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The Remarkable Odyssey of Stream Access in Montana

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INTRODUCTION

This article is about how Montana has determined the contours of the public's right to use the waters of the state for recreation. Pursuant to Montana's Constitution, the Montana Supreme court has repeatedly applied the Public Trust Doctrine to waters that the state owns for the use of its people, holding that the public has the right to the recreational use of waters that are capable of recreational use, including the use of the beds and banks of streams and rivers, even where the beds and banks are privately owned.[1] This article is primarily a chronological narrative of the remarkable development, adoption, and testing of the unique story surrounding stream access in Montana

This article will explore the early legal background, then the

1. Mont. Coal. for Stream Access v. Curran, 682 P.2d 163 (Mont. 1984); Mont. Coal. for Stream Access v. Hildreth, 684 P.2d 1088 (Mont. 1984); Mont. Const. art. IX, § 3(3).

seminal 1984 Montana cases, *Curran*[2] and *Hildreth,*[3] the subsequent adoption by the Montana Legislature in 1985 of the Stream Access Law[4] (this common name will be used throughout the text), and the following testing and probing of the perimeters of the Stream Access Law's principals and details in litigation and legislative effort. In addition, a history and description of the executive branch's implementation of the Stream Access Law and management of public recreational use of streams and rivers is undertaken.

The journey is an absorbing legal and political drama with a central thread of the broad and encompassing public right to use for recreation the water that Montana owns for the "use of its people."[5] This long, fascinating, and successful history is chronicled from a legal perspective, although the story could also be told from a purely political and public participation perspective that was equally eventful and important. In light of the scope of this article, that perspective is left for other storytellers.

The legal history of stream access in Montana is not by any means the whole story. This author plans to submit a second, follow-up article that will examine Montana's Stream Access Law through a comparison of how neighboring states have determined and limited public recreational rights, comparisons that highlight the unique approach, in significant respects, that Montana has taken. The main thrust of this saga, thirty plus years in the making now, will provide the backdrop for comments on the law's successes or short-comings, issues addressed, issues that will eventually need to be addressed, the recognition of potential future pitfalls and how to avoid them, and an assessment of the merits of Montana's approach. This is illustrated by the intense interest of the public and riparian landowners, and is underscored in comparisons with neighboring states.

As a preliminary matter, the Stream Access Law and

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2. *Curran*, 682 P.2d 163.

3. *Hildreth*, 684 P.2d 1088.

4. 1985 Mont. Laws ch. 556, 1127 (codified as Mont. Code Ann. §§ 23-2-301 to 322 (1985)).

5. Mont. Const. art. IX, § 3(3).

recreational use of streams, rivers, and lakes is administered primarily by the Montana Department of Fish, Wildlife and Parks[6] ("DFWP") and the Montana Fish, Wildlife and Parks Commission[7] ("Commission"). The roles of DFWP and the Commission will be detailed throughout this article.

A. Navigable for Title and Navigable for Recreation

At the outset, it is important to distinguish the legal concepts of navigability for title and navigability for recreation. Navigability for title describes those rivers that are "navigable in fact" under federal law for state ownership of the underlying bed of the river.[8] Navigable for recreation describes streams and rivers that the public has the right to use for recreation under state law and includes navigable for title rivers plus all other streams and rivers that Montana law has determined are available for public recreational use.[9]

The idea that states, as sovereigns, own the beds of navigable waters has its origins in English common law.[10] Initially, the thirteen colonies were held to own the bed of navigable waters subject to the ebb and flow of the tide.[11] The United States Supreme Court subsequently extended the concept of sovereign ownership by each of the thirteen original states to "all their navigable waters and the soils under them."[12] In addition, the title

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6. Mont. Code Ann. § 2-15-3401 (2013) (establishing the Department of Fish, Wildlife and Parks).

7. Mont. Code Ann. § 2-15-3402 (2013) The name of the Commission was the Fish and Game Commission until the name was changed to the Fish, Wildlife and Parks Commission in 1991. *See* 1991 Mont. Laws ch. 28 103 §1. Then it changed to Fish and Wildlife Commission in 2013. *See* 2013 Mont. Laws ch. 235 816 §6. However, the authority for the Commission relative to Stream Access Law did not change with the name changes.

8. PPL Mont., LLC v. Montana, 132 S. Ct. 1215, 1228 (2012).

9. *Curran*, 682 P.2d 163; *Hildreth*, 684 P.2d. 1088.

10. Shively v. Bowlby, 152 U.S. 1, 13 (1894); *PPL Mont.*, 132 S. Ct. at 1226-27.

11. *PPL Mont.*, 132 S. Ct. at 1226-27.

12. Martin v. Lessee of Waddell, 41 U.S. 367, 410 (1842).

to territorial lands under navigable water was declared to be held in trust for future states under the Equal Footing Doctrine.[13] Through this doctrine, a state's title to these lands is conferred by the United States Constitution. Thus, "questions of navigability for determining state riverbed title are governed by federal law."[14]

The United States Supreme Court opinion in *The Daniel Ball*[15] case set the formula for determining navigability of water, stating:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[16]

The Daniel Ball test is also used for the purposes of assessing federal regulatory authority and the applicability of specific federal statutes. When used to determine state title under the Equal Footing Doctrine, the test is based on the "natural and ordinary" condition of the water at the time of statehood;[17] depends only on navigation and does not require interstate commerce;[18] is applied on a segment-by-segment basis with each segment judged as to whether the river is or is not navigable;[19] and river segments are navigable for title only if they were used or were susceptible of use "as highways of commerce at the time of statehood."[20]

In contrast, the concept of navigable for recreation is based on the Public Trust Doctrine, which has been held to be a matter of

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13. Pollard v. Hagan, 44 U.S. 212, 228-29 (1845).
14. *PPL Mont.*, 132 S. Ct. at 1227.
15. The Daniel Ball, 77 U.S. 557 (1871).
16. *Id.* at 563.
17. *PPL Mont.*, 132 S. Ct. at 1228.
18. *Id.* at 1229.
19. *Id.*
20. *Id.* at 1233.

state law.[21] In summary:

> Under accepted principles of federalism, the states retain residual power to determine the scope of the public trust over water within their borders, while federal law determines riverbed title under the equal-footing doctrine.[22]

I. STREAM ACCESS CASES AND STATUTES

A. Pre-Curran and Hildreth

In 1895, the Montana Supreme Court in *Gibson v. Kelly* decided whether a riparian landowner to a navigable river owned to the ordinary low-water, or to the ordinary high-water mark.[23] The property at issue in the case was along the Missouri River in Choteau County. The defendant was occupying the low-water to high-water strip in front of the plaintiff's land and was excluding the plaintiff from the property. Ultimately, the plaintiff was seeking the court's aid in ejecting this intruder.[24]

In its opinion, the Court acknowledged that the question of ownership varied among the states deciding the issue.[25] The Court held that the riparian landowner owned to the low-water mark in view of the circumstances of the state. Absent any other specific support, the Court reinforced its decision by explaining, "also for the reason that the rule just announced by decision will become, in a few months, the rule by statute."[26] The Court did not fully explain its conclusion; however, the holding made it easier to find that the intruder was trespassing and avoided a conflict with the new civil code.

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21. *Id.* at 1235.
22. *Id.*
23. Gibson v. Kelly, 39 P. 517 (Mont. 1895).
24. *Id.* at 517.
25. *Id.* at 518.
26. *Id.* at 519. The new civil code the court was referring to had been approved by the Governor and would become the law on July 1, 1895.

The Court acknowledged that "the public [has] certain rights of navigation and fishery upon the river and upon the strip in question," although the "rights of navigation or of fishing are not at all involved in these pleadings." Nevertheless, the court concluded the plaintiff owned the strip, "subject only to the public use of navigation and fishing."[27] Whether or not the court's comments on the public's right to use the strip for navigation and fishing are interpreted as dicta, the real defect of the *Gibson* decision lies in the lack of reasoning. More specifically, it was left unclear how the Court and the legislature could concede to riparian landowners what otherwise would be public property.

The Civil Code of 1895 in section 1291, codified the rule that "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."[28] The 1895 legislature, in the new civil code, claimed the state as owner of "all land below the water of a navigable lake or stream."[29] The 1895 Legislature, in adopting the Political Code of Montana, defined public ways as: "[n]avigable waters and all streams of sufficient capacity to transport the products of the country are public ways for the purposes of navigation and transportation."[30]

In *Herrin v. Sutherland*, decided in 1925, the defendant was sued for trespass on the land of the plaintiff in eight separate causes of action.[31] In six of the causes of action, the defendant clearly trespassed on the plaintiff's land. The charges included: tramping on hay and grain crops; breaking through a fence to hunt birds; crossing the plaintiff's private land to access public land and to get to a pond fully enclosed within plaintiff's land; and shooting a

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27. *Id.* at 519-20.

28. Civ. Code § 1291 (1895) (codified as Mont. Code Ann. § 70-16-201).

29. Civ. Code § 1091 (1895) (codified as Mont. Code Ann. § 70-1-202).

30. Political Code § 2570 (1895) (codified as Mont. Code Ann. § 85-1-111).

31. Herrin v. Sutherland, 241 P. 328 (Mont. 1925).

shotgun while on the plaintiff's land.[32]

Two of the causes of action merit closer scrutiny, one may have addressed walking on the strip of land between the low-water and high-water marks of a navigable river and the other may have been a trespass for wading up a non-navigable stream. Of note, defendant was also found to be trespassing because, after rowing his boat up the channel of the Missouri River in Lewis and Clark County and fishing, the plaintiff walked above the ordinary low-water mark and above the high-water mark and "tramped upon and destroyed native and planted grasses." The Court concluded the defendant was a trespasser in going upon plaintiff's land "in the fashion described."[33] It would be a stretch to consider *Herrin* as holding that it was a trespass for a person rowing a boat on a navigable for title river to walk along the strip between the low-water and high-water marks, especially considering that the ruling in *Kelly v. Gibson* was not even addressed. It seems safe to assume then that the Court must have meant that the trespass occurred when the defendant went above the high-water mark.

The problematic cause of action surrounded the acts of the defendant wading up and down Fall Creek, a non-navigable stream, while fishing. The court said: "It would seem clear that a man has no right to fish where he has no right to be."[34] However, the Court's holding in this regard is confusing because the defendant again went upon the land of the plaintiff when he "tramped upon and destroyed the hay."[35] In this light, the Court's opinion remains unclear. Did the Court hold the defendant was simply a trespasser, or did the Court hold that a person trespasses by wading and fishing in a non-navigable stream?

Importantly, the interpretation of this language is relevant to understanding the Court's more modern jurisprudence on the issue. If the latter was the actual intended holding, *Curran* in 1984 overruled the holding.[36] Justice Holloway, in a concurring opinion,

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32. *Id.* at 332-33.
33. *Id.* at 331.
34. *Id.*
35. *Id.*
36. *Curran*, 682 P.2d at 171 ("[T]he holding [in *Herrin*] is purely

would have disposed of the case summarily because in each cause of action there was a technical trespass.[37]

Since 1933, a Montana statute has recognized a public right to use the water and banks up to the "high water flow line" of "navigable" rivers, streams, and sloughs for fishing.[38] If the term "navigable" means navigable for title rivers, sloughs and streams, then the statute makes it clear that the angling public has an easement to use the strip between the ordinary low-water and high-water marks, a strip of land that by statute is owned by the riparian landowner.[39] Alternatively, if the statute was intended to apply to more than just navigable for title rivers and streams, the language could arguably encompass more than just the strip of land on navigable for title rivers because the language addresses "any rights of title" between the high-water lines which could then include non-navigable for title streams.[40]

Such an interpretation is less far-fetched when the statutory definition of public ways is considered. The statutory language added to navigable waters, "all streams of sufficient capacity," not just for the purpose of navigation, but also for the transportation of "the products of the country."[41] Potentially, this language could

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dicta, has no precedential value[,] . . . and . . . is contrary to the public trust doctrine and the 1972 Montana Constitution." *Id.*) (emphasis added).

37. *Herrin,* 241 P. 333.

38. Mont. Code Ann. § 87-2-305 (1933) provides: "Navigable rivers, sloughs, or streams between the lines of ordinary high water . . . shall hereafter be public waters for the purpose of angling, and any rights of title to such streams or 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 . . . who desires to angle therein or along their banks to go upon the same for such purpose." Additionally, rivers and streams are navigable if they have "been meandered and returned as navigable" by United States surveyors, or if they are navigable in fact. 1933 Mont. Laws ch. 95, §§ 1, 2 (codified as Mont. Code Ann. § 85-1-112).

39. Mont. Code Ann. § 70-16-201 (1895).

40. Mont. Code Ann. § 87-2-305; *see Herrin,* 241 P. 333.

41. Mont. Code Ann. § 85-1-111 (1901) This statute provides in pertinent part that "[n]avigable waters and *all streams of sufficient capacity* to transport the *products of the country* are public ways for the purposes of navigation *and such transportation*." *Id.* (emphasis added).

support more than just the use of navigable for title rivers for transportation, but all waters that meet the test of sufficient capacity. While this may be regarded as a stretch, the district court in *Curran* employed a similar parsing of the language to define a recreational floating or pleasure boat test for navigable for recreation streams that included using the bed and banks.[42]

The discussion of stream access in Montana prior to the *Curran* and *Hildreth* litigation and the 1985 Legislature's adoption of the Stream Access Law would not be complete without considering how the 1972 Constitutional Convention addressed stream access and the Public Trust Doctrine.

The delegates of the Constitutional Convention discussed the Public Trust Doctrine with the resulting adoption of two proposed constitutional provisions addressing a clean and healthful environment. Both are now part of the 1972 Constitution ratified by the people of Montana, one as an enumerated inalienable right,[43] and the other establishing a duty of the state and each person to maintain and improve.[44] Most significant for stream access was language added in the revised section on water rights. There, the relevant language states that waters in the state "are the property of the state *for the use of its people*."[45]

In a discussion of the above phrase, Delegate Aronow expressed his opinion on the state of stream access at the time:

> you can go up and down that stream all you want to. But the only thing is, you can't drive across the rancher's lands willy-nilly in order to get to it. You

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42. Mont. Coal. for Stream Access v. Curran, No. 45148, (1st Judicial Dist. Ct. Mont. Dec. 7, 1982) (mem. *re* mots. for sum. j.); *See infra* at 11-14, discussion of the Dearborn River case in *Curran*, No. 45148.

43. Mont. Const. art. II, § 3 (inalienable rights); Constitutional Convention Tr. 2933, 2934 (adoption).

44. Mont. Const. art. IX, § 1(1). "The state and each person shall maintain and improve a clean and healthful in Montana for present and future generations." Constitutional Convention Tr. 2938, 2939 (adoption).

45. Mont. Const. art. IX, § 3(3) (emphasis added); Constitutional Convention Vol. II, 552-553 (Nat'l Res. & Agric. Majority Proposal), Trans. 2938, 2939 (adoption).

> can go along the county roads or wherever there's access. And you certainly may boat. You may hike up and down that stream.[46]

There was a delegate proposal that foreshadowed stream access to a remarkable degree, but was not further discussed.[47] While the Constitutional Convention did not adopt any more specific provision,[48] one way or the other, on stream access, there was the above prescient acknowledgement of stream access.

B. The Dearborn River Case (Curran) in District Court

The Montana Coalition for Stream Access, Inc. ("Coalition"), filed a lawsuit in the First Judicial District of the State of Montana on April 14, 1980, asserting that the public had the right to float, fish, and recreate between the high-water marks of the Dearborn River, as it flows through the property of landowner Dennis Michael Curran.[49] As the litigation proceeded, the Montana Department of State Lands (now reorganized within the Montana Department of Natural Resources and Conservation)

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46. Constitutional Convention Tr. 1305.

47. Constitutional Convention Vol. I, 76. Delegate Proposal No. 2 proposed a new constitutional section that would provide: "Section ---. Water. All of the water in this state, whether occurring on the surface or underground, and whether occurring naturally or artificially, belongs to the people of Montana; and those waters which are capable of substantial or significant public use may be used by the people with or without diversion or development works, regardless of whether the waters occur on public or private lands. The public has the right to the recreational use of such waters and their beds and banks to the high water mark regardless of whether the waters are navigable and regardless of whether the beds and banks are privately owned. Beneficial use of waters includes recreation and aesthetics, such as habitat for fish and wildlife and scenic waterways." *Id.* The remainder of the proposal was language on water use similar to other proposals including language that passed.

48. A new proposed Constitution of Montana was adopted by the Constitutional Convention March 22, 1972 and was ratified by the people June 6, 1972 (Referendum No. 68).

49. *Curran*, No. 45148 (mem. *re* mots. for summ. j.).

intervened as a plaintiff, claiming the state had title to the bed of the Dearborn River. Subsequently, DFWP and the State of Montana were joined as involuntary plaintiffs.

DFWP described the Dearborn River as follows:

> The Dearborn River originates along the east slope of the Continental Divide in west-central Montana. The river flows generally in a southeasterly direction from its source near Scapegoat Mountain, approximately 30 miles southwest of Augusta, Montana, to the Missouri River, a distance of approximately 66 miles. The first 20 miles of the Dearborn's course is through mountainous and canyon terrain, roughly 12 miles of which lie in the Scapegoat Wilderness. After this traverse, the river merges onto rolling plain and continues its flow for about 29 miles where it again enters a moderately timbered area. The Dearborn flows for another 17 miles and enters the Missouri River near Craig, Montana.[50]

Landowner Curran owned or controlled land through which approximately seven miles of the Dearborn flows, both upstream and downstream from where U.S. Highway 287 crosses the Dearborn.[51] Historically, Curran had denied members of the public from floating, fishing, and recreating on the Dearborn River where it crossed his land, claiming ownership of the streambed.[52] Members of the public had for some time been floating, fishing, and observing the scenic beauty of the Dearborn River, with recreational floating available at least four months of the year.[53]

Based on "statute of necessity," the district court developed a "practical rule" that a "Montana stream is navigable and

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50. Mem. in Support of Mot. for Summ. J. for Dept. of Fish, Wildlife and Parks (DFWP) at 1-2, *Curran*, No. 45148 (Apr. 23, 1982).

51. *Curran*, 682 P.2d at 165.

52. Mem. in Support of Mot. for Summ. J., *supra* note 50, at 2.

53. *Id.* at 12-13.

accessible over so much of its entire course as is navigable by recreational craft at any given time."[54] Under this rule of recreational navigation, aquatic recreationists could utilize a qualifying stream "between ordinary high water levels," including wading in the stream and walking on dry land below the ordinary high-water line.[55] This rule was based on state law, as contrasted with the federal rule determining navigable rivers for state title, i.e. ownership of the underlying bed.

The district court based its holding on an interpretation of three state statutes. Because Montana Code Annotated § 87-2-305 allows anglers to go along the banks of any "[n]avigable rivers, sloughs, or streams between the ordinary high water" to fish, and because Montana Code Annotated § 85-1-112 defines as navigable as "all rivers and streams which are navigable in fact," the district court concluded that the legislature intended that streams capable of transporting anglers in some type of watercraft are "navigable" under Montana Code Annotated § 87-2-305, and therefore should be accessible to licensed anglers.[56]

Furthermore, the district court found that the legislature had broadened recreational navigability to all recreationists with the codified definition of public waterways in Montana Code Annotated § 85-1-111.[57] The district court found by using these two separate terms "navigation" and "transportation" the legislature intended to include "ordinary, non-commercial travel" in the concept of navigation. Navigation then, by state statute, includes travel for fishing, hunting, and recreation.[58] The district court also found that the Dearborn River is navigable for title purposes with the bed of the river between the low-water marks owned by the state. This was based on evidence of log floating at the time

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54. *Curran*, No. 45148 at 4 (mem. *re* mots. for summ. j.).

55. *Id.*

56. *Id.* at 2-3.

57. "Navigable water and all streams of sufficient capacity to carry the products of the country are public ways for the purpose of navigation and such transportation." *Id.* at 3 (quoting Mont. Code. Ann. § 85-1-111).

58. *Id.* at 3-4.

statehood was granted.[59]

The district court then dismissed the motion of DFWP that Article IX, § 3(3) of the 1972 Montana Constitution means the waters of the Dearborn are "public waters" held in trust for public uses.[60] DFWP's argument was based on the language of subsection (3), which provides that "[a]ll surface . . . waters . . . are the property of the state for the use of its people." The district court reasoned that: Article IX was not self-executing; the legislature had not implemented any right of the public for recreational access to state waters; and the probable purpose of Article IX, as a whole, "was to preserve the historical appropriation system of water rights . . . rather than to assume public access to water for purposes other than appropriation."[61] The district court cited the Colorado Supreme Court's opinion in *Emmert*[62] for this principle, but also decided that the common law rule "he who owns the land controls that above it" had been set aside by the legislature though its statutes on navigable streams.[63]

The district court granted plaintiff's motion to dismiss defendant's counterclaim for inverse condemnation.[64] The key points of the district court's decision in *Curran* are that members of the public have the right to float and recreate in non-navigable streams, that they may wade and use the banks up to the ordinary high-water, and that these rights are founded in statutory language. Later, on appeal, the Montana Supreme Court held the public has broader rights that are permanently established by the Public Trust Doctrine embedded in the Montana Constitution.

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59. *Id.* at 7-16.

60. *Id.* at 16-18; Mem. in Support of Mot. for Summ. J., *supra* note 50, at 13-15.

61. *Curran,* No. 45148 at 17 (mem. *re* mots. for sum. j.).

62. People v. Emmert, 597 P.2d 1025 (Colo. 1979).

63. *Curran,* No. 45148 at 17 (mem. *re* mots. for sum. j.).

64. *Id.* at 18.

