Montana Law Review

Volume 71
Issue 2 *Summer 2010*

Article 7

7-2010

Stream Access in Montana and the Dispute Over Public Recreation on the Mitchell Slough

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NOTES

STREAM ACCESS IN MONTANA AND THE DISPUTE OVER PUBLIC RECREATION ON THE MITCHELL SLOUGH

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I. INTRODUCTION

The Montana Supreme Court and the Montana Legislature have determined that Article IX, § 3, Clause 3 of the Montana Constitution implicitly embodies the Public Trust Doctrine, and both have used this provision to protect public access to waters on private property while protecting landowners' private property rights. This casenote discusses the influence of the Public Trust Doctrine on the Montana Supreme Court's rulings—and the Legislature's legislative action—regarding stream access.

Section I examines the Public Trust Doctrine and case law from other jurisdictions concerning the Public Trust Doctrine. Section II looks at the public rights guaranteed by the Montana Constitution. Section III looks at two early cases addressing stream access in Montana. Section IV focuses on the Montana Legislature's actions following these two cases and discusses the first case challenging the constitutionality of Montana's Stream Access Law. Section V discusses a possible missed opportunity to expand the public's access to water in Montana. Section VI examines the most recent stream access dispute to reach the Montana Supreme Court: The

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Mitchell Slough Case.[1] Section VII examines the future of stream access in Montana.

II. Public Trust Doctrine History & Case Law from Other Jurisdictions

Early Roman and English law determined that certain property and resources are owned by the people and are not subject to private ownership.[2] According to this concept, "[A]ir, flowing water, the sea, and consequently the shores of the sea . . . are by natural law common to all."[3] English feudal law used this concept to assert public ownership of tidal flood plains.[4]

The first reference to the concept of a public trust in the United States came in the 1845 case *Pollard v. Hagan*.[5] In *Pollard*, the United States Supreme Court held that title to the shores and beds of all navigable waters was not subject to private ownership because the federal government held this land in trust for the people and transferred it to individual states as they were admitted to the Union.[6] The idea that newly admitted states are admitted "on an equal footing with the original [thirteen] states" is known as the Equal Footing Doctrine.[7]

Public versus private ownership of resources was further refined in *Illinois Central Railroad v. Illinois*.[8] In this case, the Illinois Legislature conveyed a large portion of the bed of Lake Michigan to Illinois Central Railroad—giving the Railroad title to the land and interest in any construction, business, or public conveniences, in Chicago's harbor.[9] The United States Supreme Court held this conveyance was void because the State holds submerged lands in trust for the people, and it cannot transfer title to the land without a clear benefit to the people.[10] The Court said that without public ownership, "every harbor in the country [is] at the mercy of a majority of the legislature of the state in which the harbor is situated."[11] The Court created the Public Trust Doctrine by holding that states own title to

1. *Bitterroot River Protective Assn., Inc. v. Bitterroot Conserv. Dist. (Mitchell Slough Case)*, 198 P.3d 219 (Mont. 2008).

2. Randy T. Simmons, *Property and the Public Trust Doctrine* 4, http://www.perc.org/pdf/ps39.pdf (Apr. 2007).

3. *Id.*

4. *Id.* at 7.

5. *Pollard v. Hagan*, 44 U.S. 212 (1845).

6. *Id.* at 230.

7. *Id.* at 222.

8. *Ill. Central R.R. v. Ill.*, 146 U.S. 387 (1892).

9. *Id.* at 433–434.

10. *Id.* at 452–453.

11. *Id.* at 455.

waters and the land beneath the waters, and "It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties."[12]

Private citizens have used the Public Trust Doctrine when suing the government for breaches of their public duties.[13] Private parties have also used the Public Trust Doctrine when suing other private parties.[14] And governments have used the Public Trust Doctrine when suing private citizens and private entities.[15]

Courts have applied the Public Trust Doctrine to waters used for recreational purposes,[16] dry sand beaches for recreation,[17] parklands,[18] wildlife and wildlife habitats,[19] inland wetlands adjacent to or near navigable waters,[20] drinking water resources,[21] and to resolve water appropriation is-

12. *Id.* at 452.

