIVE INDUSTRY !!

Thank you for the opportunity to present my views.

Charles Howe

Charles M. Howe

1. Montana Agricultural Statistics 1983 pg.2
2. Ibid pg.3
3. Ibid pg.2

SENATE JUDICIARY COMMITT
EXHIBIT NO. 63
DATE 03-08-85
BILL NO. H.B. 265

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

NAME: Bud Hansen DATE: 3/18/85

ADDRESS: Box 508

PHONE: 775-6647

REPRESENTING WHOM? Eskalaka Ranchers

APPEARING ON WHICH PROPOSAL: H.B. 265

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

COMMENT: I oppose HB 265
but in favor of Bill - 418 - 421 - 424 and
435

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 64
DATE 03 08 85
BILL NO. H.B. 265

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

NAME: DAVID E. HOWE DATE: 3/8/85

ADDRESS: Rt 38 - Box 2121

PHONE: 222-6297

REPRESENTING WHOM? PCLA

APPEARING ON WHICH PROPOSAL: HB-265

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

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTE
EXHIBIT NO. 65
DATE 03 08 85
BILL NO. HB. 265

March 6, 1985

Members of the Senate
Judiciary Committee
Montana State Senate
Helena, Montana

Gentlemen: For the record, I am Dave Howe, Park County rancher.

I strongly urge the defeat of House Bill 265 on the grounds that it represents an unwise and unwarranted extension rights of the public to float and fish on streams historically suitable for such purposes. The desirable portions of the bill dealing with definitions of the high water line has already been adequately dealt with in a bill already passed by the Senate.

My reasons for opposing House Bill 265 are as follows:

1. Rights of Portage around Artificial Barriers.

Ranch owners, whose lands include small streams not suitable for floating, must use wire fencing to control efficient use of their lands for watering and grazing of livestock. These fences inevitably cross small water courses and create artificial barriers which inhibit movement of humans and animals up and downstream. Indeed, they are intended to do so and are indispensible to ranching operations. If every landowner is required to install a gate, stile or ladder or other mechanical device to provide a route of portage around, over or through every such barrier and to maintain it in a safe condition, then such landower is being saddled with an unreasonable, impractical and intolerable additional financial burden which his already thin, or non-existent, profit margin cannot bear. He does not have the time, money or manpower to meet the requirements of House Bill 265. Indeed, the Fish and Game Department does not have the personnel or budget to monitor or administer the provisions of this bill. The safety requirements for the landowners are impossible to meet as a practical matter due to the inherent instability of such structures after the effects of drifting snow and the butting and rubbing of

SENATE JUDICIARY COMMITTE
EXHIBIT NO. 65
DATE 03-08-85
BILL NO. H.B. 265

livestock and wild game and hence force the rancher to carry new levels of public liability insurance which he cannot afford.

2. Deprivation of Revenue to Dude Ranch Operators and Others who Permit Fishing on a Fee Basis.

In the case of dude ranch operators and those who permit fishing on small streams on a daily fee basis, House Bill 265 constitutes a deprivation of a significant historical source of supplemental income. The small stream is frequently an important source of revenue for many small ranchers. It is a principal source of attraction to small dude ranch operations.

Very commonly small water courses, properly husbanded, provide on a very limited scale and only when carefully protected from over-use, excellent fisheries which otherwise would not exist. Many of these landowers achieve these results by limiting access of cattle to particular areas, restricting the number and types of fish taken and the methods of fishing. Not infrequently spawning beds are not permitted to be fished. All these measures contribute to the unique attraction of Montana as a wildlife habitat without expense to the state. They are an important supplemental source of revenue to the landowners.

3. Unintended Access to Private Land and Invasion of Privacy.

The effect of House Bill 265 is to create unintended access to private lands for purposes which are not related to the original subject of the Curran and Hildreth lawsuits. In periods of low water, particularly in the fall, dry water courses would become unintentional avenues of access to trespassers under the guise of fishing or duck or upland game hunting. To extend these rights to swimming and hunting represents an unwise and undesirable erosion of the rights of privacy of landowners. There are many private landowners who wish to preserve their lands as sanctuaries for both migratory and upland game. Many ranch houses and other private dwellings are situated near or on the banks of small streams. To deny these landowners the right to control who can and cannot hunt

SENATE JUDICIARY COMMITTEE
EXHIBIT NO 65
DATE 03-08-85
BILL NO H.B. 215

on his land is a threat to the enjoyment of private property and contrary to the interests of the public in benefiting from the preservation of game sanctuaries at private expense. To turn every ranch into a picnic ground for uninvited members of the public goes far beyond the intent of the Supreme Court in the Curran and Hildreth cases.

Not House

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

NAME: JIM SAUNDERS DATE: 3/8/85

ADDRESS: ENNIS MONTANA

PHONE: 406-682-4854

REPRESENTING WHOM? THE PRIVATE LAND OWNER

APPEARING ON WHICH PROPOSAL: House BILL 265

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

COMMENT: I OPPOSE BILL 265, I CAN NOT ~~ACCEPT~~ ACCEPT THE CONFLICT THAT IT HAS TO THE 5TH AMENDMENT IT ALSO IS LEGISLATING SOME OF US OUT OF BUSINESS IT CONFISCATES SOME OF MY PROPERTY TO PUBLIC USE, IGNORING THE LAWS OF CONDEMNATION, INTO PUBLIC USE IT WILL DESTROY ALL CONTROL ON A QUITE CLEAN TRANQUIL EXISTENCE

PRESERVE THE LAND OWNERS RIGHTS AND KILL THIS House BILL 265

Thank You

Jim Saunders

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 66
DATE 03 08 85
BILL NO. H.B. 265

NAME Walter F. Lineberger, Jr BILL NO. H.B. 265

ADDRESS Star Rt. 1, Box 154, Ennis Madison county DATE 3-8-85

WHOM DO YOU REPRESENT Self - Cattle Rancher + landowner

SUPPORT _____ OPPOSE ✓ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I believe that Senate Bills 418, 424, 421 and 435 covering High Water Mark, Prescriptive Easment, Landowners Liability and Definition of Trespasser respectively will better define and represent the rights of all parties than H.B. 265. I recommend that these 4 Senate bills be adopted.

Walter F. Lineberger, Jr.

I am a member of the Montana Stockgrowers Assn. and I am one of many members who does not agree with their support of H.B. 265.

W.F.L.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 67
DATE 03 08 85
BILL NO. H B. 265

TO THE SENATE JUDICIARY COMMITTEE HB 265

I wish to oppose the passage of HB 265. It is an extremely dangerous bill that goes far beyond the Supreme Court decision. The three "safeguards" SB 418, SB 421 and SB 424 now added do not change the intent of this bill....eventual complete access to private lands.

The results of this extremely dangerous bill could result in the devaluation of land values, increased liability for land owners and more law suits. Also the destruction of the environment we have enjoyed. We would also doom many businesses....outfitters, dude ranchers etc. if all of Montana land is available to the public. This bill would be extremely harmful to one of our main industries--recreation.

This nightmare is the product of recreationists with little concern for the rights of landowners. One needs only to read the transcripts of the Curran and Hildreth decisions to realize the genuine concerns of landowners are being disregarded as "inconsequential".

To those who think they have no need to be concerned because they have no water on their land, make no mistake, HB 265 is only the first wedge in your door. Soon they will be after complete ingress to your land.

Spotted knapweed is already a serious problem. It is easily spread by vehicles, shoes, clothing etc. Land invaded by knapweed eventually loses 95% of its grazing capacity. It is difficult to control.

Invasion by the public on private lands will present an insurmountable problem to the rancher and farmer and eventually lead to the destruction of our beautiful state. If these environmental groups were truly interested in the preservation of our environment, they would be fighting the intrusion of private property. Some agricultural organizations have been lead down the garden path and are not truly representing their membership by supporting the passage of this bill.

If for no other reason, because of the serious problem presented by knapweed, our Senators and Representatives should oppose the passage of 265. They should be fighting for the preservation of the rights of private ownership.

Nora Lydeard
Cascade, Mont.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 68
DATE 03 08 85
BILL NO. H. B. 265

TO: Senate Judiciary Committee
Chairman Joe Mazurek

FROM: Windsor Wilson
McLeod, Montana 59052

Occupation: Rancher

Opponent: HB265

DATE: March 8, 1985

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 69
DATE 03 08 85
BILL NO. H.B. 265

There has been a lot of time and effort put into the stream access issue. In my opinion, HB265 is not acceptable in its present form. As written, it leaves many unclear areas such as barriers, what are surface waters, where is the ordinary high water mark, and the section on portage that clearly is a taking of private property. All of this has been covered in earlier testimony. I will not spend any more of your time on those areas.

I would like to cover another aspect of HB265. It has been stated at all the hearings on this issue that agriculture and sportsmen were in favor of HB265. This is simply not true. On December 19 all of the agricultural groups did agree on a draft. HB265 has changed dramatically. In fact, it does not resemble in any way the December 19 draft. Still, the leadership of certain agricultural groups and their spokesmen doggedly and blindly support this bill. I belong to Farm Bureau and Montana Stockgrowers, and they are not representing my views. In visiting with other members and land owners I find that when they know and understand the implications of HB265, they are dead set against it. It seems that our opinions and suggestions have fallen on the deaf ears of our agricultural leaders. I cannot understand why they continue to support this bill.

I have visited with many fisherman, hunters and outdoorsmen whom I consider to be the true Montana sportsmen. They don't like HB265 either. These people are hard-working individuals, most of whom don't belong to a sportsmen's group. They still believe in private property. They don't mind asking permission to hunt, fish and enjoy the privilege of using someone else's property. These sportsmen do not want to be represented by those who imply representation of sportsmen.

I feel, in the best interest of people in Montana, that the four bills passed by the Senate, SB's 418, 421, 424, and 435 would be the best choice at this time. These bills would define the ordinary high water mark, liability, prescriptive easement, and trespass. The bills would help all people know where they stand. If the four Senate Bills are passed we will still have a good landowner-sportsmen relationship.

In conclusion, I believe HB265 should be killed and all our efforts put into passing the four Senate Bills.

NAME: Pam Bain DATE: 3/8/85

ADDRESS: Box 174 Melville St. Big Timber, Mt.

PHONE: 537-4485

REPRESENTING WHOM? self - rancher

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: HB 265 is a land reform bill under the guise of stream access. I urge you to table HB 265. I support: SB 418 (Boylan's highwater definition) SB 421 (Story's limitation on landowner liability) SB 424 (Williams prohibition against prescriptive easement) and SB 435 (Holt's trespass bill) The Senate has already passed 4 good bills to address the situation.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 70
DATE 03 08 85
BILL NO. H.B. 265

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

NAME: Robert Daggett DATE: 3-8-85

ADDRESS: 501 E 6th st Laurel, Montana 59044

PHONE: 628-6370

REPRESENTING WHOM? Property owners (self)

APPEARING ON WHICH PROPOSAL: bill 265

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

COMMENT: House bill 265 is contrary to the original intent extended to property owners by the Homestead Act. - the Gov't document given to a Homesteader, gave the Homesteader all the property within the boundries of the description, excluding nothing.

there were no exclusions as to streams, stream-beds or banks or other properties in the claim given the Homesteader, thereby giving exclusive right to all the property described in the document.

House bill 265 is offensive, not only to Land-owners but recreationists as well because of the unfavorable atmosphere it will cause.

House bill 265 should be defeated.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 7
DATE 03 08 85
BILL NO. H.B. 265

NAME: Peggy Turster DATE: 3/8/85

ADDRESS: Roscoe Star Rt. Absarokee Mt.

PHONE: 328-3521

REPRESENTING WHOM? Ranchers, small track & cabin people, some of who are Wolfgrowers & Stockgrowers in Southern Stillwater and Carbon Counties

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: We can't support HB 265 unless it is amended to more fully protect the landowners rights. Including changing definition of "Surface Water" to not mean exposed dry lands between the ordinary high water mark & low water mark. Surface water should be only the actual surface of water and land directly underneath water.

We don't consider any type of hunting to be a water related recreational activity.

There should also be compensation for damages to private property lands owners by recreationalist.

