Enhancing Montana's Wildlife & Habitat

2017

The Public Trust Doctrine & Montana's Stream Access

By Kathryn QannaYahu

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www.EMWH.org

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Montana Coalition Stream Access Inc.

Skyline Sportsmen's Association, Inc.

Montana Sportsmen Alliance
Voice of Reason on Montana Fish and Wildlife Issues

Backcountry Hunters & Anglers

Helena Hunters & Anglers Association
Affiliate Club of the Montana Wildlife Federation

PLWA

Ravalli County Fish & Wildlife Association

FOMM
Fishing Outfitters Association of Montana

Anaconda Sportsmen's Club

Overview

This history of stream access, from Montana's rough and wild west Territorial days, through the 1933 Legislature, to our current access battles in 2017, provides a road map illustrating stream access' public trust roots, its defense, and at times, how it was paid for by some key individuals who were passionate about public access in Montana. Due to: 1. the recent attacks on the Public Trust Doctrine during the 2017 legislators; 2. the attacks against the Montana's grassroots hunters/anglers and other conservation groups as being "Green Decoys" by out-of-state paid lobbyists; and 3. sitting legislators pushing special interest agendas, including their efforts to increase division between landowners and recreationists, furthering to make the "public trust" a dirty term, synonymous with "a taking"; I thought it a good time to shine a light on some basic access truths, to better defend against the continued privatization attempts in Montana.

There are three braided streams of thought running through this history:

- The Public Trust Doctrine/Montana Constitution as the foundation to Montana's Stream Access and the need for the general public to be armed with that knowledge to better understand and defend our public trust.
- The need for elected officials that will uphold the public trust doctrine: from the local elections, county officials, through the State and Federal positions.
- The necessity/benefit of the public and courts to defend against privatization, when our elected officials fail to uphold the Public Trust.

Jefferson, Madison & Gallatin Rivers merge to form the Missouri River, Three Forks, MT

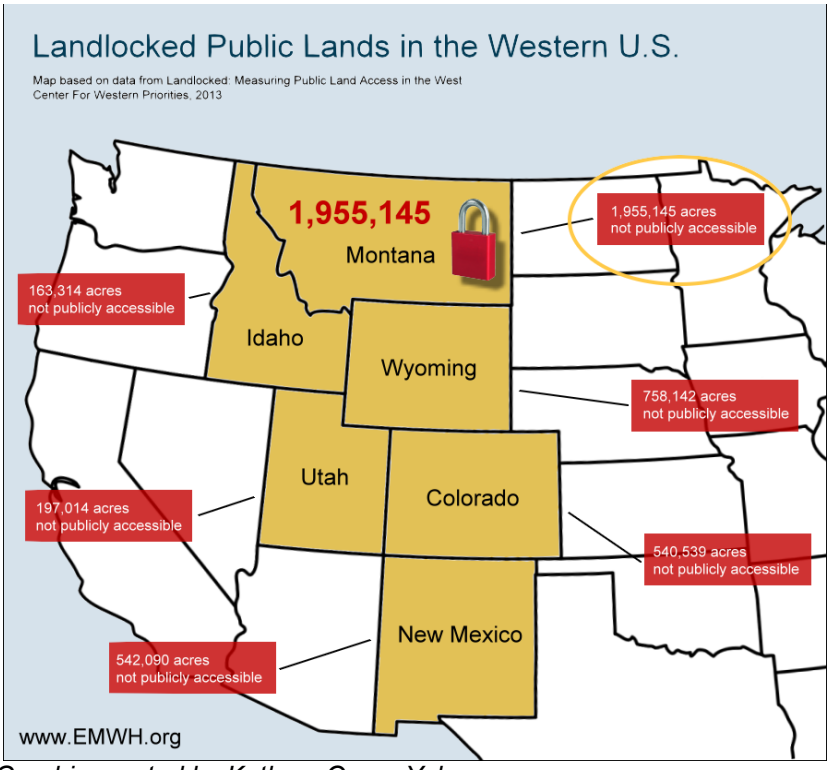
Montana is called "The Treasure State", the motto, Oro y Plata is Spanish for "gold and silver ". But, our treasures don't just lie underground. Some of our greatest treasures are our lakes, rivers and streams, the picturesque beauty that inspires art, like the angling film, "A River Runs Through It"; the incredible fishing and other recreational opportunities they provide to the general public; and the economic benefits from locals and tourism that contributes to outdoor recreation and tourism being one of the largest industries in Montana.

Montana, "The Last Best Place", elicits numerous journalistic and graphic examples of why Montana is such a treasured destination. American author John Steinbeck wrote of Montana:

"I'm in love with Montana. For other states I have admiration, respect, recognition, even some affection. But with Montana it is love. And it's difficult to analyze love when you're in it."

Surrounded by all this natural beauty, beginning with Montana's territorial days, it has also grown the necessary public trust stewards who work to ensure that Montana is the “Last Best Place” for future generations. Access is a critical part of that equation. With about 1/3 of the state comprising Federal and State public lands, residents and non-residents alike benefit from Montana's public opportunities, and our Stream Access is considered the “Best in the West”.

In a High Country News interview, Bruce Farling, Montana Trout Unlimited Director expressed, "There's a reason why we have the best trout fishing in the United States and the best access law. It isn't coincidental: When people have access to rivers for fishing, they are motivated to protect and restore them."



Graphic created by Kathryn QannaYahu

In the 2013 report, *Landlocked: Measuring Public Land Access in the West*[1], Montana has nearly 2 million acres of public lands not accessible, some of this obstruction is illegal. This is by far more than any other western state.

With all the continual, and at times illegal privatizing, special interest agendas, federal and state legislative attempts to transfer federal public lands to the states (Public Lands Transfer Movement), our legislative protection that enshrined Stream Access in Montana could be just as easily taken away through ignorance of the Public Trust Doctrine.

To ensure our “Best in the West” Stream Access is here to stay, we need to educate and equip ourselves with the Public Trust Doctrine, defending it against private, legislative and judicial attacks; diligently and tirelessly challenging each access violation, in order to preserve our trust for future generations.

As a disclaimer: this Stream Access history and the Public Trust Doctrine, cannot be condensed to a 140 character tweet.

Enhancing Montana's Wildlife & Habitat

EMWH was founded to address public trust issues in Montana, with the goal of **Putting the "Public" Back in "Public Trust"**; then expanding from the individual to the broader public by networking these values and ideals.

We elect officials to represent us and our public trust, but when those elected and appointed officials fail to uphold and defend that trust, or worse, openly declare war on it, we need to rise up, point out their responsibility and if necessary take it to court. This arming of the public requires information, history, court case examples, public information requests, transparency and elected official accountability. Otherwise, for lack of knowledge, the public could have their trust resources, and that of future generations stolen. They say, "knowledge is power". Greater still is the broad public armed with that knowledge and united in their public trust defense.
For more information: www.EMWH.org

This Document...

Endnote References are available for PDF download at this webpage, for accountability and veracity: http://www.emwh.org/public%20trust/The%20Public%20Trust%20Doctrine%20and%20Montana's%20Stream%20Access.htm

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If you would like to contribute towards the time and research that produced this document, you may:
Contribute online with a secure payment at http://www.EMWH.org/contribute.htm
Or mail a check to: Kathryn QannaYahu, 513 1/2 W. Curtiss St., Bozeman, MT 59715

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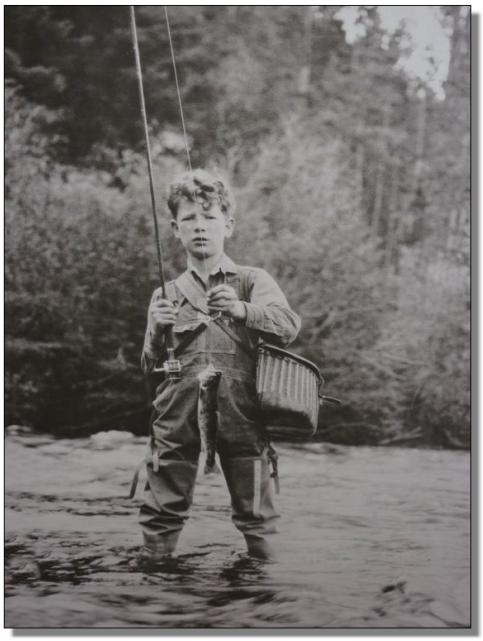
The Public Trust Doctrine & Montana's Stream Access

Table of Contents



Wise River, Montana, 1933

Public Trust Doctrine Foundation of Montana's Stream Access

Montana's stream access did not begin in the 1980's, as some may believe. Stream access began with our public trust which antedates our U.S. Constitution. It continued in our Wild West Territorial days, was addressed in more detail during our early Montana Legislature, then again over half a century later in the 1930's. Both the mining interests and the fishing interests played a part in Montana's water resources and recreation policies early on.

James Stuart, and his brother Granville, originally came to Montana prospecting for gold. Eventually, Stuart expanded his interests, including trading, land, ranching and politics. As populations and industries grew, Stuart became concerned with market fishing's heavy and wasteful toll by seining and explosives, as well as sawmill refuse's lethal effect on fish populations. During Montana's 1st Territorial Legislature (1884/1885), James Stuart, a legislator representing Deer Lodge, introduced a bill, "An Act in Relation to Trout Fishing." The bill legislated, "Sec. 1. That a fishing tackle, consisting of a **rod or pole, line and hook**, shall be the only lawful way that trout can be caught in any of the streams of this Territory. Sec. 2. That said hook shall not be baited with any drug or substance poisonous to any kind of fish whatever. Sec. 3. That it shall be unlawful for any persons or persons in the Territory of Montana to make any dams, or use any nets, seines, or any similar means for catching trout, or to use any drug or poison intending to catch, kill, or destroy any species of fish."[2] Montana's first conservation bill was signed into law on February 2, 1865.

1910 Vintage Yellowstone National Park Postcard: Trout in Clear Water

Before Montana became a State in 1889, the world's first national park was founded in 1872 by an act of congress, with its northern boundary near the confluence of the Gardiner and Yellowstone rivers, in 1872. Later, in 1903, President Theodore Roosevelt, a conservation Republican, arrived in Gardiner, Montana to dedicate what is now known as the Roosevelt Arch, he did so with a quote from the Organic Act of 1872: "For the Benefit and Enjoyment of the People."

Montana State Capitol 1896 (unbuilt)

Montana became a State on November 8, 1889 and water was an important issue even then. In Montana's third Constitution, Sec. 15 reads, "T**he use of all water now appropriated, or that may hereafter be appropriated** for sale, rental, distribution or **other beneficial use** and the right of way over the lands of others, for all ditches, drains, flumes, canals and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, **shall be held to be a public use**..."[3]

This was the foundation of our current Montana water rights, which almost a 100 years later would become part of the Montana Supreme Court's stream access decisions in the *Curran* & *Hildreth* cases in 1984.

Our current Constitutional Article IX, Environment and Natural Resources, Sec. 3, now reads, "Water rights.
(1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
(2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.
(3) **All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.**"

On the Federal scene, the discussion of the public trust, especially at the judicial level grew and evolved, with the concept of both the state and federal governments, co-trustees, each responsible for maintaining the natural resources for the public trust, for the whole of the people, for present and future beneficiaries. This became distilled to a phrase – the Public Trust Doctrine. To better understand, appreciate and defend Stream Access, you need to understand the basics of the Public Trust Doctrine.

The springboard of the "public trust doctrine" was the 1892 U.S. Supreme Court "lodestar" case (146 U.S. 387), *Illinois Central Railroad v. Illinois*. The Supreme Court cited a previous case from 1877, *People v. New York & Staten Island Ferry Co*., "Gore was the owner of the upland adjoining the lands under water embraced in the grant. The ownership of the adjacent upland, however, gave him no title to or interest in the lands under water in front of his premises. The title to lands under tide waters, within the realm of England, were by the common law deemed to be vested in the king as a **public trust, to subserve and protect the public right to use them as common highways for commerce, trade, and intercourse**. The king, by virtue of his proprietary interest, could grant the soil so that it should become private property, but his grant was subject to the paramount **right of public use of navigable waters, which he could neither destroy nor abridge**."[4] The Court further directed that the State could not abdicate control over the waters, "Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which only can be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property."[5]

The Supreme Court eloquently explained, "**The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties, … than it can abdicate its police powers in the administration of government and the preservation of the peace.**"[6]

The basics of this Public Trust Doctrine (PTD) have been further defined by a variety of courts over the years, laying out the duties of both the federal and state governments to the public[7]:

- The Public Trust Doctrine is not simply common law, easily abrogated by legislation, instead, the doctrine constitutes an inseverable restraint on the state's sovereign power.[8]
- Is a constitutional limitation on legislative power to give away resources held by the state in trust of its people, the Legislature cannot by legislation destroy the constitutional limits on its authority.[9]
- Prohibits large-scale privatization of public trust resources.[10]
- Requires the trustee to continuously supervise public trust resources to ensure their use for public trust purposes.[11]
- Administered by both the federal and state sovereigns.[12]
- Neither sovereign may alienate this land free and clear of the public trust.[13]
- The public trust provides the ultimate measure of a legislature's fiduciary performance in enacting statutes.[14]
- Safeguards the interests of the present and future beneficiaries; all public lands of the nation are held in trust for the people of the whole country.[15]
- Just as the PTD guarantees a legal basis for public access to streams and rivers, the PTD also guarantees minimal flows for fish.[16]
- The trust can only be destroyed by the destruction of the sovereign.[17]
- The Secretary of the Interior is, "the guardian of the people of the United States over the public lands..."[18]

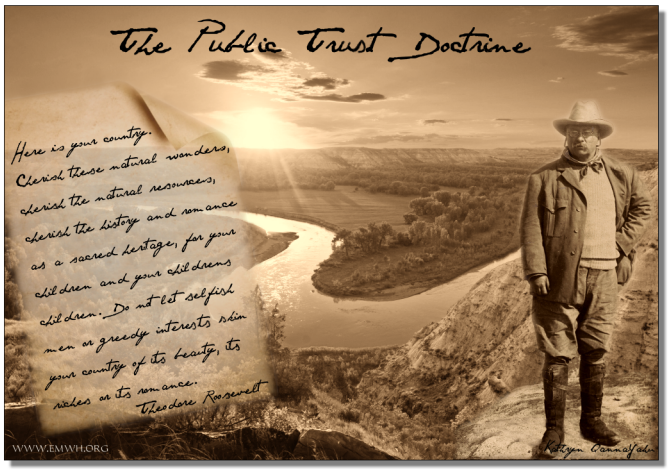
One Court clearly stated, "**The core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters**."[19] The public trust is foundational to our Montana Stream Access, which is exactly what out-of-state landowner James Cox Kennedy was attacking in PLWA's Montana Supreme Court case when he claimed stream bed ownership and attacked a part of our Constitution as being unconstitutional in 2013.

