MONTANA LEGISLATIVE HISTORY

Chapter 556 19 85

Bill H 265 S _____ Original bill & history ____C

H. Committee on Judiciary			S. Committee on Judiciary		
Hearing Date(s)	Jan 22	✓ C	Hearing Date(s)	Mar 08	✓ C
	Feb 12	✓ C		Mar 26	✓ C
	_____	____C		Mar 22	✓ C
	_____	____C		_____	____C
Date Out	_____	____C			

Did this bill originate in an interim committee? ____Yes ____No

Committee _____ Report _____

House Judiciary Subcommittee

Jan 25
Jan 26
Jan 29
Feb 04
Feb 05
Feb 06

1/18 INTRODUCED
1/18 REFERRED TO BUSINESS & LABOR
1/22 HEARING
1/24 COMMITTEE REPORT-BILL PASS AS AMENDED
1/26 2ND READING PASS
1/29 3RD READING PASS

TRANSMITTED TO SENATE
1/30 REFERRED TO BUSINESS & INDUSTRY
2/04 REREFERRED TO JUDICIARY
3/07 HEARING
3/07 ADVERSE COMMITTEE REPORT
3/07 BILL KILLED

HB 265 INTRODUCED BY REAM, MARKS
STREAM ACCESS

1/18 INTRODUCED
1/18 REFERRED TO JUDICIARY
1/22 HEARING
2/13 COMMITTEE REPORT-BILL PASS AS AMENDED
2/13 STATEMENT OF INTENT ATTACHED
2/16 2ND READING PASS 90
2/19 3RD READING PASS 91

TRANSMITTED TO SENATE
2/21 REFERRED TO JUDICIARY
3/08 HEARING
3/28 COMM REPORT-BILL CONCURRED AS AMENDED
STATEMENT OF INTENT AMENDED
3/30 2ND READING CONCURRED AS AMENDED 42
4/01 3RD READING CONCURRED 41

RETURNED TO HOUSE WITH AMENDMENTS
4/05 2ND READING AMENDMENTS NOT CONCURRED 92 4
4/09 CONFERENCE COMMITTEE APPOINTED
4/11 CONFERENCE COMMITTEE REPORT

HOUSE
4/12 2ND READING CONFERENCE COMMITTEE
REPORT ADOPTED 85 14
4/12 3RD READING CONFERENCE COMMITTEE
REPORT ADOPTED 85 12

SENATE
4/12 2ND READING CONFERENCE COMMITTEE
REPORT NOT ADOPTED 22 28
SUBSTITUTE MOTION FAILED

SENATE
4/12 2ND READING CONFERENCE COMMITTEE
REPORT ADOPTED 30 20
4/13 3RD READING CONFERENCE COMMITTEE
REPORT ADOPTED 29 21
4/16 SIGNED BY SPEAKER
4/16 SIGNED BY PRESIDENT

4/16 TRANSMITTED TO GOVERNOR
4/19 SIGNED BY GOVERNOR

HOUSE BILL NO. 265

INTRODUCED BY Ream Marks

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY DEFINING LAWS RELATING TO RECREATIONAL USE OF STATE WATERS; PROHIBITING RECREATIONAL USE OF DIVERTED WATERS; RESTRICTING THE LIABILITY OF LANDOWNERS WHEN WATER IS BEING USED FOR RECREATION; ESTABLISHING THE RIGHT TO PORTAGE; PROVIDING THAT A PRESCRIPTIVE EASEMENT CANNOT BE ACQUIRED BY RECREATIONAL USE OF SURFACE WATERS; AMENDING SECTION 70-19-405, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

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

NEW SECTION. Section 1. Definitions. For purposes of [sections 2 through 5], the following definitions apply:

(1) "Barrier" means an artificial obstruction located in or over a water body, restricting passage on or through the water, or a natural object which totally or effectively obstructs the recreational use of the surface water at the time of use. A barrier may include but is not limited to a bridge or fence or any other manmade obstacle to the natural flow of water or a natural object within the ordinary high-water mark of a stream.

(2) "Class I waters" means surface waters that:

(a) lie within the officially recorded federal government survey meander lines thereof;

(b) flow over lands that have been judicially determined to be owned by the state by reason of application of the federal navigability test for state streambed ownership;

(c) flow through public lands;

(d) are or have been capable of supporting commercial activity; or

(e) are or have been capable of supporting commercial activity within the meaning of the federal navigability test.

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

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

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

(a) an irrigation or drainage canal or ditch;

(b) an industrial, municipal, or domestic water system;

(c) a flood control channel; or

(d) a hydropower inlet and discharge facility.

(6) "Ordinary high-water mark" means the line that

 INTRODUCED BILL HB 265

water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it. Characteristics of the area below the line include, when appropriate, but are not limited to diminished terrestrial vegetation or lack of agricultural crop value.

(7) (a) "Recreational use" means with respect to class I waters: fishing, hunting, swimming, floating in small craft or other flotation devices, boating in motorized craft unless otherwise prohibited or regulated by law, or craft propelled by oar or paddle, and related unavoidable or incidental uses, within the ordinary high-water mark of the waters.

(b) Recreational use means with respect to class II waters all of the uses set forth in subsection (7)(a), except that it does not include, without permission of the landowner:

(i) overnight camping;

(ii) big game hunting or upland bird hunting;

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

(iv) the placement or creation of any permanent or semipermanent object such as a permanent duck blind or boat moorage; or

(v) other activities which are not primarily water-related pleasure activities.

(8) "Supervisors" means the board of supervisors of a soil conservation district, the directors of a grazing district, or the board of county commissioners if a request pursuant to [section 3(3)(b)] is not within the boundaries of a conservation district or if the request is refused by the board of supervisors of a soil conservation district or the directors of a grazing district.

NEW SECTION. Section 2. Recreational use permitted -- limitations -- exceptions. (1) Except as provided in subsection (3), all class I waters that are capable of recreational use as defined in [section 1(7)(a)], including the beds underlying them and the banks up to the ordinary high-water mark, may be so used by the public without regard to the ownership of the land underlying the waters.

(2) Except as provided in subsection (3), all class II waters that are capable of recreational use as defined in [section 1(7)(b)], including the beds underlying them and the banks up to the ordinary high-water mark, may be so used by the public without regard to the ownership of the land underlying them, except that recreational use does not include those activities excluded in [section 1(7)(b)].

(3) The right of the public to make recreational use of surface waters does not include the right to make

recreational use of waters:

(a) in a stock pond or other impoundment fed by an intermittently flowing natural watercourse; or

(b) while diverted away from a natural water body for beneficial use pursuant to Title 85, chapter 2, part 2 or 3.

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

(5) The provisions of this section do not affect any rights of the public with respect to state-owned lands that are school trust lands or any rights of lessees of such lands under lease on [the effective date of this act].

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

(2) A landowner may create barriers across streams for purposes of land or water management or to establish land ownership as otherwise provided by law. If a landowner erects a barrier pursuant to a design approved by the department and the barrier is designed not to and does not interfere with the public's use of the surface waters, the

public may not go above the ordinary high-water mark to portage around the barrier.

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

(b) A portage route may be established when either a landowner or a member of the recreating public submits a request to the supervisors that such a route be established.

(c) Within 45 days of the receipt of a request, the supervisors shall, in consultation with the landowner and a representative of the department, examine and investigate the barrier and the adjoining land to determine a reasonable and safe portage route.

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

(e) The cost of establishing the portage route around artificial barriers must be borne by the involved landowner, except for the construction of notification signs of such route, which is the responsibility of the department. The cost of establishing a portage route around natural barriers must be borne by the department.

(f) Once the route is established, the department has

the exclusive responsibility thereafter to maintain the portage route at reasonable times agreeable to the landowner. The department shall post notices on the stream of the existence of the portage route and the public's obligation to use it as the exclusive means around a barrier.

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

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

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

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

NEW SECTION. Section 4. Restriction on liability of landowner and supervisor. (1) A person who makes recreational use of surface waters flowing over or through land in the possession or under the control of another, pursuant to [section 2], or land while portaging around or over barriers or while portaging or using portage routes, pursuant to [section 3], does not have the status of invitee or licensee and is owed no duty by a landowner other than that provided in subsection (2).

(2) A landowner or tenant is liable to a person making recreational use of waters or land described in subsection (1) only for an act or omission that constitutes willful or wanton misconduct.

(3) No supervisor who participates in a decision regarding the placement of a portage route is liable to any person who while making recreational use of the surface waters is injured while using the portage route except for an act or omission that constitutes willful and wanton misconduct.

NEW SECTION. Section 5. Prescriptive easement not acquired by recreational use of surface waters. (1) A prescriptive easement is a right to use the property of another that is acquired by open, exclusive, notorious, hostile, adverse, continuous, and uninterrupted use for a period of 5 years.

(2) A prescriptive easement cannot be acquired through recreational use of surface waters, including the streambeds underlying them and the banks up to the ordinary high-water mark, or of portage routes over and around barriers.

Section 6. Section 70-19-405, MCA, is amended to read:

"70-19-405. Title by prescription. ~~Occupancy~~ Except as provided in [section 5], occupancy for the period prescribed by this chapter as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all."

NEW SECTION. Section 7. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 8. Applicability. Sections 5 and 6 apply only to a prescriptive easement that has not been perfected prior to [the effective date of this act].

NEW SECTION. Section 9. Effective date. This act is effective on passage and approval.

-End-

MINUTES FOR THE MEETING
JUDICIARY COMMITTEE
MONTANA STATE
HOUSE OF REPRESENTATIVES

January 22, 1985

The meeting of the Judiciary Committee, the Fish and Game Committee and the Agriculture Committee was called to order by the Chairman of the Judiciary Committee, Tom Hannah, on Tuesday, January 22, 1985, at 7:30 p.m. in Room 325 of the State Capitol.

ROLL CALL FOR THE JUDICIARY COMMITTEE: All members of the Judiciary Committee were present with the exception of Rep. Budd Gould, who had been previously excused by the chairman.

ROLL CALL FOR THE FISH & GAME COMMITTEE: Rep. Marjorie Hart was absent and excused by the chairman; Rep. Lloyd McCormick was absent; all other members were present.

ROLL CALL FOR THE AGRICULTURE COMMITTEE: All members were present.

Acting as chairman for the combined committees, Rep. Tom Hannah outlined the procedure the meeting was to follow. Testimony was to be given on House Bills 16, 265 and 275 -- the stream access bills.

CONSIDERATION OF HB 16: Rep. Bob Marks, chief sponsor of HB 16, testified on the bill. He outlined the history of HB 16. Rep. Marks served as chairman of the joint interim subcommittee No. 2, which submitted a report on the recreational use of Montana's waterways. Also serving on that subcommittee were Reps. Keyser and Ream. The report of the subcommittee describes: (1) the facts, issues, and legal concepts concerning the subject of recreational use of state waters; (2) the public sentiment on the subject, as gathered from public input at the committee's meetings; and (3) the reasons for and meanings of the committee's legislative recommendations. The report was marked as Exhibit T. Rep. Marks briefly described each section of HB 16 and the subjects addressed in each. Rep. Marks submitted a proposed amendment, marked as Exhibit A.

CONSIDERATION OF HB 265: Rep. Robert Ream, sponsor of HB 265, said this bill is a compromise bill put together by agricultural and recreational groups. He said HB 265 is a workable bill and provides a good

starting point. He briefly reviewed the five sections of HB 265.

Rep. Bob Marks, co-sponsor of HB 265, said he hopes the issue of stream access is resolved in this legislative session because all Montanans will be losers if legislation is not adopted. He said he has high regard for both landowners and recreationists.

CONSIDERATION OF HB 275: Rep. John Cobb, sponsor of HB 275, said his proposed bill is a good one, and that he would submit some amendments to it at a later date. Rep. Cobb said he felt the Supreme Court ruling on stream access was very poorly written, and did not clearly explain the idea of public trust. He said his bill is similar to HB 16 and HB 265, but differs in the restrictions it places on water classes. Under 275, the following classes are set forth: Class I meets the federal test for state ownership; Class II is any river that can be floated; and Class III includes small streams that cannot be floated. Rep. Cobb said that although the Fish and Game Commission is doing a creditable job, it is understaffed and therefore is not able to enforce stream use laws. He said Montana contains approximately 23,000 miles of streams or rivers. Of that total, approximately 9,000 miles of streams on public lands cannot be floated, but at the same time they are open to public use without restriction. He said HB 275 would add approximately 4,700 to 6,500 miles of floatable streams to the 9,000 miles of unfloatable streams. Rep. Cobb admonished the committee to carefully consider the issue of stream access to avoid possible closure of all the state's streams to future access.

PUBLIC TESTIMONY ON HB 16, HB 265 & HB 275:

Ron Waterman, an attorney representing the Montana Stockgrowers Association and members of the agricultural industry alliance, urged passage of HB 265. (His testimony was submitted and marked as Exhibit C.) He said that it is time to end the long debate and public controversy over stream access. He said the legislation sponsored by Reps. Ream and Marks addresses the major concerns of landowners. He said that landowners support the bill because it recognizes their property rights, protects them from liability, provides for portage routes around stream barriers, defines a high-water mark, prevents prescriptive easements and limits some types of recreational use. He

stated that the other two bills would not pass a constitutional test before the Supreme Court. He said this bill addresses all of the concerns within the limitations imposed by the decision of the Supreme Court. House Bill 265 divides Montana streams into Class I and Class II, and the recreational uses permitted are tied to the character of the water, with recreational activities that are not directly water related being prohibited on Class II streams without landowner permission.

Mr. Waterman called the measure a cooperative effort of agriculture, recreationists and state agencies. It deals with the concerns of landowners and defines the rights and responsibilities of landowners and recreationists.

Mary Wright, representing Trout Unlimited of Montana, testified in support of HB 265. She said she feels the legislation is balanced and fair and the bill is the least likely of the three proposed to result in protracted litigation. She further stated her opposition to HB 16 and HB 275. Her testimony was submitted and marked as Exhibit D.

Jim Flynn, director of the Dept. of Fish, Wildlife and Parks, also stated support for HB 265. He said HB 275 would narrow the scope of rivers available to recreation by establishing a floating standard. He feels it is highly vulnerable to constitutional question because of that limitation. A copy of his testimony was submitted and marked as Exhibit E.

Dennis Hemmer testified in support of HB 265 on behalf of the Dept. of State Lands. A copy of his testimony has been marked as Exhibit F.

Rep. William "Red" Menahan stated his support for HB 265. He stated that his hope was to get on with fine-tuning a bill that would benefit both rural communities and city people.

Robert VanDerVere of Helena, spoke in support of HB 265. He said he was glad the matter was "coming to a head." He said the bill could use a little work, but was basically a good approach.

Lavina Lubinas, a representative of Women In Farm Economics (WIFE), said that group supports HB 265, and urged its passage.

Gene Van Oosten, representing the Montana Cattlemen's Association, testified in support of HB 265. His testimony is attached as Exhibit G.

Jo Brunner, of WIFE, testified in support of HB 265. A copy of her testimony is attached as Exhibit H.

James Goetz, of Bozeman, representing the Montana Coalition for Stream Access, said he did not think HB 16 and HB 275 meet the intent of the language in the Supreme Court decision. He said HB 265 is a carefully tailored and considered compromise.

Dan Heinz, representing the Montana Wildlife Federation, testified in support of HB 265. He said the bill clearly defines boundaries left nebulous by the Supreme Court. It also provides protection for the landowners against abuses of those rights granted by the Court. Both HB 16 and HB 275 prohibit use on some waters where use was allowed by the Supreme Court decision. A copy of his testimony was marked as Exhibit I.

Jim McDermond, director of the Coalition for Stream Access, spoke in favor of HB 265 in its present form. He told the committees that he strongly opposes both HB 16 and HB 275. A copy of his testimony was marked as Exhibit J.

Craig Madsen stated that HB 265 does little to protect landowner rights. He said he thought HB 16 needed changes in some areas, but should be considered by the committee. He also suggested that the committee look at Rep. Ellison's proposed bill by itself or as a reasonable means of amending HB 16.

Andrea Billingsley, representing the Montana Cowbelles, testified in support of HB 265. A copy of her testimony was submitted.

Jim Wilson, president of the Montana Stockgrowers Association, stated the main concern he has is being able to work together to preserve the legislation now before the legislature.

Don McKamey, president of the Montana Woolgrowers Association, testified in support of HB 265. A copy of his testimony was marked as Exhibit K.

Richard C. Parks, president of the Fishing and Floating Outfitters Association of Montana, testified

in support of HB 265. He said he opposes HB 16 and HB 275. A copy of his testimony was marked as Exhibit L.

Gene Chapel, representing the Montana Farm Bureau Federaion, testified in support of HB 265. His testimony is marked as Exhibit M.

John Thorson, a Helena attorney, testified in support of HB 265. A copy of his testimony is attached as Exhibit M-1.

Dave Donaldson, executive vice president of the Montana Association of Conservation Districts, said that organization takes no stand relative to the substantive portions of the stream access bill, HB 265. He did, however, want to make the committee aware of areas of concern to that organization. A copy of his testimony is attached as Exhibit N.

Kevin Krumvieda, representing the Missouri River Flyfishers, testified in support of HB 265. He said his organization feels HB 265 is the best of the three bills proposed. His testimony was submitted and marked as Exhibit O.

Richard Josephson expressed his opinion on the three bills. A copy of his testimony is attached as Exhibit P.

Scott Hibbard, area rancher, said he is concerned with the invasion of landowners' privacy, and feels the water access bill infringe on the rights and responsibilities of landowners.

Ralph Holman, a landowner, outfitter and sportsman, appealed to the legislators not to turn over control of private property to non-owners. He said he does not favor any of the three proposed bills in their present form. He said there is room to compromise. A copy of his testimony is attached as Exhibit Q.

Lowell Hildreth, landowner, said he was tired of compromising with sportsmen. He opposes HB 265.

Norm Starr, rancher, testified in support of HB 16. His testimony is attached as Exhibit R.

Lawrence Grosfield, a rancher from Big Timber, said all three bills should be amended. He said HB 265 and HB 275 are unnacceptable because they both codify too much of the Supreme Court decision. In addition, both bills

go substantially beyond the Supreme Court decision in some areas and are unnecessarily complex and cumbersome. He said HB 265 does little to protect landowner rights. He said HB 16 needs changes in some areas, especially concerning fishing access and resource protection. He encouraged the committee to look closely at Rep. Ellison's draft bill by itself or as a reasonable means to amend HB 16. A copy of his testimony is marked as Exhibit S.

Rep. Keyser said HJR 36 was passed to get landowner and sportsman agreement on the stream access issue. He said that no member of the interim subcommittee approved of HB 16 in its entirety. He warned against the possibility that the legislature could not reach an agreement on some form of stream access legislation. Failure to agree on a bill, he said, would mean allowing the Supreme Court to make all stream access decisions.

DISCUSSION: Rep. Grady asked Mr. Flynn if the Dept. of Fish, Wildlife and Parks was prepared to handle the cost of providing portage around all the natural obstructions in Montana waters. Mr. Flynn said that at this time his department could not handle that expense.

Rep. Grady asked Mr. Donaldson if he had been consulted when HB 265 was drafted regarding the duties of the Montana Association of Conservation Districts, and was told that the group had not been contacted.

Rep. Ellison asked Mr. Waterman to clarify page 3, line 14 of HB 265, concerning recreational use of Class II waters. Mr. Waterman said that on Class II streams, overnight camping, big game and bird hunting, and use of all-terrain vehicles would be prohibited except by permission of the landowner.

In response to a question from Rep. Patterson, Mr. Flynn said the Dept. of Fish, Wildlife and Parks has no priorities set to implement any specific program regarding any rivers or streams. However, Mr. Flynn said the department does have some river management plans at this time.

There being no further questions or discussion before the committee, the meeting was adjourned at 10:30 p.m.

Tom Hannah
Rep. TOM HANNAH, Chairman

Exhibit D
HB 265
1-22-85

REPRESENTATIVE BOB REAM

HOUSE BILL 265

House Bill 265 is a bill put together by citizen groups interested in the issue of recreational use of state waters which cross private land. Agricultural groups and recreational groups participated in developing this compromise bill, and they deserve much credit for working together to come up with a workable bill, one that is acceptable to both sides.

Section 1
This section defines recreational use, barriers (both natural and artificial), and differentiates, between Class I and Class II rivers. Class I rivers are those that have been meandered, that have been judicially determined, as they flow through public lands, or support or have been capable of supporting commercial activity. They are the larger rivers of the state. Class II waters are all other surface waters.

Section 2
Class I waters may be used for fishing, hunting, swimming, floating in small craft or motorized craft and related incidental uses. On Class II waters, without permission of landowners, recreationists may not camp overnight, hunt big game or upland birds, operate all-terrain vehicles, place any permanent structures, or engage in non water-related recreation. In both cases the recreational activity must be below the high-water mark. This section also excludes any right to cross private land to get to recreational waters. Lease rights on [redacted] lands are not affected.

Section 3

Recreational users may, above the high-water mark, portage around barriers in the least intrusive manner possible. This may be to avoid fences or other artificial barriers constructed (and allowed) by landowners, or to avoid natural barriers. Either the user or the landowner may make a request to the supervisors of a conservation district, directors of a grazing district or county commissioners to establish a portage route. They shall examine the site with the landowner and a department representative to determine the most feasible route. Cost of establishing a route around an artificial barrier will be borne by the landowner,

around a natural barrier by the department. Costs of maintaining and signing either type of portage route after that, will be borne by the department. If there is still disagreement on a route, there is a provision to go to the district court which will have an arbitration panel to settle the dispute.

Section 4
This section restricts liability of landowners or supervisors to only willful or wanton misconduct.

Section 5
Prescriptive easement cannot be acquired through recreational use of surface waters, the streambed up to the high-water mark, or of portage routes.

This bill may not be the final word on this issue. We may have to do some fine-tuning in future sessions. But it does get us started in managing surface waters for public use while protecting rights of private landowners. I believe the department has the authority and the interest in working with all parties concerned. Montana has some good examples of splendid cooperation in river recreation.

EXHIBIT C
HB 265
1-22-85

Ron Waterman

TESTIMONY SUPPORTING HOUSE BILL 265

The Montana Stockgrowers Association and members of the agricultural industry alliance, consiting of the Montana Stockgrowers Association, Montana Wool Growers Association, Montana Association of State Grazing Districts, Montana Cowbelles, Montana Farmers Union, Montana Cattlemens' Association, Montana Cattle Feeders Association, Montana Farm Bureau Federation, Montana Water Development Association, Women Involved in Farm Economics, and the Agricultural Preservation Association, support passage of House Bill 265. These members of the agricultural community believe this bill is the most effective piece of proposed legislation addressing the stream access issue under consideration during this session and urge passage of the bill. The bill strikes a balance between the protection of private landowner rights and the identification of public recreational uses of the surface waters, beds and banks of the steams and rivers of Montana. This legislation identifies the responsibilities of both sectors affected by the stream access issue and proposes a fair and reasonable approach which accommodates the concerns of the landowner and the recreationalist.

A brief history of the events which brought the parties to their present position underscores the ineffectiveness of confrontation as a problem-solving procedure.

Several landowners, on two streams which receive significant public recreational pressures, sought to restrain and deny access to floaters and fishermen. After negotiations sponsored and encouraged by the Department of Fish, Wildlife and Parks failed, two suits were filed. In each the district court held in favor of the public and denied the landowner the relief sought.

While the suits were pending on appeal to the Supreme Court of Montana, the 1983 Legislature considered a variety of stream access legislation. Those efforts failed in deference to the appellate process. In May and June of 1984, the Supreme Court of Montana rendered two broad, sweeping decisions which allowed the public the right to use all state waters for any recreational and incidental uses. The use right was extended to the high water mark on all streams regardless of size. The decisions did not attempt to provide definition to many of the terms and rights extended, inviting a legislative response.

Fortunately the 1983 Legislature had created an interim study committee to receive testimony and propose legislation. The interim committee met both before and after the Supreme Court of Montana decisions and studied and considered primary and collateral issues raised by the decided cases.

The interim committee gave thoughtful deliberation to the issue and developed House Bill 16 which became the

catalyst for the remaining legislation being considered by this committee. It is fair to say that absent these actions the later activities of the agricultural community, working in conjunction with recreationalists and the Department of Fish, Wildlife and Parks, would have never occurred.

As the interim committee's action drew to a close, landowner groups met to outline the goals for upcoming legislation and to plan for this session. All groups agreed that it was critical to pass legislation this session, both to define areas left unclear by the Supreme Court of Montana's decisions, to allay the fears of landowners and recreationalists, and to avoid conflict as the newly won rights were tested and applied to specific streams other than the streams subject to the litigation.

To pass legislation which would be sustained in the event of a court challenge required an analysis of the limits of the Supreme Court of Montana decisions and a determination to propose legislation within those limitations. Six major goals were identified as being the subject of any proposed legislation. Those goals were:

(1) Recognition of private property rights;

(2) Restriction of landowner liability;

(3) Identification of the right of portage around barriers;

(4) Limitation upon prescriptive easement to avoid

the loss of land ownership through recreational use activity;

(5) A definition of high water to demonstrate it was equivalent to the "ordinary high water mark" of the Natural Streambed Preservation Act; and

(6) Limitation upon the public's use to follow and recreate upon diverted waters.

House Bill 265 addresses all of these concerns within the limitations imposed by the decisions of the Supreme Court of Montana. While the result reached in those decisions were not to the liking of most landowners, it is irresponsible to ignore those decisions or to propose legislation which is not cognizant of the opinions of the court. The Supreme Court of Montana, the third branch of state government, construing the Constitution of Montana, has declared rights to exist in the public which protect the continued recreational use of all waters of the state. Absent passage of a constitutional amendment restricting those rights, legislation which failed to abide by those decisions and the Montana Constitution would probably be declared void. There is little gained in passing legislation which is constitutionally flawed and likely to be declared void if challenged. Thus, while landowner groups appreciated the sincere efforts brought to the debate and drafting of both House Bill 16 and House Bill 275, they concluded alternative legislation was needed

which addressed the major goals identified and did so in a vehicle which would likely pass court challenge.

House Bill 265 defines "barrier;" "Class I waters;" "Class II waters;" "diverted away from a natural water body;" "ordinary high-water mark;" and "recreational uses for the Class I and Class II waters" as well as other terms used within the act. A barrier is a natural or artificial obstruction which totally or effectively obstructs the recreational use of a water course. The barrier is determined at the time of use and the right of portage arises only if a barrier exists. Stream fluctuations may cause barriers to exist at some time of the year but not at others.

Waters have been divided into Class I and Class II streams and the recreational uses permitted have been tied to the character of the water, with recreational activities not directly water related prohibited on Class II waters without landowner permission.

The right of the public to use the surface waters does not include the right to use waters diverted into a stock pond, if the stream has intermittent flows, and does not allow the public to follow the water diverted away from the natural water body and conveyed by canal, ditch or flood control channel.

The public's right to portage around barriers is preserved, as is the landowners' right to fence across

streams; however, a fence constructed consistent with designs approved by the Department of Fish, Wildlife and Parks and which does not interfere with the recreational use of the water will provide an alternative to portage. A landowner can create a portage--typically a gate or ladder. The bill contains provisions which create a problem solving procedure for developing a portage route should conflict arise, an unlikely event. The bill initially relegates the fact finding to the Board of Supervisors of a soil conservation district or other appropriate local board. These people were chosen because they have excellent knowledge of landowner issues and are knowledgeable of stream conditions in the county where they serve. Alternative fact finders are identified with an arbitration panel created to review unsatisfactory decisions.

Limitations upon landowner liability and prescriptive easement legislation is included. The proposed bill will be effective on passage.

There are distinctions between House Bill 265 and the other two bills before this Committee and the distinctions favor passage of House Bill 265. House Bill 16 uses navigability to measure the public's right to use surface waters without landowner permission. This approach was specifically rejected by the Supreme Court of Montana in

its two opinions and is unlikely to be upheld if challenged and reviewed on a third occasion. Moreover, using navigability alone to measure the public's rights would lead inevitably to extensive and extended litigation throughout the state, litigation which neither the landowner, the recreationalist nor the state can afford. At present few streams have been determined to be navigable and many which have enjoyed high public use--the Smith, Big Hole, and the Blackfoot--never have been declared navigable by any court.

House Bill 275, Representative Cobbs' bill, obviously proceeds on good intentions. It is modeled upon and carries forward many of the provisions of House Bill 265 with several exceptions. First, it creates a Class III stream which are streams too small to allow floating. Second, it eliminates the portage route determination found in House Bill 265. The bill, if adopted, would prohibit the public from making recreational use of waters in the smaller streams of the state, perhaps 35% of all state waters. This restriction is too narrow and it contradicts the Supreme Court of Montana decisions which rejected the ability to float a craft as the measure of the public's right and it ignores the reality that water recreation means something other than merely floating in a water craft.

Landowners are here today because of the persistent

controversy of stream access. Many landowners feel their rights have been hampered because of the unreasonable actions of a few individuals who have affected all of the agricultural community. Looking back and finding explanations for the present controversy, however, is not a positive means to resolve these issues.

Landowners are here today to support House Bill 265. They are not alone. Rather, this bill before this committee is a cooperative effect, the result of hours of work by dedicated landowners, recreationalists and the Department of Fish, Wildlife and Parks. Without this joint cooperation the present proposed legislation would not have developed. It is this type of continued cooperation which will yield benefits beyond the present legislation as these parties continue to work toward better relations between these differing communities which share common interests and goals.

The work and effort which resulted in the present bill cannot end here. The Department of Fish, Wildlife and Parks has powers already extended through Section 87-1-303, MCA, to regulate recreational activities on all streams available to public access and to consider protection of private property in that regulation. The Department has already experimented with different options to accommodate public and landowner interests on the Smith, Big Hole and the Blackfoot. These programs, and perhaps

others, must be considered to address future pressures and the needs of the landowner and the public.

It is time to end the long debate and public controversy concerning stream access. The appropriate resolution and one which warrants your support is found in House Bill 265. We encourage your support and the passage of this bill.

Ronald F. Waterman
Agricultural Alliance

7075R

Exhibit D
Water Access Bills
1-22-85

TESTIMONY OF MARY WRIGHT
MONTANA COUNCIL, TROUT UNLIMITED
H.B. 16, H.B. 265, H.B. 275
January 22, 1985

Mr. Chairman, Chairman Schultz, Chairman Ream, and Members of the Committees:

My name is Mary Wright, and I represent the Montana Council of Trout Unlimited. TU is a national non-profit fishing conservation organization with over 37,000 members in over 330 chapters. The Montana Council is the statewide governing body representing ten TU chapters and one affiliated organization with a total membership of approximately 1100. I am testifying this evening in support of H.B. 265 and in opposition to H.B. 16 and H.B. 275.

H.B. 265

Background. As many of you know, H.B. 265 represents an agreement in principle reached by a number of agricultural and sportsmen's organizations in a series of joint meetings held in December and January. A list of individuals and organizations that were invited to participate in these meetings is attached to this testimony as Appendix I. The agricultural groups initiated the talks by inviting the sportsmen's groups to the table, an action for which they deserve a great deal of credit. The Department of Fish, Wildlife and Parks also played an extremely useful part in the discussions.

The subsequent meetings showed that, working within the framework of the Montana Supreme Court decisions in the Dearborn and Beaverhead cases, we could agree on all the major issues raised by the Court's decisions as embodied in H.B. 265. After reaching agreement on these issues and circulating them as widely as possible among the participants, we presented our

proposal to Chairman Ream and Representative Marks.

Trout Unlimited and the other sportsmen's groups who have participated in this process generally agree that H.B. 265 presents a balanced, fair and reasonable articulation of rights and responsibilities of landowners and sportsmen within the framework of the Supreme Court decisions. We believe that it clarifies the issues not determined by the Court, such as the meaning of ordinary high-water mark and recreational use, and also provides certain protections to landowners in the context of public use of lakes and streams, including a limitation of liability and a declaration that recreational use of streams will not in the future result in acquisition of prescriptive easements. H.B. 265 provides for a right to portage and a procedure for establishing exclusive portage routes.

Provisions of H.B. 265. Chairman Ream has described the provisions of H.B. 265, and this testimony will not repeat his description. For the convenience of the committees, a brief outline of the bill is attached as Appendix II. TU would like to comment on specific portions of the bill.

First, we support H.B. 265's basic access provisions in section 2 as an accurate restatement of current law as articulated by the Supreme Court, subject to certain reasonable limitations. A legislative statement that any surface waters capable of recreational use may be so used by the public, including the beds underlying them and the banks up to the ordinary high-water mark, is essential for our support of any stream access legislation.

Second, with respect to defining recreational use, the Montana Supreme Court stated in the Beaverhead case,

> As we held in Curran,...the capability of use of the waters for recreational purposes determines whether the waters

> can be so used...Under the 1972 Constitution, the only possible limitation of use can be the characteristics of the waters themselves.

H.B. 265 does attempt to define recreational use according to the characteristics of the class of waters in that it would prohibit certain activities on class II, or small, streams. We believe that the restrictions on small streams, such as the prohibition on operating all-terrain vehicles and big game and upland bird hunting without permission, are reasonable. We also believe that they would withstand a court challenge because although the prohibited activities are recreation, they are not primarily water-related.

Third, TU would like to note that the definition of class I waters refers to a number of tests traditionally used by the courts to determine title to streambeds and public access. The Montana Supreme Court has stated that these tests are irrelevant to the issue of public access to surface waters. H.B. 265 cites the tests not for the purpose of deciding access, but only of selecting the proper definition of recreational use for a particular stream.

Finally, TU supports H.B. 265 as the bill least likely among the 3 bills under consideration this evening to result in protracted litigation. Although there may be some uncertainty with respect to whether a certain stream is class I or II, the practical effect is extremely limited. This is because the distinctions between class I and II streams result only in the prohibition of limited, non-water related uses on class II streams, thereby greatly reducing the potential for litigation.

Trout Unlimited has among its objectives the protection, identification and special management of our quality fishing waters, protection of trout

habitat, and protection of water quality. TU works to achieve these objectives in a number of ways, from participating in conducting and financing research projects to physically cleaning up streams and restoring degraded habitat. TU also supports enactment of laws and regulations in support of its objectives.

The Montana Fish and Game Commission has broad authority under 87-1-303 (b), M.C.A., to adopt and enforce rules governing recreational use of all lakes, rivers and streams which are legally accessible to the public. The Commission may regulate swimming, hunting, fishing, boating and other recreational activities in the interest of public health, public safety and protection of land. We would support the Commission and the Department of Fish, Wildlife and Parks in an aggressive management program to protect our water-related resources and to resolve land-related problems that may arise.

TU also supports programs, whether formal or informal, public or private, to educate both landowners and the public on their respective legal responsibilities accompanying their rights in the area of recreation. We believe that progress can be made by educating our members in the ethics of the sports we engage in.

We will strongly support any efforts to continue the dialogue between sportsmen's and landowner-agricultural interests. It has served us well and should be continued. It could help to promote reasonable interpretations to H.B. 265, which in turn would help reduce the potential for conflicts.

In another area of landowner-sportsmen cooperation, TU chapters have in the past conducted clean-up efforts on streams and participated in projects to restore and enhance trout habitat. We would commit to continue these

efforts in the future, and also volunteer to help landowners to install barriers that do not interfere with recreational use of surface waters as provided for in section (3) (2) of H.B. 265.

Finally, we fully support H.B. 265 as it is currently drafted, and believe that it is the best approach to take at this time toward resolving differences on the issue of stream access. As indicated before, Trout Unlimited's continued support of H.B. 265, or of any stream access legislation, depends upon the Legislature's adopting a measure that basically restates current law on public recreational use of surface waters as articulated by the Montana Supreme Court.

H.B. 16

Trout Unlimited opposes enactment of H.B. 16 on 2 bases. First, section 3 prohibits public use of the land underlying rivers that do not satisfy the federal test for navigability unless that use is unavoidable and incidental to use of the surface waters. This is an attempt to codify for Montana the case law of Wyoming, and limits recreational uses to those which involve floating to the exclusion of all other recreational uses. "Unavoidable and incidental" refer to activities involving use of the bed only to "push, pull or carry over shoals, riffles and rapids."

This restriction is a far cry from the rights of the public to use th State's waters currently in existence under Montana law. The Court speci fically based its Beaverhead and Dearborn decisions on the 1972 Constit limiting the areas which can be changed by legislation. The Court als specifically rejected the use of the federal navigability test to de the public's right to use Montana's streams. H.B. 16 ignores the s

adopted by the Court, that is, capability for recreational use. As such, Trout Unlimited does not believe that H.B. 16 would survive a constitutional challenge on this point, and then we would be back where we started. This Legislature would have missed an opportunity to solve this problem.

The second reason for TU's opposition to H.B. 16 also relates to litigation. H.B. 16 maintains the distinction between historically navigable and nonnavigable streams for purposes of determining what recreational uses are permitted on specific streams. Furthermore, the difference between the uses permitted on navigable streams and those permitted on nonnavigable streams is so great that both landowners and recreational users of streams would have a significant incentive to litigate. There are many streams in Montana that if tested might be judicially declared to be navigable under the federal test. No certainty as to recreational use would exist until a large number of cases were settled in court.

H.B. 275

Trout Unlimited opposes enactment of H.B. 275 on the grounds previously offered with respect to H.B. 16, that is, that it employs a test for recreational access, the federal navigability test, expressly rejected for that purpose by the Montana Supreme Court on constitutional grounds. Further, its restrictions on recreational use are unacceptable and would not, we believe, survive a constitutional challenge. We also believe that its provisions regarding recreational use of class II and class III streams are not consistent with the Court's declaration that recreational use is only limited by the character of the waters involved.

In addition, section 4, relating to the rulemaking proceeding to

classify streams and provide authority for closing streams because of public use are objectionable. The laudable purpose of the bill, the protection of the resource, should include means to deal with damage caused by private as well as public use if it is to accomplish its goal.

More important is the need for this section. Almost all the powers granted by section 4 of H.B. 275 already are granted in 87-1-303, M.C.A., to the Department of Fish, Wildlife and Parks. We see no need for the creation of a new system in the executive department, or for the costs involved, to duplicate existing legislative authority.

Conclusion

Trout Unlimited urges the committee to act favorably on H.B. 265. We appreciate the opportunity to testify this evening. Thank you.

APPENDIX I

December 19, 1984 - Stream Access Meeting - Helena, Montana

Montana Stockgrowers Association
Jimmie Wilson - Trout Creek
Fred Johnston - Agusta
Mons Teigen - Helena

Montana Woolgrowers Association
Gordon Darlinton - Three Forks
Bob Gilbert - Helena

Montana Association of Conservation Districts
Lorents Grosfield - Big Timber
Dave Donaldson - Helena

Montana Association of State Grazing Districts
Joe Etchart - Glasgow
Stuart Doggett - Helena

Western Environmental Trade Association
Norm Starr - Melville
Mike Micone - Helena

Montana Cow Belles
Carol Mosher - Agusta
Audir Billingsley - Glasgow

Montana Farmers Union
Terry Murphy - Great Falls

Sweetgrass County Preservation Association
Windsor Wilson - McLeod

Park County Legislative Association
Nancy McIlhattan - Livingston

Montana Cattlemen's Association
Senator Ray Lybeck - Kalispell

Montana Cattle Feeders Association
John Conter - Billings

Montana Farm Bureau Federation
Gene Chapel - Lewistown
Lorraine Gillis - Phillipsburg
Pat Underwood - Bozeman

Montana Grain Growers Association
Randy Johnson - Great Falls

Montana Water Development Association
Bob LeProwse - Milltown

Montana Dairymen's Association
Ken Kelly - Helena

Women Involved in Farm Economics
Joyce Spicher - Hingham
Lavina Lubinus - Lewistown
Jo Brunner - Power
Yvonne Snider - Lewistown

Agricultural Preservation Association
Sam Hofman - Manhattan
Tom Milesnick - Belgrade
Bill Asher - Bozeman

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Ron Waterman, Attorney - Helena
Rep. Bob Marks - Clancy
Rep. Kerry Keyser - Ennis
Rep. Jim Jenson - Billings
Rep. Bob Ream - Missoula
Sen. Jack Galt - Martinsdale
Sen. Paul Boylan - Bozeman

Sen. George McCallum - Plains
Sen. Max Conover - Broadview
James Silva - Butte
Larry Dodge - Helmville
James Kehr - Helena

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Montana Department of FISH, WILDLIFE & PARKS

Jim Flynn, Director
Ron Marcouex, Associate Director

Montana Wildlife Federation

Jim Richard - East Helena
Emily Stonington - Bozeman

Montana Trout Unlimited

Pete Test - Helena
Mary Wright - Livingston

Montana Outfitters and Guides Association

Craig Madsen - Great Falls

Medicine River Canoe Club

Jim McDermand

Montana Coalition for Stream Access

Tom Bugni - Butte

Montana Dude Ranchers Association

Max Barker - Agusta

Montana Floating Outfitters & Guides Association

Dave Kumlien - Bozeman

Skyline Sportsmen

Tony Schoonen - Ramsey

Federation of Flyfishermen

Greg Lilly - Bozeman
Bob Jacklin - West Yellowstone

Walleyes Unlimited

Scott Ross - Wolf Point

APPENDIX II

SUMMARY OF PROVISIONS
H.B. 265

1. General Rule

a. All surface waters capable of recreational use, including the beds underlying them and the banks up to the ordinary high-water mark, may be so used by the public without regard to the ownership of the land underlying the waters.

b. "Ordinary high-water mark" means the line that water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it. Characteristics of the area below the line include, when appropriate, but are not limited to, diminished terrestrial vegetation or lack of agricultural crop value.

Uses of Large and Small Streams

a. Class I Waters

* Defined as all waters which

- have been meandered, or
- have been judicially determined to be owned by the state, or
- flow through public lands, or
- are or have been capable of supporting commercial activity, or
- have been capable of supporting commercial activity under the federal navigability test.

* Recreational use means fishing, hunting, swimming, floating in small craft or other flotation device, boating in motorized craft (unless otherwise prohibited by law), or craft propelled by oar or paddle, and uses unavoidable or incidental thereto.

b. Class II Waters

* Defined as all waters which are not class I waters.

* Recreational use does not include overnight camping, upland bird or big game hunting, operation of all-terrain vehicles or snowmobiles, creation of permanent or semipermanent objects such as permanent duck blinds or boat moorages.

c. Exceptions

* Recreational use of diverted waters not permitted.

* No right to enter private lands to make recreational use of surface waters.

2. Other Issues

a. Right to Portage

* Provides right to portage around natural or artificial barriers in least intrusive manner possible.

* If landowner erects a barrier designed and located, as approved by the Department of Fish, Wildlife and Parks, which does not interfere with recreational use of surface waters, there is no right to portage.

* Provides a procedure for establishing exclusive portage routes.

b. Restriction on Landowner Liability

Landowner liable only for an act or omission that constitutes willful or wanton misconduct toward persons making recreational use of surface waters or using portage routes.

c. Prescriptive Easements

May not be acquired through recreational use of surface waters or portage routes after effective date.

d. Effective Date

Effective upon passage and approval.

Exhibit E
HB. 265
1-22-85

HB 265

Testimony presented by Jim Flynn, Department of Fish, Wildlife & Parks

At the outset, I would commend the Interim Committee on Stream Access for its efforts in attempting to resolve the concerns between landowners and recreationists on this subject. That committee was faced with a difficult task as a result of court action on the matter of public use of public waters, and in meeting that task they served as a valuable and necessary sounding board for the various concerns on both sides of the issue. Although the Interim Committee has addressed many concerns in HB 16, the department feels that HB 265 is the preferred bill and supports its passage.

Our fundamental concern with HB 16 is that it diverges from the Supreme Court's reliance upon Article IX, Section 3 of the Constitution. It attempts to set up the "narrow and restrictive test" that the court in the Hildreth case said was not permissible under the Constitution. HB 16 attempts to confine recreational activities on waters other than those which are navigable under the federal test by barring the use of the bed on those waters for all except safety, health, and portage purposes. That provision effectively precludes use of any waters which are not floatable. Because of that defect, the statute would likely be found unconstitutional.

In HB 275, the sponsor has attempted to address concerns about adverse impacts from floater use. Although the concern is well intended and focuses on certain problem areas, we believe that current statutes provide the opportunity to address the concerns expressed in Section 4 of HB 275.

For example, Section 87-1-303, MCA, appears to give the Montana Fish and Game Commission sufficient authority to address the problems raised. That section says, in part: "The Commission may adopt and enforce rules governing recreational uses of all...public lakes, rivers, and streams which are legally accessible to the public....These rules should be adopted in the interest of public health, public safety, and protection of property in regulating swimming, hunting, fishing, trapping, boating, including but not limited to boating speed regulations, the operation of motor driven boats, water skiing, surfboarding, picnicking, camping, sanitation and the use of firearms on the reservoirs, lakes, rivers and streams...."

As you can see, this statute gives the commission broad authority to address the problems that might be raised by floaters and recreationists on a stream. The commission also has the authority to regulate fishermen and hunters to preserve aquatic and wildlife populations. In fact, the commission has successfully used current authorities to address public use problems in the Blackfoot Corridor so we have some history of using this section to address the problems that heavy recreational use might cause.

House Bill 275 also attempts to narrow the scope of rivers available to recreation by establishing a floating standard. Like HB 16, it is highly vulnerable to constitutional question for that limitation. As a result, the department feels that HB 265 is the preferred proposal.

The department has recognized following meetings of the legislative interim committee and contacts with both agricultural and recreational groups that several areas of concern existed. Prescriptive easement, landowner liability, ordinary high water mark definition, landowners' rights to fence streams for livestock control and portage requirements were issues that needed clarification following the court's decision. HB 265 provides clarification of these issues.

The process of agricultural groups meeting with recreational groups to address these concerns and develop HB 265 is very noteworthy and significant. Although everyone may not be completely satisfied with all provisions, accommodations have been made to deal with the primary issues raised. We stand in support of HB 265 and the effort that has been made to address the concerns that were raised by the court process.

I would like to emphasize what I believe the positive impacts of the bill are.

First, in the definition section, the bill provides clarification to a number of terms which the Supreme Court declined to define. For example, the terms "barrier" and "ordinary high water mark" have been defined. In both cases, both sides attempted to find language which would allow reasonable people to understand the limits of their rights. Short of an exhaustive survey of every body of flowing water in the state and of every obstacle on every body of water, we feel that these definitions are as specific as can reasonably be drawn.

In addition, the bill identifies the kinds of recreational uses which will be allowable on the streams in the state. This has been done by defining permissible recreational use on Class II (small streams) to specifically water related activities. The bill both addresses landowner concerns about overly broad and abusive recreational use and at the same time remains consistent with the spirit of the constitutional aspects of the Supreme Court decision which recognizes legitimate recreational uses of the state's waters which will support those uses.

Likewise, the bill would not allow prescriptive easements to be taken on waterways nor would it allow the public to use diverted waters. The bill also addresses liability protection for landowners.

The bill has successfully recognized the legitimate concerns expressed by landowners throughout the state, but at the same time has kept intact the core principle of the Montana Supreme Court decisions - waters of the state are open to legitimate water related recreational uses which they are able to support.

Another significant provision of the bill concerns the matter of portage. Even with the Supreme Court decisions, differences may continue on certain rivers as to what constitutes a legitimate portage. Since the court has recognized the right of the public to portage around barriers, it is reasonable to expect that differences may, from time to time, arise. Currently there is no expeditious and fair way of resolving those differences. It is in this area that the department's presence may be most significant.

Under the bill, we would participate and cooperate with landowners in developing portage routes and maintaining them. Where the portage is caused by a natural object, the department would bear the cost of establishing a route and maintaining it. In addition, the department would assist landowners in developing fencing - where fencing is necessary - that may in some instances preclude the need for a portage around the fence. It provides a reasonably informal method of resolving differences over portage routes, and therefore promotes discussion and cooperation instead of confrontation.

Finally, it is important to continue to recognize the spirit in which this bill was born. It is 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.

I hope that the process which gave birth to this bill is the start of continuing and improving cooperation between landowners and recreationists. Because of the spirit of cooperation embodied in this bill and its responsiveness to the concerns on both sides of the issue, the department wholeheartedly endorses its passage.

Exhibit F
H.B. 265
1-22-85

TESTIMONY - HOUSE BILL 265

DENNIS HEMMER - COMMISSIONER OF STATE LANDS

HOUSE JUDICIARY COMMITTEE

January 22, 1985

On behalf of the Department of State Lands, I support H.B. 265. It is my understanding that the purpose of paragraph (5) of Section 2 is to ensure that the bill does not give the public rights on school trust lands that are inconsistent with trust status and to ensure that no state lessee's rights are diminished. However, the phrase "under lease on [the effective date of this act]" reads like a grandfather clause and implies that only current and not future lessees are protected. There is no reason for excluding new lessees or existing lessees upon renewal of their leases. I therefore recommend that this phrase be deleted and I support the bill with this amendment.

DEPARTMENT OF STATE LANDS'
PROPOSED AMENDMENT TO H.B. 265

1. Page 5, line 13
Following: "lands"
Strike: "under lease on [the effective date of this act]"

Exhibit G
H.B. 265
1-22-85

TESTIMONY CONCERNING HOUSE BILL 265
Introduced by Ream and Marks

Presented for the Montana Cattlemen's Association
by Gene Van Oosten, President

We do indeed have before us a remarkable piece of legislation. House Bill No. 265 was created by a loose alliance of agriculture organizations in order to codify what Montana agricultural landowners felt should be the proper relationship between them and the recreational and sporting users of navigable waters located on private land. This alliance wrote a bill which received almost unanimous approval from agriculture interests. We then began meetings with recreationist groups in order to discover whether this legislation could be modified sufficiently to gain their approval before its introduction as a bill. These people, quite naturally see landowners' rights from an opposing point of view. What a landowner sees as his right of ownership, a recreationist considers to be a restriction upon his freedom to enjoy the great outdoors. Nevertheless, the determination to agree was strong. Both sides made painful concessions. This bill is not perfect. But, many hands have participated in its fashioning, from both sides of the issue. Here lies its greatest strength.

The Montana Cattlemen's Association, after close study of this and other proposed legislation on the issue of recreational use of state waters, supports this bill as the nucleus of much needed legislation. A recent Supreme Court decision has placed the ownership of all surface water in the hands of the State. Therefore, new rules and new boundaries need desperately to be established.

Let us, very quickly, show you how this legislation will answer the concerns of many recreationists while at the same time protecting an individual rancher's right of ownership within the meaning of the Supreme Court case law. In Section 1 we find definitions of terms used in rule-making. Of these, "ordinary high water mark" stands out. This definition must,in any legislation that comes out of this committee, be perfect, for it constitutes a boundary line. Therefore, we do suggest amending the second sentene of this definition to read: "Characteristics of the area below the line include, when appropriate, but are not limited to a lack of terrestrial vegetation or a lack of value for agricultural purpose." We also suggest adding the Following sentence: " Flood plains or flood channels shall not be considered to lie between the ordinary high water mark, for recreational purposes, except when they carry suffieient water to support fishing or floating." We feel that this clearer and more complete wording will be as useful to recreationists and sportsmen as it is to our landowner members.

We ask the legal minds on this committee to examine the definition of "Class I waters" The alliance has tried to be thorough here. The difference between Class I and II waters is essential to this bill. It must be right. If it is not, then fix it.

Section 3 represents the level best of both recreationists and ranchers to establish guidelines for portaging around barriers. Just plain common sense was used as a reference for these provisions.

Section 4 takes care of the question of liability.very adequately.

Section 5 eliminates the possibility of the public acquiring an easement through its use of portage routes, or the waters themselves.

In Section 1 we have a definition of just what recreational use means with regard to both Class I and Class II waters. Section 2 deals with the right of the public

to make that recreational use. The mainstream of sportsmen and recreationists accepts these provisions. The rules on Class II streams are especially significant. They represent the manner in which responsible sportsmen would use these small, delicate streams even without rules.

The Montana Cattlemen's Association, in view of the tremendous loss of control over their land that our members have suffered as a result of recent Supreme Court action on surface waters, proposes that the following statement of intent be added to House Bill 265 or to any legislation on the subject: "This legislation does not, in and of itself, intend to provide the basic authority for public use of Class II surface water. These parts intend only to regulate and define public recreational use of surface waters decreed by other authority to belong to the State of Montana."

This bill will work. We ask for one amendment to clarify a definition. We ask you to make sure these definitions can be understood by all.when this bill leaves your committee. We suggest a statement of intent. But we do not want to lose any parts or sacrifice any of the concepts contained within. Months of study and negotiation have accomplished what years of conflict will not.

Exhibit H
HB 265
11-22-85

Jo Brunner

AGRICULTURE LEGISLATIVE WORK

MR. CHAIRMAN, members of the committees, my name is Jo Brunner. I am the water chairman for the Montana Women Involved in Farm Economics organization and I speak tonight in that capacity and also as a representative of the Montana Cattle Feeders Association and of the Montana Grange.

Mr. Chairman, it is the desire of our organizations to be recognized as participants in the months of discussions, consultations, drafting and re-drafting that finally rssulted in the legislation offered here tonight as HB 265.

We believe that working with the alliance of agriculture organizations we have found common meeting grounds for the concerns of our landowners whose properties hold the waters of our state and for those responsible recreationists who have an honest desire to use those waters without infringing on the rights of the landowners.

It is the intent of the three organizations I speak for tonight to support HB 265 on its way through the various aspects of legislative progress, studying the amendments and any changes, and striving for a continued cooperative effort between all the citizens of the state of Montana to foster understanding and good faith efforts to work our our problems.

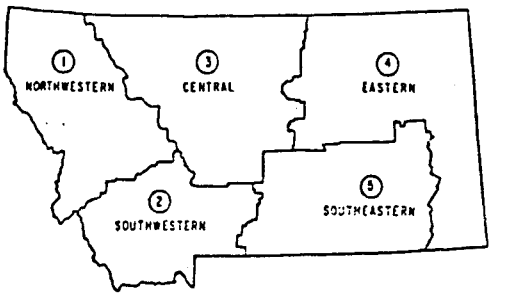
Thank you.

Exhibit I
H.B. 265
1-22-85

EDUCATION – CONSERVATION

Montana Wildlife Federation

AFFILIATE OF NATIONAL WILDLIFE FEDERATION



MONTANA WILDLIFE FEDERATION.
TESTIMONY IN FAVOR OF HB 265

Mr. Chairman and members of the committee:

My name is Dan Heinz. I am here on behalf of the Montana Wildlife Federation. Our organization represents 17 affiliated sportmen's clubs across the state. In addition there are over 4000 individual members. Our interests include waterfowl and upland hunters as well as floaters and fishermen.

We have been deeply involved in the stream access issue since its inception.

We share landowners concern that the court decision left ill defined boundaries that leave the open for abuse by uncaring recreationists.

We participated in interim efforts to negotiate commonground. HB 265 is a product of those efforts.

We strongly support compromise bill 265. This bill clearly defines boundaries the supreme court left nebulous. It also provides protection for the landowners against abuses of those rights granted by the court.

Both HB 16 and HB 275 prohibit use on some waters where use was allowed by the Supreme Court decision.

A lot of work from diverse interests has gone into HB 265. We urge you to give it favorable consideration.

We OPPOSE H.B. 275. This bill, while incorporating all of the concessions made by recreationists in H.B. 265, then goes on to restrict their rights on most of the rivers and streams in the state. Some landowners have expressed concern over the environmental impact of public use. Representative Cobb's bill presents an extreme over-reaction to this concern by giving broad and virtually unrestricted powers to the Department of Natural Resources and Conservation. This department would determine which streams we could use and under what conditions. It should be recognized that organized recreational groups are probably the best allies the landowners have on environmental issues. We care equally as much about stream habitat and preserving the scenic value as they do.
H.B. 275 subjects the recreationists to bureaucratic judgements totally beyond our control. We cannot condone the creation of this bureaucracy or accept the unfair restrictions it puts on the recreating public.

We SUPPORT H.B. 265. (In its present Form)

This bill is the result of a sincere and intense effort between an alliance of agricultural groups and a coalition of recreational groups brought together through the perserverance of Bill Asher. We commend the efforts of Ron Waterman and Mary Wright who, in consultation with these groups have drafted this bill; a true compromise which protects the rights of each.

Some groups or individuals may attempt to ammend this bill by introducing further restrictions on Stream use. To do so would certainly jeopardize passage of H.B. 265. We must not loose sight of the fact that to reach this compromise, the recreationists have already made concessions from the Supreme Court ruling.

In summary, we strongly OPPOSE H.B. 16 and H.B. 275.

We SUPPORT H.B. 265 in its PRESENT FORM.

Your consideration of our views will be greatly appreciated.

James W. McDermand

James W. McDermand
Medicine River Canoe Club
3805 4 Ave. South
Great Falls, MT 59405

6/0

Exhibit K
H.B. 265
1-22-85

DON MC KAMEY, GREAT FALLS
PRESIDENT OF MONTANA WOOL GROWERS ASSOCIATION
HB 265; STREAM ACCESS - JANUARY 22,1985

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE. FOR THE RECORD I AM DON MC KAMEY, A SHEEP AND CATTLE RANCHER ON THE SMITH RIVER SOUTH OF GREAT FALLS. I AM PRESIDENT OF THE MONTANA WOOL GROWERS ASSOCIATION. OUR RANCH HAS TEN MILES OF A HISTORIC RECREATIONAL WATERWAY FLOWING THROUGH THE PROPERTY UPON WHICH I AND MY FAMILY MAKE OUR LIVING. THE SMITH RIVER HAS FOR YEARS PROVIDED COUNTLESS FLOATERS AND FISHERMEN A WATERWAY FOR SPORT. I AM VERY FAMILIAR--DUE TO THE TEN MILES OF STREAM--WITH THE RECREATIONAL USE OF THE SMITH. I CAN TRUTHFULLY SAY THAT BY AND LARGE WE HAVE HAD FEW PROBLEMS WITH THE FLOATERS OR FISHERMEN. A LARGE FACTOR ON THE SMITH, HOWEVER, IS THAT FISH, WILDLIFE AND PARKS RECOGNIZES THE LARGE USE BY THE PUBLIC AND DURING THE MONTHS THE SMITH CAN BE FLOATED ASSIGNS A FULL TIME "RIVER WARDEN" TO POLICE THE AREA. IN MY OPENING, I ALSO WANT TO STATE CLEARLY THAT THE MC KAMEY RANCH HAS ALWAYS BEEN AVAILABLE TO THE HUNTING AND FISHING PUBLIC AS LONG AS PERMISSION FOR THOSE ACTIVITIES WAS FIRST OBTAINED. WE HAVE HAD TO TURN DOWN SOME HUNTING REQUESTS WHEN THE PRESSURE IS TOO MUCH. I THINK THAT IS ONLY REASONABLE IN THE INTEREST OF NOT ONLY SAFETY FOR THE HUNTERS BUT FOR THE RESOURCE THE SPORTSMAN IS ATTEMPTING TO HARVEST.

OUR ASSOCIATION MEMBERSHIP IS GREATLY CONCERNED ABOUT THE TWO SUPREME COURT RULINGS ON STREAM ACCESS THAT BROUGHT US TO THE THREE BILLS WE ARE HEARING TONIGHT. SERIOUS QUESTION IS RAISED OVER THE RIGHTS OF A PROPERTY OWNER AS A RESULT OF THOSE RULINGS. AT OUR ANNUAL MEETING THERE WAS NOT THE FINAL LANGUAGE FOR ANY BILLS ON STREAM ACCESS. THUS, I CAN NOT TESTIFY THAT EVERY MEMBER OF THE ASSOCIATION HAS SEEN THE PROPOSED BILLS. OUR BOARD OF DIRECTORS WHICH ARE ELECTED BY THE MEMBERSHIP HAVE ALL BEEN GIVEN COPIES FOR COMMENT. I APPEAR THIS EVENING TO TESTIFY IN FAVOR OF HOUSE BILL 265, THE BILL PRESENTED BY REPRESENTATIVE REAM AND REPRESENTATIVE MARKS AND COMMONLY REFERRED TO AS THE "AGRICULTURAL ALLIANCE-SPORTSMEN BILL". NUMEROUS MEETINGS HAVE BEEN HELD ON THE BILL AND WHAT YOU HAVE BEFORE YOU IS THE RESULT OF GIVE AND TAKE ON BOTH SIDES.

WE BELIEVE THAT A BILL MUST COME OUT OF THIS SESSION ADDRESSING: 1) A DEFINITION OF HIGH WATER MARK, 2)ADDRESSING LIABILITY OF THE LANDOWNER, 3) THE QUESTION OF BEING ABLE TO FENCE STREAMS IN ORDER TO CONTROL LIVESTOCK AND THEN SUBSEQUENTLY THE ISSUE OF PUBLIC PORTAGE 4) A BILL TO PROTECT AGAINST PRESCRIPTIVE EASEMENT RIGHTS,

HB 265 ADDRESSES THOSE AND OTHER ISSUES REGARDING STREAM ACCESS. WE BELIEVE THIS IS THE BILL AGREED TO BY NEARLY ALL OF THE AGRICULTURAL ORGANIZATIONS AND BY SEVERAL SPORTSMEN ASSOCIATIONS. I URGE YOUR APPROVAL.

Exhibit L
Water Access
1-22-85

Parks' Fly Shop
GARDINER
MONTANA
59030

Richard C. Parks, President
FISHING and FLOATING OUTFITTERS
ASSOCIATION of MONTANA

To: House Judiciary Committee
Ref: HB-16, HB-265 and HB-275

Mr. Chairman, members of the Committee, I appreciate the chance to appear on behalf of the Fishing and Floating Outfitters of Montana. My name is Richard Parks, owner of Parks' Fly Shop in Gardiner and president of FFOAM.

Ever since this issue came up several years ago there has been a lot of paranoia exhibited by recreationists and property owners alike. None of that was abated by the Supreme Court decision in the Dearborn and Beaverhead cases which ruled in the broadest possible terms in favor of the recreational users. I believe that those decisions were correct but they left behind a legacy of loose ends and undefined terms that people of ill-will could use to trample another's rights - nor would that have all been one sided. The actual problems that arose last summer clearly indicate that those who were looking for trouble could find it but that by and large the vast majority of people - sportsmen and landowners alike - are reasonable people.

We support the compromise bill HB-265 in prefrence to HB-16 and HB-275 because we believe that it does the best job of tying up those loose ends. Property owners are justifiably concerned that high water could mean flood water, that ditches would become highways and that recreational use would become a means of establishing a prescriptive easement across their land to access the water. Recreationists are concerned that fencing provisions could be used to harass the water user and more particularly that some property owners either do not understand the basis of the court decision or do not accept the ruling as what it is - the law of Montana.

HB-16 fails because it makes a clear effort to limit the effect of the court decision to such a narrow list of waters that the Court would be obliged to strike it down. It does not in my view address adequately the legitimate concerns of either land owners or recreationists. HB-275 fails for the same basic reason. Its major differences from HB-265 are in its effort to create a class of water which the Supreme Court has already ruled can't exist. Its alleged concern for the potential damage of aquatic eco-systems by recreational users is clearly a case of setting the fox to guard the hen-house. Worst of all it leaves in its wake a train of further undefined terms differentiating between class II and class III waters that will create endless additional trouble both in and out of court.

The advantages of HB-265 are many. It is necessary to define the terms used in the court decisions so that all parties can know what their rights and responsibilities are. This bill is the product of extensive discussion with a cross-section of interests and we believe it does that. The definition of "barrier" is so straight forward that virtually everyone has been able to agree on that. The definition of what is "recreational use" is much less clear. Left untouched the court decision could be read in such a way as to assert that if my feet were wet I could do anything. We do not believe that that is what the Court really meant and as a consequence differentiate two classes of water. In the smaller waters the definition of recreational use is restricted to water based activity - which after all is what started the issue in the first place. Notice that this is not the same as denying recreational use however defined as HB-16 would do-- or requiring permission which implys the right to deny as HB-275 would do. It does eliminate the objectionable uses that concern people - particularly the use of a stream bed as a highway.

Another major area of legitimate concern was the definition of "high water" which the court did not spell out. Reasonable people have been able to agree that what the court probably meant, being reasonable people, was the "ordinary high water mark". This term has a considerable history to support its continued use. By not addressing the question in the decision the court opened up irrigation ditches and other diversionary works to discussion. The basis for the court ruling is the Constitutional provision that the waters of the state are public waters. An argument could be drawn that therefore so are ditches. We do not subscribe to that view because the diversions are carried out by license of the state to convert the water to a private but benificial use and once legally diverted the water has lost its public character. HB-265 clearly states this principle.

When the Supreme Court declared that recreational users had the right to portage around barriers some people apparently believed that water craft operators were simply waiting for such a license to invade stream-side property. No one who has actually had to make such a portage believed that. By defining portage routs and the means to establish them HB-265 should remove the fear from the landowner and the temptation from irresponsible members of the public. Property owners are legitimately concerned that the court decision might open them to liability to recreational users of the water running through their property. Again HB-265 clearly removes their responsibility to the extent that it can be removed. Finally property owners were legitimately concerned that recreational use of waterways would be used to expand via prescriptive easement public access to their lands. for other purposes. Again HB-265 lays that issue to rest.

In conclusion we ask the Committee to recognize that much of the recreational public are also land owners and would not support a proposal that we believed was inimical to our rights as land owner The FISHING and FLOATING OUTFITTERS ASSOCIATION of MONTANA believ that HB-265 correctly addresses the issues left unresolved by th Supreme Court decisions and supports its passage intact.

Thank you.

Exhibit #6
1-22-85

MONTANA FARM BUREAU FEDERATION

502 South 19th
Bozeman, Montana 59715
Phone (406) 587-3153

TESTIMONY BY: Gene Chapel, Montana Farm Bureau Fed.

BILL #265 DATE 1/22/85

SUPPORT _____ OPPOSE _____

Mr. Chairman and members of the committee:

For the record my name is Gene Chapel and I own and operate a cattle ranch in Fergus County. I am president of the Montana Farm Bureau, which has a membership of approximately 4000 families. Our membership is broad-based, both from the standpoint of being statewide and also representing every commodity or endeavor that attempts to generate a living from working the land.

Water and its use along with the management of crops and livestock as it pertains to our streams and rivers in Montana are the very life blood of agriculture. Our delegates have outlined a set of policies pertaining to stream bed access that they feel are essential if they are to continue to manage their properties in a manner that is good for their families and the public.

Farm Bureau members (and god bless their wisdom) are not so naive as to hide their heads in the sand and not recognize and address the fact that the two Supreme Court cases did in fact, take away some very basic and assumed property rights, and that we will have to live within the parameters set up by these decisions. You all realize this was done under the Public Trust Doctrine that someday this legislature will have to address before all property rights are undermined.

Okay, we have the court cases and we can't go back and change them, so now it is up to the legislature to define those areas that are open to conflict or interpretation, so the recreating public can use the streams and we in agriculture can manage

our lands and do what we know best with as little interference as possible.

Farm Bureau is convinced that the areas that need definition and direction are:

1. Define a high water mark.
2. Give landowners the right to erect barriers such as fences, water diversio bridges, etc, and help us come up with a management tool to allow water users portage around them.
3. Protect landowners from unfair liabilities.
4. Protect and allow Diverted waters.
5. Prevent prescriptive easement, obtained thru recreational use.

Believe me, distinguished members of the House, Farm Bureau has worked long and hard on this issue. We were involved in the court cases, worked with the last legislature, met with virtually every agriculture group, met with many recreation groups and many individuals.

In comparing our policy, listening to our delegates at our Annual Convention, and talking to attorneys, Farm Bureau feels that House Bill 265 is the most viable and workable bill that you have before you.

You must realize that Farm Bureau would like to have more for agriculture, but in reality, house bill 265 addresses most concerns and the recreation people feel that they can live with it. We realize that this is a tough decision, but please don't leave us hanging out there with nothing because agriculture, with all of its problems, cannot afford the costs or loss of important management tools if we are to continue to form the tax base and economy for Montana that everybody has enjoyed up t o now.

As I have said before, if you see a storm coming, don't turn tail and run, because more than likely you will get wet anyhow -- instead slicker up and get the job done.

We in Farm Bureau ask your support in getting House Bill 265 enacted.

Thank You,

Gene Chapel,
President, Montana Farm Bureau Federation

EXHIBIT M-1
Water Access Bills
1/22/85

JOHN E. THORSON
643 DEARBORN
HELENA, MONTANA 59601
(406) 449-6498

January 22, 1985

I have been asked to testify on my personal legal opinion of the several bills pending before the 49th Legislature on the issue of the public's rights to recreational use of the waters of the state. These bills include HB 16, introduced upon the request of Joint Interim Committee No. 2; HB 265 (Ream and Marks); and HB 275 (Cobb).

While I am not a member of the Montana bar, I feel I have the necessary qualitifications to offer an formed judgment on the legal merits of these bills. I am a member of the New Mexico, California, and U.S. Supreme Court bars. For the last three years, I was Director of the Conference of Western Attorneys General and editor of that organization's legal journal, Western Natural Resource Litigation Digest. Western water rights, including public rights in those waters, was the most important interest of that 14-state organization. Finally, I have studied Montana's law on this subject in preparation for papers delivered on the topic to the Select Committee on Water Marketing and to Joint Interim Committee No. 2 last July.

I thank you for the opportunity to speak on some of the issues raised in these pending bills. In these remarks, I first describe an analogy that may help understand the concept and workings of public rights in water. Second, I address a general concern that I have about HB 265 and HB 275. Third, I specifically identify some of the problems or attributes of each of the bills.

I. An Analogy

A useful analogy is to compare public and private rights around a waterway to similar rights and responsibilities involving an urban street and sidewalk. After all, the streams and rivers of our country were the original streets and highways for all types of commercial and social activity. Understood in this fashion, these public rights in waters may not seem to be such a radical notion.

In this analogy, the street substitutes for the waters of the stream or river; and the sidewalks on both sides represent the banks up to the high water mark. The property beyond the sidewalk is privately owned; and, while the property underlying the road or sidewalk may also be privately owned, the private ownership is subject to a perpetual easement for public transit. At certain locations along the roadway, there is no sidewalk. At other locations, vehicles in driveways block the sidewalks.

In this street analogy, certain commonly accepted rights, responsibilities, and behaviors automatically follow. The street is used for a range of social activities from commercial trucking to recreational motoring. Motorists commonly park their vehicle at the curb -- even overnight.

The sidewalk is used by pedestrians for a similar range of commercial and social purposes. The adjoining property owner owes a duty of care to the pedestrians he knows will be there: he can't break glass on the sidewalk in an effort to injure those who pass. Neither can he fail to remove broken glass that he knows is likely to cause harm.

Likewise, the pedestrian owes certain duties to the adjoining landowners. He may go onto their property when specifically or implicitly invited, but he is guilty of trespass when he is not invited and knows the property is private property and not a park. Yet, the pedestrian commonly crosses on to private land or into the street when the sidewalk ends or to avoid those cars parked in driveways; and the landowner is rarely heard to complain.

The local government has certain authority in this analogy. It can condition the use of a popular street (for instances, limitations on load weight) and sidewalk but would be hard pressed to permanently close either. [In our stream access cases, the Court has also conditioned use by allowing recreational, not commercial, use of the surface water of the state.] The local authorities can, however, proscribe the littering of the street and the establishment of a permanent residence on the sidewalk.

Of course, there are limitations to any analogy -- including this one. For one, monitoring the safety of several miles of stream frontage is very different from monitoring the sidewalk outside the store. For another, camping on the river bank is an integral part of the normal float trip while

camping on an urban sidewalk would not be allowed. Most importantly, however, this analogy from one area of our life does suggest the commonly accepted rules by which public and private rights are balanced.

II. General Concern

I appreciate the fact that each of the bills attempts to reach the difficult balance between public rights in water and private rights in the appurtenant land. In particular, I commend the efforts of the sponsors of HB 265 to reach a workable accord between agricultural and recreational users. I think such negotiations between the parties most knowledgeable and affected are more likely to result in a harmonious solution than what can be accomplished by a court attempting to invoke general principles on the basis of the "cold" record of a case.

Yet, to the extent each of these bills attempts to classify the waters of the state for different recreational usage (e.g., Class I, II and III) on the basis of title or ownership of the underlying lands, I think there is a real danger of walking where the Montana Supreme Court has already tread. For example, while HB 265 may be the best political solution, it may not be the best legal solution. There are many good reasons why this legislature might wish to choose a practical compromise that has been artfully fashioned. My job is only to make you aware of its legal uncertainties.

The Court in Montana Coalition for Stream Access v. Hildreth said "the question of title to the underlying streambed is immaterial in determining navigability for recreational use . . . ."(No. 83-174, p. 6). The Court indicated in the Curran decision that this holding is based on both the Montana constitution and the public trust doctrine (No. 83-164, p. 14). Unless the Court changes its mind (which is not impossible given new membership), such a holding does not allow the Legislature much room to act. The supporters of HB 265 and 275 may argue that title is not being used in their bills to determine recreational usage but only to describe physical differences between streams. If that is the argument, I think it approaches splitting hairs.

With reference to HB 265, which is the bill of the three I prefer, I think the essential difference between class I and class II waters is

minor. I would recommend providing only one class of waters and include overnight camping (which I believe to be integrally related to water-based recreation) below the high water mark as a permissible recreational use on any of the waters of the state. I would prohibit big game hunting, upland bird hunting, the operation of vehicles not designed for water, permanent structures, or other activities unrelated to the water. After all, we don't approve of throwing rocks from the street into private yards; nor do we allow the building of a flower stand in the middle of a street or the operation of a tractor on a sidewalk.

Comments on HB 16:

Section 1:

(1) The definition of "barrier" is too narrow in that it does not include a natural or artificial obstruction located on the banks of a stream below the high water mark. Section 3(1) of this bill allows public use of this zone when streams are navigable for purposes of state title; thus, the public's portage rights should extend to barriers on the bank.

(2) The reference to "lack of terrestrial vegetation" is too narrow. The "diminished" standard in HB 265 is a more realistic test.

Section 2:

(1) This is a correct statement of Montana law as interpreted by the Montana Supreme Court in Montana Coalition for Stream Access v. Curran. The Court indicated that this principle is founded in both the state's constitution and the public trust doctrine.

(2) While the issue of public access to waters diverted away from a natural water way for beneficial use has not been addressed by the Court, this subsection seems quite reasonable. Montana's constitution indicates that, while the waters are the property of the state, they are "subject to appropriation for beneficial use." The public trust doctrine, which seeks to protect longstanding public uses and to preserve natural values, is not jeopardized by legal appropriation and diversion through an artificial waterway.

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Section 3:

In Curran, the Court is clear that the public's right of access extends to the high water mark . The Court is not clear as to its legal basis for this holding. The holding is probably a more specific application of constitutional and public trust principles. If so, the Legislature would be unable to limit the right in the case of streams not navigable under the federal test.

Section 4:

This is generally a correct statement of the law as set forth in Curran.

Section 5:

(1) In "fine-tuning" the public's rights in water, the Legislature probably does have the authority to establish rules of liability. As the section now reads, it seems to limit liability only as against persons in possession of land. The Legislature may wish to extend this limitation to actions against the property owner.

Section 6:

(2) Prohibiting the establishment of prescriptive easements "through the use of land . . . for recreational purposes" would extend to many situations other than those encountered around waterways. The ramifications of such a broad prohibition have not been studied by the Committee.

Comments on HB 265:

Section 1:

(1) I feel the intent of the Court was to allow portage rights around barriers, either natural or artificial, which are located anywhere between the high water marks. This definition seems to exclude artificial barriers not actually in the water but on the banks within the high water marks.

(2), (3), and (7) See comments under "General Concern," supra.

Section 2:

(1) and (2) See comments under "General Concern," supra.

(3)(a) I agree that stock ponds were probably not contemplated by the Court's decisions. There may be, however, some sizeable, publically owned impoundments within the state which, though fed intermittently, should be available for public recreational use.

(3)(b) I believe this to be a proper restriction on public access [see comments on HB 16, Section 2(2), supra].

(4) This is a correct statement of the law (subject, of course, to the public's portage rights).

Section 3:

(1) I believe this to be a correct statement of the law.

(2) line 24 & 25: I believe the approved barrier also should not interfere with the public's right of the stream bank up to the high water mark.

(3) Generally, I feel that the formal establishment of a portage route is an innovative way to meet legitimate landowners' concerns. Several concerns, however:

(c) Do you really want to haul all the supervisors out to the stream to determine portage routes? Isn't this more appropriately handled by a departmental representative?

(e) What will be the cost to the department?

(h) Perhaps there should be a provision for the arbitration award to be incorporated into a judgment of the district court. Such a judgment would aid in enforceability.

Section 4:

(1) As previously mentioned, the Legislature may wish to specifically

provide that property owners share in the limited liability.

(2) A "willful or wanton misconduct" standard may be too restrictive. I would suggest adding "gross negligence."

(3) The limited protection against liability should also extend to members of the arbitration panel.

Section 5:

(2) This subsection is unnecesary as the Court has essentially created a public easement through its decisions. I suspect the language is included to provide for the possibility the Court might change its mind.

Comments on HB 275:

Section 2:

(1) Same comments about definition of "barrier" as expressed concerning HB 265 [Section 1(1), supra].

(2), (3), and (4) See comments under "General Concern," supra.

(8) See comments under "General Concern," supra.

Section 3:

(1), (2), and (3) See comments under "General Concern," supra.

(4) This is a confusing sentence. Perhaps break into a series: "The right of the public . . . does not include the right to make recreational use of (a) waters in a stock pond; (b) waters in an impoundment fed by an intermittently flowing natural watercourse; or (c) waters diverted away from a natural water body for beneficial use . . . ."

Section 4:

While setting forth the issues and criteria to be met by the department in developing rules, the section is extremely vague as to how and when the procedure is to be invoked.

Section 6:

(2) Again, I suggest including a "gross negligence" standard.

Section 7:

(2) Again, the Court has essentially created a public easement in water. This provision seems irrelevant.

Exhibit N
1-22-85
HB. 265

January 22, 1983

TO: The Honorable Tom Hannah, Chairman, House Judiciary Committee

TESTIMONY ON HOUSE BILL 265 ON STREAM ACCESS BY THE MONTANA ASSOCIATION OF CONSERVATION DISTRICTS

The Montana Association of Conservation Districts takes no stand relative to the substantive portions of the stream access bill. However, there are two areas of concern we wish to express tonight.

1. Page 6, lines 3 through 7 describes the establishment of portage route over a barrier. We recognize that relative to the potential damage to landowners land, the supervisors have expertise to recognize possible damage to land and stream banks as a result of portage.

Our concern is whether the supervisors can determine whether the landowners rights will be violated. This responsibility is outside the normal mission of Conservation Districts.

The Association has concerns about obligating the supervisors because the supervisors are unpaid volunteers. There is a fear of overloading the districts.

2. Page 8, lines 14 through 19. We would suggest an amendment that would strike on line 16, after the word "person" all of line 16 and 17 to the word "except."

This would assure that the supervisors would not be liable to any person whether they be recreationists or landowners.

Thank you for the opportunity to express our views.

Dave Donaldson, Executive Vice President
Montana Assn. of Conservation Districts
7 Edwards Street
Helena, Montana

Exhibit O
HB 265
1-22-85

MISSOURI RIVER
FLYFISHERS

P.O. Box 6398
Great Falls, MT 59406

January 22, 1985

Statement
to the
House Judiciary Committee
concerning
Stream Access

The Missouri River Flyfishers of Great Falls, Montana, supports HB 265 in its present form. We feel it is the best bill of the three, and it seems to have the spirit of compromise begun with HB 884 of the last session. We would hope that this committee, and ultimately the legislature, will see the wisdom of a good compromise bill, and pass HB 265 into law.

It is time we started working together rather than continue the fear-based legal fighting that drains resources best used elsewhere.

We feel that HB 16 and HB 275 are not good faith bills, and fall short of a workable compromise. We ask that you vote against sending these bills to the House.

Thank you.

Steven L. Rummela
Secretary

Water Access Bills
1-22-85

TO: House of Representatives
Montana 1985 Legislature
Written Testimony on House Bill 16
(and other bills)

FROM: Richard W. Josephson
34 Spring Drive
Mallard Springs Subdivision
Big Timber, Montana 59011
Occupation: Attorney

At the time this testimony was prepared it was unclear whether Rep. Ellison's bill would be before the Legislature, or whether I would be testifying in favor of the Interim Committee's bill, House Bill 16.

My testimony can be summarized as follows:

ORDINARY HIGH-WATER MARK:

The definition of "ordinary high-water mark" that I favor is contained in Rep. Ellison's bill:

> "'Ordinary high-water mark' is the line which water has impressed on soil by covering it for sufficient periods of time to deprive the soil of its vegetation and to destroy its value for agricultural purposes. Flood plains or flood channels shall not be considered to lie between the ordinary high-water mark, for recreational purposes, except when they carry sufficient water to support fishing or floating."

The first sentence of the above definition is from the Soil Conservation Districts' definition used for a number of years to administer the Streambed Preservation Act, apparently without objection. Rep. Ellison has added to this definition a sentence excluding the flood plain and flood channels.

House Bill 265 uses the term "diminished" terrestrial vegetation. During spring flood stages or winter ice and snow jams, streams can cause "diminished" vegetation outside of the ordinary high-water mark. It is submitted that this Legislature should not expand the concept of the ordinary high-water mark.

The exclusion of dry flood channels and the flood plain is important, expecially under House Bill 265. Under House Bill 265, on "Class 1" waters, the area between the ordinary high-water marks may be used by the public to camp overnight, hunt, use firearms, operate motorized vehicles or create permanent or semi-permanent objects (like duck blinds, camps or docks).

Under House Bill 265, it is my opinion, that the right to conduct these activities arises by implication because these activities are not permitted in Class 2, and hence by implication are permitted in Class 1 waters.

Under House Bill 265, because of the broad definition of Class 1 waters, almost any stream in the state usable by a commercial guide would be Class 1 waters.

RECREATIONAL USE DEFINITION:

House Bill 16 does not define what activies constitute "recreational use".

Rep. Ellison's bill does define recreational use of surface waters to include:

- fishing;
- swimming;
- floating;
- boating in motorized craft;
- boating in a craft propelled by oar or paddle; and
- coincidental picnicing,

all within the ordinary high-water mark.

Rep. Ellison's bill also provides that, for waters that have not satisfied the federal navigation test for streambed ownership, recreational use of surface water does not include:

- overnight camping;
- operation of all-terrain vehicles or other motorized vehicles;
- hunting; and
- activities not primarily related to water related expeditions.

Rep. Ellison's bill also might imply, by implication, that the above items, because they are enumerated, are allowed on all streams that do satisfy the federal navigation test for streambed ownership.

House Bill 265 allows, by implication, the following activities, by the public, on Class 1 waters between the ordinary high-water marks:

- overnight camping;
- big game hunting;
- upland game bird hunting;
- operation of all-terrain vehicles or other motorized vehicles not primarily designed for operation upon the water;
- placement or creation of permanent or semi-permanent objects such as duck blinds or a boat moorage.

Under House Bill 265, because of the broad definition of Class 1 waters, almost all waters usable by a commercial guide could be used for the activities outlined above.

For example, there are springs and sloughs that flow into major rivers. Many such springs and sloughs are excellent duck hunting areas. Could a commercial guide build a duck blind on such a slough or spring, without permission from the landowner or without regard for the land ownership?

Does the use by a commercial guide, of this spring or slough, convert the property into Class 1 under House Bill 265?

I question whether any legislation should allow overnight camping or structures on stream and river banks without the permission of the landowner. What impact would stream bank camping have on landowners, fire danger, and sanitary conditions?

PORTAGE:

I am pleased that House Bill 16 has only codified the Supreme Court's portage language.

I am impressed by the arguments that portage should be left out of all legislation.

I am further concerned that any portage allowed above the ordinary high-water mark is a "taking" of private property without due process, and may subject the State of Montana to inverse condemnation actions.

BARRIER:

If this Legislature does not codify the issue of portage, the definition of barrier can be omitted.

QUESTIONS:

Is a waterfall a barrier?

Are long stretches of rapids a barrier?

Can the public portage several miles by vehicle?

Is a strong current, in a stream, a barrier which prohibits upstream portage?

There are numerous other and similar questions that we can all think of when addressing the issue of barriers.

RESTRICTIONS ON RECREATIONAL USE OF WATERS:

House Bill 16 and Rep. Ellison's bill preserve, to some degree, the Supreme Court's limitation of recreational use to "waters capable of recreational use". Are there some waters not "capable of recreational use"?

House Bill 16 and Rep. Ellison's bill provide that the public may not make use of surface waters which are diverted away from a natural water body for beneficial use pursuant to Title 85, Chapter 2, parts 2 or 3.

Everyone seems agreed on this issue.

TECHNICAL POINT:

The references to Title 85 should be re-checked to be sure they refer to the proper sections of the existing water law codes.

A. Waters that satisfy the federal test of navigability for purposes of state ownership.

House Bill 16 and Rep. Ellison's bill allow the public to use the land between the ordinary high-water marks on these larger streams.

B. Other waters:

House Bill 16 allows the public's use of the land between the ordinary high-water marks on these "other waters" as follows:

[When] such use is unavoidable and incidental to the use of the waters [recreational use]; or

[When] the owner of the land or his authorized agent grants permission to use the land.

Use of the land between the high-water marks is limited to use which is unavoidable and incidental to the use of the waters permitted under [Section 2] only when the use is temporarily necessary for purposes of safety, health, or by-passing barriers.