13. Richard L. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631, 645–646 (1986) (citing *City of Berkeley v. Super. Ct.*, 606 P.2d 362, 363–364 (Cal. 1980); *Paepcke v. Pub. Bldg. Commn. of Chi.*, 263 N.E.2d 11, 13 (Ill. 1970); *Super. Pub. Rights, Inc. v. St. Dept. of Nat. Resources*, 263 N.W.2d 290, 292 (Mich. App. 1977); *Gewirtz v. City of Long Beach*, 330 N.Y.S.2d 495, 501–503 (N.Y. Sup. Ct. 1972); *United Plainsmen Assn. v. N.D. St. Water Conserv. Commn.*, 247 N.W.2d 457, 458–459 (N.D. 1976); *Payne v. Kassab*, 312 A.2d 86, 88 (Pa. Cmmw. 1973)).

14. *Id.* (citing *Marks v. Whitney*, 491 P.2d 374, 377–378 (Cal. 1971) (en banc); *Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1087 (Idaho 1983); *Mont. Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163, 164–165 (Mont. 1984); *Thomas v. Sanders*, 413 N.E.2d 1224, 1226 (Ohio App. 1979)).

15. *Id.* (citing *Md. Dept. of Nat. Resources v. Amerada Hess Corp.*, 350 F. Supp. 1060, 1062 (D. Md. 1972); *State Dept. of Envtl. Protec. v. Jersey C. Power & Light Co.*, 308 A.2d 671, 671–672 (N.J. Super. L. Div. 1973)).

16. *Curran*, 682 P.2d at 171.

17. *Matthews v. Bay Head Improvement Assn.*, 471 A.2d 355, 363–366 (N.J. 1984) (holding that the Public Trust Doctrine requires public access to dry sand beaches between high water mark and vegetation line).

18. *Paepcke*, 263 N.E.2d at 15 (applying the Public Trust Doctrine to parkland); *Friends of Van Cortlandt Park v. City of N.Y.*, 750 N.E.2d 1050, 1053 (N.Y. 2001) (applying the Public Trust Doctrine to parkland).

19. *Pullen v. Ullmer*, 923 P.2d 54, 61 (Alaska 1996) (applying the Public Trust Doctrine to salmon and other fish); *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (extending the Public Trust Doctrine beyond the traditional uses of navigation, commerce, and fishing to include open space for wildlife habitat, scientific study, and swimming).

20. *Just v. Marinette Co.*, 201 N.W.2d 761, 769 (Wis. 1972) (applying the Public Trust Doctrine to wetlands adjacent to or near navigable waters).

21. *Mayor v. Passic Valley Water Commn.*, 539 A.2d 760, 765 (N.J. Super. L. Div. 1987) (applying the Public Trust Doctrine to drinking water).

sues.[22] Many states, including Montana, have incorporated the Public Trust Doctrine into their state constitutions.[23]

III. MONTANA'S CONSTITUTION

In 1972, the people of Montana ratified a new constitution. Its preamble demonstrates the value Montanans place on the environment by stating the people of Montana are "grateful to God for the quiet beauty of our state, the grandeur of our mountains, [and] the vastness of our rolling plains."[24] The Montana Constitution also states, "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."[25]

The delegates at the 1972 Constitutional Convention made it clear they intended this clause to incorporate the Public Trust Doctrine. For example, Delegate McNeil stressed that the clause is intended to "establish ownership of all water in the state subject to use by the people . . . [and] to recognize Montana Supreme Court decisions and guarantee the State of Montana's standing to claim all of its waters for use by the people of Montana."[26] Delegate McNeil went further and said, "[The section] has been put in here because the Legislature of Montana has refused to act. They have refused to recognize the interest of recreation in our waters."[27]

However, the delegates also debated whether the clause granted the public a right of access to Montana's waters. Delegate Aronow said recreational users could "hike up and down [the] stream . . . [and] certainly may boat . . . [b]ut . . . can't drive across the rancher's lands willy-nilly in order to get to it."[28] Delegate McNeil disagreed with Delegate Aronow and said the clause does not deal with "the question of access and trespass."[29] Delegate McNeil stressed:

> The section deals with the ownership of the water, subject to appropriation for beneficial uses. It is not the intent and the language does not grant access

22. *Natl. Audubon Socy. v. Super. Ct.*, 658 P.2d 709, 727–728 (Cal. 1983) (allowing the use of the Public Trust Doctrine to challenge water diversions); *United Plainsmen Assn.*, 247 N.W.2d at 463 (holding the Public Trust Doctrine limits the discretionary authority of state officials when allocating public water).

