

MINUTES OF THE MEETING  
JUDICIARY COMMITTEE  
50TH LEGISLATIVE SESSION  
HOUSE OF REPRESENTATIVES

March 19, 1987

The meeting of the Judiciary Committee was called to order by Chairman Earl Lory on March 19, 1987, at 8:00 a.m. in Room 312D of the State Capitol.

ROLL CALL: All members were present with the exception of Rep. Addy who was excused.

EXECUTIVE SESSION:

ACTION OF SENATE BILL NO. 49:

Rep. Brown moved that SB #49 Be Concurred In. Rep. Cobb moved the subcommittee amendments. Rep. Rapp-Svrcek pointed out that the amendments were not unanimously passed by the subcommittee. Rep. Gould asked Rep. Cobb what can be done about people who are not 501 (c) tax status. Rep. Cobb stated that if those people are to be protected, amendment number 3 must be stricken, and they must file as a nonprofit organization with the state to be exempted. Rep. Gould acknowledged that he would like to segregate amendment number 3. Rep. Cobb pointed out that amendments number 1, 2, and 4 could be voted on and he moved those. Question was called and a voice vote was taken. The motion CARRIED 15-1 with Rep. Rapp-Svrcek dissenting. Rep. Brown moved that SB #49, Be Concurred In As Amended. Rep. Rapp-Svrcek moved amendment number 3, because he stated that it is an important amendment. (See Subcommittee Amendment No. 3 Attached-Exhibit A). Rep. Giacometto opposed the amendment because he pointed out that the people who fall under the Montana Corporation Act are the same people who fall under the 501 (c) and just have not filed. Rep. Miles explained that the filing of 501 (c) is not a problem to do and any nonprofit corporation should be doing this filing. She stated that those who do not file under the Montana NonProfit Corporation Act can cause a potential for abuse and this is in keeping with this act. We want to exempt officers and directors of nonprofit corporations. Rep. Giacometto stated that Montana does have a law and a standard, to clarify what a nonprofit corporation is and if it is regulated properly it will work. Question was called and a voice vote was taken. The motion FAILED 13-3. Amendment number 3 has been stricken. Rep. Mercer moved that §3 be stricken in its entirety. Question was called and a voice vote was taken. The motion CARRIED unanimously. (See Amendments Attached). Question was called on the bill to Be

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Concurred In As Amended. A voice vote was taken and the motion CARRIED 15-1 with Rep. Rapp-Svrcek dissenting. SB #49 BE CONCURRED IN AS AMENDED.

ACTION ON SENATE BILL NO. 189:

Rep. Bulger moved that SB #189, Be Concurred In. Rep. Bulger moved amendments (See Amendments - Exhibit A) and discussed them. Rep. Strizich stated that these amendments are essential in order for the schools to get the needed information on drug and alcohol abuse when it is in the best interest of the youth which is the spirit and content of the Youth Court Act. Question was called and a voice vote was taken. The motion CARRIED 9-5. (See Amendments Attached). Rep. Bulger moved that SB #189, Be Concurred In As Amended. Question was called and a voice vote was taken. The motion CARRIED 11-3 with Reps. Miles, Giacometto and Hannah dissenting. SB #189 BE CONCURRED IN AS AMENDED.

ACTION ON SENATE BILL NO. 92:

Rep. Brown moved that SB #92, Be Concurred In. Question was called and a voice vote was taken. The motion CARRIED 15-1 with Rep. Cobb dissenting.

CHAIRMAN EARL LORY CLOSED THE EXECUTIVE SESSION

SENATE BILL NO. 92, Senator Stimatz, District No. 35, stated that this bill extends the authority of the reserved water rights compact commission to continue negotiations with the Indian Tribes until July 1, 1993. He pointed out that the Commission is composed of nine members, one is appointed by the Attorney General and the other eight are appointed by the Governor. SB #92, is an important bill that extends the life of the Commission for six years, he said. The importance of the Commission is that it can save millions of dollars if they are able to negotiate treaties and agreements with the Indian Tribes and the Federal Government for the reserved water rights.

PROPOSERS:

Senator Galt, Current Chairman of the Commission, stated that a six year compact date is very important. He strongly urged support for this legislation.

CHRIS TWEETEN, Assistant Attorney General for the State of Montana, who is currently the Vice-Chairman of the Reserved Water Right Compact Commission, explained that extension to six years will enable the Commission to finish work and target resources. Six years has been chosen because the most

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immediate progress can be accomplished and the Water Policy Committee suggested that the Compact Commission existence be extended.

DANIEL F. DECKER, Confederated Salish and Kootenai Tribes Attorney, submitted written testimony from Michael T. Pablo, Tribal Chairman, (Exhibit A). Mr. Decker stated that the Tribes believe that SB #92 should be considered for passage and they firmly believe that negotiations should be considered as a viable alternative to litigation. Mr. Pablo stated in his written testimony that if SB #92 should not pass, negotiations would cease and we will follow the path of the state of Wyoming and the Windriver Reservation in litigation of water rights. The state of Wyoming has spent approximately eight million dollars in litigation costs and the issue is not yet settled. He strongly requested passage of this bill.

JO BRUNNER, Montana Water Development Association, stated that even this extension may not give the Commission enough time to work. She requested that all parties affected by these negotiations should be concluded in any meetings, hearings and agreements and she asked for a do pass on this bill.

LORENTS GROSFIELD, Montana Associated Conservation Districts, went on record in favor of this bill and they especially agree with Mr. Decker in regard to negotiations.

CLAUDIA MASSMAN, Montana Environmental Information Center, went on record in support of SB #92, and the work of the Compact Commission.

MARCIA RUNDLE, Attorney for the Compact Commission, stated that all of the entities that the Commission is negotiating with have been notified and three of the Tribes have indicated that they will not attend the hearing today because they were in attendance for the House hearing on this bill and testified in favor of it. The representatives of the Northern Cheyenne requested that she report today that they are in favor of the extension of the Commission.

See the Visitors' Register Attached for further proponents that did not testify.

There were no opponents.

QUESTIONS (or Discussion) ON SENATE BILL NO. 92:

Rep. Rapp-Svrcek asked Mr. Tweeten why this can't be extended

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until the work is done. He answered that would be preferable as far as the Commission is concerned. The six year limitation is placed on the bill by the Water Policy Committee. Rep Rapp-Svrcek asked Senator Stimatz the same question. He stated that the sunset provision was put on the bill in the original bill and a deadline date puts the fire to the feet and they will move. The Commission feels they can accomplish their work within the six year period or they can never accomplish it. The filing of the water adjudication rights are in suspension until this Commission has a chance to do its' work, he said.

Rep. Eudaily asked Ms. Rundle where the money comes from under the state's special revenue fund and she stated that the Commission has been funded half by the general fund and half by the RIT and the Governor's office proposed that it will be continued with that proportion.

Rep. Meyers asked Mr. Tweeten how long the Compact Commission has been in existence. He stated that it has existed since 1979 or 1980.

Senator Stimatz closed the hearing on SB #92 by stating that negotiations are the way to go. The wrong way is through litigation.

SENATE BILL NO. 286, Senator Galt, District No. 16, stated that this act revises the stream access law to remove provisions declared unconstitutional. SB #286 also revises the provisions concerning portage routes. He pointed out that he is concerned with the stream beds and banks owned by private landowners and he is not talking about the large navigable streams where everyone recognizes that those beds and banks are owned by the state of Montana and are free and open to all of the public. SB #286 addresses the stream beds and banks of the private landowner. He submitted copies of the yellow bill that was submitted to the House Natural Resources Committee (Exhibit A) and a gray copy bill (Exhibit B) which is a compromise between the yellow copy and the blue copy bill. He stated that he personally likes the yellow copy bill and requested that the committee try and get the bill back into the yellow copy bill language. He would go along with the gray copy bill but he would rather the bill be killed than go along with the blue copy bill.

PROPOSERS AND OPPOSERS (Discussing Blue, Yellow and Gray Bills):

JIM BOTTOMLY, Rancher-Lawyer, Belgrade, stated that he is

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appalled at the out-and-out misinformation and misrepresentations being made by some of the members of the legal profession about the effect of the Supreme Court Decision in Galt v. Department of Fish, Wildlife, and Parks, and the scare tactics they have unleashed. He supported Senator Galt's yellow and gray bill. He submitted written testimony. (Exhibit C).

Senator Pinsoneault, Senate District No. 27, stated that he did not like the stream access bill when it went through because he thought that SB #265 was a grotesque insult to the private property owner. When it got to the Supreme Court the court did a lot to cure that and what Senator Galt is trying to do is fair and reasonable.

Rep. Gary Spaeth, House District No. 84, stated that the Supreme Court helped clarify some of the questions and issues raised in SB #265. He pointed out that he does not like the blue copy because it does not deal with the problem in a responsible manner and he prefers the yellow copy because it does deal with the questionable area of SB #265. He acknowledged that the gray copy needs to be looked at very seriously.

George F. Roskie, Great Falls stated that this bill is a reasonable compromise solution to the problem of stream access in Montana. While it may not satisfy all of us, particularly the land owners, at least it may prevent the public trust doctrine from further becoming the recreationalists "free lunch". He pointed out that he feels that the gray bill is reasonable but he supports the blue bill. He submitted written testimony. (Exhibit D). He supported the second reading bill but the gray bill is a reasonable compromise.

Lorents Grosfield, Montana Association of Conservation Districts, stated that he supports the introduced version of SB #286 and the yellow and gray bills. He pointed out that the Montana Legislature could do Montana sportsmen and property owners a big favor through attempting to improve landowner/sportsmen relations by trying to temper this "not-so-friendly-anymore attitude". He submitted written testimony. (Exhibit E).

Mons Teigen, Montana Stockgrowers Association, supported the gray bill and submitted written testimony. (Exhibit F).

Bob Gilbert, Montana Woolgrowers Association, stated that he supports the yellow bill.

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Mike Micone, Western Environmental Trade Association, Supports the gray bill. He further stated that the Madison Chapter of the Montana Landowners Association have asked him to express their support for SB #286. Written testimony on their behalf was submitted. (Exhibit G).

Shirley Gannon, expressed one point that no other proponents have brought out about this bill and that is the right of petition, she supports this bill.

Wes Henthorne, Director of the Sweet Grass County Preservation Association, Stated that he supports Senator Galt's position to restore the bill to its introduced version or adopt the gray version. He submitted written testimony. (Exhibit H).

Phil Strope, Sweet Grass County Preservation Association, suggested that the gray and yellow bills are his recommendation.

Chuck Merja, stated that the 1985 law very simply went overboard with the stream access issue in eliminating personal property owners rights. He supported the yellow copy or the gray copy bill. Written testimony was submitted. (Exhibit I).

Jim Flynn, Department of Fish, Wildlife and Parks, pointed out that this bill carefully removes only those provisions of the stream access law that the court declared unconstitutional. He recommended approval of SB #286 in the blue bill form. Written testimony was submitted by Mr. Flynn. (Exhibit J).

Stan Bradshaw, Montana State Council of Trout Unlimited, stated that TU supports SB #286 as it passed out of the Senate. He pointed out that they opposed the introduced version for two reasons: 1.) In the wake of the Supreme Court decision in the Galt case, we did not feel that any additional legislation was necessary on this issue; 2.) SB #286 as introduced went way beyond the scope of the Court's holding in Galt. He further explained that the prudent course for this legislature would be to do only that which is necessary to conform the statute to the Supreme Court holding in the Galt case and to do nothing more. He urged support for this bill without further amendment and submitted written testimony. (Exhibit K - which contains Supreme Court filings on the Galt case No. 86-178).

Scott Ross, Montana Coalition for Stream Access, stated that

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he supports the blue copy because it provides extra protection for landowners. He acknowledged that unnecessary changes will cause further litigation. He submitted written testimony as (Exhibit L).