Rep. Ellison's bill follows House Bill 16, except, on "other waters". Rep. Ellison's bill allows use of land between the high-water marks when: "such use of the land is unavoidable and incidental to the right of the public to make recreational use of the surface water only when use is temporarily necessary for accomplishing the recreational use of the surface waters."

C. House Bill 265: House Bill 265, in my opinion, constitutes a "taking" of private property rights under the United States and Montana Constitutions.

MONTANA HAS ALWAYS RECOGNIZED PRIVATE OWNERSHIP TO THE LOW-WATER MARK ON NAVIGABLE STREAMS AND TO THE CENTER OF THE STREAM ON ALL OTHER STREAMS. THE OWNERSHIP ON NAVIGABLE STREAMS TO THE LOW-WATER MARK HAS ALWAYS BEEN SUBJECT TO SOME KIND OF A NAVIGATION EASEMENT. ANY EXPANSION OF THIS EASEMENT MAY BE A "TAKING" OF PRIVATE PROPERTY RIGHTS WITHOUT JUST COMPENSATION AND DUE PROCESS.

LAND-OWNER LIABILITY:

House Bill 16 and Rep. Ellison's bill and the "other bills" before the House attempt to solve the problem created by the Montana Supreme Court cases regarding landowner liability to the public. I am not an expert on the issue, however, I would hate to think that dangerous rocks on the bank, a steep bank, livestock or a hanging branch would constitute a "willful" hazard that would cause the landowner to become liable if a member of the public were injured.

PRESCRIPTIVE EASEMENT:

A. House Bill 16 and Rep. Ellison's bill contain basically the same provisions. Both of these bills provide that a prescriptive easement cannot be acquired by the recreational use of land or water.

This is very important. It is important to preserve the remaining good relations between landowners and the public. The landowner would hate to think that by acquiescing to people crossing private property to reach a stream or to hunt creates a prescriptive easement in the public.

B. House Bill 265 deletes "land" and only provides limited protection against the establishment of prescriptive easements. House Bill 265 provides that a prescriptive easement cannot be acquired through recreational use of surface waters, including the streambeds underlying them and the banks up to the ordinary high-water mark or of portage routes. HOUSE BILL 265 DOES NOT EXEMPT THE RECREATIONISTS USE OF LAND GETTING TO THE WATER OR HUNTING. Does the landowner have to lock up his land to prevent the public from acquiring an easement?

STATE MANAGEMENT:

Rep. Ellison's bill is the only bill that affirmatively attempts to put some duty on the state to step in and protect a resource if the public is damaging the resource.

In my opinion, the State of Montana should limit the exercise of the "public trust" doctrine until its impact or potential impact on our waters can be studied and necessary regulations and/or laws enacted to protect the resources. The State of Montana has the power and the obligation to protect these resources from "over-use" by the public. The state could, in my opinion, restrict overnight camping and placement of structures on the streambank, for example, in the name of public health and safety.

What about protecting the wild trout and critical wildlife areas? What about protecting the rancher during calving and at other times? What about protecting the residential owner from hunting in the "front yard" next to a creek? Et cetera.

CONCLUSION:

The "floating and fishing" aspect of the public trust doctrine can be understood by most people of this state. When boating, you may have to stop along the bank for various reasons. While fishing, the fisherman goes onto the bank and occasionally around a log or rock.

To construe the Montana Supreme Court cases to include all of these other things suggested by House Bill 265 is not proper. Nor is it proper for this Legislature to codify and expand the Montana Supreme Court decisions. Your final decision will have great impact on property rights and values; and upon the relations between landowners and recreationists.

If some of the existing property rights have been taken improperly, which remains to be seen, codification of this taking in legislation is only exonerating the thief. Some degree of trust should be placed on the courts to clarify their own rulings as they apply to the various cases that may come before them.

Respectfully submitted,

Richard W. Josephson

Exhibit Q
Water Access Bills
1-22-85

January 22, 1985

House of Representatives Judiciary Committee
State Capitol
Helena, Montana 59601

Mr. Tom Hannah; Chairman

As a Landowner, Outfitter, sportsman and recreationist (most of us qualify) I sincerely appreciate efforts of the Legislature to negotiate and establish reasonable controls that protect property rights and clarify decisions that could detrimentally effect every rancher, farmer, urban lot and cabin site owner and future owner of Montana land, as a result of the 1984 Supreme Court decision. Do not make the mistake of believing you are not effected. We may well find ourselves all in the same boat.

Where will we be without reasonable controls? How much future litigation do we face? How much will all land values, stream side, urban lots or ranches depreciate? Will land ownership become a detriment? Unquestionably in my opinion water is a public assett, however, so are all forms of wildlife, snow, rain and the air we breathe that exists in our homes. Is there a difference?

Landowners and sportsmen know the problems and potential problems from experience, to potential and future landowners, to the youth of Montana who will some day own your own lot, acre or tract, do you want a reasonable right to control, to invite guests to enter or do you want the public to have free use of your property? What incentive will there be to obtain property for agricultural or other purposes that you have little right to control? How much would your urban lot, your lawn or your home be worth if you lost the right to control? What if you couldn't even lock your door? Every man, woman and youth who own or hope to own urban or rural property desperately need the protection of reasonable controls.

I do believe there is room for compromise and negotiation of Boaters-Landowners agreements similar to those in effect on the Blackfoot, Smith and other streams. That permit qualified boating, boating gates, etc. however many small creeks are 80 to 90 per cent obstructed by brush and 10 to 20 per cent accessable. To allow ingress to these creeks is to allow 80 to 90 per cent use of Landowner's private property.

For over 100 years Landowners have made agriculture number one in Montana, the protection of property rights have been a significant factor. To reverse this course could well result in a dangerous trend. If we leave the door open where will it stop and will it stop?

A look at history will show that the oldest and strongest systems of Government are those that protectthe rights of the people, not dilute them. We have seen other countries confiscate private property and turn it into public communes.

If the same concept used as a basis for the 1984 Supreme Court Stream Access decision is applied to wildlife, rain, snow, and the air we breathe it could well establish a socialistic trend, the opposite of what made America the greatest Nation on earth. I appeal to you; Do not turn the control of private property over to non-owners.

Philip M. Johnson

Exhibit R
Water Access
Bills
1-22-85

TESTIMONY TO THE HOUSE JUDICIARY, FISH & GAME AND AGRICULTURE COMMITTEES

January 22, 1985

For the record I am Norm Starr. I am a native Montanan whose address is Melville, Montana. I am in the livestock business and some small grains. I have no investments other than land, cattle and machinery.

The reason I am here and not home getting my work done is I have a duty to protect my private property rights to the best of my ability. The Supreme Court decisions of 1984 have presented a dilemma to myself as a rancher and I suspect to you as a legislator - simply because so many questions were left unanswered.

In trying to sort things out I have finally come to the conclusion that in the beginning of the white mans activity in Montana the waterways were used as roads. I also now understand our Montana Constitution says the people of the state own the water. I have been told by people who were delegates to said Constitutional Convention that the intent was to use it as a tool to keep down stream states from claiming our water. I can understand the reasoning.

I know that there is water flowing over my deeded land. I know there is a county road leading to my ranch - I own the land and pay taxes on that land- my neighbors pay taxes on the rest of it. The road was established because the inhabitants of the area needed a way to get to town - it was a necessity. I imagine in those days landowners were glad to let the county build a road and still pay taxes on the land because they needed the road. Now I am getting into some areas I can't sort out- on public roads there are rules and regulations. You can't get out of the boundary of the designated road, you can only travel at certain speeds, you have restricted weight limits, you can't use firearms from a public road, you can't camp on them or build fires on them or litter them, nor can you build structures on them. You have state people enforcing those rules and regulations and maintaining those roads. I think it is only fair the public be regulated on the waterways which flow over my deeded land, much as they are on the highways. And if there is a taking the property owner be compensated just like they are on todays taking in highway matters.

Some people don't feel the same way. You as legislators are being squeezed into making some decisions.

If you go onto national forest land during fire season you are required to have a bucket and an ax. If you camp you have to camp a certain distance from a stream to avoid degradation. In many cases you pay a camping fee and need permits for fires. If you start a fire on national forest lands and it gets away you can be billed for it.

If these rules and regulations are in effect on public lands doesn't it seem reasonable that private landowners should be given at least as much respect?

Time is short and I believe the points on the various bills will be covered. I will say I think the interim committee gave HB 16 a good shot and I like the conservation districts definition of the ordinary high water mark - it's in place and it is fair.

Finally, I hope when the smoke clears away, those of us who have allowed hunting and fishing on our private property will be treated in a manner that we will still feel comfortable in maintaining that practice.

Thank you.

Exhibit 5
Water Access
Bills
1-22-85

TESTIMONY before the House Judiciary Committee, January 22, 1984, Helena, Montana, by Lorents Grosfield, cattle rancher from Big Timber, Montana.

Part 1: STREAM ACCESS --- A Landowner Viewpoint Pages 1-5

Part 2: THE PUBLIC TRUST DOCTRINE Pages 6-8

Part 3: THE BILLS: HB 16, HB 265, and HB 275 Pages 9-end

TESTIMONY before the House Judiciary Committee, January 22, 1985, Helena, Montana, by Lorents Grosfield, cattle rancher from Big Timber, Montana.

STREAM ACCESS---

A Landowners Viewpoint

Last hunting season, we hosted 863 hunters on our ranch. This number was approximately an average representation of the annual number of hunters we have hosted on our ranch over the last ten years. In addition we have hosted well over one hundred days annually for other recreational uses such as fishing, hiking, picnicing, and camping, not to mention several hundred days of horseback riding. In other words, over the past ten years, we have hosted well over 10,000 total recreation days on our ranch, NONE of which were charged for. On the contrary, if anything, I have donated a tremendous amount of time and energy (not to mention money) toward the recreating public--- consider that if each recreation day demands only 5 minutes of my time, I have donated over 50,000 minutes or 833 hours or 104 working days or nearly one-half of an average working year to the recreating public (and let me tell you, I rarely get off with only 5 minutes by the time I've explained where to go, where not to go, where the deer are, where the other hunters are, where the "big ones" are, where the cattle are, and so on). In fact when you think about it, what I've done, and what most ranchers do, is to subsidize the recreating public to the extent of the time and expense it takes me to accomodate that public.

I don't remember any year when I was so glad that hunting season was finally over. Not that we had so many more problems than usual or that there were so many more hunters than usual. I suppose that like most people, I become more conscious of my time as I get older and realize that I have less and less of it left, and one of the questions I have to ask myself is "Do I really want to continue to donate the tremendous amounts of time that it takes to accomodate to a hunting season?" This seems especially pertinent in light of the kind of thanks that I get as an agricultural landowner from my state's government in the form of things such as the stream access court decisions, based as they were on the Montana Department of Fish, Wildlife, and Park's proposal to grant the public an easement for recreational use of all the state's waters (since our constitution says that all waters belong to the state for the beneficial use of its people).

The point is that now some recreational users would have you believe that unless they are guaranteed the full extent of the easement granted them by the court, they have nothing. This is simply not true. It is essential to remember that, statewide, recreational access is widely available on private land when asked for--- the important ingredient is the asking or otherwise negotiating for access permission. To the landowner this is an essential private property right that is vital to efficient management. To the recreational user it is a matter of common courtesy as well as, in many cases, of law. Of course there are those social reformers who feel they should not have to get permission to use private property. Some even believe there shouldn't be any private property and I won't even pretend to try to satisfy them. But, although there are exceptions, most people respect private property and appreciate and enjoy the privilege to use it, and they are careful. And every year I get letters of thanks from all over Montana and many other states--- this year one hunter wrote, "I just wanted you to know how much I appreciated being able to hunt this year on your property. Your hospitality makes me glad I live in Montana." That represents a substantially different attitude from the one that my state's government has been taking.

Are landowners concerned about the stream access court decisions? You bet they are. Landowners across the state are deeply concerned about the kind of politics that these stream access decisions represent--- the kind of politics that seeks to confiscate private property. They're concerned about the increased expenses, worries, and liability exposure that they face because of being forced to accomodate to uncontrolled recreational use of portions of their lands. And they're worried about those who will take advantage of these decisions for their own purposes.

For example, in counties all over Montana, there are farms and ranches that were settled some generations ago, and the farmsteads--- buildings, corrals, etc.--- were built near the water and the protection from the elements that is provided by riparian ecosystems. Along some rivers and streams, many of these ranching families are now exposed to duck hunters who float down these streams and blast away, without regard, in many cases, to their proximity to farmsteads or farming or ranching active worksites. Granted, in many cases these hunters are not purposefully shooting in the vicinity of these circumstances--- because of the nature of the riparian environment, it is often difficult to see out from the stream area well enough to determine such circumstances, and not having had to secure permission

to be on these portions of private land a hunter wouldn't necessarily know when he was near a farmstead. But the point is that there now is apparently nothing the landowner can do to control these situations. Some county attorneys have even gone so far as to tell landowners faced with this kind of predicament that there's nothing they can do, not even if the hunters send their dogs beyond the high water mark to retrieve game. Picture yourself out in your corrals early some cold morning doing some chore when suddenly you are confronted with a deafening "Blam, blam, blam" that shatters the morning--- would you be pleased with that situation? This landowner shudders to think of having to put up with such a problem--- I'm sorry to say that I'm glad we don't have any ducks!

From a landowner's perspective, the primary issue here is not one of recreational opportunity but of private property and the confiscation of private property rights. Now some people will try to tell you that there has been no confiscation of rights because landowners have never had these rights to begin with--- that is simply not true. Not only have landowners actively controlled access on stream portions of their property for generations, but the public has recognized, respected, and abided by the exercise of that control; in other words, historically there certainly has been a right, a widely recognized right.

At the base of the access to private lands issue is the distinction between "right" and "privilege", that is, should recreational access on private land be a "right"? And is it in the best interests of landowner-sportsmen relations, of protection of riparian ecosystems, and of the agricultural economy, that the public should be able go as it pleases upon private land and do what it pleases regardless of the interests of the landowner? Should the Department of Fish, Wildlife, and Parks continue to practice the politics of confrontation and side with forced access interests in pursuing access as a matter of public right as it did in the stream access cases? Or should it rather pursue access as a matter of privilege as has recently been exemplified by their "ASK FIRST to hunt and fish on private land" bumper stickers. Landowners across Montana see the latter effort as a giant step in the right direction. Part of the question should concern whether it is even necessary or consistent with our Montana heritage to pursue access as a matter of right in a sparsely populated state as large as Montana when nearly 40% of the land in our state is already publically owned. We already have, by far, one of the highest per capita ratios of public land to population.

I said the primary aspect of the stream access issue is private property rights. Another aspect extremely important to agriculture involves water rights. In light of the use of the public trust doctrine in the recent Mono Lake case in California where long-established water rights were lost in the name of improvement of a riparian ecosystem, the judicial introduction of the public trust doctrine in Montana in the stream access cases serves as a precedent that might be used to jeopardize our entire appropriation water rights system. In fact, some lawyers are recommending that very thing--- even the Assistant Dean of our University of Montana Law School recognizes this as, at the very least, a real possibility.

And then we come to the recreational aspect, which, practically speaking, is really a resource management aspect. The bottom line question here that the Legislature should concern itself with goes something like this: "Of the total stream mileage in Montana, under what conditions and during which seasons should what stretches of which streams be available to the public for what forms of recreation and other uses, and who should control it?" Now that may sound like a mouthful, but each segment is very important when you consider the extreme broadness of these court decisions. For example, consider the duck hunting referred to above, including the use of dogs; consider the use of three-wheelers which is just beginning in popularity as a recreational vehicle (if you'll stop by any three-wheeler dealer, you'll note that the entire industry is engaged in an advertising campaign promoting the use of three-wheelers on and along waterways--- these companies are not stupid--- they're not spending their advertising dollars on something they think won't sell); consider the many conflicts that will arise between the various recreational users (for example, the Director of the Department of Fish, Wildlife, and Parks has stated that there have already been instances of bank fishermen throwing rocks at floating fishermen on the Madison River--- inject, if you will a three-wheeler into that situation); consider the potential effects on some of the more fragile fisheries or ecosystems. The real question here is "Who is going to control it?" The point is that <u>the extreme broadness of these court decisions simply must be trimmed down.</u>

Most landowners are realist enough to know that they are never going to recover some of what's been lost by virtue of these court decisions. For example, they are just going to have to absorb the resulting property devaluation that goes along with the granting of any easment on property.

They realize that they are not going to stop the steadily increasing public recreational demands, especially involving water-based recreation. They accept that the public does have some constitutional rights to the recreational use of water. But landowners are not about to just lie down and die and accept without question the extreme broadness of what's been lost here. Those recreational users who may well have had legitimate problems and were seeking forced access in two very specific sets of circumstances on two specific stream segments would do well to admit that they got far more than they ever expected. And in the spirit of attempting to improve landowner-sportsmen relations in general while remembering that they (floaters and fishermen) are not the only recreational users that these court decisions have opened Montana streams up to, these people should be working with the landowner community and the Department of Fish, Wildlife, and Parks to try to effectively deal with some of the unacceptable problems, both present and future, that these decisions have perpetrated upon landowners, and upon the riparian resource.

One other item of significant interest serves to illustrate the intensity of concern over this issue by landowners. Last August, a two-week protest closure of private land was organized in Sweet Grass County, the protest being against the effects of the stream access court decisions on landowners. The organizers decided at the outset that if they couldn't get at least 50-60% of the total landowners in the county to participate, they would not proceed with the closure. Much to their surprise after they had approached nearly all rural landowners in the county, they found that they had over a 99% participation and agreement. This means that Republicans, Democrats, Independents, and non-politically active, as well as farmers, ranchers, cabin owners, hobby farmers, cattlemen, sheepmen, and so on--- a broad spectrum of society--- all felt strongly enough about this issue that they agreed to participate in an active protest demonstration. This is especially powerful when you consider that most of these people had probably never before participated in an active protest agreement that actually required them to take overt action, namely to deny access for two weeks to all comers, and to explain why.

It remains the Legislature's responsibility to legislate, and to address this issue fairly and decisively, consistent with our constitution and laws. I submit that this can be done while respecting the rights of BOTH landowners and recreational users.

TESTIMONY before the House Judiciary Committee, January 22, 1985, Helena, Montana, by Lorents Grosfield, cattle rancher from Big Timber, Montana.

THE PUBLIC TRUST DOCTRINE

Common sense tells me that the implications of the Montana Supreme Court stream access decisions are far-reaching and go well beyond recreational stream access. Evidently for the first time in Montana history, our Court has recognized what is called the "public trust doctrine". Until the past few months, most Montanans hadn't even heard of the public trust doctrine and now all of a sudden we find ourselves saddled with it. Although it is recognized as a legal mandate, it is not the result of any act of the Legislature even though the Montana Constitution says, "The legislative power is vested in a legislature consisting of a senate and a house of representatives." Our Constitution further states, "The power of the government of this state is divided into three distinct branches--- legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others...." Common sense tells me that a reasonable question to ask is, "Shouldn't the Legislature have some say in this matter?" We are talking about something that could well determine the direction that Montana law and litigation will take from now on, one that may be quite different from directions the Legislature has used in the past. And not just on recreational issues--- once the public trust doctrine is recognized in a state, as I understand it, it can apply to <u>all</u> water issues, and some even advocate that it be used beyond water issues on any natural resource or environment issue. For example, John E. Thorson, in a paper presented to the Montana Select Water Marketing Committee recently, states: "Historically, the doctrine has been applied to protect public uses and access to and upon navigable waters.... These roots ... should not mislead policymakers as to how the essential purpose of the principle may be applied in contemporary situations ... to other natural resources." What "OTHER NATURAL RESOURCES"? I've heard ranchers worry that if the Supreme Court can say that since the state owns the water, the public therefore has the right to follow the paths that the water takes, it can use the same logic to say that since the state owns the wildlife, the public therefore has the right to follow the paths that the wildlife takes. Is this the kind of application of the public trust doctrine that this advocate is referring to?

The origins of the public trust doctrine somehow predate our Montana Constitution. Therefore it can be and has been used to justify decisions that would probably not be possible under the Constitution alone--- it almost looks as if it is a tool to be used to achieve a desired result that is otherwise unconstitutional. The real point that I am trying to make here is that this issue is much too important

and far-reaching to be instituted in Montana in such a manner. The question of adopting the public trust doctrine in Montana needs the understanding, participation, and scrutiny of the people through the legislative process. Let me give you just a couple of examples of the kinds of things that can be done with this doctrine and I think you'll agree.

First, by using the public trust doctrine, the Montana stream access decisions deprive landowners of the ability to control who uses portions of their lands, namely all those portions within the ordinary high water marks of any surface waters and those portions outside the ordinary high water mark adjacent to any barrier in the water. Never mind that traditionally landowners have exercised these rights and that the public has abided by that exercise. Never mind that many properties (such as retirement homes along streams) have been paid dearly for precisely because of these rights. Never mind the taxes, the patents, or the investments. It's very hard for the layman to understand the Court's statement that there has not been an unconstitutional "taking" when the justification for the taking lies in a doctrine which is not even spelled out in the constitution, much less by the Legislature. The most distinctive thing about private property that distinguishes it from public property is the right to exclude others. Without this right, property can hardly be called "private" in any traditional sense. It is this right and the opportunity to achieve it that is the basis of an individualist society. Realizing the resultant challenges is the incentive that makes free enterprise work, and it is one of the most important attributes that has made this country perhaps the best country on earth in which to live. If the public trust doctrine is used as a tool to assist the continuation of a free individualistic society that is one thing, but if it is used as an instrument of social change, an instrument that would deprive individuals of their rights in favor of some centralized social values, then that is quite another thing. The same author quoted above, John Thorson, wrote further that "In both recent (Montana stream access) decisions, the Court has carefully and explicitly pointed out that its recognition of the public trust doctrine does not thereby grant public access over private property to reach state-owned waters used for recreational purposes. THIS POSITION RUNS COUNTER TO THE GENERAL TREND OF PUBLIC TRUST CASES TO ALLOW SUCH REASONABLE ACCESS." (EMPHASIS ADDED.) Can you expect me as a property owner not to be scared to death at the prospect of such a radical departure from traditional constitutional values?

The second example of what can be done with the public trust doctrine is that it can be used to invalidate prior water rights. One of the places this has been done

is in California just last year when the California Supreme Court determined in the Mono Lake case that "the public trust doctrine applies to constrain ... the extractic of water that destroys navigation and other public interests," including scenic beaut and recreational and ecological values. This wasn't just the case of some rancher losing a water right. This was a 1940 water right held by the city of Los Angeles for domestic purposes in which the city over the years had invested millions of dollars and come to depend on for a source of municipal water. The reason for the lawsuit was essentially to attempt to guarantee a minimum instream flow in a basin that, from an environmental viewpoint, was over-appropriated, in order to protect and perpetuate riparian habitat for birds and other wildlife. I submit to you that if the public trust doctrine can be used to divest a city of prior rights for drinking water, then rural agricultural water rights are tenuous indeed. Unless the Legislature gets a handle on this, can you tell me that the same tactic won't be used in Montana, especially in fully- or over-appropriated streams? Margery H. Brown, the Associate Dean of the University of Montana Law School, recently wrote a paper for the Montana Select Water Marketing Committee entitled "... The Doctrine Is Out There Awaiting Recognition." In it she says, "It is clear that ... the Montana Supreme Court (in the stream access cases) has set the stage for both legislative deliberations and additional judicial decisions on ... taking the public trust into account in the planning and allocation of water resources, and reconsidering allocation decisions on the basis of their effect on the public trust." "RECONSIDERING!" What is she advocating when she uses the word "reconsidering"? John Thorson uses the same word in his paper when he says, "Water rights ... can and should be reconsidered on a public interest basis." Further he says, "The state as public trustee, has a continuing duty to protect the people's common heritage of streams and lakes through continuing administration of the trust--- INCLUDING POSSIBLE REVOCATION OF EXISTING RIGHTS WITHOUT COMPENSATION." (EMPHASIS ADDED.) Is this what we agricultural property owners in Montana have to look forward to? Is this the legacy that our Montana Legislature is going to leave for our children?

Left unchecked, a grant of public access to private property along streams is likely only the beginning of public trust doctrine application in Montana. I SUBMIT TO YOU THAT THIS SHOULD BE THE BUSINESS OF THE LEGISLATURE, AND NOT OF THE COURTS. It is up to the Legislature to determine the policies that will decide the directions and quality of our heritage. Are you ready to condone such a radical departure from traditional respect and constitutional support for private property rights?

TESTIMONY before the House Judiciary Committee, January 22, 1985, Helena, Montana, by Lorents Grosfield, cattle rancher from Big Timber, Montana.

THE BILLS: HB16, HB 265, and HB 275

I am one of those landowners who was very active in the interim and attended most of the interim subcommittee meetings as well as a number of other meetings on the issue. I congradulate the subcommittee and its staff on an excellent research and drafting effort as well as on making themselves very available to the public during the interim. The result, HB 16, is well-thought-out, well-drafted, simple and straightforward, and deals with nearly all the important aspects of the issue. Although it may need some amendments, it is an excellent effort and starting point.

I don't think anyone can deny that landowners across Montana have lost a great deal in the Supreme Court stream access decisions, decisions shich dramatically expanded the determinations of two specific cases on two specific stream segments to cover all Montana landowners. It's hard to argue that these decisions were not policy determinations--- policy that affects all Montana. It needs to be noted that in the past it has been the responsibility of the Legislature and not of the courts to determine state policy.

At any rate, considering what course the Legislature should now take on the stream access issue, it should be helpful to keep conscious of the question "How much of the Supreme Court decision should be codified and why, and is there any good reason to codify things that go further than the decisions go with regards to expanding the rights of the public over the rights of landowners?" This is really the bottom line of the issue before you this session.

Personally, I maintain there is no essential reason to codify the more extreme areas of the Supreme Court decisions--- they are presently the law anyway and codification would be largely superfluous besides which the final language worked out in the legislative process would likely not be any simpler or easier to understand than

the Court's language, I am referring especially to the portaging around barriers issue.

How do the three bills compare as far as codifying the decisions, or going beyond codifying? In general, HB 16 codifies only the most basic ingredients and language. HB 265 codifies virtually all the decision and goes much further than the Court in some areas. HB 275 attempts to "fix" HB 265 from a property rights and resource quality viewpoint, but still goes farther than the decisions in some areas. A bill drafting request by Rep. Orval Ellison would codify only the bare essentials, less than HB 16, although it goes much further than HB 16 in some areas towards meeting the needs of recreational users and the resource itself. I would like to compare some specific areas by subject matter and point out some problem areas.

1. WHAT WATERS ARE AVAILABLE FOR PUBLIC USE? The problem with "classes" of waters is in determining which class a stream fits.

HB 16 solves this question by essentially saying that all floatable waters are available to the public for that use, and most other uses are dependent on who owns the streambed and whether permission is granted.

HB 265 solves it by defining Class 1 water so broadly that it includes virtually all waters capable of recreation such that the public can essentially use most all waters for most everything. (I submit that very few waters "capable of recreational use" would not be "capable of supporting commercial activity" in the form of guided or outfitted use. Note that the language does not say "have been used for"--- it says "are capable of".)

HB 275 injects a class of waters where the landowner retains control in order to protect the resource. The concept of protecting the resource and maintaining private control on smaller streams is laudable and I support it, but the method here proposed is complex and cumbersome.

Rep. Ellison's draft solves it much like HB 16 except that all waters are available to the public for both floating and fishing and uses incidental thereto. Other uses would depend on ownership and permission.

It might be helpful to note that Professor Stone, in his amicus brief to the Court, recommended that the court consider those waters capable of "significant and substantial" use by the public.

2. PORTAGE AND BARRIERS

All the bills define barriers is such broad terms that they may include such things as long stretches of shallow waters or of rapids, as well as deep holes. Consider a stream running bank full during high water that's high enough so as not to be wadeable--- Is a portage "buffer zone" easement above the high water mark for the length of the stream (on both sides) established?

Rep. Ellison's draft leaves it up to the Supreme Court language which is simple and straightforward: "portage around barriers in the water in the least intrusive manner possible". This is the law now. Why codify it?

3. PORTAGE ROUTES

HB 16 says only "in the least intrusive manner".

HB 265 and 275 go much further and include provision for conservation district supervisors to require a specific route at the landowner's expense (or public expense in the case of natural barriers). Aside from the problems that I have with this as a conservation district supervisor, this goes substantially beyond the Supreme Court decisions which say that the public can portage--- they do not say that a landowner must provide (donate) a means and route of portage.

4. MANAGEMENT

HB 16 doesn't really address management. One would assume that it is up to

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HB 265 only talks about management in terms of the conservation districts determining and requiring where and how a means of portage be established.

HB 275 uses that same idea plus it gives the Dept. of Natural Resources some rule-making authority for distinguishing between Classes of waters. This would be administrated and somehow, presumably, adjudicated by conservation districts.

Rep. Ellison's draft gives the Dept. of Fish, Wildlife, and Parks some authority wherever the resource is threatened from overuse.

5. LIABILITY

HB 16 relieves the landowner of liability if he doesn't charge for recreational use. Liability to a floater where the landowner charges for, say, hunting or some other use, is unclear.

HB 265 and 275 contain the same provision that relieves landowners of liability and supervisors of liability from the recreational user (but not from the landowner).

Rep. Ellison's draft relieves the landowner from liability in any case (except where willful or wanton misconduct can be shown--- all drafts have this language).

6. PRESCRIPTIVE EASEMENT

HB 16 and Rep. Ellison's draft both provide that a prescriptive easement cannot be acquired through recreational use of "land or water".

HB 265 and 275 both say only that it can't be acquired through use of water on the bed and banks. Given the Supreme Court decisions, I'm not sure where this language gives the landowner any protection at all.

7. TITLE TO LANDS UNDER STREAMS

Under Montana law, the landowner owns to the low water mark or the thread of a stream depending on whether the stream meets the federal navigability for title

fishermen on navigable streams.

HB 265, by using identical wording under Section 1, subsection 2c and 2d, comes dangerously close to equating the federal test to a commercial use for recreational activities test which would affect all Class 1 waters, which, as I've noted, could be most waters of the state. In other words, HB 265 may result in attempts to gain state ownership of title to lands under most waters--- this also clearly goes substantially beyond the Supreme Court decisions.

8. ORDINARY HIGH WATER MARK

HB 16 and 275 use the same definition. I feel the use of the word "crop" will be misleading.

HB 265 substantially changes the definition by using the word "diminished" terrestrial vegetation instead of "lack of". Landowners and recreational users alike need a simple, readily understandable and identifiable definition.

Rep. Ellison's draft uses the conservation district's definition that has been successfully used for nearly 10 years under the Streambed Preservation Act. It is much simpler and more straightforward.

IN SUMMARY, I find both HB 265 and HB 275 unacceptable because I believe they both codify too much of the Supreme Court decisions. In addition, they both go substantially beyond the decisions in some areas, and are both unnecessarily complex and cumbersome. HB 265 especially does little to protect landowner rights.

Although HB 16 is a result of a remarkable study and research effort by the interim committee and staff, and is simple and straightforward in its language essentially addressing all the vital issues, I feel it needs changes in some especially the areas of fishing accessibility and resource protection. that the Committee would look closely at Rep. Ellison's draft by itself sonable means of amending HB 16, and would recommend tabling both HB

Exhibit T

1/22/85

Recreational Use Of Montana's Waterways

A Report to the 49th Legislature Joint Interim Subcommittee No. 2

December 1984

Montana Legislative Council

Published by
MONTANA LEGISLATIVE COUNCIL
Room 138
State Capitol
Helena, Montana 59620
(406) 444-3064

1317 14 th St. S.W.
Great Falls, Mt. 59404
Jan.22,1985

Rep.Hannah
House of Rep.
Capitol Station
Helena, Mt. 59620

Dear Sir:

Please support house bill# 265 in its PRESENT Form. I have studied this bill and feel that it is an excellent COMPROMISE BILL, that will benifit both the landowners and the recreationalist.

Sincerly,

Karen E. Cantley

Karen E. Cantley

1317 14th St S.W.
Great Falls, MT 59404
Jan 22, 1995

Rep. Tom Hannah
House of Representatives
Capitol Station
Helena, Montana 59620

Dear Sir:

As a fisherman, canoeist, and hunter I would like to express my strong support for the Compromise bill---(HB 265) in its present form.

Landowner rights are well defined and protected. As are those of the general public

Thank you,

Gene Courtney III

1/21/85

Please record our support of HB265 on stream access. We are opposed to the Cobb's bill. HB265 has been a compromise with landowners and recreationists and is the fairest alternative to date.

Sincerely,
Marie & Jill Bakke
3417 3rd Ave. So.
Great Falls, MT. 59405

John Pool
2706 Arvin Rd
Billings, MT 59102

Mr. Thomas Hannah
2228 Beloit Drive
Billings, MT 59102

Dear Mr. Hannah,

"House Bill No. 16 is considered an important bill by both landowners and sportsmen. The outcome of action on this bill has the potential to significantly impact the use of the vast majority of Montana's rivers and streams.

This bill is not designed to please or accomodate any special interest group, but rather to define some reasonable codes of conduct for persons legally using surface water bodies. It includes some very important provisions for limiting landowner liability and protection from unauthorized trespass.

I am sure you are aware of the role fishing, floating and tourism in general plays in our state's economy. As with hunting, the rights of property owners must be protected, while at the same time preserving this great source of outdoor recreation. Montana needs a law like HB-16 to help accomplish this goal.

On behalf of riverbank landowners and river sportsmen I urge your support of this bill.

Very truly yours,

John Pool

INTERNAL MEDICINE
F. J. ALLAIRE, M.D.
D. E. ANDERSON, M.D.
R. D. BLEVINS, M.D.
PULMONARY DISEASE
G. A. BUFFINGTON, M.D.
NEPHROLOGY
S. J. EFFERTZ, M.D.
RHEUMATOLOGY
J. D. EIDSON, M.D.
K. A. GUTER, M.D.
ONCOLOGY
T. J. LENZ, M.D.
W. N. MILLER, M.D.
GASTROENTEROLOGY
W. N. PERSON, M.D.
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NEPHROLOGY
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R. E. ASMUSSEN, M.D.
P. L. BURLEIGH, M.D.
F. J. HANDWERK, M.D.
R. J. MCCLURE, M.D.
G. K. PHILLIPS, M.D.

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D. E. ENGSTROM, M.D.
PSYCHIATRY
W. H. LABUNETZ, M.D.
NEUROLOGY—EEG
E. E SHUBAT, PH. D.
PSYCHOLOGY

PEDIATRICS
J. A. CURTIS, M.D.
J. M. EICHNER, M.D.
N. C. GERRITY, M.D.
J. R. HALSETH, M.D.
J. P. HINZ, M.D.

SURGERY
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R. E. LAURITZEN, M.D.
GENERAL AND VASCULAR
J. E. MUNGAS, M D.
VASCULAR SURGERY
L. M. TAYLOR, M.D.
GENERAL AND THORACIC
W. C. VASHAW, M.D.
GENERAL AND VASCULAR

ADMINISTRATION
W. D. TAYLOR
M. D. MISSIMER

GREAT FALLS CLINIC
P. O. BOX 5012
1400 TWENTY-NINTH STREET SOUTH
GREAT FALLS, MONTANA 59403
PHONE (406) 454-2171

January 21, 1985

Representative Tom Hannah
House of Representatives
Capitol Station
Helena, MT 59620

Dear Representative Hannah:

This letter is written to support passage of House Bill 265, Stream Access Bill that came about as a result of compromise between agricultural groups and a coalition of recreational groups throughout the state of Montana.

Since living in Montana for the last eight years, I have enjoyed canoeing and fly fishing on many of Montana's smaller streams. I therefore, support the need for access to Class I and Class II streams to float fish and hunt water foul. The last two years I have had a small ranch near the Little Belt Moutains and therefore can certainly see the need for protection for land owners. I believe this protection is provided in the compromise bill which limits camping, hunting big game or building semi-permanent structures on Class II rivers.

The other two bills, HB 16, and the bill being introduced by Representative John Cobb are basically bad bills and not only unreasonably limit recreation for many streams in the state but also would provide a lot of gray areas of interpretation. This Bill 265 is a result of fair compromise between agricultural groups and recreational groups and appears to satisfy most people who have taken interest in this issue. I believe it should be passed without any alteration.

Best wishes,

David E. Anderson, M.D.

B THE LAZY B RANCH B

Scott G. Hibbard 6013 Hwy 12 W Helena, MT 59601

January 22, 1985

STREAM ACCESS TESTIMONY --~~DRAFT~~ SGH

Chairman Hannah and Committee Members, my name is Scott Hibbard. I'm a rancher west of Helena, and though I am not prepared to comment on the bills at hand, I would like to offer some observations on the question of stream access.

Our family owns and operates a ranch on Ten Mile Creek, a superb fishing stream that is quite wadeable, and with recent Supreme Court rulings, apparently very accessible by foot traffic since it is bridged by Highway 12. The stream passes seventy-five yards from my front door. It passes ten yards from the bunk house. It passes through our corrals and hay meadows. I am understandably concerned about the stream access issue.

My concerns are several. One: it's an invasion of privacy. Among other reasons, we live and work in the country because we value our privacy. With no control over who or how many persons can travel up or down the stream, and consequently who passes through our corrals and within speaking distance of the house, part of our reason for being ranchers is lost.

Two: it infringes on my responsibility as a land steward. As do many landowners I take my responsibility seriously. I can not hope to maintain a healthy fish population if I have no control over impact by people. Imagine a sign posted on the Ten Mile bridge that reads: This Stream Protected By Public Access. I'm sure some of the healthiest fishing streams in the West have open public access, but I can't help but wonder if, in all cases, it is the best thing for the fish. Ask anyone who knew the Smith River twenty years ago and knows it now and you'll see my point.

Three: as it now stands, the stream access issue breeds ill-will and paranoia. The Supreme Court rulings perhaps unjustly call the motives of various sportsmen's organizations into question. One could easily ask, "Why cooperate if they're going to take it anyway?" One can easily ask, "What's next? Will I lose control over access to my property?"

Nothing needs be said about the economics of the present-day family farm. Paranoia about the erosion of landowner private

rights could foreseeably force the subdivision of agricultural lands. A landowner facing a break-even proposition at best could, projecting today's current trends, think he should subdivide now while he still has the right to do so.

It is not illogical to see corollaries between the stream access rulings and the Dakota Sioux and Nez Perce reservation treaties. In each case, following the discovery of gold on reservation lands, the treaties were renegotiated. The Nez Perce reservation was reduced to one-quarter of its initial size. The Sioux were forced to cede the Black Hills. In Montana, the gold of the 1980s is recreation. As were the treaties, law is being changed against us.

One can ask, "Why should the sportsman care about the landowner?" To state the obvious, most landowners are preservers of wildlife and their habitat. With the continued cooperation of sportsmen and with the cooperation of the law we can remain so.

* * * * *

Scott E. Hilbert

Mr. Chairman and Members of the Committee:

My name is Craig Madsen.

I am a licensed Montana Outfitter and Secretary/Treasure of the Montana Cutfitters and Guides Association.

Tonight I have been asked to testify on behalf of the Montana Outfitters and Guides Association.

The Montana Outfitter and Guide Association is a diverse group composed of both land and river outfitters and landowners and non- landowners. Our Association represents outfitters who NOT ONLY are members of such organizations as the Montana stockgrowers Association but our Association itself is a member of the Montana Stockgrowers Association.

The Montana Outfitters and Guide Association urges your support on House Bill 265 as it presently stands. Our feelings are this bill clarifies many questions resulting from the recent Supreme court decisions. It seems to be a reasonable compromise between land owner and recreational interests, and it is a step in the right direction towards mending the strained relations between landowners and sportsmen.

Although this bill clearly requires giving of ground for our river outfitter members, the opinion of the Montana Cutfitters and Guides Association is that this bill deserves merit and support due to the wide ranging and collective agreement of both agricultural and recreational interests and associations.

R. Craig Madsen
Secretary/Treasure
Montana River Outfitters and
Guide Association

920 Central Avenue
Great Falls Mt 59401

1410 Boston Road
Helena, Montana
January 24, 1985

Representative Tom Hannah
House of Representatives
Capitol Station
Helena, Montana 59620

Dear Mr. Hannah:

It was gratifying to be at the Tuesday, Jan 22nd hearing on H B's 16, 265, and the bill presented by Rep John Cobb, and to see the almost whole hearted support given to H B 265.

Montana needs to mai ntain i ts image as a state where recreation is given a high priority, where the old "Out where the West begins" feeling still runs strong, where problems arising from population pressures can be solved by compromise and agreement.

It is my hope that this to was and is your reaction to house bill 265 and that you will give the bill 265 your support.

Very truly yours,

A. E. Barnes
Teacher (retired)

January 23, 1985
Greenough, MT 59836

Lindbergh Cattle Co.
Star Route, Box 337
Greenough MT 59836

Representative Tom Hannah
Chairman, House Judiciary Committee
Capitol Station
Helena, MT 59620

Dear Representative Hannah:

This letter is in reference to House Bill No. 265, which is under consideration by the House Judiciary Committee. As members of the Blackfoot River Recreation Management Advisory Council, we participated in the hearings of Joint Interim Subcommittee No. 2 and are very interested in the issue of the recreational use of state waters.

We attended the House Judiciary Committee hearing last evening, January 21, on House Bills 16, 265 and 275. We intended to support House Bill 16 with changes to Section 3, which would have hopefully made the legislation acceptable to both the Supreme Court and the recreational interests. This bill appeared to address the major concerns of all parties in a clear and concise manner without unduly limiting or expanding the Supreme Court decisions. However, during the course of the hearing it became apparent that House Bill 265 had the united support of a wide coalition of individuals and organizations representing landowner, agricultural and recreational interests. In a spirit of cooperation and compromise we offer the following suggestions which, in our opinion, will strengthen and clarify House Bill 265.

Section 1(2)(c) page 2 - line 7 "flow through public lands;" Change this to read "<u>while they</u> flow through public lands." As stated by Representative Ream, the new wording will clarify the intent of this portion of the bill. In addition, we have a concern regarding the meaning of the words "public lands." Is it the intent of this phrase to include both federal and state land?

Section 1(2)(d) page 2 - lines 8 & 9 "are or have been capable of supporting commercial activity; or" Our concern is that this phrase could possibly be interpreted in such a broad manner as to include virtually all surface waters within the "Class I" category and effectively preclude the classification of many small creeks and streams into the more logical "Class II" category.

Section 1(6) page 3 - lines 5 & 6 ".....,but are not limited to diminished terrestrial vegetation or lack of agricultural crop value." Change this to read "....., but are not limited to <u>lack of</u> terrestrial vegetation or lack of agricultural crop value." We believe that the words "lack of" in this definition, as contained in House Bill No. 16, are more clear and precise than "diminished."

Section 1(7)(a) page 3 - lines 8-10 "....fishing, hunting, swimming, floating in small craft or other flotation devices, boating in motorized craft unless otherwise prohibited....." We suggest that the word "hunting" be deleted and that the words "and waterfowl hunting" be inserted following "motorized craft." All the other items in the "recreational use" category for "Class I" waters are water-related, with the exception of hunting. With the suggested change, all the items will be water-related, which we believe is more consistent with the intent of the Supreme Court decisions.

Section 1(7)(b) page 3 - lines 19-25 - subsections (ii),(iii) & (iv)

(ii) "big game hunting or upland bird hunting;"

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

(iv) "the placement or creation of any permanent or semipermanent object such as a permanent duck blind or boat moorage; or"

We suggest that these three subsections be deleted and replaced with the following subsections:

(ii) building of fires;

(iii) waterfowl hunting; or

These changes are consistent with those recommended for section 1(7)(a) in that they are all water-related.

Section 1(7)(b)(v) page 4 - line 1 The number of the subsection would be changed to (iv).

Section 3(3)(c) page 6 - lines 11-15 "Within 45 days of the receipt of a request, the supervisors shall, in consultation with the landowner and a representative of the department, examine and investigate the barrier and the adjoining land to determine a reasonable and safe portage route." We suggest that after the word "department" on line 14, the following phrase be added: "determine if a barrier exists, and if such a determination is made, examine and investigate the barrier and the adjoining land to determine a reasonable and safe portage route." We feel that this addition is necessary because nowhere in section 3 is there a provision for determining the need for a portage route. Although the Supreme Court decision gives right of portage, we do not believe that this necessarily extends to a right of portage for convenience compared to a right of portage for necessity.

Section 4(2)(2) page 8 - lines 12 & 13 ".....only for an act or omission that constitutes willful or wanton misconduct." We feel that the words "or omission" should be deleted. Once the portage route has been established, it will be maintained by the department and we do not see how the landowner could be involved in an act of omission.

Section 8 page 9 - lines 18-20 "Sections 5 and 6 apply only to a prescriptive easement that has not been perfected prior to [the effective date of this act]." To futher clarify the word "perfected", we suggest that the word "judicially" be inserted before "perfected."

In conclusion, we share the concerns of Attorney John Thorson as he outlined them in his testimony. We feel that any application of the federal test of navigability for purposes of determining the recreational use of state waters may, in fact, be contrary to the Supreme Court decisions and the public trust doctrine. Sometime in the future it may be necessary to classify the surface waters of the State based on their capacity to sustain various types and amounts of recreational use.

Thank you for the opportunity to comment on House Bill No. 265 and be assured that we are committed to helping solve the issue of the recreational use of State waters. We would appreciate any comments concerning our perceptions of this issue and our suggested revisions to this bill from members of the committee, its staff or other interested individuals or organizations.

Sincerely,

Land M. Lindbergh
Lindbergh Cattle Company
Star Route, Box 337
Greenough, MT 59836

Hank Goetz
Lubrecht Forest, Box 1
Greenough, MT 59836

cc: Rep. Ream
Rep. Moore
Rep. Keyser
Mary Wright
Ron Waterman
Jim Flynn
Stan Bradshaw
Brenda Desmond
Jimmie Wilson

W.R. Felton
Rt 1 box 15
Jefferson SD 57038

Rep. Tom Hannah
Capitol Station
Helena, Mont.

Dear Rep. Hannah:

I was recently alerted to the Montana Legislative Crisis concerning stream access for recreational use.

Being a native son that sort of keeps one foot in Montana Im much concerned about this. For several years I have spent most of the summer on the Madison river from Hebgen dam on down some 20 miles. I have paid Frank Shaw for a spot to park and didnt like it but appreciate the fact he doesnt try and keep anyone off the stream . I fully realize the mess must clean up, and other acts of stupidity by thotless people on his land.

The term RECREATION needs defining to keep unrestricted motor travel, beer busts and Rock concerts from stream side.

I love free access to land and waters but the land owners side of the question and his interest in maintaining a fishable water is surely as imperative as free access.

Please consider that the above sentiments come from one whose roots in Montana go back to 1878. Im a landowners of rural land in Iowa and So Dakota was in the farm seed business for 60 years and in recent years have spent four to five months of the year in Montana.

Respectfully yours

W.R. Felton

Rhoda G. Cook
Executive Secretary

MONTANA OUTFITTERS & GUIDES ASSOC.

P.O. Box 631
Hot Springs, MT 59845
Ph. (406) 741-2811

January 28, 1985

Mr. Tom Hannah, Chairman
House Judiciary Committee
Capitol Building
Helena, Montana

Dear Mr. Hannah:

For your information, the Board of Directors of Montana Outfitters and Guides Association agreed not to support any bill on the stream access issue until such time as the bill is in final form and reviewed again by the Board. We would then determine what action to take, if any.

Sincerely,

Henry Barron

Henry Barron, President

JB/rgc

cc: Ralph Holman
R. Craig Madsen
Tag Rittel
Smoke Elser

TO: House of Representatives
Montana 1985 Legislature
Re HB(s) 16, 265 and 275
Testimony by Steve Aller
Big Timber, Montana 59011

Boulder River Ranch
McLeod, MT 59052

I attended the hearings on HB(s) 16, 265 and 275 last Tuesday evening, January 22nd. I did enter written testimony at that time, but would like to expand on that testimony. Most of what follows is in reference to HB 265 and the problems I see with it. HB 275, HB 16 and Rep. Orville Ellison's bill have many merits and should be looked at closely.

I am in a rather unique position in regards to most landowners affected by the recent Montana Supreme Court decisions, as I make my living on a dude ranch that offers quality fishing; fishing that we have regulated on our own as fly fishing/ catch and release.

These self-imposed regulations have given us excellent fishing, and because of our work with the stream, our business has been secure and growing.

With the Court's rulings on stream access, I am now concerned about the quality of our fishing that we will have to offer in the future.

The Public Trust Doctrine and the Court's rulings make it very clear that the public has the right to use the surface waters in the state, but do these documents go further in giving the public the liberty to use the banks, stream bed and portage rights of unlimited distance? If they do, this is clearly an illegal taking of property.

I had many people coming in last summer from above our property, below our property, and from government lands and wadding into our private property section. None of these people were fly fishermen and none were inclined to respect our self-imposed catch and release rules. These people can wade in on my private stream bottom and catch and keep five (5) rainbow trout and ten (10) pounds of brooktrout.

Under this situation, how long will I be able to offer quality fishing? If only three people came onto my property in one day and killed their limit of fish (15 rainbow, 30 pounds of brooktrout), that would be more fish taken in a day than are taken from the stream by our own people in one year!

You may think this is a problem for the Fish & Game department, but the real problem is that we've lost control of our streambed, private property rights, and we will eventually lose our business. What will I do when people no longer come to my dude ranch to fish because of poor fishing? What do I do, subdivide my property and move to town?

Please consider my individual case when drafting the upcoming bill on stream access. HB 265 could be a reasonable bill if lines 17 through 22 in Section 2 gave the people who own and pay taxes on their streambed and banks their rightful control. I'll say again, that I believe this right was taken illegally by the Court's broad ruling.

The Public Trust Doctrine, together with the Montana Supreme Court's decisions, give the public the undeniable right to the surface water, but the Public Trust Doctrine should not be interpreted to take in the streambeds and banks. If my memory is correct, Margery Brown, Associate Dean of the University of Montana Law School, remarked in earlier committee hearings that she did not read the Doctrine to give recreational use of the streambeds and banks.

Any legislation that comes from your committee should put non-meandered, privately owned streambeds back under the control of the rightful owners. This opens another question, however; how do you handle recreational use of rivers where the beds are privately owned, but there has been no conflict of use? I believe recreationists should be able to use these streams where there has been no conflict, and something could be done with 'historical use' or some related concept.

The other problem I see with HB 265 is the language pertaining to 'portage' and 'barrier'. The language covering these two sections should be simplified in some manner and you could do no better than to refer to Rep. Ellison's draft on this issue.

Going back, I hope that any bill that comes from your committee gives me control of who uses my streambed. Was it legal for the Montana Supreme Court to take control from me? I believe not! Should I be forced, if the legislature doesn't act on my concerns, to go through an expensive court case that I cannot afford? I hope not.

Respectfully submitted,

Steve Aller

Steve Aller

Mr. & Mrs. Chris Jauert
640 34th Ave. N.E.
Great Falls, Mt. 59404

January 20, 1985

Representative Tom Hannah
House of Representatives
Capitol Station
Helena, Mt. 59620

Dear Representative Hannah:

We are writing to you in support of H.B. 265, the compromise stream access bill between landowners and recreationists. This bill has received a lot of work from both the agricultural-landowner and recreation sides and is the best and most carefully thought out of the stream access bills. We feel that the other access bills such as H.B. 16 are in conflict with the recent Supreme Court ruling and are very limiting as to the streams and rivers in Montana that fishermen, boaters, and hunters could enjoy. H.B. 16 allows the public to the use of the stream bed and banks on only those rivers that meet the federal test of navigability, that is, the Missouri river, Bighorn river, part of the Yellowstone river, the lower Gallatin and the lower Dearborn river. The bill introduced by Rep. John Cobb-R, Augusta, would put many streams in Montana off limits and in addition gives unrestricted powers to the DNRC to determine which streams the public may use.

Please use your vote to support H.B. 265 and to oppose H.B. 16 and the Cobb bill. Passage of either H.B. 16 or the Cobb bill will only prolong the litigation needed to open most major waterways to citizens of Montana.

Sincerely,

Mr & Mrs Chris Jauert

John E. Soreng
2800 FAIRMOUNT BOULEVARD
EUGENE, OREGON 97403
(503) 344-6666

Jan.18, 1985

Representative Tom Hanna,
Chairman House Judiciary Committee
Capitol Station
Helena, Mt. 59620

Dear Mr. Hanna:

My wife Betty and I are out-of-state anglers; and spend a substantial part of the summer in our cabin near Livingston. We neither own nor intend to own any private fishing water, and so our angling activity is, with the exception of pay to fish spring creeks, spent on one of the many streams historically open to the public, but also on streams like the Boulder above Big Timber and others where most of the access is only available by crossing private property to the river.

At first(about six years ago) we approached ranchers & other property owners as strangers, and with rare exception were granted access and permission to drive through gates so that we could park close to the river. We remember that these courtesies as given with a glad heart. It was understood, and only rarely spoken, that gates would be closed, litter removed and generally the property and resource respected or we needn't ask again. We understood that guest ranches and the like were reserved for paying guests, but even then refusals were always courteous, sometimes with the invitation to return when the season was over.

Angling friends we have made in Montana have had very similar experiences: and with them we have discussed the current controversy about "right of Access" once anglers have been able to get to the river at a bridge or some other point. The conclusion has consistantly been that we could not enjoy the prospect of fishing from private property unless the owner both knew we were there and approved of our presence. We very much hope that the majority of Montana anglers feel the same way.

Now, Having said that, we do appreciate thatin specific situations involving boating and where sportsmen and landowners have been unable to work amicably, legal decisions may be required, but we feel strongly that the Supreme Court's recent indescriminate ruling has thrown the baby out with the bathwater.

John E. Soreng
2800 FAIRMOUNT BOULEVARD
EUGENE, OREGON 97403
(503) 344-6666

What we fear most has already begun to happen, erosion of the historic host-guest relationship between land owners and sportsmen. The end result of this, I fear, will not only be diminished angling pleasure, but refusal of access across private property. This will likely lead to a net loss of angling opportunity. The worst probable effect will be alienation and polarization between two classes of citizens that have historically had good relationships.

I would say to those who for some reason are dissatisfied with the old system: be careful of what you wish for, you might get it."

Most importantly, consider in your legislative deliberations thatall rivers and streams and their land ownership situations are markedly different. Wild fish populations in many waters are delicately balanced; and when disrupted by increased pressure may take years to recover. It will , of course, be easy to shift responsibility for this loss to the game regulation agency which unfortunately is prone to act too late with too little because of political pressure for fish harvest rather than conservative wild fish management.

Whatever the larger outcome, special consideration should be given to protecting the status quo for the fine spring creeks, that would most certainly be the worse for unrestricted public access. Many of these spring creeks and also other rivers like the Boulder are in effect hatcheries for the Yellowstone as well as other large rivers with well established public access. It will be important to understand that many very high quality fisheries are that way precisely because land owners are careful about the number of anglers that cross their property. As you know the State has no mechanism for limiting angling pressure per se.

Finally, if you will permit an older angler one bit of philosophy: Citizens rights should be a golden mean, and not an end in themselves lest mischief be done to society's tranquility and always limited resources.

We thank you for your consideration of our viewpoint on the important question of stream access before you.

Very truly yours,

John & Betty Soreng

new address
SORENG, JOHN & BETTY
3550 BLACK OAK ROAD
EUGENE, OREGON 97405

THE RIVER'S EDGE

Greg Lilly
2012 N. 7th Ave.
Bozeman, MT 59715

My name is Greg Lilly. I am co-owner of the River's Edge, a specialty fly fishing business and outfitting service in Bozeman. I am a native Montanan and I have earned a living through recreational fishing for 15 years.

I would like to testify in support of house bill 265. As I have stated, I've been in the fishing business for many years. The major thrust of our business is to help people experience, successfully, the tremendous wild trout fishing available on Montana's streams and rivers. We do that with our guided programs and through our store where we equip them with the right gear and dispense a million dollars of advice and information free. In a season we visit with thousands of anglers and in those conversations I hear the same thing over and over again. We Montanans do not realize how fortunate we are to have the staggering number of miles of trout streams we enjoy. Anglers from the rest of the U.S. have seen their home trout waters degraded or destroyed. They now look to Montana to obtain the quality of angling experience they no longer can find at home because of industrial pollution, voracious energy appetites that are satisfied to the detriment of rivers and streams, acid rain, improper mining practices urban sprawl, etc.

(406) 586-5373
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These thousands of non-resident anglers bring a lot of money to Montana, but of equal importance is the fact that they are vitally concerned that Montana's wild trout fishing, some of the finest in the world, remains at the level they experience today. Because of this concern they are strong allies of all of us in the state who are also fiercely anxious to see that the rivers and streams remain as good or better than we currently enjoy. I think that means they are allies to landowners and recreationists alike and I think this is the very important point about house bill 265. The effort to draft a bill that would address both landowner and recreationists concerns was undertaken with the thought that the two groups should be allies and not adversaries. When the supreme court determined that recreationists had basic access rights to streams, we all were delighted but at the same time we empathized with the concerns the landowners had over ambiguous definitions, portage rights, liability and so on. I feel that house bill 265 does a good job addressing all these concerns and in the process it is has proven that agicultural,landowner and recreational interests can work together. Hopefully it is a start towards an alliance that insures that in the future when are rivers and streams are truly threatened we will have the strength to preserve them.

I urge you to recommend a do pass on house bill 265.

Statement to the House Judiciary Committee
Regarding Stream Access Legislation
January 22, 1985

Franklin Grosfield - Rancher - Big Timber

My viewpoint on the stream access issue is that of an owner and operator of land and water resources which I manage for purposes of agricultural production. The public also uses the land and water resource for recreational purposes.

The resource management problem that arises is that we need to produce food and fiber at a profit which is plenty tough, and at the same time accommodate public recreational use as decreed under the Montana Supreme Court's Curran and Hildreth decisions.

I submit to you that we do not at present have the management tools available to us to deal with the problem at hand. About the only tool that we have is to close private property to public recreational use. We discovered last summer in Sweet Grass County that this is still quite effective, even under the Court cases.

Closure is not something that most ranchers enjoy doing, however, and it has obvious disadvantages to the recreational user.

I hope that the Montana Legislature gives us some tools to work with so that we can get back to managing the land and water resources for the best interests of all of us. Toward that end, I would suggest that any legislation coming from this body contain the following:

1. High Water Mark Definition - We need a practical and understandable definition of ordinary high water mark. The definition used by Conservation Districts in administration of the Natural Streambed and Land Preservation Act meets this requirement and has withstood the test of time.

2. Liability Protection - Since the property owner cannot exclude the public from certain portions of his property, he should have immunity from any liability that should arise as a result of public use under the Supreme Court Cases.

3. Prescriptive Easement - It should be clear that prescriptive easement cannot be acquired by recreational use so that the property owner has no reason to exclude public use because he is concerned about this possibility.

4. Trespass - We need a better trespass law so that we have an effective way of dealing with that small minority who abuse their use of the resource. In keeping with Fish, Wildlife and Parks excellent advertising campaign to Ask First, perhaps an expansion of the current Big Game law to include all recreational use would be in order.

5. Structures - There appears to be some question under the Court cases whether or not the property owner still has the right to build and maintain structures such as fences and headgates within the ordinary high water marks. The Legislature should clarify that this right has not been diminished, and may have to amend some laws such as the nuisance laws which could be interpreted this way in light of the Court cases.

6. Public Trust Doctrine - The Legislature should clarify, within its ability under the Constitution, how the public trust doctrine is to be applied in the future. Property owners are deeply concerned about application by the Courts of the public trust doctrine along the same lines seen in Hildreth and Curran in reference to such things as water rights, fencing, grazing, hunting and title. We need to head off the potential stripping away of pieces of private property rights to the point where that term no longer has any meaning.

Finally, the Legislature should neither expand nor codify the Hildreth and Curran decisions.

Certainly there is no reason to expand on the Court cases either from a property owner's viewpoint or a recreational user's viewpoint. It appears, however, that the Legislature will be under a great deal of pressure to pass a bill of some kind on the subject. I would hope that in our rush to do something about stream access, we don't do something to make a bad situation worse.

In that same light, I would urge that you not codify the Court cases.

As you know, our system of government has built into it a system of checks and balances known as the Doctrine of Seperation of Powers. Under this system, it is the function of the Legislative Branch to make the laws, the Executive Branch to enforce the laws, and the Judicial Branch to interpret the laws. I would respectfully suggest that it is time for the Montana Legislature to re-assert its lawmaking function.

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January 22, 1985

Honorable Robert Ream
Chairman, Fish and Game Committee
Montana House of Representatives
State Capitol
Helena, Montana 59620

RE: Recreational Use of State Waters

Dear Bob:

It is my understanding that three bills regarding the issue of recreational use of state waters, are to be considered this evening by a joint committee composed of the House Judiciary, Fish and Game, and Agricultural Committees. The bills are House Bill No. 265, House Bill No. 275, and the bill of the Interim Subcommittee No. 2. I received a copy of House Bill No. 265 on Saturday, January 19th, and a copy of House Bill No. 275 on Sunday, January 20th. I am unable to attend this evening's hearing. However, I would like to provide my written comments, particularly with reference to House Bill No. 265.

I have serious problems with a number of the provisions of House Bill 265 from the perspective of clients of our firm who are owners of agricultural land. I will attempt to address my concerns, with a reference to the applicable sections of House Bill 265 in sequential order.

It is my opinion that the definition "barrier" which appears at Section 1(1) will expand, to some degree, the parameters of the applicable court decisions. This bill appears to include barriers that either restrict passage or "recreational use". Additionally, reference is made to natural objects which "effectively obstructs" recreational use. Effective obstruction is an allusory and subjective test. Additionally, it is tied to the "time of use". The bill seems to include

boating and motorized craft as a permissible recreational use [see Section 1(7)(a)]. The presence of banks, shoals, or other natural features at low water, constitutes a "barrier", albeit that the water course would be susceptible to other forms of recreational use. I believe this is an expansion of the mandate of the Supreme Court.

I have a particular problem with the definition of Class I waters. Five standards are established for determining whether a water course is a Class I surface water. I believe that at least three of the five standards are subject to question as to whether they are consistent with the Supreme Court decision. Section 1(2)(a) includes lands which lie within the officially recorded government survey meander lines. I would submit that not all lands bordering on waterways which are meandered are navigable streams for purposes of state ownership of the streambed. Paragraph (c) of the same section includes lands which flow through public lands. Most waterways in western Montana flow through public lands. I gather that the intention may have been to include such water courses "while they flow through public lands". This presents problems, as well, in light of the fact that many ranches in Montana include small tracts of BLM, Forest, or State lands within the exterior boundaries of private property. I have particular problems with subparagraph (d) of this section. Subparagraph (d) includes surface waters which are or have been capable of supporting commercial activity. Arguably, any commercial guide could contend that the water course is capable of supporting commercial fishing activity. Furthermore, any guest ranch which has utilized waters which flow through its property and used by its guests, would have its waters classified as Class I under this definition. Mining activity, long since abandoned on the headwaters of many water courses, would also give rise to Class I treatment.

I believe that the definition of Class I water should be narrowed so as to include only those surface waters described in subparagraphs (b) and (e).

The significance of an overbroad Class I definition, notwithstanding the effect of expanding the import of the Supreme Court's decisions, is demonstrated in an examination of the treatment of Class II waters under this bill. I frankly have difficulty identifying a waterway which would be classified as ClassII under the proposed definition. I will discuss the broad definition of "recreational use" later in this letter, but it should be noted that Section 1(7)(b) provides that all recreational uses permitted in Class I waters are permitted in Class II waters, with certain exceptions,

those exceptions including the operation of all terrain vehicles or other motorized vehicles not primarily designed for operation upon the water [subsection (iii)] and the placement or creation of any permanent or semi-permanent object such as a permanent duck blind or boat moorage (iv). By clear implication, those uses which would be excluded from Class II waters would be included as permissible uses in Class I waters. I would submit that this is an expansion of the limits of recreational use afforded by the Supreme Court decision and the effect of permitting such uses could have a significant and unwarranted impact on agricultural landowners, particularly in light of the broad definition of Class I waters.

I likewise have some problems with the definition of "ordinary high water mark" [Section 1(6)]. In particular, I have difficulty with the reference to "diminished terrestrial vegetation or lack of agricultural crop value". The presence or absence of "agricultural crop value" is another vague and illusory standard. For example, is native wild grass an agricultural crop. A more appropriate standard is destruction of value for agricultural purposes. Additionally, rather than utilizing a standard of diminution of terrestrial vegetation, a more readily identifiable standard would be the deprivation of the land of such vegetation.

Additionally, the suggested provision does not seem to take into account flood plains or flood channels. I believe that the definition should clearly reflect that recreational activities are not permitted on flood plains or dry flood channels.

The next area of concern which I have with respect to House Bill 265 is the definition of recreational use [see Section 1(7)(a)]. All of the categories of recreational use appear to be water oriented with one major exception, to-wit: hunting. The Supreme Court may have envisioned the hunting of water fowl within the confines of the water course, but I do not believe that it is a proper expansion of the recreational use doctrine to include big game hunting, upland bird hunting, and the hunting of non-game animals such as coyotes and gophers as permissible recreational uses on Class I waters. Additionally, reference is made to boating and motorized craft unless otherwise prohibited or regulated by law. This legislation is absent any express designation of authority in the Department of Fish, Wildlife and Parks or other entity regarding regulation of hunting, boating and motorized craft, or other forms of recreational use which obviously could have a substantial detrimental affect on a water course or the lands which it abuts. In the absence of such express regulation or recognition by the legislature that public use can create adverse effects on wildlife, disruption of natural areas, damage of banks and lands adjacent to water bodies, this bill affords an overly broad statement of rights to the recreational user.

Additionally, reference is made to "related, unavoidable or incidental uses". Clarification of what is intended to be a permissible act within the parameters of unavoidable or incidental use would be of substantial assistance in determining whether the particular act is proper or improper within the scope of the definition.

I have referred earlier to recreational uses permitted under Class II. I would reiterate that the inclusion of certain activities, by a clear implication, includes those activities as permissible uses in Class I surface waters, and that the activities identified are not, in my opinion, consistent with the parameters of recreational use envisioned by our Supreme Court.

I have a slight problem with Section 2(3)(a). This section excludes recreational use of stock ponds or other impoundments fed by intermittently flowing natural water courses. A number of stock ponds are fed by other than intermittently flowing water courses. I would hope that such impoundments, utilized for that purpose, could be excluded from recreational use on the basis of the use made by the landowner and not the nature of the flow of the water course which services the pond.

I have some difficulty understanding the provision which appears at Section 2(5). I gather, perhaps incorrectly, that State owned lands which are school trust lands and which are subject to agricultural leases, have been administered on the basis of permitting the lessee to make decisions regarding the nature and extent of public use and access, the overriding concern being the non-interference with the conduct of the agricultural enterprise. I gather that some members of the recreating public may disagree with this management principle. At any rate, it appears to me that the provision in question does nothing more than codify the uncertainties which may exist as to the respective rights of the lessee and the public and the assertion of its recreational use rights.

I have a particular problem with the provisions relating to establishing the right to portage. The title of House Bill 265 provides, among other things, that the enactment will "establish the right to portage". Although the Supreme Court gave recreationalist the right to portage around barriers, they also mandated that this right be exercised in the least intrusive manner. The language clearly appears to place the burden primarily on the recreationalist. The portage provision (Section 3) in my opinion shifts the burden from the recreationalist to the landowner, and reduces or eliminates the ability of the landowner to deal with specific situations on a case by case basis. I believe that the attempt at codifying portage rights evidenced by House Bill 265 demonstrates the problems inherent in endeavoring to legislate beyond the scope of the Supreme Court mandate

For example, nowhere in Section 3 is there a requirement that "need" for a portage route be established. On the contrary, a portage route may be established when a member of the recreating public submits a request that such a route be established, and leads, within 45 days, to determination of a reasonable and safe portage route. See Section 3(b) and (c). Furthermore, the entire section engenders a detailed expensive administrative process for establishment and maintenance of such routes, all of which become obligatory, upon the landowner once the request is made that a route be established This provision also has significant fiscal implications. Paragraph 3(f) reflects that once the route is established, the Department of Fish, Wildlife and Parks has the exclusive responsible thereafter to maintain the portage route at reasonable times agreeable to the landowner. I gather that the obligation of maintenance is intended to extend beyond assuring that the route is open, and is inclusive of regular maintenance responsibility. I believe that this is a reasonable obligation to impose upon some public agency, but not the landowner, as it appears that the designation of such a corridor will effectively preclude the continuation of agricultural endeavors which would be difficult to continue in light of the public's right to use the designated strip for access purposes. It also raises the question of whether the designation of the route is a taking without compensation. The question of "maintenance" of the designated portage route also raises issues with respect to the liability of the landowner. The landowner's liability does appear to be limited to acts or omissions that constitute willful or wanton misconduct, while the public recreationalist portages or uses portage routes. It does not appear to me, however, that there should be any requirement of responsibility for "omissions" under those circumstances. Once designated, a landowner should not have the responsibility for continued maintenance of the way.

I additionally feel that the rights of the public with respect to portage are adequately set forth in the Supreme Court decision. If that feeling is not shared, at a maximum, the portage right should not be expanded beyond the provision evidenced by ~~objection~~ Section 4 of the Interim Subcommittee No. 2 bill.

I also have some concerns regarding the prescriptive easement section. The Subcommittee's bill clearly provides that prescriptive easements be acquired through use of "land or water for recreational purposes". The specific reference to "land" has been eliminated in House Bill 265. While some land related categories have been designated, in addition to "surface waters", I believe that the general designation and reference to land should be included in any bill passed by the legislature. Additionally, the new Section 8 of House Bill 265 provides that the prohibitions against acquisition of a prescriptive easement do not apply to prescriptive easements that have not been "perfected" prior to the effective date of the act.

I am not sure what is meant by the word "perfected". Some parties with whom I have discussed this provision suggest that this involves a judicial determination of the existence of a prescriptive easement or evidence of agreement by the parties affected by a prescriptive easement, of the existence of such an easement. I would be more comfortable with that standard. I believe it would be improper to adopt a loose standard which is not conclusive as of the effective date of the act. I am concerned that parties may, armed with the legislative enactment, claim the existence of prescriptive rights based upon the recreational use rights afforded by the legislative enactment, when in fact, no such right was intended to be obtained predicated upon former use.

I have some of the same problems with House Bill 275, to the extent that that bill incorporates comparable language to House Bill 265 with regard to the matters which I have specifically addressed. I believe, however, that House Bill 275 has some provisions which are beneficial and which merit further scrutiny. In particular, I believe that the provisions of Section 4(2) regarding the development of rules regulating water courses are helpful. Representative Cobb's bill contains a good statement of the relevant considerations which should bear on the issue of regulation of public use. Statements of overriding public concerns regarding the use of water courses, recreational rights notwithstanding, are well stated in subparagraphs 2(a)-(g). Here again, however, I believe that there is a serious question of determining the appropriate classifications of the State's water. The Class I water standard established in House Bill 275 may contain the same problems heretofore noted with respect to those waters which lie within the officially recorded federal government survey meander lines, but classification is nevertheless more appropriately restrictive and, I think that all of us can more clearly determine Class II and Class III waters under the definitions provided by Representative Cobb.

I believe that the enactment proposed by the Interim Subcommittee No. 2, may come closer to the format of an appropriate bill than either of the aforementioned proposals. I recognize that there is serious concern with regard to the standard of the "federal test of navigability" contained in the Interim Subcommittee bill. I think, however, that that standard can be appropriately modified.

I have obviously addressed in more detail House Bill 265. In part, that is because House Bill 265 is a more detailed attempt to resolve the issue of the parameters of recreational use. In part, that more detailed analysis has occurred because of the understanding that this bill represents an endorsed compromise between recreational and agricultural interests. I believe that there are serious problems

with the bill principally from the standpoint of its potential impact upon agricultural landowners.

I also believe that the format of House Bill 265 demonstrates a flaw in the overall approach to the resolution of this problem. I would respectfully submit that the endeavors to provide detailed answers to unanswered questions have, in many instances, raised new and more thorny questions. It also appears that in endeavoring to answer some of the unanswered questions, the authors of the bill have attempted to conjecture as to the posture of the Supreme Court. It is obviously my opinion that in some instances they have erred on the side of expanding rights which the Court did not intend to afford. Obviously that point may be disputed. I would suggest that the initial efforts at addressing the impacts of the Curran and Hildreth decisions by the legislature be exercised with caution, and for that reason I lean toward enactment of a bill, if a bill is to be enacted, more in accord with that proposed by Interim Subcommittee No. 2. Any legislation which is enacted will fail to address all of the issues which might come up during the next biennium. I would prefer, however, to address particular problems once they become reality rather than to create problems in an anticipatory manner.

I suspect that recreational interests would, in many instances, contend that the Court's interpretations have arisen by virtue of denial of legitimate rights by certain landowners. In the same vein, I am positive that many agricultural landowners feel that overly broad legislative enactment will create the same kind of problems from their perspective if individual recreational users attempt to exercise their rights in an overly aggressive manner, armed with broad legislative pronouncements.

This is an issue which has not been created overnight, and which is not subject to speedy resolution. I believe many citizens of the State of Montana would be more comfortable addressing some of the issues which are detailed in House Bill 265 after there has been greater experience from both the agricultural and recreationalist's standpoint in dealing with the general issue.

Very truly yours,

KNIGHT & MACLAY

ROBERT M. KNIGHT

RMK/bab

P.S.
I have enclosed a number of copies which hopefully will be sufficient for circulation to the other members of the Joint Committees.

J. S. Solberg Company
108 McLEOD ST. - BOX 817 - BIG TIMBER, MONTANA 59011 - PHONE 932-2393

January 20, 1985

House Judiciary Committee
Helena, Montana

Honorable Chairman and Committee Members:

The following testimony is offered in regard to the hearing on recreational use of State waters.

My name is Bernie Hedrick, P.O. Box 817, Big Timber, Montana. I have resided in Big Timber since May of 1983. My wife and I own and operate J. S. Solberg Company, the oldest retail clothing store in the state of Montana. Our store is a small business which is located in Big Timber.

I first became interested in the issue this summer (1984) when a customer, who resides in California and summers in Big Timber, told me that he had been denied the right of access across a rancher's land to fish an area that he had been fishing for quite sometime. The rancher was participating in an organized effort among Sweet Grass County landowners to close their land to public use for a period of time as a means of protesting the recent Montana Supreme Court rulings and to draw attention to the fact that the matter of recreational use of State waters was still not resolved.

My customer was very irrate and indicated that he probably would not return to Big Timber and as a result, would not be carrying on any business with any of the local merchants. Fortunately, a rancher's wife was in the store at the same time as my customer. She took the time to explain the rationale of the landowners actions and expanded on some of the problems that landowners experience as a result of owning property which has a stream flowing through it. She explained that gates were often left open, stock was lost, fences torn down, their land was often littered, crops were destroyed by vehicles, problems with trespass, etc.

As a result of their conversation, my customer had a better understanding of the landowners problems. He agreed that the landowner should not be open to such abuse but affirmed his right, as a responsible sportsman, to fish the public waters. The ranch wife left my store with the knowledge that the sportsman did not want to infringe on the landowner's right to own and manage his own land, but merely wanted to exercise his right to fish in public waters.

After that day in the store, I became interested in the whole issue. I read the Supreme Court Rulings, attended the Interim Subcommittee's hearing concerning the recreational use of water on July 30, 1984, have reviewed all the information available from the Legislative Council, have read articles concerning the Public Trust Doctrine and, most recently, read three rough drafts of proposed legislation.

After reading the above referenced information, I believe good legislation would address the following issues or define the following words in a manner in which any prudent man could understand.

A. Barrier
B. Ordinary High Water Mark
C. "Waters that are Capable of Recreational Use"
D. Diverted water
E. Recreational Use
F. Portaging
G. Landowner Liability
H. Prescriptive Easement

After reading other proposed legislation, I believe that the bill (LC0069/01), drafted by the Interim Subcommittee, is probably the clearest and easiest to understand. It would be my bill of preference if the following areas could be clarified:

(1) On page -2- of LC0069/01, reference is made on line 8 to "any surface waters that are capable of recreational use may be so used by the public without regard to ownership of the land underlying the waters".

How does one distinguish a surface water that is "capable of recreational use" from a surface water that is not capable of recreational use or does a distinction need to be made?

(2) Is there a general agreement or definition as to what "recreational use" means or is it even important?

3) On page -3-, line 7 through line 11, reference is made to portaging. It would appear to me that the reason for portaging is that the surface waters would be too shallow or else there would be some type of barrier which would pose a risk to the public using that water. It would therefore appear to me that some of the language should be the same as in Section 3. For example, New Section. Section 4. Portaging when permissible. A member of the public may, above the ordinary high water mark, portage around barriers in the least intrusive manner possible, avoiding damage to the landowner's land and violation of his rights.

One might add to this section by stating that "Portaging should be used by the public only for purposes of safety, health or bypassing barriers".

Other than the areas I have mentioned, I think LC0069/01 is the result of a lot of hard work on the part of the Legislative Council, Subcommittee members and all those individuals who have taken the time to give you input.

I appreciate the opportunity to offer my views and am sure you will arrive at a that everyone will find satisfactory.

Yours truly,

Bernie Hedrick

Bernie Hedrick

MINUTES FOR THE MEETING
JUDICIARY COMMITTEE
MONTANA STATE
HOUSE OF REPRESENTATIVES

February 11, 1985

The meeting of the Judiciary Committee was called to order by Chairman Tom Hannah on Monday, February 11, 1985 at 8:00 a.m. in Room 312-3 of the State Capitol.

ROLL CALL: All members were present.

CONSIDERATION OF HOUSE BILL NO. 265: Rep. Keyser informed the committee that the subcommittee studying the stream access bills has drafted a "gray bill". The changes as set forth in the gray bill were a result of a unanimous decision made among the subcommittee members. The gray bill is being prepared and will be submitted.

RE-CONSIDERATION OF HOUSE BILL NO. 443: Although HB 443 was sent out of committee on February 7, 1985, the Statement of Intent was not attached. The bill was re-referred back to committee so that the Statement of Intent could be adopted. On that basis, Rep. O'Hara moved that the committee adopt the Statement of Intent to HB 443. The motion was seconded by Rep. Hammond and carried unanimously.

CONSIDERATION OF HOUSE BILL NO. 620: Rep. Bradley, chief sponsor for HB 620, said the bill requires justices of the peace to be certified prior to their taking office. This process is basically done through the existing commission on courts. She pointed out that this would not be practiced until January 6, 1986. After that time, a J.P. could only assume the functions of that office if he filed with the county clerk and recorder a certificate showing that he completed the required educational course set up by the commission. She said it would require no expenses because it is something that can be asborbed by the commission.

Janet Stevens, justice of the peace in Missoula, testified in favor of this bill. She said the purpose of the bill is to further professionalize the courts of limited jurisdiction. It will increase the public's trust in justice of the peace courts.

Jim Jensen, appearing on behalf of the Montana Magistrates Association, wished to go on record as supporting this legislation.

MINUTES FOR THE MEETING
JUDICIARY COMMITTEE
MONTANA STATE
HOUSE OF REPRESENTATIVES

February 12, 1985

An executive session of the Judiciary Committee was called to order by Chairman Tom Hannah on Tuesday, February 12, 1985 at 7:00 a.m. in Room 312-3 of the State Capitol Building.

ROLL CALL: All members were present.

ACTION ON HOUSE BILL NO. 265: Rep. Keyser, chairman on the subcommittee studying the stream access bills, submitted the "gray bill" that the subcommittee unanimously drafted together. The gray bill is marked as Exhibit A and is attached to these minutes. He also informed the committee of the Statement of Intent. He briefly discussed with the committee the particular changes the subcommittee made to the original HB 265.

Rep. Addy had a few questions concerning the arbitration panel portion of the "gray bill" on line 9. Rep. Keyser said this would allow an arbitration panel that would work so that two parties could get together with the third party and discuss their differences and reach some sort of an agreement which would prevent them from having to go to court.

Rep. Montayne feels the language dealing with the arbitration portion is vague, and he wishes to see a consumer added to the panel.

Rep. Keyser said that the Statement of Intent is clear and concise as to what the subcommittee agreed to. It clearly gives the duties that the Fish, Wildlife and Parks Department have to address.

Rep. O'Hara moved that the committee adopt the amendments to HB 265 as the subcommittee proposed, and the Statement of Intent likewise be adopted. The motion was seconded by Rep. Grady.

In response to a question asked by Rep. Gould, Rep. Keyser said this act is effective on passage and approval.

Rep. Cobb had several amendments he submitted at this time. The first one dealt with page 1, line 25, following "that" insert "and are capable of recreational use". His reasoning behind this amendment is because he feels it clarifies that there are some waters that are not capable of recreational usage . The motion was seconded by Rep. Grady and further discussed.

Rep. Mercer stated the reasons why that particular amendment is not necessary. He referred the committee to page 4, line 24, pointing out that this language takes care of this. Another reason making the amendment unwise to put in is because under the current definitions of class 1 and class 2 waters, this permits the fish and game to regulate all those waters.

The question was called on Rep. Cobb's amendment, and the motion failed with Reps. Cobb and Grady voting for the motion.

Rep. Rapp-Svrcek referred to page 6, line 3 when he asked the question if there are any areas in the state that big game is hunted with shotguns only. Rep. Keyser stated that the subcommittee definitely discussed this subject and didn't feel this was the bill to include it. He pointed out that big game hunting will be excluded only from private property.

Rep. Keyser, in response to a question asked by Rep. Brown, stated that there is an existing statute that an individual must request permission from the landowner before hunting on his property. He said they have not changed any of this language, and big game hunting is not being stopped. There is no intent to stop hunting on what isn't private property.

In response to another question, Rep. Keyser knows of no other state which allows big game hunting from boats.

Rep. Brown moved on page 6, line 3 to strike line 3 in its entirety. The motion was seconded by Rep. Krueger. Rep. Mercer stated his objection to this motion to amend. He pointed out that there is a statute that requires an individual to have permission of the landowner before he big game hunts on that landowner's property.

The question was called, and the motion failed 5-13. Reps. Brown, Krueger, Montayne, Miles and Darko voted in favor of the motion to amend while the rest of the members voted against it.

There were further general questions asked. Chairman Hannah stated that this bill will be further considered following the hearing scheduled for 8:00 a.m. this day.

Tom Hannah

TOM HANNAH, Chairman

hearing on the punitive damage bills closed.

EXECUTIVE SESSION

Chairman Tom Hannah called an executive session to order at 11:05 a.m.

ACTION ON HOUSE BILL NO. 265: Rep. Montayne moved to amend page 9, lines 8 through 12 by inserting the word "consumer" somewhere in the language. He feels unless consumer is added, the landowner and recreationalists will continue to fight. The motion was seconded by Rep. Addy.

Rep. Gould pointed out that the recreationalist is a consumer. Rep. Montayne said that a landowner is a consumer also, but he feels that by adding another consumer would provide the three-man board with a better stabilization.

The question was called on Rep. Montayne's motion and it failed with Rep. Montayne voting "yes".

Rep. Cobb moved to amend the bill on page 6, to add a new section (E) which will say "the placement or creation of any permanent or semi-permanent object such as a permanent duck blind or boat moorage.". The amendment includes striking lines 8 through 10 on page 6. He wanted to place this language higher because basically if you are placing property on someone else's property in a permanent or semi-permanent way he doesn't feel that this is quite correct. The fish and game department doesn't allow it now, and he feels if something is going to be placed permanently or semi-permanently permission should be obtained from the landowner.

Rep. Krueger stated that broad attention to this area has been given, and we are reflecting that in relation to the duties given to the fish and game commission.

The question was called and the motion to amend failed. (Those voting in favor of the motion were Reps Hannah, Gould, O'Hara, Grady, Cobb, Bergene and Montayne.)

Rep. Cobb further moved to amend page 6, following line 7 insert a new section(b) and renumber subsequent sections. The new section would read "UPLAND BIRD HUNTING".

Rep. Eudaily stated that he felt this amendment would be inappropriate. If you're on a farmer's ranch at present you don't have permission to hunt above the high water marks.

The question was called, and the motion to amend failed with Reps. Hannah, Montayne, Grady, Cobb, Gould and Bergene voting in favor of the amendment.

Rep. Cobb moved to amend the Statement of Intent. He wished to have the following language adopted into the Statment of Intent; "The department or the commission shall develop categories for surface waters in Class I and Class II waters as to recreational use and classify all such waters as to their recreational uses." He said the reason he wished to include this is because it is a long term procedure, and all the other states are following through with this. It is just a recommendation to the fish and game department to do what they are doing, to continue to classify. Another thing he feels needs to put into the Statment of Intent is that it needs to be re-emphasized to the commission that they ought to provide procedures for immediate temporary closure of surface waters by the commission itself or by ex-officio wardens due to public health or safety or nuisance to public or private property. He said the Statement of Intent should imply that categories should be made as the commission is already doing and classifying these surface waters. Secondly, temporary closures should be clarified. Thirdly, the department should be responsible for cleaning up the litter left behing by recreationists. A copy of his proposed amendments was marked as Exhibit H and is attached hereto. Without objection, the amendments will be divided for purposes of clarity.

The first part of the amendment deals with requesting the department to develop categories for surface water and classify surface waters as to their recreational use.

Rep. Keyser said he didn't have a huge problem with C, but he feels the department has the right and are presently doing this. He doesn't know that including it in the Statement of Intent will necessarily speed up the process. Rep. Keyser said as far as adopting E, the money that could be spent is unknown and could create problems. He feels that the department already has the authority to do this.