23. *See e.g.* Haw. Const. art. XI, §§ 1, 7; Mont. Const. art. IX, § 3, cl. 3. For a detailed explanation on how the framers of the 1972 Montana Constitution incorporated the Public Trust Doctrine into the Constitution, consult *infra* section II.

24. Mont. Const. preamble.

25. *Id.* at art IX, § 3, cl. 3.

26. Mont. Const. Conv. Transcr. vol. V, 1301 (1972) (available at http://courts.mt.gov/content/library/mt_cons_convention/vol5.pdf).

27. *Id.* at 1314.

28. *Id.* at 1305.

29. *Id.* at 1306.

> rights or trespass rights. That specific question was considered in a separate proposal of Delegate Berthson's; that is, the recreational use to the high-water mark. That proposal has been introduced in the last several Legislatures, is highly controversial, and for that matter and for that reason, it was not included here. So this section deals just with the ownership of the water and not with any access rights.[30]

Delegate McNeil's comments predicted that while this section of the Constitution provides a framework for protecting the public's ownership of Montana's water, it does not answer all stream access questions. However, Article IX, § 3, Clause 3—as interpreted by the Montana Supreme Court and the Montana Legislature—has significantly influenced the public's right to access Montana's streams and rivers. These cases and the legislative history are discussed below.[31]

IV. EARLY MONTANA STREAM ACCESS CASE LAW

In 1984, the Montana Supreme Court decided two stream access cases: *Montana Coalition for Stream Access v. Curran*[32] and *Montana Coalition for Stream Access v. Hildreth.*[33] In both cases the Court recognized the relationship between the Public Trust Doctrine and the Montana Constitution. The Court used this relationship to clarify the public's access rights to rivers in Montana and lay the framework for future legislative action.

In *Curran*, a landowner claimed he could restrict use on six miles of the Dearborn River because he owned the banks and streambed of the river.[34] The Montana Coalition for Stream Access ("Coalition") brought suit after some of its members were harassed while floating and fishing the stretch of the Dearborn that flowed through Curran's property.[35] The district court held the Dearborn was navigable for recreational purposes and the public could use the river for recreation.[36] The Montana Supreme Court affirmed the district court after determining the Dearborn was navigable in fact under federal law because it passed the "Log-floating Test."[37] There-

30. *Id.*

31. *See e.g. Curran*, 682 P.2d 163; *Mont. Coalition for Stream Access v. Hildreth*, 684 P.2d 1088 (Mont. 1984), *overruled on other grounds, Grey v. City of Billings*, 689 P.2d 268 (Mont. 1984); *Galt v. Dept. of Fish, Wildlife & Parks*, 731 P.2d 912 (Mont. 1987); *Mitchell Slough Case*, 198 P.3d 219; Mont. Code Ann. §§ 23-2-301 to 23-2-322 (1985).

32. 682 P.2d 163.

33. 684 P.2d 1088.

34. 682 P.2d at 165.

35. *Id.*

36. *Id.*

37. *Id.* at 166. A river is navigable under federal law if it could be used as a highway for commerce through trade or travel by customary modes. *State of Oregon v. Riverfront Protec. Assn.*, 672 F.2d 792, 794 (9th Cir. 1982). Under the log-floating test, a stream is navigable if it was used for floating commercial grade logs during its ordinary condition. *Id.* at 794–796.

fore, "title to the riverbed was owned by the federal government prior to statehood and was transferred to the State of Montana upon admission to the Union."[38] However, the Court stressed, "Streambed ownership by a private party is irrelevant . . . [because] [i]f the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people."[39] The Court went further stating, "The Constitution and the Public Trust Doctrine do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters."[40] *Curran* demonstrates the power and breadth of the Public Trust Doctrine and also shows that the Court is willing to use the Doctrine to protect the public's right to access streams in Montana.