In 1895, Gibson v. Kelly was appealed to the Montana Supreme Court, involving the boundaries of riparian landowners. This was an important case for the public, that regardless of ownership, the public had "rights of navigation and fishery upon the river". The Supreme Court stated, "This case presents a proposition which is wholly new in this state, and one which, for a century past, has commanded the interest and learning of the ablest of the United States and state courts. The question is simply stated: If one's land be bounded by a navigable river, does title extend ad filum medium aquae, to the low-water mark, or to the high-water mark? The legal literature upon this subject in this country is rich in research, reasoning, and learning. **In fact, the matter has been so extensively treated that at this late day, when a new state is called upon to fix the rule, there is nothing left to say upon the subject, either new or original**; and the labors of a court are perhaps nothing more than to select from the three rules which have heretofore been adopted in different jurisdictions that which may be deemed to be the one which, under all the circumstances, should obtain in this state[20]…

As we, among the last commonwealths of the Union, approach a solution of this question, it would be interesting-but, in view of what has been done by scores of able courts before us, it would probably not be instructive or important – to make an excursion through this field, where the footprints of our remote predecessors have long ago been beaten into plain paths by those who are even now, to us, ancient explorers. But, in selecting into which one of these paths we shall turn the course of jurisprudence of this state, it would, were it not for the matter which we will mention below, be appropriate that we briefly state our reasons why we deem one rule, rather than the other, to be justified or demanded by our history, circumstances, geography, and topography, and by the fact that the common law, so far as the same is applicable and of the general nature, is adopted and in force in this state until repealed by legislative authority." The Court chose the low-water mark for land ownership.

Despite determining riparian land ownership to the low-water mark, the 1895 Montana Supreme Court made a critical ruling on behalf of the public, 6 years after becoming a state, based on the Public Trust Doctrine: "**It is true that, while the abutting owner owns to the low-water mark on navigable rivers, still the public have certain rights of navigation and fishery upon the river and upon the strip in question**."[21]

Touring the vast West in May 1903, President Theodore Roosevelt aroused in a speech, "Here is your country. Do not let anyone take it or its glory away from you! Cherish these natural wonders, cherish the natural resources, cherish the history and romance as a sacred heritage, for your children and your children's children. Do not let selfish men or greedy interests skin your country of its beauty, its riches or its romance. The world and the future and your very children shall judge you according as you deal with this sacred trust."

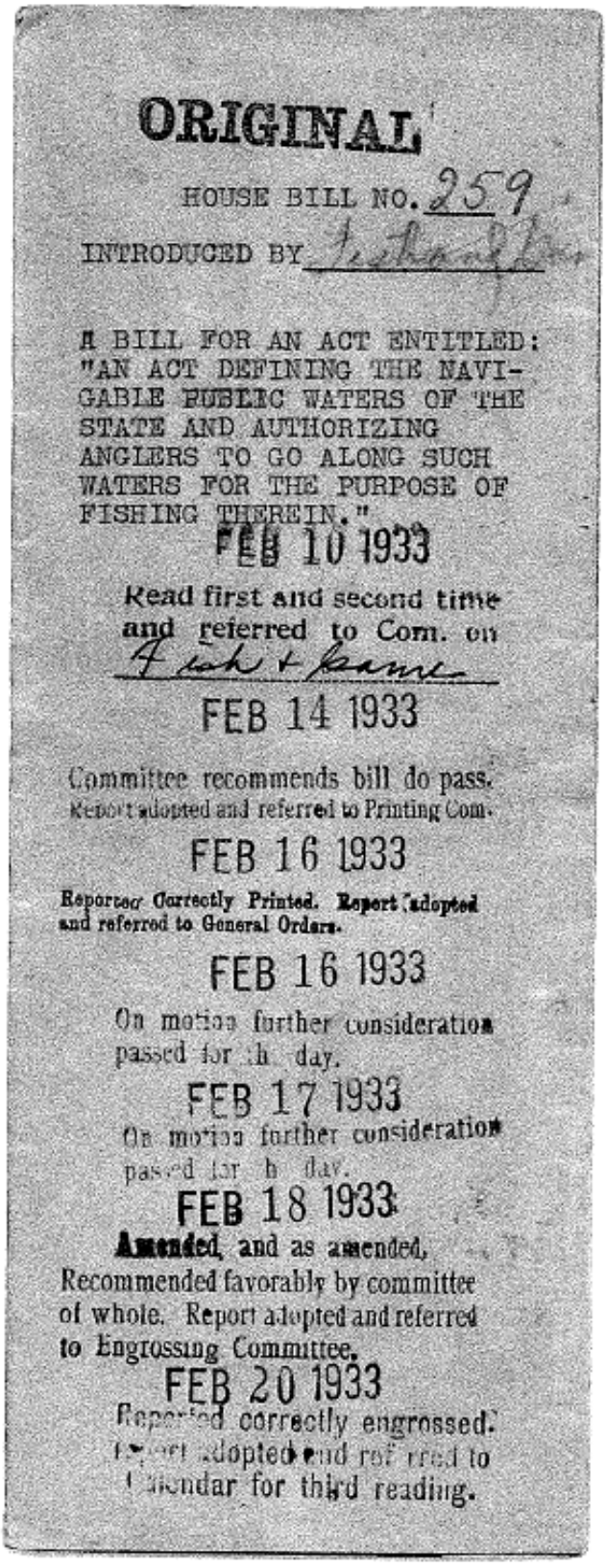


[Conservation Postcard](#) *created by Kathryn QannaYahu*

As Montana continued to grow, the increased and various uses were expanded upon in The Revised Codes of Montana of 1921. In the detail notes for Sec. 15, water rights, previously mentioned from 1889, explained the phrase "other beneficial use" as "used in this section, includes other uses than such as are kindred to rental, sale or distribution." It also specifically addresses "public use" as a use of water for irrigating agricultural land. They further related, "The language in this section, in light of our history and natural conditions, in a region where the conservation and use of its waters is all-important to its development and progress, is a mandate from the sovereign people to the courts, … the use of water is declared to be a public use, … a beneficial use of the water flowing in the streams of the state is a public use… The use of water flowing in the streams of this state is declared by the constitution to be a public use."[22]

Fishing near Bozeman, 1915, Photo courtesy of Museum of the Rockies Photo Archive

Later in the Revised Codes of 1921, we see some of the growing body of Fish & Game laws. James Stuart's earlier natural resource concerns, prompting, "An Act in Relation to Trout Fishing" - rod or pole, line and hook law, became expanded; the sections of the territorial law becoming their own laws. Sections 3714 and 3716 continues seines, however, they are now allowed in certain circumstances, in certain locations, provided the mesh was a certain size and the seines were licensed.[23] Section 3717 addressed the earlier concerns of explosives or poisons, making it a felony if found guilty and convicted.[24] Additionally, Section 3718, Dumping refuse from sawmill into streams, prohibited a person or corporation to, "dump, drop, cart, or deposit, or cause to be dumped, dropped, carted, or deposited, sawdust, bark, shavings, oil, ashes, cinders or debris in or near any such stream, pond, lake, or river..."[25]



ORIGINAL

HOUSE BILL NO. 259

INTRODUCED BY

A BILL FOR AN ACT ENTITLED: "AN ACT DEFINING THE NAVIGABLE PUBLIC WATERS OF THE STATE AND AUTHORIZING ANGLERS TO GO ALONG SUCH WATERS FOR THE PURPOSE OF FISHING THEREIN."

FEB 10 1933

Read first and second time and referred to Com. on Fish & Game

FEB 14 1933

Committee recommends bill do pass. Report adopted and referred to Printing Com.

FEB 16 1933

Reported Correctly Printed. Report adopted and referred to General Orders.

FEB 16 1933

On motion further consideration passed for the day.

FEB 17 1933

On motion further consideration passed for the day.

FEB 18 1933

Amended, and as amended, Recommended favorably by committee of whole. Report adopted and referred to Engrossing Committee.

FEB 20 1933

Reported correctly engrossed. Report adopted and referred to Calendar for third reading.

During the 1933 Legislature, Representative R.W. Spangler from Superior, was the Chairman of the Committee on Fish & Game. "Fish and Game" introduced House Bill 259 – defining navigable waters and authorizing anglers to go along such waters for fishing - specifically identifying high water lines for angling. The 1935 Political Code 3717.3[26], Navigable and Public Waters Open to Fishing, eventually became our current MCA 87-2-305 (Fish, Wildlife & Parks section). The original 1933 stream access language adopted was, "Navigable rivers, sloughs or streams between the lines of ordinary high water thereof, of the State of Montana, and all rivers, sloughs and streams flowing through any public lands of the state, **shall hereafter be public waters for the purpose of angling**, and any rights of title to such streams, or the land **between the high water flowlines** or within the meander lines of navigable streams, shall be subject to the **right of any person owning an angler's license of this state who desires to angle therein or along their banks to go upon the same for such purpose**."[27]

Kristen Juras, who would run for a Montana Supreme Court seat in 2016, would refer to this 1933 law as the first riparian property rights "erosion", in a 2010 law review she authored.

The Public Trust Doctrine not only predates our Montana Constitution, but is foundational to our "Best in the West" stream access.

Stream Access: Public Trust Doctrine and Montana's 1972 Constitutional Convention

Stream Access and the Public Trust Doctrine continued during Montana's historic 1972 Constitutional Convention discussions, adopting two proposed constitutional provisions involving a clean and healthful environment, now a part of the ratified Constitution by the people of Montana. One became an inalienable right – Article 2, Sec. 3, "All persons are born free and have certain inalienable rights. They include the **right to a clean and healthful environment** and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities." The second is a duty, Article 9, Sec. 1(1), "The **state and each**

person shall maintain and improve a clean and healthful environment in Montana for present and future generations."

Therefore, not only do you have a right, but as a responsible citizen, you have a duty to "maintain and improve a clean and healthful environment in Montana for present and future generations." And the State has the public trust duty as a steward, on our behalf and for future generations. So think about that when you vote in your local, county and state future elections – Which elected officials will best represent you in achieving this public trust objective?

Concerning Article IX, Part 6, Section 3, Delegate Cedor B. Aronow, an attorney from Shelby, was voted the temporary president of the 1972 Constitutional Convention, and authored the failed amendment to strike from our constitutional water rights, "for the use of it's people."[28] Depending on a person's perspective, "use" can mean different things. Aronow said he had received a great many letters and some long-distance phone calls on this matter from ranchers. In the discussion of the amendment, Delegate Chet Blaylock, an educator and Montana Democratic State Party Chairman, asked Aronow, "… I also have a worry about our people in towns here in Montana – Billings, Great Falls, all the other towns – who may want to get water for recreation but are precluded from doing so because wealthy Californians and wealthy Easterners have come in here and bought up huge chunks of our Montana land along our rivers and then say to our citizens, 'You can't use it.' Now do you have any solution to that problem?"[29] Aronow, spoke of the Montana tradition of landowners giving permission for access, "And I think if we all deported ourselves in that fashion and style, there wouldn't be any problem." Delegate Leo Graybill, an attorney from Great Falls, then asked Aronow, "Do I understand it to be the sense of your remarks, which are of course, in the record here, that a rancher could fence a fishing stream or river, so that I couldn't fish or boat or go up and down that river?"[30] Aronow replied, "No, that is not the sense of my remarks. 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 can go along the county roads or wherever there's access. And you certainly may boat. You may hike up and down that stream."[31]

Madison angler, Photo courtesy of Kathryn QannaYahu

Delegate Miles Romney, a newspaper publisher from Hamilton warned, "Mr. Chairman, during the noon hour I contemplated the effect of my friend Delegate Aronow's amendment to delete 'for the use of its people'. I was shocked out of several pounds of weight, which I can't afford. I want to discuss it, because it's a subject that's dear to my heart and is of great interest to the people of Ravalli County and Missoula County, thousands of whom use our watercourses in ponds and lakes... I'd like to see people who wish to fish and boat use our streams. I think that the water is the water of the people. I don't think that you can say that it belongs to the state and doesn't belong to the people. And, my goodness, if the people can't use what belongs to their state, this is a mockery, a travesty. It's something that we should correct... (speaking of outdoor recreation tourism) It's one of the biggest industries we have in the State of Montana, and we're going to slap them down if we do not provide access. I think that we should go farther than that; I think we should see that the fisherman enjoys riparian rights — and maybe that is considered in the next section... Now, I think if we prohibit the use of the streams and the water and the lakes and the ponds, if we prohibit the fisherman or the hunter or the camper or the picnicker who wishes to use the banks of those rivers and streams and lakes and ponds, if we prohibit them from using them, we are doing a disservice to the majority of the people of Montana, the vast majority. And I think that they will react in a manner in which we would regret, because their wrath will fall upon all stockmen and all

farmers who lock up their lands or who have their lands locked up by virtue of adverse legislation. I think that water is for the use of the people, whether it be stockgrowing, industrial uses, domestic uses, recreation, or what-not; and I point out that there are thousands and thousands of people in Montana and visitors from without the state who come in here annually to use our recreational potential who will be very much upset. I call to your attention a splendid book of which you are all familiar, and I quote... thou art weighed in the balance and found wanting — and I am quite certain that we are going to fit that description and fit that warning if we don't heed a little bit of sound judgment."[32]

The current Montana Constitution, Article IX, Part 6, Section 3 deals with our public trust water rights: "(1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed. (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use. (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state **for the use of its people** and are subject to appropriation for beneficial uses as provided by law. (4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records."

