

MINUTES OF THE MEETING
NATURAL RESOURCES COMMITTEE
MONTANA STATE SENATE

February 11, 1987

The meeting of the Senate Natural Resources Committee was called to order by Vice Chairman Cecil Weeding on February 11, 1987, at 1:05 p.m. in Room 325 of the State Capitol.

ROLL CALL: All members were present with the exception of Sen. Hofman who was absent.

CONSIDERATION OF SENATE BILL 159: Sen. Paul F. Boylan, Senate District 39, introduced SB 159 by first presenting the following amendment that he asked the committee to adopt.

1. Page 4, line 9

Following: "of water"

Strike: remainder of line 9 through "standards" on line 10.

Insert: "meets the federal title test of navigability"

Sen. Boylan said that SB 159 was designed to redefine the term "surface water" for the purpose of determining recreational access to State waters and would provide an immediate effective date.

PROPONENTS: Phil Strobe testified that he had been the attorney for the Galt suit and in light of the Supreme Court decision, the bill "speaks for itself." Mr. Strobe introduced Mons Teigen as Executive Secretary of the Montana Livestock Association.

Mr. Teigen announced that as the first of January he was no longer Executive Secretary, but did represent that organization. He said that the Stockgrowers Association had been concerned about stream access for a number of years. Mr. Teigen stated that HB 159 was just an outgrowth of deliberations made at the Stockgrowers Annual Convention in May 1986. After long and arduous discussion, the decision had been made at that convention that HB 265 of the previous session needed some "fine tuning." Mr. Teigen stated that SB 159 would be fully in keeping with the Court's decision in the Galt case. (Exhibit 1)

Beverly Hall, rancher at Fishtail and attorney in Billings, said the purpose of her testimony was to point out the need for this legislation and to reconcile it with the recent Supreme Court decision in Galt vs. Montana. SB 159 would amend the definition of "surface water" in section 12 of 22-2-301, MCA, by providing that "surface water" would include only the bed and bank of those streams which meet the federal title test of navigability. Under current Montana

law, the public has the right to use all surface waters of the State whether or not the stream meets the federal test of navigability. Ms. Hall said that with passage of SB 159, public would not have right of trespass on the bed and bank of a non-navigable stream without landowner's consent. She further stated that SB 159 would limit public access to the bed and bank of navigable streams without restricting the public's right to float the surface waters of streams which are not navigable. Ms. Hall reiterated that the only difference from present law is that on a non-navigable stream, floaters would be required to gain landowners' consent to disembark on the bed and bank. Ms. Hall said that SB 159 would make the stream access legislation consistent with both federal law and the new Supreme Court decision. (Exhibit 2 with Attachment)

Jim Bottomly, rancher north of Belgrade and also an attorney, offered support of SB 159 as amended. He said that the proposed language would make Montana's law consistent with almost all of the western states except Colorado who is more restrictive. Mr. Bottomly quoted the federal test of navigability: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. They are navigable in fact when they are susceptible of being used in their ordinary condition as highways for commerce." Mr. Bottomly stated that over 20 streams in Montana fall under the federal definition and he listed them. He concluded his testimony by saying that SB 159 would minimally restrict the public's right to use the waters of Montana. (Exhibit 3)

Merrill Ostrum, rancher from Fishtail, supported SB 159 and explained that the Rosebud River flows through his barnyard, by his house, which is located 100 yards from a State highway. He said that SB 159 would provide some protection for his property and his family's privacy because it would require the public to have landowner's consent before the recreationists could walk along the bank of the stream running through his yard. Mr. Ostrum supported SB 159 as amended. (Exhibit 4)

Lorents Grosfield, Montana Association of Conservation Districts, said that SB 159 strikes a reasonable balance by allowing the property owner control of the small, privately owned streambeds. (Exhibit 5)

Sen. Weeding relinquished chairmanship to Sen. Keating.

John Willard, owner of streambed land in northern Lewis and Clark County that is devoted to livestock raising, stated that clarity is needed and SB 159 would provide that clarity in reference to the definition of navigability and the distinction between floodplain and high water mark. Mr. Willard asked affirmative action be taken by the Committee on SB 159. (Exhibit 6)

George Rossetter, Fishtail, landowner and ardent fisherman, testified that HB 265 that was passed during the last legislative session confused the issue of public use of surface water and streambeds. Mr. Rossetter stated that SB 159 would carry out the judgement of the recent Supreme Court Ruling and would rectify the incongruities of HB 265. (Exhibit 7)

Bob Gilbert, Montana Wool Growers Association, stated he was in favor of SB 159 as amended. The Association had reviewed the bill and felt that it would protect private property rights and be in keeping with the recent Supreme Court decision.

Jack Salmon, Choteau, Vice President of Western Environment Trade Association and a member of the Montana Landowners Association, stated that he concurred with the foregoing testimony. Mr. Salmon submitted for the record a letter from the Montana Landowners Association, Inc. (Exhibit 8)

Kay Foster testified on behalf of the Billings Chamber of Commerce, and she said that SB 159 would provide a proper balance for the rights of both the property owner and the recreational user.

Bob Holding, Representative of Montana Association of Realtors, supported the bill as amended.

Bill Morse, attorney and landowner from Absorkee and a State Director of Montana Landowners Association, heartily supported SB 159 because the proposed legislation would answer a host of questions about liability that might run against the State of Montana. Furthermore, Mr. Morse said SB 159 would tend to alleviate the question of private landowners' liability and cost of insurance which became a staggering amount since the passage of HB 265.

Other testimony was submitted from the following but was not verbalized due to time restraints.

Peg Allen, FA Ranch, Livingston (Exhibit 9)
Steve Allen, McLeod (Exhibit 10)
Linda Larson, Alder (Exhibit 11)
Ward Jackson, Harrison (Exhibit 12)
Proponent List (Exhibit 13)

OPPONENTS: Jim Flynn, Department of Fish, Wildlife and Parks, said that SB 159 would be in direct conflict with all court decisions on stream access. Mr. Flynn stated that he felt current law had been working well and few complaints had been filed by landowners regarding abuse of stream access since enactment of HB 265 and all had been resolved. (Exhibit 14 with Attachments) To amend the law would be to invite new litigation in his opinion and he asked the committee to issue a DO NOT PASS on HB 159.

Stan Bradshaw, Trout Unlimited, stated that he had been involved in all three Supreme Court cases. Mr. Bradshaw opposed SB 159 because he felt it would violate the Supreme Court's decision on public's right to use bed and banks up to the high water mark. According to Mr. Bradshaw, SB 159 exacerbates conflict. Mr. Bradshaw said it is time for the Legislature to turn its attention to other matters of greater concern for both landowners and recreationists alike and to let the scars of the stream access battle heal. (Exhibit 15)

Scott Ross spoke on behalf of the Montana Coalition for Stream Access and opposed SB 159. Mr. Ross said that HB 265 that was enacted in 1985 works for both landowners and sportsmen and he stated that SB 159 would once again "pit Montana landowners against Montana sportsmen." Mr. Ross asked that the committee vote DO NOT PASS, thus indicating to the citizens in Montana that the argument over stream access is over. (Exhibit 16)

Steve Gilbert, who represented Paul Roos Outfitters in Helena, said that with the enactment of SB 159, many rivers which had not been adjudicated navigable will no longer be fishable to most of the outfitters in Montana who depend on these resources for their income. Changing the law would require that outfitters have permission to gain access to hundreds of privately owned parcels of land to perform their businesses in their present manner which Mr. Gilbert claimed isn't physically or economically feasible under SB 159. (Exhibit 17)

Jeanne Klobnak, Montana Wildlife Federation, said her organization is dedicated to promoting wildlife, wildlife habitat, and sportsmen's interests. Ms. Klobnak vehemently opposed SB 159 and she strongly disagreed that SB 159 would complement the Galt decision. (Exhibit 18)

Jim McDermand, spokesman for the Medicine River Canoe Club, testified that present law is good and workable. He claimed that the few and relatively minor incidents that had occurred since the passage of HB 265 supported that fact. Mr. McDermand said that passage of SB 159 would effectively prohibit reasonable use of most of the State's waterways by recreationists and strongly urged defeat of SB 159. (Exhibit 19)

Jim Kent, Outfitter from Livingston, testified for the Floating and Fishing Outfitters for Montana and he expressed opposition to SB 159 as it originally was written and also as amended. Mr. Kent wanted to enlighten the committee on the economics. In 1985, he stated that statistics showed the following purchases of fishing licenses.

Resident Fishing Licenses	185,000
Non-residents Season-Long Licenses	17,000
Non-residents 2-Day Fishing Licenses	52,000

Mr. Kent said that Montana has a deserved reputation nationwide as the "fly fishing capital" of the United States. In order to fish well for trout, one has to be able to walk the beds and banks of the streams. In Mr. Kent's business, people basically use the boat for transportation to get from one point to another. Mr. Kent said that he spends most of his time on the Smith River. Mr. Kent also stated that the Supreme Court had spoken on the stream access issue three times; and speaking for the outfitters, Mr. Kent said they would like to avoid that kind of confrontation in the future. Mr. Kent recommended a DO NOT PASS on SB 159.

Tony Schoonen, Butte Guide and Outfitters and concerned sportsman, said he felt SB 159 would definitely limit people's rights to obtain a portion of their livelihood from income they derive from the rivers. If SB 159 is passed, it would be an ultimate assurity that similar bills would be submitted to Legislature and "chip away" at people's rights. In 27 years in the outfitting business, Mr. Schoonen said he had never, repeat "never" had a problem with landowners along the rivers he floated. His customers have spent hundreds of thousands of dollars that were pumped into Montana's economy. Mr. Schoonen asked that the committee pass an adverse committee report on SB 159.

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Bob Morgan, Great Falls, spoke against SB 159 and said the bill would not be "fine tuning" the law as had been previously stated. (Exhibit 20)

Doug McClellan stated that SB 159 is unconstitutional and should not be passed.

Other testimony was received from opponents who did not speak because of the time limit.

Richard C. Parks, Fishing & Floating Outfitters
Association (Exhibit 20)
Walt Carpenter, Great Falls (Exhibit 21)

QUESTIONS (AND/OR DISCUSSION) BY COMMITTEE: Sen. Yellowtail recalled past sessions concerning stream access and he said he didn't appreciate the repetition. However, he did address a question to Mr. Morse concerning liability, 23-2-321, MCA, and Sen. Yellowtail asked Mr. Morse if the State absolves landowners from liability unless there is proof of wanton/willful misconduct. Mr. Morse responded that the underwriters have not accepted that language as written as protection for landowners.

Sen. Yellowtail announced he had copies reproduced of the Galt decision (Exhibit 22), and he asked Mr. Strobe to turn to page 6 and place SB 159 in context. Mr. Strobe said that it was his opinion that the decision of the court was the recreational test in response to Sen. Yellowtail's query.

Sen. Yellowtail stated that any use must be minimal impact and cited SB 159 regarding federal navigability and questioned aloud if that was against the decision.

Sen. Yellowtail yielded to Sen. Gage who asked who would pay for damage of property through the petitioning process.

Mr. Flynn stated that petitions do not deal with damage but do address access.

In reply to Sen. Walker's question, Mr. Strobe stated that the words "impact" and "use" were not synonymous. Mr. Strobe also said that the Supreme Court left it up to the Legislature to define "minimal," and there are areas in SB 159 where "minimal" is defined.

CLOSING: Sen. Boylan explained that SB 159 would not take away water use for the public, but that SB 159 was designed to protect banks of small streams. He emphasized that SB 159 does not say that the water does not belong to Montana, but the bill would simply protect the small streams that have not been declared navigable. Sen. Boylan indicated that with the passage of SB 159, the Supreme Court's decision would become more clear and a lot of land would be opened up that is now marked with orange paint.

CONSIDERATION OF HOUSE BILL 230: Rep. Marian Hanson, House District 100, introduced HB 230 as revising the Montana Strip and Underground Mine Reclamation Act in order to bring the act into compliance with federal law. Bill was drafted at the request of Department of State Lands. It addresses coal preparation on page 3 and coal preparation plants; remining on page 7; and increases the application fee on page 20 from \$50 to \$100, making the fee the same as other mining applications.

PROPOSERS: Dennis Hemmer, Department of State Lands, assured the committee that HB 230 would make a few minor changes in the Strip and Underground Mine Reclamation Act under which coal and uranium prospecting and mining are regulated. Mr. Hemmer stated that the major effect of these changes would allow regulation of remining activities and of coal preparation (prior to end use); and that by adding these activities to the list of regulated activities, Montana would be able to assure the reclamation of the sites and assure minimization of offsite impacts. Furthermore, Mr. Hemmer stated that Montana's act must conform to the federal act and Department of State Lands recommended to the committee that HB 230 be approved.

Ken Williams represented the Western Energy Co. and the Montana Coal Council and said the companies supported HB 230 because they would prefer to be regulated by the State rather than by the federal government.

OPPOSERS: There were no opposers.

QUESTIONS (AND/OR DISCUSSION) BY THE COMMITTEE: Sen. Stimatz asked Mr. Hemmer the purpose of deleting section 2 in SB 230. Mr. Hemmer replied that he had asked the same question and his legal counsel explained that there had been originally an amendment to that act in section 2. Subsequently, that

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section in the bill was struck because no amendments were required. Mr. Hemmer stated that section 2 would not be a repealer, but Mr. Hemmer stated that he would appreciate Natural Resources' legal aid to research that question also. Gail Kuntz will report the results of her research at a future meeting.

Sen. Lynch asked if there had been any opponents in the House, and Rep. Hanson replied there had been no opponents to testify in the committee hearing. Furthermore, SB 230 received unanimous support in the House of Representatives.

CLOSING: Rep. Marian Hanson reiterated that HB 230 would put Montana into compliance with the federal government.

There being no more business to come before the committee, Sen. Keating adjourned the meeting at 2:55 p.m.


THOMAS F. KEATING, Chairman

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ROLL CALL

NATURAL RESOURCES

COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date 2-11-87

NAME	PRESENT	ABSENT	EXCUSED
Sen. Tom Keating, Chairman	X		
Sen. Cecil Weeding, Vice Chairman	X		
Sen. John Anderson	X		
Sen. Mike Halligan	X		
Sen. Delwyn Gage	X		
Sen. Lawrence Stimatz	X		
Sen. Larry Tveit	X		
Sen. "J.D." Lynch	X		
Sen. Sam Hofman			X
Sen. William Yellowtail	X		
Sen. Elmer Severson	X		
Sen. Mike Walker	X		

Each day attach to minutes.

DATE February 11, 1987

COMMITTEE ON Natural Resources

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Tigge Holliday	Park Co Legis Assn	SB159	X	
Verna Lyn Hendrix	Park Co Legis Assn	SB159	XX	
Willie Hale	LWV	SB159		X
Lynla Larson	Upper Ruby Landowners	SB159	XX	
Kelcie Lydard	Cascade Co. Landowners	SB159	X	
Ann Lydard	Cascade-Matden-Lewis	SB159	X	
Jerry Mahler	MONTRAP COALITION FOR STREAM ^{PROTECTION}			X
Steve Gilbert	Paul Roos Outfitters	159		X
Bob Helbert	MT Woolgrowers Assn	159	X	
Rick Meis	MT Environmental Info Center	159		X
Ettore Antonelli	Self			X
Michelle Pearce	WETA	159	X	
Paul Lucas	Self	159	X	
Bob Corra	Agriculture Preservation	159	X	
Parents Grosfield	MT. Assoc. Conserv. Districts	159	X	
Helen Willard	SELF	159	X	
MARK PERHAULT	LANDOWNER GRAVELLY RING	159	X	
Bill MORSE	Mont. Landowners Assn	159	X	
Helen Goodrich	Self	159		X
George Lindbeck		159		X
Ussel Rosetta	Self	SB159		X
Bill Larson	Buck Board Guest Ranch	SB159	X	
John Salmon	WETA & Self	SB159	X	
GARY ARMISTEY	State Lands	HB230		
SAWDRA OLSEN	State Land	HB230		
Mavis Teigen	MT Stockgrowers	SB159	X	

DATE February 11, 1987

COMMITTEE ON Natural Resources

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
WARD JACKSON	JACKSON RANCH Willow Cr. Stock ASSN.	SB 159	X	
George Rosseter	Stillwater City - Mont Land ^{Assoc} Council	SB 159	X	
Margery C. Rosseter	Beartooth Ecological Council	SB 159	X	
Chuck Rein	SGCPA	SB 159	X	
Eleanor Cooperider	SGCPA	SB 159	X	
John Allen	MLA	SB 159	X	
Scott Ross	Montane Coalition for Stream Access	SB 159		X
Jim Bottamly	Montane Stock Growers	SB 159	X	
Richard M. Ostrom	ret. bloodpumper, Mt. Hoodpumper	SB	X	
Kathleen Ostrom	" "	159	X	
Praine McDermond	Medicine River Canoe Club	SB 159		X
J.P. BENDER	GREAT FALLS / W. M.	SB 159		X
Jim McDermond	Great Falls - Medicine River ^{Canoe Club}	SB 159		X
WALT CARPENTER	GREAT FALLS			X
Carol Saunders	White Sulphur Springs	SB 159	X	
R. E. Saunders	White Sulphur Springs	SB 159	X	
Beverly Hall	Bellevue	SB 159	X	
Franklin Griffith	Self, Bellevue	SB 159	X	
Mary Saunders	Montane Land ^{Assoc} Council	SB 159	X	
J.H. Sjaardens	MONTANA LAND OWNER	SB 159	X	
Bob Morgan	Miss. River Fly Fishers	SB 159		X
Gene & Bill Mahoney	Alder, Mont		X	
Steve Bradshaw	T.C.	SB 159		X
Dave Howe	P.C.L.A.	SB 159		
PETER ANDERSON	Park County Leg Assoc	SB 159	X	
Mrs. Arch Allen	Self	SB 159	X	

(Please leave prepared statement with ...)

DATE February 11, 1987

COMMITTEE ON Natural Resources

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
L. Michnevich	Self	SB 159		✓
Jim Kent	EFCAM	SB 159		✓
Tony Schoonover	Skyline MW-F	SB 159		✓
DENNIS KAVANAGH	SELF	"		✓
Jerry Jack	Montana Stockgrowers	SB 159	✓	
Robert R. Elmer	M.L.A.	SB 159	✓	
Robert R. Elmer	M.L.A.	SB 159	✓	
Bill Pruitt	self	SB 159	✓	
Lowell Mallon	Mallon Ranch Co	SB 159	✓	
Dick Todd	M.L.A.	SB 159	✓	
Dean Stanekfield	Stanekfield Cattle Co	SB 159	✓	
Charles Ralston	Ralston Ranch Inc	SB 159	✓	
Bill Haldor	Skyline Sport, Bait			✓
Debi Brammer	MT Assoc of Conservation Dist.	SB 159	✓	
Robert Simpson	M.L.A.	SB 159	✓	
Jim Delaney	Self	SB 159		✓
Julianne Terrault	self	SB 159	✓	✓
Glenda Bradshaw	self	SB 159		✓
John Beletnick	Self	"		✓
John Beletnick	self	"	✓	
John Beletnick	" M.L.A.	"	✓	
Bob Helling	Mt. Assoc. of Realtors	SB 159	✓	
Kay Foster	Billings Chamber of Commerce	SB 159	✓	
Jim Flynn	DEPT FWOP - HELENA	SB 159		✓

DATE

Feb. 11, 1987

COMMITTEE ON

Natural Resources

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Annell Heller	Richtail, Mt.	SB 159	<input checked="" type="checkbox"/>	<input type="checkbox"/>
PETE TEST	Masson, R. Co. T.U.	SB 159	<input type="checkbox"/>	<input checked="" type="checkbox"/>
John Hunt	Stillwater, self & MIA	"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
PHIL STROPE	SGC PA.	SB 159	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Mary Wright	self	SB 159	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Doug McDelland	Montana State Council T.U.	SB 159	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Lois Wajoy	Mont Lathrop	SB 159	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Russell C. Walsh	Box 531 ^{Ranch} Camp	159	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Arthur D. Hunt	Wise River, MT	159	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Jones Woodhull	Jacobson ^{Summiton, MT} Mont	159	<input type="checkbox"/>	<input checked="" type="checkbox"/>
R.D. Cunningham	SELF	159	<input type="checkbox"/>	<input checked="" type="checkbox"/>
S Taylor	SELF	159	<input type="checkbox"/>	<input checked="" type="checkbox"/>

DATE 2/11/87

COMMITTEE ON Natural Resources

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Jim Felmer	Leadership Helena		<input checked="" type="checkbox"/>	<input type="checkbox"/>
Jim Armstrong	Leadership Helena		<input type="checkbox"/>	<input type="checkbox"/>
Patricia Johnson	"		<input type="checkbox"/>	<input type="checkbox"/>
Ray McKenna	"		<input type="checkbox"/>	<input type="checkbox"/>
Luellen McArthur	"		<input type="checkbox"/>	<input type="checkbox"/>
JOHN ROGERS	"		<input type="checkbox"/>	<input type="checkbox"/>
John Celar	"		<input type="checkbox"/>	<input type="checkbox"/>
Laura Mitchell-DeLong	"		<input type="checkbox"/>	<input type="checkbox"/>
Lynna Ghiorso	Leadership Helena		<input type="checkbox"/>	<input type="checkbox"/>
STEVE ARMSTRONG	Leadership Helena		<input type="checkbox"/>	<input type="checkbox"/>
Phil Mills	" "		<input type="checkbox"/>	<input type="checkbox"/>
Ricky Lee	Leadership Helena		<input type="checkbox"/>	<input type="checkbox"/>
John Taylor	"		<input type="checkbox"/>	<input type="checkbox"/>
Steve Visocan	" "		<input type="checkbox"/>	<input type="checkbox"/>
Frank H. Stauchfeld			<input type="checkbox"/>	<input checked="" type="checkbox"/>
DAVID W. DECKER			<input type="checkbox"/>	<input checked="" type="checkbox"/>
Kate McIvor	MT Environmental Info. Gate		<input type="checkbox"/>	<input type="checkbox"/>

Testimony of Mons L. Teigen
in support of SB 159

DATE 2-11-87BILL NO. SB 159

I am Mons Teigen speaking for the Montana Stockgrowers Association in support of Senate Bill 159. Our organization has had a great deal of experience in dealing with this particular issue. We observed the Hildreth and Curran cases of several years ago through District Court and Supreme Court as well. We filed amicus briefs on both of these cases. We were one of many organizations that set about to clarify the provisions of the Supreme Court decisions which culminated in HB 265 of the last session.

The bill under consideration today is an outgrowth of deliberations made at the Stockgrowers annual convention in Kalispell in May of 1986. At that time the convention considered HB 265 of the previous session and thought that some fine tuning was called for with regard to the definition of surface waters. This decision was not entered into lightly but resulted after a long and arduous discussion where all sides of the issue were debated.

At no time during the consideration of HB 265 last session was there any suggestion that it was going to be the final law relating to stream issues. In fact, following that session, Senator Galt and others filed action against the Department of Fish, Wildlife and Parks on these same issues. Now that the Supreme Court has ruled on that decision, it seems to us that the provisions of SB 159 are even more called for. In the majority opinion of the Court, Judge Morrison said, in part, "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 is ownership of the water resource will be recognized as within the easement scope. The real property interests of private land owners are important as are the public's property interest in water. Both

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Mons L. Teigen
SB 159

are constitutionally protected. These competing interests, when in conflict must be reconciled to the extent possible."

We believe that SB 159, as amended by Senator Boylan, is fully in keeping with the Court's decision and urge the passage of this badly needed legislation.



MONTANA CATTLEMEN'S ASSOCIATION INTL

WITH A LARGE "Steak" IN MONTANA'S FUTURE

SENATE NATURAL RESOURCES

EXHIBIT NO. 1-attachment

DATE 2-11-87 ^{SUPPORT}

BILL NO. SB 159

P.O. Box 1234
Helena, Montana 59624

TESTIMONY CONCERNING SB 159

Senate Natural Resources Committee

Mr. Chairman, Senator Boylan's bill represents a positive change in the Legislature's approach to stream access law. HB 265 from last session, while it has proved useful as a framework and as a subject for litigation, did very little to sensibly limit recreational access to private property. SB 159, as introduced by Senator Boylan, recognizes that the degree of access should be different on a stream that is navigable by federal standards.

One of the reasons for the unpopularity of HB 265 was the fact that it opened up thousands of public right-of-ways across and upon privately owned land. Apparently, the Supreme Court will continue to insist that the public has the right to use the water wherever it flows. Therefore, it is imperative that the Legislature act to reduce this intrusion as much as possible.

Where a body of water has been adjudicated federally navigable, federal courts will probably hold that the bed and banks are part of the stream. But, a large body of legal opinion questions whether streams not navigable by federal standards need include the bed and banks, since the Montana constitution only states that the water itself is state-owned. In fact, according to some attorneys, the existing definition of "surface water" might not stand up on appeal to a federal court.

Even if some court finds that the bed and banks of privately owned streambeds are subject to public use for water-related purposes, as the Montana courts have already done, then certainly the State's legislature can act to control this public property. The Legislature makes rules against driving on the shoulders and the median strips of certain roads. It is now time to exercise its authority to place similar limitations on the recreational use of the State's waterways.

Passage of this bill will eliminate much of the friction between landowners and sportsmen. Most landowners understand that the water is owned by the people. They acknowledge their right to be in and upon that water. It is only when the public asserts a right to deeded, tax-paying and dry areas that resentment builds. The existing definition of surface water extends the meaning of the word "water" to include something else. The past two years have proven that HB 265 will never achieve the good purposes intended by those who supported it in 1985 as long as such a definition remains a part of the law.

Testimony of Beverly B. Hall
in support of SB 159

My name is Beverly Hall. I ranch at Fishtail and practice law in Billings. At one time I taught water law in the law school at Lewis and Clark College in Portland, Oregon.

The purpose of my testimony is to point out the need for this legislation and to reconcile it with the recent Montana Supreme Court decision in Galt v. Montana.

Section 12 of 22-2-301 MCA currently defines "surface water" to include the bed and bank of all streams to the ordinary high water mark, irrespective of whether or not the stream is navigable. SB 159 amends this definition by providing that "surface water" includes only the bed and bank of those streams which meet the Federal title test of navigability.

The Federal courts have consistently held that if a river is navigable by Federal standards, the public may use the bed and bank to the high water mark, but where the river is non-navigable, the landowner owns the bed and bank. See, e.g. Montana v. U.S., 450 U.S. 544, 67 LED 2d 493, 101 SC & 1245. State of Oregon v. Riverfront Protection Assn., 672 F2d 792, State of Alaska v U.S. 754 Fed 85, U.S. cert den 106 S.C. 333. A constitutionally protected right of land ownership is the right to exclude trespassers. Day v Armstrong, 362 P2d. 137.

Under Montana law, the public has the right to use all surface waters of the state whether or not the stream meets the Federal test of navigability. However, the public does not have the right to trespass on the bed and bank of non-navigable streams without landowner consent. Neither the Montana Supreme Court nor the stream access legislation can deprive a landowner of a federal constitutionally protected property right without due process of law. Robinson v Arigoshi, 753 F2d 1468.

SB 159 will remedy this situation by limiting public access to the

bed and bank of navigable streams without restricting the public's right to float the surface waters of streams which are not navigable. The only difference from present law is that on a non-navigable stream, floaters must have landowner consent to disembark on the bed and bank.

The Montana Supreme Court recently held, in Galt v. Montana, that 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. The use of the bed and bank must be of minimal impact.

The Court further stated that the stream access 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 real property interests of the landowner are important and are constitutionally protected.

The new Supreme Court decision represents a reasonable attempt to balance the public's recreational interests with the landowner's property rights. SB 159 would codify that result by minimizing the impact of public use of the bed and banks of non-navigable streams.

The need for this legislation is graphically illustrated by the letters from landowners Rebecca Benedict and Gary Huffmaster, which are attached to my testimony.

SB 159 will remedy the practical problem noted in these letters, and will make the stream access legislation consistent with both federal law and with the new Supreme Court decision.

2-1-87

Beverly Hall
100 North 27th
Billings, Montana
59101

Dear Ms. Hall:

I am a land owner of 20 acres of land on the East Rosebud River. When I first purchased the land in 1977, my intent was to leave it open to the public for access to the river. However, after three years of ownership it became necessary to post and fence the land.

During these three years I witnessed both the disregard for and destruction of my property by various persons using it for recreation. At least six times each summer I had to pick up garbage, cans, paper, food, burned wood, cinder blocks and other trash. I also had to bury human excretion and toilet paper repeatedly. I had people drive over the fence, drive over small trees and brush creating their own road, steal fire wood and cut down full grown trees to make a hunting camp.

Although I have continued to experience some problems since posting the land, the problems of litter and human excrement increased last summer after the passage of the new water access law. While I once believed that people using another person's property would treat it as I would, with respect and care, experience has proven me wrong.

I support your effort to provide greater protection of private land.

Sincerely,

Dear legislative committee on Stream Access;

Six years ago we purchased 20 acres of land at the foot of the Absoraka mountains. Our land is on both sides of the East Rosebud River and a few hundred feet down stream from our property line an old bridge and public road cross the river.

This bridge is a hub of summer activities. Families fish from the bridge constantly, numerous boat floaters make the bridge their final destination, and a local church even has its annual baptisimal service at this scenic spot. Most of these summer groups leave footprints and take memories.

However, the bridge (located on a school section) is public, our fenced land is private. The fishermen who wade up the stream unto our land sometimes bring their dogs--the dogs find our cabin more "socially interesting" than the streambank. Because our land has privacy the bridge area does not afford, many of the floaters make a short stop before reaching their destination. Most have the consideration to use the opposite side of the river (at least when we are watching from the front porch)but, quite honestly, almost a weekend does not go by during the summer that I do not have to use a shovel to bury human body waste leftamong the forget-me-nots in a secluded cut a few hundred feet from the house.

I hope for some recourse or compensation. Enforcable pack-it-out rules seem to be a reasonable request. Also, there is something that does not seem quite right about saying that something is public (the stream bed) and then still taxing us on it.

Rebecca C. Benedict

Owner: E 1/2 SE 1/4 NE 1/4 20 Acres 17 6 18

SENATE NATURAL RESOURCES

EXHIBIT NO. 13

DATE 2-11-87

BILL NO. SB 159

To The Senate Natural Resources Committee:

I SUPPORT Senate Bill 159 as it is written. I own a ranch consisting of approximately 10,000 acres and have about 3 miles on the Upper Ruby River on it. I feel that House Bill 265 is a constitutional violation of private property rights. I think it is important to protect these rights. There are miles of public waters for "the public" to have free access to. I don't feel floating is a problem as long as it is limited to that.

I urge you to vote YES for Senate Bill 159 as it is written.

Sincerely,

Gene Maloney

Gene Maloney
Owner, Maloney Ranches

Testimony of James Bottomly
in Support of SB 159

My name is Jim Bottomly. I am a rancher north
also a lawyer.

I support Senator Boylan's bill, Senate Bill 159 defining surface waters. We prefer, however, the bill as amended.

This proposed language would make the Montana law consistent with almost all Western states except Colorado. Colorado law is more restrictive than Senator Boylan's proposal.

Facts relative to this matter gleaned from the records of the Department of Fish, Wildlife and Parks gives the following information:

1. There are 90 million acres of land in Montana.
2. There are 28 million acres of public land in Montana - or 30 percent of all the land is public land.
3. The majority of all the streams in Montana originate in or pass through public land.
4. On these streams the public has complete access to the water, the beds and the banks.
5. According to the Department of Fish, Wildlife and Parks, there are over 17,000 miles of fishable rivers and streams in Montana.
6. A rough estimate of the classifications of these miles is as follows:
 - a. Approximately 10,000 miles are streams that would appear to meet the federal navigability test.
 - b. Approximately 5,000 miles are streams that are non-navigable - but will support floating.
 - c. 2,000 miles cannot support floating and therefore owner permission would be needed to use the beds and bank.
These 2,000 miles are streams with fragile ecology and

are the main support for trout propagation. Most environmentalists would recommend that these streams not be trampled upon in any event.

7. The Federal Test of Navigability for title purposes is as follows:

"Those rivers must be regarded as public navigable rivers in law which are navigable in fact. They are navigable in fact when they are susceptible of being used in their ordinary condition as highways for commerce."

8. Again, using Department of Fish, Wildlife and Parks information it would appear that the following streams are some of the streams that would meet the test:

- a. Missouri
- b. Madison
- c. Main channel of the Gallatin
- d. Jefferson
- e. Marias
- f. Milk
- g. Sun
- h. Kootenai
- i. Yellowstone
- j. Big Horn
- k. Clarksfork
- l. Powder
- m. Tongue
- n. Clarks Fork at the Columbia and its tributaries
- o. Bitterroot
- p. Blackfoot

- q. Flathead
- r. Thompson
- s. Dearborn

Conclusion: This bill would minimally restrict the public's rights to use the waters of this state.

This bill is implicit in the Supreme Court's decision in the Galt case and is an extremely reasonable reconciliation of those competing property interests.

5

Lazy J. Quarter Circle Ranch
James J. or Tennie P. Bottomly
3729 Hamilton Rd.
Belgrade, MT 59714
(406) 388-6298

SENATE NATURAL RESOURCES
EXHIBIT NO. 3-attachment
DATE 2-11-87
BILL NO. SB159

TO: All Interested Parties
FROM: James J. Bottomly
DATE: January 30, 1987
RE: STREAM ACCESS

Enclosed is a position paper regarding the Galt Vs. State of Montana Case.

Senator Boylan has introduced Senate Bill 159 which will amend HB265 and restrict the use of the beds and banks on the smaller streams in Montana.

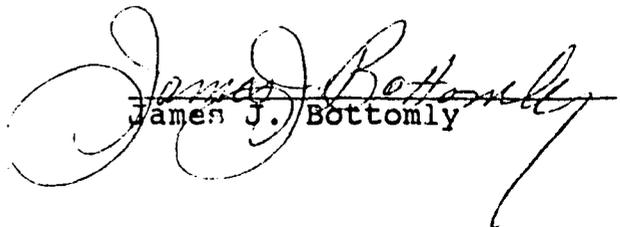
The Amendment will read as follows:

12. "Surface water" means the surface of a natural body of water and, if such body of water meets the Federal title test of navigability, the beds and banks of such body of water up to the ordinary high water mark".

There will be a hearing on SB 159 at 1:00 PM on 11 February 1987 before the Senate Natural Resources Committee.

You should plan to attend and to testify on behalf of Senator Boylan's Bill.

Please circulate this far and wide to all interested parties and advise your local representative of your position.


James J. Bottomly

JJB/rdm
Enclosure

GALT vs. STATE OF MONTANA

MEMORANDUM

The Montana Supreme Court has spoken on the right of recreationalists and the right of land owners as it pertains to stream access. This decision is interpreted as follows:

1. The State of Montana owns the water of this State for the benefit of its people.
2. The State does not own the beds and banks of the non-navigable streams.
3. While the public has a right to use the waters held in trust for them, the public cannot use the beds and banks for hunting, camping, building of structures or for any purpose when water is not flowing therein.

The Supreme Court in Galt vs. State of Montana stated:

"The real property interests of private land owners 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."

Senate Bill 159 introduced by Senator Boylan is an extremely reasonable reconciliation of these competing property interests as set forth by the Supreme Court.

This bill would allow the following:

1. On those streams that meet the Federal test for navigability where title to the beds up to low water mark is in the State, the public has the unrestricted right to use the waters and to use the beds and banks of the stream below low water mark and to use the land between high and low water mark as long as such use in this area has minimal impact. Minimal impact by legislation includes fishing from the banks between high and low water mark.
2. As to those smaller streams that do not meet the Federal test for title, the Public has the right to use the water and float the streams if it is capable of such use -- however, they do not have the right to use the beds and banks of such streams unless:

- a. The owner of the land grants permission, or
- b. Such use will have "minimal impact" on the land and is "unavoidable and incidental" to the use of the water.

This later statement is implicit in the Supreme Courts decision where it uses the words - "Minimally impacting the adjoining land owner's fee interest"; "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 is ownership of the water resource will be recognized as within the easements scope" (emphasis supplied).

"Minimal impact" on the adjoining land owners fee interest has been clearly defined by court decision. In the Curran Case, the Supreme Court cited with complete approval the Wyoming Case of Day vs. Armstrong (WY, 1961) 362 P.2d 137, 147. This case was one of the controlling decisions used by the Montana Supreme Court in arriving at the conclusions in Curran.

This case defines "minimal use" as follows:

When waters are able to float craft, they may be so used. When so floating craft, as a necessary incident to that use, the bed or channel of the waters may be unavoidably scraped or touched by the grounding of craft. Even a right to disembark and pull, push or carry over shoals, riffles and rapids accompanies this right of flotation as a necessary incident to the full enjoyment of the public's easement. . . . On the other hand, where the use of the bed or channel is more than incidental to the right of floating use of the waters, and the primary use is of the bed or channel rather than the floating use of the waters, such wading or walking is a trespass upon lands belonging to a riparian owner and is unlawful. Such trespass cannot be made lawful either by legislative or judicial action . . . Except as herein specified, to use the bed or channel of the river to wade or walk the stream remains an unlawful trespass.

Again, this is an extremely reasonable reconciliation of these competing property interests.

SENATE NATURAL RESOURCES

EXHIBIT NO. 4

DATE 2-11-87

February 11, 1987 BILL NO. SB 159

RE: Testimony of R.M. Ostrum
on SB 159

TO: Tom Keating

My name is Merrill Ostrum, and I ranch at Fishtail. My property borders on Fishtail Creek and on the East and West Rosebud Rivers. Meadow Creek & Fishtail Creek are small non-navigable streams. The East and West Rosebud Rivers are a little larger, but are not big enough to sustain any form of commercial navigation.

The West Rosebud River flows through our barnyard and by our house, which is located approximately 100 yards from a state highway. Last summer a van pulled up next to my gate, and several people jumped from the highway bridge to the bank of the West Rosebud and started walking through my barnyard along the river bank.

The streambed is approximately 30 feet from our bedroom window. Another piece of our property has open range with county road access. This piece of property has turned into a county fair on Sunday afternoons.

SB 159 would provide some protection for our property and our family's privacy, because it would require the public to have the landowner's consent before they walk along the bank of a small stream running through his yard. As I understand it, there would be no change in the public's right to use navigable rivers or to float rivers.

I've read the recent Supreme Court Decision in Galt v. State of Montana. I'm not a lawyer, but I did understand the part that said that the real property interests of private landowners are important and are constitutionally protected.

Exhibit 1

I think this bill represents a reasonable compromise between the landowner's rights and the public's rights, and I urge your support of it. We have always had a good rapport with our fishermen, but since HB 265 this rapport has ceased to some extent.

I support the bill as presented by Senator Boylan. We support the amendment version.

TESTIMONY on SB 159

before the Senate Natural Resources Committee, February 11, 1987,
by Lorents Grosfield,
for the Montana Association of Conservation Districts

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE:

Under an extreme interpretation of the Curran and Hildreth court decisions by some of the recreational groups, Montana agriculture was told that unless it went along with this interpretation, it would suffer even worse losses at the hands of the recreationalists. This situation of intimidation coupled with appeasement resulted in HB 265. Though parts of this legislation are good, the extreme breadth and scope go way beyond what most reasonable people concluded was necessary to address the specific problems in those two decisions. To force property owners to play host to relatively unregulated public use of their property on a grand state-wide scale was an overkill that was both unnecessary and unjust. No one is arguing the public's right to use the waters or to use, in a relatively unrestricted manner (except as otherwise covered by law or regulation), the larger streams of our state, those gems many of which are nationally famous.