C. The Beaverhead River Case (Hildreth) *in District Court*

The Coalition, on April 8, 1981, filed a complaint in the state district court for Beaverhead County asserting that members of the public had the right to float and recreate on the Beaverhead River.[65] The suit was against landowner Lowell S. Hildreth for a variety of actions. Most notably, Hildreth had installed a fence across the downstream side of a bridge on his property, was preparing to install a cable across the river further upstream, and was harassing and interfering with floaters.[66]

The Beaverhead River is formed by the confluence of Horse Prairie Creek and the Red Rock River, now inundated by the Clark Canyon Dam. The Beaverhead River flows in a northeastern direction for fifty miles from the dam to join the Big Hole River where they form the Jefferson River near Twin Bridges.[67] The river flows through Hildreth's land for 1.5 miles, starting approximately two miles below the dam.[68] The Beaverhead River was, and had been for decades, floated by persons fishing and recreating without permission.[69] Initially, the landowner was enjoined from interfering with floaters and required to remove the fence on the downside of Hildreth bridge across the river.[70] Hildreth's counterclaim for a taking by inverse condemnation was dismissed in part, because the court found no viable takings claim under either of the potential outcomes, i.e., if the members of the public had a right to float or did not have a right to float, the issue of a takings was resolved either way.[71]

The district court held:

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65. Mont. Coal. for Stream Access v. Hildreth, No. 9604 (5th Judicial Dist. Ct. Mont. Dec. 7, 1982) (findings of facts and conclusions of law).

66. *Id.* at 10.

67. *Id.* at 2.

68. *Id.* at 2-3.

69. *Id.* at 12.

70. *Id.* (May 15, 1981) (prelim. inj.).

71. *Id.* (June 23, 1982) (order).

> The Beaverhead River, where it runs through the property of Defendant, is navigable under the pleasure-boat test of navigability, and, as such, members of the public have the right to float the river and use its banks up to the ordinary high water mark free from interference from Defendant.[72]

The court also held that the public could portage around the bridge during times of high-water "when necessary, in a manner which is least intrusive to the interference with Defendant's property."[73] The court had initially severed and reserved the issue of Hildreth's counterclaim for an inverse condemnation. Then, the court, in certifying its final judgment, pursuant to Rule 54(b) of the Montana Rules of Civil Procedure, rejected the counterclaim with the following language: "[t]his court views the issues decided in favor of plaintiff to be dispositive of the remaining issues, and if affirmed on appeal, the remaining issues would probably be thereby resolved."[74]

In review, both district courts adopted a pleasure boat test of navigability for recreational use, not just to float a river, but to also use the bed and banks up to the ordinary high-water mark. Interestingly, one court based its holding on an interpretation of state statutes on navigability, but rejected the Public Trust Doctrine in its decision. The other based its decision on the persuasive force of holdings in other jurisdictions, without mentioning the public trust at all. As it turns out, the Montana Supreme Court would see things differently.

D. The Montana Supreme Court Decisions in Curran *and* Hildreth

Twice in the summer of 1984, the Montana Supreme Court was faced with deciding what rights the public had to utilize streams and rivers in Montana for recreation: first, in *Curran* and one month later in *Hildreth*.

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72. *Id.* at 14 (findings of fact and conclusions of law).
73. *Id.* at 16.
74. *Id.* at 2 (Dec. 22, 1982) (j.).

In *Montana Coalition for Steam Access v. Curran,*[75] decided May 15, 1984 and written by Chief Justice Haswell, the Court issued a uniquely broad and encompassing determination of the public right to stream access. Initially, the Court affirmed the district court's decision that the Dearborn River was navigable under the federal law of navigability for title by application of a log-floating test and, therefore, title to the riverbed was held by the state in accordance with the Equal Footing Doctrine.[76] The Court then addressed whether, under state law, recreational use and fishing make a stream navigable. The Court, in clear and exceptionally broad language held:

> In sum, we hold that, under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes.[77]

The Court cited to specific language in Article IX, § 3(3) of the 1972 Montana Constitution:

> All surface, underground, flood, and atmospheric waters within the boundaries of the state are property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in law.[78]

It seems ironic that the Court cited the Wyoming Supreme Court in support for the proposition that the public can use water suitable for recreation "without regard to title or navigability,"[79] as

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75. *Curran*, 682 P.2d 163.
76. *Id.* at 168.
77. *Id.* at 171.
78. *Id.* at 170.
79. *Id.* at 170 (citing Day v. Armstrong, 362 P.2d. 137, 147 (Wyo. 1961)).

Wyoming's prohibition on touching the bed and banks of non-navigable for title streams, stands almost in polar opposition to Montana's law on stream access.[80] In fact, the Court erroneously summarized Wyoming law as holding "that public recreational use of the waters was limited only by the susceptibility of the water for that purpose."[81]

Of great importance, the Montana Court cited to and quoted from the seminal 1892 United States Supreme Court decision as clearly defining the Public Trust Doctrine.[82] The Court first found that under the Public Trust Doctrine "states hold title to navigable waterways in trust for public benefit"[83] and then declared that under the Constitution of Montana, all waters of the state "are owned by the state and are held in trust for the people."[84]

However, the Court cautioned the opinion did not grant the public any right to "enter upon or cross over private property to reach state owned waters hereby held available for recreational purposes."[85] Rather, the Court held, "that the public has the right to use the state-owned water to the point of the high water mark" except for barriers which the public could portage around "in the least intrusive way" while "avoiding damage to private property."[86] In support of its finding that the public right to use streams extends to the high-water mark, the Court relied on the "angling statute,"[87] and *Gibson v. Kelly*, an 1895 decision that "recognized a public right to access for fishing and navigational purposes."[88]

Just over a month later, the Court issued its opinion in *Montana Coalition for Stream Access v. Hildreth*. Again authored

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80. *Day*, 362 P.2d at 145-46 (limiting stream access in Wyoming to floating only, with no wading or walking on the bed and banks).

81. *Curran,* at 170.

82. *Id.* at 167-68 (citing Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892)).

83. *Id.* at 168.

84. *Id.* at 170.

85. *Id.* at 172.

86. *Id.* at 172.

87. Mont. Code Ann. § 87-2-305.

88. *Curran,* at 172; for the angling statute, *see supra* note 38; for a discussion of *Gibson v. Kelly*, *see supra* note 23 and accompanying text.

by Chief Justice Haswell, the Court's opinion reinforced the public's right to recreate in Montana streams by deciding public recreational use rights on a stream that was not navigable for title.[89] The district court had "found the Beaverhead River navigable for recreation under the pleasure-boat test." The Court affirmed the result but said it was "unnecessary and improper to determine a specific test under which to find navigability for recreational use."[90]

The Court reinforced *Curran*, saying:

> the capability of the use of the waters for recreational purposes determines whether the waters can be so used. The Montana Constitution clearly provides that the state owns the waters for the benefit of its people. The Constitution does not limit the waters' use. Consequently, this Court cannot limit their use by inventing some restrictive test.[91]

The Court addressed specifically the corresponding public right to use the bed and banks:

> 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.[92]

In summary, the Court held, and confirmed in agreement with *Curran*, that for rivers that are navigable for recreational purposes public use is limited "only by the capabilities of the water

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89. *Hildreth*, 684 P.2d 1088.
90. *Id.* at 1091.
91. *Id.*
92. *Id.*

for such use"[93] and "the public has the right to use the bed and banks up to the ordinary high water mark."[94] Therefore, *Curran* and *Hildreth* recognize a public right to recreate in waters by floating, wading, and walking along the bank up to the high-water mark.

In dismissing Hildreth's claim for inverse condemnation, the Court explained that "[p]ublic use of the waters and bed and banks of the Beaverhead up to the ordinary high water mark was determined, not title."[95] Further, because "Hildreth has never owned and does not now own the waters of the Beaverhead River"[96] he was not "deprived of a property right by the district court."[97]

Justice Gulbrandson dissented and would have left the conflicts between landowners and recreational users up to the Montana legislature. He claimed, based on recent sessions, "there has been public evidence that a reasonable and legal solution could have been achieved within the legislative forum."[98] As we shall see, *infra*, the legislature was contemplating stream access significantly more restrictive than stream access required by the *Curran* and *Hildreth* decisions.

II. THE STREAM ACCESS DEBATE IN THE MONTANA LEGISLATURE PRIOR TO AND FOLLOWING *CURRAN* AND *HILDRETH*

As the story now transitions to the public policy arena, it is important to appreciate the position in which the Montana Legislature found itself following the landmark decisions just announced. To be sure, the Montana Supreme Court had left no doubt as to the perimeter of a very broad and encompassing public recreation right anchored in the Montana Constitution and the

93. *Id.* at 1094.
94. *Id.*
95. *Id.* at 1093.
96. *Id.* at 1094.
97. *Id.*
98. *Id.* at 1095.

Public Trust Doctrine. Yet, the suspense of the time surrounded the looming question of whether the legislature would honor the constitutional and public trust mandates of the Montana Supreme Court.

Across the state, the politics and social ideals of public access were dividing Montanans. The legislature, in the 1983 Session and for most of the interim before the 1985 Session, was setting a course towards a comparatively quite restrictive version of public access. Even after the May and June 1984 Supreme Court decisions, a dramatic struggle ensued between very restrictive stream access proposals and the very broad framework established by the Supreme Court.

A. The 1983 Legislature Failed to Adopt Any Stream Access Statutes

The Montana Legislature was indeed addressing stream access concurrent with the process of the litigation in the district courts and the Supreme Court. In the 1983 legislative session, there were four significant bills introduced dealing with the subject of stream access. The one that passed was House Joint Resolution 36.[99] HJR 36 requested that an interim committee be assigned to study the rights of the public to access and use public lands and waterways and to identify and preserve the rights of landowners adjacent to public land and waterways. The resolution identified a list of study topics: methods of acquiring access across private land; right of the public to use waterways, including a legislative definition of navigability, if necessary, and use of adjacent uplands; rights and title interests of adjacent landowners; landowner's right to place fences, bridges, flumes, etc. in the waterway; and liabilities of landowners and public users.

Perhaps the strangest proposed bill of the 1983 Legislative session was SB 348.[100] The bill was a reaction to the district court decision in the *Curran* litigation. The district court had read the

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99. H.R.J. Res. 36, 48th Legis., Reg. Sess. (Mont. Mar. 19, 1983).

100. S. 348, 48th Legis., Reg. Sess. (Mont. Feb. 3, 1983) (Introduced Bill).

statutory definition of navigable in Montana Code Annotated § 85-1-112 as broader than the requirements set out by the U.S. Supreme Court for determination of rivers navigable for title. This determination, coupled with Montana Code Annotated § 87-2-305 that allows anglers to wade on the bed and banks of state defined "navigable streams," was the grounding of the district court's conclusion that Montana had a pleasure boat test for public access of streams along with the use of the bed and banks.[101]

SB 348 narrowed the state statutory definition of "navigable for recreation" to one more restrictive than the federal test of "navigable for title."[102] In order to qualify, a stream must have been "actually used in its ordinary condition as a highway for commerce, travel and trade . . . and if the commerce, trade, and travel were successful activities." The federal *Daniel Ball* test includes rivers that are susceptible of being used as highways of commerce and do not necessarily require that the commerce be successful. Furthermore, under the requirements of SB 348 for recreational use, the stream must have been used in this manner on the date of statehood, November 8, 1889.

The effect of SB 348 would have been dramatic. Under the proposed law, the floating of logs and recreational use would not qualify any stream for the status of navigable for recreation under the new state law.[103] For example, the Dearborn River would still be a navigable river for title with the state owning the bed of the river; however, under the new statutory definition the public would have no right to float or fish the Dearborn River where it flowed through private land. The DFWP testified that the bill "would effectively 'lock out' historic uses of most of Montana's rivers . . . In fact, all portions of the original Blue Ribbon streams[104] would be

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101. *Curran,* No. 45148, at 2-4 (mem. *re* mots. for sum. j.).

102. *See The Daniel Ball*, 77 U.S. at 563; *see also supra* note 15 and accompanying text.

103. S. 348, *supra* note 100, at 1-2.

104. 1969 Mont. Laws ch. 345, 875 (H.R. 450) amended Rev. Code Mont. 1947 § 89-801 by adding § 2, which authorized the Commission to appropriate instream flows in 12 "blue ribbon" streams and rivers "to maintain stream flows necessary for the preservation of fish and wildlife

excluded from the list of navigable streams."[105]

Although SB 348 died in the Senate Judiciary Committee,[106] several other bills were proposed with similarly egregious ambitions. HB 799 would have transferred the title of the bed of navigable for title rivers to any private riparian landowners[107] in clear violation of the Enabling Act, the Montana Constitution, and the Public Trust Doctrine.[108] HB 888, as introduced, would have transferred title to the bed of navigable for title rivers to the riparian landowners.[109] This part of the bill was amended on the House Floor to exclude rivers "determined at anytime to be navigable under the federal navigability definition."[110] The effect of the amendment was to return the ownership of the beds of navigable rivers to the state, albeit in an awkwardly worded amendment to Montana Code Annotated § 70-16-201.[111] The other major amendment in the bill was to create a Wyoming type stream access[112] limited to floating rivers only with "a canoe, kayak,

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habitat." *Id.* The 1973 Montana Water Use Act repealed § 89-801 of 1973 Mont Laws ch. 452, § 46, 1121. However, the repeal did not affect the completed instream flow appropriations.

105. S. JUDICIARY COMM., DEBATE ON S. 348, 48th Legis., Reg. Sess. (Mont. Feb. 16, 1983) (written testimony of Jim Flynn, Director, DFWP).

106. History and Final Status, S. 348, 48th Legis., Reg. Sess., Sen. Bills and Res., 118 (Mont. 1983).

107. H.R. 799, 48th Legis., Reg. Sess. (Mont. Feb. 15, 1983) (Introduced Bill).

108. The Enabling Act of 1889, 25 Stat. 676 (Feb. 22, 1889); Mont. Const. of 1889, art. XVII, § 1. Both require full market value for the disposal of state land. The Public Trust Doctrine as adopted by the Montana Supreme Court in *Curran*, 682 P.2d at 167-8 (citing *Ill. Cent. R.R.*, 146 U.S. 387). The Doctrine prohibits, except in limited circumstances, Montana from conveying navigable river beds into private ownership.

109. H.R. 888, 48th Legis., Reg. Sess. (Mont. Feb. 17, 1983) (Introduced Bill).

110. H.R. 888, 48th Legis., Reg. Sess. § 2 (Mont. Feb. 22, 1983) (3d Reading). The amendment was confusing because the language as amended no longer said whether the riparian landowner takes to the low or high-water mark.

111. *Id.*

112. *Day*, 362 P.2d at 145-46 (limits stream access in Wyoming to

inflatable boat, skiff, or any other boat designed to be propelled by oar, paddle, or motor."[113]

Both HB 888 as introduced and as amended, would allow members of the public "to navigate and exercise the instance of navigation" in rivers using the defined watercraft.[114] This in itself presumably would not allow floaters to wade or touch the bed and banks, except to portage around obstructions. Since Montana Code Annotated § 87-2-305 was not amended, which allows anglers to use the bed and banks of navigable rivers, sloughs, or streams, the issue of the use of the beds and banks would be somewhat uncertain if HB 888 had passed.[115]

All of these three major bills (SB 348, HB 799, and HB 888) proposed to adopt stream access provisions that would be radically more restrictive than the preceding district court decisions in the *Curran* and *Hildreth* litigation. The study resolution, HJR 36, however would provide an informative window on the political debate, both before and after the Supreme Court decisions in *Curran* and *Hildreth*, in the summer of 1985.[116]

B. The 1985 Legislature Enacts the Stream Access Law

After the 1983 session, the odyssey of the adoption of the present stream access statutes began. To follow in a meaningful way the course of the legislative struggle and eventual success, it is critical to keep in mind the two main threads of stream access in

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floating only with no wading or walking on the bed and banks).

113. H.R. 888, *supra* note 109, at 2-3.

114. *Id.* at § 3 (Mont. Feb. 17, 1983) (Introduced Copy) (adding § (3)(a) to Mont. Code Ann. § 85-1-112); H.R. 888, 48th Legis., Reg. Sess., Section 3 (Mont. Feb. 22, 1983) (3d Reading) (amending new § (3)(a) of Mont. Code Ann. § 85-1-112) (this amendment would have limited stream access to navigable for title rivers).

115. History and Final Status, H.R. 888, 48th Legis., Reg. Sess., H. Bills and Res. 316 (Mont. 1983). House Bill 888 passed in the House, but died in the Senate Committee on Agriculture, Livestock, and Irrigation; History and Final Status, H.R. 799, 48th Legis., Reg. Sess., H. Bills and Res. 287 (Mont. 1983). H.R. 799 in the House Committee on Fish and Game.

116. *Curran*, 682 P.2d 163; *Hildreth*, 684 P.2d 1088.

Montana. The primary stream access guarantees of the Supreme Court's *Curran* and *Hildreth* decisions are that the capability of a stream for recreation defines the extent of the public right, and that the public has the right to use the bed and banks of a stream up to the ordinary high-water mark while recreating in a stream. Translated to its practical application, several principles followed: all streams are open to stream access; there can be no floating or pleasure boat test; and recreationists may wade in the stream and walk on the bank up to the ordinary high-water line.

Nevertheless, one significant question remained unresolved by the Court: how to define the details of the extent and limits of stream access? Addressing these details in statute would provide specific guidance for recreationists and protect the private property rights of riparian landowners. This category of definitions includes: defining the ordinary high-water mark, recreational use, and barriers; determining what activities do not qualify and are not allowed as water-related pleasure activities; how to regulate portage activities; how to treat water diverted into irrigation and drainage ditches and water conveyed as part of a municipal water supply system; what activities are not appropriate in the smaller streams; limits on landowners liability; assuring that the recreating public has no right to cross private property to get to a stream or river; and that access across private property by the public cannot be the basis of a prescriptive easement.

While the above principles will determine the merits of proposed legislation and help grade the debate and final legislative product, initially the legislature did not have the absolute resolve of the Supreme Court's decisions. Instead, the two district court decisions, based on statutory interpretations or the application of common law principles, allowed the legislature almost unlimited latitude prior to the *Curran* and *Hildreth* decisions.

In June 1983, the Legislative Council (a committee composed of legislators with the duty of overseeing and directing legislative staff and interim activities)[117] assigned the study of water

117. Mont. Code Ann. §§ 5-11-101 to 120 (1985) (established the Legislative Council and authorized its powers and duties).

recreation under HJR 36 to joint Interim Subcommittee No. 2.[118] The committee met in August 1983, January 1984, and March 1984 to study the legal issues, develop a work plan, and hold a public hearing.[119] The tangible result was a request by the committee for local groups and individuals, aided by conservation districts, to identify floatable and non-floatable streams in their areas.[120]

Then, the legal and policy landscape changed dramatically when the *Curran* decision was announced on May 15 and the *Hildreth* decision on June 21.[121] At the next meeting on July 30, the committee was advised on the limits that the Supreme Court's decisions placed on legislative response. The committee was advised that because of the Court's ruling based on the Public Trust Doctrine embedded in the language of Montana's 1972 Constitution and applied to all surface waters "the only possible limitation of the use arises from the characteristics of the water."[122] Professor Margery Brown advised on the decision space of the Legislature in that it "may alter existing statutes not only to protect this newly enunciated public right but also to underscore the public responsibilities that go with these rights, insofar as protection of adjacent landowner property rights is concerned."[123] Similarly, another consultant advised that because the court based its decision on the Public Trust Doctrine "the Legislature cannot substantially modify the result of those decisions. Had the court based its decision on narrower grounds (e.g., statutory grounds), the Legislature would have been able to modify the results of the decisions by changing statutes."[124]

Along the same line, Senator Jack Galt asked if a

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118. J. INTERIM SUBCOMM. NO. 2, 49TH LEGIS., REPORT ON RECREATIONAL USE OF MONTANA'S WATERWAYS 2 (1985).

119. *Id.* at 5-6.

120. *Id.* at 6-7.

121. *Curran*, 682 P.2d 163; *Hildreth*, 684 P.2d 1088.

122. J. INTERIM SUBCOMM. NO. 2, 49TH LEGIS., HJR 36 WATER RECREATION STUDY, MINUTES, at 10 (July 30, 1984) (testimony of Margery Brown, Assoc. Dean, Univ. of Mont. Sch. of Law).

123. *Id.* at 11 (testimony of Dean Brown).

124. *Id.* at 9 (testimony of consultant John Thorson).

prohibition on the use of river beds would be legal and was advised, "[t]he right to use the bed is so fundamentally related to the public's interest in the water that even the legislature cannot take it away."[125] In spite of clear, contrary advice, the subcommittee voted 4-3 (Representative James D. Jenson absent) to draft a Wyoming-type bill that would restrict stream access to floating and prohibit "the angler from walking up the stream."[126] At the following and last meeting of the subcommittee on September 28, a motion to strike this section of the subcommittee bill died on a tie vote.[127]

The result was a draft designated Legislative Council ("LC") 69[128] that carried out the subcommittee's recommendation to the 1985 Montana Legislature to enact a bill "prohibiting, with certain exceptions, use of land beneath surface waters that do not satisfy the federal test of navigability for purposes of state ownership."[129] The bill would allow the use of the beds and banks of rivers that satisfy the "federal test of navigability for purposes of the state ownership."[130] In the end, LC 69 was introduced in the 1985 session as HB 16.[131]

With the failure of the Joint Interim Subcommittee to recommend viable stream access legislation that did not blatantly violate the tenets of the *Curran* and *Hildreth* decisions, the fate of successful stream access legislation now rested in the hands of others. A coalition of groups representing landowners and agricultural interests, led by Helena attorney Ron Waterman, went to the Director of DFWP, Jim Flynn, to propose that his coalition work with DFWP and recreationists on a "compromise bill." As a consequence, Mr. Waterman and DFWP attorney Stan Bradshaw were assigned the task of drafting a bill that would be faithful to the *Curran* and *Hildreth* decisions while addressing many of the

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125. *Id.* at 11-12.

126. *Id.* at 32-33.

127. J. INTERIM SUBCOMM. NO. 2., 49TH LEGIS., HJR 36 WATER RECREATION STUDY, MINUTES, at 40 (Sept. 28, 1984).

128. J. INTERIM SUBCOMMI NO. 2, *supra* 118, at Appendix A.

129. *Id.* at i, ¶ (1)(b), Appendix A (LC 69, § 3(2)).

130. *Id.* at i, ¶ (1)(c), Appendix A (LC 69, § 3(1)).