Jeanne C. Klotnak, Montana Wildlife Federation, stated that the Federation concurs with the testimony of the Mt. Council of Trout Unlimited, Mt. Coalition for Stream Access and the Department of Fish, Wildlife and Parks in their support of the blue copy as a fair compromise.

Jim McDermand, Medicine River Canoe Club, Great Falls, supports the blue copy of the bill. He stated that SB 286 now conforms the current law to three Supreme Court rulings. It also compliments the immeasurable hours of sincere and intense work by the 1985 legislature in structuring the fair and equitable Stream Access Law. Written testimony was submitted by Mr. McDermand as (Exhibit M).

Richard Parks, owner of the Park's Fly Shop, Livingston, and President of the Fishing and Floating Outfitters Association of Montana, supports the blue copy of the bill because after being amended on the floor of the Senate this bill now does, in fact, conform the statutes with the Court's decisions. He cautioned against amending it as he can not envision changes that would not again attempt to reverse the clear intent of the multiple Court rulings already handed down on this issue. He submitted written testimony. (Exhibit N).

Bob Holding, Montana Association of Realtors, supported the yellow copy of the bill.

Walt Carpenter, Great Falls, submitted written testimony. (Exhibit O). He supported the blue copy of the bill because diluting this bill with further amendments, in an endeavor to bring it back into a semblance of the form in which it was originally introduced by Senator Galt, would make the bill unacceptable to sportsmen, he said. He stated that the present copy is a fair bill.

Jerry Manly, Montana Stream Access Coalition, supports this legislation with no amendments.

Pete Test, Chairman of the Montana State Council when SB 265 was passed two years ago, and he stated that it is a little soon to modify the bill. He agreed with the Supreme Court decision and the blue copy.

Bob Morgan, Federation of Fly Fishermen, West Yellowstone,

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and the Missouri Fly Fishers from Great Falls, stated that the original bill proposed as a compromise is indeed not that and is an attempt to go back to all of the original parts of SB #265. He pointed out that he agrees with the Court's changes and supported the amendments of Senator Halligan's. He supported the blue bill.

Jim Delsey, Bozeman, stated that Montana has the best rivers, streams and access and he supported the blue copy bill. He pointed out that no bill will ever be letter perfect for every problem that may arise.

Cindy Jauert, Medicine River Canoe Club, supported the blue copy and stated that the Supreme Court has already given Montana citizens recreational uses of state owned waters. She submitted written testimony. (Exhibit P).

Larry Michnevich, stated that he supports the blue bill because there has been enough litigation. He wants to get on with life and not spend anymore time on this issue.

Roger W. Young, President of the Great Falls Area Chamber of Commerce, sent in written testimony. (Exhibit Q). He stated that Stream Access is important to Montana's quality of life and to tourism and recreation development. The 1985 Stream Access Law represents a reasonable compromise which affords protection for private property rights.

QUESTIONS (or Discussion) ON SENATE BILL NO. 286:

Rep. Cobb asked Mr. Bradshaw about overnight camping in the blue bill. He stated that it attempts to delete what had previously been stated as an absolute right to camp regardless of the necessity. He pointed out that the appropriate thing to do was to delete in its entirety the reference to camping and leave it to the issue of whether camping in a given instance is really appropriate and necessary to the use of the water. Rep. Cobb asked Mr. Bradshaw if the given circumstance should be clarified and which rivers can be camped on or not camped on. Mr. Bradshaw answered that he appreciates the concern of Rep. Cobb but he does not know if it is possible to do that in the sense of structuring some sort of mechanical formula for quickly telling someone that information. Rep. Cobb pointed out that the commercial outfitter can camp on the landowners land and he is charging recreationists for a camping trip on the river and making money off of camping on somebody else's land. He asked Mr. Bradshaw if this is correct. Mr. Bradshaw stated that Rep. Cobb is partly correct and agreed to an extent but the limit-



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ation is going to be whether the camping is a necessity. The outfitter cannot set up a base camp just because he chooses to do so. The outfitter must have a need to camp, he said. Rep. Cobb asked Mr. Ross if the petition access that he stated is working so well should be narrowed down. Mr. Ross said that the petition is set up to protect the landowners interest, fishermen's interest and the resources.

Rep. Keller asked Mr. Ross how many petitions have been processed. Mr. Ross stated that he can not answer that question right off the top of his head.

Rep. Miles asked Mr. Flynn if there were many complaints received during the last two years regarding camping. He stated that the Department has received 245 total and there were 76 citations issued, which deal with stream access trespassing, bird hunting and big game hunting trespassing.

Senator Galt closed the hearing on SB 286 by stating that the yellow and gray copies are his proposed amendments to the blue copy bill. He stated that the amendments proposed do conform to the Supreme Court decision and recognizes an important point, private property. He explained that these amendments are addressed to the small streams and not the class one waters.

SENATE BILL NO. 380, Senator Pinsoneault, District No. 27, stated that this is an act clarifying the law relating to the products liability area. It defines two defenses available in a products liability case and provides an immediate effective date. This bill provides guidance for District Court judges that try cases and clarification for jury instructions. In a civil case the bottom line is, how are instructions to the jury couched.

PROPOSERS:

JACQUELINE TERRELL, Montana Association of Defense Counsel, and she is speaking on behalf of John Stevenson. She stated that an amendment will be offered by the American Insurance Association and it is supported by the Counsel. She acknowledged that this is a good bill.

Glen Drake, American Insurance Association, stated that they support the intent and concept of this bill as originally drafted. On second reading, this bill was amended in such a way that we now believe it nullifies one of the intended defenses to a products liability action. He submitted written testimony and an amendment. (Exhibit A).

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Jim Robischon, Montana Liability Coalition, supported SB #380 with the proposed amendments of Mr. Drake.

Karl England, Montana Trial Lawyers Association, stated that they have lukewarm support for this bill. SB #308 has an objective assumption of risk and there must be a middle ground. Montana has never used the objective assumption of risk.

There were no opponents and no questions.

Senator Pinsoneault closed the hearing on SB 308 stating that the bill is a step in the right direction and he explained that the amendment is left to the committee's good judgment.

SENATE BILL NO. 372, Senator Pinsoneault, District No. 27, explained that this is an act revising the dispute settlement procedures involving new motor vehicle warranties. It provides for notice to the dealer as an agent of the manufacturer, imposing an obligation of good faith and increasing penalties for violations. He stated that if the consumer wants arbitration this bill gives flexibility.

PROPOSERS:

John Motl, Attorney, Helena, stated that half of his practice consists of representation of consumers on automobile warranty cases, new cars and used cars. The lemon law has been used by him as much as any attorney can in the state of Montana. He stated that he sees this act as an improvement in Montana's existing lemon law and an important addition to this bill is that it attempts to give the consumer a copy of the warranty repair work. He further emphasized that on behalf of the consumer, pass this bill.

OPPOSERS:

N. R. SHERBERT, General Motors Corporation, pointed out that GMC works with the Better Business Bureau for an arbitration system. He stated that he has mixed emotions on this bill because there are some areas of it that are an improvement to the existing code. He pointed out also that GMC feels it is an obligation of the consumer to have some liability in this program, the responsibility of the consumer should not be eliminated. The consumer must notify the manufacturer that he has a problem with his vehicle. The suggestion that the consumer should get a work order from the dealer, and therefore the manufacturer will be notified that is not something that will happen. He highly recommended that the

language that reads, "a work order is notification to the manufacturer and the dealer is an agent of the manufacturer" be stricken.

H. THOMAS SCHWERTFEGER, Regional Manager, State Government Relations, Ford Corporation, supported returning to the original language of the current lemon law. He submitted a letter as an exhibit that the present law works well. (Exhibit A).

Tom Harrison, Montana Auto Dealers Association, recommended that the notice portion of the bill be eliminated. Section 6, creates a whole new area of tort. He urged it be not concurred in recommendation.

There were no further opponents.

QUESTIONS (or Discussion) ON SENATE BILL NO. 372:

Rep. Rapp-Svrcek asked Mr. Sherbert what the relationship is to GMC of a dealer. He stated that the dealer is an independent businessman who is franchised.

Senator Pinsoneault closed the hearing on Sb #372.

SENATE BILL NO. 375, Senator Bishop, District No. 46, pointed out that this act generally revises the laws relating to civil actions for the wrongful death of another. He stated that on page 3, lines 23-25, a substitute change takes place in regard to damages only being recovered once.

PROPOSERS:

Karl England, Montana Trial Lawyers Association, supported the bill as is. He stated that he feels there may be some very good policy reasons why a double recovery would be appropriate but there is a good compromise situation in this bill where there can not be two causes of action, there can only be one. So, a single recovery is a significant change from the current law but one that the Association feels is reasonable, responsible and a good compromise.

There were no further proponents testifying. (See Visitors' Register Attached).

There were no opponents.

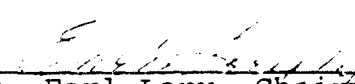
JUDICIARY COMMITTEE

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Senator Bishop closed the hearing on SB #375

ADJOURNMENT: There being no further business before the Committee, the meeting was adjourned at 12:48 p.m.

  
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Rep. Earl Lory, Chairman

## DAILY ROLL CALL

JUDICIARY

COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date March 19, 1987

NAME	PRESENT	ABSENT	EXCUSED
JOHN MERCER (R)	✓		
LEO GIACOMETTO (R)	✓		
BUDD GOULD (R)	✓		
AL MEYERS (R)	✓		
JOHN COBB (R)	✓		
ED GRADY (R)	✓		
PAUL RAPP-SVRCEK (D)	✓		
VERNON KELLER (R)	✓		
RALPH EUDAILY (R)	✓		
TOM BULGER (D)	✓		
JOAN MILES (D)	✓		
FRITZ DAILY (D)	✓		
TOM HANNAH (R)	✓		
BILL STRIZICH (D)	✓		
PAULA DARKO (D)	✓		
KELLY ADDY (D)		✓	✓
DAVE BROWN (D)	✓		
EARL LORY (R)	✓		

AMENDMENTS TO SB 49, THIRD READING COPY, PROPOSED BY HOUSE  
JUDICIARY COMMITTEE SUBCOMMITTEE ON IMMUNITY BILLS.

1. Title, line 12.

Following: "MCA"

Insert: "; AND PROVIDING AN APPLICABILITY PROVISION AND AN  
IMMEDIATE EFFECTIVE DATE"

2. Page 1, line 21.

Following: "MISCONDUCT."

Insert: "The immunity granted by this section does not apply  
to the liability of a nonprofit corporation."

3. Page 1, line 24 through line 1 of page 2.

Strike: "OR" on page 1, line 24 through "ACT" on line 1 of page  
2

4. Page 2.

Following: line 15

Insert: "NEW SECTION. Section 4. Effective date --  
applicability. This act is effective on passage and  
approval and applies to claims accruing after the effective  
date of this act."

ASB49a/JM/JM2

# STANDING COMMITTEE REPORT

MARCH 19,

19 37

## JUDICIARY

Mr. Speaker: We, the committee on

report **SENATE BILL NO. 49**

☐ do pass  
☐ do not pass

☒ be concurred in  
☐ be not concurred in

☒ as amended  
☐ statement of intent attached

Chairman

1. Title, 1937, 15.  
Article: "SECTION 15"  
Section: "SECTION 15"  
Chapter: "CHAPTER 15-15"  
Following: "SECTION 15"  
Article: "SECTION 15" AND PROVIDING AN APPLICABILITY PROVISION AND AN  
IMMEDIATE EFFECTIVE DATE

2. Part 1, 1937, 15.  
Following: "SECTION 15"  
Article: "SECTION 15" AND PROVIDING AN APPLICABILITY PROVISION AND AN  
IMMEDIATE EFFECTIVE DATE

3. Part 1, 1937, 15.  
Article: "SECTION 15" AND PROVIDING AN APPLICABILITY PROVISION AND AN  
IMMEDIATE EFFECTIVE DATE

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REP. MILES WILL CARRY THE BILL!