~~If~~ If HB 265 can't be amended we urge it be killed and we then support the 4-SBs which address stream access.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 72
DATE 03 08 85
BILL NO. H.B. 265

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 73
DATE 03 08 85
BILL NO. H.B. 265

To the mebers of the Senate Judiciary Committee:

My name is Dave Moore. I am a dryland farmer and Vocational Agriculture teacher from Big Timber.

Until now I have never given testimony, written or verbal, concerning a bill but I feel I must speak out against HB 265. As a dryland farmer I realize, perhaps not fully, the deleterious effect this bill will have on my operation which is situated in rolling hills containing several spring-fed creeks and many large coulees which carry run-off water. HB 265 effectively takes my right to control access to and within my fields.

Although I am no longer a full-time teacher, during the winter months I spend an average of two and one half days per week teaching in the Big Timber Public School system. I have had many opportunities to visit with vo-ag students at the high school level about HB 265. Most of the students have not heard of HB 265. Those young people who are informed on the bill and its contents usually are willing to overlook the economic ramifications of HB 265 to landowners, but, almost without exception, feel that if they were landowners, as many will be if it is economically feasible for them to follow in ther fathers' footsteps, they could not idly sit by as the right to control access to and on land for which they pay taxes is taken from them.

But it is not the young people who are aware of HB 265 that are my main concern. As I mentioned above most young people are uninformed concerning HB 265, or any other bill for that matter, as, I believe, are most adults. This being the case, how can we as guardians of the future of these young saddle them with a land reform bill (HB 265) which takes from them rights that have historically and constitutionally been exercised by their forefathers.

In summary, HB 265 will have adverse effects on this and future generations of landowners. Landowner-sportsman relationships will be strained, perhaps to dangerous limits. I urge this committee to table or kill HB 265 and adopt SB 418, SB 421, SB 424 and SB 435, bill which more aptly address the rights and obligations of

NAME: Wes Henthorne DATE: 3/8/1985

ADDRESS: Melville Rte Box 214 Big Timber

PHONE: 932-4197

REPRESENTING WHOM? self

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: Support Senate Bills 418
421
424

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 74
DATE 03 08 85
BILL NO. HB 265

March 8, 1985
Testimony before the Senate Judicicary Committee on HB265

My name is Wes Henthorne. I am a resident of Sweetgrass County and manage a ranching operation located in Park, Sweetgrass, and Gallatin Counties. The following questions are the primary reasons for my opposition to HB 265:

1) Is it the intent of HB 265 that the public may on "Class I waters" by clear implication without the permission of the landowner:

A-overnight camp;
B-place or create any permanent or semipermanent object, such as a permanent duck blind or boat moorage;or
C-conduct other activities which are not primarily water related pleasure activities?

2) Is the language in HB 265 sufficiently clear to easily distinguish between Class I and Class II waters as defined in HB 265?

3) Is it the intent of this bill by defining surface waters in Section 1 (10) "'surface water' means, for determining the public's access for recreational use, a natural body of water, its bed and its banks up to the ordinary high water mark." to define land as water?

4) In light of current budgetary problems being addressed by the legislature is it appropriate for the Fish and Game Commission to be given the immediate additional fiscal burdens of developing rules for recreational use and approving structure designs for all Class I and Class II waters in the state?

5) Does HB 265 intend that a landowner must bear the cost of establishing a portage route around artificial barriers such as natural gas pipelines, county bridges, etc. for which the landowner has no other responsibility?

6) Does the establishment of a portage route with no compensation to the owner constitute a taking without just compensation?

7) Do the "supervisors" as defined in the bill, Section 1 (9) need the additional responsibility of establishing portage routes?

The list of questions raised by HB 265 goes on and on. In the interest of brevity I would like to conclude that the problems that this large and complex piece of legislation tries but fails to address are resolved much better by the three simple Senate bills that went through this committee earlier this session.

SENATE JUDICIARY COMMITT
EXHIBIT NO. 74
DATE 03-08-85

Senate Judicial Chairman and Committee
Hearing SB 265

Elaine Allestad Gibson Route Box 756
Big Timber, Montana 59011

I would like to go on record as being opposed to SB 265. I believe that this bill goes far beyond the Supreme Court decision in taking away land owner rights. I do not believe the Supreme Court ~~decision~~ Justices meant for their decisions to go this far.

For example the section on the right to portage around man made or natural barriers, is clearly taking private land for transportation with out just compensation to the land-owner. In the Supreme Court decision they did not state anything about

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 75
DATE 03 08 85
BILL NO H.B. 265

portage around natural barriers.

In this bill they are expanding the water recreation usage to land recreation usage, which goes far beyond the Supreme Court decisions again.

I think it is wrong to classify water or streams in only two classes. This will create a legal nightmare when it is tested by individuals who want to prove right to use or who want to prove the right to refuse usage of these waters.

I believe if this bill passes it is going to ruin landowner-sportsmen relationships.

We own about 3 or 4 miles of land on both sides of a small creek that is mostly dry about 6 months out of a year. This bill would give anyone the right to walk up the

middle of our land through all our buildings and corrals, which I believe is invading our privacy. We have also leased property which boarders 5 miles of the Yellowstone River. We have always allowed anyone who "asked" to cross our property to gain access to the river to do any water recreating, unless our stock was going to be disturbed by the traffic, shooting, or if they had dogs with them. We have always had good relations with sportsmen. We also allowed the annual Boat Floaters to dock on our land as long as they respected our land owner rights. We wanted all garbage taken care of, no fires, and no driving except on designated roads. The Boat Floaters Committee understands that if our wishes are

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 75
DATE 03-08-85
BILL NO. H.B. 265

not kept, that they would probably loose the privledge to stop there. So we have developed a good land-owner-sportsmen relationship. But if SB265 is passed-they (the sportsmen) will be demanding there right to stop on our land and the usage of the lands to camp and build fires. Which is totaly against good conservation of the land and water of this state, and that is why we made the rules for usage of our land in the first place.

I have many more examples why SB265 is not a good bill but to shorten this I will close with one more message.

I believe the sportsmen have the right to use the waters of this state for water recreation but I believe it is only a privalage that

SENATE JUDICIARY COMMI
EXHIBIT NO. 75
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they can use privately owned land for recreational use.

I plead with you to kill SB265 in its entirety because I believe we have four good bills that have passed the Senate that will protect landowners as well as the sportsman, SB418, SB421, SB424, & SB435.

Thank you

Elaine K. Allestad

P.S.

I am also a Montana Woolgrower Association member and am in disagreement with my associations position on SB265.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 75
DATE 03-08-85
BILL NO. H.B. 265

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

NAME: Verna Lou Landis DATE: March 8, 1985

ADDRESS: Rt 1 Wilsall, Mont 59086

PHONE: 578-2228

REPRESENTING WHOM? Myself

APPEARING ON WHICH PROPOSAL: H B 265

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

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 76
DATE 03 08 85
BILL NO. H.B. 265

March 8, 1985

Mister Chairman, members of the committee.

I am Verna Lou Landis from Wilsall, Mont. I'm a landowner and rancher I oppose H.B. 265

Class I and Class II waters bother me. I understand the Supreme Court ruling to apply to navigable streams, therefore small streams should be excluded.

I believe what we should be doing is changing the Supreme Court ruling. Not clarifying it with another bad decision.

Thank you.

SENATE JUDICIARY COMMIT
EXHIBIT NO. 76
DATE 03-08-85
BILL NO. H.B. 26

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

NAME: Virge Holliday DATE: 3/8/85

ADDRESS: Rt 2 Box 355

PHONE: 578-2349

REPRESENTING WHOM? myself

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 77
DATE 03 08 85
BILL NO. H.B. 265

Mr Chairman +

Members of the Judiciary Committee,

My name is Virge Holliday. We have a family ranch in Park County with the Shields River running full length through it.

I"m here to oppose HB265, the Stream Accass bill, and ask that it be killed. A bad bill doesn't improve a bad Supreme Court decision. If this can be made non damaging to ranchers, fine. If not, let's be about changing the decision, which the legislature can do -- it has equal power with the Supreme Court.

It just isn't in me to compromise something as important as our private property rights, one of the things that made this country great.

It's my opinion that those in agriculture (and I belong to a couple of those organizations) who support this bill threw away the baby with the bath water.

When SB310, the Stream Preservation bill was forced over us ten years ago, it was to make <u>landowners</u> protect the beds and banks of streams. There was at least a pretense of environmental concern, even though that was also infringement on our private property.

There's no such concern with this stream access which turns the entire public loose on us -- the same public you lock all doors to protect yourselves from. When everyone has access to everything, there will be nothing for anyone. It will be goodby to the wild geese finally nesting along our river, to the sand hill cranes and occasional swan that finds their way to our water, and probably much more besides. Look at the garbage, vandalism, and damage in any public place to see what's coming. And who stands the cost and cleans up this mess? Let me guess!

Who paid for, worked for and took care of this land and water? Certainly not those who now want to play on it for free.

Please kill HB265 and let the four good Senate bills that passed with such a majority handle the problems arising from the Supreme Court decision.

Thank you.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 77
DATE 03-08-85
BILL NO. H.B. 265

NAME: John De Cook DATE: March 8-1985

ADDRESS: Melville - Mont.

PHONE: 537 4437

REPRESENTING WHOM? self

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: I John De Cook farm in Goldenvally + Sweetgrass Counties. I feel HB 265 if passed will have a very undesirable impact on my dryland operation. I feel HB265 is the first step in giving our right to protect an care for the land away.

I support the Four small bills.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 78
DATE 03 08 85
BILL NO. H.B. 265

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

NAME: GEORGE M ROSSETTER DATE: _____

ADDRESS: BOX 175 FISHTAIL MT.

PHONE: 328-8485

REPRESENTING WHOM? BEARTOOTH STOCK ASSN

APPEARING ON WHICH PROPOSAL: 265

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

COMMENT:

Beartooth Stock Assn is opposed to 265 as stands - Definition of Surface Date should not include trail Portage is not constitutional - should be deleted or include "with compensation" and further are left with the responsibility of Portage. We are not satisfied with the definition of high water mark.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 79
DATE 03 08 85
BILL NO. H.B. 265

To: SENATE HOUSE JUDICIARY COMMITTEE MARCH 8 1985

MY NAME IS GEORGE ROSSETTER .... I AM FROM FISHTAIL MT. STILLWATER COUNTY AND OWN A [redacted] CATTLE OPERATION.

IN THE HOUSE OF REPRESENTATIVES H.B. 265 WAS PRESENTED AS BEING A COMPROMISE BETWEEN THE RECREACIONISTS AND THE MAIN LINE AGRICULTURAL ORGANIZATIONS. IN MY OPINION THE SPOKESMAN FOR THESE AGRICULTURAL GROUPS , IN HIS DESIRE TO AFFECT A COMPROMISE WITH THE RECREATIONISTS AGREED TO TERMS IN THE BILL THAT ARE NOT ONLY UNSATISFACTORY TO MANY OF THE GRASS ROOT MEMBERS OF THE AGRICULTURAL GROUPS BUT INDEED ARE NOT CONSTITUTIONAL. AS THE MEMBERS HAVE BECOME AWARE OF THE CONTENTS OF THE BILL THEY HAVE WITHDRAWN THEIR SUPPORT. THIS FACT IS EVIDENT WHEN YOU HEAR TO-DAY FROM SUCH AFFILIATES AS THE BEARTOOTH STOCK ASSN. LOCATED IN STILLWATER COUNTY. ANY NUMBER OF THE SPEAKERS IN OPPOSITION TO H. B. 265 ARE MEMBERS OF THE MAIN LINE AGRICULTURAL ORGANIZATIONS.