1975 Montana Natural Land and Streambed Preservation Act

East Rosebud Creek, Photo courtesy of Kathryn QannaYahu

Our Legislature passed Senate Bill 310 in 1975, the Montana Natural Land and Streambed Preservation Act, commonly called, "the 310 Law" after the bill number. As Montana Trout Unlimited related in their 2006 Amicus Brief involving the Mitchell Slough stream access case, "… the 310 Law was brought to the 44th session of the Montana legislature by a coalition of ranchers, conservationists, and other citizens who were convinced Montana's rivers needed protection… Their specific concern was an increasing number of ill-advised stream relocation and armoring projects that, in the words of one proponent, had taken his boyhood trout stream and 'changed it to a glorified irrigation ditch...' "[33]

This Act is now part of Montana Code Annotated 75-7-101 thru 125. The Intent of the policy was described in subsections 1 and 2 as, "The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted The Natural Streambed and Land Preservation Act of 1975. It is the legislature's intent that the requirements of this part provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

(2) It is the policy of the state of Montana that its natural rivers and streams and the lands and property immediately adjacent to them within the state are to be protected and preserved to be available in their natural or existing state and to prohibit unauthorized projects and, in so doing, to keep soil erosion and sedimentation to a minimum, except as may be necessary and appropriate after due consideration of all factors involved. Further, it is the policy of this state to recognize the needs of irrigation and agricultural use of the rivers and streams of

the state of Montana and to protect the use of water for any useful or beneficial purpose as guaranteed by The Constitution of the State of Montana."

This 310 Law would later become more relevant during the 2008 Mitchell Slough Supreme Court Case, defining the Mitchell Slough as a natural body of water, therefore ensuring that the surface waters would continue to be used for recreational purposes.

Montana Brook Trout, Fish Eye Guy Photography, Pat Clayton

The Curran Supreme Court Case

In the late 70's, Dennis Michael (Mike) Curran, a Texas oil executive, and his oil company, harassed and interfered with the public's recreational use of the Dearborn River. He claimed, "title to the banks and streambed of a portion of the Dearborn River, and claims the right, as an owner of private property, to restrict its use." So on April 14, 1980, a passionate group of men from the Butte area led by Tom Bugni and Jerry Manley, joined by Tony Schoonen, along with the Skyline Sportsmen Assoc., formed the Montana Coalition for Stream Access, Inc. They decided to fight back.

Montana Trout Unlimited, which was formed in 1962/1963, had a number of Chapters and members that supported the new Coalition, which understandably comprised a number of their TU members. It was viewed as too politically contentious for TU to take the lead in the stream access legal debate. Montana TU contributed articles which, "… appeared in Trout magazine telling TU members around the country how they could support the Coalition".[34] Later, Montana TU would take a major stand and join in legal access cases as a "Friend of the Court".

MCSAI filed a lawsuit in Montana's First Judicial District Court in Helena – *MCSAI vs. Curran*, asserting the public had a right to float, fish and recreate between the high-water marks. Montana Fish, Wildlife & Parks and the State of Montana joined as plaintiffs.

Ultimately, the District Court ruling held, "the Dearborn River is in fact navigable for recreation purposes under Montana law; that recreation access to it is determined by state law according to one criterion – namely, navigability for recreation purposes; and that the question of recreational access is to be determined according to state, not federal, law."[35] That passionate group of hunting/angling conservationists won.

Curran appealed to the Montana Supreme Court in 1984. In their opinion, the Court addressed the Public Trust Doctrine directly, stating, "...all states entering the Union subsequent to the original thirteen would enter on an 'equal footing' and the Public Trust Doctrine, which provides that states hold title to navigable waterways in trust for the public benefit and use are two important doctrines to be considered in determining a navigability-for-title question."[36] The Dearborn River title was found to rest with the State.

Citing an 1893 case, *Lamprey v. State*, which expanded navigability to include public recreational use, the Supreme Court explained, "Thus, Curran has no right to control the use of the surface waters of the Dearborn to the exclusion of the public … Curran has no right of ownership to the riverbed or surface waters because their ownership was held by the federal government prior to statehood in trust for the people. Upon statehood, title was transferred to the State, burdened by this public trust … If the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people. **The Constitution and the public trust doctrine do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters**." The Court further stated, "**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 recreational purposes.**"[37]

Tony Schoonen on the Big Hole River, Photo courtesy Roy Morris

Additionally, the Montana Supreme Court ruled that the public, "… may only cross private property in order to portage around barriers in the water; the right to portage must be accomplished in the least intrusive manner possible."[38] They also rightly upheld private property rights from trespass declaring, "That the public do not have the right to enter into or trespass across private property in order to enjoy the recreational use of State-owned waters."[39]

On March 31, 1980, a number of the same hunters and anglers that formed the Stream Access Coalition also began addressing our public access to state lands. Tony Schoonen, Jack Atcheson Sr. and Jack Jones formed and filed the Montana Coalition for Access on State Public Lands, Inc., funding their work out of their own pockets. The name would later be changed to Montana Coalition For Appropriate Management of State Lands, Inc. The Coalition led the charge for our state lands access, which includes some stream access, but this is a whole other beautifully detailed story.

The Hildreth Supreme Court Case

About a year after the *Curran* case, on April 8, 1981, the Coalition took on Lowell Hildreth in *Montana Coalition for Stream Access v. Hildreth*. Hildreth, a landowner abutting the Beaverhead River, had installed a dangerous fence across the stream and was preparing to install a cable across the river further upstream. He was also harassing and interfering with the public. "The Coalition filed a complaint on April 8, 1981, alleging that the public and members of the Coalition were entitled to float the Beaverhead through Hildreth's property."[40] On the first day of trial, the Court dismissed Hildreth's counterclaim against the Coalition.[41] The District Court later held, "The Beaverhead River, where it runs through the property of the 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 the Defendant."[42] The Court also held that the Public could portage around obstacles.
Following on the heels of the Montana Supreme Court decision in *Curran*, the Supreme Court ruled for the Coalition, in the same summer, concerning the *Hildreth* appeal.

The Court cited their previous ruling in *Curran*, "We have not limited the recreational use of the State's waters by devising a specific test."[43] They further upheld the public's right of portage. "The Beaverhead River is navigable for recreational purposes and the public has a right to use its bed and banks up to the ordinary high water mark with limited right to portage across private property in order to bypass barriers in the waters."[44]

If it were not for the legal efforts of the Stream Access Coalition to defend our public trust interests, funded by grassroots sportsmen, the privatizing efforts to rob us of our trust would have succeeded.

Montana Supreme Court: Recreation Not Dependent On Title

Have you heard the general argument that landowners own the streambeds and stream access is a taking?

Madison River, Photo courtesy of Kathryn QannaYahu

As stated, both the *Curran* and *Hildreth* cases were appealed and ended up in the Montana Supreme Court, which issued their decisions in the summer of 1984. In *Curran*, the Court affirmed the lower District Court's ruling, "**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 recreational purposes.**"[45] Additionally, citing *Illinois Central Railroad v. Illinois,* addressed earlier, "states hold title to navigable waterways in trust for public benefit...all the waters of the state are owned by the state and are held in trust for the people."[46]

This presents a very important point. While the States, as sovereigns, were given **title** to the beds of **navigable** waters – to be held in trust for future states under the Equal Footing Doctrine, conferred by the United States

Constitution, the arguing of "title" against stream access recreation is similar to the bogus argument of the Sagebrush Rebellion, which erroneously argues that they want the western State's land back from the Fed. It was never the State's to begin with. To clarify, Montana has Class 1 waters and Class 2 waters. Class 1 waters are navigable, Class 2 are non-navigable. Regardless of title, don't be sucked into that particular red herring landownership argument. **Montana Stream Access Recreation Is Not Dependent On Title, It Is A Public Trust!**

To reinforce the point, the Montana Supreme Court in *Hildreth*, referenced *Curran* reiterating, "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**." [47]

The Supreme Court further addressed the public's right to bed and bank, "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."[48] The Court emphasized, "...**ownership of the streambed is irrelevant to determination of public use of the waters for recreational purposes**. Navigability for recreational use is limited, under the Montana Constitution, only by the capabilities of the waters themselves for such use. Hildreth has never owned and does not now own the waters of the Beaverhead River. Under Montana law, the public has the right to use the Beaverhead and its bed and banks up to the ordinary high water mark, with additional, narrowly limited rights to portage around barriers."[49]

1983 - "The Doctrine Is Out There Awaiting Recognition"

Madison River, Photo courtesy of Kathryn QannaYahu

In 1983, the Legislature sought to address growing stream access issues. Four bills were introduced, with only one passing, HJR 36, a bill to study the rights of the public to access and use public lands and waterways. One of the failed bills, HB 799, would have violated the US Enabling Act of 1889[50], the Montana Constitution and our Public Trust Doctrine by transferring title of the river/stream beds to private riparian landowners. This is why it is so crucial to have an educated public voting for representatives that will uphold our public trust. With the Supreme Court's *Curran* and *Hildreth* rulings in the summer of 1984, this threw their current study in a quandary with the legal and policy landscape changed radically.

On July 30, 1984, the Joint Interim Subcommittee No. 2, HJR 36, Water Recreation Study met[51], with Public Trust Doctrine presentations from John Thorson and Margery Brown discussed.[52] Thorson was a Natural Resources Consultant and attorney on contract with the Legislature's Select Committee on Water Marketing. Margery Brown was the Associate Dean at the University of Montana, School of Law.[53] Both had previously presented their papers at the Select Committee For Water Marketing, on July 13th and 14th, 1984, in Billings, MT. Thorson's paper was titled, The Public Trust Chautauqua Comes to Town: Implications For Montana's Water Future[54]; Brown's paper, Montana Waterways, The Montana Supreme Court and the Public Trust Doctrine.[55]

Thorson explained the public trust doctrine's basis was important to legislators for 3 reasons: "(1) it suggests limits on what the Legislature can do regarding regulating public access to waters; (2) it provides guidelines and ramifications as to how the Legislature may form and evaluate the state's water policy; and (3) it may herald an

integration with the appropriate water doctrine."[56] He explained that the doctrine **requires** government officials exercise a " 'high level of care', almost a 'fiduciary care', when dealing with resources of such importance to the public." Thorson continued that the doctrine is "**not new or radical**". He further explained that, "**because the Supreme Court used the doctrine as a basis for its decisions** (*Curran* & *Hildreth*)**, 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 result of the decisions by changing statutes… the Legislature cannot modify the definition of 'recreational navigability'."[57]

Thorson detailed 4 actions the Legislature could do, point no. 4 being, "provide for education of the public as to the public's rights and responsibilities."[58] Unfortunately, the public trust education of the public has been lacking.

Margery Brown presented her paper on the public trust doctrine, "… The Doctrine Is Out There Awaiting Recognition."[59] Brown referred to the Montana Supreme Court *Curran* & *Hildreth* decisions, "Having elucidated the public trust doctrine in its traditional setting, the court then tied it to the language in Montana's 1972 Constitution and imposed the doctrine on all surface waters. Thus, the court used an **old doctrine within the framework of a new constitution**."[60]

Stillwater River, Photo courtesy of Kathryn QannaYahu

Senator Jack Galt, one of the Committee members and an aggressive, vocal opponent to stream access, asked, "...whether prohibition of use of the bed would be illegal. Mr. Thorson responded that the public's right to use the bed is like an easement or a public right that has always been there, and that **there is nothing the Legislature can do to get rid of it or transfer it to the private owner. The right is so fundamentally related to the public's interest in the water that even the Legislature cannot take it away**."[61]

The Minutes further record, "Senator McCallum asked what makes the public trust doctrine the supreme law. It is not in the U.S. or Montana Constitutions. From where does its authority come? Dean Brown responded that it comes from Roman and English law. Certain resources, such as air and water, have public value. **It is a common-law doctrine from our heritage, and it is applied to the 1972 Montana Constitution.** Senator McCallum stated he thought courts must rule on statutes and the constitution. Dean Brown responded that courts have traditionally based their ruling on common law and case law. Judges can look to various sources of law. **The public trust doctrine as applied to water is an old doctrine.** Mr. Thorson said that negligence and liability law, for example, are based on our common-law heritage and have been developed by the courts. The right of privacy is another right the courts say is inherent, even though it is not specifically stated in our constitution (it does in our Montana Constitution). **The public trust doctrine is an inalienable right which is so basic and fundamental that a Legislature or even the people, by amending their constitution, cannot eliminate it**."[62]

Who really voted for Stream Access?

Another fallacy of the Stream Access argument is the "us against them, the haves versus the have nots". Some opponents of Stream Access continually try to make it a landowner or agriculture versus recreationist issue; it is not, it is a Public Trust Doctrine issue that benefits all the public. In 1985, 11 access bills were introduced. The Legislature passed HB 265, sponsored by Bob Ream (a Representative on the 1984 Joint Interim Subcommittee No. 2, HJR 36 Water Recreation Study), which was created and promoted by a coalition of groups representing landowners, agriculture interests, recreationists and Fish, Wildlife & Parks.