ART A  
3-19-89  
SB# 189

Amendment 38189

1. page 1, line 6 Strike: "CONVICTED OF"  
Insert: "WHO ADMITS OR IS ADJUDICATED AS HAVING VIOLATED THE OFFENSE OF"
2. page 2, line 2 Strike: "CONVICTED OF A VIOLATION OF"  
Insert: "WHO ADMITS OR IS ADJUDICATED AS HAVING VIOLATED"
3. page 2, line 3 Strike: "LAW ENFORCEMENT "  
Insert: "YOUTH COURT"
4. page 2, line 4 Following: STUDENT  
Strike: "."  
Insert: "FOR THE FOLLOWING PURPOSES;  
1). REFERRAL FOR ENROLLMENT IN A SUBSTANCE ABUSE PROGRAM  
2). ENFORCEMENT OF PRE-EXISTING SCHOOL DISCIPLINARY PROCEDURES.  
SUCH INFORMATION SHALL NOT BE FURTHER DISCLOSED AND MAY NOT BECOME PART OF THE STUDENT'S PERMANENT RECORD."
5. page 2, lines 5 and 6 Strike: lines 5 and 6 in their entirety.



# STANDING COMMITTEE REPORT

MARCH 19,

19 87

## JUDICIARY

Mr. Speaker: We, the committee on

SENATE BILL NO. 189

report

☐ do pass  
☐ do not pass

☒ be concurred in  
☐ be not concurred in

☒ as amended  
☐ statement of intent attached

Chairman

### 1. Title, line 6.

Strike: "CONVICTED OF"

Insert: "WHO ADMITS VIOLATING OR IS ADJUDICATED AS HAVING VIOLATED A LAW RELATING TO"

### 2. Page 2, line 1.

Strike: "CONVICTED OF A VIOLATION OF"

Insert: "WHO ADMITS VIOLATING OR IS ADJUDICATED AS HAVING VIOLATED"

### 3. Page 3, line 3.

Strike: "LAW ENFORCEMENT"

Insert: "YOUTH COURT"

*Check microfiche copy*

### 4. Page 5, line 4.

Strike: "STUDENT"

Insert: "For purposes of referral and placement in a residential care program or placement in a disciplinary program, provided that stated at the time of the admission of the student."

### 5. Page 6, line 5.

Strike: "EXEMPT"

Insert: "ANYONE"

### 6. Page 7, line 6.

Strike: "LEGAL OFFICIALS"

Insert: "and may not be made part of the student's permanent record."

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REP. BULGER WILL CARRY THE BILL!

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# STANDING COMMITTEE REPORT

MARCH 19,

19 87

Mr. Speaker: We, the committee on JUDICIARY

report SENATE BILL NO. 92

☐ do pass  
☐ do not pass

☒ be concurred in  
☐ be not concurred in

☐ as amended  
☐ statement of intent attached

\_\_\_\_\_  
Chairman

THIRD

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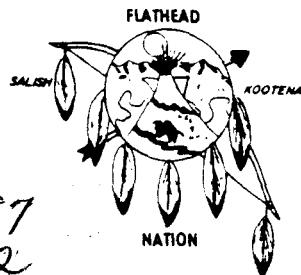
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**REP. IVERSON WILL CARRY THE BILL!**



**THE CONFEDERATED SALISH AND KOOTENAI TRIBES  
OF THE FLATHEAD RESERVATION**

Box 278  
Pablo, Montana 59855  
(406) 675-2700  
FAX (406) 675-2806



Joseph E. Dupuis - Executive Secretary  
Vern L. Clairmont - Executive Treasurer  
George Hewankorn - Sergeant-at-Arms

TRIBAL COUNCIL MEMBERS:  
Michael Pablo - Chairman  
Ron Thernault - Vice-Chairman  
Laurence Kenmille  
Louis W. Adams  
Robert L. McCrea  
Sonny Morigeau  
Fred Matt  
Victor L. Stinger  
Pat Lefthand  
James H. Steele

March 18, 1987

Honorable Earl Jory, Chairman  
House Judiciary Committee  
State Capitol  
Helena, MT 59601

Dear Mr. Jory:

The Confederated Salish and Kootenai Tribes support S.B. 92 to extend the life of the Reserved Water Rights Compact Commission as written without any amendments. We are in negotiations with the Compact Commission but if amendments are attached the Tribal Council will have to reconsider our position.

Should S.B. 92 not pass negotiations would cease and we will follow the path of the state of Wyoming and the Windriver Reservation in litigation of water rights. The state of Wyoming has spent approximately 8 million dollars in litigation costs and the issue is not yet settled. Should the state of Montana have to litigate with all Tribes the cost would be staggering.

We have a difficult task ahead and we do not need any distractions which may effect the status of the Compact Commission with negotiations. I strongly request passage of S.B. 92 as written and let's get to the task ahead.

CONFEDERATED SALISH & KOOTENAI TRIBES

Sincerely,

Michael T. Pablo  
Tribal Chairman

WITNESS STATEMENT

A  
3-19-87  
SB#92

NAME Daniel F. Decker BILL NO. SP92  
ADDRESS P.O. Box 278, Pablo, Montana 59855 DATE 3/19/87  
WHOM DO YOU REPRESENT? Confederated Salish and Kootenai Tribes  
SUPPORT X OPPOSE \_\_\_\_\_ AMEND \_\_\_\_\_

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments: - See attached statement from the Confederated Salish and Kootenai Tribes; Tribal Council Chairman, Michael T. Pablo.

APPROVED BY COMM. ON  
NATURAL RESOURCES

SENATE BILL NO. 286

INTRODUCED BY GALT, ELLISON, PINSONEAULT, KELLER, COBB,  
HOPMAN, SEVERSON, HIRSCH, HAMMOND, BOYLAN, KEATING, SWIFT

A BILL FOR AN ACT ENTITLED: "AN ACT TO REVISE THE STREAM  
ACCESS LAW TO REMOVE PROVISIONS DECLARED UNCONSTITUTIONAL;  
TO REQUIRE RECREATIONAL USE TO BE EXERCISED WITH REGARD TO  
LAND OWNERSHIP; TO REQUIRE LANDOWNER PERMISSION FOR  
RECREATIONAL USE INVOLVING MORE THAN MINIMAL USE OF LAND; TO  
REVISE PROVISIONS CONCERNING PORTAGE ROUTES; AMENDING  
SECTIONS 23-2-301, 23-2-302, AND 23-2-311, MCA; AND  
PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

Section 1. Section 23-2-301, MCA, is amended to read:  
"23-2-301. Definitions. For purposes of this part, the  
following definitions apply:

(1) "Barrier" means an artificial obstruction located  
in or over a water body, restricting passage on or through  
the water, which totally or effectively obstructs the  
recreational 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 manmade obstacle to the natural flow of water.

(2) "Class I waters" means surface waters, other than  
lakes, that:

(a) lie within the officially recorded federal  
government survey meander lines 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) are or have been capable of supporting the  
following commercial activities: log floating,  
transportation of furs and skins, shipping, commercial  
guiding using multiperson watercraft, public transportation,  
or the transportation of merchandise, as these activities  
have been defined by published judicial opinion as of April  
19, 1985; or

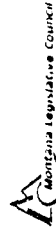
(d) are or have been capable of supporting commercial  
activity within the meaning of the federal navigability test  
for state streambed ownership.

(3) "Class II waters" means all surface waters that  
are not class I waters, except lakes.

(4) "Commission" means the fish and game commission  
provided for in 2-15-3402.

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

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



1 motorized vehicles not primarily designed for operation upon  
2 the water;  
3 (b) the recreational use of surface waters in a stock  
4 pond or other private impoundment fed by an intermittently  
5 flowing natural watercourse;  
6 (c) the recreational use of waters while diverted away  
7 from a natural water body for beneficial use pursuant to  
8 Title 85, chapter 2, part 2 or 3, except for impoundments or  
9 diverted waters to which the owner has provided public  
10 access;  
11 (d) big game hunting except by long bow or shotgun  
12 when specifically authorized by the commission;  
13 (e) overnight camping within sight of any occupied  
14 dwelling or within 500 yards of any occupied dwelling;  
15 whichever is less;  
16 (f) the placement or creation of any permanent duck  
17 blind, boat moorage, or any seasonal or other objects within  
18 sight of or within 500 yards of an occupied dwelling;  
19 whichever is less; or  
20 (g) (d) use of a streambed as a right-of-way for any  
21 purpose when water is not flowing therein;  
22 (3) the right of the public to make recreational use  
23 of class II waters does not include, without permission of  
24 the landowner;  
25 (a) big game hunting;

1 (b) overnight camping;  
2 (c) the placement or creation of any seasonal object;  
3 or  
4 (d) (e) other activities which are not primarily  
5 water-related pleasure activities as defined in  
6 23-2-301(10); or  
7 (f) any activities that involve more than minimal use  
8 of the underlying and adjoining privately owned land.  
9 (3) The right of the public to make recreational  
10 use of surface waters does not grant any easement or right  
11 to the public to enter onto or cross private property in  
12 order to use such waters for recreational purposes.  
13 (4) The commission shall adopt rules, pursuant to  
14 87-1-303, in the interest of public health, public safety,  
15 or the protection of public and private property, governing  
16 recreational use of class I and class II waters. These rules  
17 must include the following:  
18 (a) the establishment of procedures by which any  
19 person may request an order from the commission:  
20 (i) limiting, restricting, or prohibiting the type,  
21 incidence, or extent of recreational use of a surface water;  
22 or  
23 (ii) altering limitations, restrictions, or  
24 prohibitions on recreational use of a surface water imposed  
25 by the commission;

1 owned-by-the-landowner-on-whose-land-the-portage-route--will  
2 be-placed-must-be-borne-by-the-department:

3 (f) Once the route is established, the department has  
4 the exclusive responsibility thereafter to construct the  
5 portage route and to maintain the portage route at  
6 reasonable times agreeable to the landowner. The department  
7 shall post notices on the stream of the existence of the  
8 portage route and the public's obligation to use it as the  
9 exclusive means around a barrier.

10 (g) If either the landowner or recreationist disagrees  
11 with the route described in subsection (3)(e), he may  
12 petition the district court to name a three-member  
13 arbitration panel. The panel must consist of an affected  
14 landowner, a member of an affected recreational group, and a  
15 member selected by the two other members of the arbitration  
16 panel. The arbitration panel may accept, reject, or modify  
17 the supervisors' finding under subsection (3)(d):

18 (h) The determination of the arbitration panel is  
19 binding upon the landowner and upon all parties that use the  
20 water for which the portage is provided. Costs of the  
21 arbitration panel, computed as for jurors' fees under  
22 3-15-2017, shall be borne by the contesting party or parties;  
23 all other parties shall bear their own costs.

24 (i) [g] The determination decision of the arbitration  
25 panel supervisors may be appealed within 30 days to the

1 district court for trial de novo. If not appealed within 30  
2 days, the decision is final.

3 (j)(h) Once a portage route is established, the public  
4 shall use the portage route as the exclusive means to  
5 portage around or over the barrier.

6 (4) Nothing contained in this part addresses the issue  
7 of natural barriers or portage around said barriers, and  
8 nothing contained in this part makes such portage lawful or  
9 unlawful."

10 NEW SECTION. Section 4. Extension of authority. Any  
11 existing authority of the fish and game commission to make  
12 rules on the subject of the provisions of this act is  
13 extended to the provisions of this act.