AS I SPEAK HERE TODAY I TOO WOULD LIKE TO SEE A COMPROMISE BILL BETWEEN THE RECREATIONISTS AND THE LAND OWNERS, BUT WHAT WE SEE NOW IN 265 IS A FAR CRY FROM THE BILL CREATED BY THE INTERIM COMMITTEE. IT IS EVIDENT THAT 265 IS A FLAWED INSTRUMENT. THE DEFINATION OF SURFACE WATER TO INCLUDE THE BED, THUS ENABLING THE PUBLIC TO USE THE DRY STREAM BED, IS NOT BASED ON THE SUPREME COURT DECISION, THE MONTANA CONSTITUTION OR ANY LEGISLATION. THE ISSUE OF PORTAGE WHEREBY THE PUBLIC CAN EXIT THE STREAM AND CROSS PRIVATE PROPERTY TO CIRCUMVENT SUCH NATURAL [redacted] BARRIERS AS HOLES, BOULDERS, BRUSH ETC. IS SURELY NOT CONSTITUTIONAL. I HAVE CONSULTED FIVE DIFFERENT ATTORNEYS AND THEY ALL AGREE THAT PORTAGE IS THE TAKING OF PRIVATE PROPERTY WITHOUT COMPENSATION. I HOPE THAT SUCH LAWYERS PRESENT IN THIS COMMITTEE AS MR. MAZUREK, MR. TOWE, MR. DANIELS, MR. PINSONEAULT, MR. CRIPPEN AND ANY OTHERS THAT I AM NOT AWARE OF WILL TAKE A HARD LOOK AT THE TWO ISSUES I HAVE REFERRED TO. I ASSUME THAT THIS MATTER WILL BE DISCUSSED THIS MORNING IN MORE DETAIL BY OTHERS.

IN CONCLUSION: THE EROSION OF SUPPORT FOR 265 IS DUE TO THE FAULTY STRUCTURE OF THE BILL AND I HOPE THAT AN INTELLIGENT AND THOUGHTFULL SENATE WILL DELETE THE NON-PRODUCTIVE AND UNCONSTITUTIONAL SECTIONS AND TAKE WHATEVER OTHER STEPS ARE NEEDED TO PROPERLY ADDRESS THE MATTER.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 79
DATE 03-08-85
BI H.B. 265

My name is George Pressler from Fishtail Mt.
I Stillwater Cty. I operate a cattle ranch. I am
here to represent the Beartooth Stock Assn.
of Stillwater County. As you are aware, there
are many grass root members of the
Agricultural organizations who do not support
H.B. 265 in its present form. I
submit the following resolution as evidence:

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 79
DATE 03-08-85
BILL NO. H.B. 265

February 18, 1985

After considerable thought and conversation about House Bill #265 concerning water access for recreational use we present this resolution.

WHEREAS, the high water mark is not defined to our satisfaction: and

WHEREAS, the classification of water is not explained enough to identify our rights of ownership; and

WHEREAS, the landowners are left with the responsibility of portage and without control of the land from the high water mark to low water flow;

We, the Board of Directors of the Beartooth Stock Association, are opposed to House Bill #265 as presented.

Bernard Van Ess
Secretary - Treasurer
Beartooth Stock Assn.

SENATE JUDICIARY COMMI
EXHIBIT NO. 79
DATE 0308-85
BILL NO. H.B. 265

NAME: Conrad B Fredricks DATE: 3/8/85

ADDRESS: Big Timber, MT

PHONE: 932-5440

REPRESENTING WHOM? Sweet Grass County Preservation Ass'n

APPEARING ON WHICH PROPOSAL: HB 765

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

COMMENTS: See written testimony

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 80
DATE 03 08 85
BILL NO. H.B. 265

MONTANA CONSTITUTIONAL CONVENTICN

1971-1972

DELEGATE PROPOSAL NO. 2

DATE INTRODUCED: JAN. 20, 1972 — Rejected by Constitutional Convention

Referred to Natural Resources and Agriculture Committee

A PROPOSAL FCR A NEW CONSTITUTIONAL SECTICN PRCVIDING FOR WATER RIGHTS.

BE IT PROPOSED BY THE CONSTITUTIONAL CONVENTICN OF THE STATE CF MONTANA:

Section 1. There shall be a new Constitutional Section to provide as follcws:

"Section ___. WATER. All cf the water in this state, whether occurring on the surface or undergrcund, and whether occurring naturally or artificially, belongs tc the people of Montana; and those waters which are capable cf substantial cr significant public use may be used by the people with or without diversicn or development works, regardless of whether the waters occur on public or private lands. The public has the right to the recreational use of such waters and their beds and banks tc the high water mark regardless of whether the waters are navigable and regardless of whether the beds and banks are privately cwned. Beneficial use of waters includes recreation and aesthetics, such as habitat for fish and wildlife and scenic waterways.

The use of all water now appropriated, cr that may hereafter be appropriated for sale, rental, distributicn, or other beneficial use, and the right of way over the lands of others, fcr all ditches, drains, flumes, canals, and aqueducts, necessarily used in ccnnection therewith, as well as the sites fcr reservoirs necessary for ccllection and stcring the same, shall be held to be a public use.

The legislature may provide either directly, cr indirectly through administrative agencies, for the control and regulaticn of both existing and future rights tc uses cf water."

INTRODUCED BY: /s/ Earl Berthelson

S[illegible] JUDICIARY COMMITTEE
[illegible]IT NO. 80
DATE 03 08 85
BILL NO. H.B. 265

judicious use and reclamation.

Because Montana has at least 500,000 acres of strippable coal land and untold acres of other natural resources, your committee believes the responsibilities of protecting and restoring the surface conditions of those lands for unborn generations should not be left to men, but rather protected by fundamental law.

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

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

Existing Article IX Section (3)(3) 1972 Constit.

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

(4) Beneficial uses include, but are not limited to, domestic, municipal, agriculture, stockwatering, industry, recreation, scenic waterways, and habitat for wildlife, and all other uses presently recognized by law, together with future beneficial uses as determined by the legislature or courts of Montana. A diversion or development work is not required for future acquisition of a water right for the foregoing uses. The legislature shall determine the method of establishing those future water rights which do not require a diversion and may designate priorities for those future rights if necessary.

(5) Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests.

(6) The legislature shall provide for the administration, control and regulation of water rights and shall establish a system of centralized records.

COMMENTS

Your committee feels that water and water rights are of crucial importance to the past history and future development of

the State of Montana. For this reason the committee feels justified in expanding the present Constitutional section which relates solely to the use of water to include provisions for the protection of the waters of the state for use by its people.

Subsection (1) guarantees all existing rights to the use of water and includes all adjudicated rights and nonadjudicated rights including water rights for which notice of appropriations has been filed as well as rights by use for which no filing is of record.

Subsection (2) is a verbatim duplication of Article III, section 15 of the present Constitution and has been retained in its entirety to preserve the substantial number of court decisions interpreting and incorporating the language of this section.

Subsection (3) is a new provision to establish ownership of all waters in the state subject to use by the people. This does not in any way affect the past, present or future right to appropriate water for beneficial uses and is intended to recognize Montana Supreme Court decisions and guarantee the state of Montana standing to claim all of its waters for use by the people of Montana in matters involving other states and the United States Government.

Subsection (4) is a new provision to permit recreation and stockwatering to acquire a water right without the necessity of a diversion. This applies only to future rights and, of course, only to waters for which there are no present water rights. This subsection further provides that future agricultural and industrial water development will not be foreclosed by recreation, as it is left up to the legislature to determine the method of establishing a future water right without a diversion and the legislature is further authorized to establish priorities of water uses for those waters where the legislature decrees priorities necessary.

Subsection (5) acknowledges a continuance of our present water law principle that the first appropriation in time is the better right and provides that no future appropriations shall be denied except in the public interest.

Subsection (6) mandates the legislature to administer, control and regulate water rights. This does not in any way change the present legislatively established system of local control of adjudicated waters by water commissioners appointed by the District Court having jurisdiction. A new requirement is added to establish a system of centralized records of all water rights in addition to the present statutory system of local filing of records. The centralized records are intended to provide a single location for water rights information and a complete record of all water rights.

NAME Kermit Anderson BILL NO. 265

ADDRESS Wibaux, Mt DATE 3-8-85

WHOM DO YOU REPRESENT Rancher

SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

Ranchers are loosing all rights with this 265 Bill

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 81
DATE 03 08 85
BILL NO. H.B. 265

NAME Lucille Anderson BILL NO. 265 H-B

ADDRESS Melville Mt DATE 3/8/85

WHOM DO YOU REPRESENT Mussell

SUPPORT _____ OPPOSE / AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments: This bill is unfair to landowners taking away land long paid for and buying high taxes on. Bill will not solve the problems created only add more. I strongly oppose

SENATE JUDICIARY COM
EXHIBIT NO. 82
DATE 03 08 85
BILL NO. H.B. 26

March 6, 1985

Anstett

Honorable Joe Mazurek, Chairman
State Judiciary Committee
Capitol Station
Helena, Mont. 59620

Re: House Bill: 265
Senate Bills: 418, 421
424, 435

Dear Senator:

In the study of the contents of H.B. 265, we feel this bill is not the proper legislation or the answer to the many questions of stream access for either the recreationist or the owners of land adjacent to these streams, of which we are of the latter. The basic rights of such owners should be considered for the pleasure of the recreationist, unmolested. The latter thus no legitimate claim to that land the owners have to own on their livelihood — a necessary ordinary to all of us.

In addition, this bill (265) would create additional and unnecessary expense for the Fish & Game Dept. for enforcement at a time when budget deficits are a grave concern for all legislators.

In turn, we feel Senate Bills: 418, 421, 424, 435 more adequately address the problems involved in the Supreme Court's decisions of stream access.

We pray that you, as Chairman of the Senate Judiciary Committee and as a responsible legislator will support the four Senate bills taking heed of our opinion opposing H.B. 265

Respectfully,

Dean & Arlene Anstett

Arlene W Anstett

P.S. In meeting the Senate Judiciary, we also support their stand on these issues.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 83
DATE 03 08 85
BILL NO. H.B. 265

Fairview
Montana 59252

NAME: J.R. CLEVELAND DATE: MARCH 8-85

ADDRESS: BOX 210 MELVILLE MT. 59055

PHONE: 406 537 4552

REPRESENTING WHOM? LAND OWNER

APPEARING ON WHICH PROPOSAL: HOUSE BILL 265

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

COMMENTS: I HAVE TRAVELED FROM ATLANTA TO HELENA TO OPPOSE HOUSE BILL 265. MY LIFE TIME DESIRE TO RANCH IN MONTANA WILL BE RUINED IF THE PUBLIC IS ALLOWED THE USE OF PRIVATE PROPERTY. LAND VALUES WILL BE DEVISTATED.

I AM FOR SENATE BILLS 418
421
424
435

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 84
DATE 03 08 85
BILL NO. H.B 265

William Dunham

March 8, 1985

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 85
DATE 03 08 85
BILL NO. H.B. 265

Senate Judiciary Committee
Helena, Mt.

Dear Senator Marzurek and Committee Memebers:

We are a private nonprofit conservation organization holding conservation easements on eleven ranches in Montana. These easements provide permanent protection to among other things, two miles of one of the finest spring creek fisheries in the state and seven miles of critical grayling habitat in the Upper Big Hole.

As an example, the spring creek now has fly fishing only, catch-and-release, and limits the number of fishermen a day on the stream. These limitations are restrictions on the property deed and were made in order to provide long range protection of the fishery.

The court decisions, opening these fragile fisheries to the general public will make it impossible for us to enforce these restrictions. Furthermore, unless Fish Wildlife and Parks and the Legislature rapidly implement catch-and-release regulations on most small streams, the increased public fiahing pressure resulting from these decisions will inevitably result in a decline in Montana's wild trout fishery.

The quality of Montana's fishery is very important for our tourism industry and for the economies of our small towns in particular. With the dire straits of the agricultural economy, it is more important than ever that we help the small town economies by maintaining the quality of our natural resources base.

George Anderson, a nationally famous guide, says of our spring creeks,"Another thing most people don't realize is that if these fragile streams were open to the public with no restriction on access, they would have been ruined long ago."

As managers of riparian zone habitat, we urge that any legislation passed restrict small stream usage as much as is consistent with the court decisions. We suggest that definition of the term "barriers" include only man-made barriers, not natural objects, and suggest that the court decisions use of "barriers" refers to manmade objects -- fences on the Dearborn and a bridge on the Beaverhead.

Finally, it is no secret that a great many ranchers are in serious financial trouble. For many of them it is the quality of rural life that has kept them hanging on as long as they have, rather than selling out to subdividers. Losing

control as to who and how many persons can be on their small stream, which frequently flows right through their back yard, and how those people fish and how many fish they kill --may well be the straw that breaks the camel's back for many landowners. This loss of control and privacy they have enjoyed for decades, coupled with hard economic times and fear of further erosion of their property rights may indeed make many of them decide to sell out to a subdivider for the highest dollar while they still have the right to do so.