The question was called on the motion to adopt the first part of amendment 7, i.e. (C), and it failed with Reps. Hannah, O'Hara, Cobb, and Bergene voting for the amendment.

Amendment 7 (D) would provide for immediate temporary closing of surface waters by the commission, the department, or ex-officio wardens due to public health safety or nuisance to public or private property. The motion failed with Reps. Cobb, Hannah, Gould, and Bergene voting "yes" on the motion to amend.

The third amendment would require the department to be responsible for cleaning up the litter on property. The motion failed with Reps. Cobb and Bergene voting for the motion.

Following further discussion, Rep. Mercer stated that he hopes to see the committee give its unanimous consent to adopt the subcommittee's decision.

Rep. Keyser pointed out that the senate will probably amend this bill in many ways. He also stated that the subcommittee couldn't possibly spell out absolutely everything that came up in the bill. He pointed out that the Fish and Game Commission is presently doing many of these things.

The question was called, and the motion to adopt the subcommittee's amendments to HB 265 carried with Rep. Cobb voting "no".

ADJOURN: A motion having been made, and the motion having been seconded, the meeting adjourned at 11:30 a.m.

Tom Hannah
REP. TOM HANNAH, Chairman

2-7-85
2nd version
HB 0265/gray

HOUSE BILL NO. 265

INTRODUCED BY REAM, MARKS

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY DEFINING LAWS RELATING TO RECREATIONAL USE OF STATE WATERS; PROHIBITING RECREATIONAL USE OF DIVERTED WATERS; RESTRICTING THE LIABILITY OF LANDOWNERS WHEN WATER IS BEING USED FOR RECREATION; ESTABLISHING THE RIGHT TO PORTAGE; PROVIDING THAT A PRESCRIPTIVE EASEMENT CANNOT BE ACQUIRED BY RECREATIONAL USE OF SURFACE WATERS; AMENDING SECTION 70-19-405, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

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

NEW SECTION. Section 1. Definitions. For purposes of [sections ~~2~~ 1 through 5], the following definitions apply:

(1) "Barrier" means an artificial obstruction located in or over a water body, restricting passage on or through the water, or a natural object IN OR OVER A WATER BODY which totally or effectively obstructs the recreational use of the surface water at the time of use. A barrier may include but is not limited to a bridge or fence or any other manmade obstacle to the natural flow of water or a natural object within the ordinary high-water mark of a stream.

(2) "Class I waters" means surface waters that:

(a) lie within the officially recorded federal government survey meander lines thereof;

(b) flow over lands that have been judicially determined to be owned by the state by reason of application of the federal navigability test for state streambed ownership;

(c) flow through public lands, WHILE WITHIN THE BOUNDARIES OF SUCH LANDS;

(d) are or have been capable of supporting THE FOLLOWING commercial ~~activity~~ ACTIVITIES: LOG FLOATING, TRANSPORTATION OF FURS AND SKINS, SHIPPING, COMMERCIAL GUIDING USING MULTIPERSON WATERCRAFT, PUBLIC TRANSPORTATION, OR THE TRANSPORTATION OF MERCHANDISE, AS THESE ACTIVITIES HAVE BEEN DEFINED BY PUBLISHED JUDICIAL OPINION AS OF [THE EFFECTIVE DATE OF THIS ACT]; or

(e) are or have been capable of supporting commercial activity within the meaning of the federal navigability test.

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

(4) "COMMISSION" MEANS THE FISH AND GAME COMMISSION PROVIDED FOR IN 2-15-3402.

~~(4)~~(5) "Department" means the department of fish, wildlife, and parks provided for in 2-15-3401.

~~(5)~~(6) "Diverted away from a natural water body" means

a diversion of surface water through a manmade water conveyance system, including but not limited to:

(a) an irrigation or drainage canal or ditch;

(b) an industrial, municipal, or domestic water system;

(c) a flood control channel; or

(d) a hydropower inlet and discharge facility.

~~(6)~~(7) "Ordinary high-water mark" means the line that water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it. Characteristics of the area below the line include, when appropriate, but are not limited to diminished terrestrial vegetation or lack of agricultural crop value. A FLOOD PLAIN ADJACENT TO SURFACE WATERS IS NOT CONSIDERED TO LIE WITHIN THE SURFACE WATERS' HIGH-WATER MARKS.

~~(7)~~(8) ~~(a)~~ "Recreational use" means with respect to ~~class I~~ SURFACE waters: fishing, hunting, swimming, floating in small craft or other flotation devices, boating in motorized craft unless otherwise prohibited or regulated by law, or craft propelled by oar or paddle, OTHER WATER-RELATED PLEASURE ACTIVITIES, and related unavoidable or incidental uses~~,--within-the-ordinary-high-water-mark-of the-waters~~.

~~(b)--Recreational-use-means-with-respect--to--class--II~~

~~waters--all--of--the--uses--set--forth-in-subsection-(7)(e),~~
~~except-that-it-does-not-include,-without-permission--of--the~~
~~landowner:~~

~~(i)--overnight-camping;~~

~~(ii)-big-game-hunting-or-upland-bird-hunting;~~

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

~~(iv)-the-placement-or--creation--of--any--permanent--or~~
~~semipermanent--object-such-as-a-permanent-duck-blind-or-boat~~
~~moorage;-or~~

~~(v)--other---activities---which---are---not---primarily~~
~~water-related-pleasure-activities.~~

~~(8)~~(9) "Supervisors" means the board of supervisors of a soil conservation district, the directors of a grazing district, or the board of county commissioners if a request pursuant to [section 3(3)(b)] is not within the boundaries of a conservation district or if the request is refused by the board of supervisors of a soil conservation district or the directors of a grazing district.

(10) "SURFACE WATER" MEANS, FOR THE PURPOSE OF DETERMINING THE PUBLIC'S ACCESS FOR RECREATIONAL USE, A NATURAL WATER BODY, ITS BED, AND ITS BANKS UP TO THE ORDINARY HIGH-WATER MARK.

NEW SECTION. Section 2. Recreational use permitted --

limitations -- exceptions. (1) Except as provided in ~~subsection (3)~~ SUBSECTIONS (2) THROUGH (4), all ~~class--I~~ SURFACE waters that are capable of recreational use ~~as defined in section 1(7)(a), including the beds underlying them and the banks up to the ordinary high-water mark,~~ may be so used by the public without regard to the ownership of the land underlying the waters.

~~(2)--Except as provided in subsection (3), all class II waters that are capable of recreational use as defined in section 1(7)(b), including the beds underlying them and the banks up to the ordinary high-water mark, may be so used by the public without regard to the ownership of the land underlying them, except that recreational use does not include these activities excluded in section 1(7)(b).~~

~~(3)~~(2) The right of the public to make recreational use of surface waters does not include ~~the right to make recreational use of waters~~, WITHOUT PERMISSION OF THE LANDOWNER:

(a) THE OPERATION OF ALL-TERRAIN VEHICLES OR OTHER MOTORIZED VEHICLES NOT PRIMARILY DESIGNED FOR OPERATION UPON THE WATER;

(B) THE RECREATIONAL USE OF SURFACE WATERS in a stock pond or other impoundment fed by an intermittently flowing natural watercourse; or

~~(b)~~(C) THE RECREATIONAL USE OF WATERS while diverted

away from a natural water body for beneficial use pursuant to Title 85, chapter 2, part 2 or 3; OR

(D) BIG GAME HUNTING.

(3) THE RIGHT OF THE PUBLIC TO MAKE RECREATIONAL USE OF CLASS II WATERS DOES NOT INCLUDE, WITHOUT PERMISSION OF THE LANDOWNER:

(A) OVERNIGHT CAMPING;

(B) THE PLACEMENT OR CREATION OF ANY PERMANENT OR SEMIPERMANENT OBJECT, SUCH AS A PERMANENT DUCK BLIND OR BOAT MOORAGE; OR

(C) OTHER ACTIVITIES WHICH ARE NOT PRIMARILY WATER-RELATED PLEASURE ACTIVITIES.

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

(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; AND

(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).

~~(5)~~(6) The provisions of this section do not affect any rights of the public with respect to state-owned lands that are school trust lands or any rights of lessees of such lands ~~under lease on the effective date of this act~~.

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

(2) A landowner may create barriers across streams for purposes of land or water management or to establish land ownership as otherwise provided by law. If a landowner erects a ~~barrier~~ STRUCTURE pursuant to a design approved by the department and the ~~barrier is designed not to~~ and STRUCTURE does not interfere with the public's use of the surface waters, the public may not go above the ordinary high-water mark to portage around the ~~barrier~~ STRUCTURE.

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

(b) A portage route may be established when either a landowner or a member of the recreating public submits a request to the supervisors that such a route be established.

(c) Within 45 days of the receipt of a request, the supervisors shall, in consultation with the landowner and a representative of the department, examine and investigate the barrier and the adjoining land to determine a reasonable and safe portage route.

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

(e) The cost of establishing the portage route around artificial barriers must be borne by the involved landowner, except for the construction of notification signs of such route, which is the responsibility of the department. The cost of establishing a portage route around natural barriers must be borne by the department.

(f) Once the route is established, the department has the exclusive responsibility thereafter to maintain the portage route at reasonable times agreeable to the

landowner. The department shall post notices on the stream of the existence of the portage route and the public's obligation to use it as the exclusive means around a barrier.

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

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

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

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

NEW SECTION. Section 4. Restriction on liability of landowner and supervisor. (1) A person who makes

recreational use of surface waters flowing over or through land in the possession or under the control of another, pursuant to [section 2], or land while portaging around or over barriers or while portaging or using portage routes, pursuant to [section 3], does not have the status of invitee or licensee and is owed no duty by a landowner other than that provided in subsection (2).

(2) A landowner or tenant is liable to a person making recreational use of waters or land described in subsection (1) only for an act or omission that constitutes willful or wanton misconduct.

(3) No supervisor who participates in a decision regarding the placement of a portage route is liable to any person who ~~while--making--recreational--use-of-the-surface waters-is-injured-while-using~~ IS INJURED OR WHOSE PROPERTY IS DAMAGED BECAUSE OF PLACEMENT OR USE OF the portage route except for an act or omission that constitutes willful and wanton misconduct.

NEW SECTION. Section 5. Prescriptive easement not acquired by recreational use of surface waters. (1) A prescriptive easement is a right to use the property of another that is acquired by open, exclusive, notorious, hostile, adverse, continuous, and uninterrupted use for a period of 5 years.

(2) A prescriptive easement cannot be acquired

through:

(A) recreational use of surface waters, including:

(I) the streambeds underlying them; ~~and~~

(II) the banks up to the ordinary high-water mark; or ~~of~~

(III) ANY portage ~~routes~~ over and around barriers; OR

(B) THE ENTERING OR CROSSING OF PRIVATE PROPERTY TO REACH SURFACE WATERS.

Section 6. Section 70-19-405, MCA, is amended to read:

"70-19-405. Title by prescription. ~~Occupancy~~ Except as provided in [section 5], occupancy for the period prescribed by this chapter as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all."

NEW SECTION. Section 7. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 8. Applicability. Sections 5 and 6 apply only to a prescriptive easement that has not been perfected prior to [the effective date of this act].

NEW SECTION. Section 9. Effective date. This act is

effective on passage and approval.

-End-

EXHIBIT H
2/12/85
HB 265

Proposed Amendment for John Cobb

1. Page 2, line 20.
Strike: "."
Insert: "and are capable of recreational use."

Page 1, line 25.
Strike: ":"
Insert: "are capable of recreational use and:"

2. Page 6, line 4.
Insert: "(E) The placement or creation of any permanent or semi permanent object, such as a permant duck blind boat moorage."

Page 6, line 3.
Strike: "."
Insert: "or"

Page 6, line 9-11.
Strike: in its entirety

3. Page 6, line 4
Add "(F) upland bird hunting if posted as required under _____."

4. Page 6, line 4.
Insert: "(G) hunting or overnight camping within 500 feet of a residence."

5. Page 6.
Following: line 7
Insert: "upland bird hunting."

6. Page 6, line 17-18.
Strike: "pursuant to 87-1-303"

7. Page 7.
Following: line 7
C) develop categories for surface waters within Class I and Class II waters as to recreational uses and to classify all surface waters as to their recreational uses.

D) provide procedures for immediate temporary closing of surface waters by the Commission, its Department or ex-official wardens due to public health, safety, or nuisance to public or private property.

E) upon notice of a landowner, have the Department clean up all litter on surface waters left from recreational use of surface waters without permission of the landowner.

F) All rules adopted by the commission in the interest of public health, public safety, or protection of public and private property shall be as strict as those provided for in section _____.

ROLL CALL VOTE

HOUSE COMMITTEE JUDICIARY

DATE February 13, 1985 BILL NO. HB 627 TIME 11:10

NAME	AYE	NAY
Kelly Addy		
Toni Bergene		✓
John Cobb	✓	
Paula Darko		✓
Ralph Eudaily	✓	
Budd Gould	✓	
Edward Grady	✓	
Joe Hammond		✓
Kerry Keyser	✓	
Kurt Krueger	✓	
John Mercer	✓	
Joan Miles		✓
John Montayne	✓	
Jesse O'Hara	✓	
Bing Poff	✓	
Paul Rapp-Svrcek		
Dave Brown (Vice Chairman)		
Tom Hannah (Chairman)	✓	

Marcene Lynn
Secretary

Tom Hannah
Chairman

Motion: Rep. Eudaily made a substitue motion on line 23 to strike "review all" and insert "have access to". The motion was seconded by Rep. Mercer and carried 11-4.

CS-31

STANDING COMMITTEE REPORT

February 13 19 85

MR. Speaker:

We, your committee on Judiciary

having had under consideration House Bill No. 265

first reading copy (white color)

STREAM ACCESS

Respectfully report as follows: That House Bill No. 265

BE AMENDED AS FOLLOWS:

1. Page 1, line 16.
Strike: "2"
Insert: "1"

2. Page 1, line 19.
Following: "object"
Insert: "in or over a water body"

3. Page 2, line 7.
Following: "lands"
Insert: ", while within the boundaries of such lands"

4. Page 2, line 8.
Following: "supporting"
Insert: "the following"

DO PASS.

CONTINUED

Chairman.

STATE PUB. CO.
Helena, Mont.

COMMITTEE SECRETARY

February 13 19 85

5. Page 2, line 9.
Strike: "activity"
Insert: "activities: log floating, transportation of furs and skins, shipping, commercial guiding using multiperson watercraft, public transportation, or the transportation of merchandise, as these activities have been defined by published judicial opinion as of [the effective date of this act]"

6. Page 3, following line 14.
Insert: "(4) "Commission" means the fish and game commission provided for in 2-15-3402."
Renumber: subsequent subsections.

7. Page 3, line 6.
Following: "value."
Insert: "A flood plain adjacent to surface waters is not considered to lie within the surface waters' high-water marks."

8. Page 3, line 7.
Strike: "(a)"
Following: "to"
Strike: "class" and "I" on line 8
Insert: "surface"

9. Page 3, line 11.
Following: "paddle,"
Insert: "other water-related pleasure activities,"

10. Page 3, line 12.
Following: "uses"
Strike: ", within" through "waters" on line 13

11. Page 3, following line 13.
Strike: subsection (b) in its entirety

12. Page 4, following line 9.
Insert: "(10) "Surface water" means, for the purpose of determining the public's access for recreational use, a natural water body, its bed, and its banks up to the ordinary high-water mark."

13. Page 4, line 17.
Strike: "subsection (3)"
Insert: "subsections (2) through (4)"

Following: "all"
Strike: "class I"
Insert: "surface"

CONTINUED

Chairman.

STATE PUB. CO.
Helena, Mont.

February 13 19 85

14. Page 4, line 13.
Following: "use"
Strike: "as defined" through "mark," on line 15

15. Page 4, following line 16.
Strike: subsection (2) in its entirety
Renumber: subsequent subsections

16. Page 4, line 25.
Following: "include"
Strike: "the" through "waters" on page 5, line 1
Insert: ", without permission of the landowner"

17. Page 5, line 2.
Following: "(a)"
Insert: "the operation of all-terrain vehicles or other motorized vehicles not primarily designed for operation upon the water; (b) the recreational use of surface waters"

18. Page 5, line 3.
Strike: "or"

19. Page 5, line 4.
Strike: "(b)"
Insert: "(c) the recreational use of waters"

20. Page 5, line 5.
Following: "3"
Insert: "; or (d) big game hunting"
Following: "."
Insert: "(3) The right of the public to make recreational use of class II waters does not include, without permission of the landowner:
(a) overnight camping;
(b) the placement or creation of any permanent or semi-permanent object, such as a permanent duck blind or boat moorage; or
(c) other activities which are not primarily water-related pleasure activities."
Renumber: subsequent subsections

21. Page 5.
Following: line 9
Insert: "(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

CONTINUED

Chairman.

February 13 19 85

(ii) altering limitations, restrictions, or prohibitions on recreational use of surface water imposed by the commission; and (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)"
Renumber: subsequent subsection

22. Page 5, line 13.
Following: "lands"
Strike: "under" through "act)"

23. Page 5, line 23.
Strike: "barrier"
Insert: "structure"

24. Page 5, line 24.
Strike: "barrier" through "and"
Insert: "structure"

25. Page 6, line 2.
Strike: "barrier"
Insert: "structure"

26. Page 6, line 16.
Following: "who"
Strike: "while" through "using" on line 17
Insert: "is injured or whose property is damaged because of placement or use of"

27. Page 9, line 1.
Following: "through"
Insert: ":(a)"

28. Page 9, line 2.
Following: "including"
Insert: ":(i)"

29. Page 9, line 3.
Following: "them"
Insert: ";"
Strike: "and"
Insert: "(ii)"

30. Page 9, line 4.
Following: "mark"
Strike: "."
Insert: ";"

CONTINUED

Chairman.

STATE PUB. CO.
Helena, Mont.

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Following: "or"
Strike: "of"
Insert: "(iii) any"

Following: "portage"
Strike: "routes"

Following: "barriers"
Insert: "; or (b) the entering or crossing of private property to reach surface waters"

AND AS AMENDED,
DO PASS
STATEMENT OF INTENT ATTACHED

STATE PUB. CO.
Helena, Mont.

REP. TOM HANNAH Chairman.

February 12, 19 85

STATEMENT OF INTENT
HOUSE BILL NO. 265

A statement of intent is required for House Bill 265 because section 2(5) directs the fish and game commission to adopt rules governing recreational use of surface waters.

In its implementation of this bill, the long-range goal of the commission must be to preserve, protect, and enhance the surface waters of this state while facilitating the public's exercise of its recreational rights on surface waters. The commission shall strive to permit broad exercise of public rights, while protecting the water resource and its ecosystem. In adopting the procedural rules required by section 2, the commission shall emphasize that in close cases the decision must be to protect the environment by restricting or continuing to restrict recreational use, since it is easier to prevent environmental degradation than it is to repair it.

In developing the rules implementing House Bill 265, the commission shall make every effort to make the process uncomplicated and clear. As provided in subsection (5)(b) the commission must issue written findings and an order whenever a request is made for restrictions on recreational use of a surface water or for the lifting of previously imposed limitations on recreational use of a surface water. The commission may adopt rules providing for summary dismissal of requests when a substantially similar request has been received and acted upon within a brief time prior to the second or subsequent requests if, during the time period since the first request, it is unlikely that there has been a change in the situation upon which the commission based its earlier decision.

In developing the rules establishing criteria for determination upon a request made under subsections (5)(a) or (5)(b), the commission shall require that each of the following factors that is relevant to the decision must be considered in the determination:

(a) whether public use is damaging the banks and land adjacent to the water body;

(continued)

Chairman.

STATE PUB. CO.
Helena, Mont.

(b) whether public use is damaging the property of landowners underlying or adjacent to the water body;

(c) whether public use is adversely affecting wildlife or birds;

(d) whether public use is disrupting or altering natural areas or biotic communities;

(e) whether public use is causing degradation of the water quality of the water body; and

(f) any other factors relevant to the preservation of the water body in its natural state.

In making its decision after a request has been made for restrictions of recreational use, the commission may impose any reasonable limitation on the recreational use of surface waters including complete prohibition of a particular type of recreation, prohibition of a particular type of recreation in certain specified areas, such as within a specified distance of a residence or other structure, or in an appropriate case, prohibition of all recreation.

STATE PUB. CO.
Helena, Mont.

REP. TOM HANNAH Chairman.

MINUTES OF THE MEETING
JUDICIARY SUBCOMMITTEE
ON STREAM ACCESS BILLS
MONTANA STATE
HOUSE OF REPRESENTATIVES

January 25, 1985

The meeting of the Judiciary subcommittee on stream access bills was called to order at 7:00 a.m. in Room 312-3 of the State Capitol.

All members were present, as were several representatives of interested groups.

The committee opened with a discussion of Ron Waterman's proposed amendment to HB 265, p. 8, lines 16-17. That amendment would read: "person who is injured or whose property is damaged because of placement or use of a portage . . . ." replacing that portion of lines 16-17 following "who" and preceding "portage."

Rep. Mercer moved to approve the amendment, and the motion was carried. Rep. Krueger moved to approve Section 4, and that motion also was carried.

Rep. Mercer expressed his concern with the lack of limits to recreational use in HB 265. He said he felt the bill should provide specific authority for the Fish and Game Commission to limit recreational use, particularly on small streams.

Reps. Krueger and Hammond said that addressing the problem posed by Rep. Mercer would mean starting over in drafting the stream access proposals, and that the committee should focus on working with compromise bill before it.

Rep. Mercer suggested that HB 265 be amended to include a cross-reference to the MCA statute addressing the authority of the Fish and Game Commission to regulate recreational use. That statute is §87-1-303 MCA.

At the request of Chairman Keyser, the subcommittee proceeded to a discussion of the provision of HB 265 allowing use of all terrain vehicles (ATV's) as set forth in lines 20-22, page 3. Rep. Keyser said he had problems with allowing the use of ATV's along streams flowing through private property. Rep. Keyser suggested a restriction on the use of ATV's on all streams, not just Class II streams.

Rep. Mercer asked if the subcommittee should consider a complete prohibition of certain recreational uses. Dan Heinz, representing the Montana Wildlife Federation, said his group would be willing to accept some restriction on activities that threaten landowners, but he would be failing to do his job if he didn't mention a concern about restriction of sportsmen's options.

Rep. Hammond asked whether the authority of the Fish and Game Commission granted in §87-1-303 MCA would cover the issue of ATV use.

Rep. Keyser said the concerns of the subcommittee would have to be discussed at a later date and the committee agreed to adjourn until 7:30 a.m. Saturday, January 26.

KERRY KEYSER, Chairman

MINUTES OF THE MEETING
JUDICIARY SUBCOMMITTEE
ON STREAM ACCESS BILLS
MONTANA STATE
HOUSE OF REPRESENTATIVES

January 26, 1985

The meeting of the Judiciary subcommittee on stream access bills was called to order by Chairman Kerry Keyser at 7:30 a.m. Saturday, January 26, in Room 312-3 of the State Capitol.

All members were present, as were several representatives of interested groups.

The committee began with a discussion of HB 265, Section 1, subsection (7), which defines recreational use. Chairman Keyser suggested that the committee discuss whether subsection (7)(a) should be amended to include prohibitions on all-terrain vehicles and activities which are not primarily water-related, such as are included in subsections (7)(b)(iii) and (7)(b)(v).

Rep. Mercer suggested that such prohibitions be added to subsection (7)(a), which covers recreational use on Class I waters.

Rep. Krueger said that he was opposed to moving the (7)(b)(v) provisions against "other activities which are not primarily water-related pleasure activities" to Class I waters. The designation of Class I waters is made because of the ability to support a broad spectrum of activity, and addition the (v) prohibition could limit many uses, he said. Rep. Krueger said he shared the concern over the use of ATV's, but worried that the addition of an "other activities" provision could prohibit activities such as hiking along riverbanks.

Rep. Mercer then suggested that (7)(a) be amended to include, on page 3, line 13, following "waters" the language "except that it does not include, without permission of the landowner: (i) operation of all-terrain vehicles or other motorized vehicles not primarily designed for operation upon the water." That amendment was approved unanimously by the committee.

Rep. Keyser suggested the committee amend page 5, line 13, by striking the words "under lease on [the effective date of this act]." Rep. Krueger moved to pass the amendment, and it was approved unanimously by the committee.

The committee then moved to a discussion of the term "recreational use." Rep. Krueger said he thought it would be a good idea to index to §87-1-303 MCA for a definition of recreational rights.

Ron Waterman agreed, saying the Fish & Game Commission cannot define recreation, it can only regulate use as provided in §87-1-303. The committee agreed to amend Section 2 (page 4, following line 23) to include a referential to 87-1-303. Brenda Desmond agreed to prepare an amendment to present at the next meeting.

Rep. Mercer questioned whether such an amendment would be adequate, saying perhaps a provision should be included that would assign the duty of regulation, not only the authority to regulate to the Fish & Game Commission. Rep. Krueger said the cross-reference to 87-1-303 would allow flexibility to regulate use, and that any further change would drastically alter the bill and require a fiscal note. He said all the foreseeable aspects of HB 265 could not be addressed at this time.

Stan Bradshaw, attorney for the Dept. of Fish, Wildlife and Parks, said the mechanisms are already in place for the department to address recreational use concerns. Those mechanisms, he said, are relatively informal, but allow flexible, problem-specific approaches to address issues.

Rep. Mercer countered that if HB 265 removes the responsibility of stream regulation and protection from the landowner, the state has a duty to take on those tasks, and to have formal mechanisms to address problems. HB 265 should authorize the Fish & Game to place restrictions on stream use, he said.

Mr. Bradshaw told the committee that even in the absence of such formal authorization, the Fish and Game Commission would be very responsive to complaints about stream abuse by either recreationists or landowners.

Rep. Hammond questioned whether a statement of intent could be attached to the bill directing Fish and Game actions, instead of containing such language in the bill. Rep. Mercer asked whether the committee had objections to Section 7 of Rep. Ellison's proposed bill, and wondered whether those specific provisions could be

added to HB 265. Mr. Waterman raised the issue of a possible necessary fiscal note if such provisions were added, and said the committee should avoid making the bill too cumbersome.

Rep. Krueger said that if the bill proves to be unworkable, then the legislature should look at adding specific provisions covering Fish & Game responsibilities. He said the sensitivity of the issue of stream access and the public interest in the issue would guarantee responsible action by the Fish & Game Commission.

Mary Wright of Trout Unlimited said she opposes the inclusion of language similar to that in Section 7 of Rep. Ellison's bill because the Fish & Game Commission is already carrying out those duties.

Rep. Mercer said he would withdraw his objections to the lack of specific provisions for Fish & Game responsibilities if that department does in fact restrict and regulate activities that harm both large and small streams.

Rep. Krueger suggested that a statement of intent be attached to the bill incorporating provisions for Fish & Game actions before the bill goes back to committee.

The committee agreed to discuss the issue of big game hunting at its next meeting.

There being no time to hear additional issues, the subcommittee adjourned at 8:45 a.m.

Rep. KERRY KEYSER, Chairman

MINUTES OF THE MEETING
JUDICIARY SUBCOMMITTEE
ON STREAM ACCESS BILLS
MONTANA STATE
HOUSE OF REPRESENTATIVES

January 29, 1985

The meeting of the Judiciary subcommittee on stream access bills was called to order by Chariman Kerry Keyser at 7:00 a.m., January 29, 1985, in Room 312-3 of the State Capitol.

All members of the subcommittee were present, as were representatives of several interested groups.

Rep. Keyser suggested that the meeting begin with a discussion of how to integrate a reference to 87-1-303 MCA into HB 265. At the last meeting of the subcomittee, researcher Brenda Desmond was asked to prepare an amendment providing a reference to 87-1-303. The amendment she prepared reads:

1. Page 4, following line 23.
   Insert: "(3) The commission shall adopt regulations pursuant to 87-1-303 governing recreational use of class I and class II waters including the establishment of a procedure by which any person may request that the type or incidence of such use be limited in the interest of public health, public safety, or protection of property."

Renumber subsequent subsections.

Rep. Mercer asked if the words "any person may request" would mean that the Fish & Game Commission would be required to grant a hearing. He also raised the question of possible over-regulation by the Fish & Game under the authority granted. He said he was "highly suspicious" of the language regarding the requirement of a hearing.

Rep. Krueger said that the legislature does not need to promulgate every possible regulation the Fish & Game commission may need in the future. He said the legislature has the power to correct problems at a later time.

Rep. Mercer said the committee would not be adopting regulations, but rather setting up a framework outlining what sort of limitations and authority would be granted to the Fish & Game.

Rep. Krueger said that no regulations would be adopted by that agency without adequate public hearing and input.

Rep. Mercer said he was concerned about possible problems that would result from not setting out clearly the extent and limits of Fish and Game authority -- for instance, would the commission be allowed to close a stream entirely to protect it from degradation.

Ron Waterman said he believes the language "regulate and limit" set out in 87-1-303 vests with the Fish & Game sufficient authority to address stream problems, including the authority to close a stream if necessary.

Rep. Hammond moved that the proposed amendment to HB 265 be adopted. The amendment was unanimously approved, but with Reps. Keyser and Mercer expressing some reservations about its adequacy.

Rep. Mercer said he had problems with the section of HB 265 which defines recreational use. The way in which the bill currently defines recreational use is confusing, he said. He suggested that the term be defined at the beginning of the bill, and that restrictions on that use as defined should be noted later in the bill. He showed the committee a revision he had prepared, and said he would have it printed and distributed to the committee. After reviewing Rep. Mercer's proposed revision, Mr. Waterman said he felt that Rep. Mercer's work helped clarify the intent of HB 265, and stayed within the spirit of the Supreme Court decision.

The subcommittee decided to address the question of prescriptive easements after the entire committee had heard Rep. Orval Ellison's proposed bill (set for hearing in committee 2/1/85).

Rep. Keyser suggested that in its next meeting the subcommittee should discuss the issues of upland and big game hunting, over which he said there is a good deal of concern.

Mr. Waterman suggested that the subcommittee decide on whether to approve the amendment to HB 265 suggested by Rep. Ream. That amendment, on page 2, line 7, would add the words "while flowing through such lands" after "lands". Rep. Krueger moved the amendment be adopted, and the committee unanimously did so.

The meeting was adjourned at 7:55 a.m.

REP. KERRY KEYSER, Chairman

MINUTES OF THE MEETING
JUDICIARY SUBCOMMITTEE
ON STREAM ACCESS BILLS
MONTANA STATE
HOUSE OF REPRESENTATIVES

February 4, 1985

The meeting of the Judiciary Subcommittee was called to order at 5:00 p.m. by Chairman Kerry Keyser. All members were present, as were representatives of several interested groups.

Rep. Keyser suggested that the subcommittee begin with a discussion of the definition of surface water, since Rep. Mercer had expressed problems with the lack of a clear definition in HB 265. He suggested a definition of surface water which would cover the actual water in a stream, along with the banks and bed.

Rep. Krueger said he had no conceptual problem with such definition, but would like to hear more discussion of it. Rep. Hammond said he had no problem with such a definition.

Ron Waterman said he thought a definition of surface water would add consistency and clarity to the bill.

Rep. Keyser said that the definition of surface water suggested by Rep. Mercer was appropriate, and reflects the opinion of the Supreme Court.

Researcher Brenda Desmond suggested that a "tightened up" version of the definition of surface water that appeared on page 2, lines 17-19 of the yellow-coded draft should be added to the proposed bill. The definition was to be presented at the next committee meeting for approval.

Rep. Mercer said that in the yellow copy there is no definition of recreational use. Mr. Waterman said such a definition is unnecessary, since the bill spells out specifically what types of recreation cannot take place.

Rep. Keyser agreed, saying the committee should not bring extra confusion to the measure. He asked if the committee could work with the text of the blue-coded bill.

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

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

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

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

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

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

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

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

Rep. Krueger said the committee must be careful not to take away any ownership rights, and that the language suggested by Mr. Waterman meets that responsibility.

Rep. Hammond moved that the committee adopt a definition of "surface water" that would include the phrase: "surface water for the purpose of determining the public's access for recreational use means . . . ." That motion was unanimously approved.

Dan Heinz, representing the Montana Wildlife Federation, asked that the committee discuss the issue of big game hunting, specifically page 4, lines 17-24 of the blue-coded copy.

Rep. Mercer said the entire provision regulation big game hunting (lines 17-24) was unnecessary, because restrictions on big game hunting should be uniform on all waters.

Rep. Krueger said that lines 17-24 are necessary, because the distinction between activities that can be supported on Class I and Class II streams is necessary. That distinction, he said, provides protection for Class II streams. A single class definition could not provide adequate protection for all the state's streams.

Rep. Krueger said he could envision instances where Class I streams could support big game hunting.

Mr. Heinz said he recognizes the hazard of hunting on small streams, but stressed his intention to defend sportsmen's rights to hunt on large streams.

Rep. Keyser asked if it was true that big game could safely be hunted on streambanks. He said it seems that hunting on a stream could create a dangerous situation.

Mr. Heinz said that those hazards would apply in many hunting situations and rely on the responsible actions of hunters to avoid dangerous situations. He said float-hunting is a well-established use in many areas. The Montana Wildlife Federation does not want to be unreasonable, and will not push for big game hunting on small streams, he said.

Mr. Waterman said that when the Supreme Court defined recreational use, it did not restrict big game hunting. Page 4, subsection 4 of the blue-coded copy does not

recognize a question of whether big game hunting would be allowed, it assumes such an allowance and addresses the regulation of it.

He suggested language be included that would say "Except as allowed by the commission, big game hunting will not be allowed within the ordinary high water mark." That would address the problem and still not abandon the language of subsection 4, he said.

Mary Wright of Trout Unlimited objected to that approach, which would close significant areas to recreational use until the Fish and Game Commission opens them up again. Such a move would place a big burden, financially and with respect to rule-making, on the commission, she said.

Rep. Mercer said he feels that there is a big difference between hunting on a river and hunting on land. He said population and livestock density is much greater on rivers, and that landowners should be considered. Permission to hunt is a necessity, he said.

Mr. Waterman said that population density was only a problem along a handful of Class I rivers.

Mr. Heinz restated his position that hunting on rivers is a hard-won right granted to sportsmen by the Supreme Court, and that his group opposes having to ask landowner permission. He said the group would be quite willing to accept Fish and Game restrictions on hunting in these areas.

Rep. Mercer said the Fish and Game would still have a right to close any area, but that the legislature should go a step further and say that whenever big game hunting is going to take place on private land -- even in waters on private land -- the landowner should be able to regulate it. He said the legislature has the right to prohibit recreational uses, and can use private landowner help in doing so.

Rep. Ellison said he wanted to see hunting prohibited where beds and banks are privately owned.

The committee agreed to adjourn and take up the questions of hunting and portage at its next meeting.

Rep. KERRY KEYSER, Chairman

MINUTES OF THE MEETING
JUDICIARY SUBCOMMITTEE
ON STREAM ACCESS BILLS
MONTANA STATE
HOUSE OF REPRESENTATIVES

February 5, 1985

The meeting of the Judicary Subcommittee on stream access bills was called to order by Chairman Kerry Keyser at 5:00 p.m. All members were present, as were representatives of several interested groups. The committee began work with a revised bill, showing amendments and additions made to date, and color-coded as the "teal bill."

Ron Waterman directed the committee's attention to page 4, lines 18-21 of the teal bill, to new language restricting big game hunting along streams.

Dan Heinz, representing the Montana Wildlife Federation, said that he disagreed with the provision. He said it is the MWF's perception that the Supreme Court's Hildreth decision gave sportsmen the right to pursue water-related recreational activity within the high water marks, and that his group would stand firm on that right, subject to big game hunting restrictions set by the Fish and Game.

Rep. Keyser asked whether it was appropriate for the law to give the big game hunter more rights than the landowner. He noted that the law says you must get permission of the landowner to hunt on private land other than streams.

Mr. Heinz said the landowner's rights do not apply between the high and low water marks of a stream. He said his group is only claiming its right to recreation, and will not accept a blanket exclusion of that right.

Mr. Waterman asked if Mr. Heinz recognized an inconsistency in the willingness to accept regulation by the Fish and Game Commission, but not by the legislature.

Rep. Krueger suggested that discussion of this controversial issue be temporarily discontinued, and that the committee move on to a discussion of the portage issue.

The committee turned to page 5, new section 3 of the teal copy to discuss portage.

Rep. Keyser asked if anyone at the meeting had a problem with the section on portage, in an attempt to define the areas of difference.

Dave Donaldson, representing the Montana Association of Conservation Districts, said that he had no fundamental problems with the section, but wondered whether it was appropriate to allow "supervisors" as defined in the bill to interpret "rights."

Mr. Waterman said the definition of "supervisors" includes not only conservation districts, but county commissioners, the soil conservation service and grazing districts, and that both responsibilities and protection from liability are provided for "supervisors."

Stan Bradshaw, attorney for the Fish and Game commission, said that the procedures outlined in the portage section, and the responsibilities to which Mr. Donaldson referred, were "pirated" from the Streambed Preservation Act, which has been effective, and seemed like a logical place to start.

Rep. Mercer suggested that the committee take up the question of "barriers" as defined in Section 3, subsection 2 (p. 6, lines 3-10). He said that if an article does not obstruct, then it cannot be a barrier. He suggested that the word "structure" be inserted in place of the word "barrier" in lines 6-10.

Mr. Waterman agreed that the suggestion made by Rep. Mercer would allow landowners to create obstructions that would still allow for recreational use. The committee agreed to amend Section 3, subsection 2, to delete the word "barrier" in lines 6, 7, and 10, and to replace it with the word "structure," and to delete the words "is designed not to and" from line 7.

Rep. Mercer questioned whether the language of Section 3, subsection (3)(j) would allow for a change "down the line" if an established portage route should for some reason become unusable. Mr. Bradshaw said it was his feeling that the existence of a process as defined in the section would allow for establishment of a new portage route should that become necessary.

Phil Strope, attorney for the Sweetgrass County Protective Association, said the language in the Supreme Court opinion refers to barriers only in the water, and not to

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

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

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

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

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

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

Mr. 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 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.

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

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

The committee voted unanimously to adopt the entirety of Section 3, as amended -- page 5, line 22, through page 8, line 10.

Mr. Strope suggested that the language contained in the proposed legislation is insufficient to carry out the intentions of the bill. He said that the bill would undoubtedly result in litigation, and asked for a consideration of court costs, and language to cover condemnation proceedings. Rep. Keyser said that the objection would be duly noted by the committee.

The committee moved on to consider new language suggested by Mr. Waterman on page 9, lines 13-15. Mr. Waterman said the provision that prevented the acquiring of a prescriptive easement through recreational use is "a gain that works both ways," offering benefits to both recreationists and landowners. He said the provision eliminates the risk of loss of property by landowners, and makes it more likely that recreational uses will be tolerated by landowners. The new language was adopted unanimously by the committee.

Rep. Krueger suggested that the committee discuss the language of Section 2, subsection 5, covering Fish and Game commission regulation of recreational use. Rep. Mercer said he would like to see a more clear outline of a complaint and hearing procedure.

Mr. Waterman said the language of subsection 5 directs the commission to adopt such a complaint and hearing procedure by directing the commission to adopt regulations and procedures.

Mr. Bradshaw said that the subsection expresses a reasonable desire to hold the commission accountable, and heads in the right direction in doing so. He suggested that perhaps a little re-writing might make the intent of the provision more clear.

Rep. Keyser asked researcher Brenda Desmond to prepare a re-written version of that subsection to be presented at the next committee meeting.

The meeting was adjourned, reserving further issues for later discussion.

Rep. Kerry Keyser, Chairman

MINUTES OF THE MEETING
JUDICIARY SUBCOMMITTEE
ON STREAM ACCESS BILLS
MONTANA STATE
HOUSE OF REPRESENTATIVES

February 6, 1985

The meeting of the Judiciary subcommittee on stream access bills was called to order by Chairman Kerry Keyser at 5:00 p.m. All members were present, as were representatives of several interested groups. The committee continued working from a bill draft referred to as the "teal bill."

Carrying over a previous discussion, the members of the committee decided to add to Section 1 a definition of "commission" as the department of fish, wildlife & parks.

Rep. Krueger suggested that a definition of the term "recreational use" also be added to that section. Mr. Waterman noted that such a definition was left out because later sections specifically defined any recreational uses that would be prohibited through the act.

Rep. Krueger asked that the definition be put back in to Section 1, saying it would not be redundant, and would add necessary language. Rep. Mercer agreed, saying a definition of recreational use is important, and that it gives the assurance that recreational use must have to do with water.

Referring to the original bill, Mr. Waterman suggested removing the Class I and Class II distinctions from the definition of recreational use given on page 3, lines 7-13, and relying on that definition. His suggested definition then read: ""Recreational use" means with respect to surface waters, fishing, hunting, swimming, floating in small craft or other flotation devices, boating in motorized craft unless otherwise prohbitied or regulated by law, or craft propelled by oar or paddle, and other water related pleasure activities and unavoidable or incidental uses."

Mike Josephson admonished the committee to take care with the placement of the term "surface waters," noting that it might be interpreted differently in different contexts.

He also questioned the inclusion of hunting as a recreational use. He noted that ATV's are not included in the definition of recreational use, but are specifically excluded later in the bill. He cautioned against this different standard of approach to limiting recreational uses.

Upon motion by Rep. Hammond, the definition of recreational use noted above was approved.

The committee then turned to a discussion of the issue of big game hunting. Rep. Hammond suggested that perhaps the controversy over big game hunting had been inflated, since the practice of hunting along waters is not new. Rep. Keyser said that since stream access would give hunters new access to private land, the question must be addressed. Rep. Hammond questioned whether permission to hunt would be necessary, since indications are that sportsmen have the right of use on all areas below the high water mark.

Rep. Keyser said that it is not unreasonable to require that hunters ask permission to hunt along streams, since entry on to privately owned adjacent lands is likely. He noted that big game hunting on islands would still be controlled by the department of fish and game, and that no rights would be taken away from hunters through a requirement of permission. Rep. Keyser noted that surrounding states, which have fairly relaxed regulations concerning stream access, all disallow hunting of big game along waterways, except by permission.

Mary Wright of Trout Unlimited said that since the stream corridor would be available for recreational use, hunting should not be treated differently from other recreational activities. She said nothing in the Supreme Court decision called for such a distinction.

Rep. Hammond asked if there has been any negative impact as a result of hunting along streams, and Rep. John Cobb said that some of his constituents living near Vaughn had suffered property damage, and were concerned about safety. Rep. Keyser noted that the interim subcommittee had heard testimony on shots entering yards and hitting barns.

Rep. Hammond said if big game hunting were disallowed except by permission of landowners, hunters would be unable to determine the point in a river-float hunt when they passed from the land where they had permission to property where they did not. Mr. Waterman commented that the problem of knowing where those boundaries lie are common to all hunters, including upland hunters, and that difficulty is the responsibility of the hunter. He added that if streams provide a full recreational corridor, subject to department regulations, that it should also be subject to legislative regulation.

Bill Asher, representing the Agricultural Protective Association, said that hunters have rights as well as responsibilities. He said hunters should be aware of the negative factors involved to stockmen when considering riparian hunting. He noted that fall-calving cows often seek shelter and solitude in riparian areas, and that hunting could result in loss of calves. Mr. Waterman agreed, saying the committee should be aware of a substantial amount of testimony regarding the negative effects of big game hunting along streams.

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

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

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

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

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

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

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

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

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

that would read:"(d) big game hunting, except by shotgun or muzzle-loader, as authorized by regulation of the commission." He also suggested that archery hunting be added in that subsection. He said that such a phrase would be about as fine-tuned as could be achieved at the time.

Rep. Krueger said he had no problem with such an amendment.

Rep. Mercer said he opposed the amendment for two reasons; first, the hunter has no guarantee of where an injured animal will go, and second, safety questions remain. Limiting hunting to shotguns has shortened the range, he said, but the hunter still may be shooting toward houses and property.

Rep. Hammond stated that he was not convinced that the sort of instances Rep. Mercer alluded to have actually occurred.

Mike Josephson said he thought the committee was losing sight of the safety issue. "We're not talking about the responsible hunter," he said, noting that regulations must address all hunters.

Rep. Keyser asked that the committee vote on Rep. Mercer's motion to disallow big game hunting except by permission of the adjacent landowner. Reps. Mercer and Keyser voted yes, Reps. Hammond and Krueger voted no. Because of the tie, Rep. Keyser said the bill would go back to committee without a recommendation on the big game hunting issue. At that time, Rep. Hammond said that the subcommittee had heard about all the testimony available on the issue, and stated that he would change his vote, but only for the purpose of getting the bill out of the subcommittee with a recommendation. Rep. Mercer's motion was approved on a 3-1 vote.

Rep. Hammond moved adoption of section 2 as amended, which was unanimously approved.

Mr. Waterman suggested that the committee add an effective date to page 2, line 11. Rep. Mercer countered by saying he had a big problem with the provision defining commercial activity, saying it was "too broad"

Rep. Keyser questioned whether the underlined language on that line was necessary at all to define commercial activity.

Mary Wright said the language was probably not necessary, but provides a clarification. Mr. Waterman agreed, saying the language was in response to a discussion with Rep. Ellison, and provided an additional context for "commercial activity."

Rep. Mercer suggested that the committee could simplify the distinction further by dropping the commercial activity distinction altogether, because "the consequences aren't that big." Mary Wright countered that the consequences of the definition do have meaning, and are of great importance to some parties.

Rep. Mercer asked if there is a waterway in the state that could satisfy (d) or (e), but not (a)(b) or (c). Ms. Wright said, yes, some small rivers or large streams could fall into that category.

Rep. Mercer then asked what was teh use of having Class I and Class II waters if it was impossible to tell the difference. "If there's no clear line, there's no sense to the bill," he said.

Mrs. Wright stated that sportsmen have no desire to see every river in the state designated as Class I. "We don't think it's going to give us unrestricted access, and we don't want it," she said of the bill. The categories do have a meaning, she continued. She cited the Ruby River, which would be a Class I stream, but noted that the creeks feeding it would be Class II.

Rep. Cobb commented that the state should have a floatability test, but worried that it would add small creeks, if tested during high water.

Stan Bradshaw stated that he had spent ten years researching the navigability question, and felt that the test already described in the bill offers a narrower description than a floatability test.

Rep. Mercer said that the definitions of Class I and Class II waters in the bill are "horribly unfair to the public."

Rep. Keyser asked how it could clear up the definition if (d) and (e) were removed, and Rep. Mercer said that a stream might not fall under (a)(b) or (c), but could fall under (d) or (e). He said that (d) or (e) "could be anything." Rep. Mercer then moved to have subsections (d) and (e) (page 2, lines 10-14, teal copy) stricken, and asked for a new subsection (b) that would read "(b) satisfy the federal test of navigability for the purposes of state ownership;".

Rep. Keyser said that would likely make all but three rivers in the state Class II.

Rep. Krueger said the state would be forced into litigation under the proposed (b) amendment. He said looking at commercial activity allows reliance on case law.

Rep. Krueger said he would be willing to "back off" if someone offered a judicial definition of commercial activity.

Mary Wright suggested that the existing (d) be amended to add "judicially defined as of the effective date of this act." Mr. Waterman said he had read nearly all the available definitions of commercial activity, and they rarely mentioned a "purely fishing or hunting guide."

Rep. Keyser offered a substitute motion, to add the language "as of the date of this act" following "judicially defined" on page 2, line 11. Reps. Keyser, Hammond and Krueger voted yes, Rep. Mercer voted no.

Rep. Hammond moved that the committee adopt the amended definition of Class I waters, and that motion was approved, with Rep. Mercer voting no.

Rep. Krueger moved the acceptance of the definition of Class II waters, with the addition of a definition of recreational use, previously agreed upon. That motion was unanimously approved.

Rep. Keyser moved that the committee adopt the bill in its present form, holding the right to formally adopt the gray copy.

There being no further business before the committee the meeting was adjourned.

Kerry Keyser Chairman

Rep. KERRY KEYSER, Chairman

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

March 8, 1985

The forty-fourth meeting of the Senate Judiciary Committee was called to order at 10:05 a.m. on Friday, March 8, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol Building. The Senate Fish and Game Committee was in attendance.

ROLL CALL: All Senate Judiciary Committee members were present. In addition, all Senate Fish and Game Committee members were present, with the exception of Senator Judy Jacobson.

CONSIDERATION OF HB 265: Representative Bob Ream, sponsor of HB 265, introduced the bill to the committee and traced a bit of its history. There were a variety of bills on stream access last legislative session. Because of the uncertainty regarding the Hildreth and Curran Supreme Court decisions at that point in time, Representative Keyser sponsored a resolution requesting an interim study. The interim committee provided a public forum for this issue. People began to realize it wasn't a black and white situation; there were areas of grey in between on which people were going to have to compromise. Both sides realized they would have to come up with a bill to ameliorate some of their concerns. This is not a committee bill, but a bill on which the two sides got together in the months before the session began and hammered out. The bill was before the House Judiciary Committee, which appointed a subcommittee headed by Representative Keyser. There was an attempt to involve both sides in the decisionmaking on the amendments made by the subcommittee. Representative Ream then suggested the committee read the interim study (Exhibit 1).

PROPONENTS: Representative Bob Marks, co-sponsor of HB 265 and chairman of the interim committee, testified in support of HB 265. He carried HB 888 last session, which covered many of the same things. Last session, people protested passage of that bill until the Supreme Court cases had been decided because they thought they could win those cases. If they had won the cases, there would have been no need to come back this session with HB 265. There has been some inference that if the bill is tinkered with, it will be killed in the Senate or on the House floor. Representative Marks hoped the committee would not get spooked from killing this bill without carefully considering what this bill does to the people who say it does things to them, who are both landowners and recreationists. He suggested the committee carefully consider a comparison between what this state would have with just the Supreme

Court decisions or what the state would have with some sort of legislation. He did not say the bill was perfect, but he suggested if the committee did not feel it were, they should try to improve it. Representative Marks felt that when we come right down to the management of our streams and properties in the state, there is going to have to be a compromise, and that compromise was forced on us by the court decisions.

Representative Kerry Keyser testified for two main reasons: (1) He served on the joint interim committee which dealt with the recreational use of Montana waters. (2) He was appointed chairman of the House Judiciary Subcommittee which took under consideration the many water bills dealing with recreational use and the landowners' rights of our state waters. The goal of the subcommittee was to keep HB 265 within the bounds of the Supreme Court decisions and to express the legislature's desire to tie down and define the areas that were left very broad in those decisions. The bill defines: (1) diverted away from natural water bodies; (2) ordinary high water mark (puts the definition back in the banks of the stream and does not include any floodplain); (3) off-water storage and off-waterways which cannot be used; (4) surface waters and limitations of these waters; (5) rights of portage; (6) right to appeal; (7) restriction of liability of landowners and supervisors as far as recreational use of the water; and (8) prescriptive easement (not acquired by the recreational use of surface water). Had HB 888 passed and been on the statutes last session, it would have had to have been considered in the Hildreth and Curran Supreme Court decisions. The federal Court of Appeals and the United States Supreme Court have told Montana time and again it will decide its own water problems as they will not take them. He hopes this legislature will adopt a law which will set some guidelines. The statement of intent states the commission shall strive to permit broad exercise of public rights while protecting water resources and the ecosystem. Representative Keyser then referred to the statement of intent, page 1, lines 12-19, and page 2, line 9 through page 3, line 9. The Fish and Game Commission presently has the right to control the use of present streams in the state of Montana as to use of floaters, fisherman, catch and release, and where you can float and where you cannot. As the constitution has a separation of powers provision, it allows the Supreme Court to take these cases and make decisions. The constitution also mandates upon the legislature the right to take care of these problems. Representative Keyser proposed an amendment that was talked about in the House Judiciary Committee, but it was their decision not to change the bill as it went into the House and instaed they would bring this before the Senate (Exhibit 2).

Ronald F. Waterman, an attorney from Helena, appeared on behalf of Montana Stockgrowers Association, Montana Woolgrowers Association, Montana Association of State Grazing Districts, Montana Cowbelles,

Montana Farmers Union, Montana Cattle Feeders Association, Montana Farm Bureau Federation, Montana Water Development Association, Women Involved in Farm Economics, Montana Grain, Montana Irrigators, Inc., Montana Dairymen, Montana Cattlemen's Association, Park County Preservation Association, and the Agricultural Preservation Association Mr. Waterman presented written testimony to the committee (Exhibit 3). This written testimony included several amendments. In addition, Mr. Waterman testified that SB 418, previously passed by the Senate Judiciary Committee, deals with the ordinary high water mark. The contention of those who propose to kill HB 265 is the definition of ordinary high water mark which should be used is that given by and within the Natural Streambed Preservation Act regulations. It speaks in terms of where vegetation is absent from a stream as a way of defining the ordinary high water mark. By regulation, the Department of Natural Resources and Conservation found a device under which it could extend its jurisdiction as far into the stream as possible, and it has done that by calling the low water mark, the high water mark. HB 265 has a definition that defines the high water mark where it is--where there is diminished vegetation, diminishment caused by the presence of water over that vegetation. All of those who live in Montana can conceptualize where that is as being within the beds and banks of a stream; it is not a corridor several hundred yards wide through which the public can trespass through landowners' property. It is in fact a clearly defined stream area and a fair and balanced definition. Mr. Waterman also found trouble with the way floodplains have been dealt with in SB 418. SB 418 says the floodplains can be used so long as there is water on them, and that means the flood irrigated waters of this state would have recreationalists into hay meadows during the spring and summer during irrigation season. That is not what was intended. That is not what landowners want or recreationalists seek. Mr. Waterman feels HB 265 properly deals with floodplains by saying simply the use is prohibited for all reasons and all seasons. Mr. Waterman testified that the definition of surface water does not open the corridors of the dry waterways for public use. The reason for that is simple. Class I--the large rivers, do not dry except in a drought year. Class II streams will dry. With respect to Class II streams, we have said those streams can only be used for water-related pleasure activities. Recreational use is defined in section 2 in the manner in which the court said the streams can be used. Then we go on to say those things that are inconsistent with a water-related activity, of which big game hunting is one. You will hear some testimony suggesting big game hunting should be allowed within the ordinary high water mark. Mr. Waterman testified there are a number of reasons why that language is there and why the proposed amendment should not be followed: (1) Big game hunting needs permission on all private property, whether within or outside the ordinary high water mark. (2) Big game hunting with high powered rifles is a danger to those people who live along the streams. (3) Big game

hunting is using high powered rifles to knock down deer and elk within that waterway. For those times when they are not successful and the deer and elk get outside the high water mark, you are then encouraging the incidental trespass. That is why big game hunting is a flat prohibition and that is why all terrain vehicle operation is an absolute prohibition absent the caveat if you have the landowner's permission. We are trying to encourage the recreationalists to ask first and encourage the landowners who are asked to give permission. Some of the proposed amendments address the creation of permanent structures and prohibiting them without the landowner's permission. We have defined two segments of the land into Class I and Class II, large rivers and smaller streams, and on smaller streams, there are some other things that are inconsistent with landowner use and cannot be used. We have addressed prescriptive easement and talked about the fact you cannot follow diverted waters, pointed out that landowner liability must be addressed, have addressed portage route. Portage the Supreme Court said is a right to go around barriers in the least intrusive manner without damaging private property rights, and we have reiterated that, but then they have provided a mechanism whereby if excessive portage on all sides of the stream becomes an abuse or an inconvenience, landowners have a device under which they can restrict portage to a single, exclusive route. The portage route is a definitional way of problem solving without using access to the courts. They have spoken in terms of prescriptive easement to assure that the public does not have a right through use to obtain a prescriptive easement of the water, beds, banks, portgage routes, or any other progression over the land. Mr. Waterman testified that the Senate bills are not adequate to cover the problem. There have been some arguments advanced that this is a compromise, and if there is a compromise at all, it is a compromise against an uncertain future where litigation can and will further erode landowner rights in exchange for the certainty of a bill which is balanced and fair and which considers all of the elements of a complex subject.

Mary Wright, representing the Montana Council of Trout Unlimited, which participated in the process that is now embodied in HB 265, testified they fully support HB 265 as a fair, balanced, and reasonable treatment of all the issues raised by the Montana Supreme Court in the Hildreth and Curran decisions. They believe it clarifies the issues that were not decided by the Supreme Court; it states clearly the rights and responsibilities of the sportsmen, and it protects the landowners. It integrates all of the issues surrounding stream access; it has many strengths; and because of these strengths, they ask the committee's support of the legislation. One of the strengths lies in its comprehensive treatment of the issues. At the same time it is a focused treatment. It provides a suitable vehicle for the legislature to address all of the stream access issues. It classifies streams and preserves reasonable landowner control over smaller streams by preserving

in a reasonable way the rights granted by the court to sportsmen. It provides the means for sportsmen/landowners to join together with the Department of Fish, Wildlife and Parks to regulate uses of streams on a site-specific basis to accomplish the stated goals of all the parties that our resources be protected. In addition, Ms. Wright submitted written testimony to the committee (Exhibit 4). Ms. Wright concurred in the previous testimony and the amendments presented by Mr. Waterman.

The following testified in support of HB 265 and, where indicated, presented written testimony or made additional testimonial remarks:

Jim Flynn, on behalf of the Department of Fish, Wildlife and Parks (Exhibit 5). Jimme L. Wilson, rancher from Trout Creek and President of the Montana Stockgrowers Association (Exhibit 6). Dan Heinz, on behalf of the Montana Wildlife Federation (Exhibit 7). Richard Parks, owner of Parks' Fly Shop and President of the Fishing and Floating Outfitters Association of Montana (Exhibit 8). Paul F. Berg, representative of the Billings Rod and Gun Club and the Southeastern Sportsman Association (Exhibit 9). They believe it should allow big game hunting below the high water mark on Class I streams without the necessity of the private property owners' permission. Robert Vandevere, a registered concerned citizen lobbyist from Helena, testified in support of the bill. He stated that if the bill needs a touchup, it should be worked out two years from now. Jo Brunner, representing the Montana Grange, the Montana Cattlefeeders Association, and the Montana Dairymen's Association, asked for the committee's full support of HB 265 with the amendments submitted by Mr. Waterman (Exhibit 10). Mike Mcone, of the Western Environmental Trade Association, stated they support legislation that protects the private property rights. They believe if modications are made to HB 265 they can support the legislation and offered amendments to the committee (Exhibit 11). Gene Chapel, President of the Montana Farm Bureau Federation, stated they represent 38 organized counties throughout the state, and only one of those county farm bureaus dissented from the position in support of the bill, namely Sweetgrass County Farm Bureau (Exhibit 12). Mack Quinn, rancher from Big Sandy and immediate past President of the Montana Farm Bureau (Exhibit 13). Don McKamey, President of the Montana Woolgrowers Association who lives south of Great Falls on the Smith River (Exhibit 14). He stated the majority of his membership is in support of this legislation. Jerry Manley, President of the Montana Coalition for Stream Access (Exhibit 15). Lorraine Gillies, of Granite County (Exhibit 16). Jim McDermand, spokesman for the Medicine River Canoe Club in Great Falls, testified HB 265 in its present form is an equitable bill that will satisfy the wishes of the majority on both sides (Exhibit 17). Lavina Lubinus, representing Women Involved in Farm Economics (Exhibit 18). Joe Etchart, President of the Montana Association of State Grazing Districts, supported the passage of HB 265 with Mr. Waterman's amendments (Exhibit 19).

Maynard Smith, from Glen, supported the bill but asked for a change (Exhibit 20). As a supervisor on the Beaverhead Conservation District, they have been working with the Streambank Act for the past eight years (SB 310). He personally has been on about 50 streambank inspections, consisting of a member of the conservation district, the landowner, and a member of the Fish and Game Department. They have dealt with the mean high water mark, which is just about the same described in HB 265, but it is a little different. He asked that the committee change the definition in HB 265 to coincide with the description of the ordinary high water mark in SB 310.. Kevin Krumvieda, representing the Missouri River Flyfishers, stated his membership fully supports HB 265 (Exhibit 21). Walter McNaney, President of the Big Horn County Farm Bureau (Exhibit 22). Don Jones, a member of the Gallatin County Farm Bureau and former member of the Montana State Board of Directors of the Farm Bureau, appeared in support of HB 265 as it is now written but was concerned that there may be an amendment to get big game hunting, which he opposed (Exhibit 23). Carl Hope, member of the Big Horn County Farm Bureau (Exhibit 24). Dave McClure, President of the Fergus County Farm Bureau (Exhibit 25). Roy Voltkamp, President of the Gallatin County Farm Bureau, stated they feel the people who put this bill together found a workable solution to this problem (Exhibit 26). Tony Schoonen, President of the Skyline Sportsmen Club in Butte affiliated with the Coalition for Stream Access, urged the committee's support of HB 265 and proposed that the bill be amended (Exhibit 27). R. A. Ellis, representing the Helena Valley Irrigation District and the Lewis and Clark County Farm Bureau (Exhibit 28). Walt Carpenter, representing himself and many friends and recreationists, appeared in support of HB 265 without any amendments (Exhibit 29).

In addition, the following written testimony was submitted in support of HB 265, although not presented orally to the committee: Jack Hayne, representing the Teton-Pondera Farm Bureau (Exhibit 30); Patty Busko, President of the Wildlands & Resources Association (Exhibit 31); James Kemr, D.D.S., who requested the bill not be changed to eliminate duck blind construction on Class I streams or to allow seasonal blinds that can be removed at the end of the season (Exhibit 32); Tom Milesnick (Exhibit 33); and Bruce R. McLeod, President of the Park County Legislative Association (Exhibit 34).

OPPONENTS: Former senator Ben Stein appeared in opposition to the bill (Exhibit 35) and testified that in the situation where there is a hunter on his property, his hunting license states he must have permission of the landowner. If the hunter does not, Mr. Stein can call the game warden. However, Mr. Stein testified that in the case of a fisherman, the Supreme Court has opened the whole situation. He'd have to call his lawyer instead of the game warden. He feels this legislation will make a bad situation between the landowners and the sportsmen. He feels that without regard to what the Supreme Court has done, until they can print

in a few words in plain English on the fishing license how the fisherman stands in relation to the landowner, this verbage is junk.

Phil Strope, a Helena attorney, appeared representing people from the land and livestock community who were either members of the Stockgrowers, Woolgrowers, or Farm Bureau who are not in support of the agricultural coalition's position as enunciated by Mr. Waterman who initially represented all of those people. He testified that they did not feel, as Representative Marks contended, that the court decisions forced any sort of compromise. Mr. Strope addressed Mr. Waterman's statement that it was a broad, sweeping decision. Mr. Strope stated they had a witness here who had visited with Judge Haswell where he spoke pubicly about it and told the people assembled not to read too much into the decision, to read the decision in terms of what it decided--it was a water decision and not a land use decision. Mr. Strope touched on the two areas they felt the committee should think about in the decision as to whether or not to pass this bill. (1) Definition of surface water (refer to Exhibit 36 for extensive discussion of this point). HB 265 recommends that the definition of surface water is mandated by the Supreme Court. Mr. Strope states this definition is not. He stated a statute which has been on the books since 1898 says the abutting property owner owns the land down to the low water mark subject to the right of a fisherman to use the water when it is up to the high water mark. If you take the definition of HB 265 for surface water, what you are creating is a right in the public to use those dry streambeds when there's no water on them. Admittedly in HB 265, they have written out of the law a number of areas where the public would like to use the rights to get on public property. But if this legislation is passed, you are setting into statute the right of the public to use the dry streambeds for whatever purpose successive sessions of this legislature decides is a public use. (2) Exercising the most awesome power of government. In the U.S. Constitution and the Montana Constitution there is not one phrase that says anything about the right of the sovereign to take by right of eminent domain. All it says in those constitutions is what the government has to do if it exercises those rights, in which case it has to pay just compensation. In this state, you have to go to court to determine that what the government is proposing to do is in the best interests of the public. In the federal system, all you have to do is get an appropriation. Here, in this bill, the language about portgage leaves out what he considers is the most important thing for a property owner or citizen--what's missing in the portage issues of HB 265 is any provision to pay the landowner anything if the public exercises its right to create a portage route around natural barriers. Mr. Strope stated that it was at this legislature that they have had a chance to speak up because at all of the previous forums they were summarily relegated to the back of the bus. They have tried to get them to realize what Judge Haswell says in his opinion, where he cites the statute that says

landowners have the right to own the land down to the low water mark subject to the fishermen's right. HB 265 takes that right away. Judge Haswell, eight times in the Hildreth case, cites Curran as the fountainhead opinion. When he quotes the right of the public to use the beds and the banks, what he means is when there's water on it. When there's no water on it, those beds and banks are governed by the statute passed in 1898 that says the landowner owns it. Mr. Strope referred to Senator Blaylock's question a week ago when he asked what you did when the bank of the stream is straight up and down. Mr. Strope says the answer to that is whether you pass HB 265 or SB 418, you will not change one bit the public's right to get on somebody's property above the high water mark. If the bank is straight up and down, the high water mark and the low water mark are essentially the same vertically; and so in those areas, the public will be precluded. HB 265 deals with those areas where a gentle slope exists and creates a general access corridor for the public to use to travel up and down for such uses as the legislature puts on it.

Dick Josephson, an attorney from Big Timber, appeared representing himself and the Sweet Grass Preservation Association (Exhibit 37). He testified that Mr. Strope covered many of his concerns. He stated that under this bill, the public can camp between the high and the low water marks. Under this bill, they can come in and put in permanent structures. Mr. Waterman has finally agreed to amend out permanent structures, but the amendment allows them to put in semi-permanent structures, which to him means boat docks or overnight camps. Class I waters are defined as anything that will float a two-person boat or a log. He believes the state of Montana must project an image of protecting private property rights, and while maintaining our environment, we want to attract business. He believes the value of property rights will go down if HB 265 passes. Mr. Josephson testified that allowing portage above the high water mark at the request of the recreationist on the landowner's land and at the landowner's expense is costly for the landowner and the soil conservation people that have to administer it. Then the landowner can drag this guy into an arbitration proceeding, who if he doesn't like the portage route has equal standing with the landowner as to how it ought to be changed; and then if they don't like that, they go to district court. He does not agree this will save court costs. He testified the state of Montana must have a reputation of protecting private property rights.

Representative John Cobb appeared on his own behalf and presented written testimony (Exhibit 38). He stated there are parts of the bill he really likes: the statement of intent and the procedure about challenging if there's an abuse on the stream. He stated the best way to understand stream controversy is to think of a highway going down through your land and think of it as water. Before the private landowner

controlled who could use that highway. The court took that away and said now the state can control that use and the legislature can do anything it wants as long as it's for a beneficial use. No matter what is done this session, you could end up in court because there could always be judicial review of what is done in the legislature. Representative Cobb stated he would like the committee to consider some amendments. There are already existing rules which most people don't realize about the public's use on waters (pages 68, Exhibit 38). Although they were just for a few designated places, he feels the Senate ought to decide if those rules should apply to all of these waters. They take care of nuisances, disorderly conduct, hunting, camping, etc. The second thing he would like taken out of the bill is the placement of semi-permanent or permanent objects. The Supreme Court says the landowner doesn't have any control over that recreation, but neither does the recreationist have the right to put private property on that recreational area. Only the Fish and Game has been given the authority to allow those placements of objects. If the landowner can't do it, neither can the recreationist. The Supreme Court said waters capable of recreational use can be used without regard to ownership. That implied to him there were some waters out there that weren't capable of recreational use. He is asking that the legislature tell the Fish and Game to go down and list waters like other states have done and the types of recreation you can use on them or the types of substantial use. The public trust doctrine that other states use is an environmental protection doctrine, not a recreational doctrine. Recreation is just a tiny part of the public trust doctrine. He requests that if we're going to have this bill without change, the legislature first tell the Fish and Game to go out and list waters and the types of uses that can be done on them and, secondly, keep these rules still in effect so they apply to all waters and people know what they can do on them, and thirdly, keep that part about the right to challenge that is already in HB 265 that says if there's a problem, any person can ask the Fish and Game to do something about it. The problem in the Supreme Court in this case was they said you can use all waters capable of recreational use. You can use the bed and the bank is what they are trying to say. The other states say you can only use the bed and the bank for an incidental use and kept all of the recreation on floatable rivers. You can always argue whether the Supreme Court knew what it was saying by leaving those few words out about you can use the bed and the banks except for incidental use. If you put the overall rules in ahead of time as to what you can do on these rivers and creeks, and then consider those restrictions on a case-by-case basis; no matter what happens in court, at least there's going to be a lot more water opened up anyway.

The following testified in opposition to HB 265 and, where indicated, presented written testimony or made additional testimonial remarks:

Ted Lucas, a rancher from Highwood, a member of the Montana Stockgrowers Association who served on the landowner recreation committee, and a board member of the Western Environmental Trade Association (Exhibit 39). Tack Van Cleves, a rancher and dude rancher from Big Timber, representing the state members of The Dude Ranchers' Association (Exhibit 40). They feel its passage may very well be the end of the dude ranching industry in this state.

Bill Morse, attorney from Absarokee, representing the Stillwater County Association of Taxpayers and Madison County ranchers (Exhibit 41), testified it is not the time for the type of compromise this bill suggests. He believes if you do not pass HB 265, we will see what the Supreme Court meant, because he believes a careful reading of those cases will show that they are directed to the facts in those cases. Mr. Morse felt we should also bear in mind what will happen to those people who own land along streams. When someone buys a piece of property with a stream on it, they pay a tremendous price as opposed to buying a piece of dryland. If this state takes away the incidence of ownership of those streams, he questioned what that will do to the ad valorem value of that land when the owners talk to their assessors. He believes they have a tremendous case to show if they don't have those incidents of ownership, they don't have to pay taxes on them, and if they don't have to pay taxes on it, that value is going to plummet and those extra bucks are going to have to come from some other place. He believes this is far-reaching legislation, and does not believe there is any state in the union or the free world that has gone as far as we are suggesting that HB 265 ought to take us or that the Supreme Court has already taken us.

Dr. Clayton Marlow, a research scientist with the Montana Agricultural Experiment Station (Exhibit 42). He asked that the committee consider several grey areas within the bill which are enumerated on his exhibit. Roger Koopman, a businessman and sportsman from Bozeman and former Field Representative for the National Rifle Association, testified in opposition to HB 265 (Exhibit 43). Paul Hawks, on behalf of the Stillwater Protective Association, an affiliate of the Northern Plains Resource Council, presented written testimony and proposed amendments to the bill (Exhibit 44). Mr. Hawks also submitted for the record the testimony of Chuck Rein (Exhibit 45). Steve Aller, operator of a guest ranch in Park County, a fly fisherman, and a past member of Trout Unlimited, appeared in opposition to HB 265 believing it expands the two Supreme Court decisions (see written testimony and samples of letters of some of the concerns that are being expressed by fishermen from other parts of the country (Exhibit 46). Byron Grosfield testified that he would support HB 265 if amended by SB 418, SB 421, and SB 224. Failing that, he heartily opposed the bill (Exhibit 47). Mr. Grosfield also presented written testimony on behalf of Robert W. Janett (Exhibit 48). Ralph Holman concurred with all of the previous testimony to HB 265 and

submitted additional written testimony (Exhibit 49). Bill Phillips, life member of the National Rifle Association and most of the trapping associations in the country (Exhibit 50). He testified that Mr. Waterman mentioned people with fishing rods won't be able to fish on these dry gulches, but people from out of state will be able to come in with their hunting dogs. He can't use dogs to run lions and cats on places where sheepmen have sheep because the dogs will disturb the sheep, and he has to be careful that he picks up his traps. Some people will not even try to pick up their traps. Jean Parsons testified HB 265 gives the landowner very little ability to be custodians of their land (Exhibit 51). Phil Rostad, representing the Meagher County Preservation Association (Exhibit 52). He felt SB 418, SB 421, SB 424, and SB 435 adequately address the problems. Lorents Grosfield, cattle rancher from Big Timber (Exhibit 53). Charles W. d'Autremont, from Alder, testified his property's value is directly proportional to its private river rights, and without the same, the value of his land is negligible (Exhibit 54). He was concerned about land values and safety. He thought it was presumptuous of the state to seek more land and access when the Fish and Game Commission cannot maintain adequate control over the land and waters currently under their jurisdiction. If the state demands an easement through his property, then he demands the same protection from trespass and hunters, etc. Bud Pile, rancher from Greycliff (Exhibit 55). He reminded the committee that the four Senate bills which it has already passed are simple and clear and do not need a lawyer to be interpreted. He feels HB 265 is unnecessary and complicated and is subject to interpretation. He stated he had brought a boat paddle along with him because he wanted to remind them that when the Supreme Court access ruling came about, he went down the creek and he wouldn't need it. Mr. Pile then presented the paddle to Chairman Mazurek. Mrs. Arch Allen, of Livingston, testified she recognized the Supreme Court decisions and felt they have taken from the legislature their checks and balances of government. She hoped the committee would restore this to our Montana form of government by amendments to HB 265 so we have the legislative, the executive, and the judicial, not one-sided government. In addition, Mrs. Allen presented written testimony (Exhibit 56). Sharon Welin, representing the Boulder Valley Association, an affiliate of the agriculturally based Northern Plains Resource Council, appeared in opposition to HB 265 but supported the four Senate bills (Exhibit 57). Mrs. Joan Langford, representing five local people from Reedpoint (Exhibit 58). John McDonald, rancher from Flint Creek, member of the Stockgrowers Association and the Farm Bureau, testified that in the mining business, there are several questions that have arisen out of this bill (Exhibit 59). In his area, there are some rather large bodies of water which have traditionally been closed to public use for reasons of safety, and they would like to see some clarification of how that will fit into this bill. John Willard, a landowner in Lewis and Clark County, asked that the committee take a look at the other states with more experience that have handled

this (Exhibit 60). He asked that the rights of the landowner be protected, that the public trust be confined to water, and that the responsibilities for those trespassing on the land be fully specified in the law. Robert Burns, of Big Timber, stated he is opposed to HB 265 because there is no compromise to private ownership (Exhibit 61). Bob Saunders, representing the Meagher County Preservation Association (Exhibit 62). Charles Howe, of Belgrade, stated this bill would affect him as a rancher and as a businessman (Exhibit 63). Bud Hansen, representing the ranchers up and down his creek in Ekalaka (Exhibit 64). David Howe, Park County rancher (Exhibit 65). Kelly Flynn, representing Hidden Hollow Ranch in Broadwater County, testified this bill will adversely affect their ranch. J. N. Saunders, Ennis, objected to HB 265 on the basis it confiscates his ground (Exhibit 66). Walt Lineberger, Madison County (Exhibit 67). Neva Lydeard, Cascade, testified there are two points in opposition to the bill which no one had brought out yet (Exhibit 68). One is the problem of knapweed. The other thing that has not been mentioned is one-third of the state is owned by federal and state governments and why can't the recreationists use that instead of private land. Windsor Wilson, McLeod, opposed HB 265 but supported the four Senate bills (Exhibit 69). Pam Reim, Melville (Exhibit 70). Bob Daggett, Laurel, appeared against HB 265 and stated he thinks it is an attempt to build something on a foundation that was wrong in the first place (Exhibit 71). Peggy Ferster, representing some ranchers from Carbon County (Exhibit 72). Dave Moore, dryland farmer and Vocational Agriculture teacher from Big Timber (Exhibit 73). Wes Henthorne (Exhibit 74). Elaine Allestad, Big Timber (Exhibit 75). Verna Lou Landis, Wilsall (Exhibit 76). Virge Holliday, Wilsall (Exhibit 77). John DeCock, Melville (Exhibit 78). George Rossiter, representing the Bear Tooth Stock Association, testified they would like to see any number of amendments to this bill and presented a resolution from the association (Exhibit 79). Jack Salmon, landowner from Salmon, opposed the bill.

Conrad Fredricks, representing the Sweet Grass County Preservation Association (Exhibit 80), stated Mr. Waterman in his written testimony listed six goals that the landowner coalition had in proposing necessary legislation. He submitted that five of those are currently addressed in the three Senate bills already heard before the committee or in Representative Grady's HB 520 which makes it clear that waters diverted away from the natural water course are not subject to use. The only one that is not covered is portage. The portage issue has now gone from Hildreth's bridge, which Judge Shanstrom says you could go around, the narrow right given by the Supreme Court, to the extended right now in HB 265, where in the case of artificial barriers, not only does the landowner have to furnish the land, but he has to pay for establishing a portage route out of his pocket. In the case of natural barriers, this is not necessarily limited to if it is his barrier. It makes no distinction between the county bridge, the state bridge, The Montana Power Company power line,

or a diversion structure put in by his neighbor to irrigate his adjacent lands. Another point he mentioned is Mr. Wilson, the President of the Stockgrowers Association, is worried about what might happen if the Supreme Court got this case again. He passed out Delegate Proposal No. 2 (Exhibit 80), discussed at the Constitutional Convention, which has the language of the public trust doctrine and which proposal was rejected by the Constitutional Convention (Exhibit 80). He believes if that is brought to the attention of the Supreme Court in future litigation, we might get a different result on the constitutional basis that the Supreme Court hung its decision on.

In addition, the following written testimony was submitted in opposition to HB 265, although not presented orally to the committee: Kermit Anderson, Melville (Exhibit 81); Lucille Anderson, Melville (Exhibit 82); Dolores Anstett and Arthur Anstett, of The Tall Timber, McLeod (Exhibit 83); J. R. Cleveland, Melville (Exhibit 84); William Dunham, Executive Director, Montana Land Reliance, Helena (Exhibit 85); Everett Hicks, L Y Ranch, Wolf Creek (Exhibit 86); Clarence Keough, Wilsall (Exhibit 87); Dick Klick, Sun Butte Outfitters and Ranchers and Associates, August (Exhibit 88); David Lackman, Lobbyist, Montana Public Health Association (Exhibit 89); William Larson, Alder (Exhibit 90); Linda Larson, Alder (Exhibit 91); Mary Lineberger, Ennis (Exhibit 92); Bill Maloney, Alder (Exhibit 93); Rosabelle Maloney, Alder (Exhibit 94); Rose Maloney, Alder (Exhibit 95); Sam Maloney, Alder (Exhibit 96); Barbara Hollman Morse, Absorokee (Exhibit 97); Duane Neal, Black Otter Guide Service, Pray (Exhibit 98); Mary Jane Rickman, Fishtail (Exhibit 99); John Rittel, Blacktail Ranch, Wolf Creek (Exhibit 100); Margery Rossetter (Exhibit 101); Mary Saunders, Ennis (Exhibit 102); L. J. Schieffert, McLeod (Exhibit 103); Norm Starr, Melville (Exhibit 104); Barbara Van Cleve, Big Timber (Exhibit 105); Channing Welin, McLeod (Exhibit 106); Ralph Holman, McLeod (Exhibit 107); landowners from Nye (Exhibit 108); and Andrew Dana, Livingston (Exhibit 109).

QUESTIONS FROM THE COMMITTEE: Senator Crippen asked several questions revolving around the term "barrier" and how it relates to portage. Although the two Supreme Court cases referred only to barriers, HB 265 goes on to include man-made barriers. Senator Crippen asked Mr. Waterman if he read into the two Supreme Court cases natural barriers as well as man-made barriers. Mr. Waterman responded that he read at least the Hildreth case to refer to man-made barriers, and because they did not restrict it to man-made barriers only, they are thereby in their definition and in their extension of it, the right to portage around those barriers. Senator Towe pointed out that the court was not dealing with a natural barrier in these decisions; they were dealing with an obstruction in one case and in the other with harrassment by a landowner. He asked if it followed if the court were to be talking about both man-made and natural barriers, it would have alluded to all barriers. Senator

Crippen felt it was an important point because the thing that concerned him somewhat is if we include natural barriers and allow portage around natural barriers, there may be a situation where a natural barrier is going to extend for quite a length. If we require by the legislation that there be portage around those barriers, then are we not requiring that the landowner provide navigability for recreational purposes down the entire length of any stream covered by this bill. Mr. Waterman responded that the Curran case referred specifically to barriers. Even though Curran did not deal with man-made barriers, the Curran case dealt with a stream some 30 miles in length, the Dearborn River, which has natural barriers in it. The question which Curran raised is whether or not the public in the course of floating that stream had the right to go up onto the banks or even to touch the bed of the river as they attempted to portage through or over low water marks. From that context, he saw Curran first addressing natural and Hildreth addressing man-made. Within the context of the two cases, the court has said the right of the public to portage is a right to portage around all barriers in a least intrusive manner. Senator Crippen clarified that the court did not say "all." Mr. Waterman stated they did not distinguish barriers, but they have clearly defined portage, and they have stated the right of portage exists coincidental to the right of the use of the underlying surface waters. Senator Crippen stated that in the context of this legislation, when you are talking about a man-made barrier like a fence or a diversion dam, you require the landowner to provide a reasonable and safe route for the recreational use of the surface water. He has no problem with that. His concern is that it may be too broad of a requirement in the case of a natural barrier, especially in the case where the barrier could be a swamp that extends for a great length, since we are talking about all rivers. Mr. Waterman did not believe a swamp would be a barrier as it has been defined and stated a barrier would be an artificial or natural object over or in the water body which restricts recreational use. A swampy area is an inconvenience the recreationist must abide by. Returning to Curran, if that is a barrier the court says can be portaged around, the question becomes whether or not the public has a right to portage around that barrier, be it natural or artificial. With reference to the natural barrier, if there is a request for a portage route, then the Department of Fish, Wildlife and Parks has the responsibility of placing that route and the like--putting the responsibility for the natural barrier where it should rest, on the public's shoulders.

Senator Towe asked Mr. Strope to clarify who he represented. Mr. Strope responded he represented the Sweetgrass Preservation Association. Senator Towe asked if when this legislation is passed, the right of the public to use dry streambeds and the property below the high water mark would be affected, how that is squared with the Hildreth decision which is clear on that point and says "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 beds and the banks up to the ordinary high water mark." Mr. Strope answered that both of the opinions are water opinions, not land-use opinions. Mr. Strope stated that it is very clear in Curran, Judge Haswell did not find the 1895 statute unconstitutional. On the contrary, he cited it very approvingly. That statute gives the abutting landowner the right to the beds and banks down to the low water when there's no water on them. Mr. Strope stated HB 265 attempts to convert a water right into a land-use right, and that's the opposition of his group. They don't want the opinions expanded. Senator Towe questioned why if we are bound to have further clarification from the Supreme Court we rush into it at this time until we really know what the Supreme Court is saying. Mr. Waterman responded you must read Curran and Hildreth together and not isolate Curran out. Hildreth came down a month after Curran and clarified areas in Curran that were vague. From the perspective of future litigation, Mr. Waterman stated we do not know the issues, or the case, or the time lines under which that issue will reach the court. He felt that if we do not address through legislative enactment now, the stream access issues, we invite the court to say that this body cannot act in this area and you, the court, should write the rules.

Senator Yellowtail asked Dr. Marlow about his concern with the difficulty of defining high water mark in terms of riparian vegetation. He asked if he could offer a workable alternative that will define the question posed by the court. Dr. Marlow stated the suggestions made earlier that the old Streambed Preservation statute is a very workable one that has lasted eight years.

Senator Pinsoneault asked Mr. Morse if he would restate his concerns about the tax consequence. Mr. Morse responded he is concerned about ad valorem land values. Tremendous values are allocated to this entire concept of running streams. If we pull away from the landowner the rights that are inherent in connection with those running streams, such as privacy and all that, he doesn't see how we can avoid the absolute certainty the value is diminished tremendously. Mr. Waterman responded Mr. Morse is correct in that there would be a diminishment of values, but he felt the diminishment came about through the two Supreme Court cases, and if we provide certainty and clarity of definition, we address many of the rights that have been lost as a consequence of those Supreme Court decisions. Senator Towe addressed the same issue and stated the decisions were not made in a vacuum. There is a lot of background with regard to the enabling act which limits how much Montana can and can't do in terms of providing protection for private and public property. We must be cognizant of the fact the same issue is also present on oceans. They have had the same decision. The ocean and the shoreline belong to the public. No one has private ownership of that ocean or shoreline.

That has clearly diminished the value of the property. Mr. Morse stated the point he was making was if anything happened to diminish market value, the ad valorem value should be assessed accordingly. If taxes go down, somebody else is going to pay the bill.

Senator Blaylock asked Mr. Strope where we would be better off relying on just the Supreme Court decisions and not passing HB 265. Mr. Strope responded in the context that these are water decisions, you are converting a water right into a land-use right, and he doesn't feel the court would go that far without just compensation being paid to the landowners for that right.

Senator Mazurek asked Mr. Flynn if the Department through its present regulations controlled pets. Mr. Flynn stated if a private landowner normally controls dogs on his property, that would be a normal land management practice, and he would continue doing that. Senator Mazurek stated the question is whether a pet traveling with a recreationist going from the stream or a bed or banks onto the landowner's property. Mr. Flynn responded that with the authority outlined in HB 275 and with the authority the Department or Commission has, they could implement those regulations, and in those areas where necessary, they could prohibit the accompaniment of a recreationist by a dog or require that the dog be leashed.