SB 159 strikes a reasonable balance by leaving with the property owner the control of the small, privately-owned streambeds. This is the historical fact, constitutionally protected. Restoration of this status quo will go a long way toward defusing present-day landowner-sportsman polarity in Montana. I URGE YOUR SUPPORT OF SB 159.

THANK YOU.

With Sincerity,

Lorents Grosfield

NAME: Julie Willard DATE: 2-11-87

ADDRESS: 3119 Country Club Circle, Billings, MT 59102

PHONE: (406) 259-1966

SENATE NATURAL RESOURCES

EXHIBIT NO. 6

DATE 2-11-87

REPRESENTING WHOM? Self BILL NO. SB159

APPEARING ON WHICH PROPOSAL: SB159

DO YOU: SUPPORT? as amended AMEND? OPPOSE?

COMMENTS: No written statement, will provide on request. Appearing as landowner - Clear Fork stream

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

Note: MR. Willard's ^{written} statement arrived and is attached

SENATE NATURAL RESOURCES

EXHIBIT NO. 6-attached ^{SB 159}

DATE 2-11-87

BILL NO. SB 159

February 11, 1987

To the Hon. Tom Keating, Chairman, Senate Natural Resources Committee, and members of the Committee:

My name is John Willard and I own streambed land in northern Lewis and Clark county devoted to livestock raising.

Mr. Chairman and members of the committee, thank you for the opportunity to appear before you on Senate Bill No. 159. I appear in support of this bill, including the offered amendment to page 4, line 9 and through line 10.

I am convinced much of the problem arising from passage of the so-called stream access bill by the 1985 legislature can be traced to confusion over terms and lack of clarity, particularly in regard to the definition of navigability and of distinction between flood plains and high water marks. SB 159 would clarify and correct both.

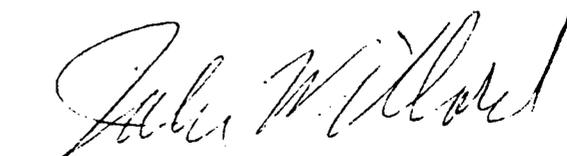
My ranch property is adjacent to a state-owned elk winter range, which contributes to confusion by those attempting to use fishing waters on either or both properties. Also, there is a heavy concentration of beavers on my property, resulting in a varying water level and mark lines, contributing to confusion still further.

Enactment of this bill will not prevent float use of truly navigable waters, since it would render Class II waters, as defined in the access bill, accessible only by proper permission from adjacent landowners. These waters, such as I have flowing through my premises, are not suitable for any sort of navigation and SB 159 properly defines them. At the same time it clearly identifies the proper status of lands adjacent.

I am cognizant of the needs and desires of fishermen. For 32 years I wrote a weekly hunting and fishing column for daily newspapers and very much desire to eliminate confusion and promote harmony between landowners and anglers.

It should not be assumed that court decisions, other than sections relating directly to constitutional provisions, are not subject to legislative review and change. The legislature has the power and authority to make changes in the best interests of the state and its citizens.

I sincerely ask affirmative action of this committee on SB 159.


John Willard

SENATE NATURAL RESOURCES

EXHIBIT NO. 7

DATE 2-11-87

BILL NO. SB159

To: Senate Natural Resources Committee

My name is George Rossetter from Fishtail Mt. . . . I am a land owner and ardent fly fisherman. For over 25 years I have been floating and fishing the Stillwater river. This river consists mostly of what would be considered "white water." It empties into the Yellowstone about 45 miles west of Billings in Stillwater County. I have always felt free to float the surface of this river on both the navigable and non-navigable portions. However, I have always asked permission if wading the area that is bordered by private land. I have always understood that Montana law states that the owner of the land adjoining the river owns to the middle of the stream bed (70-16-20 MCA "owner takes to middle of lake or stream." Likewise, I have understood the "Anglers Statute" that allows wading on the beds of navigable streams. (87-2-305) MCA. I do not feel that I have undergone any hardship in observing the above. It seems to me that S.B. 159 confirms the rules and regulations as I have always known them. H.B. 265 confused the issue of public use of the surface water and stream beds. I feel that S.B. 159 carries out the judgment of the recent Supreme Court Ruling and rectifies the incongruities of H.B. 265.

George Rossetter

George Rossetter
Feb. 11 1987



MONTANA COUNTRY
MONTANA LANDOWNERS ASSOCIATION, INC.

MADISON CHAPTER
BOX 612
ENNIS, MONTANA
59729

SENATE NATURAL RESOURCES
EXHIBIT NO. 9
DATE 2-11-87
BILL NO. SB 159

February 11, 1987

Senate Natural Resources Committee
Capitol Station
Helena, Montana 59620

Re; SB 159

Gentlemen;

On behalf of the 147 members in the MADISON CHAPTER, MONTANA LANDOWNERS ASSN., INC. I want to express the unanimous support of the Senator Boylan bill being debated today, February 11, 1987. We feel that this bill is necessary to protect and preserve the rights of landowners now and in the future, without damaging the rights of the recreationist, and preserve the delicate balance of class 2 streams as hatcheries for the future enjoyment of the recreationist.

Please give this bill your endorsement and pass it as written.

Thank you,

Mary saunders, Secretary
MONTANA LANDOWNERS ASSN., INC.
MADISON CHAPTER
Box 612
Ennis, Montana 59729



FA RANCH

BOX 868 • LIVINGSTON, MONTANA 59047

SENATE NATURAL RESOURCES

EXHIBIT NO. 9

DATE 2-11-87

BILL NO. SB159

Mr. Chairman , Members of the Committee -

I am Mrs. Arch Allen of Livingston. I am speaking on behalf of my husband and myself.

Our concern is that we have over 30 acres of land that lies under a non- navigable stream on our ranch. We hold a patented deed from the United States government that included the streambed and its banks.

We feel that Senator Boylan's Bill, SB159, has great merit in redefining recreational uses of the water and surface water for this use.

Please give SB 159 a "Do Pass" recommendation out of this committee, *as amended by Paul Boylan 2/11/87.*

Thank you.

Peg Allen

Mr. Chairman, members of the committee,

My name is Steve Aller. I represent the Sweet Grass Chapter of Montana Land Owners. We agree with the earlier testimony and strongly urge a do pass recommendation for S.B. 159.

To date H.B. 265 has been an excuse to trespass. The number of trespass problems has far outnumbered the figure of 8 that has been in print. I have personally experienced twice that number of trespass problems since the passage of H.B. 265.

As an affected landowner I would hope that this committee would use this bill as a step in making H.B. 265 a more equitable law for landowners. Passage of this bill should also help restore a landowner sportsman relationship that is very rapidly slipping past the point of no return.

Steve Aller
M^cLeod, MT

EXHIBIT NO. 11

DATE 2-11-87

DATE: 2/11/87

BILL NO. SB 159

NAME: Linda Larson

ADDRESS: P.O. Box 134 Alder, Mt. 59710

PHONE: 406-842-5384

REPRESENTING WHOM? Myself and other land owners

APPEARING ON WHICH PROPOSAL: SB 159

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

COMMENTS: I feel this is a real compromise. Surface should mean the surface of the water (that is what the state owns) NOT the beds & banks of the smaller streams. Floating has never been an issue on those streams.

Mr Flynn said there were only ten tickets written. In our area the reason for that is because the GAME warden won't come when there is trouble. 265 is NOT working! S.B. 159 will

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: WARD JOEL JACKSON DATE: FEB 11

ADDRESS: Box 174 Harrison, N.T. 59735

PHONE: 685-3225

SENATE NATURAL RESOURCES

EXHIBIT NO. 12

REPRESENTING WHOM? JACKSON RANCH

DATE 2-11-87

BILL NO. SB 159

APPEARING ON WHICH PROPOSAL: SB 159

DO YOU: SUPPORT? AMEND? OPPOSE?

COMMENTS: I support this bill a 100%

I'm having a serious problem with trespassers and
this bill will significantly help.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

TO THE SENATE NATURAL RESOURCE COMMITTEE:

I SUPPORT SENATE BILL 159 AS IT IS WRITTEN.

SIGNED BY THE FOLLOWING:

Karen Anderson
Dale Anderson
Bill Flynn
Marlene Flynn
Bill Conley
Sharon Conley
Bonnie Conley
Gwen Birrer
Alice Brunzell
Mike Maloney
Jim Brunzell
Pete Birrer
Bob Birrer
Rose Maloney
William Maloney
Sam Maloney
Floyd Fredrickson
Sue Conley
Fred Conley
John F. Stimson
LaRae Stender

To The Senate Natural Resorce Committee:

I SUPPORT Senate Bill 159as it is written. I don't own any property on the river but I feel we should protect all private property rights. I urge you to vote YES for Senate Bill 159 as it is written.

Sincerely,



Karen Anderson

SENATE NATURAL RESOURCES
EXHIBIT NO. 13
DATE 2-11-87
BILL NO. SB159

To The Senate Natural Resorce Committee:

I SUPPORT Senate Bill 159as it is written. I don't own any property on the river but I feel we should protect all private property rights. I urge you to vote YES for Senate Bill 159 as it is written.

Sincèrly,



Dale Anderson

SENATE NATURAL RESOURCES
EXHIBIT NO. 13
DATE 2-11-87
SB159

SENATE NATURAL RESOURCE

EXHIBIT NO. 13

DATE 2-11-87

BILL NO. SB 159

To The Senate Natural Resorce Committee:

I SUPPORT Senate Bill 159as it is written. I don't own any property on the river but I feel we should protect all private property rights. I urge you to vote YES for Senate Bill 159 as it is written.

Sincerely,



Bill Flynn

To The Senate Natural Resorce Committee:

I SUPPORT Senate Bill 159as it is written. I don't own any property on the river but I feel we should protect all private property rights. I urge you to vote YES for Senate Bill 159 as it is written.

Sincerely,



Marlene Flynn

SENATE NATURAL RESOUR

EXHIBIT NO. 13

DATE 2-11-87

BILL NO. SB 159

EXHIBIT NO. 15
DATE 2-11-87
BILL NO. SB 159

To The Senate Natural Resorces Committee:

I SUPPORT Senate Bill 159 as it is written. I feel that House Bill 265 is unconstitutional and think we should protect all private property rights. I urge you to vote YES for Senate Bill 159 as it is written.

Sincerely,



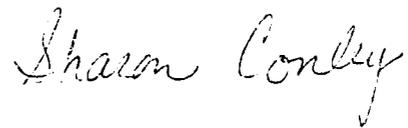
Bill Conley

SENATE NATURAL RESOURCES
SENATE NATURAL RESOURCES
EXHIBIT NO. 13
DATE 2-11-87
BILL NO. SB 159

To The Senate Natural Resorce Committee:

I SUPPORT Senate Bill 159 as it is written. I feel that House bill 265 is unconstitutional and think we should protect all private property rights. I urge you to vote YES for Senate Bill 159 as it is written.

Sincerely,



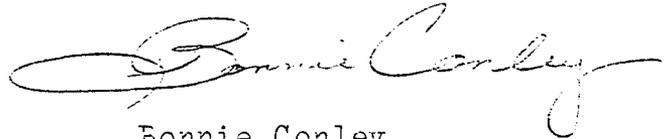
Sharon Conley

SENATE NATURAL RESOURCE
EXHIBIT NO. 13
DATE 2-11-87
BILL NO. SB 159

To The Senate Natural Resource Committee:

I SUPPORT Senate Bill 159 as it is written. I feel that House bill 265 is unconstitutional and think we should protect all private property rights. I urge you to vote YES for Senate Bill 159 as it is written.

Sincerely,



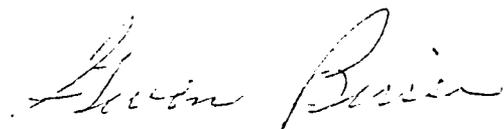
Bonnie Conley

SENATE NATURAL RESOURCE
EXHIBIT NO. 13
DATE 2-11-87
BILL NO. SB 159

To The Senate Natural Resource Committee:

I SUPPORT Senate Bill 159 as it is written. I don't own any property on the river but I feel we should protect all private property rights. I urge you to vote YES for Senate Bill 159 as it is written.

Sincerely,



Gwen Birrer

SENATE NATURAL RESOURCES
EXHIBIT NO. 13
DATE 2-11-87
BILL NO. SB159

To The Senate Natural Resorce Committee:

I SUPPORT Senate Bill 159 as it is written. I feel that House Bill 265 is unconstitutional and think we should protect all private property rights. I urge you to vote Yes for Senate Bill 159 as it is written.

Sincerely,

Alice Brunzell

Alice Brunzell

SENATE NATURAL RESOURCES
EXHIBIT NO. 13
DATE 2-11-87
BILL NO. SB159

To The Senate Natural Resorce Committee:

I SUPPORT Senate Bill 159 as it is written. I don't own any property on the river but I feel we should protect all private property rights. I urge you to vote YES for Senate Bill 159 as it is written.

Sincerely,

Mike Maloney

Mike Maloney

To The Senate Natural Resorce Committee:

I SUPPORT Senate Bill 159as it is written. I don't own any property on the river but I feel we should protect all private property rights. I urge you to vote YES for Senate Bill 159 as it is written.

Sincerely,



Jim Brunzell

SENATE NATURAL RESOURCES
EXHIBIT NO. 13
DATE 2-11-87
BILL NO. SB159

To The Senate Natural Resorce Committee:

I SUPPORT Senate Bill 159as it is written. I don't own any property on the river but I feel we should protect all private property rights. I urge you to vote YES for Senate Bill 159 as it is written.

Sincerely,



Pete Birrer

SENATE NATURAL RESOURCES
EXHIBIT NO. 13
DATE 2-11-87
BILL NO. SB159

SENATE NATURAL RESOURCES
EXHIBIT NO. 13
DATE 2-11-87
BILL NO. SB159

To The Senate Natural Resources Committee:

I SUPPORT Senate Bill 159 as it is written. The Snow-crest Ranch Company has approximately 52,000 acres with more than 12 miles of the Upper Ruby River going through the center of it. I feel that House Bill 265 is a constitutional violation of private property rights. I think it is important to protect these rights. There are miles of public waters for "the public" to have free access to. I don't feel floating is a problem as long as it is limited to that,

I urge you to vote YES for Senate Bill 159 as it is written.

Sincerely,

Bob Birrer
General Manager
Snowcrest Ranch Co.

Bob Birrer

SENATE NATURAL RESOURCES

EXHIBIT NO. 13

DATE 2-11-87

BILL NO. SB159

To The Senate Natural Resources Committee:

I SUPPORT Senate Bill 159 as it is written. I own a ranch consisting of approximately 10,000 acres and has about 3 miles on the Upper Ruby River on it..I feel that House Bill 265 is a constitutional violation of private property rights. I think it is important to protect these rights. There are miles of public waters for "the public" to have free access to. I don't feel floating is a problem as long as it is limited to that,

I urge you to vote YES for Senate Bill 159 as it is written.

Sincerely,



Rose Maloney
Owner, Maloney Ranches

To The Senate Natural Resources Committee:

I SUPPORT Senate Bill 159 as it is written. I own a ranch consisting of approximately 10,000 acres and has about 3 miles on the Upper Ruby River on it..I feel that House Bill 265 is a constitutional violation of private property rights. I think it is important to protect these rights. There are miles of public waters for "the public" to have free access to. I don't feel floating is a problem as long as it is limited to that,

I urge you to vote YES for Senate Bill 159 as it is written.

Sincerely,

William Maloney

William Maloney
Owner, Maloney Ranches

To The Senate Natural Resources Committee:

I SUPPORT Senate Bill 159 as it is written. I manage a ranch consisting of approximately 10,000 acres and has about 3 miles on the Upper Ruby River on it..I feel that House Bill 265 is a constitutional violation of private property rights. I think it is important to protect these rights. There are miles of public waters for "the public" to have free access to. I don't feel floating is a problem as long as it is limited to that,

I urge you to vote YES for Senate Bill 159 as it is written.

Sincerely,

A handwritten signature in cursive script that reads "Sam Maloney". The signature is written in black ink and is positioned above the typed name and title.

Sam Maloney
Operation Manager
Maloney Ranches

To The Senate Natural Resources Committee:

I SUPPORT Senate Bill 159 as it is written. I manage a ranch that has over three miles of the Upper Ruby River on it. I feel that House Bill 265 is a constitutional violation of private property rights. I think it is important to protect these rights. There are miles of public waters for "the public" to have free access to. I don't feel floating is a problem as long as it is limited to that,

I urge you to vote YES for Senate Bill 159 as it is written.

Sincerely,

Floyd Fredrickson
Manager, Ruby Ranch



SENATE NATURAL RESOURCES

EXHIBIT NO. 13

DATE 2-11-87

BILL NO. SB159

To The Senate Natural Resources Committee:

I SUPPORT Senate Bill 159 as it is written. My ranch consists of approximately 52,000 acres with more than one mile of the Upper Ruby River and a spring pond on it. I feel that House Bill 265 is a constitutional violation of private property rights. I think it is important to protect these rights. There are miles of public waters for "the public" to have free access to. I don't feel floating is a problem as long as it is limited to that,

I urge you to vote YES for Senate Bill 159 as it is written.

Sincerely,



Sue Conley

SENATE NATURAL RESOURCES

EXHIBIT NO. 13

DATE 2-11-87

BILL NO. SB159

To The Senate Natural Resources Committee:

I SUPPORT Senate Bill 159 as it is written. My ranch consists of approximately 32,000 acres with more than one mile of the Upper Ruby River and a spring pond on it. I feel that House Bill 265 is a constitutional violation of private property rights. I think it is important to protect these rights. There are miles of public waters for "the public" to have free access to. I don't feel floating is a problem as long as it is limited to that,

I urge you to vote YES for Senate Bill 159 as it is written.

Sincerely,


Fred Conley

SENATE NATURAL RESOU

EXHIBIT NO. 13

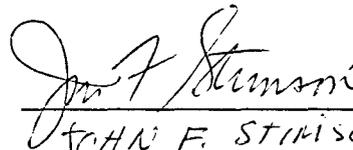
DATE 2-11-87

BILL NO. SB159

Senate National Resource Committee
Honorable Senator Paul Boylan

Dear Senator,

I support proposed Senate Bill #159, amending House Bill #265.

 2/10/87
JOHN F. STINSON
PO 646
SHERIDAN, MT 59749

SENATE NATURAL RESOU.
EXHIBIT NO. 13
DATE 2-11-87
BILL NO. SB159

Senate National Resource Committee
Honorable Senator Paul Boylan

Dear Senator,

I support proposed Senate Bill #159, amending House Bill #265.

LaRae Stender
183 Mill Cr. Rd
Sheldon, Mt 59749

SB 159

February 11, 1987

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

The amendment proposed by SB 159 to the stream access law is in direct conflict with all court decisions on this subject, and perhaps more important, does not consider the experience of the public, landowners and the department since the enactment of HB 265. The law is working well.

There were only 10 citations issued for trespass related to stream access statewide from July 1, 1985 until November 24, 1986, and these during a time period when tens of thousands of recreationists used thousands of miles of streams.

There have been fewer portage issues than anticipated. To date there have been 12 requests for portages. Ten were handled directly between the landowners and the department. Two required the presence of Conservation District supervisors and all have been resolved.

There have been 10 stream access petitions acted upon by the commission since enactment of the law. Three required restrictions on recreational use and other actions have been taken by the department, such as signing and increased enforcement of trespass laws.

The process established under HB 265 appears to be both adequate and effective in addressing the circumstances related to stream access.

The establishment of the stream access law was a long and difficult process for Montanans. The law was the result of an intense public debate.

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. To amend the stream access statutes now, and in this manner, will invite the potential for unnecessary litigation and prolonging a difficult subject.

It is the time to continue the good record the law has shown to date and we urge that SB 159 be given a do not pass vote.

SB159

REPORT TWO AND RECOMMENDATIONS ON A
REQUEST TO RESTRICT PUBLIC RECREATIONAL USE ON

Ten Mile Creek
filed by
F. M. Gannon

SENATE NATURAL RESOURCES
EXHIBIT NO. 14, Attach. 1
DATE 2-11-87
BILL NO. SB 159

Report and Recommendations
prepared by
Montana Department of Fish, Wildlife, and Parks
and
Submitted to the
Montana Fish and Game Commission
on
August, 1986

INTRODUCTION

The Department of Fish, Wildlife and Parks was directed by the legislature under HB 265 (Chapter 556, Laws of 1985) to adopt rules pertaining to the management of recreational use of rivers and streams. A process was established by which persons may petition the Fish and Game Commission to restrict public recreational use of certain waterways (1) to protect against impacts of recreational use under rule IV and (2) to limit recreational use of streams to their actual capacity under rule VI. This process became effective July 12, 1985.

Upon receipt of a petition the Department of Fish, Wildlife and Parks issues a public notice in four major Montana daily papers and also in the local daily paper in the area involved in the petition to solicit public comment over at least a 30 day period. The notice is also mailed directly to those who have expressed interest in the process, and a news release is issued.

The Department of Fish, Wildlife and Parks has 45 days to investigate the petition and report findings and recommendations to the commission, unless an extension is requested by the department and granted by the commission. The commission then has 30 days to issue a decision granting, denying or granting with modifications the petitioned relief.

ALLEGATIONS

On July 24, 1985, F. M. Gannon filed a PETITION REGARDING THE RESTRICTION OF TEN MILE CREEK BASED UPON LIMITATIONS IN ITS CAPACITY FOR RECREATIONAL USE and a PETITION REQUESTING RESTRICTIONS ON TEN MILE CREEK TO PROTECT AGAINST THE IMPACTS OF RECREATIONAL USE.

The Petition requests that Ten Mile Creek in Lewis and Clark County, as it passes through F.M. Gannon's property in the E 1/2 N 1/4 Section 28, T10N, R4W, MPM, be closed to all public use on a year-round basis.

The petitions specifically allege:

- 1) That irreparable damage to fish, game and birds could occur from increased use.
- 2) The banks are steep, making trespassing and damage almost certain.
- 3) The stream has very limited capability to support recreational use including fishing, hunting, swimming, and floating.

PRIOR COMMISSION ACTION

The Commission voted on September 28, 1985 to adopt the recommendations from the department's report of September 4, 1985 and ordered the department to evaluate the floatability of this section of Ten Mile Creek and report the findings to the Commission by September 1, 1986. In addition the Commission ordered:

- 1) The section described in the Gannon petition shall be closed to swimming;
- 2) The section described in the Gannon petition will be open to hunting by permission of the landowner only;
- 3) The department will provide signs related to swimming and hunting restrictions to the petitioner, who will be responsible for the posting and maintenance of the signs;
- 4) The Commission further recommends that the landowner place signs along the channel informing users that they will be trespassing and liable for criminal charges if they or their pets leave the stream channel.

FINDINGS

On May 28, Doug Habermann observed Ten Mile Creek at two access locations, Williams Street Bridge and upstream approximately 1.5 miles above the Broadwater Spa. The stream was at a medium to high level and turbid. The stream appeared to be floatable with the channel width ranging from 10 to 20 feet. The water depth was up to two feet.

On June 4, Doug Habermann floated this section of Ten Mile Creek in a 12 foot plastic kayak. The water level had dropped since the previous week and was clear.

The float took one hour and ten minutes. Although overhanging branches were occasionally a nuisance, the physical features of Ten Mile Creek allowed easy floating in the kayak. The channel was sufficiently wide to allow turning of a kayak.

During the float seven fences, four bridges and one four foot diversion dam were encountered along a 1.5 mile stretch of water on the stream. These man-made barriers required six portages. The two most difficult portages were a four-foot irrigation diversion dam and a ten-foot high fence consisting of sheep wire, cable, barbwire, and suspended wooden structures on the lower end of Mr. Rogers property. These portages were located downstream from the Gannon property.

During the summer of 1985 stream depth averaged 8 to 13 inches in this reach. The Gannon's indicated that they had observed only two people floating the stream during spring run-off in 1983. They did not believe the stream was large enough to float.

In summary, there were no natural hazards that prevented floating Ten Mile Creek during this time. People using kayaks or innertubes could float the stream but may have difficulty with the numerous portages required, particularly the downstream end of the section. This reach of stream is not suitable for larger boats such as rafts or driftboats.

ALTERNATIVES

- 1) Close this reach of Ten Mile Creek to floating by rafts or driftboats. The flow and channel characteristics of this stream limit the size of crafts that can be expected to use Ten Mile Creek except possibly during above normal, spring run-off.
- 2) Close the stream when water levels became too low to reasonably allow floating by any craft. This would require monitoring of stream flow. The opening and closing dates would vary from year to year depending on water conditions.
- 3) Deny the petition to close the stream to floating under the assumption that the natural characteristics of the stream, the stream flow and the numerous portages which are required will limit the amount of recreational floating.

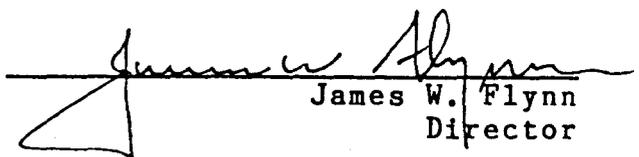
Recommendations

The Department recommends adopting alternative 3.

The stream is floatable by kayaks and innertubes. However, there is very little floating use on this stream and no evidence that it will increase. The character of the stream and the numerous man-made barriers downstream from the Gannon's property will likely inhibit an increase in floating use.

*Great - float boat
- and drift boat
- use*

Gannon - no more


James W. Flynn
Director

Report prepared by:

Doug Habermann, Parks Division, Bozeman
Pat Graham, Fish Division, Helena

51
SENATE NATURAL RESOURCES
EXHIBIT NO. 14, attach 2
DATE 2-11-87
BILL NO. SB159

Report and Recommendations on a
Request to Restrict Public Recreational Use on

North Fork of the Musselshell River

filed by

Bruce M. Cady

RECEIVED
APR 3 1986
FISH WILDLIFE & PKS.

Report and Recommendations
prepared by
Montana Department of Fish, Wildlife, and Parks
and
submitted to the
Montana Fish and Game Commission
on

INTRODUCTION

The Department of Fish, Wildlife and Parks was directed by the legislature under HB 265 (Chapter 556, Laws of 1985) to adopt rules pertaining to the management of recreational use of rivers and streams. A process was established by which persons may petition the Fish and Game Commission to restrict public recreational use of certain waterways (1) to protect against impacts of recreational use under rule IV and (2) to limit recreational use of streams to their actual capacity under rule VI. This process became effective July 12, 1985.

Upon receipt of a petition the Department of Fish, Wildlife and Parks issues a public notice in four major Montana daily papers and also in the local daily paper in the area involved in the petition to solicit public comment over at least a 30 day period. The notice is also mailed directly to those who have expressed interest in the process, and a news release is issued.

The Department of Fish, Wildlife and Parks has 45 days to investigate the petition and report findings and recommendations to the commission, unless an extension is requested by the department and granted by the commission. The commission then has 30 days to issue a decision granting, denying or granting with modifications the petitioned relief.

ALLEGATIONS

On March 4, 1986, Bruce M. Cady filed a PETITION REQUESTING RESTRICTIONS ON THE NORTH FORK OF THE MUSSELSHELL RIVER TO PROTECT AGAINST THE IMPACTS OF RECREATIONAL USE. The petition requests that a reach of the North Fork of the Musselshell River, approximately 0.8 mile in length be closed year around to fishing, floating, and to camping. The stream is in Section 8, T9N, R10E north of Highway 12 approximately 0.6 mile west of mile marker 66 to approximately 0.2 mile east of mile marker 66.

Specific allegations include:

"River runs through a specially constructed enclosure which contains bison."

"These animals calve at approximately the same time as the spring fishing season opens."

"These are ... wild animals and can be very dangerous."

Findings of Fact

Pat Graham discussed the petition with Mr. Cady over the phone on March 13. Department representatives Pat Graham, Dick Bucsis, Gene Clark, Gayle Joslin, and Al Wipperman met with Mr. Cady and toured the area on March 26.

Mr. Cady owns a ranch which borders both sides of Highway 12 east of White Sulphur Springs. The North Fork of the Musselshell River runs from west to east through Mr. Cady's property for about three miles. Along the western boundary of the ranch Mr. Cady constructed a large enclosure which contains 20 bison ranging in age from yearlings to 15 years of age. The enclosure encompasses approximately 100 acres of land and has existed for almost 10 years.

Flow in the North Fork of the Musselshell River is controlled by Bair Reservoir, an irrigation reservoir, four miles upstream. The face of the dam offers the only public access to the river upstream from Mr. Cady's property except by the permission of landowners.

Immediately upstream from Mr. Cady's western boundary is the property of a Mr. Solberg who has several cabins which he rents to guests during the summer. Flagstaff Creek enters the bison enclosure from the south near the eastern end. A county road crosses the stream approximately 9 miles downstream from the Cady's property.

The bison are in the enclosure year around. The fence is over six feet tall with two strands of barbed wire around the top to discourage people from trespassing and entering the enclosure. There are two big bulls, two steers, three cows and thirteen young bison.

The bison breed in August and calve in mid-May. Last August during the breeding season one bull was killed by another. Several years ago, also during the breeding season, one bull broke out of the fence and uprooted several trees on the Solberg property causing several thousand dollars in damages.

The Cady's feed the bison and they also graze extensively in the pasture. Wallows were observed and the bison have caused bank damage. The streambed also has considerable silt accumulation. Mr. Cady attributes this to a large amount of silt which was flushed from the reservoir upstream as it was drafted very deep during last summer's drought. This deep drawdown also flushed suckers downstream into the river.

During the summer the bison often seek shade in trees near the stream. Most of the area north of the stream is an open pasture extending part way up the mountain.

Mr. Cady has several "no trespassing" signs along the fence and also signs stating "Danger Wild Animals". Mr. Cady allows hunters and fishermen to use the remainder of his ranch for recreation with his permission. Last year he signed in over 300 hunters and allowed many more people on to fish. Mr. Cady has observed several people trespassing on his property but these were not associated with the bison pen. He observed only one person in the pen last year and has observed others in the past. The local warden has issued 3 to 4 citations to people trespassing on the creek to fish while the season was closed over the past 20 years.

Mr. Cady has always kept the enclosure closed to public access. But since the supreme court decisions affecting stream access, the public has legal access to the pasture along the stream channel either by obtaining access to the stream with the permission of landowners upstream or downstream, or from Flagstaff Creek. Access along Flagstaff Creek off of Highway 12 would require wading and negotiating thick brush.

Relief Requested by Landowner

Mr. Cady requests that the section of the North Fork of the Musselshell River within the bison enclosure be closed to fishing, floating, and camping on a year around basis as long as the enclosure is used to pasture bison.

Potential Alternatives for Relief

Mr. Cady is concerned primarily about public safety and also about the damage that the bison could cause if frightened by recreationists and they broke through the

fence. Bison are wild animals although they are not aggressive by nature. They are inclined to hold their ground and not flee.

According to Mary Meagher, Research Biologist for Yellowstone Park, more people are injured every year in the Park by bison than by bears. Usually it is because people get too close trying to take pictures. Through the 1970's about one person was injured by bison every other year. By the 1980's; with more bison and more tourists, the figure varied from two to 12 injuries per year. Two people have been killed by bison in the Park. She also said that all bulls other than calves should be considered dangerous. Females with calves usually try to avoid confrontations.

- 1) Camping - The North Fork of the Musselshell River is probably a Class II stream in which case campers must already obtain the landowners permission. Therefore no commission action is needed on this item.

- 2) Fishing and Floating - The issue is not specifically the damage which would be caused by the recreationists, but to the recreationists. The Commission has the authority to regulate recreational use on public or private lands for purposes of public safety. Alternatives include:
 - a) Increase the number of signs to warn the public of danger.

Presently there is no sign on the downstream boundary of the fence although to legally enter the stream one would have to have Mr. Cady's permission which would include a verbal warning or else walk several miles upstream from a county road crossing.

The large size of the fence and two strands of barb wire around the top are likely more of a deterrent to the public than the bison. Mr. Welsh "Sunny" Brogan who used to own bison north of Yellowstone Park recently paid off a lawsuit brought about when a bull bison charged a person on the opposite side of the fence. The fence held, but was elastic enough that the bison was able to butt the person. Mr. Cady has already experienced bison breaking out of his fence on one previous occasion.

In this case the recreationist who wanted to proceed along the stream would presumably do so at their own risk.

- b) Close the bison enclosure to recreational use during the caving season (mid-May to mid-June) and breeding season (August).

The stream is already closed from the end of November through the third Saturday in May. The seasonal closure would be of some value because these times seem to be when the animals are least predictable according to Mr. Cady. Mary Meagher, however, indicated that the bulls were the most dangerous and thus problems could occur during any season.

- c) The bison enclosure could be closed the entire year.

As mentioned above the stream is closed to fishing from the end of November through the third Saturday in May. Floating would also be unlikely to occur because the reservoir upstream keeps flows at artificially low levels while it fills up during the spring. There are also no reports of floating occurring on this section of stream.

The closure may reduce the probability of entry into the enclosure. The fence and the bison in this case would constitute an artificial barrier and may require designation of a portage route around the pen. This would require passage along the Solberg's property upstream from the pen.

d) Move the pen to just north of the stream.

*Mr. Cady
would not accept
this option.*

There would be no legal way to enter the enclosure. Shade structures could be built to offset the loss of access to the trees. A water gate would have to be constructed but portage around this structure could be done entirely on Mr. Cady's property. The bison would also need access to the corrals occasionally which could be insured by temporary closure of the stream or temporary portages. The stream banks could also be revegetated to provide at least a partial visual barrier between fishermen and the bison. It would also serve to improve the stream banks.

The department would cost share moving the fence using existing materials.

Beaverhead

REPORT AND RECOMMENDATIONS ON
REQUESTS TO RESTRICT PUBLIC RECREATIONAL USE ON

THE BEAVERHEAD RIVER

FILED BY

M. GENE BAIR, ET. AL.

SENATE NATURAL RESOURCES

EXHIBIT NO. 14, attach 3

DATE 2-11-87

BILL NO. SB 159

Report and Recommendations
prepared by
Montana Department of Fish, Wildlife and Parks
and
submitted to the
Montana Fish and Game Commission
on

INTRODUCTION

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The Department of Fish, Wildlife and Parks has 45 days to investigate the petition and report findings and recommendations to the commission, unless an extension is requested by the department and granted by the commission. The commission then has 30 days to issue a decision granting, denying or granting with modifications the petitioned relief.

ALLEGATIONS

Between March 12 and April 8, 1986, nine (9) petitions TO PROTECT AGAINST THE IMPACTS OF RECREATIONAL USE on the upper Beaverhead River were received by the department. The petitions all ask for the prohibition of floating on the upper river and therefore are dealt with in one report. The petitioners, none of whom own land along the Beaverhead River, are as follows:

Leonard Kidd 13221 S.E. 151 St. Renton, Washington 98058	Kerma Kidd 13221 S.E. 151 St. Renton, Washington 98058	Clyde Hawley, Jr. 2305 Asgean Idaho Falls, ID 83401
E. E. Harshbarger, Sr. 120 South 18th 202-C Brighton, Colorado 80601	William Crosier 1010 9th Avenue Greeley, Colorado 80631	
M. Gene Bair 1373 N. 950 E. Shelley, Idaho 83274	Edgar Helm 5565 N. Federal #83 Denver, Colorado 80221	
Taylor F. Cottle 504 N. Park Shelley, Idaho 83274	Donald D. Koontz 1918 Boulder Avenue Helena, Montana 59620	

The petitioners all ask for a prohibition of floating from Clark Canyon Dam to either Pipe Organ Bridge (8 miles) or Grasshopper Creek (12.5 miles).

Specific allegations related to rule IV include:

"Numbers of trophy trout in this portion of the Beaverhead River have decreased drastically due to overharvest by float fishermen."

"There has been a significant decline in all fishing" due to float fishermen.

"This is a small river, soon to be decimated."

"Eighteen years ago, 5, 6, 7 and even 9 pounders were commonplace. During past 5 or 6 years when floating has at least tripled, only one 9 pounder has been taken."

"Floaters and trespassers are leaving trash and keep so many fish and they don't even care."

Specific allegations not related to rule IV include:

"I have found most boat fishermen to be very discourteous to those wading in the river."

"There have been several confrontations with ranchers because those floating do not obtain permission to trespass."

"Boat fishermen trespassing on private property."

"Commercial guides are the biggest problem."

✓ "Boat^{er}s interfere with my fishing."

Findings of Fact

Department representative X Jerry Wells X visited with the Kidds, Mr. Harshbarger, Mr. Crosier, Mr. Bair and Mr. Cottle by telephone on March 23 or March 25, 1986. Wells and Pat Graham met with Ron and Tom Koontz on March 28 in Helena. All of the petitioners were asked a series of questions to shed more light on their concerns. These questions sought to determine the nature of their concerns, the cause of the problems they perceive, how long they have fished the river, where they fish the river, if they have floated the river, if the river is wadable in the summer months, if they have perceived a decline in numbers of 18 inch and larger trout and exactly what restrictions they are asking for.

As of April 1, we have been unable to contact Mr. Helm.

The fisheries division has conducted extensive fisheries investigations on the upper Beaverhead River since 1966. This information is utilized in this report. Information gathered by department biologists on flow regimes and river physical conditions is also utilized in this report.

During the course of the investigation, we learned the following:

The Petitioners

All of the petitions are quite similar in allegations and contained the same wording in several places. Two of the petitioners volunteered the information that they had received a blank petition with specific instructions on how to fill it out in an envelope without a return address. The sender claimed to represent an organization dedicated to saving the Beaverhead River.

While the petitioners requested restrictions on floating from Clark Canyon Dam to Pipe Organ Bridge or Grasshopper Creek, they did most of their fishing on the Hildreth Ranch between the High Bridge and Henneberry Bridge.

Nearly all of the petitioners expressed, what in our opinion, was a sincere concern about the fishery of the Beaverhead River. Several of the petitioners have fished the river for more than 15 years and have observed dramatic increases in boat traffic on the river.

All of the petitioners told us that they were catching far fewer trophy trout (5 pounds and larger) than they were 5, 10 or 15 years ago. The petitioners all believed that the reason for this decline was the float fishermen.

The petitioners all told us that numbers of floaters had increased markedly in the last 5 years. Nearly all of the petitioners described conflicts between themselves and float fishermen. Some of the petitioners also described confrontations between Mr. Hildreth and float fisherman but were unaware of any conflicts between other landowners and float fishermen. Several of the petitioners expressed antagonism toward the commercial guides whom they felt were exploiting the river. The petitioners, in general, expressed the belief that most floaters kept too many fish and were discourteous.

Nearly all of the petitioners expressed dismay at the lack of the law enforcement on the river. Several of the petitioners told us they had never been checked by a warden on the river.

All of the petitioners felt that boats and boat fishermen interfered with and disturbed their fishing experience.

Cottle, Crosier, Koontz and Bair all told us that they had floated the river at least once but did not make a practice of it.

All of the petitioners agreed that during the irrigation season when flows are high (700-1000 cfs) in the river, it is extremely difficult to wade the river. In the petitioners opinion, it is extremely difficult to move up or downstream very far without getting out and walking above the high water mark of the river.