As for the hunter and fisherman, what will they be left with when the small fisheries and the elk and deer winter range in the foothills have been converted to houses?

Whatever access legislation does or does not result from this session of the legislature, we think one of the best ways to mitigate the impact on these small, high quality wild trout fisheries is catch-and-release regulations. This should be implemented as soon as possible; these small fisheries will go downhill fast without it.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 85
DATE 03 08 85
BILL NO. H.B. 265

Sincerely,

W.H. Dunham

William H. Dunham
Executive Director
Montana Land Reliance
P.O. Box 355
Helena, Mt. 59624

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

NAME: Everett Hicks DATE: March 8 1985

ADDRESS: LY Ranch - Wolf Creek

PHONE: 235-4736

REPRESENTING WHOM? LY Ranch

APPEARING ON WHICH PROPOSAL: Bill 265 - Stream Access

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

COMMENT: We (the ranches) are loosing everything including our land owners rights for a little recreation. Recreation doesn't pay the bills - ranching does

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 86
DATE 03 08 85
BILL NO. H.B. 265

I am in opposition to HB 265 and feel it would very damaging to many ranch in Park County I believe the four good bills passed by the Senate SB 435, 418, 421 and 424 takes care of the main problems of the Supreme Court decision

Clarence L Keough
Wilsall mont.

SENATE JUDICIARY COMM
EXHIBIT NO. 87
DATE 03 08 8
BILL NO. H.B.

NAME: Dick Klick DATE: 3-8-85

ADDRESS: Augusta

PHONE: 2645806

REPRESENTING WHOM? Sun Butte Outfitters & Ranchers & Associates

APPEARING ON WHICH PROPOSAL: H.B. 265

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

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTE
EXHIBIT NO. 88
DATE 03 08 85
BILL NO. H.B. 265

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

NAME: DAVID LACKMAN DATE: March 8,1985

ADDRESS: 1400 Winne Avenue, Helena, Montana 59601

PHONE: (406) 443-3494

REPRESENTING WHOM? Montana Public Health Association (Lobbyist)

APPEARING ON WHICH PROPOSAL: HB 265 (Ream) STREAM ACCESS

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

Senate Judiciary Committee 10: A.M. Old supreme court room

COMMENT: Our Environmental category

We support the purposes of HB 265. However, the definition of "ordinary high water mark" presently in the bill would be difficult to apply as to streams where they spread out; such as is the case of the Bitterroot River north of Hamilton. Also, we do not feel that it provides adequate protection for the landowner in some situations. The definition of high water mark which the Soil Conservation uses is preferable. It is presently in SB418 (Boylan) definition of high water mark. However, this bill will be void if HB 265 passes.

The following amendment to HB 265 is suggested:
On page 3, line 10 beginning with "cause", delete the rest of the line and continuing through lines 11, 12, 13, & 14 thru "value". Then substitute the following - which is essentially the definition contained in SB 418:

" deprive the soil of its vegetation or to destroy its value for agricultural purpose. Flood plains or flood channels are not considered to lie between the ordinary high-water marks for recreational purposes, except when they carry sufficient water to support fishing or floating."

We feel that this definition will be easier to apply; and that it affords the landowner better protection. Then there is the question of protecting land along streams from pollution by recreationists. This stricter definition will help

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 89
DATE 03 08 85
BILL NO. H.B. 265

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

NAME: William G Larson DATE: March 8, 1985

ADDRESS: Box 136 Alder, Montana

PHONE: 842-5384

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT: Support Senate Bills 418, 421, 424 435

I am in direct opposition to HB 265 on the basis that it violates my individual and personal rights of a citizen and a land owner.

This bill is in fact a land use bill. Supported by, New (Title Insurance policies) withhold the streambed from high water mark to high water mark. This land has previously been under my personal control since 1962 as a catch and release commercial fly fishing stream.

Under the new water adjudication we have applied for a flow through non-consumptive use for all recreation

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

William G Larson

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 90
DATE 03 08 85

NAME Linda S. Larson BILL NO. HB 265

ADDRESS P.O. Box 136 Alder Mt. DATE 3/8/85

WHOM DO YOU REPRESENT Land owners

SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I oppose HB 265 and support Senate Bills 418, 421, 424, 435.

Linda S. Larson

SENATE JUDICIARY COM
EXHIBIT NO. 91
DATE 03 08
BILL NO. H.B. 2

NAME Mary S. Lineberger BILL NO. H.B. 265

ADDRESS Star Rt. 1, Box 154, Ennis, Madison County DATE 3-8-85

WHOM DO YOU REPRESENT Self - Cattle Rancher + landowner

SUPPORT _____ OPPOSE ✓ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I believe that HB 265 goes beyond the Supreme Court rulings in Curran and Hildreth in granting rights to recreationists to use dry land between the low and high water marks and also appropriating the bed of a stream for public use, without condemnation or compensation.

I further believe that Senate Bills #18, #24, #21 and #35 will better serve Than HB 265.

I feel that passage of HB 265 would substantially reduce the value of my land.

Mary S. Lineberger

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 92
DATE 03 08 85
BILL NO. H.B. 265

NAME Bill Maloney BILL NO. 245

ADDRESS Alder, Mont Box 139 DATE 3-8-85

WHOM DO YOU REPRESENT

SUPPORT OPPOSE X AMEND

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I support Senate Bills #18, #21, #24, #31

SENATE JUDICIARY COM
EXHIBIT NO. 93
DATE 03 08
BILL NO. H.B. 2

NAME Josabelle Maloney BILL NO. HB 265

ADDRESS Box 139 Ider MT DATE 3/8/85

WHOM DO YOU REPRESENT Land Owner

SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I oppose HB 265 and support Senate Bills 18, 21, 24, 35.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 94
DATE 03 08 85
BILL NO. H.B. 265

NAME Ron Marshall BILL NO. _____

ADDRESS PO Box 139 Alder, Mont. DATE 3-8-85

WHOM DO YOU REPRESENT _____

SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I support Senate Bills 418, 421, 424, 435

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 95
DATE 03 08 85
BILL NO. H.B. 265

NAME Ina D Maloney BILL NO. HB 265

ADDRESS Box 139 Alder MT 59710 DATE 3/8/85

WHOM DO YOU REPRESENT _____

SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

In 1860, my ancestors fled Ireland because the English stole their land. If HB 265 passes, my land will be stolen. Where can I go?

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 96
DATE 03 08 85
BILL NO. H.B. 265

NAME: Barbara Holman Morse DATE: 3-8-85

ADDRESS: Box 550 Absarokee Mt. 59001

PHONE: 406-328-2661 -- 406-328-8147

REPRESENTING WHOM? myself

APPEARING ON WHICH PROPOSAL: HB 265

DO YOU: SUPPORT?_____ AMEND?_____ OPPOSE? very strongly oppose

COMMENTS: I could never believe any Congress or any Government would take my property right away from me. This property that I have worked many hard years for. I do not support HB 265.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITT
EXHIBIT NO. 97
DATE 03 08 85
BILL NO. H.B. 265

Duane Neal

BLACK OTTER GUIDE SERVICE

Duane or Ruth Neal
Box 93
PRAY, MONTANA 59065
Phone 406-333-4362
Licensed Guides and Outfitters

March 7, 1985

Senator Joe Mazurek
Chairman
Senate Judiciary Committee
State Capitol
Helena, Mt 59020

RE: House Bill 265

Dear Senator Mazurek:

I am a private property owner and Outfitter in the State of Montana. I am here today representing my families interests to our private property rights.

I am opposed to HB 265 due to the fact that it will open portions of my private property to use by the public with out compensation for the diminished value of the property due to the public's use of the private property. I find this bill to be contrary to the Montana State Constitution and recent decisions rendered by the Montana Supreme Court in both the Hildreth and Curran cases.

The Hildreth case gave the public the use of the bed and banks of the Beaverhead due to the fact that the Beaverhead River was declared a Naviagable River, which would be in compliance with the Montana constitution and Federal Laws governing naviagable Rivers.

The Montana Supreme Court did not decide the issue of navigability in the Curran case and henceforth did not give the public the right to use the beds and banks of the river. They did however uphold the private property owners right to the bed and banks of the river.

The only exception in either decision granting the public the right to use the private property of the adjacent land owner is in the case of a barrier in the water and then a portage route may be used on a very limited basis.

HB 265 opens virtually every trickle of water in the State of Montana to use by the public with very few restraints.

Please Kill this Bill.

Respectfully,

Duane Neal

Duane Neal

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 98
DATE 03 08 85
BILL NO. H.B. 265

NAME Mary Jane Rickman BILL NO. 265

ADDRESS Rt. 1 Box 174 Fishtail, Mont. 59028 DATE March 8-85

WHOM DO YOU REPRESENT Myself & husband & ranchers in my area

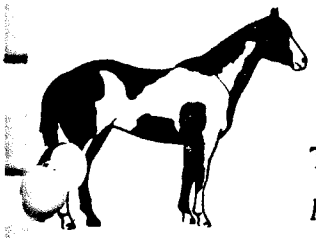
SUPPORT _____ OPPOSE V AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

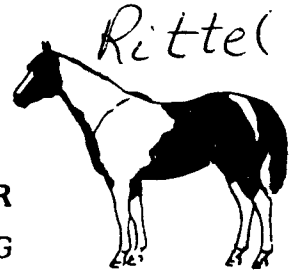
Comments:

My husband and I are very much opposed to bill 265. There is no way the ranchers will tolerate this recreation prescribed. Untold problems would arise. The bill should never be passed.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 99
DATE 03 08 85
BILL NO. H.B. 265



BLACKTAIL RANCH



Rittel

Wolf Creek, Montana 59648
TAG RITTEL Phone: 406-235-4330 SANDRA RENNER

RANCH VACATIONS • MUSEUM • CAVERN • PAINT HORSES • HUNTING

January 31, 1985

Mr. Chairman, & Members of Committee

I am against H.B 265 as they like it.

I am a rancher on the South fork of the Yellowstone River. A stream that my family has taken care of since 1939. We have 5 miles of stream running through the ranch. It is easy to gain it to the general public for fishing or Hunting.

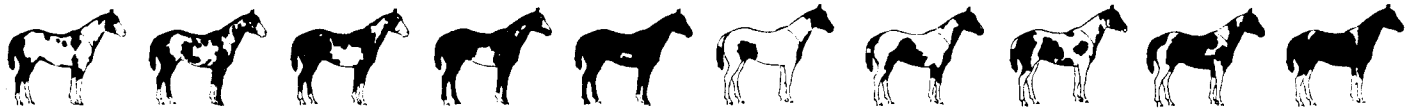
I see nothing in this Bill for the land owners. Everything has been taken from us and in no way do I read any thing but public access without control.

I would advise killing this Bill as we are better off right now with nothing.

Sincerely

John T. Clay Rittel

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 100
DATE 03 08 85
BILL NO. H.B. 265



NAME Margery Rossetter BILL NO. HB265

ADDRESS ~~Box~~ 175 DATE 3/8/85

WHOM DO YOU REPRESENT myself

SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I am extremely concerned about HB265 that permits and allows access and uncontrolled public intrusion for public recreation on the small streams.

Many ranches along the streams like ours are in a very remote and isolated area.

After the Ranch wife packs her Ranch husbands lunch and he is gone for the day what protection does a Ranch wife have against being molested or raped?

As you know we have crime in the rural as well as the urban areas. You might say that the stream could become a highway of crime to my door!

I can not live with or accept HB265 as written.

Please defeat HB. 265

Margery Rossetter

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 101
DATE 03 08 85
BILL NO. H.B. 265

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 102
DATE 03 08 85
BILL NO. H.B. 265

NAME Mary N Saunders BILL NO. HB265

ADDRESS Box 23, ENNIS, Mt. DATE 3-8-85

WHOM DO YOU REPRESENT Myself

SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments: I firmly oppose HB265

We have enjoyed the privilege of controlling the recreation activities on our land for over 100 years. Our streams and adjacent ground maintain a delicate balance because of this control. If HB265 passes, our land and its recreational value would be destroyed beyond repair and this would mean Thousands of dollars in loss to us - I do not appreciate having some outside stranger stand on my front porch and "recreate" in or around the stream that runs in front of my house. This "stranger" certainly would object to contributing to my Tax responsibility. Please defeat this Bill-265.