131. H.R. 16, 49th Legis., Reg. Sess. (Mont. Jan. 7, 1985).

concerns of landowners.[132] The result was HB 265, sponsored by Representative Bob Ream and supported by the coalition of agricultural landowners, the coalition of recreationists, and DFWP.[133]

HB 265 as introduced[134] divided surface waters in two categories: Class I waters that meet or potentially meet the federal navigability test for state streambed ownership; and, Class II waters which are all other surface waters that are not Class I waters. Class I and Class II waters could be used by the public "without regard to the ownership of the land underlying the waters," for all defined recreational uses the waters are capable of, including the use of the beds and banks up to the ordinary high-water mark. Some uses of Class II waters were restricted, such as overnight camping, big game and bird hunting, use of all-terrain vehicles, and placement of permanent duck blinds and boat moorages. Recreational use of stock ponds and ditches was prohibited.

As written, a member of the public could portage around barriers and the bill established a formal process for establishing portage routes. The bill also addressed landowner liability, provided a prohibition on prescriptive easements through recreational use of surface water, affirmed that the public had no right to cross private property to access streams, and defined terms, such as "barrier," "ordinary high-water mark," and "recreational use." During the session, the organizational structure of the bill would change, additional terms defined, definitions fine-tuned, some uses of Class I waters prohibited, and lakes and natural barriers were excluded. These changes were the subject of significant debate, but the heart of the introduced bill remained in the language of the final, adopted bill.

The competing bills were: HB 16 (the subcommittee bill) that, for all streams that did not meet the federal test of navigability for state ownership of the beds, prohibited the use of the beds and

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132. Interview with Stan Bradshaw, Former Agency Attorney at Montana Fish, Wildlife & Parks, Helena (Mar. 28, 2014).

133. *See infra* notes. 140, 141, 143 and accompanying text.

134. H.R. 265, 49th Legis., Reg. Sess. (Mont. Jan. 18, 1985) (Introduced Copy).

banks so that only floating was allowed;[135] HB 275 that would restrict stream access to a pleasure boat test but allowed the use of the beds and banks thereby ignoring the Supreme Court decisions in *Curran* and *Hildreth* while codifying the district court decisions;[136] and HB 498, that in the same fashion as HB 16, proposed a Wyoming floating use only with essentially no use of the beds and bank except on navigable for title rivers.[137] HB 16, HB 275, and HB 498 all died in the House Judiciary Committee where the bills were referred after they were introduced.[138] HB 265 was heard in a joint meeting of the House Judiciary Committee, House Fish and Game Committee, and the House Agriculture Committee on January 27, 1985 along with HB 16 and HB 275.[139] Ron Waterman, in written testimony, described the introduced HB 265 as the cooperative effort among landowners, recreationalists, and the DFWP. The membership of the agricultural and landowner coalition who supported HB 265 was varied and diverse.[140]

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135. H.R. 16, 49th Legis., Reg. Sess. (Jan. 7, 1985) (Introduced Bill).

136. H.R. 275, 49th Legis., Reg. Sess. (Jan. 19, 1985) (Introduced Bill).

137. H.R. 498, 49th Legis., Reg. Sess. (Jan. 29, 1985) (Introduced Bill).

138. History and Final Status, H.R. 16, 48th Legis., Reg. Sess., H. Bills and Res. 8 (Mont. 1983); History and Final Status, H.R. 275, 48th Legis., Reg. Sess., H. Bills and Res. 98 (Mont. 1983); History and Final Status, H.R. 498, 48th Legis., Reg. Sess., H. Bills and Res. 178 (Mont. 1983).

139. H. JUDICIARY COMM., MEETING ON H.R. 16, H.R. 265, H.R. 275, MINUTES, at 1 (Jan. 22, 1985).

140. The following groups all supported House Bill 265: The Montana Stockgrowers Association, Montana Wool Growers Association, Montana Association of State Grazing Districts, Montana Cowbells, 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. *Id.* Ex. C at 1, 8 (written testimony of Ron Waterman). The testimony also identified six major goals of the agricultural and landowner coalition: "(1) Recognition of private property rights; (2) Restriction of landowner liability; (3) Identification of the right of portage around barriers; (4) Limitation upon prescriptive easement to avoid

The Montana Council of Trout Unlimited, represented by Mary Wright, testified that the agricultural groups initiated discussions with the sportsmen's groups and DFWP with a resulting agreement on all the major issues raised by the Supreme Court's decision.[141] The agreed principles were proposed to Representatives Ream and Marks and embodied in HB 265.[142] The Montana DFWP, represented by Director Jim Flynn, also testified in support of HB 265, acknowledging HB 265 as "a product of cooperation between two significant Montana interest groups."[143]

The House Judiciary Committee appointed a subcommittee on stream access bills, with Representative Kerry Keyser selected as chairman. The subcommittee met six times[144] and adopted proposed amendments to HB 265[145] that were then adopted by the full House Judiciary Committee.[146] The subcommittee amendments adopted by the full House Judiciary Committee included several important components.[147]

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the loss of land ownership through recreational use activity; (5) a definition of high water to demonstrate it was the equivalent to the 'ordinary high water mark' of the Natural Streambed Preservation Act; and (6) limitation upon the public's use to follow and recreate upon diverted waters." Mont. Code Ann. §§ 75-7-101 to 125 (The Natural Streambed and Land Preservation Act of 1975). H. JUDICIARY COMM., *supra* note 139, at Ex. C at 4.

141. H. JUDICIARY COMM., *supra* note 139, Ex. D at 1 (written testimony of Mary Wright).

142. *Id.* Ex. D at 1-2.

143. *Id.* Ex. E at 3 (written testimony of Jim Flynn).

144. *See generally* H. JUDICIARY SUBCOMM. ON STREAM ACCESS BILLS, MINUTES Jan. 25, 26, and 29, Feb. 4, 5, and 6, 1985.

145. *Id.* at 6 (Feb. 6, 1985).

146. H. JUDICIARY COMM., EXEC. SESS. ON MONT. H.R. 265, MINUTES, at 9 (Feb. 12, 1985).

147. The amendments included a grant of rulemaking authority to the Commission to consider limits on recreational necessary to protect the resource and private property; defined what commercial activities would qualify a river as a Class I water; added a catch-all phrase "other water-related pleasure activities" to the definition of "recreational use;" added a definition of "surface water;" that includes the bed and banks; changed the structure of restrictions on use of Class I and Class II waters from within the definition of recreational use to a separate section in the bill; prohibited the use of all-

After passing in the House, the Senate Judiciary Committee made extensive amendments to HB 265. The primary amendment added was: "The public has no right to make recreational use of Class II waters without permission of the landowners."[148] Thus, in a single sentence the Senate Judiciary Committee voted to eviscerate the very essence of stream access that the Montana Supreme Court had held was a public trust right recognized by the 1972 Montana Constitution. However, the whole Senate adopted amendments to reverse the heart of the Judiciary Committee amendments.[149]

In spite of the legislative progress, two troublesome results of the combination of the dueling amendments remained. The definition of "recreational use" was amended so that fishing, hunting, and swimming could not be done "within 100 yards of an occupied dwelling" and, "recreational use" was further restricted by removing the catch-all phrase "other water related pleasure activities."[150]

Then Senator Galt proposed an amendment that was adopted by the Senate to remove from the definition of "surface water" the part that allowed recreationists to use the bed and bank of a stream, again turning stream access into a right only to float on

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terrain vehicles and other motor vehicles and big game hunting within the ordinary high-water marks of all surface waters; added rulemaking authority to the Commission for governing the recreational use of Class I and Class II waters; and a few other amendments. H.R. 265, 49th Legis., Reg. Sess. (Mont. Feb. 14, 1985) (2d Reading).

148. *Id.* (Mar. 27, 1985) (S. Judiciary Comm. amendments to 3d Reading, No. 25).

149. *Id.* (Mar. 30, 1985) (S. Comm. of the whole amendments to 3d Reading moved by Sen. Yellowtail). The result of the two sets of Senate amendments was to: remove natural objects from the definition of "barrier;" qualify that nothing in House Bill 265 makes portage around natural barriers lawful or unlawful; state that the recreational use of lakes is not addressed; restrict camping, placement of permanent duck blinds, boat moorage, etc. within sight or 500 yards of an occupied dwelling, whichever is less, on Class I waters; and added authority to the Fish and Game Commission to adopt a procedure for restricting, on Class II waters, recreational use to the actual capacity of the water. *Id.* (April 1, 1985) (Reference Bill).

150. *Id.* at § 1(10) (Reference Bill).

all rivers, including navigable rivers.[151] A conference committee was appointed to address the different Senate and House versions and recommended that these last three severe restrictions be removed.[152] Both the Senate and House adopted the conference committee report and when the Governor signed the bill on April 19, 1985, Montana had a stream access law.[153]

HB 520, that prohibits the recreational use without permission of any water directed for a beneficial use in irrigation ditches, drainage canals and ditches, etc., was passed.[154] The bill's language, but not the meaning, differed slightly from its counterpart in HB 265 so the two were meshed in Montana Code Annotated § 23-2-301(6) and § 23-2-302(2) and (2)(c) by the Code Commissioner.[155]

The 1985 Legislature was perhaps the one and only session that could have passed a collaborative bill fashioned by both organizations representing recreationists and organizations representing landowners, that stayed true to the public recreational rights guaranteed by the Montana Supreme Court, and that provided needed definitions and detail while protecting the private property rights of riparian landowners. Ultimately, eleven stream access bills were introduced. Three of those that did not pass would have significantly restricted stream access in direct contradiction of the Supreme Court decision and five more died because their content was mirrored in HB 265, or because they were more restrictive regarding trespass then the legislature was comfortable with adopting. The two bills that passed in addition to HB 265 supplemented the themes of the compromises underlying the new stream access law.

The passage of HB 265 must be measured against strong

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151. *Id.* (March 30, 1985) (S. Comm. of the whole amendments to 3d Reading moved by Sen. Galt).

152. *Id.* (April 10, 1985) (Conf. Comm. Rep.).

153. 1985 Mont. Laws ch. 556, 1127 (codified at Mont. Code Ann. §§ 23-2-301 to 322).

154. 1985 Mont. Laws ch. 429, 805 (H.R. 520).

155. Mont. Code Ann. §§ 23-2-301, 302, Annotation Compiler's Comments 7 (2012).

and repeated efforts prior to and throughout the session to restrict stream access to floating only. This opposition would have limited recreational use to the larger river only when there is enough water to float and would have prohibited fishing while wading. The political contest started with a restrictive, proposed bill adopted by the interim committee, survived competing bills in the House, encountered rough waters in Senate Judiciary Committee and Senate floor amendments, and was finally resolved by a House and Senate conference committee. In stark contrast to the attempts to limit stream access, the new Stream Access Law, with remarkable simplicity, allows recreational use of all rivers and streams within the ordinary high-water mark, whether floating, wading, or walking along the banks, while protecting riparian, private landowners from trespass above the high-water mark. Thus, in retrospect, the 1985 session can be viewed as representing legislative closure in establishing Montana's stream access, but the controversy was not over.

III. LITIGATION CLAIMING THE STREAM ACCESS LAWS OF HB 265 WAS A TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION

Almost immediately after the 1985 session, another phase in the evolving saga of stream access was initiated through directly attacking the newly adopted stream access statutes. The strategy was to claim that the new law went too far, therefore resulting in an unconstitutional taking of private property without just compensation. Interestingly, the initial litigation was led by the principal opponent in the legislature, Senator Jack Galt. This attack would continue in different forms and venues until just recently.

A. The Galt *Taking Case in the District Court*

A number of plaintiffs, Jack Galt and others, filed a complaint in state district court[156] on June 14, 1985[157] claiming that

156. Galt v. State, No. ADV-85-565 (1st Judicial Dist. Ct. Mont.

House Bill 265[158] was unconstitutional as a taking of private property without just compensation. The plaintiffs claimed there was a taking because the new law allowed the public to recreate using the lands "between the high and low-water mark when there is no water upon the land and to create portage routes upon the private lands of plaintiffs above the high-water mark and around artificial barriers."[159] The complaint asked that HB 265 be declared "illegal, unconstitutional and void" because it was a taking.[160]

In the litigation, the plaintiffs argued that the Montana Supreme Court authorized recreational use only of the "*waters* and the *streambed under those waters*."[161] The plaintiffs relied upon the language of Montana Code Annotated § 70-16-201 which granted ownership of land to the riparian landowner on a navigable stream down to the low-water mark. This statute uses "navigable" meaning navigable for title under the federal test.[162] The plaintiffs made no distinction between navigable for title streams and other streams where a riparian landowner owns the land to the middle of the stream.[163] The Defendants, State of Montana and DFWP, responded that HB 265 carefully tracked the *Curran* and *Hildreth* holdings and that both decisions "… declared that there was no taking of a landowner's title because his ownership interest was impressed with a recreational easement,"[164] although neither decision used the word "easement."

The district court denied the plaintiffs' claim that HB 265 was unconstitutional, based on the doctrine of *stare decisis*, because

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Feb. 13, 1986) (op. and order).

157. *Id.* at 1.

158. 1985 Mont. Laws ch. 556, 1227 (codified at Mont. Code Ann. §§ 23-2-301 to 322 (1985)).

159. Compl. § VI, *Galt*, No. ADV-85-565.

160. *Id.* at ¶ 1.

161. Pls.' Br. in Support of Summ. J. at 16, *Galt*, No. ADV-85-565 (emphasis in the original).

162. *Gibson*, 39 P. 517.

163. Mont. Code Ann. § 70-16-101; Pls' Br., *supra* note 161, at 21.

164. St.'s Mem. of P. & A. in Opp'n to Pls.' Br. in Support of Summ. J. and in Support of Def.'s Mot. for Summ. J. at 2, *Galt*, No. ADV-85-565 (Dec. 2, 1985).

the issue had already been decided in the *Curran* and *Hildreth* cases where: "the district courts dismissed Curran's and Hildreth's inverse condemnation claims and the Montana Supreme Court affirmed both decisions."[165] The district court specifically referred to the *Hildreth* court's holding that "[t]he public has the right to *use* the *waters* and the *bed* and *bank* up to the *ordinary high water mark.* (*See Curran.*) Further, . . . in the case of barriers, the public is allowed to *portable around such barriers.*"[166] The district court compared the *Hildreth* language to the essentially identical language in HB 265.[167]

B. The Galt *Taking Case in the Montana Supreme Court*

When the case reached the Montana Supreme Court, the appellants, plaintiffs in the district court (*Galt, et al.*), asserted that HB 265 was an unconstitutional taking of property for public recreational use without just compensation in violation of the Fifth Amendment of the United States Constitution, and constituted a taking or damaging of property in violation of Article II, § 29 of the 1972 Montana Constitution.[168]

More specifically, Galt claimed that the public had rights only in the use of the water and had no right to use the bed and banks that were privately owned.[169] For non-navigable waters, this meant the public could not use the streambed and banks. Therefore, floating only should be allowed. For the larger navigable for title rivers, or essentially Class I waters as defined in HB 265, the public could not use, i.e. stand on or wade in, the strip between the high-water and low-water lines,[170] apparently whether there was water flowing there or not. This meant that a person

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165. *Galt*, No. ADV-85-565 at 15 (op. and order).

166. *Id.* at 14-15 (quoting *Hildreth*, 684 P.2d at 1091) (emphasis in original).

167. *Id.* at 15.

168. Br. of Appellants at 1, 10, Galt v. State, No. 86-178 (Mont. 1986) (Apr. 28, 1986).

169. *Id. passim.*

170. *Id. passim.*

fishing could float and only wade if he or she was deep enough in the water to be below the low-water line. In addition, and somewhat in conflict with their overarching argument, Galt also argued that the enumerated, allowed uses of the high- to low-water strip on Class I waters were unconstitutional.

Montana Code Annotated § 23-2-301(2) prohibits some uses on all waters and allows some identified, but qualified uses on only Class I waters, the specific uses that Galt claimed were an unconstitutional use of private property: big game hunting with a long bow or shotgun if authorized by the Commission; overnight camping if out-of-sight or 500 yards from an occupied dwelling; and permanent duck blinds, boat moorages, or any seasonal object if out-of-sight or 500 yards from an occupied building.[171] Galt also objected to the "right" to use a dry streambed as a right-of-way; however here, Galt misread the statute because this use is prohibited.[172] Galt also claimed it was unconstitutional to allow portage routes pursuant to Montana Code Annotated § 23-2-311 over private property around artificial barriers.[173] In addition, Galt asserted that requiring the landowner to pay for the construction of a portage route was unconstitutional.[174]

The DFWP responded by arguing that the Legislature codified the *Curran* and *Hildreth* holdings into the statutes enacted by HB 265. Further, that the *Curran* and *Hildreth* decisions got it right when the court held that the public had the right to recreate between the high-water marks of all streams capable of recreational use, and that these rights are guaranteed by the Public Trust Doctrine as applied to the public use of water by the 1972 Constitution. This includes the use of the beds and banks up to the high-water mark on all streams and rivers.[175]

The Montana Supreme Court's decision, written by Justice

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171. *Id.* at 4.

172. Mont. Code Ann. § 23-2-302(2)(g) (prohibits "use of a streambed as a right-of-way for any purpose when water is not flowing therein." *Id.*).

173. Br. of Appellants, *supra* note 168, at 47.

174. *Id.* at 52.

175. Br. of Resp't *passim*, *Galt*, No. 86-178 (Jul. 31, 1986).

Morrison,[176] was part expected, part unexpected, and quite confusing. The Court first acknowledged the appellants, Galt et al., were requesting that the new stream access statutes, Montana Code Annotated § 23-2-301 *et seq.*, were unconstitutional as a taking of private property without just compensation.[177] Then the Court held the statutes were constitutional in accordance with the Montana Constitution and *Curran* and *Hildreth* except for four specific provisions.[178] The Court reaffirmed that the public's right to use waters for recreation includes "the bed and banks up to the high water even though the fee title in the land resides with the adjoining landowners."[179]

The Court then announced a general limitation on the right to use the bed and bank while recreating that "there is no attendant right that such use be as convenient, productive, and comfortable or possible" and "that any use of the bed and banks must be of minimal impact."[180] The first expression of this limitation seems to have no practical meaning, while the "minimal impact" is an appropriate caution. The Court, therefore, reserved to itself the right to define the kinds of use permissible.[181] The Court, acting much like a subcommittee of the legislature, addressed three uses of the banks of Class I waters, i.e. rivers either navigable for title or potentially navigable for title. The Court's qualifications as it parsed these uses are important.

The Court found the statute overbroad in allowing camping where it is not "necessary for the utilization of the water resource."[182] In other words, a person can camp only where it is necessary as part of a floating trip. The Court emphasized this by observing: "The public can float and fish many of our rivers without camping overnight."[183] The Court also found the construction of

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176. Galt v. State, 731 P.2d 912 (Mont. 1987) [hereinafter *Galt I*].
177. *Id.* at 913.
178. *Id.* at 916.
179. *Id.* at 915.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*

permanent objects like duck blinds on navigable rivers was overbroad but, on the other hand, acknowledged duck blinds may be necessary on large bodies of water.[184] Stated another way, seasonal duck blinds, boat moorages, and other objects are therefore allowed where necessary on Class I waters.

In contrast, the Court decided big game hunting between the high-water marks on the larger, Class I waters could not be "permitted under any circumstances" as a public right.[185] In addition, the Court found that requiring a private landowner to pay for the construction of a portage route over the landowner's private property unconstitutional because "[t]he landowner received no benefit from the portage."[186] According to the Court, the state should pay because the public benefits.[187]

In conclusion, the Court held that private riparian landowners "have their fee impressed with a dominant estate in favor of the public." This easement must be "narrowly confined so that the impact to beds and banks owned by private individuals is minimal."[188] The Court in parting said the unconstitutional portions were severable leaving "the balance of the statute intact."[189] It is worth noting that this decision only affects the public's right to recreate in water flowing through private property. If the river or stream flows through state or federal property the *Galt I* restriction would not apply.

The contentiousness of these questions is seen through the dissenting opinions of several of the justices. Justice Gulbrandson would have restricted Class II waters to floating only like Wyoming. Justices Hunt and Sheehy would both have upheld the constitutionality of the statutes entirely.[190] Both opined that it was up to the legislature to balance landowner and public rights if

184. *Id.* at 916.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 918, 920, 924.

needed.[191] Justice Sheehy sharply focused on the fact that the majority had restricted public use of Class I banks and streambeds below the high-water mark whose title, in his opinion, actually reside in the state, not riparian landowners. Justice Sheehy reasoned that Montana upon statehood received title to streambeds up to the high-water mark on navigable rivers,[192] citing the United States Supreme Court in *Schively v. Bowlby.*[193] Therefore, he believed that the public use of the high to low-water mark is not in the nature of an easement, but rather under the public trust doctrine the state owns the strip and may not deed to private riparian landowners the ownership of part of the streambed.[194]

Citing the seminal United States Supreme Court case applying the Public Trust Doctrine to navigable waters that *Curran* relied upon,[195] Justice Sheehy argued that because the state cannot transfer control of lands subject to the public trust, the part of Montana Code Annotated § 70-16-201 enacted in 1895 and purporting to transfer title to the low-water mark on navigable rivers, was never and could never have been effective.[196] Justice Sheehy could have also have found support in the Enabling Act[197] and the 1889 Montana Constitution[198] since both arguably would have required the state to receive fair market value when it was

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191. *Id.* at 918, 920-21, 923.

192. *Id.* at 921.

193. Schively v. Bowlby, 152 U.S. 1, 48-50 (1894).

194. *Galt I*, 731 P.2d at 921.

195. *Id.* at 921-22 (citing *Ill. Cent. R.R.*, 146 U.S. 387).

196. *Id.* at 922.

197. The Enabling Act of 1889, § 11, ¶ 4 requires: "provided, however, that none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the fair market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safety secured to the state."

198 Mont. Const. of 1889, art. XVII, § 1 required: "and none of such land, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state."

effected by the enactment of Montana Code Annotated § 70-16-201 to transfer the high to low-water strip to riparian landowners. Thus, in Justice Sheehy's opinion, the state in HB 265 was regulating big game hunting, overnight camping, and construction of duck blinds on state owned property.[199] Justice Sheehy also noted landowners were permitted to fence across state owned streambeds in Class I rivers in return for portage routes around these artificial barriers.[200] Therefore, Justice Sheehy would not have found unconstitutional a requirement that landowners pay for construction of portage routes around their own fence if the fence impeded recreational use.[201] However, this conclusion would only apply to navigable for title rivers.