In *Hildreth*, a landowner who owned land adjacent to the Beaverhead River installed a fence and planned to install a cable across the river for the opening day of fishing season.[41] The Coalition filed a complaint alleging the public could float the Beaverhead through the landowner's property.[42] The Coalition also sought a preliminary injunction to enjoin the landowner from interfering with the public's access to the river.[43] Following a trial, the district court found in favor of the Coalition and granted "a permanent injunction declaring the Beaverhead River subject to public access up to the high water mark."[44]

The Montana Supreme Court affirmed the district court and determined that the federal test for navigability is irrelevant when determining whether the public can access a Montana stream for recreation.[45] The Court said the federal navigability test determines title, but it does not determine whether the public can recreate on the State's waters.[46] The Court stressed the Montana Constitution "clearly provides that the State owns the waters for the benefit of its people" and refused to limit the waters' use "by inventing some restrictive test."[47] The Court said water that is capable of recreational use can be used for public recreation regardless of who owns title to the underlying streambed.[48] This demonstrates the importance of the Public Trust Doctrine when discussing stream access in Montana. While the decision appears to make title irrelevant for purposes of stream

38. *Curran*, 682 P.2d at 166.
39. *Id.* at 170.
40. *Id.* at 170.
41. 684 P.2d at 1090.
42. *Id.*
43. *Id.*
44. *Id.* at 1090–1091.
45. *Id.* at 1091.
46. *Id.*
47. *Hildreth*, 684 P.2d at 1091.
48. *Id.* at 1092.

access, it does not necessarily rule out future takings challenges by landowners.

Hildreth and *Curran* reaffirmed the power of the Public Trust Doctrine, and as a result of these cases, the Montana Legislature integrated the principles of the Doctrine into Montana law.

V. LEGISLATIVE ACTION AND THE MONTANA STREAM ACCESS LAWS

In 1985, following *Curran* and *Hildreth*, the Montana Legislature passed the Montana Stream Access Law.[49] The Stream Access Law attempted to clarify the public's right of access by codifying the principles from *Curran* and *Hildreth*: "[A]ll 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."[50]

The Stream Access Law divides streams into Class I and Class II waters. Class I waters are surface waters, other than lakes, that are navigable under the federal test, while Class II are all other surface waters, except lakes.[51] Under the Law, recreational use includes "fishing, hunting, swimming, floating in [a] small craft . . . boating in [a] motorized craft . . . or craft propelled by oar or paddle, [and] other water-related pleasure activities."[52]

The Stream Access Law initially contained a number of controversial provisions that were later ruled unconstitutional. For example, the Law allowed members of the public to camp overnight on Class I waters, as long as they were not within sight or within 500 yards of an occupied dwelling.[53] The Law also allowed the public to erect permanent duck blinds and seasonal boat moorages on Class I waters, as long as they were not within sight or within 500 yards of an occupied dwelling.[54]

Shortly after the Stream Access Law was passed, it was challenged in *Galt v. State* and the Montana Supreme Court decided the Legislature had stretched the public's constitutional right to stream access too far by impinging on landowners' constitutionally protected private property rights.[55]

In *Galt*, a group of landowners brought an action against the Montana Department of Fish, Wildlife, and Parks ("FWP") seeking to have the Stream Access Law declared an unconstitutional taking.[56] The district

49. Mont. Code Ann. §§ 23-2-301 to 23-2-322 (1985).
50. *Id.* at § 23-2-302(1).
51. *Id.* at § 23-2-301(2) to 23-2-301(3).
52. *Id.* at § 23-2-301(10).
53. *Id.* at § 23-2-302(2)(e).
54. *Id.* at § 23-2-302(2)(f).
55. 731 P.2d at 915.
56. *Id.* at 913.

court granted summary judgment to FWP, but the Montana Supreme Court reversed.[57] The Court held that most of the Stream Access Law was constitutional because the Montana Constitution gives ownership of the water to the public.[58] The Court also noted it had previously determined the public has the right to use the water and the real estate underlying the water for recreational use.[59] However, the Court said there was no requirement that this "use be as convenient, productive, and comfortable as possible."[60] The Court then determined the portions of the Stream Access Law allowing the public to camp overnight and build permanent duck blinds and boat moorages on any commercially navigable stream were overbroad and unconstitutional.[61] The Court also found the sections allowing big game hunting and requiring the landowner to pay for public portage routes around obstructions invalid.[62] The Court said, "The real property interests of private landowners are important as are the public's property interest in water," and because "[b]oth are constitutionally protected[,]" they "must be reconciled to the extent possible."[63]

Galt demonstrates that the Court will not allow the Montana Legislature to endlessly expand the public's access under the Stream Access Law. The holding shows that the power of the Public Trust Doctrine is not limitless and suggests landowners have the strongest challenge to the Stream Access Law when a particular aspect of the Act infringes on the landowners' constitutionally protected private property rights.