Thank you,
Mary Saunders

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

NAME: L. J. Schieffert DATE: 3/8/85

ADDRESS: McLeod Mont. 59052

PHONE: 932-6156

REPRESENTING WHOM? _____

APPEARING ON WHICH PROPOSAL: _____

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

COMMENT: I am opposed to 265 But in favor of Bills -418- 421- 424- 435-
Thank you

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMIT
EXHIBIT NO. 103
DATE 03 08 85
BILL NO. H.B. 2

NAME: Tom Hall DATE: March 8

ADDRESS: Nicholls Mt.

PHONE: 537-4185

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: 26

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

COMMENTS: 265 is an infringement on my Private property rights - 418 421 + 1424 are much better + clearer - more Concise.

265 goes way farther than the Supreme Court decisions + I oppose it

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 104
DATE 03 08 85
BILL NO. H.B. 265

NAME Barbara Van Cleve BILL NO. HB 265

ADDRESS Big Timber DATE Mar 8

WHOM DO YOU REPRESENT myself.

SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

This bill is an invasion of property rights - it takes away land which we have bought and paid taxes on from Yr 1 - Landowners raise food for the world — Is it fair to add the burden of trespassers to that we already carry from weather, predators insects + long long hours of hard work - Please Kill HB 265 - Your property rights might be next on the line,

~~Thx~~

SENATE JUDICIARY COMM.
EXHIBIT NO. 105
DATE 03 08 8
BILL NO. H.B. 26

NAME [illegible] BILL NO. HB 265

ADDRESS Box 316 Mcleod Rt. DATE May 9, 85

WHOM DO YOU REPRESENT _____

SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I am a concerned Sportsman that owns two Stream side real estate. I feel that HB 265 expands the permissiveness of the Supreme court ruling to allow intrument of private property rights.

Please continue the support of SB 413, 421, 424 and 435

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 106
DATE 03 08 85
BILL NO. H.B. 265

March 7, 1985

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 107
DATE 03 08 85
BILL NO. H.B. 265

Senator Joe Mazurek
Chairman
Senate Judiciary Committee
State Capitol
Helena, Montana 59620

Re: House Bill 265

Dear Chairman:

Back in the 70's a House Bill which stated "Stand in the middle of a stream and as far as the eye can see shall be open to public recreation" met a hard and fast defeat. H.B. 265 is but another attempt to accomplish the same results. The first step to obtain free and uncontrolled use of private property. I have heard a significant number of recreationists state; "We will go after the wildlife next," "Get as much as we can this time, the rest will follow," "We want unrestricted hunting too," etc. etc. If successful, God help the rancher-farmer.

H.B. 265 will open a Montana playground, not only to resident, it gives the key to our land to well over 200 million U. S. residents to indulge in free, unrestricted and unlimited water related recreation. Thousands of miles of additional rivers, creeks, trickles of water and even dry stream beds and thousands of miles of private property land corridors will become as public as a Chicago city street resulting in a multitude of landowner problems.

Most disheartening is the taking of private property from one and giving its use to another without due process and compensation, "a shocking reality."

Landowners will lose the right to control land he owns and the right to protect the stream, bank and corridor resource.

Taking will result in an overall loss of land value estimated by many to amount to between ten and fifty per cent and amounting to millions and quite possibly hundreds of millions of dollars of tax value property. "Streamside property is the most valuable" A severe blow to an already depressed agriculture economy.

Loss of land value will severely restrict, and possibly preclude, the ability of the farmer-rancher to obtain operating capitol loans. Will tax rolls reflect this depreciation of land value? Landowners will surely be entitled to and rightfully request a reduction of land taxes, another blow to our exonomy.

Streamside property now considered to be very valuable, will become a liability. What incentive will remain to own land that has become a detriment? All at a time when Montana searches desperately for revenue.

H.B. 265 in essence implies that landowners do not have the ability to manage and control and proposes to turn management over to the Department of Fish, Wildlife and Parks. Some landowners apparently agree and they should do so. The Department have for some time been soliciting landowners to participate in such a program currently in effect and I suggest those who desire this program contact the Department for voluntary turn over for public use. Try it on a two year trial basis. They don't need H.B. 265. Let those of us who have been gaurdians of the resource remain in control. We don't need H.B. 265 either.

The general public currently have free use of well over 30 million acres of public land and its waters. (well over 1/3 of Montana) H.B. 265 expands this decision to include thousands of miles of stream beds, banks and endless corridors through private property. A trickle of water a foot wide, running for ten miles through a ranch and choked with brush a half mile wide, even to the point of making the water inaccessible, will become a one half mile wide corridor for hunting birds, waterfoul, gophers and possibly Big game in addition to dragging a boar and providing access to a neighbors property or public lands. The brush that chokes a creek is a definate barrier as long as the creek or its bed is wide enough to put your foot in.

Free access sounds beautiful to some urban dwellers who have always wanted to fish that creek on Joe's place; the problem is that it also sounds good to California and like state residents where the resource was depleted years ago and the vast majority of inland (what little is left) is of planted fish. When the resident heads for his favorite hole on Joe's place there could well be several hundred ahead of him. If one thousand people decide to invade Joe's property for fishing, hunting or making mud balls. Men, women, children, cats and dogs, there is no protection for Joe who has lost control except for paying taxes and liability.

How long will it be before trout fingerlings that had a sanctuary on Joe's place, will be replaced by planted trout? I had a taste of planted streams during occasional visits to a construction job in California years ago. "Quite a comedy." No fish and the streams were jammed, the Department of Fish and Game under public pressure would plant streams, trucks would be followed to planting sites and dump fish in while a horde of adults and children were filling their sacks, a simple act with artificially fed trout. Two days later no fish. Will that be our tomorrow? Is Montana being taken over by Trout Unlimited, Audobon and recreationists from states where the resources were exploited to near elimination years ago.

Where will funding come from to implement the enormous additional burden placed on the Department of Fish, Wildlife and Parks and law enforcement agencies to enforce tresspass laws, to answer calls for help from landowners, to file charges, to plant hatchery trout, to build and operate hatcheries, to expand administrative personnel and office buildings, to employ additional wardens? The number of Game wardens are severely limited at this time and I have heard several complain of being severely restricted on time and mileage allowance. The resident of course will be faced with reduced limits, higher license fees (strongly opposed) possible drawings, etc. Remember all water related play and recreation (except fishing and hunting) is free, no licnese required, no identification and only a very slight penalty, if any, for tresspass.

There is little in the liability section to feel secure about. I have witnessed lawsuits where misconduct and negligence was successfully claimed because the owner of equipment, material or an excavation should have known that a child may be tempted to play on the equipment etc. and should have properly precluded entry to the area. If you are required to leave a tractor near a stream corridor or in it because of a breakdown and a child climbs on it and gets hurt or a child goes to pet a calf, or other animal, and is maimed or killed by the mother of such, you may well be liable and the recreationist could easitly wind up becoming owner of your land. You may be required to fence around the corridor.

If the state wants our land for public use, let the state use due process, let the state supply landowner liability insurance to protect the landowner from the recreationist who will be using camp fires that could easily burn you out.

During the Coalitions lawsuit they were often quoted as stating they only wanted use of floatable streams, how quickly desires change.

If the Supreme Court decision is ambiguous let them clarify it. Its their decision. We can live with it until clarified, why can't the recreationists? Ask yourself why would the recreationist and the Coalition work so hard to get H.B. 265 passed if there wasn't enormous gain in it for them?

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 107
DATE 03-08-85
BILL NO. H.B. 265

Ralph Holman
McLeod, Montana

Nye, Montana 59061
March 4, 1985

Senate Judiciary Committee
Senator Joe Mazurek, Chairman
Capitol Station
Helena, Montana 59620

Re: HB265

Dear Senator Mezurek:

Because of the weather and our occupation, we find it impossible to appear before your committee to submit testimony in regard to HB265. However, we are ranchers and land owners in Stillwater County and will be affected by the stream access legislation. As Chairman of the Senate Judiciary Committee, we ask you to please let it be known to all the members of the committee that we the undersigned would like to see the above bill amended in the following way:

1) We feel the public has the right as laid down by the Supreme Court to use the surface water, although HB265 goes beyond this by taking away our property rights.

2) We, also, feel that our property rights should not be given away as to portage or the right for others to enter our land.

Respectfully submitted,

Keith E Martin
Kathryn E. Martin
Glen R. McKinsey
Kathy J. McKinsey
Dale H. McKinsey
Susan A. Russell
Kathryn V. Eaton
Glen V. Eaton
Bob McKinsey
David W. Martin Jr. (Voter)

Laurie N. Jensen
Sherman Roberts
Bonnie Roberts
Jerry J. Edwards
William Eberhardt
Eileen Eberhardt
Delores E Curran
Jerold M Curran
[illegible]
Doris Hertel
Michael J. Jensen

SENATE JUDICIARY COMMITTE
EXHIBIT NO. 108
DATE 03 08 85
BILL NO. H.B. 265

PERSONAL TESTIMONY OF ANDREW C. DANA

BEFORE THE MONTANA STATE SENATE

CONCERNING PROPOSED STREAM ACCESS LEGISLATION

Date: March 8, 1985

To: Montana Senate, Judiciary Committee
Montana 1985 Legislature
Written testimony

From: Andrew C. Dana
Box 2006A, Route 38
Livingston, MT 59047
Phone: 587-9591 (w), or 222-2065 (h)

The recent Montana Supreme Court decisions threw into question the rights of the public to use the state's waters for recreation, the rights of landowners to restrict recreational access, and the role of the Department of Fish, Wildlife, and Parks in protecting the rights of recreationists, landowners, and the integrity of the natural resource base in Montana. In response, the Montana House of Representatives passed House Bill 265 in an attempt to clarify the ambiguities left by the Court decisions.

THIS TESTIMONY IS IN OPPOSITION TO HOUSE BILL 265 FOR THE FOLLOWING REASONS:

1) The classification system proposed by House Bill 265 does not address the potential problems of recreational overuse of fragile riparian ecosystems. The Supreme Court cases clearly state that "the capability of use of the waters [of the state] for recreational uses determines their availability for recreational use by the public." Many small streams in Montana are ecologically fragile and are not capable of supporting

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 109
DATE 03 08 85
BILL NO. H.B. 265

unrestricted fishing access. Unlimited fishing pressure on these streams will eventually result in the depletion and degradation of the quality of Montana's resource base. Therefore, House Bill 265, which leaves virtually every stream in the state open to the possibility of overfishing, clearly violates (a) the intention of the Supreme Court decisions and (b) Article IX of the Montana Constitution which requires that the legislature "provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."

2) House Bill 265 gives regulatory responsibility for every waterway in Montana to the Department of Fish, Wildlife, and Parks (DFWP). The DFWP is currently understaffed and underfinanced to carry out these responsibilities. In order to protect the fisheries of the state the DFWP will be required either to raise license fees or to seek increased funding from the state's general fund. The first alternative will be unpopular among sportsmen and will be discriminatory against the less affluent members of society. The second alternative, tapping the state's general fund, is not practical in this time of fiscal restraint. If the DFWP is not able to raise sufficient funds for adequate recreational resource regulation, Montana's resource base will decline in quality to the detriment of the state's tourist-based economy and the state's citizens in general. Additionally, recreationists will be faced with an array of extensive, restrictive, and confusing regulations.

3) House Bill 265 expands, rather than clarifies, the Supreme Court rulings by providing for the use of lands adjacent to Montana waterways. The provisions dealing with portage place an unfair and costly burden on landowners to provide portage routes for the benefit of the public. Why should individual landowners be required to pay for the public's use of their land? In essence, House Bill 265 penalizes landowners simply because they own property adjacent to streams.

4) House Bill 265 by implication allows the construction of permanent and semi-permanent structures, overnight camping, and the use of firearms on private property between the ordinary high water marks of "Class I" streams. This is a clear violation of an existing Montana Statute (MCA Section 70-16-201) which states that private property extends to the low water mark on all navigable streams.