All of the petitioners perceived that they were catching far fewer trout over 18 inches in length than they did 5, 10 or more years ago. Nearly all of the petitioners, in fact, told us that they were catching far fewer trout of any size than they did 5, 10 or more years ago.

The Beaverhead River from Clark Canyon Dam to Grasshopper Creek

Flow in the Beaverhead River is completely controlled by the Clark Canyon Dam. Releases tend to be low (100-250 cfs) during the non-irrigation season and quite high during the irrigation season (700-100 cfs). The river in this reach is characterized in most locations by stable streambanks densely vegetated with willows and other vegetation. The river is confined to a single channel and is generally less than 100 wide even at high flow. During irrigation season, which usually runs from mid-May to mid-September, the river in this reach is bankfull. The current velocities, average depths and dense willow cover on the banks make wade fishing difficult at best. Moving up or downstream any distance is nearly impossible without walking above the high water marks of the river. The only way to effectively fish this reach of the river during the bankfull period is from a drifting boat. Float fishing on the Beaverhead River has a long history and, in fact, existed prior to the construction of the dam. Float fishing has increased in popularity on this reach of the river in recent years. The number

of commercially guided trips has also increased dramatically in the last several years. A hazardous, low bridge which exists in this reach of river has prevented the increase in floaters from being even greater. While exact numbers of float fishing trips are not known, it would not be unusual to observe 20 boats in a given day in August from Clark Canyon Dam to Pipe Organ Bridge. During the irrigation season, we would estimate that between 80 and 90 percent of all fishing in this reach of the river takes place by float fishermen.

The Beaverhead River from Clark Canyon Dam to Pipe Organ Bridge, is open to fishing from the third Saturday in May through November. The remainder of the river is open year-round.

The Trout Population

The Beaverhead River has been managed as a wild trout fishery for nearly 30 years. The river supports wild populations of both brown and rainbow trout. The department began intensive monitoring of the trout population in the mid-1960's to assess the effects of the Clark Canyon Dam on the trout populations of the Beaverhead River. Since 1966, the department has made nearly continuous spring and fall population estimates using electrofishing techniques in the Hildreth study section which is located within the reach of the river that the petitioners based their allegations on. For a more complete and in depth discussion of the trout populations of the Beaverhead, the reader is directed to the bibliography at the end of this report.

The early years following the construction of Clark Canyon Dam were characterized by low numbers of trout but relatively large numbers of trophy trout (five pounds and larger). These years (1965-1974) were characterized by violent fluctuations in flow released from Clark Canyon during the spawning seasons of both rainbow and brown trout. These fluctuations caused very poor reproductive success in most years and resulted in low numbers of both rainbow and brown trout in the Beaverhead River. The trout that were in the river in those years tended to be large since they had very few other fish to compete with for both food and space. The department began discussions with the operators of the Clark Canyon Dam, the East Bench Irrigation Unit, in the early 1970's in hopes of providing more stable spawning flows. These efforts were

successful and since 1974 the East Bench Unit has provided stable spawning flows during the spring and fall spawning seasons. These stable spawning season flows resulted in marked increases in reproductive success for brown trout and increased but irregular reproductive success for rainbow trout. By the early 1980's, numbers of trout in the 6400 foot Hildreth study section had increased from 1966-1974 averages of less than 700 to more than 3000. Biomass had increased from an average of 1500 pounds to over 4000 pounds in the same period. Since the two species have reacted somewhat differently, we will continue the discussion with each species separately.

Brown Trout

Numbers of brown trout began to increase almost immediately following the onset of favorable spawning flows. Recruitment to the population has remained stable since the mid-1970's.

This population appeared to reach carrying capacity in the late 1970's and has remained fairly stable since then despite increased fishing pressure. Numbers of 18 inch and larger brown trout were greater in 1985 than in any year since we began electrofishing. Numbers of 20 inch and larger brown trout were also greater in 1985 than any year since we began sampling. Numbers of brown trout greater than five pounds were greatest in 1974 and 1975, when brown trout numbers and total biomass were at a very low level.

While growth rates have declined with increased densities, they remain the fastest for any river in Montana.

Brown trout numbers and biomass have been shown to be directly related to the flow release pattern at Clark Canyon Dam during the fall spawning periods. Flow fluctuations during spawning led to poor reproductive success and, in turn, influenced year-class strength in succeeding years. Stable spawning flows improved reproduction and led to stronger year-classes in later years. To date, fishermen have not been the controlling factor to the population. The brown trout in this reach of river should have a faster growth rate with increased harvest of smaller fish.

Rainbow Trout

Increased reproductive success for the rainbow population occurred with the onset of stable spawning flows in the mid-1970's. However, despite stable flows in the years that followed, rainbow recruitment has remained somewhat erratic. Strong year classes entering the population interspersed with weak year classes has resulted in erratic numbers of older and larger rainbow when compared to the brown trout population.

Numbers of 18 inch and larger rainbow trout were higher in 1980 and 1985 than in any years that we sampled. Numbers of 20 inch and larger rainbow were greatest in 1980. Numbers of 20 inch and larger rainbow from 1980 through 1985 have remained three to four times greater than during the late 1960's and early 1970's. Numbers of rainbow trout over five pounds were greatest in 1973 and 1983.

While rainbow trout recruitment has not been as stable as brown trout recruitment, the rainbow population remains considerably greater than during the late 1960's and early 1970's. Numbers of older and larger rainbow trout are dictated by the strengths of their year classes as age I fish. To date, fishermen have not been the controlling factor to the rainbow population under present season and bag limits. However rainbow trout are generally more vulnerable to anglers than brown trout. Restrictive regulations for rainbow trout may have to be considered in the future if fishing pressure continues to increase.

Management Objectives

The fishery management objectives for the Beaverhead River from Clark Canyon Dam to Pipe Organ Bridge are to provide the greatest number of 18 inch and larger trout possible and to provide the opportunity of catching wild trout in the five pound and larger category. At the present time, this reach of the Beaverhead River has greater numbers of trout larger than 18 inches, larger than 20 inches and larger than 22 inches per mile, than any other river in the state of Montana. The river also continues to provide the opportunity of catching both brown and rainbow trout in excess of five pounds.

Relief Requested by Petitioners

The petitioners wish to prohibit floating from Clark Canyon Dam to Pipe Organ Bridge (8 miles) or the mouth of Grasshopper Creek (12.5 miles). The petitioners base their request on allegations that the trophy fishery has been decimated by float fishermen.

The majority of the petitioners also allege that the entire fishery, including all sizes of fish has been severely reduced by float fishermen. The petitioners are asking that this prohibition be year-round despite the fact that the fishing season above Pipe Organ Bridge runs only from the third Saturday in May through November.

Some of the petitioners also requested more restrictive regulations which included reduced limits, tackle restrictions and reduced seasons. These concerns are normally addressed in the regulation setting process rather than the stream access petition process. The department has not heard, so far as we know, from any of the petitioners in the past regarding their concerns about fishing regulations in the Beaverhead River.

Potential Alternatives for Relief

1) Floating -

Deny petition under Rule IV based on lack of damage. The only damage attributed to floating per se is alleged to be reducing the catchability of fish for bank fisherman. Limited capability to support use is not an allowable reason for restricting Class I stream to floating.

2) Fishing from Boats

- a) Eliminate fishing from boats in an attempt to increase size of fish by reducing fishing pressure.

Grant Petition should be alternative

- b) Deny petition based on lack of demonstrated damage to fish population from fishing from boats and suggest petitioners address these concerns about size of fish through the biennial fishing regulation setting process.

3) Restrictive Regulations

- a) Adopt restrictive regulations as requested.
- b) Deny request and suggest petitioners submit their comments during our biennial regulation setting process which will next occur in September-December, 1987.

Investigators:

Jerry Wells, Regional Fish Manager

Pat Graham, Fish Management Bureau Chief

Beaverhead River References

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Wipperman, A. and A. Elser. 1968. Southwest Montana fishery study, inventory of the waters of the project area. Job Completion Rept., Federal Aid in Fish and Wildlife Restoration Acts, Project No. F-9-R-16, Job No. I. Montana Dept. of Fish, Wildlife and Parks, Helena. 14 pp.

308/1

SENATE NATURAL RESOURCES
EXHIBIT NO. 14, attach 4
DATE 2-11-87
BILL NO. SB 159

REPORT AND RECOMMENDATIONS ON A
REQUEST TO RESTRICT PUBLIC RECREATIONAL USE ON

TEN MILE CREEK

FILED BY

NORMAN ROGERS

REPORT AND RECOMMENDATIONS

PREPARED BY

MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS

AND

SUBMITTED TO THE

MONTANA FISH AND GAME COMMISSION

ON

June 26, 1986

INTRODUCTION

The Department of Fish, Wildlife and Parks was directed by the legislature under HB 265 (Chapter 556, Laws of 1985) to adopt rules pertaining to the management of recreational use of rivers and streams. A process was established by which persons may petition the Fish and Game Commission to restrict public recreational use of certain waterways (1) to protect against impacts of recreational use under rule IV and (2) to limit recreational use of streams to their actual capacity under rule VI. This process became effective July 12, 1985.

Upon receipt of a petition the Department of Fish, Wildlife and Parks issues a public notice in four major Montana daily papers and also in the local daily paper in the area involved in the petition to solicit public comment over at least a 30 day period. The notice is also mailed directly to those who have expressed interest in the process, and a news release is issued.

The Department of Fish, Wildlife and Parks has 45 days to investigate the petition and report findings and recommendations to the commission, unless an extension is requested by the department and granted by the commission. The commission then has 30 days to issue a decision granting, denying or granting with modifications the petitioned relief.

ALLEGATIONS

On April 22, 1986, Norman Rogers filed a petition requesting restrictions on Ten Mile Creek to protect against the impacts of recreational use. The petition requests that approximately 1,692 feet of Ten Mile Creek from the bridge on Williams Street west to the State Nursery property line fence be closed year around to fishing. Specific allegations include:

1. "the public is using the creek as an access to our property;"
2. "they have been coming in by the creek to destroy and vandalize our property."

Findings of Fact

Art Whitney and Pat Graham discussed the petition and toured the area with Mr. Rogers on May 6, 1986.

Mr. Rogers and some of his relatives own the property between the Williams Street Bridge and the State Nursery's eastern boundary. Ten Mile Creek runs from west to east through approximately 1,700 feet of the northern edge of their property. This boundary of the Rogers property is protected by a hurricane type fence from the Williams Creek bridge to a point about 400 feet west of the bridge. At this point the fence turns north, crosses the creek and proceeds north/northwest across pasture land on the north side of the creek. Some of the entry of vandals to Mr. Rogers' property reportedly occurred at the point the fence on the south side of the creek turns north to cross the creek. The fence has been recently reinforced at this point to cover what appeared to be some cut wires. The western edge of Mr. Rogers' property is separated from the State Nursery property by a 4-4½ feet high hogwire fence with bags of human hair hung approximately 30-40 feet apart to discourage entry of deer. Mr. Rogers reported no

problem with entry of vandals through this fence. Apparently, the public does not have easy entry to State Nursery property.

Mr. Rogers' property contains several residences, a number of very old frame storage buildings, and one large stone building now used as a shop and for storage. Most of the rest of the area is filled with large and small trucks, heavy machinery, old boilers, dilapidated sheds, smaller storage buildings, and a number of used pickups and cars. ~~apparently destined for resale.~~

Mr. Rogers is a licensed used car dealer. The storage buildings contain what appear to be the residue of a lifetime spent in the construction and mining businesses. Two of the larger sheds we inspected contained many storage bins, filled to overflowing with mining and construction hardware of all descriptions. It is difficult to walk among these storage bins because of the overflow which is on the floor and piled against every wall. Some of the outside area holds machinery recently constructed for future mining ventures, some holds used equipment which appears to be operable and other areas hold vehicles and equipment which looks as if they have been beyond repair for many years. Mr. Rogers' response to "What will you do with this?" varied from "We'll probably scrap this out eventually" to "We just built that last year."

Mr. Rogers stated that the major vandalism occurred to his property in the spring of 1985 and consisted of the theft of two pickup trucks. One was found later in Butte, the other has not been recovered. Both thefts occurred at night. In one instance, thieves gained access by cutting the fence along Ten Mile Creek and exited with the pickup by cutting the chain that secured the main gate. The other theft was conducted by gaining access by cutting the fence along the main highway and then escaping with a pickup by the same route.

Mr. Rogers stated all other acts of vandalism consisted of theft of smaller unidentified items, breaking window panes out of

storage buildings, siphoning gasoline out of vehicles, and two specific acts against wildlife. These last two were fatally wounding a deer in the fall of 1985 and destroying the eggs in a duck's nest in the spring of 1984.

Relief Requested by Landowner

The area owned by Mr. Rogers and his relatives is used for their residences, for his used car business, and for the storage of a vast amount of mostly used mining and construction equipment and supplies. The area is entirely surrounded by fences of various sizes and strengths, posted with no trespassing signs and contains a recently added photoelectric alarm system. Vandalism to this property has occurred by persons breaking through or climbing over his fences both from the creek and from the other sides of the property. Also, vandalism reportedly was occurring prior to the time the stream access law became effective. Mr. Rogers stated that they have owned this property for 40 years and have had problems with smashed windows for the last 15 years. Mr. Rogers requests that the stream be closed to fishing because he feels he would be able to reduce vandalism by ordering people out of the creek before they had the opportunity to climb over or break through his fence. Thus, the fishing closure is requested not to prevent damage to Ten Mile Creek or its fisheries but to prevent vandalism to adjacent private property by fishermen using the creek as an access route. Therefore, no evaluation was made of the stream fishery habitat or fish population in the section of Ten Mile Creek on Mr. Rogers' property.

Potential Alternatives for Relief

1. Close the approximately 1,700 feet of Ten Mile Creek along and on Mr. Rogers' property to fishing in an attempt to reduce angler traffic (and thus, the number of potential vandals).

- (
2. Deny the request. There is no alleged damage to the fishery and potential vandals could still walk up the stream without fishing. With this option the Department could furnish Mr. Rogers with several signs reminding fishermen that their access is confined to the area between the high water marks. Ten Mile Creek has very steep banks on Mr. Rogers' property thus persons within the high water marks would have no access to any of the equipment stored either outside or in his buildings.

Suggested Department Recommendations

The Department recommends Option 2 because some of the vandalism has occurred by persons gaining access from other than by the creek side of Mr. Rogers' property and some vandalism by persons gaining access from the creek occurred before the stream access law became effective.

300/45

SENATE NATURAL RESOUR

EXHIBIT NO. 14, attas

DATE 2-11-87

BILL NO. SB159

Report and Recommendations on a
Request to Restrict Public Recreational Use on

Clark Fork River

filed by

Thomas Greil

Report and Recommendations

prepared by

Montana Department of Fish, Wildlife and Parks

and

Submitted to the

Montana Fish and Game Commission

on

September 27, 1985

INTRODUCTION

The Department of Fish, Wildlife and Parks was directed by the legislature under HB 265 (Chapter 556, Laws of 1985) to adopt rules pertaining to the management of recreational use of rivers and streams. A process was established by which persons may petition the Fish and Game Commission to restrict public recreational use of certain waterways (1) to protect against impacts of recreational use under rule IV and (2) to limit recreational use of streams to their actual capacity under rule VI. This process became effective July 12, 1985.

Upon receipt of a petition the Department of Fish, Wildlife and Parks issues a public notice in four major Montana daily papers and also in the local daily paper in the area involved in the petition to solicit public comment over at least a 30 day period. The notice is also mailed directly to those who have expressed interest in the process, and a news release is issued.

The Department of Fish, Wildlife and Parks has 45 days to investigate the petition and report findings and recommendations to the commission, unless an extension is requested by the department and granted by the commission. The commission then has 30 days to issue a decision granting, denying or granting with modifications the petitioned relief.

ALLEGATIONS

On August 9, 1985 Thomas Greil filed a PETITION TO PROTECT AGAINST THE IMPACTS OF RECREATIONAL USE on 100 yards of the Clark Fork River east of Missoula.

Specific allegations include:

- 1) His property along the Clark Fork River had become a public campground for destructive beer and swimming parties.
- 2) Use of his property causes a traffic hazard from vehicles parked on Tamarack Drive.
- 3) He states late night/early morning swimming disturbs the peace.
- 4) He and his mother have been threatened by people using the river front property.
- 5) Private property has been damaged.
- 6) His dog has been physically harmed.
- 7) Immoral behavior has been increasing.
- 8) People copulate, defecate and are nude.

Findings of Fact

Bill Thomas, information officer, and Earle Davis, warden captain, met with Tom and Richard Greil at the site listed in the petition on August 13, 1985. Photos were taken on August 13, 1985 and August 30, 1985. Thomas reviewed land ownership at the county courthouse on August 13, 1985. Thomas, Davis, and Jim Ford met with county attorney and sheriff on September 5, 1985. Tom Greenwood and Pat Graham also visited the property for review.

The petitioner, Mr. Thomas Greil, owns property along the Clark Fork River between Milltown and East Missoula. The I-90 highway and bridge border his property on the upstream side (see Map 1). The interstate highway and bridge have had an impact on his shoreline property in two ways: A local access road (Tamarack Drive) was built under the bridge thus providing public access to the river bank; and the bridge piers slow the river flow, creating an eddy on the Greil shoreline and a sandy beach.

Mr. Greil has had over the past several years problems with some of the people who used the beach area. His home is approximately 300 yards from the water line. It sits on a flat bench that declines rapidly to the beach area (see photo). Mr. Greil's brother's home is approximately 75 yards from the water line.

Prior to the early 1970's Mr. Greil reported very few problems with swimmers and/or recreationists. He did note that an irrigation pump had been stolen some time in the early 70's. Starting in the early 1970's the area became "over-used." A neighbor one time counted 21 cars apparently belonging to swimmers parked along Tamarack Drive. In another instance, six buses were counted parked there. During that period other problems included camping without permission, someone shot at Mr. Greil's dog, rowdy parties, orgies, and people defecating along the streambank.

Mr. Greil fenced the access to his property down to the low water mark in 1982. After that "all swimming" stopped and they did not have "one problem". He also allowed access for fishing and boat use.

In July of 1985, 11 swimmers became rowdy at 3:30 a.m. creating a disturbance on the beach. He called the sheriff's office and an officer responded. He shined his light on the swimmers who were departing from the area. One of the swimmers, when questioned by Mr. Greil, referred to their "right to use the river bank". Someone also hit and hurt his dog which he took to a veterinarian in early July. It is unknown who hit the dog.

Prior to fencing the property in 1982, Tom and his mother were threatened and a commercial advertising sign was torn down on his property and the river bank had been set on fire several times. Mr. Greil also said there has been a litter problem and that he had to clean up the beach after every party. In recent years Mr. Greil has conferred with the county attorney twice, called and talked to department employees twice, and requested the assistance of the sheriff's office once. Four visits to the property were made by department personnel. There was no litter observed nor evidence of damage to the streambed and/or bank or damage to private property.

Relief Requested by Landowner

Mr. Greil specifically requests that a 100 yard section of river bank property sitting west of I-90 bridge between Milltown and East Missoula be closed to all swimming from June through September each year.

Potential Alternatives for Relief

A meeting was held with Mike Halligan of the Missoula County Attorney's Office and Greg Hintz of the Missoula County Sheriff's Office on September 5, 1985. Alternatives for assisting Mr. Greil with his property were discussed. From the meeting it was determined:

- a) That the majority of the problems that Mr. Greil has would constitute disorderly conduct and that the county can and would enforce or prosecute this type of offense.
- b) That the sheriff's office would contact Mr. Greil, in writing, offering to assist him with his problems (letter attached).
- c) That Mr. Greil could contact the county commissioners and request a hearing to prohibit parking along Tamarack Drive.
- d) That the county was not interested in prohibiting occupancy after a certain hour or restricting swimming, etc. because they feel they lack such authority in this case.

The department is presently working with Montana Power Company to determine the feasibility of developing an access site below Milltown Dam, one-quarter mile upstream from the Greil property. The site could constitute partial mitigation for impacts resulting from the reconstruction of Milltown Dam.

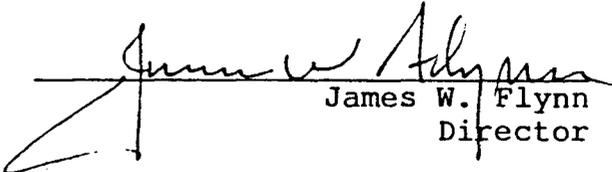
Fencing of the property has apparently discouraged much of the historical use at the site. The department, however, reviewed a number of additional alternative actions for the site including:

- 1) The department contacted Mr. Greil to discuss the possibility of entering into a formal management agreement for the beach and one or two acres on the bench above the beach to provide adequate parking with safe access off Tamarack Drive. An iron-pipe gate would be used to control access on a daily basis and have posted hours of operation. The site could be managed with restrictions similar to those in other sites the department manages. Parking is a key element.
- 2) Utilize the existing authority and manpower of the sheriff's office to enforce and prosecute disorderly conduct and other related illegal activities and the department could assist in trespass violations.

- 3) The Commission could send a letter of support for parking restrictions along Tamarack Drive after dark if needed for safety reasons to the Missoula County Commissioners, if Mr. Greil seeks a hearing.
- 4) The department could make periodic checks of the area for litter during the summer of 1986.

Recommendation:

Since alternative 1 is not acceptable to the applicant the department recommends the commission adopt alternatives 2 through 4.


James W. Flynn
Director

Investigators

Bill Thomas, Regional Information Officer
Earle Davis, Warden Captain
Tom Greenwood, Park Program Manager
Pat Graham, Bureau Chief, Fisheries

MISSOULA COUNTY

OFFICE OF THE SHERIFF

COUNTY COURTHOUSE

MISSOULA, MONTANA 59802

(406) 721-5700

September 18, 1985

DANIEL L. MAGONE
SHERIFF

T. GREGORY HINTZ
UNDERSHERIFF

Mr. Thomas Greil
1055 Tamarck Drive
Missoula, Montana 59802

SUBJ: Access to Beach Area on Clark Fork River

Dear Mr. Greil:

On September 5, 1985 I met with representatives of the Montana Fish and Game in the Missoula County Attorney's Office. During this meeting we discussed the problems you were having with the number of people who are using the beach access area which borders your property and the Clark Fork River for recreational purposes. I was advised of a problem that occurred in July of 1985 at approximately 3:30 a.m. where eleven swimmers were using this area and became very disorderly, and it was necessary for you to request law enforcement assistance to handle this problem.

I know that there are some discrepancies as to the exact boundaries of your property and how it effects the land use area near the Clark Fork River, and also the parking of vehicles off of Tamarack Drive. I can assure you that if problems arise in the future where you require law enforcement assistance and you call 9-1-1, officers will be sent to your location to assist. They will insure that the peace is not disturbed. I will also instruct our patrol officers to do frequent patrols in this area during the summer months of next year to insure that those using that beach area do not become disorderly and that there is no illegal possession of alcohol or littering occurring in the area. They will also insure that traffic flow will not be affected on Tamarack Drive if a parking problem does arise.

If I can be of any further assistance to you please feel free to contact me at the Missoula County Sheriff's Department. My telephone number is 721-5700, extension 306.

Sincerely,

DANIEL L. MAGONE
SHERIFF

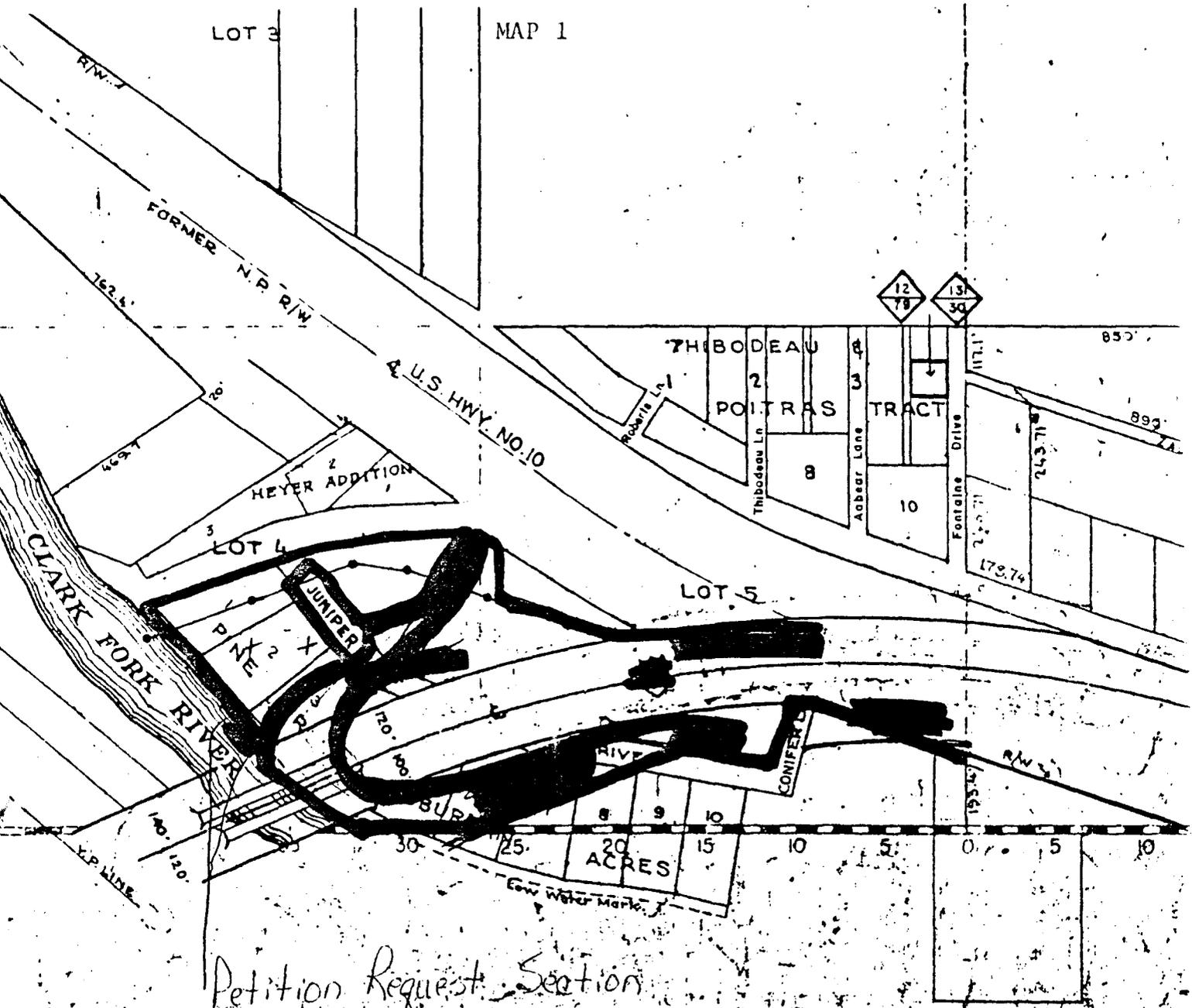


T. Gregory Hintz
Undersheriff

cys to: Mr. Bill Thomas, Mt. Fish & Game
Missoula County Board of County Commissioners
Missoula County Attorney Mike Halligan
9-1-1 Dispatch

LOT 3

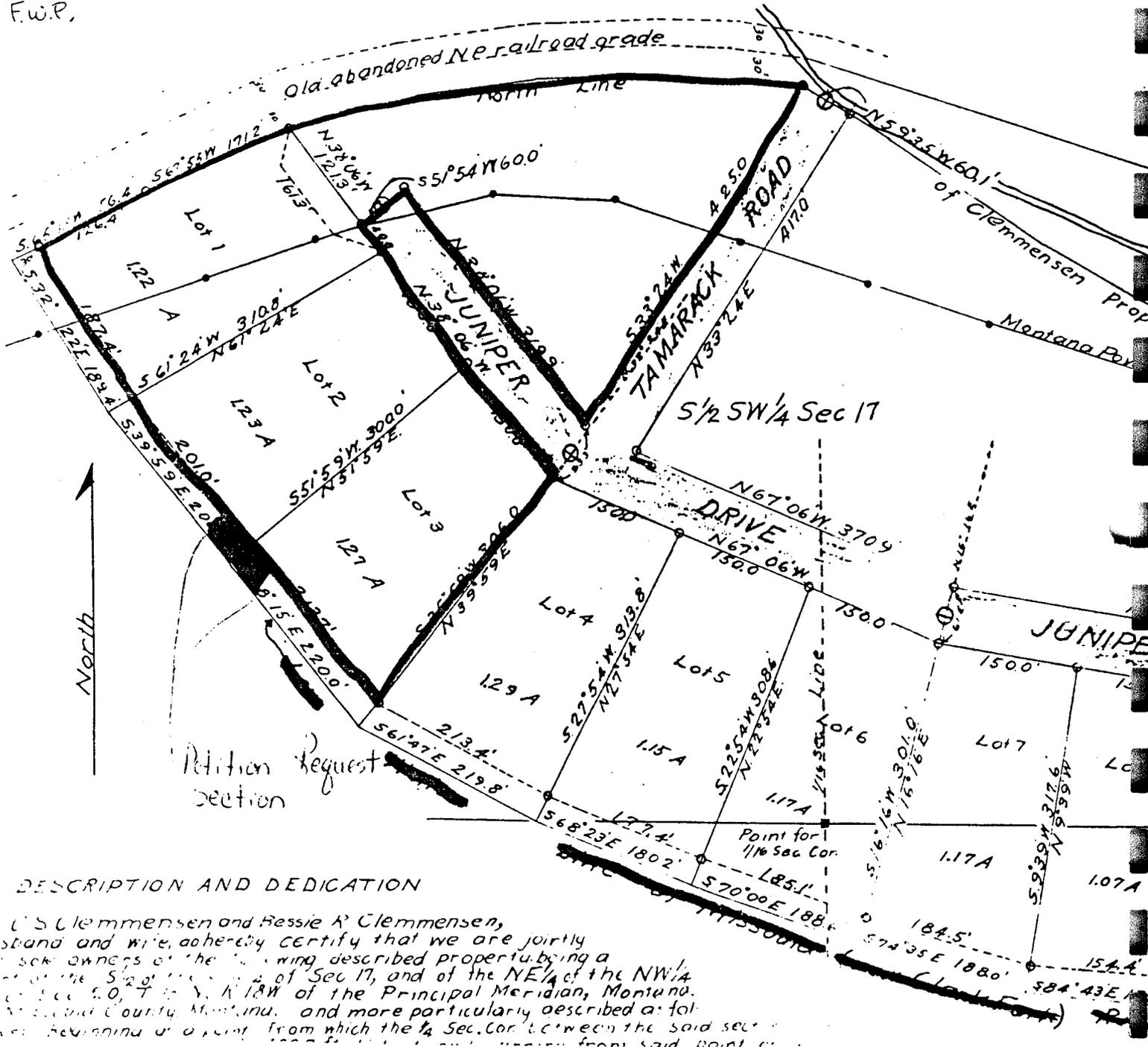
MAP 1



Petition Request Section

-  = Greil Ownership
-  = State of Montana
-  = Tamarack Drive
- X = Greil Residences

F.W.P.



DESCRIPTION AND DEDICATION

U.S. Clemmensen and Fessie A. Clemmensen, husband and wife, do hereby certify that we are jointly and several owners of the following described property, being a part of the S 1/2 of the SW 1/4 of Sec 17, and of the NE 1/4 of the NW 1/4 of Sec 5, T 12 N, R 18 W of the Principal Meridian, Montana, Yellowstone County, Montana, and more particularly described as follows: Beginning at a point from which the 1/4 Sec. Cor. between the said sec...

— = Greil Ownership (minus that sold to Highway Dept.)

APPENDIX A

Photographs of Clark Fork River
between Milltown and East Missoula

Photographs taken by Bill Thomas

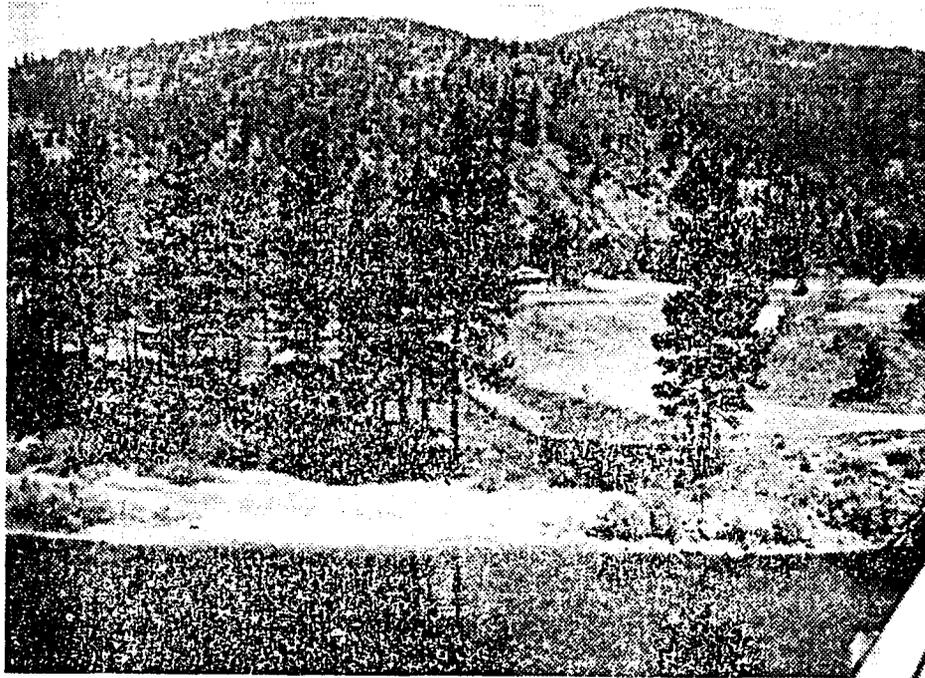


Photo #1: View from I-90 bridge. Note Tamarack Drive, Tom Greil's home fence and beach.

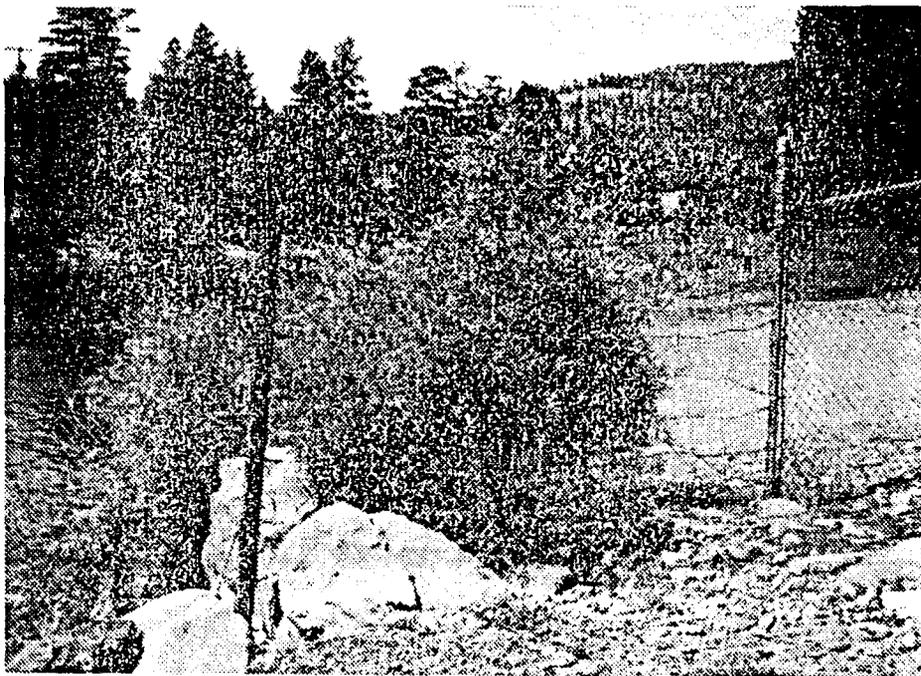


Photo #2: View from upstream side of Greil's property. Note fence below ordinary high water line. Person's location denote approximately 100 yards of beach Greil requests be closed to swimming.



Photo #3: View from Tamarack Drive looking downstream. Note fence. Person's position indicates approximately 30 feet above low water line.

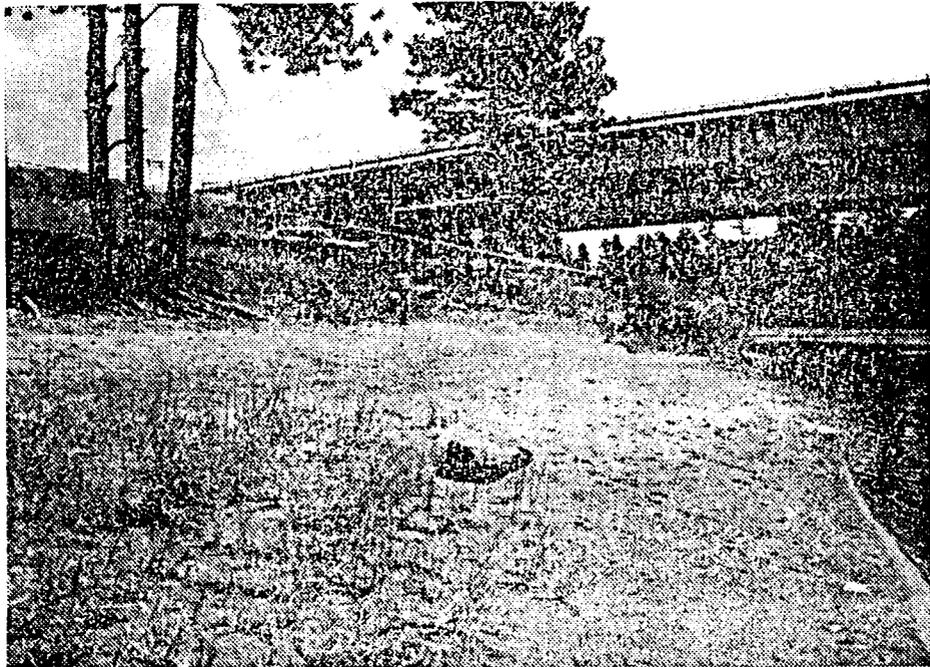


Photo #4: View looking upstream. Note I-90 bridge fence and vehicle on Tamarack Drive. Person's position indicates approximately 30 feet above low water line.

SENATE NATURAL RESOURCES
EXHIBIT NO. 14, attached
DATE 2-11-87
BILL NO. SB 159

Report and Recommendations on a
Request to Restrict Public Recreational Use on

Middle Creek

filed by

Mr. and Mrs. William Keightley, et al.

Report and Recommendations

prepared by

Montana Department of Fish, Wildlife and Parks

and

Submitted to the

Montana Fish and Game Commission

on

September 27, 1985

INTRODUCTION

The Department of Fish, Wildlife and Parks was directed by the legislature under HB 265 (Chapter 556, Laws of 1985) to adopt rules pertaining to the management of recreational use of rivers and streams. A process was established by which persons may petition the Fish and Game Commission to restrict public recreational use of certain waterways (1) to protect against impacts of recreational use under rule IV and (2) to limit recreational use of streams to their actual capacity under rule VI. This process became effective July 12, 1985.

Upon receipt of a petition the Department of Fish, Wildlife and Parks issues a public notice in four major Montana daily papers and also in the local daily paper in the area involved in the petition to solicit public comment over at least a 30 day period. The notice is also mailed directly to those who have expressed interest in the process, and a news release is issued.