VI. A Possible Missed Opportunity to Expand Public Access to Water in Montana

The next case interpreting *Curran*, *Hildreth*, and the Stream Access Law was *Ryan v. Harrison & Harrison Farms L.L.L.P.*[64] *Ryan* was an unpublished slip opinion where the litigant missed an opportunity to challenge the constitutionality of the portion of the Stream Access Law that excludes lakes from the public's access.[65]

Ryan involved a dispute about whether the public had the right to access Lois Lake.[66] Lois Lake was created in 1966 when the defendant's predecessor, Robert Lea, constructed an earthen dam on his property to im-

57. *Id.*
58. *Id.* at 915.
59. *Id.*
60. *Id.* at 915.
61. *Galt*, 731 P.2d at 915–916.
62. *Id.* at 916.
63. *Id.*
64. *Ryan v. Harrison & Harrison Farms, L.L.L.P.*, 2001 MT 128N, ¶ 20.
65. Mont. Code Ann. § 23–2–310 (2007).
66. *Ryan*, 2001 MT 128N, ¶ 7.

pede the flow of Snowshoe Creek.[67] Ryan had obtained permission from a previous owner to fish Lois Lake, but later was denied access by a subsequent owner of the lake.[68] On February 9, 1999, Ryan filed a complaint to gain access to the lake.[69]

On January 19, 2000, Ryan moved to file an amended complaint in order to substitute the Attorney General as a party so he could challenge the constitutionality of exempting lakes from the public's access.[70] The district court, after oral argument, denied this motion and granted Harrison summary judgment—concluding that Lois Lake is located entirely on private property and can only be accessed by crossing private property.[71]

Ryan appealed *pro se* to the Montana Supreme Court, claiming the district court erred by deciding: (1) Ryan did not have a right to cross private property to recreate on Lois Lake; (2) Ryan could only access Lois Lake by crossing private property; and (3) Ryan did not have access, without reaching the merits of Ryan's constitutional challenge.[72] The Montana Supreme Court affirmed the district court based on two facts: first, Lois Lake is situated on and surrounded entirely by private property; and, second, Ryan could not access the lake without crossing private property.[73] Ryan argued he could access the lake in three ways from Snowshoe Creek Road without crossing private property.[74] However, Harrison had presented two affidavits to the district court proving that although Snowshoe Creek Road is maintained by the county, it nonetheless is a private road.[75] The Court also affirmed the district court's denial of Ryan's motion to file an amended complaint because he failed to comply with Montana Code Annotated § 27–8–301 and Montana Rule of Civil Procedure 24(d).[76]

Accordingly, Ryan missed his opportunity to challenge the constitutionality of the Stream Access Law provision that exempts man-made lakes from the public's access. The challenge would have presented the courts with a unique question: whether the public has a constitutional right to access a lake that was created by damming a stream the public can use for

67. *Id.*
68. *Id.*
69. *Id.* ¶ 8.
70. *Id.* ¶ 11.
71. *Id.* ¶ 13.
72. *Ryan*, 2001 MT 128N, ¶¶ 3–6.
73. *Id.* ¶ 33.
74. *Id.* ¶ 27.
75. *Id.* ¶¶ 29–31.
76. *Id.* ¶¶ 42–44; Mont. R. Civ. P. 24(d) (a party challenging the constitutionality of any act of the Montana Legislature is required to notify the Montana attorney general and the court of the constitutional issue); Mont. Code Ann. § 27–8–301 ("[I]f the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard.").

recreational purposes when the public's access would only minimally infringe on private property rights. While this may not have been a successful challenge, it would have forced the Court to review the Stream Access Law and determine whether the Legislature can logically exclude lakes when the Montana Constitution applies to "all surface waters."