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

-End-

EXHIBIT. B  
3-19-89  
SB# 286

## SENATE BILL NO. 286

INTRODUCED BY GALT, ELLISON, PINSONEAULT, KELLER,  
COBB, HOFMAN, SEVERSON, HIRSCH, HAMMOND, BOYLAN,  
KEATING, SWIFT, SPAETH

A BILL FOR AN ACT ENTITLED: "AN ACT TO REVISE THE STREAM  
ACCESS LAW TO REMOVE PROVISIONS DECLARED UNCONSTITUTIONAL;  
~~TO-REQUIRE-RECREATIONAL-USE-TO-BE-EXERCISED-WITH--REGARD--TO~~  
~~LAND---OWNERSHIP;---TO---REQUIRE--LANDOWNER--PERMISSION--FOR~~  
~~RECREATIONAL-USE-INVOLVING-MORE-THAN-MINIMAL-USE-OF-LAND; TO~~  
REQUIRE RECREATIONAL USE TO BE EXERCISED WITH CONSIDERATION  
OF LAND OWNERSHIP; TO REQUIRE LANDOWNER PERMISSION FOR  
RECREATIONAL USE INVOLVING MORE THAN MINIMAL USE OF LAND; TO  
REVISE PROVISIONS CONCERNING PORTAGE ROUTES; AMENDING  
SECTIONS ~~23-2-301~~, 23-2-301, 23-2-302, AND 23-2-311, MCA;  
AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

(Refer to Second Reading Bill)

Strike everything after the enacting clause and insert:

SECTION 1. SECTION 23-2-301, MCA, IS AMENDED TO READ:

"23-2-301. Definitions. For purposes of this part, the  
following definitions apply:

(1) "Barrier" means an artificial obstruction located  
in or over a water body, restricting passage on or through



~~CONFIDENTIAL~~  
~~DATE~~  
~~BY~~

the water, which totally or effectively obstructs the recreational 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 manmade obstacle to the natural flow of water.

(2) "Class I waters" means surface waters, other than lakes, that:

(a) lie within the officially recorded federal government survey meander lines 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) are or have been capable of supporting the following commercial activities: log floating, transportation of furs and skins, shipping, commercial guiding using multiperson watercraft, public transportation, or the transportation of merchandise, as these activities have been defined by published judicial opinion as of April 19, 1985; or

(d) are or have been capable of supporting commercial activity within the meaning of the federal navigability test for state streambed ownership.

(3) "Class II waters" means all surface waters that are not class I waters, except lakes.

(4) "Commission" means the fish and game commission

1 provided for in 2-15-3402.

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

4 (6) "Diverted away from a natural water body" means a  
5 diversion of surface water through a manmade water  
6 conveyance system, including but not limited to:

7 (a) an irrigation or drainage canal or ditch;

8 (b) an industrial, municipal, or domestic water  
9 system, excluding the lake, stream, or reservoir from which  
10 the system obtains water;

11 (c) a flood control channel; or

12 (d) a hydropower inlet and discharge facility.

13 (7) "Lake" means a body of water where the surface  
14 water is retained by either natural or artificial means and  
15 the natural flow of water is substantially impeded.

16 (8) "Occupied dwelling" means a building used for a  
17 human dwelling at least once a year.

18 (9) "Ordinary high-water mark" means the line that  
19 water impresses on land by covering it for sufficient  
20 periods to cause physical characteristics that distinguish  
21 the area below the line from the area above it.  
22 Characteristics of the area below the line include, when  
23 appropriate, but are not limited to deprivation of the soil  
24 of substantially all terrestrial vegetation and destruction  
25 of its agricultural vegetative value. A flood plain

1 adjacent to surface waters is not considered to lie within  
2 the surface waters' high-water marks.

3 (10) "Recreational use" means with respect to surface  
4 waters, unless otherwise prohibited or regulated by law:  
5 fishing, hunting waterfowl, swimming, floating in small  
6 craft or other flotation devices, boating in motorized craft  
7 ~~unless--otherwise--prohibited--or-regulated-by-law,~~ or craft  
8 propelled by oar or paddle, other water-related pleasure  
9 activities, and minimal and related unavoidable or  
10 incidental uses necessary for utilization of the water  
11 itself.

12 (11) "Supervisors" means the board of supervisors of a  
13 soil conservation district, the directors of a grazing  
14 district, or the board of county commissioners if a request  
15 pursuant to 23-2-311(3)(b) is not within the boundaries of a  
16 conservation district or if the request is refused by the  
17 board of supervisors of a soil conservation district or the  
18 directors of a grazing district.

19 (12) "Surface water" means, for the purpose of  
20 determining the public's access for recreational use, a  
21 natural water body, its bed, and its banks up to the  
22 ordinary high-water mark."

23 Section 2. Section 23-2-302, MCA, is amended to read:

24 "23-2-302. Recreational use permitted -- limitations  
25 -- exceptions. (1) Except as provided in subsections (2)

1 through (5), all surface waters that are capable of  
 2 recreational use may be so used by the public without regard  
 3 to WITH CONSIDERATION OF the ownership of the land  
 4 underlying the waters.

5 (2) The right of the public to make recreational use  
 6 of surface waters does not include, without permission or  
 7 contractual arrangement with the landowner:

8 (a) the operation of all-terrain vehicles or other  
 9 motorized vehicles not primarily designed for operation upon  
 10 the water;

11 (b) the recreational use of surface waters in a stock  
 12 pond or other private impoundment fed by an intermittently  
 13 flowing natural watercourse;

14 (c) the recreational use of waters while diverted away  
 15 from a natural water body for beneficial use pursuant to  
 16 Title 85, chapter 2, part 2 or 3, except for impoundments or  
 17 diverted waters to which the owner has provided public  
 18 access;

19 (d) ~~big--game hunting except--by--long-bow-or-shotgun~~  
 20 ~~when--specifically--authorized--by--the--commission~~ EXCEPT  
 21 WATERFOWL HUNTING WHEN SPECIFICALLY AUTHORIZED BY THE  
 22 COMMISSION;

23 ~~(e)--overnight-camping-within--sight--of--any--occupied~~  
 24 ~~dwelling--or--within--500--yards--of--any-occupied-dwelling,~~  
 25 ~~whichever-is-less;~~

1        (E) CAMPING;

2        ~~(f)(e)~~(F) the placement or creation of any permanent  
3 duck blind, boat moorage, or ~~any-seasonal-or-other-objects~~  
4 ~~within-sight-of-or-within-500-yards-of-an-occupied-dwelling,~~  
5 ~~whichever-is-less~~ other-permanent--object ANY SEASONAL OR  
6 OTHER OBJECTS; or

7        ~~(g)(f)~~(G) use of a streambed as a right-of-way for any  
8 purpose when water is not flowing therein;

9        ~~(3)--The--right--of--the--public--to--make--recreational--use~~  
10 ~~of-class-II-waters--does--not--include--without--permission--of~~  
11 ~~the-landowner;~~

12        ~~(a)--big-game-hunting;~~

13        ~~(b)--overnight-camping;~~

14        ~~(c)--the--placement-or-creation-of-any-seasonal-object;~~

15 or

16        ~~(d)~~(H) other activities which are not primarily  
17 water-related pleasure activities as defined in  
18 23-2-301(10); OR

19        (I) ANY ACTIVITIES THAT INVOLVE MORE THAN MINIMAL USE  
20 OF UNDERLYING AND ADJOINING LAND.

21        ~~(4)~~(3) The right of the public to make recreational  
22 use of surface waters does not grant any easement or right  
23 to the public to enter onto or cross private property in  
24 order to use such waters for recreational purposes.

25        ~~(5)~~(4) The commission shall adopt rules pursuant to

1 87-1-303, in the interest of public health, public safety,  
2 or AND the protection of public and private property,  
3 governing recreational use of class I and class II waters.  
4 These rules must include the following:

5 (a) the establishment of procedures by which any  
6 person may request an order from the commission:

7 (i) limiting, restricting, or prohibiting the type,  
8 incidence, or extent of recreational use of a surface water;  
9 or

10 (ii) altering limitations, restrictions, or  
11 prohibitions on recreational use of a surface water imposed  
12 by the commission;

13 (b) provisions requiring the issuance of written  
14 findings and a decision whenever a request is made pursuant  
15 to the rules adopted under subsection ~~(5)(a)~~ (4)(A); and

16 (c) a procedure for the identification of streams  
17 within class II waters which are not capable of recreational  
18 use or are capable of limited recreational use, and a  
19 procedure to restrict the recreational use to the actual  
20 capacity of the water.

21 ~~(6)~~(5) The provisions of this section do not affect  
22 any rights of the public with respect to state-owned lands  
23 that are school trust lands or any rights of lessees of such  
24 lands."

25 Section 3. Section 23-2-311, MCA, is amended to read:

Handwritten: 2  
SB 0286 - 036

1 "23-2-311. Right to portage -- establishment of  
2 portage route. (1) A member of the public making  
3 recreational use of surface waters may, above the ordinary  
4 high-water mark, portage around barriers in the least  
5 intrusive manner possible, avoiding damage to the  
6 landowner's land and violation of his rights.

7 (2) A landowner may create barriers across streams for  
8 purposes of land or water management or to establish land  
9 ownership as otherwise provided by law. If a landowner  
10 erects a structure which does not interfere with the  
11 public's use of the surface waters, the public may not go  
12 above the ordinary high-water mark to portage around the  
13 structure.

14 (3) (a) A portage route around or over a barrier may  
15 be established to avoid damage to the landowner's land and  
16 violation of his rights, as well as to provide a reasonable  
17 and safe route for the recreational user of the surface  
18 waters.

19 (b) A portage route may be established when either a  
20 landowner or ~~a--member--of--the--recreating--public~~ THE  
21 DEPARTMENT submits a request to the supervisors that such a  
22 route be established.

23 (c) Within 45 days of the receipt of a request, the  
24 supervisors shall, in consultation with the landowner and a  
25 representative of the department, examine and investigate

1 the barrier and the adjoining land to determine a reasonable  
2 and safe portage route AND THE COMPENSATION TO BE PAID TO  
3 THE LANDOWNER IF THE ROUTE TO BE ESTABLISHED INVOLVES USE OF  
4 PRIVATELY OWNED LAND.

5 (d) Within 45 days of the examination of the site, the  
6 supervisors shall make a written finding of the most  
7 appropriate portage route.

8 (e) The cost of establishing the portage route around  
9 artificial barriers AND, WHERE REQUIRED PURSUANT TO  
10 SUBSECTION (3)(C), THE COMPENSATION TO BE PAID THE LANDOWNER  
11 must be borne by the involved--landowner,--except--for--the  
12 construction--of--notification-signs-of-such-route,--which-is  
13 the--responsibility--of--the department. The---cost---of  
14 establishing--a-portage-route-around-artificial-barriers-not  
15 owned-by-the-landowner-on-whose-land-the-portage-route--will  
16 be-placed-must-be-borne-by-the-department.

17 (f) Once the route is established, the department has  
18 the exclusive responsibility thereafter to construct and to  
19 maintain the portage route at reasonable times agreeable to  
20 the landowner. The department shall post notices on the  
21 stream of the existence of the portage route and the  
22 public's obligation to use it as the exclusive means around  
23 a barrier.

24 (g) If either the landowner or recreationist THE  
25 DEPARTMENT disagrees with the route described in subsection



SB 0286/gray  
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1    ~~the~~ (3)(D), EITHER may petition the district court to  
2    name a three-member arbitration panel. The panel must  
3    consist of an affected landowner, a member of an affected  
4    recreational group, and a member selected by the two other  
5    members of the arbitration panel. The arbitration panel may  
6    accept, reject, or modify the supervisors' finding under  
7    subsection (3)(d).

8        (h) The determination of the arbitration panel is  
9    binding upon the landowner and upon all parties that use the  
10   water for which the portage is provided. Costs of the  
11   arbitration panel, computed as for jurors' fees under  
12   3-15-201, shall be borne by the contesting party or parties;  
13   all other parties shall bear their own costs.

14        (i) The determination of the arbitration panel may be  
15   appealed within 30 days to the district court.

16        (j) Once a portage route is established, the public  
17   shall use the portage route as the exclusive means to  
18   portage around or over the barrier.

19        (4) Nothing contained in this part addresses the issue  
20   of natural barriers or portage around said barriers, and  
21   nothing contained in this part makes such portage lawful or  
22   unlawful."