The author hopes to provide a more in-depth discussion and analysis of whether the state or riparian, private landowners should actually own the strip between the low and high-water marks on navigable rivers, citing judicial decisions in other states, and exploring the ramifications of addressing this issue for the first time in Montana, in a subsequent publication.

C. The Following Galt II *Case on Attorney Fees*

Article II, Section 29 of the 1972 Montana Constitution provides that when a private property owner prevails in litigation asserting that his or her property was taken or damaged without just compensation, the private property owner is entitled to be awarded "necessary expenses of litigation."[202] This includes attorney fees.[203] The plaintiffs in *Galt I* were award attorney fees by the district court, which was upheld on appeal by the Montana Supreme Court.[204]

The Montana Supreme court affirmed, once again, that the

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199. *Galt I*, 731 P.2d at 923.

200. *Id.* at 924.

201. *Id.*

202. Galt v. State, 749 P.2d 1089, 1090-91 (Mont. 1988) [hereinafter *Galt II*].

203. *Id.* at 1092-93.

204. *Id.* at 1090-91.

newly enacted stream access statutes were challenged as an unconstitutional taking of private property without compensation.[205] It was important that the Supreme Court was very clear in what was at stake in *Galt I*. Only a few, severable portions of the stream access bill were found unconstitutional[206] and, if left standing, would have "served to take private property without just compensation."[207] The court in *Galt I* then found the balance of the statutes constitutional.[208]

In this litigation ("*Galt II*") over attorney fees, the court found that the requirement for an award of attorney fees was met.[209] Curiously, the Court held Article II, Section 29 authorized an award of attorney fee "under the particular facts of this case" and limited "this holding to the facts of this case."[210] Perhaps this qualifying language reflected the fact that *Galt I* had upheld the significant majority of the new stream access law and, with the few qualified, unconstitutional portions severable, the new law remained virtually intact.

Throughout the litigation in *Galt I*, the parties extensively briefed and identified the central issue of whether the stream access law was a taking of private property without just compensation before both the state district court and the Montana Supreme Court. Although the district court acknowledged and decided this issue, the Supreme Court barely acknowledged it while addressing the issue only by inference in *Galt I*. The Court waited until the attorney fee issue in *Galt II* to finally address in one sentence that the *Galt I* decision had actually decided the takings issue. This lack of clarity was frustrating at best and arguably left the issue still unresolved or, at least, left the issue to a future court to declare that *Galt I* had actually decided the issue.

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205. *Id.* at 1094 (citing *Galt I*, 731 P.2d at 916).
206. *Galt I*, 731 P.2d at 916; *Galt II*, 749 P.2d at 1094.
207. *Galt II*, 749 P.2d at 1093-94.
208. *Galt I*, 731 P.2d at 916.
209. *Galt II*, 749 P.2d at 1093-94.
210. *Id.* at 1094.

D. Galt III*, A Stream Access Brochure Was Not a Taking*

DFWP published an informational brochure on stream access following the adoption by the legislature of HB 265. The brochure was revised and republished in April, 1988 to incorporate the holdings in *Galt I*.[211] The intent of the brochure was to summarize the rights and responsibilities of landowners and recreationist regarding the stream access law, Montana Code Annotated § 23-2-301 through 23-2-322. The same plaintiff group as in *Galt I* and *Galt II* requested a declaratory judgment that the brochure was unconstitutional and that Montana Code Annotated § 23-2-310(12), the definition of surface water that allowed the use of the beds and banks for recreation, was also unconstitutional.[212] The plaintiffs also alleged the entire stream access law was unconstitutional because the law creates an unconstitutional denial of equal protection of the law in violation of the United States and Montana Constitutions by not specifically addressing the recreational use of lakes.[213] The district court dismissed most all the complaints made by the plaintiff as *res judicata* because the parties, subject matter, issues, and capacity of parties were the same and the issues had been litigated or should have been litigated in *Galt I*.[214] This included the brochure which was attached as an exhibit to the complaint in *Galt I*.[215]

This left just three provisions in the new brochure that had been revised in response to the holding by the Supreme Court in *Galt I* plus a new allegation regarding camp fires.[216] The district court found that the brochure in two places correctly qualified the allowance of camping below the high-water mark on Class I waters

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211. DEPT. FISH WILDLIFE & PARKS, STREAM ACCESS IN MONTANA, RIGHTS AND RESPONSIBILITIES OF LANDOWNERS AND RECREATIONISTS, BROCHURE (Apr. 1988) (on file with *Pub. Land & Resources L. Rev.*).

212. Galt v. State, No BDV-88-544, 1-8 (1st Judicial Dist. Ct. Mont. Aug. 31, 1989) (Dec. and Order) [hereinafter *Galt III*].

213. *Id.* at 6.

214. *Id.* at 7-9.

215. *Id.* at 8-9.

216. *Id.* at 9.

as "only permissible when it is necessary for the enjoyment of the water resource."[217] The district court found that in "one small particular" the brochure appeared to go beyond *Galt I* by not explicitly stating that the use of seasonal duck blinds and boat moorages is allowed only if they are both necessary and are on large bodies of water.[218] After further briefing, the district court declined to hold that an informational brochure can constitute a taking.[219] In this way, the district court denied the plaintiff was entitled to attorney fees.[220] Thus the litigation over the brochure ended, and can accurately be described as much ado over nothing.

IV. AG OPINION ON SNOWMOBILING AND TRAPPING

In 1985 following the adoption of the Stream Access Law by the 1985 Legislation, Attorney General Mike Greehy issued an opinion on two questions about the reach of the new law.[221] He first held that snowmobiles could not be used on frozen surface water without landowner permission. This conclusion follows directly from the language of § 2(2)(a) of Chapter 556 that requires landowner permission for the use of "motorized vehicles not primarily designed for operation upon the water."[222] Next he held that trapping of fur-bearing animals between the ordinary high-water lines of surface waters is not part of the public recreational rights under the Stream Access Law because trapping is a commercial rather than a recreational activity.

The definition of "recreational use" does not specifically include trapping and trapping is not included within the catch-all phrase "other water-related pleasure activities."[223] Therefore, the criminal trespass statutes apply to trapping on private land.[224] The

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217. *Id.* at 9-12.

218. *Id.* at 14-15.

219. *Id.* at 2 (Oct. 26, 1989) (Order on Recons.).

220. *Id.* at 2.

221. Mont. Att'y Gen. Op. 41-36 (1985).

222. Mont. Code Ann. § 23-2-301(10) (2013).

223. Mont. Att'y Gen. Op., *supra* note 221, at 138, 140 (citing 1985 Mont. Laws ch. 556 1127 (codified at Mont. Code Ann. § 23-2-301(10)).

224. *Id.* at 138, 140-41. *See* Mont. Code Ann. § 45-6-201 (2013)

opinion did not make any distinction between Class I and Class II waters.[225] However, for Class I waters that are navigable for title, reliance on the distinction between recreational and commercial activities could be questioned.

V. RELEVANT LEGISLATION AND LITIGATION ON STREAM ACCESS ISSUES (1987-1999)

With the passage of the Stream Access Law and with the Montana Supreme Court upholding its constitutionality, it would be logical to conclude that the story ends here. However, this is not the case as the law will be tested politically, legally, and administratively over the next 40 years with regulation of recreational use of rivers and streams and access being the primary threads of the laws continuing history, along with another test of the law's constitutionality in federal court and another challenge in state court.

This next section, covering the period of 1987 through 1999, will be relatively smooth sailing with only a couple of challenges to the Stream Access Law itself and some fine-tuning. However, there will be a significant transition to comprehensive authority for government, represented by the Commission, to be able to regulate recreational use of rivers and streams as needed with growing recreational use.

A. 1987 Legislative Session

The 1987 Legislature started with a bill to turn the Stream Access Law on its head by restricting non-navigable for title streams to floating only, in addition to a bill that claimed to incorporate the *Galt I* holding but either would have made

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(If private land is posted, landowner permission is necessary. If private land is not posted, a person has the privilege to enter and remain on private land until the landowner revokes the privilege by personal communication.); *see also* Mont. Code Ann. § 87-6-601 (2013) (nonresident trappers must have written permission from a landowner).

225. Mont. Att'y Gen. Op., *supra* note 221, at 139.

significant changes or was just incomprehensibly ambiguous.

SB 159[226] proposed an amendment to the definition of surface water in the stream access statutes. The public's right to use the bed and banks up to the ordinary high-water mark of all natural water bodies (i.e. all streams capable of supporting recreational use) is found in the definition in Montana Code Annotated § 23-2-301(12). The amendment would have allowed the use of the bed and banks only if a "body of water has been adjudicated to be navigable by federal standards." This would have been an extreme restriction of stream access by allowing only floating on almost all rivers and streams in Montana because only a few rivers have actually been adjudicated navigable for title. Rivers that qualify as navigable for title, but have not yet been adjudicated would be restricted to floating without any wading or walking on the beds and banks. The bill died in the Senate Natural Resources Committee on a tie vote.[227]

SB 286 claimed that its purpose was to remove the provisions declared unconstitutional in *Galt I*.[228] The definition of recreational use was amended to provide, or at least imply, that any recreational use may be prohibited by law which would be contrary to *Curran, Hildreth,* and *Galt I*. Next, the public recreational use of surface water "*without* regard to the ownership of the land underlying the waters" was amended to "*with* regard."[229] The meaning of this change was unclear, but likely intended to be a restriction. In addition, the portage provision was extensively amended.

Although *Galt I* only required that the state pay for the physical construction of portage routes, the amendment would have required landowners to be compensated for the land used for a portage route, a right the public already had. Finally, distinctions

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226. S. 159, 50th Legis., Reg. Sess. (Mont. 1987) (Introduced Bill).

227. History and Final Status, S. 159, 50th Legis., Reg. Sess., Sen. Bills and Res. 62-63 (Mont. 1987).

228. S. 286, 50th Legis., Reg. Sess. (Mont. 1987) (Introduced bill).

229. *Id.* (*see* amendments proposed in the introduced bill including changing "without regard" to "with regard" in Mont. Code Ann. § 23-2-302(1)).

between recreational use of *Class I* and *II* were removed without a discernible reason. The bill was redrafted on the Senate floor to reasonably reflect the *Galt I* decision, although without some of nuance of the *Galt I* qualifications.[230] However, the House amended SB 286 by reverting to some provisions which were inconsistent with *Curran, Hildreth,* and *Galt I*.[231] The Senate did not concur in the House amendments, the House did not appoint a free conference committee, and the bill died.[232]

B. Challenge to a Yellowstone River Rule Based on Safety Criteria

The following litigation in state district court illustrates the limitations, prior to 1999, on the Commission's ability to regulate conflicts between recreational users of rivers based solely on safety. When HB 626 was adopted in the 1999 session, it added public welfare as additional criteria. The Commission's rulemaking authority was then dramatically broadened.[233]

In 1988, the Commission adopted a rule which placed a ten-horsepower limitation on motorboats on the section of the Yellowstone River from Livingston downstream to Springdale.[234] At the time of the adoption of the rule, the Commission had authority to adopt rules regulating use of public waters based on health, safety, and damage to property criteria.[235]

A complaint was filed in state district court asking that the rule be declared invalid.[236] The essence of the complaint was that

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230. *Id.* (Feb. 25, 1987) (3d Reading).

231. *Id.* (Mar. 30, 1987) (Reference Bill).

232. History and Final Status, S. 286, 50th Legis., Reg. Sess., Sen. Bills and Res. 110-111 (Mont. 1987).

233. *See* Section V, H *infra* at 50, discussing H.R. 626, 56th Legis., Reg. Sess., (Mont. Apr. 20, 1999).

234. 19 Mont. Admin. Reg. 2219 (Oct. 13, 1988).

235. Mont. Code Ann. § 87-1-303(2) (1987) The Commission's criteria to adopt rules regulating recreational use of waters were "in the interest of public health, public safety, and the protection of property."

236. Big Sky Riverboaters, Inc. v. State, No. DV 89-882 (13th Judicial Dist. Ct. Mont. June 18, 1989).

the Commission had not shown that there was a threat to public safety, the one applicable criteria.[237] The Department and Commission realized the validity of the rule was not supported by the administrative record because the facts did not support a threat to public safety. Therefore, plaintiffs, the Department, and the Commission agreed to settle the litigation, with the Department and Commission agreeing to redo the rulemaking process to either repeal, affirm, or modify the rule.[238]

The Commission at the conclusion the new rulemaking process decided to retain the rule banning motorboats of greater than ten horsepower between Livingston downstream to the U.S. Highway 89 because a threat to public safety was now demonstrated in this relatively narrow section of the river that contains a high frequency of rapids. The Commission repealed the restriction on motorboats between the Highway 89 bridge and the Springdale bridge because the river was wider with less recreational use and injury to persons was unlikely.[239]

C. 1989 Legislative Session

In HB 655, the Legislature passed the Smith River Management Act which granted DFWP specific authority to manage and regulate recreational use of the Smith River.[240] With this new statutory authority, the Commission had for the first time comprehensive authority to regulate recreational use of a river, limited to the Smith River however, for addressing competing uses and crowding among different recreational users.

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237. Compl. ¶ 14, *Big Sky Riverboaters*, No. DV 89-882 (July 21, 1989).

238. *Big Sky Riverboaters*, No. DV 89-882 (June 18, 1990) (settlement agreement); *Id* (June 18, 1990) (stipulation and order of dismissal with prejudice).

239. 9 Mont. Admin. Reg. 740 (May 16, 1991).

240. 1989 Mont. Laws ch. 512, 1216 (codified at Mont. Code Ann. § 23-2-401 to 410 (1989)).

D. 1991 Legislative Session

In 1991, the legislative bills were primarily focused on the use of streambeds and banks. The first, HB 81, was an attempt to restrict the use of river banks but was tabled in the House Fish and Game Committee.[241] It would have prohibited overnight camping and campfires on the banks of Class I waters, and campfires on the banks of Class II waters (overnight camping was already not allowed on Class II waters).[242] The legislature successfully passed HB 359 which prohibits the operation of motor vehicles and off-highway vehicles below the ordinary high-water mark on state and federal land, except where the appropriate land management agency allows public crossing on designated roads or trails.[243] However, the use must have minimal impact on the ecology and the bed of the stream. Curiously, the prohibition applies to private lands riparian to Class I waters, but only to the portion of the streambed covered by water even though the private riparian landowner owns to the low-water mark, whether covered by water or not.

E. 1993 Legislative Session Considered Authority to Regulate Recreational Use

The 1993 Legislature considered two bills to clarify and expand the authority of the DFWP to adopt and enforce rules regulating the recreational use of lakes and streams. The legislature's first attempt, SB 341,[244] would have granted authority to the Commission to adopt rules on public reservoirs, lakes, streams and rivers "to protect and preserve natural resources, preserve the diversity of recreational opportunities, and minimize

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241. History and Final Status, H.R. 81, 52d Legis., Reg. Sess., H. Bills and Res. 245 (Mont. 1991).

242. H.R. 81, 52th Legis., Reg. Sess. (Mont. Jan.1, 1991) (Introduced Bill).

243. 1991 Mont. Laws ch. 491, 1586 (H.R. 359) (codified at Mont. Code Ann. § 61-8-371 (2013)).

244. S. 341, 53d Legis., Reg. Sess. (Mont. Feb. 9, 1993) (Introduced Bill).

user conflicts."[245] The bill would have given the Commission the authority to establish the need to restrict or adopt quotas on commercial use to accomplish these goals. The bill was unclear who, the Commission or the Board of Outfitters, could actually adopt a quota on commercial use.

This bill was one of the first in a series of attempts to grant the Commission more comprehensive authority to manage recreational use of public state waters. The fundamental problem was that the Commission's rulemaking authority is limited to rules affecting only public health, public safety, and the protection of property, which is very limiting.[246] The other bill, SB 297[247] would have amended the Smith River Management Act to limit the maximum group size to 12; require an annual lottery to selected authorized outfitters; and prohibit the transfer of individual launch permits.

F. 1995 Legislative Session

In 1995, the legislature considered HB 348, a rerun of SB 341 of the 1993 Session, which granted the Commission the same specific authority to regulate recreational use on public waters. The difference was that the number of outfitters or guides on a river could be limited by the Board of Outfitting only when the Commission adopted rules limiting the number of recreational users on a river.[248] The bill was amended to ensure that the Commission's rulemaking authority was limited to impacts caused by recreational users,[249] but it failed on the second reading vote in the House.[250]

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245. *Id.* at 3:17-21.

246. Mont. Code Ann. § 87-1-303(2) (1993).

247. S. 297, 53d Legis., Reg. Sess. (Mont. Feb. 2, 1993) (Introduced Bill).

248. H.R. 348, 54th Legis., Reg. Sess. (Mont. Jan. 27, 1995) (Introduced Bill).

249. *Id.* at 2:25, 3:27-28 (Feb. 17, 1995) (2d Reading).

250. History and Final Status, H.R. 348, 54th Legis., Reg. Sess., H. Bills and Res. 363 (Mont. 1995).

G. 1997 Legislative Session

In 1997, SB 149[251] represented another attempt to give the Commission authority to manage and regulate recreational use of public reservoirs, lakes, streams and rivers, along with a corresponding responsibility of the Board of Outfitters to regulate and limit fishing outfitting if necessary. The bill was the product of a committee composed of members of outdoor recreation groups and interested persons.[252] However the key language was for all practical purposes identical to HB 348 of the 1995 legislative session except a negotiated rulemaking process was required. The bill was amended in the Senate Fish and Game Committee to ensure that any rules adopted could not restrict the rights of riparian landowners to access adjacent lakes, rivers, or streams.[253] The bill passed the Senate as amended but was tabled in the House Fish, Wildlife and Parks Committee.[254]

H. 1999 Legislative Session – Bridge Access Attempted and Regulation of Recreational Use Addressed

The 1999 session was eventful with the introduction of the first of many bills attempting to address access at county bridges and three bills dealing with recreational use of rivers. The most significant bill finally gave the Commission full authority to regulate the recreational use of rivers.

SB 418,[255] introduced in 1999, was the first in a series of bills attempting to address the issue of whether the right-of-ways for

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251. S. 149, 55th Legis., Reg. Sess. (Mont. Jan. 9, 1997) (Introduced Bill).

252. *Hearing on S. 149 Before the Mont. Sen. Fish and Game Comm.,* 55th Legis. Sess. (Mont. Jan. 23, 1997) written testimony of Patrick Graham, DFWP (copy on file with *Pub. Land & Resources L. Rev.*).

253. S. 149, 55th Legis., Reg. Sess., at 4:20-23 (Mont. Jan. 29, 1997) (2d Reading).

254. History and Final Status, S. 149, 55th Legis., Reg. Sess. Sen. Bills and Res. 77-78 (Mont. 1997).

255. S. 418, 56th Legis., Reg. Sess. (Mont. Feb. 9, 1999) (Introduced Bill).

county and state roads can be used to access streams and rivers for recreational use at bridge crossings. The bill declared that recreational access to streams was not part of a right-of-way or bridge easement unless specifically stated in an easement document or unless the state or county has fee title to the right-of-way.[256] Rather, bridge easements would be limited to the width of the bridge except for a "secondary, nonexclusive, and nontransferable easement" for maintenance and repair.[257] As a result of SB 418, there would have been very little, if any, access at existing bridges. The bill likely would have led to a significant reduction in access where a new easement was necessary because many landowners would resist access as part of a new easement. This invented concept revising county road easements would appear again and again, until finally held in error by the Montana Supreme Court.[258]

There were two significant problems with SB 418, in addition to prohibiting access to streams and rivers from public bridge right-of-ways that anglers and floaters had used for decades. The way the bill was drafted, it appeared to forfeit other necessary and critical public uses for right-of-ways, such as power lines, telephone lines or cables, sewer lines, and other similar future uses. If access to public streams and rivers is already a property right of the public as part of the easement, then to abandon this public property right, as the bill would do, would be unconstitutional in violation of the Montana Constitution Article X, section 11 (1972). This section of the constitution requires that public land be held in trust and that public land cannot be disposed of unless fair market value is received. Also, if legal access to streams and rivers is part of the public right to use streams and rivers for recreational use, then to forfeit this access may be unconstitutional as a violation of the Public Trust Doctrine.[259] The bill was tabled by the Senate Fish

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256. *Id.* at §§ 1, 3, 4.

257. *Id.* at § 2.

258. Pub. Lands Access Ass'n v. Bd. of Cnty. Comm'rs of Madison Cnty., 321 P.3d 38 (Mont. 2014).

259. *See supra* note 108, referencing the Public Trust Doctrine adopted by *Curran,* 682 P.2d 163.

and Game Committee.[260]

In an attempt to regulate outfitting on the Beaverhead and Big Hole Rivers, the legislature considered SB 445.[261] The bill was adopted by the Legislature and would: require outfitters and guides to have and display boat tags; limit outfitting on the Beaverhead and Big Hole Rivers based on historic use; prohibit outfitting on these rivers in a specified section of each river on every Saturday; require the DFWP to facilitate a consensus process to develop management plans on the Beaverhead and Big Hole Rivers with the Commission to adopt the plans through rulemaking; and, require the adoption of management plans in a similar manner for other rivers where there is concern about use levels, user conflicts, resource and property damage, and limited public facilities.[262] The bill required that where a plan called for reductions in recreational use on a river "the reduction will be made in commercial and nonresident use rather than in noncommercial, resident use."[263]

Because some provisions of the bill, after numerous amendments, were confusing, contradictory, unclear, and this last restriction arguably violated the equal protection or the privileges and immunities clauses of the United States Constitution, Governor Racicot vetoed the bill.[264] The veto was not overridden[265] and the Governor, in the veto message, directed DFWP and Commission to initiate rulemaking under HB 626 of the same session to address the issues that were subjects of SB 445. With the passage of HB 626,[266] the legislature addressed potential conflicts between motorboats, personal watercraft and anglers, swimmers, divers, etc.

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260. History and Final Status, S. 418, 56th Legis., Reg. Sess., Sen. Bills and Res. 237 (Mont. 1999).