Senator Crippen stated he has struggled while reading these two bills as to the definition of "capable." The only test the Supreme Court seems to have put out is in one case that the recreational use of the water is without limitation. Senator Crippen asked Mr. Waterman if he felt Flathead Lake would fall into the definition of surface water by the two court cases. Mr. Waterman responded affirmatively. Senator Crippen asked if the use of the water would be restricted between the high water and low water mark. Senator Crippen referred to a lake which had a lot of waterfront useage. Using Swan Lake as an example, Mr. Waterman stated yes, he felt the decisions would apply and grant the public broad use of that water. Senator Crippen stated the statement of intent gave rather broad authority to the Department to define what waters are capable and to define the characteristics of the water involved to conform to the two Supreme Court cases. He asked Mr. Flynn if they feel they can effectively manage all of the waters in the state of Montana with the personnel and moneys they have been requested be appropriated and do what it says they will do in the statement of intent. Mr. Flynn responded appropriations has authorized $50,000 additional moneys in each of the next two years of the biennium in anticipation that the Department will be required to do some additional legal work and monitoring work as far as the stream access legislation. Mr. Flynn stated they do not agree that they will deal with all lakes and streams within the next two years. He stated the process for rules and

regulations needed to be established first before they address actual portages around barriers, which process is described in the statement of intent.

Senator Towe said, assuming Mr. Strope is correct in saying these two decisions really address only the use of water and not the underneath land ownership, how do you address the question of Mr. Josephson and some of the other persons raised that while you are prohibiting overnight camping and placement of duck blinds on Class II waters, you are not prohibiting that on Class I waters, and isn't that beyond the scope of the Supreme Court decisions. Mr. Waterman responded that as he reads the cases, the cases, while they tie a right to public use of the water, they allow incidental use of the adjacent land, and they allow incidental use for recreational purposes. There is nothing in the Supreme Court cases that defines recreation. HB 265 puts realistic limitations on those recreational uses. Senator Towe if he were suggesting that without this statute there would be presently under the Supreme Court cases permission to use all-terrain vehicles, recreational use of stock ponds, recreational uses of water diverted away from natural bodies, and big game hunting below the high water mark. Mr. Waterman stated those are all potential areas where through confrontation courts could rule, because there is no limitation on those statutes; those statutes in reference to recreational use allow the full and broad gambit of those uses. He believes that is a potential consequence of allowing the Supreme Court cases to go unregulated by appropriate legislation. Senator Towe asked Mr. Strope if this bill wouldn't really help everyone by at least limiting those four areas. Mr. Strope responded no, because if you do not pass HB 265, you are not creating a statute which gives the public a right to the land below high and low water marks. If you never give the public the right to those lands, then they can never make any use of it. It is their contention the Supreme Court preserved that statutory right of an abutting property owner to own it down to the low water mark when there's no water on it. He is burdened by the water uses when there's water on it. If HB 265 passes and this legislature says the public now owns the land between the high and low water marks, you are in effect repealing the old 1895 statute that Judge Haswell quoted. If you repeal that and create the public's right to use the land between the high and low water marks, then it is true you may authorize the public to make some use of it or no use of it.

Senator Brown stated he was concerned that one unintended consequence of HB 265 would be to allow the general public access for recreational purposes to beach front property. He asked Mr. Waterman if the bill would apply to lakefront property. Mr. Waterman responded he believes the Supreme Court cases apply to lake front property, and the bill does nothing with reference to improve, enhance, or expand those rights. What the bill does do, however, is, through the regulation process,

direct the Department to address those areas of concern. Senator Brown stated both the Curran and Hildreth decisions applied to navigable streams that were being used for recreational purposes. He believes the definition contained in the bill would apply to lakes. He's not sure the Supreme Court decisions would allow the public to camp on someone's lake front. Mr. Waterman responded that as he reads Curran, it speaks of the fact of all public waters within the state. He believes the Supreme Court did not consider the ramifications of this, and that is why he feels legislatively we should approach the problem.

Senator Crippen asked about compensation for portage. The bill states if portage is required by means of an artificial barrier, it be paid for by the landowner, while if portage is required by a natural barrier, it be paid for by the state. His concern is for artificial barriers. He asked if there were precedent in the law to require compensation to a landowner where the state requires an easement for a third party to venture through the landowner's property (to get on to a mining claim for example). Senator Crippen asked how you square that with the requirement in the bill that only in the case of natural barriers will the landowner be compensated. Mr. Waterman addressed what the bill did that the Curran case did not. Curran said only that the landowner can diminish by appropriation the flow of the stream. Curran does not speak specifically that the landowners are allowed to create an artificial barrier across a public way which the court found implicit in the public trust. As a consequence, they addressed that in HB 265 and said the public's right can be compromised by the right of landowners for management purposes to fence. We then said there are alternatives. They recognize the right of the public, which the court said is there to portage around in any way in any fashion that barrier in the least intrusive manner. They have also created a way to limit that public right, so if you will, the party who loses a portion of the right by reason of the exercise of the creation of a portage route is the public, not the landowner, because the landowner is going from the situation where there is unlimited and total portage to having that portage placed into a specific, limited, exclusive area. Senator Crippen asked if we were correct in saying through this bill we are limiting the rights of the public insofar as their access to get from one spot to another spot when confronted by an artificial barrier. Mr. Waterman stated we are doing that only if by reason of the exercise of the portage rights of the public, landowners request that a portage route be established to restrict unlimited portage rights of the public.

Mr. Wilson, President of the Montana Stockgrowers Association, testified he is more concerned with the ability of a Montana rancher's making a living off the land. The trap we have been caught in is watching the value of the land inflate and loan agencies lending money on the land on the value of the land and not on the ability of the landowner to make a

viable living on that ranch and pay that money back. He does not think the issue is whether this will have some effect on the value of your land; they are interested in protecting their rights on their land to make a living raising cattle.

CLOSING STATEMENT: Representative Ream closed by stating some comments were made by opponents that were inaccurate. He stated this is a complex issue. He stated at the outset HB 265 will not solve everyone's problems; it simply cannot, and no piece of legislation can, because we have constraints as lawmakers; we have the U.S. and Montana Constitutions to deal with. The state of Montana must protect both public and private rights. Much of statutory law is taken up with trying to balance those two, and he believes HB 265 is trying to balance those two. The last issue is there are fears, and those fears are real. He is sympathetic to those fears. Many of those fears have dissolved as they've tried to reach some kind of common understanding. We have not reached the endpoint of this legislation; we're going to have to continue to work together on it. Representative Ream stated one small amendment needed to be made on page 5, line 2, wherein the number 4 should be changed to number 5. Representative Ream's closing remarks stated you are now up the creek with a paddle; HB 265 is your canoe or vessel; he hoped the committee would dip its paddle carefully and warned them to watch out for the rocks and don't get out of the boat until it is safely ashore unless they can walk on water.

There being no further business to come before the committee, the meeting was adjourned at 1:05 p.m.

Committee Chairman

ROLL CALL

SENATE JUDICIARY COMMITTEE

49th LEGISLATIVE SESSION -- 1985 Date

NAME	PRESENT	ABSENT	EXCUSED
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Bruce D. Crippen	X		
Senator Jack Galt	X		
Senator R. J. "Dick" Pinsoneault	X		
Senator James Shaw	X		
Senator Thomas E. Towe	X		
Senator William P. Yellowtail, Jr.	X		
Vice Chairman Senator M. K. "Kermit" Daniels	X		
Chairman Senator Joe Mazurek	X		

DATE ______________

COMMITTEE ON ______________________________

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
ave Donaldson	Mt. Assoc. of Cons. Dist	265	—	—
[illegible]	Rancher [illegible]	265	X	
rry Dodd	Rancher	265	X	
Underwood	MT. Farm Bureau	265	X	
ara Olson	Mt. Farm Bureau	265	X	
ydon Darlinton	APA. rancher	265	X	
eorge [illegible]	Mt Dairyman's assn	265	X	
[illegible]	—	265	X	
Pauline [illegible]	Ranching - Ruby River	265	X	
[illegible]	—	265		
uce M. Cady	Meagher Co Rancher	265		X
aul [illegible]	Ashland Ranchy	265	With amendments	
an Stevens	Ashland rancher	265		
arcia [illegible]		265	X	
[illegible]	Fishtail Rancher	265		
[illegible]	Fishtail Rancher	265		X
[illegible] & Sons	Ranching - [illegible]	265		X
Virgil DENSON	RANCHER	265		
LEAH M. FASNACHT	"	265		
[illegible]	Cascade [illegible]	265		X
Bill Shortridge	Cascade [illegible]	265		X
[illegible]	Sportsman	265		X
[illegible]	"			
[illegible] McDonough	Cattle & Athletic - Rancher	265		X

(Please leave prepared statement with Secretary)

DATE 3/6

COMMITTEE ON Judiciary HB 265

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Jim England	citizen - recreationist	265	X	--
Mark Norem	Rancher	265		X
K. Steendermeyer	Rancher Beaverhead	265		X
Marguerite L. Fulker	Rancher - Gallatin Co	265	X	
W. D. Fulker	Rancher Gallatin	265	X	
DON VALITON	RANCHING-OUANDO, MT	265		
Dianne L McDermand	self	265	X	
- Ikon				

(Please leave prepared statement with Secretary)

DATE 3/8

COMMITTEE ON

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
Hal Price	Montana Wildlife Fed.	HB265	X	
Sonya Caltmill	United Meth. Youth	HB265		X
Tracie Davies	United Methodist Church	HB265	X	
Laurie Anderson	Senate Page	HB265		X
Caitlin Hall	Senate Page	HB265		X
Mary Kaggdale	Landowners Coalition	HB265	X	
Jean Kegler	Landowners - Coalition	HB265	X	
Channing W. Wolcott	individual	HB265		X
Elli Hawks	myself	HB265		X
Jeanne-Marie Souvigney	NPRC	HB265	—	
Courtney Jamieson	United Methodist Youth	HB265	—	
Paul Hungerford	myself	HB265	X	
Jason Fitt	myself	HB265		X
Kat Imhoff	myself	HB265	X	
Duane Neal	Gray	HB265		X
Anne A. Moe	Selkirk Angus Ranch	HB265	X	
Andrew C. Dana	myself	HB265		X
Norman A. Bishop	myself	HB265	—	
Jack Eidel	MSGA	HB265	X	
Betty J. Eidel	M C Bucks	HB265	X	
Peggy (Nichols)	Self	HB265	X	
Gordon Vance	Self	HB265		
Steve Berkheimer	Self	HB265	X	
Joan Bailey	Self	HB265	X	
Bill Faulconer	Self	HB265	X	

1 of 1

DATE _____

COMMITTEE ON _____

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
[illegible] Holliday	myself	HB265		X
[illegible] Ott	myself	HB265		X
[illegible] Goddard	myself	HB265		X
[illegible] Lou Linden	myself	HB265		X
[illegible] Rossetter	myself	HB265		X
[illegible]	myself	HB265		X
[illegible] Jonson	Sweetgrass Co. Pres. Assoc.	HB265		X
[illegible]	[illegible]	HB 265		X
[illegible]	self	265		X
[illegible] Allen	self	265		X
Sharon Welin	Boulder Valley Association	265		X
[illegible]	myself	HB265		X
Jack Van Dyke	Dude Ranchers	HB 265		✓
[illegible]	Rancher	HB265		✓
[illegible] Anderson	Rancher	H.B. 265		X
[illegible]	Rancher	HB265		X
[illegible]	Rancher	HB265		X
[illegible]	IWLFE	HB265	X	
[illegible]	Rancher self	HB265		X
[illegible]	Rancher	HB265		X
[illegible]	Stockman	HB265		X
[illegible]	Rancher	HB265		X
[illegible]	Rancher	HB265		X
[illegible]	self	HB 265		X
[illegible]	self	HB 265		X
[illegible]	self	HB265		X

(Please leave prepared statement with Secretary)

DATE

COMMITTEE ON

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Carol Mosher	Montana Cow Belles	265	X	
Arvill Keller	Mt. Cow-Belles Ranches	265	X	
Bill Maloney	Rancher	265		X
Bruce Maloney	Farm Bureau Cow Belle	265		X
[illegible] Dunlavy	Alter C	265		X
Joan B Langford	Landowner (Delegate	265		X
[illegible] Swanson	Land owner	265		X
Phyllis Tidyman	Land owner	265		X
L. L. Schaffer	Rancher	265		X
Marvin Duncan	Landowner	265		X
K. M. Foley	Mont. Water Devel. Assn Mt. Irrigators	265	X	
D M Rossetter	Beartooth Stock Assn.	265		X
Elaine Hanson	Belbaka Cattle Ranches	265		X
Bud Hansen	Belbaka Cattle Ranches	265		X
Tom Milesnick	Self	265	X	
Jim Wilson	Montana Stockgrowers	265	X	
Dave Herron	FCLA	265		X
Charles Hood	Self	265		X
Kenneth Sears	Rancher/woman	265		X
Franklin Crawford	Rancher	265		X
Bill Phillips	Sportsman	265		X
Roger Koopman	Businessman/Sportsman	265		X
[illegible] Haggart	Rancher	265		X
Robert Haggart	Rancher	265		X
Kay Eckman	Rancher	265		X
Wes Hamilton	Cow Manager	265		X

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DATE

COMMITTEE ON

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Clayton Marbut	Lawrence	265		X
Wayne Lehman	Sweet Grass Co. Farm Bureau	265		X
Bill MORSE	Stillwater Co Assn Taxpayers	265		X
Bud Saunders	Musselshell Co Farm Bureau	265		X
Donald. Saunders	Musselshell County	265		X
Peggy Justice	Rep Stillwater County	265		X
Dean Keith	Rep. Stillwater County			X
Opal Miller	Absentee " "			X
Mary Jane Rickman	Fishtail " "			X
Avery Blackstone	Absentee " "	265		X
J K Brennan	Grange - Columbus	265	X	
Conrad B Fredricks	Sweet Grass Co. Preservation Assn	265		X
Andrea Billingsley	Montana Cowbelles	265	X	
Jack Billingsley	MSGA	265	X	
Bill Ashton	APA + PCLA	265	X	
Mack Quinn	MFBF	265	X	
Gene Chappel	MFBF	265	X	
Wm McManey	MFBF	265	X	
Carl B Hope	MFBF	265	X	
Tim B Davis	APA	265	X	
C S Davis	APA	265	X	
Ted Suges	Self	265		X
John Redmond	Self	265		X
Ed Waterman	MSGA	265	✓	
Lisa Cleveland	Landowner			X
Dennis Cleveland	"			X

DATE

COMMITTEE ON

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Lorraine Stor	self	265		+
Lorraine Miller	self - rancher	265	/	
[illegible]	Trout Unlimited	265	x	
Pam Kain	self - rancher	265		X
Lorna Frank	Mt. Farm Bureau	265	X	
John DeCock	Self farmer	265		X
Dave Moore	self - farmer, ve-ag teacher	265		X
Robert Noe	~~Self~~ Self	265		X
Robert Pelton	Self	265		X
Evelyn Dodd	Ruby Valley Cowbelles	265	X	
[illegible]	Ruby Valley Cowbelle	265	X	
Parents Grosfield	Self	265		X
Bob Gilbert	Montana Wool growers	265	X	
Don McKamey	Mont. Wool growers	265	X	
Ralph Thomas	Rancher-outfitter	265		X
[illegible]	Representative	265		X
[illegible]	Mont Cattle Trader	265		X
Elaine Allestad	Self	265		X
Debbie Camp	self	265		X
Paul F Berg	Billings Rod + Gun Club Southeastern Sports Men Ass	265	X	
Tony A Schoonen	Mont. Wildlife Federation	265	X	
Mon Teigen	Mont Stockgrowers Assn	265	X	
Bud Pike	Self	265		X
[illegible]	[illegible]	265		X
[illegible]	Self	265	X	
[illegible]	[illegible]			X

(Please leave prepared statement with Secretary)

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COMMITTEE ON ____________________________

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
John E. Lutzmer	Self	265	X	
Frank M. Cline	Fergus Co Farm Bureau	265	X	
[illegible]	Fergus Co.	265		
[illegible]	[illegible] Co. Farm Bureau	265	X	
[illegible]	Gall. Co Farm Bureau	265	X	
[illegible]	Self	265	X	
[illegible]	Self	265		X
[illegible] Wilson	Self	265		X
Jack Eadel	MSGA	265	X	
[illegible]	CC	265	X	
John Willcher	Lewis and Clark Co. Rancher			X
[illegible]	Big Timber			X
[illegible]	Stillwater Protective Assn.			X
[illegible]	Big Timber, Mont			X
[illegible] Morgan	Belgrade Mt.			
A.C. [illegible]	"		[illegible]	
Anne Allen [illegible]	Big Timber			X
[illegible]	Big Timber, Mont	265		X
[illegible]	Flathead Trout Unlimited	265	X	/
[illegible]	Augusta			X
[illegible]	Cascade			
Dennis Hicks	[illegible] Creek	265		X
[illegible] Hicks	" "	265		X
[illegible]	Cascade	265		X
[illegible]	MONTANA COALATION FOR STREAM ACCESS	265	X	
[illegible]	Manhattan	265		X

(Please leave prepared statement with Secretary)

DATE ____________

COMMITTEE ON ____________

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
Sam Hofman	A.P.A.	265	✓	
Tony Schoonen	Skyline	265	✓	
Dan Heinz	Montana Wildlife Fed.	265	✓	
David P. Boehm	MT Farm Bureau	265	✓	
Claire Boehm	Mt. Farm Bureau	265	✓	
[illegible]	Mt. Farm Bureau	265	✓	
Dolores [illegible]	Mt Farm Bureau	265	✓	
[illegible] Freeman	[illegible] Landowner	265		✓
[illegible]	[illegible]	265		✓
Walt Carpenter	Great Falls - self	265	✓	
[illegible]	Wolf Creek MT self	265		✓
[illegible]	Wolf Creek Self	265		
[illegible] Peterson	Livingston "	265	✓	
Nancy McIlhattan	Livingston - self	265	✓	
Kevin L. [illegible]	Missouri River Flyfishers Great Falls	265	✓	
Jim McDermand	Medicine River Canoe Club Great Falls	265	✓	
Richard C. Parks	FFOAM - self	HB-265	✓	
Joe Etchart	Mt. Assn of State Grazing Dist	265	✓	
JACK HAYNE	TETON PONDERA F.B.	265	✓	
[illegible] Klein	Augusta	265		✓
[illegible] Klein	Augusta	265		✓
Rupert E & Jean [illegible]	Cascade MT.	265		✓
E. Maynard Smith	GLEN MT	265	✓	
[illegible]	Helena	265	✓	
Stuart Doggett	Ass of State Grazing Districts - Helena	265	✓	
Bud & Irene [illegible]	Cascade Mont	265		✓

(Please leave prepared statement with Secretary)

DATE _____

COMMITTEE ON _____

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
David LACKMAN	MT Public Hlth Assn	265	X	
Frank C. Thompson	Self	265		X Amend
A. W. Elwell	Self	265	X	
Chuck Rein	Self			X
Jerry Crawford	Prickly Pear Sportsmen	265	X	
John McDonald	Self	265		X
David Cole	self	265	X	
Art Von Tersleese	Helena Self	265	X	
LARRY CURRAN	Self	265	X	
Mike Meloy	WETA	265	Amend	~~Amend~~ Oppose unless Amend
Kelly Flynn	Representing self Hidden Hollow Ranch	265		X unless Amend

(Please leave prepared statement with Secretary)

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COMMITTEE ON ______________________________

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
[illegible] Thompson	myself	265	Amend	
[illegible]	myself	265		✓
Jo Lahti	Myself	265	✓	
[illegible] Bauman	Helena	265		✓
[illegible]	[illegible] County [illegible]	265		✓
[illegible]	visitor			
[illegible]	visitor			
[illegible]	Visitor			
[illegible]		265		✓
[illegible]		265		✓
[illegible]	Visitor - [illegible]			
[illegible]	[illegible] Ranch	265	AMEND	
[illegible]	Jack Creek Ranch	265	Amend	
[illegible]	[illegible]	265		
R. L. Sean	Ranch Foreman	265		✓
[illegible]	Self	265		✓
[illegible]	Visitor			
[illegible]	United Methodist Church	265		
[illegible]	United Methodist Church	265	✓	
[illegible]	myself	265	Amend	
[illegible]	self	265	Amend	
[illegible]	myself	265		✓
[illegible]	[illegible]	265		✓
[illegible]	[illegible]	265		✓
[illegible]	[illegible]	265		✓

DATE _____

COMMITTEE ON _____

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Bruce R. McLeod	Self & Park Co. Legis. Assn.	HB 265	✓ (amend)	
Mrs Bill Langford	Self + 5 property owners	HB 265		X

Recreational Use Of Montana's Waterways

A Report to the 49th Legislature
Joint Interim Subcommittee No. 2

December 1984

Published by
MONTANA LEGISLATIVE COUNCIL
Room 138
State Capitol
Helena, Montana 59620
(406) 444-3064

Rep. Keyser

Proposed Amendments to HB 265

1. Page 3, line 1.
   Following: "of"
   Strike: "surface"

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DATE 030885
BILL NO. HB 265

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Ron Waterman

TESTIMONY TO SENATE JUDICIARY

SUPPORTING HOUSE BILL 265

The Montana Stockgrowers Association and members of the agricultural industry alliance, consisting of the Montana Stockgrowers Association, Montana Wool Growers Association, Montana Association of State Grazing Districts, Montana Cowbelles, Montana Farmers Union, Montana Cattle Feeders Association, Montana Farm Bureau Federation, Montana Water Development Association, Women Involved in Farm Economics, Montana Grange, Montana Irrigators, Inc. and the Agricultural Preservation Association, support passage of House Bill 265 with some minor amendments. These members of the agricultural community believe this bill is the most effective piece of proposed legislation addressing the stream access issue under consideration during this session and urge passage of the bill. The bill strikes a balance between the protection of private landowner rights and the identification of public recreational uses of the surface waters, beds and banks of the streams and rivers of Montana. This legislation identifies the responsibilities of both sectors affected by the stream access issue and proposes a fair and reasonable approach which accommodates the concerns of the landowner and the recreationalist.

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A brief history of the events which brought the parties to their present position underscores the ineffectiveness of confrontation as a problem-solving procedure. Several landowners, on two streams which receive significant public recreational pressures, sought to restrain and deny access to floaters and fishermen. After negotiations sponsored and encouraged by the Department of Fish, Wildlife and Parks failed, two suits were filed. In each the district court held in favor of the public and denied the landowner the relief sought.

While the suits were pending on appeal to the Supreme Court of Montana, the 1983 Legislature considered a variety of stream access legislation. Those efforts failed in deference to the appellate process. In May and June of 1984, the Supreme Court of Montana rendered two broad, sweeping decisions which allowed the public the right to use all state waters and the beds and banks to the high water mark for any recreational and incidental uses. The use right was extended to the high water mark on all streams regardless of size and for all recreational uses the character of the stream could support. The decisions did not attempt to provide definition to many of the terms and rights extended, inviting a legislative response. Indeed, the time to address this matter is now before further litigation clouds the subject and closes

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the opportunity for a balanced legislative resolution.

Fortunately the 1983 Legislature had created an interim study committee to receive testimony and proposes legislation. The interim comittee met both before and after the Supreme Court of Montana decisions and studied and considered primary and collateral issues raised by the [illegible].

The interim committee gave thoughtful deliberation to the issue and developed House Bill 16 which became the catalyst for the remaining legislation being considered by this committee. It is fair to say that absent these actions the later activities of the agricultural community, working in conjunction with recreationalists and the Department of Fish, Wildlife and Parks, would have never occurred.

As the interim committee's action drew to a close, landowner groups met to outline the goals for upcoming legislation and to plan for this session. All groups agreed that it was critical to pass legislation this session, both to define areas left unclear by the Supreme Court of Montana's decisions, to allay the fears of landowners and recreationalists, and to avoid conflict as the newly won rights were tested and applied to specific streams other than the streams subject to the litigation.

To pass legislation which would be sustained in the

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event of a court challenge required an analysis of the limits of the Supreme Court of Montana decisions and a determination to propose legislation within those limitations. Six major goals were identified as being the subject of any proposed legislation. House Bill 265 appropriately addresses each element of necessary legislation. Those goals were:

(1) Recognition of private property rights;

(2) Restriction of landowner liability;

(3) Identification of the right of portage around barriers;

(4) Limitation upon prescriptive easement to avoid the loss of land ownership through recreational use activity;

(5) A definition of high water to demonstrate it was equivalent to the "ordinary high water mark" of the Natural Streambed Preservation Act; and

(6) Limitation upon the public's use to follow and recreate upon diverted waters.

House Bill 265 addresses all of these concerns within the limitations imposed by the decisions of the Supreme Court of Montana. While the result reached in those decisions were not to the liking of most landowners, it is irresponsible to ignore those decisions or to propose legislation which is not cognizant of the opinions of the

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court. The Supreme Court of Montana, the third branch of state government, construing the Constitution of Montana, has declared rights to exist in the public which protect the continued recreational use of all waters of the state. Absent passage of a constitutional amendment restricting those rights, legislation which failed to abide by those decisions and the Montana Constitution would probably be declared void. There is little gained in passing legislation which is constitutionally flawed and likely to be declared void if challenged. Recognizing this concept, the House Judiciary Committee, after hearing all the stream access bills, created a subcommittee which combined all the pending bills into a single bill, using HB 265 as the vehicle to advance these amendments. All interested landowner and recreation groups were present and had the opportunity to provide imput into the bill. The major concerns raised were appropriately addressed.

House Bill 265 defines "barrier;" "Class I waters;" "Class II waters;" "diverted way from a natural body;" "ordinary high-water mark;" and "recreational uses for the Class I and Class II waters" as well as other terms used within the act. A barrier is a natural or artifical obstruction which totally or effectively obstructs the recreational use of a water course. The barrier is determined at the time of use and the right of portage arises

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only if a barrier exists. Stream fluctuations may cause barriers to exist at some time of the year but not at others. The definition of "surface water" has been inserted to avoid repeating the directive of the Supreme Court that the water and the bed and banks to the high-water marks are available to recreationists.

Waters have been divided into Class I and Class II streams and the recreational uses permitted have been tied to the character of the water, with recreational activities not directly water related prohibited on Class II waters without landowner permission. Big game hunting has been treated the same on private land within the high-water marks as elsewhere -- landowner permission is required on private property.

The right of the public to use the surface waters does not include the right to use waters diverted into a stock pond, if the stream has intermittent flows, and does not allow the public to follow the water diverted away from the natural water body and conveyed by canal, ditch or flood control channel.

The public's right to portage around barriers is preserved, as is the landowners' right to fence across streams; however, a fence constructed consistent with designs approved by the Department of Fish, Wildlife and Parks and which does not interfere with the recreational

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use of the water will provide an alternative to portage. A landowner can create a portage--typically a gate or ladder. The bill contains provisions which create a problem solving procedure for developing a portage route should conflict arise, an unlikely event. This procedure does not result in a taking since the public's right to portage is restricted to an exclusive route, thus landowner property rights are not limited but expanded. The bill initially relegates the fact finding to the Board of Supervisors of a soil conservation district or other appropriate local board. These people were chosen because they have excellent knowledge of landowner issues and are knowledgeable of stream conditions in the county where they serve. Alternative fact finders are identified with an arbitration panel created to review unsatisfactory decisions.

Limitations upon landowner liability and prescriptive easement legislation is included. The proposed bill will be effective on passage.

The Senate has already addressed the stream access issue through passage of three "insurance" bills--offered to provide landowners relief in the event HB 265 failed passage. The presence of these bills should not justify the failure of HB 265. The three bills are incomplete responses to the stream access issue. Two of the bills

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addressing landowner liability, SB 421 and prescriptive easement, SB 424, approach the subject in the same general fashion. However, the liability limitation found in SB 421 is incomplete. The bill offers no relief for portage problems and extends no limitations of liability to others involved in resolving portage issues. SB 424 unfortunately attempts to address non-stream access prescriptive right questions. My clients believe the debate on stream access should not be clouded by other questions, better addressed through separate legislation. This approach will allow the full intent and affect of any legislation to be debated by both sides.

SB 418, advancing an alternative definition of high-water is perhaps the most troubling of the "insurance" legislation. Like HB 265 it follows the definitional pattern of the Natural Streambed Preservation Act but incorporates the example found in the regulation. The definition of "high water" in the 310 permitting regulations was designed to extend regulatory control over much of the stream. But it does so by adopting a definition of low, not high water. If any definition requires landowner attention, it is the definition in the regulation, not the definition found in HB 265. House Bill 265 alone gives the appropriate definition of "high water".

More troubling, however, is the alternative approach

taken in the two bills regarding the use of flood plains. HB 265 places these areas totally beyond public recreational use. SB 418 does not and allows public use when the areas are covered with water. Since SB 418 doesn't prohibit the use of water diverted away from a stream, because the bill does not comprehensively address all of the stream access issue, the result under SB 418 is recreational users would be authorized to fish and float in flood irrigated pastures during the spring and summer of each year. This unintended result is one not acceptable to landowners and not sought by recreationalists. This result should be avoided by passage of HB 265.

Landowners are here today because of the persistent controversy of stream access. Many landowners feel their rights have been hampered because of the unreasonable actions of a few individuals who have affected all of the agricultural community. Looking back and finding explanations for the present controversy, however is not a positive means to resolve these issues.

Landowners are here today to support House Bill 265. They are not alone. Rather, this bill before this committee is a cooperative effect, the result of hours of work by dedicated landowners, recreationalists and the Department of Fish, Wildlife and Parks and by the House Judiciary Committee and its subcommittee. Without this

joint cooperation the present proposed legislation would not have developed. It is this type of continued cooperation which will yield benefits beyond the present legislation as these parties continue to work toward better relations between these differing communities which share common interests and goals.

There have been some arguments advanced suggesting that the present bill is a "compromise", suggesting this concept is contrary to the legislative process. Obviously it is not. Moreover, if a compromise has occurred, it has occurred by both parties, compromising the uncertainty of the future in exchange for the certainty of the present, a result which favors landowners but gives all concerned the ability to know what their respective rights and responsibilities are.

The work and effort which resulted in the present bill cannot end here. The Department of Fish, Wildlife and Parks has powers already extended through Section 87-01-303, MCA, to regulate recreational activities on all streams available to public access and to consider protection of private property in that regulation. HB 265 gives direction for implementation of these regulations both in Section 2(5) and in the statement of intent. The Department has already experimented with different options to accommodate public and landowner interest on the Smith,

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Big Hole and the Blackfoot. These programs, and perhaps others, must be considered to address future pressures and the needs of the landowner and the public.

Hear the voices of concern addressed by both the proponents and opponents. Those who criticize the efforts of HB 265 seek to return to the status of the law before the Supreme Court decisions. Defeat of HB 265 will not accomplish these desires, it will leave the agricultural community without the definitions, remedies and protections of HB 265. Consider the bills the Senate has already passed and you find there has been little resolved. Conversely HB 265 addresses and resolves all elements of the stream access issue. It does so fairly and with balance, protecting landowner rights while identifying and preserving public recreational interests.

It is time to end the long debate and public controversy concerning stream access. The appropriate resolution and one which warrants your support is found in House Bill 265. We encourage your support and the passage of this bill.

Ronald F. Waterman
Agricultural Alliance

7246R

SENATE JUDICIARY COMMITTE
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DATE 03 08 85
BILL NO. H.B. 265

NAME RONALD F. WATERMAN BILL NO. HB 265

ADDRESS HELENA MT 59624 DATE 03/08/85

WHOM TO YOU REPRESENT MONTANA STOCKGROWERS ASSOCIATION

SUPPORT XX OPPOSE AMEND XX

Comments:

1. Page 3, line 5.
   Following: "system"
   Insert: "at the point where the waters are subjected to to treatment"

2. Page 4, line 24.
   Following: "MARK"
   Insert: "OR RESERVOIRS WITHIN THE NATURAL WATER BODY"

3. Page 6.
   Following: line 3
   Insert: (E) THE PLACEMENT OR CREATION OF ANY PERMANENT STRUCTURE OR OBJECT, SUCH AS A PERMANENT DUCK BLIND OR BOAT MOORAGE.

4. Page 6.
   Strike: lines 8, 9 and 10 in their entirety
   Insert: (B) THE PLACEMENT OR CREATION OF ANY SEMI-PERMANENT OBJECT SUCH AS A SEASONAL DUCK BLIND; or

5. Page 9, line 7.
   Following: "petition the district court"
   Insert: "within 30 days of the decision"

6. Page 10, line 12
   Following: "No supervisor"
   Insert: "or any member of the arbitration panel"

7. Page 11, line 8
   Following: "REACH"
   Insert: "OR LEAVE"

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A COMPARISON BETWEEN SUPREME COURT DECISIONS AND HOUSE BILL 265

Supreme Court Decision	Result	H.B. 265	Result
Landowner has no right of control of the use of surface waters, except to satisfy prior appropriation uses. Curran 41 St.Rep.914 Hildreth 41 St.Rep. 1195	Full public use of water without regard to land ownership	Public recreational rights recognized but certain activities, i.e. vehicle operation big game hunting prohibited on all waters; other activities including camping, creation of permanent and semi-permanent structures prohibited on smaller streams	Public right defined and limited where recreational use would conflict with private rights
Recreational use of waters recognized, but the capacity of the water alone determines the types and availability for recreational activity. Curran, 41 St.Rep. 914	No definition of recreational use, reference to other state statutes will supply definitions	Recreational uses defined and restricted to water related activities with some restrictions, Sec.1(8)	Recreational activities of surface waters restricted to water activities
The public trust doctrine does not permit a private party to interfere with the public's right to recreational use of the surface [illegible] State's waters. Curran, 41 St.Rep. 914	Unlimited public use of all state water, with no interference	Limitations on public uses imposed to assure activities are water related; use of diverted and impounded waters prohibited; landowners permitted to fence across streams and rivers. Sec. 2(2)(c); 2(3); Sec. 3(2)	Landowner management options protected and preserved; recreational activities limited to stream use only
The public trust doctrine permits full recreational use of surface waters. Curran, 41 St.Rep. 914 Hildreth, 41 St.Rep. 1195	Public easements on waterways and potential prescriptive easements on private property, portage routes, and private land crossings to reach public streams	Prescriptive easements cannot be developed through use of surface waters, beds, banks, portage routes or across private land to reach surface waters Sec. 5	No potential prescriptive easements developing upon private land
The public trust doctrine permits full recreational use of surface waters. Curran, 41 St.Rep. 914 Hildreth, 41 St.Rep. 1195	Unlimited public use of all state water, with no interference	Fish & Game Commission directed to formulate rules limiting, restricting or prohibiting types and extent of recreational uses of waters. Sec. 2(5); Statement of Intent	Limitation of recreational use of water for health safety & protection of public & private property reasons
[illegible] prohibited from crossing private property to reach waters. Curran 41 ST.Rep. 916; Hildreth 41 St.Rep. 1195	Public trespass across private land not permitted	Public prohibited from crossing private property to reach waters Sec. 2(4)	Public trespass across private land not permitted

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. The public's use of water is, under normal circumstances, allowed to the high water mark of the waters. Curran 41 St.Rep. 916; Hildreth St.Rep. 1195	No definition of high water mark and potential of including flood plains while wet or dry	High water mark defined to mean the line impressed upon land by water for sufficient periods to all distinction of areas & prohibiting recreational uses of flood plains. Sec. 1(7)	Definition which contains recrea tional activitie to within banks of a stream
. Public's right to use stream includes right to portage around all barriers which interfere with right, allowing portage in least intrusive manner, avoiding private property damage. Curran 41 St.Rep. 917 Hildreth 41 St.Rep. 1195	No definition of barrier. Public alone determines manner and method of portage	Barrier defined to only objects which totally or effectively obstructs recreational use of water, portage permitted avoiding damage to private land and rights; portage route determination possible to preserve landowner management needs. Sec. 1(1); Sec. 3	Public given limited right t portage around barriers and landowner can restrict portag to exclusi route for manage- ment needs
. Public surface water user has right to make full recreational use of water without control by landowner. Curran 41 St.Rep. 917; Hildreth 41 St.Rep. 1195	Recreational user present on land as a matter of right and landowner probably owes duty of ordinary care	Landowner and supervisor liability to recreational user limited to wilful or wanton misconduct	Limited duty of care owed recre tional user pro hibition against intentional act desioned to ignore
J. The public right to use the water includes a right to use the water, the bed and bank up to the ordinary high water mark and to portage around barriers. Hildreth, 41 St.Rep. 1195	The recreational use of public includes the water, beds and banks of streams	Surface waters defined to include the beds and banks of streams up to the ordinary high water mark. Sec. 1(7)	The recreati use of the publi includes the water, beds and banks of stream

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TESTIMONY OF THE MONTANA COUNCIL, TROUT UNLIMITED

BEFORE THE SENATE JUDICIARY COMMITTEE

H.B. 265

March 8, 1985

Mr. Chairman and Members of the Committee:

My name is Mary Wright, and I represent the Montana Council of Trout Unlimited. TU is a national non-profit fishing conservation organization [illegible] members nationwide in about 330 chapters. The Montana Council is the state governing board representing ten local chapters and one affiliated organization in Montana.

TU participated in the process that led to the proposal now embodied in H.B. 265. Other sportsmen's organizations taking part in that process were the Montana Coalition for Stream Access, the Montana Wildlife Federation, the Skyline Sportsmen, the Floating and Fishing Outfitters Association of Montana, the Medicine River Canoe Club, and the Missouri River Fly Fishers. The Agricultural organizations referred to by Mr. Waterman and the Department of Fish, Wildlife and Parks were also part of the deliberations on this legislation.

We fully support H.B. 265 as a reasonable, fair and balanced treatment of the issues raised by the Montana Supreme Court in its Curran and Hildreth decisions last year. It clarifies the issues not decided by the Court, states clearly the rights and responsibilities of sportsmen, and affords protection for landowners which have become important in light of the Court's decisions. Because H.B. 265 integrates all the issues surrounding stream access, it has many strengths. It is because of these strengths that we ask the Committee's support for this legislation.

One of the strengths of H.B. 265 lies in its comprehensive treatment of the issues. At the same time, it is a focused treatment. The statement of rights and responsibilities of landowners and sportsmen relates only to stream access, and does not unnecessarily go beyond those issues. Another strength of H.B. 265 is that it provides a suitable vehicle for the Legislature to address all the issues. It has been said many times that if the Legislature had expressed its will in the last session, we would not be here today engaged in yet another effort to reach the solutions we are seeking. A third strength of the bill is that it classifies streams. In doing so, H.B. 265 preserves reasonable landowner control over small streams while implementing in a reasonable way the rights afforded to sportsmen on state constitutional grounds by the Court. Finally, H.B. 265 provides the means for sportsmen and landowners to join together with the Department of Fish, Wildlife and Parks to regulate uses of streams on a site specific basis to accomplish the stated goal of all the parties that our resources be protected.

On the substantive provisions of H.B. 265, I would like to make a few comments. First, the bill divides the waters of the state into two

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categories. Although the Court did not provide for any such classification, we believe that it is reasonable to do so in order to protect the rights, including the right of privacy, of landowners on small streams that have not before been accessible to the public. On class I waters, a broad range of recreational use is permitted, consistent with the Court's decisions. On the smaller class II streams, landowners have the right to control a number of uses, including camping, use of all-terrain vehicles, big game hunting, and any other uses that are not primarily water-related. I would like to emphasize that these landowner rights to control uses of smaller streams were not provided by the Court, but are included in H.B. 265 because we favor legislation that is reasonable and that will reduce the potential for conflict in the future.

On the issue of portage, the Court stated that sportsmen have the right to portage around barriers in the least intrusive manner possible. This provision is restated in section 3 (1), which adds to the Court's language the phrase, "avoiding damage to the landowner's land and violation of his rights." The balance of section 3, the longest section of the bill, is written so as to provide landowners with protection against possible abuse of the portage rights of sportsmen. Subsection (2) states that if a landowner builds a barrier across a stream for management or ownership purposes, he may build a barrier that does not interfere with recreational use of the water. In order to do so, he may call upon the Department of Fish, Wildlife and Parks for assistance. If the barrier is properly designed and placed, and does not interfere with passage along the stream, then there is no right to portage above the ordinary high-water mark, and thus no right on the part of the sportsmen to enter the land.

Subsection (3) of section 3 provides a procedure for resolving differences as to portage routes. We do not believe that this provision will have to be used very often, and when used, it would again be for the protection of the landowner. This is because it would be used to establish an exclusive portage route, rather than multiple portage routes, once again reducing the private land available to sportsmen to use in portaging around barriers.

The remaining provisions also involve landowner protections. These relate to prescriptive easements and restrictions on landowner liability. The prescriptive easement section, section 5, states that prescriptive easements may not be acquired through use of surface waters, including the beds and banks up to the ordinary high-water mark, or the use of land while portaging or travelling to or from streams. This section is tailored to the situations that might arise after the effective date of this legislation through use of streams for recreation.

On the liability issue, H.B. 265 limits the liability of landowners as well as supervisors who participate in a decision relating to portage routes. Their liability to a sportsman injured while making recreational use of streams or while using portage routes would be limited to liability for acts or omissions that constitute wilfull or wanton misconduct.

In his testimony, Mr. Waterman referred to certain clarifying amendments. Trout Unlimited supports those amendments, and requests that this Committee take favorable action both on the amendments and on H.B. 265.

I appreciate the opportunity to testify here today, and will be happy to answer any questions. Thank you.

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HB 265

Testimony presented by Jim Flynn, Department of Fish, Wildlife & Parks

March 8, 1985

This bill appears before you today in large part because of the efforts of the Interim Committee on Stream Access. While it is quite different from the bill proposed by the interim committee, it was the discussion and communication spawned by that committee which led to HB 265. Both landowners and recreationists, recognizing the need for such legislation, set aside their differences to establish legislation that responds to the legitimate concerns of both as a result of the recent Supreme Court decisions.

I would like to briefly highlight the positive aspects of the bill.

The definition section clarifies a number of terms the Supreme Court did not define; these include definitions of "barrier" and "ordinary high water mark."

The bill limits landowner liability and precludes the acquisition of a prescriptive easement by the recreational use of a waterway or by use of a portage.

It defines the kinds of recreational uses to be made of the state's waterways, acknowledging those uses allowed or disallowed in other state statutes not affected by the court decisions.

The bill requires the department to draft regulations which will provide a procedure by which all members of the public will have access to a decision making body if that person is concerned that recreational use is harmful to any waterway.

And finally, I would bring to the committee's attention the one area that goes to the heart of the matter which stimulated the court decision and brought us to this point - that being the subject of portage.

In the Supreme Court cases, it was the obstruction in and on some waterways and the lack of the opportunity to portage which resulted in the court action.

The Supreme Court in both cases was emphatic in holding that the public has the right to portage around barriers in the stream. It is clear, since the court did not confine portaging to the area between the ordinary high water marks, that it recognized the right to portage over the adjacent uplands to the extent necessary to avoid barriers. The court was clear in considering the protection of private land which might be impacted by a portage. This bill adopts the Supreme Court's language on portage rights verbatim.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 5
DATE 03 08 85
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The bill takes one additional and necessary step, however, and allows for a structured process to mediate disputes, should they arise over where a proper portage route should be, and, where necessary, allows for the designation of a proper route. I want to emphasize that either the landowner or the recreationist can use this process to resolve a problem.

The bill also allocates costs for the construction of portage routes where such construction is necessary. If the barrier is created by the landowner, he must pay the cost. If it is naturally caused, the department pays for the construction. In all cases, the department will bear the cost of maintaining the route once it is established.

Finally, the act discourages the unnecessary use of portages by allowing the landowner, in consultation with the department, to construct fences which don't interfere with the use of the water. Where such fences are built, the public may not portage around such barriers above the ordinary high-water mark.

Through our observation to date, it is our concern that the question of portage as outlined in the Supreme Court decisions holds the greatest potential for disagreement in the use of streams in Montana. It was our concern that if the portage question were not addressed, Montanans would soon see the subject of stream access again before the courts.

While this legislation cannot guarantee that will not happen, it takes a major step toward lessening the possibility. Section 3 on pages 7, 8 and 9 lays out quite clearly the rights and responsibilities of both landowners and recreationists. It establishes a structured process for developing portages; it provides portage routes for responsible parties, and perhaps most importantly, provides a mechanism for the resolution of differences on the ground and among local people. Hopefully this final aspect will avoid precedent-setting court decisions in the future.

The portage provision, among others, suggests HB 265 is designed to foster communication and cooperation between the landowner and the recreationist. It is a bill born out of cooperation.

We urge the committee to keep alive that spirit of cooperation and act favorably toward HB 265.

EXHIBIT NO. 6
DATE 03 08 85
BILL NO. H.B. 265

My name is Jimme L. Wilson. I am a rancher from Trout Creek and the President of the Montana Stockgrowers Association. We ranch in a mountain valley through which two streams flow. The two Supreme Court decisions had quite an effect on our operation as we fence across the streams for pasture management, thus creating "man-made obstacles." The broad decisions forced upon us by the Supreme Court, which affects 17,000 miles of rivers and streams in Montana, to satisfy two short stretches of streams on the Dearborn and Beaverhead Rivers, is very frustrating. Equally frustrating is trying to draft legislation which will hopefully protect our rights as landowners in the future.

One of the members of the agriculture loose alliance remarked to me last week how difficult it was to satisfy his own thinking on stream access. "How wonderful it would be if someone who was not associated with the prob lem could give us all the right answers on the issue." My answer to him was, "Don't look too far for this man. You have him near at hand. This man, it is you, it is I, it is all of us."

The Montana Stockgrowers Association has been addressing the stream access problem for several years. Two years ago, when we support House Bill 888, the hue and cry from some of our members could be heard across the land - "You are selling us down the river, you are taking awa our rights as landowners." So we withdrew our support of the bill. Well, the Supreme Court went far beyond what House Bill 888 was asking but strangely enough the same people were silent when we lost the court cases until we proposed legislation to narrow down the broad Supreme Court decisions. Many of the people here today testifying as opponents of House Bill 265 in effect are not protesting against House Bill 265 but are protesting against the Court's decisions which are now law. The Court's decisions constitute a radical departure from the well-

ESTABLISHED PUBLIC POLICY OF THE STATE OF MONTANA. PUBLIC AND PRIVATE RIGHTS TO USE OF WATER HAD BEEN ACKNOWLEDGED BY THE SUPREME COURT AND THE LEGISLATURE SINCE STATEHOOD.

WHEN I WAS A MILITARY ~~AVIATOR~~ PILOT, WE SPOKE OF "OLD PILOTS" AND "BOLD PILOTS." HOWEVER, THERE WERE NO "OLD BOLD PILOTS." LOBBYING IS MUCH THE SAME WAY. THE MONTANA STOCKGROWERS ASSOCIATION HAS REPRESENTED THE CATTLE INDUSTRY FOR OVER 100 YEARS AND WE NEVER HAVE LED OUR MEMBERS DOWN A PATH OF SELF DESTRUCTION AND WE ARE NOT NOW. SATISFYING EVERYONE IS IMPOSSIBLE. THERE IS ALWAYS THAT SMALL MINORITY YOU NEVER REACH -- HOWEVER, THEY ARE USUALLY THE MOST VOCAL.

WHEN I ASK SOME OF THE OPPONENTS OF HOUSE BILL 265 WHAT THEIR SUGGESTIONS FOR BETTER LEGISLATION ARE, THE ANSWERS RANGE FROM NONE AT ALL TO AMENDING A FEW WORDS OR PHRASES IN THE BILL. AS AN INDIVIDUAL WHO LIVES ON 3½ MILES OF THESE STREAMS UNDER QUESTION, I WILL NOT TAKE ANOTHER CHANCE OF LOSING MORE OF MY RIGHTS THROUGH COURT ACTIONS AS WE DID IN THE SUMMER OF 1984. I FIRMLY BELIEVE IN GOVERNING MYSELF THROUGH THE LEGISLATIVE PROCESS. I WILL NOT TAKE MY CHANCES AGAIN WITH THE COURTS. WE MUST PASS STREAM ACCESS LEGISLATION THIS SESSION. HOUSE BILL 265 IS THE BEST VEHICLE WITH WHICH TO ACCOMPLISH THIS.

NAME: Dan Heinz DATE: 3/7/85

ADDRESS: 107 W. Lawrence

PHONE: 442-9117

REPRESENTING WHOM? Montana Wildlife Federation

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: The Bill as is represents a lot of work on both sides of the issue.

The compromise is good.

Those who oppose the bill are asking the legislature to fix what they believe to be a bad decision by the Court with a law contrary to the findings of the Supreme Court

We ask the committee to carefully examine the relationship between 265 and the court findings.

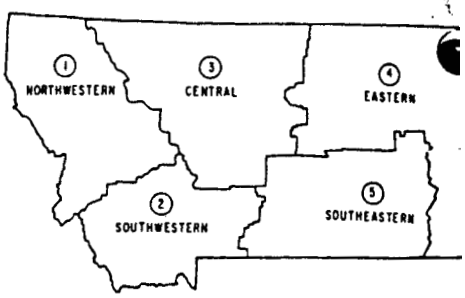
PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 7
DATE 03 08 85
BILL NO. H.B. 265

EDUCATION – CONSERVATION

Montana Wildlife Federation

AFFILIATE OF NATIONAL WILDLIFE FEDERATION



Testimony on HB265
March 7, 1985

My name is Dan Heinz. I'm testifying today on behalf of the Montana Wildlife Federation which consists of 17 affiliated clubs with 1000 members across the state.

We have been fully involved in the development of HB265. We have, along with many others representing agriculture and recreation, spent thousands of hours on HB265, all of which have been dedicated to striking a ballance between the rights of Land Owners and recreationists. We believe the balance sought exists in HB265.

There are those who obviasly do not like 265.

To us, it is apparent their disatisfaction is really, in fact, directed at the two Supreme Court decisions which 265 is based on. They want the legislature to fix what they believe to be a bad decision with a law contrary to the findings of the Supreme Court decision. We ask this committee to carefully examine the relationship between HB265 and court findings.

We are confident that the committee will recognize that HB265 is, in reality, carefully taylored statue that is fully consistent with the courts findings.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 7
DATE 03 08 85
BILL NO. H.B. 265

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 8
DATE 03 08 85
BILL NO. H.B. 265

Parks

Parks' Fly Shop

GARDINER
MONTANA
59030

Testimony in support of
HB-265 before the Senate
Judiciary Committee and
Fish and Game Committee

Mr. Chairman, members of the Committees, for the record I am Richard Parks of Gardiner Montana, owner of Parks' Fly Shop and president of the Fishing and Floating Outfitters Association of Montana. On this matter I represent myself and our association's 100 plus outfitter members.

We support HB-265 but would like to see it amended so that section 2, D (line 3 on page 6) would allow the use of long bows, black powder firearms and shotguns for big game hunting. It is our belief that this would better conform to current practice. A number of our members are engaging in hunting floats now and would not care to have to make major changes in their operations.

I would like to discuss an area that is certain to attract adverse comment. It seems that a few people simply do not understand the provisions for portage routes as stated in the bill. To begin with the Supreme Court decisions specifically require that portage be permitted. All pretentions to the contrary are a waste of time. The question to ask then becomes, "How do we accomodate the legitimate concerns of adjacent property owners to the portage requirement?" All the court said was that portage must be in the least intrusive manner possible. This assertion is so broad that it is susceptible to conflicting interpretations and it leaves no means of resolving those conflicts short of district court. Section 3 of the bill is designed - after much intense discussion - to provide a means of reaching an equitable determination of portage rights without resorting to the court system.

Comments I have heard and seen expressed in the papers indicate that there is still a considerable misunderstanding by a few landowners about when and why portage would be resorted to by a recreationist. We do NOT want portage rights for the purpose of trespass. We would prefer not to have to portage at all. If someone doubts that I invite them to help me portage my 350 lb. boat plus its associated equipment. There exists a minimal but real possibility that occassional natural events or situations could create a portage requirement. Therefore we need the law to recognize that. The adjacent landowner who is complaining about costs should note that these are born by the recreational public through the Department of F,W & P's. The fact remains that the vast majority of portage situations are created by the adjacent property holder. From the recreationist's point of view it would be very simple to demand that the property owner in question clear the public right-of-way. Those who are complaining that HB-265 permits the use of dry streambeds should go back to the decisions and note that the bill restricts such use while the Supreme Court did not.

There is nothing whatsoever unfair about requiring the obstructor to bear that expense. The Highway department requires me to keep the roadway clear of obstructions protruding from my property at my expense for example. In HB-265 we recognize that while it might be our right to demand this standard be applied it is too rigid in practice. Part 2 (starting on line 18 of page 7) specifically recognizes that adjacent landowners may have a need to erect some structure in, on or over a waterway. Furthermore it provides an incentive for designing such structures so as to not impede the normal use of the waterway. In practice I do not expect the provisions of Part 3 (starting on page 8) will very often come into full play. It is worth noting that unlike my interaction with the Highway department the maintance costs of portage routes are to be born by the recreational public.

Let me just run through a few scenarios that illustrate how I expect things will go most of the time - and conversely why we need this section in the law. In the first instance, on a middle sized stream such as the Smith River it is fairly common for property lines to cross the river. There already exist a number of such boundries and their associated fences. Many of them have been designed with integral float gates which eliminate the need for a portage route. Another case may arise there or elsewhere and a reasonable property holder would recognize the potential problem, consult with the Department and build an appropriate fence. This is done with minimal hassle and cost and gives no right to a recreational user to enter the property owners land.

In the second instance postulate a holder who choses not to recognize the sense of this and simply throws up a regular 4 wire fence. Now recreational users are going to get from one side to the other - probably by stretching the fence to get the boat under and crossing themselves at the most convenient site which may or may not be within the ordinary high water mark. Over time this will certainly require maintance on the fence and may well break it down entirely. This cost must be born entirely by the owner. As long as the landowner doesn't object and usage is relatively light it probably won't be a problem. Once either side has become sufficiently annoyed however the portage route process gets triggered. Some have suggested scrapping this entirely. In view of the court decisions I can live with this but I don't think property owners should be obligated to do so. The consequence is to force every disagreement into adversarial and expensive proceedings in court.

In the third instance contemplate the case of a property owner who choses to barricade the river with a nest of barbed wire for purposes of harrassing the recreational user. In HB-265 we have a means of solving the problem; if not to the property owner's satisfaction at least in an administrative, case by case, site specific manner that creates no new dangerous precidents in law.

In conclusion, HB-265 is a carefully considered effort to mediate the requirements of the Supreme Court decisions and the legitimate concerns of land owners. No piecemeal approach will do as good a job. The whole portage section is designed to limit the impact that recreational users can have on private land adjacent to the waterways. We urge your favorable consideration of HB-265 with the suggested amendment. Thank you.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 8
DATE 03 08 85
BILL NO. H.B. 265

NAME: Paul F Berg DATE: Mar 8 '85

ADDRESS: 3708 Harry Cooper Place Billings MT

PHONE: 656-2015

REPRESENTING WHOM: Billings Rod and Gun club, and Southeastern Sportsman Association

APPEARING ON WHICH PROPOSAL: H.B. 265

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

COMMENTS: We think that big game hunters should have the right to hunt below the Ordinary High Water Mark on Class I waters without adjacent landowner permission with conventional sporting weapons.

It is extremely difficult for a floater hunter to contact all landowners along the river.

We are experienced hunters and do it with utmost Safety.

Law breakers will ignore any law passed. Sportsmen will be penalized unnecessarily if this bill passes without our suggested amendment

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 9
DATE 03 08 85
BILL NO. H.B. 265

NAME: Paul F. Berg DATE: Mar 8 '85

ADDRESS: 3708 Harry Cooper Place Billings MT. 59106

PHONE: 652-2015

REPRESENTING WHOM? Billings Rod and Gun Club and Southeastern Sportsmen Association

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: (Continued)

Sportsmen have already made many concessions to landowners. We gave up the early elk hunting season; agreed to shorter hunting seasons and to later season starts, all to protect livestock in our national forests. Also, hunting license money goes for predator control to benefit livestock operators. We already have stringent trespass laws. We find it very difficult to get permission to hunt on many ranches ~~if they are~~ along the river because the landowners do not come to the door, are not home, or won't let anyone hunt.

We have conceded enough and are becoming increasingly concerned about what we will be asked to give up next.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 9
DATE 03 08 85
BILL NO. H.B. 265

652-2015

Paul F Berg
Billings Rod & Gun Club
and
Southeastern Sportsman Assoc.
3708 Harry Cooper Place

Paul Berg
Billings Rod and Gun Club

Billings, Montana
March 8, 1985

Mr. Joe Mazurek, Chairman
Senate Judiciary Committee
Capitol Station
Helena, Montana 59620

Dear Mr. Mazurek:

Our 1,000-member Billings Rod and Gun Club and Southeastern Sportsman Association, representing 9 clubs and 5,000 sportsmen, appreciate the prodigious amount of time and effort that all of you have put into House Bill 265 (the Stream Access Bill) to satisfy both the landowners and the sportsmen of Montana.

Hunting, fishing and floating streams provide important recreational opportunities for many Montanans. Approximately one million general hunting and fishing licenses are sold in Montana each year. About 800 million dollars were generated in Montana in 1982 from expenditures made by hunters and fishermen; a significant contribution to the economy of our State.

Hunting on islands and along river banks, using boats for access, requires good outdoor skills and equipment, and only experienced hunters will cope with the adverse weather conditions common during the hunting seasons.

River hunters we know are good sportsmen who do not cause problems or create safety hazards or conflicts with landowners. We respect private property rights, always ask permission to hunt on private property, and abide by established safety rules and laws.

The islands and the area below the ordinary high water mark, as defined in H.B. 265, contain thousands of acres where hunters disperse in pursuit of their game.

We expect that a few trespass problems have occurred over the years, but we are not aware of any property damage caused by sportsmen. We police our ranks continuously.

Also, we know that there are some lawbreakers -- the ones who trespass, shoot at road signs and everything else around, and cause problems for landowners. The same people cause problems for city dwellers.

Unfortunately, they are the ones who give all sportsmen a bad reputation, and bad news travels fast and never dies or fades away.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 9
DATE 03 08 85
BILL NO. H.B. 265

Mr. Joe Mazurek, Chairman March 8, 1985

We think that denying sportsmen the privilege of hunting big game below the ordinary high water mark (as does H.B. 265) is unnecessarily restrictive, penalizes sportsmen, and favors the lawbreaker who will ignore any law.

Therefore, we urge that you amend H.B. 265 to reinstate the language that allows big game hunting with conventional sporting weapons below the ordinary high water mark on Class I waters without landowner permission.

This amendment would greatly improve sportsmen-landowner relationships in Montana.

The opportunity to testify on this important proposed legislation is appreciated.

Sincerely yours,

Larry Whitmyer, President
Billings Rod and Gun Club

C. C. (Jiggs) Stapleton, President
Southeastern Sportsman Association

Statement of the Billings Rod and Gun Club and Southeastern Sportsman Association on H.B. 265, presented by Paul F. Berg to the Senate Judiciary Committee, Montana State Legislature, Helena, Montana, March 8, 1985.

Paul F. Berg
3708 Harry Cooper Place
Billings, Montana 59106
656-2015

Billings, Montana
March 8, 1985

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Senate Judiciary Committee
Capitol Station
Helena, Montana 59620

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SENATE JUDICIARY COMMITTEE
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Statement of the Billings Rod and Gun Club and Southeastern Sportsman Association on H.B. 265, presented by Paul F. Berg to the Senate Judiciary Committee, Montana State Legislature, Helena, Montana, March 8, 1985.

Paul F. Berg
3708 Harry Cooper Place
Billings, Montana 59106
656-2015

Jo Brunner

AGRICULTURE LEGISLATIVE WORK

NAME Jo Brunner COMMITTEE Senate Judiacary ~~Senate Fish and Game~~

ADDRESS 1496 Kodiak Road, Helena DATE March 8, 1985

REPRESENTS Montana Grange, Montana BILL NO. HB 265

Cattlefeeders Assoc. Montana Stockgrowers Association

SUPPORT X AMEND with OPPOSE

Mr. Chairman, members of these committees, for the record, my name is Jo Brunner and I will testify at this hearing on HB 265 for the Members of the Montana Grange and for the Montana Cattlefeeders Association.

These organizations wish to go on record as being in full support of, and as having participated in the drafting of House Bill 265 as requested here today. We also support the amendments offered by Mr. Ron Waterman.
It is our positions that as citizens of the state of Montana who will be affected personally by the Supreme Court decisions and by any legislation passed this session concerning our streams and our surrounding lands, we have had the opportunity to participate in the efforts to alleviate a great many of the problems brought about by the decisions and that this bill being heard today will benefit all of us.
We ask your full support of HB 265 with the amendments that Mr. Waterman proposed for the alliance.

Thank you.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 10
DATE 03 08 85
BILL NO. H.B. 265

NAME Mike Micone BILL NO. HB 265

ADDRESS 2301 Colonial Drive, Helena, MT 59601 DATE 3/08/85

WHOM DO YOU REPRESENT Western Environmental Trade Association

SUPPORT _____ OPPOSE _____ AMEND XX

Comments:

1. Title - Page 1, line 8.
   Strike: colon
   Insert: "or land is being used as an incident of water recreation"

2. Page 1, line 10
   Strike: "of surface waters"

3. Page 1, line 19
   Strike: "or natural object in or over a water body which totally or effectively obstructs the recreational use of the surface water at the time of use"

4. Page 1, line 25 and Page 2, lines 1 through 20 - Strike

5. Page 3, line 10 following "that" - through line 14 following "value"- Strike
   Insert: "deprive the soil of its vegetation and to destroy its value for agricultural purpose."

6. Page 3, line 18
   Strike: "hunting"

7. Page 3, line 23
   Following "uses"
   Strike: "period"
   Insert: "within the ordinary high water mark of the waters"

8. Page 4, line 14 through 24 - Strike

9. Page 6, line 4 through 6 - Strike
   line 7 - change (A) to (E)
   line 8 - change (B) to (F)
   line 11 - change (C) to (G)
   line 13 - change (4) to (3)
   line 17 - change (5) to (4)
   line 20 - following "recreational", strike "use of Class I and Class

10. Page 8, line 6 through 16 - Strike

11. Page 8, line 20
    Strike: "The" and line 21 and 22 in their entirety

12. Page 9, line 5 through 20 - strike

SENATE JUDICIARY COMMITTEE
EXHIBIT NO 11
DATE 03 08 85
BILL NO H.B. 265

13. Page 9, line 25 - Strike: "and supervisor"

14. Page 10, line 12 through 18 - Strike

15. Page 11, line 2 following "of"
Strike: "surface"
Insert: "land or"

SENATE JUDICIARY COMMIT
EXHIBIT NO. 11
DATE 03 08 85

MONTANA FARM BUREAU FEDERATION

502 South 19th Bozeman, Montana 59715
Phone (406) 587-3153

TESTIMONY BY: Gene Chapel

BILL # HB 265 DATE March 8, 1985

SUPPORT XXXX OPPOSE

Mr. Chairman and committe members my name is Gene Chapel. I am president of the Montana Farm Bureau Federation and I represent that organization and its 4000 member families.

We are here today to support House Bill 265 as passed by the House. You have heard a lot of technical and specific testimony so I will not take your time belaboring these points. Instead, I want to take you on a trip out to my ranching operation or any one of our member's ag operations.

O.K, here we go -- An individual or group of recreationists have entered the stream or waterway where it goes under the county road for the purpose of recreating. You know they could have used that road that goes thru my pasture because I'm a nice guy and five more years of use they will have prescriptive easement anyway.

Anyhow they are recreationists and I have no idea what or how they are going to enjoy themselves today because recreating covers everything from hunting to riding their all-terrain vehicles, trapping or maybe just picking rocks. That is something that I have no control over anyhow.

I sure hope that when they reach that irrigation canal that they don't decide to go down it, but really, I guess that is their right if they want to. I wonder how they are going to go around, over or under that new fence I just put across the creek to keep the bulls out of the heifers. Boy, I

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 12
DATE 03 08 85
BILL NO. H.B. 265

hope they don't go on the east side of the creek and make tracks thru that new seeding, but I guess its up to them how they want to do it.

Boy,speaking of those bulls, I hope the recreationists don't get scared and do something to hurt themselves, or do you suppose one of them might get hurt crossing that new fence. I sure could have a liability suit against me, but so far I've been lucky -- so best not worry.

I suppose the ground is dried out enough where the creek flooded the hay field two weeks ago so they will probably have their picnic up there. I sure would like to keep them out of that area, but I'm not sure where the highwater mark is, so, I best keep my mouth shut.

You know, one of these days, somebody is going to take the recreating public to court again and try to get this mess cleaned up, but I tell you one thing, it's not going to be me because I can't afford the costs. I saw what happened the last time and I don't believe the court was receptive to those two landowners or we wouldn't be in this jam now.. So why take a chance on maybe coming out worse off than we are today?

Senators, that's where we are today. An awful lot of us cannot afford to go to court or even try to put in management practices that may cause somebody else to initiate court actions. Most of us will be forced to roll over and play dead. That's where we, as landowners, are today because of the two supreme court decisions that were handed down.

The recreating public doesn't like it either because they know we are upset and they would like some definitions so they know where to go and what to do.

H.B. 265 covers all of these areas and does it in such a manner that agriculture can go on feeding this country without worrying about what is going on, down the stream and the recreationists can enjoy themselves

SENATE JUDICIARY COMMITT
EXHIBIT NO. 12
DATE 03 08 85

without worrying about whether they are in the wrong or the right.

We in the Farm Bureau ask your support of H.B. 265 here as a committee and also on the floor of the Senate.

Thank You.

Gene Chapel
President, Montana Farm
Bureau Federation

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 12
DATE 03 08 85
BILL NO. H.B. 265

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MONTANA FARM BUREAU FEDERATION

502 South 19th Bozeman, Montana 59715
Phone (406) 587-3153
Mack Quinn

TESTIMONY BY: _____

BILL # HB 265 DATE March 8,1985

SUPPORT XXXXXX OPPOSE _____

Mr. Chairman, members of the committee. For the record I am Mack Quinn, rancher from Big Sandy, and the immediate past President of the Montana Farm Bureau. I appreciate the opportunity to testify in support of HB 265.

Two years ago we worked very hard to get a bill passed that would address and protect the rights of the land owners and at the same time provide some accommodations to the recreationist; however, as you know that was not to be. Looking back, and hindsight is always clearer than foresight, it is my opinion that most folks would agree that not passing such a bill was a big mistake in view of the far reaching decisions of the Montana Supreme Court. I trust we don't repeat that mistake.

Farm Bureau, with many other organizations, in fact meetings were open to all groups, met many, many times over the past two years to put together a bill that would define some of the vague areas of the courts ruling, and also to re-establish some of the rights that we as ranchers have lost.

I think HB 265 does that. I know that some people are not happy with it, but you need only to study the Supreme Court decisions to realize all that we as landowners have lost, and understand that the decision is now law. This bill is the best we have been able to get accepted and it does re-establish some rights and it does define some areas in which we badly need clarification.

I would hope that emotionalism does not cloud reasonable thinking, and you would see the need to pass this bill.

Thank you for your time.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 13
DATE 03 08 85
BILL NO. H.B. 265

Mack Quinn
SIGNED

FARMERS AND RANCHERS UNITED

NAME: Don McKamey DATE: March 8, 1985

ADDRESS: South of Great Falls on the Smith River

PHONE:

REPRESENTING WHOM? President, Montana Woolgrowers Association

APPEARING ON WHICH PROPOSAL: HB 265

DO YOU: SUPPORT? XXX AMEND? OPPOSE?

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 14
DATE 03 08 85
BILL NO. H.B. 265

(This sheet to be used by those testifying on a bill.)

NAME: Jane Mantle DATE: 3/8/85

ADDRESS: 1640 WILSON BUTTE

PHONE: 723-8497 723-8587

REPRESENTING WHOM? MONTANA COALITION For STREAM ACCESS

APPEARING ON WHICH PROPOSAL: _____

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

COMMENT: ALLOW HUNTING ON CLASS I STREAMS BELOW HIGH WATER MARK, WITH SHOTGUN & BOW & ARROW

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 15
DATE 03 08 85
BILL NO. H.B. 265

Lorraine Gillies

March 8. 1985
Testimony FOR HB 265

Mr. Chairman, Members of the Committee:

For the record, I'm Lorraine Gillies--our family raises commercial cattle in Granite County, West of Philipsburg on Rock Creek. This is a widely advertised Blue Ribbon Trout Stream, and popular recreation area.

We viewed the Supreme Court Decisions in the cases on the Dearborn and Beaverhead Rivers as serious threats to our private property rights. And in view of agriculture's shakey hold on today's economy, we cannot afford time nor money for lengthy court cases. Therefore, we view legislation into which the ag community has a voice as the only way to go. In both the afore-mentioned cases, the Supreme Court invoked the Public Trust Doctrine and the 1972 Constitution in support of their decisions. These two documents are ones that private property holders will have to deal with for some time, and I feel the only recourse short of the Court System is to use the legislative process.

We must have specific definitions for all the terms that affect our livlihood--high water mark, navigability, barrier, liability, portage, and easement. These must be adequately addressed by agriculture in order that we can continue as viable operators.

It has been argued that we, as landholders are giving all our rights away with this type of legislation. Unfortunately, we were dealt a nearly fatal blow to our Constitutional Rights by the Supreme Court, and now we must rally and establish the rules of this game for our own protection. We have a chance to clarify hazy definitions and terms with HB 265, and I would hope that this bill, as a joint effort of landowners, recreationists and the Department of Fish Wildlife & Parks be given a chance.

There are some sections of this bill with which we are not really comfortable, but it is a BEGINNING. All those concerned should keep the dialogue open and reasonable. In short, we support HB 265 as a start in the right direction. It's not perfect, but it seems that me that when landowners, recreationists, and the Department can agree on something, it's time to sit up and take note.

Thank you.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 16
DATE 03 08 85
BILL NO. HB. 265

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Medicine River Canoe Club
Great Falls, Montana

MARCH 8, 1985

Senate Judiciary Committee
State Capitol
Helena, Montana

Chairman Mazurek & Members of the Committee:

My name is Jim McDermand and I am the spokesman for the Medicine River Canoe Club in Great Falls. Beginning with the 1983 legislative session, I have attended almost all of the hearings on the stream access issue including all those of Interim Subcommittee #2. Most recently I have attended the hearings in the House on House Bills 16, 265, 275 and 498. I have also participated in many other meetings on this subject too numerous to mention.

Our organization supports HB 265. This bill is the result of a sincere and intense effort between an alliance of agricultural groups and a coalition of recreational groups. It represents a true compromise which protects the rights of each.

However, we ask that you please give some consideration to one minor change. That change would be to allow big game hunting between the ordinary high water marks on Class I waters with shotgun, archery, or black powder weapons. Recreationists and landowners alike recognize that there have been some problems in the past with rifle hunters along the river corridor, but we are not aware of any incidents involving the three methods of big game hunting listed above. We believe that no major problems would arise from allowing this type of hunting. However, if there were, the Department of Fish, Wildlife and Parks, through the authority vested in them, would be able to close problem areas. Please give

SENATE JUDICIARY COMMITTEE
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the sportsmen the benefit of the doubt and allow this limited type of recreational hunting. If it proved unsatisfactory, the next legislative session could certainly repeal the provision. We ask only that such a hunting provision be given just consideration and a fair chance.

The House Judiciary Committee worked intensely on HB 265 to assure that the rights of both the landowners and the recreationists were preserved. At the same time they seem to have kept most of the bill's provisions within the framework of the Supreme Court rulings - at lease to the extent that a court challenge of these provisions would be very unlikely.

We hope this committee will recognize the quality of work achieved on this bill in the House and not attempt to change its basic meaning or intent. In its present form it is an equitable bill that will satisfy the wishes of the majority on both sides. We urge you to give HB 265 a do pass recommendation.

James W. McDermand.

James W. McDermand
Medicine River Canoe Club
3805 4 Ave. South
Great Falls, MT 59405

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 17
DATE 03 08 85

(This sheet to be used by those testifying on a bill.)

NAME: Lavina Lubinus DATE: March 8, 1985

ADDRESS: 1501 Chestnut, Helena

PHONE: 442-8723

REPRESENTING WHOM? Women Involved in Farm Economics

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT:

We are very proud of the effort put forth by the Agriculture, Bureaucrats & FWFE. The spirit of cooperation and willingness to listen made it a much easier task.

No one is happy with the Supreme Court decision but we realize they are the law of the land and must abide by their decision.

House Bill 265 and the Amendments proposed by Gov Watermann for the Agriculture Committee

Mr Chairman & members of the Committee we urge your support of HB 265.

Thank You

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 18
DATE 03 08 85
BILL NO. H.B. 265

My name is Jimme L. Wilson. I am a rancher from Trout Creek and the President of the Montana Stockgrowers Association. We ranch in a mountain valley through which two streams flow. The two Supreme Court decisions had quite an effect on our operation as we fence across the streams for pasture management, thus creating "man-made obstacles." The broad decisions forced upon us by the Supreme Court, which affects 17,000 miles of rivers and streams in Montana, to satisfy two short stretches of streams on the Dearborn and Beaverhead Rivers, is very frustrating. Equally frustrating is trying to draft legislation which will hopefully protect our rights as landowners in the future.

One of the members of the agriculture loose alliance remarked to me last week how difficult it was to satisfy his own thinking on stream access. "How wonderful it would be if someone who was not associated with the prob lem could give us all the right answers on the issue." My answer to him was, "Don't look too far for this man. You have him near at hand. This man, it is you, it is I, it is all of us."

The Montana Stockgrowers Association has been addressing the stream access problem for several years. Two years ago, when we supported House Bill 888, the hue and cry from some of our members could be heard across the land - "You are selling us down the river, you are taking away our rights as landowners." So we withdrew our support of the bill. Well, the Supreme Court went far beyond what House Bill 888 was asking but strangely enough the same people were silent when we lost the court cases until we proposed legislation to narrow down the broad Supreme Court decisions. Many of the people here today testifying as opponents of House Bill 265 in effect are not protesting against House Bill 265 but are protesting against the Court's decisions which are now law. The Court's decisions constitute a radical departure from the well-

SENATE JUDICIARY COMMITTEE
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DATE 03-08-85
BILL NO. H.B. 265

ESTABLISHED PUBLIC POLICY OF THE STATE OF MONTANA. PUBLIC AND PRIVATE RIGHTS TO USE OF WATER HAD BEEN ACKNOWLEDGED BY THE SUPREME COURT AND THE LEGISLATURE SINCE STATEHOOD.

WHEN I WAS A MILITARY ~~AVIATOR~~ PILOT, WE SPOKE OF "OLD PILOTS" AND "BOLD PILOTS." HOWEVER, THERE WERE NO "OLD BOLD PILOTS." LOBBYING IS MUCH THE SAME WAY. THE MONTANA STOCKGROWERS ASSOCIATION HAS REPRESENTED THE CATTLE INDUSTRY FOR OVER 100 YEARS AND WE NEVER HAVE LED OUR MEMBERS DOWN A PATH OF SELF DESTRUCTION AND WE ARE NOT NOW. SATISFYING EVERYONE IS IMPOSSIBLE. THERE IS ALWAYS THAT SMALL MINORITY YOU NEVER REACH -- HOWEVER, THEY ARE USUALLY THE MOST VOCAL.

WHEN I ASK SOME OF THE OPPONENTS OF HOUSE BILL 265 WHAT THEIR SUGGESTIONS FOR BETTER LEGISLATION ARE, THE ANSWERS RANGE FROM NONE AT ALL TO AMENDING A FEW WORDS OR PHRASES IN THE BILL. AS AN INDIVIDUAL WHO LIVES ON 3½ MILES OF THESE STREAMS UNDER QUESTION, I WILL NOT TAKE ANOTHER CHANCE OF LOSING MORE OF MY RIGHTS THROUGH COURT ACTIONS AS WE DID IN THE SUMMER OF 1984. I FIRMLY BELIEVE IN GOVERNING MYSELF THROUGH THE LEGISLATIVE PROCESS. I WILL NOT TAKE MY CHANCES AGAIN WITH THE COURTS. WE MUST PASS STREAM ACCESS LEGISLATION THIS SESSION. HOUSE BILL 265 IS THE BEST VEHICLE WITH WHICH TO ACCOMPLISH THIS.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 18
DATE 03 08 85
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(This sheet to be used by those testifying on a bill.)

NAME: Jon Ketchart DATE: 3-8-85

ADDRESS: Bx 429 Glasgow

PHONE: 228-4818

REPRESENTING WHOM? MT Assn. of State Grazing Districts

APPEARING ON WHICH PROPOSAL: HB 265

DO YOU: SUPPORT? 265 AMEND? _____ OPPOSE? _____

COMMENT: Ammended as Ron Waterman Suggests

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITT
EXHIBIT NO. 19
DATE 03 08 85
BILL NO. H.B. 265

247

NAME: EDWARD SMITH DATE: MAR 1985

ADDRESS: HELENA

PHONE: 442-3741

REPRESENTING WHOM?

APPEARING ON WHICH PROPOSAL: HB 265

DO YOU: SUPPORT? X AMEND? X OPPOSE?

COMMENTS:

I SEE SAME LANGUAGE IN HB 265 REGARDING ORDINARY HIGH WATER MARK AS IN SB 310.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 20
DATE 03 08 85
BILL NO. H.B. 265

MISSOURI RIVER
FLYFISHERS

P.O. Box 6398
Great Falls, MT 59406

March 4th, 1985

Members of the Senate Judiciary Committee:

My name is Kevin Kennedy, and I am secretary of the Missouri River Flyfishers. I am here representing my organization to speak in favor of House Bill 265.

The Missouri River Flyfishers feels that H.B 265 is a workable compromise on the stream access issue. Much thought and hard work have been brought to bear on this issue. Landowners and recreationists alike have made significant concessions so the bill would float.

Now we are hearing many "Chicken Little" statements from concerned but ill-informed landowners stating that recreationists will be "invading" their property in droves, and will even be responsible for a major spotted knapweed infestation!

Let's be realistic. This bill not only protects the rights of the property owner, it also contains a mandate to the Fish and Game commission to not use a procedure to remove any stream from public use if-

"CLEANER WATER – BRIGHTER STREAMS"

SENATE JUDICIARY COMMITTEE
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DATE 03 08 85

recreational use is proven to be detrimental to that riparian environment. Members of the Missouri River Floaters are not interested in trespassing on landowner property; they are interested in fishing. We don't believe the fishing will be very good up a dry gulch.

This bill has the support of a broad spectrum of landowners and recreationists. We ask this committee to give support HB 265.

Kevin L. Krumwiede
Secretary

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 21
DATE 03 08 85
BILL NO. H.B. 265

NAME: Walter Mahoney DATE: 3/8/95

ADDRESS: Hysham MT. 59038

PHONE: 342-5687

REPRESENTING WHOM? Big Horn Co Farm Bureau

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: H.B. 265 is a good bill as it gives the Montana and Landowner

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTE
EXHIBIT NO. 22
DATE 03 08 95
BILL NO. H B. 265

NAME: Ronald E Jones DATE: 3-8-85

ADDRESS: 3500 Axe Rd. Belgrade, MT. 59714

PHONE: 388-4534

REPRESENTING WHOM? Myself + Gallatin Co Farm Bureau

APPEARING ON WHICH PROPOSAL: H.B. 265

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

COMMENTS: I support H.B. 265 as it is now written. As long as big game hunting is not allowed. If any amendments should be made, they should be beneficial to the landowner + the protection of private property rights.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 23
DATE 03 08 85
BILL NO. H.B. 265

252

NAME: Carl B Hope DATE: 3/8/85

ADDRESS: Box 61 Big Horn Mt. 59010

PHONE: 406-342-5634

REPRESENTING WHOM? Big Horn County Farm Bureau I.P.

APPEARING ON WHICH PROPOSAL: H B 265

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

COMMENTS: HB 265 will make a law that both the sports River Floater and Land owner can live with. HB 265 defines the high water mark of streams to a reasonable point HB 265 provides the landowner protection & sound and reasonable way to establish portage routes.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 24
DATE 03 08 85
BILL NO. H B. 265

(This sheet to be used by those testifying on a bill.)

NAME: David L McClure DATE: 3/8/85

ADDRESS: RT 2 Lewistown Mont 59457

PHONE: 535-9874

REPRESENTING WHOM? Fergus Co Farm Bureau

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT: I am county president of Fergus Count, Farm Bureau we have over 350 family memberships. I ask your support for HB 265.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 25
DATE 03 08 85
BILL NO. H.B. 265

(This sheet to be used by those testifying on a bill.)

NAME: Ray Voltkamp DATE: 3/8/85

ADDRESS: 3200 Voltkamp Rd Dutton 59715

PHONE: 338-4817

REPRESENTING WHOM? Gallatin County Farm Bureau

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT: We feel that the people who put this bill together found a workable solution to the problem.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 26
DATE 03 08 85
BILL NO. H.B. 265

NAME: Tom Schnoor DATE: 2 Mar 85

ADDRESS: Box 2 Manson 59748

PHONE: 282-1510

REPRESENTING WHOM? Sportsmen

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: Allow hunting on USFS streams only to high water mark with primitive weapons, black powder bow & arrow.

Support HB 265 as written

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 27
DATE 03 08 85
BILL NO. H.B. 265

NAME: R. A. Ellis DATE: 3/8/85

ADDRESS: 1735 Sierra Rd. E. Helena Valley

PHONE: 458-5586

REPRESENTING WHOM? Self Lewis & Clark F.P.D. - Helena Valley Irrg. Dist.

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 28
DATE 03 08 85
BILL NO HB. 265

(This sheet to be used by those testifying on a bill.)

NAME: WALT CARPENTIER DATE: 03-08-85

ADDRESS: 320-40 ST. So., GREAT FALLS, MT. 59405

PHONE: (406) 452-9673

REPRESENTING WHOM? MYSELF & FRIENDS

APPEARING ON WHICH PROPOSAL: HOUSE BILL 265

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

COMMENT: A GOOD REASONABLE COMPROMISE BILL, FAIR TO ALL CONCERNED

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 29
DATE 03 08 85

Carpenter

March 8, 1985

Mr. Chairman & Members of the Committee:
Senate Judiciary Committee
Montana State Capitol
Helena, Montana

I am Walt Carpenter of Great Falls, and I represent myself and a number of friends who are interested in fishing, floating Montana's streams, and hunting.

During the 1983 Legislative session I was closely involved in the stream access issue, attended most of the meetings of Interim Subcommittee No. 2, and have followed the deliberations on stream access by the 1985 Legislature.

House Bill 265 is the product of a number of meetings between agricultural and recreational groups, during which each side made consessions, and the result is a bill that is fair to both sides as finalized by the House. It is supported by the majority of farm and ranch organizations, the Montana Department of Fish, Wildlife and Parks, and by the recreational community.

I hope the Senate will pass HB-265 without any major amendments, as it is finely tuned, and any restrictive amendments would certainly ruin it. The House amended HB-265 to prohibit big game hunting on streams below the high water mark without adjacent landowner permission. Possibly a minor change should be made in the bill to permit big game hunting below the high water mark with shotguns and bows only, as this would not be detrimental to landowner's rights or concerns. Shotguns and bows are short range weapons.

Unauthorized trespass has been a sore point with landowners. House Bill 911 strengthens trespass laws and provides for severe penalties for trespass on private lands. It also requires the landowner to do a minimum amount of posting of private land, which is certainly reasonable.

Thank you for any favorable consideration of House Bill 265 and HB-911.

Walt Carpenter

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 29
DATE 03 08 85
BILL NO. H.B. 265

(This sheet to be used by those testifying on a bill.)

NAME: JACK HAYNE DATE: _____

ADDRESS: DUPUYER MT

PHONE: 472-3263

REPRESENTING WHOM? TETON-POWDER FARM BUREAU

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT:

SUPPORT AND URGE THE PASSAGE OF HB 265

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 30
DATE 03 08 85
BILL NO. H.B. 265 240

WILDLANDS & RESOURCES ASSOCIATION

Busko

Great Falls, Montana

March 8, 1985

Senator Joseph Mazurek, Chairman
Judiciary Committee
State Senate
State Capitol
Helena, Montna 59620

Chairman Mazurek & Members of the Committee:

The Wildlands & Resources Association of Great Falls has been following the Stream Access issue since it was introduced in the 1983 legislature. We recognize that the landowners have a legitimate concern about protecting certain property rights. We also recognize that water based activity such as river floating and fishing, constitutes a very significant part of Montana's recreation and tourism industry.

We support HB 265 because we feel it protects the landowner's interests and at the same time permits the recreationist to enjoy activities associated with public waters. HB 265 represents a cooperative effort between agricultural and recreation groups, and also a lot of effort on the part of the House Judiciary Committee.

We urge that this Committee give HB 265 a do pass recommendation without changes that would alter its basic meaning or intent.

Respectfully,

Patty Busko

Patty Busko, President
Wildlands & Resources Association
5414 4th Ave. South
Great Falls, MT 59405

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 31
DATE 03 08 85
BILL NO. H.B. 265

NAME: James Kerr DDS DATE: 3/8/85

ADDRESS: 1721 Virginia Dale, Helena

PHONE: 442-8083

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL:

DO YOU: SUPPORT? ✓ AMEND? ✓ OPPOSE?

COMMENTS: Don't change 265 to eliminate Duck Blind construction on CoT streams. We have given enough to be eliminated on CoT.

Don't Accept the Amendment - pass with no change.

If worst comes: Allow Seasonal Blinds that can be removed at the end of the season. You sit out there and freeze your A off.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

Thanks.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 32
DATE 03 08 85
BILL NO. H.B. 265

NAME: Tom O Milesnick DATE: 3/8 85

ADDRESS: 5805 Dry Creek Rd. Belgrade, Mt. 59714

PHONE: 388-4180

REPRESENTING WHOM? self

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: Definition of High water mark is very clear and leaves no question as to where the mark is. the Bill address most of the issue that were effected By the Supreme Court. I would like you to consider the limitation of the use of all firearms without the permission of the land owner. On our ranch we have 4 major water ways two of which are spring creeks. The unlimited use of firearms has placed hardships on both me and sportsmen that get permission to get on the stream other than the water way. We had very few problems when permission was required because we could tell them where the fishermen was or where the duck hunters were.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 33
DATE 03 08 85
BILL NO. H.B. 265

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 34
DATE 03 08 85
BILL NO. H.B. 265

Testimony For House Bill 265

by

Bruce R. McLeod, President
Park County Legislative Association

Mr. Chairman, members of the committee ...