During the Stream Access Subcommittee, which met on February 5, 1985, the Minutes reflect that Mr. Strope, an attorney for the Sweet Grass County Protective Association expressed "takings" concerns of private landowners, "Mr. Strope maintained that recreationists are attempting to expand the area allowed for recreational use, and that the Supreme Court decisions support a water-related right only, and not a right to use or travel on banks or beds above the low-water mark. Mr. Bradshaw (Stan Bradshaw, attorney for MT Fish, Wildlife & Parks and the Fish & Game Commission) said that the Supreme Court has specifically allowed recreational use to the high water line, and the right to portage, and suggested that Mr. Strope's concern is ill founded."[63] HB 265 stated Class 1 and Class 2 waters could be used by the public, "… **without regard to the ownership of the land underlying the waters**", **for all the defined recreational uses the waters are capable of, including the use of the beds and banks up to the ordinary high-water marks**.[64]

The Montana Stream Access Coalition, as well as other conservation oriented groups such as Montana Wildlife Federation, Montana Council of Trout Unlimited, and the Fishing and Floating Outfitters Association of Montana (FOAM) supported HB 265. What is not so well known is that some of the groups supporting HB 265 included The Montana Stockgrowers Assoc., Montana Wool Growers Assoc., Montana State Assoc. of State Grazing Districts, Montana Cowbells, Montana Farmers Union, Montana Cattlemen's Assoc., Montana Cattle Feeders Assoc., Montana Farm Bureau Federation, and the Montana Water Development Association. The discussions were said to be, "… a product of cooperation between two significant Montana interest groups. The bill itself is representative of what reasonable people can achieve when they sit down and listen to each other's concerns."[65] Senator Galt again tried to interfere by proposing an amendment to remove from the definition of "surface water" the part that allowed recreationist to use the bed and bank of a stream, including navigable rivers. This amendment, and two other severe restrictions, were removed by a conference committee.[66] HB 265 became our Stream Access Law on April 19, 1985, now housed in Title 23-2-301 thru 322 MCA.

One day before HB 265 became law, to address the ongoing issue of the public losing legal access to our federal public lands, retired Supervisor of the Gallatin National Forest, Gene Hawkes, led individual foresters to form and file for the Public Lands Access Association, Inc. PLAAI later changed their name to include Montana's stream access, becoming the Public Land/Water Access Association. The purpose of the organization was to inform the public about deteriorating access situations and to take the lead in regaining the right to public access to all the public lands within the state. Many of the Montana Coalition For Stream Access members became PLAAI members, carrying on the access work under this new banner.

Swan Creek, Photo courtesy Kathryn QannaYahu

Galt's Lawsuits Against Stream Access

Nearly 2 months after HB 265 became law, Sen. Jack Galt, his wife, and 8 other landowners, including Hildreth, filed the first of three lawsuits against the State Fish, Wildlife & Parks and the State of Montana in the 1st Judicial Court, on June 14, 1985. *Galt v. State* challenged the constitutionality of the law.[67] The complaint stated our Stream Access Law was a "taking" and asked it be declared, "illegal, unconstitutional and void." The District Court denied HB 265 was unconstitutional and upheld the *Curran* and *Hildreth* decisions.

Not to be deterred, Galt appealed to the MT Supreme Court, filed on January 15, 1987, whose decision was a mix. The Court upheld the Law, but decided some limitations on the bed and bank while recreating – such as no big game hunting, no camping, no temporary duck blinds, or boat moorage, and landowners did not have to pay for construction of portage access.[68]

The Access Assault Continued

The Galt lawsuits were not the end of the Stream Access debate. Efforts through the legislature have attempted to chip away at or overturn our public access in one form or another. During the 1987 Legislature, Senator Paul F. Boylan from Bozeman, introduced SB 159, which sought to amend the surface waters definition to include, "meets the federal title test of navigability." [69] Mons Teigen, a representative of the Stockgrowers Association, stated, "SB 159 was just an outgrowth of deliberations made at the Stockgrowers Annual Convention."[70] If SB 159 had passed, it would have been a severe restriction of stream access. Another example of the need to audit candidates, choosing those that will uphold their public trust values, for the benefit of all Montana.
Another bill, SB 286, was introduced during the same legislature, by access opponent Senator Galt from Martinsdale. Galt, who had previously filed a lawsuit against stream access, sought to remove the provisions declared unconstitutional by the Montana Supreme Court. The bill was amended in the House, inconsistent with *Curran*, *Hildreth* and *Galt I* cases. The Senate did not concur and the bill died.[71]

An out of state legal organization based in Colorado, the Mountain States Legal Foundation, with an interesting history and agenda (MSLF's director ran for Montana's governor in 2003. Can you imagine what Montana's public access would be like if he won?), picked up the anti-stream access torch in Montana, filing a lawsuit in federal court, on behalf of a handful of landowners against FWP Director, Graham; MT FWP and the FWP Commission. *Madison v. Graham* (2001) sought to have "Montana's Stream Access Law declared unconstitutional on the grounds that it (1) violated their Fourteenth Amendment substantive due process rights, and (2) was void for vagueness." The district court listed a variety of reasons why the case must be dismissed, including the complaint for failure to state a claim upon which relief can be granted and statute of limitations. The court reviewed the major federal and state constitutional challenges to the Stream Access Law and found the laws to be constitutional, minus the provisions the MT Supreme Court already addressed in *Galt*. The plaintiffs' complaint was dismissed with prejudice.[72] On appeal (2002), the Ninth Circuit Court affirmed the district court's decision and disposed of the case.[73] The United States Court of Appeals for the Ninth Circuit denied the landowner's Petition for Writ of Certiorari (asking the U.S. Supreme Court to review the lower court decision) on May 27, 2003.[74] This denial meant the decision stood as the final decision, ending the landowners appeal of the Ninth Circuit Court decision and another attempt on the constitutionality of Montana's Stream Access Law.

Slough off of Stillwater River, Photo courtesy of Kathryn QannaYahu

Wealthy Out of State Interests

Increasingly, wealthy out-of-staters who learned of Montana's outdoor beauty and opportunities, began purchasing land, including large ranches. Yet, some landowners were not knowledgeable of or were simply disrespecting / dismissing of Montana's public access and stream access laws.

A 1999 New York Times article, *Rich Newcomers Closing the Wilds of Montana*, addressed a legal case involving the Cowboy Heaven Trail, "The case underlined a growing trend. Those who can afford a slice of the Rockies often find a bonus: when they buy acreage that borders Government-owned wilderness areas, they gain access to thousands more acres of public land. But many newcomers grow unhappy with the public's right of access to public lands through their private ranches. Some realize

that they can have exclusive or near exclusive access to huge chunks of taxpayer-owned ground by locking the public out. Incidents in which private landowners close trails or roads are growing."[75]

Montana Senator Jon Tester later wrote in a guest editorial in 2007, "Over the last few months I've been following an issue that strikes a chord with a lot of folks here in Big Sky Country. It's an issue that isn't going away. In fact, it's one that's getting bigger as wealthy out-of-staters discover Montana and decide to buy up huge chunks of it for exclusive getaway homes."[76]

Non resident landowners could often afford to hire land managers or outfitters to manage their lands. This sometimes included "management" actions such as cutting off public access to public roads and streams. This privatizing of our public access resulted in stream access litigation to restore it, such as the Mitchell Slough case (Huey Lewis and Charles Schwab) ruled on by the Montana Supreme Court in 2008.

2006 Public Policy Report

In May of 2006, the University of Montana, Public Policy Research Institute published a report – Stream Access in Montana, covering the 20 years since the 1985 Stream Access Law. "Twenty years after passage of Montana's Stream Access Law, people are still talking—and, in some cases, arguing—about its provisions. This policy report aims to illuminate the unresolved issues and misunderstandings regarding the law, and to lay out options for moving forward..." [77]

The findings of their interviews stated, "Most of the people we talked with—recreationists and landowners alike—said that the Stream Access Law works well and has been very successful, as evidenced by the hundreds of thousands of anglers, boaters, and other recreationists using Montana streams each year with few if any conflicts with landowners. Several people also said that enactment of the law did not dramatically change people's behavior—there has been no stampede of anglers and boaters and no avalanche of disputes."[78]

2008 Mitchell Slough Supreme Court Case

The 2008 Mitchell Slough Supreme Court case ruling began almost a decade earlier in 1999, when the local Bitterroot Conservation District received an inquiry if a 310 permit, per Montana's 310 Law (1975 Montana Natural Land and Streambed Preservation Act), was required to do work within the bank and the bed of the trout rich slough.[79] Some of the private landowners had diverted water to a privately owned "ditch" with private trout fishing – not publicly accessible fishing.

The Montana River Action reported, "Mitchell Slough is a historic, 11 miles long side channel of the Bitterroot River and has been used by fishermen and floaters for generations. Known historically as the 'East Branch' of Bitterroot River, the waterway has been a favorite fishery for local folks and sustains wild native westslope cutthroat, eastern brook, rainbow, brown trout and whitefish. Bull trout (Dolly Varden) were caught in the past. Wealthy, out-of-state landowners (rocker Huey Lewis, broker Charles Schwab and others) bought up the land along the slough and other landowners, who cater to paying fishing and private friends, erected double fences to keep out the floaters and waders on the premise that the slough is an irrigation ditch and what was once recognized as public is now theirs. Actually, the slough channels are a natural stream and meander within the riparian area of the Bitterroot River."[80]

In determining if "natural" applied to the slough, "The BCD unsuccessfully sought intervention from the DNRC, Department of Environmental Quality (DEC) and Fish, Wildlife and Parks (FWP) to determine the status of

Mitchell Slough."[81] The BCD's determined that Mitchell Slough was not subject to the 310 Law, the authority of which was then challenged by the Bitterroot River Protective Association (BRPA). BRPA also claimed, under Montana's Stream Access Law, that the waters of the Mitchell Slough were open to recreational access. Through appeals, the case ended up at the Montana Supreme Court.

In the Amicus Brief filed by the Sportsmen's Groups, the following groups were represented: Montana Wildlife Federation, Ravalli County Fish and Wildlife Association, Hellgate Hunters and Anglers, Big Sky Upland Bird Association, Helena Hunters and Anglers, Anaconda Sportsmen Inc., Red Lodge Rod and Gun Club, Billings Rod and Gun Club, Dawson Rod and Gun Club, Gallatin Wildlife Association, Russell Country Sportsmen, Skyline Sportsmen Association and the Montana River Action Network.[82]

Their Brief stated, "… all formed for the purpose of promoting and protecting various forms of outdoor recreation. Their concern is not just that the Mitchell might be closed to recreation, but that many streams, creeks, and rivers across Montana may follow suit as well. They are here to speak up for one of the constitutionally protected rights they regularly enjoy."[83]

Montana Council of Trout Unlimited's (MTU) Amicus Brief shared, "MTU members were instrumental in passing the Montana Natural Land and Streambed Preservation Act of 1975 (commonly called 'the 310 Law' after its original designation as Senate Bill 310). Over the past two decades MTU and its chapters, working in partnership with private landowners, have undertaken numerous stream restoration projects under the jurisdiction of the 310 Law."[84]

The Supreme Court reversed the District Court decision, finding that the Mitchell Slough qualified as a natural perennial stream under the 310 Law, requiring a permit to alter the stream bed. The Court determined that Mitchell Slough was a natural channel, improved by people over the years, that the channel existed in a natural state before man-made alterations. "In conclusion, the Mitchell Slough is subject to stream access and public recreation as provided by the SAL. (Stream Access Law)"[85]

2009 Bridge Access

Bridge Access, East Gallatin River, Mike Cline

Some of those out-of-state landowners continued to carry the anti public land and water access torch that had been fervently carried by Senator Jack Galt for many years, and with deep pockets, they have continued this legal battle for decades, despite repeatedly losing the court battles. While Stream Access Law remained firm, sometimes the only access point to the water was a bridge on a county road, causing bridges to become the new battleground of stream access.

One such out-of-state landowner has been James Cox Kennedy, who began purchasing some Madison County land abutting the Ruby River in the 1990s. He restricted the public from entering the river on his ranch property, at three public road bridges across the Ruby River, which had been used for decades by anglers. Fences at the bridge abutments on Duncan Road, Lewis Lane, and Seyler Lane were wired up to keep people from accessing the river, including electric fences.

Bridge access issues in Madison County led the Madison County Attorney, Robert Zenker, and Fish, Wildlife & Park's Director, Patrick Graham, to write the Montana Attorney General requesting an opinion, "May a member of the recreating public gain access from the right-of-way of a public road at a bridge crossing to a stream or river between the ordinary high-water marks?"[86]

On June 2, 2000, Attorney General Mazurek issued his opinion (*48 Op. Att'y Gen. No. 13*), which functioned as law until overturned in court or replaced by legislation. Mazurek replied, "Your opinion request evolved through a series of controversies between the recreating public and riparian landowners along the Ruby River in Madison County."[87] Mazurek confirmed, "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".[88] He also stated that a bridge and its abutments are part of that public highway, subject to the same public easement for the road and bridge, and access to streams and rivers from county roads and bridges created by prescription is dependent upon the width and uses of the road during the prescriptive period.

James Cox Kennedy's continued privatization efforts involving bridge access, led PLWA (originally PLAAI) to file a suit against Madison County in 2004, involving the bridges on Duncan Road, Lewis Lane and Seyler Lane. Portions of that litigation continued up until 2016 involving the Seyler Lane Bridge.