The Department of Fish, Wildlife and Parks has 45 days to investigate the petition and report findings and recommendations to the commission, unless an extension is requested by the department and granted by the commission. The commission then has 30 days to issue a decision granting, denying or granting with modifications the petitioned relief.

ALLEGATIONS

On August 14, 1985, Bill and Louise Keightley, et al. filed a PETITION TO PROTECT AGAINST THE IMPACTS OF RECREATIONAL USE ON Middle Creek between the Gallatin National Forest boundary and Cottonwood Road, a distance of approximately two stream miles. The stream section is south of Bozeman approximately 7 miles. The petitioners allege that wildlife species that utilize this riparian corridor would be adversely impacted by public use of the stream. The petitioners represent some but not all of the landowners along this two mile reach of Middle Creek as well as other landowners who do not own land bordering the stream.

Findings of Fact

Department representatives LeRoy Ellig and Jerry Wells met with Mrs. Louise Keightley and her two sons and toured their land along Middle Creek on August 22, 1985. The Keightleys are the only signatories to the official department petition and wrote and solicited the signatures of 20 other individuals to accompany the petition. Wells spoke with four of the other six petition signers that own land bordering Middle Creek on September 12, 1985. Graham Taylor, wildlife biologist responsible for this area also visited the site on September 13, 1985.

During the course of our investigation, we observed the following: (please refer to accompanying map).

Discussions with the Keightleys, Mrs. John Vellinga, Bob Jordan, Bill Fraser and Steve Ungar did not support that there has been increased use by the public walking between the high water mark of Middle Creek. Mr. Fraser, who owns land accessing the downstream portion of Middle Creek at Cottonwood Road, said he had never seen anyone except local children in the vicinity of the stream on his property. Mrs. Vellinga and Mrs. Keightley described problems associated with members of the public accessing their property from South 19th Street. The allegations involved sunbathing, picnicking and operation of motorcycles, all of which appear to have taken place above the high water marks on Middle Creek. These activities would constitute trespass of the landowners property and were not directly connected to any legal use of the stream within the high water marks. Mr. Ungar, who lives upstream from the Vellingas believes that use has increased recently but described incidents that also occurred outside the high water mark of the stream. The Vellingas and Mr. Ungar both described incidents involving motorcycles operated by youngsters trespassing onto their property and driving through the stream. Mr. Jordan told us that while he has had increased incidences of trespassing from the Hyalite Canyon Road onto his property,

he is unaware of anyone walking downstream between the high water marks from the adjoining National Forest land.

Wildlife values within the area and along Middle Creek are similar to those found throughout the Gallatin Valley. They include typical riparian associated wildlife species such as whitetail deer, beaver, some waterfowl species, shore birds and a variety of passerine species. Mule deer, elk, black bear and moose may be found as occasional visitors.

The greatest impact to wildlife along Middle Creek is clearly the magnitude of subdivision and development that is encroaching on and changing wildlife habitat. If the riparian vegetation along Middle Creek is protected, the impacts of subdivisions can be reduced on those species directly associated with the stream side vegetation zone.

There is no evidence that wildlife have been harmed by recreational use between the high water marks of Middle Creek.

Middle Creek supports a wild rainbow and brown trout population in the reach between the forest boundary and Cottonwood Road. The greatest impact to the trout population is the magnitude of water withdrawn from the stream for irrigation during the summer. There is no evidence of recreational use impact on the fishery.

In summary, the limited use now observed by the petitioners results primarily from trespass across private property and in many (or most) instances is for activities unrelated to water-based recreation. The petitioners concerns are primarily for prospective or anticipated increases in use because of the large number of students at Montana State University. No evidence of damages were observed and use of the stream channel originating from access obtained from public access points was not identified as a problem.

Relief Requested by Landowner(s)

The petitioners specifically ask for public access between the high water marks to be at the adjoining landowners' discretion.

Potential Alternatives for Relief

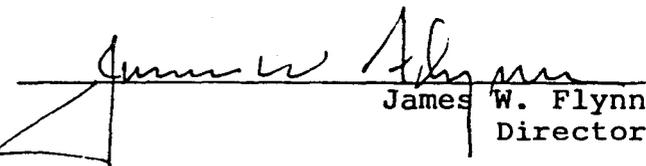
- 1) Deny petition based on lack of any damage and apparent minimal use of Middle Creek between the high water mark by recreationists.
- 2) Deny petition for reasons stated in (1) and encourage landowners to post their land along South 19th Street

and Cottonwood Road. As of September 16, 1985, there is only one visible "No Trespassing" sign on land belonging to Vellingas. Access with permission signs could be made available by the department with landowners responsible for posting and maintaining the signs.

- 3) Encourage the petitioners to report incidences of trespass to the sheriff or game wardens.

Recommendation:

The department recommends the commission adopt alternatives (2) and (3).


James W. Flynn
Director

Investigators

LeRoy Ellig, Regional Supervisor
Jerry Wells, Regional Fisheries Manager
Graham Taylor, Wildlife Biologist

N

Fraser

Cottonwood Rd.

Widdle Creek

Keightley

S. 1974

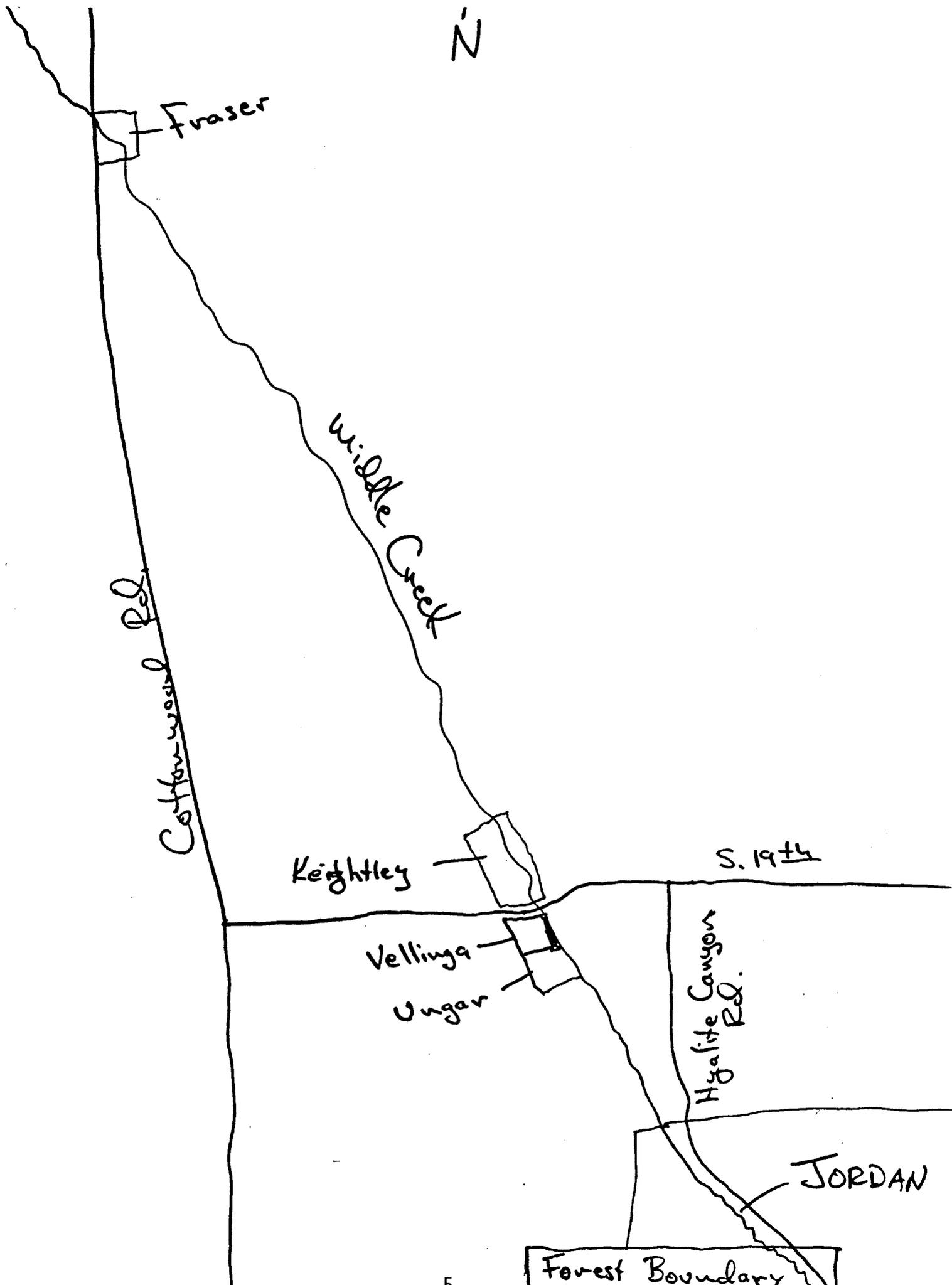
Vellinga

Ungar

Hyalite Canyon Rd.

JORDAN

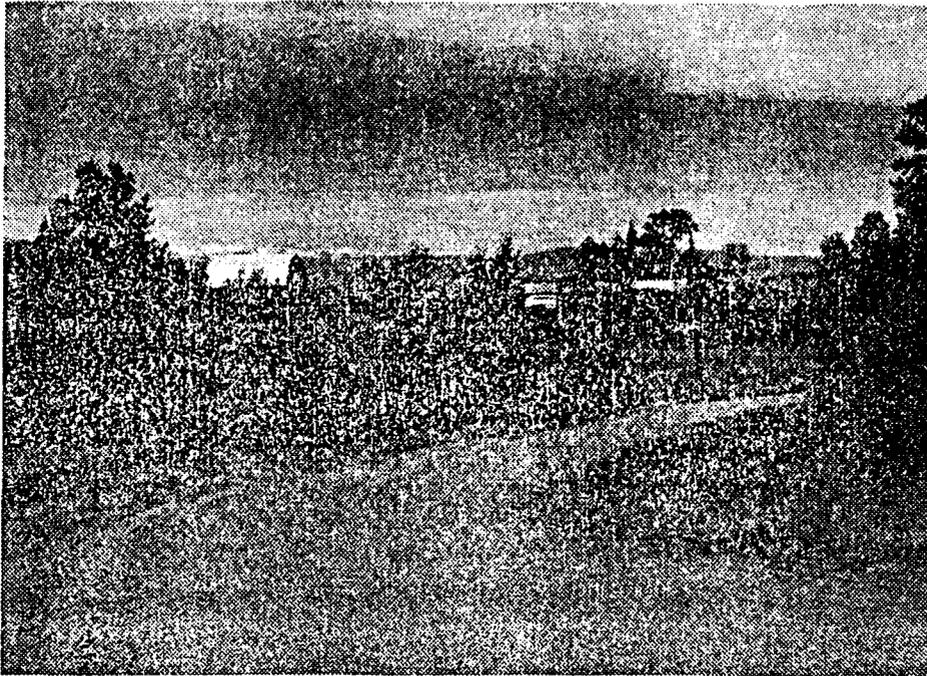
Forest Boundary



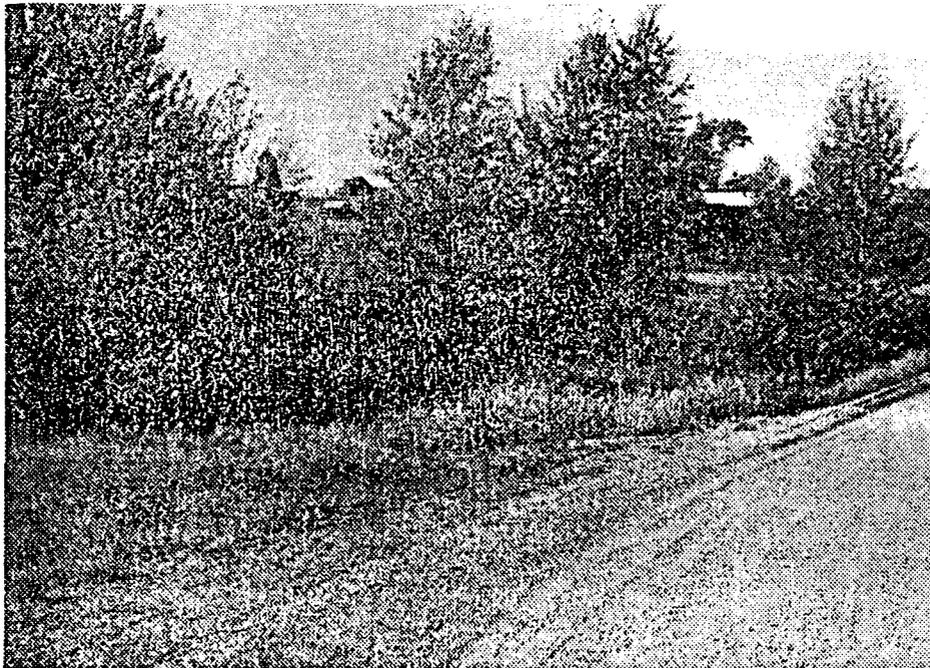
APPENDIX A

Photographs of Middle Creek
between the Gallatin National Forest
Boundary and Cottonwood Road

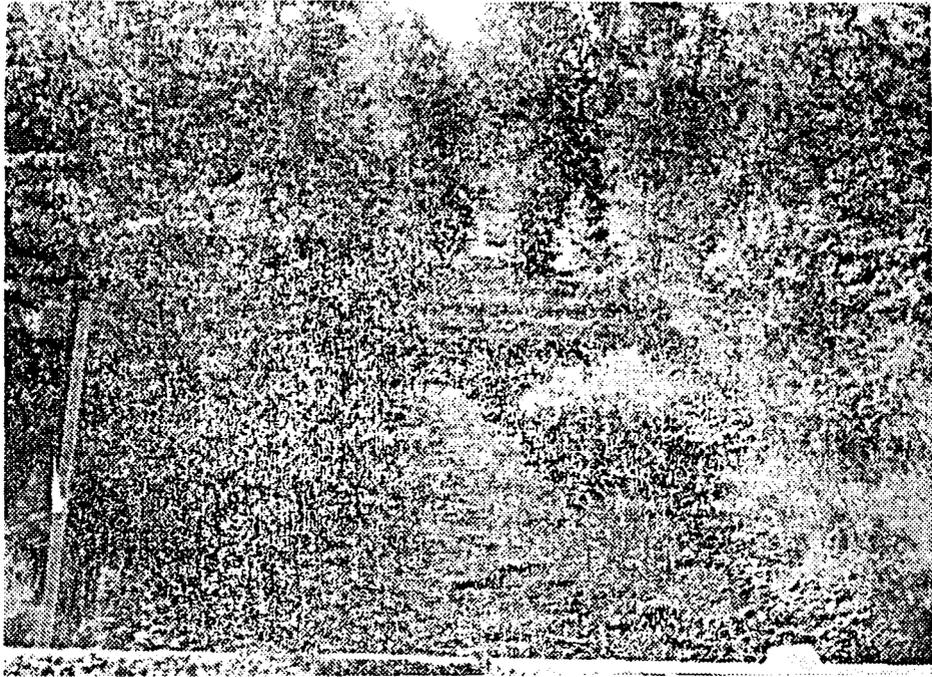
Photographs taken by Jerry Wells



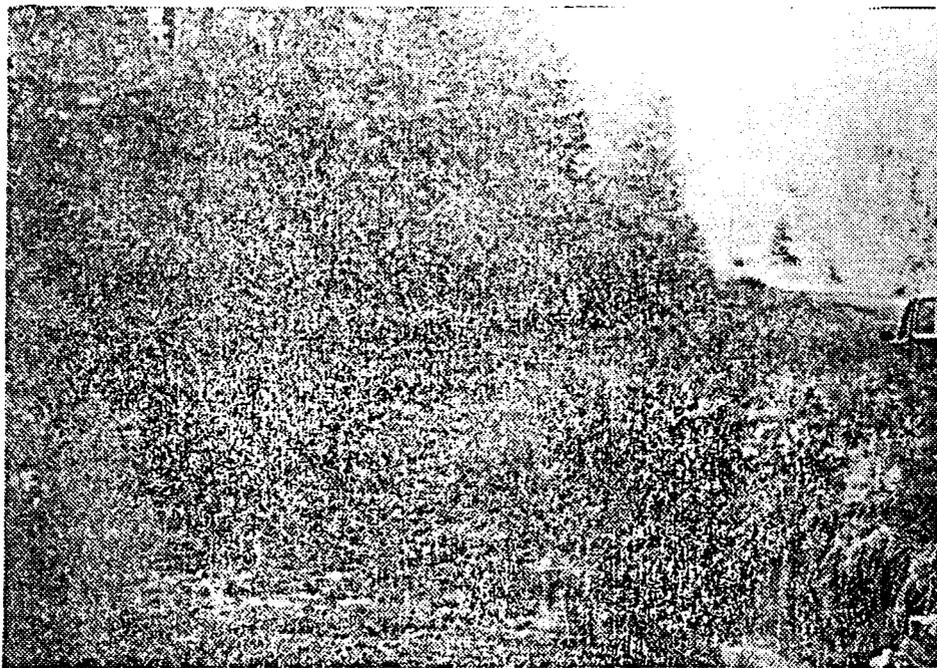
South 19th Street crossing Middle Creek. Keightley's land located on right hand side of bridge, Vellinua land located on left side on opposite side of stream. Members of public allegedly park their vehicles along county right-of-way in this photo and sunbathe and picnic.



South 19th Street at southeast corner of bridge over Middle Creek. Members of the public allegedly park their vehicles in foreground.



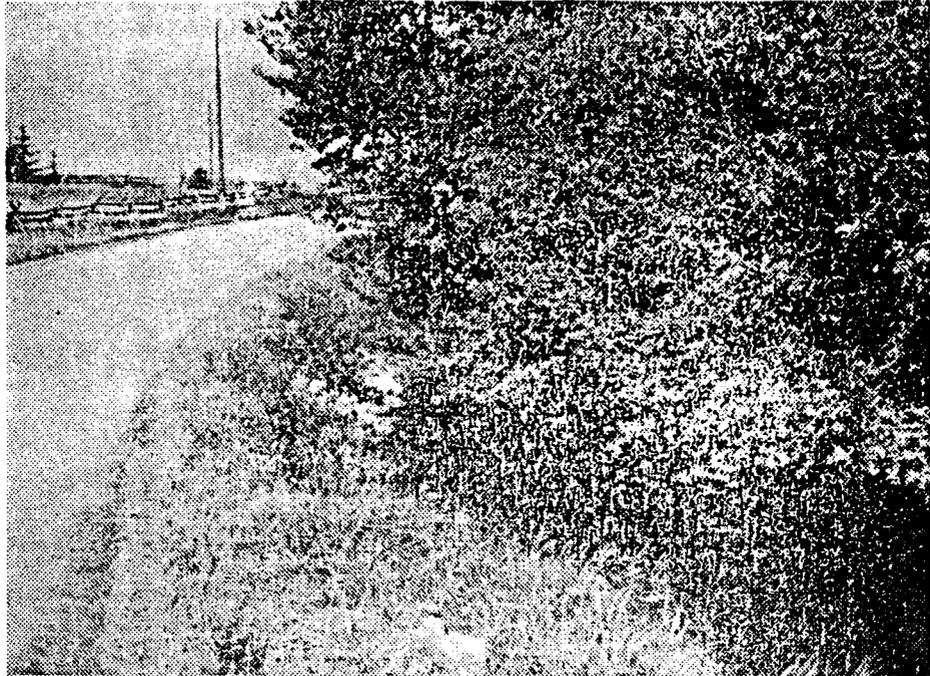
Middle Creek looking upstream from bridge on S. 19th Street.



Middle Creek immediately upstream from Cottonwood Road. The private land adjoining the stream is owned by Mr. and Mrs. Bill Fraser.



Southwest corner of South 19th Street crossing of Middle Creek.
Note "No Trespassing" sign on land belonging to Vellinga family.



County right-of-way includes portion of Middle Creek along S. 19th Street just prior to entering the Keightley's land (downstream from S. 19th bridge)



Middle Creek looking downstream from bridge on S. 19th Street.

SENATE NATURAL RESOURCES
EXHIBIT NO. 14, Attach 7
DATE 2-11-87
BILL NO. SB159

Report and Recommendations on a
Request to Restrict Public Recreational Use on

Boulder River

filed by

Boulder River Ranch (Steve Aller)

Barbara Holman Morse

Duane and Carol Long

Report and Recommendations

prepared by

Montana Department of Fish, Wildlife and Parks

and

Submitted to the

Montana Fish and Game Commission

on

October 20, 1985

INTRODUCTION

The Department of Fish, Wildlife and Parks was directed by the legislature under HB 265 (Chapter 556, Laws of 1985) to adopt rules pertaining to the management of recreational use of rivers and streams. A process was established by which persons may petition the Fish and Game Commission to restrict public recreational use of certain waterways (1) to protect against impacts of recreational use under rule IV and (2) to limit recreational use of streams to their actual capacity under rule VI. This process became effective July 12, 1985.

Upon receipt of a petition the Department of Fish, Wildlife and Parks issues a public notice in four major Montana daily papers and also in the local daily paper in the area involved in the petition to solicit public comment over at least a 30 day period. The notice is also mailed directly to those who have expressed interest in the process, and a news release is issued.

The Department of Fish, Wildlife and Parks has 45 days to investigate the petition and report findings and recommendations to the commission, unless an extension is requested by the department and granted by the commission. The commission then has 30 days to issue a decision granting, denying or granting with modifications the petitioned relief.

ALLEGATIONS

On September 4, 1985, Boulder River Ranch, by and through Steve Aller, Barbara Holman Morse, Duane Long and Carol Long filed a PETITION REQUESTING RESTRICTIONS ON BOULDER RIVER TO PROTECT AGAINST THE IMPACTS OF RECREATIONAL USE. The petition requests that the reach of Boulder River between the mouth of Froze-to-Death Creek and Natural Bridge Falls be closed to floating, camping and hunting year-round. Petitioners also request that fishing be restricted to fly fishing only from July 15 until the following spring runoff. The area in question is located in Sections 26, 34 and 35 of T3S, R12E and Sections 2, 3 and 10 of T4S, R12E.

Specific allegations include the following:

"...that unlimited public use presents a clear and immediate threat to the fish and wildlife, and will disrupt or alter natural areas or biotic communities.

"...there are no suitable places to camp, for floaters to stop, or no safe places to hunt from the stream in this stretch of the river."

"...floating is inherently dangerous because of the Natural Bridge Falls on the end of this stretch of the river."

"The river is not capable of the recreational use of boating in motorized craft."

The last three of these allegations seem to suggest a Rule VI request based on capability of use. Additional communication with the petitioners, however, indicates that they seek restrictions only on the basis of Rule IV, relating to environmental impacts. See Appendix B.

Findings of Fact

Steve McMullin conducted telephone interviews with Duane Long on September 20 as well as Bill and Barbara Holman Morse on September 24. Department representatives Roger Flinger, Steve McMullin and Ron Carlson met with Mr. Aller and toured the area on September 23.

~~The Boulder River is a Class I stream as defined under HB 265 (Chapter 566, Laws of 1985). Evidence indicates the river has been used for commercial purposes historically. As a result, findings of fact addressed in this report are limited to Rule IV which was developed to protect against impacts of recreational use.~~

Froze-to-Death Creek enters the Boulder River from the west, 5.7 river miles upstream of Natural Bridge Falls. Landowners adjoining the river in this reach include Allie Daniels, Christine Watts, Gallatin National Forest, Duane and Carol Long, Boulder River Ranch, Barbara Holman Morse and the State of Montana. The petitioners own most of the land adjoining the river. The Gallatin National Forest adjoins

the river on the east bank in a portion of Section 10, T4S, R12E. The river flows through national forest land in the southeast corner of Section 34, T3S, R12E and a 1/4-mile-wide corridor extending west to east across Section 26, T3S, R12E. Natural Bridge State Monument is located at the northern end of the reach in question. Christine Watts owns a cabin on the west side of the river between Froze-to-Death Creek and the Long property. Allie Daniels owns several cabins immediately upstream of the Watts' property. Her cabins are rented during the summer months.

Duane and Carol Long reside on their property. It is partially subdivided and a few horses are pastured. Boulder River Ranch has been operated as a guest ranch since 1911. Fishing is the primary emphasis of the guest ranch, although cabins are occasionally rented to hunters in the fall. Pastures on the Boulder River Ranch have historically been grazed. Present grazing management involves leased grazing rights for 40 head of cattle from July through October. Barbara Holman Morse is an absentee landowner. The Morse property is not used for agricultural purposes, except for short-term grazing as livestock are moved between pastures on other properties.

The 5.7-mile reach of stream affected by the petition has a distinct character compared to the rest of the upper Boulder River. In the vicinity of Froze-to-Death Creek, the Boulder River changes from a moderate gradient pool-riffle-run-type stream to a low gradient stream dominated by large, deep pools and long, flat runs. It is a meandering, meadow-type stream throughout the reach bordered by Boulder River Ranch and the Barbara Holman Morse property. The north end of the reach is a cascading, high gradient stream that flows through a gorge on Gallatin National Forest and State of Montana property, finally plunging over vertical falls of 70 feet.

Streambanks throughout the reach are generally in good condition. One area adjacent to the Long residence and another area on the Boulder River Ranch have been riprapped to stabilize the streambank. Riparian vegetation is relatively sparse for a meadow stream.

Aller estimates angler use from the guest ranch is approximately 20 anglers per day through the mid-July to early September season, or approximately 1,100 angler-days on three miles of river. Although trails along the streambanks are evident, there appears to be little if any erosion or damaged banks.

Use of this reach of the river by persons other than the petitioners or their guests has increased slightly since HB 265 went into effect. Mr. Aller contacted approximately 30 users during the 1985 season. Most of these people were

using the streams within the constraints of HB 265. There appears to be some problems with trespass, particularly where the Morse property adjoins national forest lands on the north and east. All petitioners agree current levels of use are not damaging the river's banks or biota. They fear that use will increase with time. It is apparent that use by persons other than the petitioners or their guests is minor by comparison.

Most of the private property south of Froze-to-Death Creek has been subdivided and numerous cabins are seasonally occupied. A few lots remain undeveloped, mostly in the Kendan Acres subdivision. Development will certainly continue, but due to the limited number of lots available, it is unlikely that a significant increase in future stream use could be attributed to home owners. It is possible that fishing pressure will increase in the future by the general public. Public access to the river may be gained at several points, including the following:

- 1) Twomile Bridge on the Boulder Road,
- 2) Falls Creek picnic area,
- 3) Gallatin National Forest land on the east side of the river in Section 10, T4S, R12E,
- 4) Gallatin National Forest land in Section 34, T3S, R12E,
- 5) Gallatin National Forest land and State of Montana land in Section 26, T3S, R12E.

During the summer of 1985, anglers other than guests of Boulder River Ranch probably accounted for less than five percent of the total fishing pressure in the reach. It is unlikely that this percentage of anglers would adversely affect the fish population of the reach in question. Relative to the number of guests using the area, other anglers do not clearly represent a threat to natural areas or biotic communities.

Department electrofishing samples were taken in 1974 and 1984 and provide baseline fish population information against which judgments of possible future impacts may be made. In 1974 the estimate was made only for rainbow trout. There were 312 rainbow trout 12 inches and larger per mile. This was about 11 percent of the population which would be characterized as good for rainbow trout in this type of stream. A trend count was made in 1985 and found that 15 percent of the population was 12 inches and larger.

Campsites in the 5.7-mile reach are scarce. A flat area adjacent to the river bank on Gallatin National Forest pro-

perty in Section 34, T3S, R12E is a good, undeveloped campsite. Numerous gravel bars throughout the reach would be exposed in late summer or fall. Camping is not permitted at Natural Bridge State Monument. No camping has occurred in this reach of the river in the last several years.

The stream is floatable by canoe or raft, but is not suitable for motorized craft. Floaters could exit the stream legally on Gallatin National Forest property in Section 34, T3S, R12E, or prior to entering the gorge at Natural Bridge. Several area residents mentioned they have floated all or portions of the 5.7-mile reach. Floating into the gorge at Natural Bridge would be dangerous. Mr. Aller noticed only two parties floating the river during the summer of 1985.

Relief Requested by Landowner(s)

The petitioners request the following restrictions to recreational use of this stretch of the river, between its high-water marks, during the period as indicated below:

- 1) No camping, year-round
- 2) No floating or boating in craft propelled by oar or paddle, or in motorized craft, year-round.
- 3) No hunting, year-round,
- 4) Fishing restricted to fly fishing only from July 15 until the following spring runoff.

Potential Alternatives for Relief

The Boulder River is a Class I stream. Restrictions on recreational use would have to be based on damage or anticipation of damage from a clear threat.

- 1) Camping - Overnight camping on a Class I stream is presently limited by HB 265 (Chapter 566, Laws of 1985). Without permission of the landowner, overnight camping cannot occur within sight of any occupied dwelling or within 500 yards of any occupied dwelling, whichever is less.
 - a) The Commission could place additional restrictions on camping or close the area to camping. There has been little camping use in recent years along this section of stream.
 - b) The Commission could deny the request for a camping closure because of lack of damage or evidence that would suggest camping use would increase.

2) Floating - a) The Commission could close the river to floating to minimize the possibility of trespass by floaters taking out downstream. Floating use has been very limited with no resulting damage. Some trespass violations have occurred.

b) The Commission could deny the request for closure and direct the department to meet with petitioners and Gallatin National Forest officials to discuss the need and location for signing. The department would provide signs with the landowners being responsible for posting and maintaining them. The department would enforce any reported trespass violations.

3) Hunting - Big game hunting on Class I streams is prohibited without landowner permission except by long bow or shotgun when specifically authorized by the Commission.

a) The Commission could close this section of stream to hunting or authorized hunting by permission only. However, there has been no damage caused by hunters, there is no historical record of significant waterfowl hunting, nor is there any reason to anticipate significant increased hunting use.

b) This segment of the petition could be denied because of no significant historical use of the stream by waterfowl hunters and no reason to anticipate a significant increase occurring.

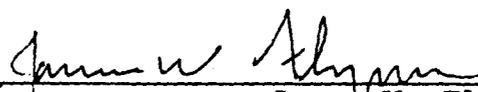
4) Fishing - a) The Commission could deny the petition request and address the request during the normal regulation setting process. The large majority (about 95 percent) of fishing use on this segment of stream is by guests of the landowners. These guests catch and release their fish at the request of the landowners. The department has placed the requested artificial lures only regulation on the letter to cooperators as part of our normal fishing regulation setting process.

b) The department is initiating development of a fisheries management plan for the Boulder River. As part of this process the department could evaluate the need for and desirability of special regulations on all or portions of the Boulder River. The department will continue fish population monitoring in representative reaches of the stream. The management plan would be developed with public involvement. Mr. Aller has supplied copies of approximately 65 guests who support the requested regulations. The large majority of other public comment is currently opposed to any restrictions.

c) The Commission could grant the regulation request pending continued evaluation of the fishery although a year of baseline data already exists.

Recommendation:

The department recommends the Commission adopt alternatives 1 (b), 2 (b), 3 (b), 4 (a) and 4 (b).


James W. Flynn
Director

Investigators

Roger Fliger, Regional Supervisor
Steve McMullin, Regional Fisheries Manager
Ron Carlson, Game Warden

APPENDIX A

Photographs of Boulder River
between mouth of Froze-to-Death Creek
and Natural Bridge Falls

Photographs taken by Steve McMullin

Figure 1. Looking downstream into the gorge at Natural Bridge State Monument.



Figure 2. Boulder River just upstream of Natural Bridge State Monument near the boundary between Gallatin National Forest and Barbara Holman Morse property.



Figure 3. Looking downstream near the north end of the Boulder River Ranch (Aller property).

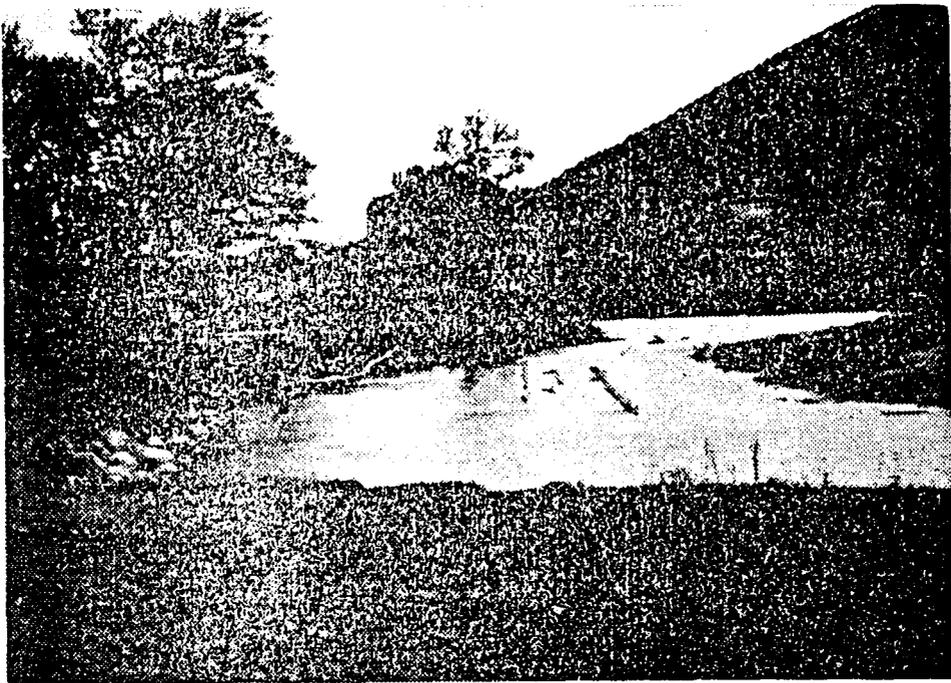


Figure 4. Public access to river on Gallatin National Forest, Sec. 34, T3S, R12E. Gallatin National Forest is to the left of right fence line; Aller property on the right.



Figure 5. Looking downstream near the south end of Boulder River Ranch (Aller property).

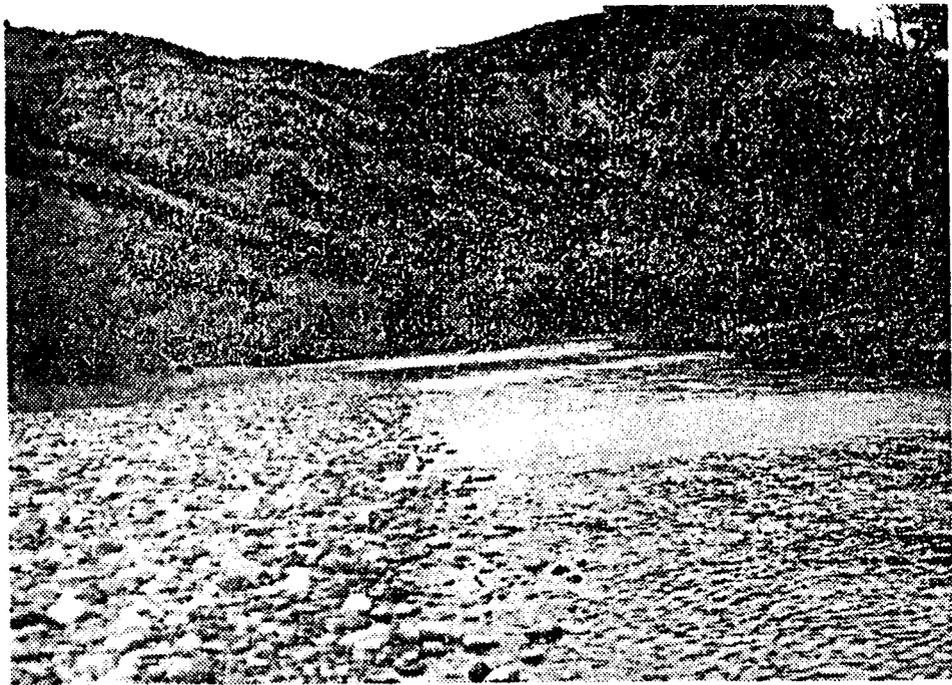


Figure 6. Looking upstream from Long residence.

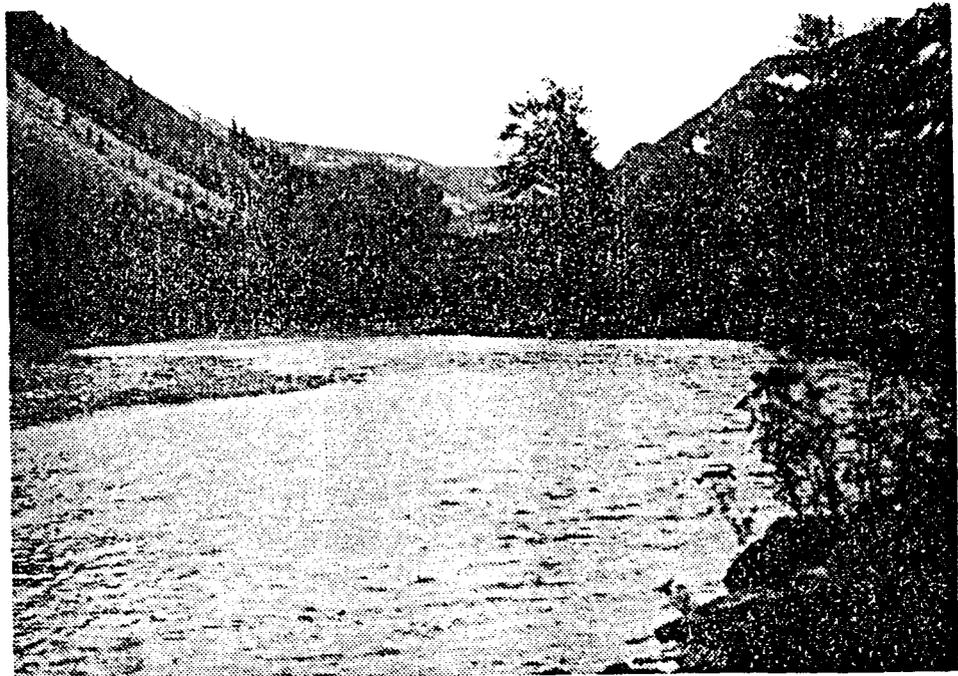
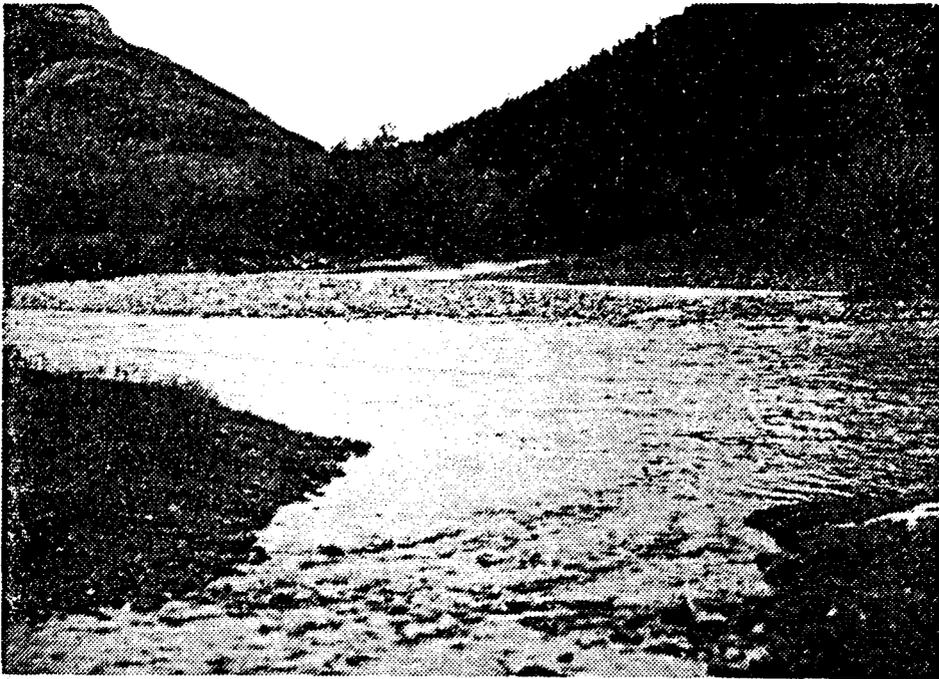


Figure 7. Looking downstream from the mouth of Froze-to-Death Creek.