I am speaking today as President of the Park County Legislative Association (PCLA), an organization made up of about sixty landowners in Park County, Montana. We are very concerned with the stream access issue since most of our members own land through which one or more streams flow. We have worked with legislators for a number of years on the issue, including the last two when stream access was being worked on in the interim study committee, and the past weeks when House Bill 265 (HB 265) was being considered in the House. We have watched, and sometimes helped, the bill change to the form being considered here today.

It is the opinion of the majority of our members, that we should support the bill in its present form. There are also some of our members who do not support the bill. In this testimony, I will briefly discuss why the majority support the bill, and then close with a suggestion for three amendments. If these three amendments were to be adopted, the PCLA would then give nearly unanimous support to the bill.

For the majority opinion, we find that HB 265, in its present form, does not, as has been repeatedly suggested in the press, extend the Hildreth and Curran Supreme Court cases. In 265, an attempt to define "barrier" has been included. While the definition may not be complete until tested in court, the two Supreme Court (SC) cases simply say "in case of barriers the public is allowed to portage around such barriers in the least intrusive manner possible".

Hildreth; Page 5, Paragraph 3
Curran; Page 19, Paragraph 6

The SC decisions did not say the public must use one and only one portage route, nor did it specify any proceedure for establishing the route. HB 265 does both. It also establishes that the landowner at least has the opportunity, when installing needed structures, to design them in such a way that no portage is necessary. Portage is not granted by HB 265 as some suggest, the SC decisions did the granting. This bill limits, not extends portage.

The description of Class I and Class II waters in HB 265 is an attempt to clarify the SC language on "navigable for title"

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and "navigable for use".

Curran; Page 13, Paragraph 2

This is an advantage to the landowner since the SC rulings make no distinction at all and simply say all waters are susceptible to recreational use by the public.

Hildreth; Page 5, Paragraph 1
Curran; Page 14, Paragraph 3

In this bill waters "diverted away from a natural water body" for use such as irrigation are excluded from recreational use. That is a very positive factor for ranches that use ditches and canals to deliver water to their crops and stock.

"Ordinary high water" was mentioned extensively in the SC rulings.

Hildreth; Page 2, Paragraph 1
Page 3, Paragraph 4
Page 5, Paragraph 3
Page 9, Paragraph 4
Page 11, Paragraph 2

Curran; Page 17, Paragraph 5
Page 18, Paragraph 1
Page 19, Paragraph 6

However, these words were never defined. HB 265 offers a definition that does exclude flood plains adjacent to the surface waters. We feel the definition of the actual high water mark could be improved as will be suggested later, but it is expected that this may be a point ultimately clarified in court.

The definition of surface water in HB 265 is taken directly from the SC decisions.

Hildreth; Page 9, Paragraph 4
Page 11, Paragraph 2

Also, the words "may be used by the public without regard to the ownership of the land underlying the waters" or "streambed ownership" are used extensively in the SC rulings.

Hildreth; Page 9, Paragraph 2
Page 11, Paragraph 2

Curran; Page 14, Paragraph 3
Page 15, Paragraph 2

There are no restrictions or definitions of public use. HB 265 specifically limits certain things on all surface waters and places several limits on other activities on Class II waters. The only limitations mentioned by the SC rulings were limitations

imposed by "the characteristics of the waters themselves".

Hildreth; Page 5, Paragraph 3
Page 11, Paragraph 2

Curran; Page 14, Paragraph 3

Liability and prescriptive easement issues are addressed in HB 265 and the Fish and Game Commission is specifically directed to adopt rules to protect public health, public safety, and public and private property. None of this is even mentioned in the SC cases and, hence, there are no references to cite here. It again is obvious that HB 265 has defined or limited (as opposed to extending) the SC rulings. The majority of the PCLA membership accepted HB 265 as a "good" (as opposed to an "ideal" or "everything we needed") overall package.

In closing, we would suggest three amendments be considered.

1. On page 3, line 18 of HB 265, under the definition of "recreational use", replace the word "hunting" with "waterfowling". (see Curran; Page 12, Paragraph 1 (inset))

2. On page 2, lines 9 through 15, remove all these words since they simply restate the federal navigability test for title already called out in (b) and (e) of section (2).

3. On page 3, line 13, change "limited to diminished terrestrial vegetation or lack of agricultural crop value. A FLOOD PLAIN ADJACENT TO SURFACE WATERS IS NOT CONSIDERED"

   To read: "limited to lack of terrestrial vegetation or of agricultural crop value. A FLOOD PLAIN OR DRY CHANNAL ADJACENT TO SURFACE WATERS IS NOT CONSIDERED"

We feel these changes would help clarify the meaning of the bill and perhaps help avoid unnessary confrontations between the landowners and the public making reacreational use of the waters.

Thank you for your attention.

Respectfully submitted:

Bruce R. McLeod

Bruce R. McLeod, President
Park County Legislative Association

NAME: Ben Stein DATE: 3/8/85

ADDRESS: Wilsall 59086

PHONE: 578 2347

REPRESENTING WHOM? self

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: will turn in later

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 35
DATE 03 08 85
BILL NO. H.B. 265

267

PHILIP W. STROPE
ATTORNEY AT LAW

P.O. BOX 874
501 N. SANDERS
HELENA, MT 59624
406/442-6570

February 19, 1985

Senator Joe Mazurek
Chairman
Senate Judiciary Committee
State Capitol
Helena, MT 59620

RE: House Bill 265

Dear Senator Mazurek:

I represent the Sweetgrass County Protective Association. It is a landowner group of citizens of the state of Montana. My people do not support HB 265 as it has been approved by the House of Representatives. I am referring to the gray copy of the bill.

The key provision of HB 265 from which most of our dispute arises is the definition of surface water as shown on page 4, line 21. The bill provides as follows:

> "(10) 'SURFACE WATER' MEANS, FOR THE PURPOSE OF DETERMINING THE PUBLIC'S ACCESS FOR RECREATIONAL USE, A NATURAL WATER BODY, ITS BED, AND ITS BANKS UP TO THE ORDINARY HIGH WATER MARK."

My people feel that the definition of surface water as set forth herein is in violation of section 70-16-201, Montana Codes Annotated, and is far in excess of the public policy doctrine for the waters of this state as laid down by the Montana supreme court in the Curran and Hildreth decisions in 1984.

The definition of surface water as set forth in HB 265 will give the public the right to use not only the water of this state but also the beds and banks with or without water on them up to the ordinary high water mark. This grant of authority will create a land corridor for public access during low water periods. The impact of this definition of surface water is that it changes a constitutionally guaranteed right of the public to use the waters of this state into a "land use" policy. There is no language in either the 1972 constitution of the state of Montana, the statutes of this state nor the opinions of the court in the Curran and Hildreth decisions that compel, obligate or direct the legislature to convert the right of the public to use the waters of this state into a new "land use" policy. On the contrary, they provide otherwise.

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The constitution of Montana provides at Article IX, Section 3 for water rights but not land use rights as follows:

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

Section 70-16-201, Montana Codes Annotated, provides protection and security for private land adjacent to water. The section provides as follows:

> "70-16-201. Owner of land bounded by water. Except where the grant under which the land is held indicates a different intent, the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

The Montana supreme court in its Curran decision, 41 St.Rep. 906 (1984), had the obligation of reconcilling the constitutional provision with the right of the adjacent landowner and the rights of fishermen. The courts speaking through Chief Justice Haswell and concurred in by five justices said as follows:

> "While section 70-16-201, MCA, provides for private ownership of the adjacent lands to the low water mark, the 'angling statute', section 87-2-305, MCA, recognizes a public right to access for fishing purposes to high water mark. Further, in Bigson v. Kelly (1895), 39 P. 517, 15 Mont. 417, this court recognized a public right of access for fishing and navigational purposes to the point of the high water mark. Therefore, we hold that the public has a right to use the state-owned waters to the point of the high water mark except to the extent of barriers in the waters, in case of barriers, the public is allowed to portage around such barriers in the least intrusive way possible, avoiding damage to the private property holder's rights."

The Curran decision clearly set forth the right of the public to use state-owned water but, the decision did not create a new land

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use policy. On the contrary, it affirmed the right of private ownership of the adjacent lands to the low water mark. One month later, Curran was affirmed in the Hildreth decision, 41 St.Rep. 1192 (1984). In Hildreth, Chief Justice Haswell again delivered the opinion of the court concurred in by five justices. He referred to Curran with approval eight times in that decision. Judge Haswell again enunciated the right of the public to use state-owned waters, but he did not create a new land use policy. He said, and I quote as follows:

> "As we held in Curran, supra, under the Public Trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes."

The public does have a right to use the state-owned waters up to the high water mark. But, the public does not have a right to use the beds and banks of Montana's water courses between the high and low water mark when there is no water on the land. The adjacent landowner still has the right to use the land between the high and low water mark when there is no water on the land, section 70-16-201. The public has a right to use surface water without regard to the ownership of the streambed, but, the public does not have the right to use the beds and banks between low and high water mark when there is no water on the land. The denition of surface water in HB 265 page 4, line 21 should be amended as follows:

> "(10) 'SURFACE WATER' MEANS, FOR THE PURPOSE OF DETERMING THE PUBLIC'S ACCESS FO R RECREATIONAL USE, A NATURAL WATER BODY, ITS BED AND ITS BANKS UP TO THE ORDINARY HIGH WATER MARK EXCEPT FOR THE EXCLUSION OF THE BED AND BANKS TO THE LOW WATER MARK PROVIDED FOR IN 70-16-201, MCA."

On behalf of my people, I respectfully urge the adoption of the amendment to the definition of surface water and for such additional amendments to th remainder of the body of the bill as will be necessary and probably staff-determined.

Very truly yours,

Philip W. Strope

PHILIP W. STROPE

PS/vkf

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(This sheet to be used by those testifying on a bill.)

NAME: Richard W. Josephson DATE: 3/8/85

ADDRESS: 34 Spring Drive, Big Timber, Mt. 59011

PHONE: 932-5440

REPRESENTING WHOM? Sweet Grass Pres. Assoc. + self.

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT: Written Comments have been delivered to the Senate members xc attached

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

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February 13, 1985

ANALYSIS OF HOUSE BILL 265, LAND AND WATER ACCESS BILL
(Revised version of HB 265 dated 02/09/85)

INTRODUCTION: The principal issues of concern in this version of HB 265 are as follows:

We are concerned about the broad definition of Class I waters, which, in effect, extends the scope of the Montana Supreme Court cases and their effect.

We are concerned about the definition of the ordinary high water mark which refers to "diminished" vegetation. The definition used in HB 265 supersedes and replaces the definition used by the Soil Conservation Districts the last several years in administering The Natural Streambed and Land Preservation Act of 1975. (We prefer the definition in HB 498.)

We are concerned about the definition of recreational use, and the activities that are allowed on Class I waters that are really land-based activities rather than water-based activities, such as discharge of firearms, overnight camping and construction of permanent or semi-permanent structures.

We are concerned about the definition of surface waters which appears to extend the scope of the Supreme Court cases and the 1972 Montana Constitution by defining dry land within the ordinary high water mark as "surface water".

We are concerned about the public's ability to manage every stream, river and lake in the State and what that will cost.

We are concerned about the cost to the landowner of being required to follow a time consuming administrative procedure to obtain regulations to protect his property and that cost to the landowner and the State.

We are concerned about the elaborate portage provisions of the Act that can be triggered by a request of any recreationalist for a

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portage route.

We are concerned about the taking of valuable property rights by the public. Establishing portage routes above the high water mark is an infringement on private property rights. An extension of the public easement enunciated by the Supreme Court cases from water related activities to land-based activies is an intrusion on private property rights.

We are concerned about the effect this bill will have on established property values.

STATUS OF BILL: The House Judiciary Subcommittee has reported out for approval of the full Judiciary Committee and second reading this version of HB 265. Apparently, at least for now, the Judiciary Committee will table HB 16 (Interim Committee), HB 275 (Cobb) and HB 498 (Ellison).

I think we can attribute the Judiciary Committee's action on HB 265 to the recommendations for passage by the "Agricultural Alliance" represented by Ron Waterman, and Montana Trout Unlimited and other recreational oriented groups represented principally by Mary Wright.

I respectfully disagree with their position.

Hence, my comments in this analysis will be directed to the provisions of HB 265 in its present form (02/09/85 gray edition).

DEFINITION OF BARRIER: HB 265 still gives the public an elaborate portage right across private property. Therefore, the definition of "barrier" becomes important to the issue of portage. SEE, the discussion on portage below.

DEFINITION OF "CLASS I WATERS": HB 265 defines "Class I waters" and this is important because the public may do by implication all of those things on Class I waters which are prohibited only on Class II waters. Section 2(3) is the section that prohibits certain activities on Class II waters. Section 2(3) provides:

"The right of the public to make recreational use of Class II waters does not include, without permission of the landowner:

(A) Overnight camping;

(B) The placement or creation of any permanent or semipermanent object, such as a permanent duck blind or boat moorage; or

(C) Other activities which are not primarily water-related pleasure activities."

Hence, by clear implication, the public may on "Class I waters" do the following:

(A) The public may - overnight camp;

(B) The public may - place or create any permanent or semipermanent object, such as a permanent duck blind or boat moorage; or,

(C) The public may - conduct activities which are not primarily water-related activities.

"Class I waters" are defined in Section 2(2) as follows:

"'Class I Waters' means surface waters that:

(a) lie within the officially recorded government survey meander line thereof;

(b) flow over lands that have been judicially determined to be owned by the state by reason of application of the federal navigability test for state streambed ownership;

(c) flow through public lands, while within the boundaries of such lands;

(d) are or have been capable of supporting the following commercial activities: LOG FLOATING, TRANSPORTATION OF FURS AND SKINS, SHIPPING, COMMERCIAL GUIDING USING MULTIPERSON WATER CRAFT, PUBLIC TRANSPORTATION, OR THE TRANSPORTATION OF MERCHANDISE, as these activities have been defined by published judicial opinion as of (the effective date of this act); or,

(e) are or have been capable of supporting commercial activity within the meaning of the federal navigability test." (Emphasis supplied.)

CLASS II WATERS are defined by Section 1(3) as all waters which are not "Class I waters".

THIS IS AN ATTEMPT, BY THE LANGUAGE OF HB 265, to classify any natural body of water that can support floating a log, a canoe or multiperson water craft as "Class I waters". This definition, combined with the portgage provisions of this bill, virtually classifies a majority of Montana's fishable streams, sloughs and lakes, and areas that can be floated in a duck boat into "Class I waters". This, coupled with the definition of "surface waters", openly allows the public to use the land and the water between the high water marks for not only

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water-related activities but also non-water related activities, such as overnight camping, all types of hunting, except big game hunting, trapping, building camps, boat docks, duck blinds, and anything else not expressly prohibited by Section 2(2).

The only items prohibited by Section 2(2) are all-terrain vehicles (not primarily designed for use on water), and big game hunting. Section 2(2) also prohibits the public from using a stock pond or other water impoundment fed by an intermittently flowing natural water course and diverted waters. This language also implies that the public is not prohibited from using a stock pond or impoundment that is fed by a steady natural water course. Further, if this stock pond or impoundment can float a log or a canoe, it would be a "Class I water" and the public would have the right to camp overnight, build boat docks, etc., between the high water marks of the pond or impoundment. This might be particularly intrusive on private property if the public can gain access by portage to the pond, or gain access from a county road, or gain access by the use of public land, or by condemnation.

We do give the Judiciary Committee that worked on this bill credit for deleting big game hunting and some all-terrain vehicles. At least some headway has been made since the Agricultural Coalition and the recreationists endorsed this bill at the public hearing on January 22, 1985.

DEFINITION OF ORDINARY HIGH WATER MARK: We would also like to give the Judiciary Committee credit for attempting to exclude the flood plain from being included within the ordinary high water mark. However, there is still substantial question under the definition used in HB 265 whether areas of the flood plain are excluded.

The definition of "ordinary high water mark" used by HB 265 still uses the terms "diminished terrestrial vegetation or lack of agricultural crop value". Any flow of water or ice could, and probably will, cause "diminished terrestrial vegetation". Crops refer to things like grain or hay and the word "crop" is, therefore, not a proper choice of

words when defining the "ordinary high water mark". WE CAN SEE SUBSTANTIAL ARGUMENTS AS TO WHAT AREA CANNOT RAISE CROPS OR WHAT AREAS SHOW SIGNS OF DIMINISHED VEGETATION.

DEFINITION OF RECREATIONAL USE: Section 2(8) provides:

> "'Recreational use' means with respect to surface waters: fishing, hunting, swimming, floating in small craft or other flotation devices, boating in motorized craft, unless otherwise prohibited or regulated by law, or craft propelled by oar or paddle, other water-related pleasure activities and related unavoidable or incidental uses." (Emphasis supplied.)

This revised definition of recreational use, except for the term "hunting" seems to define recreational uses as water-related activities. If this is the intent of the bill, why not eliminate the "overnight camping and the construction of permanent or semipermanent structures and other non-water related activities" from the bill entirely and prohibit these non-water related activites? We can see built-in conflicts between this definition of recreational uses and the definition of what cannot be done on Class II waters and by implication done on "Class I waters". Conflicting or unclear sections may cause unnecessary litigation.

DEFINITION OF SURFACE WATER: Section 1(10) defines "surface water" as follows:

> "'Surface water' means, for the purpose of determining the public's access for recreational use, a natural body of water, (and) its bed and its banks up to the ordinary high water mark." (Emphasis supplied.)

HOW CAN SOMEONE ATTEMPT TO DEFINE LAND AS WATER, FOR ANY PURPOSE? This may be one of the first attempts, since biblical times, for someone to work out a way to walk on water. (Pardon the sarcasm.)

The 1972 Montana Constitution, Article IX, Section 3(3), used the term "surface water" in the following context:

> "(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." (Emphasis supplied.)

RE: Analysis of HB 265, Land & Water Access Bill (Cont'd.)
(Revised version of HB 265, dated 02/09/85)

The definition of "surface waters" in the present version of HB 265 expands the definition of "surface water" to include the water body, plus its bed and banks up to the high water mark. So, the definition attempts to classify land, even if dry, between the ordinary high water mark as "surface water".

THIS ATTEMPT TO DEFINE LAND AS WATER CLEARLY DEMONSTRATES THE INTENT OF THOSE SUPPORTING THE BILL TO, BY DEFINITION, TAKE AWAY THE OWNERSHIP OF LAND AND TRANSFER THE TITLE TO THE PROPERTY FROM THE LANDOWNER TO THE PUBLIC.

Section 70-16-201, M.C.A., provides:

> "Except where the grant under which the land is held indicates a different intent, the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

ARE THOSE SUPPORTING HB 265 ATTEMPTING TO REPEAL THIS STATUTE?

RECREATIONAL USE PERMITTED: Section 2 of HB 265 provides for permitted recreational use.

Section 2(1) provides that, except in subsection (2) through (4), all surface waters (as defined above) that are capable of recreational use may be so used by the public, without regard to the ownership of the land underlying the waters. Again, by defining "surface water" to include the land between the high water marks, whether or not it is covered by water, is WRONG.

Section 2(2) through (4) does prohibit the public from using: all- terrain vehicles that are not primarily designed for operation upon water; stock ponds or other impoundments fed by an intermittent flowing natural water course; diverted water and prohibits big game hunting.

PRIVATE (?) PROPERTY: Section 2(4) reaffirms the Supreme Court cases and provides:

> "The right of the public to make recreational use of surface waters does not grant any easement or right to the public to enter into or cross private property in order to use such waters for recreational purposes."

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How this section relates to the rights granted to the public to portgage above the high water mark, I am not sure. I am not sure, after reading the definitions of "surface water", the "ordinary high water mark", and the portgage sections, exactly what is private property. In spite of my confusion as to the dividing line between public and private property rights, I am glad this provision is in the bill.

SUPERVISION SECTION: Section 2(5) provides that, the Commission (Fish and Game Commission) shall adopt rules pursuant to 87-1-303, in the interest of public health, public safety, or the protection of public or private property, governing the recreational use of Class I and Class II waters.

I wonder how long this will take and what it will cost, not only to the State of Montana, but how much will it cost the landowner to follow this rulemaking procedure on every stream in the State.

PERHAPS IT WOULD BE BETTER TO RESTRICT THE PUBLIC'S USE OF STREAMS AND SMALL LAKES UNTIL SUCH REGULATIONS CAN BE IMPLEMENTED TO PROTECT THE RESOURCES AND THE SURROUNDING PROPERTY RIGHTS AND VALUES. THE MAJOR RIVERS THAT HAVE BEEN HISTORICALLY BOATED COULD BE LEFT OPEN IF THINGS LIKE OVERNIGHT CAMPING, HUNTING, AND THE CONSTRUCTION OF PERMANENT AND SEMIPERMANENT STRUCTURES WERE PROHIBITED, AT LEAST UNTIL THE VARIOUS AREAS ARE STUDIED.

If the public/State is going to insist on taking over the streams, rivers and lakes and their beds and banks, I can understand the need to manage and protect these resources. I question whether the public/State can adequately protect and preserve these resources, especially the non-boatable streams, with an immediate effective date of the proposed HB 265.

RIGHT TO PORTAGE: HB 265 provides an elaborate procedure for the public to portage around "barriers". Section 1(1) defines "barrier" as follows:

"'Barrier' means an artificial obstruction located in or over a water body, restricting passage on or through the water, or a natural object in or over a water body which totally or effectively obstructs the recre-

ational use of the surface water at the time of use. A barrier may include, but is not limited to, a bridge or fence or any other man-made obstacle to the natural flow of water or a natural object within the ordinary high water mark of a stream." (Emphasis supplied.)

Section 3(1) gives the public the right to portage around barriers, above the ordinary high water mark, in the least intrusive manner possible, avoiding damage to the landowner's land and violation of his rights. WHAT RIGHTS?

I submit that, allowing the public to use the landowner's land above the high water mark, especially when portaging around natural or existing artificial barriers, is an open and notorious violation of the riparian owner's private property rights pusuant to the provisions of the Montana and Federal Constitutions.

A natural barrier in the stream includes rapids, falls, rocks, brush, deep holes, or anything that "effectively obstructs the recreational use of the surface water" under the definition of "barrier".

Section 3(2) does give the landowner certain and limited rights to create barriers. However, the act provides that if a landowner creates a structure (i.e. irrigation structure) "pursuant to a design approved by the department (Dept. of Fish, Wildlife & Parks) and the structure does not interfere with the public's use of the surface water (defined as including land), the public may not go above the ordinary high water mark to portage around the structure.

What does this mean? Does this provision mean that the Dept. of Fish, Wildlife and Parks is now going to determine specifications for every "structure" erected within the beds and banks of every stream? We have existing and adequate procedures through the Soil Conservation Districts that appear to be working well for all concerned.

Section 3(3) goes on to provide, among other things:

(a) "A portage route around or over a barrier may be established to avoid damage to the landowner's land and violation of his rights as well as to provide a reasonable and safe route for the recreational user of the surface water."

(b) "A portage route may be established when either a landowner or a member of the recreating public submits a request"

(c) "The cost of establishing the portage route around artificial barriers must be borne by the involved landowner, except for the construction of notification signs of such route, which is the responsibility of the department. The cost of establishing a portage route around natural barriers must be borne by the department."

THIS SECTION GIVES THE DEPT. OF FISH, WILDLIFE AND PARKS THE RIGHT TO GO ONTO THE LANDOWNER'S LAND, ABOVE THE HIGH WATER MARK, AND ESTABLISH PORTAGE ROUTES. THE LANDOWNER MUST PAY FOR THE PORTAGE ROUTE IF THERE IS AN ARTIFICIAL BARRIER, LIKE A DAM, BRIDGE, FENCE, OR IRRIGATION STRUCTURE IN THE STREAM. (This, apparently, applies whether the artificial barrier is public or private, and applies even though the barrier was in place prior to the Supreme Court decisions.)

If the barrier is natural, the department will build the portage route over the landowner's land. There is nothing in the bill about compensation to the landowner by the public for the use of the landowner's private property for this public facility.

This is another "boot strapping" attempt to take away private property rights without just compensation and impose a substantial expense on the private landowner. Strategically placed portage routes could become new access points for the public to enter "surface waters".

Section 3(3)(c) provides that, within 45 days of the receipt of a request (from the landowner or from a member of the recreating public) supervisors (Conservation District Supervisors) shall (must), in consultation with the landowner and a representative of the department, examine and investigate the barrier and the adjoining land to determine a reasonable and safe portage route.

Section 3(3)(d) provides, within 45 days of the examination of the site, the supervisors shall make a written finding of the most appropriate portage routes.

Section 3(3)(f) provides, once the route is established, the department has the exclusive responsibility thereafter to maintain the portage route at reasonable times agreeable to the landowner, etc.

Section 3(3)(g) provides, if either the landowner or recreationist disagrees with the route described in subsection (3)(e), SENATE JUDICIARY COMMITTE

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the district court to name a three-member arbitration panel. The panel must consist of the affected landowner, a member of an affected recreational group, and a member selected by the two other members, etc.

IN SUMMARY, THIS SECTION PROVIDES:

1. That any member of the recreating public may cause to be established a portage route over the landowner's land above the high water mark.

2. That a member of the public will have equal say with the landowner where the portage route will go.

3. The landowner will have to donate the land and, in the case of an artificial barrier, whether existing or new, pay for the establishment of the portage route.

4. The landowner may be forced into court or an arbitration hearing if some recreationist is not satisfied with the portage route selected by the Supervisors.

LIABILITY: Section 4 of HB 265 attempts to give the landowner some liability protection, which attempt is appreciated, I am sure, by the landowners. I must say that the act goes further to protect the Soil Conservation Supervisor's liability than it does to protect the landowner. Will or wanton should be changed to will and wanton. Otherwise simple knowledge of a danger (natural or artificial) might be construed as "willful" where the landowner doesn't take timely action to mitigate the danger.

PRESCRIPTIVE EASEMENTS: Section 5 of HB 265 contains a convoluted attempt to solve the problem of prescriptive easements and may, because of the grandfathering provision of the section, actually give rise to lawsuits brought on behalf of the public for pre-existing prescriptive easements. The act says nothing about protecting the private landowner from common law dedication of a right of way.

All landowners should be in favor of the recently added provision in Section 5(2)(B) which prohibits future prescriptive rights from

being established by "the entering or crossing of private property to reach surface waters".

This section is one of the few "carrots" inserted in this legislation to attract landowner support. The question might legitimately be asked, why should a prescriptive easement be available for any recreational use, not just water-related recreational use.

CONCLUSION: For this bill to be acceptable, it must respect existing property rights. The definition of "ordinary high water mark" and "surface water" must be amended. Land based recreation on the river bottoms must be deleted specifically as to use of firearms, overnight camping and construction of permanent and semipermanent structures. The whole issue of portage should be deleted. It is my opinion the Supreme Court cases did not authorize unlimited portage above the ordinary high water mark and, if they did, it was and is a taking of private property without compensation.

I strongly urge that you oppose House Bill 265.

Respectfully submitted,

Richard W. Josephson

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DELEGATE PRCPCSAL
No. 2 - Water Rights

MONTANA CONSTITUTIONAL CONVENTICN

1971-1972

DELEGATE PROPOSAL NO. 2

DATE INTRODUCED: JAN. 20, 1972 — Rejected by Constitutional Convention

Referred to Natural Resources and Agriculture Committee

A PROPOSAL FCR A NEW CONSTITUTIONAL SECTICN PRCVIDING FOR WATER RIGHTS.

BE IT PROPOSED BY THE CONSTITUTIONAL CONVENTICN OF THE STATE CF MONTANA:

Section 1. There shall be a new Constitutional Section to provide as follcws:

"Section ___. WATER. All cf the water in this state, whether occurring on the surface or undergrcund, and whether occurring naturally or artificially, belongs tc the people of Montana; and those waters which are capable cf substantial cr significant public use may be used by the people with or without diversicn or development works, regardless of whether the waters occur on public or private lands. The public has the right to the recreational use of such waters and their beds and banks tc the high water mark regardless of whether the waters are navigable and regardless of whether the beds and banks are privately cwned. Beneficial use of waters includes recreation and aesthetics, such as habitat for fish and wildlife and scenic waterways.

The use of all water now appropriated, cr that may hereafter be appropriated for sale, rental, distributicn, or other beneficial use, and the right of way over the lands of others, fcr all ditches, drains, flumes, canals, and aqueducts, necessarily used in ccnnection therewith, as well as the sites fcr reservoirs necessary for collection and stcring the same, shall be held to be a public use.

The legislature may provide either directly, cr indirectly through administrative agencies, for the control and regulaticn of both existing and future rights tc uses cf water."

INTRODUCED BY: /s/ Earl Berthelson

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judicious use and reclamation.

Because Montana has at least 500,000 acres of strippable coal land and untold acres of other natural resources, your committee believes the responsibilities of protecting and restoring the surface conditions of those lands for unborn generations should not be left to men, but rather protected by fundamental law.

Section 3. WATER RIGHTS. (1) All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed.

(2) The 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.

existing Art. IX Section (3)(3) 1972 Const.

(3) All surface, underground, flood, and atmospheric waters within the boundaries of the state of Montana are declared to be the property of the state for the use of its people and subject to appropriation for beneficial uses as provided by law.

(4) Beneficial uses include, but are not limited to, domestic, municipal, agriculture, stockwatering, industry, recreation, scenic waterways, and habitat for wildlife, and all other uses presently recognized by law, together with future beneficial uses as determined by the legislature or courts of Montana. A diversion or development work is not required for future acquisition of a water right for the foregoing uses. The legislature shall determine the method of establishing those future water rights which do not require a diversion and may designate priorities for those future rights if necessary.

(5) Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests.

(6) The legislature shall provide for the administration, control and regulation of water rights and shall establish a system of centralized records.

COMMENTS

Your committee feels that water and water rights are of crucial importance to the past history and future development of

the State of Montana. For this reason the committee feels justified in expanding the present Constitutional section which relates solely to the use of water to include provisions for the protection of the waters of the state for use by its people.

Subsection (1) guarantees all existing rights to the use of water and includes all adjudicated rights and nonadjudicated rights including water rights for which notice of appropriations has been filed as well as rights by use for which no filing is of record.

Subsection (2) is a verbatim duplication of Article III, section 15 of the present Constitution and has been retained in its entirety to preserve the substantial number of court decisions interpreting and incorporating the language of this section.

Subsection (3) is a new provision to establish ownership of all waters in the state subject to use by the people. This does not in any way affect the past, present or future right to appropriate water for beneficial uses and is intended to recognize Montana Supreme Court decisions and guarantee the state of Montana standing to claim all of its waters for use by the people of Montana in matters involving other states and the United States Government.

Subsection (4) is a new provision to permit recreation and stockwatering to acquire a water right without the necessity of a diversion. This applies only to future rights and, of course, only to waters for which there are no present water rights. This subsection further provides that future agricultural and industrial water development will not be foreclosed by recreation, as it is left up to the legislature to determine the method of establishing a future water right without a diversion and the legislature is further authorized to establish priorities of water uses for those waters where the legislature decrees priorities necessary.

Subsection (5) acknowledges a continuance of our present water law principle that the first appropriation in time is the better right and provides that no future appropriations shall be denied except in the public interest.

Subsection (6) mandates the legislature to administer, control and regulate water rights. This does not in any way change the present legislatively established system of local control of adjudicated waters by water commissioners appointed by the District Court having jurisdiction. A new requirement is added to establish a system of centralized records of all water rights in addition to the present statutory system of local filing of records. The centralized records are intended to provide a single location for water rights information and a complete record

Rep. Cobb

1. Place or refer to the rules now existing as to regulations of recreational use by FWP in the statement of intent or in the bill; that these rules are still applicable or not; or if any new rules should be as strict as existing rules.

The Problem

A. The court rulings dealt with whether landowners on adjacent water bodies could restrict recreational use. The answer was no. All waters according to House Bill 265 are to be regulated by FWP.

B. FWP already has existing rules regarding public recreational use.

C. Many recreationists believe they can do pretty much what they want on waters subject to restrictions in House Bill 265. Many landowners are concerned recreationists can do pretty much what they want subject to restrictions in House Bill 265. If landowners can't restrict use neither can a recreationist do what he wants without the State's permission.

1) For example - overnight camping is restricted to Class I waters. However, the regulations say they can camp only in designated areas. Many people believe one can camp almost anywhere below the high water mark if one is not causing damage. Are the current regulations still in effect or were new ones required?

2) The same problem concerns fires, pets, garbage, vehicles, etc. The rules are quite strict about the uses. When House Bill 265 says one can place objects - permanent or semi permanent - does that out-weigh the rules as they do not allow this now. Even all terrain vehicles were not allowed under existing rules.

3) The same problem is for hunting. House Bill 265 allows waterfowl and upland bird hunting. But the rules say FWP must post waters and lands they regulate for hunting. If they do not post under the rules you can't hunt. Does House Bill 265 over weigh these rules or not. only applies to nongame + before Archery Season.

E. The rules were made after hearings and agreement by many of the proponent groups here. They were made to protect and preserve public waters. To change them to a lower standard would be wrong. The rules were made up due to abuse in the past by some. Since the rules are working they should be used on all waters. They seem to be working on less than 1000 miles, they should be applied to over 23,000 miles of streams and the numerous lakes now included in House Bill 265.

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F. The rules should be kept or made into law with House Bill 265. They are strict and we should not allow two standards to be applied to waters in Montana (1) before courtcases and (2) after courtcases.

G. The Senate should decide if these rules are still applicable. House Bill 265 is here to write into law what the court said as well as limit certain recreational uses and define certain definitions. The rules governing recreational use are already in effect and should still apply or even be made into law to clarify public use on recreational waters.

2. Take out the placement of semi-permanent or permanent objects such as a duck blind or boat moorage.

A. If don't take out, then define.

B. Under existing FWP rules can't place these objects on Montana waters. Could place ice huts on certain waters for a limited time.

C. No other state allows this.

3. House Bill 265 should delinate between waters capable of recreational use and waters not capable of recreational use.

A. The Supreme Court rules that waters capable of recreational use may be used without regard to ownership of the land.

B. This automatically implies that there are waters out there in Montana that are not capable of recreational use.

C. House Bill 265 gives FWP power to regulate all waters in this State for recreational purposes.

1. This means
   a. run off from a house
   b. puddles in the road
   c. a one inch stream

2. This does not make sense and House Bill 265 should be clarified to say only waters capable of recreational use are regulated by FWP and open to public recreational use. If they are not capable of recreational use - one needs landowner permission to use the waters.

D. Other states use a substantial use test of recreation.

1) If a water can not be used for a substantial recreational use or a substainable recreational use then it should not be opened except by landowner permission.

F. How to give landowner control over some waters.

1) on waters not capable of recreational use

2) waters not capable of substantial recreational use. (define recreation as substantial recreation)

3) waters not capable of substainable recreational use.

4) State can allow control of use to landowner subject to right to take back due to public trust doctrine.

5) No one gave the reason why diverted waters are not open to the public except by permission of the landowner.

A. There are numerous waterbodies less capable of recreational use than diverted water bodies. The Supreme Court said waters capable of recreational use are open regardless of land ownership. Therefore we are making an exception that (1) diverted waters are not capable of use or (2) that another reason is made such as #4 above or either #2 or #3 or #1 above. If we can stop use on those waters we can do so on other waters if the legislature wants to.

4. State that FWP shall list waters as to the classes and different types of uses of recreation as well as hold hearings in different areas telling of proposed uses and gathering comments.

5. State that FWP shall limit or restrict use of waters not capable of substantial recreational use.

A. FWP's own statistics show small waters are limited in fishing ability, and can not be transplanted.

B. 1985 is last year demand meet supply of fishing.

C. Best fishing and recreation is in floatable rivers and lakes.

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EXHIBIT NO. 3.B
DATE 03-08-85
BILL NO. H.B. 265

I. Montana Cases

1. Montana Constitution
All surface, underground, flood and atmos. waters within the boundaries of the state are the property of the state for the use of the people and are subject to appropriation for beneficial uses as provided by law.

2. The two Montana Cases
A. Curran
1. Under the public trust doctrine and the 1972 constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes.

2. The Supreme Court began its discussion of the "recreational use" issue by stating that it "found no error" in the District Court's determination that "recreational use and fishing make a stream navigable".

In this section, the Supreme Court ruled (1) navigability for use is a matter governed by state law; (2) under the Montana 1972 Constitution and the public trust doctrine, the waters of Montana are owned by the state in trust for the people; (3) the susceptibility of use of the waters for recreational purposes (rather than streambed ownership, which is irrelevant to this issue), determines their availability for recreational use by the public; and (4) therefore, "any surface waters that are capable of recreational use may be so used by the public".

3. The public does not have a right of way across private land to state owned waters.

4. The opinion does place two restrictions on the public's use of waters: first, waters may be used only to the high-water mark; and second, waters may be used only if the public has access rights to a waterbody.

3. Hildreth Case

Generally speaking, the Beaverhead decision can be viewed as a strong affirmation of the position taken by the Montana Supreme Court in the Dearborn case. The Beaverhead opinion affirmed the Dearborn ruling that under the public trust doctrine and Article IX, section

3(3) of the 1972 Montana Constitution the waters of the state are owned by the public, and the public has the right to make recreational use of water bodies up to their ordinary high-water mark. Further, the public has the right to use the bed and banks of public waters. Finally, the public has the right to portage around barriers in water bodies in the least intrusive manner possible.

Although there was basis in the Dearborn opinion for an interpretation that it authorized use of the beds and banks of a public waterway as well as the waters themselves, the court did not specifically state whether or not public use rights extended to a waterway's bed and banks. In the Beaverhead decision, this matter was settled by the statement that "The public has the right to use the waters and the bed and banks up to the high water mark."

The Beaverhead decision stated that the Supreme Court will not devise a test for determining the meaning of recreational use since "the capability of use of the waters for recreational purposes determines whether the waters can be so used". The court further explained that since the Constitution does not limit the water's use, the Supreme Court cannot "limit their use by inventing some restrictive test". Finally, the court stated:

> 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.

II. Public Trust Doctrine

1. Longstanding doctrine. The government must preserve and protect particular resources within the jurisdiction for the public good and the good of the resource.

2. Under the doctrine, the state acting on behalf of the people, has the right to regulate, control and utilize waters for the protection of certain uses - recreation is but one of them.

3. The best way to think of the public trust doctrine as it relates to recreation on water is to think of the waterway going through private property as a highway. Before the decisions, the landowner could restrict use of the highway, now after the decisions the landowner cannot restrict use of the highway. However, the state

can restrict use and the state can close all the waters or open all the waters subject to judicial review.

4. The trust is dynamic, rather than static, concept and seems destined to expand with the development and recognition of new public uses.

   a) allows adapting such waters for changing public needs.
   b) private parties may not make the choice between navigation and commerce, between development versus conservation.
   c) the choice belongs exclusively to the state and cannot be exercised by private individuals. (Colberg - California)
   d) in short the doctrine limits extent to which private entities can acquire interests in water, but does not limit the slate regulatory control of such use.
   e) the state can choose among competing public uses and preserves the states continuing right to make the choice, but does not compel the state to make a specific substantial choice.
   f) the doctrine can strike a balance between conflicting rights - subject to judicial review.

Other states

1. Arkansas uses a recreational use test based on if a steamboat can use waters.
2. Minnesota uses a pleasure boat test.
3. California - waters capable of being navigated by oar or motor propelled small craft.
4. Idaho - any stream which in its natural state will float logs in any other commercial or floatable commodity or is capable of being navigated by oar or motor propelled small craft, for pleasure or commercial purposes is navigable.
5. Other states that use doctrine and some test.
   A. New Mexico
   B. Missouri
   C. Wyoming
   D. Michigan
   E. Ohio
   F. Illinois
6. Recreational uses of waters in neighboring states
   A. hunting (any type), overnight camping or other camping, all-terrain vehicles:
      1. No - Wyoming, Colorado, Washington, New Mexico
         Yes - Idaho, but - state of Idaho claims title to streambed, and that portion of riparian zone within the ordinary or mean average high water mark.

2. All states require permission from landowners to hunt on private property - even Idaho requires that a "reasonable attempt to contact" landholder for permission to pursue or retrieve birds or game shot in the state's reparian zone.
3. Wyoming, Colorado, and New Mexico, California hold that recreationists cannot touch or use any portion of private streambed or bank, as it belongs to landowner.
4. No state allows overnight camping except by permission.

B. Restriction of recreational uses:
1. Wyoming, Colorado, Washington, New Mexico and Idaho all use a navigability test to determine floatability and unfloatable streams.

Property rights restrict uses in other states. In Wyoming even fishing is prohibited if the fisherman must touch any part of streambed or bank without private landowner's permission. But if it's floatable, you can use it, no matter where if flows.

C. Most tests of states use a substantial recreational use test as described by stone and other law review articles. Colorado now has 15 different types of recreation uses on their rivers. California has scenic, wild and developed rivers. Most neighboring states have listed their waters as to different recreation uses and restrict uses where a substantial use can not be sustained.

D. Portage routes
1. all states say just portage around. None have the Montana procedure.

E. Several recent federal decisions have liberally applied the title test of navigability created by the United States Supreme Court over a century ago. These decisions have found a variety of western waterways to be navigable and, therefore, owned by the respective states. Rejecting earlier suggestions to the contrary, the federal courts have determined that navigability is not precluded by a waterway's isolated location, limited seasonal utility, or capacity to support only the most modern forms of craft or timber.

California courts have adopted a different course. Rather than start from the premises that the public interest and navigability are irrevocably tied to ownership, they have focused on two principles. The first involves the public trust doctrine, recently the subject of renewed interest in California law. The second, sparked in large part by an expanding population's need for recreational opportunities, revolves around the long standing but essentially limited rule that the public has a right of recreational navigation irrespective of questions of ownership.

California courts appear to be merging these two concepts and finding that state waterways which are usable for only limited purposes are imbued with the public trust, together with all the public rights and responsibilities the trust implies.

F. (California Figh) can convey sovergn lands and waters to private interests, yet waters and lands remain subject to the trust easement.

III. Montana Law - Existing

1. We have numerous environmental laws protecting the environment.
   - A. 75-2-401 - Air Quality
   - B. 75-5-101 - Water Quality
   - C. 75-7-101 - Acquatic Ecosystem protection
   - D. 75-7-201 - Lakeshores
   - E. 75-10-101 - Waste and Litter Control

2. Recreational Use
   - A. HB 265
     1. go around barriers
     2. define high water mark
     3. 2 classes of water
     4. FWP regulate all waters as to recreation in interest of public health, public safety or protection of property
     5. Procedure for portage routes
     6. Provides overnight camping and placing of some permanent or permanent objects
     7. Upland bird hunting and hunting
     8. Can't use diverted waters without permission of landowner.
     9. Class I can use for other activities besides water related.
     10. No prescriptive easement
     11. No civil liability of landowner

3. Existing law in Montana with no bill.

A. 2 court decisions
   1) right to portage
   2) waters capable of recreational use
   3) can't trespass to gain access to water
   4) use of recreation up to high water mark
   5) waters may be used only if the public has access right to a waterbody.

B. Regulations by FWP's

Public Use Regulations

12.8.201 GENERAL POLICY (1) The following regulations shall govern the use of all lands or waters under the control, administration, and jurisdiction of the Montana department of fish, wildlife, and parks. These areas are hereinafter referred to as "designated recreation areas". Regulations governing each specific area will be posted in that area. Lands and waters controlled or administered by the department may be used for recreational or other purposes subject to the prohibitions as set forth in these or other applicable rules, or otherwise provided by law.

12.8.202 WEAPONS AND FIREWORKS (1) No person may discharge any firearm, fireworks, air or gas weapon, or arrow from a bow, on or over either land or water, from April 1 to the opening date of archery season each year, unless the designated area is otherwise posted. Other areas, or parts thereof, may be closed to shooting when the director determines there is undue hazard to human life or property.

12.8.203 PETS (1) No person may permit a pet animal to run at large in a designated public recreation area. Persons in possession of pet animals must restrain them and keep them under control on a leash in a manner which does not cause or permit a nuisance or any annoyance or dangers to others. The leash may not exceed 15 feet in length and must be in hand or anchored at all times.

(2) Pet animals may not be kept in or permitted to enter areas or portions of areas posted to exclude them. Persons in possession of pet animals who cause or permit said animals to create a nuisance or an annoyance to others or who do not restrain pet animals properly may be expelled from the area in addition to being subject to any other penalty provided.

(3) Animals owned or possessed by persons who are not staying in an area will be captured and will not be returned th the owner or possessor

until the cost of capture and holding the animal are reimbursed to the department. This rule applies from April 1 through September 15 of each year unless the area is otherwise posted.

12.8.204 VEHICLES (1) No motor vehicle may be driven at a speed greater than the posted speed.

(2) No motor vehicle may be driven off authorized roads, except onto parking areas provided.

(3) No person may park any vehicle, trailer, camper, or other vehicle except in designated parking areas, nor shall any person pitch a tent or otherwise set up camp other than in designated camping areas.

(4) No person may operate over-the-snow equipment in any area which is specifically posted against such operation.

12.8.205 CAMPING AND GROUP USE (1) No person may camp overnight in a department administered recreation area without obtaining a single use overnight camping permit or having permanently and properly affixed to his vehicle a seasonal camping permit or Montana state golden year's pass issued by the director or under his authority, when such area has been signed and posted as fee camping area.

(2) The basic amount of fees for single use overnight camping permits or seasonal camping permits shall be as determined by the commission and posted by the director or his duly authorized agent.

(3) No group of more than 30 persons may use a department administered recreation area except with prior permission by the director or his agent. Groups may be assessed user fees by the director or his agent as determined by the commission and may be required to surrender a deposit to defray additional or unusual department expenses caused by their use of recreation areas.

(4) No person or persons may maintain occupancy of camping facilities or space in any one designated recreation area for a period longer than 14 days during any 30-day period unless the area is otherwise posted. In areas so posted said occupancy will be limited to 7 days during any 30-day period. Such 30-day periods shall run consecutively during the year commencing with the first day each person camps in a designated recreation area each year.

(5) No person may leave a set-up camp, or trailer, camper, or other vehicle unattended for

more than 48 hours unless the area is otherwise posted.

(6) No person may camp overnight in any department administered shelter building unless the shelter is posted as a camp shelter.

12.8.206 FIRES (1) No person may build or maintain a fire in any designated recreation area, except in established fireplaces and fire rings maintained for such purposes, or in portable camp stoves. Exception: Certain areas may be posted allowing fires to be built in other than the above mentioned places.

(2) No person may leave a camping area without completely extinguishing all fires started or maintained by such person.

12.8.207 PROPERTY DISTURBANCE (1) No person may destroy, deface, injure, remove, or otherwise damage any natural or improved property or willfully or negligently cut, destroy, or mutilate any tree, shrub, or plant, or any geological, historical, or archaeological feature, not including flowers, berries, cones, or fallen dead wood.

(2) No person may disturb or remove the topsoil cover or permit the disturbance or removal of topsoil cover. This prohibits digging for worms, burying of garbage, and allowing pets to dig holes.

(3) Gathering or cutting firewood for off site use is prohibited without prior written approval of the director or his agent.

12.8.208 DISORDERLY CONDUCT (1) Disorderly conduct such as drunkenness, use of vile or profane language, fighting, indecent exposure, or operation of a motor vehicle in a manner as to create a nuisance or annoyance or danger to others, or loud or noisy behavior is prohibited; and in addition to any other penalty provided, the participant may be expelled from the area.

12.8.209 RESTRICTED AREAS & NIGHT CLOSURES (1) No persons may enter upon any portion of any area that is posted as restricted to public passage.

(2) Public recreation areas as posted will be closed nightly, except for emergency ingress and egress.

(3) Checkout time for campers using fee areas is 4:00 p.m. the following day if not posted or at such other time as posted in the area.

(4) Checkout time for users not camping overnight is sundown in areas so posted.

12.8.210 WASTE DISPOSAL (1) No person may dump dead fish or animals or parts thereof, human excrement, refuse, rubbish, or wash water (except in receptacles provided for this purpose) nor pollute or litter in any other manner a public recreational area. Sewage wastes from self-contained trailers, campers, or other portable toilets shall be disposed of only in posted sanitary trailer dump stations. Wash water may be disposed of in sealed vault latrines.

(2) No household or commercial garbage or trash brought in as such from other property shall be disposed of in any designated public recreation area.

Existing Laws

A.	87-1-303	Duties of FWP as to recreation
B.	23-2-522	Discharge of Waste from vessell prohibited
C.	27-30-101	Def. of nuisance
D.	45-6-101	Criminal mischief
E.	45-6-203	Criminal trespass to property
F.	45-8-111	Public nuisance
G.	75-10-212	Disposal in unauthorized areas prohibited
H.	75-10-253	Dumping penalty
I.	87-1-102	Penalties for violation of FWP regulations
J.	87-1-504	Protection of private property wardens as ex-official fire wardens
K.	87-3-125	Restrictions on use of motor vehicles while hunting
L.	87-3-304	Landowners permission required for big game hunting
M.	23-2-523	Prohibited operation and moving
N.	85-2-223	Public recreational uses

Possible Law Suits under H265

1) taking of property under 5th and 14th amendments and Federal Civil Rights Act, Section 1983

The Civil Rights Act, 42 U.S.C. Section 1983 (1976 and Supp. IV 1980), provides that: Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction to the deprivation of any

rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper preceedings for redress.

2) violation of privacy rights
3) recreation harms environmental protection of wildlife and habitat

Miles of Streams in Montana

1. 19,168 miles of streams (Montana Water Quality - 1984)
2. FWP study (1980) - over 23,000 miles
3. recognized under the Corps of Engineers as navigable - 1900 miles
4. waters affected by HB 265 - over 23,000 miles
5. Floatable rivers in the state 6700 - 8700 miles
6. A) streams nonfloatable and have unrestricted ingress - 9000 miles
   B) streams unfloatable on private land - 7300-5300 miles
7. In 1980 FWP study only 900 miles out of 17,000 miles of streams were not allowed use for recreational purposes.
8. In 1980 FWP study on sport fishery value on Montana's streams the following statistics were found:

Sport fishery potential of stream reaches

The class of each reach was based on a point system in which points were awarded for (1) fish abundance as indicated by biomass or numbers and sizes of game or sport fish, (2) ingress (legal rights of the public to fish the reach or willingness of landowner to permit fishing), (3) esthetics and (4) use by fishermen (fishing pressure).

1 - highest value fishery resource
2 - higher priority fishery resource
3 - substantial fishery resource
4 - moderate fishery resource
5 - limited fishery resource

value	total km	floatable	non/floatable	not specified
1	1,419	1,212	80.3	127.3
2	2,778.9	2,140.0	427.5	211.4
3	4,399.6	1,346.5	1,891.8	1,161.3
4	14,905.0	2,398.4	8,723.5	3,783.1
5	3,642.1	128.6	2,616.2	897.3

Study

Overuse

	total km	floatable	non/floatable	not specified
By stock	5,077.6	1,599.2	1,814.6	1,663.8
By game	16.0	0.0	16.0	0.0
By people	75.6	0.0	75.6	0.0

Montana recreation sites		acres
Lakes	210	21,280
River	273	24,630
Land Base	503	74,594
Total Sites	987	120,504

Fishing as managed by FWP

Other Game and Sport Fish in Lakes

1) includes sauger, walleye, northern pike, largemouth bass, small mouth bass, sturgeon, burbot, channel catfish and several other species utilized by recreational fisherman, but not legally classified as game fish.
2) about 250 individual waters support these species
3) Montana residents account for 90% of the angler use
4) about 40% of nonresident use occurs in Region 7 (Miles City). This is largely due to Wyoming residents who fish the Tongue River Reservoir and nearby ponds.
5) Nearly 80% of this fishery is bordered by public land where ingress is ensured; most of the remainder is bordered by private land where public use is allowed with minimal restrictions.

Fishing

1. over 200,000 residents (35% of those over 9 years of age) participate in recreational fishing.
2. residents account for 82% of the total fishing pressure and trout waters received a major portion of the use by both residents and nonresidents. Nonresidents showed a higher preference for trout waters, especially for trout stream fishing.

Trout fishing in lakes

1. 40% of all fishing
2. most lakes are lightly fished, but each department region has some lakes that currently received the maximum use that can be sustained without degrading the quality of the fishery.
3. Approximately 55% of the fishery is on public lands where public use is insured; 30% is bordered by combinations of public and private ownership where access is incomplete. The remaining 15% occur on private land where ingress varies from uncontrolled to prohibited. Very few trout lakes are completely unavailable because of posting.
4. Trout lakes number over 1,900 individual waters
5. Each department region has some trout lakes, but a large portion of the waters and the total acreage lie in the central and western portions of the state.

Stream Trout fishing

1. Montana streams support 5 species of trout.
2. Some 12,000 miles of stream support populations that provide most of the trout fishery.
3. Many additional smaller tributaries support the productivity of these 12,000 miles by maintaining flows and water quality and by providing spawning and nursery areas. Trout streams occur mostly in the western and central portions of the state but each fish and game region offer some stream fishing for trout.
4. The management of trout populations in these streams is based on wild trout produced naturally in the streams. Very little can be done to increase production in these streams, but a major effort will be required to maintain present production through habitat preservation.
5. Existing trout populations can support a temporary increase on days of recreational fishing through 1985 if the department implements more restrictive regulations on selected waters. This increase in days will be offset in subsequent years by expected losses of trout production due to habitat deterioration.
6. Fishing regulations have been quite liberal in the past but will become more restrictive on some waters as use a harvest approaches the supply.
7. In 1975-76 over 1/2 of the nonresident angling effort was directed to trout in streams.
8. Approximately 70% of the trout stream fishery is bordered by private lands. Public use is restricted to some degree on about 18% of the fishery.
9. Based on current fishing standards, the anticipated use on trout streams will approach the total supply in most regions by the late 1980's.
10. 1975 study

Regional Distribution of trout streams

region	miles of trout streams
1	2,710
2	1,490
3	3,100
4	3,400
5	1,350
6	180
7	10

Recreation activities as defined by FWP

ORV, bicycling, bird watching, boating, camping, cross country skiing, driving for pleasure, fishing, hiking, horseback riding, hunting (includes trapping, archery/bow and arrow hunting), motorbike riding (both on and off road vehicles), outdoor swimming, picnicking, playing outdoor games (includes golf, tennis, frisbee, softball, etc.), river floating or canoeing (includes rafting), snowmobiling, walking for pleasure, downhill skiing, other winter sports (includes sledding, tobogganing, snowshoeing, dog sledding,

etc.), rock hounding (includes prospecting and metal detection).

Statistics

1. Eastern Montana is 70% private lands
2. Western Montana is 70% public lands
3. Most of the state's blue ribbon trout streams are in Western Montana.
4. By the time the state's mountain trout streams have reached Eastern Montana, they have become warm water fisheries.
5. Private ownership in this state is 63.9%.
6. Total land area in this state is 93,271,040 acres.
7. Total water area in this state is 879,280 acres.

Montana Outdoor Recreation Survey 1980 by FWP

1. 90% wanted the department to maintain fish habitat.
2. 49% wanted regulation scheduling the use of popular recreation waters during periods of high use. Of those approving scheduling 66% favored the issuing of permits and 27% opposed permits.
3. 90% said there were conflicts between recreationists and landowners.
   A. 52% said it was serious.
   B. 17% said not too serious.
4. Recreationists perspective
   A. 24% said had a problem with landowner.
   B. 26% in urban areas said had a problem compared to 22% who live in rural areas.
   C. 31% and 39% of fishing and hunting enthusiasts respectively said they had experienced problems with landowners, compared to only 14% among nonfisherman and 16% among nonhunters.
   D. 24% said friction with landowners occurred often, 27% said sometimes and 48% said not too frequently.
5. The landowner perspective
   A. 54% said they had encountered problems with recreationists regarding access.
   B. Landowners in the eastern part of the state appeared to have had proportionately more problems than those in Western Montana.
      1. Over 60% in Region 6 and 66% in Region 7 reported problems compared to 48% in Region 1 and 46% in Region 2.
   C. 32% of landowners said problems encountered very often; 35% said sometimes and 29% said not too frequently.
6. Possible solutions
   A. 75% favored negotiating long-term easements
      1. about 81% of the persons who fished in 1979 favored this compared to 67% among those who did not fish.

2. of the respondents, 71% of landowners favored this proposal.

7. Other highlights of the survey
   A. 75% of Montanans devote some of their leisure time to outdoor recreation activity.
   B. The most popular activities were picnicking, driving for pleasure and walking for pleasure.
   C. 58% reported fishing at least one day, medium number of days spent fishing were 14.
   D. The younger age groups participated higher in more vigorous activities. Bird watching and nature study, driving or walking for pleasure and picnicking were activities which showed high participation by those 65 and over.
   E. Montana fisherman overwhelmingly stated they preferred to catch a few large fish rather than many small fish.
   F. In general, they favor multiple use of Montana's water. Only 8% of the respondents said that fish and wildlife should have the highest priority in water use. Almost 42% felt that agriculture should also receive first priority along with fish and wildlife. About 36% felt water should be equally available for all uses, including industrial uses.

Nonresidents spend 4.5 days in Montana and spent 72,700 activity days canoeing on rivers and lakes.

Montana shows registered 32,122 boats with an estimation of 20,537 Montana boats unregistered.

Nonresident floaters	250,990	(1979)
Resident floaters	136,500	(1979)
Total floaters	387,490	

75% of Montanan's eighteen years of age and over spend some of their leisure time participating in outdoor recreation activities. (1979)

57% report camping at least one day, medium number of days recorded was 10 and 21 activities sited. (1979)

46% favored user fees to pay for recreational facilities and services.

70% said conflicts between private landowners and people who use their land for recreation are perceived as a serious problem.

1979 Activities by residents	
Fishing	321,000
River float, canoeing	136,500
Outdoor swimming	356,500
Boating	177,500

Camping	314,500
Driving for pleasure	389,800
Motor bike riding	102,600
Picnicking	423,200
Walking for pleasure	392,600

Smith River Survey 1980 FWP

1. Visitors drove an average of 162 miles (one way) to reach the river.
2. Spent an average of 3.50 days on the rivers.
3. After floating and camping, participated most in fishing, sightseeing, rest and relaxation.
4. Saw an average of 7 other floating visitors and 7 shoreline visitors per day, but did not perceive the river as crowded.

esulting in ...
anting the pub- want to see the bill killed, ... Doge-
ss to nearly all said ... Great Falls supports HB265 in ...

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 39
DATE 03 08 85
BILL NO. H.B. 265

WISTOWN NEWS ARGUS - SUNDAY, MARCH 3, 1985

Guest Opinion . . .

Deeply concerned about impact of HB 265

(EDITOR'S NOTE — Ted Lucas, the writer of this column, has ranched much of his life in the Highwood area. He has been a leader through the years in cattle organizations, done much in the study of weed control and is also a sportsman who loves Montana and his area. He is exceptionally well qualified to discuss the subject of House Bill 265 on stream access.)

by TED LUCAS

About three-fourths of a mile of Highwood Creek runs through my ranch. I am deeply concerned about how House Bill 265 stream access bill will affect land owners and cabin owners with streams and rivers running through or by them, or who border lakes.

I am, and have been for many years, a member of the Montana Stockgrowers Association. I have served on the Landowner Recreation Committee for many years, and was vice chairman and chairman of the committee and served two terms on the executive committee.

When the Stream Preservation Act was passed 10 years ago (Senate Bill 310), I served on the committee that worked up the model rules for that act. I also served for several years on the Montana Association of Conservation District Legislative Committee and have served one term and been appointed to another on the Lewistown District BLM Advisory Council. I am a member of WETA and am on their board.

House Bill 265 goes way beyond the Supreme Court's decisions. Here are some examples:

— House Bill 265 expands surface water to mean from high water mark to high mark (dry land becomes surface water).

The definition of the high water mark used for 10 years to administer the Stream Preservation Act

> *"Highwood Creek has flooded several times over the years, and as it flows through me the high water mark, using the new defini- ... a recreation*

poses, just that it is capable of such use.

In an ordinary year on the Highwood Creek you could, for maybe a month to six weeks, float logs or multi-person water craft (rubber raft or canoe). Thus Highwood Creek would be Class I.

Recreation use on both Class I and Class II waters under HB 265 includes: fishing, hunting, swimming, floating (small craft or other flotation devices), boating in motorized craft propelled by oar or paddle, other water-related pleasure activities, and related unavoidable or incidental uses.

In Class I waters you can do, by inference, what you cannot do in Class II waters: overnight camping, construct permanent or semi-permanent objects (permanent duck blind or boat dock), other activities which are not primarily water-related pleasure activities.

No where do I see in the Supreme Court decisions any indication of a right to placing any permanent or semi-permanent object, such as a duck blind or

> *"No need has to be shown. The route shall be established at a very considerable cost to the landowner who is not compensated for the land taken."*

boat moorage, below the high water mark or other activities that are not water related. This must be corrected.

By using the new definition of surface water — the new nebulous definition of high water mark along with commercial activities defining Class I and Class II waters — totally new areas of confrontation are developed that will bring on long, bitter and costly court battles. These areas must be amended in the first two definitions and the commercial activities paragraph deleted.

— There is a section on portage. Part of this reads: a portage route may be established when either a landowner or member of the recreating public submits a request to the supervisors that such a route be established.

Within 45 days of the receipt of a request, the supervisors shall, in consultation with the lan- ... a representative of the department, ex-

... and destroy its value for agricultural purposes.

— We do need to add flood plains or flood channels are not considered to be within the ordinary high-water mark. This is a very clear and understandable description.

Now HB 265 has expanded this to read: Ordinary high water mark means the line that the water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it. Characteristics of the area below the line include, when appropriate, but are not limited to: diminished terrestrial vegetation or lack of agricultural crop value.

A flood plain adjacent to surface waters is not considered to lie within the surface water's high-water marks. By using the new language ("diminished terrestrial vegetation or lack of agricultural crop value") the high water mark has been greatly extended. Who could make a decision as to where the high water mark actually is?

Highwood Creek has flooded several times over the years, and as it flows through me the high water mark, using the new definition, would make a recreation corridor 100 to 300 or more yards wide. Under HB 265 this corridor is considered to be surface waters.

— Waters have been put into two classes in HB 265: Class I and Class II. All waters not Class I are Class II.

Part of the description of Class I waters reads: Class I waters means surface waters that are or have been capable of supporting these commercial activites — log floating, transportation of furs and skins, shipping, commercial guiding using multi-person watercraft, public transportation or the transportation of merchandise.

This description does not require that this water is now being used or has ever been used for these pur-

... or confrontation are developed that will bring on long, bitter and costly court battles."

land to determine a reasonable and safe portage route.

Within 45 days of the examination of the site, supervisors shall make a written finding of the n... appropriate portage route. The cost of establishing the portage route around artificial barriers must be paid by the involved landowner, except for the construction of notification signs of such route, which is the responsibility of the department. The cost of establishing a portage route around natural barriers must be borne by the department.

No need has to be shown. The route shall be established at a very considerable cost to the landowner who is not being compensated for the land taken.

I urge each of you to get a copy of House Bill 265 and study it yourselves to determine how it affects you and see if it is the same as you are being led to believe. If it isn't, contact your agriculture associations and legislators and tell them so.

I am not now having problems with hunters and fisherman. I control hunting and am posted to allow fishermen access without ever asking. With HB 265, most recreationists won't create a problem for me and other landowners. For those that cause problems, there will be no recourse except through the courts.

We have three bills: SB 418 defining high water mark, SB 421 limiting landowner liability and SB 424 not requiring prescriptive easement through recreational use of land on water.

Let's make every effort to pass these three bills this session and address what, if any, problems arise in the next two years during the 1987 Legislature. If HB 265 passes, we will all regret it. This must not occur.

(This sheet to be used by those testifying on a bill.)

NAME: Jack Van Cleve DATE: 8 Mar '85

ADDRESS: Big Timber

PHONE: 537-4404

REPRESENTING WHOM? Montana members of The Dude Ranchers' Association

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT: After personally polling all but one Montana member ranch of The Dude Ranchers' Association, I have been authorized to represent them as opposed to this bill.

The intrusion of recreationalists on heretofore private land will destroy a great deal of the ambiance which is a large part of the dude ranch appeal. This bill could destroy a large segment of the dude ranch industry, which contributes substantially to Montana's economy every year.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 40
DATE 03 08 85
BILL NO. H.B. 265

NAME: Bill Morse DATE: 3-8-85

ADDRESS: Box 560, Absarokee

PHONE: 328-2661

REPRESENTING WHOM? ~~Stillwater Co.~~ Landowners in Stillwater & Carbon Co. & Stillwater County Assn. of Taxpayers & Madison Co. Ranchers.

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: Intrusion on private property rights. Would seriously depress land values & cut tax values.

Our huge acreages of public land are available for recreation.

This would be a "taking" of land without payment -- doubtful constitutionality.

High cost of implementation: design & construction of portage areas -- added fish & game personnel.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 41
DATE 03 08 85
BILL NO. HB 265

(This sheet to be used by those testifying on a bill.)

NAME: Dr. Clayton B. Marlow DATE: 8 March 95

ADDRESS: Montana State University

PHONE: 994-5572

REPRESENTING WHOM? _____

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 42
DATE 03 08 95
BILL NO. H.B. 265

Testimony given by Dr. Clayton B. Marlow
Research Scientist, Montana Agricultural Experiment Station
to the Senate Judiciary Committee, March 8, 1985

HB 265 appears to be a workable compromise between landowner protection and public recreational access. But to adequately address the needs of both groups, it is necessary to clarify several "gray" areas within the bill.

I. Points for Clarification

A. New Section: Section 1. Subsection (2) pg. 2

1. Use of "federal government surveys" as criteria for classification of class I waters does not address recreational capacity of waters. If the "federal survey" mentioned is a U.S. Geological Survey topography map, then there is little need for class II designation because these surveys list nearly all geographic structures which carry water for all or part of the year.

2. Use of "waters flowing through public lands" as a classification criteria again does little to describe the water's recreational capacity.

3. Both the Federal Navigability and commercial activities criteria will be beneficial to both groups because they provide a measure of the water's recreational capacity.

B. New Section: Section 1. Subsection (2) pg. 2

1. The description of channel characteristics below the "ordinary high water mark" can be questioned by both landowners and recreationists.
   a. Does the phrase "diminished terrestrial vegetation" mean that the naturally occurring dense stands of willow, cottonwood or reed canarygrass indicate the individual is above the highwater mark?
   b. Is native forage an agricultural crop? Do sedge and wirerush bottoms have to be hayed before they are considered a crop?

II. Summary

A. If the answers to these questions are left up to the courts, landowners and recreationists may find both the action and the results costly.

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SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 43
DATE 03 08 85
BILL NO. SB 185 H.B. 265

(This sheet to be used by those testifying on a bill.)

NAME: Roger Kaufman DATE:

ADDRESS: 811 S. Tracy Ave., Bozeman

PHONE: 587-7555

REPRESENTING WHOM? self

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT: I'm a businessman & sportsman who has been very active over the years in various sportsmen organizations. I'm a former employee of the National Rifle Assn., serving as their field rep. in this region. I firmly believe that HB265 is not supported by the vast majority of true Montana sportsmen. We have everything to lose and virtually nothing to gain if this bill becomes law. This legislation goes far beyond the scope of the Supreme Court ruling and can in no way be characterized as a "compromise bill." It would have the effect of driving a wedge between the landowner & sportsman — groups that have traditionally been friends and allies in this state. HB265 is not just a water bill — it is a land use bill. The Supreme Court did not rule on the land use issue. By antagonizing the landowner and encroaching upon his property rights, the sportsman — through this bill — will be the big loser. Any possible short term gains by the sportsman will be far outweighed by the long term devastation of the landowner-sportsman relationship. The bill would also create a powerful dis-incentive for landowners to maintain good fish & game habitat. In a few short years, the quality of

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

hunting & fishing in Montana would show a significant decline.

Above all, this is a freedom issue. Freedom is indivisible. You take it away from one man and you take it away from all. HB 265 is a radical assault on the property rights of many Montanans — and therefore takes away a measure of freedom from all of us. Although living on a ¼ acre plot in Bozeman is all the freedom I want, this bill affects me — and my family — as much as anyone. As a

I am Paul Hawks of Melville. I am presenting amendments to HB 265 on behalf of the Stillwater Protective Association, an affiliate of the Northern Plains Resource Council.

1. Our first set of amendments deals with portage. The present language vastly expands a stream's capability to sustain recreational use. We believe permitting the public to demand portage routes around natural objects or existing artificial barriers is a violation of private property rights. While our amendments would still provide for portage routes, property owners should not be penalized.

We don't assume that a portage route is necessary just because someone requests it. Our amended language allows the board of supervisors to make that determination.

2. The definition of surface water should not include land. If you want the recreationalist to have the use of land, then put the allowable use of the beds and banks up to the high water mark back in the definition of "recreational use."

3. We feel that any hunting because of concerns for safety of family and protection of property. and other land-based activities, should require landowners consent.

Our intention in amending use of stock ponds is to protect impoundments on private land fed by continually flowing water sources. We don't, in any way, want to affect the recreational use of public impoundments of water.

4. Finally, the definition of "ordinary high water mark" should be replaced with that of SB418.The language used in this bill should not create problems between the landowner and the sportsman. A good landowner-sportsman relationship has been the basis of enjoying quality recreational opportunities in our state. HB 265 should not do anything to jeopardize that relationship. If it does, we all lose.

In conclusion, we are in support of Senate bills 418, 421, 424, and 435 because they protect our concerns as landowners. However, if our amendments were accepted, we could support HB 265.

SENATE JUDICIARY COMMITTEE
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AMENDMENTS TO HB 265

submitted by the Stillwater Protective Assn.

1. Portage

Section 1 (1), page 1, line 19

"the water, ~~or a natural object in or over a water body~~ which..."

and lines 23-24

"obstacle to the natural flow of water ~~or a natural object within the ordinary high water mark of a stream.~~"

Section 3 (1), page 7, line 15

"ordinary high-water mark, portage around artificial barriers in the"

Section 3 (3)(a), page 8, line 1

"a portage route around or over ~~a~~ an artificial barrier may"

Section 3 (3)(c). page 8, lines 12-13

"the barrier and the adjoining land to determine if a ~~reasonable and safe~~ portage route is necessary

Section 3 (3)(d), page 8, line 15-16

"Supervisors shall make a written finding of ~~the most appropriate~~ whether a portage route is needed and the most appropriate route if if one is necessary"

Section 3 (3)(e), page 8, line 21

"cost of establishing a portage route around ~~natural~~ existing artificial barriers"

2. Surface Water

Section 1 (10), page 4, lines 21-24 strike

Section 1(8), page 3, lines 23-24

"or incidental uses, within the ordinary high water mark of the waters"

3. Land-based Activities

Section 1 (8), page 3, line 18

"surface waters: fishing, ~~hunting~~, swimming, floating"

Section 2 (2)(d), page 6, line 3

"~~big game~~ hunting"

Section 2 (1), page 5, line 2

"Subsections (2) ~~through (4)~~ and (3)"

Section 2 (3), page 6, line 4-6, strike

line 7 - change (A) to (E)

line 8 - change (B) to (F)

SENATE JUDICIARY COMM...
EXHIBIT NO. 44
DATE 03-08-85
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TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE
March 8, 1985

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 45
DATE 03 08 85
BILL NO. H.B. 265

My name is Chuck Rein. I am a rancher from Melville, Montana.

Since the Dearborn and Beaverhead river lawsuits the private property rights of many Montana citizens, whether or not they are involved in agriculture have been in jeopardy. Many questions have been raised by these cases, and now it is your turn, as our duly elected representatives to answer the questions and address the issue based on your own knowledge and by hearing and/or reading informative, well researched testimony. Some of the areas that I feel need to be addressed include but not limited to acquiring prescriptive easement by recreational use, limiting landowners liability and defining the high water mark. These issues require technical and legal analysis and terms to address them properly, thus, I won't attempt to do that in this paper. I will however describe how I, as a rancher who lives in the foothills of the Crazy Mountains, near the head of the Sweet Grass Creek, is affected by the Supreme Court decisions regarding stream access. The Rein family has owned this property for over ninety years, my grandfather having settled here in 1893. As far as I know access to this piece of stream has never been denied, except during times of extreme fire danger or when the number of fishermen using our property (free of charge) was so great we denied access to any additional sportsmen for that particular weekend. I feel that by opening most surface water in Montana to public access, many beautiful streams, such as the Sweet Grass, will become overcrowded. Such overcrowding will harm the resource in several ways. The fish population is being depleted faster than it is reproducing itself now - even with the number of fishermen being controlled. What will happen to the resource if the number of fishermen is left completely unchecked? What will happen to the ecosystem if a liberal definition of high water mark is adopted? If recreationists are allowed to use the flood plain they may be able to camp and picnic on my fields or worse yet in my backyard. The situation I just described was possibly extreme, but weren't the Supreme Court cases also extreme? As a conservation district super-

visor for over eight years, I like the definition of highwater mark used by the conservation districts to administer SB 310, the Natural Streambed and Land Preservation Act of 1975. I hope what ever version of a bill that comes out of this committee it has this definition of highwater mark.

One of the inherent problems with public access is the inability to control who uses the property. In such cases the person who abuses his rights (speaking from experience the percentage of this type of person is small) adversely affects the resource for all who want to enjoy it as well as those who depend on it for their livelihood. Strong littering and trespass laws would help protect our beautiful natural resources.

Members of the committee, seldom does an issue of such magnitude and importance come before the legislature. I urge you to carefully examine the facts and make your final decision in a manner that will strengthen private property rights, promote good landowner-sportsmen relations, and preserve and protect Montana's valuable natural resources. I urge you to kill H.B. 265.

Thank you.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 45
DATE 03-08-85
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Testimony on H.B. 265

Mr. Chairman and members of the Committee,

My name is Steve Aller. I operate a guest ranch in Park County. I am a fly fisherman and a part member of Trout Unlimited.

I am opposing H.B. 265 as I believe it expands the 2 Supreme Court decisions and attempts to codify the 'taking' of private property rights.

With the help of H.B. 265 I will loose further control of my stream bed and banks. In addition to this loss I also lose the right to control public use. Consequently the quality fishing I now offer will ultimately be degraded.

This quality fishing has been the product of self-imposed catch and release rules that all our guests have complied with since the late 1950's.

If the public is given open access to our streams then the future is of great concern. It is very doubtful that they will be inclined to respect our catch and release policies and my livelyhood will be at stake.

In my attempts to preserve our superior fishing I approached the dept. of Fish, Wildlife and Parks asking to have catch & release fishing made official policy.

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Unfortunately they seem in no hurry to help me preserve our stream in its present condition.

Many of our guests are concerned that we will not be able to offer the quality fishing that we have had in the past. Some are suggesting that if our streams are to become the playground for all water related recreation then maybe there vacation dollars would be better spent elsewhere.

I am submitting two letters which appeared in Fly-Fisherman magazine as an example of some of the concerns that are being expressed by fishermen from other parts of the country.

In closing I would like to say that any bill that comes from the legislature must try to recognize the fact that there are streams in the State where the bed and banks are privately owned. Any bill that cannot address this basic concept should be looked at with suspicion.

I fully understand the situation the Supreme Court has forced on us but I respectfully submit that H.B. 265 is an attempt to erode our rights beyond what the Courts intended.

Thank you.

SENATE JUDICIARY COMMITTEE
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FFM DEC 1984 — Testimony : HB. 265

The Right To Float and Fish

THE ISSUE IS SETTLED. Fisherman and others have the right to float and fish boatable waters in Montana. So says the Montana Supreme Court in a recent decision [illegible] MAN. That decision could be appealed in the U.S. Supreme Court, but a successful appeal is unlikely.

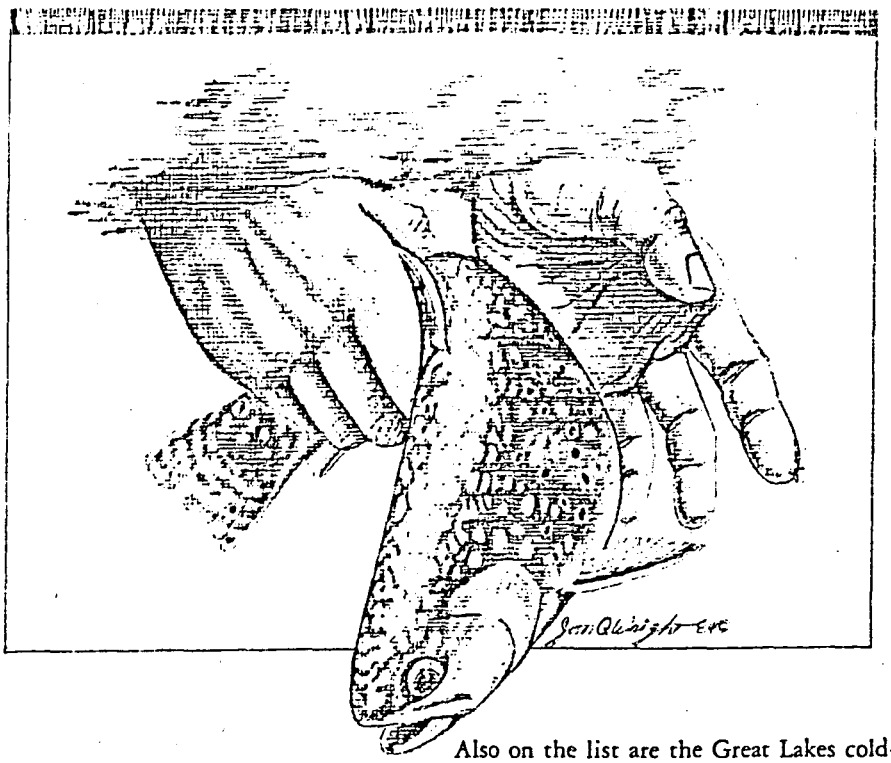
Public use of navigable water in the U.S. is as American as the Constitution. State after state has affirmed and re-affirmed the principle of law, and there is little likelihood that the American way will change. Nor is it likely that the Canadian opening of salmon rivers to the public will change either.

And the North American way of handling waters for the use of the public is a benefit to fishermen, despite some exceptions, and despite the contention by elitists that quality fishing can only exist on private waters.

Lawyers say that the original public use of waters in North America was a practical necessity: Rivers were the thoroughfares of commerce and travel in the wilderness; they were, in effect, the roads. Rivers that were navigable were part of the public domain. In most states today that principle of law maintains. It means that in most states fishermen may fish boatable waters otherwise inaccessible due to the rights of landowners.

There is more to the issue of private versus public ownership of the waters. Recent history has shown that public use of the waters may be its single best chance of salvation as quality trout water. The reason lies in the politics of water use. Fishermen, especially fly fishermen, comprise the only political force, albeit small, for conservation and preservation of quality trout waters. Their involvement comes at a time when projects threaten to take thousands of acre-feet of western water and when priceless North Coast rivers in northern California are being eyed jealously by southern California developers.

Rivers have few friends. But in the vanguard of those few are the fishermen. Their love for moving waters and the trout that thrive there is the very foundation of fly fishing itself. Initially in his youth, the fish bring the fisherman to the water and the beauty of the surroundings, the clean blue-ribbon waters and their trout, call him back.



To deny fishermen, especially fly fishermen, the use of waters is to deny the rivers their friends, the political allies who will fight destructive, ill-conceived water projects.

Does this mean that the day of the private trout club and private property is over? Each has its place. Closed private waters have been a fixture of American fishing since the beginning. But the vast majority of fishing in the U.S. is done on public waters, both stream and lake, and virtually all large-scale conservation and restoration projects are funded by the public and depend on public waters for their success.

The list of public-water conservation and restoration successes is long. On that list is the notably successful Yellowstone River cutthroat trout special catch-and-release management in Yellowstone Park. Also on the list are the Great Lakes cold-water fisheries restorations, the Columbia River salmon and steelhead maintenance projects, the Connecticut River Atlantic salmon restoration and the multi-billion-dollar clean-up projects under the Clean Waters Act that have made such rivers as the Susquehanna and the Connecticut fit once more for fishing, boating and swimming. All are publicly financed projects on publicly fishable waters. No such projects could have been sold to the Congress without the public's belief that the waters were worth saving, saving for the public's use of them.

Public fishing access to water is fundamental to the preservation of our waters and their fisheries. The Montana Supreme Court decision re-affirms that basic American way of doing things, a way that exists in few other countries of the world. We fly fishermen who travel and fish those Montana rivers, and who appreciate their rare quality, have a victory to celebrate.

JOHN RANDOLPH

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 46
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FFM MAR. 1985

Rebuttal

THE DECEMBER 1984 editorial "The Right To Float and Fish" (FFM, Vol. 16, No. 1) extolling the Montana Supreme Court decision to open virtually all of Montana's waters to the public for recreational use deserves comment.

This decision is not the boon to fishermen that the editorial contends. Conversely, it has the potential, over the next few years, of making much of the quality trout fishing, for which Montana is justly noted, a thing of the past.

To understand why this is the case requires a careful reading of the court's ruling in the Dearborn case (the more sweeping of the two decisions). The editorial quotes only selectively and loosely from this ruling to make its case. The impression is created that only rivers suitable for float fishing are now open. This is not true. All water which can be used for any sort of "recreational" activity is now legally open provided only that one does not gain access by trespassing over private property. This includes such things as swimming, canoeing, hunting, bird-watching, water-skiing and, presumably, even taking a jet boat upstream. None of these activities mixes very well with fly fishing. The ruling specifically makes wading legal...including wading upstream. Furthermore, if such "navigation" is difficult (between the poorly defined "high-water marks") it is now legal to "portage" around any obstacles (natural or man-made) over otherwise private property. It is only a matter of time until the word gets around and hordes of bait fishermen (who, as a class, are not noted for their conservation awareness) start walking up the fragile spring creeks, degrading the habitat and taking out their legal limits of "meat."

Tight Lines...

The editorial dismisses the issue of the rights of private owners (part of the "elitest" minority, obviously) without discussion. The quality fishing that can be found on many such "privately owned" streams is referred to as mere "contention." The fact remains that public fishing in Montana, as elsewhere, has, with but few exceptions, gone downhill over the years. Some of the best fishing to be found is on privately controlled water. Most of the owners will allow fishing if one asks permission. Such permission is refused on occasion to those unwilling to abide by limited kill rules, to those who litter or otherwise degrade the environment and to limit the fishing pressure. It can be argued that such access control is in large measure responsible for the quality fishing that these "private" waters still afford. For some of the water the owners have been charging a fee (and also spending money, time and effort to keep the water in first class condition). The court's decision leaves the question of access to places like Armstrong's and Nelson's spring creeks open to question. Do I have to pay or can I now just walk in from the Yellowstone river with my spinning rod and canned salmon eggs?

With these almost universal access rights, the owners will have little incentive to maintain the habitat and in this day of shrinking budgets, it is not likely that the state will be able to do this. They can't even handle the public waters to the degree that they would like. I have enjoyed a few weeks of good fishing in Montana each year for the past 16 years and have fished both public and private water. On no occasion have I run into a warden and have never been asked to show my license.

Unless the Montana legislature takes up this issue and corrects the court's overzealous excesses, it is likely that Montana's reputation for good fishing will deteriorate. The guide businesses that measure their success by their ability to get their clients a "wall" fish or a legal limit will do just fine for a short time while they exploit this new opportunity.

Tourism is not an inconsequential industry in Montana. Hundreds of motels and eating establishments can look forward to diminished business as the fishermen seek greener pastures. I spend a couple of thousand dollars each year going to Montana. When the fishing deteriorates too much, I can find better uses for the money. But, what will our children and grandchildren do? Take up mountain climbing and canoeing? Oh well, not to worry too much, they may never know how it was or how it could have been (unless someone tells them about it on TV) and won't miss it.

As with all rights and privileges there must be accompanying responsibility. Here we have the granting of sweeping rights to the recreationists with no concurrent action to insure commensurate responsibility. It is a sad commentary, true, that there are plenty of people who will rush in to exploit the situation...before someone else beats them to it! The reported jubilation over this "victory for sportsmen" is, I fear, premature. I hope I am wrong; but I feel far from jubilant.

D. Y. BARRER
Rockville, Maryland

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 46
DATE 03-08-85
BILL NO. H.B. 265

FFM MAY 1985

TIGHT LINES

New Right Is Wrong

I am disturbed by your recent endorsement of the Montana supreme court ruling. It is difficult to believe that a fly-fishing magazine could sink to such a low level of editorialism without at least vigorously tying the Court's decision to catch-and-release. You must realize that the court's decision may result in the gradual decline of the great wild trout fishery we know in Montana.

Isn't it a plain and simple fact that when wild trout water becomes more accessible to the general public, the sport for everyone suffers? Isn't it true that when floaters have access to big fish we waders can't reach during early season's high water, the trout become more vulnerable to meat fishermen? Those are hardly "elitist" concerns as you would describe them in your editorial.

Witness the Madison River. That river was closed for several years to give it a rest from floaters. A vigorously enforced catch-and-release program has begun to restore the Madison and Yellowstone Rivers, but Mother Nature can never be supplanted by any restoration program.