In my opinion as a natural resource policy analyst, it makes little sense to give the Department of Fish, Wildlife, and Parks sole responsibility for the management of the state's recreational resources. A system of mutual cooperation between the DFWP and landowners should be developed. Because private landowners live and often work in close proximity to the waterways of the state, they have advantages of location and ability to manage streams both efficiently and equitably.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 109
DATE 030885
BILL NO. HB 265

If landowners are given responsibilities of resource stewardship by the state, they will have incentives to maintain the high quality of the state's resources. If landowners abuse these stewardship privileges, the state could revoke the privileges. Landowners could be expected to manage recreational resources carefully if they faced the threat of losing stewardship rights.

The idea of stream classification incorporated in House Bill 265 is commendable, but as defined in the Bill, the classifications do not go far enough to protect sensitive streams from potential overuse. At least one more classification should be included which allows landowner control of recreational access to Montana's small, sensitive streams under supervision of the DFWP. Such classification of streams would not be simple, but it is certainly a reasonable solution if the alternatives are landowner-recreationist polarization and the ultimate degradation of the state's sensitive fisheries.

As another alternative, property rights to water should be clarified. Under current Montana water law, it is impossible for individuals to appropriate instream water for fish, wildlife, and recreational purposes, yet individuals and private groups may appropriate water for other beneficial uses if the water is diverted. Such appropriation is tantamount to private ownership. Clearly, water has a high value if left instream. Montana water law should be streamlined to allow individuals and private groups, including such groups as Trout Unlimited and The Nature Conservancy, to appropriate exclusive rights to small, sensitive streams in order to protect the state's resource base.

The ideas of expanded stream classification and instream appropriations are only suggestions, but even in rough form, they provide opportunities for flexible and creative resource management completely neglected by House Bill 265.

In summation, I believe that Legislative approval of House Bill 265 would violate the rights of the citizens of the State of Montana as outlined in the Constitution, in the Statutes, and in Judicial decisions.

- House Bill 265 would permit overfishing of Montana's small streams in violation of Article IX of the Constitution and various statutes designed to ensure the environmental integrity of riparian ecosystems. Additionally, the Bill violates the public trust doctrine by allowing the destruction of publicly owned fisheries through overuse.

- House Bill 265 places an unfair burden on landowners holding property adjacent to waterways by making them pay: (1) costs of the public's recreational use of waters and privately held lands within high water marks, (2) costs of establishing portage routes, and (3) costs associated with litter and invasion of privacy.

- House Bill 265 asks the Department of Fish, Wildlife, and Parks to take on the impossible task of regulating recreational use of every waterway in the state without landowner cooperation. The DFWP has neither the money not the manpower to protect the state's resources adequately. As a result, the Bill virtually assures that the state's fisheries will decline in quality to the detriment of all in the long run.

- House Bill 265 completely ignores the existing statute which specifies that landowners own to the low water mark of navigable waterways. The provisions of the bill therefore allow taking of private property without just compensation which violates Article II, Section 29 of the State Constitution.

For all of the reasons stated above, I respectfully urge that the members of the Senate Judiciary Committee reject House Bill 265 as written.

Respectfully submitted,

Andrew C. Dana

Andrew C. Dana

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 109
DATE 030885
BILL NO. HB 265

POLITICAL ECONOMY RESEARCH CENTER

502 South 19th, Suite 211
Bozeman, Montana 59715
(406) 587-9591

RECREATIONAL ACCESS TO MONTANA'S WATERWAYS: CONFLICT OR COOPERATION*

by

Terry L. Anderson

Senior Fellow, Political Economy Research Center and
Professor of Economics, Montana State University

RECREATIONAL ACCESS TO MONTANA'S WATERWAYS: CONFLICT OR COOPERATION*

by

Terry L. Anderson

Senior Fellow, Political Economy Research Center and

Professor of Economics, Montana State University

* Working paper, revised 2/12/85.

ABSTRACT

This paper analyzes the potential impact that two 1984 Montana Supreme Court opinions may have on the small stream fisheries of Montana. Both opinions declared that since the state of Montana holds all of the waters of the state in trust for the benefit of its citizens, no private individuals with land adjacent to waterways may control recreational use of those waters. All surface waters in the state may now be open to unlimited access for recreational purposes.

The Court decisions imply that all state waters which are capable of supporting recreation are common property. Problems associated with common property resources have been well documented. In general, common pool resources are overused by the public because each individual user receives benefits but does not have to pay the full costs of resource use. Costs are spread to society as a whole as the resource base declines from overuse.

Montana faces an imminent decline in the health of its sensitive and highly productive small stream fisheries now that they are open to unlimited recreational access. The decline in these fisheries is likely to affect adversely the fisheries in Montana's larger rivers, the state's economy, and the outstanding recreational opportunities Montanans currently enjoy.

Allocation of resources is usually determined through private control or by means of public regulation. When grappling with ways to protect the resources of the state in the aftermath of the Supreme Court decisions, the Montana legislature must decide whether to adopt public or private management schemes. Both public and private management are feasible, but

private management options avoid the high costs, prospects of increased taxes and license fees, expansion of state bureaucracy, and complex regulatory schemes associated with centralized, public management.

While public management may be necessary on the state's larger, navigable waterways, landowners with responsibility for resource stewardship have advantages of location and incentive to protect small streams from overuse. In the long run, private control of fragile small streams is more efficient and more beneficial for the people of Montana.

Two policy options are identified which would allow for efficient and beneficial management of Montana's small stream fisheries. A stream classification system which designates the streams that require protection is one possibility. Small streams which are most effectively managed and protected by landowners should be placed in a category that gives landowners both the authority and responsibility to protect the recreational resource base.

A second option is to repeal Montana's statutory requirement that water appropriation rights may only be acquired by individuals and private groups through diversion of water from natural watercourses. By allowing landowners, individuals, conservation groups, and sportsmen's organizations to appropriate recreational water rights on small, fragile waterways, overuse and overcrowding of recreational resources could be controlled and minimum flows maintained. This would place highly valued instream water uses on an equal basis with the other beneficial uses of water in the state and would serve to rectify current inconsistencies in Montana water law.

TABLE OF CONTENTS

INTRODUCTION

In 1984, the Montana Supreme Court ruled on two cases which concerned the right of the public to gain access to the waters of the state for recreational purposes. Both cases were brought by the Montana Coalition for Stream Access, Inc. and various state agencies against Dennis M. Curran, a landholder along the Dearborn River, and Lowell S. Hildreth, a landholder with property adjacent to the Beaverhead River. The Coalition's goal was to force the two landholders to allow the public to float and fish the Dearborn and Beaverhead Rivers. The Supreme Court held that both rivers should be open for public recreational use. Unexpectedly, the Court also ruled that since all surface waters in the state of Montana were publicly owned, they all should be available for unrestricted recreational access.

The breadth of the Supreme Court's decisions shocked both the defendants and the plaintiffs. Even the Coalition did not anticipate such sweeping mandates. Reaction was swift and predictable. Landowners in Montana decried the cases as appalling examples of judicial law-making and as takings of private property. Sportsmen reveled in apparent victory. Controversy and sometimes bitter conflict have surrounded the issue of recreational use of surface water in Montana ever since.

At least four bills have been introduced to the 1985 session of the Montana legislature which attempt to resolve disputes that have arisen over the stream access issue. These bills have been introduced in an effort by legislators to clarify the ambiguities and implications of the Court decisions and balance the concerns of landowners with the concerns of recreationists. Additionally, the legislators recognize their constitutional mandate to safeguard Montana's water resources from degradation.

While a great amount of attention has been relegated to the conflicts that have emerged among landowners and recreationists as a result of the Montana Supreme Court cases, considerably less attention has been paid to the effects of these decisions on the recreational resource base of Montana. Although some sportsmen view the decisions as unqualified victories, their elation may be unjustified. Serious questions arise about what impacts unlimited recreational access to Montana's smaller streams will have on the state's fisheries. This paper analyzes the potential impact of the Supreme Court decisions on state resources, particularly the state's fisheries and recreational resource base. Policy options to deal with resource problems that may arise also are identified and evaluated.

THE MONTANA SUPREME COURT CASES

Both the Dearborn and the Beaverhead Rivers are moderately sized streams with high recreational value. In central Montana, the Dearborn flows from the Scapegoat Wilderness, through scenic canyons and rolling plains to join the Missouri River. Fishing on the Dearborn is superb, and recreational boating is popular. The Beaverhead River originates at the outlet of Clark Canyon Dam in the southwestern portion of the state, flows north past Dillon, and eventually combines with the Big Hole and Ruby Rivers to form the Jefferson River. The Beaverhead is reputed to produce more large fish per mile than any other stream in the state.

The Coalition for Stream Access, Inc. brought suit against two landowners who hold property adjacent to the rivers—Lowell Hildreth on the Beaverhead and Dennis Curran on the Dearborn--to establish a clear public right to use the rivers for recreational purposes. Both Curran and Hildreth objected to public use of the rivers, believing that they had the right to control the waters flowing through their property. In each case, the District Courts held against the landowners and affirmed that the public did have the right to use the rivers for recreational purposes. The cases went to the Supreme Court of Montana on appeal.

The Dearborn case was heard first. In The Montana Coalition For Stream Access, et al. v Dennis Michael Curran,[1] the Supreme Court affirmed the ruling of the District Court, but it also substantially broadened the

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[1] Referred to as Curran throughout the rest of this paper.

ruling. Citing the Montana Constitution and the public trust doctrine,[2] the Court held:

> The capability of use of the waters for recreational purposes determines their availability for recreational use by the public. Streambed ownership by a private party is irrelevant. If the waters are owned by the State, no private party may bar the use of those waters by the people . . . . Any surface waters capable of use for recreational purposes are available for such purposes by the public, irrespective of streambed ownership.

The Court did not define "capable" and therefore placed no limits or restrictions on the amount or the type of recreation that was appropriate on Montana waterways.

A month later, the Supreme Court considered The Montana Coalition for Stream Access, et. al. v Lowell S. Hildreth.[3] The Court reiterated and strengthened the decision reached in Curran by specifically rejecting any "test" used to determine whether a stream is suitable for public recreational use. "[The] only possible limitation of use can be the characteristics of the waters themselves." Again the court made no effort to define what the limiting characteristics might be.

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[2] Article IX of the Montana Constitution provides that all waters in Montana are state property, held for the use of the people. The public trust doctrine was first clearly enunciated in the 1892 U. S. Supreme Court case, Illinois Central Railroad vs. Illinois. The doctrine reads, in part:

> The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties, . . . than it can abdicate its police powers in the administration of government and the preservation of peace.

[3] Referred to as Hildreth throughout the rest of this paper.

The Curran and Hildreth cases significantly expanded the rights of the public to gain access for recreational purposes to Montana's waterways. the decisions will have little effect on the state's larger rivers, such as the Yellowstone, the Missouri, and the Kootenai, because these rivers were previously available for virtually unrestricted public use. Smaller streams, on which public use was customarily regulated by private riparian landowners, were opened to all recreational uses with no regard for potential adverse impacts that could accrue through overuse.

THE CREATION OF A COMMON PROPERTY RESOURCE

The Tragedy of the Commons

In effect by invoking the public trust doctrine, the Montana Supreme Court declared that all water resources are held in common since no individual has the right to exclusive control of the resources. While some may consider this appropriate, problems associated with common property resources are well documented. In general, when a resource is held by everyone, both the quantity and the quality of the resource decline. Free and open access means that individual resource users have no incentive to consider all of the costs of their use.

Ecologist Garrett Hardin described the "tragedy of the commons" in the context of a common pasture. If all were free to add cattle to the commons, it would soon be overgrazed. An individual who decides to add an

extra cow will reap the gain of an additional fattened animal and therefore will have an incentive to add cattle. Of course, each cow will impose a cost on the common pasture, but to the cow's owner this cost will be small since it is spread among all users. Furthermore, each individual recognizes that if he refrains from adding a cow to the commons in an effort to improve the forage, he cannot prevent others from adding their cows. As a result, such restraint will have no effect; the forage will continue to decline from overuse.

The same tragedy of the commons can occur with a fishery. Individual fishermen gain by using the stream. Additional pressure and more fish harvested reduce the quality of the overall fishing experience, but again these costs are shared with all other fishermen. The person who returns a fish to the stream to grow and to be caught again has no guarantee that the next fisherman will not keep the fish. Thus, the incentive for catch and release fishing on sensitive streams is greatly diminished.