SENATE NATURAL RESOURCES
EXHIBIT NO. 14, Attach
DATE 2-11-87
BILL NO. SB159

Report and Recommendations on a
Request to Restrict Public Recreational Use on

Mill Creek

filed by

Robert H. Gatiss

Report and Recommendations

prepared by

Montana Department of Fish, Wildlife and Parks

and

Submitted to the

Montana Fish and Game Commission

on

November 5, 1985

INTRODUCTION

The Department of Fish, Wildlife and Parks was directed by the legislature under HB 265 (Chapter 556, Laws of 1985) to adopt rules pertaining to the management of recreational use of rivers and streams. A process was established by which persons may petition the Fish and Game Commission to restrict public recreational use of certain waterways (1) to protect against impacts of recreational use under rule IV and (2) to limit recreational use of streams to their actual capacity under rule VI. This process became effective July 12, 1985.

Upon receipt of a petition the Department of Fish, Wildlife and Parks issues a public notice in four major Montana daily papers and also in the local daily paper in the area involved in the petition to solicit public comment over at least a 30 day period. The notice is also mailed directly to those who have expressed interest in the process, and a news release is issued.

The Department of Fish, Wildlife and Parks has 45 days to investigate the petition and report findings and recommendations to the commission, unless an extension is requested by the department and granted by the commission. The commission then has 30 days to issue a decision granting, denying or granting with modifications the petitioned relief.

ALLEGATIONS

On September 25, 1985, Robert H. Gatiss filed a PETITION REGARDING THE RESTRICTION OF MILL CREEK BASED UPON LIMITATIONS IN ITS CAPACITY FOR RECREATIONAL USE and a PETITION REQUESTING RESTRICTIONS ON MILL CREEK TO PROTECT AGAINST THE IMPACTS OF RECREATIONAL USE. The petitions request that Mill Creek in Flathead County in the vicinity of its intersection with Montana Highway 35 and Broeder Loop Road be closed to fishing, boating and swimming year around.

Specific allegations include:

"This creek is spring fed and level remains same all year thus there is no high water or low water mark. To use a boat would be impossible due to two woven wire fences, two bridges and a water wheel."

"Fishing over fence on north end. Have refused access on many occasions. This petition has been prompted by attitude of fishermen and recent hostile action."

"...not much problems occurred in past but fishermen have become more demanding since the new law."

"Swimming--too cold."

Findings of Fact

Department representatives Jim Vashro and Pat Graham met with Mr. Gatiss and toured the property on October 1. Vashro took a photo series of the stream on October 13. Fishery biologist Bob Domrose electrofished a section of stream just below the Gatiss property to gather fisheries information and collected stream cross-sectional data on October 18. Vashro returned to the site on October 23 to gather additional information on man-made obstacles and conduct a final interview with Mrs. Gatiss. During the course of our investigation we observed the following:

The property involved has been owned by the Gatiss family for nearly 90 years. The land involved includes approximately 400 feet of Mill Creek while the upland portions include the Gatiss Gardens and the Gatiss homesite.

Mill Creek is a spring creek with stable flow and water temperature year around. The stream originates in Jessup Mill Pond approximately 1 mile upstream. Approximately 95 percent of the flow from the pond is diverted through the adjacent U.S. Fish and Wildlife Service Creston Fish Hatchery and then returned to the stream. Hatchery Manager Tom Pruitt reported on October 22, 1985, that the springs measure 47°F

year around. Flows are fairly consistent at about 42 cfs (19,000 gpm), and water temperatures in the hatchery average about 46°F and range from 38 - 52°F. The water temperature at the Sibley property was measured at 46°F on October 13, 1985, by Vashro. Four cross sections of stream in the Sibley property immediately downstream were measured by Bob Domrose on October 18. The average stream width was 26 feet. The average depth was 1.3 feet, and the maximum depth measured was 2.6 feet. The flow was measured at 32 cfs. However on the Gatiss property the stream banks are mostly armored with rock and the width is generally less than 20 feet.

The stream has supported industrial use in the area including two sawmills, one shingle mill, three feed and flour mills, and two breweries in the past as well as the present federal fish hatchery and agricultural use. Past channel alterations are evident and the channel is heavily silted due to land use patterns and the absence of flushing flows in the spring.

The property includes the Gatiss Gardens (Appendix E) which are owned and maintained by Gatiss and Sibley. The gardens cover 5 acres and include nearly 1½ miles of roads and trails winding among over 2,000 perennial plants and flowers. The public is welcome to visit the gardens, and the 1985 guest register showed about 1,300 entries between May 2 and October 12 representing several thousand visitors from all over the world. Both streambanks through this section have been completely riprapped and footpaths have been built on both streambanks to accommodate public touring of the gardens.

A 500 foot portion of the stream ¼ mile downstream on the Sibley property was electrofished by Bob Domrose on October 18 (Appendix B) to collect information on the fisheries. The section sampled ran from the lowest footbridge to the lower property boundary on Broeder Loop Road. Biologists collected five rainbow trout and one brook trout ranging from 3.4 to 12.1 inches in length. Several larger rainbow (12-14") were observed but not captured. Numerous sculpins were also observed. This sample is consistent with visual observations of the stream on several different days.

Fish habitat is generally poor because of a lack of pools and cover and the accumulation of silt in the streambed. Gamefish are relatively scarce, but were observed in the few pools which had been scoured out by stream obstructions. Most of the trout present probably originate from escapement from the hatchery upstream.

Fishing use has been low in the past due probably both to a lack of access and poor fishing quality. The stream would

be difficult to use on a recreational basis. There is little fluctuation between the high and low water marks because of the stable annual flow. As a result recreationists would have to stay in the water if they were denied access to the adjacent land. The silty bottom and occasional deep holes would make wading difficult in some areas. The stream has sufficient flows to support floating, but frequent man-made obstacles (two fences, one vehicle bridge, two foot-bridges, and one waterwheel) (Appendix C) would make floating so inconvenient that the most logical portage route would probably be around the entire 400 feet of Gatiss property. Stream velocities average 1.5 to 3 feet/second under the bridges. A stile does exist at the lower fence.

Interviews with the Gatisses showed there has been little recreational use of Mill Creek through their property because the Gatisses have refused all requests for access. They feel there has been some fishing over the fence in the past, but there have been no problems this year. They have never observed floaters on the stream. There has been no increase in use since the stream access legislation was passed, but Mr. Gatiss feels fishermen have become more demanding when refused access. Mr. Gatiss had a confrontation with a fisherman this past summer who became very argumentative when refused access. Actual damages due to recreational use have only occurred on the neighboring Siblingrud property. Department personnel have counseled Mr. Gatiss on the new stream access and trespass laws and in the past month he had painted the fenceposts orange where Mill Creek enters his property.

The stream through the Gatiss property is too deep in certain places and silty to wade easily, too small and cut up by fences and bridges to float comfortably and too cold to swim in. If the Gatisses continue their policy of refusing recreational access across their land, it is doubtful that any more recreational use will develop. At the same time, the Gatisses welcome large numbers of the public on their property to tour their flower gardens. There is no evidence to indicate that wading fishermen would be any more likely to damage the resource or gardens than the general public. Wading fishermen could use the footpaths that exist on both sides of the stream if the need for portage developed, but carrying boats on these paths would likely damage the adjacent flower beds. However, this portion of the stream appears to contain almost no game fish, and it is unlikely that much recreational use will develop.

Relief Requested by Landowner

Mr. Gatiss requests that Mill Creek be closed for all recreational use, or in the alternative, to fishing, boating and swimming year around.

Potential Alternatives for Relief

- A. Petition requesting restrictions on Mill Creek to protect against the impacts of recreational use.

This petition, based on rule IV of the Commission's rules on the management of recreational use of rivers and streams, requests that the Commission completely restrict access to the Gatiss property for recreational use. In support of this request, the petition alleges that (1) the high and low water marks are the same; (2) use of a boat would be impossible because of artificial obstructions; and (3) fishermen have recently been hostile when refused permission to fish.

The Commission may order restrictions on recreational use under rule IV if the restrictions are necessary to alleviate the types of damage described in subsection (2), which refers to actual or imminent damage to the streams, adjacent lands, fish or wildlife or natural areas or biotic communities.

Neither the petition nor the department's investigations showed any public recreational use of Mill Creek in the past or present, and thus there has been no adverse effects. Therefore the department does not believe that closure of Mill Creek as it flows through the petitioner's property is warranted under rule IV by the record in this case, and recommends that the Commission not grant the petition.

- B. Petition based upon limitations in capacity for recreational use.

In a second petition, the petitioner states that Mill Creek, as it runs through the Gatiss property, is incapable of supporting swimming, boating or fishing. This petition is based on rule VI, which authorizes the Commission to order any restriction it finds necessary on a class II stream to limit the recreational use on the stream to its actual capacity.

Rule IV (4) sets forth factors for the Commission's consideration of streams' capacity for recreational use. With respect to swimming, the factors are "the danger and difficulty associated with swimming the waters and the availability on the stream of waters deep enough to swim" (rule IV (4) (c)); with respect to fishing, "the department's stream evaluation data for that particular stream, any fish population data for the stream, and the suitability of the stream habitat for game fish" (rule IV (4)(a)); and with respect to boating, "the actual suitability of the water to the use of watercraft as evidenced by historical use" (rule IV (4)(d)).

(1) Swimming. The petition and the department's investigation show: ... (a) that Mill Creek is spring fed, and has stable flows and water temperatures throughout the year; (b) that the average annual temperature is about 46°F with an annual range of 38° - 52°F; (c) that the stream's average depth is 1.3 feet, with a heavily silted stream bottom; (d) that the deepest spot measured on the petitioner's property and that immediately downstream was 2.6 feet; and (e) that there are some "deep holes" that would make wade fishing difficult.

Based on this record, the Commission has the option of determining:

(a) that Mill Creek is incapable of supporting swimming and therefore should be closed to swimming because the low water temperature makes it unsafe, and despite the presence of a few deep holes, there is insufficient depth for swimming.

(b) that Mill Creek is capable of limited swimming because summer temperatures may rise sufficiently so that it is not unsafe and there may be a few places where the water is deep enough, and that therefore Mill Creek should remain open for swimming during the summer months.

Because it appears that option (a) is a more accurate conclusion with respect to safety and depth, the department recommends that the Commission adopt option (a).

(2) Fishing. The department's investigation shows: (a) that game fish exist in Mill Creek; (b) that they are very small and few in numbers; (c) that game fish habitat is poor because Mill Creek lacks adequate pools and cover and the stream bottom is heavily silted, but that there are a few pools scoured out by obstructions.

Based on this record, the Commission has the option of determining:

(a) that Mill Creek is capable of supporting fishing, and therefore should not be closed to fishing, because there are some game fish in the creek, it has some adequate habitat, and has supported some fishing, some of which was illegal, in the past.

(b) that Mill Creek is not capable of supporting fishing and therefore should be closed to fishing, because the quality and quantity of game fish and habitat is insufficient.

(c) that the question of fishing on Mill Creek could be resolved by means of the Commission's annual fishing regulations, and that therefore the petition should be denied.

The department recommends that the Commission adopt option (b).

(3) Boating. The department investigation shows that the petitioner, in many years as owner of the property, has never seen a floater on Mill Creek. In addition, Mill Creek is in places less than 20 feet wide.

Based on this record, the Commission has the option of determining:

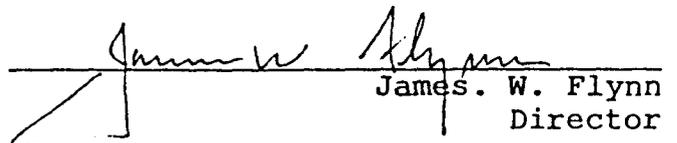
(a) that Mill Creek is incapable of supporting floating because lack of historic use indicates that it is unsuitable, and because it is too narrow.

(b) that Mill Creek has sufficient depth to float certain watercraft and that it should not be closed to boating.

The department recommends that the Commission adopt option (a).

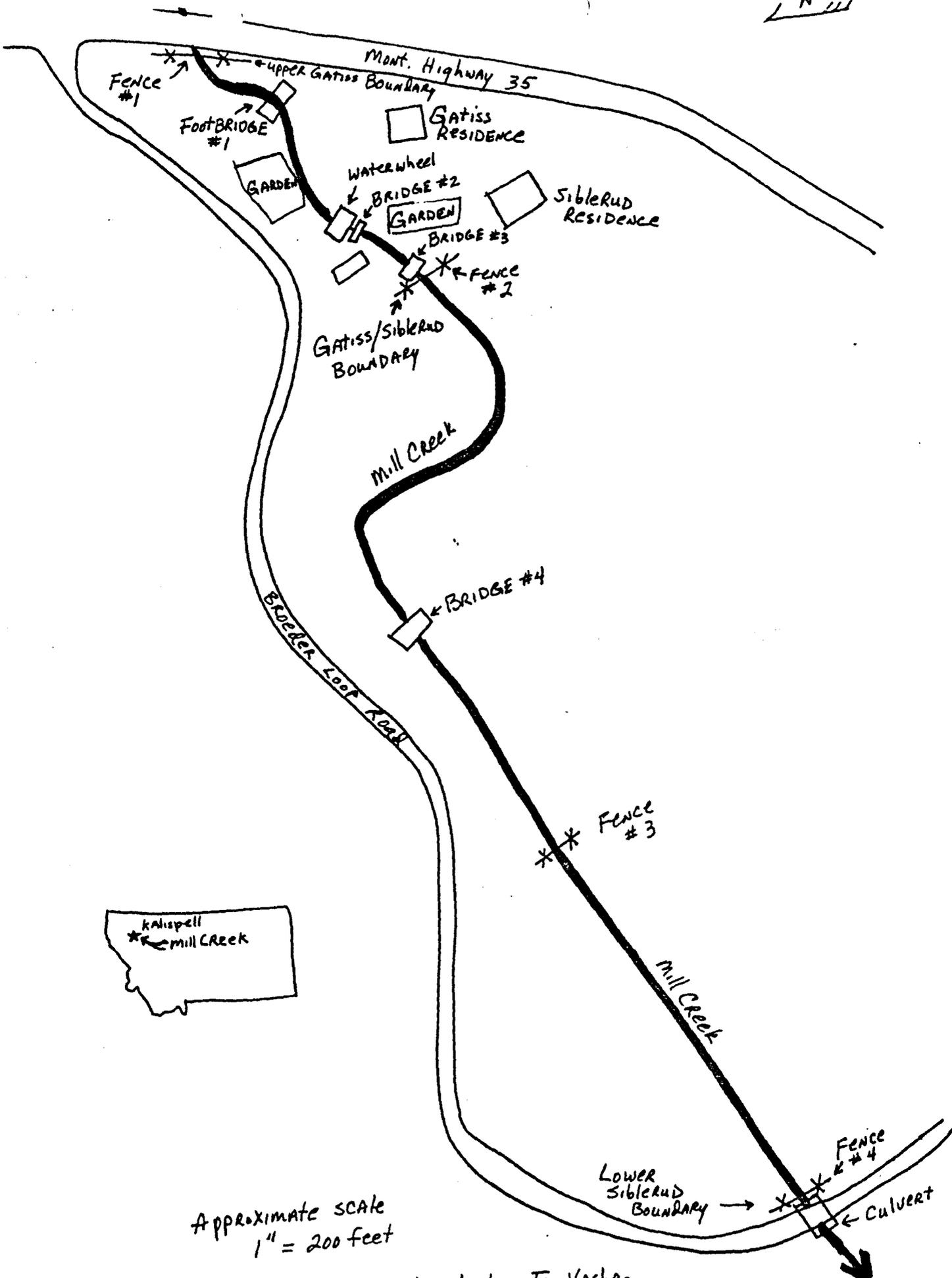
Summary. The department recommends:

- A. Denial of the petition under rule IV; and
- B. Dispose of the petition under rule VI consistent with the Commission's individual conclusions as to swimming, fishing and boating.


James. W. Flynn
Director

Investigators

Jim Vashro, Regional Fisheries Manager
Pat Graham, Fisheries Bureau Chief
Bob Domrose, Fishery Biologist



Approximate scale
1" = 200 feet

Sketch by Jim Vasheo

APPENDIX B

Bob Domrose Fisheries Evaluation - Mill Creek
Office Memorandum dated October 21, 1985, Ref: BD36

STATE OF MONTANA
DEPARTMENT OF FISH, WILDLIFE AND PARKS

Office Memorandum

DATE: October 21, 1985
Ref: BD36

TO : Jim Vashro
FROM : Bob Domrose

SUBJECT: Fisheries Evaluation - Mill Creek
Downstream from Sibley Residence

Mill Creek originates from a spring source (Jessup Mill Pond) and is a partial water source for the Creston Fish Hatchery. Flow measurements and fish population data were collected from a 500' stream section downstream from Sibley Gardens below the Highway 35 bridge crossing on October 18. This stream section flows through an open, heavily grazed pasture and is characterized by a straight run with a single riffle in the middle of the section. Stream bank cover in the form of woody brush vegetation is absent. Instream cover consists of patches of watercress bordering the stream edges and mats of short submerged vegetation growing on heavy accumulated silt deposits ranging upwards to 2 feet. Gravel deposits inbedded with silt were present in the riffle area.

The average stream width is 26' and the average depth is 1.3 feet (4 cross-sectional measurements). The flow was measured at 32 cfs.

Game fish populations were extremely light. A total of 5 fish were captured (4 Rb and 1 EB) with average of 3.4 to 7.0" from the entire shocking section (single downstream pass). Numerous sculpins were also collected. An attempt was made to shock a pool above a road culvert downstream. Two large Rb (12-14") were observed and a 12.1" Rb was captured.

It would appear that fall populations of trout and trout habitat in this stream section are poor. Additional fishing pressure is likely to have little impact on the existing fishery. It would appear that adequate depth is present for floating small rafts. Being a spring creek, flows probably do not fluctuate seasonally to any degree. However, there are 5 foot bridges, a fence line, and 1 culvert crossing through this quarter mile stream section which would make floating extremely difficult.

BD/bj

APPENDIX C

**Physical measurements on man-made obstacles and stream cross-section
measurements for Mill Creek in the Gatiss and Sibelrud property**

I. Measurements on Man-made Obstacles

Man-made Obstacle	Maximum Clearance between structure and stream
1. Fence - upper Gatiss property boundary	4-6"
2. Footbridge No. 1	22"
3. Waterwheel and Bridge No. 2	10"
4. Footbridge No. 3 and fence on Gatiss/Sibelrud boundary	20"
5. Footbridge No. 4	10"
6. Cross-fence	4-6"
7. Fence - lower Sibelrud property boundary	16"
8. Culvert - Broeder Loop Road	36"

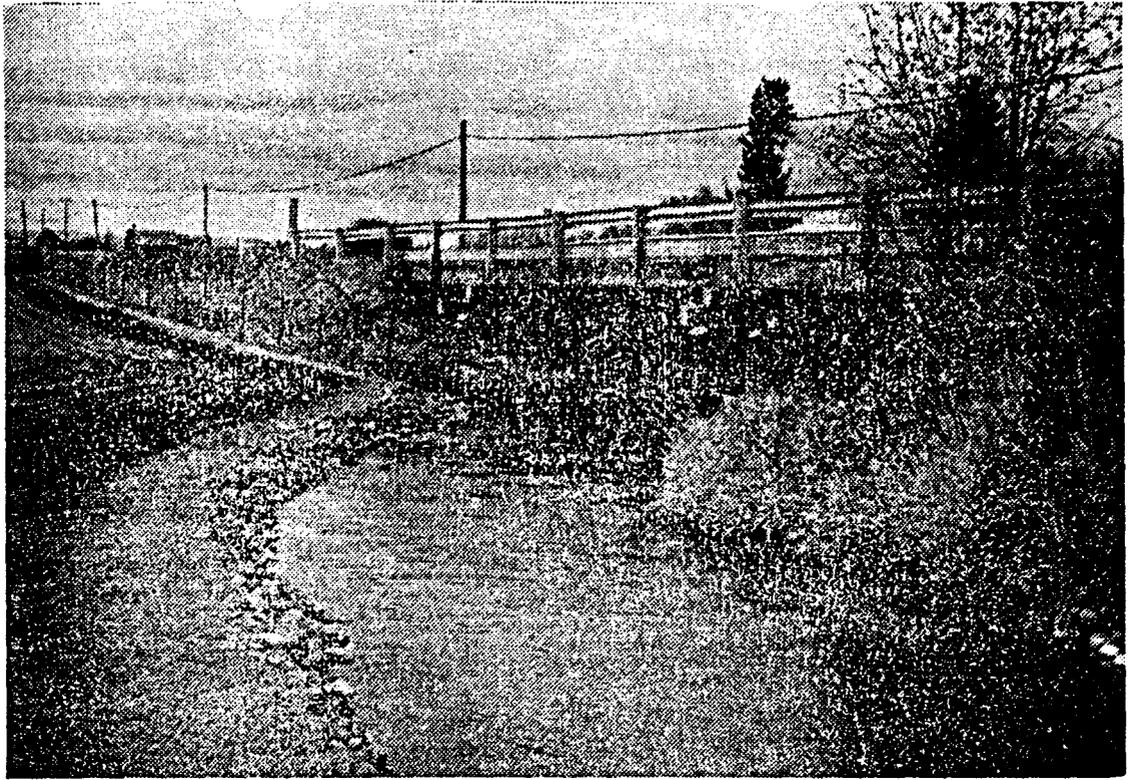
II. Measurements on Stream Cross-section

Channel Type	Width	Depths (ft)					Average Depth
Riffle	26'	0.8	1.3	1.2	1.1		1.2
Riffle	28'	0.8	1.1	1.4	1.2	0.6	1.0
Run	24'	1.2	1.7	1.8			1.6
Run	25'	0.8	1.5	2.6	2.5	1.1	1.9

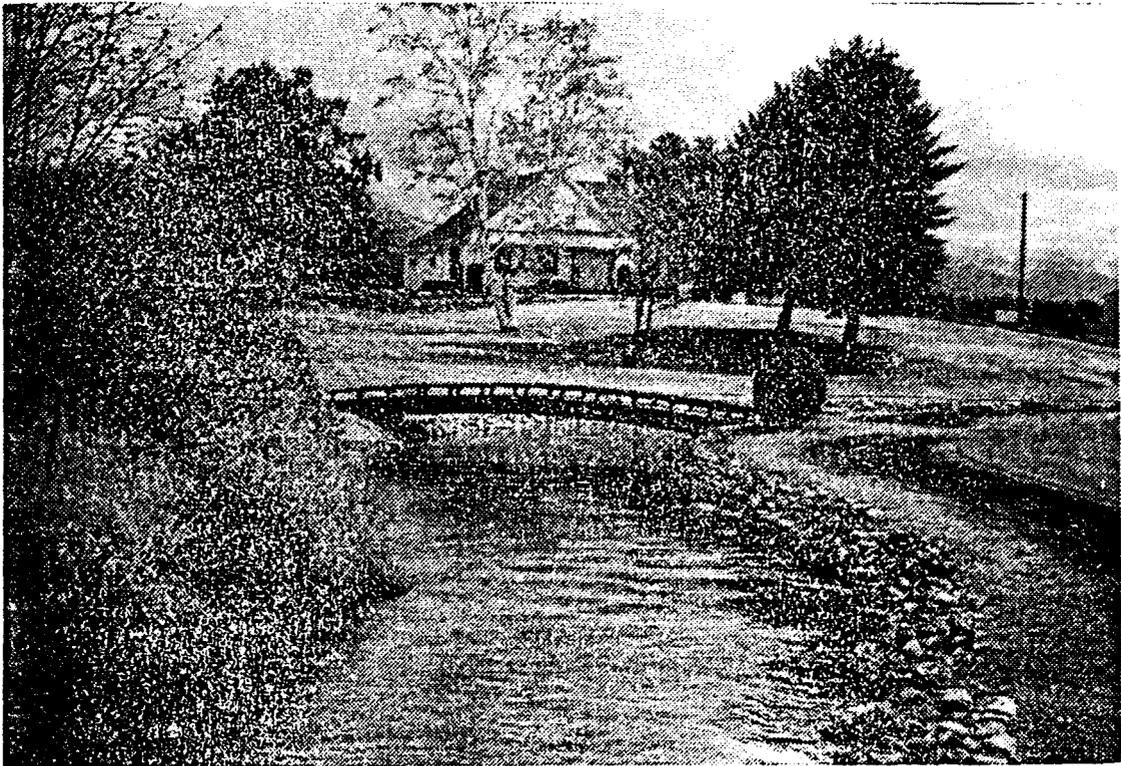
APPENDIX D

Sequential photograph series of Mill Creek
proceeding downstream through the Gatiss property

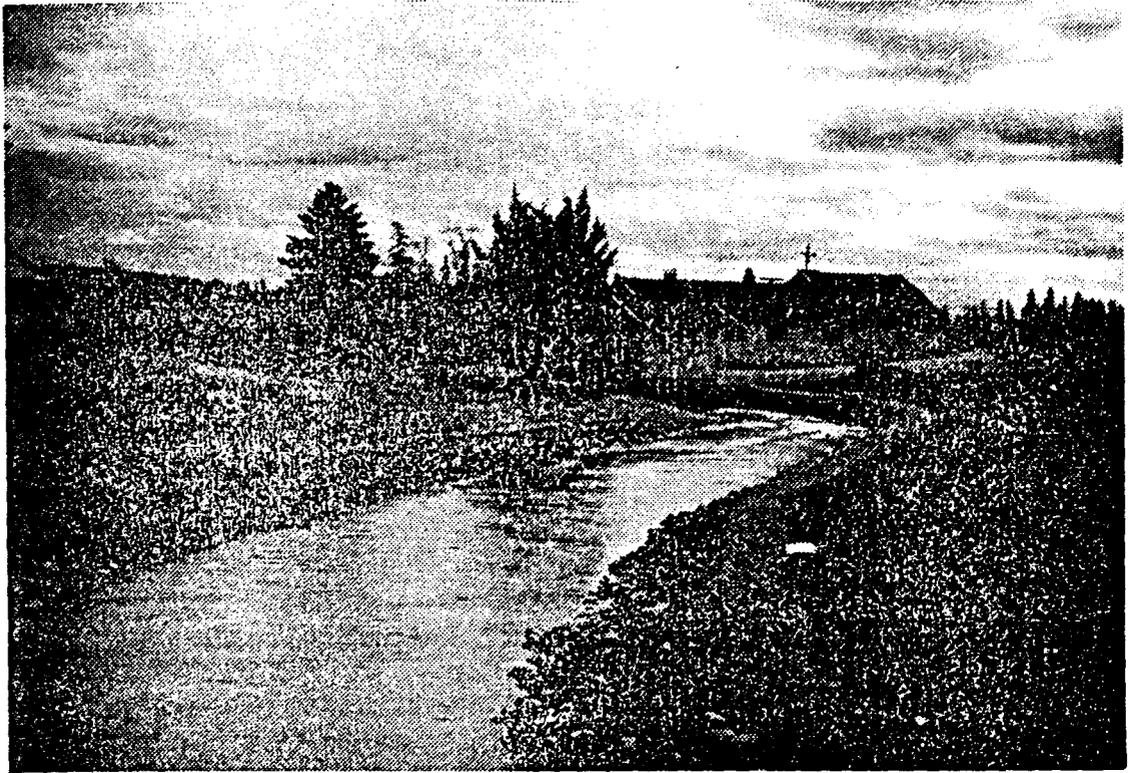
Photographs taken by Jim Vashro
on 10/13/85



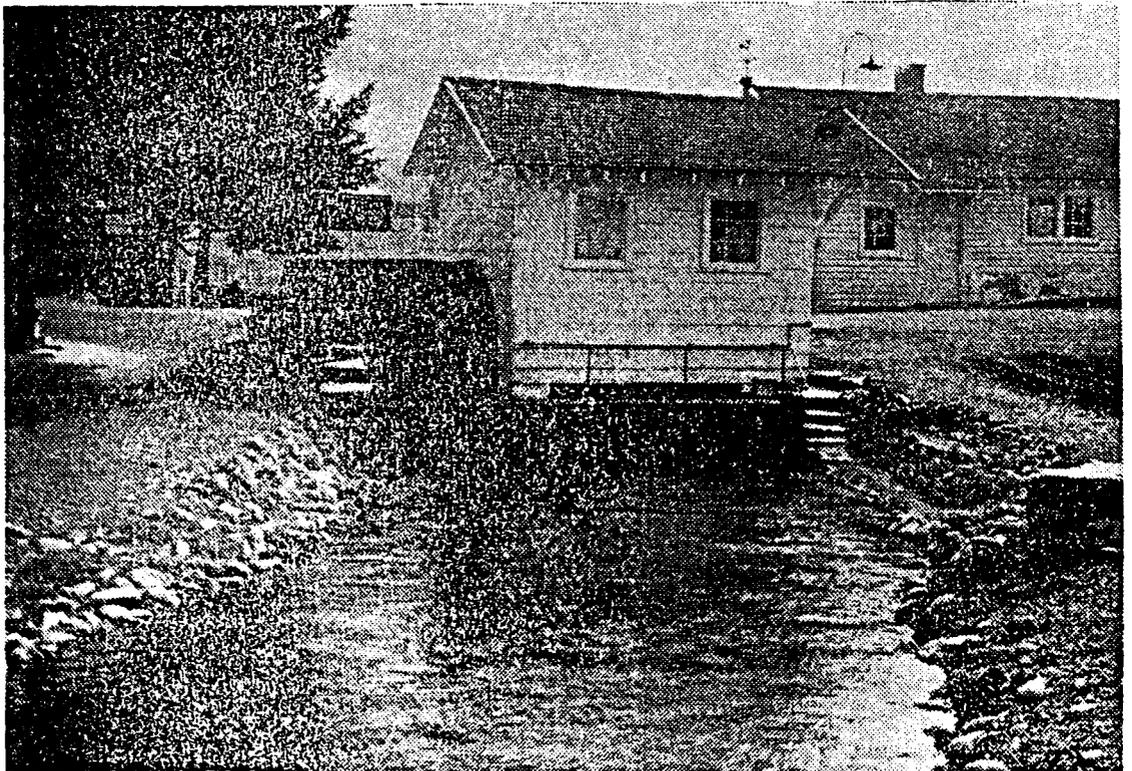
Photograph No. 1. Fence at upper boundary of Gatiss property. Fenceposts have been painted fluorescent orange.



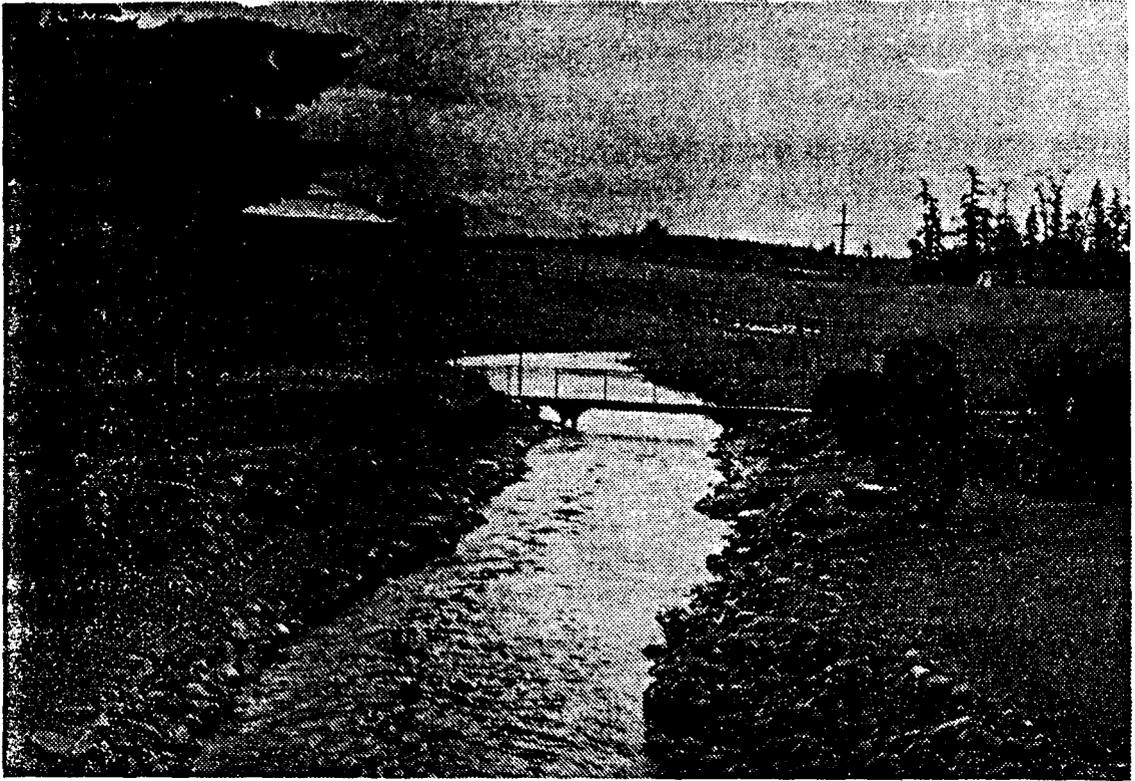
Photograph No. 2. View downstream from upper property line. Gatiss house in background.



Photograph No. 3. View downstream from footbridge in Photo No. 2. Portion of garden on left. Both banks are riprapped and have a footpath.



Photograph No. 4. Closeup of waterwheel and house. Vehicle bridge immediately below the house.



Photograph No. 5. View down from waterwheel. Gardens and footpaths on both sides of the stream. Fence and footbridge mark the boundary between Gatiss/Siblerud property.

APPENDIX E

Front page of
Brochure on "The Gatiss Gardens"

"THE GATISS GARDENS"



4790 Mont 35-R5 Kalispell, Montana 59901
¾ mile east of Creston 4 Corners - Phone 755-2950

Our Gardens are widely known, tho never advertised, nor commercialized. While the greater number of our garden visitors are from Montana, the rest of the U. S. and Canada are well represented, as well as a scattering world wise. Visitors have many questions - This leaflet, we hope, will help in answering SOME of the questions, and at the same time be a memento of the time spent with us, plus some supplier's references.

The Gardens cover approximately 5 acres - with nearly 1½ miles of roads and walks, and over 2000 name tagged super hardy perennials.

As in past years, we continue to spend a considerable amount on new or improved varieties of plants

SENATE NATURAL RESOURCES
EXHIBIT NO. 14 Attach 9
DATE 2-11-87
BILL NO. SB 159

Report and Recommendations on a
Request to Restrict Public Recreational Use on

Mill Creek
filed by
Donald P. Sibley

Report and Recommendations
prepared by
Montana Department of Fish, Wildlife and Parks
and
Submitted to the
Montana Fish and Game Commission
on
November 5, 1985

INTRODUCTION

The Department of Fish, Wildlife and Parks was directed by the legislature under HB 265 (Chapter 556, Laws of 1985) to adopt rules pertaining to the management of recreational use of rivers and streams. A process was established by which persons may petition the Fish and Game Commission to restrict public recreational use of certain waterways (1) to protect against impacts of recreational use under rule IV and (2) to limit recreational use of streams to their actual capacity under rule VI. This process became effective July 12, 1985.

Upon receipt of a petition the Department of Fish, Wildlife and Parks issues a public notice in four major Montana daily papers and also in the local daily paper in the area involved in the petition to solicit public comment over at least a 30 day period. The notice is also mailed directly to those who have expressed interest in the process, and a news release is issued.

The Department of Fish, Wildlife and Parks has 45 days to investigate the petition and report findings and recommendations to the commission, unless an extension is requested by the department and granted by the commission. The commission then has 30 days to issue a decision granting, denying or granting with modifications the petitioned relief.

ALLEGATIONS

On September 25, 1985, Donald R. Sibley filed a PETITION REGARDING THE RESTRICTION OF MILL CREEK BASED UPON LIMITATIONS IN ITS CAPACITY FOR RECREATIONAL USE and a PETITION REQUESTING RESTRICTIONS ON MILL CREEK TO PROTECT AGAINST THE IMPACTS OF RECREATIONAL USE. The petitions request that Mill Creek in Flathead County in the vicinity of its intersection with Montana Highway 35 and Broeder Loop Road be closed to fishing, boating and swimming year around.

Specific allegations include:

"This creek is spring fed, and the level remains the same all year, thus there is no high or low water mark. To use a boat on Mill Creek would be difficult or impossible due to three fences and shallow spots in the creek."

"Fishing across fence off Broeder Loop Road where culvert runs under road and by fishermen climbing fence and fishing in open waters. This petition has been prompted due to fishermen cutting down fence by culvert."

Findings of Fact

Department representatives Jim Vashro and Pat Graham met with Mrs. Sibley and toured the property on October 1. Vashro took a photo series of the stream on October 13. Fishery biologist Bob Domrose electrofished the stream to gather fisheries information and stream cross-section data on October 18. Vashro returned to the site on October 23 to gather additional information on man-made obstacles and conduct final interviews with Mr. Sibley.

During the course of our investigation, we observed the following:

The property involved was purchased by the Sibleys 14 or more years ago. The land involved includes approximately 1,780 feet of Mill Creek while the upland portions include a portion of the Gatiss Gardens and the Sibley homesite. The majority of the land is in pasture utilized by cattle, horses, and domestic ducks and geese.

Mill Creek is a spring creek with stable flows and water temperatures year around. The stream originates in Jessup Mill Pond approximately one mile upstream. Approximately 95 percent of the flow from the pond is diverted through the adjacent U.S. Fish and Wildlife Service Creston Fish Hatchery and then returned to the stream. Hatchery Manager Tom Pruitt reported on October 22, 1985, that the springs measure 47°F year around. Flows are fairly constant at about

42 cfs (19,000 gpm), and water temperatures in the hatchery average about 46°F and range from 38 - 52°F. The water temperature at the Sibley property was measured at 46°F on October 13, 1985 by Vashro. Four cross sections of stream in the Sibley property were measured by Bob Domrose on October 18. The average stream width was 26 feet, and the average depth was 1.3 feet. The maximum depth measured was 2.6 feet. The flow was measured at 32 cfs.

The stream has supported industrial use in the area including two sawmills, one shingle mill, three feed and flour mills and two breweries in the past as well as the present federal fish hatchery and agricultural uses. Past channel alterations are evident and the channel is heavily silted due to land use patterns and the absence of flushing flows in the spring.