261. S. 445, 56th Legis., Reg. Sess. (Mont. Feb. 11, 1999) (Introduced Bill).

262. *Id.* (Apr. 21, 1999) (Reference Bill as Amended).

263. *Id.* at § 2(5).

264. Letter from Marc Racicot, Governor, to Bruce Crippen, Senator, President of the Senate, and John Mercer, Representative, Speaker of the House, *Veto of S. 444* (May 10, 1999).

265. History and Final Status, S. 445, 56th Legis., Reg. Sess. Sen. Bills and Res. 249 (Mont. 1999).

266. 1999 Mont. Laws ch. 569, 2544 (H.R. 626).

by specifying distances of separation, and no-wake zones through the bill language itself or through rules adopted by the Commission. The bill prohibits the use of personal watercraft on the upper Missouri and its tributaries.[267]

However, by far the most significant amendment in the bill was a comprehensive expansion of the authority of the Commission to manage and regulate use of publicly accessible waters of the state. This was accomplished simply by adding the term "public welfare" to the statutory scope of the Commission's rulemaking authority. The rulemaking authority, as amended,[268] reads:

> These rules must be adopted in the interest of public health, public safety, *public welfare*, and protection of property *and public resources* in regulating swimming, hunting, fishing, trapping, boating, including but not limited to boating speed regulations, the operation of motor-driven boats, *the operation of personal watercraft, the resolution of conflicts between users of motorized and nonmotorized boats,* water-skiing, surfboarding, picnicking, camping, sanitation, and use of firearms on the reservoirs, lakes, rivers, and streams or at designated areas along the shore of the reservoirs, lakes, rivers, and streams. (New amendatory language is italicized.)

The term "public welfare" was amended into the bill in the Senate Fish and Game Committee.[269] As a result, the Commission gained complete police powers to adopt rules, as contrasted with being limited to adopting rules for the purposes of public health, public safety, or protection of property.

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267. H.R. 626, 56th Legis., Reg. Sess., (Mont. Apr. 20, 1999) (Reference Bill as Amended).

268. *Id.* at § 3 (amending Mont. Code Ann. § 87-1-303(2)).

269. *Id.*

VI. *MADISON V. GRAHAM*: ANOTHER TAKING CHALLENGE NOW IN FEDERAL COURT

In May of 2000, a group of plaintiffs filed a complaint in federal district in Montana seeking to enjoin the enforcement of the Montana Stream Access Law as it applies to the bed and banks of non-navigable waters, specifically the Stillwater River, Ruby River, and O'Dell Creek.[270] The plaintiffs asserted that the Stream Access Law violates their Fifteenth Amendment to the United States Constitution right to substantive due process or, in the alternative, denies their right to due process pursuant to 42 U.S.C. § 1983. The plaintiff's also claimed the statute is void for vagueness.[271]

The district court started its analysis by applying Ninth Circuit precedent that the court must view plaintiffs' substantive due process claim as a Fifth Amendment takings claim because there is explicit textual protection under the takings or just compensation clause of the Fifth Amendment of the United States Constitution.[272] An "as applied" Fifth Amendment claim would have first required exhaustion of state remedies.[273] The court then stated that the plaintiff have failed to state a claim upon which relief could be granted, whether a takings claim or a substantive due process claim, because "Montana's Stream Access Law clearly and substantially advances a legitimate government interest and cannot be said to be irrational or arbitrary".[274] The court continued a listing of reasons the plaintiffs claim must be dismissed, finding that the plaintiffs were barred by the 3-year statute of limitations of Montana Code Annotated § 27-2-204(1) because their claim of a potential loss of property was triggered by either the passage of Article IX, Section 3(3) of the 1972 Montana Constitution or the

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270. Madison v. Graham, 126 F. Supp. 2d 1320, 1322 (D. Mont. 2001).

271. *Id.* at 1322.

272. *Id.* at 1324 (citing Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) (en banc)).

273. *Id.* at 1324.

274. *Id.* at 1325.

enactment by the Montana Legislature in 1985.[275] In addition, The Court found the plaintiffs are barred by *res judicata* based on *Galt I*, which was a full adjudication performed by a competent court.[276] The court relied upon *Galt II* (the attorney fee phase of *Galt I*) to clearly characterize the *Galt I* decision: "The *Galt I* plaintiffs challenged the Montana Stream Access Law 'as a taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article II, Section 29 of the Montana Constitution.'"[277]

Finally, the court concluded that plaintiffs are also precluded from asserting their claims by the Rooker-Feldman Doctrine. The doctrine precludes review by a federal district court of final adjudication of a state's highest court or to evaluate constitutional claims addressed in a state court's decision.[278] The court found that *Galt I* had reviewed the major federal and state constitutional challenges to the Stream Access Law and found the law to be constitutional, except for a few provisions and that the proper review could have been performed by the United States Supreme Court, but no appeal was attempted.[279] Therefore, the plaintiffs' claim for relief was precluded by the federal Rooker-Feldman Doctrine in addition to being barred by the statute of limitations and *res judicata*.[280] The court found no merit in plaintiffs' vagueness claim asserting that natural barriers were not addressed in the Stream Access Law and a claim that the definition of "ordinary high water mark" in Montana Code Annotated § 23-2-301(a) was ill-defined.[281] The plaintiffs' complaint was dismissed with prejudice.[282]

The Ninth Circuit on appeal affirmed the district court

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275. *Id.* at 1326.

276. *Id.*

277. *Id.* at 1326 (citing *Galt II*, 749 P.2d at 1090 (attorney fees phase of *Galt I*)).

278. *Id.* at 1327.

279. *Id.*

280. *Id.*

281. *Id.* at 1327-28.

282. *Id.* at 1328.

decision holding: that the plaintiffs only alleged facts giving rise to a takings claim; that the right to exclude others is a property right addressed by the takings clause of the Fifth Amendment; and, that labeling their claim as a substantive due process claim does not change its nature as a takings claim. Therefore, under *Armendariz*, the plaintiffs failed to adequately allege a substantive due process claim and the district court correctly dismissed their complaint with prejudice.[283]

The Ninth Circuit did not address several other grounds for dismissal that the district court found because they were not necessary to dispose of the case. The Ninth Circuit did however specifically hold the Rooker-Feldman Doctrine does not bar federal court jurisdiction when a federal court litigant was not a party in the state proceeding, noting that only one of the parties were a litigant in the state court proceeding, i.e. *Galt I*.[284] The United States Supreme Court denied the plaintiffs' petition for a writ of certiorari on May 27, 2003 ending this litigation.[285]

With the conclusion of this litigation in federal court, the Stream Access Law had now been upheld against challenges to its constitutionality in both state and federal courts.

VII. STREAM ACCESS FROM COUNTY ROADS AT BRIDGES

Starting with an Attorney General's Opinion in 2000 that the public had a right to access streams from county road right-of-ways, the issue had a pin ball journey through the 2001, 2005, 2007, and 2009 legislative sessions culminating in the adoption of HB 190 in 2009 that codified the Attorney General's Opinion.

To follow the path of the bridge access issue, it is helpful for the reader to keep in mind two central concepts. One is how to accommodate both livestock fencing to bridge abutments without blocking access to streams. The other is which of two competing

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283. Madison v. Graham, 316 F.3d 867, 871-72 (9th Cir. 2002) (citing *Armendariz*, 75 F.3d 1311).

284. *Id.* at 869 n.2.

285. Madison v. Graham, 538 U.S. 1058 (2003).

paths to take. One set of bills in the legislature would have virtually eliminated access by allowing access only if the original road easement documents specifically stated that stream access was part of the easement. Of course, this level of detail was not part of the establishment of easements in the past. The other competing set of bills would allow both access and livestock fences. However the devil was in the details, or more accurately in the politics.

A. An Attorney General's Opinion on Bridge Access at County Roads

In the latter part of the 1990s, there was a growing controversy over whether recreationists could legally access streams at county bridges. In particular, the controversy over bridge access along the Ruby River in Madison County needed to be addressed and resolved. A number of fishers and floaters were in complete disagreement with some riparian landowners over access at county road bridges to the Ruby River. The recreationists wanted to fish and float the Ruby River starting and ending at bridge crossings, but individual landowners wanted to block access from the county roads.

The history in Madison County starts on September 11, 1995, when the county adopted Ordinance 3-95. This ordinance essentially provided specific requirements on the use of county road right-of-ways to allow landowners to fence to bridge abutments and to allow stream access by the public through the fences. The ordinance was challenged in state district court, *Kennedy v. Madison County*, No. 8483 (Fifth Judicial District Court of Montana, Madison County, filed May 22, 1996) by some landowners. Madison County repealed the ordinance on April 4, 1997, to resolve the litigation and because the issue has significant statewide impact and importance. Madison County and DFWP decided to request an Attorney General's opinion as the most direct and satisfactory way to help settle the issue. [286]

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286. Letter from Patrick J. Graham, Director, Mont. Dept. of Fish, Wildlife and Parks, to Joseph P. Mazurek, Mont. Attorney General with attached memorandum of authorities at 2-3 (June 11, 1998).

The DFWP and counties needed guidance to resolve the issue of whether criminal trespass may occur when the public accesses streams and rivers at public road bridge crossings.[287] The DFWP requested an AG Opinion on June 11, 1998 and included a memorandum of authorities supporting a conclusion that the public can access streams and rivers from the right-of-way of a public road at a bridge crossing.[288] The request suggested that a right of access needs to be qualified in two ways. That the counties need to have authority to have control over roads as needed for safety and parking and that prescriptive use roads could be limited to uses that establish the roadway.[289] The DFWP characterized public access at bridges "as a fundamental and inherently necessary part of the public's constitutional right to use Montana's streams and rivers for recreational purposes."[290] Madison County also requested that the Attorney General resolve the issue although the county did not take a position or advocate a conclusion.[291]

On June 2, 2000, Attorney General Mazurek issued his opinion holding:[292]

> 1. Use of a county road right-of-way to gain access to streams and rivers is consistent with and reasonably incidental to the public's right to travel on county roads.
>
> 2. A bridge and its abutments are a part of the public highway, and are subject to the same public easement of passage as the highway to which they are attached. Therefore, the public may gain access to streams and rivers by using the bridge, its right-of-way, and its abutments.

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287. *Id.*, letter at 1, mem. at 1.
288. *Id.*, letter at 2, mem. at 25.
289. *Id.*, letter at 2, mem. at 25-26.
290. *Id.*, mem. at 25.
291. *Id.*, mem. at 3.
292. Mont. Att'y Gen. Op. 48-13 (2000).

> 3. A member of the public must stay within the road and bridge easement to gain access to stream and rivers. Absent definition in the easement or deed to the contrary, the width of a bridge right-of-way easement is the same as the public highway to which it is attached.
>
> 4. Access to streams and rivers from county roads and bridges is subject to the valid exercise of the county commission's police power and its statutory power to manage county roads.
>
> 5. Access to streams and rivers from county roads and bridges created by prescription is dependent upon the uses of the road during the prescriptive period.

In the text of the opinion, Attorney General Mazurek recognized the connection between access at bridges and the public's constitutional right to use all streams and rivers capable of recreational use.[293] In summary, Attorney General reasoned that using a public right-of-way, the road, to access a stream or river, which is another public right-of-way, "is consistent with and reasonable incidental to the public's right to travel on county roads."[294] However, the opinion was erroneous in holding that the uses of prescriptive roads depended on the uses during the prescriptive period.[295]

B. Bridge Access Attempted in the 2001, 2005, and 2007 Legislative Sessions

The 2001 controversy centered around a recurring theme:

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293. *Id.* at 4.

294. *Id.* at 5.

295. *Id.* at 1, holding 5; *Pub. Lands Access Ass'n*, 321 P.3d at 44-54 (use of a prescriptive road is for all public road purposes although the width of the right-of-way depends on use during the prescriptive use period).

access to county bridges. The apparent intent of HB 528[296] was to codify a portion of the Attorney General's ("AG") opinion that the public can generally access streams and rivers from county right-of-ways at bridge crossings.[297] However, the AG did recognize that this access "is subject to the valid exercise of the county commission's police power and its statutory power to manage county roads."[298] The AG found that the authority of county commissions to control the use of roads is for the purpose of safety and parking.[299]

HB 528 would have faithfully codified the portion of the AG's opinion dealing with control of county roads for safety and parking, with one exception. The last amendatory sentence in the introduced bill arguably went much further by authorizing county commissions to restrict public access to waterways at bridge crossings "if the restrictions are related to public health, safety, or welfare."[300] This authority might have allowed county commissions to go beyond the primary focus of the bill by closing off access at their discretion. The sentence was amended out in the House State Administration Committee.[301] The bill passed out of the committee, but died on second reading in the House.[302]

The 2005 Session continued the controversy of fences for livestock control at bridges where the same fences can prevent or inhibit public access to the underlying stream. Two bills failed, one that ignored the potential for fences to be barriers while the other was overreaching. However, the most significant bill, which prevents the abandonment of public access to public waters, passed.

If passed, HB 133 would have allowed a landowner to extend a fence from the road right-of-way to a county road bridge

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296. H.R. 528, 57th Legis., Reg. Sess. (Mont. Feb. 9, 2001) (Introduced Bill).

297. Mont. Atty'y Gen. Op., *supra* note 292.

298. *Id.* at 1.

299. *Id.* at 8.

300. H.R. 528, *supra* note 296 at 2:3-5 (Introduced Bill).

301. *Id.* at 2:3-5 (2d Reading).

302. History and Final Status, H.R. 528, 57th Legis., Reg. Sess., H. Bills and Res. 512 (Mont. 2001).

abutment.[303] A fence could be used to control livestock or it could be constructed to obstruct or prevent access to a stream. The bill was opposed because of the latter potential purpose.[304] An amendment was prepared for the purpose of requiring that the fence would not block public access.[305] The bill was then tabled in the House Local Government Committee.[306]

The most significant stream access bill of the 2005 session was HB 269.[307] An existing statute already required that where a county road which provides access to public land is abandoned, another public road must provide "substantially the same access."[308] The same requirement applied for state highways.[309] Because the public has an easement to use the bed and banks for recreation,[310] under these circumstances, both statutes may already have applied if the easement for recreational use qualifies as public land. However, there was a growing controversy and concern over when a county road may be rerouted and where access is restricted in an agreement with the landowner at the new bridge right-of-way.[311]

HB 269 amended both statutes to provide or clarify that when a county or state highway right-of-way provides existing legal access to public water, including access for recreational use, and the road or highway is abandoned, another road or highway must

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303. H.R. 133, 59th Legis., Reg. Sess. (Mont. Dec, 20, 2004) (Introduced Bill).

304. Open FAX from MGTU to DFWP (Jan. 17, 2015) (copy on file with *Pub. Land & Resources L. Rev.*).

305. H.R. 133, *supra* note 303 (prepared amendments HB 13301 ads for Rep. Clark) (copy on file with *Pub. Land & Resources L. Rev.).*

306. History and Final Status, H.R. 133, 59th Legis., Reg. Sess., H. Bills and Res. 276 (Mont. 2005).

307. H.R. 269, 59th Legis., Reg. Sess. (Mont. Jan. 11, 2005) (Introduced Bill).

308. Mont. Code Ann. § 7-14-2615 (2005).

309. Mont. Code Ann. § 60-2-107 (2005).

310. *Galt I*, 731 P.2d at 916.

311. *See, e.g., Hearing on H.R. 269 Before the S. Comm. on Fish and Game,* 59th Legis. Sess. (Mont. Mar. 8, 2005) (written testimony of M. Jeff Hagener, Director, DFWP) (copy on file with *Pub. Land & Resources L. Rev.*).

provide substantially equivalent access.[312] Therefore legally, and in theory, when a county road is rerouted with a new bridge at a new location, there must be access to the stream or river from the new bridge right-of-way. The bill passed and was signed by the Governor.[313]

During the same session, another bill in an ongoing effort to address access at bridges was considered. Bridge access legislation starting with SB 148 in 1999 would continue in numerous bills until finally HB 190 passed in 2009. Generally, the issues were stream access at bridges and fences as potential barriers to access.

HB 560,[314] as introduced, proposed to codify the Attorney General's opinion that county road and bridge right-of-ways provide public access to stream and rivers. The Attorney General Opinion holdings were proposed verbatim.[315] Pursuant to Montana Code Annotated § 23-2-311(2), landowners are allowed to fence across streams to control livestock or manage property. However, this bill would authorize the DFWP to abate dangerous or hazardous fences across streams so that floaters would not be harmed or their property damaged.[316] The bill also would grant authority to the DFWP to issue declaratory rulings on whether: a stream is capable of recreational use; whether a particular surface water is off-limits to public recreational use because it is a stock pond or private impoundment; or, whether a particular surface water is off-limits because it is a ditch diverting water for beneficial use.[317]

Extensive amendments were considered, primarily addressing landowner fences from the edge of the right-of-way to bridge abutments. The amendments would have conditioned the

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312. H.R. 269 59th Legis., Reg. Sess., § 1 (Mont. Mar. 23, 2005) (Enrolled Copy) (amending Mont. Code Ann. § 7-14-2615(3)); *Id.* at § 2 (amending Mont. Code Ann. § 60-2-107(4)).

313. 2005 Mont. Laws ch. 168, 591.

314. H.R. 560, 59th Legis., Reg. Sess. (Mont. Feb. 5, 2005) (Introduced Bill).

315. *Id.* at §2, 3; Mont. Att'y Gen. Op., *supra* note 292.

316. H.R. 560, *supra* note 314, at 2:22-27.

317. *Id.* at §3.

fences by requiring that public access to the streams or rivers was substantially the same as existed prior to the erection of the fence.[318] The bill died in the House Fish, Wildlife and Parks Committee.[319]

The 2007 Session was particularly frustrating for the efforts to resolve the dilemma of fences and access at county bridges, with the failure of all four bridge access bills that were introduced. A reasonable conclusion is that the opposing factions were not yet ready to compromise.

SB 78[320] as introduced in 2007 was controversial. As introduced, SB 78 allowed fences to angle from a landowner's fence on the right-of-way line to a bridge abutment for the purpose of controlling livestock. However, the fence could not make access to the underlying stream more "difficult or dangerous than without the fence."[321] There were provisions for cost reimbursements to landowners who added gates, stiles, or other methods to ensure public access. The Board of County Commissioners and DFWP could alter or remove a fence that did not qualify, and an arbitration process was set out to resolve disputes.[322] The bill also attempted to codify the AG's Opinion that the recreating public could access a stream or river at bridge crossings.[323]

FWP worked with county Commissioners, Trout Unlimited, the Montana Wildlife Federation and others to draft amendments to address concerns with the language in the introduced bill.[324] The amendments were adopted by the Senate Fish and Game

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318. *Id.* (March 15, 2005) (proposed amendments HB 056007, ads) (copy on file with *Pub. Land & Resources L. Rev.).*

319. History and Final Status, H.R. 560, 59th Legis., Reg. Sess., H. Bills and Res. 415 (Mont. 2005).

320. S. 78, 60th Legis., Reg. Sess. (Mont. Dec. 12, 2006) (Introduced Bill).

321. *Id.* at §§ 1(4), 3(1)(b).

322. *Id.* at § 3, at 2-10.

323. *Id.* at § 2.

324. *Hearing on S. 78 Before the S. Comm. on Fish and Game*, 60th Legis. Sess. (Mont. Jan. 18. 2007) (written testimony of Chris Smith, Chief of Staff, DFWP) (copy on file with *Pub. Land & Resources L. Rev.).*

Committee and rewrote the bill.[325] The revised bill would allow a fence that did "not prevent public access or provides improved access." "Prevent public access" was defined in the bill as a fence that creates a barrier or makes access more difficult.[326] The other provision of the introduced bill remained essentially intact.

When the bill got to the House Fish, Wildlife and Parks Committee, the Committee amended the bill, not only to gut it, but to gut the holdings of the AG's Opinion as well. The most egregious amendment from the viewpoint of supporters of stream access, was to prohibit access at bridges except when the road or bridge easement itself specifically allowed recreational users to access the stream or river.[327] In practical terms, this meant there would be no public access unless the landowner allowed it. Immediately following the adoption of these amendments, the bill was tabled.[328]

This is an appropriate place to describe why fences to bridge abutments matter. From a landowner's perspective, the most practical fencing to control livestock is to fence directly from the fencing along the right-of-way to the bridge abutment. However, under Montana Code Annotated § 7-14-2134, such a fence across the county road easement would be illegal as an encroachment. In spite of the illegality, landowners have traditionally fenced to the bridge abutment. The other option, the legal one, would be to continue fencing across the stream along the right-of-way line. This fencing would be more difficult to construct and most likely would need to be repaired or replaced after each spring run-off.

From the perspective of recreationists, especially those floating, a fence upstream or downstream of a bridge is a potentially dangerous hazard, especially at higher flows. Further,

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325. S. 78, *supra* note 320 (2d Reading).

326. *Id.* at §§ 2(7), 4(1)(b)(ii).

327. S. 78, *supra* note 320 (Mont. April 3, 2007) (3d Reading) (amendments SB 007801 ads sponsored by Rep. Chas Vincent, for the House Fish, Wildlife and Parks Comm. The critical amendment was number 18.) (copy on file with *Pub. Land & Resources L. Rev.*).

328. History and Final Status, S. 78, 60th Legis., Reg. Sess., Sen. Bills and Res. 46 (Mont. 2007).

fences to the bridge abutment can be an obstacle to access and, sometimes, potentially hazardous. This is the dilemma that supporters of stream access at bridges had, up to 2007, been trying unsuccessfully to resolve. In the abstract it is an easy problem to solve, but politically, the issue divided supporters of stream access from those who oppose or desired to limit stream access.

In another attempt to restrict access at bridge crossings, HB 642[329] would have allowed access only where stream access was expressly stated in a petition or dedication creating the right-of-way or was acquired by condemnation.[330] The restriction also applied to any other uses of the county road right-of-way except for maintenance of the bridge. This meant that all other county uses of the right-of-way, e.g. telephone lines or fiber optic cables, would stop at any bridge crossing. The sponsor, Representative Milburn, then proposed an amendment with a substitute concept: no access at a county bridge unless there is "a court order declaring a particular bridge site as a legal access point."[331] The result would be no access at county bridges except where access was successfully litigated as legal in bridge-by-bridge determinations. The bill was tabled in the House Fish, Wildlife and Parks Committee.[332]

When the legislature successfully removed the $500,000 limit on a county's road and bridge capital improvement fund with the passage of HB 426,[333] the Governor returned the bill with proposed amendments that codified the AG's Opinion on bridge access. The amendments allowed fencing to bridges to control livestock if the fence was the "least restrictive to the public's ability to access a stream or river." The county board of commissioners, in

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329. H.R. 642, 60th Legis., Reg. Sess. (Mont. Feb. 12, 2007) (Introduced Bill).