A number of legislative attempts were made to deal with bridge access, none were successful. Then, in 2009, Rep. Kendall Van Dyk from Billings, sponsored the HB 190 Bridge Access Law. The bill opened, "WHEREAS, the Legislature finds that significant controversy has existed related to public access to streams and rivers from county road and bridge rights-of-way; and WHEREAS, a Montana Attorney General's Opinion in 2000 (48 A.G. Op. 13) held that the 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 and that the public may gain access to streams and rivers by using the bridge, its right-of-way, and its abutments;..." [89]HB 190 ended up basically codifying the Mazurek Opinion with some qualifications. It was signed by the Governor and became a law on April 13, 2009.

Information provided in Montana Trout Unlimited Amicus Brief in 2012 stated, "Public road bridges are an important component of the recreational stream access that is integral to the livelihood and way of life of so many Montanans. There are at least 2,014 public road bridges in the state (not including state and federal highway bridges) that cross natural bodies of water… It is common for public road bridges even on minor roads to be used for recreational access."[90]

Madison River, Photo courtesy of Kathryn QannaYahu

The Fish & Wildlife Commission Authority

An oft overlooked aspect to Stream Access …

The Montana Fish & Wildlife Commission is a "five-member Commission appointed by the Governor from five geographical districts. Members serve staggered four-year terms, with three members appointed at the beginning of the Governor's term and two appointed two years after the Governor's term begins… The Commission is a quasi-judicial citizen board whose general authority and duties are further defined and shaped by specific responsibilities in the statutes."[91]

In 1989, Representative Hal Harper from Helena, sponsored HB 655, the Smith River Management Act. Harper explained, "This bill is an attempt to provide the maximum public use of the resource while we minimize the conflicts between recreationists and the landowners."[92] The passage of this law gave FWP the authority to manage and regulate Smith's River recreational use; and for the first time, Commission authority to regulate recreational use, located in Title 23, Chapter 2, Part 4 MCA. HB 626, again sponsored by Rep. Hal Harper, proposed to designate certain Montana waters as no wake zones; it was adopted in 1999. This added "public welfare" to the Fish & Wildlife Commission authority[93], expanding their authority, currently in MCA 87-1-306.

Montana Code Annotated 87-1-303 (2) legislates Fish & Wildlife Commission authority concerning recreational waters - "Except as provided in 87-1-301(7), the commission may adopt and enforce rules governing recreational uses of all public fishing reservoirs, public lakes, rivers, and streams that are legally accessible to the public or on reservoirs and lakes that it operates under agreement with or in conjunction with a federal or state agency or private owner. 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, waterskiing, 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."

The expanded powers and rule making authority over the Public's access and recreational use of Montana's waters have been increasingly handed to our Fish, Wildlife & Parks Commission over the years. The Governor appointed Commission can consider petitions from persons asking the Commission to limit public recreational use for a variety of reasons, such as protecting the ecology of the stream, prevent damage to property or limit use of Class 2 streams to the actual capacity of the stream. The Smith, Beaverhead and Big Hole Rivers are examples.

In Title 23, Chapter 2 – Recreation, Part 3 – Recreational use of streams (23-2-302 (5)) we see the specific laws involving petitions and FWP Commission authority to close access.

(5) The commission shall adopt rules pursuant to 87-1-303, in the interest of public health, public safety, or the protection of public and private property, governing recreational use of class I and class II waters. These rules must include the following:

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

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

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

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

(c) a procedure for the identification of streams within class II waters that are not capable of recreational use or

are capable of limited recreational use, and a procedure to restrict the recreational use to the actual capacity of the water.

The specific details of the Fish & Wildlife Commission Administrated Rules of Montana, regarding Management of Recreational Use of Rivers and Streams, was adopted by the Commission in July 1985 – ARM 12.4.101-106. 103 describes the Petition process which anyone may initiate.

Bob Lane (retired FWP Chief Legal Counsel) reviewed each access petition since the adoption of the Stream Access Law. He recounted in 2015, "In the first 18 months after the adoption of the Stream Access Law (July 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. Since December 1986, there have been three petitions, with two denied and one resolved through settlement… 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."[94] Lane followed up, "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."[95]

A recent example of this Commission authority was the petition in April 2016 by a Big Timber landowner and outfitter on the Boulder River where he outfits. He protested the use by the public, citing it was a conflict, asking the Commission to, "limit the number of boats floating the Boulder through one of the many options available to the Commission." The resulting FWP analysis concluded that most of the issues on the river involved private landowners "who have had relatively exclusive use of the river." FWP found "No degradation of the fishery in the Boulder River has been documented and we have no objective indication otherwise that the fishery itself is in jeopardy." [96]

The Commissioners voted to deny this particular petition, but depending on the Governor voted into office and his Fish & Wildlife Commission appointments, as well as the makeup of the Senate who confirm the appointments, the public could lose the recreational stream access we currently enjoy, petition by petition.

Battle Lines and Allies

2011 saw another legislative attempt with the "Dirty Ditch" bill, HB 309[97], sponsored by Rep. Jeff Welborn and Sen. Chas Vincent - Clarify prohibition on recreational access to ditches. Montana Coalition for Stream Access President, Tony Schoonen from Butte, wrote in the Montana Standard, "Here we go again. If House Bill 309 passes, Montana's 26-year history of public stream access will likely come to an end... Called the 'Ditch Bill,' HB 309 is a cleverly devised scheme to redefine our rivers, streams and side channels as 'ditches' off limits to all public access."[98]

Pointdexter Slough, Photo courtesy MT FWP

Dirty Ditch Bill, HB 309, 2011, Helena, Standing room only, Photo courtesy of Montana Coalition for Stream Access

Schoonen then addressed the massive negative impact the bill would have on Montana recreationists and businesses. "What are the implications of this bill? A University of Montana study shows that $168 million is pumped into Montana's economy annually from fishing activities on Montana's rivers and streams. This includes money spent in hotels, restaurants, sporting goods, gasoline and with outfitters and guides. This doesn't include the millions more spent by non-fishing river users, such as kayakers, canoeists, pleasure floaters or kids in inner tubes – all of which can only recreate due to their rights given them under Montana's Stream Access Law."[99]

Another article, showing the bill opposition and protests by a number of hunting/angling groups in Montana relayed, "At least one busload and several carpools of anglers are heading to Helena on Tuesday to challenge proposed changes to Montana's stream access laws. 'We're tracking a lot of bills, but this is the one where we're really going to get engaged,' said Land Tawney, president of Hellgate Hunters and Anglers. 'The Ravalli County Game and Fish Association is sending a dozen members, and they're splitting the cost of the bus with us. I've got high school friends I haven't talked to in 10 years that want to get on the bus.' "[100]

MTU Director Bruce Farling was quoted, " 'This implicates most streams in Montana. If you've got a headgate or a wing dam that changes the bed elevation of a stream to get water to a ditch, then that channel would be off limits. If the water is return flow by half, it would also be off limits. That's most of the rivers in Montana late in the summer where there's irrigation.' "[101]

Robin Cunningham, a member of FOAM, testified as a business owner opposing HB 309. "I am a member of the Fishing Outfitters Association of Montana, a business association counting some 720 outfitter and guide members whose small businesses contribute 25 million annually to Montana's recreation service economy… The definitions of our Stream Access Law have worked for almost three decades. In spite of local dissatisfaction with a recent court decision affecting a small waterway on the Bitterroot River, the current Stream Access Law is sufficient and needs no corrective amendments. HB 309's passage will change my business operation and those of my fellow outfitters. When faced with indecisive and opposing legal arguments about whether ditches include side-channels, braids, and sections of rivers I use daily, I will have to assume these stream sections are ditches. I cannot afford to wait while courts dictate the future of my business."[102]

HB 309 passed the House Agriculture and died in the Senate Agriculture, Livestock and Irrigation Committee.

In the next year's legal battle with out-of-state billionaire, James Cox Kennedy who was trying to privatize access in Madison County, along the Ruby River, Montana Trout Unlimited joined PLWA's case as a "Friend of the Court" (Amicus Curiae) in 2012 Montana Supreme Court case. Two other organizations that filed Amicus Briefs, though not in support of PLWA and stream access, rather for privatizing interests, were United Property Owners of Montana (UPOM) and Property and Environment Research Center (PERC).

Seyler Lane Bridge, Photo courtesy of Kathryn QannaYahu

UPOM stated they filed the Brief to address the "undue burdens that will be imposed on Montana's landowners if the District Court's April 16, 2012 Findings … are reserved and PLAA's arguments are adopted."[103] UPOM fearmongered, "...as long as government continues to find new ways to intrude on the rights of property owners, a role exists for a group like UPOM as a unified voice for the landowners."[104]

Unfortunately, UPOM does not understand that the Public Trust Doctrine is not "new", nor is it an intrusion (taking) of property owners, it is an upholding of the Public's ownership, predating their private ownership. UPOM, a vocal and divisive organization, does not represent the voice of the majority of private landowners in Montana, as many public trust and stream access defenders are also private landowners.

The second Amicus Brief was filed by PERC in Bozeman. The private property rights organization opened, "This case raises important questions about the link between secure private property rights and the provision of public goods from private land and water rights. To whit, granting public access in this case is likely to diminish the amount of fish and wildlife habitat provided by private landowners, not only on the Ruby River, but throughout Montana."[105] PERC's economical privatization was addressed, "The management of private lands in Montana is changing. With their focus on maximizing the economic return from their land, private owners have historically focused on crops and livestock, timber, oil and gas, residential development, and other extraction-based industries. But with the growing demand for recreational opportunities, streams, ponds, wetlands, and native vegetation have become important from the perspective of **amenity production**."[106] PERC not only advocated for private revenue, profiting off of a public resources, but for the restricting access by the public, falsely citing, "deleterious effects", "destruction of habitat", "erosion" and no "quality recreational experience" would be the result. They went on to say that if a landowner is prevented from profiting from the public resources, "...they have little incentive to invest in habitat", and would rather, "shoot, shovel and shut-up".[107]

MT Trout Unlimited's Amicus Brief stated, "For three decades, MTU and its membership have been instrumental in legal and legislative efforts to establish, define, and defend the public's right to access Montana waters for the purpose of recreation."[108]

MTU further elucidated, "Many of Montana's large mainstream rivers and their tributaries receive tens of thousands of angler days per year, and floating, hunting, photography, and wildlife watching are increasingly common on rivers large and small throughout the state. The unique beauty and recreational opportunities provided by Montana's streams are integral to the way of life of countless Montanans. They have also helped to establish Montana as a world-class recreational destination, and have given rise to a multi-million dollar sector of the economy that directly and indirectly supports the livelihood of thousands of state residents."[109]

Refuting PERC's privatizing stance, in a Montana Standard interview, MTU's Executive Director Bruce Farling explained, "**Montana has the most liberal stream access laws in the nation and the best trout fishing and that's because when the public has a stake – it cares for the resource**."[110]

Montana Supreme Court and the Seyler Lane Bridge Victory

In the ongoing legal case between Public Land/Water Access Association and Madison County, in which James Cox Kennedy joined as an intervenor, the appeal once again ended up in the Montana Supreme Court. The Seyler Bridge Montana Supreme Court Appellate Hearing was held on April 29, 2013. The Oral Argument was heard at Montana State University, Strand Union Bldg., before a standing room audience which included students, faculty, media and the public.[111]

During the hearing, James Cox Kennedy's attorney, Mr. Kaufman, argued that Montana's Stream Access laws and the stream access portion of our Constitution was unconstitutional. Besides Kaufman stating that Kennedy owns the air space above the river, that stream access was a "taking", he also argued, "This court said that unconstitutional actions are void and the passage of time does not render them okay, does not render them constitutional." At which point Justice Patricia Cotter challenged, "You're asking us to overturn *Curran* & *Hildreth*, aren't you, and also to declare the stream access bill unconstitutional?" Kennedy's attorney replied, "That's correct."

Justice Cotter then probed, "Counsel, **aren't you also asking us to declare a portion of the Montana Constitution unconstitutional?** (Kennedy's attorney interjected "Yes") Article Nine, Section 3 provides paragraph 3 that, '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.' If your position is, we were to accept it, would reject that provision of the constitution?" Again, Kennedy's attorney answered, "Yes".

Kennedy, a deep pocketed, out-of-state landowner, was attacking a portion of our Montana Constitution and our public trust based Stream Access law.