The property includes a portion of the Gatiss Gardens which are owned and maintained by the Sibleys and Gatiss'. The entire gardens cover five acres and include nearly 1½ miles of roads and trails winding among over 2,000 perennial plants and flowers. The public is welcome to visit the gardens, and the 1985 guest register showed more than 1,300 entries between May 2 and October 12 representing several thousands of visitors from all over the world. The majority of the rest of the property is in 36 acres of agricultural land which was farmed for alfalfa hay in the past but is now used as pasture. The Sibleys pasture up to 19 cow/calf pairs each year along with some horses and one to two dozen domestic ducks and geese. Livestock grazing has cropped down the streamside cover and bank trampling and erosion is evident at several locations. Mr. Sibley has attempted repair work on one bank section that has been trampled.

A 500 foot portion of the stream was electrofished by Bob Domrose on October 18 (Appendix B) to collect information on the fisheries. The section sampled ran from the lowest footbridge to the lower property boundary on Broeder Loop Road. Biologists collected five rainbow trout and one brook trout ranging from 3.4 to 12.1 inches in length. Several larger rainbows (12-14 inches) were observed but not captured. Numerous sculpins were also observed. This sample is consistent with visual observations of the stream on several different days. Fish habitat is generally poor because of a lack of pools and cover and a silty bottom with intermittent patches of weeds. Gamefish are scarce but were observed in the few pools which had been scoured out by stream obstructions. Most of the trout present probably originate from escapement from the hatchery upstream. Fishing use has been low in the past due to a lack of access and poor quality fishing.

The stream would be difficult to use for recreation. There is little fluctuation between the high and low water marks

because of the stable annual flow. As a result recreationists would have to stay in the water if they were denied access to the adjacent land. The silty bottom and occasional deep holes would make wading difficult in some areas. The stream has sufficient flows to support floating, but frequent man-made obstacles (three fences, two footbridges and one culvert) (Appendix C) would make floating so inconvenient that the most logical portage route would probably be around the entire 1,750 feet of Sibley property. Stream velocities average 1.5 to 3 feet/second under the bridges. A stile does exist at the upper fence.

Interviews with the Sibleys revealed the following problems have occurred in the past:

1. A bucket in the field had holes shot in it 10-12 years ago.
2. A young hunter killed four tame ducks 10 years ago.
3. A fisherman was digging for worms in the field 8-10 years ago.
4. Persons were shooting from the road at wild ducks in the creek 6-8 years ago.
5. A mare received a puncture wound in her shoulder. It was never determined if the wound was caused by a shot, a branch, or other cause.
6. A fisherman demanded access from Mr. Gatiss during summer, 1985, and became argumentative when refused. The lower Sibley fence was cut down several days later.
7. Fence wires have been pushed down by persons climbing over the fence and several 2 x 4 braces have been broken by similar use.

Mr. Sibley feels most use occurs at the lower end of his field which is not visible from his house. He observes two to three cars per weekend parked on Broeder Loop Road and occasionally on weeknights. Use has declined since the downstream property owner posted his land. Mr. Sibley feels most fishermen fish from the county road and cast over the fence although he observed several kids in his field this summer and has found bait cans, etc. in the field. He has not observed an increase in use since the stream access decision in June, 1984. He has never observed a floater on the stream. Department personnel have counseled the Sibleys on the new stream access and trespassing laws, and in the past month they have posted three "No Hunting" signs and painted the fenceposts fluorescent orange where Mill Creek leaves their property.

Although the past problems with public use are regrettable, the number of incidents does not seem excessive for the timespan involved. Most appear to be strictly vandalism and which would not be alleviated by any restrictions the Commission can place on recreational use. Use has not increased as a result of the passage of stream access legislation and, due to the poor quality of the fishery and the difficulty of access, increases in recreational use are not anticipated in the future. Swimming use is not anticipated due to the cold water.

Damage to the resource appears to be primarily due to livestock grazing. Damage to the fences has occurred due to vandalism and apparent recreational use. This problem could be alleviated by proper signing (partially accomplished already), enforcement of existing trespass laws, and construction of a stile over the lower fence with proper signing to let anglers know this is a portage route only for access to wading the stream and not to the bank area above the water level.

Relief Requested by Landowner

Mr. Sibley requests that Mill Creek be closed to fishing, boating and swimming on a year around basis.

Potential Alternatives for Relief

- A. Petition requesting restrictions on Mill Creek to protect against the impacts of recreational use.

This petition, based on rule IV of the Commission's rules on the management of recreational use of rivers and streams, requests that the Commission completely restrict access to the Sibley property for recreational use. In support of this request, the petition alleges that (1) the high and low water marks are the same; (2) use of a boat would be difficult or impossible because of fences and shallow places; and (3) fishermen have trespassed and cut down a fence.

The Commission may order restrictions on recreational use under rule IV if the restrictions are necessary to alleviate the types of damage described in subsection (2), which refers to actual or imminent damage to the streams, adjacent lands, fish or wildlife or natural areas or biotic communities.

Neither the petition nor the department's investigations showed any public recreational use of Mill Creek in the past or present, other than some possible use by trespassing anglers. The problems of trespass and vandalism have not been excessive, and may be alleviated by proper posting and enforcement of the trespass laws.

Therefore the department does not believe that closure of Mill Creek as it flows through the petitioner's property is warranted under rule IV by the record in this case, and recommends that the Commission not grant the petition.

B. Petition based upon limitations in capacity for recreational use.

In a second petition, the petitioner states that Mill Creek, as it runs through the Sibley property, is incapable of supporting swimming, boating or fishing. This petition is based on rule VI, which authorizes the Commission to order any restriction it finds necessary on a class II stream to limit the recreational use on the stream to its actual capacity.

Rule IV (4) sets forth factors for the Commission's consideration of streams' capacity for recreational use. With respect to swimming, the factors are "the danger and difficulty associated with swimming the waters and the availability on the stream of waters deep enough to swim" (rule IV (4) (c)); with respect to fishing, "the department's stream evaluation data for that particular stream, any fish population data for the stream, and the suitability of the stream habitat for game fish" (rule IV (4)(a)); and with respect to boating, "the actual suitability of the water to the use of watercraft as evidenced by historical use" (rule IV (4)(d)).

(1) Swimming. The petition and the department's investigation show: (a) that Mill Creek is spring fed, and has stable flows and water temperatures throughout the year; (b) that the average annual temperature is about 46°F with an annual range of 38° - 52°F; (c) that the stream's average depth is 1.3 feet, with a heavily silted stream bottom; (d) that the deepest spot measured on the petitioner's property and that immediately upstream was 2.6 feet; and (e) that there are some "deep holes" that would make wade fishing difficult.

Based on this record, the Commission has the option of determining:

(a) that Mill Creek is incapable of supporting swimming and therefore should be closed to swimming because the low water temperature makes it unsafe, and despite the presence of a few deep holes, there is insufficient depth for swimming.

(b) that Mill Creek is capable of limited swimming because summer temperatures may rise sufficiently so

that it is not unsafe and there may be a few places where the water is deep enough, and that therefore Mill Creek should remain open for swimming during the summer months.

Because it appears that option (a) is a more accurate conclusion with respect to safety and depth, the department recommends that the Commission adopt option (a).

(2) Fishing. The department's investigation shows: (a) that game fish exist in Mill Creek; (b) that they are very small and few in numbers; (c) that game fish habitat is poor because Mill Creek lacks adequate pools and cover and the stream bottom is heavily silted, but that there are a few pools scoured out by obstructions.

Based on this record, the Commission has the option of determining:

(a) that Mill Creek is capable of supporting fishing, and therefore should not be closed to fishing, because there are some game fish in the creek, it has some adequate habitat, and has supported some fishing, some of which was illegal, in the past.

(b) that Mill Creek is not capable of supporting fishing and therefore should be closed to fishing, because the quality and quantity of game fish and habitat is insufficient.

(c) that the question of fishing on Mill Creek could be resolved by means of the Commission's annual fishing regulations, and that therefore the petition should be denied.

The department recommends that the Commission adopt option (b). We would like to point out to the Commission that the degraded status of Mill Creek as it runs through this property is entirely the result of long standing private use, detrimental to the creek which predated the Natural Streambed and Land Preservation Act of 1975 and other conservation legislation. This recommendation should not serve as an incentive for any landowner to destroy the recreational value of streams on his property in order to exclude the public.

(3) Boating. The department investigation shows that the petitioner, in more than 14 years as owner of the property, has never seen a floater on Mill Creek. Although in many places there appears to be enough water to float a watercraft, the petitioner states that there are many shallow spots.

Based on this record, the Commission has the option of determining:

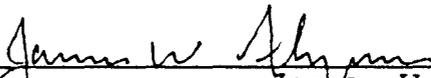
(a) that Mill Creek is incapable of supporting floating because lack of historic use indicates that it is unsuitable, and because of the shallow spots.

(b) that Mill Creek has sufficient depth to float certain watercraft and that it should not be closed to boating.

The department recommends that the Commission adopt option (a).

Summary. The department recommends:

- A. Denial of the petition under rule IV; and
- B. Dispose of the petition under rule VI consistent with the Commission's individual conclusions as to swimming, fishing and boating.



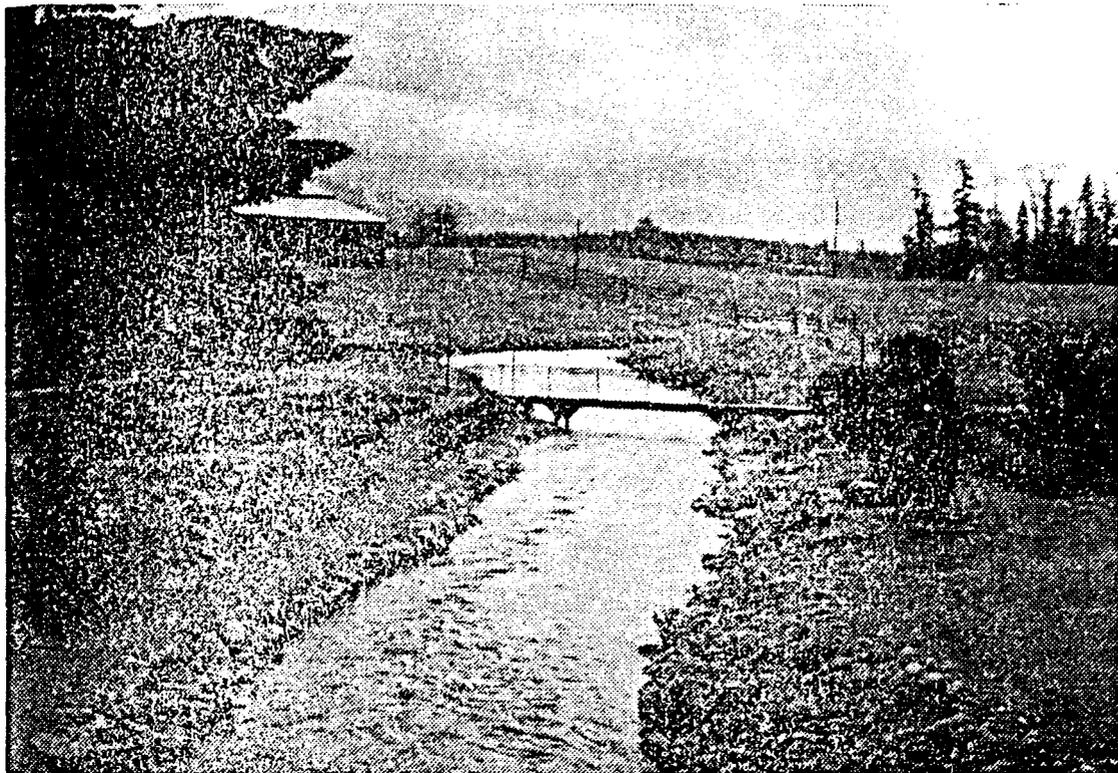
James. W. Flynn
Director

Investigators

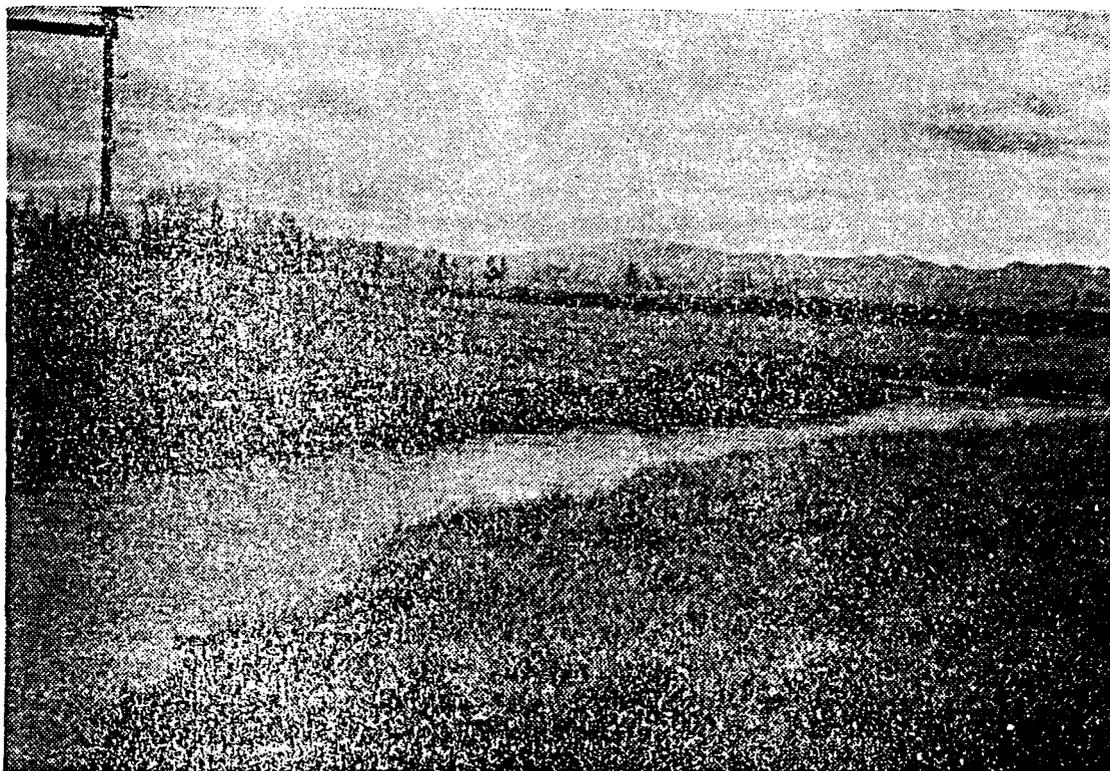
Jim Vashro, Regional Fisheries Manager
Pat Graham, Fisheries Bureau Chief
Bob Domrose, Fishery Biologist

APPENDIX A

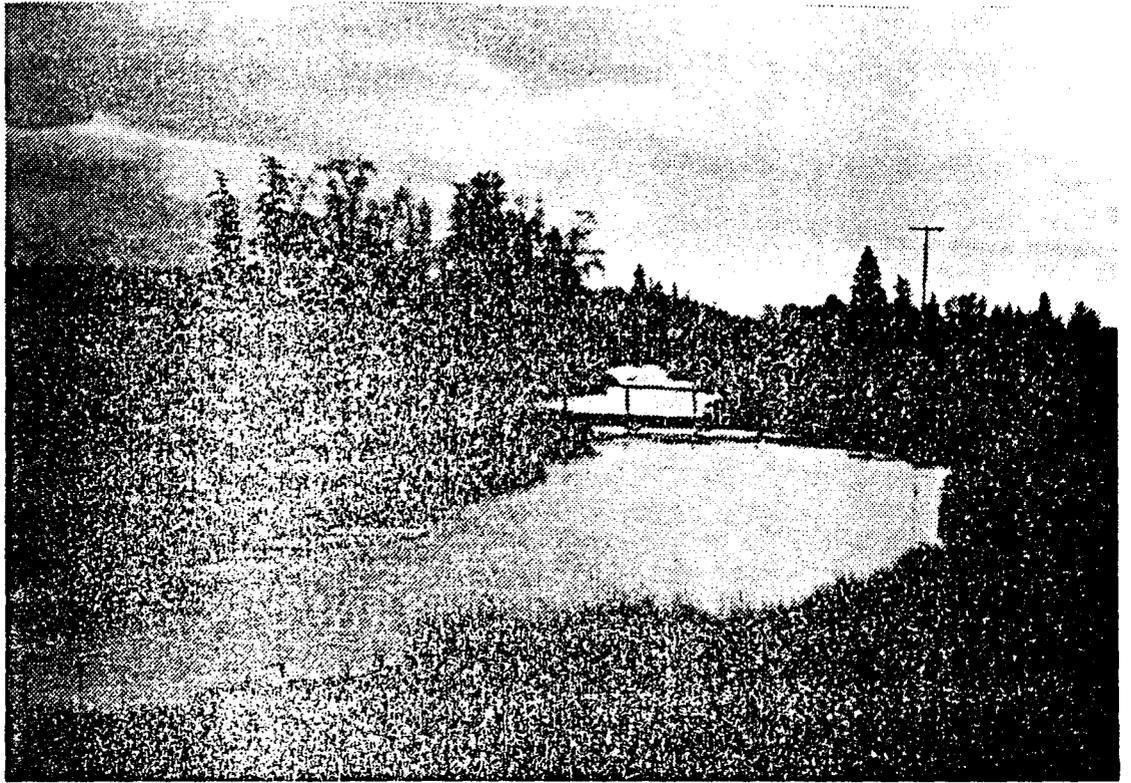
Map of Mill Creek
through the Sibley's property



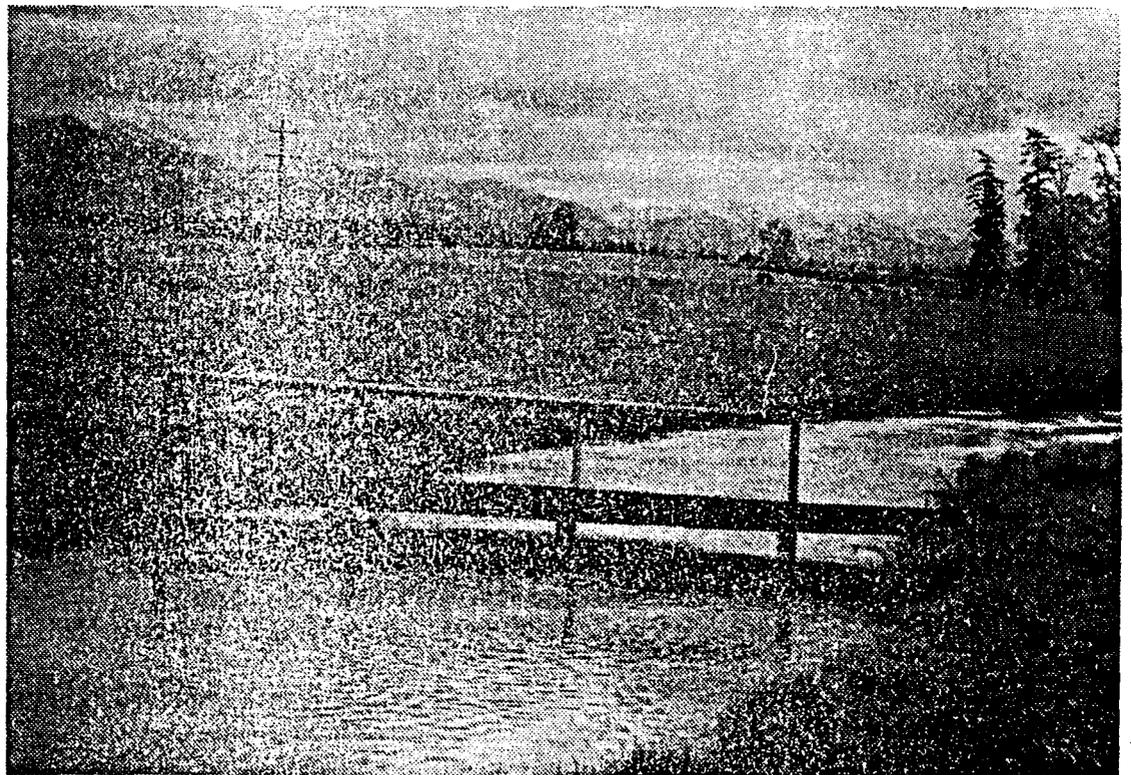
Photograph No. 1. View of fence and footbridge on boundary between Gatiss and Siblingrud properties. Siblingrud portion of Gatiss Gardens on left. Walkway over fence behind shrub on right.



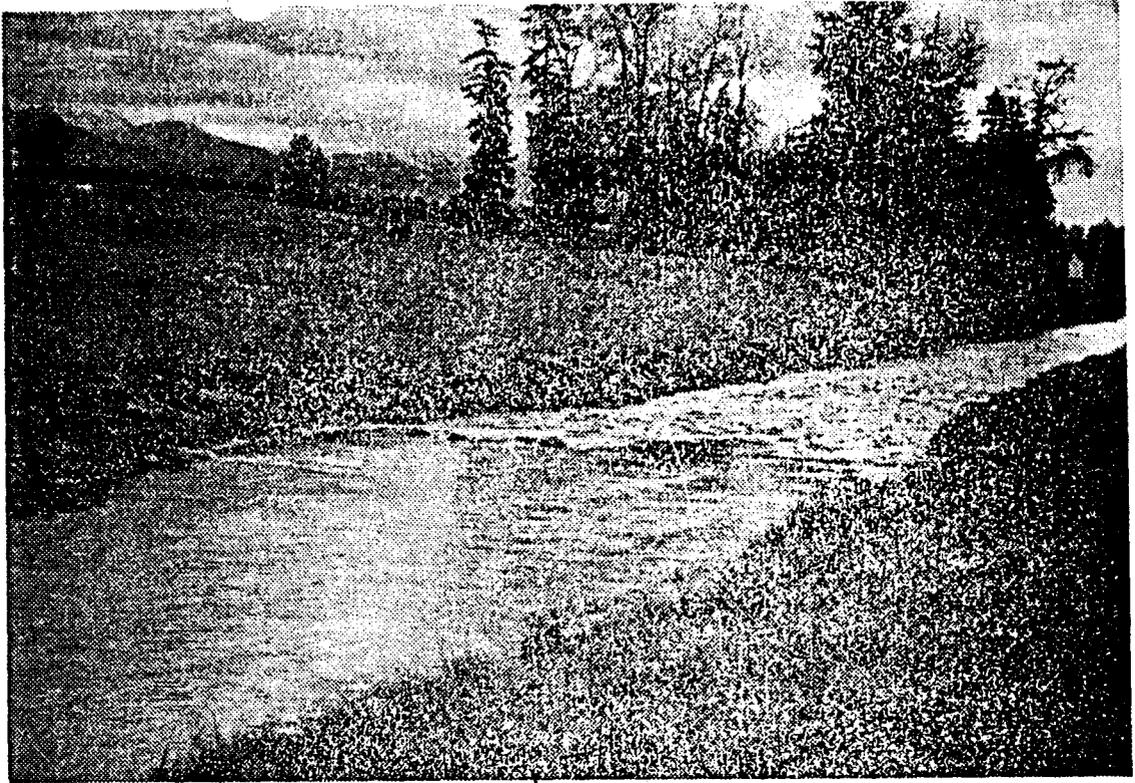
Photograph No. 2. Grazing use evident. Mr. Siblingrud has attempted to repair trampling damage on left bank of stream.



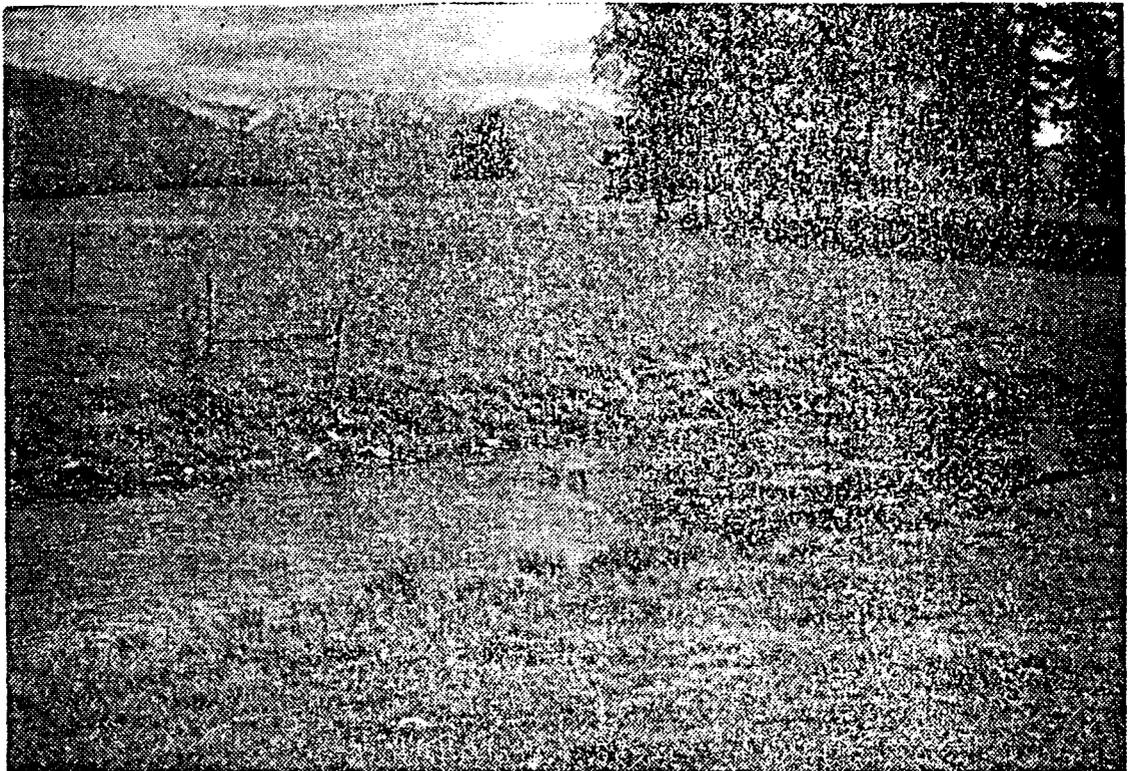
Photograph No. 3. View to end of property.



Photograph No. 4. Footbridge No. 4. Some cattle evident in background.



Photograph No. 5. View of only shallow riffle in section. Livestock trampling evident on left bank.



Photograph No. 6. View of cross fence.



Photograph No. 7. View of fence and culvert at lower property boundary.
Fenceposts have been painted flourescent orange.

SENATE NATURAL RESOURCES
EXHIBIT NO. 14, attach 70
DATE 2-11-87
BILL NO. SB159

REPORT Two AND RECOMMENDATIONS ON A
REQUEST TO RESTRICT PUBLIC RECREATIONAL USE ON
NELSON'S SPRING CREEK

FILED BY
WILLIAM DANA

REPORT AND RECOMMENDATIONS
PREPARED BY
MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS
AND
SUBMITTED TO THE
MONTANA FISH AND GAME COMMISSION
ON
NOVEMBER 12, 1986

INTRODUCTION

The Department of Fish, Wildlife and Parks was directed by the legislature under HB 265 (Chapter 556, Laws of 1985) to adopt rules pertaining to the management of recreational use of rivers and streams. A process was established by which persons may petition the Fish and Game Commission to restrict public recreational use of certain waterways (1) to protect against impacts of recreational use under rule IV and (2) to limit recreational use of streams to their actual capacity under rule VI. This process became effective July 12, 1985.

Upon receipt of a petition the Department of Fish, Wildlife and Parks issues a public notice in four major Montana daily papers and also in the local daily paper in the area involved in the petition to solicit public comment over at least a 30 day period. The notice is also mailed directly to those who have expressed interest in the process, and a news release is issued.

The Department of Fish, Wildlife and Parks has 45 days to investigate the petition and report findings and recommendations to the commission, unless an extension is requested by the department and granted by the commission. The commission then has 30 days to issue a decision granting, denying or granting with modifications the petitioned relief.

Background

On July 22, 1985 William Dana, Jr. filed a PETITION REGARDING THE RESTRICTIONS OF NELSON SPRING CREEK BASED UPON LIMITATIONS IN ITS CAPACITY FOR RECREATIONAL USE. The Petition requests that Nelson Spring Creek in Park County be closed to recreational use without permission of the owners. Because the petitions also alleged damages the department requested Mr. Dana to file a PETITION TO PROTECT AGAINST THE IMPACTS OF RECREATIONAL USE. Both PETITIONS are addressed in this report.

Specific allegations include:

"The creek is incapable of supporting unlimited wading in its bed because this would inevitably cause severe damage to its fragile ecosystem including its irreplaceable role as a spawning ground for Yellowstone River trout."

"Unlimited wading in Nelson Spring Creek would create a strong, though with current data unquantifiable, risk of severely degrading the creek as a spawning area and if that degradation occurs there will be degradation of the Yellowstone fishery for miles up and downstream from the mouth of the creek."

On August 5, 1985 Edwin S. Nelson filed a PETITION REGARDING THE RESTRICTION OF NELSON SPRING CREEK BASED UPON LIMITATIONS IN ITS CAPACITY FOR RECREATIONAL USE. The Petition requests that Nelson Spring Creek in Park County be closed to recreational use without permission of the owners. Because the petition also alleged damages the department requested Mr. Nelson to file a PETITION TO PROTECT AGAINST THE IMPACTS OF RECREATIONAL USE. Both PETITIONS are addressed in this report.

Specific allegations include:

- 1) "Public use (unrestricted) will damage banks and land."
- 2) "Public use will damage underlying water body."
- 3) "Anticipated use presents a clear and immediate threat to the whole stream and to our hatchery operation."

Department representatives Jerry Wells, Pat Graham and Chris Clancy investigated the allegations contained in these petitions. The department submitted reports based on these investigations to the Montana Fish and Game Commission on September 4, 1985. Copies of these reports are on file with the department. The commission conditionally extended the petition on September 28, 1985 for 14 months and directed the department to conduct studies:

- a - To ascertain the amount and types of recreational use on Nelson Spring Creek as it flows through the Dana property in the next year.
- b - To determine the distribution and timing of spawning and quantify the effect of wading on survival of cutthroat, brown, and rainbow trout eggs. This would be done in laboratory and field tests.
- c - To evaluate the sensitivity of spring creeks to damage by evaluating spring creeks under a variety of use patterns.

- d - To conduct studies on the "social" carrying capacity of spring creeks. If restrictions are needed efficient and equitable methods of restricting use would be evaluated.

During the period of study, the Petitioner could again request restrictive regulations if anticipated or present use presented a clear and immediate threat to items described under rule IV or the department could recommend action based on the data being gathered during the study period.

Nelson

In October, 1986 the Nelsons decided to withdraw their petition primarily because the increased public use they had anticipated had not occurred. They have the right to repetition the Commission in the future if they believe conditions warrant. The Nelsons had observed only two fishermen fishing in Nelson Spring Creek without permission during the summer of 1985. These fishermen had trespassed across private property. They have not, to the best of our knowledge, experienced any unauthorized use since the commission action in September 1985. The remainder of the report will only refer to the Dana's lower section on Nelson Spring Creek except where additional information serves to clarify the issues raised by the Danas.

AMOUNT AND TYPE OF USE

Dana

Extensive efforts were made to quantify use of NSC on the Dana property. Fishermen who gained access across the Dana property by permission were asked to register prior to fishing. When possible those fishermen were asked to not wade in sections 3 and 4 because of concern for protection of trout redds. The register was located in a barn that anglers had to pass by to get to NSC and it is believed that nearly all of the authorized use on the Dana property is reflected in the register.

With the permission and cooperation of the Dana family, the Department installed five 8mm movie cameras programmed to take single pictures at time intervals from five different vantage points. These cameras were installed in early March, 1986 and removed September 4, 1986.

Camera A was located on the property boundary between the Dana's and Nelson's. This camera covered the water downstream to the Dana bridge and took photographs every 5 minutes during daylight hours.

Camera B was located just upstream from Dana bridge and covered the area from the bridge downstream to a cable across NSC with a no trespassing sign attached. This camera also took photographs every 5 minutes during daylight hours.

Camera C was located on a post near the cable across the stream and covered the area downstream approximately 80 yards. This camera also took photographs every 5 minutes during daylight hours.

Camera D was located in a tree on the east bank of the Yellowstone River near the mouth of NSC. This camera covered the boat landing site at the mouth of NSC and took photographs every 10 minutes during daylight hours.

Camera E was also located in a tree on the east bank of the Yellowstone River and covered the Yellowstone River in a downstream direction from the mouth of NSC. This camera took photographs every 2½ minutes during hours of daylight.

Dana Register - People registering made 299 fishing trips (Table 1) to NSC on the Dana property from March 9, 1986 through August 30, 1986. Over 80 percent of this use occurred between June 29 and August 30, 1986. The Dana family accounted for approximately 40 percent of the use, Montana residents accounted for another 40 percent of the use, and non-resident anglers accounted for the remaining 20 percent.

Cameras - The primary objective of the cameras was to document wading use of NSC by anglers between the Dana bridge and the downstream portion of the Dana property. Other objectives included attempting to document how many boats landed at the mouth of NSC while floating the Yellowstone River and attempting to quantify how many of these anglers actually waded up NSC beyond the Dana property line.

Time and personnel constraints made it possible to analyze only cameras B, C and D for this report. Complete coverage from February 28 to September 1, 1986 was achieved for camera B and nearly complete coverage for camera C. Camera D's film was overexposed during the mid-day period from June 12 through September 4, 1986.

The resolution of the film made it impossible to distinguish individual fishermen. Unless fishermen wore bright colored clothing, it proved to be very difficult to identify individuals from frame to frame as they moved up or down the stream. Following individual fishermen from the camera C field of view into the field of view of camera B was generally not possible.

Coverage of the boat landing area at the mouth of NSC was nearly complete from March 14 through June 12 except the film was overexposed during mid-day for most days from June 12 through September 4. Therefore, the number of boats landing is underestimated.

During the camera coverage period, 72 boats appeared on the film of the landing site at the mouth of NSC. Based solely on the film analysis, two boats landed in March, one in April, 11 in May, none in June, 30 in July and 28 in August. No boats were identified in the film in the 42 day period between May 21 and July 2. This period corresponds roughly to high and turbid water in the Yellowstone River associated with runoff. The July and August period featured the greatest number of landings at the mouth of NSC. The July/August period is also the heaviest use period for float fishing on the Yellowstone River.

Both anglers who had walked upstream from the boat landing and those with permission to cross Dana's property were observed in the reach of stream eighty yards below the No Trespassing sign. One hundred and fifty nine (159) anglers were observed on the film during the study period. Horses and cattle were also occasionally observed in and adjacent to NSC. It was not possible to document

Table 1. Numbers of anglers observed using photographic equipment at sites along Nelson Spring Creek from March 9 through August 30, 1986.

Week	<u>Dana Register</u> # Anglers	<u>Camera D</u> # Boats Landing	<u>Camera C</u> # Anglers	<u>Camera B</u> # Wading Anglers ^{/1}
03/09 - 03/15	2	1	5	0
03/16 - 03/22	0	0	9	4
03/23 - 03/29	4	1	6	0
03/30 - 04/05	3	no data	3	1
04/06 - 04/12	2	0	1	0
04/13 - 04/19	1	0	0	0
04/20 - 04/26	1	0	3	0
04/27 - 05/03	9	4	8	0
05/04 - 05/10	5	3	11	1
05/11 - 05/17	8	2	13	1
05/18 - 05/24	6	3	7	1
05/25 - 05/31	4	0	4	0
06/01 - 06/07	10	0	0	0
06/08 - 06/14	12	0	2	1
06/15 - 06/21	7	0	3	3
06/22 - 06/28	7	0	7	7
06/29 - 07/05	20	3	3	2
07/06 - 07/12	20	3	4	0
07/13 - 07/19	26	5	12	3
07/20 - 07/26	44	11	15	6
07/27 - 08/02	22	11	8	2
08/03 - 08/09	13	11	14	2
08/10 - 08/16	28	6	5	0
08/17 - 08/23	31	3	6	0
08/24 - 08/30	14	5	-	1
Total	299	72	149	35

^{/1}-An additional 20 anglers fished from both the bank and shore and 16 fished exclusively from the bank. Only these anglers wading exclusively were included in this table because the others were presumed to either have permission or were illegally trespassing.

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how many anglers waded upstream beyond the "no trespassing" cable and sign from this camera.

In the stream section from the Dana bridge downstream to the "No Trespassing" sign 71 anglers were observed by camera from February 28 through August 30. Of these anglers, 16 fished exclusively from the bank, 20 fished both from the bank and while wading and 35 fished exclusively while wading. The majority of the angling pressure occurred from June 1 through August 30, 1986. It was not possible in most cases to specifically identify individuals and therefore, not possible to determine how many of these fishermen had waded upstream from the Yellowstone River.

Table One combines data from the Dana register and cameras in an attempt to identify relationships between the number of anglers with permission, number of boats landing at the mouth of NSC, number of anglers below the no trespassing sign (camera C) and the number of anglers wading in the section immediately above the no trespassing sign (camera B). The table includes data from March 9 through August 30, 1986.

The only way the angling public can enter NSC without trespassing is by wading upstream from the Yellowstone River. However, nearly half (15) of the fishermen observed wading in the section upstream from the no trespassing sign were during periods when no boats landed at the mouth. It could not be determined how many of the remaining 20 fishermen had permission. During the period of study, a minimum of 72 boats landed at the mouth of NSC and would have had an average of 2.5 people per boat or about 180 potential fishermen. It is also apparent that anglers photographed downstream from the no trespassing sign represent both anglers with permission from the Dana's and those gaining access from the river.

The major concentration of spawning cutthroat trout occurs in the stream section between the bridge and the no trespassing sign (sections 3 and 4). Of the minimum potential of 454 anglers (both registered and floaters) who might have waded in this section of NSC, only 35 actually did so. Given the potential for extensive wading use of this section of NSC, it is clear that both the Dana's instructions to registered anglers and their "no trespassing" sign and cable limited wading in this portion of NSC.

SPAWNING AND EFFECTS OF WADING

This portion of the study was conducted by Bruce Roberts of the Montana Cooperative Fisheries Research Unit located at Montana State University. Chris Clancy and other FWP employees assisted with the field work and Dr. Robert White, leader of the co-op fish unit, supervised the research. Roberts and White have submitted a report summarizing their findings entitled Potential Influence of Recreational Use on Nelson Spring Creek. A summary of their report follows.