330. *Id.* at § 1 (amending Mont. Code Ann. § 7-14-2112).

331. *Id.* (Feb. 15, 2007) (amendments HB 64201.ads requested by Rep. Milburn for the H. Fish, Wildlife and Parks Comm. The critical amendment was No. 6). (copy on file with the *Pub. Land & Resources L. Rev.).*

332. History and Final Status, H.R. 642, 60th Legis., Reg. Sess., H. Bills and Res. 428 (Mont. 2007).

333. H.R. 426, 60th Legis., Reg. Sess. (Mont. Jan. 2, 2007) (Introduced Bill).

consultation with the DFWP, could impose conditions ensuring public access.[334] The Governor's amendments were not adopted by the legislature, the originally adopted bill was then returned to the Governor who signed the bill.[335] As a result, statutory resolution of access at bridges would wait for the next session.

C. 2009 Legislative Session Finally Resolves Bridge Access

The positive result of the 2009 session was to finally resolve legislatively the issue of access at county bridge crossings by passing HB 190. The practical and simpler bill compared to a competing bill, HB 26.

HB 26[336] proposed to resolve access to streams at county bridges; however, HB 26 was more complicated than HB 190 with a detailed process than was unnecessary. HB 190 was simpler and more direct and was the product of a collaborative group that included representatives of recreationists, landowners, and counties. Also, HB 26 left it up to the discretion of county commissions whether or not to require public passage through fences that were otherwise barriers.[337] The bill was tabled in the House Fish, Wildlife and Parks Committee.[338]

Of all the bills proposed addressing stream access at county bridges, HB 190[339] was the most straightforward, practical and the least complicated. A landowner was allowed to fence to a bridge

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334. Letter from Brian Schweitzer, Governor of Mont., to Scott Sales, Speaker of the House, and Mike Cooney, President of the Mont. Senate (April 11, 2007) (returning HB 426 with proposed amendments) (copy on file with *Pub. Land and Resources L. Rev.*).

335. History and Final Status, H.R. 426, 60th Legis., Reg. Sess., H. Bills and Res. 365. (2007 Mont. Laws ch. 380, 1645).

336. H.R. 26, 61st Legis., Reg. Sess. (Mont. Nov. 25, 2008) (Introduced Bill).

337. *Id.* at § 2(2)(a) (Board of County Commissioners only required to "take any action necessary").

338. History and Final Status, H.R. 26, 61st Legis., Reg. Sess., H. Bills and Res. 235 (Mont. 2009).

339. H.R. 190, 61st Legis., Reg. Sess. (Mont. Jan. 7, 2009) (Introduced Bill).

abutment for the purposes of controlling livestock and for property management if the fence provided for public passage to an underlying stream for recreational use. The new statutory language included a list of acceptable ways to provide for public access, such as a stile, gate, roller, walkover, or a wooden rail fence that provides for passage. If there was a dispute, DFWP would negotiate a solution with the landowner or just install a suitable access modification to the fence. DFWP pays for the fence modification necessary to provide public passage.[340]

A qualifying fence would not be an encroachment pursuant to Montana Code Annotated § 7-14-2134 as amended.[341] Most of the AG's Opinion on bridge access was codified, including a Senate Fish and Game Committee amendment that added a qualification that the bill did not "create or extinguish" any right to use a road established by prescriptive use.[342]

Further amendments in the Senate Fish and Game Committee included limiting landowner liability for persons using road and bridge easements to access streams, to acts or omissions that constitute willful or wanton misconduct, and that providing one access feature on each side of a stream may be sufficient.[343] HB 190 reflected months of collaborative and constructive dialog among many interests.[344] The bill passed both the House of Representatives and Senate by near unanimous votes and was signed by the Governor.[345]

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340. *Id.* at § 3.

341. *Id.* at § 1 (amending Mont. Code Ann. § 7-14-2134).

342. *Id.* at § 2(1)-(3) (Mar. 27, 2009) (2d Reading, 2d House as amended).

343. *Id.* at §§ 2(4), 3(2)(b).

344. *Hearing on H.R. 190 Before the S. Comm. on Fish and Game,* (Mont. Mar. 19, 2009) (written testimony of Bob Lane, Chief Legal Counsel, DFWP) (copy on file with *Pub. Land & Resources L. Rev.*).

345. History and Final Status H.R. 190, 61st Legis., Reg. Sess., H. Bills and Res. 298 (Mont. 2007). These passed and approved amendments to the Stream Access Law. 2009 Mont. Laws ch. 201, 1685 (codified at Mont. Code Ann. § 23-2-312 (§ 2 of H.R. 190) and at Mont. Code Ann. § 23-2-313 (§ 3 of H.R. 190)).

VIII. THE BRIDGES OF RUBY RIVER – THE CAPSTONE OF BRIDGE ACCESS

The issue of public access at county bridges and roads, where the public road right-of-way was established by prescription, was largely resolved by the Montana Supreme Court in *Public Land Access Association v. Board of County Commissioners*[346] as it addressed a dispute and controversy over access to the Ruby River at Seyler Lane and Seyler Bridge. The other significant issue in the case was over whether the district court's ruling that the public could access the Ruby River from a right-of-way granted by deed at Lewis Lane road and bridge was an unconstitutional taking of private property.[347]

The Public Lands Access Association, Inc. ("PLAA") sought a declaration, starting with a complaint filed May 2004, that the public could access the Ruby River from three roads and bridges: Duncan District Road established by statutory petition; Lewis Lane established by grant or dedication; and Seyler Lane established by prescriptive use.[348] The district court of Madison County denied the public access from Seyler Bridge and Seyler Road but granted the public access from Lewis Bridge.[349]

Unique to this litigation, the parties stipulated that Seyler Bridge and Seyler Lane is a county road right-of-way that was established by prescriptive use.[350] The district court split the county right-of-way for Seyler Lane into a public right-of-way for just the traveled portion and a wider secondary easement limited to the county for maintenance and repairs that is separate from the public road right-of-way.[351]

On appeal, the Supreme Court found that a prescriptive road does not have a secondary easement for maintenance and repair but, rather, the public right-of-way includes "the areas

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346. *Pub. Lands Access Ass'n*, 321 P.3d 38.
347. *Id.* at 40.
348. *Id.* at 40.
349. *Id.* at 40-41.
350. *Id.* at 41.
351. *Id.* at 42.

necessary to support and maintain the road, as well as land needed to make the road safe and convenient for public use."[352] The Court distinguished public road easement case law from cases involving private easements.[353] The Court agreed with authorities from other states, that the width of a county road extends beyond the traveled way.[354]

The Court then turned to the width of a prescriptive road, holding that the minimum sixty-foot road width otherwise required by statute[355] does not apply to prescriptive use roads.[356] The "character and extent" of its use, the land necessary to support and maintain the road, and "historical evidence of the nature of the enjoyment by which the public acquired the right-of-way" are the factors the district court, on remand, was directed to consider in determining the width of Seyler Land, a prescriptive use road.[357] The width "must be sufficient to encompass the incidents necessary to enjoying, supporting and maintaining the roadway."[358]

The Court found that recreational use could be considered as a factor in determining the width of the right-of-way acquired by prescriptive use. However, the evidence of recreational access to Ruby River will need to pre-date the 1985 statute prohibiting prescriptive use across private property to reach a stream.[359] Recreational use would need "to be established through clear and convincing evidence for the requisite statutory period."[360]

The next holding of the Supreme Court was the most significant. The Court did not limit road usage to the historic uses establishing the right-of-way but to uses incident to the historic use and those "that are reasonably foreseeable."[361] This would include

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352. *Id.*
353. *Id.* at 42-43.
354. *Id.* at 43-44.
355. Mont. Code Ann. § 7-14-2112(1).
356. *Pub. Lands Access*, 321 P.3d at 44-45.
357. *Id.*
358. *Id.* at 45.
359. *Id.* at 46 (citing Mont. Code. Ann. § 23-2-322(2)(b)).
360. *Id.*
361. *Id.* at 49.

foot travel, including access to the Ruby River as reasonably foreseeable.[362] By defining the scope of public prescription roads to include all reasonable foreseeable future uses for a public roadway, the decision made prescriptive public roads useful as public roads into the future, rather than a liability for a county. For example, if a road is limited to historic uses, installing buried power lines or telephone lines would not be possible without the permission of every landowner along the way or condemnation every time a new use is made of the road.

The last issue was raised by Mr. Kennedy, a landowner at Lewis Lane and Bridge, who intervened in this litigation.[363] Specific to this issue, the county road deed for Lewis Lane dedicated the right-of-way to public use whether in the form of a fee or easement.[364] Regardless, Mr. Kennedy claimed the right of use that was granted never intended recreational access to the Ruby River. Second, he claimed the district court's decision allowing access at Lewis Lane was an unconstitutional taking of private property because he owned the riverbed underlying the public right-of-way.[365]

The court held that a grant of a right-of-way is for those public uses "known at the time of the dedication, but also to those justified by a lapse of times and change of conditions."[366] In summary, the grant was for all public highway purposes, then and in the future.

On the second issue, the Court found no taking for two reasons. Kennedy's predecessor had granted the "swath of riverbed underlying the bridge and within the right-of-way to the public." Second, citing to *Curran*, *Hildreth*, and *Galt I*, it is "settled law in Montana that the public may use the beds of non-navigable rivers, up to the high water mark, for recreation." Therefore, by precedent, recreational "public use does not constitute

362. *Id.*
363. *Id.* at 40.
364. *Id.* at 50-51.
365. *Id.* at 50.
366. *Id.* (citing Bolinger v. Bozeman, 439 P.2d 1062, 1069 (Mont. 1972) (quoting Wattson v. Eldridge, 278 P.236, 238 (Cal. 1929)).

compensable taking of private property."[367] The Court observed that the Montana Constitution "provides the state owns the water for the benefit of its people, and places no limits on their use."[368] In light of this provision, the public use right is described as not an interest in the landowner's property, but as a physical reality that "some 'minimal contact' with the banks and beds of rivers is generally necessary."[369]

The Court distinguished ownership of the water and its use from ownership of the underlying land: "Some insignificant use of the riverbeds and river banks is, and always has been, necessary to the public's use and enjoyment of its resource. That use does not amount to an easement or any other 'interest' in land."[370] The Court referred to *Hildreth* to conclude, "that no taking of private property occurs in public use of beds and banks of waters up to the high water mark because title does not pass with the use right."[371] The Court summarized its holding: "Kennedy never owned a property right that allowed him to exclude the public from using its water resource, including the riverbed and banks up to the high-water mark. Nothing has been taken from him."[372]

This Ruby River access decision is notable for the nature of the issues it resolved and the manner in which it was accomplished. In this decision, established prescriptive use roads are recognized as county roads for all public road purposes now and in the future. The decision means that county commissioners do not face a dilemma over the management and use of a county road that was never formally dedicated because of a narrow limitation on public use. The court also affirmed that a county road acquired in a

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367. *Id.* at 51 (citing *Curran*, 682 P.2d at 171; *Hildreth*, 684 P.2d at 1091; *Galt I*, 731 P.2d at 916).

368. *Id.* at 52 (citing Mont. Const. art IX, § 3(3)).

369. *Id.* (referencing *Galt I*, 731 P.2d at 915).

370. *Id.* at 53; *see* Mont. Code Ann. § 23-2-309 ("The provisions of this part and the recreational uses permitted by 23-2-302 do not affect the title ownership of the surface waters, the beds, and the banks of any navigable or non-navigable waters or the portage routes within the state." *Id.*).

371. *Pub. Lands Access*, 321 P.3d at 53.

372. *Id.*

formal manner, such as a dedication, grant or condemnation, can be used for all public road purposes now or in the future. Importantly, public use now includes access to streams.

Except for the detail of the width of a prescriptive road, *PLAA* just capped the saga of public access to streams at county bridge crossings with final legal recognition. As a final bonus, the Montana Supreme Court opinion authored by Justice Michael Wheat, has carefully, explicitly and definitely explained that the Stream Access Law is not a taking of private property. The previous Montana Supreme Court decisions with similar holdings lacked the clarity and completeness of *PLAA.*

IX. THE MITCHELL SLOUGH – DITCH OR BRANCH OF THE BITTERROOT RIVER

The story of the Mitchell Slough has state-wide implications because irrigators on one side of a braided river historically have attached their headgate and ditch to the near side-channel as they are physically constrained to do. Therefore, the physical circumstances of Mitchell Slough are replicated in other rivers. The issue was whether or not the side-channel itself can be converted to a privately owned "ditch," albeit a "fishing ditch."

The controversy over the status of the Mitchell Slough was finally resolved by the Montana Supreme Court[373] finding that the Mitchell Slough qualifies as a natural, perennially flowing stream subject to the jurisdiction of the Natural Streambed and Land Preservation Act of 1972, commonly known as the 310 Law, and is subject to stream access and public recreation as provided by the Stream Access Law.[374] This dispute had been going on for years with some landowners riparian to Mitchell Slough, and their representatives, insisting the watercourse should be called "Mitchell Ditch."

The Mitchell Slough is in Ravalli County east of the Bitterroot River between Hamilton and Stevensville. It leaves the

373. Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist., 198 P.3d 219 (Mont. 2008).

374. *Id.* at 232, 242.

East Fork of the Bitterroot River meandering in a north/northeasterly direction for approximately fifteen miles before rejoining the Bitterroot River, having first split into an east and a west channel. The Mitchell Slough's original confluence with the East Fork was supplemented by a concrete diversion structure constructed by the three primary ditch companies in 1915. Later the ditch companies in the 1940's constructed the Tucker headgate a quarter-mile upriver on the East Fork and dug a quarter-mile canal to reconnect the East Fork to the Mitchell Slough's channel, all to ensure a dependable water flow in the Mitchell Slough.[375]

This review will concentrate primarily on the stream access issue, although the 310 Law and stream access issues are linked together procedurally. The Bitterroot Conservation District, in an administrative declaratory ruling process, determined that the Mitchell (the courts sometimes referred to the watercourse as the Mitchell rather than Mitchell Slough or Mitchell Ditch) was not a natural perennial - flowing stream subject to the 310 Law.[376] This decision was appealed to the Twenty-First Judicial Court, Ravalli County, by the Bitterroot River Protective Association ("BPPA"), but the Montana DFWP did not appeal the decision of the Bitterroot Conservation District. BPPA's complaint in district court also claimed the Mitchell Slough was open to recreational access under the Stream Access Law. Groups of landowners intervened, along with three primary irrigation companies, Etna Ditch, Webfoot Ditch, and Union Ditch. Some of the landowners cross-claimed for a declaration that the Mitchell Slough was not subject to the Stream Access Law. DFWP was joined as an involuntary plaintiff for the Stream Access Law issue.[377] Both BRPA and DFWP appealed the district court's decision holding that the Mitchell Slough was not subject to stream access.[378] Thus, the two issues were joined in one case.

In the end, the district court's holding that Mitchell Slough was not subject to the 310 Law was reversed by the Montana

375. *Id.* at 223, 238-39.
376. *Id.* at 222.
377. *Id.* at 222-23.
378. *Id.* at 223.

Supreme Court.[379] Although this was a significant decision by the Court, the subject of this article is the Stream Access Law. Thus, the thrust of this section will concentrate on that issue.

The following are the significant facts that the Supreme Court relied upon:

The Mitchell Slough was designated as the "Right Fork of the St. Mary's Fork of the Bitterroot River" on the 1872 Government Land Office ("GLO") survey map and remains in partially the same location as in 1872.[380] "Certain portions of the Mitchell Slough have been rerouted, redirected, and controlled by humans to the extent that the Mitchell Slough does not follow the same path it may otherwise have naturally followed without intervention."[381] There was enough water in Mitchell Slough to supply water to the Union, Etna, and Webfoot irrigation ditches in the 1800's.[382] The Etna Ditch and headgate was constructed and connected to Mitchell Slough in 1871, the Union Ditch in 1889, and the Webfoot Ditch in 1871.[383] The present day flows in the Mitchell Slough in the non-irrigation season were measured in a February 2001 U.S. Geological Survey, starting with a flow of 18.2 cubic feet per second ("c.f.s.") at the closed Tucker headgate and ending with a discharge of approximately 60.49 c.f.s. back into the Bitterroot River from the east and west channels and Brushy Creek (a third braid of Mitchell Slough) for an increase in flow of about 42.25 c.f.s.[384]

The Court defined the task before it as follows:

> Three statutory phrases of the SAL (Stream Access Law) are at issue and must be satisfied for the

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379. *Id.* at 233.

380. *Id.* at 224.

381. *Id.*

382. *Id.* at 238-39.

383. Br. of Involuntary Pl. and Appellant Mont. Dept. of Fish, Wildlife and Parks at 5, *Bitterroot River Protective Ass'n*, 198 P.3d 219 (Nov. 15, 2006) (citing trial exhibits based on the Ravalli County Water Resources Survey).

384. *Bitterroot River Protective Ass'n*, 198 P.3d at 239.

> Mitchell to be subject to public recreational use. They are essentially as follows: that the Mitchell is 1) a natural water body 2) capable of recreational use and 3) not diverted away from a natural water body through a manmade conveyance system - one of the SAL's exceptions.[385]

The Court started with an acknowledgement that "whether the Mitchell is a natural water body for purpose of the SAL is ultimately a conclusion of law."[386] The Court concluded "that the district court's dictionary-based definition which essentially requires a pristine river unaffected by humans in order to be deemed "natural," results in an absurdity: for many Montana waters, the SAL would prohibit the very access it was enacted to provide."[387] The Court then stepped through an analysis first of the nature of water in Mitchell Slough that in some way had been influenced by humans through upriver diversion and ditch systems, resulting in irrigation waste water and return flow that the district court considered "artificial" and "not natural."[388] The Court concluded "the Mitchell serves as a watercourse from which such water can be again appropriated" requiring "the conclusion that the Mitchell is a watercourse flowing in a 'natural channel.'"[389]

Next the Court considered whether the Mitchell Slough is "a manmade conveyance system" that becomes an exception to public stream access if the system carries water for a beneficial use.[390] The Court reasoned that Mitchell Slough was certainly a

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385. *Id.* at 236-37.

386. *Id.* at 237.

387. *Id.* at 238.

388. *Id.* at 239.

389. *Id.* at 240.

390. The language of the statutory exception and incorporated definition set out the required elements: "(2) the right of the public to make recreational use of surface waters does not include . . . (c) the recreational use of waters while diverted away from a natural water body for beneficial use pursuant to Title 85, Chapter 2, part 2 or 3," and Mont. Code Ann. § 23-2-301(6)(a) (2005): "'Diverted away from a natural water body' means a diversions of surface water through a constructed water conveyance system,

natural water body 130 years ago, that Mitchell Slough has been altered but that it had not "lost its original natural character by such work and was transformed into a 'manmade' conveyance system. Man-improved, certainly, but not man-made."[391] The Court cited the "healthy, breeding fish population" found by the district court[392] and the fact that the water flows through Mitchell Slough year-round, not just during the irrigation season[393] as elements in its ultimate conclusion that Mitchell Slough is subject to stream access and public recreation.[394]

In summary, the Mitchell Slough decision, at least for a side-channel branch of a river before the intervention of humans, holds that the watercourse cannot be altered by man into a ditch, that all waters, in the watercourse, including return flows from irrigation, are part of the "natural flows" of a "natural water body" for purposes of the Stream Access Law. Also, to qualify as a constructed ditch carrying irrigation water, the ditch should flow with water only during the irrigation season. In addition, the Court held that the presence of a healthy fishery helps to define a stream capable of recreational use.

A. Legislative Attempts to Nullify the Mitchell Slough Decision

Almost immediately there was an attempt to undo the Mitchell Slough decision in the 2009 Session and then again in the 2011 Session. However, both bills failed because they attempted to assert that a stream altered by humans or a stream with return flows from irrigation is not a natural water body, arguments that were rejected by the Montana Supreme Court.[395]

In the 2009 Session, SB 314 would have had the effect of exempting many, if not the majority, of the smaller Class II streams

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including but not limited to: (a) an irrigation or drainage canal or ditch." Mont. Code Ann. § 23-2-302(2)(c) (2005).

391. *Bitterroot River Protective Ass'n*, 198 P.3d at 240-41.

392. *Id.* at 241.

393. *Id.* at 241-42.

394. *Id.* at 242.

395. *See Id.* at 219.

from qualifying as surface water in which the public has the right to recreate. [396] The definition of surface water in the Stream Access Law is "a natural water body."[397] The amendments in SB 314 would mean that any stream that had been altered by humans, for example controlling the flow with a headgate or similar device or changing the course of a stream so that it remains connected to an irrigation ditch, would no longer be a "natural water body."[398] Also, any water in a stream that was once diverted for irrigation and has returned to a stream must be excluded from the natural flow of a stream to determine a qualifying theoretical flow.[399] The result could be that streams in basins with significant irrigation may have a zero theoretical flow, therefore, would not be "natural" and would be off-limits for stream access. The bill had every appearance of an attempt to reverse the Mitchell Slough decision. After discussion with supporters and opponents of the bill, Sponsor Senator Laible requested that the bill not be heard by the Senate Natural Resources Committee. As a consequence the bill died.[400]

Nevertheless, in the 2011 Session there was another attempt to overrule the Supreme Court's Mitchell Slough decision. HB 309[401] would have replaced the present clear language in the stream access statutes that describe ditches that are off-limits to recreational use. The stream access statutes define a ditch as a constructed water conveyance system used to divert water for a beneficial use.[402] HB 309 would have replaced this clear and effective protection for landowner irrigators with new dense, murky, and confusing language that would allow private individuals to privatize side-channels of braided rivers and streams and,

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396. S. 314, 61st Legis., Reg. Sess. (Mont. Jan. 1, 1009) (Introduced Bill).