VII. MITCHELL SLOUGH CASE

The next important stream access dispute that found its way to the Montana Supreme Court concerned a stream in the Bitterroot Valley known as the Mitchell Slough.[77] Here, the Court mentioned the Montana Constitution and the Public Trust Doctrine, but it was not faced with a challenge to any of the provisions of the Stream Access Law.[78] Therefore, the Court concentrated primarily on the statute, while "act[ing] with respect for all the constitutional rights of the parties."[79] In a lengthy but relatively straightforward opinion, the Court reversed the lower court and determined the Stream Access Law applies to the Mitchell Slough because it is a natural stream.[80]

The Mitchell Slough is a stream fed partly by water diverted from the East Fork of the Bitterroot River by the Tucker Headgate.[81] The Mitchell Slough flows north for 16 miles between Hamilton and Stevensville and eventually empties into the Bitterroot River.[82] Historically, the Mitchell Slough has been used for irrigation, stock water, and fish and wildlife purposes.[83] Although it is unclear exactly when landowners began restricting the public's access to the Mitchell, many Montanans agree with state Senator Jim Shockley that it was some time after the landowners began claiming the Mitchell Slough was an irrigation ditch that did not qualify as a natural stream under the Stream Access Law.[84]

The controversy over public access on the Mitchell Slough first hit the courts in 1991, when two brothers ignored landowners' restrictions and fished the slough.[85] They crossed private land to access the slough and were arrested and charged with trespassing. They were later found not guilty by a jury who presumably believed the Stream Access Law allowed

77. *Mitchell Slough Case*, 198 P.3d 219.

78. *Id.* at 234.

79. *Id.*

80. *Id.* at 232.

81. *Id.* at 223.

82. *Id.*

83. *Mitchell Slough Case*, 198 P.3d at 223.

84. Jim Robbins, *Tug of War Is On in Montana Over Public Access to Waterway*, N.Y. Times A13 (Jul. 26, 2006) (available at http://www.nytimes.com/2006/07/26/us/26slough.html).

85. *Id.*

the public to fish the Mitchell Slough.[86] Although the Stream Access Law expressly states it "does not grant any easement or right to the public to enter onto or cross private property in order to use such waters for recreational purposes," the jury essentially told the brothers, "Go fishing."[87] A few years later, a number of local residents informed local authorities they were going to ignore the no-trespassing signs and access the Mitchell Slough from a county-owned bridge.[88] A game warden watched this "fish-in" take place, but made no arrests.[89] Because both juries and game wardens were allowing anglers to fish the Mitchell Slough, the landowners sought administrative relief.

In 2002, the Bitterroot Conservation District ("BCD"), through its administrative declaratory ruling process, determined "the Mitchell Slough was not a naturally flowing perennially flowing stream under the Natural Streambed and Land Preservation Act."[90] The Bitterroot River Protective Association ("BRPA") appealed the BCD's decision to the district court, claiming the Public Trust Doctrine applied to the Mitchell Slough, the Mitchell Slough was a naturally flowing stream, and the Stream Access Law allows the public to recreate on the Mitchell Slough.[91] The district court determined the Mitchell Slough is not a natural body of water under the Stream Access Law, and the public had no right to recreate on the Mitchell.[92]

In making this decision, the court determined that, "130 years ago the Mitchell Slough may well have been considered a natural body of water under the Stream Access Law," but said it was no longer natural because the Bitterroot River has migrated west and, without man's manipulations, the Mitchell would not flow.[93] In making this ruling, the court recognized the Mitchell flows year round and actually gains water after leaving the Tucker Headgate because natural springs and groundwater flow into the slough.[94] The court also recognized the Mitchell Slough has a vibrant fish population but said the fish population was not a factor "heavily considered by the Court."[95]

86. *Id.*; Jesse Froehling, *Muddy Waters*, Missoula Indep. 2 (Apr. 30, 2009) (available at http://www.missoulanews.com/index.cfm?do=article.details&id=F3A74CEC-14D1-1357-9CDA97134DBD900A&page=2).

87. Mont. Code Ann. § 23-2-302(4); Froehling, *supra* n. 86, at 2.

88. Robbins, *supra* n. 84.

89. *Id.*

90. *Bitterroot River Protective Assoc., Inc. v. Bitterroot Conserv. Dist.*, 2006 Mont. Dist. LEXIS 576, Cause No. DV-03-476, 1 (21st Jud. Dist. Mont., May 9, 2006).

91. *Id.* at 1–2.

92. *Id.* at 5.

93. *Id.*

94. *Id.* at 8–9.

95. *Id.* at 9–10.