This is not to say that everyone will behave in this way. Some sportsmen will respect the stream and follow catch and release practices when appropriate. But the incentive to do so is diminished. If we observe the treatment of open access resources, the evidence is not convincing that good sportsmanship and sensitive resource use prevail. Ask why it is that river access points owned and maintained by the Department of Fish, Wildlife, and Parks are often littered, overused, and overfished. Ask why ocean salmon populations are decimated and why many animal populations are driven to extinction. The tragedy of the commons is pervasive.

This tragedy can only be avoided if access to property is restricted. As Ralph Johnson and Russell Austin (1967) note,

> with the ever increasing pressure of fishermen and recreationists on the small lakes [and streams] in the Western states, it is apparent that for their own protection and the protection of the riparians, some restraints must be placed on the common right of use of these waters.

In the United States the most common method of access restriction is private ownership. The private owner reaps direct benefits of resource use, but he also bears the full costs. When resources are publicly controlled, well-intended governmental resource managers, working out of their agency offices, often are removed from the full consequences of their policy decisions. They receive few direct benefits from their decisions and are not directly affected by many of the costs their decisions might incur. Private resource managers more often live in day-to-day contact with their assets and have a feel for the special needs for their resources. Hence, there is more incentive for responsible management in the private sector. The rancher who overstocks his range will bear the cost in the form of range damage, causing reduced future production and reduced land values. Since the majority of stream owners do not charge for stream access, they will not feel an immediate financial impact from unrestricted recreational access. They will experience, however, a decline in fish populations and negative impacts on riparian lands.

Without private control of access, public restrictions must be imposed. While there is no question that such restrictions can work, they are costly. The DFWP already has a tremendous responsibility for managing fisheries. Adding to this responsibility by requiring the DFWP to manage all streams in the state will necessitate the appropriation of more funds. Intensive and expensive study of the state's small stream fisheries will be needed because there is a dearth of site specific information about how much access to allow in individual locations. Furthermore, examples abound

of bureaucratic mismanagement of important environmental resources (Baden and Stroup, 1981).

Montana's Small Streams

Now that small streams are open to unlimited recreational use and have become common property, a decline in the quality of Montana's fisheries is imminent. Overfishing and overcrowding will occur on some Montana streams. The decline in the quality of the resource will be gradual but inexorable, as Americans' leisure time continues to rise and as recreational pressure intensifies. Prior to the Court decisions, landowners were producing public goods--state-owned wild fish--in streams and rivers which they believed they had rights to control. Without control of stream access, landowners will have no incentive or authority to oversee use of the riparian resources of Montana, and they will take no interest in maintaining stream quality. As a result, the state will now be forced to allocate recreational use of resources, rather than depending on landowner discretion to limit access and to control overuse of streams. Red tape and its accompanying frustrations and costs will be substituted for efficient private resource management.

The impacts of common ownership will be particularly severe on small streams which are fragile and sensitive. At least four factors contribute to the greater fragility and sensitivity of small streams compared to large streams: (1) there is less protective cover for fish, (2) spawning grounds are more likely to be trampled, (3) fish populations will undergo greater stress from harassment associated with increased human activity, and (4) insect life on which fish depend will suffer a greater chance of destruction.

The timing and extent of these adverse impacts will vary depending on the type and location of the streams. First to be affected will be highly productive spring creeks and freestone streams, which often provide crucial spawning and nursery habitat for the state's larger waterways. Because these streams are so productive, anglers will descend on them to take advantage of the high quality fishing they offer. Overfishing will ruin these fisheries, not only destroying the recreational base of the streams themselves, but in certain cases, damaging the fisheries of larger rivers. In addition, streams near Montana's larger population centers will experience increased recreational pressure, causing a decline in the quality of the recreational experience.

In the past, high quality fishing has been preserved on sensitive streams through private ownership. Examples abound:

- On the Boulder River in Sweet Grass County a rancher has strictly limited access and kill on the stream adjacent to his property. Fish of over three pounds are caught regularly. Upstream a short distance on National Forest land, only small, stocked fish are caught because the stream is overfished.

- South of Livingston, on Nelson's and Armstrong's Spring Creeks, public access is strictly rationed by the landowners. Both in-state and out-of-state fishermen pay up to thirty dollars a day to fish on these streams, pumping money into the local and Montana economies. Local tackle store proprietor and angling expert George Anderson (1984) writes, "if these streams were open to the public with no restriction on access, they would have been ruined long ago."

- On a small spring creek in the Gallatin valley, a landowner has fenced cattle out of his stream to promote bank stabilization. Fish populations have risen as cover has regenerated. Silt has washed out, exposing gravel suitable for spawning. An added public benefit is that the stream has once again become important nursery for the East Gallatin River.

- On Poindexter Slough near Dillon, a riparian landowner invested in stream habitat improvement to enhance the fishery. Currently, the "improved" section of stream produces fish for adjacent state-owned land.

The small streams mentioned above, and many others like them which are highly productive and which have been regulated by private management, have become extremely important to Montana's tourist and fishing tackle businesses. Destruction of these resources will adversely affect Montana's economy. The decline of resource quality will be incremental and difficult to document because it will be slow. As it occurs, however, the impact of resource degradation will spread beyond the fisheries. Montana will lose some of its nationally famous and superb fisheries which provide enjoyment for her citizens and generate fishing and tourist related revenues estimated by the Department of Fish, Wildlife, and Parks (DFWP) to be worth $90 million in 1982 (Flynn, 1984).

Distribution of Costs and Benefits

Attention should also be focused on the distribution of costs and benefits as a result of the Curran and Hildreth cases. With the waterways of Montana open to unlimited recreational use, obviously Montana's recreationists who use riparian resources will benefit from unrestricted entry to productive streams, at least until the resources are degraded through overuse. Non-resident recreationists will also enjoy rights to use Montana's fish and riparian assets without asking permission. The DFWP undoubtedly will have to devote more resources to conflict resolution and therefore will require an expansion of its budget to pay for increased costs associated with the need for heightened regulation, enforcement, and protection of the state's resources. Thus, the state bureaucracy will expand to the benefit of state employees.

The costs of unlimited access to Montana's waters cannot be ignored. To pay for a larger state bureaucracy, money will have to be taken from general funds or additional sources must be tapped. This will cause a redistribution of wealth from non-recreationists, who will unwittingly subsidize the costs generated by recreational uses of the state's waters. Alternatively, the DFWP will be forced to raise license fees for recreational use, perhaps to a level so high that non-residents will spend vacation dollars elsewhere. In addition to the loss of resource quality, private landowners will face greater liability, more damage to agricultural property and livestock, and more interference from public intrusion into rights of privacy and private property.

The public will generate environmental third party effects. Litter, sanitary problems, and noise are common problems at public fishing access sites today, and there is no reason to believe that the public will behave with more discipline on small streams surrounded by private property. These cost will be borne by riparian land owners. If access rights also include the right to hunt waterfowl, the potential for third party effects is even greater. Cattle will disturbed and perhaps injured.

In sum, the Curran and Hildreth cases have opened more than the waters of the state to increased recreational use. By creating common property, the cases have opened the way for degradation of the small stream fisheries in Montana. The door has been opened for expansion of state bureaucracy and for increased taxes to pay for DFWP enforcement and regulatory activities. Notoriously ineffective public resource management will need to be substituted for private resource husbandry, which has served the state well in the past. Finally, the cases have eroded further private property rights.

INCONSISTENT RESOURCE POLICIES

The introduction of the public trust doctrine into Montana water law has thrown into question Montana's entire system of water allocation. Conceivably, perfected private rights to use water for agricultural, domestic, or industrial purposes could be challenged under the public trust framework. In a recent court case in California (National Audubon Society v Department of Water and Power of the City of Los Angeles, 1983), the city of Los Angeles was forced under the public trust doctrine to abandon a legally appropriated water right to protect wildlife habitat in Mono Lake. While wildlife and people who value wildlife clearly benefited, uncertainty was created in California water law. In essence, the public trust doctrine is incompatible with the appropriation system of water rights because it undermines the security of resource control granted by the appropriation system. The introduction of the doctrine into Montana water law, therefore, has exacerbated inconsistencies in the state's water policies.

While the Supreme Court interpreted the state constitution to mean that the public has the right to use all of the surface waters of the state for recreational purposes, the constitution also clearly charges the legislature with the duty to protect the state's resources from degradation. Article IX, Section 1(3) reads: "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" (emphasis added). In the case of small streams that will suffer from overfishing, the Court's decision contradicts the policies set forth by the legislature to protect natural resources. One such policy states,

> It is the policy of this state . . . to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with least possible degradation of the natural aquatic ecosystems. [MCA 85-2-102(3)]

Permitting overuse of aquatic resources through unrestricted recreational access certainly does not maximize benefits for Montanans. Another policy states,

> It is the policy of the State of Montana that its natural rivers and streams and the lands and the property immediately adjacent to them . . . are to be protected and preserved in their natural or existing state . . . Further, it is the policy of this state . . . to protect the use of water for any useful or beneficial purpose as guaranteed by the Constitution of the State of Montana. [MCA 75-7-102]

The uses of water for fish, wildlife, and recreation are specifically cited in MCA 85-2-102 as beneficial. Any policy, judicial or legislative, that harms such beneficial uses may be unconstitutional. The Curran and Hildreth case rulings will destroy small stream fisheries, and recreational opportunities in Montana will suffer as a result. The sweeping decisions made by the Supreme Court therefore may be unconstitutional when applied to small waterways.

The Supreme Court decisions may also violate the principles of the public trust doctrine when applied to the small streams of Montana. "According to the [public trust] doctrine . . . government must protect particular resources within its jurisdiction for the public good and for the good of the resource" (Montana Legislative Council, 1984) (emphasis added). If the Court rulings result in the deterioration of Montana's fisheries as a consequence of unlimited recreational access, the provisions of the public trust doctrine will be completely contradicted since neither the "public good" nor the "good of the resource" will be protected.

On the other hand, the Supreme Court stated that the only limiting factors for recreational use of water in Montana are 1) the "characteristics of the waters themselves" (Hildreth) and 2) "The capability of use of the waters for recreational purposes determines tneir availability for recreation by the public" (Curran). This language implies that the state may indeed restrict public access to streams when such waters are not capable of supporting unlimited recreational use. Taken in combination with the constitutional mandate charging the legislature to protect the state's resources, these statements unambiguously force the legislature to face the problem of recreational resource degradation through overuse. Policy options which address common property fishery problems are discussed below.

RESOURCE MANAGEMENT OPTIONS

Natural resources are normally allocated in two ways in the United States. Either private property owners dictate how resources are used, or governmental agencies distribute scarce resources through regulation. The U. S. Constitution stresses the sanctity of private property rights, and for most of the nineteenth century the federal government disposed of its vast natural resource holdings to private owners. Beginning with the Progressive Era, however, governmental agencies actively entered the resource management arena and retained title to many public resources. It was during this era, in 1892, that the Supreme Court decided Illinois Central Railroad vs Illinois, the first clear statement of the public trust doctrine.

In cases where private property rights cannot be well specified and enforced, public ownership and control may be justified. In most cases, however, private property rights provide an effective means to prevent the tragedy of the commons. The Montana legislature must decide which avenue, public or private, is more appropriate for the management of the state's fisheries and water resources.

Public Regulation

There is no question that the DFWP has the expertise to regulate streams and rivers in order to provide a strong resource base and quality recreation. Several cases support this conclusion:

- The Rock Creek fishery near Missoula was badly overfished in the early 1970s. By means of a complex set of tackle and harvest restrictions, the DFWP succeeded in restoring Rock Creek to its status as one of the pre-eminent trout streams in the state. Special regulations, tailored to the specific needs of the fishery, remain in effect on Rock Creek.

- The Smith River in Meagher and Cascade Counties has come under enormous recreational boating and fishing pressure in recent years. Several landowners on the river became distraught with the public's disregard for private property. The DFWP responded by assigning a warden to patrol and monitor the public's use of the Smith. This warden has no other duties. Conflicts on the river have decreased.

- With the growth in popularity of fly-fishing and with the concurrent growth in Montana's reputation as the finest trout fishing area in the U. S., populations of trout in the upper Madison River degenerated due to increases in fishing pressure. The DFWP again responded effectively. It studied the fishery intensively, implemented strict catch restrictions, and patrolled the river diligently. The fishery has recovered and remains robust.