23        NEW SECTION. Section 4. Extension of authority. Any  
24   existing authority of the fish and game commission to make  
25   rules on the subject of the provisions of this act is

- 1 extended to the provisions of this act.
- 2 NEW SECTION. Section 5. Effective date. This act is
- 3 effective on passage and approval.

-End-

C  
3-19-87  
SB#286

TESTIMONY

of

JAMES J. BOTTOMLY

IN SUPPORT OF SB 286 yellow or Gray

My name is Jim Bottomly. I am a rancher north of Belgrade. I am also a lawyer. I support SB 286 with the amendments we propose.

I am appalled at the out-and-out misinformation and misrepresentations being made by some of the members of the legal profession about the effect of the Supreme Court Decision in Galt vs. Dept. of Fish, Wildlife and Parks, and the scare tactics they have unleashed.

Dean Leapart of the Montana Law School used to teach Introduction to Law, a first year law course. He constantly cautioned fledgling student lawyers: DON'T RELY ON THE HEAD NOTES of a reported decision for they are merely some annotator's ideas of what the case is about. DON'T RELY ON A BRIEF FILED BY ONE OF THE ATTORNEYS as to what the case holds, because the attorney will only quote those few items he feels will bolster his case.

Dean Leapart always said:

READ THE ENTIRE DECISION.

And, then

RE-READ THE ENTIRE DECISION.

Then ANALYZE that

decision by taking all four corners of that document and giving effect to each word. Give complete and literal meaning to each phrase and leave out nothing. Do not take any provision out of context, do not eliminate anything as superfluous because the Judge who wrote the decision carefully included each and every word in its written context for a specific legal reason.

I grew up in the household of a Judge, Judge R.V. Bottomly, of this states Supreme Court. In many philosophical discussions I had with him, his greatest complaint of some lawyers was their proclivity to play fast and loose with the legal system, to take phrases from judicial decision out of context in an attempt to justify a tenuous position.

I submit that this is what the opposition here is doing---playing fast and loose with a very simple and clear legal decision.

It doesn't take a lawyer to know what the court held--it only takes good common sense.

The Supreme Court, in the Galt case, made some very direct and binding legal holdings:

Holding No. 1 - Page 5:

The public trust doctrine in Montana's Constitution grants public ownership in water not in beds and banks of streams. That is a specific holding in this case.

Holding No. 2 - Page 5:

While the public has a right to use the water for recreational purposes and minimal use of underlying and adjoining real estate essential to enjoyment of its ownership in water, there is no attendant right that such use be as convenient, productive, and comfortable as possible. That too is a specific holding.

Holding No. 3 - Pages 6-7:

The public has a right of use up to the high water mark, but only such use as is necessary to utilization of the water itself. Another specific legal finding.

Holding No. 4 - Page 6: AND MOST IMPORTANT:

"We hold that any use of the bed and banks must be of minimal impact". Those are the court's words and is the law.

Holding No. 5 - Page 7:

We re-affirm well-established constitutional principles protecting property interests from confiscation. A specific holding.

Holding No. 6 - Page 7:

Landowners through whose property a water course flows...have their fee impressed with a dominant estate in favor of the public.

Holding No. 7 - Page 7:

This easement must be narrowly confined so that impact to beds and banks owned by private individuals is minimal. Another specific holding.

Holding No. 8 - Page 7:

Only that use which is necessary for the public to enjoy its ownership of the water will be recognized as within the easements scope. Another specific holding.

These are specific legal findings by which the court in an 8 to 2 decision stated what the law is as applicable to stream access--everyone is bound by them.

While the court, at Page 8, did find that specific provisions were unconstitutional, the balance of the Statutory Scheme must be interpreted so as to conform to and be consistent with the eight (8) explicit legal holdings of this decision.

SB 286 with the amendments we propose does just this and no more.

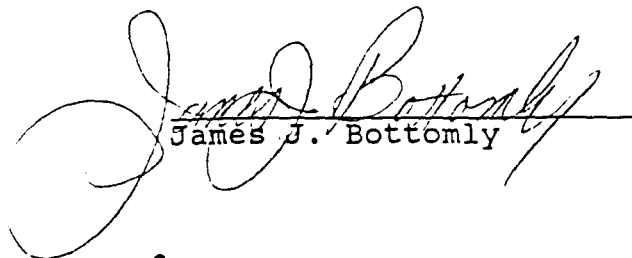
The passage of this bill as amended will do more to reduce landowner-recreationalist confrontation. It will result in the re-opening of many small blue ribbon trout streams to the public on a controlled basis, thus ensuring premier fishing for the years to come.

In Galt the court made one more important holding on Page 7:

"The equal property interests of private landowners are important, as are the public's property interest in water. Both are constitutionally protected. These competing interests, when in conflict, must be reconciled to the extent possible."

SB 286 with our proposed amendments is a reasonable reconciliation of these competing interests.

We urge you to pass this bill with the proposed amendments.

  
James J. Bottomly

JJB/vj

D  
3-19-87  
SB# 286

# George F. Roskie

---

3440-6TH AVENUE SOUTH  
GREAT FALLS, MONTANA

STATEMENT ON SB286

HOUSE JUDICIARY COMMITTEE

MARCH 19, 1987

Mr. Chairman and members of the committee, for the record I am George Roskie speaking for myself. I have previously sent a letter to the members of the committee and would like to have it incorporated in the hearing record.

As I stated in my letter I am convinced that the Montana Supreme Court in the Curran and Hildreth decisions were clearly in error in using the Public Trust Doctrine as a basis for granting public rights on non-navigable , or so called Class II , streams in Montana. And further that the legislature went much to far in making these rights a matter of law in the current Montana Stream Access statute.

The socalled public trust doctrine originated in Roman law, was adopted in English common law and came to this country with the colonies. Early on it was applied in the Massachusetts Bay Colony's "Great Pond" ordinance of 1641 providing public use of waters in any pond 10 acres or greater. And in 1787 in the Northwest Ordinance declaring that "navigable waters that lead into the Mississippi and the St. Lawrence shall be common highways, forever free".

In all the history of court decisions over the past 200 years the public trust doctrine has universally been considered a property interest only over the beds of navigable waters. Even the Mono Lake case in Clifornia so often referred to turns substantively more on the navigability of Mono Lake than on the protection of the birdlife in the Mono ecosystem. And even the use of a "pleasure boat test" by some states to apply the public trust doctrine supports the navigability oncept of the doctrine.

100-1225-528

In their concurring remarks in the Galt vs Montana decision both Chief Justice Turnage and Justice Gulbrandson disagree with the Curran and Hildreth decisions use of the public trust doctrine to establish public rights on non-navigable waters. As Chief Justice Turnage states "The public trust doctrine is not expressly set forth in the Montana Constitution" And further "If the State of Montana is to be considered a trustee over waters of this State, or a trustee over any other property, under a Public Trust Doctrine, then the State must be held to the standard that applies to all trustees which standard requires that the trustee must own legal title to the property over which trust power is sought to be exercised".

Aside from the legal basis or authority in these cases, the invocation of the public trust to define public recreation rights in Montana has resulted in social conflict, raised questions about the security of private property rights, and may violate public trust rights to healthy riparian ecosystems by allowing recreation overexploitation. By invoking the public trust doctrine and ruling that all waterways in Montana are in fact common property, the court may have opened the way for the degradation of the highly productive and valuable small stream fisheries of Montana. And further expansion of public recreation "rights" under the authority of the public trust may ultimately result in a decline in environmental quality rather than in environmental protection.

For generations the majority of land owners in Montana have permitted public hunting and fishing on their lands as good neighbors to the rest of us in Montana. Unfortunately a new <sup>o</sup>conf<sub>x</sub>ig<sub>x</sub>ational attitude by some groups on so-called public rights has developed demanding rights which never before existed and forcing legal action and decisions by the courts. In the case of the stream access decisions the Court seems "to portage around the constitution" and in the view of one national legal authority "is hopelessly confused over what the public trust doctrine really is".

Since it appears that the problem will not "just go away" I submit that SB286 by Senator Galt and others, either in its Senate Second Reading form, or with amendments as proposed by its sponsors, is a reasonable compromise to the problem. Clearly the private, and other, property rights of the riparian land owners of non-navigable streams, beds and banks included, must be protected. Even the confused and contradictory statements in the Galt decision declares "the real property interests of the private land owners are important as are the public's property interests in water. Both are constitutionally protected". This is a little hard to believe when the Court also held that the public has the right of use of the bed and banks up to the high water marks "without regard to the ownership of the lands underlying the water".

I believe it is essential in the bill to permit recreational use of all waters ONLY "with due consideration" of the ownership of the land underlying the waters, whether it be private, county, state, federal or Indian. I further believe that where there is more than MINIMAL use of the underlying and adjacent real estate - such as for portages - that private land owners be compensated for the use of their land.

Again, I believe SB286 is a reasonable compromise solution to the problem of stream access in Montana. And while it may not satisfy all of us, particularly the landowners, at least it may prevent the public trust doctrine from further becoming the recreationalists "free lunch".

Thank you for permitting <sup>me</sup> to appear before your committee on behalf of SB286.



F  
3-1987  
SB#286

TESTIMONY on SB 286  
before the House Judiciary Committee, March 19, 1987,  
by Lorents Grosfield

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE:

Proponents of the Third Reading Copy of SB 286, which is the gutted version of the Introduced Bill, seem to like to say that all is going well in Montana regarding stream access after the Curran and Hildreth decisions and the passage of HB 265 by the last legislature. Yet a Game Warden survey done by the Department of Fish, Wildlife, and Parks shows that there have been at least 245 complaints registered with them since July 1, 1986. And this doesn't count the complaints that have been logged with the Department's 800 telephone number, which was installed for the purpose of handling these and other complaints. Nor does it count complaints logged with county sheriffs' offices. And it certainly doesn't count complaints handled on the ground by landowners themselves. I would guess this latter category to be by far the largest, as this is the style of most landowners in most circumstances.

No one is arguing the public's right to use the waters, or to use the larger streams of our state in a relatively unrestricted manner. But the extreme breadth and scope of HB 265 went way beyond what most reasonable people concluded was necessary to address the specific problems in the two court decisions. To force property owners to play host to relatively unregulated public use of their property (along and under streams--- no matter how small) on a grand state-wide scale was an overkill (and an invitation to trespass) that was both unnecessary and unjust.

Last week (March 11th), the Billings Gazette carried a lead editorial that started out as follows (emphasis added):

"Montana has taken on a new color.

Drive through the mountains of Western Montana, the valleys lining the Missouri, the Gallatin, the Yellowstone, the Stillwater and all the other rivers of the state.

Drive across the high plains of Eastern Montana.

Everywhere, it's the same.

Gate posts are topped by florescent orange."

Does anyone really think that orange paint and stream access are unrelated? Does anyone really think that stream access and the dramatic increase in fee hunting in this state are totally unrelated? It is folly to think that everything is fine, and that property owners are not bothered by this assault on their basic rights. Landowner/sportsmen relations in Montana are NOT fine. Sure, the fishing and floating guides and outfitters made out like bandits with HB 265 last legislative session. (Some of them will probably like the Third Reading Copy of SB 286 even better, since it goes even further than HB 265 relative to camping.) But other sportsmen, especially hunters and fishermen, bear the brunt of the orange paint and the "not-so-friendly-anymore attitude" of Montana's property owners. The Montana Legislature could do Montana sportsmen and property owners a big favor through attempting to improve landowner/sportsmen relations by trying to temper this "not-so-friendly-anymore attitude". Your vote for the intent of Senator Galt's Introduced Bill, SB 286, is a vote for improved landowner/sportsmen relations.

WE URGE YOUR SUPPORT of the intent of the Introduced Bill.