Distribution and Timing of Spawning

Methods - Thirteen spawning sections were identified in NSC (Figure 1). Weekly redd counts were made by walking the entire creek from 1 November 1985 to 11 August 1986 with a few exceptions: Section 13 was not identified until 19 December 1986; Sections 1 and 2 were flooded by the Yellowstone River from May 30 to July 6, 1986 and sections 11 and 12 were approximately 95 percent

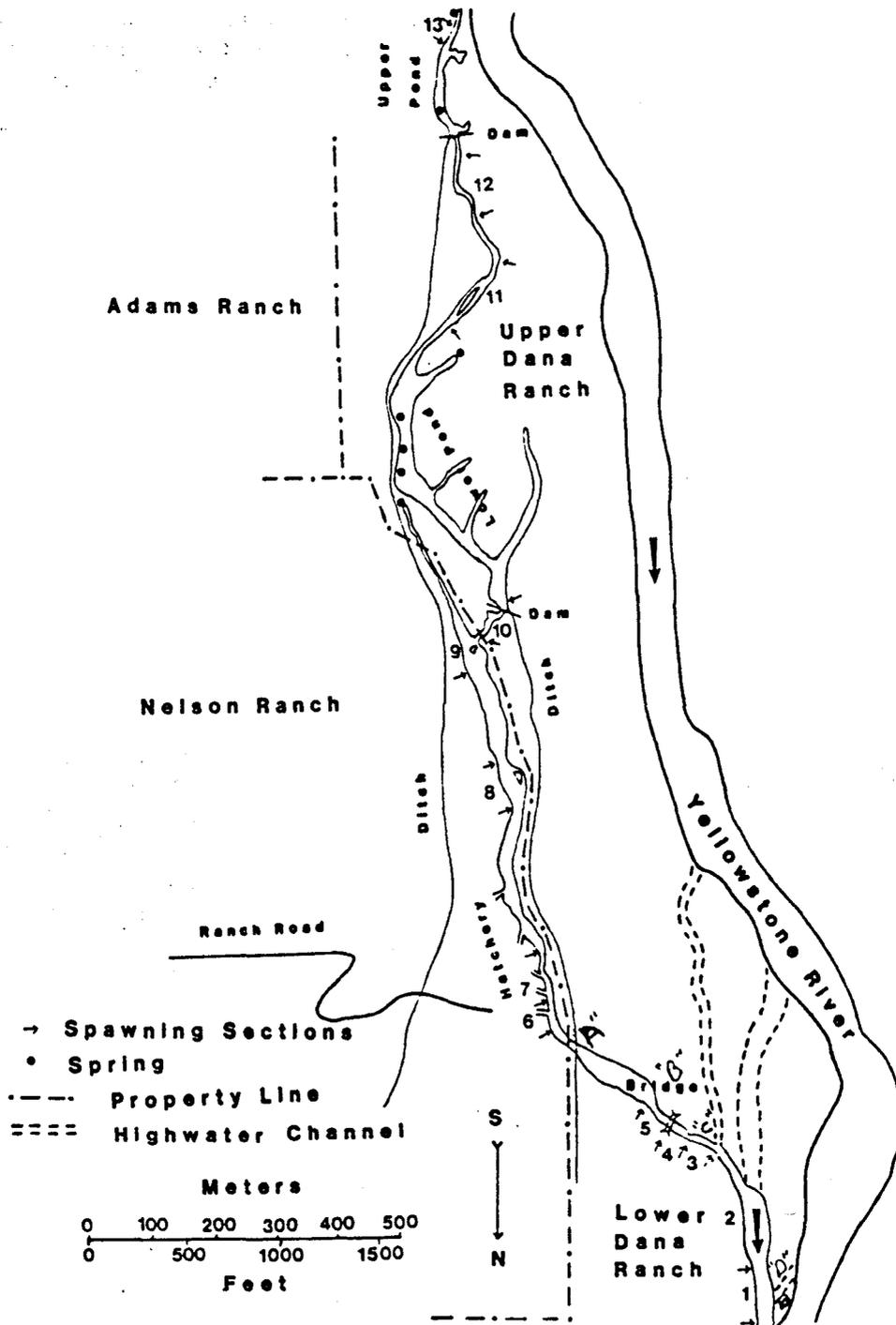


Figure 1. Nelson Spring Creek study area showing spawning sections, major springs and property lines.

dewatered from 6 June 1986 to the end of the irrigation season. Outflow and inflow ditches to the hatchery ponds and raceways on the Nelson ranch were not censused. Accurate redd counts were difficult in section 10 (spillway pools) due to deep water. Redd locations were recorded on maps weekly to enable us to determine area of spawning riffles and to estimate the proportion of NSC that is being used for spawning. Orange rocks were placed on each redd to prevent multiple counting. In times of spawning overlap between species, an attempt was made to distinguish when the last fish of one species and the first of the second species was spawning. Stream depths were also monitored with the use of a staff gage mounted on the bridge between sections 4 and 5.

From March 1984 to July 1986, trapping and electrofishing surveys were conducted by the MDFWP near the mouth of NSC to assess the relative size of the spawning run of brown, rainbow and cutthroat trout and to search for fish which had been tagged in the Yellowstone River. A 500 foot (152 m) section of the creek near the mouth was electrofished weekly or trapped daily. A box trap with wire leads was placed near the mouth to capture upstream brown and rainbow trout migrants. The trap was installed at the lower end of section 5 (just above the bridge) to monitor cutthroat trout from the Yellowstone River during the June and July high water period. Trapped fish were anesthetized, counted, measured, weighed, sexed and tagged with a red Floy-T tag prior to being returned to the stream. Spawning condition of each female trout was also noted.

Results - Weekly redd counts were started the day (1 November 1985) first spawning activity was observed in section 4. Some brown trout redds constructed before 1 November 1985 in the other 12 sections may have been missed (Table 2). Seventy-five percent of the spawning took place in sections 4, 9, 11 and 12. Sections 3, 4 and 5 (the sections identified by the Dana's as potentially being adversely impacted by fishermen) contributed 2.5%(13), 20.5%(104) and 2.5%(13) of the redds in the entire creek, respectively, while sections 11 and 12 contributed 10.9%(55) and 29.1%(147), respectively (Table 2). Forty-eight of the redds located in sections 3, 4 and 5 were thought to be made by brown trout, 55 by rainbow trout and 27 by cutthroat trout. The most productive spawning section on the Nelson Ranch (section 9) contributed 12.5%(64) of the redds in the entire creek and 23%(9) of the cutthroat trout redds.

Spawning areas made up 4.5% of the creeks surface area, excluding the area of two headwater ponds. Sections 11 and 12 contained the most spawning area for rainbow and brown trout. Sections 11 and 12 were unavailable for cutthroat trout to spawn in because of reduced flow resulting from an irrigation diversion. Brown trout were observed spawning from 1 November 1985 to 16 January 1986; rainbow trout from 19 December 1985 to 23 May 1986 and cutthroat trout from 13 June 1986 to 28 July 1986. Rainbow and brown trout spawning appeared not to overlap in sections 1-5, whereas in the upper 8 sections spawning overlapped (Table 2). There were 3 weeks between the time rainbow trout finished spawning and cutthroat trout began. Brown and rainbow trout used the entire creek for spawning, whereas cutthroat trout spawning was concentrated in sections 3, 4 and 9 (Table 2).

The rainbow trout run peaked between 3 March and 10 March, (Table 3). Electrofishing data from the last 3 years indicate that most Yellowstone River cutthroat trout spawners migrate into NSC between mid-June and mid-July. During 1986 spawning continued until 28 July with peak spawning between 21 June and 21

Table 2. Weekly redd counts in Nelson Spring Creek, Montana from 1 November 1985 to 11 August 1986.

Month	Day	SECTIONS													Total
		1	2	3	4	5	6	7	8	9	10	11	12	13	
November	1	0	3	2	12	1	1	3	1	2	0	4	9	-	38
	11	0	3	0	9	0	1	4	1	0	1	10	28	-	57
	18	1	3	3	6	3	0	3	0	1	0	4	10	-	34
	25	0	1	0	2	1	1	0	1	4	0	7	9	-	26
December	3	0	1	1	3	0	2	0	0	6	0	6	14	-	33
	11	0	0	0	3	0	1	0	1	1	0	6	8	-	20
	19	0	1	0	1	0	1	1	2	6	1	2	7*	2	24
	30	0	1	0	0	1	2	0	2	6	0	2	6	1	21
January	7	0	0	0	0	0	1	2	0	2	0	5	5	1	16
	16	0	0	0	3	0	1	0	0	4	0	1*	5+	0	14
	23	0	0	0	4	0	0	0	0	2	0	1*	4*	1	12
	28	4*	0	0	1	0	0	0	0	2	0	0	2	0	9
February	7	5	0	1	6	0	0	0	1	1	0	0	5	0	19
	15	2	0	0	2	0	0	0	0	0	0	0	0	1	5
	21	8	0	0	2	0	1	0	0	1	0	0	3	0	15
	27	4	0	0	6	0	0	2	0	5	1	0	4	0	22
March	7	2	0	0	4	0	1	1	0	6	0	0	5	0	19
	13	3	1	0	5	3	2	1	0	2	0	1	6	0	24
	21	2	1	0	2	0	0	0	0	2	0	1	4	0	12
	27	1	0	0	2	0	0	0	0	1	0	0	2	0	6
April	4	1	4	0	4	0	1	0	0	0	0	1	3	0	14
	10	1	1	0	6	0	1	0	0	0	0	3	4	0	16
	18	0	0	0	2	0	0	0	0	1	0	1	1	0	5
	25	0	0	0	0	0	1	0	0	0	0	0	2	0	3
May	2	0	0	0	0	0	0	0	0	0	0	0	1	0	1
	9	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	23	0	0	0	2	0	0	0	0	0	0	0	0	0	2
	30	-	-	0	0	0	0	0	0	0	0	0	0	0	0
June	6	-	-	0	0	0	0	0	0	0	0	-	-	-	0
	13	-	-	1	1	0	0	0	0	0	0	-	-	-	2
	21	-	-	2	3	1	0	0	0	2	0	-	-	-	8
	30	-	-	2	3	3	0	1	0	2	0	-	-	-	11
July	6	-	0	0	4	0	0	0	0	0	0	-	-	-	4
	14	1	1	0	3	0	0	0	0	1	0	-	-	-	6
	21	0	0	1	2	0	0	0	0	2	0	-	-	-	5
	28	0	0	0	1	0	0	0	0	2	0	0	0	0	3
August	4	0	0	0	0	0	0	0	0	0	0	-	-	-	0
	11	0	0	0	0	0	0	0	0	0	0	-	-	-	0
TOTAL		35	21	13	104	13	18	18	9	64	3	55	147	6	506

* Rainbow trout redd

+ Brown trout redd

- Not checked

Table 3. Trapping and electrofishing data (collected near the mouth of Nelson Spring Creek) from fall 1984 to summer 1986 on brown, rainbow and cutthroat trout migrating from the Yellowstone River (Clancy 1984, 1985 and pers. comm.).

Species	Year	Method	Dates	Males	Females	Temp. (°F) (Max-Min.)	Spawning condition of females
LL	1984	ELFH	10/16	-	-	-	green
			10/29	-	-	52-46	green
			11/7	17	12	52-44	some ripe
			11/13	18	11	-	some ripe
	1986	TRAP	10/11-22	0	0	-	-
			10/23-30	1	1	-	green
11/1-10			7	3	-	green	
RB	1984	TRAP	3/20-30	19	10	56-44	50% ripe
	1986	TRAP	1/29-31	18	4	47-?	most green
			2/1-10	13	4	51-42	most green
			2/11-20	0	4	50-40	green
			2/21-28	17	14	53-45	33% ripe
			3/1-10	26	11	-	33% ripe
			3/11-20	12	14	-	50% ripe
			3/21-30	1	6	-	ripe-spent
			4/1-	-	-	-	spent
			CT	1984	ELFH	6/25	2
7/2	3	0				-	-
7/9	5	6				-	ripe
7/16	3	7				-	spent
7/23	3	2				-	spent
1985	ELFH	6/3		1	0	-	-
		6/12		2	2	-	green
		6/19		0	1	-	ripe
		6/27		9	6	-	ripe
		7/5		9	5	-	ripe
		7/9		5	3	-	spent
		7/17		3	3	-	spent
1986	ELFH	6/17		1	0	-	-
		6/25		1	4	-	most green
		6/30		4	2	-	spent
		7/7		1	4	-	ripe
		7/14		1	1	-	spent
		1986		TRAP	6/11-20	2	1
6/21-30	15				6	61-50	green
7/1-4	8				7	63-50	ripe

RB = Rainbow trout
ELFH = electrofishing

CT = Cutthroat trout
TRAP = trapping

LL = Brown trout

July. It appears that brown trout start running up NSC in early November to spawn which coincides with the peak of spawning in sections 1-5.

Nelson Spring Creek is a spawning area for cutthroat, rainbow and brown trout. However, it is most important to the Yellowstone cutthroat trout. Yellowstone River cutthroat trout in the Livingston area appear to be exclusively tributary spawners, while rainbow trout are primarily tributary spawners. Nelson Spring Creek is the best cutthroat trout spawning stream known to occur in the Livingston area (from NSC to the mouth of the Shields River). Several channels of Armstrong Spring Creek are used by cutthroat trout for spawning. We believe that one-third of the mature cutthroat trout in the Yellowstone River from NSC to the Shields River spawn in these channels compared to two-thirds in NSC.

The Effect of Wading on Egg Survival

Methods - Artificial stream channels were constructed at the Bozeman Fish Technology Center. These channels were filled with gravels simulating gravels from known spawning areas in NSC. Spring water of approximately 9°C was run through the channels. Fertilized trout eggs were buried in the substrate and different chambers in the channels received different wading treatments. Wading treatments were administered by a 165 pound person. Controls were established for each wading treatment.

Treatments included:

- Treatment 1: Wading between fertilization and eye-up.
- Treatment 2: Wading between eye-up and hatching
- Treatment 3: Wading between fertilization and hatching.
- Treatment 4: Wading between hatching and emergence.
- Treatment 5: Wading between eye-up and emergence.
- Treatment 6: Wading between fertilization and emergence.

Results - Survival of brown, rainbow and cutthroat trout embryos was reduced in all wading treatments compared to controls. The differences were significant (P 0.05) for rainbow and cutthroat but too few brown trout samples were available for statistical evaluation.

Embryo mortality resulting from human wading was highest for eyed eggs just prior to hatching and for pre-emergent fry. Wading daily throughout the incubation period (Treatment 6) resulted in a total mortality of 96.3 percent and 82.8 percent for rainbow and cutthroat trout embryos respectively, compared to controls. Wading every third day resulted a total mortality of 53.2 percent for brown trout embryos compared to controls.

Potential Impact to Yellowstone River Trout

Utilizing photographic data of fishermen, Roberts and White quantified wading events on trout redds located in section 3 and 4 downstream from the Dana's bridge. The majority of spawning by Yellowstone River trout migrating into NSC occurred in this reach. Using several assumptions, they made projections regarding the impact of current recreational wading use on the Yellowstone River trout species that spawn in NSC.

Roberts and White concluded that the Yellowstone River brown trout population was not impacted by mortality associated with wading on brown trout redds in NSC. This conclusion was based on the fact that brown trout in the Yellowstone River are mostly main stem spawners that prefer river side channels over tributary streams. They also concluded that the Yellowstone River rainbow trout population in the vicinity of NSC was not impacted by current levels of recreational wading in NSC. Rainbow trout in the Yellowstone River are primarily tributary spawners. In the Livingston area, both NSC and Armstrong Spring Creek are utilized for spawning purposes. The Armstrong Spring Creek channels are presently used considerably more than NSC. The Yellowstone River in the vicinity of NSC supports the greatest number of adult rainbow trout in the entire river which suggests that recruitment is not limiting this population.

Roberts and White did conclude that current levels of recreational wading in NSC may be limiting numbers of Yellowstone River cutthroat trout in the vicinity of NSC. The cutthroat population in this reach of the river is the lowest of the entire river upstream from Springdale. Spawning for this population is limited almost exclusively to NSC. Roberts and White concluded that while fishermen harvest is probably of greater concern in limiting this population, wading may also be reducing recruitment to the river population. Recreational use by registered anglers and Yellowstone River float fisherman is also largest during the cutthroat spawning period.

SENSITIVITY OF SPRING CREEKS TO DAMAGE

Spring creeks are particularly susceptible to damage because of the low gradient and constant flows. After looking at several spring creeks in southwestern Montana, we concluded that none were similar enough to Nelson Spring Creek to offer valid comparisons either because of their smaller size, lower fishermen use or the existence of significant damage from non-recreational use. A recent inventory of the spring creeks of Montana concluded that very few of them have not been severely impacted or destroyed by agricultural practices (Decker-Hess, 1985)

Nelson Spring Creek presently receives relatively high levels of recreational use compared to most streams. This use is dispersed along the stream and does not appear to be causing noticeable damage. Cattle and horses were observed along the creek seasonally and had caused damage. On the Dana property riparian vegetation was damaged along a portion of the west bank.

No conclusions could be reached about what levels of recreational use might begin to cause damage to the stream. As noted above, Nelson Spring Creek had a much higher amount of use per mile on an annual basis than most streams in the state. The section of stream below the Dana's No Trespassing sign presently receives the large majority of use by those Yellowstone River floaters who stop at the mouth. This section of stream is influenced by high spring flows in the river and is less susceptible to damage because of the channel configuration.

SOCIAL CARRYING CAPACITY

The petition to limit access by William Dana stated that a proper definition of the recreational carrying capacity of a stream should be based on both its biological and psychological carrying capacity. The petition defined

psychological capacity as the number of fishermen who can fish a body of water at the same time without reducing the enjoyment of the experience to an unacceptable level.

The Fish and Game Commission directed the department to conduct studies on the "social" carrying capacity of Nelson Spring Creek.

A fundamental problem is defining social carrying capacity. Most definitions relate to "the upper limit of the number of people and the length of their use periods that a recreation site can absorb without losing its usability for the same kind of recreation use over time.

This definition fails to account for numerous variables such as type of use, seasonality of use, who the users are (residence, attitude towards the resource, desired recreation experience), and where the recreation use occurs.

The definition implies the landscape has an inherent capacity to absorb recreational use. But without management objectives there is no inherent capacity other than the number of people who can physically "fit" in the particular resource setting. A more appropriate definition of carrying capacity developed by researchers after extensive review is "a management system directed toward maintenance or restoration of ecological and social conditions that are acceptable and appropriate given management objectives of the area."

Establishing use objectives requires understanding peoples' reasons for fishing, how they feel about the resource, and what type of experience they are anticipating. Surveying recreation visitors is therefore an important component of determining social carrying capacity.

Past research gives us an idea of what to expect. Hobson Bryan (1979) collected survey and observational data on anglers in Montana and adjacent states to develop his typology of anglers. He characterized anglers along a spectrum based on fishing styles, from the occasional angler, to whom fishing is not that important, to the technique-setting, specialist anglers whose lives may center around fishing.

Bryan said that spring creek anglers were good examples of highly specialized anglers. They typically fished many times a year and have fished much of their lives. They were likely to own many rods and invest much time and money in fishing-related activities. They took vacations specifically to fish unique waters, sharing fishing experiences with other friends who were also highly committed anglers.

Spring creek anglers therefore had quite specific sets of expectations of what they wanted to get out of the recreation experience. They also had specific expectations about the social and physical resource conditions that were necessary to provide the experience desired. In other words, they were more resource-dependent than other, less specialized anglers who could fish a wider range of waters and be satisfied. Catching lots of trout or trophies was not as important to these anglers as catching wily trout under challenging conditions--a real test of fishing skills.

A preference survey of users of Nelson Spring Creek was conducted during the late summer of 1986. In addition surveys were conducted of fishermen floating the Yellowstone River in the reach where Nelson Spring Creek enters the river and also on Poindexter Slough, a spring creek with public access near the town of Dillon.

Results of the survey were summarized in a separate report to the department by Stewart Allen and John Duffield, University of Montana (Table 4). Major findings were:

- 1) Fishermen who come to fish Nelson Spring Creek place great value on being outdoors, the opportunity to catch wild trout, viewing scenery, experiencing solitude and relaxing.
- 2) Anglers fishing along the Dana and Nelson properties said that limited angler access contributed more to their satisfaction than did catch-and-release regulations or the trout populations.
- 3) About one-third of the anglers said there was no stream in Montana that was comparable to NSC and most of those that thought there was a similar stream named Armstrongs Spring Creek which flows into the Yellowstone River from the opposite bank in the same reach of river. (Armstrong Spring Creek is controlled access, fee fishing).
- 4) There were many similarities between Yellowstone River float fishermen and Nelson Spring Creek fishermen. They prefer to use flies, valued solitude and valued the opportunity to catch wild trout. Many of those surveyed had fished both waters.
- 5) Average number of fishermen observed in addition to ones own party was 2.6 on Nelson's and 1.65 on Dana's. About 20 percent of Nelson's anglers and 40 percent of Dana's said they saw no other anglers. Other statistics are presented in Table 4.
- 6) Sixty seven percent of fishermen said the other fishermen they saw had no effect on their fishing experience.
- 7) Anglers on Nelson's said an average of five people could fish at the same time (median = 6) and anglers on Dana's stated an average of four people could fish at the same time (median = 4). (The Dana's preferred limit on number of users was exceeded for one-third of the fishermen based solely on party size information.)
- 8) Fishermen on Nelson Spring Creek valued fishing-related aspects of the experience more highly than did Yellowstone River anglers. Fishing was central to the Yellowstone River anglers experience but being outdoors and being with family were also very important.
- 9) Yellowstone River anglers saw an average of 18 people on their trip, 22 percent saw more anglers than expected and 69 percent reported that the other anglers they saw had no affect on their fishing trip.
- 10) Four of the approximately 38 float fishermen (10 percent) questioned during the August survey period that would have passed Nelson Spring Creek said

Table 4. Results from a preference survey of fishermen on Nelson Spring Creek and fishermen floating the adjacent reach of the Yellowstone River.

	<u>Nelson</u>	<u>Dana</u>	<u>Yellowstone</u>
Percent Resident	10%	34%	69%
Experience (average days fishing per year)	30	30	25
Years fishing	30	30	29
Fly fishermen	94	93	68
Repeat fishermen	65	80	*
Average years fishing NSC	8	9	*
Favorite place to fish	49	49	*
<hr/>			
On most recent trip:			
Average hours fished	7.3	5.6	5
Average hours spent wading	6.5	4.3	*
Fishing success (fish/trip) (split)	8	9	5
Average number of fishermen in party (split)	2.7	3.3	1.6

* - Question not asked

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they stopped to fish. Two of these probably walked up the stream past the No Trespassing sign.

Management Model

Projections of carrying capacity were also made using economic models conducted as part of the preference survey. This confirmed that reducing congestion (limits on use) was a highly valued quality of the Nelson Spring Creek fishery, particularly in comparison to increasing total catch. Based on a model to maximize net social benefits, current use limits approximate optimal social carrying capacity. In other words, on balance the total value to fishermen at the present use level is larger than it would be with more or fewer people. This analysis did not factor in the costs of alternative management systems that would be needed to regulate use.

Amount of Use

Although use of Nelson Spring Creek is generally restricted, it is high on an angler per mile basis compared to other streams. From the mouth to the lower boundary between the Dana's and Nelson's, over 454 anglers fished on 0.4 mile which equates to 1,100 angler days per mile of fishing use annually. By comparison use on the upper Madison River is between 1,100 and 1,500 angler days per mile of mostly floating use.

Impacts of Use on Fishing Experience

This study could not assess the impact of existing fisherman use on fishing success. The Danas state that anglers who enter the stream from the Yellowstone River will not be allowed to trespass above the high water mark. In a spring creek with relatively stable flows year around this means anglers would have to wade nearly all the time. Even anglers with permission said they wade 80-85 percent of the time. However, they can leave the stream to move around other fishermen. The movement of fishermen wading upstream from the Yellowstone would likely disturb fish and make the already challenging opportunity to catch fish more difficult, reducing catch rates and intruding on other anglers.

The average use level preferred by existing users of Nelson Spring Creek was the same as the use level recommended by the Dana's. However, 39% of the users would prefer fewer than 4 anglers and seven anglers was the most any respondent felt could use this section of stream at one time. Existing users would be expected to support current management; other potential users might favor other limits. There were, however, many similarities between the Nelson Spring Creek and Yellowstone River fishermen. If Yellowstone River fishermen sought similar experiences to the existing users they may conclude that similar levels of use are desirable. However, they would have no way of knowing how many fishermen are using the stream or how those fishermen are already distributed along the stream when they stop at the mouth. Their pursuit of this experience may detract from those already fishing or, conversely, their own experiences may be diminished as other anglers subsequently move past them in the stream.

Probability of Increased Use

There are no data to accurately predict how use on the Yellowstone River will change or how many of the float fishermen will choose to ignore the No Trespassing sign and walk up the stream. Mr. Dana said that more fishermen were observed fishing the lower end of the spring creek (below the No Trespassing sign) than in 1985. At present most of the fishermen are respecting the No Trespassing sign. Use is highest during July and August.

The Department also conducted legal research on the Commission's authority to regulate recreational use based on "Social Carrying Capacity." A memo from Stan Bradshaw, Attorney, to Ron Marcoux, Associate Director is attached.

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**Montana Department
of
Fish, Wildlife & Parks**



MEMORANDUM

TO: Ron Marcoux
FROM: Stan Bradshaw
RE: Social Carrying Capacity of Nelson Spring Creek
DATE: November 5, 1986

This is in response to your request for a memorandum discussing the Department's authority to regulate the public's use of waters, specifically Nelson Spring Creek, based upon the "social carrying capacity" of that water.

The Commission has the authority to set the fishing rules which the Department shall enforce. Section 87-1-301(2). The Commission also has the authority to regulate recreational uses on waters of the state which are open to the public. Section 87-1-303, MCA. The authorizations in Section 87-1-301 and 303, however, have specific criteria which confine the Commission's discretion. Section 87-1-301(1) authorizes the Commission to set policies for the protection, preservation, and propagation of fish. Thus, in establishing fishing regulations, the regulations have to be focused around the protection, preservation and propagation of the fishery. Our regulations currently are motivated by some aspect of either protection, preservation, or propagation. The regulating of fishing by the establishment of a "social carrying capacity" of anglers on a stream does not concern itself with the protection, preservation, and propagation of a fishery.

Section 87-1-303(2) requires that any regulation of the recreational use of public waters within the state shall be adopted in the interest of public health, public safety, and the protection of property. Again, the limitation of use based upon "social carrying capacity" does not concern itself with public health, public safety, or the protection of property.

The two sections cited above are the sections which authorize Commission regulation of public use of the state's waterways and the fishery resource. In each case, the regulation describes the boundaries of the Commission's discretion. As a matter of law,

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November 5, 1986
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an agency can only do that which the Legislature authorizes. For the agency to control public use based upon "social carrying capacity", the Department would exceed the authority delegated to it by the Legislature.

Even if we assume, for the sake of argument, that the Legislature has authorized the Department to pass regulations based upon "social carrying capacity", any such authorization would probably be legally infirm. As the Department's studies indicate, "social carrying capacity" is a highly subjective term not readily defined by reference to any objective criteria. If someone could suggest that the Legislature has, somewhere in the statutes, authorized the regulation of public use based upon "social carrying capacity", it is very likely that such authorization could be challenged as an unlawful delegation of legislative authority. When the Legislature delegates rulemaking authority, it must do so by defining the specific limits of the agency's authority. Here, even if one can glean some authorization, it would have to be without the limitations described in Sections 87-1-301 and 87-1-303. Therefore, a court would likely find any such delegation to be an unlawful delegation of authority to the agency.

In conclusion, any attempt by the Department to regulate based upon "social carrying capacity" either exceeds the Department's authority, or if such authority exists, it would constitute an unlawful delegation of authority to the Department by the Legislature.

dm

ALTERNATIVES

Biological

- 1) Prohibit wading in sections three, four and nine during the cutthroat spawning and incubation period, June 15 through September 15. Provide adequate signs to the landowner which they will post and maintain.
 - Wading by fishermen causes mortality to incubating cutthroat eggs which contributes to the low number of cutthroat in this section of the Yellowstone River.
 - Largest amount of seasonal use by floaters on the Yellowstone River occurs during the cutthroat spawning/incubation period which increases the prospect of additional use and damage to eggs in the future.
 - The department would continue to monitor the cutthroat population in the Yellowstone River.
- 2) The department would evaluate the alternative restrictive regulations on harvest of Yellowstone cutthroat trout downstream from Pine Creek Bridge through the normal fishing regulation setting process.
 - The low numbers of cutthroat trout are likely due, in part, to angler harvest. Cutthroat are notably susceptible to fishing. Special regulations were implemented upstream from Pine Creek bridge in 1984 to increase the number of adult cutthroat.
 - It is not likely that the management objective of increasing the number of cutthroat trout (>12 inches) from approximately 30 fish per mile to approximately 50 fish per mile can not be achieved solely by protecting spawning areas.
 - Increased numbers of cutthroat which may result from the potential restrictive regulations would increase the significance of the existing spawning areas, such as Nelson Spring Creek.
- 3) Do not restrict wading use during the cutthroat spawning season.
 - Although recreational use is and would likely continue to cause damage, it is not significant to the Yellowstone cutthroat population as a whole. However, it would likely impair the department's ability to increase or maintain cutthroat in the adjacent 15 miles of river.

- If not controlled, damage to the eggs by cattle or horses wading in the stream would reduce the benefits gained by restricting recreational use.

- The department would have to continue monitoring recreational use and its impacts on cutthroat spawning in Nelson Spring Creek.

Social

The department conducted a study to determine baseline information on levels of use and the preference of existing users. This study was expanded to study the issue of "social carrying capacity" which was raised by the petitioner. Subsequent legal research by the department concluded that the commission does not have the authority to limit recreational use on the basis of "social carrying capacity" alone.

The commission does have the ability to limit use based on public health, safety and the protection of property (Section 87-1-303(2)). Also, on Class II streams recreational use can be limited to the capability of the stream to support water-based recreational use such as the streams floatability, fishability and swimability. The issue of "social carrying capacity" is beyond these authorities. Therefore the department offers no recommendations in this section.

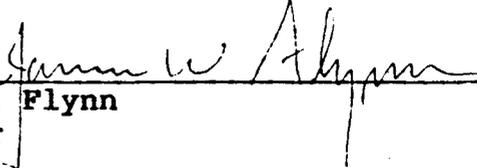
Recommendations:

The department recommends the commission adopt alternatives one and two.

Yellowstone cutthroat trout are a species of special concern, the population is presently below the management objectives and they spawn in a relatively few tributary streams including Nelson Spring Creek.

Field and lab studies indicate a high potential to cause mortality of eggs due to wading. Recreational floating use on the Yellowstone River is highest during the mid-June to mid-September cutthroat spawning and incubation period. The department previously restricted fishing to catch and release in Nelson Spring Creek to protect spawning cutthroat and also implemented more protective regulations upstream in the Yellowstone River. Additional restrictions will likely be necessary to meet the management objections and would be monitored in that light.

The department recommends the Commission adopt alternatives 1 and 2.


James W. Flynn
Director

Report Prepared by:

Patrick Graham, Fisheries Management, Helena
Jerry Wells, Fish Manager, Bozeman
Chris Clancy, Fisheries Biologist, Livingston

in cooperation with:

Dr. Robert White, Cooperative Fisheries Research Unit
Bruce Roberts, Montana State University
Dr. John Duffield, Economics and Recreation Departments, U of M
Dr. Stewart Allen, University of Montana

This study could not have been completed successfully without the cooperation of the adjacent landowners. The Dana's and Nelson's were very helpful and patient throughout the study period. We sincerely appreciate their cooperation.

S.B. 159
TESTIMONY OF STAN BRADSHAW,
MONTANA STATE COUNCIL OF TROUT UNLIMITED
FEBRUARY 11, 1987

Mr. Chairman, members of the committee, my name is Stan Bradshaw. I am here today on behalf of the Montana State Council of Trout Unlimited. Trout Unlimited has been involved in the legislative discussions on stream access over the past two sessions and has maintained a continuing interest in the issue. On a personal level, I have been involved in the litigation of all three of the stream access cases decided by the Supreme Court and have been involved in the legislative process on this issue over the past two sessions. Needless to say, our interest in this issue runs deep.

Trout Unlimited opposes S.B. 159 for two reasons. First, it directly violates the Montana Supreme Court's recognition of the public's right to make recreational use of the state's surface waters. Second, because it represents such a drastic reduction of the public right, it holds only the promise of continued conflict at a time when both sides, landowner and recreationist alike, more than ever need to find ways to work together in solving problems that confront them both.

The essence of the proponents' argument is that, because the landowner owns the bed and banks of nonnavigable streams, the public should be precluded from using the bed and banks of all but those streams that have been declared navigable. The practical effect of the amendment, however, is to cancel the public's right to make recreational use of most of the waters in the state. Senator Boylan was quite candid about that in an

interview with the Bozeman Chronicle in which he said, "It would take the little streams out of the (stream access law). They (anglers) could get in there with permission." (Attachment #1) This approach is not novel to this body or, for that matter, the Supreme Court. In considering S.B. 159, the committee should keep in mind the history of the proponents' argument on this issue.

In the two court cases which initiated the legislative debate over the last two sessions, Coalition v. Curran and Coalition v. Hildreth, the landowners in those respective cases argued that the public right of use should be confined to those rivers which were navigable under a federal test of commercial navigability. The Supreme Court emphatically rejected that argument in both cases. In Curran, the court held that under Article IX, section 3 of the 1972 Montana Constitution, any surface waters of the state which are capable of recreational use may be so used by the public without regard to streambed ownership up to the ordinary high water marks. In the Hildreth case, the court expressed itself even more clearly:

"We have not limited the recreational use of the State's waters by devising a specific test...

Under the 1972 Constitution, the only possible limitation of use can be the characteristics of the water themselves. Therefore no owner of property has the right to control the use of those waters as they flow through his property. The public has the right to use the waters and the bed and banks up to the ordinary high water mark..." [emphasis added]

The court simply recognized that the right to use of surface waters necessarily involves some right to use of the bed and banks; it limited the extent of that use to the strip between the ordinary high water marks.

Notwithstanding this clear statement of the public's right,

a number of opponents to H.B. 265 last session insisted on trying to amend out of the bill the public right to use the bed and bank and to confine the public's right of use to navigable rivers. Mr. Strope, lobbying for the opponents to H.B. 265, argued that the public had the right to use only the surface waters and not the bed and banks of those waters. (Attachment #2) Those arguments failed, primarily because of the Hildreth case.

After the bill passed, a number of landowners sued to have the bill declared unconstitutional in the case of Galt v. DFWP. The core of their argument was that the court in Curran and Hildreth did not intend to allow the use of the beds and banks of nonnavigable streams. The court's response was short and to the point:

"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 the use of the bed and banks ... 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'...The Montana Constitution makes no distinction between Class I [navigable] and II [nonnavigable] waters. All waters are owned by the state for the use of its people.
[Emphasis added]

It is clear that court recognizes that the public use of the water carries with it an accompanying right to use the bed and banks up to the ordinary high water mark, regardless of the title to the streambed. It is equally clear that, under the Montana Constitution the public's right is not confined to waters navigable under a federal test of navigability. Finally, it is important to note that court did not find section 23-2-301(12) to

be unconstitutional.

Finally, as I said at the outset, this bill promises only more acrimony and conflict. The conflicts since the passage of H.B. 265 appear to be relatively few and far between, and reasonable people appear to have been able to live with it. If S.B. 159 passes, however, old wounds will be reopened and the conflict will start anew. This will happen because S.B. 159 is so restrictive as to be disruptive to the use many rivers long recognized as open to public use. To the best of my knowledge, only six rivers have been judicially declared navigable in the state of Montana - the Missouri, the Gallatin, the Dearborn, the Bighorn, the Yellowstone, and possibly the Beaverhead. Many of the most popular rivers in the state have never had such a judicial declaration - the Madison, the Bighole, the Smith, the Jefferson, and the Flathead, to name just a few. And yet, under the language of this bill, the legislature would be telling the public at large, "Travel these rivers at your peril." If this bill passes, there will inevitably be more time and money spent arguing in court yet again what the court has conclusively settled.

It is time for this body to turn its attention to other matters of greater concern to both landowners and recreationists alike and to let the scars of this battle heal. In that spirit, Trout Unlimited urges the committee to vote DO NOT PASS on S.B. 159.

Boylan-Galt bill would restrict stream access

By DENNIS SWIBOLD
Chronicle Staff Writer

HELENA — Just when you thought the stream access battle was over, recreationists are lining up to fight a bill they fear could further muddy the right to use Montana's streams and rivers.

Senate Bill 159, sponsored by Sen. Paul Boylan, D-Bozeman, would allow floaters and fishermen to use the beds and banks of only those rivers judged "navigable" by federal standards.

What that would do, opponents claim, is keep fishermen and floaters off smaller streams and rivers and even many of the state's larger rivers without the landowners' permission.

"That's basically what we're trying to do," said Boylan. "It would take the little streams out of the (stream access law). They (anglers) could still get in there with permission."

The point of the bill is to narrow access.

But Stan Bradshaw, a former attorney for the Department of Fish, Wildlife and Parks and now a lobbyist for Trout Unlimited, said Boylan's bill goes against the spirit of last week's Supreme Court ruling on stream access.

The court ruled that anglers and boaters have a right to use the beds and banks of streams below the high water mark, but were banned from using the land for non-water uses like camping and hunting.

But Boylan's bill would change the state's stream access law to say the recreational rights apply only to waters that have been "adjudicated to be navigable by federal standards."

"I don't think that's what the Supreme Court meant in its ruling," Bradshaw said.

Only a handful of Montana rivers have been formally judged "navigable" in court decisions, he said. Such rivers include the Missouri, Yellowstone, Gallatin, Bighorn and Dearborn.

Other Montana rivers popular with fishermen and boaters have never been formally declared navigable by the courts, although it is presumed they would meet the federal test, Bradshaw added. Such rivers include the Flathead, Madison, Kootenai, Clark's Fork, Bitterroot and Blackfoot rivers, he said.

Boylan's bill is co-sponsored by Sen. Jack Galt, R-Martinsdale, who filed the stream access appeal that resulted in the landowner gains in last week's Supreme Court ruling.

Boylan said today the bill's supporters may draft an amendment taking out the requirement that rivers meet a federal navigability test, which includes deciding whether a river or stream had ever been used for commercial purposes.

But the bill would still require a court to decide whether a river is navigable, Boylan said. Fishermen don't like that.

"If this thing passes, I think you'd see a lot of court actions to decide whether those rivers are navigable or not," Bradshaw said.

"This would relegate everybody, landowners and recreationist alike, to the potential of spending a lot of time in court."

Even though the Supreme Court narrowed the range of recreational use on streams, Bradshaw said most sportsmen feel they can live with the ruling. Boylan's bill only continues the bitter struggle that both sides of the stream access issue had thought the high court ruling had ended.

He said Trout Unlimited, FWP officials and the Coalition for Stream Access will likely line up against Boylan's bill.

"We don't think this bill is necessary," Bradshaw said. "As a practical matter, we think the stream access law is working pretty well."

"Our basic premise is maybe it's time to let a few wounds heal and the way to do that is to move on to another issue."

Attachment #1

Ron Waterman noted that the underscored portions of the blue working copy were his own additions, and should be considered and rejected or adopted by the committee. The only exception is the underlined portion on page 9, line 17, which was suggested by the Legislative Council.

Rep. Ellison said he wanted the committee to know he had serious problems with the suggested definition of surface water.

Phil Strobe, attorney for the Sweetgrass County Protective Association, agreed with Rep. Ellison. He said it is the view of his organization that the Supreme Court had provided for private ownership of land up to the low water mark, allowing a limited recreational "easement of sorts" for navigation and fishing up to the high water mark. He said that the definition of surface water should designate only the actual water, and only up to the low water mark. On that score, he said, landowners are "in fundamental disagreement" with any other definition of surface water.

Rep. Keyser said that the committee was operating under the assumption that the Supreme Court defined surface water as extending to the high water mark. The committee has defined the high water mark to protect landowners, he said.