It must be remembered, however, that the DFWP has implemented special management plans for only a few streams in the state at a relatively high cost. Additionally, the DFWP acted to protect fisheries after the resource had suffered from degradation; the Department took no measures to avert overuse before damage was well progressed. As a result of the Supreme Court rulings, the DFWP may ultimately be responsible for the regulation of virtually every stream in Montana. If only one-tenth of the streams in Montana required special regulations to protect them from overuse, the sportsman would be confronted by a cumbersome, almost incomprehensible tangle of catch limits, tackle restrictions, and fluctuating seasons. It is questionable whether centralized control of fisheries will produce the diversity of recreational opportunity that the private sector currently provides. The legislature must consider whether it is advisable or even feasible to give regulatory authority for all waterways to the DFWP.

The problem is further complicated by the fact that expertise and knowledge are useless without money and manpower. The DFWP currently has neither to manage all of the state's streams. If the legislature demands that the DFWP regulate the fisheries, the Department will be forced to expand its activities significantly. More money will be needed. The DFWP may look to the state's general fund for increased appropriations--hardly a desirable prospect in this day of fiscal restraint. If the appropriations are made, either taxes will have to rise or cuts in other government programs will be necessary. The alternative is for the DFWP to raise license fees to cover the additional costs, but this is not something generally favored by sportsman groups. If no money is appropriated, the DFWP will not be able to protect the resources adequately.

Even before Curran and Hildreth resource management activities were inadequate. Angling and other recreational pressure is growing rapidly on the state's larger rivers. On these rivers an argument can be made for some public management because of the federal navigability test and because land ownership on the streambanks is highly fragmented.

The state's numerous smaller streams, however, present an entirely different and vastly more complex resource management problem. The public sector will find management of small streams extraordinarily costly and difficult if it tries to protect the resource without the aid of private land owners. The number of small streams and their geographical dispersion make centralized public management of recreational impacts both inefficient and impractical. Game wardens cannot be everywhere at once, and it would be astronomically expensive to hire enough extra wardens to insure that the state's resources were protected from degradation. Another option exists.

Private Resource Management

Private landowners live, and often work, in close proximity to valuable fisheries. They are able to oversee and allocate the recreational activity that occurs on their lands with minimal effort. Because of their proprietary interest in their land and water, landowners have incentives to manage resources efficiently. While some abuse of fisheries by landowners undeniably has occurred in the past, in general Montana's private property owners have been excellent stewards of the state's natural resources.

Objections are raised that landowners may indiscriminately exclude members of the public from their rights to use the fish and water resources of the state. While a few landowners, in fact, have allowed no public access, the overwhelming majority of ranchers and farmers in the state do permit limited recreational use of their property. The DFWP estimated in

1980 that at most only 3,000 miles of stream out of the 23,000 in the state were ever totally restricted to recreation; a more likely figure is that only 1,000 miles of waterway have ever been completely restricted (Cobb, 1985). On occasion, recreationists will be turned away from private property, and the fisherman who is refused permission will be disappointed. While this is unfortunate, it constitutes effective resource allocation, and the integrity of the resource base is maintained.

In light of (1) landowner proximity to small streams, (2) the vested interest property owners have in their lands and waters, (3) the fact that landowners protect and feed fish and wildlife resources for the public at significant personal cost, and (4) landowner history of outstanding stewardship of natural resources, it is worth considering ways of continuing to use the private sector to allocate at least some of the state's fishing resources. The examples cited on pages 9-10 suggest that this management can provide access, foster recreational diversity, and improve fisheries.

Feasibility of Private Control

The decision in the Hildreth case flatly states that "no owner of property adjacent to State-owned waters has the right to control the use of those waters as they flow through his property." In the shadow of this statement, little hope would seem to exist for private management of small streams. Yet, the Montana Constitution charges the legislature with protecting the state's resources from degradation. Since state regulation will succeed only partially in protecting the fisheries from overuse due to cost and manpower constraints, a management scheme which relies solely on public regulation will fail. The resource will decline, and tenets of the constitution will be violated. In its attempt to find a solution to

the problem of unlimited recreational access, the legislature is trapped: the constitution says the legislature must protect the state's resources, but the Supreme Court decisions, which prevent private control of access, promise to cause degredation of small streams.

The crux of the problem lies in the inconsistencies of Montana water law. If the Montana Supreme Court interpreted the constitution correctly and if landowners truly have no legal right to "control the use" of state-owned water, then all the "use" rights to water granted by the Department of Natural Resources and Conservation to irrigators, municipalities, industry, and households may be illegal. When the state grants water appropriation permits, it does not transfer title to water to the appropriator; rather, the state grants usufructory rights which entitle appropriators to control state water and use it consumptively as long as the water is used beneficially.

In the Montana Code Annotated, irrigation, stock-watering, domestic, industrial, and municipal uses of water are all cited as beneficial uses. The state issues appropriation permits for all these activities, even though such uses consume state-owned, public water. For some uses, therefore, Montana sanctions the private consumption—tantamount to private control—of public water. Recreational use of water and use of water to protect fish and wildlife are also cited as beneficial, yet individuals and private organizations are unable to appropriate waters for recreation and for fish and wildlife. Clearly, the law is deficient. Montana has never ranked priorities of beneficial water use, but the current system effectively places water use for recreation and for fish and wildlife below other uses in priority.

The discrimination in state law against appropriation of water for instream use can be attributed to an archaic statute which reflects the evolution of the appropriation system. When the appropriation system was developed, water left in streams was considered a wasted resource. Instream flows were considered valueless. With growing demand for environmental quality and recreational water use, however, instream water uses have taken on ever higher value. Under the Montana Water Use Act of 1973, individuals must "divert, impound or withdraw" water to obtain an appropriation. Albert Stone (1981), Professor of Water Law at the University of Montana, argues that this statute is outdated and ripe for reform:

> One may ask whether "diversion for beneficial use" was not merely illustrative of the most common means by which the public made use of the water, rather than a definition of a requisite. "Beneficial use" seems to be the real touchstone of the appropriation system of water rights . . .

As Stone points out, some modern water uses which are clearly beneficial do not require "diversion" (e.g. hydroelectric power generation). Other uses do not require water impoundment or withdrawal, particularly water-based recreation.

Because the stream access issue is inseparable from resource quality issues, the legislature currently faces a remarkable opportunity to streamline and rectify Montana water law, to promote cooperation rather than conflict between landowners and recreationists, and to clarify the role of the DFWP in stream and fishery management. By allowing landowners to appropriate recreation and fish and wildlife rights, giving them control of the instream use of small streams in Montana, everyone would benefit:

- landowners would gain incentives to maintain recreational quality in order to retain their rights,

- recreationists would benefit through healthy fish populations and access to streams they request permission to fish,

- the problems of overfishing and overcrowding would be solved,

- the fisheries of Montana would be spared from degradation,

- the DFWP would be relieved of the impossible task of regulating all of Montana's sensitive fisheries,

- sportsmen would not be faced with expensive license fees and with complex, confusing regulations,

- non-recreationists would not have to subsidize DFWP projects to control the impact of recreationists on fisheries, and

- the growth of bureaucratic control over the citizens of Montana would be minimized.

If the legislature takes the initiative to resolve the inconsistencies in Montana water law and if it approves private instream water appropriation for recreational and fish and wildlife purposes, conflicts and tensions would be reduced, and the marvelous fisheries of the state of Montana would gain some desperately needed protection.

POLICY RECOMMENDATIONS

The Montana Constitution charges the legislature with insuring that the natural resources in the state do not suffer from degradation. As a result of the Curran and Hildreth Supreme Court decisions, however, the state's ecologically sensitive small stream fisheries are threatened with the possibility of overuse. When considering proposed solutions to the problems raised by the stream access rulings, the legislature would be remiss if it ignored the potential environmental impacts of the Court decisions.

To resolve this tension between its constitutional mandate and the Supreme Court rulings, the legislature has two options. The first is to specify through legislation what are the limiting "characteristics of the waters themselves" and when "the capability of use of the waters for recreational purposes determines their availability for recreation by the public." Bills which propose to classify Montana's waters into various categories reflect this approach. This solution can be accomplished with relative ease but will not address the longer term problem of regulating and insuring adequate instream flows. Therefore, the second solution is to restructure Montana water law so that it allows private appropriation for instream purposes. This latter option will require more study but offers a longer term solution to a problem that will continue to plague the legislature and the judiciary if left undefined.

Several bills have been introduced into the 1985 legislature which have the potential of defining characteristics and capabilities of streams to support open access. It is widely recognized that many streams in the state cannot support open access. A bill is needed which defines these

sensitive streams and which places them in a category where they can be controlled in the most efficient and beneficial manner possible.

A bill which provides for small stream access management by riparian landowners will help minimize conflict and will give owners incentives to help manage the state's fisheries. Third party effects from recreationists on private property (e.g. litter, noise, and agricultural disruption) will be minimized since the landowner, with his proprietary interests, will monitor public resource use closely. An expansion of the state's bureaucratic authority and the inflation of the DFWP's budget (at the expense of state taxpayers) will be avoided. Finally, Montana's fragile fisheries will be protected from overuse.

Such a bill should muster the support of both landowners and recreationists. Sportsmen and environmentalists should support such legislation giving small stream access management to riparian landowners because it will prevent the degradation of our important fisheries. In the absence of private control of the small streams of the state, recreationists may have access to water, but over the long term the water will not provide the kind of quality recreational experience for which Montana is deservedly famous.

The second policy option for the legislature is to revise Montana water law to allow private appropriation of instream flows (Anderson and Johnson, 1984). The deletion from the statutes of Montana's beneficial use diversion requirement (1973 Montana Water Use Act, sec. 85-2-102[1]) would accomplish this reform. The reform is overdue. As Stone (1981) points out,

> [The statute] MCA sec. 85-2-102(1) recognizes appropriation "by stock for stock water." No "dam, ditch, reservoir or other artificial means [is] used" for watering cattle . . . Should in-stream use by people . . . have less recognition and dignity than in-stream use by cattle?

If instream appropriations were possible, instream rights for recreational and fish and wildlife purposes could be won by interested individuals and groups who could then foster related benefits. If instream flows were legally recognized, individuals, sportsmens' groups, and environmental organizations could request water rights from the state and could purchase existing diversion rights to promote fish, wildlife and recreational goals.

Instream flow rights do not threaten to disrupt other rights to water; rather, the recognition of instream flows would allow water uses for recreation and fish and wildlife to compete on an equal basis with other uses. Not all small streams would be appropriated for instream uses. The existence of instream rights would depend on the value placed on instream benefits by landowners and sportsmens' groups (Huffman, 1983). Some landowners would take no interest in stream protection. These streams would remain open to the public under the Curran and Hildreth rulings.

The state would still have ultimate control over the use of public waters and publicly owned fish and wildlife because it would retain the rights to grant, withhold, and revoke recreational water use permits. Yet, by delegating responsibility for managing recreational resource use to the private sector, as it does for other beneficial water uses, the state would promote more effective, less costly, decentralized resource management. In the long run, allowing private stewardship of public resources would provide more benefits for the citizens of Montana than would a system which relies on centralized, public control of resources. Private stewardship on small sensitive streams would reduce common property problems, create incentives for people to recognize instream flow values, save the people of Montana countless tax dollars, and preserve Montana's remarkable small stream fisheries.

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The Political Economy Research Center is an unusual organization. Our research orientation and level of commitment provide PERC associates with an important opportunity to analyze and make recommendations on economic and natural resource issues in both the governmental and private sectors. Approximately 50 percent of our efforts have been devoted to natural resource economics and policy, while the balance of our work deals with taxation, regulation, entrepreneurship, economic history, and a sprinkling of other topics. To the best of our knowledge, we are the only research organization with this orientation.

Since its founding in 1980, the Center has maintained a principled commitment to the development of a society of free and responsible individuals in their relations with one another and their environment. On the basis of considerable study and research, we expect these values to be fostered by social and political organizations relying on private property rights, the rule of willing consent, and the market process. Although we are sensitive to the problems of market failure, we recognize that there is an analogous set of problems with governmental management.

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