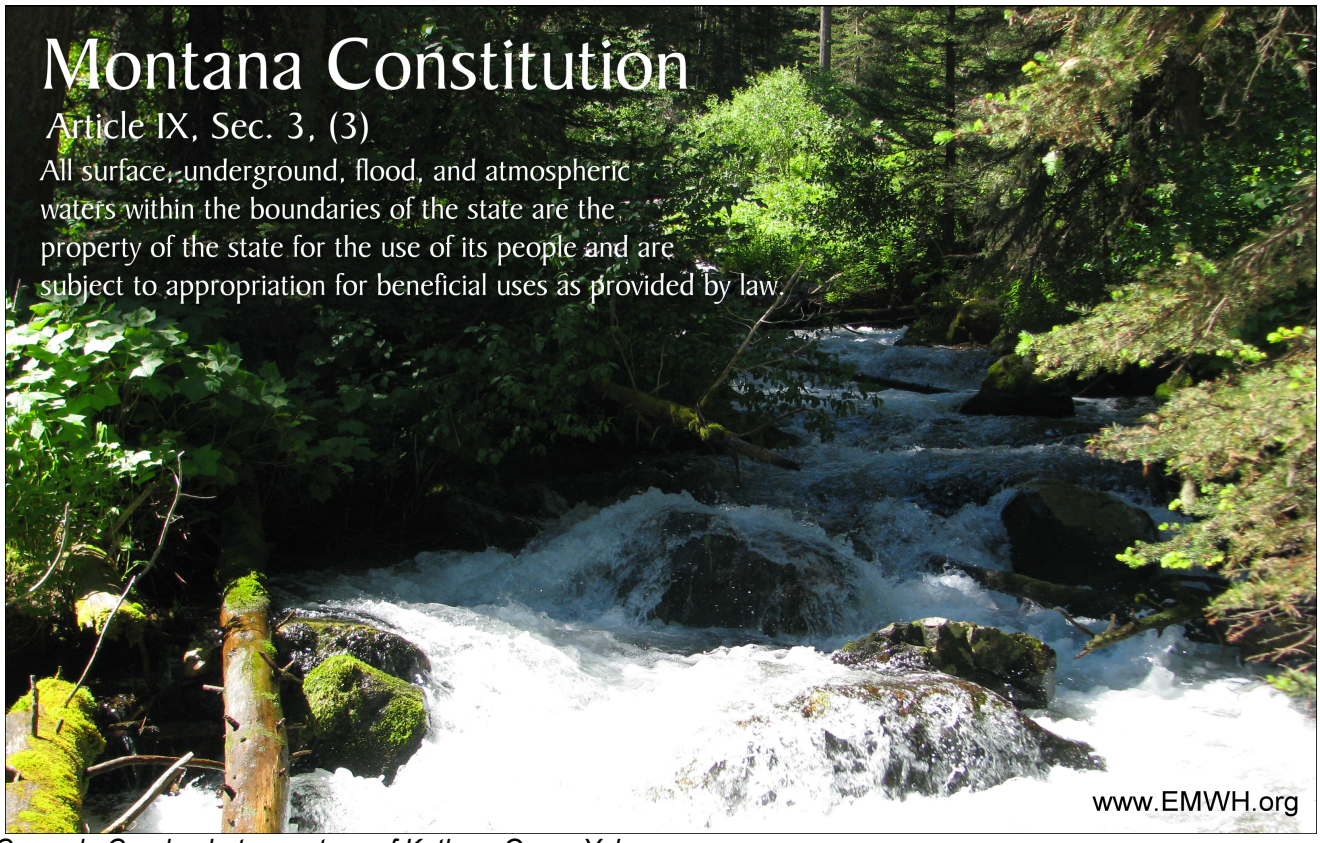
On January 2014, the Montana Supreme Court ruling reaffirmed Montana's Stream Access Law, clarifying that the public may use the entirety of the public prescriptive easement right-of-way for all lawful public purposes.[112] It also remanded the Ruby River action back to the District Court to determine the "definite width of a single, unified" public road right-of-way that was not determined at the previous trial. Per the Supreme Court, the width must include whatever land is "reasonably necessary" to maintain and support the established public road and bridge and the land that has historically been used by the public. This was a great victory for PLWA and the public trust.

During the Seyler Lane case, PLWA sought the assistance of Montana Attorney General, Tim Fox, and the Assistant Attorney General, Matthew Cochenour to intervene, taking over Madison County's (elected officials) defense, since the duty of the State of Montana is the safety of the public on its roadways and bridges.[113] There was no reply to their request, nor intervention from Montana's Attorney General (another elected official).

Outdoor writer, Don Thomas, in his article, *A Rift Runs Through It, Fighting for access to the Ruby River,* described PLWA as one of those motivated "protectors" of Montana's stream access. "Wearing the white hat—Montana's very own Public Land and Water Access Association (PLWA from here on in), a group of unpaid volunteers that for years has played a crucial role in reopening illegally blocked access to public lands and waters throughout the state. Most Montanans wouldn't realize how much public land access has been denied this way save for efforts by PLWA. Although basically a ragtag guerilla group fighting an odds-against battle against powerful, well-financed interests, its record of success in the courts has been remarkable."[114]

In the 2016 District Court case for the Seyler Lane easement, District Court Judge Loren Tucker determined the easement widths over the various parts of Seyler Lane and the bridge.[115] PLWA's attorney, Devlan Geddes explained, "We asked for 47.5 feet and 46 feet in width at the ends of the Seyler Bridge. He granted us 47.5 feet at both ends. The other widths are mostly irrelevant to our concern of access to the river. This is a victory for PLWA, because the Court confirmed that Montanans may lawfully access the Ruby River from within the Seyler Lane right of way. The 47.5' width determination provides a sufficient path at the corners of the bridge that members of the public may access the river," celebrated Geddes.

A long and hard fought access battle was won against Madison County and the Intervenors: Montana Stockgrowers Association, Hamilton Ranches, Inc., and Atlanta billionaire, James Cox Kennedy, who stated he owns the air space above the river, that stream access was a "taking", and that Montana's Stream Access Law was "unconstitutional". Once again, the constitutionality of Montana's Stream Access Law was upheld.



Cascade Creek, photo courtesy of Kathryn QannaYahu

Montana's 2016 Election Campaign

Public Access in general, and Stream Access in particular, were hot topics during Montana's 2016 election year.

One example of a very important elected position that rose to prominence, often overlooked by voters, was the Supreme Court election. Kristen Juras, from Great Falls, announced her bid for a seat on the Supreme Court. In the course of researching the candidate, Enhancing Montana's Wildlife & Habitat uncovered a law review in which she was one of the authors - *Stop the Beach Renourishment Stops Private Beachowners' Right to Exclude the Public*.

This review of water rights included a section on Montana's stream access. Juras wrote on pg. 58, "Although the early Montana courts and legislature strongly protected riparian rights (1) by extending riparian ownership to the low-water mark of navigable waters and to the middle of non-navigable waters, and (2) by affirming the riparian owner's right to exclude the public's use of privately-owned stream beds, these rights have progressively eroded. The first erosion was slight (and, in view of Montana's affinity for fishing, caused little controversy) -the adoption in 1933 of the 'angler's statute' allowing fishermen to enter onto the banks of navigable rivers between the low- and high-water marks for purposes of fishing. The second erosion was monumental-the expansion of the public trust doctrine to allow public use of both navigable and non-navigable stream beds for recreational use."[116] Juras asserts Montana's Stream Access was an erosion! And she was trying to win a seat on our Supreme Court, which rules in appealed cases, such as *Curran*, *Hildreth* and *Seyler Lane*.

In an effort to alert the voting public, to a potential access threat to the Montana Supreme Court, EMWH published and networked the Review with the page 58 quote. The *Galt* cases were also a part of her law review discussion and the fact that Kristen Juras is the niece of Senator Jack Galt, who adamantly opposed stream access, is pertinent.

Stream Access was discussed at a forum of Western Montana Bar Association members, questioning Juras and her opponent Dirk Sandefur on the subject in Sept. 2016. Rob Chaney reported in the article, *Juras, Sandefur trade jabs on same-sex marriage, stream access*, "About 70 Missoula-area lawyers, clerks and judges listened to University of Montana law professor Juras and Cascade County District Judge Sandefur at an election forum Thursday in Missoula. Supreme Court justice races are nonpartisan… Juras replied she did consider the 1985 stream access law a settled matter, but added that many issues remain at loose ends. For example, she said the stream bed ownership of non-navigable waterways might be private, and bridge-access policies might depend on whether the bridge is privately or publicly owned. Sandefur charged that Juras was hinting she was ready to pick away at the stream access laws and showing a bias that was improper on the bench."[117] Sandefur won the seat.

This wasn't the first political effort at changing the make up of our Montana Supreme Court judges though. In the 2012 election, Laurie McKinnon won the open Supreme Court Justice seat against Ed Sheehy. But, it was not a normal judicial campaign, it was viewed by many to be a smear campaign against Sheehy.

The Huffington Post ran a 2016 article on an investigation into an out-of-state dark money effort to change the make up of the Montana Supreme Court utilizing those smear campaign ads - *Two Of America's Richest Men Secretly Tried To Sway Montana's Judicial Elections*.[118] "Three years passed before the identities of the billionaire businessmen funding the ads came to light, following an investigation by Montana's Commissioner of Political Practices. The December 2015 probe found that the Montana Growth Network had violated state election laws and forced the nonprofit to disclose its funders. Sheehy was dumbfounded. 'Before 2012, nothing like that had ever happened in a judicial race in Montana,' he said."

"The largest portion of the group's money came from two of America's richest men. San Francisco billionaire

Charles Schwab, the founder of the eponymous discount brokerage firm, donated $300,000. James Cox Kennedy, the Atlanta-based chairman of media giant Cox Enterprises, gave $100,000. Schwab is worth a reported $6.4 billion, while Kennedy is worth $10.2 billion — ranking both of them among Forbes' wealthiest 400 Americans." Concerning the Stream Access Law, the article went on to expound, "Schwab and Kennedy don't like that law — at least as it applies to their land. They've spent more than a decade challenging it in court, sometimes with the support of other wealthy out-of-state landowners. By 2012, they had already lost at least three cases before the Montana Supreme Court. The probe also revealed that the two billionaires had a direct stake in a case moving through Montana's courts at the time of the 2012 election."

"But the situation looks fairly clear to Bruce Farling, executive director of Montana Trout Unlimited, a conservation group that has worked to defend the stream access law against these challenges.
'Those guys wrote big checks to this outfit [Montana Growth Network] to write big checks to [support] McKinnon, and I can't think of any other reason they would be interested in that race other than the fact that their stream access cases have shown up before the Montana Supreme Court,' he said."

PLWA's President, John Gibson voiced, "If they can't win in court, they'll change the court. They'll change the justices that make the decisions, and that's ongoing." Ed Sheehy illustrated what was at stake, "When Montana passed its Corrupt Practices Act, it was designed to get corporations out of the judiciary — because where I work now in Butte, which is my hometown, the Anaconda Company controlled the judges that were on the bench. That was the idea, to let people have a right to a true, fair trial."

Ominously, in the 2014 PLWA Seyler Lane Supreme Court case, Justice Laurie McKinnon was one of the 7 member court that ruled on the case and one of the two dissenting votes against PLWA.[119]

Cherry River Fishing Access Site on the East Gallatin River

Another demonstration of the importance of Montana's stream access, reared its head in the 2016 election campaign at the gubernatorial level, with Stream Access being debated between Governor Steve Bullock and Greg Gianforte. EMWH uncovered, publicly published and networked court documents and property records from Gianforte's filing against Montana Fish, Wildlife & Parks, in Gallatin County, again in an effort for the voting public to be aware of the threat to our Public Trust Doctrine. The Gianfortes had filed a Complaint For Quiet Title against FWP to take the public's land and access. "12. **FWP refuses upon demand to voluntarily extinguish the easement.**" Since FWP wouldn't just hand over the public's legally acquired recreation site easement, the Gianforte's LLC sought to "extinguish all improperly conveyed property rights and to achieve clean title to the property without burdensome encumbrances, such as this alleged Easement."[120] The 1993 FWP 1.01 acre (more or less) Recreation Site Easement (current FWP Cherry Creek Fishing Access Site) and Grant of Custody of Land Document with a note[121], as well as the field survey conducted in 1997, **preceded** the Gianforte's 2005 purchase of the land. Despite Gianforte's contradictory statements on the matter, they sought to legally bully the public's trust agency, FWP, out of a public fishing access site on the East Gallatin.

Jumping in to defend Gianforte, PERC (Property and Environment Research Center), wrote an oped - *The insatiable thirst for access*.[122] PERC assailed the Stream Access history in general and PLWA specifically, bringing up the Public Trust Doctrine involved in these historical cases, then followed, "With wind in their sails, however,

stream access zealots have demonstrated an insatiable appetite for more and more." He segued into his third point of attack, Governor Bullock. "To further illustrate just how the public trust doctrine is used in political debates, consider Governor Bullock's response to Gianforte's invitation to fish on his property. 'Thanks for the invitation. But the beauty is, that's a public right of way. I don't need your permission.' This might make a nice political sound bite, but in fact, both the state Supreme Court and the Legislature specifically say that protecting the public's right to stream recreation does not create an easement or right of way."

What Anderson chooses to be personally blind to or intentionally misleads a general public that does not understand the public trust and access, is that a **willing landowner** that previously owned that property before Gianforte bought it, **gave a perpetual easement** to establish a fishing access site to Montana Fish, Wildlife & Parks in 1993. Bullock, nor anyone else, needs Gianforte's permission for access to that site. And again, this is not a "taking", as the privatizing agenda would like the general public to believe.

PERC misleadingly closed with his fourth point of attack – the grassroots hunters and anglers that defend the public trust, "No doubt the access zealots will continue their **public trust** march, but that doesn't mean true Montana sportsmen and women have to follow their lead. It is time to return to Montana's roots by honoring private property rights — and, indeed, by celebrating them."

This oped was an intentional attempt to divide, to make two camps where they don't exist: between the have's and the have not's, between public trust and private property, and between "true" Montana sportsmen and women and the "green decoy" efforts to malign the real grassroots, homegrown hunters & anglers of Montana. Anderson intentionally ignores the decades of public trust advocacy by the multitudes of Montanan hunters and anglers illustrated in this history, but then, that is what the privatizing dark money contributed to PERC is designed to do; such as the contributions Gianforte has made to PERC, listed on his website contribution page before he removed it.[123]

Considering the role and power of the governor, including signing/veto power of legislative bills and a seat on the State Land Board, which involves public land sales and exchanges, Gianforte's loss in the gubernatorial election served to help protect public resources from exclusive use.

Yes PERC, it is time for Montana to return to its roots, Montana's public trust doctrine roots by celebrating them!

The Public Trust Doctrine Attack in the 2017 Legislature

On January 30, 2017, a Public Lands Rally was held in Helena, in the Rotunda of the Capitol. All three levels of the Rotunda, including the stairways, were filled with over 1000 protesting members of the Public to send a message to the Legislature – in a nutshell, they were defending The Public Trust Doctrine. Hunting/angling and non consumptive conservationist's signs advocated for a myriad of Public Trust Doctrine tenets: our public lands; our stream access; recreational access to our public lands; no Federal Lands Transfer; left side, right side, unite outside; vote to keep and protect our public lands; keep it public; for future generations; public lands for our kids, not special interests; keep it wild and the outdoor recreation economic benefit; public landowner and "public" means "everyone".