397. Mont. Code Ann. § 23-1-301(12).

398. S. 314, *supra* note 396, at 2:13-18.

399. *Id.* at 2:16-18.

400. History and Final Status, S. 314, 61st Legis., Reg. Sess., Sen. Bills and Res. 135 (Mont 2009).

401. H.R. 309, 62d Legis., Reg. Sess. (Mont. Jan. 21, 2011) (Introduced Bill).

402. Mont. Code Ann. §§ 23-2-301(6), 302(2)(c) (2009).

perhaps, whole streams. For example, some kind of control structure is placed at the head of the side-channel and at some point along the side-channel there is an actual headgate for a real ditch leaving the side channel, then the former live side-channel would become a private ditch pursuant to HB 309.[403] Also return flows would count as water diverted, and when the total return flows from all irrigation in a river basin are the majority of the flow in a river or stream, the river or stream would no longer be public.[404] For example, the water diverted from the Bitterroot River during the irrigation season is three times the actual flow of the river with the result that the flow in the river primarily comes from return flows.[405] The proposed amendments in HB 309 also define a stream altered by humans as qualifying as a ditch,[406] although the point at which there would be enough alteration would be a subject of debate, i.e. future litigation.

An examination of the proposed amendatory language adding a new subsection (2)(c) to Montana Code Annotated § 23-2-302, justifies the above conclusions. Admittedly, the language in the amendments is difficult to follow; however, an interpretation of the language is facilitated by the facts that these are the very arguments that the landowners proposed in an attempt to turn a live side-channel of the Bitterroot River, Mitchell Slough, into a private fishing ditch. The Montana Supreme Court resoundingly rejected these arguments.[407]

The bill passed the House of Representatives but it was eventually tabled in the Senate Agricultural, Livestock and

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403. H.R. 309, *supra* note 401, at § 2 (amending Mont. Code Ann. § 23-2-302(2) by adding subsection (c)).

404. *Id.* (amending Mont. Code Ann. § 32-2-302(2)(c)(ii) to § 23-2-302(2)).

405. *Hearing on H.R. 309 Before the Sen. Comm. on Agriculture, Livestock and Irrigation Comm.,* 62d Legis. Sess., ¶ 3 (Mont. Mar. 8, 2011) (written testimony of Bob Lane, Chief Legal Counsel, DFWP) (copy on file with *Pub. Land & Resources L. Rev.*).

406. H.R. 309, *supra* note 401, at §1 (amending Mont. Code Ann. § 23-2-301(6)).

407. *Bitterroot River Protective Ass'n,* 198 P.3d 219.

Irrigation Committee.[408] This author recalls that over three hundred citizens attended the Senate Committee hearing with approximately one hundred testifying in opposition to HB 309, and only a handful testified in favor of the bill.

X. AFTER 28 YEARS THE LEGISLATURE AMENDS THE STREAM ACCESS LAW TO INCORPORATE THE HOLDINGS OF *GALT I*

It has taken the legislature 28 years to incorporate the holdings of *Galt I*[409] into the Stream Access Law. The first attempt was SB 286 in the 1987 Session, but the effort was plagued by ambiguous language that may have resulted in significant changes to the law and by a failure to accurately capture the Galt I holdings.[410]

In the 2007 Session, HB 721[411] was apparently intended to amend the stream access statutes to codify the *Galt I*[412] decision. However the bill as drafted failed to accurately follow the qualifications within the *Galt I* decision and added at least one sentence that could be in violation of the underlying *Curran* and *Hildreth*[413] decisions. The sentence stated: "Any use of real estate that is adjoining the *water* is allowed with permission or contractual agreement with the landowner."[414] If the term "water" means land down to the low-water mark, the sentence would have violated the holdings of the *Curran* and *Hildreth* decisions that allow the use of the bed and banks. The bill was tabled in the House Fish, Wildlife and Parks Committee.[415]

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408. History and Final Status, H.R. 309, 62d Legis., Reg. Sess., H. Bills and Res. 307 (Mont. 2009).

409. *Galt I*, 731 P.2d 912.

410. *See* Section V, A *supra* at 44-46, on the 1987 Legislative Session.

411. H.R. 721, 60th Legis., Reg. Sess. (Mont. Feb. 15, 2007) (Introduced Bill).

412. *Galt I*, 731 P.2d 912.

413. *Curran*, 682 P.2d 163; *Hildreth*, 684 P.2d 1088.

414. H.R. 721, *supra* note 411, at 3:24-25 (emphasis added).

415. History and Final Status, H.R. 721, 60th Legis., Reg. Sess.,

Finally in 2015, the Legislature considered for the first time a bill, SB 232,[416] that was narrowly drafted with its only objective to codify the holdings of the Galt I decision.[417] The bill prohibits any big game hunting between the high-water mark of Class I rivers, requires DFWP to pay for the construction of portage routes, and allows camping and seasonal duck blinds and boat moorages only where necessary for the enjoyment of a Class I river. The bill was passed unanimously.[418]

XI. *PPL MONTANA* – A NAVIGABLE FOR TITLE CASE

The final significant decision is one by the United States Supreme Court that by its own terms does not affect Montana's Stream Access Law. However, in opining on the federal test for state ownership of navigable riverbeds, it is a cautionary tale of "be careful what you ask for." The decision is significant because, in clarifying the criteria by which rivers or river segments qualify as navigable for title, there was the potential for an impact on stream access in Montana.

In *PPL v. Montana*, the State of Montana was claiming that PPL Montana, LLC ("PPL") was liable to the state in the form of rent for the use of riverbeds where PPL had constructed and operated 10 hydroelectric facilities. Five of the hydroelectric dams were on Upper Missouri River along the Great Falls reach, two facilities further up river in canyons on the Stubbs Ferry reach, and two dams in steep canyons on the Madison River, which collectively are called the Missouri-River Project. The remaining hydroelectric dam is on the Clark Fork River and is called the Thompson Falls Project.[419]

Montana's claim to compensation for the use of the

H. Bills and Res. 449 (Mont. 2007).

416. S. 232, 64th Legis., Reg. Sess. (Mont. Jan. 28, 2015) (Introduce Bill).

417. *Galt I*, 731 P.2d 912.

418. 2015 Mont. Laws ch. 327 (S. 232) (amending Mont. Code Ann. §§ 23-2-302, 311).

419. *PPL Mont.*, 132 S. Ct. at 1218-19.

riverbeds depends on its assertion of ownership of the riverbeds. This assertion itself turns on whether or not the rivers at the location of the hydroelectric dams are navigable for title purposes. The state district court ruled that Montana owned the riverbeds and that PPL owed the state approximately $41 million in rent for the use of the riverbeds between 2000 and 2007.[420] The Montana Supreme Court affirmed.[421] The United States Supreme Court granted certiorari,[422] reversed the judgment, and remanded.[423]

The key issues were the Montana Supreme Court's approach that "navigability for title purposes is very liberally construed,"[424] justifying assessing a river's navigability as a whole with short interruptions, rather than assessing the navigability of the segments where the dams were located.[425] The second issue was the weight and relevance of the present-day use of the Madison River in determining navigability.[426]

The Court, in reviewing the controlling legal principles stated: federal law governs questions of navigability for state riverbed title;[427] under the Equal Footing Doctrine, a state takes title to the beds of navigable rivers within the state upon the statehood;[428] and the determination is of navigability is based on the "natural and ordinary condition" of the water at the time of statehood.[429]

In determining title to a riverbed, the U.S. Supreme Court "considers the river on a segment-by-segment basis to assess whether the segment of the river, under which the riverbed in

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420. *Id.* at 1225-26 (citing PPL Mont., LLC v. Montana, 229 P.3d 421, 440, 442-43 (Mont. 2010)).

421. *PPL Mont.*, 229 P.3d at 460-61.

422. PPL Mont., LLC v. Montana, 131 S. Ct. 3019 (mem.).

423. *PPL Mont.*, 132 S. Ct. at 1235.

424. *Id.* at 1226 (citing *PPL Mont.*, 229 P.3d at 446).

425. *Id.* (citing *PPL Mont.*, 229 P.3d at 446, 449.).

426. *Id.* at 1233.

427. *Id.* at 1227 (citing United States v. Utah, 283 U.S. 64, 75 (1931); United States v. Oregon, 295 U.S. 1, 14 (1935)).

428. *Id.* at 1227-28.

429. *Id.* at 1228.

dispute lies, is navigable or not."[430] Incidentally, the Court clarified that the need to portage around a river segment "may defeat navigability for title purpose"[431] and concluded "the 17-mile Great Falls reach, at least from the head of the first waterfall to the foot of the last, is not navigable for purposes of riverbed title under the Equal-Footing Doctrine."[432] Citing evidence in the record, the court determined there is "significant likelihood" that some of the other reaches where the dams are located may fail the federal test of navigability for title and remanded for the Montana courts to assess these reaches in compliance with the principles the court discussed.[433]

The Court also found error in the Montana Supreme Court's reliance on present day use of the Madison River as "probative of its susceptibility of use at statehood," because there was no analysis that modern watercraft are comparable to the capabilities of the watercraft available at the time of statehood, and no analysis of whether the condition of the river had changed since statehood.[434] Therefore, "reliance upon the state's evidence of present-day, recreational use, at least without further inquiry, was wrong as a matter of law."[435]

The Court expressed its view of the equities of Montana's claim for compensation. The Court noted Montana filed a claim for riverbed rent over a century after the first dam was built, the state was fully aware of the hydroelectric projects, had participated in the federal licensing process of the dams, and knew that PPL had paid rents to the United States.[436] The Court said that Montana's long failure to assert title is some evidence for concluding the river

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430. *Id.* at 1229. The Court cited *United States v. Utah*, summarizing the conclusions of that case "that the Colorado River was navigable for its first roughly 4-mile stretch, non-navigable for the next roughly 36-mile stretch, navigable for its remaining 149 miles." *Id.* (quoting *Utah*, 295 U.S. at 73-74, 79-81, 89).

431. *Id.* at 1232.

432. *Id.* at 1232.

433. *Id.* at 1232-33.

434. *Id.* at 1233-34.

435. *Id.* at 1234.

436. *Id.* at 1235.

segment was non-navigable.[437]

However, the real significance of this case for stream access is the court's response to Montana's suggestion that denying the state title to the riverbeds would undermine the public trust doctrine supporting stream access.[438] The Court dismissed this suggestion as a misunderstanding of the Equal Footing and Public Trust Doctrines.[439] The Court in a clear distinction between respective authority of federal and state law stated:

> While equal footing cases have noted that the State takes title to the navigable waters and their beds in trust for the public, the contours of the public trust do not depend upon the Constitution. Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.[440]

The *PPL Montana* decision does not affect access to streams in Montana under Montana's very inclusive Stream Access Law. It does however give license to other western states if they choose to expand and clarify their stream access laws while balancing access with private property rights and interests.[441]

Under the Montana Stream Access Law 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."[442] There is however some difference in allowed incidental and necessary use of the bed and banks between Class I waters

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437. *Id.* at 1235.

438. *Id.* at 1234 (citing Br. for Resp't., 20, 24-26, *PPL Mont.*, 132 S. Ct. 1215 (Oct. 27, 2011) (2011 WL 5126226).

439. *Id.* at 1234.

440. *Id.* at 1235 (internal citation omitted).

441. Nathan Damweber, *PPL Montana v. Montana: From Settlers to Settled Expectations*, 40 ECOLOGY L.Q. 163, 193 (2013).

442. Mont. Code Ann. § 23-2-302(1).

(larger rivers) and Class II waters (the smaller rivers or streams).[443] Class I waters are generally defined consistent with waters that are navigable for title under the federal test. However, in at least one aspect, the Class I definition is broader because it includes waters "capable of supporting . . . commercial guiding using multiperson watercraft."[444] Therefore, the Madison River is a Class I water for the Stream Access Law although it may or may not be navigable under the federal test for state ownership of the bed.

XII. LITIGATION ILL ADVISED – A CAUTIONARY TALE

Sometimes issues are not prepared to properly be decided by courts until they are sufficiently framed by facts. The following is an example of such litigation. This case is presented as a cautionary tale of a case that could have ended badly for the potential scope of stream access.

When Robert L. Ryan was denied permission to fish in Lois Lake, he filed a complaint for declaratory relief to gain access to the lake.[445] Lois Lake was created in about 1966 when an earthen dam was constructed on Snowshoe Creek. The Third Judicial District Court of Montana, Powell County, denied his claim of access on the ground that Lois Lake can be accessed only by crossing private property that Ryan did not have permission to cross.[446] Ryan appealed, *pro se*, to the Supreme Court making two claims. He claimed that he could reach Lois Lake without crossing private property and that Montana Code Annotated § 23-2-310, by excluding lakes from the Stream Access Law, denies the public of the right to use lakes, such as Lois Lake, for recreational purposes and is, therefore, unconstitutional.[447]

The Supreme Court only reached the first issue, concluding

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443. Mont. Code Ann. § 23-2-302(2), (3).

444. Mont. Code Ann. § 23-2-301(2)(c).

445. Ryan v. Harrison & Harrison Farms L.L.L.P., 306 Mont. 534, slip op. at 1 (Mont. 2001).

446. *Id.* at *8.

447. *Id.* at *3.

that Lois Lake was entirely surrounded by private property and thus, Ryan had no right to cross private property to recreate in Lois Lake.[448] Ryan argued that he could access Lois Lake from Snowshoe Creek Road. However, the Supreme Court found that Ryan could not get to Lois Lake from Snowshoe Creek Road without crossing private property because the road right-of-way did not reach the ordinary high-water mark of the lake.[449] Ultimately, the Court did not reach the merits of Ryan's constitutional challenge because Ryan had failed to timely serve the Attorney General or name the state as a party, thereby waiving his constitutional challenge.[450]

Montana Code Annotated § 23-2-310 says: "Nothing contained in this part *addresses* the recreational use of surface waters of lakes."[451] It is clear then that the statute does not address whether or not the public has a right to recreate in lakes, including man-made impoundments on live streams. The Supreme Court did note that Lois Lake is a man-made, artificial lake, "entirely on private property and used for watering stock and for irrigation purposes" and said the definition of "surface water" limits public recreational use to "natural" waterbodies.[452] However, this was clearly *dicta*. The Court did not discuss the limitation on recreational use of waters "while diverted away from a *natural water body* for beneficial use."[453] Nor did the court consider the statutory definition of "lake" that includes surface water retained by "artificial means."[454] Nor was the prohibition on public

448. *Id.* at *4.

449. *Id.* at *6.

450. *Id.* at *8; *see* Mont. Code Ann. § 27-8-301 (1935) (requires service on the Attorney General when a statute is alleged to be unconstitutional). *See* Mont. R. Civ. P. 24(d) (1999) (required service on the Attorney General when the constitutionality of a statute is questioned unless a state agency is a party. This rule was replaced in 2011 by Mont. R. Civ. P. 5.1, which requires service on the Attorney General when the constitutionality of a statute is challenged.).

451. Mont. Code Ann. § 23-2-310 (emphasis added).

452. *Ryan*, 306 Mont. Slip op. at 4.

453. Mont. Code Ann. § 23-2-302(2)(c) (emphasis added).

454. Mont. Code Ann. § 23-2-301(7).

recreational use in a "stock pond or other private impoundment fed by an *intermittently* flowing natural watercourse" considered.[455]

A reservoir on a live stream fits the definition of lake but is not created by diverting water away from the stream. Any issue of the status of a reservoir on a live stream, as contrasted with a storage reservoir on private land created by diverting water from a live stream through a constructed ditch, was not decided in this case. Thus, a reservoir on a live stream could meet the test of *Curran* and *Hildreth* as public water supporting recreational use. None of these arguments were raised nor considered in the Court's *dicta*. It is telling that the Montana Supreme Court classified their decision as noncitable.[456]

When Mr. Ryan contacted the DFWP asking for support, he was advised that the factual circumstances surrounding Lois Lake offered a very weak framework for raising such an important issue with consequent risks that better, more compelling facts would avoid. Mr. Ryan was encouraged not to appeal.[457]

XIII. ADMINISTRATION OF STREAM ACCESS

A. Introduction

The political and public support of stream access depends upon a fair and even-handed administration of recreational use of streams and rivers under the Stream Access Law. This includes implementation of bridge access at county roads, determinations of necessary portage routes, limitations where recreational use is damaging to stream ecology or riparian land, and the adoption of use regulations to preserve the enjoyment of the resource. For these reasons, it is important to examine the year-to-year administrative efforts by the Commission and DFWP.

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455. Mont. Code Ann. § 23-2-302(2)(b) (emphasis added).

456. *Ryan*, 306 Mont. slip op. at 1 (classified pursuant to Mont. Sup. Ct. Internal Operating R. § 1, ¶ 3(c)).

457. Telephone interview with Robert L. Ryan, Plaintiff, Ryan v. Harrison, Helena, Mont. (March 2000).

B. Implementation of Bridge Access at County Roads Pursuant to HB 190

HB 190[458] resolved the dilemma of providing for public access at county bridges through landowner fences that encroached across the right-of-way by angling up to the bridge abutment which is the most practical way to control livestock.[459] The legislation established that recreationists have the right to access streams from county road right-of-ways and adjacent landowners have approval to attach fences to bridge abutments provided there is public passage through the fence to the stream.

DFWP is required to negotiate with landowners to decide on the type of public access that is needed, such as a gate, stile, roller, walkover, wooden fence rail or other appropriate structure. The new statute sets out a simple process to resolve any disagreements between DFWP and a landowner. DFWP, with the cooperation and contribution of any interested parties and landowners, provides the materials, installation, and maintenance of a public passage modification to a fence.[460]

As documented in a memorandum to Regional Supervisors, DFWP started implementing HB 190 in 2009 by establishing guidelines and working with groups and landowners on bridge access projects.[461] A glitch in access at bridges developed when the Montana Department of Transportation ("MDT") was constructing a new county bridge at a different location that required the acquisition of a new road right-of-way. MDT was negotiating new right-of-ways in some cases with landowners who wanted to limit public access in the right-of-way agreement with MDT.[462] The issue

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458. 2009 Mont. Laws ch. 201, 1685 (codified at Mont. Code Ann. §§ 23-2-312, 313 (2009)).

459. *See* Section VII, C, *supra* 66-67, on 2009 legislation.

460. Mont. Code Ann. § 23-2-312.

461. Mem. from Dave Risley, Mont. DFWP, to Regional Supervisors, *Bridge Access* (June 23, 2010) with attached *Guidelines for Bridge Access Procedures and Objectives* (June 2010).

462. Mem. from Harvey E. Nyberg and Bob Lane to Jeff Hagener, Director, DFWP, *Loss of Public Access at Bridges*, (Aug. 29, 2001).

was in limbo for some time until MDT adopted a policy for addressing stream access at highway crossings.[463]

The policy is divided into two parts. Where no additional right-of-way is required or needed, MDT will construct similar access to that which existed with the old bridges.[464] However, where an additional or new right-of-way is required, the policy then says MDT will "acquire sufficient right-of-way to construct the facility for a *highway purpose*" and, when the right-of-way is for a county road easement, MDT "will *attempt* to preserve existing access by terms of the easement."[465] This policy can be construed to have meant that river or stream access at new right-of-ways for county roads will not be obtained if the landowner does not agree to access. However, "highway purpose" now clearly includes all present and future road uses, including access to streams at road and highway bridge crossings.[466]

Further MDT is prevented from abandoning access at the old bridge crossing unless replacement access is provided. Specifically, the county or MDT cannot abandon access at a county road or state highway to "public land or waters, including access for public recreational use . . . unless another public road or right-of-way provides substantially the same access."[467] The Stream Access Law, as amended by HB 190, says that the public may access rivers and streams at a public bridge and county road right-of-way.[468] Therefore, MDT should be required to not just "attempt" to preserve existing access but to actually preserve existing public access. Perhaps, and hopefully this is what MDT is now doing.

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463. Mem. No. 02-01 from Joel Marshik, Acting Chief Engineer MDT, to All Offices, *Stream Access at Highway Crossings* (Mar. 1, 2002).

464. *Id.* at ¶ 5.A.

465. *Id.* at ¶ 5.B (emphasis added).

466. *Public Lands Access Ass'n*, 321 P.3d 38.

467. Mont. Code Ann. §§ 7-14-2615 (3), 60-2-107(3).

468. Mont. Code Ann. § 23-2-312 (1).

C. Portage Routes Pursuant to the Stream Access Law

The Montana Supreme Court and the Montana Legislature have addressed barriers in streams and rivers that may otherwise interfere with the public's access along the corridor between the ordinary high-water marks. The public is allowed to portage around barriers by going above the ordinary high water mark" in the least intrusive way possible, avoiding damage to the private property holder's rights."[469] The Stream Access Law makes the same allowance for portage around artificial barriers, but also specifically acknowledges the right of the landowner to create barriers, such as fences, across streams for land or water management, such as the control of livestock.[470] In addition, there is a process for establishing portage routes when necessary.

This more formal process for establishing portage routes around or over man-made barriers is assigned to the board of supervisors of a soil conservation district, the directors of a grazing district, or the board of county commissioners.[471] As a last resort, there is an arbitration process.[472] The Stream Access Law does not specifically address portage around natural barriers because barriers are only defined as "artificial obstruction."[473] DFWP is responsible for the cost of any portage route construction and maintenance.[474]

Initially, there were only twelve requests for establishing portages. Seven were initiated in 1985 and five in 1986. Ten of the requests had been or were being handled directly between the DFWP and the landowner. The Department has provided signs, assisted in rearranging fences, provided float gates, etc. Two of the requests were handled through the local conservation districts. For example, a bridge over the Beaverhead River was raised to permit

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469. *Curran,* 682 P.2d at 172.

470. Mont. Code Ann. §§ 23-2-301(1), 311(1), (2).

471. *Id.* at §§ 23-2-301(11), 311(3)(a)-(d).

472. *Id.* at § 23-2-311(3)(g)-(i).

473. *Id.* at § 23-2-301(1).

474. *Galt*, 731 P.2d at 916; Mont. Code Ann. § 23-2-311 (as amended by 2015 Mont. Laws ch. 327 (S. 232)).

boat passage and reduce associated dangers. This result was due in large part to the efforts of the Beaverhead Conservation District.[475]

Since this early period, most all portage routes have been established by the DFWP and landowner working together.[476] These principles and statutory provisions ensure that the recreating public has access and is not barred from using streams and river while recognizing and protecting the rights of private landowners.