F  
3-19-87  
501286

Warden Stream Access Questionnaire  
FISHERMEN ON STREAMS

	Complaints		Investigations		NTA's (citations)	
	12 Months	5 Months	12 Months	5 Months	12 Months	5 Months
	07-01-85	07-01-86	07-01-85	07-01-86	07-01-85	07-01-86
R-1	5	14	5	14	0	1
R-2	7	16	5	10	2	2
R-3	12	8	6	7	2	2
R-4	9	10	5	5	1	3
R-5	7	5	6	2	3	1
R-6	1	0	1	0	0	0
R-7	1	0	1	0	0	0
Totals	42	53	29	38	8	9

Warden Stream Access Questionnaire  
HUNTERS, BIG GAME, DUCK,  
TRAPPERS, HIKERS AND OTHERS ON STREAMS

	Complaints		Investigations		NTA's (citations)	
	12 Months	5 Months	12 Months	5 Months	12 Months	5 Months
	07-01-85	07-01-86	07-01-85	07-01-86	07-01-85	07-01-86
R-1	37	25	28	24	14	9
R-2	11	29	7	25	3	13
R-3	1	5	3	2	0	3
R-4	1	7	1	7	0	2
R-5	9	10	4	5	2	6
R-6	5	8	4	7	2	2
R-7	1	1	1	0	0	0
Totals	65	85	48	70	21	35

Final

604/25/2

## WITNESS STATEMENT

F  
3-19-87

SB # 286

NAME

L. T. Egan

Scribe

BILL NO.

286

ADDRESS

1679

DATE

3/19/87

WHOM DO YOU REPRESENT?

Mont Stargrowers Association

SUPPORT

OPPOSE

AMEND

X

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

## Comments:

We support the amendment suggested by Sen. Ball. His proposal will serve to make ~~the~~ public stream usage more understandable to both landowners and the recreating public. Without this clarification, ordinary folks will be hard pressed to know what is allowed without consulting an attorney who could study <sup>both</sup> the Ball decision as well as HB 265.

Despite the claims that landowner-sportsman confrontations have been minimized - the great number of orange painted posts in the areas along the Yellowstone River suggest that landowners are concerned. This concern results in thousands of acres of private land no longer accessible to sportsmen. Sen. Ball's amendments will go a long way toward clarifying both parties' position and an improvement in their relations.

Please adopt Sen. Ball's amendments.

# MONTANA LANDOWNERS ASSOCIATION, INC.

MADISON CHAPTER  
BOX 612  
ENNIS, MONTANA  
59729

G

3-19-87

SB # 286

2-16-87

House Judiciary Committee  
Capitol Building  
Helena, Montana 59607

Gentlemen:

On behalf of the 176 members of the MONTANA LANDOWNERS ASSN., INC., MADISON CHAPTER, I wish to thank the members support of Senator Jack Galt and his proposed amendments to the 2nd reading of SB286 as it passed the Senate floor vote.

We feel that the proposed amendments are necessary to maintain a balance of property and if these amendments are not accepted please call the floor.

Thank you.

Sincerely,

*Mary A. Saunders*

Mary Saunders, Secretary  
MEM. MONT. MOUNTAIN CHAPTER  
Box 612  
Ennis, Montana 59729

*Marufuku*

WITNESS STATEMENT

#

3-19-86

SB= 286

NAME Timothy J. Sullivan BILL NO. 1

ADDRESS Timberline DATE 3-19-86

WHOM DO YOU REPRESENT? Sullivan & S. Co.

SUPPORT Timberline OPPOSE                      AMEND                     

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

The subject of the proposed bill is  
 somewhat of a loose end but the  
 intent of the bill is to improve the interest  
 of the public in the subject.  
 If you cannot enter the bill to the  
 subject of the bill or if you have any  
 questions about the bill.

(Microfilm)

WITNESS STATEMENT

FILED F  
3-19-87  
SB # 286

NAME Chuck MERTA BILL NO. SB286  
 ADDRESS 99 Cascade Rd DATE \_\_\_\_\_  
 WHOM DO YOU REPRESENT? Self - as a Sun River "high water mark" <sup>frontage</sup> owner  
 SUPPORT SB286 - as introduced OPPOSE \_\_\_\_\_ AMEND \_\_\_\_\_

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

The '85 law very simply went overboard with the stream access issue, in eliminating personal property owners rights.

Please read the supreme court decision, because it tells you how the '85 legislature ~~was~~ ERRORED. Reinstated some personal property rights in this state. I support the yellow copy of the bill - or grey copy if need be.

EXHIBIT J  
3-19-87  
SB #286

SB 286  
March 19, 1987

Testimony presented by Jim Flynn, Dept. of Fish, Wildlife & Parks

The recent Supreme Court decision regarding stream access declared that only certain provisions of the stream access law passed in 1985 were unconstitutional, and found the balance of the stream access statutes to be constitutional.

Because the legislature, in adopting HB 265, attached a severability clause to that law, it was our opinion that further legislation on the subject was not needed. However, the bill before you conforms precisely to the changes required by the court ruling.

This bill carefully removes only those provisions of the stream access law that the court declared unconstitutional. If there is to be legislation from this session on the subject of stream access, this bill, in its present form, adequately addresses the subject.

The enactment of the stream access law last session and the affirmation of its major elements in the recent Supreme Court ruling were made after careful consideration of the rights of both landowners and the recreating public. The passage of SB 286 will implement the most recent case law into the statute and hopefully will preclude further unnecessary litigation.

We recommend approval of SB 286 in its present form.

K  
3-19-87  
SB # 286

S.B. 286  
TESTIMONY OF STAN BRADSHAW  
MONTANA STATE COUNCIL OF TROUT UNLIMITED  
MARCH 19, 1987

Mr. Chairman and members of the committee, my name is Stan Bradshaw, and I appear today on behalf of the Montana State Council of Trout Unlimited. As many of you are aware, Trout Unlimited closely followed the progress of H.B. 265 last session, and has retained a continuing interest in this issue.

T.U. supports S.B. 286 as it passed out of the Senate. We opposed it the introduced version for two reasons: first, in the wake of the Supreme Court decision in the Galt case, we did not feel that any additional legislation was necessary on this issue; second, S.B. 286 as introduced went way beyond the scope of the Court's holding in Galt.

In order to understand T.U.'s concerns, it is important to look at the Court's holding. I have included a copy of the majority opinion with my testimony so that committee may refer to it in considering this bill. The core of the Court's holding is found on page 8, where the court said:

"Accordingly, we find section 23-2-302(2)(d), ((e), and (f), MCA, to be unconstitutional. Further, we find section 23-2-311(3)(e), MCA to be unconstitutional insofar as it requires the landowner to bear the cost of constructing a portage route around artificial barriers. The balance of the statutory scheme accords with the Montana Constitution and the opinions of this court. We find the unconstitutional portions of the statute to be subject to severance and therefore, leave the balance of the statute intact. [emphasis added]

Thus, out of the entire statute, the court found only four provisions to be unconstitutional. In other parts of the opinion, you will find the court's discussion as to those four provisions highlighted. S.B. 286, as it passed the



Senate, is based on those discussions.

It is important to note that the court was quite surgical in parsing out those provisions that it found objectionable. It went out of its way to specifically identify, by subsection number, the suspect provisions and to disclaim any further intent to tamper with the statute.

The introduced bill, on the other hand, appeared to resurrect arguments plaintiff had made to the court and which the court rejected. Specifically, it proposed to bring the issue of title back into the consideration of the public's right to use the waters, and appeared to require compensation to the landowner for the use of any portage route. The plaintiffs in Galt had argued for the adoption of both of these positions by the court and both arguments were rejected by the court. Further, the introduced version of S.B. 286 sought to ban all hunting; the court confined its holding to big game hunting.

Likewise, the amendments to S.B. 286 which have been proposed today attempt to reinstate many of the same provisions that appeared in the original bill. For instance, the amendments would prohibit all hunting except waterfowl hunting without permission. The court addressed only big game hunting. In addition, Senator Galt's proposed amendments go beyond what the current law requires on lands above the ordinary high water mark. Under current law, if land is not posted, only big game hunting is prohibited without permission.

In addition, the proposed amendments would, at the very least, bring new confusion into the public's right to use the state's surface waters without regard to title by changing statutory

language which came directly from the Supreme Court's decision in the Curran case. In Curran, the Court held:

"In sum, we hold that, under the public trust doctrine and the 11972 Montana Constitution, any surface waters that are capable of recreational use may be so used without regard to streambed ownership or navigability for nonrecreational purposes"

Section 23-2-302(1) MCA reads, in part:

"All surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters".

The amendments proposed by Senator Galt would change this language to replace "without regard to" to "with consideration of". This language is ambiguous and, worse, potentially violative of the Supreme Court's recognition that streambed ownership is irrelevant to the public's right to use the surface waters of the state.

Finally, the proposed amendments would require the purchase of land when a portage route is constructed. This exceeds the court's holding in Galt.

There has been some argument made that the legislature needs to amend the bill to reflect the court's discussion about "minimal use". However well intended, that assertion is incorrect. First, even though the court did say that the public has the right to make only minimal use of the bed and banks of the streams and rivers of the state, it did not direct any additional amendments to those sections which Senator Galt proposes to amend. This is because the discussion of minimal use was relevant only to the issue of what uses the court found not to be minimal because they were not necessary to the use of the water resource. Beyond addressing those specific uses as the court

Directed, no further

directed, no further changes to the statute were necessary to conform the statute to the holding in the Galt case.

Any reasonable reading of the Galt case indicates that the legislature, when it enacted H.B. 265, came pretty close to the mark. Given the number of different provisions that the bill had, and the very few that the Court found objectionable, it is fair to say that the legislature's efforts in enacting H.B. 265 were successful.

Given the potential for dispute over Senator Galt's proposed amendments, it would seem that the prudent course for this legislature would be to do only that which is necessary to conform the statute to the Supreme Court holding in the Galt case and to do nothing more. The additional tinkering proposed here, no matter how well intended, only promises to exacerbate the continuing argument over stream access at a time when all sides are better served by operating within the framework defined by the court.

For the foregoing reasons, The Montana State Council of Trout Unlimited urges this committee to support S.B. 266 without further amendment.

K  
3-19-87  
SB 286

No. 86-178

IN THE SUPREME COURT OF THE STATE OF MONTANA

1986

JACK E. GALT, et al.,

Plaintiffs and Appellants,

-vs-

STATE OF MONTANA, acting by and  
through the DEPARTMENT OF FISH,  
WILDLIFE AND PARKS,

Defendant and Respondent.

APPEAL FROM: District Court of the First Judicial District,  
In and for the County of Lewis & Clark,  
The Honorable Henry Loble, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Philip W. Strobe argued, Helena, Montana

For Respondent:

Stan Bradshaw, Dept. Fish, Wildlife and Parks,  
Helena, Montana  
Poore, Roth & Robinson; Urban L. Roth argued,  
Butte, Montana

For Amicus Curiae:

Charles F. Moses argued for Directors of T-Bone  
Cattlemens Assoc., et al., Billings, Montana

Submitted: October 21, 1986

Decided: January 15, 1987

Filed:

JAN 15 1987

*Ethel M. Harrison*  
Clerk

Mr. Justice Frank B. Morrison, Jr. delivered the Opinion of the Court.

Plaintiffs appeal the order of the First Judicial District Court granting summary judgment in favor of the defendant, State of Montana. We reverse.

In 1984, this Court decided the twin cases of *Montana Coalition for Stream Access, Inc. v. Curran* (Mont. 1984 P.2d 163, 41 St.Rep. 906, and *Montana Coalition for Stream Access, Inc., v. Hildreth* (Mont. 1984), 684 P.2d 108 St.Rep. 1192. In *Curran*, we held that under the public trust doctrine as derived from the Montana Constitution the State has a right to use any surface waters capable of use for recreational purposes up to the high water marks and to provide a portage around barriers in the water in the least intrusive manner possible. This holding was reaffirmed in *Hildreth*.