Witness the decline of the Bighorn River. That river was recently opened to the floaters you defend. Professional guides, who insist that their clients release fish, acknowledge there is already a decline in the size of fish being captured. Fishing pressure, coupled with this year's unfortunate Bighorn fish kill, may result in a further decline in the quality of fishing there.

Isn't it better, and less costly, to preserve wild trout habitats *before* restoration becomes necessary? When are we going to learn that simple fact? Why do we anglers always have to settle for less when there are so many examples of what can happen with unenlightened management of trout fisheries.

Your editorial seems to confuse public water conservation with a fundamental American right to hold property.

For instance, how will the court's decision apply to the three miles of Montana river I fish every year? The rancher owns both banks and pays taxes on the river bottom. He regulates the fishing to "flies only" and all rainbows under 20 inches must be released. It is the type of fragile water that could easily be destroyed in just one season by unprincipled floaters. Is it "the American way of doing things," as you insist, to permit floaters unbridled access to such fishing?

I hope that the Montana Department of Environmental Protection moves forward with a progressive form of tax incentives to prevent open land from falling into the hands of developers, private or governmental. That process, coupled with a further vigorous application of catch-and-release on all wild trout water will be the only method to preserve wild trout fishing for future generations.

The issue is not dead. There is a Sage Brush rebellion going on in Montana. I hope the court's decision is reversed and have no reason to celebrate with you your compliance with the special interests who have pushed "The Right to Float and Fish." I can only hold them in contempt of a basic sporting ethic: Respect landowner's rights.

ERWIN S. EDELMAN
Cornwall, Conn.

Regulatory powers belong to both state and federal governments. Catch-and-release fisheries management is conducted by the states (and the feds in Yellowstone Park) under regulatory powers. Fisheries management is a function of the state (and federal) wildlife agencies and has nothing to do with the constitutional rights questions dealt with by the Montana court. The Montana decision did deal directly with private property rights versus public access rights. And only a constitutional convention in Montana, nor the Montana legislature, *can change the court decision.*

JOHN RANDOLPH, EDITOR

FFM MAY 1985

Tight Lines...

rather than pushing in one direction only.

Meanwhile, let's get with the program. I don't intend to burn candles at night or go back to the horse and buggy.

JIM JONES
Anaheim, Calif.

Whose Rights?

I was pleased to note the rebuttal presented by D.Y. Barrer of Rockville, Maryland to your December 1984 editorial. As an out-of-state visitor to our trout streams, he has made a better assessment of the effects of the Montana supreme court ruling to open all trout streams for recreational use than have many natives.

Perhaps the court's decision was meant to force the state legislature into action and we had better hope that it does see fit to do so. It is now common talk in coffee shops and tackle shops that "such and so of a landowner will not be able to keep me out now!" This attitude exists even in cases where the landowner interest is purely an effort to protect the resources that fly fishermen cherish.

An aspect of this decision that no one has addressed is how cattlemen will control livestock on landholdings crossing creek and river bottoms where the erection of barricades or fences, which is now forbidden, would interfere with whatever boats the so called recreationists want to put up or down that same stream? Who will pay for the special devices needed? It appears to this writer that all of us who use and enjoy wildlife and fishing are failing to see the contribution made by private landowners to these resources. Like Barrer, I am far from jubilant. All sportsmen better think this matter through carefully and support legislative efforts to overturn this decision.

ART AYLESWORTH
Ronan, Montana

The "legislative efforts" you refer to are of no legal significance in this case. Since this is a constitutional issue, the state legislature can do nothing to affect a change. Only a state constitutional congress has the legal power to amend the state constitution. THE EDITORS

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 46
DATE 03-08-85
BILL NO. H.B. 265

To the Senate Judiciary Committee, Montana Legislature, Helena, Mt.

I am Byron Grosfield from Big Timber, Mt. For 50 years I lived on ranches. The following 25 have been spent in a small town of about 1700 population. I've fished and hunted all my life and have canoed about 75 miles of the Yellowstone, 165 miles of the Missouri (in Montana) and paddled the headwaters of the Mississippi as well as a lake in Canada.

Because of these contacts and experiences I feel that I am well qualified to talk about the difference of opinions between the land owner and the recreationist alike.

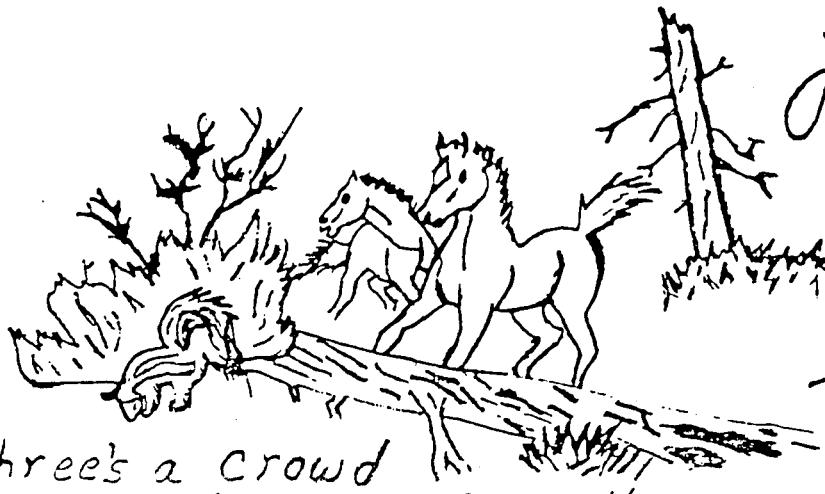
To date serious problems have been few and far between. However, if House Bill 265 is passed at its present reading, the ensuing complications will result in distrust, lack of cooperation, plus needless expense for both concerned parties.

If the bill is passed as it now stands, it will set a dangerous precedent--a precedent that can inhibit or prohibit the freedom of citizens everywhere. There is no doubt but that the rights of today's land owners would not be questioned if the Indians' rights to the bed of the Big Horn River had not been taken from them.

I support House Bill 265 if amended by Senate Bills 418, 421, and 224. Failing this, I heartily endorse killing this same bill in order that a greater number of people in the State of Montana can become more informed and knowledgeable by the next legislative session. It is of the utmost importance that a bill with such far-reaching consequences receive thoughtful and deliberate consideration. We need a bill that is palatable for the land owner and also reasonable for the recreationist.

Byron Grosfield

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 47
DATE 03 08 85
BILL NO. H.B. 265



The Hawley Mountain Guest Ranch

Three's a crowd

March 7/85

Senate Judiciary Committee;

I am opposing H.B. 265 as it will put me out of business. As a guest rancher most of our clients come to a private ranch in Montana to enjoy our great outdoors with some privacy. Once we lose the right to control that privacy, those of us in this business and the state of Montana will lose the economic benefits that the clients of such businesses have been bringing into the state.

As far as operating a ranch in general there are challenges enough so that one of the only rewards that keeps a rancher from giving up is the pride the rancher has in that land and his ability to have control over the land in the best interest of his livelihood.

H.B. 265 will take all this away and is a setback for the state of Montana.

In place of H.B 265 I am proposing the four small bills of SB 418, SB 421, SB 424, and SB 435.

Sincerely,
Robert W. Jarrett

Robert W. Jarrett
Box 4, McLeod, MT.

NAME: RALPH M. HOLMAN DATE: 3/8/85

ADDRESS: THE "33" RANCH - McLEOD, MONT. 59052

PHONE: 932-6338, 932-5928, 932-6588

REPRESENTING WHOM? SELF.

APPEARING ON WHICH PROPOSAL: H.B. 265

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

COMMENTS: Testimony Copies attached.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 49
DATE 03 08 85
BILL NO. H.B. 265

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 49
DATE 03-08-85
BILL NO. H.B. 265

March 7, 1985

Senator Joe Mazurek
Chairman
Senate Judiciary Committee
State Capitol
Helena, Montana 59620

Re: House Bill 265

Dear Chairman:

Back in the 70's a House Bill which stated "Stand in the middle of a stream and as far as the eye can see shall be open to public recreation" met a hard and fast defeat. H.B. 265 is but another attempt to accomplish the same results. The first step to obtain free and uncontrolled use of private property. I have heard a significant number of recreationists state; "We will go after the wildlife next," "Get as much as we can this time, the rest will follow," "We want unrestricted hunting too," etc. etc. If successful, God help the rancher-farmer.

H.B. 265 will open a Montana playground, not only to resident, it gives the key to our land to well over 200 million U. S. residents to indulge in free, unrestricted and unlimited water related recreation. Thousands of miles of additional rivers, creeks, trickles of water and even dry stream beds and thousands of miles of private property land corridors will become as public as a Chicago city street resulting in a multitude of landowner problems.

Most disheartening is the taking of private property from one and giving its use to another without due process and copensation, "a shocking reality."

Landowners will lose the right to control land he owns and the right to protect the stream, bank and corridor resource.

Taking will result in an overall loss of land value estimated by many to amount to between ten and fifty per cent and amounting to millions and quite possibly hundreds of millions of dollars of tax value property. "Streamside property is the most valuable" A severe blow to an already depressed agriculture economy.

Loss of land value will severely restrict, and possibly preclude, the ability of the farmer-rancher to obtain operating capitol loans. Will tax rolls reflect this depreciation of land value? Landowners will surely be entitled to and rightfully request a reduction of land taxes, another blow to our economy.

Streamside property now considered to be very valuable, will become a liability. What incentive will remain to own land that has become a detriment? All at a time when Montana searches desperately for revenue.

H.B. 265 in essence implies that landowners do not have the ability to manage and control and proposes to turn management over to the Department of Fish, Wildlife and Parks. Some landowners apparently agree and they should do so. The Department have for some time been soliciting landowners to participate in such a program currently in effect and I suggest those who desire this program contact the Department for voluntary turn over for public use. Try it on a two year trial basis. They don't need H.B. 265. Let those of us who have been gaurdians of the resource remain in control. We don't need H.B. 265 either.

The general public currently have free use of well over 30 million acres of public land and its waters. (well over 1/3 of Montana) H.B. 265 expands this decision to include thousands of miles of stream beds, banks and endless corridors through private property. A trickle of water a foot wide, running for ten miles through a ranch and choked with brush a half mile wide, even to the point of making the water inaccessible, will become a one half mile wide corridor for hunting birds, waterfoul, gophers and possibly Big game in addition to dragging a boat and providing access to a neighbors property or public lands. The brush that chokes a creek is a definite barrier as long as the creek or its bed is wide enough to put your foot in.

Free access sounds beautiful to some urban dwellers who have always wanted to fish that creek on Joe's place; the problem is that it also sounds good to California and like state residents where the resource was depleted years ago and the vast majority of inland (what little is left) is of planted fish. When the resident heads for his favorite hole on Joe's place there could well be several hundred ahead of him. If one thousand people decide to invade Joe's property for fishing, hunting or making mud balls. Men, women, children, cats and dogs, there is no protection for Joe who has lost control except for paying taxes and liability.

How long will it be before trout fingerlings that had a sanctuary on Joe's place, will be replaced by planted trout? I had a taste of planted streams during occasional visits to a construction job in California years ago. "Quite a comedy" No fish and the streams were jammed, the Department of Fish and Game under public pressure would plant streams, trucks would be followed to planting sites and dump fish in while a horde of adults and children were filling their sacks, a simple act with artificially fed trout. Two days later no fish. Will that be our tomorrow? Is Montana being taken over by Trout Unlimited, Audubon and recreationists from states where the resources were exploited to near elimination years ago?

Where will funding come from to implement the enormous additional burden placed on the Department of Fish, Wildlife and Parks and law enforcement agencies to enforce tresspass laws, to answer calls for help from landowners, to file charges, to plant hatchery trout, to build and operate hatcheries, to expand administrative personnel and office buildings, to employ additional wardens? The number of Game wardens are severely limited at this time and I have heard several complain of being severely restricted on time and mileage allowance. The resident of course will be faced with reduced limits, higher license fees (strongly opposed) possible drawings, etc. Remember all water related play and recreation (except fishing and hunting) is free, no license required, no identification and only a slight penalty, if any, for trespass.

There is little in the liability section to feel secure about. I have witnessed lawsuits where misconduct and negligence was successfully claimed because the owner of equipment, material or an excavation should have known that a child may be tempted to play on the equipment etc. and should have properly precluded entry to the area. If you are required to leave a tractor near a stream corridor or in it because of a breakdown and a child climbs on it and gets hurt or a child goes to pet a calf, or other animal, and is maimed or killed by the mother of such, you may well be liable and the recreationist could easily wind up becoming owner of your land. You may be required to fence around the corridor.

If the state wants our land for public use, let the state use due process, let the state supply landowner liability insurance to protect the landowner from the recreationist who will be using camp fires that could easily burn you out.

If the Supreme Court decision is ambiguous let them clarify it. It is their decision We can live with it until clarified, why can't the recreationist? Ask yourself why would the recreationist and the Coalition work so hard to get H.B. 265 passed if there wasn't enormous gain in it for them?

During the Coalition's lawsuit they were often quoted as stating they only wanted use of floatable streams, how quickly desires change. On or about January 26, 1985, Jerry Manley, President and Tom Bugni, Vice President and Secretary Treasurer of the Coalition for Stream Access sent out a letter threatening that if Big Game hunting is deleted from H.B. 265 the Coalition would have the bill killed. The March 1, 1985 issue of the Billings Gazette states the group have reconsidered its threat and quotes Tom Bugni; "We would not go so far as to kill the bill because of that issue" "We feel we have got too much to lose " unquote. That ladies and gentlemen proves our case that H.B. 265 gives away far more than the Supreme Court decision.

Ralph Holman, landowner, rancher
McLeod, Montana

(This sheet to be used by those testifying on a bill.)

NAME: BILL PHILLIPS DATE: 3-8-85

ADDRESS: 217 S. 8TH BOZEMAN MT

PHONE: OFFICE 586-5405 HOME 587-7506

REPRESENTING WHOM? SELF

APPEARING ON WHICH PROPOSAL: HB 265

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? #265

COMMENT: ALLOWING THE PUBLIC TO HAVE ACCESS TO MOST ALL WATERWAYS FOR GENERAL USE WITHOUT LANDOWNER PERMISSION GOES TOO FAR AND APPEARS TO BE LAND REFORM.

ALLOWING THE PUBLIC TO USE A BOAT IN A NAVIGABLE STREAM IS FAIR AND JUST. PLEASE, LETS NOT GO TOO FAR ON THIS ISSUE. PLEASE DON'T PASS #235

#418, 421, 424, 435 WILL DO THE JOB FINE.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 50
DATE 03 08 85
BILL NO. H.B. 265

We oppose HB265 for the following reasons:

The landowner will no longer have control of his land which has been taken without compensation. He will still have to pay taxes on the stream beds.

He cannot police his property. He, for the most part, has kept his land free of garbage and has been concerned for the beauty of the land. No other help is evident for patroling streams.

HB265 goes far beyond the Supreme Court ruling which allows public access to navigable streams. It was not intended to allow public use of small, fragile streams.

If passed, this bill will make it necessary for landowners to fence the stream banks to indicate to the public the high water marks.

If the state would condemn this land, then the landowner would be given something for his land and also relieved of responsibility and taxes on it. As the bill reads, the land will be taken from him by force.

Jean Parsons
Rupert Parsons

Box 85
Cascade, MT 59421

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 51
DATE 03 08 85
BILL NO. H.B. 265

(This sheet to be used by those testifying on a bill.)

NAME: Phil Rostad DATE: 3/8/85

ADDRESS: Martinsdale Mt

PHONE: 572-3351

REPRESENTING WHOM? Meagher Co Preservation Ass

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT: I oppose HB 265 and support the committee bill SB 414, 421, and 424 along with Senator Galt's Bill 435, because I do not want the legislature to create access Corridors for the public on every fly stream bed in the State.

Further I dont believe the public has a right to free passage around barriers.

For the record I am a member of the Montana Stockgrowers Assn.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 52
DATE 03 08 85
BILL NO. H.B. 265

SENATE JUDICIARY COMM
EXHIBIT NO. 53
DATE 03 08 85
BILL NO. H.B. 2(

TESTIMONY before the Senate Judiciary Committee, March 8, 1985, Helena, Montana, by Lorents Grosfield, cattle rancher from Big Timber, Montana.

Mr. Chairman, Members of the Committee:

I appear here today in opposition to HB 265 primarily because I believe that it is not a recreational access bill, but a land reform bill. An attempt has been made in this bill to greatly expand two specific Montana Supreme Court decisions involving two specific fact scenarios on two specific stream segments.

On the afternoon of December 7, 1984, in a presentation on the stream access issue to the Water Forum held here in Helena primarily for the benefit of incoming legislators, Chief Justice Frank Haswell made the following statement: "Don't overanalyze the cases out of the context of the specific facts."

In HB 265, we see reference to all-terrain vehicles, big game hunting, other hunting, duck blinds and other permanent structures, overnight camping, and non-water related pleasure activities. While these activities may be addressed differently on Class 1 and Class 2 waters, I submit to you that none of them were in the "context of the specific facts" of either of the cases.

In HB 265, we see reference to required means of portage, easements that are to be donated and constructed at the expense of landowners, as required by Conservation Districts. This is completely out of the "context of the specific facts" of the cases. The Court said the public could portage around barriers "in the least intrusive manner possible, avoiding damage to the adjacent owner's property and his rights". That is substantially different from saying that landowners must provide and pay for portage means. One wonders how requiring a landowner to provide portage means at his own expense can be compatible with a "least intrusive manner", especially one that "avoids damage to the adjacent owner's property"--- is not a man's pocketbook, property?

In HB 265, on page 2, lines 9-18, we see Class 1 waters defined as including waters that are capable of supporting commercial activities as defined by "published judicial opinion" or "within the meaning of the federal navigability test". Which federal navigability test, the test for title or the test for commerce? The test for commerce has been used in the federal Clean Water Act to involve all waters

of the United States for purposes of controlling pollution. This has been supported by "published judicial opinion". I have a list of 1304 streams in Montana east of the Continental Divide that meet this criterion for purposes of Army Corps of Engineers jurisdiction for purposes of commerce? One wonders what the point is of defining Class 2 streams--- are there any? I submit that it would be a short list. The Court repeatedly talked about waters "capable of recreational use". Obviously the Justices felt there was a third class of waters not so capable. At any rate, they were only talking about two specific stream segments that did meet the test of being "capable of recreational use".

Judge Haswell said, "Don't overanalyze the cases out of the context of the specific facts." Why should the Legislature go substantially beyond the Court in deteriorating the rights of property owners along streams, as it is being asked to do in HB 265?

MARCH 8, 1985

TESTIMONY before the ~~House~~ Senate Judiciary Committee, ~~January 22, 1985~~, Helena, Montana, by Lorents Grosfield, cattle rancher from Big Timber, Montana.

(This Testimony is still pertinent.)

Part 1: STREAM ACCESS--- A Landowner's Viewpoint Pages 1-5

Part 2: THE PUBLIC TRUST DOCTRINE Pages 6-8

Part 3: THE BILLS: HB 16, HB 265, and HB 275 Pages 9-end

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 53
DATE 03-08-85
BILL NO. H.B. 265

TESTIMONY before the House Judiciary Committee, January 22, 1985, Helena, Montana, by Lorents Grosfield, cattle rancher from Big Timber, Montana.

STREAM ACCESS---

A Landowners Viewpoint

Last hunting season, we hosted 863 hunters on our ranch. This number was approximately an average representation of the annual number of hunters we have hosted on our ranch over the last ten years. In addition we have hosted well over one hundred days annually for other recreational uses such as fishing, hiking, picnicing, and camping, not to mention several hundred days of horseback riding. In other words, over the past ten years, we have hosted well over 10,000 total recreation days on our ranch, NONE of which were charged for. On the contrary, if anything, I have donated a tremendous amount of time and energy (not to mention money) toward the recreating public--- consider that if each recreation day demands only 5 minutes of my time, I have donated over 50,000 minutes or 833 hours or 104 working days or nearly one-half of an average working year to the recreating public (and let me tell you, I rarely get off with only 5 minutes by the time I've explained where to go, where not to go, where the deer are, where the other hunters are, where the "big ones" are, where the cattle are, and so on). In fact when you think about it, what I've done, and what most ranchers do, is to subsidize the recreating public to the extent of the time and expense it takes me to accomodate that public.

I don't remember any year when I was so glad that hunting season was finally over. Not that we had so many more problems than usual or that there were so many more hunters than usual. I suppose that like most people, I become more conscious of my time as I get older and realize that I have less and less of it left, and one of the questions I have to ask myself is "Do I really want to continue to donate the tremendous amounts of time that it takes to accomodate to a hunting season?" This seems especially pertinent in light of the kind of thanks that I get as an agricultural landowner from my state's government in the form of things such as the stream access court decisions, based as they were on the Montana Department of Fish, Wildlife, and Park's proposal to grant the public an easement for recreational use of all the state's waters (since our constitution says that all waters belong to the state for the beneficial use of its people).

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 53
DATE 03-08-85
BILL NO. H.B. 265

The point is that now some recreational users would have you believe that unless they are guaranteed the full extent of the easement granted them by the court, they have nothing. This is simply not true. It is essential to remember that, statewide, recreational access is widely available on private land when asked for--- the important ingredient is the asking or otherwise negotiating for access permission. To the landowner this is an essential private property right that is vital to efficient management. To the recreational user it is a matter of common courtesy as well as, in many cases, of law. Of course there are those social reformers who feel they should not have to get permission to use private property. Some even believe there shouldn't be any private property and I won't even pretend to try to satisfy them. But, although there are exceptions, most people respect private property and appreciate and enjoy the privilege to use it, and they are careful. And every year I get letters of thanks from all over Montana and many other states--- this year one hunter wrote, "I just wanted you to know how much I appreciated being able to hunt this year on your property. Your hospitality makes me glad I live in Montana." That represents a substantially different attitude from the one that my state's government has been taking.

Are landowners concerned about the stream access court decisions? You bet they are. Landowners across the state are deeply concerned about the kind of politics that these stream access decisions represent--- the kind of politics that seeks to confiscate private property. They're concerned about the increased expenses, worries, and liability exposure that they face because of being forced to accomodate to uncontrolled recreational use of portions of their lands. And they're worried about those who will take advantage of these decisions for their own purposes.

For example, in counties all over Montana, there are farms and ranches that were settled some generations ago, and the farmsteads--- buildings, corrals, etc.--- were built near the water and the protection from the elements that is provided by riparian ecosystems. Along some rivers and streams, many of these ranching families are now exposed to duck hunters who float down these streams and blast away, without regard, in many cases, to their proximity to farmsteads or farming or ranching active worksites. Granted, in many cases these hunters are not purposefully shooting in the vicinity of these circumstances--- because of the nature of the riparian environment, it is often difficult to see out from the stream area well enough to determine such circumstances, and not having had to secure permission

to be on these portions of private land a hunter wouldn't necessarily know when he was near a farmstead. But the point is that there now is apparently nothing the landowner can do to control these situations. Some county attorneys have even gone so far as to tell landowners faced with this kind of predicament that there's nothing they can do, not even if the hunters send their dogs beyond the high water mark to retrieve game. Picture yourself out in your corrals early some cold morning doing some chore when suddenly you are confronted with a deafening "Blam, blam, blam" that shatters the morning--- would you be pleased with that situation? This landowner shudders to think of having to put up with such a problem--- I'm sorry to say that I'm glad we don't have any ducks!

From a landowner's perspective, the primary issue here is not one of recreational opportunity but of private property and the confiscation of private property rights. Now some people will try to tell you that there has been no confiscation of rights because landowners have never had these rights to begin with--- that is simply not true. Not only have landowners actively controlled access on stream portions of their property for generations, but the public has recognized, respected, and abided by the exercise of that control; in other words, historically there certainly has been a right, a widely recognized right.

At the base of the access to private lands issue is the distinction between "right" and "privilege", that is, should recreational access on private land be a "right"? And is it in the best interests of landowner-sportsmen relations, of protection of riparian ecosystems, and of the agricultural economy, that the public should be able go as it pleases upon private land and do what it pleases regardless of the interests of the landowner? Should the Department of Fish, Wildlife, and Parks continue to practice the politics of confrontation and side with forced access interests in pursuing access as a matter of public right as it did in the stream access cases? Or should it rather pursue access as a matter of privilege as has recently been exemplified by their "ASK FIRST to hunt and fish on private land" bumper stickers. Landowners across Montana see the latter effort as a giant step in the right direction. Part of the question should concern whether it is even necessary or consistent with our Montana heritage to pursue access as a matter of right in a sparsely populated state as large as Montana when nearly 40% of the land in our state is already publically owned. We already have, by far, one of the highest per capita ratios of public land to population.

I said the primary aspect of the stream access issue is private property rights. Another aspect extremely important to agriculture involves water rights. In light of the use of the public trust doctrine in the recent Mono Lake case in California where long-established water rights were lost in the name of improvement of a riparian ecosystem, the judicial introduction of the public trust doctrine in Montana in the stream access cases serves as a precedent that might be used to jeopardize our entire appropriation water rights system. In fact, some lawyers are recommending that very thing--- even the Assistant Dean of our University of Montana Law School recognizes this as, at the very least, a real possibility.

And then we come to the recreational aspect, which, practically speaking, is really a resource management aspect. The bottom line question here that the Legislature should concern itself with goes something like this: "Of the total stream mileage in Montana, under what conditions and during which seasons should what stretches of which streams be available to the public for what forms of recreation and other uses, and who should control it?" Now that may sound like a mouthful, but each segment is very important when you consider the extreme broadness of these court decisions. For example, consider the duck hunting referred to above, including the use of dogs; consider the use of three-wheelers which is just beginning in popularity as a recreational vehicle (if you'll stop by any three-wheeler dealer, you'll note that the entire industry is engaged in an advertising campaign promoting the use of three-wheelers on and along waterways--- these companies are not stupid--- they're not spending their advertising dollars on something they think won't sell); consider the many conflicts that will arise between the various recreational users (for example, the Director of the Department of Fish, Wildlife, and Parks has stated that there have already been instances of bank fishermen throwing rocks at floating fishermen on the Madison River--- inject, if you will a three-wheeler into that situation); consider the potential effects on some of the more fragile fisheries or ecosystems. The real question here is "Who is going to control it?" The point is that <u>the extreme broadness of these court decisions simply must be trimmed down.</u>

Most landowners are realist enough to know that they are never going to recover some of what's been lost by virtue of these court decisions. For example, they are just going to have to absorb the resulting property devaluation that goes along with the granting of any easment on property.

They realize that they are not going to stop the steadily increasing public recreational demands, especially involving water-based recreation. They accept that the public does have some constitutional rights to the recreational use of water. But landowners are not about to just lie down and die and accept without question the extreme broadness of what's been lost here. Those recreational users who may well have had legitimate problems and were seeking forced access to two very specific sets of circumstances on two specific stream segments would do well to admit that they got far more than they ever expected. And in the spirit of attempting to improve landowner-sportsmen relations in general while remembering that they (floaters and fishermen) are not the only recreational users that these court decisions have opened Montana streams up to, these people should be working with the landowner community and the Department of Fish, Wildlife, and Parks to try to effectively deal with some of the unacceptable problems, both present and future, that these decisions have perpetrated upon landowners, and upon the riparian resource.

One other item of significant interest serves to illustrate the intensity of concern over this issue by landowners. Last August, a two-week protest closure of private land was organized in Sweet Grass County, the protest being against the effects of the stream access court decisions on landowners. The organizers decided at the outset that if they couldn't get at least 50-60% of the total landowners in the county to participate, they would not proceed with the closure. Much to their surprise after they had approached nearly all rural landowners in the county, they found that they had over a 99% participation and agreement. This means that Republicans, Democrats, Independents, and non-politically active, as well as farmers, ranchers, cabin owners, hobby farmers, cattlemen, sheepmen, and so on--- a broad spectrum of society--- all felt strongly enough about this issue that they agreed to participate in an active protest demonstration. This is especially powerful when you consider that most of these people had probably never before participated in an active protest agreement that actually required them to take overt action, namely to deny access for two weeks to all comers, and to explain why.

It remains the Legislature's responsibility to legislate, and to address this issue fairly and decisively, consistent with our constitution and laws. I submit that this can be done while respecting the rights of BOTH landowners and recreational users.

TESTIMONY before the House Judiciary Committee, January 22, 1985, Helena, Montana, by Lorents Grosfield, cattle rancher from Big Timber, Montana.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 53
DATE 03-08-85
BILL NO. H.B. 265

THE PUBLIC TRUST DOCTRINE

Common sense tells me that the implications of the Montana Supreme Court stream access decisions are far-reaching and go well beyond recreational stream access. Evidently for the first time in Montana history, our Court has recognized what is called the "public trust doctrine". Until the past few months, most Montanans hadn't even heard of the public trust doctrine and now all of a sudden we find ourselves saddled with it. Although it is recognized as a legal mandate, it is not the result of any act of the Legislature even though the Montana Constitution says, "The legislative power is vested in a legislature consisting of a senate and a house of representatives." Our Constitution further states, "The power of the government of this state is divided into three distinct branches--- legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others...." Common sense tells me that a reasonable question to ask is, "Shouldn't the Legislature have some say in this matter?" We are talking about something that could well determine the direction that Montana law and litigation will take from now on, one that may be quite different from directions the Legislature has used in the past. And not just on recreational issues--- once the public trust doctrine is recognized in a state, as I understand it, it can apply to <u>all</u> water issues, and some even advocate that it be used beyond water issues on any natural resource or environment issue. For example, John E. Thorson, in a paper presented to the Montana Select Water Marketing Committee recently, states: "Historically, the doctrine has been applied to protect public uses and access to and upon navigable waters.... These roots ... should not mislead policymakers as to how the essential purpose of the principle may be applied in contemporary situations ... to other natural resources." What "OTHER NATURAL RESOURCES"? I've heard ranchers worry that if the Supreme Court can say that since the state owns the water, the public therefore has the right to follow the paths that the water takes, it can use the same logic to say that since the state owns the wildlife, the public therefore has the right to follow the paths that the wildlife takes. Is this the kind of application of the public trust doctrine that this advocate is referring to?

The origins of the public trust doctrine somehow predate our Montana Constitution. Therefore it can be and has been used to justify decisions that would probably not be possible under the Constitution alone--- it almost looks as if it is a tool to be used to achieve a desired result that is otherwise unconstitutional. The real point that I am trying to make here is that this issue is much too important

and far-reaching to be instituted in Montana in such a manner. The question of adopting the public trust doctrine in Montana needs the understanding, participation, and scrutiny of the people through the legislative process. Let me give you just a couple of examples of the kinds of things that can be done with this doctrine and I think you'll agree.

First, by using the public trust doctrine, the Montana stream access decisions deprive landowners of the ability to control who uses portions of their lands, namely all those portions within the ordinary high water marks of any surface waters and those portions outside the ordinary high water mark adjacent to any barrier in the water. Never mind that traditionally landowners have exercised these rights and that the public has abided by that exercise. Never mind that many properties (such as retirement homes along streams) have been paid dearly for precisely because of these rights. Never mind the taxes, the patents, or the investments. It's very hard for the layman to understand the Court's statement that there has not been an unconstitutional "taking" when the justification for the taking lies in a doctrine which is not even spelled out in the constitution, much less by the Legislature. The most distinctive thing about private property that distinguishes it from public property is the right to exclude others. Without this right, property can hardly be called "private" in any traditional sense. It is this right and the opportunity to achieve it that is the basis of an individualist society. Realizing the resultant challenges is the incentive that makes free enterprise work, and it is one of the most important attributes that has made this country perhaps the best country on earth in which to live. If the public trust doctrine is used as a tool to assist the continuation of a free individualistic society that is one thing, but if it is used as an instrument of social change, an instrument that would deprive individuals of their rights in favor of some centralized social values, then that is quite another thing. The same author quoted above, John Thorson, wrote further that "In both recent (Montana stream access) decisions, the Court has carefully and explicitly pointed out that its recognition of the public trust doctrine does not thereby grant public access over private property to reach state-owned waters used for recreational purposes. THIS POSITION RUNS COUNTER TO THE GENERAL TREND OF PUBLIC TRUST CASES TO ALLOW SUCH REASONABLE ACCESS." (EMPHASIS ADDED.) Can you expect me as a property owner not to be scared to death at the prospect of such a radical departure from traditional constitutional values?

The second example of what can be done with the public trust doctrine is that it can be used to invalidate prior water rights. One of the places this has been done

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is in California just last year whem the California Supreme Court determined in the Mono Lake case that "the public trust doctrine applies to constrain ... the extraction of water that destroys navigation and other public interests," including scenic beauty and recreational and ecological values. This wasn't just the case of some rancher losing a water right. This was a 1940 water right held by the city of Los Angeles for domestic purposes in which the city over the years had invested millions of dollars and come to depend on for a source of municipal water. The reason for the lawsuit was essentially to attempt to guarantee a minimum instream flow in a basin that, from an environmental viewpoint, was over-appropriated, in order to protect and perpetuate riparian habitat for birds and other wildlife. I submit to you that if the public trust doctrine can be used to divest a city of prior rights for drinking water, then rural agricultural water rights are tenuous indeed. Unless the Legislature gets a handle on this, can you tell me that the same tactic won't be used in Montana, especially in fully- or over-appropriated streams? Margery H. Brown, the Associate Dean of the University of Montana Law School, recently wrote a paper for the Montana Select Water Marketing Committee entitled "... The Doctrine Is Out There Awaiting Recognition." In it she says, "It is clear that ... the Montana Supreme Court (in the stream access cases) has set the stage for both legislative deliberations and additional judicial decisions on ... taking the public trust into account in the planning and allocation of water resources, and reconsidering allocation decisions on the basis of their effect on the public trust." "RECONSIDERING!" What is she advocating when she uses the word "reconsidering"? John Thorson uses the same word in his paper when he says, "Water rights ... can and should be reconsidered on a public interest basis." Further he says, "The state as public trustee, has a continuing duty to protect the people's common heritage of streams and lakes through continuing administration of the trust--- INCLUDING POSSIBLE REVOCATION OF EXISTING RIGHTS WITHOUT COMPENSATION." (EMPHASIS ADDED.) Is this what we agricultural property owners in Montana have to look forward to? Is this the legacy that our Montana Legislature is going to leave for our children?

Left unchecked, a grant of public access to private property along streams is likely only the beginning of public trust doctrine application in Montana. I SUBMIT TO YOU THAT THIS SHOULD BE THE BUSINESS OF THE LEGISLATURE, AND NOT OF THE COURTS. It is up to the Legislature to determine the policies that will decide the directions and quality of our heritage. Are you ready to condone such a radical departure from traditional respect and constitutional support for private property rights?

TESTIMONY before the House Judiciary Committee, 22, 1985, Helena, Montana, by Lorents Grosfield rancher from Big Timber, Montana.

THE BILLS: HB16, HB 265, and HB 275

I am one of those landowners who was very active in the interim and attended most of the interim subcommittee meetings as well as a number of other meetings on the issue. I congradulate the subcommittee and its staff on an excellent research and drafting effort as well as on making themselves very available to the public during the interim. The result, HB 16, is well-thought-out, well-drafted, simple and straightforward, and deals with nearly all the important aspects of the issue. Although it may need some amendments, it is an excellent effort and starting point.

I don't think anyone can deny that landowners across Montana have lost a great deal in the Supreme Court stream access decisions, decisions shich dramatically expanded the determinations of two specific cases on two specific stream segments to cover all Montana landowners. It's hard to argue that these decisions were n policy determinations--- policy that affects all Montana. It needs to be noted that in the past it has been the responsibility of the Legislature and not of the courts to determine state policy.

At any rate, considering what course the Legislature should now take on the stream access issue, it should be helpful to keep conscious of the question "How much of the Supreme Court decision should be codified and why, and is there any good reason to codify things that go further than the decisions go with regards to expanding the rights of the public over the rights of landowners?" This is really the bottom line of the issue before you this session.

Personally, I maintain there is no essential reason to codify the more extre areas of the Supreme Court decisions--- they are presently the law anyway and cod cation would be largely superfluous besides which the final language worked out in the legislative process would likely not be any simpler or --- to understand th

the Court's language. I am referring especially to the portaging around barriers issue.

How do the three bills compare as far as codifying the decisions, or going beyond codifying? In general, HB 16 codifies only the most basic ingredients and language. HB 265 codifies virtually all the decision and goes much further than the Court in some areas. HB 275 attempts to "fix" HB 265 from a property rights and resource quality viewpoint, but still goes farther than the decisions in some areas. A bill drafting request by Rep. Orval Ellison would codify only the bare essentials, less than HB 16, although it goes much further than HB 16 in some areas towards meeting the needs of recreational users and the resource itself. I would like to compare some specific areas by subject matter and point out some problem areas.

1. WHAT WATERS ARE AVAILABLE FOR PUBLIC USE? The problem with "classes" of waters is in determining which class a stream fits.

HB 16 solves this question by essentially saying that all floatable waters are available to the public for that use, and most other uses are dependent on who owns the streambed and whether permission is granted.

HB 265 solves it by defining Class 1 water so broadly that it includes virtually all waters capable of recreation such that the public can essentially use most all waters for most everything. (I submit that very few waters "capable of recreational use" would not be "capable of supporting commercial activity" in the form of guided or outfitted use. Note that the language does not say "have been used for"--- it says "are capable of".)

HB 275 injects a class of waters where the landowner retains control in order to protect the resource. The concept of protecting the resource and maintaining private control on smaller streams is laudable and I support it, but the method here proposed is complex and cumbersome.

Rep. Ellison's draft solves it much like HB 16 except that all waters are available to the public for both floating and fishing and uses incidental thereto. Other uses would depend on ownership and permission.

It might be helpful to note that Professor Stone, in his amicus brief to the Court, recommended that the court consider those waters capable of "significant and substantial" use by the public.

2. PORTAGE AND BARRIERS

All the bills define barriers is such broad terms that they may include such things as long stretches of shallow waters or of rapids, as well as deep holes. Consider a stream running bank full during high water that's high enough so as not to be wadeable--- Is a portage "buffer zone" easement above the high water mark for the length of the stream (on both sides) established?

Rep. Ellison's draft leaves it up to the Supreme Court language which is simple and straightforward: "portage around barriers in the water in the least intrusive manner possible". This is the law now. Why codify it?

3. PORTAGE ROUTES

HB 16 says only "in the least intrusive manner".

HB 265 and 275 go much further and include provision for conservation district supervisors to require a specific route at the landowner's expense (or public expense in the case of natural barriers). Aside from the problems that I have with this as a conservation district supervisor, this goes substantially beyond the Supreme Court decisions which say that the public can portage--- they do not say that a landowner must provide (donate) a means and route of portage.

4. MANAGEMENT

HB 16 doesn't really address management. One would assume that it is up to either the public or private landowner, as the case may be.

HB 265 only talks about management in terms of the conservation districts determining and requiring where and how a means of portage be established.

HB 275 uses that same idea plus it gives the Dept. of Natural Resources some rule-making authority for distinguishing between Classes of waters. This would be administrated and somehow, presumably, adjudicated by conservation districts.

Rep. Ellison's draft gives the Dept. of Fish, Wildlife, and Parks same authority wherever the resource is threatened from overuse.

5. LIABILITY

HB 16 relieves the landowner of liability if he doesn't charge for recreational use. Liability to a floater where the landowner charges for, say, hunting or some other use, is unclear.

HB 265 and 275 contain the same provision that relieves landowners of liability and supervisors of liability from the recreational user (but not from the landowner).

Rep. Ellison's draft relieves the landowner from liability in any case (except where willful or wanton misconduct can be shown--- all drafts have this language).

6. PRESCRIPTIVE EASEMENT

HB 16 and Rep. Ellison's draft both provide that a prescriptive easement cannot be acquired through recreational use of "land or water".

HB 265 and 275 both say only that it can't be acquired through use of water on the bed and banks. Given the Supreme Court decisions, I'm not sure where this language gives the landowner any protection at all.

7. TITLE TO LANDS UNDER STREAMS

Under Montana law, the landowner owns to the low water mark or the thread of a stream depending on whether the stream meets the federal navigability for title test, subject to a few easements such as the angling easement for licensed

fishermen on navigable streams.

HB 265, by using identical wording under Section 1, subsection 2c and 3d, dangerously close to equating the federal test to a commercial use for recreational activities test which would affect all Class 1 waters, which, as I've noted, could be most waters of the state. In other words, HB 265 may result in attempts to gain state ownership of title to lands under most waters--- this also clearly goes substantially beyond the Supreme Court decisions.

8. ORDINARY HIGH WATER MARK

HB 16 and 275 use the same definition. I feel the use of the word "crop" will be misleading.

HB 265 substantially changes the definition by using the word "diminished" terrestrial vegetation instead of "lack of". Landowners and recreational users alike need a simple, readily understandable and identifiable definition.

Rep. Ellison's draft uses the conservation district's definition that has been successfully used for nearly 10 years under the Streambed Preservation Act. It is much simpler and more straightforward.

IN SUMMARY, I find both HB 265 and HB 275 unacceptable because I believe they both codify too much of the Supreme Court decisions. In addition, they both go substantially beyond the decisions in some areas, and are both unnecessarily complex and cumbersome. HB 265 especially does little to protect landowner rights.

Although HB 16 is a result of a remarkable study and research effort by the interim committee and staff, and is simple and straightforward in its language, essentially addressing all the vital issues, I feel it needs changes in some areas, especially the areas of fishing accessibility and resource protection. I would urge that the Committee would look closely at Rep. Ellison's draft by itself or as a reasonable means of amending HB 16, and would recommend tabling both HB 265 and HB 275.

NAME: CHARLES W. D'AUTREMONT DATE: 8 MAR 85

ADDRESS: JOBE CREEK RANCH, BOX 30, ALDER, MT 59710

PHONE: (406) 842-5561

REPRESENTING WHOM? SELF

APPEARING ON WHICH PROPOSAL: H.B. 265

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

COMMENTS: MY PROPERTY'S VALUE IS DIRECTLY PROPORTIONAL TO ITS PRIVATE RIVER RIGHTS. WITHOUT SAME THE VALUE OF THE LAND IS NEGLIGABLE.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
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d'

IN 1978, I PURCHASED 275 ACRES OF LAND IN MADISON COUNTY, MT, LOCATED 25 MILES SOUTH OF ALDER, WITHIN THE BOUNDRIES OF WHICH LIES 1½ MILES OF THE RUBY RIVER.

I PURCHASED THIS LAND, AT SUCH GREAT REMOVE FROM THE AMENITIES OF CIVILIZATION, SUCH AS ARE ENJOYED BY THE MAJORITY IN THIS COUNTRY, BECAUSE I SOUGHT FOR MYSELF AND MY FAMILY: 1. PRIVACY, 2. NATURAL BEAUTY, 3. A PATRIMONY FOR MY CHILDREN, IN THE FORM OF THE ABOVE, AS WELL AS A LOCATION FOR THEM IN WHICH THEY COULD ENJOY A SENSE OF CONTINUITY (AN EXCEEDINGLY SCARCE RESOURCE IN THIS COUNTRY), AND 4. A RIVER TO MANAGE, CONSERVE AND ENJOY WITH FAMILY AND FRIENDS.

IN SEARCHING FOR AND OBTAINING THIS LAND, I EXPENDED CONSIDERABLE TIME, EFFORT AND MONEY BECAUSE I REALIZED HOW RARE WHOSE THINGS I SOUGHT WERE BECOMING, NOT ONLY IN THIS COUNTRY, BUT IN THE WORLD.

MY AWARENESS WAS NOT ACADEMIC, RATHER BASED ON FIRST HAND EXPERIENCE. AT THE AGE OF FOURTEEN, I FOUND MY FIRST EMPLOYMENT AS A FISHING GUIDE ON THE BRULE RIVER OF WISCONSIN. IN SUBSEQUENT YEARS, I CONTINUED GUIDING AND AFTER GRADUATE STUDIES IN WATER RESOURCE MANAGEMENT AT THE UNIVERSITY OF WISCONSIN, I ESTABLISHED A COMMERCIAL RIVER RUNNING COMPANY, OPERATING FLOAT TRIPS ON THE GREEN, THE COLORADO, AND THE SAN JUAN RIVERS OF UTAH, AND THE SNAKE RIVER IN WYOMING. DURING THIS PERIOD I OPERATED UNDER PERMITS FROM THE B.L.M., THE FOREST SERVICE, THE NATIONAL PARK SERVICE AND THE STATES OF UTAH AND WYOMING. BETWEEN PERIODS OF COMMERCIAL GUIDING, I HAVE FISHED AND RUN RIVERS IN CANADA, THE U.S., MEXICO AND SOUTH AMERICA.

DURING A LIFETIME OF GUIDING, FISHING AND RIVER RUNNING, I HAVE OBSERVED THAT THE PUBLIC, WITHOUT OWNERSHIP RESPONSIBILITIES, AND EVEN UNDER THE TIGHTEST OF GOVERNMENT CONTROL (SUCH AS IN THE GRAND CANYON), RARELY, IF EVER, APPROACH THE RIVER RESOURCE WITH THE SAME CONCERN AS THE PRIVATE LANDOWNER.

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IN POINT OF FACT, MUCH OF MY TIME ON RIVER HAS BEEN SPENT ACQUIRING A LARGE, IF TEMPORARY, COLLECTION OF BEER CANS, TOILET TAMPAX, DISPOSABLE DIAPERS AND OTHER GARBAGE. I HAVE ALSO SPENT CONSIDERABLE TIME TRYING TO ERADICATE SPRAY PAINTED AND CARVED INITIALS AND NAMES FROM PLACES OF SUCH BEAUTY THAT THEY SHOULD HAVE BEEN NATIONAL SHRINES.

ADDITIONALLY, I HAVE OBSERVED THAT WHERE THE PUBLIC HAS BEEN ENCOURAGED BY STATE AGENCIES TO FLOAT THROUGH PRIVATE LAND, THAT LAND INVARIABLY SUFFERS. I HAVE SEEN SCREEN HOUSES AND COOK SHEDS DESTROYED, SHELTERED SPRINGS RUINED, ARTIFACTS AND HISTORICAL RELICS STOLEN.

ON PUBLIC LAND I HAVE WATCHED THE DEFACEMENT AND DESTRUCTION OF ARCHEOLOGICAL RUINS, SUPPOSEDLY UNDER THE PROTECTION OF THE FEDERAL GOVERNMENT.

IN TRUTH, WHEN EVERYONE HAS FREE ACCESS TO PROPERTY, NO ONE WILL ASSUME THE RESPONSIBILITY FOR SAME.

THE BEST EXPLANATION OF THIS IS FOUND IN BARRY COMMONER ARTICLE, "THE TRAGEDY OF THE COMMONS."

HOUSE BILL 265 POSES A DIRECT THREAT NOT ONLY TO THE ENVIRONMENT IN GENERAL, BUT TO MY ENVIRONMENT AND THEREFORE MY CONTINUED RESIDENCE IN MONTANA.

IF H.B. 265 PASSES THE SENATE, MY PRIVACY WILL BE DESTROYED, IN AS MUCH AS THE RIVER FLOWS THROUGH MY FRONT YARD.

I WILL SUFFER A DIRECT LOSS OF INCOME, SINCE THE PUBLIC, IN VERY LIMITED NUMBERS, IS PERMITTED TO FISH ON MY PROPERTY FOR A MODEST FEE,* (FACT: UNDER MY MANAGEMENT FISHING QUALITY HAS IMPROVED ON THE STREAM TO SUCH AN EXTENT THAT PEOPLE BOOK RESERVATIONS MONTHS IN ADVANCE FOR THE PRIVILEGE OF CATCH AND RELEASE FLYFISHING.

THE INVESTMENT VALUE OF MY LAND WILL PLUNGE, AS THE PROPERTY IS ENTIRELY RECREATIONAL. IT HAS NOT BEEN AN ECONOMICALLY SELF SUFFICIENT AGRICULTURAL UNIT SINCE THE 1930's. ITS PRIMARY VALUE IS AS A PRIVATE FISHERY.

ENVIRONMENTALLY, I WILL SUFFER, AS BOTH THE STREAM BANK AND THE FISHERY WILL BE DEGRADED. IT IS PRESUMPTUOUS OF THE MONTANA FISH AND GAME DEPARTMENT TO SEEK MORE LAND AND ACCESS WHEN THEIR LIMITED FINANCES AND MANPOWER ALREADY PRECLUDE ADEQUATE CONTROL OF LANDS AND WATERS CURRENTLY MANAGED.

ULTIMATELY, PASSAGE OF H.B. 265 WILL ROB MY CHILDREN OF THE VERY CONTINUITY I SOUGHT FOR THEM, FOR IF PASSED I SHALL PROMPTLY SELL THE LAND, ACCEPTING WHATEVER LOSS, AND LEAVE THE STATE. ALL CONSEQUENCES TO MY CHILDREN, I WILL LAY ON THE HEADS OF THOSE RESPONSIBLE.

LEGALLY, I BELIEVE H.B. 265 TO BE ON VERY SHAKY GROUND, IN THAT IT SEEKS TO TAKE LAND WITHOUT JUST COMPENSATION. ADDITIONALLY IT SETS DANGEROUS PRECEDENT BY PLACING LUXURY OVER BASIC CONSTITUTIONAL SAFEGUARDS, FOR INDEED RECREATION IS A LUXURY, WHEREAS PRIVATE PROPERTY HAS BEEN CONSTITUTIONALLY PROTECTED SINCE THE BIRTH OF THIS COUNTRY.

FINALLY, H.B. 265 IS UNNECESSARY AS WELL AS ENVIRONMENTALLY UNSOUND, IN AS MUCH AS EXTENSIVE PUBLIC LAND AND ACCESS ALREADY EXISTS, BEYOND THE MANAGEMENT CAPABILITIES OF THE RESPONSIBLE AGENCIES. (THE MANAGEMENT SHORTAGE WILL BE BORN OUT BY ANY HONEST AGENCY EMPLOYEE ACTIVELY INVOLVED IN THE FIELD.)

GOVERNMENT'S OBLIGATION IS NOT ONLY TO SEEK THE GREATEST GOOD FOR THE GREATEST NUMBER, BUT ALSO TO PROTECT THE RIGHTS OF MINORITIES. THE LATTER MAY BE MORE IMPORTANT FOR ULTIMATELY WE ARE ALL MINORITIES.

I OPPOSE PASSAGE OF H.B. 265 AND SUPPORT S.B.s 418, 421, 424+.

RESPECTFULLY,

CHARLES W. D'AUTREMONT

JOBE CREEK RANCH, BOX 30, ALDER, MT 5971[illegible]

NAME: Bud Pile DATE: 8 Mar 85

ADDRESS: Grey Cliff, Mt.

PHONE: 932-6595

REPRESENTING WHOM? Ranchers

APPEARING ON WHICH PROPOSAL: H.B. 265

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

COMMENTS: I am very opposed to this bill- it expands the Supreme Court ruling by definition of surface water & portages. The four small bills you have already passed accomplish our needs much better.

Thank you

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 55
DATE 03 08 85
BILL NO. H.B. 265

(This sheet to be used by those testifying on a bill.)

NAME: Mrs. Arch Allen DATE: 3/8/85

ADDRESS: FA Ranch Box 868 Livingston, Mt. 59047

PHONE: 333-4315

REPRESENTING WHOM? Self

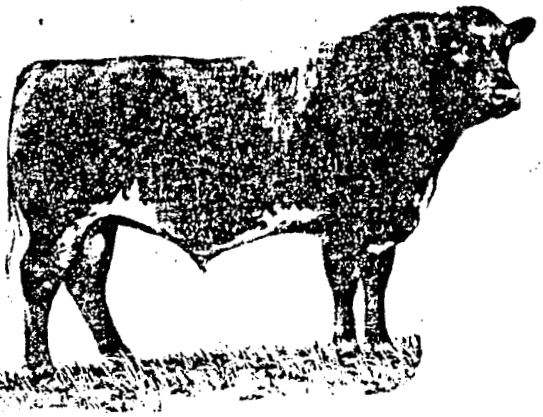
APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT: attached testimony

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 56
DATE 03 08 85
BILL NO. H.B. 265



FA RANCH
BOX 868 • LIVINGSTON, MONTANA 59047

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 56
DATE 03-08-85
BILL NO. H.B. 265

HB 265

Mr. Chairman, members of the Committee -- I am Mrs. Arch Allen of Livingston speaking for myself and for my husband. We have a mountain valley ranch with a stream running down the middle of it. The land is a patented homestead from the United States Government, dated 1892, just three years after Montana became a state. The stream bed and banks are included in the metes and bounds survey.

In 1977 this stream , Mill Creek, was determined non-navigable by the Army Corps of Engineers. The above criteria would indicate that we are secure in our property rights of the land beneath the water as well as adjacent to it.

In the 43rd Legislative Assembly in January 1973, the first threat to privately held land with water flowing over it became areality in HB 133 "An act to establish a statewide System for Designation and Management of Wild, Scenic and Recreational Waterways." This reserved an easement of ¼ mile from the bank on each side of the river and its tributaries.

The 44th Legislature in 1975 introduced HB 59, "An Act authorizing the Board of Natural Resources and Conservation to administer a system of wild, scenic, and recreational river areas". This bill was to establish recreational river areas (including tributaries) of any water course in the State with

more

adjacent lands, which possess water conservation, scenic, fish, wildlife, historic, or outdoor recreation values which should be preserved. It did not include any lands more than 1,000 ft. from normal water lines of the water course. It provided for Federal assistance to acquire lands andscenic easements.

And now in 1985 we have HB 265 in the 49th Legislature, a far more sophisticated detailed piece of legislation but with the same determination "Private Property Is A Public Resource." "All surface waters (the water body, its bed and its banks) that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters." There is no mention of the taking of taking private property for public use and just compensation as there was in the previousbills. This is a bold land grab.

The water belongs to the people. The Montana Constitution so states.

MCA Section 70-16-201 provides: "Except where the grant under which land is held indicates a different intent, the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low water mark. When it borders upon any other water, the owner takes to the middle of the lake or stream."

HB 265 draws up guide lines and trys to clarify the Supreme Court decisions on the Curran and Hildreth cases.

The problem is with the Supreme Court decisions if left intact by the Legislative Assembly.

This action by the Supreme Court destroys the checks and balances of our form of government. These decisions

more

ignore Article 5 and Article 14 of the United States constitution, the Montana Code of Laws and have rendered decisions that make one man's pleasure an economic hardship on another by destroying land values.

I have spoken against HB 265 because to accept it is to endorse and codify into law the Supreme Court decisions.

Thank you.

Mrs. Archie Allen

TESTIMONY RE HOUSE BILL 265

I represent the Boulder Valley Association, an affiliate of the agriculturally based Northern Plains Resource Council.

We are opposed to HB 265, and recommend that it be killed.

We are not opposed to floating on the larger, historically used rivers in Monana.

The definition of "high water mark" in HB 265 is much too broad and vague. We feel the definition in Senate Bill 418 should be used.

We are particularly upset about the inclusion of the rights to portage around natural barriers because this right would vastly increase the recreational capabilities of most streams in the state. This portage provision expands the permissiveness of the Montana Supreme Court decisions. By portaging through privately owned lands the public is effectively gaining an easement through private property. My dictionary defines easement as:

> "an interest in land owned by another that entitles its holder to a specific limited use or enjoyment".

Furthermore, Section 70-16-201, M.C.A., provides:

> "Except where the grant under which the land is held indicates a different intent, the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

If a portage route is requested around an artificial barrier by either a landowner or a member of the recreating public, it is my understanding that the landowner has to pay the cost of establishing the portage route. This would mean the landowner would not only have to provide a portage route across his property above the high water mark, but the landowner would also have the burden of the portage cost. Who pays if the artificial barrier is a bridge on a county road, a state highway, or an irrigation diversion structure providing water for an adjacent land owner?

We support Senate Bill 424 providing that "a prescriptive easement cannot be acquired through use of land or water for recreational purposes."

Recreation on private property should be granted or denied by the property owner, and if granted, as a privilege to the recreationist rather than a right. We strongly support Senate Bill 435.

Boulder Valley Association also strongly supports Senate Bill 421 restricting the "liability of landowner or tenant during recreational use of waters or land by (the) public."

Respectfully submitted

Sharon Welin

We will support amendments proposed by Stillwater Protective

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 57
DATE 03 08 85
BILL NO. H.B. 26

(This sheet to be used by those testifying on a bill.)

Mrs Bill Langford

NAME: Joan B LANGford DATE: 3-8-85

ADDRESS: Reedpoint, Mont

PHONE: 326-2171

Rancher

REPRESENTING WHOM? Delegation 50 - Reedpoint Mont

APPEARING ON WHICH PROPOSAL: H.B 265

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

COMMENT: We oppose House Bill 265

House Bill 265 is made out for Public Recreationist sights and the sights of the landowner are infringed upon ~~disregard~~.

Farmers & Ranchers should have more to say in regard to legislation that affects them so much, their mens & taxes are vital to our state Montana is an Agriculture State and Agricultures its should be protected

We do not feel that we should be the liability & responsibility of unlimited access to our property

All landowners 1st 2 lots 20 acres 5000 acres should be concerned about H.B 265 ~~do you feel that you~~ They should be able to know - who is on ~~our~~ their property and regulate the happenings because ~~they~~ their are held responsible -

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

~~Senate Bill 311 Defeat Highway Mob Support~~

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 58
DATE 03 08 85
H.B. 265

NAME: John McDonald DATE: March 4

ADDRESS: Dravers A

PHONE: 354-3554

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: H.B. 265

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

COMMENTS:

Opposed for several reasons

1. Infringement of private property rights

2. The definition of [illegible] streams is unrealistic.

3. No limits as to [illegible] [illegible] [illegible] [illegible] [illegible] streams but are not accessible to all streams

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 59
DATE 03 08 85
BILL NO. H.B. 265

(This sheet to be used by those testifying on a bill.)

NAME: John Willard DATE: 3/8/85

ADDRESS: 3119 Country Club Circle, Billings MT 59102

PHONE: (406) 259-1966

REPRESENTING WHOM? Self as Commissioner Clerk County Bank owned

APPEARING ON WHICH PROPOSAL: HB 265 SB 418, 421, 424, 435

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

COMMENT: oppose HB 265 in present form.
Support principles of Senate Bills
my objection with HB 265

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 60
DATE 03 08 85
BILL NO. H.B. 265

NAME: Robert H. Burns DATE: _____

ADDRESS: Big Timber

PHONE: 932-4150

REPRESENTING WHOM? _____

APPEARING ON WHICH PROPOSAL: 265

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

COMMENTS: Cattle rancher in Sweet Grass County Park Co.
We're in favor of the state in taking property without just compensation.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 61
DATE 03 08 85
BILL NO. H.B. 265

NAME: R.E. SAUNDERS DATE: 3/8/85

ADDRESS: Box 425 White Sulphur Springs

PHONE: 547-3590

REPRESENTING WHOM? Dell & Meagher Co Preservation Assn

APPEARING ON WHICH PROPOSAL: 265 H.B.

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

COMMENTS: Summary:

We oppose bill in its present form. Sections 1 of the bill granting rights to the stream bed between high and low water marks are in violation of 70-16-201 of the Code and article II Section 29 of the State Constitution, and not consistent with the Supreme Court rulings.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 62
DATE 03 08 85
BILL NO. H.B. 265

March 6, 1985

House Bill 265

This bill presents substantial problems as it is now written. It defines "surface water" for the purpose of public access as "The Natural Water Body, its bed, and its banks up to the high-water mark. Nowhere does it state that there must be water on the stream bed for purpose of public access. Thus, the bill goes much further than the Supreme Court decisions in the Curran and Hildreth cases, which state the public right is to use the "Surface Waters" up to the high water mark, and "That the public's right to use the State-owned waters is restricted to the area between the high water marks". Obviously, there must be water present in order to exercise any right to the water.

The Montana Code, 70-16-201, states: "Owners of land bounded by water except where grant under which the land is held indicated a different intent, the owner of the land, when it borders upon a navigable lake or stream takes to the edge of the lake or stream at the low water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream".

Sections of this bill which grant rights to recreationists for use of stream beds between the high and low water marks, including portage routes, when that portion of the stream bed is dry, are unconstitutional.

The Montana state Constitution, Article II, Section 29, states: "Private property shall not be taken or damaged for the public use without just compensation to the full extent of the loss having been first made or paid into court for the owner...".

We believe that the violations of 70-16-201 of the Code and the Montana State Constitution must be eliminated from this bill.

Additionally, the following change is suggested: Page 2, line 20, after the word "waters", add: "and contain at all times sufficient water to support fish life".

Meagher County Preservation Association

R. E. Saunders

R. E. Saunders
White Sulphur Springs

SENATE JUDICIARY COMMI
EXHIBIT NO. 62
DATE 03-08-85

(This sheet to be used by those testifying on a bill.)

NAME: CHARLES HOWE DATE: 3/8/85

ADDRESS: 8360 Springhill Comm. Rd. Belgrade, Mt.

PHONE: 586-8884

REPRESENTING WHOM? SELF

APPEARING ON WHICH PROPOSAL: SENATE Hearing HB 265

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

COMMENT: The economic impacts of this legislation would be disastrous to a state faced with shrinking economies and budgets. The costs of implementation by Fish, Wildlife and Parks would be an incredible additional expense to that department in a bi-ennium in which the governor has asked the state to lower its departmental budgets by 2%.

The impacts of lost productivity, profits and state GASA receipts on Agriculture's behalf would lower available budgets even further — Adversely affecting all of Montana's citizens adversly.

HB 265 in its present form does not consider the damages that would result to this state's economy.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 63
DATE 03 08 85
BILL NO. H.B. 265

March 8, 1985

Senate Judiciary Committee
Public Hearing on H.B. 265
State Capitol
Helena, Montana

Mr. Chairman and Members of the Committee:

For the record, I am Charles Howe from Gallatin County, Montana. I am a rancher and a business man in Montana and am here to speak in defense of Agriculture and in opposition to H.B. 265.

Agriculture is the most important industry in the State!, contributing just over one third (1/3) of the total State cash reciepts. The value of Agricultural cash contributions is approximately One and three quarters of a Billion Dollars ($ 1,750,000,000.00) out of a total State economic production capacity of Five and a quarter Billion Dollars, ($ 5,250,000,000.00).

Land use in the State is such that Two Thirds (2/3) of the total State acreage (93.2 million acres) is held privately. Sixty Two point Three Million (62.3 million) acres are held in Farms and Ranches, and better than Two Third (2/3) of that is pasture and range land. That means approximately Fourty Two Million acres (42,000,000) is the land base from which the Livestock Industry derives its productivity.

This productivity supports a wide variety of other businesses in Montana, such as Manufacturing, Sales, and Services Industries which are all essential Industries to Agriculture as well as to their local communities.

The key to this productivity is TOTAL MANAGEMENT CAPABILITY, and that means being able to MANAGE ONES LAND TO THE THE BENEFIT OF ONES LIVESTOCK PRODUCTION AND MONETARY RETURN WITHOUT THE INTERFERENCE OF OUTSIDERS. Public encroachment would be such an interference, causing

disruption of livestock use patterns, livestock handling practices and land use management techniques.

I quote Gov. Ted Schwinden,"Efficient agricultural management and production is not only important to the survival of Montana's Farms and Ranches, it also promotes strong local and state economies".[1]

Our University Systems,Social Services Systems, in short our entire state budget system is dependant in large part upon the success of our agricultural system. The success of the agricultural system is dependant upon total management control by the independant Farmer and Rancher.

To quote Mr. Kieth Kelly, Director of the Department of Agriculture, "The growth we have seen in agriculture is attributable to carefull planning and management decisions made by producers, bankers and researchers. The result of this growth has maintained agricultures position as 'number one' in Montana's economy."[2]

Agriculture is under attack today from many fronts and one of the most sever of th attacks is against the management capability of controlling one's own land use policy.

House Bill 265 intrudes the public into the private land use and management scene in such a way as to detract from the Farmers and Ranchers primary duties.

House Bill 265 requires that the land owner assume extra financial burden in behalf of the public. See Sec. 3, para. 3(e).

It requires that land be taken without compensation. See Sec. 3 para. 1.

It also requires that stock handling decisions be made in deference

to the public and not to the maximization of herd performance. See Sec 4 subsec. 2. (Liability)

In addition to the above, it requires allowances be made for stock harrassment which do not exhist now, ie. shelter belts and available water not being available to stock due to the presence of human pressure.

My veterinarian tells me that the value of these shelter belts and open running water can not possibly be replaced at any price. THIS BILL, H.B. #265 IS A BAD BILL BECAUSE IT JEOPRODIZES AN ENTIRE STATE AND ALL OF ITS AGENCIES AND CITIZENS, NOT JUST ITS AGRICULTURE.

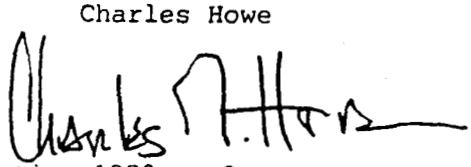
As Gov. Schwinden said in his letter of introduction to the Montana Livestock and Crop Reporting Services 1983 Bulletin entitled MONTANA AGRICULTURAL STATISTICS, and I quote "Agriculture can claim a rich past and a solid presence in Montana. Lets work together to ensure an equally bright future for food and fiber production in this state."[3]

Reject H.B.265 in its entirety, and enact Senate Bills 418,421, 424 and 435. These are good tools that protect the state of Montana, its budgets, institutions, agencies, people and agriculture.

Let us not be so short sighted as to rush thru a piece of legislation , regardless of who appears to support it, that would CAUSE ANY DAMAGE TO THE STATES MOST PRODUCTIVE INDUSTRY !!

Thank you for the opportunity to present my views.

Charles Howe



1. Montana Agricultural Statistics 1983 pg.2
2. Ibid pg.3
3. Ibid pg.2

SENATE JUDICIARY COMMITT
EXHIBIT NO. 63
DATE 03-08-85
BILL NO. H.B. 265

(This sheet to be used by those testifying on a bill.)

NAME: Bud Hansen DATE: 3/18/85

ADDRESS: Box 508

PHONE: 775-6647

REPRESENTING WHOM? Eskalaka Ranchers.

APPEARING ON WHICH PROPOSAL: H.B. 265

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

COMMENT: I oppose HB 265 but in favor of Bill - 418 - 421 - 424 and 435

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 64
DATE 03 08 85
BILL NO. H.B. 265

(This sheet to be used by those testifying on a bill.)

NAME: DAVID E. HOWE DATE: 3/8/85

ADDRESS: Rt 38 - Box 2121

PHONE: 222-6297

REPRESENTING WHOM? PCLA

APPEARING ON WHICH PROPOSAL: HB-265

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

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITT
EXHIBIT NO. 65
DATE 03 08 85
BILL NO. HB. 265

345

March 6, 1985

Members of the Senate
Judiciary Committee
Montana State Senate
Helena, Montana

Gentlemen: For the record, I am Dave Howe, Park County rancher.

I strongly urge the defeat of House Bill 265 on the grounds that it represents an unwise and unwarranted extension rights of the public to float and fish on streams historically suitable for such purposes. The desirable portions of the bill dealing with definitions of the high water line has already been adequately dealt with in a bill already passed by the Senate.

My reasons for opposing House Bill 265 are as follows:

1. Rights of Portage around Artificial Barriers.

Ranch owners, whose lands include small streams not suitable for floating, must use wire fencing to control efficient use of their lands for watering and grazing of livestock. These fences inevitably cross small water courses and create artificial barriers which inhibit movement of humans and animals up and downstream. Indeed, they are intended to do so and are indispensible to ranching operations. If every landowner is required to install a gate, stile or ladder or other mechanical device to provide a route of portage around, over or through every such barrier and to maintain it in a safe condition, then such landower is being saddled with an unreasonable, impractical and intolerable additional financial burden which his already thin, or non-existent, profit margin cannot bear. He does not have the time, money or manpower to meet the requirements of House Bill 265. Indeed, the Fish and Game Department does not have the personnel or budget to monitor or administer the provisions of this bill. The safety requirements for the landowners are impossible to meet as a practical matter due to the inherent instability of such structures after the effects of drifting snow and the butting and rubbing of

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 65
DATE 03-08-85

livestock and wild game and hence force the rancher to carry new levels of public liability insurance which he cannot afford.

2. Deprivation of Revenue to Dude Ranch Operators and Others who Permit Fishing on a Fee Basis.

In the case of dude ranch operators and those who permit fishing on small streams on a daily fee basis, House Bill 265 constitutes a deprivation of a significant historical source of supplemental income. The small stream is frequently an important source of revenue for many small ranchers. It is a principal source of attraction to small dude ranch operations.

Very commonly small water courses, properly husbanded, provide on a very limited scale and only when carefully protected from over-use, excellent fisheries which otherwise would not exist. Many of these landowers achieve these results by limiting access of cattle to particular areas, restricting the number and types of fish taken and the methods of fishing. Not infrequently spawning beds are not permitted to be fished. All these measures contribute to the unique attraction of Montana as a wildlife habitat without expense to the state. They are an important supplemental source of revenue to the landowners.

3. Unintended Access to Private Land and Invasion of Privacy.

The effect of House Bill 265 is to create unintended access to private lands for purposes which are not related to the original subject of the Curran and Hildreth lawsuits. In periods of low water, particularly in the fall, dry water courses would become unintentional avenues of access to trespassers under the guise of fishing or duck or upland game hunting. To extend these rights to swimming and hunting represents an unwise and undesirable erosion of the rights of privacy of landowners. There are many private landowners who wish to preserve their lands as sanctuaries for both migratory and upland game. Many ranch houses and other private dwellings are situated near or on the banks of small streams. To deny these landowners the right to control who can and cannot hunt

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 65
DATE 03-08-85

on his land is a threat to the enjoyment of private property and contrary to the interests of the public in benefiting from the preservation of game sanctuaries at private expense. To turn every ranch into a picnic ground for uninvited members of the public goes far beyond the intent of the Supreme Court in the Curran and Hildreth cases.

Not State

(This sheet to be used by those testifying on a bill.)

NAME: JIM SAUNDERS DATE: 3/19/85

ADDRESS: ENNIS MONTANA

PHONE: 406-682-4854

REPRESENTING WHOM? THE PRIVATE LAND OWNER

APPEARING ON WHICH PROPOSAL: House Bill 265

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

COMMENT: I OPPOSE BILL 265, I CAN NOT ACCEPT THE CONFLICT THAT IT HAS TO THE 5TH AMENDMENT IT ALSO IS LEGISLATING SOME OF US OUT OF BUSINESS IT CONFISCATES SOME OF MY PROPERTY TO PUBLIC USE; IGNORING THE LAWS OF CONDEMNATION; INTO PUBLIC USE IT WILL DESTROY ALL CONTROL ON A QUITE CLEAN TRANQUIL EXISTENCE

PRESERVE THE LAND OWNERS RIGHTS AND KILL THIS HOUSE BILL 265

Thank You

Jim Saunders

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 66
DATE 03 08 85
BILL NO. H.B. 265

NAME Walter F. Lineberger, Jr BILL NO. H.B. 265

ADDRESS Star Rt. 1, Box 154, Ennis Madison County DATE 3-8-85

WHOM DO YOU REPRESENT Self - Cattle Rancher + landowner

SUPPORT _____ OPPOSE ✓ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I believe that Senate Bills 418, 424, 421 and 435 covering High Water Mark, Prescriptive Easement, Landowners Liability and Definition of Trespasser respectively will better define and represent the rights of all parties than H.B. 265. I recommend that these 4 Senate bills be adopted.

Walter F. Lineberger, Jr.

I am a member of the Montana Stockgrowers Assn. and I am one of many member who does not agree with their support of H.B. 265.

W.F.L.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 67
DATE 03 08 85
BILL NO. H.B. 265

TO THE SENATE JUDICIARY COMMITTEE HB 265

I wish to oppose the passage of HB 265. It is an extremely dangerous bill that goes far beyond the Supreme Court decision. The three "safeguards" SB 418, SB 421 and SB 424 now added do not change the intent of this bill....eventual complete access to private lands.

The results of this extremely dangerous bill could result in the devaluation of land values, increased liability for land owners and more law suits. Also the destruction of the environment we have enjoyed. We would also doom many businesses....outfitters, dude ranchers etc. if all of Montana land is available to the public. This bill would be extremely harmful to one of our main industries--recreation.

This nightmare is the product of recreationists with little concern for the rights of landowners. One needs only to read the transcripts of the Curran and Hildreth decisions to realize the ~~general~~ genuine concerns of landowners are being disregarded as "inconsequential".

To those who think they have no need to be concerned because they have no water on their land, make no mistake, HB 265 is only the first wedge in your door. Soon they will be after complete ingress to your land.

Spotted knapweed is already a serious problem. It is easily spread by vehicles, shoes, clothing etc. Land invaded by knapweed eventually loses 95% of its grazing capacity. It is difficult to control.

Invasion by the public on private lands will present an insurmountable problem to the rancher and farmer and eventually lead to the destruction of our beautiful state. If these environmental groups were truly interested in the preservation of our environment, they would be fighting the intrusion of private property. Some agricultural organizations have been lead down the garden path and are not truly representing their membership by supporting the passage of this bill.

If for no other reason, because of the serious problem presented by knapweed, our Senators and Representatives should oppose the passage of 265. They should be fighting for the preservation of the rights of private ownership.

Nora Lydeard
Cascade, Mont.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 68
DATE 03 08 85
BILL NO. H. B. 265

TO: Senate Judiciary Committee
Chairman Joe Mazurek

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 69
DATE 03 08 85
BILL NO. H.B. 265

FROM: Windsor Wilson
McLeod, Montana 59052

Occupation: Rancher

Opponent: HB265

DATE: March 8, 1985

There has been a lot of time and effort put into the stream access issue. In my opinion, HB265 is not acceptable in its present form. As written, it leaves many unclear areas such as barriers, what are surface waters, where is the ordinary high water mark, and the section on portage that clearly is a taking of private property. All of this has been cover in earlier testimony. I will not spend any more of your time on those ar

I would like to cover another aspect of HB265. It has been stated at all the hearings on this issue that agriculture and sportsmen were in favor of HB265. This is simply not true. On December 19 all of the agricultural groups did agree on a draft. HB265 has changed dramatically In fact, it does not resemble in any way the December 19 draft. Still, the leadership of certain agricultural groups and their spokesmen doggedly and blindly support this bill. I belong to Farm Bureau and Montana Stockgrowers, and they are not representing my views. In visiting with other members and land owners I find that when they know and understand the implications of HB265,,they are dead set against it. It seems that our opinions and suggestions have fallen on the deaf ears of our agricultural leaders. I cannot understand why they continue to support this bill

I have visited with many fisherman, hunters and outdoorsmen whom I consider to be the true Montana sportsmen. They don't like HB265 eithe These people are hard-working individuals, most of whom don't belong to a sportsmen's group. They still believe in private property. They don't mind asking permission to hunt, fish and enjoy the privilege of using someone else's property. These sportsmen do not want to be represented by those who imply representation of sportsmen.

I feel, in the best interest of people in Montana, that the four bills passed by the Senate, SB's 418, 421, 424, and 435 would be the best choice at this time. These bills would define the ordinary high wat mark, liability, prescriptive easement, and trespass. The bills would help all people know where they stand. If the four Senate Bills are pa we will still have a good landowner-sportsmen relationship.

In conclusion, I believe HB265 should be killed and all our efforts put into passing the four Senate Bills.

NAME: Pam Bain DATE: 3/8/85

ADDRESS: Box 174 Melville Rt. Big Timber, Mt

PHONE: 537-4485

REPRESENTING WHOM? self - rancher

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: HB 265 is a land reform bill under the guise of stream access. I urge you to table HB 265. I support: SB 418 (Boyland's highwater definition) SB 421 (Story's limitation on landowner liability) SB 424 (Williams prohibition against prescriptive easement) and SB 435 (Holt's trespass bill) The Senate has already passed 4 good bills to address the situation.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 70
DATE 03 08 85
BILL NO. H.B. 265

(This sheet to be used by those testifying on a bill.)

NAME: Robert Daggett DATE: 3-8-85

ADDRESS: 501 E 6th st Laurel, Montana 59044

PHONE: 628-6370

REPRESENTING WHOM? Property owners (self)

APPEARING ON WHICH PROPOSAL: bill 265

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

COMMENT: House bill 265 is contrary to the original intent extended to property owners by the Homestead Act. - the Gov't document given to a Homesteader, gave the Homesteader all the property within the boundries of the description, excluding nothing.

there were no exclusions as to streams, stream-beds or banks or other properties in the claim given the Homesteader, thereby giving exclusive right to all the property described in the document.

House bill 265 is offensive, not only to Land-owners but recreationists as well because of the unfavorable atmosphere it will cause.

House bill 265 should be defeated

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 71
DATE 03 08 85
BILL NO. H.B. 265

NAME: Peggy Hirstein DATE: 3/8/85

ADDRESS: Roscoe Star Rt. Absarokee Mt.

PHONE: 328-3521

REPRESENTING WHOM: Ranchers, small track & calving people, some of who are wool growers & stockgrowers in Southeastern and Carbon Countys

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: We can't support HB 265 unless it is amended to more fully protect the landowners rights. Includ changing definition of "Surface Water" to not mean exposed dry lands between the ordinary high water mark & boundary mark. Surface water should be only the actual surface of water and land directly underneath water.

We don't consider any type of hunting to be a water related recreational activity.

There should also be compensation for damages to private property. Lands owned by recreationalist ~~owners~~ to. If HB 265 can't be amended we urge it be killed and we then support the 4 - SBs. which address these issues.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 72
DATE 03 08 85
BILL NO. H.B. 265

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 73
DATE 03 08 85
BILL NO. H.B. 265

To the mebers of the Senate Judiciary Committee:

My name is Dave Moore. I am a dryland farmer and Vocational Agriculture teacher from Big Timber.

Until now I have never given testimony, written or verbal, concerning a bill but I feel I must speak out against HB 265. As a dryland farmer I realize, perhaps not fully, the deleterious effect this bill will have on my operation which is situated in rolling hills containing several spring-fed creeks and many large coulees which carry run-off water. HB 265 effectively takes my right to control access to and within my fields.

Although I am no longer a full-time teacher, during the winter months I spend an average of two and one half days per week teaching in the Big Timber Public School system. I have had many opportunities to visit with vo-ag students at the high school level about HB 265. Most of the students have not heard of HB 265. Those young people who are informed on the bill and its contents usually are willing to overlook the economic ramifications of HB 265 to landowners, but, almost without exception, feel that if they were landowners, as many will be if it is economically feasible for them to follow in ther fathers' footsteps, they could not idly sit by as the right to control access to and on land for which they pay taxes is taken from them.

But it is not the young people who are aware of HB 265 that are my main concern. As I mentioned above most young people are uninformed concerning HB 265, or any other bill for that matter, as, I believe, are most adults. This being the case, how can we as guardians of the future of these young saddle them with a land reform bill (HB 265) which takes from them rights that have historically and constitutionally been exercised by their forefathers.

In summary, HB 265 will have adverse effects on this and future generations of landowners. Landowner-sportsman relationships will be strained, perhaps to dangerous limits. I urge this committee to table or kill HB 265 and adopt SB 418, SB 421, SB 424 and SB 435, bill which more aptly address the rights and obligations of both landonwers and sportsmen.

NAME: Wes Henthorne DATE: 3/8/1985

ADDRESS: Melville Rte Box 214 Big Timber

PHONE: 932-4197

REPRESENTING WHOM? self

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: Support Senate Bills 418
421
424

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 74
DATE 03 08 85
BILL NO. HB. 265

March 8, 1985
Testimony before the Senate Judicicary Committee on HB265

My name is Wes Henthorne. I am a resident of Sweetgrass County and manage a ranching operation located in Park, Sweetgrass, and Gallatin Counties. The following questions are the primary reasons for my opposition to HB 265:

1) Is it the intent of HB 265 that the public may on "Class I waters" by clear implication without the permission of the landowner:

A-overnight camp;
B-place or create any permanent or semipermanent object, such as a permanent duck blind or boat moorage;or
C-conduct other activities which are not primarily water related pleasure activities?

2) Is the language in HB 265 sufficiently clear to easily distinguish between Class I and Class II waters as defined in HB 265?

3) Is it the intent of this bill by defining surface waters in Section 1 (10) "'surface water' means, for determining the public's access for recreational use, a natural body of water, its bed and its banks up to the ordinary high water mark." to define land as water?

4) In light of current budgetary problems being addressed by the legislature is it appropriate for the Fish and Game Commission to be given the immediate additional fiscal burdens of developing rules for recreational use and approving structure designs for all Class I and Class II waters in the state?

5) Does HB 265 intend that a landowner must bear the cost of establishing a portage route around artificial barriers such as natural gas pipelines, county bridges, etc. for which the landowner has no other responsibility?

6) Does the establishment of a portage route with no compensation to the owner constitute a taking without just compensation?

7) Do the "supervisors" as defined in the bill, Section 1 (9) need the additional responsibility of establishing portage routes?

The list of questions raised by HB 265 goes on and on. In the interest of brevity I would like to conclude that the problems that this large and complex piece of legislation tries but fails to address are resolved much better by the three simple Senate bills that went through this committee earlier this session.

SENATE JUDICIARY COMMI
EXHIBIT NO. 74
DATE 03-08-85

Senate Judicial Chairman and Committee
Hearing SB 265

Elaine Allen Gibson Route Box 756
Big Timber, Montana 59011

I would like to go on record as being opposed to SB 265. I believe that this bill goes far beyond the Supreme Court decision in taking away land owner rights. I do not believe the Supreme Court ~~decision~~ Justices meant for their decisions to go this far.

For example the section on the right to portage around man made or natural barriers, is clearly taking private land for transportation without just compensation to the land-owner. In the Supreme Court decision they did not state anything about

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 75
DATE 03 08 85
BILL NO. H.B. 265

portage around natural barriers).

On this bill they are expanding the water recreation usage to land recreation usage, which goes far beyond the Supreme Court decisions again.

I think it is wrong to classify water or streams in only two classes. This will create a legal nightmare when it is tested by individuals who want to prove right to use or who want to prove the right to refuse usage of these waters.

I believe if this bill passes it is going to ruin landowner-sportsmen relationships.

We own about 3 or 4 miles of land on both sides of a small creek that is mostly dry about 6 months out of a year. This bill would give anyone the right to walk up the

SENATE JUDICIARY COMMITTEE
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DATE 03-08-85
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middle of our land through all our buildings and corrals, which I believe is invading our privacy. We have also leased property which boarders 5 miles of the Yellowstone River. We have always allowed anyone who "asked" to cross our property to gain access to the river to do any water recreating, unless our stock was going to be disturbed by the traffic, shooting, or if they had dogs with them. We have always had good relations with sportsmen. We also allowed the annual Boat Floaters to dock on our land as long as they respected our land owner rights. We wanted all garbage taken care of, no fires, and no driving except on designated roads. The Boat Floaters Committee understands that if our wishes are

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 75
DATE 03-08-85

not kept, that they would probably loose the privledge to stop there. So we have developed a good land-owner-sportsmen relationship. But if SB265 is passed-they (the sportsmen) will be demanding their right to stop on our land and the usage of the lambs to camp and build fires. Which is totaly against good conservation of the land and water of this state, and that is why we made the rules for usage of our land in the first place.

I have many more examples why SB265 is not a good bill but to shorten this I will close with one more message.

I believe the sportsmen have the right to use the waters of this state for water recreation but I believe it is only a privalage that

SENATE JUDICIARY COMMITT
EXHIBIT NO. 75
DATE 03-08-85

they can use privately owned land for recreational use.

I plead with you to kill SB265 in its entirety because I believe we have four good bills that have passed the Senate that will protect landowners as well as the sportsman, SB418, SB421, SB424, & SB435.

Thank you

Elaine K. Allestad

P.S.

I am also a Montana Woolgrower Association member and am in dissagreement with my associations position on SB265.

SENATE JUDICIARY COMMIT
EXHIBIT NO. 75
DATE 03-08-8
BILL NO. H.B. 265

(This sheet to be used by those testifying on a bill.)

NAME: Verna Lou Landis DATE: March 8, 198

ADDRESS: Rt 1 Wilsall, Mont 59086

PHONE: 578-2228

REPRESENTING WHOM? Myself

APPEARING ON WHICH PROPOSAL: H B 265

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

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 76
DATE 03 08 85
BILL NO. H.B. 265

March 8, 1985

Mister Chairman, members of the committee.

I am Verna Lou Landis from Wilsall, Mont. I'm a landowner and rancher I oppose H.B. 265

Class I and Class II waters bother me. I understand the Supreme Court ruling to apply to navigable streams, therefore small streams should be excluded.

I believe what we should be doing is changing the Supreme Court ruling. Not Clarifying it with another bad decision.

Thank you.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 76
DATE 03-08-85
BILL NO. H.B. 265

(This sheet to be used by those testifying on a bill.)

NAME: Virge Holliday DATE: 3/8/85

ADDRESS: Rt 2 Box 355

PHONE: 578-2349

REPRESENTING WHOM? Myself

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 77
DATE 03 08 85
BILL NO. H.B 265

Mr Chairman +

Members of the Judiciary Committee,

My name is Virge Holliday. We have a family ranch in Park County with the Shields River running full length through it.

I"m here to oppose HB265, the Stream Accass bill, and ask that it be killed. A bad bill doesn't improve a bad Supreme Court decision. If this can be made non damaging to ranchers, fine. If not, let's be about changing the decision, which the legislature can do -- it has equal power with the Supreme Court.

It just isn't in me to compromise something as important as our private property rights, one of the things that made this country great.

It's my opinion that those in agriculture (and I belong to a couple of those organizations) who support this bill threw away the baby with the bath water.