D. Regulation of Recreation Use of Streams and Rivers by Administrative Rule or Order

The Montana Fish, Wildlife, and Parks Commission has the authority to adopt rules regulating the recreational use of streams and rivers, lakes, and reservoirs,[477] and the authority to adopt rules for procedures to consider petitions for orders to limit, restrict, or prohibit recreational use of surface waters, or to limit the use of a Class II stream to its capacity for recreational use.[478]

The general rulemaking authority pursuant to Montana Code Annotated § 87-1-303 can be exercised to adopt annual or biennial seasonal rules,[479] under an exception to Montana

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475. Mem. from James W. Flynn, Director, Review of Activities Related to Stream Access, DFWP. (Dec. 1986) (copy on file with *Pub. Land & Resources L. Rev.*).

476. Interview with Jim Darling, Fisheries Division, DFWP, Helena, Mont. (Mar. 2014).

477. Mont. Code Ann. § 87-1-301(1)(b), (c) (Commission authority to adopt to adopt fishing regulations and rules governing use of water under the jurisdiction of the DFWP); Mont. Code Ann. § 87-1-303(2) (specific authority of the Commission to adopt rules regulating recreation use of public fishing reservoirs, public lakes, rivers and streams "in the interest of public health, public safety, public welfare, and protection of public property and public resources.").

478. Mont. Code Ann. § 23-2-302(5) (authority to adopt rules for procedures to considering orders to limit, restrict or prohibit recreation use of surface waters and to restrict recreational use of identified Class II waters to the determined actual capacity of the water.).

479. Mont. Code Ann. § 2-4-102(11)(b)(iv) (annual or biennial fishing or seasonal recreational use rules are not rules subject to the more formal rulemaking requirements of the Mont. Admin. Procedures Act

Administrative Procedure Act ("MAPA"), or to adopt Administrative Rules of Montana ("ARM") pursuant to the more formal requirements of MAPA.[480] All rulemaking, whether seasonal rules or ARM rules, and all orders restricting use or limiting use on a stream must meet all notice, opportunity to participate, and open meeting requirements of the Montana Constitution and implementing statutes. This section will detail examples of key rulemaking or orders of the Commission.

E. Restriction on Outfitting Use of the Big Hole and Beaverhead Rivers

Following the veto of SB 445 by Governor Racicot in 1999,[481] the Commission initiated rulemaking on the Beaverhead and Big Hole Rivers to address increased user conflicts, resource, and property damage concerns, demands on limited public facilities, and the quality of the recreational experience concerns.[482] The rules were adopted June 29, 1999 as an interim biennial rule, the biennial rule was amended on January 12, 2000, and adopted as a biennial rule on May 2, 2001.[483] The Fishing Outfitters Association of Montana filed a complaint in district court in Gallatin County on January 7, 2002 challenging the adopting of the biennial rule on procedural, jurisdictional, and constitutional grounds,[484] during the pendency of the litigation the Commission adopted the rules as ARM under MAPA effective April 25, 2003.[485]

The 18th Judicial Court upheld the rules finding: that the Commission had authority under Montana Code Annotated § 87-1-

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(MAPA)).

480. Montana Administrative Procedures Act, Mont. Code. Ann. §§ 2-4-101 to 711.

481. *See* summary of S. 445, *supra* notes 261-65 and accompanying text.

482. 24 Mont. Admin. Reg. 3462, 3465 ¶ 4 (Dec. 26, 2002).

483. Fishing Outfitters Ass'n of Mont. v. Mont. Fish, Wildlife and Parks Comm'n., No. DV-02-32 (8th Judicial Dist. Ct. Mont. Aug. 14, 2002) (certification of admin. r.).

484. *Id.* (Aug. 4, 2004) (dec. and order); *Id.* (Aug. 17, 2004) (j.).

485. 8 Mont. Admin. Reg. 759 (Apr. 24, 2003).

303 to adopt the rules; that the Commission met or exceeded procedural and substantive requirements of MAPA; that the restrictions in the recreational use rules against nonresidents do not violate the Commerce Clause of the United States Constitution; and the rules do not violate the Land and Water Conservation Fund, 16 U.S.C. §§ 406e-4 *et seq.*[486]

The structure of the rules is to limit outfitters to their documented historic use prior to 1999. On the Beaverhead River, the river is divided into five reaches with each eligible outfitter limited by an allowed number of launches per day based on historic use in each reach. In addition, there are two different designated reaches where in one of the reaches float fishing by nonresidents and float outfitting is not allowed on Saturday and the other reach has the same restriction on Sunday. The rules apply from the third Saturday in May through Labor Day.[487]

The Big Hole River is divided into eight river zones with the headwater zone closed to float outfitting and in the other seven zones, one zone is closed to outfitting each day with the zone that is restricted on Saturday and the zone that is restricted on Sunday also closed to float fishing by nonresidents. As on the Beaverhead River, the rules apply from the third Saturday in May through Labor Day.[488]

F. Biennial Smith River Rules

The Smith River Management Act was adopted by the legislature in 1989.[489] The Act was administered by the Commission until July 1, 2013 when the State Parks and Recreation Board ("Board") was created and delegated the responsibility to

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486. *Fishing Outfitters Ass'n*, No-02-32 (dec. and order). Appeal to the Montana Supreme Court was withdrawn and dismissed. *Id.* (Dec. 20, 2004) (withdrawal of appeal), *dismissed by*, No. 04-808 (Mont. Dec. 21, 2004).

487. Mont. Admin. R. 12.11.205, 12.11.215 (2010).

488. Mont. Admin. R. 12.11.210, 12.11.220 (2010).

489. Smith River Management Act, 1989 Mont. Laws ch. 512, 1216 (codified at Mont. Code Ann. §§ 23-2-401 to 410).

manage the Act.[490] The Commission, and now the Board, is charged with regulating and allocating "recreational and commercial floating and camping to preserve the biological and social benefits of recreational and commercial use of the Smith River waterway in its natural state."[491] The Board may set recreational and commercial user fees, allocate recreational use, including outfitting, through a permit system, restrict use to preserve the experience while considering landowner tolerance, the capacity of the river, and minimizing user conflict and providing for a level of solitude.[492]

The Commission has used its authority to adopt biennial rules setting private and commercial float trip fees, allocating private float trips through a random lottery for the time period of April through October 31, limiting the number of commercial outfitted float trips per year, requiring floaters to camp at designated boat campsites, prohibiting dogs on float trips, and restricting fires to metal fire rings.[493] The rules apply to the use of the Smith River from Camp Baker downriver approximately 60 river miles to Eden Bridge. Camp Baker and Eden Bridge are the only public access in this stretch of the river, so floaters must camp at designated public boat camps and must complete the trip unless they have landowner permission to leave the river. This makes the Smith River somewhat a unique experience and helps to explain the enactment of specific statutes for its management.[494]

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490. 2013 Mont. Laws ch. 235, 816 (H.R. 24) (established the State Parks and Recreation Board and changed the Fish, Wildlife and Parks Commission to the Fish and Wildlife Commission. Ch. 235 assigned the responsibilities for state parks to the Board that were formerly part of the Commission's responsibilities).

491. Mont. Code Ann. § 23-2-408(1).

492. Mont. Code Ann. § 23-2-408.

493. MONT. STATE PARKS BIENNIAL SMITH RIVER RULE, FEES AND RULES FOR SMITH RIVER STATE PARK AND RIVER CORRIDOR (adopted Mar. 11, 2015), *available at*, http://stateparks.mt.gov/smith-river/).

494. *Fishing Access Sites on Smith River*, MONT. FISH, WILDLIFE AND PARKS, http://fwp.mt.gov/fishing/searchResults.html?siteId=111479047 4133&q Type=waterStream&siteType=FA (last visited June 21, 2014).

G. Petitions to Restrict Use Stream-by-Stream

The Commission has adopted rules to carry out the statutory directive of Montana Code Annotated § 23-2-302(5) to consider petitions from persons asking the Commission to limit recreational use to protect the ecology of the stream, prevent damage to property, or to limit use of Class II streams to the actual capacity of the stream.[495]

The rules set out an administrative process and provide more detailed criteria for decisions on whether to limit recreational use. The procedures require a written and signed petition, an investigation and report by the DFWP, and a timeframe for Commission decision making, including public notice and comment.[496] The Commission can close or restrict recreational use when it finds that present public use is damaging the banks and adjacent land, damaging the property of a riparian landowner, adversely affecting fish or wildlife, altering natural areas or biotic communities, or degrading water quality.[497] Future use can be considered if the anticipated use presents a clear and immediate threat.[498] The Commission can prohibit, limit, or restrict recreational use through orders that are the least disruptive to recreational use while still providing the necessary protection.[499] The Commission may, upon a subsequent petition, alter a previous order when there are changed circumstances or the alleged damage did not occur.[500]

For Class II streams, the Commission can restrict recreational use to the actual capacity of the stream or prohibit recreational use when the stream cannot support the use.[501] This author reviewed the files DFWP has kept for each petition. In the first 18 months after the adoption of the Stream Access Law (July

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495. Mont. Admin. R. 12.4.101-106 (1996).
496. *Id* at 12.4.103.
497. *Id.* at 12.4.104.
498. *Id.*
499. *Id.*
500. *Id.* at 12.4.105.
501. *Id.* at 12.4.106.

12, 1985 to December 1986), 12 petitions were filed. Of the 12 petitions, two were withdrawn, three were granted or granted in part and seven were denied.[502] Since December 1986, there have been three petitions, with two denied and one resolved through settlement.[503] The following are examples from those petitions:

A petition to close Nelson Spring Creek, a tributary of the Yellowstone River near Livingston, based on limited capacity and impacts to the fishery, was granted in part. The Commission prohibited wading in specified sections of Nelson Spring Creek to protect the spawning grounds of cutthroat trout. The prohibition is in effect during the cutthroat spawning and incubation period, June 15 through September 15 of each year.[504] A stream running through an existing bison pasture was closed to public recreation on the grounds that the bison posed a safety hazard.[505] A petition to close Ten Mile Creek near Helena was granted in part to close the stream to swimming and restrict hunting.[506] All other petitions were denied. Generally, the Commission found that the stream, including its trout populations, biotic communities, and water quality, and the riparian property was not being damaged by recreational use.[507]

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502. Mem. from James W. Flynn, Director, Review of Activities Related to Steam Access, DFWP. (Dec. 1986) (copy on file with *Pub. Land & Resources L. Rev.*).

503. Review of files maintained by Jim Darling, Fisheries Division, DFWP.

504. *Re: Petition of William D. Dana*, (Mont. St. Fish and Game Comm'n Jan. 22, 1987) (findings of fact and order) (copy on file with *Pub. Land & Resources L. Rev.*).

505. *Petition of Bruce M. Cady Requesting Restrictions on the North Fork of the Musselshell River*, (Mont. St. Fish & Game Comm'n June 18, 1986) (findings of fact and order) (copy on file with *Pub. Land & Resources L. Rev.*).

506. *Re: Petition of F.M. Gannon*, (Mont. St. Fish and Game Comm'n Oct. 11, 1985) (findings of fact and order) (copy on file with *Pub. Land and Resources L. Rev.*).

507. Examples of petitions that were denied: *Petition of Donald R. Siblerud Requesting Restrictions on Mill Creek*, (Mont. Fish & Game Comm'n Jan. 15, 1986) (findings of fact and order); Letter from Stan Meyer, Chairman, Mont. Fish, Wildlife & Parks Comm'n, to Charles W. and Elena B.

Even though seldom used now, this petition process has demonstrated its value. It provides an opportunity for landowners, who are concerned that public use will damage a stream running through their property, to have their concerns heard and considered. In summary, the Commission has concluded that generally public recreational use of a stream is self-limiting by the capacity of the stream itself, a judgment that is supported by practical experience.

XIV. A REVIEW OF STREAM ACCESS

The University of Montana, Public Policy Research Institute, conducted a survey in 2005 and published a Montana Public Policy Report in 2006 ("Report"), entitled "Stream Access in Montana."[508] The survey and report, twenty years after the passage of the Stream Access Law in 1985, was intended to identify unresolved issues and misunderstandings, while also investigating options for moving forward. The following is this author's summary of the Report's basic conclusions:[509]

- Most recreationists and landowners say the Stream Access Law works well with few conflicts with landowners.
- Many landowners say the Stream Access Law adequately protects their property

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d'Autremont (Feb. 11, 1999) (denying petition to restrict recreational use of the Ruby River. The Commission found no evidence that trout populations were being adversely affected nor evidence of damage to property, biotic communities, or water quality); FISH, WILDLIFE AND PARKS COMM'N MINUTES at 86-88 (Oct. 7, 1996) (Commission voted not to close Sheep Creek or Muddy Creek flowing through the property of Renee S. Thompson, Petitioner, to duck hunting and fishing.); *Report and Recommendations*, Mont. Fish, Wildlife and Parks (Sept. 5, 1996) (finding no evidence to support a fishing closure, although the report noted that retrieval of ducks would likely require a trespass) (copies on file with the *Pub. Land & Resources L. Rev.*).

508. PUBLIC POLICY RESEARCH INSTITUTE, UNIV. OF MONT., STREAM ACCESS IN MONTANA, MONT. POLICY REPORT 1 (May 2006).

509. *Id.* at 7-11.

rights and they enjoy the benefits of stream access themselves.

- Any problems are relatively minor and can be addressed by educational efforts, legislation, and enforcement.
- The primary issue is the need to allow fences to bridge abutments on county roads along with safe and reasonable access to the stream or river.

However, a few landowners saw the Stream Access Law as flawed because, in their opinion, it contradicts legal precedent, denies landowners the right to control who enters their property, creates disincentives for landowners to practice good riparian stewardship, is unenforceable because of vague terms in the law such as "ordinary high-water mark," and is impossible to enforce against trespass, littering, and other illegal activities.[510]

It is illuminating that the Report's inventory of specific conflicts over stream access have been resolved.[511] The Mitchell Slough litigation helped clarify what is a natural stream and what is a ditch for purposes of public access. The litigation over access at bridge easements on the Ruby River concluded that recreationists could access streams at all county bridge crossings including county roads established by prescriptive use. Also disputes over access at replacement bridges when the old bridge has been abandoned had at least been tempered by a policy adopted by the MDT.

The report focused on education to explain the law and address specific issues such as "trespass, littering, wildfire prevention, weed control, camping, human waste disposal, and portaging."[512] In fact, the report opined that the Stream Access Law was a way of balancing private and public rights, with many landowners saying they can live with and support the Stream Access Law because there are provisions in the law that protect

510. *Id.* at 7.
511. *Id.* at 8.
512. *Id.* at 10.

their private property interests.[513]

XV. COMMENTARY

Both facts and the law matter. In the odyssey of stream access in Montana, both have played significant, critical, and pivotal roles. Without their inexorably intertwined combination, it is difficult to imagine the comprehensive and successful developments that have molded Montana's Stream Access Law. First the facts, then the law.

On the Dearborn River and the Beaverhead River, landowners had decided to prohibit public floating and fishing, although the general public had floated and fished on each river for decades. The landowners had used intimidation, harassment, and physical barriers in their attempts to stop public use. It is no surprise that the courts, state district courts and Supreme Court, would find a way to allow the public to continue to use these rivers. The surprise was how broad and firmly anchored in Montana constitutional law and the Public Trust Doctrine the decisions were.

The *Curran* and *Hildreth* decisions authored by Chief Justice Haswell, locked a public right to recreate on state water into the constitutional ownership of water for the use of its people secured by the state's sovereign obligations required by the Public Trust Doctrine. Therefore, these two decisions set the stage for legislation and judicial decisions that followed. In theory the legislation was required to closely follow the *Curran* and *Hildreth* decisions and, if the legislative body did not do so, then the Supreme Court could or would make it right. However, in a political world, the legislature in a conservative response could have attempted to undermine the courts decisions, hoping for a reversal.

Nevertheless, the 1985 Legislature's response was as unique and groundbreaking as the Supreme Court decisions. The compromise and collaboration of the alliance of recreationist groups and the alliance of landowner groups resulted in legislation that was faithful to the holdings of the Supreme Court. The

513. *Id.* at 22.

recreationists gained clear and detailed protection of stream access rights while the landowner alliance gained protection of private property rights by prohibiting trespass outside of the bed and banks, e.g. no public right to cross private land or to establish prescriptive use easements, by prohibitions on the use of private ditches, and by limits on potential landowner liability for users of streams and rivers. In many, if not all subsequent legislative sessions, the present Stream Access Law probably would not have passed resulting in a prolonged controversy.

As expected, opponents of the Stream Access Law would test the law both directly and by attempting to chip away at its margins. The numerous attempts to challenge the Stream Access Law constitutionally as a taking without just compensation have failed with the courts finding that in setting the line between the rights of private landowners over whose land a publicly owned stream flows and the public's right to use the stream, nothing was taken from the private landowners.

One of the issues that this author sees as potentially still not entirely resolved is the status of the strip between the high-water to low-water marks on navigable for title rivers. The *Galt I* decision limited or qualified the public's right to use the strip, as allowed in the original Stream Access Law language, without addressing whether Montana, in 1895 could have constitutionally and consistent with the Public Trust Doctrine, ceded ownership to riparian landowners. Or, when the fee title in the strip was ceded, what retained public use rights and state control in the form of an easement are required pursuant to the Constitution and the Public Trust Doctrine.

The controversy over the status of Mitchell Slough is a prime example of an attempt to chip away at the margins of the Stream Access Law by turning live river channels and streams into private fishing "ditches." The Supreme Court in its 7-0 decision held Mitchell Slough was a natural water body subject to the right of the public to recreate under the Stream Access Law. Legislative attempts to reverse the Mitchell Slough decision would have led to similar claims under similar circumstances to turn river channels, and even streams, into private "fishing ditches."

Denying access to streams and rivers at county bridges was

another attempt to limit the public's ability to use streams and rivers. The Achilles heel of legislative bills to limit access as not qualifying as a public road purpose was the potential collateral damage to the ability of counties to expand the use of a county road as needed to support expanding public needs such at telephone lines, power lines, sewer lines, etc., without new easements that would be difficult or impossible to acquire or without expensive and lengthy condemnation.

The recent and prescient *PLAA v. Madison County* decision by the Supreme Court that county roads must have a broad range of potential uses under the umbrella of public road purposes benefits counties, road users, and recreationists. The court applied this principle to roads created by dedication, petition, and public prescriptive use to hold that access to streams and rivers at county bridge crossings was a public road purpose. The court held, however, that the width of a public prescriptive use road was to be determined based on the facts of historic use. The case-by-case determination will put counties in a practical difficulty.

Many county roads look like and are administered just like petitioned or dedicated county roads -- they were just established by a sort of road wedlock. In hindsight, a more practical, and probably just as legally justified, solution would be, or could eventually be, that the width of a county prescriptive road is 60 feet, the same default width as all other county roads, except subject to an acknowledge rebuttable presumption. This would remove a cloud over the remaining uncertainty for county prescriptive roads and shift the focus to just the county roads where the width of the road may be a legitimate issue.

The management of public recreational use of rivers and streams by DFWP and the Commission has been successful, especially viewed from the vantage point of case-by-case, or stream-by-stream, efforts. DFWP has worked with landowners and recreationists to build fences at bridge crossings that meet the twin objectives of controlling livestock while facilitating safe and practical access to the underlying stream. The Commission has functioned as a relief-valve by ruling on petitions to restrict stream access because of claimed resource harm or property damage, although in most circumstances the capacity of a stream has

functioned as a self-executing limitation. Allocating recreational use, preserving the benefits of recreating in streams and rivers, and reducing conflicts has been and can be addressed in Commission rulemaking. Portage routes have been handled in a low-key manner, generally by the face-to-face collaboration between landowners and DFWP field personnel.

A word of caution is appropriate. Comprehensive public access has benefitted from favorable factual situations and corresponding favorable legislative and judicial responses. Supporters of stream access would be wise to appreciate that the reverse can happen. Abuses of recreational access, such as littering, trespass, out-of-control dogs, or failures to respect the rights of private property owners, could lead to restrictions on stream access. One particular, potential example comes to mind. If hunters use stream corridors as public access through private property to get to public land, this is not a stream access right. If this abuse reaches a trigger level, the eventual legislative and judicial response will most likely not be to the liking of stream access proponents.

In summary, Montana Stream Access Law, while very broad, is also not complicated, has avoided lingering and divisive controversies, benefits from clear and straightforward statutory direction and limitations, and helps protect private property interests. These reasons help explain its remarkable success over the past three decades. Montana is fortunate compared to many neighboring states, from the perspective of supporters of stream access. In Montana, if a person can legally access a stream, he or she can fish, whether floating or wading, as long as he or she stays within the ordinary high-water lines. Public access is available from state and federal public lands, including fishing access sites provided by fee purchases or easements obtained by DFWP or federal agencies, at highway and county road bridge crossings or by permission of private landowners.

Recreationists owe a debt of gratitude to the 1984 Montana Supreme Court for its landmark decisions, authored by Chief Justice Haswell, that guarantee public stream access to all rivers and streams. They also owe a debt of gratitude to the 1985 Legislature's passage of the Stream Access Law that was the product of not only the members of the legislature but also the

unparalleled, collaborative support of strong and inclusive alliances of both landowners and recreationists, with the additional support of DFWP. The result is an amazingly simple and straightforward law that codifies a public right to recreate in streams and rivers, but also carefully defines the limits of public access. For landowners, the debt is to the collective wisdom of their alliance in honoring the Supreme Court decision while negotiating respect for and preserving the rights of riparian, private landowners within the language of the law.

The result is a Stream Access Law that works, has gained increasing respect, and has proven its value. For thirty years the law has weathered constitutional challenges and attempts to undermine it by denying access from public road crossings and by defining live streams as ditches. These challenges have actually made the Stream Access Law stronger by ensuring that streams cannot become fishing ditches and by guaranteeing and enhancing access at public bridge crossings. Citizen vigilance, support, and advocacy have been the crucial factors in preserving and strengthening the Stream Access Law.