The BRPA appealed the decision to the Montana Supreme Court.[96] The BRPA claimed the Mitchell Slough was a natural stream under the Natural Streambed and Land Preservation Act of 1975, commonly known as the 310 Law.[97] The BRPA also claimed the Mitchell was open to public recreation under the Stream Access Law.[98]

The Court examined the record and stressed that although man has altered the Mitchell, it has flowed through a natural channel for over 100 years.[99] The Court also stressed that although a large amount of water is diverted from the Bitterroot into the Mitchell at the Tucker Headgate, the Mitchell's flow increases due to "return flows, groundwater, springs and precipitation" and that eventually the Mitchell "deposits more water back into the Bitterroot River than [is] diverted from the Bitterroot at Tucker Headgate."[100] Next, the Court stated, the purpose of the 310 Law is to "protect the use of water for any useful or beneficial purpose as guaranteed by The Constitution of the State of Montana . . . [and] to prevent unreasonable depletion and degradation of natural resources."[101] The Court concluded by holding the Mitchell is a natural, perennially flowing stream under the 310 Law.[102]

After deciding the 310 Law dispute, the Court moved to the stream access issue. The Court began by clarifying that the 310 Law and the Stream Access Law use different definitions for what bodies of water are covered under their respective provisions—e.g., a body of water that qualifies as a ditch under the 310 Law may not qualify as a ditch under the Stream Access Law.[103] The Court recognized that deciding this issue would require examination of two Montana constitutional provisions: (1) the declaration that all waters of Montana are owned by the State for the use of its people in Article IX, § 3, and (2) the private property protections within Article II, § 3.[104] However, the Court distinguished this case from *Galt* because it did not contain a constitutional challenge to the provisions of the Stream Access Law.[105] Accordingly, while the Court attempted to respect the constitutional rights of all parties, it decided the case primarily by statutory interpretation.[106]

96. *Mitchell Slough Case*, 198 P.3d at 221.
97. *Id.*
98. *Id.*
99. *Id.* at 231.
100. *Id.* at 232.
101. *Id.* (quoting Mont. Code Ann. § 75-7-102 and Mont. Const. art. IX, § 1(3)).
102. *Mitchell Slough Case*, 198 P.3d at 232.
103. *Id.* at 233.
104. *Id.*
105. *Id.* at 234.
106. *Id.*

The Court began its analysis by identifying three elements of the Stream Access Law that must be met for the Mitchell Slough to be subject to public recreational use.[107] First, the Mitchell must be a natural body of water.[108] Second, the Mitchell must be capable of recreational use.[109] Third, the Mitchell must not be water that is diverted away from a natural waterway through a man-made conveyance system.[110]

After examining the evidence concerning man's alteration and return flows, the Court decided the Mitchell was a natural water body, even though it has been altered by man.[111] The Court criticized the district court for applying a narrow definition of natural and stressed that many natural Montana rivers have been channelized, reshaped, or otherwise altered by man.[112] The Court said, "[T]he mere fact that man has influenced a waterway does not require its exclusion from access provided under the Stream Access Law."[113] The Court also determined the Mitchell was capable of recreational use because there is no dispute that boating, hunting, and fishing have historically occurred on the Mitchell.[114] The Court further stated that the Mitchell has a healthy population of fish, and although "the presence of fish alone does not make a water body natural, it is one fact to be considered in the determination, both of a stream's recreational capability and its naturalness."[115] Last, the Court determined the Mitchell was "[m]an-improved," but not a manmade conveyance system because only a 400-yard canal directly below the Tucker Headgate was dug by man, while the remaining 16 miles of the Mitchell "was naturally formed and significant portions of the channel remain in its historic location."[116] Because all three factors were satisfied, the Court concluded that "the Mitchell Slough is subject to stream access and public recreation as provided by the Stream Access Law."[117]

Although the Court mentioned the need to balance the constitutional rights of the public and the landowners, this was mostly lip service, and the Court seemed to concentrate on the facts that recreational use was possible on the Mitchell and that the Mitchell was a natural body of water. However, the principles of the Public Trust Doctrine are embedded in the opin-

107. *Id.* at 236.
108. *Mitchell Slough Case,* 198 P.3d at 236.
109. *Id.*
110. *Id.*
111. *Id.* at 239.
112. *Id.* at 238.
113. *Id.* at 236.
114. *Mitchell Slough Case,* 198 P.3d at 236.
115. *Id.* at 241.
116. *Id.* at 240.
117. *Id.* at 242.

ion, and the unanimous opinion suggests every justice on the Court feels some waters are too precious to be monopolized by a private party.