When SB310, the Stream Preservation bill was forced over us ten years ago, it was to make landowners protect the beds and banks of streams. There was at least a pretense of environmental concern, even though that was also infringement on our private property.

There's no such concern with this stream access which turns the entire public loose on us -- the same public you lock all doors to protect yourselves from. When everyone has access to everything, there will be nothing for anyone. It will be goodby to the wild geese finally nesting along our river, to the sand hill cranes and occasional swan that finds their way to our water, and probably much more besides. Look at the garbage, vandalism, and damage in any public place to see what's coming. And who stands the cost and cleans up this mess? Let me guess!

Who paid for, worked for and took care of this land and water? Certainly not those who now want to play on it for free.

Please kill HB265 and let the four good Senate bills that passed with such a majority handle the problems arising from the Supreme Court decision.

Thank you.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 77
DATE 03-08-85
BILL NO. H.B. 265

386

NAME: John De Cook DATE: March 8-1985

ADDRESS: Melville - Mont.

PHONE: 537 4437

REPRESENTING WHOM? self

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENTS: I John De Cook farm in Stillwater & Sweetgrass Counties. I feel HB 265 if passed will have a very undesirable impact on my dryland operation. I feel HB 265 is the first step in giving our right to protect an care for the land away.

I support the Four small bills.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 78
DATE 03 08 85
BILL NO. H.B. 265

(This sheet to be used by those testifying on a bill.)

NAME: GEORGE M ROSSETTER DATE: _____

ADDRESS: BOX 175 FISHTAIL MT.

PHONE: 328-8485

REPRESENTING WHOM? BEARTOOTH STOCK ASSN

APPEARING ON WHICH PROPOSAL: 265

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

COMMENT:

Beartooth Stock Assn is opposed to 265 as stands - Definition of Surface Data should not include Bed Portion is not constitutional - Should be deleted or include "with Compensation" and further are left with the responsibility of postings. We are not satisfied with the definition of high water mark.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 79
DATE 03 08 85
BILL NO. H.B 265

To: SENATE HOUSE JUDICIARY COMMITTEE MARCH 8 1985

MY NAME IS GEORGE ROSSETTER .... I AM FROM FISHTAIL MT. STILLWATER COUNTY AND OWN A [redacted] CATTLE OPERATION.

IN THE HOUSE OF REPRESENTATIVES H.B. 265 WAS PRESENTED AS BEING A COMPROMISE BETWEEN THE RECREACIONISTS AND THE MAIN LINE AGRICULTUR ORGANIZATIONS. IN MY OPINION THE SPOKESMAN FOR THESE AGRICULTURAL GROUPS , IN HIS DESIRE TO AFFECT A COMPROMISE WITH THE RECREATIONI AGREED TO TERMS IN THE BILL THAT ARE NOT ONLY UNSATISFACTORY TO MANY OF THE GRASS ROOT MEMBERS OF THE AGRICULTURAL GROUPS BUT INDEED ARE NOT CONSTITUTIONAL. AS THE MEMBERS HAVE BECOME AWARE OF THE CONTENTS OF THE BILL THEY HAVE WITHDRAWN THEIR SUPPORT. THIS FACT IS EVIDENT WHEN YOU HEAR TO-DAY FROM SUCH AFFILIATES AS THE BEARTOOTH STOCK ASSN. LOCATED IN STILLWATER COUNTY. ANY NUMBER OF THE SPEAKERS IN OPPOSITION TO H. B. 265 ARE MEMBERS OF THE MAIN LINE AGRICULTURAL ORGANIZATIONS.

AS I SPEAK HERE TODAY I TOO WOULD LIKE TO SEE A COMPROMISE BILL BETWEEN THE RECREATIONISTS AND THE LAND OWNERS, BUT WHAT WE SEE NOW IN 265 IS A FAR CRY FROM THE BILL CREATED BY THE INTERIM COMMITTEE. IT IS EVIDENT THAT 265 IS A FLAWED INSTRUMENT. THE DEFINATION OF SURFACE WATER TO INCLUDE THE BED, THUS ENABLING THE PUBLIC TO USE THE DRY STREAM BED, IS NOT BASED ON THE SUPREME COURT DECISION, THE MONTANA CONSTITUTION OR ANY LEGISLATION. THE ISSUE OF PORTAGE WHEREBY THE PUBLIC CAN EXIT THE STREAM AND CROSS PRIVATE PROPERTY TO CIRCUMVENT SUCH NATURAL [redacted] BARRIERS AS HOLES, BOULDERS, BRUSH ETC. IS SURELY NOT CONSTITUTIONAL. I HAVE CONSULTED FIVE DIFFERENT ATTORNEYS AND THEY ALL AGREE THAT PORTAGE IS THE TAKING OF PRIVATE PROPERTY WITHOUT COMPENSATION. I HOPE THAT SUCH LAWYERS PRESENT IN THIS COMMITTEE AS MR. MAZUREK, MR. TOWE, MR. DANIELS, MR. PINSONEAULT, MR. CRIPPEN AND ANY OTHERS THAT I AM NOT AWARE OF WILL TAKE A HARD LOOK AT THE TWO ISSUES I HAVE REFERRED TO. I ASSUME THAT THIS MATTER WILL BE DISCUSSED THIS MORNING IN MORE DETAIL BY OTHERS.

IN CONCLUSION: THE EROSION OF SUPPORT FOR 265 IS DUE TO THE FAULTY STRUCTURE OF THE BILL AND I HOPE THAT AN INTELLIGENT AND THOUGHT-FULL SENATE WILL DELETE THE NON-PRODUCTIVE AND UNCONSTITUTIONAL SECTIONS AND TAKE WHATEVER OTHER STEPS ARE NEEDED TO PROPERLY ADDRESS THE MATTER.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 79
DATE 03-08-85
BI H.B. 265

My name is Doug Roseth from Fishtail Mt
5 Stillwater Cty. I operate a cattle ranch. I am
here to represent the Beartooth Stock Assn.
of Stillwater County. As you are aware, there
are many grass root members of the
Agricultural organizations who do not support
H. B. 265 in its present form. I
submit the following resolution as evidence

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 79
DATE 03-08-85
BILL NO. H.B. 265

February 18, 1985

After considerable thought and conversation about House Bill #265 concerning water access for recreational use we present this resolution.

WHEREAS, the high water mark is not defined to our satisfaction: and

WHEREAS, the classification of water is not explained enough to identify our rights of ownership; and

WHEREAS, the landowners are left with the responsibility of portage and without control of the land from the high water mark to low water flow;

We, the Board of Directors of the Beartooth Stock Association, are opposed to House Bill #265 as presented.

Bernard Van Ewen
Secretary - Treasurer
Beartooth Stock Assn.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 79
DATE 03-08-85
BILL NO. H.B. 265

NAME: Conrad B Fredricks DATE: 3/8/85

ADDRESS: Big Timber, MT

PHONE: 932-5440

REPRESENTING WHOM? Sweet Grass County Preservation Ass'n

APPEARING ON WHICH PROPOSAL: HB 765

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

COMMENTS: See written testimony

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTE
EXHIBIT NO. 80
DATE 03 08 85
BILL NO. H.B. 265

MONTANA CONSTITUTIONAL CONVENTICN

1971-1972

DELEGATE PROPOSAL NO. 2

DATE INTRODUCED: JAN. 20, 1972 — Rejected by Constitutional Convention

Referred to Natural Resources and Agriculture Committee

A PROPOSAL FCR A NEW CONSTITUTIONAL SECTICN PRCVIDING FOR WATER RIGHTS.

BE IT PROPOSED BY THE CONSTITUTIONAL CONVENTICN OF THE STATE CF MONTANA:

Section 1. There shall be a new Constitutional Sectien to provide as follcws:

"Section ___. WATER. All cf the water in this state, whether occurring on the surface or undergrcund, and whether occurring naturally or artificially, belongs tc the people of Montana; and those waters which are capable cf substantial cr significant public use may be used by the people with or without diversicn or development works, regardless of whether the waters occur on public or private lands. The public has the right to the recreational use of such waters and their beds and banks tc the high water mark regardless of whether the waters are navigable and regardless of whether the beds and banks are privately cwned. Beneficial use of waters includes recreation and aesthetics, such as habitat for fish and wildlife and scenic waterways.

The use of all water now appropriated, cr that may hereafter be appropriated for sale, rental, distributicn, or other beneficial use, and the right of way over the lands of others, fcr all ditches, drains, flumes, canals, and aqueducts, necessarily used in ccnnection therewith, as well as the sites fcr reservoirs necessary for cclection and stcring the same, shall be held to be a public use.

The legislature may provide either directly, cr indirectly through administrative agencies, for the control and regulation of both existing and future rights tc uses cf water."

INTRODUCED BY: /s/ Earl Berthelson

S[illegible] JUDICIARY COMMITTEE
EXHIBIT NO. 80
DATE 03 08 85

judicious use and reclamation.

Because Montana has at least 500,000 acres of strippable coal land and untold acres of other natural resources, your committee believes the responsibilities of protecting and restoring the surface conditions of those lands for unborn generations should not be left to men, but rather protected by fundamental law.

Section 3. WATER RIGHTS. (1) All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed.

(2) The 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.

Existing Article IX Section (3)(3) 1972 Constit.

(3) All surface, underground, flood, and atmospheric waters within the boundaries of the state of Montana are declared to be the property of the state for the use of its people and subject to appropriation for beneficial uses as provided by law.

(4) Beneficial uses include, but are not limited to, domestic, municipal, agriculture, stockwatering, industry, recreation, scenic waterways, and habitat for wildlife, and all other uses presently recognized by law, together with future beneficial uses as determined by the legislature or courts of Montana. A diversion or development work is not required for future acquisition of a water right for the foregoing uses. The legislature shall determine the method of establishing those future water rights which do not require a diversion and may designate priorities for those future rights if necessary.

(5) Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests.

(6) The legislature shall provide for the administration, control and regulation of water rights and shall establish a system of centralized records.

COMMENTS

Your committee feels that water and water rights are of crucial importance to the past history and future development of

the State of Montana. For this reason the committee feels justified in expanding the present Constitutional section which relates solely to the use of water to include provisions for the protection of the waters of the state for use by its people.

Subsection (1) guarantees all existing rights to the use of water and includes all adjudicated rights and nonadjudicated rights including water rights for which notice of appropriations has been filed as well as rights by use for which no filing is of record.

Subsection (2) is a verbatim duplication of Article III, section 15 of the present Constitution and has been retained in its entirety to preserve the substantial number of court decisions interpreting and incorporating the language of this section.

Subsection (3) is a new provision to establish ownership of all waters in the state subject to use by the people. This does not in any way affect the past, present or future right to appropriate water for beneficial uses and is intended to recognize Montana Supreme Court decisions and guarantee the state of Montana standing to claim all of its waters for use by the people of Montana in matters involving other states and the United States Government.

Subsection (4) is a new provision to permit recreation and stockwatering to acquire a water right without the necessity of a diversion. This applies only to future rights and, of course, only to waters for which there are no present water rights. This subsection further provides that future agricultural and industrial water development will not be foreclosed by recreation, as it is left up to the legislature to determine the method of establishing a future water right without a diversion and the legislature is further authorized to establish priorities of water uses for those waters where the legislature decrees priorities necessary.

Subsection (5) acknowledges a continuance of our present water law principle that the first appropriation in time is the better right and provides that no future appropriations shall be denied except in the public interest.

Subsection (6) mandates the legislature to administer, control and regulate water rights. This does not in any way change the present legislatively established system of local control of adjudicated waters by water commissioners appointed by the District Court having jurisdiction. A new requirement is added to establish a system of centralized records of all water rights in addition to the present statutory system of local filing of records. The centralized records are intended to provide a single location for water rights information and a complete record of all water rights.

NAME Kermit Anderson BILL NO. 265

ADDRESS Miles City, Mt DATE 03-8

WHOM DO YOU REPRESENT Ranchers

SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

Ranchers are loosing all rights with th

265 Bill

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 81
DATE 03 08 85
BILL NO. H.B. 265

NAME Lucille Anderson BILL NO. 265 HB

ADDRESS Melville Mt DATE 3/8/85

WHOM DO YOU REPRESENT Musselshell

SUPPORT _____ OPPOSE / AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments: This bill is unfair to landowners taking away land long paid for and paying high taxes on. Bill will not solve the problems created only add more. I strongly oppose

SENATE JUDICIARY COM
EXHIBIT NO. 82
DATE 03 08 85
BILL NO. H.B. 265

March 6, 1985

Anstett

Senate Judiciary Committee
State Capitol
Helena, Mont. 59620

Re: House Bill: 265
Senate Bills: 418, 421
424, 435

Dear Senator:

In the study of the contents of H.B. 265, we feel this bill is not the proper legislation or the answer to the many questions of stream access for either the recreationalist or the owners of land adjacent to those streams, of which we are of the latter.

The basic rights of such owners should not be curtailed for the pleasure of the recreationalist, unrealistically. The latter has no "bonafide" claim to that land the owners have to live on for their livelihood — a necessary industry to this area.

In addition, this bill (265) would create additional and unnecessary expense for the Fish & Game Dept. for enforcement at a time when funded dollars are a scarce concern for all legislators.

In time, we feel Senate Bills: 418, 421, 424, 435 may adequately address the problems involved in the Supreme Court's decisions of stream access.

We trust that you, as Chairman of the Senate Judiciary Committee and as a responsible legislator will support the four Senate bills taking heed of our opinion opposing H.B. 265

Respectfully,

Douglas D. Anstett
Esther W. Anstett

As members of the Senate Judiciary we also support this stand on this issue.

The Fall Creek Ranch, Inc.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 83
DATE 03 08 85
BILL NO H.B. 265

NAME: J.R. CLEVELAND DATE: MARCH 8-85

ADDRESS: BOX 210 MELVILLE MT. 59055

PHONE: 406 537 4552

REPRESENTING WHOM? LAND OWNER

APPEARING ON WHICH PROPOSAL: HOUSE BILL 265

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

COMMENTS: I HAVE TRAVELED FROM ATLANTA TO HELENA TO OPPOSE HOUSE BILL 265. MY LIFE TIME DESIRE TO RANCH IN MONTANA WILL BE RUINED IF THE PUBLIC IS ALLOWED THE USE OF PRIVATE PROPERTY. LAND VALUES WILL BE DEVISTATED.

I AM FOR SENATE BILLS 418
421
424
435

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 84
DATE 03 08 85
BILL NO. H.B 265

William Dunham

March 8, 1985

SENATE JUDICIARY COMM.
EXHIBIT NO. 85
DATE 03 08 85
BILL NO. H.B. 26.

Senate Judiciary Committee
Helena, Mt.

Dear Senator Marzurek and Committee Memebers:

We are a private nonprofit conservation organization holding conservation easements on eleven ranches in Montana. These easements provide permanent protection to among other things, two miles of one of the finest spring creek fisheries in the state and seven miles of critical grayling habitat in the Upper Big Hole.

As an example, the spring creek now has fly fishing only, catch-and-release, and limits the number of fishermen a day on the stream. These limitations are restrictions on the property deed and were made in order to provide long range protection of the fishery.

The court decisions, opening these fragile fisheries to the general public will make it impossible for us to enforce these restrictions. Furthermore, unless Fish Wildlife and Parks and the Legislature rapidly implement catch-and-release regulations on most small streams, the increased public fiahing pressure resulting from these decisions will inevitably result in a decline in Montana's wild trout fishery.

The quality of Montana's fishery is very important for our tourism industry and for the economies of our small towns in particular. With the dire straits of the agricultural economy, it is more important than ever that we help the small town economies by maintaining the quality of our natural resources base.

George Anderson, a nationally famous guide, says of our spring creeks,"Another thing most people don't realize is that if these fragile streams were open to the public with no restriction on access, they would have been ruined long ago."

As managers of riparian zone habitat, we urge that any legislation passed restrict small stream usage as much as is consistent with the court decisions. We suggest that definition of the term "barriers" include only man-made barriers, not natural objects, and suggest that the court decisions use of "barriers" refers to manmade objects -- fences on the Dearborn and a bridge on the Beaverhead.

Finally, it is no secret that a great many ranchers are in serious financial trouble. For many of them it is the quality of rural life that has kept them hanging on as long as they have, rather than selling out to subdividers. Losing

control as to who and how many persons can be on their small stream, which frequently flows right through their back yard, and how those people fish and how many fish they kill --may well be the straw that breaks the camel's back for many landowners. This loss of control and privacy they have enjoyed for decades, coupled with hard economic times and fear of further erosion of their property rights may indeed make many of them decide to sell out to a subdivider for the highest dollar while they still have the right to do so.

As for the hunter and fisherman, what will they be left with when the small fisheries and the elk and deer winter range in the foothills have been converted to houses?

Whatever access legislation does or does not result from this session of the legislature, we think one of the best ways to mitigate the impact on these small, high quality wild trout fisheries is catch-and-release regulations. This should be implemented as soon as possible; these small fisheries will go downhill fast without it.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 85
DATE 03 08 85
BILL NO. H.B. 265

Sincerely,

W.H. Dunham

William H. Dunham
Executive Director
Montana Land Reliance
P.O. Box 355
Helena, Mt. 59624

(This sheet to be used by those testifying on a bill.)

NAME: Everett Hicks DATE: March 8 1985

ADDRESS: LY Ranch - Wolf Creek

PHONE: 235-4736

REPRESENTING WHOM? LY Ranch

APPEARING ON WHICH PROPOSAL: Bill 265 - Stream Access

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

COMMENT: We (the ranches) are losing everything including our land owners rights for a little recreation. Recreation doesn't pay the bills - ranching does

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 86
DATE 03 08 85
BILL NO. H.B. 265

I am in opposition to HB 265 and feel it would very damaging to many ranch in Park County I believe the four good bills passed by the Senate SB 435, 418, 421 and 424 takes care of the main problems of the Supreme Court decision

Clarence L Keough
Wilsall Mont.

SENATE JUDICIARY COMM
EXHIBIT NO. 87
DATE 03 08 8

NAME: Dick Klick DATE: 3-8-85

ADDRESS: Augusta

PHONE: 2645806

REPRESENTING WHOM? Sun Butte Outfitters & Ranchers & Associates

APPEARING ON WHICH PROPOSAL: H.B. 265

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

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTE
EXHIBIT NO. 88
DATE 03 08 85
BILL NO. H.B. 265

(This sheet to be used by those testifying on a bill.)

NAME: DAVID LACKMAN DATE: March 8,1985

ADDRESS: 1400 Winne Avenue, Helena, Montana 59601

PHONE: (406) 443-3494

REPRESENTING WHOM? Montana Public Health Association (Lobbyist)

APPEARING ON WHICH PROPOSAL: HB 265 (Ream) STREAM ACCESS

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

Senate Judiciary Committee 10: A.M. Old supreme court room

COMMENT: Our Environmental category

We support the purposes of HB 265. However, the definition of "ordinary high water mark" presently in the bill would be difficult to apply ~~on~~ to streams where they spread out; such as is the case of the Bitterroot River north of Hamilton. Also, we do not feel that it provides adequate protection for the landowner in some situations. The definition of high water mark which the Soil Conservation uses is preferable. It is presently in SB418 (Boylan) definition of high water mark. However, this bill will be void if HB 265 passes.

The following amendment to HB 265 is suggested:
On page 3, line 10 beginning with "cause", delete the rest of the line and continuing through lines 11, 12, 13, & 14 thru "value". Then substitute the following - which is essentially the definition contained in SB 418:

" deprive the soil of its vegetation or to destroy its value for agricultural purpose. Flood plains or flood channels are not considered to lie between the ordinary high-water marks for recreational purposes, except when they carry sufficient water to support fishing or floating."

We feel that this definition will be easier to apply; and that it affords the landowner better protection. Then there is the question of protecting land along streams from pollution by recreationists. This stricter definition will help

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 89
DATE 03 08 85
BILL NO. H.B. 265

(This sheet to be used by those testifying on a bill.)

NAME: William G Larson DATE: March 8, 1985

ADDRESS: Box 136 Alder, Montana

PHONE: 842-5384

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: HB 265

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

COMMENT: Support Senate Bills 418, 421, 424 435

I am in direct opposition to HB 265 on the basis that it violates my individual and personal rights of a citizen and a land owner.

This bill is in fact a land use bill. Supported by, New (Title Insurance policies) withhold the streambed from high water mark to high water mark. This land has previously been under my personal control since 1962 as a catch and release commercial fly fishing stream.

Under the new water adjudication we have applied for a flow through non-consumptive use for all recreation

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

William G Larsen

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 90
DATE 03 08 85

NAME Linda S. Larson BILL NO. HB 265

ADDRESS P.O. Box 136 Alder Mt. DATE 3/8/85

WHOM DO YOU REPRESENT Land owners

SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I oppose HB 265 and support Senate Bills 418, 421, 424, 435.

Linda S. Larson

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 91
DATE 03 08 85
BILL NO. H.B. 265

NAME Mary S. Lineberger BILL NO. H.B. 265

ADDRESS Star Rt. 1, Box 154, Ennis, Madison County DATE 3-8-85

WHOM DO YOU REPRESENT Self - Cattle Rancher + landowner

SUPPORT _____ OPPOSE ✓ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I believe that HB 265 goes beyond the Supreme Court rulings in Curran and Hildreth in granting rights to recreationists to use dry land between the low and high water marks and also appropriating the bed of a stream for public use - without condemnation or compensation.

I further believe that Senate Bills 418, 424, 421 and 435 will better serve Than HB 265.

I feel that passage of HB 265 would substantially reduce the value of my land.

Mary S. Lineberger

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 92
DATE 03 08 85
BILL NO. H.B. 265

NAME Bill Maloney BILL NO. 245

ADDRESS Alder, Mont Box 139 DATE 3-8-85

WHOM DO YOU REPRESENT _____

SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I support Senate Bills #18, #21, #24, #31

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 93
DATE 03 08 85
BILL NO. H.B. 265

NAME Josabelle Yaloney BILL NO. HB 265

ADDRESS Box 139 Elder Mt DATE 3/5/85

WHOM DO YOU REPRESENT Land Owner

SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I oppose HB 265 and support Senate Bills 418, 421, 424, 435.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 94
DATE 03 08 85
BILL NO. H.B. 265

NAME Ron Marshall BILL NO. _____

ADDRESS P.O. Box 139 Alder, Mont. DATE 3-5-85

WHOM DO YOU REPRESENT _____

SUPPORT _____ OPPOSE ✓ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I support Senate Bills 418, 421, 424, 435

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 95
DATE 03 08 85
BILL NO. H.B. 265

413

NAME Tim D. Maloney BILL NO. HB 265

ADDRESS Box 139 Alder MT 59710 DATE 3/8/85

WHOM DO YOU REPRESENT _____

SUPPORT _____ OPPOSE ✓ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

In 1860, my ancestors fled Ireland because the English stole their land. If HB265 passes, my land will be stolen. Where can I go?

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 96
DATE 03 08 85
BILL NO. H.B. 265

NAME: Barbara Holman Morse DATE: 3-8-85

ADDRESS: Box 550 Absarokee Mt. 59001

PHONE: 406-328-2661 -- 406-328-8147

REPRESENTING WHOM? myself

APPEARING ON WHICH PROPOSAL: HB 265

DO YOU: SUPPORT? ______ AMEND? ______ OPPOSE? very strongly oppose

COMMENTS: I could never believe my country or my government would take my property right away from me. This is property that I have worked very hard for! Please do not pass H.B. 265.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 97
DATE 03 08 85
BILL NO. H.B. 265

Duane Neal

BLACK OTTER GUIDE SERVICE

Duane or Ruth Neal
Box 93
PRAY, MONTANA 59065
Phone 406-333-4362
Licensed Guides and Outfitters

March 7, 1985

Senator Joe Mazurek
Chairman
Senate Judiciary Committee
State Capitol
Helena, Mt 59020

RE: House Bill 265

Dear Senator Mazurek:

I am a private property owner and Outfitter in the State of Montana. I am here today representing my families interests to our private property rights.

I am opposed to HB 265 due to the fact that it will open portions of my private property to use by the public with out compensation for the diminished value of the property due to the public's use of the private property. I find this bill to be contrary to the Montana State Constitution and recent decisions rendered by the Montana Supreme Court in both the Hildreth and Curran cases.

The Hildreth case gave the public the use of the bed and banks of the Beaverhead due to the fact that the Beaverhead River was declared a Naviagable River, which would be in compliance with the Montana constitution and Federal Laws governing naviagable Rivers.

The Montana Supreme Court did not decide the issue of navigability in the Curran case and henceforth did not give the public the right to use the beds and banks of the river. They did however uphold the private property owners right to the bed and banks of the river.

The only exception in either decision granting the public the right to use the private property of the adjacent land owner is in the case of a barrier in the water and then a portage route may be used on a very limited basis.

HB 265 opens virtually every trickle of water in the State of Montana to use by the public with very few restraints.

Please Kill this Bill.

Respectfully,

Duane Neal

Duane Neal

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 98 /
DATE 03 08 85
BILL NO. H.B. 265

NAME Mary Jane Rickman BILL NO. 265

ADDRESS Rt. 1 Box 174 Fishtail, Mont. 59028 DATE March 8-85

WHOM DO YOU REPRESENT Myself & husband & ranchers in my area

SUPPORT _____ OPPOSE V AMEND _____

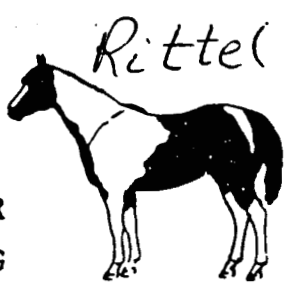
PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

My husband and I are very much opposed to bill 265. There is no way the ranchers will tolerate this recreation prescribed. Untold problems would arise. The bill should never be passed.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 99
DATE 03 08 85
BILL NO. H.B. 265

BLACKTAIL RANCH



Rittel

Wolf Creek, Montana 59648
TAG RITTEL Phone: 406-235-4330 SANDRA RENNER

RANCH VACATIONS • MUSEUM • CAVERN • PAINT HORSES • HUNTING

March 5, 1985

MR. CHAIRMAN, MEMBERS OF COMMITTEE
I AM AGAINST H.B 265 AND LIKE IT.
I AM A RANCHER ON THE SOUTH SIDE OF
THE SMITH RIVER. A STREAM THAT MY FAMILY
HAS TAKEN CARE OF SINCE 1939. WE HAVE 5 MILES
OF STREAM RUNNING THROUGH THE RANCH. IT
IS USED TO SMALL TO BRING IT TO THE GENERAL
PUBLIC FOR FISHING OR HUNTING.
I SEE NOTHING IN THIS BILL FOR THE
LAND OWNER. EVERYTHING HAS BEEN TAKEN
FROM US AND IN NO WAY DO I READ
ANY THING BUT PUBLIC ACCESS WITHOUT
CONTROL.
I WOULD ADVISE KILLING THIS BILL AS
WE ARE BETTER OFF RIGHT NOW WITH NOTHING.

SINCERELY

John T. Clay Rittel

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 100
DATE 03 08 85
BILL NO. H.B. 265

NAME Margery Rossetter BILL NO. HB265

ADDRESS Box 175 DATE 3/8/85

WHOM DO YOU REPRESENT myself

SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I am extremely concerned about HB265 that permits and allows access and uncontrolled public intrusion for public recreation on the small streams.

Many ranches along the streams like ours are in a very remote and isolated area.

After the Ranch wife packs her Ranch husbands lunch and he is gone for the day what protection does a Ranch wife have against being molested or raped?

As you know we have crime in the rural as well as the urban areas. You might say that the stream could become a highway of crime to my door!

I can not live with or accept HB265 as written.

Please defeat HB. 265

Margery Rossetter

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 101
DATE 03 08 85

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 102
DATE 03 08 85
BILL NO. H.B. 265

NAME Mary N Saunders BILL NO. HB265

ADDRESS Box 13, ENNIS, Mt. DATE 3-8-85

WHOM DO YOU REPRESENT Myself

SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments: I firmly oppose HB265

We have enjoyed the privilege of controlling the recreational activities on our land for over 100 years. Our streams and adjacent ground maintain a delicate balance because of this control. If HB265 passes, our land and its recreational value would be destroyed beyond repair and this would mean thousands of dollars in loss to us. I do not appreciate having some outside stranger stand on my front porch and "recreate" in or around the stream that runs in front of my house. This "stranger" certainly would object to contributing to my tax responsibility. Please defeat this Bill-265. Thank you, Mary Saunders

(This sheet to be used by those testifying on a bill.)

NAME: L. J. Schieffert DATE: 3/8/85

ADDRESS: McLeod Mont. 59052

PHONE: 932-6156

REPRESENTING WHOM?

APPEARING ON WHICH PROPOSAL:

DO YOU: SUPPORT? AMEND? OPPOSE? X

COMMENT: I AM opposed to 265 But infavor of Bills -118- 421- 424 - 435-
Thank you

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 103
DATE 03 08 85

NAME: Tom Hall DATE: March 8

ADDRESS: Nicholls MD.

PHONE: 537-4185

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: 26

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

COMMENTS: 26-65 is an infringement on our Private property Rights - 418 421 + 1424 are much better + clearer - more Concise.

26-65 goes way further than the Supreme Court decisions + I oppose it

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 104
DATE 03 08 85
BILL NO. H.B. 26

NAME Barbara Van Cleve BILL NO. HB 265

ADDRESS Big Timber DATE Mar 8

WHOM DO YOU REPRESENT myself.

SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

This bill is an invasion of property rights - it takes away land which we have bought and paid taxes on from Yrs! - Landowners raise food for the world - Is it fair to add the burden of trespassers to that we already carry from weather, predators, insects & long long hours of hard work - Please Kill H B 265 - Your property rights might be next on the line.

~~Vote~~

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 105
DATE 03 08 85
BILL NO. H.B. 265

NAME [illegible] BILL NO. H/B 265

ADDRESS Box 816 McLeod Rt. DATE Mar 8 85

WHOM DO YOU REPRESENT _____

SUPPORT _____ OPPOSE X AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I am a concerned sportsman that owns two Stream side real estate. I feel that H/B 265 expands the permissiveness of the Supreme court ruling to the detriment of private property rights.

Please continue the support of SB 419, 421, 424 and 435

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 106
DATE 03 08 85
BILL NO. H.B. 265

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 107
DATE 03 08 85
BILL NO. H.B. 265

March 7, 1985

Senator Joe Mazurek
Chairman
Senate Judiciary Committee
State Capitol
Helena, Montana 59620

Re: House Bill 265

Dear Chairman:

Back in the 70's a House Bill which stated "Stand in the middle of a stream and as far as the eye can see shall be open to public recreation" met a hard and fast defeat. H.B. 265 is but another attempt to accomplish the same results. The first step to obtain free and uncontrolled use of private property. I have heard a significant number of recreationists state; "We will go after the wildlife next," "Get as much as we can this time, the rest will follow," "We want unrestricted hunting too," etc. etc. If successful, God help the rancher-farmer.

H.B. 265 will open a Montana playground, not only to resident, it gives the key to our land to well over 200 million U. S. residents to indulge in free, unrestricted and unlimited water related recreation. Thousands of miles of additional rivers, creeks, trickles of water and even dry stream beds and thousands of miles of private property land corridors will become as public as a Chicago city street resulting in a multitude of landowner problems.

Most disheartening is the taking of private property from one and giving its use to another without due process and compensation, "a shocking reality."

Landowners will lose the right to control land he owns and the right to protect the stream, bank and corridor resource.

Taking will result in an overall loss of land value estimated by many to amount to between ten and fifty per cent and amounting to millions and quite possibly hundreds of millions of dollars of tax value property. "Streamside property is the most valuable" A severe blow to an already depressed agriculture economy.

Loss of land value will severely restrict, and possibly preclude, the ability of the farmer-rancher to obtain operating capitol loans. Will tax rolls reflect this depreciation of land value? Landowners will surely be entitled to and rightfully request a reduction of land taxes, another blow to our exonomy.

Streamside property now considered to be very valuable, will become a liability. What incentive will remain to own land that has become a detriment? All at a time when Montana searches desperately for revenue.

H.B. 265 in essence implies that landowners do not have the ability to manage and control and proposes to turn management over to the Department of Fish, Wildlife and Parks. Some landowners apparently agree and they should do so. The Department have for some time been soliciting landowners to participate in such a program currently in effect and I suggest those who desire this program contact the Department for voluntary turn over for public use. Try it on a two year trial basis. They don't need H.B. 265. Let those of us who have been gaurdians of the resource remain in control. We don't need H.B. 265 either.

The general public currently have free use of well over 30 million acres of public land and its waters. (well over 1/3 of Montana) H.B. 265 expands this decision to include thousands of miles of stream beds, banks and endless corridors through private property. A trickle of water a foot wide, running for ten miles through a ranch and choked with brush a half mile wide, even to the point of making the water inaccessible, will become a one half mile wide corridor for hunting birds, waterfoul, gophers and possibly Big game in addition to dragging a boar and providing access to a neighbors property or public lands. The brush that chokes a creek is a definate barrier as long as the creek or its bed is wide enough to put your foot in.

Free access sounds beautiful to some urban dwellers who have always wanted to fish that creek on Joe's place; the problem is that it also sounds good to California and like state residents where the resource was depleted years ago and the vast majority of inland (what little is left) is of planted fish. When the resident heads for his favorite hole on Joe's place there could well be several hundred ahead of him. If one thousand people decide to invade Joe's property for fishing, hunting or making mud balls. Men, women, children, cats and dogs, there is no protection for Joe who has lost control except for paying taxes and liability.

How long will it be before trout fingerlings that had a sanctuary on Joe's place, will be replaced by planted trout? I had a taste of planted streams during occasional visits to a construction job in California years ago. "Quite a comedy." No fish and the streams were jammed, the Department of Fish and Game under public pressure would plant streams, trucks would be followed to planting sites and dump fish in while a horde of adults and children were filling their sacks, a simple act with artificially fed trout. Two days later no fish. Will that be our tomorrow? Is Montana being taken over by Trout Unlimited, Audobon and recreationists from states where the resources were exploited to near elimination years ago.

Where will funding come from to implement the enormous additional burden placed on the Department of Fish, Wildlife and Parks and law enforcement agencies to enforce tresspass laws, to answer calls for help from landowners, to file charges, to plant hatchery trout, to build and operate hatcheries, to expand administrative personnel and office buildings, to employ additional wardens? The number of Game wardens are severely limited at this time and I have heard several complain of being severely restricted on time and mileage allowance. The resident of course will be faced with reduced limits, higher license fees (strongly opposed) possible drawings, etc. Remember all water related play and recreation (except fishing and hunting) is free, no licnese required, no identification and only a very slight penalty, if any, for tresspass.

There is little in the liability section to feel secure about. I have witnessed lawsuits where misconduct and negligence was successfully claimed because the owner of equipment, material or an excavation should have known that a child may be tempted to play on the equipment etc. and should have properly precluded entry to the area. If you are required to leave a tractor near a stream corridor or in it because of a breakdown and a child climbs on it and gets hurt or a child goes to pet a calf, or other animal, and is maimed or killed by the mother of such, you may well be liable and the recreationist could easitly wind up becoming owner of your land. You may be required to fence around the corridor.

If the state wants our land for public use, let the state use due process, let the state supply landowner liability insurance to protect the landowner from the recreationist who will be using camp fires that could easily burn you out.

During the Coalitions lawsuit they were often quoted as stating they only wanted use of floatable streams, how quickly desires change.

If the Supreme Court decision is ambiguous let them clarify it. Its their decision. We can live with it until clarified, why can't the recreationists? Ask yourself why would the recreationist and the Coalition work so hard to get H.B. 265 passed if there wasn't enormous gain in it for them?

SENATE JUDICIARY COMMIT
EXHIBIT NO. 107
DATE 03-08-85
BILL NO. H.B. 265

Ralph Holman
McLeod, Montana

Nye, Montana 59061
March 4, 1985

Senate Judiciary Committee
Senator Joe Mazurek, Chairman
Capitol Station
Helena, Montana 59620

Re: HB265

Dear Senator Mezurek:

Because of the weather and our occupation, we find it impossible to appear before your committee to submit testimony in regard to HB265. However, we are ranchers and land owners in Stillwater County and will be affected by the stream access legislation. As Chairman of the Senate Judiciary Committee, we ask you to please let it be known to all the members of the committee that we the undersigned would like to see the above bill amended in the following way:

1) We feel the public has the right as laid down by the Supreme Court to use the surface water, although HB265 goes beyond this by taking away our property rights.
2) We, also, feel that our property rights should not be given away as to portage or the right for others to enter our land.

Respectfully submitted,

Keith E Martin
Kathryn L. Martin
Glen R. McKinsey
Kathy J. McKinsey
Daly H. McKinsey
Susan A. Russell
Kathryn V. Eaton
Glen V. Eaton
Bob McKinsey
David W. Martin Jr. (Voter)

Laurie M. Jensen
Sherman Roberts
Bonnie Roberts
Jerry J. Edwards
William Edwards
Eileen E. Edwards
Delores E Curran
Jerold M Curran
Richard W. Watts
Doris Hertle
Michael J. Jensen

SENATE JUDICIARY COMMI
EXHIBIT NO. 108
DATE 03 08 85
BILL NO. H.B. 265

PERSONAL TESTIMONY OF ANDREW C. DANA

BEFORE THE MONTANA STATE SENATE

CONCERNING PROPOSED STREAM ACCESS LEGISLATION

Date: March 8, 1985

To: Montana Senate, Judiciary Committee
Montana 1985 Legislature
Written testimony

From: Andrew C. Dana
Box 2006A, Route 38
Livingston, MT 59047
Phone: 587-9591 (w), or 222-2065 (h)

The recent Montana Supreme Court decisions threw into question the rights of the public to use the state's waters for recreation, the rights of landowners to restrict recreational access, and the role of the Department of Fish, Wildlife, and Parks in protecting the rights of recreationists, landowners, and the integrity of the natural resource base Montana. In response, the Montana House of Representatives passed House Bill 265 in an attempt to clarify the ambiguities left by the Court decisions.

THIS TESTIMONY IS IN OPPOSITION TO HOUSE BILL 265 FOR THE FOLLOWING REASONS:

1) The classification system proposed by House Bill 265 does not address the potential problems of recreational overuse of fragile riparian ecosystems. The Supreme Court cases clearly state that "the capability of use of the waters [of the state] for recreational uses determines their availability for recreational use by the public." Many small streams in Montana are ecologically fragile and are not capable of supporting

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DATE 03 08 85
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unrestricted fishing access. Unlimited fishing pressure on these streams will eventually result in the depletion and degradation of the quality of Montana's resource base. Therefore, House Bill 265, which leaves virtually every stream in the state open to the possibility of overfishing, clearly violates (a) the intention of the Supreme Court decisions and (b) Article IX of the Montana Constitution which requires that the legislature "provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."

2) House Bill 265 gives regulatory responsibility for every waterway in Montana to the Department of Fish, Wildlife, and Parks (DFWP). The DFWP is currently understaffed and underfinanced to carry out these responsibilities. In order to protect the fisheries of the state the DFWP will be required either to raise license fees or to seek increased funding from the state's general fund. The first alternative will be unpopular among sportsmen and will be discriminatory against the less affluent members of society. The second alternative, tapping the state's general fund, is not practical in this time of fiscal restraint. If the DFWP is not able to raise sufficient funds for adequate recreational resource regulation, Montana's resource base will decline in quality to the detriment of the state's tourist-based economy and the state's citizens in general. Additionally, recreationists will be faced with an array of extensive, restrictive, and confusing regulations.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 109
DATE 030885
BILL NO. HB 265

3) House Bill 265 expands, rather than clarifies, the Supreme Court rulings by providing for the use of lands adjacent to Montana waterways. The provisions dealing with portage place an unfair and costly burden on landowners to provide portage routes for the benefit of the public. Why should individual landowners be required to pay for the public's use of their land? In essence, House Bill 265 penalizes landowners simply because they own property adjacent to streams.

4) House Bill 265 by implication allows the construction of permanent and semi-permanent structures, overnight camping, and the use of firearms on private property between the ordinary high water marks of "Class I" streams. This is a clear violation of an existing Montana Statute (MCA Section 70-16-201) which states that private property extends to the low water mark on all navigable streams.

In my opinion as a natural resource policy analyst, it makes little sense to give the Department of Fish, Wildlife, and Parks sole responsibility for the management of the state's recreational resources. A system of mutual cooperation between the DFWP and landowners should be developed. Because private landowners live and often work in close proximity to the waterways of the state, they have advantages of location and ability to manage streams both efficiently and equitably.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 109
DATE 030885
BILL NO. HB 265

If landowners are given responsibilities of resource stewardship by the state, they will have incentives to maintain the high quality of the state's resources. If landowners abuse these stewardship privileges, the state could revoke the privileges. Landowners could be expected to manage recreational resources carefully if they faced the threat of losing stewardship rights.

The idea of stream classification incorporated in House Bill 265 is commendable, but as defined in the Bill, the classifications do not go far enough to protect sensitive streams from potential overuse. At least one more classification should be included which allows landowner control of recreational access to Montana's small, sensitive streams under supervision of the DFWP. Such classification of streams would not be simple, but it is certainly a reasonable solution if the alternatives are landowner-recreationist polarization and the ultimate degradation of the state's sensitive fisheries.

As another alternative, property rights to water should be clarified. Under current Montana water law, it is impossible for individuals to appropriate instream water for fish, wildlife, and recreational purposes, yet individuals and private groups may appropriate water for other beneficial uses if the water is diverted. Such appropriation is tantamount to private ownership. Clearly, water has a high value if left instream. Montana water law should be streamlined to allow individuals and private groups, including such groups as Trout Unlimited and The Nature Conservancy, to appropriate exclusive rights to small, sensitive streams in order to protect the state's resource base.

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DATE 030885
BILL NO. HB 265

The ideas of expanded stream classification and instream appropriations are only suggestions, but even in rough form, they provide opportunities for flexible and creative resource management completely neglected by House Bill 265.

In summation, I believe that Legislative approval of House Bill 265 would violate the rights of the citizens of the State of Montana as outlined in the Constitution, in the Statutes, and in Judicial decisions.

- House Bill 265 would permit overfishing of Montana's small streams in violation of Article IX of the Constitution and various statutes designed to ensure the environmental integrity of riparian ecosystems. Additionally, the Bill violates the public trust doctrine by allowing the destruction of publicly owned fisheries through overuse.

- House Bill 265 places an unfair burden on landowners holding property adjacent to waterways by making them pay: (1) costs of the public's recreational use of waters and privately held lands within high water marks, (2) costs of establishing portage routes, and (3) costs associated with litter and invasion of privacy.

- House Bill 265 asks the Department of Fish, Wildlife, and Parks to take on the impossible task of regulating recreational use of every waterway in the state without landowner cooperation. The DFWP has neither the money not the manpower to protect the state's resources adequately. As a result, the Bill virtually assures that the state's fisheries will decline in quality to the detriment of all in the long run.

- House Bill 265 completely ignores the existing statute which specifies that landowners own to the low water mark of navigable waterways. The provisions of the bill therefore allow taking of private property without just compensation which violates Article II, Section 29 of the State Constitution.

For all of the reasons stated above, I respectfully urge that the members of the Senate Judiciary Committee reject House Bill 265 as written.

Respectfully submitted,

Andrew C. Dana

Andrew C. Dana

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 109
DATE 030885
BILL NO. HB 265

RECREATIONAL ACCESS TO MONTANA'S WATERWAYS: CONFLICT OR COOPERATION*

by

Terry L. Anderson

Senior Fellow, Political Economy Research Center and

Professor of Economics, Montana State University

* Working paper, revised 2/12/85.

ABSTRACT

This paper analyzes the potential impact that two 1984 Montana Supreme Court opinions may have on the small stream fisheries of Montana. Both opinions declared that since the state of Montana holds all of the waters of the state in trust for the benefit of its citizens, no private individuals with land adjacent to waterways may control recreational use of those waters. All surface waters in the state may now be open to unlimited access for recreational purposes.

The Court decisions imply that all state waters which are capable of supporting recreation are common property. Problems associated with common property resources have been well documented. In general, common pool resources are overused by the public because each individual user receives benefits but does not have to pay the full costs of resource use. Costs are spread to society as a whole as the resource base declines from overuse.

Montana faces an imminent decline in the health of its sensitive and highly productive small stream fisheries now that they are open to unlimited recreational access. The decline in these fisheries is likely to affect adversely the fisheries in Montana's larger rivers, the state's economy, and the outstanding recreational opportunities Montanans currently enjoy.

Allocation of resources is usually determined through private control or by means of public regulation. When grappling with ways to protect the resources of the state in the aftermath of the Supreme Court decisions, the Montana legislature must decide whether to adopt public or private management schemes. Both public and private management are feasible, but

private management options avoid the high costs, prospects of increased taxes and license fees, expansion of state bureaucracy, and complex regulatory schemes associated with centralized, public management.

While public management may be necessary on the state's larger, navigable waterways, landowners with responsibility for resource stewardship have advantages of location and incentive to protect small streams from overuse. In the long run, private control of fragile small streams is more efficient and more beneficial for the people of Montana.

Two policy options are identified which would allow for efficient and beneficial management of Montana's small stream fisheries. A stream classification system which designates the streams that require protection is one possibility. Small streams which are most effectively managed and protected by landowners should be placed in a category that gives landowners both the authority and responsibility to protect the recreational resource base.

A second option is to repeal Montana's statutory requirement that water appropriation rights may only be acquired by individuals and private groups through diversion of water from natural watercourses. By allowing landowners, individuals, conservation groups, and sportsmen's organizations to appropriate recreational water rights on small, fragile waterways, overuse and overcrowding of recreational resources could be controlled and minimum flows maintained. This would place highly valued instream water uses on an equal basis with the other beneficial uses of water in the state and would serve to rectify current inconsistencies in Montana water law.

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INTRODUCTION

In 1984, the Montana Supreme Court ruled on two cases which concerned the right of the public to gain access to the waters of the state for recreational purposes. Both cases were brought by the Montana Coalition for Stream Access, Inc. and various state agencies against Dennis M. Curran, a landholder along the Dearborn River, and Lowell S. Hildreth, a landholder with property adjacent to the Beaverhead River. The Coalition's goal was to force the two landholders to allow the public to float and fish the Dearborn and Beaverhead Rivers. The Supreme Court held that both rivers should be open for public recreational use. Unexpectedly, the Court also ruled that since all surface waters in the state of Montana were publicly owned, they all should be available for unrestricted recreational access.

The breadth of the Supreme Court's decisions shocked both the defendants and the plaintiffs. Even the Coalition did not anticipate such sweeping mandates. Reaction was swift and predictable. Landowners in Montana decried the cases as appalling examples of judicial law-making and as takings of private property. Sportsmen reveled in apparent victory. Controversy and sometimes bitter conflict have surrounded the issue of recreational use of surface water in Montana ever since.

At least four bills have been introduced to the 1985 session of the Montana legislature which attempt to resolve disputes that have arisen over the stream access issue. These bills have been introduced in an effort by legislators to clarify the ambiguities and implications of the Court decisions and balance the concerns of landowners with the concerns of recreationists. Additionally, the legislators recognize their constitutional mandate to safeguard Montana's water resources from degradation.

While a great amount of attention has been relegated to the conflicts that have emerged among landowners and recreationists as a result of the Montana Supreme Court cases, considerably less attention has been paid to the effects of these decisions on the recreational resource base of Montana. Although some sportsmen view the decisions as unqualified victories, their elation may be unjustified. Serious questions arise about what impacts unlimited recreational access to Montana's smaller streams will have on the state's fisheries. This paper analyzes the potential impact of the Supreme Court decisions on state resources, particularly the state's fisheries and recreational resource base. Policy options to deal with resource problems that may arise also are identified and evaluated.

THE MONTANA SUPREME COURT CASES

Both the Dearborn and the Beaverhead Rivers are moderately sized streams with high recreational value. In central Montana, the Dearborn flows from the Scapegoat Wilderness, through scenic canyons and rolling plains to join the Missouri River. Fishing on the Dearborn is superb, and recreational boating is popular. The Beaverhead River originates at the outlet of Clark Canyon Dam in the southwestern portion of the state, flows north past Dillon, and eventually combines with the Big Hole and Ruby Rivers to form the Jefferson River. The Beaverhead is reputed to produce more large fish per mile than any other stream in the state.

The Coalition for Stream Access, Inc. brought suit against two landowners who hold property adjacent to the rivers—Lowell Hildreth on the Beaverhead and Dennis Curran on the Dearborn--to establish a clear public right to use the rivers for recreational purposes. Both Curran and Hildreth objected to public use of the rivers, believing that they had the right to control the waters flowing through their property. In each case, the District Courts held against the landowners and affirmed that the public did have the right to use the rivers for recreational purposes. The cases went to the Supreme Court of Montana on appeal.

The Dearborn case was heard first. In The Montana Coalition For Stream Access, et al. v Dennis Michael Curran,[1] the Supreme Court affirmed the ruling of the District Court, but it also substantially broadened the

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[1] Referred to as Curran throughout the rest of this paper.

ruling. Citing the Montana Constitution and the public trust doctrine,[2] the Court held:

> The capability of use of the waters for recreational purposes determines their availability for recreational use by the public. Streambed ownership by a private party is irrelevant. If the waters are owned by the State, no private party may bar the use of those waters by the people . . . . Any surface waters capable of use for recreational purposes are available for such purposes by the public, irrespective of streambed ownership.

The Court did not define "capable" and therefore placed no limits or restrictions on the amount or the type of recreation that was appropriate on Montana waterways.

A month later, the Supreme Court considered The Montana Coalition for Stream Access, et. al. v Lowell S. Hildreth.[3] The Court reiterated and strengthened the decision reached in Curran by specifically rejecting any "test" used to determine whether a stream is suitable for public recreational use. "[The] only possible limitation of use can be the characteristics of the waters themselves." Again the court made no effort to define what the limiting characteristics might be.

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[2] Article IX of the Montana Constitution provides that all waters in Montana are state property, held for the use of the people. The public trust doctrine was first clearly enunciated in the 1892 U. S. Supreme Court case, Illinois Central Railroad vs. Illinois. The doctrine reads, in part:

> 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 peace.

[3] Referred to as Hildreth throughout the rest of this paper.

The Curran and Hildreth cases significantly expanded the rights of the public to gain access for recreational purposes to Montana's waterways. the decisions will have little effect on the state's larger rivers, such as the Yellowstone, the Missouri, and the Kootenai, because these rivers were previously available for virtually unrestricted public use. Smaller streams, on which public use was customarily regulated by private riparian landowners, were opened to all recreational uses with no regard for potential adverse impacts that could accrue through overuse.

THE CREATION OF A COMMON PROPERTY RESOURCE

The Tragedy of the Commons

In effect by invoking the public trust doctrine, the Montana Supreme Court declared that all water resources are held in common since no individual has the right to exclusive control of the resources. While some may consider this appropriate, problems associated with common property resources are well documented. In general, when a resource is held by everyone, both the quantity and the quality of the resource decline. Free and open access means that individual resource users have no incentive to consider all of the costs of their use.

Ecologist Garrett Hardin described the "tragedy of the commons" in the context of a common pasture. If all were free to add cattle to the commons, it would soon be overgrazed. An individual who decides to add an

extra cow will reap the gain of an additional fattened animal and therefore will have an incentive to add cattle. Of course, each cow will impose a cost on the common pasture, but to the cow's owner this cost will be small since it is spread among all users. Furthermore, each individual recognizes that if he refrains from adding a cow to the commons in an effort to improve the forage, he cannot prevent others from adding their cows. As a result, such restraint will have no effect; the forage will continue to decline from overuse.

The same tragedy of the commons can occur with a fishery. Individual fishermen gain by using the stream. Additional pressure and more fish harvested reduce the quality of the overall fishing experience, but again these costs are shared with all other fishermen. The person who returns a fish to the stream to grow and to be caught again has no guarantee that the next fisherman will not keep the fish. Thus, the incentive for catch and release fishing on sensitive streams is greatly diminished.

This is not to say that everyone will behave in this way. Some sportsmen will respect the stream and follow catch and release practices when appropriate. But the incentive to do so is diminished. If we observe the treatment of open access resources, the evidence is not convincing that good sportsmanship and sensitive resource use prevail. Ask why it is that river access points owned and maintained by the Department of Fish, Wildlife, and Parks are often littered, overused, and overfished. Ask why ocean salmon populations are decimated and why many animal populations are driven to extinction. The tragedy of the commons is pervasive.

This tragedy can only be avoided if access to property is restricted. As Ralph Johnson and Russell Austin (1967) note,

> with the ever increasing pressure of fishermen and recreationists on the small lakes [and streams] in the Western states, it is apparent that for their own protection and the protection of the riparians, some restraints must be placed on the common right of use of these waters.

In the United States the most common method of access restriction is private ownership. The private owner reaps direct benefits of resource use, but he also bears the full costs. When resources are publicly controlled, well-intended governmental resource managers, working out of their agency offices, often are removed from the full consequences of their policy decisions. They receive few direct benefits from their decisions and are not directly affected by many of the costs their decisions might incur. Private resource managers more often live in day-to-day contact with their assets and have a feel for the special needs for their resources. Hence, there is more incentive for responsible management in the private sector. The rancher who overstocks his range will bear the cost in the form of range damage, causing reduced future production and reduced land values. Since the majority of stream owners do not charge for stream access, they will not feel an immediate financial impact from unrestricted recreational access. They will experience, however, a decline in fish populations and negative impacts on riparian lands.

Without private control of access, public restrictions must be imposed. While there is no question that such restrictions can work, they are costly. The DFWP already has a tremendous responsibility for managing fisheries. Adding to this responsibility by requiring the DFWP to manage all streams in the state will necessitate the appropriation of more funds. Intensive and expensive study of the state's small stream fisheries will be needed because there is a dearth of site specific information about how much access to allow in individual locations. Furthermore, examples abound

of bureaucratic mismanagement of important environmental resources (Baden and Stroup, 1981).

Montana's Small Streams

Now that small streams are open to unlimited recreational use and have become common property, a decline in the quality of Montana's fisheries is imminent. Overfishing and overcrowding will occur on some Montana streams. The decline in the quality of the resource will be gradual but inexorable, as Americans' leisure time continues to rise and as recreational pressure intensifies. Prior to the Court decisions, landowners were producing public goods--state-owned wild fish--in streams and rivers which they believed they had rights to control. Without control of stream access, landowners will have no incentive or authority to oversee use of the riparian resources of Montana, and they will take no interest in maintaining stream quality. As a result, the state will now be forced to allocate recreational use of resources, rather than depending on landowner discretion to limit access and to control overuse of streams. Red tape and its accompanying frustrations and costs will be substituted for efficient private resource management.

The impacts of common ownership will be particularly severe on small streams which are fragile and sensitive. At least four factors contribute to the greater fragility and sensitivity of small streams compared to large streams: (1) there is less protective cover for fish, (2) spawning grounds are more likely to be trampled, (3) fish populations will undergo greater stress from harassment associated with increased human activity, and (4) insect life on which fish depend will suffer a greater chance of destruction.

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The timing and extent of these adverse impacts will vary depending on the type and location of the streams. First to be affected will be highly productive spring creeks and freestone streams, which often provide crucial spawning and nursery habitat for the state's larger waterways. Because these streams are so productive, anglers will descend on them to take advantage of the high quality fishing they offer. Overfishing will ruin these fisheries, not only destroying the recreational base of the streams themselves, but in certain cases, damaging the fisheries of larger rivers. In addition, streams near Montana's larger population centers will experience increased recreational pressure, causing a decline in the quality of the recreational experience.

In the past, high quality fishing has been preserved on sensitive streams through private ownership. Examples abound:

- On the Boulder River in Sweet Grass County a rancher has strictly limited access and kill on the stream adjacent to his property. Fish of over three pounds are caught regularly. Upstream a short distance on National Forest land, only small, stocked fish are caught because the stream is overfished.

- South of Livingston, on Nelson's and Armstrong's Spring Creeks, public access is strictly rationed by the landowners. Both in-state and out-of-state fishermen pay up to thirty dollars a day to fish on these streams, pumping money into the local and Montana economies. Local tackle store proprietor and angling expert George Anderson (1984) writes, "if these streams were open to the public with no restriction on access, they would have been ruined long ago."

- On a small spring creek in the Gallatin valley, a landowner has fenced cattle out of his stream to promote bank stabilization. Fish populations have risen as cover has regenerated. Silt has washed out, exposing gravel suitable for spawning. An added public benefit is that the stream has once again become important nursery for the East Gallatin River.

- On Poindexter Slough near Dillon, a riparian landowner invested in stream habitat improvement to enhance the fishery. Currently, the "improved" section of stream produces fish for adjacent state-owned land.

The small streams mentioned above, and many others like them which are highly productive and which have been regulated by private management, have become extremely important to Montana's tourist and fishing tackle businesses. Destruction of these resources will adversely affect Montana's economy. The decline of resource quality will be incremental and difficult to document because it will be slow. As it occurs, however, the impact of resource degradation will spread beyond the fisheries. Montana will lose some of its nationally famous and superb fisheries which provide enjoyment for her citizens and generate fishing and tourist related revenues estimated by the Department of Fish, Wildlife, and Parks (DFWP) to be worth $90 million in 1982 (Flynn, 1984).

Distribution of Costs and Benefits

Attention should also be focused on the distribution of costs and benefits as a result of the Curran and Hildreth cases. With the waterways of Montana open to unlimited recreational use, obviously Montana's recreationists who use riparian resources will benefit from unrestricted entry to productive streams, at least until the resources are degraded through overuse. Non-resident recreationists will also enjoy rights to use Montana's fish and riparian assets without asking permission. The DFWP undoubtedly will have to devote more resources to conflict resolution and therefore will require an expansion of its budget to pay for increased costs associated with the need for heightened regulation, enforcement, and protection of the state's resources. Thus, the state bureaucracy will expand to the benefit of state employees.

The costs of unlimited access to Montana's waters cannot be ignored. To pay for a larger state bureaucracy, money will have to be taken from general funds or additional sources must be tapped. This will cause a redistribution of wealth from non-recreationists, who will unwittingly subsidize the costs generated by recreational uses of the state's waters. Alternatively, the DFWP will be forced to raise license fees for recreational use, perhaps to a level so high that non-residents will spend vacation dollars elsewhere. In addition to the loss of resource quality, private landowners will face greater liability, more damage to agricultural property and livestock, and more interference from public intrusion into rights of privacy and private property.

The public will generate environmental tnird party effects. Litter, sanitary problems, and noise are common problems at public fishing access sites today, and there is no reason to believe that the public will behave with more discipline on small streams surrounded by private property. These cost will be borne by riparian land owners. If access rights also include the right to hunt waterfowl, the potential for third party effects is even greater. Cattle will disturbed and perhaps injured.

In sum, the Curran and Hildreth cases have opened more than the waters of the state to increased recreational use. By creating common property, the cases have opened the way for degradation of the small stream fisheries in Montana. The door has been opened for expansion of state bureaucracy and for increased taxes to pay for DFWP enforcement and regulatory activities. Notoriously ineffective public resource management will need to be substituted for private resource husbandry, which has served the state well in the past. Finally, the cases have eroded further private property rights.

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The introduction of the public trust doctrine into Montana water law has thrown into question Montana's entire system of water allocation. Conceivably, perfected private rights to use water for agricultural, domestic, or industrial purposes could be challenged under the public trust framework. In a recent court case in California (National Audubon Society v Department of Water and Power of the City of Los Angeles, 1983), the city of Los Angeles was forced under the public trust doctrine to abandon a legally appropriated water right to protect wildlife habitat in Mono Lake. While wildlife and people who value wildlife clearly benefited, uncertainty was created in California water law. In essence, the public trust doctrine is incompatible with the appropriation system of water rights because it undermines the security of resource control granted by the appropriation system. The introduction of the doctrine into Montana water law, therefore, has exacerbated inconsistencies in the state's water policies.

While the Supreme Court interpreted the state constitution to mean that the public has the right to use all of the surface waters of the state for recreational purposes, the constitution also clearly charges the legislature with the duty to protect the state's resources from degradation. Article IX, Section 1(3) reads: "The legislature shall 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" (emphasis added). In the case of small streams that will suffer from overfishing, the Court's decision contradicts the policies set forth by the legislature to protect natural resources. One such policy states,

> It is the policy of this state . . . to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with least possible degradation of the natural aquatic ecosystems. [MCA 85-2-102(3)]

Permitting overuse of aquatic resources through unrestricted recreational access certainly does not maximize benefits for Montanans. Another policy states,

> It is the policy of the State of Montana that its natural rivers and streams and the lands and the property immediately adjacent to them . . . are to be protected and preserved in their natural or existing state . . . Further, it is the policy of this state . . . to protect the use of water for any useful or beneficial purpose as guaranteed by the Constitution of the State of Montana. [MCA 75-7-102]

The uses of water for fish, wildlife, and recreation are specifically cited in MCA 85-2-102 as beneficial. Any policy, judicial or legislative, that harms such beneficial uses may be unconstitutional. The Curran and Hildreth case rulings will destroy small stream fisheries, and recreational opportunities in Montana will suffer as a result. The sweeping decisions made by the Supreme Court therefore may be unconstitutional when applied to small waterways.

The Supreme Court decisions may also violate the principles of the public trust doctrine when applied to the small streams of Montana. "According to the [public trust] doctrine . . . government must protect particular resources within its jurisdiction for the public good and for the good of the resource" (Montana Legislative Council, 1984) (emphasis added). If the Court rulings result in the deterioration of Montana's fisheries as a consequence of unlimited recreational access, the provisions of the public trust doctrine will be completely contradicted since neither the "public good" nor the "good of the resource" will be protected.

On the other hand, the Supreme Court stated that the only limiting factors for recreational use of water in Montana are 1) the "characteristics of the waters themselves" (Hildreth) and 2) "The capability of use of the waters for recreational purposes determines tneir availability for recreation by the public" (Curran). This language implies that the state may indeed restrict public access to streams when such waters are not capable of supporting unlimited recreational use. Taken in combination with the constitutional mandate charging the legislature to protect the state's resources, these statements unambiguously force the legislature to face the problem of recreational resource degradation through overuse. Policy options which address common property fishery problems are discussed below.

RESOURCE MANAGEMENT OPTIONS

Natural resources are normally allocated in two ways in the United States. Either private property owners dictate how resources are used, or governmental agencies distribute scarce resources through regulation. The U. S. Constitution stresses the sanctity of private property rights, and for most of the nineteenth century the federal government disposed of its vast natural resource holdings to private owners. Beginning with the Progressive Era, however, governmental agencies actively entered the resource management arena and retained title to many public resources. It was during this era, in 1892, that the Supreme Court decided Illinois Central Railroad vs Illinois, the first clear statement of the public trust doctrine.

In cases where private property rights cannot be well specified and enforced, public ownership and control may be justified. In most cases, however, private property rights provide an effective means to prevent the tragedy of the commons. The Montana legislature must decide which avenue, public or private, is more appropriate for the management of the state's fisheries and water resources.

Public Regulation

There is no question that the DFWP has the expertise to regulate streams and rivers in order to provide a strong resource base and quality recreation. Several cases support this conclusion:

- The Rock Creek fishery near Missoula was badly overfished in the early 1970s. By means of a complex set of tackle and harvest restrictions, the DFWP succeeded in restoring Rock Creek to its status as one of the pre-eminent trout streams in the state. Special regulations, tailored to the specific needs of the fishery, remain in effect on Rock Creek.

- The Smith River in Meagher and Cascade Counties has come under enormous recreational boating and fishing pressure in recent years. Several landowners on the river became distraught with the public's disregard for private property. The DFWP responded by assigning a warden to patrol and monitor the public's use of the Smith. This warden has no other duties. Conflicts on the river have decreased.

- With the growth in popularity of fly-fishing and with the concurrent growth in Montana's reputation as the finest trout fishing area in the U. S., populations of trout in the upper Madison River degenerated due to increases in fishing pressure. The DFWP again responded effectively. It studied the fishery intensively, implemented strict catch restrictions, and patrolled the river diligently. The fishery has recovered and remains robust.

It must be remembered, however, that the DFWP has implemented special management plans for only a few streams in the state at a relatively high cost. Additionally, the DFWP acted to protect fisheries after the resource had suffered from degradation; the Department took no measures to avert overuse before damage was well progressed. As a result of the Supreme Court rulings, the DFWP may ultimately be responsible for the regulation of virtually every stream in Montana. If only one-tenth of the streams in Montana required special regulations to protect them from overuse, the sportsman would be confronted by a cumbersome, almost incomprehensible tangle of catch limits, tackle restrictions, and fluctuating seasons. It is questionable whether centralized control of fisheries will produce the diversity of recreational opportunity that the private sector currently provides. The legislature must consider whether it is advisable or even feasible to give regulatory authority for all waterways to the DFWP.

The problem is further complicated by the fact that expertise and knowledge are useless without money and manpower. The DFWP currently has neither to manage all of the state's streams. If the legislature demands that the DFWP regulate the fisheries, the Department will be forced to expand its activities significantly. More money will be needed. The DFWP may look to the state's general fund for increased appropriations--hardly a desirable prospect in this day of fiscal restraint. If the appropriations are made, either taxes will have to rise or cuts in other government programs will be necessary. The alternative is for the DFWP to raise license fees to cover the additional costs, but this is not something generally favored by sportsman groups. If no money is appropriated, the DFWP will not be able to protect the resources adequately.

Even before Curran and Hildreth resource management activities were inadequate. Angling and other recreational pressure is growing rapidly on the state's larger rivers. On these rivers an argument can be made for some public management because of the federal navigability test and because land ownership on the streambanks is highly fragmented.

The state's numerous smaller streams, however, present an entirely different and vastly more complex resource management problem. The public sector will find management of small streams extraordinarily costly and difficult if it tries to protect the resource without the aid of private land owners. The number of small streams and their geographical dispersion make centralized public management of recreational impacts both inefficient and impractical. Game wardens cannot be everywhere at once, and it would be astronomically expensive to hire enough extra wardens to insure that the state's resources were protected from degradation. Another option exists.

Private Resource Management

Private landowners live, and often work, in close proximity to valuable fisheries. They are able to oversee and allocate the recreational activity that occurs on their lands with minimal effort. Because of their proprietary interest in their land and water, landowners have incentives to manage resources efficiently. While some abuse of fisheries by landowners undeniably has occurred in the past, in general Montana's private property owners have been excellent stewards of the state's natural resources.

Objections are raised that landowners may indiscriminately exclude members of the public from their rights to use the fish and water resources of the state. While a few landowners, in fact, have allowed no public access, the overwhelming majority of ranchers and farmers in the state do permit limited recreational use of their property. The DFWP estimated in

1980 that at most only 3,000 miles of stream out of the 23,000 in the state were ever totally restricted to recreation; a more likely figure is that only 1,000 miles of waterway have ever been completely restricted (Cobb, 1985). On occasion, recreationists will be turned away from private property, and the fisherman who is refused permission will be disappointed. While this is unfortunate, it constitutes effective resource allocation, and the integrity of the resource base is maintained.

In light of (1) landowner proximity to small streams, (2) the vested interest property owners have in their lands and waters, (3) the fact that landowners protect and feed fish and wildlife resources for the public at significant personal cost, and (4) landowner history of outstanding stewardship of natural resources, it is worth considering ways of continuing to use the private sector to allocate at least some of the state's fishing resources. The examples cited on pages 9-10 suggest that this management can provide access, foster recreational diversity, and prove fisheries.

Feasibility of Private Control

The decision in the Hildreth case flatly states that "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." In the shadow of this statement, little hope would seem to exist for private management of small streams. Yet, the Montana Constitution charges the legislature with protecting the state's resources from degradation. Since state regulation will succeed only partially in protecting the fisheries from overuse due to cost and manpower constraints, a management scheme which relies solely on public regulation will fail. The resource will decline, and tenets of the constitution will be violated. In its attempt to find a solution to

the problem of unlimited recreational access, the legislature is trapped: the constitution says the legislature must protect the state's resources, but the Supreme Court decisions, which prevent private control of access, promise to cause degredation of small streams.

The crux of the problem lies in the inconsistencies of Montana water law. If the Montana Supreme Court interpreted the constitution correctly and if landowners truly have no legal right to "control the use" of state-owned water, then all the "use" rights to water granted by the Department of Natural Resources and Conservation to irrigators, municipalities, industry, and households may be illegal. When the state grants water appropriation permits, it does not transfer title to water to the appropriator; rather, the state grants usufructory rights which entitle appropriators to control state water and use it consumptively as long as the water is used beneficially.

In the Montana Code Annotated, irrigation, stock-watering, domestic, industrial, and municipal uses of water are all cited as beneficial uses. The state issues appropriation permits for all these activities, even though such uses consume state-owned, public water. For some uses, therefore, Montana sanctions the private consumption—tantamount to private control—of public water. Recreational use of water and use of water to protect fish and wildlife are also cited as beneficial, yet individuals and private organizations are unable to appropriate waters for recreation and for fish and wildlife. Clearly, the law is deficient. Montana has never ranked priorities of beneficial water use, but the current system effectively places water use for recreation and for fish and wildlife below other uses in priority.

The discrimination in state law against appropriation of water for instream use can be attributed to an archaic statute which reflects the evolution of the appropriation system. When the appropriation system was developed, water left in streams was considered a wasted resource. Instream flows were considered valueless. With growing demand for environmental quality and recreational water use, however, instream water uses have taken on ever higher value. Under the Montana Water Use Act of 1973, individuals must "divert, impound or withdraw" water to obtain an appropriation. Albert Stone (1981), Professor of Water Law at the University of Montana, argues that this statute is outdated and ripe for reform:

> One may ask whether "diversion for beneficial use" was not merely illustrative of the most common means by which the public made use of the water, rather than a definition of a requisite. "Beneficial use" seems to be the real touchstone of the appropriation system of water rights . . .

As Stone points out, some modern water uses which are clearly beneficial do not require "diversion" (e.g. hydroelectric power generation). Other uses do not require water impoundment or withdrawal, particularly water-based recreation.

Because the stream access issue is inseparable from resource quality issues, the legislature currently faces a remarkable opportunity to streamline and rectify Montana water law, to promote cooperation rather than conflict between landowners and recreationists, and to clarify the role of the DFWP in stream and fishery management. By allowing landowners to appropriate recreation and fish and wildlife rights, giving them control of the instream use of small streams in Montana, everyone would benefit:

- landowners would gain incentives to maintain recreational quality in order to retain their rights,

- recreationists would benefit through healthy fish populations and access to streams they request permission to fish,

- the problems of overfishing and overcrowding would be solved,

- the fisheries of Montana would be spared from degradation,

- the DFWP would be relieved of the impossible task of regulating all of Montana's sensitive fisheries,

- sportsmen would not be faced with expensive license fees and with complex, confusing regulations,

- non-recreationists would not have to subsidize DFWP projects to control the impact of recreationists on fisheries, and

- the growth of bureaucratic control over the citizens of Montana would be minimized.

If the legislature takes the initiative to resolve the inconsistencies in Montana water law and if it approves private instream water appropriation for recreational and fish and wildlife purposes, conflicts and tensions would be reduced, and the marvelous fisheries of the state of Montana would gain some desperately needed protection.

POLICY RECOMMENDATIONS

The Montana Constitution charges the legislature with insuring that the natural resources in the state do not suffer from degradation. As a result of the Curran and Hildreth Supreme Court decisions, however, the state's ecologically sensitive small stream fisheries are threatened with the possibility of overuse. When considering proposed solutions to the problems raised by the stream access rulings, the legislature would be remiss if it ignored the potential environmental impacts of the Court decisions.

To resolve this tension between its constitutional mandate and the Supreme Court rulings, the legislature has two options. The first is to specify through legislation what are the limiting "characteristics of the waters themselves" and when "the capability of use of the waters for recreational purposes determines their availability for recreation by the public." Bills which propose to classify Montana's waters into various categories reflect this approach. This solution can be accomplished with relative ease but will not address the longer term problem of regulating and insuring adequate instream flows. Therefore, the second solution is to restructure Montana water law so that it allows private appropriation for instream purposes. This latter option will require more study but offers a longer term solution to a problem that will continue to plague the legislature and the judiciary if left undefined.

Several bills have been introduced into the 1985 legislature which have the potential of defining characteristics and capabilities of streams to support open access. It is widely recognized that many streams in the state cannot support open access. A bill is needed which defines these

sensitive streams and which places them in a category where they can be controlled in the most efficient and beneficial manner possible.

A bill which provides for small stream access management by riparian landowners will help minimize conflict and will give owners incentives to help manage the state's fisheries. Third party effects from recreationists on private property (e.g. litter, noise, and agricultural disruption) will be minimized since the landowner, with his proprietary interests, will monitor public resource use closely. An expansion of the state's bureaucratic authority and the inflation of the DFWP's budget (at the expense of state taxpayers) will be avoided. Finally, Montana's fragile fisheries will be protected from overuse.

Such a bill should muster the support of both landowners and recreationists. Sportsmen and environmentalists should support such legislation giving small stream access management to riparian landowners because it will prevent the degradation of our important fisheries. In the absence of private control of the small streams of the state, recreationists may have access to water, but over the long term the water will not provide the kind of quality recreational experience for which Montana is deservedly famous.

The second policy option for the legislature is to revise Montana water law to allow private appropriation of instream flows (Anderson and Johnson, 1984). The deletion from the statutes of Montana's beneficial use diversion requirement (1973 Montana Water Use Act, sec. 85-2-102[1]) would accomplish this reform. The reform is overdue. As Stone (1981) points out,

> [The statute] MCA sec. 85-2-102(1) recognizes appropriation "by stock for stock water." No "dam, ditch, reservoir or other artificial means [is] used" for watering cattle . . . Should in-stream use by people . . . have less recognition and dignity than in-stream use by cattle?

If instream appropriations were possible, instream rights for recreational and fish and wildlife purposes could be won by interested individuals and groups who could then foster related benefits. If instream flows were legally recognized, individuals, sportsmens' groups, and environmental organizations could request water rights from the state and could purchase existing diversion rights to promote fish, wildlife and recreational goals.

Instream flow rights do not threaten to disrupt other rights to water; rather, the recognition of instream flows would allow water uses for recreation and fish and wildlife to compete on an equal basis with other uses. Not all small streams would be appropriated for instream uses. The existence of instream rights would depend on the value placed on instream benefits by landowners and sportsmens' groups (Huffman, 1983). Some landowners would take no interest in stream protection. These streams would remain open to the public under the Curran and Hildreth rulings.

The state would still have ultimate control over the use of public waters and publicly owned fish and wildlife because it would retain the rights to grant, withhold, and revoke recreational water use permits. Yet, by delegating responsibility for managing recreational resource use to the private sector, as it does for other beneficial water uses, the state would promote more effective, less costly, decentralized resource management. In the long run, allowing private stewardship of public resources would provide more benefits for the citizens of Montana than would a system which relies on centralized, public control of resources. Private stewardship on small sensitive streams would reduce common property problems, create incentives for people to recognize instream flow values, save the people of Montana countless tax dollars, and preserve Montana's remarkable small stream fisheries.

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The Political Economy Research Center is an unusual organization. Our research orientation and level of commitment provide PERC associates with an important opportunity to analyze and make recommendations on economic and natural resource issues in both the governmental and private sectors. Approximately 50 percent of our efforts have been devoted to natural resource economics and policy, while the balance of our work deals with taxation, regulation, entrepreneurship, economic history, and a sprinkling of other topics. To the best of our knowledge, we are the only research organization with this orientation.

Since its founding in 1980, the Center has maintained a principled commitment to the development of a society of free and responsible individuals in their relations with one another and their environment. On the basis of considerable study and research, we expect these values to be fostered by social and political organizations relying on private property rights, the rule of willing consent, and the market process. Although we are sensitive to the problems of market failure, we recognize that there is an analogous set of problems with governmental management.

This paper is one of a series of research efforts supported by PERC.

improve Senator Brown's bill. Senator Brown moved as a substitute motion that Mr. Petesch's proposed amendments be adopted (see standing committee report for text of amendments). The motion carried unanimously. Senator Brown moved HB 717 be recommended BE CONCURRED IN AS AMENDED. The motion carried with Senator Shaw voting in opposition.

FURTHER CONSIDERATION OF HB 911: The committee then discussed the proposed amendments to the bill proposed by Lorents Grosfield at the previous committee meeting. Senator Mazurek felt the first two were probably necessary, but he questioned the third. Senator Shaw stated when you come on his ranch, he has it posted, but before you get to the house, you cross four more cattleguards. He asked if he would have to post each of them. Also, he questioned whether he would have to post all of the cattleguards after his house. Senator Towe stated this bill only applied to those points where your land joins public land. You post it where it comes into this land. He asked that Mr. Petesch work these amendments into the bill. Senator Mazurek stated we had also talked about the department's having to advertise in more than their own publications. He then asked Mr. Petesch to work Mr. Grosfield's suggestions up into amendment form for the next committee meeting. Senator Towe asked about the third proposal. Senator Mazurek again stated he didn't think it was necessary. Senator Towe reiterated we didn't want that one. Senator Towe stated the fence post concerns him, because many if not all are already orange. Senator Galt asked where he ever saw an orange fence post. Mr. Petesch pointed out metal fence posts are not used at gates.

FURTHER CONSIDERATION OF HB 265: Chairman Mazurek stated the subcommittee had finished its work on the bill and would deliver its report to the committee tomorrow. He scheduled an executive session for 7:00 p.m. the next day. That would give the committee the next day to work on the bill if it ran into problems. Senator Blaylock recommended the discussion be confined to the committee. If the spectators get up and continue to testify as they have been in the subcomittee, he did not feel the committee would be able to finish its work. Senator Towe felt they should allow some time to those in attendance. He felt the way the subcommittee had handled its hearings, it may not take as long. He pointed out the subcommittee was able to reach some conclusions, and there were some areas on which it had come to an impasse. In those areas, there is a lot of outside input. He felt we should consider it if someone comes up with a brand new suggestion. Senator Mazurek suggested the word be put out they had better have any suggestions in writing to the committee so it can be part of Senator Yellowtail's report. Senator Shaw stated he would fight any attempt to open the meeting up at the executive session. He felt enough of that had been done. Senator Pinsoneault stated what has been done has been good and

he complimented the subcommittee on its work. However, he felt the committee had reached the point that if there is a bill out and if they want to submit amendments, they should present them in writing. He felt the public debate should be cut off. Senator Mazurek pointed out four members of the subcommittee had heard all of the public's input, and they will be put in a position to relay the comments that were heard. He stated letting people talk will be the exception. The other thing it will mean is it will involve some reading and preparation on the committee's part part to the meeting to make things move along at a reasonable pace.

TABLING OF HJR 24: Senator Brown moved HJR 24 be TABLED. The motion carried with Senators Blaylock, Brown, Towe, and Yellowtail voting in opposition.

FURTHER CONSIDERATION OF HB 329: Senator Yellowtail stated he wondered if a clarification of a mail notice by saying certified mail would satisfy the opposition. Senator Towe commented he was inclined to like the bill. Senator Pinsoneault moved HB 329 be tabled. Senator Blaylock stated he put that effective date on there to put the heat on and say you are going to come to a decision on this or the bill will go into effect. Senator Shaw stated they promised before to come back and didn't, so he would like to see it put back to 1985. Senator Pinsoneault then withdrew his motion. Senator Towe stated if we are not going to make it effective before the interim study, there was no reason to put it in. Senator Blaylock commented it would say in effect this bill will go in unless you get to a decision in that study and come up with some solutions. It is a gun to their heads. Senator Shaw moved to delete the effective date provision changing it from 1987 to a 1985 effective date. Senator Towe suggested striking section 3 in its entirety and letting it to into effect when the books were printed in October. The motion to change the effective date failed with Senators Shaw and Towe voting in favor. Senator Brown moved HB 329 be tabled. The motion failed on a tie vote (see roll call vote attached as Exhibit 9).

There being no further business to come before the committee, the meeting was adjourned at 12:10 p.m.

Committee Chairman

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

March 27, 1985

The sixty-first meeting of the Senate Judiciary Committee was called to order at 7:29 p.m. on March 27, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members were present.

ACTION ON HB 265: Chairman Mazurek called upon Subcommittee Chairman Bill Yellowtail to present the subcommittee's report to the Senate Judiciary Committee as a whole. Senator Yellowtail began by presenting the subcommittee meeting minutes (Exhibit A, March 13, 1985, meeting; Exhibit B, March 18, 1985, meeting; Exhibit C, March 20, 1985, meeting; and Exhibit D, March 25, 1985, meeting). [The April 10, 1985, conference committee minutes on HB 265 were later added to these minutes for ease of locating them (Exhibit E).] He then identified the documents which would be referred to over the course of the evening. First were the proposed subcommittee amendments to HB 265 (Exhibit 1). Next was a grey bill which contained the proposed subcommittee amendments to the bill (Exhibit 2). Third were the issues of deadlock, which are matters that the subcommittee members could not agree on (Exhibit 3). Fourth are proposed amendments which would implement the deadlock issues reached by the subcommittee (Exhibit 4). Fifth is a set of amendments labeled "alliance proposed amendments" (Exhibit 5). This set of amendments was offered by Senator Towe on behalf of an alliance group of individuals represented by Ron Waterman. Exhibit 6 was a grey bill including the alliance proposed amendments offered as Exhibit 5. Next is a set of amendments proposed by Senator Crippen on behalf of a group of landowners represented by Phil Strope, Conrad Fredricks, and Dick Josephson (Exhibit 7). Exhibit 8 is a third grey bill which includes the amendments offered on Exhibit 7. Exhibit 9 is a set of amendments proposed by Senator Towe. Senator Yellowtail clarified that the amendments offered by Senator Towe, by the alliance group, and by Senator Crippen were not part of the subcommittee report.

Chairman Mazurek then allowed the committee to recess for 15 minutes in order that those in attendance and the committee members might have an opportunity to review the alliance and Crippen proposals which had not been available before the meeting began this evening.

The meeting then reconvened. Before explaining the sub-

committee amendments, Senator Yellowtail gave a little background into HB 265. He explained that HB 265 arose out of the supreme court decisions in the Curran and Hildreth cases. The supreme court decisions set out some questions that need to be addressed, and, in addition, some clarification that needs to be made, principally for landowners, as to what their protections are relative to stream use by recreationists. Senator Yellowtail stated that the subcommittee addressed HB 265 in great detail and allowed considerable input from the public.

Senator Yellowtail then moved adoption of the proposed amendments by the subcommittee (Exhibit 1). Amendment No. 1 prohibits all recreation on private impoundments which have been licensed for private use. Amendment No. 2 allows Fish and Game to address the issue of hunting.

Amendment No. 3 relates to natural barriers; natural barriers are not addressed in this bill. The subcommittee felt the supreme court had not clearly addressed the issue of natural barriers, and, therefore, it was unnecessary to do so in this bill. Amendment No. 4 again relates to natural barriers.

Regarding amendment No. 5, the original HB 265 had streams classified as Class I and Class II with definitions of what those streams might be. The definition of Class I and Class II streams centers around navigability. The subcommittee proposes to use a definition which relates to the actual criteria by which the streams are being classified and, therefore, has changed the name of Class I streams to navigable streams. Amendment No. 6 changes one of the criteria for classification of streams. Amendments No. 7 and 8 change nomenclature away from Class I and Class II.

It was necessary to define the term "occupied dwelling" in amendment No. 9 because that term is used later in the bill. At this point Senator Shaw asked if "occupied dwelling" had anything to do with calving barns. Senator Yellowtail explained "occupied dwelling" was used to get away from the term "habitable building."

Senator Yellowtail then went on to explain that amendments No. 10 and 11 relate to the matter of the definition of ordinary high water mark. Amendment No. 12 is the definition of recreational use. It outlines many recreational uses that might be conducted on streams. The committee modified "swimming" to say it is allowable as a recreational use except within 100 yards of an occupied dwelling. The subcommittee also added the term "hiking" in this subparagraph. The reason for that is there is a fishing statute that has been on the books and which refers to traversing up

and down the stream within the high water mark for fishing purposes. Amendment No. 13 prohibits the recreational use of surface waters in a stock pond or other private impoundment fed by an intermittently flowing natural water course. Amendments No. 14 and 15 are non-substantial, grammatical corrections. Amendment No. 16 is where the subcommittee poses to remove the differentiation between larger and smaller streams. Amendment No. 17 prohibits overnight camping within 500 yards of any occupied dwelling for the purposes of all streams. Senator Galt questioned whether this applied to all waters. Senator Yellowtail responded that as the proposal reads right now, yes.

Amendment No. 18 is a relettering correction. Amendment No. 19 strikes the word "permanent." This word is redundant in this section. Amendment No. 20 is a grammatical correction. Amendment No. 21 is a relettering correction. Amendment No. 22 is a punctuation correction. Amendment 23 prohibits the use of a streambed for any purpose when water is not flowing therein. Amendment No. 24 is a nomenclature change. Amendment No. 25 is renumbering change.

Amendment No. 26 begins getting into the matter of portage. A change is necessary to refer specifically to an artificial barrier. Senator Mazurek questioned why. Senator Yellowtail responded simply for clarity. Amendment No. 27 struck the word "natural" and inserted the word "artificial." Amendment No. 28 inserted the words "not owned by the landowner on whose land the portage route will be placed." Amendment No. 29 inserted the words "within 30 days of the decision." Amendments No. 30 and 31 inserted the words "his agent or his tenant" with regard to the liability of the landowner and the supervisor. Amendment No. 32 inserted the words "any member of the artitration panel." Amendment No. 33 essentially is a disclaimer and says that this act has nothing to do with the issue of title or ownership of the surface waters or the beds or banks of the streams.