Mr. Strobe stated that areas of a streambank between the spring high water mark and the fall low water mark are owned by the abutting property owner, and that the public has no new right in that exposed shoreline. He continued to express disagreement with any definition of surface water that would endeavor to create a public right to use the space between high and low water marks.

Rep. Mercer said he disagreed with Mr. Strobe that the Supreme Court was only talking about "wet stuff" when it entered its stream access decisions. He maintained that the state has the right to decide how land that is sometimes occupied by water is used. The landowner's protection, said Rep. Mercer, is that he has the right to grant permission for uses that go on his land.

Mr. Waterman said that under the Hildreth decision, the meaning of the Court with regard to surface water is clear, and that Rep. Mercer is correct in his interpretation.

Mr. Waterman suggested that the proposed legislation include a definition of "surface water for defining the public's right of use." Such a definition, he said, would not infringe on the question of ownership.

barriers between the low and high water mark. He said that to disallow or regulate such barriers would be setting the stage for the legislation to be overturned in litigation.

Rep. Keyser said that the portage issue being discussed referred strictly to barriers in the water, and asked where there would be a problem with barriers outside the water.

Mr. Strobe said that if the definition of "surface water" were to include the bed and banks up to the high water mark, then a barrier in that area would create a public right to portage around barriers that were not in the water.

Rep. Mercer suggested that perhaps the definition of barrier should be limited to structures in the water only, "just the wet stuff," and not the surface water.

Mr. Waterman referred to the Hildreth decision, in which the issue was a cable stretched just above the water, which effectively prohibited recreational use of the stream. He suggested that the definition of barrier might be amended to mean a structure which prohibits "recreational use of surface water."

Rep. Krueger said the committee should avoid getting into the high water mark/low water mark issue, and address the question of actual barriers to recreational use.

Mr. Strobe maintained that recreationists are attempting to expand the area allowed for recreational use, and that the Supreme Court decisions support a water-related right only, and not a right to use or travel on banks or beds above the low-water mark.

Mr. Bradshaw said that the Supreme Court has specifically allowed recreational use to the high water line, and the right to portage, and suggested that Mr. Strobe's concern is ill-founded.

Bill Asher, representing the Agricultural Preservation Association, asked to be put on record as supporting the position of landowner groups that recreational use rights should not be expanded.

On general agreement, the committee adopted the definition of "surface water" provided on page 2, lines 17-20 of the teal copy (Section 1, subsection 4).

Jerry Manning, president of the Montana Coalition for Stream Access, stated that only 16 incidents of problems with big game hunting along streams had been reported last year, with a high number of those occurring on Curran or Hildreath property. He stated that the Supreme Court granted hunting rights to sportsmen, and that grant should be recognized by the legislature.

Phil Strope, representing the Sweetgrass Protective Association, said that statement was "fundamentally in error," and maintained that the court granted navigational use on water only. He added that landowners consider hunting a "significant hazard."

Rep. Mercer said the court had said that private property owners cannot regulate water related use between the high water marks, but did not say that the legislature could not regulate such use. Big game hunting along that corridor is inappropriate, he said, and suggested deleting subsection (4) on page 4, which allowed big game hunting without landowner permission.

Rep. Krueger suggested that the committee consider allowing big game hunting with shotguns or black-powder rifles, which would lessen safety concerns, along stream corridors.

Mary Wright noted that the Fish and Game commission does provide for hunting with those restrictions in some areas. She suggested that perhaps the reasonable distinction should be made not between big game hunting and bird hunting, but be based on ballistics. Rep. Krueger agreed that such an approach might address the safety factor well.

Stan Bradshaw, attorney for the commission, said that it does regulate some areas by limiting hunting to shotguns only, and that safety is the motivation. That regulation, he said, has been "reasonably successful."

Bill Asher stated that safety is an important consideration, but the committee should not lose sight of the trespass problem. He questioned whether hunters can guarantee that big game, once hit, will stay between the high-water marks.

Mary Wright commented that the right to use surface waters clearly does not include the right to trespass, but said that responsible hunters would not take a shot that would not drop an animal without risking trespass.

Rep. Hammond conceded that he was torn between the issue of safety and recreational rights to hunt on a waterway. He suggested the addition of a subsection (d) following line 13, p. 4,

Testimony on SB159 Presented to the Senate Natural Resources
Committee on Behalf of the Montana Coalition for Stream Access
by Scott Ross

The Montana Coalition for Stream Access is opposed to SB159.

The Coalition has played an active role in the Stream Access issue for a number of years, beginning prior to the Curran and Hildreth Supreme Court cases and continuing on through the passage of HB265 in 1985. Proposed legislation such as SB159 prompts us to continue our active participation.

Individuals and organizations on both sides of the Issue would have to agree on at least one point; this has been a trying experience for those who have been involved.

Sportsmen and landowners welcomed the Supreme Court's decision in the recent Galt case. It seemed to be an acceptable compromise for many, including the Coalition.

SB159 threatens to reignite the controversy. The issue of whether the public may use the beds and banks of Montana's smaller streams (i.e. Class II) is one that was argued at length during the HB265 debates in 1985. In our opinion, the issue was also fully addressed by the Supreme Court's decision in the Galt case. A careful examination of that decision should leave little doubt as to whether SB159 is a constitutionally acceptable measure.

Before we face off to rehash old arguments, the Coalition asks that you stand back to take an objective view; what is happening on Montana's streams and rivers and how are landowners being affected?

All of us recognize that there are some problems. However, before we try to legislate solutions to problems through measures like SB159, fair recognition to the efforts of those on both sides of the Issue dictates that we examine the nature of those problems.

(2)

We must begin by recognizing that few citations related to stream access have been issued since the passage of HB265. Perhaps more importantly, there have been few complaints. Most of the citations that have been issued were for trespass on private property. We must assume that the individuals at fault either (1) failed in their responsibility to know and understand the law or (2) chose to disregard the law. The latter type of person will be difficult to restrain by passing legislation such as SB159, as they have demonstrated a lack of regard for the law already.

In any event, we must qualify our recognition that "there are some problems" by stating that those problems are due in large part to activities that are clearly not allowed by provisions of the Stream Access law.

Protection afforded the landowner does not stop with the statutory language. The Department of Fish, Wildlife, and Parks has also adopted Rules to regulate recreation on streams. These Rules allow any person to petition the Fish and Game Commission for restrictions on recreation based on (1) limitations of a waterway's capacity for recreational use or (2) a need to protect against the impacts of recreational use.

Some of the situations in which public recreation may be limited through the petition and hearing procedure include instances where "public use is damaging the banks and land adjacent to the water body" or where "public use is damaging the property of the landowner underlying or adjacent to the water body". Those provisions would seem to be especially relevant to some of the concerns that may have led to the introduction of SB159.

The petition procedure also permits any person to "petition the Commission for an order to identify Class II streams which are not capable of recreational use or are capable of limited recreation use, and to restrict the recreational use to the actual capacity of the stream." This would seem to afford the landowner additional protection from those few who would use any stream as an access route for their otherwise illegal activities.

A few petitioners have requested Commission action. As a result, the DFWP has been directed in a few instances to establish limitations relative to safety and the capacity of streams for recreational use. In some instances, the Commission directed the Department to assist landowners through special trespass enforcement efforts.

The Stream Access issue is one which has pitted Montana landowners against Montana sportsmen. SB159 has brought us back together as adversaries when all Montana citizens share a common concern over far larger issues.

Over all of the Stream Access arguments (including many points which are now apparently held in agreement by both sides) now looms what we consider to be an important question; do we have a law that works for both landowners and sportsmen? The Coalition would have to answer yes. We believe that the current law is acceptable and should allow us to move on to address new issues in a cooperative spirit.

We hope that this committee will choose to use this opportunity to tell Montana's citizens that the argument over Stream Access is over. Please Do Not Pass SB159.

Good afternoon:

My name is Steve Gilbert. I represent Paul Roos Outfitters (PRO) from Helena. Thank you for the opportunity to present testimony on this subject.

SENATE NATURAL RESOURCE

EXHIBIT NO. 17

DATE 2-11-87

BILL NO. SB159

PRO is like many floating-fishing outfitting businesses in this part of Montana. Our business depends on a combination of factors which include water level, water quality, access to the water, and quality of the fishery resource. Although the PRO clientele is primarily a floating flyfishing group, most clients are interested in the opportunity to spend time wade-fishing. Also, access to streambanks is important from the standpoint of lunch and rest stops and for overnight camping.

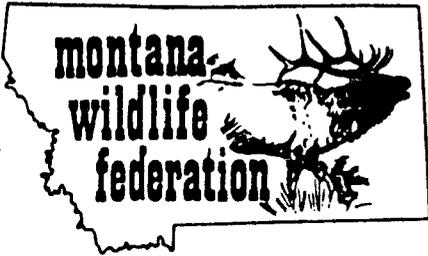
At PRO the motto has always been "Be on the right river at the right time." If the water level is high or low for a quality fishing experience on one river or if the fishing has been better somewhere else, then let's fish a different river. Consequently, a wide variety of waters are fished from year to year. On a given year, as many as 15 different waters may be fished. Included in this number are such favorites as Rock Cr., the Little and Big Blackfoot, Clark Fork, Beaverhead, Madison, Big Hole, Smith, Clearwater, Sun, Yellowstone, Dearborn, Gallatin, Jefferson, and the Missouri. Of this number, only the Gallatin, Yellowstone, Dearborn, and Missouri Rivers are adjudicated navigable waters. Many clients are also interested in the quality fishing available on spring creeks all over western Montana, and other non- or semi-floatable waters such as the Little Prickly Pear, Belt Creek, Rattlesnake Cr., The Boulder, Stillwater, and the Shields, to name a few. Fishing on many of these creeks requires permission from understanding landowners, and gaining this permission hasn't been a problem in the past.

1984 was a fairly typical year for PRO. There was adequate water in most rivers, and many were floated and fished. Of the over 300 guest days of business at PRO, 265 of them were on rivers which were not adjudicated navigable. This is a 7:1 ratio. As you can see, rivers other than the Big 5 navigable rivers are important to the outfitting business.

What are the implications of the proposed changes to a stream access law which in its present wording has become acceptable in compromise to most landowners and fishermen? One, for certain, is that many rivers which have not been adjudicated navigable will no longer be fishable to most of the outfitters in Montana who now depend on these resources for a sizeable chunk of income. To change the law would require that outfitters have permission to gain access to hundreds of privately owned parcels of land to perform their businesses in their present manner. This is clearly not physically or economically feasible for a group of professionals whose businesses operate on a fairly close-to-the bone financial basis.

Thank you for listening to me and for this opportunity to present testimony.

EDUCATION - CONSERVATION



Montana Wildlife Federation

AFFILIATE OF NATIONAL WILDLIFE FEDERATION

Testimony on SB 159

Senate Natural Resources Committee

February 11, 1987

P.O. Box 3526
Bozeman, MT 59715

SENATE NATURAL RESOURCES
EXHIBIT NO. 18
DATE 2-11-87
BILL NO. SB 159

Mr. Chairman, Honorable members, my name is Jeanne Klobnak. I stand before you today on behalf of the Montana Wildlife Federation in their opposition to SB 159.

The Montana Wildlife Federation (MWF) is a conservation organization dedicated to promoting wildlife, wildlife habitat, and sportsmen's interests.

MWF 's members are dissapointed to say the least that some do not see it fit to leave dead dogs lie. SB 159 flies in the face of three Supreme Court decisions in an attempt to satisfy a segment of Montanans who feel the the Public Trust doctrine and Article IX of the Montana State Constitution as interpreted in the Dearborn case are unacceptable.

We would hope that this committee, in its wisdom will see it fit to nip this temper tantrum in the bud before it costs tax payers an undue amount of time and money in the courts ... again, and again, and again.

We urge a do not pass bote on SB 159.

Medicine River Canoe Club
Great Falls, Montana

FEBRUARY 9, 1987

SENATE NATURAL RESOURCE

EXHIBIT NO. 19

DATE 2-11-87

BILL NO. SB159

SENATE NATURAL RESOURCES COMMITTEE

State Capitol
Helena, Montana

CHAIRMAN KEATING and MEMBERS OF THE COMMITTEE:

My name is JIM McDERMAND and I am the spokesman for the Medicine River Canoe Club in Great Falls. Beginning with the 1983 legislative session, I have attended 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.

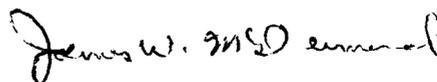
The definition of "Surface Water" as it now reads in the current Stream Access law conforms to the three previous rulings by the Montana Supreme Court. Each ruling clearly defines the rights of the public to use the water, the bed, and the banks up to the ordinary high water mark of all natural waterways. To change the definition as proposed in S.B. 159 clearly shows contempt for the Supreme Court's decisions.

Passage of this bill would effectively prohibit reasonable use of most of the states waterways by recreationists. It would nullify the years of effort by the legislature, recreational groups, and agricultural groups that achieved the realistic and workable stream access law we now have.

We strongly urge defeat of S.B. 159 to avoid the certainty of further litigation and renewed conflict.

Thank you.

Respectfully,



JAMES W. McDERMAND, Spokesman
MEDICINE RIVER CANOE CLUB
3805 4 Ave. So.
Great Falls, MT 59405

NAME: Bob Morgan DATE: 7/11/87

ADDRESS: 3575 5th Ave. So. Great Falls
~~SENATE NATURAL RESOURCES~~

PHONE: 457-7770 EXHIBIT NO. 20
DATE 2-11-87

REPRESENTING WHOM? Missouri River Fly Fishers
BILL NO. SB 159

APPEARING ON WHICH PROPOSAL: SB 159

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

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.



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

SENATE NATURAL RESOURCES

EXHIBIT NO. 21

DATE 2-11-87

BILL NO. SB159

Sen. Tom Keating, Chm.
Natural Resources Comm.

I apologize for my inability to attend the hearing on SB-159 held February 11, 1987. I would appreciate having our testimony entered in the record. I am President of the Fishing and Floating Outfitters Association of Montana which is the professional association representing 227 outfitters and guides in this state engaged in that aspect of the outfitting industry. On this issue I am reasonably confident I also represent dozens of those who have not joined our association.

SB-159 is an attack on our industry. It is more annoying than hurtful in as much as it is plainly moot. This very matter was expressly addressed by the court case decided just weeks ago by the Supreme Court. In their ruling the court rejected the reasoning behind this legislation. Even as amended there is no way that it can be warped into a configuration acceptable to the court or to our industry. Quite frankly, I resent our need to appear once again on this issue. By now the debate has proven far more destructive than any of the alleged facts surrounding any of the actual events involved.

We urgently recommend that SB-159 be given the swift burial of a DO NOT PASS vote.

Sincerely

Richard C. Parks, Pres.

cc. to all committee members

Sen. Cecil Weeding, V.Chm.

Sen. John Anderson

Sen. Mike Holligon

Sen. Delwyn Gage

Sen. Lawrence Stimatz

Sen. Larry Tveit

Sen. "J. D." Lynch

Sen. Sam Hofman

Sen. William Yellowtail

Sen. Elmer Severson

Sen. Mike Walker

February 10, 1987

SENATE NATURAL RESOURCES COMMITTEE
State Capitol
Helena, Montana

SENATE NATURAL RESOURCES

EXHIBIT NO. 22

DATE 2-11-87

BILL NO. SB159

CHAIRMAN KEATING and MEMBERS OF THE COMMITTEE

My name is Walt Carpenter, I live in Great Falls, and I am addressing this communication to you as a sportsman and a concerned citizen.

Now a senior citizen, I have enjoyed the responsible use of our Montana streams for fishing, and occasional floating, for many years. I would like for my children to be able to enjoy the use of our waterways in the future, as I have in the past, and up to the present. I respect the rights of adjacent landowners, and have always endeavored to be a good neighbor when using our streams.

Senate Bill 159 runs directly contrary to the three recent Montana Supreme Court decisions on stream access, which clearly permit the recreational use of the surface waters in all Montana streams, the beds and the banks up to the ordinary high water mark. It is impossible to use the surface waters of any stream if denied the right to set foot on the bed or the banks.

If S.B. 159 should become law, the popular Smith River would become off limits to all recreational use, including fishing, as would other local rivers such as the Marias River, the Sun River, and many others throughout the state.

Passage of this bill would have a most unfavorable effect on fishing and all water related sports, causing many tourists to look to neighboring states for their vacations. This would only further erode the already poor economic climate in Montana, with the loss of badly needed out of state dollars.

Many river outfitters are now struggling to merely survive during the present hard times, and passage of S.B. 159 would put them out of business. Other service firms catering to tourists would also be adversely effected if the bill should become law.

The promotion of tourism is high on our Governor's agenda, indicating the importance of the money contributed to the Montana economy by those visitors.

I respectfully urge the committee members to kill S.B. 159 in committee.

Sincerely yours,

Walt Carpenter
Walt Carpenter
320 40th Street South
Great Falls, Montana 59405

SENATE NATURAL RESOURCES
EXHIBIT NO. 23
DATE 2-11-87
BILL NO. SB159

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

El...

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), 682 P.2d 163, 41 St.Rep. 906, and *Montana Coalition for Stream Access, Inc., v. Hildreth* (Mont. 1984), 684 P.2d 1088, 41 St.Rep. 1192. In Curran, we held that under the public trust doctrine as derived from the Montana Constitution the public has a right to use any surface waters capable of use for recreational purposes up to the high water marks and may 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 the recreational use of streams. Appellants, plaintiffs below, brought this action for declaratory relief pursuant to the Uniform Declaratory Judgment Act, §§ 27-8-101 through 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 water 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;

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.

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

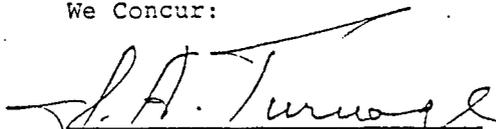
interests, when in conflict, must be reconciled to the extent possible.

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

Mr. Chief Justice J. A. Turnage, concurring remarks:

I have signed the majority opinion because I believe the result of the majority will offer some clarification to the existing law as well as remove unconstitutional provisions from the statutes.

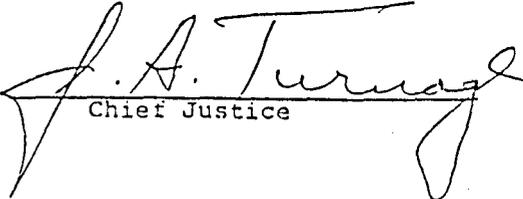
I do not agree with all that has been said about the Public Trust Doctrine in this opinion and in the Curran and Hildreth decisions.

It was not then and it is not now necessary to resort to the theory of Public Trust Doctrine to find a right to the use of surface waters in this State for recreational purposes. This right, to whatever extent it may ultimately develop, is to be found in the express language of 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.

The Public Trust Doctrine is not expressly set forth in the Montana Constitution. It is a legal theory created by courts. This Court should not resort to creating or finding legal theories when a result can be reached from express constitutional language.

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.


Chief Justice

Mr. Justice L. C. Gulbrandson specially concurring:

I concur with the holding of the majority opinion that § 23-2-302(2)(d), (e), and (f), MCA, are unconstitutional. I would also hold that § 23-2-301(12), MCA, which defines "surface waters" as including "the bed and its banks up to the ordinary high-water mark" is unconstitutional as applied to Class II waters.

I would, in line with my dissents in the Curran and Hildreth decisions, request that this Court expunge from the Hildreth decision, the unsupported statement that "the public has the right to use [the bed and banks] up to the ordinary high water mark." Hildreth, 684 P.2d 1088, 1094. In my opinion, that statement is dicta. There was no legal authority for said statement, it was not necessary to decide the issue before the court, and it conflicts with the holding of the majority decision that only that use which is necessary for the public to enjoy its ownership of the water resource will be recognized. In support of this position, I cite Day v. Armstrong (Wyo. 1961), 362 P.2d 137, a case relied upon by the majority in Curran. In Curran, this Court stated:

In 1961, the Wyoming Supreme Court supported public use of waters suitable therefor without regard to title or navigability. The Court held:

"Irrespective of the ownership of the bed or channel of waters, and irrespective of their navigability, the public has the right to use public waters of this State for floating usable craft and that use may not be interfered with or curtailed by any landowner. It is also the right of the public while so lawfully floating in the State's waters to lawfully hunt or fish or do any and all other things which are not otherwise made unlawful." Day v. Armstrong (Wyo. 1961), 362 P.2d 137, 147.

In essence, the Wyoming court held that public recreational use of waters was limited only by the susceptibility of the waters for that purpose.

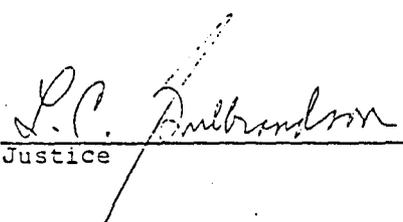
Curran, 682 P.2d 163, 170.

The Wyoming Supreme Court in Day further stated:

When waters are able to float craft, they may be so used. When so floating craft, as a necessary incident to that use, the bed or channel of the waters may be unavoidably scraped or touched by the grounding of craft. Even a right to disembark and pull, push or carry over shoals, riffles and rapids accompanies this right of flotation as a necessary incident to the full enjoyment of the public's easement. . . . On the other hand, where the use of the bed or channel is more than incidental to the right of floating use of the waters, and the primary use is of the bed or channel rather than the floating use of the waters, such wading or walking is a trespass upon lands belonging to a riparian owner and is unlawful. Such trespass cannot be made lawful either by legislative or judicial action . . . Except as herein specified, to use the bed or channel of the river to wade or walk the stream remains an unlawful trespass.

Day, 362 P.2d 137, 145-46.

It is my opinion that where the State has title to the streambed, it may legislate, within the limits of declared public policy, the use of the streambed. Where the title to the streambed is privately owned, the State has no legal authority to legislate use of the bed and banks of that stream without paying just compensation through lawful eminent domain proceedings.


Justice

Mr. Justice William E. Hunt, Sr., dissenting:

I dissent. The majority finds §§ 23-2-301, et seq., MCA, an impermissible enlargement of the public trust doctrine and this Court's holdings in *Montana Coalition for Stream Access, Inc. v. Curran* (Mont. 1984), 682 P.2d 163, 41 St.Rep. 906, and *Montana Coalition for Stream Access, Inc. v. Hildreth* (Mont. 1984), 684 P.2d 1088, 41 St.Rep. 1192. They describe in some detail the evils they foresee if the public uses the streambed up to the high water mark in a "convenient, productive, and comfortable" way. While they acknowledge the public's right to use the streambed, and reject appellant's claim that the public may only use the surface of the water, they find the use permitted by §§ 23-2-301, et seq., MCA give the public rights that are not necessary to utilize the stream or river.

I do not agree that this is so but if it is then it is a question for the legislature to solve as experience teaches how we can best balance the rights of the landowner and the public.

The issues addressed by the majority opinion are not properly before this Court. They were not raised at the District Court level nor on appeal. The appellants filed an action for declaratory judgment alleging that §§ 23-2-301 through 23-2-322, MCA (H.B. 265) were unconstitutional as a taking of private property for public use without the landowner's consent or just compensation.

In the District Court and on this appeal appellants raised these three issues:

1. Whether H.B. 265 operates as a taking of private property for the public purpose of recreational uses without providing just compensation for the taking.

2. Whether H.B. 265 is constitutionally deficient because it failed to include in its title any reference to or any reasonable reference to the fact that private property was being committed to the public purpose of recreational uses without just compensation, and without the consent of the landowner.

3. Whether the District Court erred in not finding H.B. 265 unconstitutional in part.

The issues raised by appellants and briefed by respondents on appeal are clearly *res judicata* under this Court's decisions in Curran, 682 P.2d 163, 41 St.Rep. 906, and Hildreth, 684 P.2d 1088, 41 St.Rep. 1192. In both of those opinions we upheld the dismissal of the defendant's counterclaims for inverse condemnation based on the theory there had been a taking of land without compensation. In discussing this issue in Curran we pointed out the provision in the Montana Constitution that applied and discussed its application as follows:

"All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." [Art. IX, §. 3(3), 1972 Mont. Const.]

Thus, Curran has no right to control the use of the surface waters of the Dearborn to the exclusion of the public except to the extent of his prior appropriation of part of the water for irrigation purposes, which is not at issue here. Curran has no right of ownership to the riverbed or surface waters because their ownership was held by the federal government prior to statehood in trust for the people. Upon statehood, title was transferred to the State, burdened by this public trust.

In essence, the question is whether the waters owned by the State under the Constitution are susceptible to recreational use by the public. The capability of use of the waters for recreational purposes determines their availability for recreational use by the public. Streambed ownership by a private party is irrelevant. If the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people. The Constitution and the public trust doctrine do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters.

Curran, at 170, 41 St.Rep. at 914.

In Hildreth, we again considered the issue and said:

Hildreth's claim for inverse condemnation is based upon the theory that there has been a taking of his land without compensation. Such is not the case. Public use of the waters and the bed and banks of the Beaverhead up to the ordinary high water mark was determined, not title. (Emphasis in original.)

Hildreth, at 1093, 41 St.Rep. at 1197.

H.B. 265 represents a legislative enactment that attempts to reconcile the conflicting interests of recreationalists and landowners, within the ambits of the law as set out by this Court in Curran and Hildreth.

The District Court provided us with an excellent analysis of the launching and ultimate enactment of H.B. 265. This dissent adopts that portion of District Court's Opinion and Order as follows:

C. House Bill 265

The minutes of the meeting of the Senate Judiciary Committee on March 8, 1985 relate some of the history of House Bill 265 as follows:

"Representative Bob Ream, sponsor of HB 265, introduced the bill to the Committee and traced a bit of its history. There were a variety of bills on stream access last [1983] legislative session. Because of the uncertainty regarding the Hildreth and Curran Supreme Court decisions at that point in time, Representative Keyser sponsored a resolution requesting an interim study. The interim committee provided a public forum for this issue. People began to realize it wasn't a black and white situation; there were areas of gray in between on

which people were going to have to compromise. Both sides realized they would have to come up with a bill to ameliorate some of their concerns. This is not a committee bill, but a bill on which the two sides got together in the months before the session began and hammered it out. The bill was before the House Judiciary Committee, which appointed a subcommittee headed by Representative Keyser. There was an attempt to involve both sides in the decision making on the amendments made by the subcommittee. . . . The goal of the subcommittee was to keep House Bill 265 within the bounds of the Supreme Court decisions and to express the Legislature's desire to tie down and define the areas that were left very broad in those decisions."

As Judge Loble pointed out, many organizations were instrumental in supporting this bill. For example the Montana Stockgrowers Association and members of the agricultural industry alliance, consisting of the Montana Stockgrowers Association, Montana Wool Growers Association, Montana Association of State Grazing Districts, Montana Cowbellers, Montana Farmers Union, Montana Cattlemen's Association, Montana Cattle Feeders Association, Montana Farm Bureau Federation, Montana Water Development Association, Women Involved in Farm Economics, and the Agricultural Preservation Association, supported passage of H.B. 265.

Their position was set forth very clearly in a written statement submitted to the committee and it is set forth here:

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

Fortunately the 1983 Legislature had created an interim study committee to receive testimony and

propose legislation. The interim committee met both before and after the Supreme Court of Montana decisions and considered primary and collateral issues raised by the decided cases.

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

As the interim committee's action drew to a close, landowner groups met to outline the goals for upcoming legislation and to plan for [the 1985] session. All groups agreed that it was critical to pass legislation this session, both to define areas left unclear by the Supreme Court of Montana's decisions, to allay the fears of landowners and recreationalists, and to avoid conflict as the newly won rights were tested and applied to specific streams other than the streams subject to the litigation.

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

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

[Written testimony of Ron Waterman, dated January 22, 1985.]

In my opinion, the District Court correctly concluded that the very point decided in Curran and Hildreth is the issue in this case and that § 23-2-302, MCA was the legislation that constitutionally responded to these opinions and it was left with nothing to do but grant defendant's motion for summary judgment.


Justice

Mr. Justice John C. Sheehy, dissenting:

I concur in the dissent of Mr. Justice William E. Hunt, Sr., and have further remarks to make.

The best that can be said of the majority opinion is that as to the recreational use of waters, it has certainly muddied the waters. When one reads the majority opinion in the light of Curran (1984), 682 P.2d 163, 41 St.Rep. 906, and Hildreth (1984), 684 P.2d 1088, 41 St.Rep. 1192, one can only conclude that the law respecting the correlative rights of landowners and recreational water users in Montana is adrift in a sea of confusion.

I. THE STATUTES ON THE RECREATIONAL USE OF STREAMS

Following our decisions in Curran and Hildreth, the legislature met in 1985. One of the principal subjects attacked by the legislature in 1985 was the enactment of laws that would define the rights of recreational water users with respect to adjoining landowners. The legislation was vigorously argued, and the resulting statutes incorporated in Title 23, Chapter 2, Part 3 represent a legislative enactment that balanced the contending arguments of the interested parties. The legislation shows that it was founded on a proper interpretation of Curran and Hildreth, in a field where the interpretation by the legislature was proper. This Court has no business interfering or setting legislation aside where the legislature has properly acted within its distinctive sphere.

For ease of discussion, rather than setting out the statutes in haec verba, it is suitable to paraphrase what the legislature has done, and to set out with particularity those portions which the majority have confused.

First, the legislation refers to surface waters, and streams. It has no applicability to lakes. "Surface water" was defined for the purpose of recreational use to include a natural water body, its bed and its banks up to the ordinary high water mark. § 23-2-301(12), MCA. By defining "surface water" to include the water itself and its stream bed up to the high water mark, the legislature was following the law as expostulated in Curran and Hildreth, as will be shown later in this dissent.

The legislature also defined "recreational use" to include fishing, hunting, swimming, floating, boating, and "other water related pleasure activities, and related unavoidable or incidental uses." § 23-2-301(10), MCA.

An important part of the legislation is the division by the legislature of surface waters into classes. Class I waters essentially are defined as those waters that are recognized as navigable or have been judicially determined as navigable or are capable of supporting commercial activities. All other surface waters are designated Class II waters. § 23-2-301(2), (3), MCA.

Recreational uses are permitted in § 23-2-302. More specific reference will be made to those hereunder.

II. TITLE TO STREAMBEDS

The glaring defect in the majority opinion is that although it purports to support the public trust doctrine enunciated in Curran and Hildreth, it finds the public's right to use those waters to be something in the nature of an easement. Such a concept of ownership or right of use is in derogation of the public trust doctrine because under the doctrine the title to the streambed up to the high water mark resides in the state, and while the state may regulate the

public use of streambeds under its ownership, it may not deed away the ownership of the streambeds. As to Class I streambeds, the concept of a mere easement right in the public must fail. The state has title.

In Curran, the majority pointed out that under Schively v. Bowlby (1894), 152 U.S. 1, 48-50, 14 S.Ct. 548, 566, 38 L.Ed.2d 331, the Supreme Court stated:

The Congress of the United States, in disposing of the public lands, has constantly acted on the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and . . . shall not be granted away during the period of territorial government; . . . shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into union . . . but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state, after it shall become a completely organized community. (Emphasis added.)

682 P.2d at 167, 41 St.Rep. at 910.

We further pointed out in Curran that under the public trust doctrine as first enunciated in Illinois Central Railroad v. Illinois (1892), 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018, the United States Supreme Court said:

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

682 P.2d at 168, 41 St.Rep. at 911.

The majority opinion has set out the provisions of S 70-16-201, MCA, which purports to provide that the owners of

land abounded by water take ownership to the low water mark. Under the public trust doctrine, such transfer of lands subject to the public trust under navigable streams cannot occur. "The control of the state for the purposes of the trust can never be lost." Illinois Central Railroad, 146 U.S. at 387, 13 S.Ct. at 110, 36 L.Ed. at 1018.

Section 17-16-201, MCA, was enacted in 1895, according to its history, although it probably pre-existed state government. Nevertheless, when defining fishing rights in 1933, the legislature provided in § 87-2-305, MCA:

Navigable waters subject to fishing rights. Navigable rivers, sloughs, or streams between the lines of ordinary high water thereof of the State of Montana and all rivers, sloughs and streams flowing through any public lands of the state shall hereafter be public waters for the purpose of angling, and any rights of title to such streams of the land between the high water flow lines or within the meander lines of navigable streams shall be subject to the right of any person owning an anglers license of this state who desires to angle therein or along their banks to go upon the same for such purpose.

The definition by the legislature in 1933 of the right to use the streambeds up to the high water mark for the purpose of fishing is an indirect recognition of the legislature that § 70-16-301, MCA, is not worth the paper it is written on insofar as it applies to the streambeds between high water marks on navigable streams.

Plainly, then, we held in Curran and that holding controls here:

Curran has no right of ownership to the river bed or surface waters because their ownership was held by the federal government prior to statehood in trust for the people. Upon statehood, title was transferred to the state, burdened by this public trust.

682 P.2d at 170, 41 St.Rep. at 914.

The retrenchment by the majority members from Curran to a position that the adjoining landowners on a stream owned the streambed subject to an easement is perplexing. Three of the majority members, Justices Morrison, Harrison and Weber signed the Curran opinion without a murmur of discontent. Justice Gulbrandson, in his dissent in Curran did not dispute the public trust doctrine theory of ownership in the state, but argued instead that summary judgment was improper on the test of navigability of the Dearborn River.

In Hildreth, we strongly reaffirmed Curran, saying:

Under the 1972 Constitution, the only possible limitation of use can be the characteristics of the waters themselves. Therefore, no owner of property adjacent to state-owned waters has the right to control the use of those waters as they flow through his property. The public has the right to use the waters and the bed and banks up to the ordinary high water mark. Curran, supra. Further, as we held in Curran, in case of barriers, the public is allowed to portage around such barriers in the least intrusive manner possible, avoiding damage to the adjacent owners property and his rights.

Hildreth, 684 P.2d at 1091, 41 St.Rep. at 1195.

In Hildreth, we determine that the landowner had not been deprived of a property right. We said:

As discussed previously in this opinion and extensively in Curran, supra, ownership of the stream bed is irrelevant to determination of public use of the waters for recreational purposes. Navigability for recreational land use is limited, under the Montana Constitution, only by the capabilities of the waters themselves for such use. Hildreth has never owned and does not now own the waters of the Beaverhead River. Under Montana law, the public has the right to use the Beaverhead and its bed and banks up to the ordinary high water mark, with additional, narrowly limited rights to portage around barriers.

684 P.2d at 1094, 41 St.Rep. at 1198.

In Hildreth, Justices Morrison and Weber concurred. Justices Gulbrandson and Harrison dissented, partly on the ground that they would defer to the legislature in finding

solutions to water use conflicts between landowners and recreational users. The legislature has now acted.

In the fairly recent case, *Montana v. United States* (1981), 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493, reaffirmed the proposition that states when organized, own the title to the riverbeds of navigable streams. The court said:

The Crow Treaties in this case, like the Chippewa treaties in Holt State Bank, fail to overcome the established presumption that the beds of navigable rivers remain in trust for future states and pass to the new states when they assume sovereignty.

450 U.S. at 553, 101 S.Ct. at 1252, 67 L.Ed. at 502.

The statement of the majority opinion therefore, that, "we reaffirm well-established constitutional principals protecting property interests from confiscation" is ill-founded insofar as it applies to Class I streambeds. The adjoining property owners have no ownership interest in the streambeds of Class I waters and therefore, nothing is being confiscated. The major premise of the majority opinion is faulty. When the state legislature acts within its sphere to regulate the use of property which the state owns, we should respect the legislative discretion.

III. BIG GAME HUNTING

The majority hold unconstitutional this portion of § 23-2-302(2), MCA:

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

. . .

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

. . .

It has always been accepted that landowners may give permission to big game hunters to go on the landowners' premises for big game hunting. The legislature in the above statute extended this requirement of permission from the landowner to the streambeds which the landowners do not own. If the requirement for the landowners' permission were being attacked by a water recreational user we might have reason to declare that portion of the statute unconstitutional except for the fact the Department of Fish, Wildlife and Parks in any event has the right to control big game hunting. The statute confers no right to big game hunting or streambeds except by permission of the landlord. There is no unconstitutionality inherent in the provision.

IV. OVERNIGHT CAMPING AND DUCK BLINDS

What is said foregoing about the right of the state to control streambeds, particularly under Class I lands, would indicate that the legislature has a perfect right as owner to permit any sort of lawful activity on the portions of the lands that it owns. The majority finds that permitting a water recreational user to roll out his sleeping bag or set up his pup tent overnight is "overbroad." Yet, these are legislative decisions, made by the legislature after public hearings and discussion. What was done was the legislature's business and not ours.

V. THE RIGHT OF PORTAGE

The legislature provided for portage, at the same time as it defined recreational uses, by enacting § 23-2-311, MCA. Paraphrasing that statute, the recreational user of surface waters is empowered to portage around barriers in the least intrusive manner possible, avoiding damage to the landowner's land. The landowner is permitted to create barriers across

streams for land or water management or to establish boundary fences. No right of portage is granted if the barrier does not interfere with the public's use of the surface waters. Either a recreational user or a landowner may request a portage route around or over a barrier to avoid damage to a landowner's land. If an artificial barrier is placed by the landowner, the cost of establishing a portage route is borne by the landowner. If the barrier is not of the landowner's doing, the Department of Fish, Wildlife and Parks pays the cost of the portage route. Once established, the Department must maintain the portage route. An arbitration panel is provided for in case the landowner or recreationalist disagree. The portage route is the exclusive means to portage over and around the barrier. No attempt was made by the legislature to establish portage routes for natural routes, as distinguished from artificial barriers.

Again, without distinguishing Class I waters, and without substantial discussion of the difference between Class I and Class II waters, the majority finds the provisions of § 23-2-311, MCA, unconstitutional, insofar as the landowner must bear the cost of constructing a portage route.

The effect of this portion of the majority opinion is to give the landowner the go-ahead to construct artificial barriers across navigable waters which impede recreational use without cost. What we have said foregoing with respect to title serves to refute any possible logic in that position.

VI. CONCLUSION

I would uphold the constitutionality of the statutes in toto. The legislature, cognizant of its ownership rights and

its duties as trustee of the public acted within its legislative discretion in adopting the statutes. There is no sound basis for our interference.

John C. Sheehan
Justice

TESTIMONY FOR HB 230

SENATE NATURAL RESOURCES

EXHIBIT NO. 24

DATE 2-11-87

BILL NO. HB 230

Several minor changes have been proposed to amend the Strip and Underground Mine Reclamation Act, under which coal and uranium prospecting and mining are regulated. The major effect of these changes is to allow regulation of remining activities and of coal preparation (prior to end use). By adding these two activities to the list of regulated activities, Montana is able to assure the reclamation of the sites where these activities take place, as well as assure minimization of offsite impacts. In addition some of the sites would be abandoned mine sites. By requiring reclamation, monies in the Abandoned Mine fund would be freed to reclaim other abandoned sites of potentially greater significance.

The other main reason for requiring remining and coal preparation activities to be regulated is because the U.S. Office of Surface Mining Reclamation and Enforcement, which oversees the Montana program, is requiring such regulation. Much of this, at the federal level is the outgrowth of several court decisions. The state act must conform to the Federal Act.

In addition, the fee for mining-related applications is proposed to increase \$50. This would bring the application fee in line with other fees provided for in the Act. Currently the mining application fee is \$50 and the prospecting fee is \$100. The proposed change would make the fees equitable for both types of operations.

The Department recommends approval of the bill.