Filled Helena Capitol Rotunda, Photo courtesy of Mike Korn

Senator Jennifer Fielder, one of the more active peddlers of the federal lands transfer movement and Executive Director of the American Lands Council in Idaho, had her Sanders County constituency out in force with signs chastising her. In each legislature, special interest bills regularly arise. Some years are worse than others. 2017 has seen a number of attempts on access, including hidden attempts to steal "air space", that many of the public did not even know they had to begin with.

Jan. 30, 2017 Public Lands Rally, Helena, Capitol Rotunda, Photo courtesy Mike Korn

But, an obvious agenda by some, in the 2017 legislative session, was the prominent attack against the Public Trust Doctrine as a whole, to disparage it, make it sound like a dirty word, to equate it with a private property "taking". Equally egregious is the out-of-state, dark money attempt to crush the grassroots, homegrown hunting and angling groups in Montana, who for decades have defended the Public Trust and access, often out of their own pockets, and when necessary – in court. As one of the streams running through this history has shown, the bulk of the access and public trust advocacy has been borne by Montana grassroots hunting and angling groups.

Rick Berman and Will Coggin (transfer federal public lands paid lobbyists) are both from Washington D. C. In fact, their orchestration of slandering and attacking average hunter/angler groups in the western states became so large, as well as their other activities, journalists and organizations began investigating them. There is now a whole website dedicated to exposing Berman's organization and the many fronts he operates on Rick Berman Exposed. SourceWatch also has a wiki page.

"Richard 'Rick' Berman is a longtime Washington, D.C. public relations specialist whose lobbying and consulting firm, Berman and Company, Inc., advocates for special interests and powerful industries. Berman and Co. wages deceptive campaigns against industry foes including labor unions; public-health advocates; and consumer, safety,

animal welfare, and environmental groups." One of his many front group projects is Green Decoys. "Green Decoys is a project of the Center for Organizational Research and Education that claims several sportsmen, hunting, and fishing groups are actually fronts for environmentalists."

In true McCarthyist style, Green Decoys defamatory position is that these hunting/angling groups are "green decoy's" because they are sportsmen in name only, targeting Backcountry Hunters & Anglers, Trout Unlimited and Theodore Roosevelt Conservation Partnership. In Montana they specifically target the BHA Chapter and other homegrown groups like Montana Sportsmen Alliance, Montana Hunters & Anglers, and Montana Wildlife Federation with all their Affiliates, like Public Lands/Water Access Association.

In addition to Will Coggin's (Washington D.C.) massive opinion letters campaign to newspapers across the West, advocating for the transfer of our Federal lands to the States and spreading his Green Decoy propaganda, Coggin took to emailing MT legislators, defaming, "There are several groups active in the state who claim to represent sportsmen. But our research points to these groups simply being camouflage for radical environmentalists." He conveniently provided a web link to his Green Decoy smear campaign. Again, another out-of-state, dark money attempt to attack Montana's public trust resources and access tradition.

In response to the grassroots efforts during the legislative session, Senator Jedediah Hinkle from Bozeman, Vice Chair of the Senate Fish & Game Committee, publicly declared war against Montana's grassroots hunters & anglers. In a Voices of Montana broadcast on March 31, 2017, speaking on a divisive constitutional referendum bill Senator Fielder sponsored (SB 236), he stated, "Senate Bill 236, I would just, to let your listeners know out there, one thing I want to warn everyone of, be careful the emails you get, because there's a lot of Green Decoy groups out there, who are really just shills, they may sound like sportsmen, they may advocate that they are sportsmen..." (the announcer cuts in) "Jedediah, I have been tricked myself. Make sure you go to greendecoys.com, check out who is who."[124]

Senator Jennifer Fielder, Chair of the Senate Fish & Game Committee, emailed a Fish, Wildlife & Parks Commissioner candidate up for reappointment, on April 17, 2017, with a variety of questions. Question no. 5 was prefaced by her statement: "For years FWP has shown bias in favor of hard left partisan interest groups including Montana Wildlife Federation (and their subsidiaries), Back Country Hunters and Anglers, Montana Sportsmen's Alliance, Trout Unlimited, Back Country Horsemen, and Montana Bow Hunters Association. While engaged in varying degrees of political activism, some of these organizations do not have broad membership nor do they represent balanced objectivity concerning the broad range of sportsmen who participate in the activities these groups associate themselves with."[125]

As evidenced through decades of petitions, hearings, submitted public comments and court cases, the grassroots hunters & anglers have not only led the charge for defense of the public trust, but have carried the bulk of the load and cost as well, which is why they have been targeted.

During the Senate Fish & Game Hearing on SR 45, April 11, 2017, for the confirmation of Martha Williams as FWP Director, Senator Fielder, in fearmongering fashion asked, "Do you have any idea why landowners are so fearful of Public Trust Doctrine? We heard testimony, on another bill from property owner's group, and they were fearful that legislation was bringing Public Trust Doctrine into our Constitution."[126]

Like a tag team duo, two days later, during the Hearing for the FWP Commissioner confirmations - SR 64, Vice Chair Hinkle, acting as Chair, asked one of the nominees, "Are you familiar with the Public Trust Doctrine? Cause I know there is a lot of landowners in the state that are worried about that, that maybe that would interfere with private property rights. Are you familiar with that?"[127]

Whether Sen. Fielder understands it or not, the Public Trust Doctrine is already in our Montana Constitution and was long before she ever moved here in 2007! The Doctrine is "not new or radical", it has been out there, simply "awaiting recognition".

As Bob Lane, former Chief Legal Counsel for FWP, explains in, *The Remarkable Odyssey of Stream Access in Montana*, "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, and the other establishing a duty of the state and each person to maintain and improve. 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.' "[128]

In 1984, the New Jersey Supreme Court clarified, "Archaic judicial responses are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be 'fixed or static,' but one to 'be molded and extended to meet changing conditions and needs of the public it was created to benefit."[129]

These hearing examples are just a few of the cases during the 2017 legislature, where the Public Trust Doctrine was brought up by opposition. I project, within certain privatizing factions, this will become intensified.

In Conclusion

Author fishing on the Madison River, first year in Montana

I have attempted to build this bridge between a dispassionate, factual chronology and a public trust advocacy. The reader will frequently see the use of "our", illustrating that I too am a part of and self identify with our Public Trust Doctrine, tasked with protecting our natural resources, for the benefit of the whole, for future generations. As a relative "newcomer" to this public resource rich state, I have not tried to privatize it, rather I have embraced Montana and her public trust heritage.

There is also the matter of documenting this Public Trust Doctrine, stream access history, the activities of those passionate defenders of their day, because too many are passing on, taking their institutional memory with them.

While a number of high profile cases have involved out-of-state, wealthy landowners, the access obstruction and anti public trust sentiment involves some local Montanan's as well. Some of these obstructions are clearly illegal. Compounding the illegal obstructions, some elected officials choose to turn a blind eye to these "takings" of our public trust. And through our legislature, other elected officials seek to pillage, through self interest legislation, robbing the public of their commonly held public resources and access to them.

Our unique Stream Access Law expressly protects private property rights, while providing for recreational use of an established public resource. To be clear, Montana's Stream Access is not a taking of private property; it is founded on a public trust that has withstood the challenges to its constitutionality in both state and federal courts.

Guest speaker, Attorney Jim Goetz, addressed PLWA's membership on April 29, 2017 at their Annual meeting in Bozeman, MT. Goetz was the attorney in the *Curran* and *Hildreth* cases for Montana Stream Access Coalition and his firm, more recently, for PLWA's various access cases, such as Seyler Lane. He briefly relayed key points of stream access history to the PLWA membership, speaking of MSAC's origins with the Butte hunters/anglers; the legal cases, based on the Public Trust Doctrine and Montana's Constitution; the right of the public to use the waters of the State; and the 2016 Supreme Court and Gubernatorial elections. Stream Access is, "...now thoroughly embedded, we will have challenges, like the Cox Kennedys, … but I think we've basically won our victory. It's now just a matter of fighting to protect it."[130]

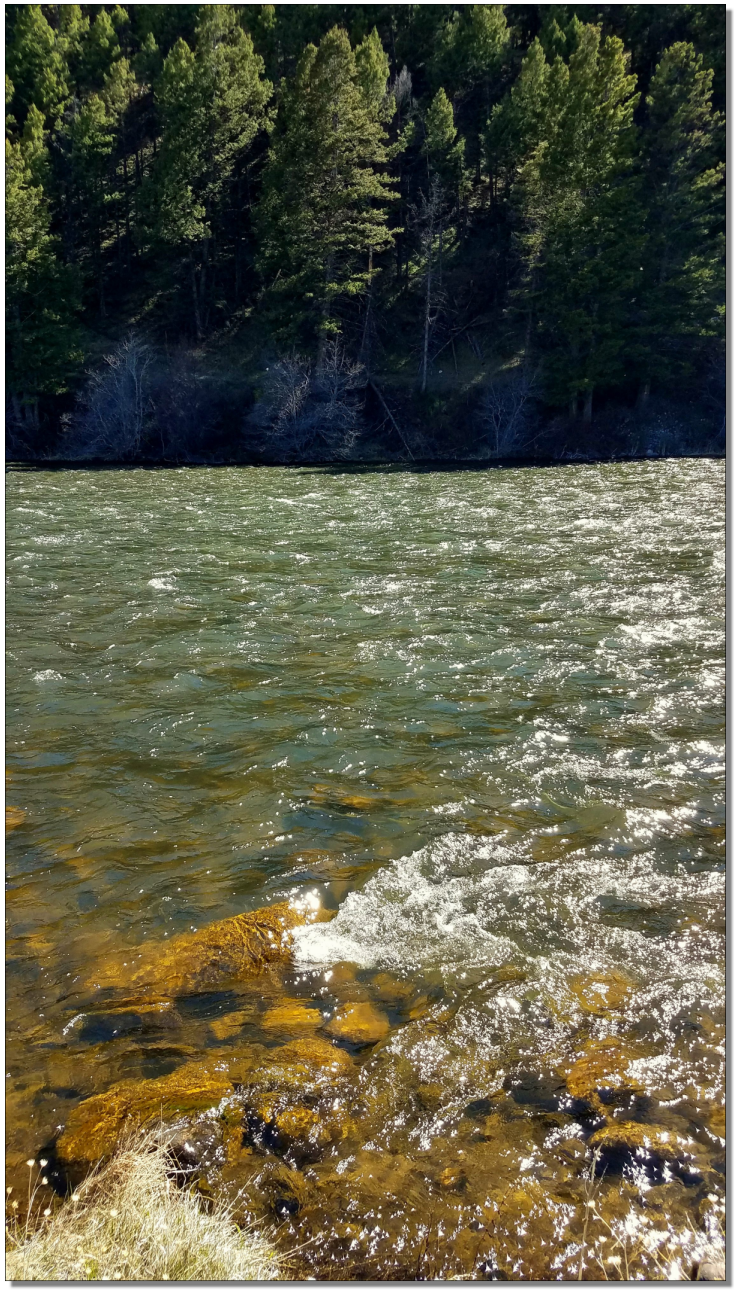
Jim Goetz, Photo courtesy of Alisia Duganz

It is particularly critical during the elections, that we not forget the Public Trust champions who fought for our remarkable stream access legacy and the Montana Constitutional duty that we, as citizens, have to "maintain and improve a clean and healthful environment in Montana for present and future generations."

We must be mindful: the legislature makes the laws; and the executive branch executes them; with the judicial branch judging those laws and their execution. At the county level, commissioners act as both legislators and executors. Representatives and Senators craft the laws during the legislative sessions. County attorneys, judges and justice of the peace serve as the front line in that local judicial process, ultimately landing on the steps of our Supreme Courts. We need to be wise in electing officials to these positions, ensuring they represent and defend our Public Trust Doctrine and access values. Voting scorecards on a number of public trust issues are available. For example: Montana Sportsmen Alliance Legislative Scorecards and Montana League of Conservation Voters Scorecards.

Consider Stream Access and the Public Trust Doctrine, as the banks and the bed of our water ways. Just as the banks and bed can erode and degenerate, if abused, without continuous supervision, passionate protection and safeguarding for our future generations, so too, our Public Trust Doctrine can become eroded and lost.

It is crucial when we hear a self-interest group equate the public trust or stream access with "a taking"; or watch the county commissioners turning blind eyes to private landowners blocking public access; or read about yet another necessary access case in the courts being derided as "litigious"; or hear grassroots hunting/angling conservationists being targeted as "Green Decoys" by the dark money interests and privateers of our public resources; or hear Montana legislators publicly attacking the Public Trust Doctrine – we must all respond to their attacks on the Public Trust Doctrine, our Montana and U.S. Constitution. Don't ever let anyone lead you to believe the Public Trust Doctrine and Stream access are something new, some recent fad or a "taking", they are rooted deeply in our national history.



Madison River, Photo courtesy of Kathryn QannaYahu

The Public Trust Doctrine is not just some ideology, it is a fundamental reality for us all and generations yet unborn. When attacks are made on the Public Trust Doctrine, those attacks are not solely attacking the PTD, they are attacking our Common Law heritage, and everything that is built on top of the Public Trust Doctrine.

If not aware before, we are are equipped with the knowledge that the Public Trust Doctrine predates our Montana Constitution, our U.S. Constitution and is the foundation of Montana's "Best in the West" stream access – for the use of its people!