In response to these two decisions, the legislature enacted §§ 23-2-301, et seq., MCA, addressing recreational use of streams. Appellants, plaintiffs in the above cases, brought this action for declaratory relief pursuant to the Uniform Declaratory Judgment Act, §§ 27-8-101 to 27-8-313, MCA, requesting the District Court to declare §§ 23-2-301, et seq., MCA, unconstitutional as a taking of private property without just compensation. The District Court upheld the constitutionality of the statutes and awarded summary judgment in favor of the State.

Addressing the constitutionality of §§ 23-2-301 et seq., MCA, on appeal we frame the issues as follows:

- 1) Whether the public trust doctrine relating to navigable waters includes the use of adjoining land?

2) Whether §§ 23-2-301, et.seq., MCA, permit uses of the bed and banks and adjoining land beyond the scope of the public trust doctrine?

Appellants challenge the following sections as unconstitutional:

23-2-301. Definitions. For purposes of this part, the following definitions apply:

. . . .

(2) "Class I waters" means surface waters, other than lakes, that:

(a) lie within the officially recorded federal government survey meander lines 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) are or have been capable of supporting the following commercial activities: log floating, transportation of furs and skins, shipping, commercial guiding using multiperson watercraft, public transportation, or the transportation of merchandise, as these activities have been defined by published judicial opinion as of April 19, 1985; or

(d) are or have been capable of supporting commercial activity within the meaning of the federal navigability test for state streambed ownership

(3) "Class II waters" means all surface waters that are not class I waters, except lakes.

. . . .

(12) "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.

23-2-302. Recreational use permitted -- limitations -- exceptions.

(1) Except as provided in subsections (2) through (5), all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters.

(2) The right of the public to make recreational use of surface waters does not include, without permission or contractual arrangement with the landowner:

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

(b) the recreational use of surface waters in a stock pond or other private impoundment fed by an intermittently flowing natural watercourse;

(c) the recreational use of waters while diverted away from a natural water body for beneficial use pursuant to Title 85, chapter 2, part 2 or 3, except for impoundments or diverted waters to which the owner has provided public access;

~~(d) big game hunting except by long bow or shotgun when specifically authorized by the commission;~~

~~(e) overnight camping within sight of any occupied dwelling or within 500 yards of any occupied dwelling, whichever is less;~~

~~(f) the placement or creation of any permanent duck blind, boat moorage, or any seasonal or other objects within sight of or within 500 yards of an occupied dwelling, whichever is less; or~~

(g) use of a streambed as a right-of-way for any purpose when water is not flowing therein.

(3) The right of the public to make recreational use of class II waters does not include, without permission of the landowner:

(a) big game hunting;

(b) overnight camping;

(c) the placement or creation of any seasonal object; or

(d) other activities which are not primarily water-related pleasure activities as defined in 23-2-301(10). \* \* \*

23-2-311. Right to portage -- establishment of portage route.

(1) A member of the public making recreational use of surface waters 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. \* \*

(3)(e) ~~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 artificial barriers not owned by the landowner on whose land the portage route will be placed must be borne by the department. \* \* \*

The public trust doctrine is found at Article IX, Section 3(3), of the Montana Constitution which provides:

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 subject to appropriation for beneficial uses as provided by law.

Section 70-1-202, MCA, provides:



Property of the state -- what included. The state is the owner of:

- (1) all land below the water of a navigable lake or stream;
- (2) all property lawfully appropriated by it to its own use;
- (3) all property dedicated or granted to the state; and
- (4) all property of which there is no other owner.

Section 70-16-201, MCA, states:

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.

As noted in Curran, supra, and Hildreth, supra, the constitutional provision clearly provides the State owns the waters for the benefit of its people. In those decisions, we further held that the public's right to use the waters includes the right of use of the bed and banks up to the high water mark even though the fee title in the land resides with the adjoining landowners. We did not define what kinds of use are permissible under the public trust doctrine.

The issue before us now is whether the public trust doctrine includes the types of use of the bed and banks found in §§ 23-2-301, et seq., MCA. Section 23-2-302, MCA, has provided for a public right to build duck blinds, boat moorages, and camp overnight, so long as not within sight of or within 500 yards of an occupied dwelling, whichever is less.

The public trust doctrine in Montana's Constitution grants public ownership in water not in beds and banks of streams. While the public has the right to use the water for recreational purposes and minimal use of underlying and adjoining real estate essential to enjoyment of its ownership

in water, there is no attendant right that such use be as convenient, productive, and comfortable as possible.

The public has a right of use up to the high water mark, but only such use as is necessary to utilization of the water itself. We hold that any use of the bed and banks must be of minimal impact.

Appellants contend the right of public use set forth in the Curran and Hildreth decisions applies only to the surface of navigable streams. This is incorrect. In Hildreth we explicitly included the right to use of the bed and banks. 684 P.2d 1094, 41 St.Rep. 1199. In Curran, we adopted a recreational use test to determine navigability. Appellants apparently contend that the right of public use is restricted to Class I waters; i.e., those waters considered to be navigable under the federal test. This is not so. As we said in Curran, "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." 682 P.2d 170, 41 St.Rep. 914. The Montana Constitution makes no distinction between Class I and II waters. All waters are owned by the State for the use of its people.

Pursuant to § 23-2-302, MCA, overnight camping and construction of a duck blind are permissible within a few feet of an occupied dwelling so long as these activities are not "within sight". Similarly, a boat mooring could be placed directly in front of someone's home if obscured from vision.

Overnight camping is not always necessary for utilization of the water resource itself. The public can float and fish many of our rivers without camping overnight.

2-11-68  
J. L. ...

The statute is overbroad in giving the public right to a recreational use which is not necessary for the public's enjoyment of its water ownership. The same can be said of constructing permanent objects between high water marks. Although duck blinds may be necessary for enjoying the ownership interests in certain large bodies of water, the right to construct permanent improvements on any commercially navigable stream does not follow.

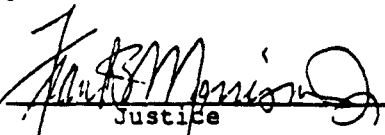
Big game hunting as authorized by § 23-2-302(d), between high water marks, is not permitted under any circumstances because it is not a necessary part of the easement granted the public for its enjoyment of the water. Further, although the recreational user has a right to portage around obstructions minimally impacting the adjoining landowner's fee interest, there can be no responsibility on behalf of the landowner to pay for such portage route. The landowner receives no benefit from the portage. The benefit flows to the public and the expense should be borne by the State.

We reaffirm well established constitutional principles protecting property interests from confiscation. Landowners, through whose property a water course flows as defined in Curran and Hildreth, supra, have their fee impressed with a dominant estate in favor of the public. This easement must be narrowly confined so that impact to beds and banks owned by private individuals is minimal. Only that use which is necessary for the public to enjoy its ownership of the water resource will be recognized as within the easement's scope. The real property interests of private landowners are important as are the public's property interest in water. Both are constitutionally protected. These competing

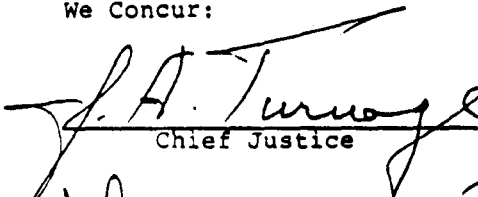
interests, when in conflict, must be reconciled to the extent possible.

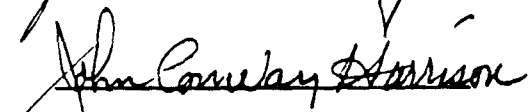

Accordingly, we find § 23-2-302(2)(d), (e), and (f), MCA, to be unconstitutional. Further, we find § 23-2-311(3)(e), MCA, to be unconstitutional insofar as it requires the landowner to bear the cost of constructing a portage route around artificial barriers. The balance of the statutory scheme accords with the Montana Constitution and the opinions of this Court. We find the unconstitutional portions of the statute to be subject to severance and therefore, leave the balance of the statute intact.

We enter declaratory judgment in favor of appellants in accordance with the views herein expressed.

  
Justice

We Concur:

  
Chief Justice

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
Justices

March 19, 1987

L  
3-19-87  
SB # 286

Testimony In support of SB286 (w/Halligan amendment) on Behalf of  
The Montana Coalition for Stream Access by Scott Ross

Before the House Judiciary Committee

\*\*\*\*\*

The Montana Coalition for Stream Access supports SB286 in its present form.

Because of the substantial changes that have been made in the bill, and in light of further changes that are apparently being sought by some, our testimony today must focus on the need for those changes.

HB265, as passed by the 49th Legislature, was the result of a need to address, in statute, the decisions of the Montana Supreme Court in the Curran and Hildreth cases. Some have charged that HB265 went 'too far'. The Supreme Court's Galt decision lends some affirmation to those charges in declaring unconstitutional four distinct subsections of the Stream Access Law. The fact that HB265 might be overbroad in reflecting the Curran and Hildreth decisions was anticipated by the Legislature; the severability clause allowed the body of the law to remain intact and now enables us to respond to the need to revise the law by surgically removing or altering those provisions that have been declared unconstitutional. The changes reflected in the present form of SB286 are limited to those specific items.

We believe that broader changes to the Stream Access Law should be carefully weighed in terms of practical need.

Testimony on SB286 in the Senate included numerous references to the concepts of 'minimal use' and 'minimal impacts'. While it is true that the Supreme Court's Galt decision discussed minimal use and minimal impacts, we believe that these were used as the standards by which water-related recreational uses allowed in current statute were examined to determine which uses might exceed those criteria. We do not believe that the Court was providing directives by which we might further alter our Stream Access Law. They were very specific in terms of which recreational activities should not be allowed (because they exceed the minimal use standard).

It is important to note that there are provisions in the current law which address situations in which recreational activities allowed under the provisions of HB265 may be restricted or prohibited if they cause more than 'minimal impact' to adjacent property. These provisions are found in Section 23-2-302(4) and are embodied in the Fish and Game Commissions's stream access petition procedure and the Administrative Rules that have been adopted to govern that procedure.

Testimony and debate on SB286 (& SB159) included reference to problems caused by recreationists. In most instances, these problems appear to be the result of either (1) a misunderstanding of the law or (2) disregard for the law. Montana's Stream Access Law is more than just a set of guidelines outlining what types of recreation are allowed; as law, it must be used to bring offenders to justice. Changing the law in an attempt to eliminate offense will certainly not have much effect on those who have

(2)

3-1-87  
13 # 232

little regard for it (the law) in the first place. If existing problems are largely due to either a lack of enforcement or hesitation by those who are affected to use the law for their protection, then we should recognize that as a need for action other than a change in the statute. We believe that unnecessary or incautious changes in the Stream Access law will invite further litigation and will do little to make for 'better law' in a practical sense.

The Montana Coalition for Stream Access asks the Committee to support SB286 in its present form- We believe that it now reflects an appropriate response to the need for revision to coordinate with the Supreme Court's Galt decision. We hope that the Committee will approve this measure without further amendment.

Thank you.

# Medicine River Canoe Club

Great Falls, Montana

March 19, 1987

H  
3-19-87  
SB#286

House Judiciary Committee  
State Capitol  
Helena, Montana

Chairman Lory and Members of the Committee:

My name is Jim McDermid and I am the spokesman for the Medicine River Canoe Club in Great Falls. Beginning with the 1983 legislative session, I have attended nearly all of the hearings on the stream access issue.

Our organization was part of the alliance of recreational and agricultural groups that supported last session's H.B. 265 which ultimately became the stream access law. The few and relatively minor incidents that have occurred since its passage are supportive of the fact that it is a good, workable law.

This legislative session, Senator Galt introduced S.B. 286 which purported to conform the stream access law to the recent Supreme Court ruling. However, the bill, as introduced, called for twenty-one changes in the statute, not just the four that the court addressed. Because the Senate recognized this obvious attempt to change the concept of the current law, it was amended to address only those four issues directed by the court. The Senate, therefore, in the court's own words, left "the balance of the statute intact." (Galt vs State of MT)

As passed by the Senate and presented to this committee, S.B. 286 now conforms the current law to three Supreme Court rulings. It also compliments the immeasurable hours of sincere and intense work by the 1985 legislature in structuring the fair and equitable Stream Access Law.