VIII. The Future of Stream Access in Montana

The Court's Mitchell Slough opinion was unanimous. The opinion affirmed a fairly consistent body of case law upholding the validity and scope of the Stream Access Law—which grants public access to certain bodies of water in Montana so long as the law does not allow the public to infringe on the private property rights of landowners.[118] However, it is unlikely the opinion will end the debate on stream access in Montana. In fact, the most recent dispute involving stream access concerns the public's right of way from bridges on county roads to the streams these bridges cross. According to an October 2008 opinion by Fifth Judicial District Court Judge Loren Tucker, landowners have the right to attach fences to county bridges, and the public has a right to step over the fence to access streams.[119] Judge Tucker's order says the Stream Access Law is not implicated in his opinion because the dispute involves the intersection of two public rights of way: the stream and the county road.[120]

Judge Tucker's order spawned legislative action in the most recent Montana legislative session—House Bill 190. The bill was sponsored by Kendall Van Dyk, D-Billings, who says the bill "is a compromise between sportsmen and landowners."[121] House Bill 190 had overwhelming bi-partisan support and was passed in form of Montana Code Annotated §§ 23–2–312, 23–2–313 (2009). These statutes allow landowners to attach a fence to a county bridge for livestock control, so long as the fence provides a public passage that allows the public to access surface waters for recreational use.[122] The statutes also require that FWP, or other interested parties, provide materials, installation, and maintenance for any fence modifications necessary to provide a public passage and exempt landowners from liability once a legal fence is installed.[123] Van Dyk has said the new laws are good for everyone but "rich out-of-staters—If a rich out-of-stater wants to buy access to rivers and streams, I know some incredibly pretty

118. The exception to this case law is *Galt* discussed *infra* at note 57, where the Court struck down certain provisions of the Stream Access Law as unconstitutional, however, those provisions are no longer part of the Stream Access Law.

119. *Public Lands Access Assoc., Inc., v. Bd. of Co. Commnrs. of Madison Co.*, Cause No. DV-29-04-43 (5th Jud. Dist. Mont., Oct. 1, 2008).

120. *Id.* at 5–8.

121. Jennifer McKee, *Bill may Offer Stream Compromise*, Missoulian B1 (Jan. 11, 2009) (available at www.missoulian.com/news/local/article_9e6b2ae4-873c-5b27-9238-98a45defe16a.html).

122. Mont. Code Ann. § 23–2–313 (2009).

123. Mont. Code Ann. §§ 23–2–312, 23–2–313.

places in Wyoming they can look at."[124] Van Dyk is presumably speaking about Wyoming's stream access law, which allows the public to float streams and rivers but prohibits the public from wading or walking on the streambed which belongs to the riparian owner.[125]

IX. CONCLUSION

Although the statutes codified from House Bill 190 clarified stream access in Montana, it is unlikely that these laws will end the debate over the public's right to recreate on surface waters in Montana. While the public and many legislators support Montana's Stream Access Law, there are some ranchers and landowners who oppose it. The Court will likely hear additional cases concerning stream access because "[s]ome newcomers do not know or care that Montana has a law that guarantees public access[.]"[126] The Court in *Galt* upheld the majority of the Stream Access Law as constitutional, but the most important future cases will likely involve constitutional challenges to the Stream Access Law or the statutes codified from HB 190. These cases may involve future constitutional takings allegations, and it will be particularly interesting to see how the Court balances the constitutional right of public access with the landowners' constitutional right to privacy. Despite these conflicting rights, it is likely that both the Court and the Legislature will continue to use the Public Trust Doctrine in future stream access decisions and legislation.

Although the Court will ultimately decide how far the Stream Access Law is stretched, the Montana Legislature and Montana politicians will also play key roles in determining the future of stream access. At least one politician, Montana's governor, Brian Schweitzer, is committed to protecting the public's right to access Montana's rivers and streams. He has voiced this commitment by saying, "If you want to buy a big ranch and you want to have a river and you want privacy, don't buy in Montana. The rivers [of Montana] belong to the people of Montana."[127]

124. McKee, *supra* n. 121, at B2.

125. *See Day v. Armstrong*, 362 P.2d 137, 146–147 (Wyo. 1961) (holding the public can float rivers and streams that are capable of being floated, but may not walk or wade on the streambed because this land belongs to the riparian owner).

126. Robbins, *supra* n. 84.

127. *Id.*