As Theodore Roosevelt, a conservation hunter and angler, expressed in his address before the National Convention of the Progressive Party in Chicago, August 6, 1912,

"There can be no greater issue than that of conservation… Moreover, we must insure so far as possible the use of certain types of great natural resources for the benefit of the people as a whole… We do not intend that our natural resources shall be exploited by the few against the interests of the many, nor do we intend to turn them over to any man who will wastefully use them by destruction, and leave to those who come after us a heritage damaged by just so much… Our aim is to preserve our natural resources for the public as a whole, for the average man and the average woman who make up the body of the American people. "

I dedicate this history to those advocates still with us and those no longer remaining, those who have answered the elected call of duty to be good stewards of our natural resources for the "use of its people"; the agencies who manage our trust; those who have legally defended the Public Trust Doctrine; and to the grassroots conservation hunters & anglers who continually defend the public trust for future generations. To borrow from a quote, so that we see further, may this work honor and stand on the shoulders of these public trust giants.

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1 Landlocked: Measuring Public Land Access in the West, Center For Western Priorities, (2013)
2 Act, Resolutions and Memorials of the Territory of Montana, passed by the First Legislative Assembly, Convened at Bannack, December 12, 1864, (Virginia City, Montana, D.W. Tilton & Co., 1866), PDF pg. 424
3 Constitution of the State of Montana, 1889, (Helena, Montana, Independent Publishing Co., 1889)
4 People v. New York & Staten Island Ferry Co., (January 16,1877), PDF pg. 4
5 Illinois Cent. R. Co. v. State of Illinois, United States Supreme Court, (1892), PDF pg. 14
6 Ibid.
7 Alec L v. McCarthy No. 14-405, Supreme Court of the United States, Amicus Curiae Brief of Law Professors in Support of Granting Writ of Certiorari, William H. Rogers, Jr., (Seattle, WA, University of Washington School of Law, 2014)
8 Ibid., PDF pg. 27
9 Ibid., PDF pg. 28
10 Ibid., PDF pg. 11
11 Ibid.
12 Ibid., PDF pg. 13
13 Ibid., PDF pg. 14
14 Ibid., PDF pg. 25
15 Ibid.
16 National Audubon Society v. Superior Court of Alpine County, Supreme Court of California, S.F. 24368, (February 17, 1983)
17 Alec L v. McCarthy No. 14-405,Supreme Court of the United States, Amicus Curiae Brief of Law Professors in Support of Granting Writ of Certiorari, William H. Rogers, Jr., (Seattle, WA, University of Washington School of Law, 2014) PDF pg. 28
18 Ibid., PDF pg. 30
19 Ibid., PDF pg. 28
20 Gibson v. Kelly, Supreme Court of Montana, (February 26, 1895), pg. 2
21 Ibid., pg. 3
22 The Revised Codes of Montana of 1921 in Four Volumes, I. W., (San Francisco, California, Choate, Bancroft-Whitney Company, 1921), pg. 59, PDF pg. 82
23 Ibid., pgs. 1366, 1368 PDF pg. 1389, 1391
24 Ibid., pg. 1368, PDF pg. 1391
25 Ibid.
26 The Revised Codes of Montana of 1935, Volume Two, (Great Falls, Montana, State Publishing Company, 1936), pg. 622
27 Laws, Resolutions and Memorials of the State of Montana, (Helena, Montana, State Publishing Co., 1933), pg. 165
28 Montana Constitutional Convention, Verbatim Transcript, March 1, 1972-March 9, 1972, Vol. V, (Helena, MT, Montana Legislature, 1981), pgs. 1303, 1304
29 Ibid., pg. 1304
30 Ibid, pgs. 1304, 1305
31 Ibid., pg. 1305
32 Ibid., pgs. 1306, 1307
33 Montana Trout Unlimited, Amicus Curiae, In the Supreme Court of the State of Montana, Case No. DA 06-0520, (2006)
34 Farling, Bruce, A History of TU in Montana: Five Decades of Conservation, http://montanatu.org/wp-content/uploads/2012/11/MTU-History-to-2009.pdf , (2009)
35 Montana Coalition for Stream Access v. Curran, No. 83-164, The Supreme Court of the State of Montana, (1984), pg. 2
36 Ibid., pg. 9
37 Ibid., pg. 14

38 Ibid, pg. 19
39 Ibid.
40 Montana Coalition for Stream Access v. Hildreth, No. 83-174, The Supreme Court of the State of Montana, (1984), pg. 2
41 Ibid., pg. 3
42 Ibid., pg. 2
43 Ibid., pg. 5
44 Ibid., pg. 12
45 Curran, No. 83-164, The Supreme Court of the State of Montana, (1984), pg. 15
46 Ibid., pg. 8
47 Hildreth, No. 83-174, The Supreme Court of the State of Montana, (1984), pg. 5
48 Ibid.
49 Ibid., pg. 11
50 Enabling Act of 1889
51 HJR 36, Joint Interim Subcommittee No. 2 Minutes, (July 30, 1984), pg.1, PDF pg. 1
52 Ibid., pg. 8, PDF pg. 2
53 Ibid., pgs. 9, 10. 8, PDF pgs. 3, 4
54 Montana Environmental Quality Council Annual Report, Ninth Edition, Montana's Water, (December 31, 1985), pgs. 196-203
55 Ibid., pgs. 204-208
56 Ibid., pg. 9, PDF pg. 3
57 Ibid.
58 Ibid., pg. 10, PDF pg. 4
59 Ibid.
60 Ibid.
61 Ibid., pg. 12, PDF pg. 6
62 Ibid., pg. 14, PDF pg. 8
63 Montana Legislative History, HB 265, Chapter 599, L. (1985), pg. 161
64 Ibid., pg. 4
65 Ibid, Testimony presented by Jim Flynn, Department of Fish, Wildlife & Parks, Exhibit E, pg. 40
66 Lane, Robert N. The Remarkable Odyssey of Stream Access in Montana, Public Land and Resources Law Review: Vol. 36, Article 5, (2015), pgs. 100, 101
67 Register of Civil Actions, District Court of the First Judicial District, Lewis and Clark County, Galt v. State, ADV- 85-565 and Montana Supreme Court, Galt v. State, No. 86-178, (1986), pg. 2
68 Galt v. State, ADV- 85-565 and Montana Supreme Court, No. 86-178, (1986)
69 Minutes of the Meeting, Natural Resources Committee, Montana State Senate, SB 159, (February 11, 1987), pg. 1
70 Ibid.
71 Minutes of the Meeting, Natural Resources Committee, Montana State Senate, SB 286, (February 18, 1987), pg. 2
72 Madison v. Graham, 316 F.3d 867 (2002), United States Court of Appeals, Ninth Circuit, (2002), PDF pg. 4
73 Ibid.
74 Madison v. Graham,538 U.S. 1058, Supreme Court of the United States, Certioraris Court of Appeals for the Ninth Circuit Court, (May 27, 2003)
75 Robbins, Jim, Rich Newcomers Closing the Wilds of Montana, The New York Times, (1999)
76 Tester, Sen. Jon, Wealthy Out-of-Staters and Montanans' Access to Land, New West, (2007)
77 Public Policy Research Institute, Stream Access in Montana, covering the 20 years since the 1985 Stream Access Law, (Missoula, Montana, University of Montana, May 2006), pg.2
78 Ibid.
79 Bitterroot River Protection and FWP, v. Bitterroot Conservation District, et al., DA 06-0520, The Supreme

Court of the State of Montana, (2008), pg. 4

80 Montana River Action, http://www.montanariveraction.org/bitterroot-river.html Condensed version of Montana River Action publication, State of the State, Rivers, (Bozeman, MT, 2008)

81 Bitterroot River Protection and FWP, v. Bitterroot Conservation District, et al., DA 06-0520, The Supreme Court of the State of Montana, (2008), pg. 4

82 Sportsmen's Groups, Amicus Curiae, In the Supreme Court of the State of Montana, Case No. DA 06-0520, (2006), pg. v

83 Ibid., pg. 1

84 Montana Trout Unlimited, Amicus Curiae, In the Supreme Court of the State of Montana, Case No. DA 06-0520, (2006)

85 Bitterroot River Protection and FWP, v. Bitterroot Conservation District, et al., DA 06-0520, The Supreme Court of the State of Montana, (2008), pg. 54

86 48 Op. Attorney General No 13, Mazurek (2000), pg. 1

87 Ibid.

88 Ibid., IV

89 HB 190, 61st Legislature, Sponsor Representative Kendall Van Dyk, (2009)

90 Montana Trout Unlimited, Amicus Curiae, In the Supreme Court of the State of Montana, Case No. DA 12-0312, (2012), pg. 3, PDF pg. 10

91 http://fwp.mt.gov/doingBusiness/insideFwp/commission/ (April 2017)

92 Minutes of the Meeting, Natural Resources Committee, Montana State Senate, HB 655, (March 13, 1989), pg. 8

93 HB 626, 56th Legislature, Sponsor Representative Hal Harper, (1999)

94 Lane, Robert N., The Remarkable Odyssey of Stream Access in Montana, Public Land and Resources Law Review: Vol. 36, Article 5, (2015), pgs. 163, 164

95 Ibid., pg. 165

96 Montana Fish & Wildlife Commission Meeting Minutes, No. 12 Petition to Restrict Commercial Outfitting on the Lower Boulder River, near Big Timber - Final, (April14, 2016)

97 HB 309, 62nd Legislature, Sponsored by Rep. Jeff Welborn and Sen. Chas Vincent, (2011)

98 Schoonen, Tony, Counterpoint: End of stream access?, Montana Standard, March, 6, 2011

99 Ibid.

100 Chaney, Rob, Anglers traveling to Helena to protest changes in Montana stream access law, The Missoulian, (March 7, 2011)

101 Ibid.

102 Fishing Outfitters Association of Montana (FOAM), Robin Cunningham, Opposition Testimony to HB 309, (March 8, 2011)

103 United Property Owners of Montana, Amicus Curiae, In the Supreme Court of the State of Montana, Case No. DA 12-0312, (2012), pgs. 1, 2

104 Ibid., pg. 2

105 Property and Environment Research Center, Amicus Curiae, In the Supreme Court of the State of Montana, Case No. DA 12-0312, (2012), pg. 1

106 Ibid.

107 Ibid., pg. 3

108 Montana Trout Unlimited, Amicus Curiae, In the Supreme Court of the State of Montana, Case No. DA 12-0312, (2012), pg. v.

109 Ibid., pg. 3

110 Gevock, Nick, Property rights, conservation groups join Montana stream access lawsuit, The Missoulian, (Oct. 31, 2012)

111 Video of Montana Supreme Court Oral Argument, https://www.youtube.com/watch?v=kk6okXntnNU , (2014)

112 Public Lands Access Association, Inc. v. The Board of County Commissioners of Madison County, Supreme

Court of the State of Montana, DA-12-0312, (2014)

113 Email/Letter from PLWA attorney, Devlan Geddes to Attorney General Tim Fox and Assistant Attorney General Matthew Cochenour, (August 28, 2014)

114 E. Donnall Thomas, Jr., A Rift Runs Through It, Fighting for access to the Ruby River, Outside Bozeman, (Fall 2015)

115 Public Lands Access Association, Inc. v. The Board of County Commissioners of Madison County, Montana Fifth Judicial District Court, Madison County, No. DV-29-04-43, Final Judgment, Findings of Fact, Conclusions of Law and Order Clarifying, (2016)

116 Juras, Kristen, Sydney F. Ansbacher, and Robert K. Lincoln Stop the Beach Renourishment Stops Private Beachowners' Right to Exclude the Public, 12 Vt. J. Envtl. L. 43, The University of Montana School of Law, (2010), pg. 58

117 Chaney, Rob, Juras, Sandefur trade jabs on same-sex marriage, stream access, The Missoulian, (Sept. 15, 2016)

118 Blumenthal, Paul, Two Of America's Richest Men Secretly Tried To Sway Montana's Judicial Elections, The Huffington Post, (May 10, 2016)

119 Public Lands Access Association, Inc. v. The Board of County Commissioners of Madison County, Supreme Court of the State of Montana, DA-12-0312, (2014), pg. 66

120 East Gallatin, LLC v. The Montana Department of Fish, Wildlife & Parks, Montana Eighteenth Judicial District Court, Gallatin County, No. DV-09-502C, http://www.emwh.org/issues/public%20trust/mt%20pt%20threats/gianforte/gianforte%20lawsuit.pdf, (Feb. 1, 2013)

121 Department of Fish, Wildlife & Parks Recreation Site Easement and Grant of Custody of Land, County of Gallatin, 276336, Film 138, Page 2222, http://www.emwh.org/issues/public%20trust/mt%20pt%20threats/gianforte/FWP%20Recreation%20Site%20Easement%201993.pdf, (Dec. 2, 1993)

122 Anderson, Terry, PERC, The insatiable thirst for access, Independent Record, (Sept. 1, 2016)

123 Screenshot of Gianforte Grantees, PERC

124 Voices of Montana 3/31/2017 Interview with Sen. Fielder and Sen. Jedediah Hinkle on SB 236, short audio clip of Sen Hinkle audio on "green decoys", http://www.emwh.org/issues/public%20trust/mt%20pt%20threats/privatizing/hinkle%20voices%20of%20montana%203%2031.wmv , (March 31, 2017)

125 Sen. Fielder's email of Questions to FWP Commissioner Appointee Matthew Tourtlotte, http://www.emwh.org/issues/public%20trust/mt%20pt%20threats/fielder/Fielder%20Tourtlotte%20email.html, (April 17, 2017)

126 MT Legislative Session Video Hearing Minutes, SR 45 FWP Director Confirmation, Martha Williams, (April 11, 2017)

127 MT Legislative Session Video Hearing Minutes, SR 64 FWP Commissioners Confirmation, (April 13, 2017)

128 Lane, Robert N., The Remarkable Odyssey of Stream Access in Montana, Public Land and Resources Law Review: Vol. 36, Article 5, (2015), pg. 12

129 Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, N.J. Supreme Court, (1984)

130 Jim Goetz Stream Access Overview video https://www.youtube.com/watch?v=t_UAJLmiBTc