We sincerely urge you to pass S.B. 286 as presented to you by the Senate.

(Blue Copy)

Thank you.

Respectfully yours,

*James W. McDermid*

James W. McDermid, Spokesman  
Medicine River Canoe Club  
3805 4th Ave. South  
Great Falls, Montana 59405



Fishing & Floating Outfitters  
Association of Montana  
P.O. Box 1372  
Livingston, Montana 59047

March 19, 1987

Rep. Earl Lory, Chm.  
House Judiciary Comm.  
Ref. SB-286

3-19-87  
SB 286

Mr. Chairman, members of the committee, for the record my name is Richard Parks. I own the Parks' Fly Shop in Gardiner and am President of the Fishing and Floating Outfitters Association of Montana. It is on behalf of FFOAM's 227 statewide members that I appear today.

When this bill was heard in the Senate we opposed it as it did much more than its title suggested. While we could disagree with the Supreme Court's restrictions on recreational use of Montana's waterways we see the necessity of accepting their rulings. After being amended on the floor of the Senate this bill now does, in fact, conform the statutes with the Court's decisions. We caution you against amending it as we can not envision changes that would not again attempt to reverse the clear intent of the multiple Court rulings already handed down on this issue.

We therefore urge a **DO PASS** vote for an unamended SB-286.



3-19-87  
SB#286

March 13, 1987

HOUSE JUDICIARY COMMITTEE  
State Capitol  
Helena, Montana

CHAIRMAN LORY and MEMBERS OF THE COMMITTEE

My name is Walt Carpenter, I live in Great Falls, and I am interested in Senate Bill 286 as a sportman and a concerned citizen.

The 1985 Legislature, after untold hours of deliberations, and input by major landowner groups and sportsman's organizations, passed a stream access bill that seemed to be as fair to all concerned as was possible.

In addition to passing a stream access bill, the 1985 Legislature also did an excellent job in strengthening trespass laws, to protect landowner's rights.

Senator Jack Galt, not satisfied with the 1985 stream access bill, took the issue to court, and after losing in District Court, appealed the case to the Montana Supreme Court. The Supreme Court ruled that only four minor provisions of the stream access bill were unconstitutional, but upheld the remaining sections.

Senator Galt, in the current legislative session, introduced S.B. 286, purported to be only a housekeeping bill, to bring state law into conformance with the latest Supreme Court ruling. However, S.B. 286, as introduced, went far beyond the Supreme Court's decision, making some twenty one changes in the stream access bill, instead of the four set forth by the Court.

After deliberation by the full Senate, an amendment by Senator Halligan was approved, which brought S.B. 286 into line with the Supreme Court decision. In this form the bill was passed over to the House.

Diluting this bill with further amendments, in an endeavor to bring it back into a semblance of the form in which it was originally introduced by Senator Galt, would make the bill unacceptable to sportsmen, and if passed, would no doubt only lead to further confrontations on our streams, and litigation in the courts.

I firmly believe most Montana citizens are getting very tired of this stream access matter being dragged on and on, and are in favor of a bill that is fair to all concerned, and hopefully put the issue to rest.

S.B. 286, as finally approved by the Senate, is a fair bill, and I respectfully urge this Committee to approve it without further amendments.

Sincerely,

*Walt Carpenter*  
Walt Carpenter

P  
3-19-89  
SB 986

TO: SENATOR JAMES H. HILL, JR.  
HOUSE REPRESENTATIVE  
SUBJECT: S.B. 986 FOR S.B. 236

Committed to the people:

I am here in Helena today to represent myself, my husband, and the friends whom we came along with to show our support for S.B. 236 as amended by the Gallatin Amendment. We have camped - camped on the Dearborn River, the Blackfoot River, the Marias River, the Smith River, the Missouri River and here today on the Sun River. Many stretches of these rivers would be unsuitable for the 2-6 day trips that we use them without being able to camp inside the high water mark of the stream bed. This stream bed is important to all of us, and we have not caused the riparian lands we have used by littering or in any way infringing on landowner rights nor have we caused damage to adjacent agricultural land. Most of the riparian areas along these rivers are in fact not suitable for anything else but camping and recreational use and wildlife benefits. If you exclude these uses then all you have to benefit is landowner rights. We feel that isn't a very wise use of a state owned waterway resource. If they are used with respect by all then all will benefit. Please note that the Supreme Court has already given us the right to these recreational uses of state owned water related activities and S.B. 236 with the Gallatin Amendment is contrary to the Supreme Court ruling.

Sincerely,

*James Hill*  
*Montana State Senator*

*Macrofreesi*



**GREAT  
FALLS AREA  
CHAMBER OF COMMERCE**

P.O. BOX 2127  
926 CENTRAL AVENUE  
GREAT FALLS, MONTANA 59403  
(406) 761-4434

3-19-87  
SB# 286

March 12, 1987

TO: House Judiciary Committee  
Cascade County Legislative Delegation

FROM: Roger W. Young, President

**SUBJECT: STREAM ACCESS**

The Great Falls Area Chamber of Commerce supports the passage of SB-286 (Galt) to revise the stream access law in order to remove provisions declared unconstitutional. We support this bill as it has been amended by the Senate so that it amends only those portions required by the recent Supreme Court ruling. It is the consensus of opinion that SB-286 not go so far as to alter the intent and change the concept of the current law which was passed in 1985. We understand that there had been only 10 recorded violations since that legislation was passed. We have studied both sides of this issue and believe the best advice to the Legislature would be to confine its consideration to implementing those points expressly addressed by the Supreme Court in its ruling. Stream access is important to Montana's quality of life and to tourism and recreation development. The 1985 stream access law represents a reasonable compromise with affords protection for private property rights.

A  
3-19-87  
SB 380

WRITTEN TESTIMONY  
OF AMERICAN INSURANCE ASSOCIATION  
OF  
SB 380

We strongly support the intent and concept of this bill as originally drafted. On second reading, however, this bill was amended in such a way that we now believe it nullifies one of the intended defenses to a products liability action.

Specifically, the misuse defense was amended to provide that misuse may be a defense only when the consumer unforeseeably misuses the product. In effect, this amendment creates a means of holding a product manufacturer liable in any case in which he could have foreseen misuse. Any product, however, can be misused and that always can be foreseen in some scenario.

For example, a gun, no matter how safely or perfectly manufactured, can be misused and that misuse is foreseeable. Because of that foreseeable misuse, that gun manufacturer could be liable for a product defect when none was present.

Therefore, we request that the third reading (blue) copy of the bill be amended as follows:

1. Page 2, line 22  
Following: "was"  
Strike: "UNFORESEEABLY"

## VISITORS' REGISTER

COMMITTEE

BILL NO.

380

DATE \_\_\_\_\_

E March 19, 1987

SPONSOR

[illegible]

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

## VISITORS' REGISTER

JUDICIARY

COMMITTEE

SENATE  
BILL NO.~~286~~ 286

DATE

March 19 1987

SPONSOR

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
John M. Denmark	Madison River Camp Club	X (No Amendment)	
WILL DEWENTER	SPORTSMAN	X (No Amendment)	
John Dewenter	SPORTSMAN		
W. A. Ballou	SPORTSMAN	X (No Amendment)	
Dwaine Johnson	SPORTSMAN	X (No Amendment)	
Tom Winkler	SPORTSMAN	X (No Amendment)	
Ed Brainerd	Self	X (Unamended)	
Glen Brainerd	Self	X (As presented)	
John Kent	Sportsman	X (As presented)	
Norman L. Hall	Self	X (As presented)	
Bob Corbett	Agriculture Extension County	X (As presented)	
Tom L. L. L.	Self	X (As presented)	
F. C. T. C.	T. C.	X (NO AMENDMENT)	
John L. L.	Self	X (As presented)	
John L. L.	John L. L.	X (As presented)	
J. P. L.	Gr. Falls W. L.	X (As presented)	
John L. L.	John L. L.		
John L. L.	Self	X (As presented)	
Bob Corbett	MT Wildlife Resources	X yellow & grey copy	Oppose blue

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

## VISITORS' REGISTER

JUDICIARY

COMMITTEE

CHARGE

BILL NO. 72DATE 12/10/1977

SPONSOR \_\_\_\_\_

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Jo Bunn	MAD	X	
Daniel Deane	Confederate Soldiers' Union	X	
Marcia Kundle	RWCC	X	
Gordon McQuarrie	Q R U G	X	
Chris Twetten	RWCC	X	
Marvin Mamm	NETC	X	
Clay Smith	A.S. Union	X	
Robert B. Gifford	MT. Assoc. Exposed	X	
Paul Lugin			
John Brantner	MT. Assoc. of American Dist	X	
James E. Murgare	East C. James Trench	X	

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

## VISITORS' REGISTER

JUDICIARY

COMMITTEE

SENATE  
BILL NO.286

DATE

March 19, 1987

SPONSOR

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Bottom 17	Self	As orig intro	
W. G. ...	...	...	
Richard Parks	FFOAm	Passed Version	
Larry Michnevich	Self	Passed Version	
Ann Michnevich	Self	Passed Version	
Arthur B. Coffin	MT COUNCIL OF TX	Passed Version	
Annelle Keller		✓	
Joanne C. Malinski	MT Wildlife Fed.	Passed Version	
Scott Ross	Coalition for Stream Access	✓	(unintentional)
Lee Fayers	W. THOMPSON THE BUREAU ASSOCIATION	✓	
Stan Blackman	Front '87	✓	oppose amendment
Phil Strope	LHCFA	original bill ✓	oppose bill
Ed ...	Self	original bill ✓	oppose bill
Miss ...	MT Strongman Co.	original ✓	
Loren ...	MT Assoc. Conservation District	original ✓	
John ...	208TH	original ✓	
Rob ...	MT Assoc. Conservation Dist.	✓	
...	T-6	original ✓	
...	FFO	original ✓	

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.



# VISITORS' REGISTER

JUDICIARY

COMMITTEE

SENATE  
BILL NO.

375

DATE \_\_\_\_\_

March 19, 1987

SPONSOR

[illegible]

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

## VISITORS' REGISTER

JUDICIARY

COMMITTEE

SENATE  
BILL NO.

372

DATE \_\_\_\_\_

March 19, 1987

SPONSOR

[illegible]

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

DEPARTMENT OF COMMERCE

*copy to file*  
*Feb. 2, 1987*  
*6/16*



TED SCHWINDEN, GOVERNOR

14.9 9TH AVENUE

STATE OF MONTANA

(406) 444-3491

HELENA, MONTANA 59620-0301

RECEIVED

FEB 2 87

DENVER FPSD

January 30, 1987

EXHIBIT A  
DATE 3-19-87  
# SB 3172

J. H. Hagman  
Mediation & Litigation Section  
Ford Parts & Service Division  
3000 Shaefer Road  
Dearborn, Michigan 48121

Dear John:

I have attended the past two F.C.A.B. arbitration hearings in Missoula as an observer, and I am writing to share my observations with you.

It appears that the procedure being used is very effective and satisfies the needs of the consumer as well as the desires of the Department of Commerce. This is due in large part to the efforts of Mr. Russ Saul from your Denver region. Mr. Saul remains impartial, and provides needed information and services in a professional manner.

The Board is composed of competent, reasonable people that are concerned with the needs of all parties involved in the arbitration procedure and are objective in their deliberations.

Once again, the procedure seems to be consistent with the intent of the law and appears to be effective.

I want to thank you for the extra effort you have taken to see that this is a successful program in Montana.

Sincerely,

*Bob*

Robert B. Logan  
Department of Commerce

RLB/ej

cc: Brinton B. Markle  
Chief Counsel  
Department of Commerce

R. C. Lackey  
Ford Motor Co. District Manager  
P.O. Box 5588 T.A.  
Denver, CO 80217

P.S. The trout fishing is great here; when can we expect you?