Following Senator Yellowtail's explanation of the proposed subcommittee amendments, the Judiciary Committee reverted to his motion to adopt the same. The motion carried unanimously.

Senator Towe then addressed the issue of the proposed alliance amendments. He indicated the alliance members have by and large indicated they would accept the subcommittee amendments; however, they have requested a few more rather insignificant changes. Senator Towe stated that if in fact the committee were to accept the alliance amendments, he would withdraw several of the deadlock issues which he proposed.

Senator Towe moved that the alliance proposed amendments be adopted.

Senator Crippen stated that the committee had before it two sets of amendments. He felt the committee should be aware the amendments he has proposed were worked up by members of the Stillwater Protective Association and by representatives of the landowners. In addition, Senator Galt has had an opportunity to look at these amendments. They are far more extensive, but they were done for a reason. These amendments will be at odds with those of the alliance. Senator Crippen stated that he did not want the committee to be in a position where it would be voting on one set of amendments and then voting on the other.

Chairman Mazurek stated that it was his suggestion that Senator Towe would walk the committee through his amendments and then Senator Crippen would have an opportunity to walk the committee through his.

Senator Towe then began his explanation of the alliance amendments. He believes amendment No. 1 is a change with little substance but which might have some emotion. It proposes that the definition of classifications not be changed but that the nomenclature would be. One of the concerns is that using the word "navigable" carried with it a lot of baggage. There are a lot of definitions of navigable water. By using that word, we risk another court's coming in and saying navigable means something different than what the legislature has spelled out in this bill.

Amendment No. 2 effectively removes lakes from the bill. Senator Towe stated he sees no choice in adopting this amendment. He believes there is no realistic opportunity of getting this bill passed unless they exclude lakes from the operation of the bill.

Amendment No. 3 strikes government meander line, which Senator Towe believes is really unnecessary. Amendment No. 4 is a nomenclature change. Amendment No. 5 takes lakes out of all classes of waters discussed by this bill. Amendment No. 6 is the diversion exclusion. In other words, if you have a municipal water reservoir, you can't stop recreation on that reservoir. Amendment No. 7 exempts lakes from the water definition. Amendment No. 8 prohibits overnight camping within 500 years of an occupied dwelling. This applies to all classes of water. Amendment No. 8 also prohibits the placement or creation of any permanent structure or object which is a permanent duck blind or boat moorage.

Amendments No. 9, 10, 11, 12, 13, and 14 state which uses would be prohibited on Class I and Class II streams. Amendment No. 15 is a nomenclature change. Amendment No. 16 leaves portage around natural barriers for the court to decide.

Amendment 17 states that this act does not address "lakes." Senator Galt asked if he were proposing to take "lakes" out of the bill. Senator Towe responded affirmatively. Senator Galt asked if the supreme court used "lakes" in its opinions. Senator Towe said that they did not refer to "lakes." However, he believed if the issue of "lakes" were squarely put before the courts, it would probably include them. Senator Galt asked if the supreme court decisions included the angling statute. Senator Towe stated he did not see any reference to the angling statute in the opinions. Senator Crippen stated the committee should remember the questioning period when HB 265 was first heard before the committee. At that time, Senator Crippen asked Ron Waterman if HB 265 and the supreme court opinions, as interpreted by HB 265, applied to "lakes." Mr. Waterman responded yes at that time. There was some concern about Flathead Lake. The committee then discussed Flathead Lake, Whitefish Lake, and Seeley Lake. The implication was clear. Lakes were intended to be included in HB 265 and have been included in the bill. Senator Crippen stated removing lakes from the bill is an illusory compromise at the best. He believes what we are doing, by doing this, is we are leaving the lakefront owners high and dry. There are no guarantees as to what will be allowed. His proposed amendments address this issue. Senator Daniels stated there is difference between lakes and rivers. One bounded by riparian rights, and one is bounded by littoral rights. Senator Pinsoneault stated when the question arose concerning the applicability of this bill to lakes, he was stunned. He thinks the cases talk about stream access and streambeds. He believes lakes should be excluded. Senator Crippen stated even though we have two supreme court cases that deal with this, it is his contention he would support the dissent in both of those cases that the supreme court overstepped its bounds and was legislating. Senator Crippen feels it is the legislature's responsibility to enact laws and the supreme court's responsibility to interpret those laws in light of the constitution.

Senator Crippen then explained his proposed amendments. Senator Crippen stated the committee has before it the subcommittee issues of deadlock. His amendments propose to

go through these issues of deadlock and try to find ways to compromise. They looked at the water we have and tried to catagorize it. They have come up with two or three catagories. They looked at it first from the standpoint of the stream running from the mountain through the rancher's yard into a larger river or stream. They feel there ought to be very little, if anything, allowed in those areas. The next catagory is large rivers that have by custom and by use been used by recreationists to float, duck hunt, stop and have a beer, etc. Those he would classify as the mainstream rivers of the state. The third classification are those rivers that are in between. They call those the Stillwater River, the Boulder River, etc. These are areas where you have a little more limitation as far as custom and use. There are a larger number of property owners hunting these streams. That is the rationale that went through their minds. Senator Crippen agreed with the alliance that the subcommittee's intent to classify the waters as navigable and non-navigable will not hold water. There has been talk by some that the committee should just kill HB 265. The House has killed all of the Senate bills relating to water. Senator Crippen agreed with Senator Yellowtail that they did not want to do something by which they were going to abrogate their authority as a legislature and put this issue back in the hands of the court, not having accomplished anything. That would not be good for the legislature or for the sportsmen.

There are amendments to define the term "navigable." Proposed amendment No. 6 is where they get into the three definitions of water. The whole point was to keep lakes in the bill. They did not know how to treat different types of lakes, so they tied them into the different types of streams feeding them. As far as the definition of the bigger rivers, there may be some the committee would want to add or some that they would want to take out. In addressing the larger rivers, there are certain things by usage and custom that have been allowed on these rivers. The definition of Class C waters permits activities, including fishing below the ordinary high water mark, waterfowl hunting, and big game hunting with long bow or shotgun except within 500 yards of any occupied dwellings or other structure impounding domestic livestock or used for agricultural purposes. This is a significant compromise on the part of the landowners in that area. It would also allow swimming except within 300 yards of any occupied dwelling. The definition includes hiking below the ordinary high water mark; camping below the ordinary high water mark, except within 500 yards of an occupied dwelling, or any other uses that are allowed on those that are more restrictive will also be allowed on these streams. They also allow related

unavoidable or incidental uses for purposes of safety. The point there is with persons floating down, we don't feel we can restrict them from getting out for purposes of safety.

Amendment No. 12 relates to Class A waters, which for the most part would be non-navigable waters. It is defined by the title definition, the title belongs to the landowners to the centerline of the bed. They felt the areas in amendment No. 13 are redundant because we are going back in and defining the use of the waters and in certain cases the banks in the three classifications. They have used them as they relate to use and feel that is a more proper way.

Senator Crippen stated they forgot to strike lines 4 and 5 on page 6, "fed by an intermittently flowing natural watercourse." They also want to eliminate any use of a stock pond "without the consent of a landowner".

Amendment No. 16 is getting into the area of portage. Amendments No. 23 and 24 are attempts to reach some type of a compromise to avoid taking without compensation. Senator Galt stated, this refers to the constitution where you can't take public land without compensation. Senator Crippen then asked that for purposes of clarification, amendment No. 28 be stricken.

Following Senator Crippen's explanation of his proposed amendments, Senator Towe stated he felt the proposal was essentially unworkable. His first objection was a technical one. He stated as they have now defined navigable and non-navigable, all lakes are non-navigable, and, therefore, all motorboad activity is banned on all lakes. Even if they correct that, they have classified Class C waters and have allowed various items to take place on certain lakes. If you use those lakes, you will be limited to a few lakes such as Canyon Ferry, Flathead, and Fort Peck. There are still bans on motorboats on Whitefish Lake, Seeley Lake, and others. Senator Towe felt there was an insurmountable problem of banning motorboat activity on some lakes. Senator Crippen stated as he had in his opening statement, lakes have caused them a great deal of problems. He did not say this is the best way of handling lakes, but the banning of motorboats can be addressed. He reminded the

committee that they are attempting to reach some sort of compromise. If some points are unworkable, they should be analyzed. Senator Towe stated when they classify Class C waters, they say the mainstream of certain rivers. He believes this definition has left out the Clark Fork, the Beaverhead, the Dearborn, the Madison, the Jefferson, and the Gallatin. He also asked how they solved the problem of the mainstream. It is not clear whether the Middle Fork or the South Fork of the Flathead is the mainstream. He thinks they will have no end of problems dealing with that classification system. Senator Crippen stated the Clark Fork should be in there. He also believed that Senator Towe brought up a good point as to the classification of the mainstream. He felt the committee may or may not want to put some of these things in. He was trying to get in waters that by custom and usage these things in Class C will be allowed by law. He stated the compromise the subcommittee had reached the other night is one side would keep the streams wide open and the other side would close them entirely. His group felt two classifications of streams would not work.

Senator Crippen stated they had allowed some things like fishing and hiking below the ordinary high water mark, but they don't say anything about waterfowl hunting. By using day camping below the ordinary high water mark, it appears they have actually banned overnight camping. He does not believe that is a good idea, because there has traditionally been overnight camping along these areas. Senator Crippen stated they have especially excluded overnight camping. He believes most of it is done on islands or on public access. If it is not done on these lands, he believes you should ask permission.

Senator Towe then addressed amendment No. 12. He said he had some concerns about fishing. It is permitted by Section 87-2-305, MCA, and the angling statute says you can angle on the banks. With this proposal you can't do that on Class C waters. That is inconsistent. By striking surface waters altogether, not only have they raised a question about compliance with the Hildreth and Curran decisions, they have specifically authorized use of the bed and the banks by some. He believes this means you can only hunt if you are in a boat because of the way surface waters has been taken out. Senator Crippen stated he disagreed. It is clear how you can do it on Class C waters. The intention was to use the definition of surface water as it pertains to these types of streams. It is redundant and inappropriate.

Senator Towe stated on page 6 they leave undefined the words "private impoundment." Senator Galt explained that means not a public impoundment. Senator Towe stated he thinks it is pretty narrow to say the only other activities allowed are water-related pleasure activities, and these amendments have limited that further by saying only those determined by the commission. Senator Crippen stated big game hunting is not allowed except by approval of the landowner. They are expanding that. They are trying to open up some of these areas to big game hunting. He feels this is quite a substantial step from what the subcommittee talked about the other night.

Senator Towe said he had problems with the portage question. He thinks we cannot limit it as severely as that. He is not certain what public health and safety means. Senator Crippen asked Senator Towe what he felt the reason for a portage would be. Senator Towe responded it would be to get around a barrier. He stated the supreme court cases have used the word "barrier," and when you have a barrier, you have a right to portage around it. As far as he can determine it has nothing to do with public health and safety. Senator Crippen stated he did not see any problem with that definition. Senator Towe stated he thinks you are suggesting portage around natural barriers with that language. Senator Towe stated he has concerns with amendment No. 26. They have already said where the landowner agrees with the portage route, he has to pay for it, but if he does not agree, then the state will pay for it. Senator Towe believes the only thing the landowner will have to do is disagree in order to get the state to pay for the portage route.

Senator Towe stated amendment No. 26 says the department may condemn an easement. The bill says the department has no power of condemnation, and, therefore, we will have to give them those powers. Senator Crippen stated that in requiring a landowner to put up a portage around a barrier that is in existence, the landowner must be compensated. If condemnation is not what the committee feels would be the proper way, it will have to find another way. Senator Towe stated they may have a point with regard to natural barriers, and that is why he was willing to take natural barriers out of the effect of this act. Senator Crippen stated again, he agrees as far as putting up a barrier, the landowner must pay for the portage route. Senator Towe did not believe that is what his amendment stated. Mr. Petesch stated it referred to the establishment of an exclusive route.

Senator Towe urged adoption of his amendments. He didn't think the Crippen amendments would work. He thinks his

amendments are proper. He does not agree 100% with the amendments he proposes, but he thinks it is the best possible way out of this dilemma. Senator Yellowtail stated the amendments proposed by Senator Crippen do not constitute a middle ground in any manner. He thinks there are serious flaws that tread on the supreme court decisions. Regarding the issue of portage, Senator Yellowtail referred the committee to the language on page 18 of the Curran decision and page 5 of the Hildreth decision, which contain explicit language as to the public's right to portage. He thinks to limit the matter of portage as suggested essentially to the matter of condemnation of an exclusive route goes beyond what is reasonable and rational and beyond any compelling state interest. He stated the use of land between the high water mark in Class A proposes prohibitions against the use of the bed and the bank. He reminded the committee they have a fishing statute, Section 87-2-305, MCA, which permits treading on the beds and the banks up to the high water marks. He also stated the Hildreth decision on page 5 says the public has the right to use the waters and beds and banks up to the high water mark. Senator Galt stated that refers to the ability to tread on the bed and bank. That infers navigable streams, and in that case, the bed up to the low water mark belongs to the state. He believes navigable streams are entirely different than non-navigable streams. Senator Yellowtail referred to the words of the supreme court in the Hildreth decision on page 9 which referred to the public trust doctrine and the constitution. Senator Galt stated he agrees the constitution gives them the water of the state of Montana and anyone can recreate on the surface of the water, but that doesn't give the people using the surface of the water the right to intrude on the beds and banks of non-navigable streams. Senator Crippen stated as Senator Yellowtail seems to read these cases that this language constitutes a taking without due process of the law of private property. Senator Towe stated in the Hildreth case that is extremely clear. In the event Mr. Hildreth lost the case, he was seeking inverse condemnation. Senator Crippen suggested the committee look at Justice Gilbrandson's dissent in the Curran case. He believes that has potential statewide application. He believes the supreme court went beyond the bounds of its authority, and it is the obligation and duty of the legislature to let the supreme court know that. The legislature should keep in mind that the supreme court is an equal body with the legislature.

Senator Blaylock referred to the Hildreth decision at page 11. As discussed previously, ownership of the streambed is irrelevant to the determination of the use of waters for recreational purposes. Senator Galt stated you are shaping this bill on the supreme court's decision. They mentioned all waters. You can't separate some waters from other waters as to ownership or use of them for any purpose.

Senator Crippen moved as a substitute motion that his amendments be adopted. Senator Towe spoke against that motion. The motion failed as evidenced by a roll call vote (Exhibit 10). Chairman Mazurek stated the committee would then revert to Senator Towe's motion to adopt his amendments. Senator Crippen stated on page 6 they are going to allow overnight camping within 500 yards of any occupied dwelling. Senator Towe explained this is on the bed and the banks under the high water mark. Senator Crippen asked if overnight camping would be allowed on all classes of rivers. Senator Towe responded no; overnight camping is banned on Class II waters.

Senator Crippen stated you are not allowing the placement of any permanent structure. He asked if that were restricted on both classes of water. Senator Towe responded yes, it was restricted on both classes of water. Senator Crippen asked if by this they were allowing a semi-permanent duck blind. Senator Towe responded yes, on Class I waters. Senator Crippen stated his objection to this is the same as Senator Galt's and Senator Shaw's. Senator Towe's compromise eliminates lakes entirely. He does not think that will make Senator Himsl happy, because he agrees that if we don't address the problem of lakes, they are left wide open. The landowner who has a cabin on a lake will have the same problem as a landowner on a river. To make a distinction between the two is highly improper and will be subject to future lawsuits.

Senator Galt asked if they are now allowing overnight camping on any rivers at all. Senator Towe responded it would be allowed on Class I rivers so long as they are not within 500 yards of an occupied dwelling. Senator Galt asked if it would be between the high and low water marks. Senator Towe responded affirmatively. Senator Galt stated you are depriving the landowner of his own rights to control his own lands. That is taking without just compensation. Senator Mazurek stated the department would have

the ability to adopt rules and regulations regarding camping. Mr. Petesch directed the committee's attention to Section 87-1-303, MCA. Senator Galt asked if the word "public" were in there. Mr. Petesch stated the statute refers to legally accessible to the public. He interprets that as applying to all waters. Senator Galt stated you are still allowing intrusion on private land. Senator Towe referred to camping. He thinks that while it may be true the landowner owns the land between the low and high water marks, the supreme court has made it clear that in fact the recreational right extends to the bed and bank up to the high water mark. He thinks we can step in with limitations, but feels the supreme court will throw any other limitations out immediately.

Senator Towe stated he would like to make lakes as a third class and allocate specific uses. However, for purposes of compromise, that issue should be left to another day. At this point, and at this late hour, he did not feel it could be addressed. Senator Brown stated the lake issue has been fundamental matter to him all along because both supreme court cases arose out of streams and not lakes. The cases did not talk about lakeshores or the ownership patterns of lakes, which are entirely different matters than streams. If it happens that sometime in the future the court deals with lakes, then so be it, but he stated he would not vote for anything that included lakes. Senator Daniels stated there is a difference between littoral rights, which involve lakes and seashors, that are not applicable to streambeds and streams. The motion to adopt Senator Towe's proposed amendments labeled Exhibit 5 failed, with Senators Crippen, Galt, Pinsoneault, Shaw, and Daniels voting in opposition. (See roll call vote attached as Exhibit 11.)

Senator Crippen stated in the proposals he had, they were trying to protect the lakes as well as the streams. Senator Crippen moved that HB 265 be amended as follows:

Page 5, lines 4 and 5.

Following: "body" on line 4
Strike: remainder of line 4 through "MARK' on line 5

Senator Crippen stated if this bill passes in any form whatsoever, we are making sure it includes lakes as the Curran and Hildreth cases could be expanded to so include them. By accepting this amendment, you are assuring the fact that you can go around in a motorboad and waterski, but you cannot go up on the beds. You can use the water, but not use the banks at all. Senator Towe stated he is not sure that addresses the entire concern, because we use the other

uses throughout the bill. Senator Yellowtail objected to the motion. He referred to pages 5 and 9 of the Hildreth case, which states the public can use the water and the beds and banks up to the ordinary high water mark. Senator Mazurek stated he thinks the language being deleted is right out of the supreme court opinions. Senator Crippen stated even though it may be out of the opinion, he believe the supreme court was overstepping its bounds. By including the banks, they are taking private property as we have talked about before. Senator Towe stated by making this adjustment, we have destroyed all of the landowner protections that have been built into this bill. Under the court cases, we will have the recreational use of the water up to the high water mark. Senator Pinsoneault stated he agrees with Senator Crippen about the high and low water marks. It is a taking that is improper. It is repugnant to the property owner. The motion to amend the bill on page 5 failed, with Senators Blaylock, Daniels, Mazurek, and Yellowtail voting in opposition. (See roll call attached as Exhibit 12.)

Senator Brown then asked that the committee address the deadlock issues and consider them one at a time. Senator Daniels stated he is in favor of a bare-bones bill which basically embodies the four matters we have sent out of the Senate in earlier bills (SB 418, 421, 434, and 435) and eliminates a lot of this detail stuff. He thinks we should take such things as camping out of the bill. He could accept the bare-bone things that we have sent out of the Senate. He thinks other things should be set by policy and city ordinance.

Chairman Mazurek then addressed deadlock issue No. 1. Senator Crippen moved the committee adopt amendment No. 1 on Deadlock Issue No. 1, Exhibit 4. Mr. Petesch explained this will prohibit all recreational use of navigable waters without the permission of the landowner. Senator Blaylock asked if you could fish on them. Senator Towe responded yes. Senator Daniels stated this means you couldn't fish on them without permission. Senator Crippen stated that yardage requirement was a compromise. Senators Crippen & Galt recommended that on non-navigable waters, the public has no right to make use of them without permission. Senator Towe stated he would oppose the amendment because it would prohibit fishing on those streams. These are all of the streams that have not been declared navigable waters. He did not think the supreme court would permit it or it is what the public expects. Senator Crippen stated, we are talking about the stream that comes through the farmer's yard. These would be streams such as Fishtail Creek. It is tough to get into these streams, and there are very few access points. To do

anything else will just start a long series of closing the gates to the recreationists and areas where we have built up much rapport between the landowners and the recreationists. Senator Yellowtail referred the committee to the supreme court decision in Hildreth on page 5. It refers to the capability of the use of the waters for recreation. When a small stream can be used for fishing, then it is capable of such use. Senator Crippen stated if you take that conclusion, there will be parts of these non-navigable streams on which you can float and camp, as well as fish, and he thinks that is the wrong way to go. He believes the angling statute refers to navigable streams. A motion to amend the bill as indicated on Deadlock Issue No. 1 (Exhibit 4) carried with Senators Blaylock, Mazurek, Towe and Yellowtail voting in opposition.

Senator Towe moved that the suggested amendments indicated on Deadlock Issue No. 2 (Exhibit 4) be adopted. His preference would be to exclude lakes from the current definition of navigable and non-navigable, create a third definition, and define "lakes." That would solve the lake situation. It also makes it possible for the Fish and Game Commission to make further regulations. Senator Galt asked if that meant you could not swim within 100 yards of a house on Whitefish Lake. Senator Towe responded yes. Senator Mazurek asked if you can't set the regulations, do you want the lakes in or out? Senator Towe stated 100 yards is from an occupied dwelling; some dwellings may be on the shoreline and others may be set back from the shore. Senator Crippen stated the Senators Brown and Pinsoneault were concerned about "lakes." If we adopt this amendment, what Senator Towe is saying is outside the 100-yard mark, you can shoot ducks and camp as well, as overnight camp and other types of recreational activities. Senator Brown asked if Deadlock Issue No. 2, Amendment No. 4, is interpreted to mean someone can't camp on public property or private property. Senator Towe stated that this would not affect public property under any circumstances. Senator Blaylock asked if you would be in violation of the law if on Flathead Lake you were to run your motorboat 75 yards within an occupied dwelling. Senator Towe stated that he thinks that is correct. It says that there cannot be any recreational use within 100 yards of an occupied dwelling. He doesn't feel that comfortable about coming that close to a dwelling. He believes there is a certain amount of privacy we should protect. Senator Brown asked if this will get lakes out of his proposal. Senator Mazurek stated no. Senator Towe stated this puts lakes in the bill, but prohibits uses within 100 yeards of an occupied dwelling. The motion to accept the proposed amendments to Deadlock Issue No. 2 failed with Senator Towe voting in favor of the motion.

Senator Brown moved that the committee accept Amendments No. 1, 2, and 3 shown on Deadlock Issue No. 2 (Exhibit 4) and proposed alliance amendment No. 17 (Exhibit 5). He stated that would take lakes out of the bill. Senator Crippen stated as a compromise, he would support the proposed amendment. The motion carried with Senator Galt and Shaw voting in opposition.

The committee then addressed Deadlock Issue No. 3. Senator Towe moved that proposed Deadlock Issue No. 3 be adopted. He said that makes it clear we are not addressing natural barriers. Senator Mazurek asked what the rationale was about not allowing portage around waterfalls. Senator Towe stated that is why we need this language. By taking out references to natural barriers, we did not want to speak to the issue one way or the other. You are saying it is beyond the scope of this bill. Senator Mazurek asked why it is beyond the scope of this bill. Senator Towe stated it was for the same reason lakes are beyond the scope of this bill. Senator Mazurek submitted that question has been answered, and we are just ducking it in this bill. Senator Crippen stated the concern the subcommittee had was by not mentioning natural barriers, it would leave in future issues before the supreme court. Because the legislature did not mention it, we asked why you didn't just leave it out entirely. Senator Towe responded when we made the motion to take it out entirely, the newspaper said the subcommittee banned entirely portage around natural barriers. This will stop that type of comments. Senator Daniels felt what the newspapers say isn't important. He asked if the supreme court addressed it in the Curran decision. Senator Towe stated he thought if the question were fairly presented to the court, it would probably say there is a right to portage around barriers, and there is a right of compensation, but that question has yet to be faced. Rather than to get into some sticky issues of eminent domain, he thinks it is best we eliminate the issue from the bill, because we can't resolve all of the problems at this time. Senator Pinsoneault felt we are a policy-making body, and if we don't address it, we may be shirking our responsibility. The motion to accept Deadlock Issue No. 3 failed with Senators Crippen, Galt, Mazurek, Shaw, and Yellowtail voting in opposition. Senator Yellowtail asked why they were voting no. Senator Towe stated some of those were voting no so they could argue before a court that in fact you cannot portage around natural barriers.

Senator Crippen moved that the grey bill be amended as follows:

Page 10, line 8.
Following: line 7
Insert: "(4) Nothing contained in [this act] addresses the issue of natural barriers or portage around said barriers. Nothing contained in [this act] makes such portage legal."

Senator Crippen stated he feels that makes it clear. Senator Towe felt the amendment should state "lawful or unlawful." Senator Yellowtail moved as a substitue motion for all motions pending that natural barriers and portage around them be reinserted in HB 265. He thinks this will clarify where the committee stands on that issue. He believes the motion has merit and referred the committee to the Curran decision, page 18. He stated as a matter of common sense, you will run into bridges and dams and fences. These are man-made barriers. You will also run into trees, waterfalls, and rocks. These are natural barriers. He does not believe it is unreasonable to traverse around natural barriers. Senator Crippen stated the facts in the Hildreth case addressed artificial barriers. He has two concerns with leaving natural barriers in the bill, first he thinks the bill will be lost. Second, what you are requiring now of the landowner is to ensure that the entire length of the stream will be navigable. He can see where the landowner has erected a barrier himself, because that is a man-made act, but he feels it is improper and wrong for the legislature to say to the landowner that in order to preserve the recreationist' right, you have to provide navigability along that stream, and it is his responsibility to provide portage around all natural barriers. There may be situations on natural barriers where you may have to go inland a fair distance to get around that natural barrier, so you may have to take a bigger bite out of the landowner's property to do that. Senator Mazurek suggested they look at the historical basis of this issue. If a trapper were floating his canoe down the stream and there was a rock jam, he could get out and portage around it. Senator Crippen stated we are not talking about the trapper, because in those days most of the land was not private land but was public. He agreed that in cases where there is a hazard and a danger, we should allow that they should be able to get out and around the barrier. The motion to

reinsert natural barriers in the bill failed with Senators Crippen, Daniels, Galt, Pinsoneault, Shaw and Towe voting in opposition.

Senator Towe made a substitue motion for all motions pending that Deadlock Issue No. 3 amendment No. 1, be adopted, and the bill be further amended by adding the words at the end of the sentence "and nothing contained in this act makes such portage lawful or unlawful." Senator Crippen stated he thinks by making it illegal, we are opening up the door. He would prefer to see the language as it presently is in Deadlock Issure No. 3 before this amendment. Senator Towe stated he doesn't like the language, because any other language would imply natural barriers are illegal in some manner. The motion to adopt Deadlock Issue No. 3 as amended carried with Senators Crippen, Galt, and Shaw voting in opposition.

Senator Towe moved that the words "navigable" and "non-navigable" be replaced with the words "Class I" and "Class II" wherever they appear in the bill. Senator Brown stated you have to base your definition of Class I and Class II on some definition of navigable and non-navigable, so we aren't getting away from the problem of a court's coming in at a later point and defining navigable as something other than what is in the bill. Senator Mazurek stated when you use the terms "navigable" and non-navigable," you start to get into the issue of title. Senator Towe stated what we are saying is we are fixing the judicial determination as of this moment to these and no more, so some judge cannot say he thinks this can be brought in. The motion to replace navigable and non-navigable with Class I and Class II carried with Senators Brown, Crippen, Galt, and Shaw voting in opposition.

Senator Crippen moved the committee adopt the amendments suggested on Deadlock Issue No. 4, including the technical amendments located at the bottom of the deadlock issue which are necessary to conform the bill. Senator Galt stated the purpose of these amendments is to conform with the constitution of the state of Montana that you can't take private property for public use without eminent domain. Mr. Petesch explained this removes the arbitration panel and supervisor provison from the bill and makes the suggested subparagraphs (a), (b), & (c) the exclusive ways by which portage routes may be acquired. Senator Yellowtail felt the committee had already rejected this in substance when it rejected Senator Crippen's earlier amendment. Senator Galt stated he didn't think this committee wanted to get into taking private property without compensation. He believes you can't take private property for public use without compensation according to the constitution of the state of Montana. Senator

Towe asked if when you put a fence across a stream, were you in fact impeding the recreational use of the public to use the waters. Senator Galt responded he supposed so. Senator Towe asked if in fact you were doing so, should we provide you can't put a fence up. Senator Galt felt he didn't think you could do that on a navigable stream now without permission. You can do anything you please with the land you own under a non-navigable stream. Senator Towe suggested if you put up an artificial barrier, he thinks the court has spoken and you have to allow a little trespass around that barrier so you can continue to use that stream as the public has the right to do. Senator Crippen stated he thinks we are talking about artificial barriers that were established legally. We should not assume the supreme court said something that was legal at one time is now illegal; they just said provide portage. Now we are taking the Curran and Hildreth cases a little further. We are providing for portage, and we will pay you for providing the access around the barrier which was legal to begin with. Senator Brown addressed Senator Galt. He stated that without regard to the supreme court decisions, if the constitution says the public has the right to use the water and they come to a barrier, then they don't really have the right to use the water beyond the barrier. How can the public enjoy the constitutional right without getting around the barrier? Senator Crippen said you are providing a method for them to do that. Senator Daniels replied when you read the Curran opinion, it says, in the case of barriers, the public is allowed to portage around such barriers in the least intrusive manner possible, avoiding damage to the private property holders' rights. He suggested that you either avoid damage or pay the landowner for it. Senator Mazurek stated the Hildreth decision stated you can portage in order to cross barriers. Senator Pinsoneault suggested that a period be placed after the word portage in the suggested subparagraph (3). Senator Towe suggested we are not saying, as Senator Crippen proposed, that the portage or would just have to be around the barrier already in existence. It also applies to any barriers that may be put up in the future.

Senator Peinsoneault moved as a substitue motion that the proposed amendment on Deadlock Issue No. 4 be adopted with the following corrections:

> The brackets be removed in each place that they appear and a period be placed after the word "portage" in subparagraph (3).

Senator Towe stated this language was written to cover all portage, not just that around barriers in existence at the time. Senator Crippen stated we are talking about barriers that are in existence now. Senator Yellowtail felt portage was not a terrible land grab. You do not want to portage any further than possible. He believes people will portage

in the least energy-expended manner possible.

Senator Towe moved as a substitute motion for all motions pending the HB 265 be concurred in as amended. The motion failed with Senators Blaylock, Shaw, and Towe voting in favor. (See roll call vote attached as Exhibit 17.)

Senator Mazurek then reverted to Senator Pinsoneault's motion regarding Deadlock Issue No. 4 and his proposed amendments to that issue. Senator Mazurek asked how that amendment ties in with the court opinion if you have barrier in place and the court says you have to provide portage. Mr. Petesch responded he doesn't think a lot of the amendments that have been offered to this bill are in keeping with the Hildreth and Curran decisions. If you wanted to just follow Hildreth and Curran, you would not need this bill. Senator Towe stated he thinks the motion violates both the spirit and the letter of the decisions to ban portage unless it is paid for in this manner. He thinks it is an interesting and intriguing argument. He has some problems with natural barriers. On artificial barriers, he doesn't think there is any question or doubt or Hildreth would have been paid for the barrier he put up. Senator Crippen stated it was his understanding the Hildreth bridge is still there, and Hildreth still hasn't provided portage around it. He does not believe in either of these cases the responsible landowners would have done what they did. Again, the bridge is still there; it may stay there until he gets compensation. The motion regarding Deadlock Issue No. 4 carried with Senators Blaylock, Towe, and Yellowtail voting in opposition (see roll call vote sheet attached as Exhibit 18).

Senator Brown moved the adoption of the proposed amendments relating to Deadlock Issue No. 5. Mr. Petesch explained this amendment would have the effect of prohibiting hunting of any sort without the landowner's permission. Senator Brown stated he doesn't think hunting had anything to do with, the Hildreth and Curran decisions. Senator Towe stated his objection is now you are talking about all hunting, whether on big streams or on smaller rivers. There are some places where that river is very, very wide. He thinks it is outside the scope of the Curran and Hildreth decisions to ban hunting from these streams. Senator Yellowtail replied in Hildreth, the court said the capability of the use of the waters for recreational purposes will determine whether the waters can be used. He believes waterfowling is a recreational use. Senator Mazurek asked if this in effect meant you couldn't go down the Yellowstone River and hunt ducks.

Senator Crippen stated that is why he tried to go into three classes of streams. The motion regarding Deadlock Issue No. 5 failed with Senators Brown, Crippen, Galt, and Shaw voting in favor (see roll call vote attached as Exhibit 19).

Senator Towe moved adoption of amendment No. 2 set forth on Deadlock Issues No. 6 and 7. We have not defined water-related pleasure activites. He presumes they are the same activities as defined in recreational use with respect to surface waters. It is not clear without this amendment that what was referred to in this point in the bill is that other activities which are not water-related are banned at this sentence. He presumes what we mean by water activities that are not banned are not recreational uses. He thinks we need to clarify it. By passing this amendment, we will define water-related pleasure activities to be the same as recreational uses with respect to surface waters. Senator Crippen pointed out there are two amendments relating to Deadlock Issues No. 6 and 7. Senator Towe said he would accept amendment No. 1 if Senator Crippen would accept amendment No. 2. Senator Crippen replied one of the problems he sees if you keep in the definition the beds and the banks to the high water banks, then we are talking about surface waters where you are allowing some of these activities up to the high water mark. Mr. Petesch replied what you are doing is adding this into the list of things you can't do without permission of the landowner. Senator Towe said without this, there is a strong possibility the other activities that are not water-related may include some of the recreational uses.

Senator Crippen moved as a substitute motion that the committee not adopt either one of the amendments listed under Deadlock Issues No. 6 and 7. The motion carried with Senators Blaylock, Pinsoneault, Towe, and Yellowtail voting in opposition (see roll call vote attached as Exhibit 20).

Senator Galt moved the amendments listed under the Deadlock Issue No. 8 be adopted. Senator Yellowtail stated we are using navigability as a means of separating classes of streams. Subsection (c) includes activities which essentially are tests that have been defined by published judicial opinions, so they essentially reinforce and describe what those streams are. Senator Galt replied we are now off navigability and on to Class I. He is concerned about the language "or have been capable." Senator Towe stated he

thinks this amendment is unworkable, because if you left just subsections (a) and (b) in the bill, you would have defined some rivers that have government survey meander lines. That includes some large and some rivers, but not all rivers. There are a number that would have been judicially determined in this state. There have been some that have been determined to meet the federal navigability tests. Lots of others do meet the test but have not been adjudicated. You have some large rivers and some small rivers included, but some medium size ones are not included. The activities listed in subsection (c) enumerate court decisions on what establishes navigability and by limiting them to the definitions arrived at on the effective date and is an attempt to set further those bases for deciding federal navigability. Senator Mazurek stated he thinks this is a particularily dangerous amendment in light of the fact we have adopted Deadlock Issue No. 1 which prohibits activities on Class I streams. Senator Crippen asked if there have been any judicial determinations involving the Clean Water Act that could effect us here when you talk about judicial opinions and where you were talking about supporting activities under the federal navigability test. Mr. Petesch stated he is unaware of how this would be effected by the Clean Water Act. These are the federal navigability for commercial tests and not ownership tests. The motion to adopt Deadlock Issue No. 8 failed with Senators Crippen, Galt, and Shaw voting in favor (see roll call vote attached as Exhibit 21).

Senator Towe stated he would like to address Discussion Topic No. 9 relating to hiking. By rejecting Deadlock Issue No. 6, he thinks you have effectively banned hiking along the Yellowstone River and have, in fact, banned hiking at all rivers at this point. Mr. Petesch referred to the definitions of recreational use, surface water, and the area below the high water mark. The right to make recreational use of surface waters does not include, without the permission of the landowner, those that are not water-related. Senator Towe asked if someone could come in and say hiking is not water-related. Mr. Petesch stated that it is a recreational use by definition. Senator Towe suggested if you carry a fishing pole, you are all right.

As a substitute motion, Senator Towe moved to adopt the Deadlock Issue No. 6 and 7. The motion carried with Senators Brown, Crippen, Galt, and Shaw voting in opposition.

Senator Towe moved adoption of his proposed Amendment No. 1 with the following amendment thereto: The proposed inserted material with the following: "except by longbow or shotgun as specifically authorized by the commission." He stated this is not limited to certain size streams. Senator

Crippen pointed out that on non-navigable water, you are saying there will be no hunting. Senator Mazurek pointed out that on non-navigable waters, we have banned all recreational use. As a practical matter, he asked if he anticipated the commission would designate specific streams. Senator Towe stated it might even designate a particular area on the stream. He commented he is not asking for all hunting, just longbow and shotgun because they don't carry as far. He also pointed out the commission may say "no hunting," and we would have to go along with that. Senator Crippen stated his problem is with subsection (b) of the definition. We say in subsection (b) "that are or have been capable of supporting commercial activities." He asked why we need subsection (d). Senator Towe responded he did not know. Senator Crippen asked if that activity be classified as a commercial activity under this definition if you had a dude ranch. Senator Yellowtail responded he hardly thought so, as it relates to the water, unless in involves a commercial use of the water. Senator Crippen contended teaching them how to fish might be a commercial use. Senator Crippen was concerned if by doing that you were really spreading it out to the smaller streams. Senator Towe pointed out subsection (d) is essentially subsection (c) before 1889. The motion to adopt Senator Towe's proposed amendment No. 1 (Exhibit 9) as amended carried with Senators Brown, Crippen, and Shaw voting in opposition.

Senator Mazurek pointed out that parts of the statement of intent dealt with portage, and we will have to go back and correct those areas. Hearing no objections, he left that to Mr. Petesch to fix. Senator Shaw moved that

New Section, Section 8, page 12, lines 9 - 14, be stricken. He felt that if one section were invalid, the rest of this bill should also be invalid. The motion failed with Senators Daniels and Shaw voting in favor.

Senator Pinsoneault stated that when you were talking about establishing a route and making a judicial process out of it, he wondered if the landowners ever heard of the section in the civil code about submission of a controversy without action. He felt that that may be a possible alternative solution that would save a lot of bucks for those trying to get portage. Senator Towe pointed out portage is now gone.

Senator Crippen stated he would like to compliment Senator Yellowtail for the job he did as chairman of the subcommittee. He knows that it was difficult and that he is not happy about the outcome. He also pointed out to the committee that by doing what it did with Senator Towe's suggestions, with the exception of the permanent duck blind, the committee has passed the alliance amendments.

Senator Towe moved that HB 265 be recommended [BE CONCURRED IN AS AMENDED]. The motion carried with Senators Crippen, Galt, and Shaw voting in opposition. (See roll call vote attached as Exhibit 23.)

There being no further business to come before the committee, the meeting was adjourned at 1:26 a.m.

COMMITTEE CHAIRMAN
SENATOR JOE MAZUREK

cs

MONTANA STATE SENATE
JUDICIARY SUBCOMMITTEE ON STREAM ACCESS
MINUTES OF THE MEETING

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. A
DATE 032785
BILL NO. HB 265

March 13, 1985

The first meeting of the Senate Judiciary Subcommittee on Stream Access was called to order at 7:25 p.m. on March 13, 1985, by Chairman Bill Yellowtail in Room 325 of the Capitol.

ROLL CALL: All subcommittee members were present.

CONSIDERATION OF HB 265: Chairman Yellowtail opened the subcommittee meeting by stating the Senate Judiciary Committee as a whole has had comprehensive and extensive testimony on this bill. The subcommittee is to consider the amendments which have been proposed. Senator Towe suggested that since Greg Petesch, the staff attorney, has a good handle on the amendments, he should walk the subcommittee through the bill. Senator Crippen felt the subcommittee should highlight some of the issues raised during this hearing so that when we are dealing with particular amendments, we will know that we are dealing with a particular issue. Senator Galt felt Mr. Petesch should explain the amendments. Senator Towe questioned whether it would make more sense to go through the amendments one at a time as to who presented them or to go through the bill. Mr. Petesch felt going through the bill would be the best. Chairman Yellowtail instructed him to do so.

Mr. Petesch stated he would skip the statement of intent for now. Once the subcommittee decided what it wanted to do with the bill, it should then address the statement of intent. The Stillwater Protective Association and the Western Environmental Trade Association (hereinafter referred to as WETA) have proposed amendments to the definition of barrier on page 1. They are essentially limiting barriers to artificial barriers. The first issue then becomes whether the subcommittee should address the bill to all barriers or simply artificial barriers. Senator Towe moved that the subcommittee strike natural barriers out of the definition, leaving us with artificial barriers. The subcommittee will have to address portage around artificial barriers, but the bill will not say anything about portage around natural barriers. Senator Crippen felt the supreme court cases were really dealing with artificial barriers. Senator Galt referred the subcommittee to the Hildreth decision addressing artificial barriers. Senator Towe stated neither case addresses the question of natural barriers or objects, and we don't know how the court will decide that issue. Senator Galt agreed. Senator Yellowtail stated as a practical matter, in floating down a stream, it is very likely there will be cases where there will be natural barriers. That will necessitate that a recreationist will have to get out and traverse around the barrier. Senator Towe stated we cannot solve all of the world's problems tonight. Somebody, someday will have to address that. If we try to address that in this bill, we will

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possibly lose the bill, and he wouldn't want to do that. Senator Crippen stated his concern is by the inclusion of natural barriers, we are placing the burden of providing navigability from the source to the mouth. The motion to eliminate natural barriers from the bill carried unanimously.

Mr. Petesch explained that there are two proposals on how to do this. They both related to page 1 beginning at line 19 following the word "water." WETA has proposed striking the remainder of line 19 through the period on line 21. The Stillwater Protective Association has proposed striking only a portion of the language found on line 19, "or a natural object IN OR OVER A WATER BODY."

Senator Galt moved that HB 265 be amended as follows:

1. Page 1, line 19.
Following: "water,"
Strike: "or a natural object IN OR OVER A WATER BODY"

2. Page 2, lines 23 and 24.
Following: "water" on line 23
Strike: remainder of line 23 through "stream" on line 24

The motion carried unanimously.

Mr. Petesch stated that will have some implications when the subcommittee gets to the issue of portage. He then stated the next issue was proposed by WETA. They propose to eliminate the classification of waters into classes. You would have surface waters only under their proposal. There is some basis for that in the decision of the court where they referred to the recreational use test. The court opinion said we cannot define the use because the waters themselves do so. Senator Towe commented that raises the question of the implication that is left in the bill that Class II waters prohibit camping, and the bill provides then by implication Class I waters allow camping. The problem is we can clearly, within the confines of the decision, put a limit on some waters, but if we do that, by implication we are permitting it on others. A substantive question that needs to be decided is if we combine the two classes, we are not going to prohibit any of those other things that are prohibited on Class II waters. We are going to leave that alone. Senator Galt replied that is the heart of this thing. He asked how can you allow anyone to put a camp on any of these waters when the landowner owns the water down to the low water mark. Senator Crippen suggested the subcommittee define Class I waters. Mr. Petesch stated Class I waters are essentially the bigger rivers. The federal navigability test is the major test under this definition. There is a

restatement of the federal navigability test two or three times and the other criteria is those streams flowing through public lands. We are talking about such rivers as the Missouri, the Yellowstone, and the Dearborn. Senator Towe stated using the definition we have in the bill, subparagraph (d) seems to be the real key. Mr. Petesch stated what the test comes down to is the log floating test, so the rest are not terribly significant. Senator Yellowtail replied subparagraph (c) may be significant because it may include a smaller stream. Senator Galt asked if state lands were public lands. Senator Yellowtail responded affirmatively. Senator Galt questioned small streams going through school lands. Senator Crippen asked if they became Class I and Class II as they went through the public land. Senator Towe responded it could be several different classes as they go down the stream. Mr. Petesch stated some of the definitions have been taken from Section 87-2-305, MCA.

Senator Towe suggested the subcommittee come up with a definition of what is navigable. Senator Galt replied everything that isn't navigable belongs to the people paying the taxes. Senator Towe asked what the subcommittee intended to prohibit on navigable streams. Senator Galt replied anything it wanted to except the surface use of the water. Senator Towe asked about confining this bill to the surface use of the water. Senator Galt responded that would be a very good idea in his opinion. Senator Crippen stated the subcommittee needed to define recreation. He asked if the subcommittee would then run into the problem of the high and low water marks. Senator Yellowtail reminded the committee that the supreme court opinions stated the surface and the bed and banks up to the ordinary high water mark are available for public recreational use. That poses the question of capability of recreational use. Senator Galt contended the supreme court used the Wyoming decision as one of its reasons for allowing these uses. The Wyoming decision prohibits the use of the bed and the banks except for incidental uses. Outside of that, the recreationists cannot use the streambeds. Unfortunately the Montana supreme court never went that far in its decisions. Senator Crippen agreed that if we could contain this bill to use of the surface of the water, then we would surely solve the problem that was raised about the dry creek beds. Senator Yellowtail agreed and stated the supreme court has clearly stated that between the high water marks is the usable definition. Senator Towe stated page 15 of the Curran case and page 5 of the Hildreth decision seem to be talking about surface waters. He thinks there is support for the concept we are talking about waters; however, there is that statement the public has the right to use the waters and the beds and the banks up to the ordinary high water mark. He believes someone could argue when it says the bed and the banks, they are saying if there is water over the bed and the banks, but he is not sure if (the supreme court decisions would apply)

if there were no water. He thinks we should just address the question of surface waters. Senator Crippen responded that would solve Senator Brown's problems with the lakes. Mr. Petesch responded you have also solved a lot of the issues of controversy.

Senator Towe questioned whether the supreme court meant something more than that or are we going to say the supreme court is talking about water and underneath the water is the bed and the bank, and if you put your foot on it, then you have the right to use it. Ron Waterman pointed out the debate that has gone on here is similar to the debate which went on before. He tends to believe the full language and import of the cases reach in terms of the utilization of the land to the high water mark whether or not it is covered with water. Because of the specific language which Senator Towe noted and also because of the underlying factual situation, he believes this is true. In Curran, specificially, there was an extended discussion of the boating activity relative to the dry portions of the streambed. That was a substantial issue in the Curran case, which dealt with natural barriers. Looking at how those cases developed at the trial court level, if we talk just about the surface waters, that does away with the need to address the issue of dry streambeds which would leave us with a bill addressing only surface waters and inviting litigation over the issue of the high water mark which is uncovered by water. This invites further litigation in a meaningless manner.

Mr. Waterman referred to Judge Bennett's Memorandum Regarding Motions for Summary Judgment in the district court decision in Curran, Cause No. 45148, page 4. Senator Galt asked why the supreme court didn't continue its research into the Wyoming decision where the Wyoming supreme court declared the streambeds private property. Mr. Waterman responded he urged that position on behalf of the Montana Stockgrowers Association. Their position was essentially set forth in Judge Gilbrandson's dissent. Phil Strope stated Ron Waterman has brought up Judge Bennett's decision. Mr. Strope said he has talked with Judge Bennett, and it was Judge Bennett's off-the-cuff comment that what the supreme court did is limit the decision to the water, and he decided in his own mind the two things that have been discussed here. The supreme court went to the Wyoming decision that says it was a water use and you could use it incidental to the water use and nothing further. In Curran, the supreme court cited the 1895 statute that says the abutting property owner owns the beds down to the low water mark. In the Hildreth decision, it was a water decision because of the fact that the court did not in any way find the

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statute out of order. The supreme court cited the statute with approval. What should be done in HB 265, if at all, is to confine the bill to the water issue.

Senator Crippen asked if you confined to the water issue how would you handle the question of between the low and high water marks. Mr. Strope stated he didn't think there was any comment in the supreme court opinions that would indicate the court said a member of the public essentially has a recreational privilege and has the right to intrude on private property. Mr. strope responded if all the banks are straight up and down, then there is no issue. Mr. Strope stated that has been a tolerated trespass in society, but there is also a legal right for a property owner to go to that person who is exercising the trespass and say he shouldn't do it anymore.

Mr. Strope also said one other issue is if HB 265 were to die and then the question is raised about regulation of recreational use of water, there currently is a whole body of law to rely on. Senator Crippen commented if the courts got us into this mess with those regulations in existence, he doesn't have that much faith in the supreme court that it may not come back in and do something more disastrous. He has more faith in the legislature than in the supreme court and believes that is why we should not kill this bill.

Mr. Petesch disagreed with Ron Waterman and Phil Strope. He doesn't think the Curran case was that unclear in what it meant by high water mark because of the reference to the angling statute. Senator Towe stated he doesn't think we know yet how the supreme court will decide some of these cases, like putting up a duck blind. Maybe we can limit the bill and get it passed and do some good. If you don't do something about the bed and the banks and make some restriction on them, more litigation is going to result. We can sit here now and do something and prevent those problems. Mr. Strope stated there is no way of knowing how much litigation will come up whether you pass or do not pass the bill. The prospect of another case or two in this area is extremely high. One group or the other will look for a fact situation to go again to the court. The makeup of the court has changed. The prospects of lawyers' fees being generated is very realistic. Senator Towe stated we should not shirk our responsibilities and not try to make some policy decisions so the supreme court has to.

Senator Galt stated he wants to get it clear and in the record there is no argument that navigable streams and the streambeds and banks belong to the state of Montana to the high water mark. Senator Yellowtail asked if he meant to suggest fishermen may tread on the banks. Senator Galt responded yes, on navigable streams. Mr. Petesch stated Senator Galt is referring to navigability for title purposes. Senator Galt responded that is correct. Senator Crippen stated that should not include the right to camp, even on the navigable streams.

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Senator Yellowtail referred the subcommittee back to the capability of use. Senator Galt responded he felt the supreme court made a mistake, as ownership goes to the low water mark. From the low water mark to the high water mark belongs to the adjoining landowners (on navigable streams). Senator Yellowtail replied the Big Horn case contradicts that. Dick Josephson stated according to the patent and title, the states were allowed a choice because they controlled that issue. Montana passed a statute stating the low water mark. Other states passed a statute stating the high water mark. Senator Yellowtail suggested the United States Supreme Court spoke in the Big Horn case about ownership of the beds and the water. He believes that will probably prevail over our state's statutes. Mr. Petesch stated the state has the right to determine ownership level. Senator Yellowtail responded he's fairly sure the supreme court granted the use of the Big Horn River to the high water mark. Senator Yellowtail went on to state the question at hand is should there be a distinction between Class I and Class II waters and then accordingly to find uses for these waters. Senator Crippen pointed out if you keep the classification you have now, you have to change subsection (c), because that says any little stream that might go through a school section would be included.

Mr. Waterman called the subcommittee's attention to page 7, line 8, of the bill, which indicates school trust lands are not affected one way or the other. He felt that although they may have chosen the wrong words with public lands, they tried to assure school lands would not be included. Senator Towe did not feel it made any difference whether they were defined as navigable versus non-navigable or Class I versus Class II. He then referred to page 6 of HB 265 relating to the things you could not do on Class II streams. He suggested we just simply say we are going to prohibit those three items listed there on all waters. Mr. Petesch stated there are proposed amendments which do that. So long as you are not regulating the use of the water, you are on safe ground and can do that. On public lands along navigable waterways, the state in effect does those very things on the waters that are currently public waters.

Senator Towe suggested why if we were to do that, we would have no reason for a distinction or Class I and Class II waters. Senator Galt suggested going back to line 15 on page 5. Senator Towe suggested deleting lines 4 - 6 on page 6 of the bill. Senator Galt felt that would be fine. Senator Yellowtail asked what must a duck hunter do to set up a duck blind (on state-owned Class I waters). Senator Towe responded he must get permission. If it is a state land it will be listed. If it is a park, you automatically

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have permission. Senator Yellowtail pointed out that if it's the Big Horn River, that would be anywhere below the high water mark. Senator Yellowtail replied if you are going to camp, you are dealing with something you cannot do on the water. The legislature has the right to say it doesn't want camping on any state parks. It has the power to do that, even though it doesn't want to. Senator Towe stated the legislature can say you can put up a duck blind. It can also say you can do it with the permission of the landowner. Mr. Petesch pointed out it could well be that if you allow duck blinds to be placed on private property without permission, you would have a taking problem. Senator Towe replied that problem could be solved if we made it clear you need permission of the landowner before you do anything. He felt that they now needed a definition of surface water. Mr. Petesch referred the committee to page 4, lines 21 - 24.

Senator Towe moved that the subcommittee strike from the bill page 1, line 25, through line 20 on page 2, the definition of Class I and Class II. Senator Yellowtail commented he really thinks what we are doing in this case has serious implications for not only customary use of waters in this state, but for the intent of the supreme court decisions. Especially as articulated in Hildreth. It would be a far better use of our obligation as a legislature to be as inclusive as possible to avoid future litigation. If we prohibit that, we are inviting further losses. It is hard to avoid the bed and the banks language of the Hildreth decision and the reference to the fishing language and the Bennett language. He thinks we are reaching beyond the intention of the supreme court in being so narrow minded. Senator Galt replied the decisions were based on the water use. This isn't depriving anyone from floating. They can do anything they want to on navigable streams. Senator Yellowtail stated by this amendment what we are doing is prohibiting it on all streams, navigable or not. He thinks we are inviting a real disaster in that case. Senator Crippen stated a lot will depend on how you define high water mark. What we are doing with this is defining recreational use. By adopting the amendment, we say they mean that, but they do not pertain to these things. Senator Yellowtail replied overnight camping has been a part of recreational use, as floaters camp overnight on streams. People also put up duck blinds. Senator Galt stated they could even overnight camp on public grounds without permission. Director Jim Flynn explained they allow overnight camping on all of the lands they control. Senator Galt asked if they had authority to control overnight camping on all state lands. Director Flynn stated they have the right to control all activities on state lands. Senator Yellowtail replied they are proposing to outlaw overnight camping on all lands. Mr. Petesch explained that the prohibition is without permission. Senator Towe

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stated as a practical matter, in many cases the landowner won't insist, but he should have the right to come down any say you are intruding on my personal property rights at this point. At the point when the recreationist says there is a spot here that is below the high water mark, I will not get up on the bank, and I have that right, he probably will take it to the supreme court, and they will have to decide that case.

Senator Yellowtail asked how they should address the question of the capability of use. Senator Galt replied that is the surface water. Anyone can use it for any purpose. The water itself that is. The motion to eliminate the differentiation between Class I and Class II streams carried with Senator Yellowtail voting in opposition. Senator Towe moved to strike all of the lines 4 through 6 on page 6 and reletter the remaining subparagraphs (along with any necessary clerical changes which would need to be made.) Senator Galt asked why they should not just strike Class II. Senator Towe responded that is the effect of his motion. Senator Towe added to his motion striking Class I and Class II on line 20 and putting in surface instead. The motion carried with Senator Yellowtail voting in opposition.

Senator Crippen stated he had a question about page 6, lines 8 and 9. He asked if the word "permanent" should be deleted. He stated what we are doing here is saying if you are going to put a duck blind up, you need permission. Senator Crippen moved to delete the word "permanent" on page 6, line 9. The motion carried unanimously.

Mr. Petesch stated the next issue was the controversy concerning ordinary high water mark. Senator Towe stated he wants to use the definition of diminished vegetation. Senator Galt replied he did not want that. Senator Galt stated he would like to adopt Mr. Petesch's proposed amendment No. 3. Senator Crippen questioned whether the Senate Judiciary Committee had not already defined high water mark. Senator Towe replied that had a caveat on it: If we pass this bill, that one is no good. He believes this is an unworkable definition. With that definition, he can bring you down to the actual water every single time because there is vegetation. Senator Galt stated if it floods, it diminishes the vegetation on it. Senator Towe stated the diminished terrestrial vegetation is to help you identify the line. You can usually see it on any bank. If you say absolutely no vegetation, he disagrees. Senator Galt stated he would go with the Department of Natural Resources and Conservation in its great wisdom in adopting this rule. Senator Towe

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asked if he would agree there is vegetation below the high water mark. Senator Galt replied there is even vegetation under the water. Senator Towe stated with your definition, you have come down to the water. Senator Towe disagreed. He stated "value for agriculture purposes" doesn't mean value for crop purposes. Senator Crippen stated if you were talking about the surface water, it wouldn't make any difference because you are keeping them on the surface. Senator Towe stated there is vegetation on the vertical bank. Senator Towe felt we ought to do something other than state absolutely no vegetation. Mr. Josephson stated that definition was picked for lack of something better. Lorents Grosfield stated the conservation districts have used that definition for ten years. They have had no problem with it. In deliberations with conservation district supervisor, it never occured that they were talking about anything but lack of terrestrial vegetation. They never assumed aquatic vegetation. If you are talking about looking at vegetation with a microscope, he doesn't know how to address that. Senator Towe suggested if the language in the bill that offends you most is page 3, line 12, they limit it to lack of substantial vegetation and total destruction of its value for agricultural purposes. Dan Hines, Montana Wildlife Federation, stated the intent of their definition is to define the ordinary high water mark as the annual water mark that did not include the floodplain. Senator Crippen stated if you have a stream that is going through a farmer's meadow land, he can see where every year the high water mark will be right up to the banks and the low water mark would be just a trickle of water in there. If we can't get something with which the landowners can live, you will probably end up with the biggest lockout you have ever seen. By being too broad, we will be doing a greater dis-service to the recreationist. Mr. Grosfield stated if you are defining a line where nobody understands where it is, you are going to have confrontations. When discussing diminished vegetation versus lack of vegetation, he asked what diminished would mean. Senator Yellowtail stated it would be difficult to find a definition that will suit all types of streams and all situations. Senator Towe suggested we still have the definition of ordinary high water mark, which means the line the water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it. Senator Towe moved as a substitute motion that the definition of ordinary high water mark be amended as follows:

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Page 3, lines 13 and 14.
Following: "2" on line 13
Strike: remainder of line 13 through "value" on line 14
Insert: "deprivation of the soil of substantially all terrestrial vegetation and destruction of its value for agricultural purposes"

The motion carried with Senator Crippen voting in opposition.

Mr. Petesch stated the next issue is the definition of recreational use. A suggestion was made to strike "hunting" entirely and another suggestion struck "hunting" and inserted "water-fowling." Mr. Petesch reminded the committee it had already prohibited these uses without landowner permission. Senator Crippen stated if you ban hunting, then you are banning hunting on the Big Horn, Yellowstone, and the Missouri. Mr. Petesch stated the Wyoming case included hunting within recreational uses. Senator Galt moved that hunting be struck from line 18, page 3. His motion was made on the grounds it is not a water sport. Senator Crippen stated you are then eliminating hunting on the lakes. The motion failed, with Senator Galt voting in favor.

Mr. Petesch stated in the same definition there are suggestions to reinsert the stricken language on page 3, lines 23 and 24. Senator Towe stated that is unnecessary, because it is in the definition of surface waters. Mr. Petesch stated the committee still had to deal with the issues of portage and prescriptive easement problems. Chairman Yellowtail then suggested the subcommittee recess and reconvene its hearing on another evening.

There being no further business to come before the subcommittee, the meeting was adjourned at 9:30 p.m.

William P. Yellowtail
Subcommittee Chairman

cs

HB 0265/si

STATEMENT OF INTENT

HOUSE BILL 265

House Judiciary Committee

A statement of intent is required for House Bill 265 because section 2(5) directs the fish and game commission to adopt rules governing recreational use of surface waters.

In its implementation of this bill, the long-range goal of the commission must be to preserve, protect, and enhance the surface waters of this state while facilitating the public's exercise of its recreational rights on surface waters. The commission shall strive to permit broad exercise of public rights, while protecting the water resource and its ecosystem. In adopting the procedural rules required by section 2, the commission shall emphasize that in close cases the decision must be to protect the environment by restricting or continuing to restrict recreational use, since it is easier to prevent environmental degradation than it is to repair it.

In developing the rules implementing House Bill 265, the commission shall make every effort to make the process uncomplicated and clear. As provided in subsection (5)(b), the commission must issue written findings and an order whenever a request is made for restrictions on recreational use of a surface water or for the lifting of previously imposed limitations on recreational use of a surface water. The commission may adopt rules providing for summary dismissal of requests when a substantially similar request has been received and acted upon within a brief time prior to the second or subsequent requests if, during the time period since the first request, it is unlikely that there has been a change in the situation upon which the commission based its earlier decision.

In developing the rules establishing criteria for determination upon a request made under subsections (5)(a) or (5)(b), the commission shall require that each of the following factors that is relevant to the decision must be considered in the determination:

(a) whether public use is damaging the banks and land adjacent to the water body;

(b) whether public use is damaging the property of landowners underlying or adjacent to the water body;

(c) whether public use is adversely affecting wildlife or birds;

(d) whether public use is disrupting or altering natural areas or biotic communities;

(e) whether public use is causing degradation of the water quality of the water body; and

(f) any other factors relevant to the preservation of the water body in its natural state.

In making its decision after a request has been made for restrictions of recreational use, the commission may impose any reasonable limitation on the recreational use of surface waters including complete prohibition of a particular type of recreation, prohibition of a particular type of recreation in certain specified areas, such as within a specified distance of a residence or other structure, or in an appropriate case, prohibition of all recreation.

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March 13, 1985

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. A-3
DATE 032785
BILL NO. HB 265

Senator Joe Mazurek, Chairman
Senate Judiciary Committee
Capitol Station
Helena, MT 59620

Dear Senator Mazurek and Members of the Committee,

On Friday, March 8, representatives from two NPRC affiliates testified in opposition to HB265. One affiliate, the Stillwater Protective Association (SPA), offered amendments in four areas: portage, surface water definition, land-based activities, and ordinary high-water mark definition.

Since that hearing, NPRC's executive committee voted to support, as a Council position, the position of the affiliates and the amendments offered by SPA. Our members are deeply concerned about how any bill coming from this legislature will affect the relationship between landowner and recreationist. It is essential that we maintain that good relationship by taking steps to protect the privacy and safety of the landowner, and the landowner's ability to do business, while at the same time allowing recreationists to enjoy the use of the waters in the state.

The fundamental disageements over HB 265 seem to revolve around the interpretations of the Supreme Court decisions, and the breadth of activities allowed under those decisions, including the distinction between land-based and water-based activities. These amendments reflect our members concerns and interpretations of the decisions. These concerns are not isolated to a particular group within NPRC, but have been expressed by members throughout the state, including eastern Montana.

These amendments reflect a sincere desire on the part of our Council to avoid conflict, and to address the areas where we see the potential for misunderstanding or abuse. We know that the road to this point has been difficult, and we appreciate your time and work on this bill. It's an important issue for many of our members, and we would be glad to work with you on the bill, and particularly on the suggested amendments.

Sincerely,

Jeanne-Marie Souvigney
NPRC Staff

AMENDMENTS TO HB 265

submitted by the Stillwater Protective Assn.
and the Northern Plains Resource Council

1. Portage

Section 1 (1), page 1, line 19

"the water, ~~or a natural object in or over a water body~~ which..."

and lines 23-24

"obstacle to the natural flow of water ~~or a natural object within the ordinary high water mark of a stream.~~"

Section 3 (1), page 7, line 15

"ordinary high-water mark, portage around artificial barriers in the"

Section 3 (3)(a), page 8, line 1

"a portage route around or over ~~a~~ an artificial barrier may"

Section 3 (3)(c). page 8, lines 12-13

"the barrier and the adjoining land to determine if a ~~reasonable and safe~~ portage route is necessary

Section 3 (3)(d), page 8, line 15-16

"Supervisors shall make a written finding of ~~the most appropriate~~ whether a portage route is needed and the most appropriate route if if one is necessary"

Section 3 (3)(e), page 8, line 21

"cost of establishing a portage route around ~~natural~~ existing artificial barriers"

2. Surface Water

Section 1 (10), page 4, lines 21-24 strike

Section 1(8), page 3, lines 23-24

"or incidental uses, within the ordinary high water mark of the waters"

3. Land-based Activities

Section 1 (8), page 3, line 18

"surface waters: fishing, ~~hunting~~, swimming, floating"

Section 2 (2)(d), page 6, line 3

"~~big game~~ hunting"

Section 2 (1), page 5, line 2

"Subsections (2) ~~through (4)~~ and (3)"

Section 2 (3), page 6, line 4-6, strike

line 7 - change (A) to (E)

line 8 - change (B) to (F)

line 11 - change (C) to (G)

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line 13 - change (4) to (3)

line 17 - change (5) to (4)

Section 2 (2)(b), page 5, line 23-24

"pond or other private impoundment ~~fed by an intermittently flowing natural watercourse~~"

4. Ordinary High-Water Mark

Section 1(7), page 3, lines 8-16, strike and substitute with the language of Senate Bill 418 in its entirety.

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MONTANA STATE SENATE
JUDICIARY SUBCOMMITTEE ON STREAM ACCESS
MINUTES OF THE MEETING

March 18, 1985

The second meeting of the Senate Judiciary Subcommittee on Stream Access was called to order at 7:07 p.m. on March 18, 1985, by Subcommittee Chairman Bill Yellowtail in Room 325 of the State Capitol.

ROLL CALL: All subcommittee members were present.

FURTHER CONSIDERATION OF HB 265: Senator Crippen suggested the subcommittee return to the area of classification of waters. As was testified in the Judiciary Committee's initial hearing, this bill not only pertains to the rivers and streams in the state, but also to all surface waters and that includes lakes. That fact really isn't known all that well to the general public. He asked as the orginal bill came out what it would do to the property owner who might have a cabin fronting a lake. Did the supreme... court intend someone could pull up with a boat onto a beach and camp? That is an area that has to be addressed. We also have a custom and usage situation. We have a number of large rivers in the state. On the other end of the spectrum is a smaller stream that meanders through a farmland or ranchland area and is primarily for angling, where there is very little distinction between the high water mark and the low water mark. Senator Towe suggested the subcommittee return to Class I and Class II waters. Senator Crippen stated he even has a question with the Class I and Class II waters. He doesn't know if the public wants a broad use of surface waters. Class I waters by their definition included all navigable lakes. Senator Galt stated there is no doubt but that Class I waters includes lakes because most have already been declared navigable. Senator Yellowtail stated the definition of surface waters as read literally probably would include lakes. Senator Towe felt much of the need for doing as Senator Crippen has suggested depends on how we handle what is or is not prohibited. He has a number of suggestions he wants to present in that area. Senator Galt asked if we were then saying that we don't start where we left off the other evening and you are suggesting we start all over again. Mr. Petesch replied we had just finished the recreational use section on the bottom of page 3. Senator Towe stated he wants to go back, because it has been called to his attention there may be an unintentional problem in the

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definition of ordinary high water mark. In the definition of "and destruction of its value for agricultural purposes," someone said it could mean cattle coming down to the bank and using the water for purposes of watering the stock. Senator Galt replied he had not thought of it that way. Cattle is a different thing than agriculture. Agriculture is growing something from the ground. Senator Towe asked if there were any objection to clarifying the language, such as stating "the destruction of its value for agricultural purposes except for watering livestock." Ron Waterman pointed out with reference to the language you are struggling with, he would turn the subcommittee back to the language that was amended and addresses very realistically the issues you raised. Senator Galt stated when you talk about an agricultural crop, you are talking about something that is grown from the land, and the watering of cattle is an entirely different science. Crop means something that can be harvested from the land. Senator Towe stated the comment you used was growing things. Why can't we use the word "crop." Senator Galt stated it is an economic thing from the land; it is something you sell. Senator Towe suggested "destruction of the land for growing any agricultural produce." Mr. Waterman stated since we are searching for words to substitute for "agricultural crop value," it was pointed out by the Cowbelles that for many members of the livestock industry, stock is a crop. He suggested the words "lack of agricultural vegetative values." Senator Towe moved that the definition be amended to strike the words "agricultural purposes" and insert "destruction of its agricultural vegetative value." Senator Crippen stated that may be fine for us to figure out, but it will take a Philadelphia lawyer to figure out ordinary high water mark. Let's use that as a guideline and then come back and redefine it later. The motion to amend the definition of ordinary high water mark carried unanimously.

Senator Towe then suggested the subcommittee start on section 2, which is the use section itself. He wanted to make a suggestion on big game hunting. He wants to add the words "except longbow and shotgun, provided it is not within 500 feet of habitable buildings." Mr. Petesch stated an amendment was suggested that would include black powder guns. Senator Crippen responded you are going to have to have permission. He asked Director Jim Flynn if we include big game hunting in here or made that exclusion, would he feel the sportsmen would still have to obtain permission from the adjoining landowner, because you are on the landowner's property. Senator Crippen stated we have a law on the books that says you must get permission now. He asked if the recreationists would be

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violating it if they stepped on the bank now. Jim Flynn, Director, Department of Fish, Wildlife and Parks, responded if the individual were on the streambed and were hunting with a longbow or muzzleloader, he would assume they were not in trespass. Senator Crippen asked what the difference was if you are hunting, you are hunting. Mr. Flynn responded if you excluded hunting between the high water mark except with the use of a longbow or muzzleloader then you are saying it illegal to use anything else except those two weapons.

Senator Galt pointed out the present law says the land is owned between the low water marks of a navigable river by the state. Mr. Flynn stated that is correct. Senator Galt asked how you justify someone's hunting up to the high water mark not being trespass. Mr. Flynn stated it is his understanding that is what the supreme court decisions addressed. Without HB 265 and the language amended at the first subcommittee meeting, it is highly debatable, and it would seem to him the supreme court decisions would allow big game hunting within the high water marks. Senator Galt stated on non-navigable streams, it says the landowner owns the land to the middle of the stream. He then asked if they could hunt on that property. Mr. Flynn stated it is his understanding the court said between the high water marks recreational use was allowed, and it had no relationship to who owned the land under the stream. Senator Galt asked if this meant he would have to hunt and retrieve big game between the high water marks. Mr. Flynn responded yes; anything that happened above that would have to be with the landowner's permission. Senator Galt asked if a hunter got game and it went on private property and he couldn't retrieve it, would he be guilty of abusing game. Mr. Flynn stated if the individual went to the landowner and was refused permission, that would impact the situation.

Senator Crippen asked if the department had embarked on a program to try and create an atmosphere of good will between the landowners and the sportsmen. Mr. Flynn responded yes, that has been an effort that has been occurring for the last four years of this administration. Senator Crippen stated that program is beginning to bear some fruit. His concern is if we allow big game hunting on all waters, that will include Fishtail Creek and the smaller streams going through a farmer's pasture. If we allowed that, we would be doing a great disservice to the sporting public, and that would go a long way to destroying a relationship we are attempting to build.

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Senator Crippen stated getting into the area of classification of waters, on the Yellowstone River, if you are on the bank, during hunting season, there is a lot of space between the low water mark and the high water mark. In that area, maybe you could say you can allow this type of hunting. But using that instance on a smaller stream such as the Rosebud River, where there are cabin sites around, he felt would be a different situation. One could apply in one, and we would be better off not to have hunting on the others. Mr. Flynn stated it is his understanding that is the way HB 265 was eight or nine days ago. Dan Heinz, Montana Wildlife Federation, wanted to allow hunting on larger streams with short range weapons.

Mr. Waterman stated a great deal of effort has gone into finding a compromise. This issue was one which consumed four or five hours one evening, and it was finally resolved in the manner HB 265 came across to the Senate committee--the two classifications with no big game hunting on smaller streams. There was a recognition there were a number of problems with it, but there was no need to create additional problems. Allowing these types of weapons to be used, even on the larger streams, ends up with the likelihood of incidental trespass. It is an invitation to trespass which should not be extended under the circumstances.

Conrad Fredericks stated the Curran and Hildreth decisions said the waters of this state that are capable of recreational use can be used for that purpose. To say that those decisions contemplated or implied big game hunting is going outside the decisions. People don't hunt big game animals in the water like they do ducks.

Senator Towe went one step further and asked about one other exception. He asked if we should just restate the current law, big game hunting "except on surface waters adjacent to publicly owned islands or other lands where hunting is permitted." Mr. Waterman responded the language that Senator Towe is proposing is substantially a restatement of present law, because if these were public lands, the permission is extended. However, if you do that emphatically, what you are doing is saying as a matter of law, those waters can never be closed by the department, which has regulatory authority over them. Senator Towe asked about using the land between the high water mark and the low water mark. He asked if there were any question or doubt about it at the present time in the existing law, that there were a right to hunt on adjacent lands and publicly owned islands. Mr. Waterman did not think so.

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Phil Strope stated he would like to see the subcommittee refer to Section 70-16-201, MCA. The public already owns the land, such as an island. If it's the decision of the committee that public land should be open to big game hunting for bow and arrow, then it is under the old law, the old 1895 statute, open. In the area where private persons own the land adjacent to the waters, Section 70-16-201, MCA, states a private person adjacent to any stream or lake has the right to control it down to the low water mark. In the case where the public owns it, they can determine how they want to control it. Mr. Strope thinks the committee should go to page 4 and make its determination as to the definition of surface water. Without deciding what surface water means, you don't know what can be done between the high and low water marks. Senator Towe stated there may be some merit in adding it for clarification purposes. Senator Crippen felt the Curran and Hildreth decisions pertain to those. Senator Towe felt the issues were hotly disputed at this point. Senator Crippen moved that we leave it as it and have big game hunting excluded. Senator Towe suggested that issue be set aside and the subcommittee come back to it later. Senator Crippen withdrew his motion.

Senator Crippen asked if subsection (B) on page 5 took into consideration stock ponds being flooded by an underground stream or by a canal property dug by an owner and is being fed by that. Mr. Petesch suggested the sentence be amended to include the word "private"; it would then read "or other private impoundment." Mr. Waterman stated they put this language in with respect to the intermittently flowing water-course-- the stream that was not flowing on a year-round basis. They did not contemplate a pond fed by a spring or a canal if it were done in an intermittent manner. By inserting private impoundment, it seems you may have a problem with reference to those impoundments on the Missouri River behind The Montana Power Company dams. He doesn't think it was the intention the public could not use the waters behind the Power Company dams. Their licenses required those open usages. Mr. Waterman suggested it be amended by stating "private impoundments except those licenses by the Federal Power Use Act." Senator Towe asked how you then address the question that the Martinsdale reservoir is a public impoundment fed by a dam. It doesn't say private unless we put the word in. Mr. Strope stated he is not sure whether it has improved it or not. He would have to do some research into this problem.

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Mr. Fredericks asked if there was some way the subcommittee could address the situation of off stream storage. That would be covered under the diverted away language. Senator Towe responded yes. Bill Morris wondered about the small streams that are just a dribble but not enough to be called intermittent. They have spent a lot of money to build a private dam. He would be perplexed to have them opened up for public fishing. Mr. Waterman replied with reference to the issue of the small stream that is consistently flowing and not intermittent, the language of the court is the language we must give credence to and that is the definition of surface waters. The impoundment would be acceptable. With respect to those ponds which have been separately licensed, that is an issue which they have not addressed. He felt the language could go on to say "or ponds licensed by the commission." Mr. Morris felt that addresses that issue, but also felt it went beyond, in his view, the supreme court's posture on this. Senator Towe stated what he was suggesting was trying to protect what you are asking for. Mr. Morris stated it is not removed from the watershed; you could have trouble with water rights. Senator Galt moved that the sentence be amended to read "the recreational use of surface waters in a stock pond or other private impoundment fed by an intermittent or flowing natural watercourse." Mr. Waterman replied if you accept that language, you are at odds with the concept of public water in Curran and Hildreth. That language would not address the issue raised by Mr. Morris. Mr. Strope commented if you would look on page 4 to the definition as it now stands under surface water, it uses the words " a natural water body." If you retain surface water in your definition then when you go to your prohibition section, you would come very close to Senator Galt's proposal on page 4 if you say that one of the ingredients of the surface water definition is it must be a natural water body. Then a continuously flowing stream would be a natural water body. Mr. Petesch commented that if this were a very small stream, in order to get access, you have to stay within the high water mark to get to the stream to begin with. He also pointed out you can petition the Fish and Game Commission to restrict use of waters. Senator Towe replied he would oppose that. He would not have any objection to leaving "or one licensed for private use by the commission" or just put in "private" so Mr. Morris could get a restriction for his use.

Senator Crippen suggested that the sentence be amended to read "the recreational use of surface waters in a stock pond or other private impoundment fed by an intermittent or continuously flowing natural or man made water course."

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Senator Galt stated he would withdraw his amendment if Senator Crippen made his. Senator Towe commented the natural watercourse on a flowing stream is restricting it further than you want it to. He asked what "private" meant in that case. Does it mean the stream were open to the public for recreational purposed before he put a dam in, could he keep the public off by putting a dam up? He doesn't think you want to do that. He thinks you should go to the Fish and Game Commission and say you want to put up a dam and close it to the public. The landowner has the right to go to the Fish and Game Commission and ask that because there is a private impoundment that it be closed. If it is intermittent, then you can go ahead and close it. Senator Towe stated the existing definition perhaps with the addition of impoundment includes stock ponds. Most of these kinds of impoundments are stock ponds. Senator Towe moved, as a substitute motion, to insert the word "private" between the words "other" and "impoundment" on line 23 of page 5. The motion carried unanimously. Senator Towe went on to state one person has raised the suggestion of putting in the Statement of Intent at this point, since we are relying on the regulations of the commission, that the commission should liberally look at requests by individuals for private impoundments of water. Senator Towe stated he would like to add after overnight camping "except within 500 yards of any habitable building." On the bigger streams, we might have a bigger problem prohibiting camping altogether. Senator Galt asked if they realized they are talking about private property on which people are paying taxes. He asked if they would allow these campers on their private property. Senator Towe stated if it is below the high water mark, he suspects they don't have a choice.

Senator Yellowtail stated he would like to try to grasp once again, in the case of navigable streams, whether the state owns the bed of the navigable streams. Senator Galt responded, "Let them camp on the bed." Senator Yellowtail asked if the state owned the bed of the stream to the high water mark. Senator Galt responded no; it owned the bed to the low water mark. Senator Yellowtail asked what the effect would be of the Big Horn case. Mr. Fredericks responded the court of appeals decided the United States, in trust for the Crow Tribe, owns to the high water mark because of the nature of the treaty, and based on that particular set of circumstances, the court of appeals decided the federal government does in fact own to the high water mark in trust for the tribe. It is with regard to only that particular river on that particular reservation. Senator Galt asked if it reverted to the state. Mr. Fredericks responded he didn't know. The government owns between the low and the high water marks because of the treaty.

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Senator Yellowtail stated the Big Horn is a special and unique case and the only case in which the state of Montana controls to the high water mark.

Senator Towe asked if they had any problems with at least going back to the definition of Class I waters in subsections (a), (b), or (c). Senator Towe asked if the camping provision proposed would be acceptable to (a), (b), and (c) kinds of waters. Senator Galt replied the landowner owns to the low water mark even on (a) and (b) waters. Senator Crippen stated he tends to agree on some of the smaller streams. We are trying to find a compromise everyone can live with. This is an area we might have to compromise on. We should keep an open mind on what Senator Towe has stated, which may be part of a compromise situation. Senator Galt asked about (c). Senator Crippen stated we are talking about sections (a) and (b).

Senator Towe moved that the bill be amended as follows:

Page 6, line 7.
Following: "CAMPING"
Insert: "within 500 yards of any habitable building"

Senator Galt pointed out in the context of the bill that means on any streams in Montana. Senator Towe stated we have to address that. Senator Crippen stated we can recognize that as a legitimate purpose on some bodies of water. Senator Galt stated he will resist putting that into the bill without any definitions. Senator Galt suggested before voting on the motion we go back to subsections (a) and (b). Senator Crippen commented, if we cannot distinguish those streams, we will take that out. The motion carried, with Senator Galt voting in opposition.

Senator Towe stated he thinks we have to address the dry streambed provision. Senator Towe moved that we add an additional subparagraph (H), which would state "use of a streambed as an avenue for any purpose when it is dry." Senator Galt felt it should be qualified not only as a dry streambed with water on it, it must also have enough water on it to have fish habitat. Senator Yellowtail asked if that wouldn't be covered, because there are no water-related activities feasible on that stream. Mr. Waterman stated as a point of proposal to make this fit it in, it would be better as a separately numbered section. You would not have to come back later if you put the classification back in. Senator Towe asked that the researcher make a note of that. Mr. Waterman stated the idea

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is in concurrence with the idea the public cannot use a streambed as a right-of-way for any purpose when it is dry. Mr. Strope asked if it would be appropriate to add the words "substantially dry." Under the proposed definition, each time it rains, the prohibition wouldn't apply. Senator Towe responded what we are talking about in the sense of dry is that it is not flowing. Maybe we should say that. If the flow is arrested, that is what we are really talking about. Mr. Waterman stated with reference to the fishing habitat issue, there are other recreational uses that can be made with water. Senator Galt asked what they were. Mr. Waterman responded among other things, he would touch upon swimming. Senator Galt responded if the fish could not live in it, you could not swim in it. Mr. Waterman felt fish may be absent because the habitat has not been populated with fish. The absence of flow will effectively deprive the fish of a habitat. Senator Towe asked that his motion be corrected to reflect "not flowing" instead of "dry." Senator Yellowtail thought "dry" was sufficient. If we say not flowing, we will open up a worse situation. There might be substantial standing water in a section of a stream. Senator Galt asked how would they get to that point of water if the stream were dry. Senator Yellowtail suggested the lower end of the pond may be a bridge. The motion carried unanimously.

Senator Towe drew the subcommittee's attention to subparagraph (G) on the white bill. By putting that as a restriction for all waters without classifying the waters, we may have gone too far, and there may be some legitimate nonwater-related activities on streams, such as hiking or rockhounding. Mr. Petesch stated with regard to hiking, you have to go back to what recreational use of surface waters is on page 3. The only one of those that isn't specifically water-related is hunting. This comes back to how you define surface waters. Judge Bennett specifically enumerated hiking as a recreational right within the high water mark. Senator Galt replied in that decision, they also called the Dearborn a navigable river. That applies to navigable waters. Mr. Petesch responded the problem with limiting that to navigable waters is you are ignoring the Hildreth decision. Senator Towe asked how what we have outline in recreational use fits into subparagraph (G). Mr. Petesch replied subparagraph (G) tries to tie things in to the water. There is something that was added to "recreational use" which is "other water-related pleasure activities." Subparagraph (G) says those that are not water-related are prohibited. Mr. Petesch stated what you have said with respect to hunting is the public has the right to make recreational use of surface waters except as limited by the exclusion

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of big game hunting. Senator Towe asked if they wanted to put hiking and rockhounding in, should they add it as a recreational use or add it to subparagraph (G)? Mr. Petesch replied it should be put in recreational use of they want it there. Subparagraph (G) is intended to be a catch-all exclusion of other things you don't want done. Senator Towe asked how they got from recreational use. He asked where the language was that brings that in. Mr. Petesch referred him to page 5, line 15. Senator Towe stated if that were the case, then we have to add that to the definition of recreational use. Senator Towe moved that page 3, line 18, be amended to add the words "hiking" and "rockhounding" following the word "hunting." Senator Galt stated he would like to insert "within 500 yards of any habitable building." Mr. Waterman replied if it is meant to address only the hunting, it should follow the word "hunting." Mr. Waterman felt that by putting in rockhounding, you may be removing valuable minerals under the guise of this. Senator Towe withdrew everything in his motion except the part relating to hiking and the part relating to within 500 yards of any habitable buildings. Senator Crippen did not think that should be allowed even within a few yards. Dan Heinz stated they wouldn't object to prohibitions within 500 yards of a residence. Floating and fishing would have to remain. Mr. Fredericks said the thing that bothers him is the hiking on smaller streams. A big game hunter will say he is not big game hunting, he is just going through. He believes you are opening a corridor. Senator Yellowtail said we must rely on the court language and what the court wished to be specifically allowed.

Chairman Yellowtail asked that the motion be divided. He believed the matter of hiking is fairly clear, but the matter of a 500-yard limitation on this or on that would soon allow most activities on most streams. Senator Crippen stated he didn't think we should rely totally on the Curran and Hildreth cases to open usage carte blanche. Senator Yellowtail stated we needed to know how far number two shot carried. How in practicable terms is that enforceable? Senator Towe stated it is pretty clear if someone discharges a weapon ten yards away. He doesn't think that is a terribly difficult thing. Senator Towe asked if that existed somewhere in law. He asked if there weren't protection for the poor, innocent bystander. Mr. Flynn stated there seems to be some thought there is a law or rule within the department that may address that. There is believed to be a zone of safety. Senator Towe asked if it were 100 yeards. Stan Bradshaw, Attorney, Department of Fish, Wildlife and Parks, stated the department and commission had fairly broad authority in regulating hunting, and it extends to regulating safety features. There is not, to his knowledge,

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anything that presently prohibits hunting within a specific distance of habitations, but authority is there to address that if it is necessary to do so. Mr. Petesch stated Section 87-1-303, MCA, gives the commission authority to enforce rules governing recreational uses of streams. He believes you could address that issue in a statement of intent on distance restrictions. Senator Towe stated you could also address swimming. Senator Crippen believes they addressed it as it was limited to the facts. Mr. Petesch stated you can limit Curran to its facts, but in Hildreth, the court, in its conclusion, says they have not limited recreational use. Senator Towe suggested we leave the hunting issue out of the bill, ask the Fish and Game Commission to address the issue, and put in a 100-yard limitation for swimming. Senator Crippen stated both Curran and Hildreth broaden the right of the sportsman to float down the river and step on the bank within 100 yards or 100 feet of a house that is on the river and shoot ducks. Are you saying the scope of that decision is to do that? Mr. Petesch stated he is not sure it refers to ducks, but the Yellowstone is a navigable river, and you can fish on it, and now you have the right to hunt ducks for purposes of recreational use.

Senator Crippen stated the legislative body is to make the law and it's the court's responsibility to interpret it. While we pay attention to the Curran case and to the scope of its facts, if we go beyond that, we recognize we are going beyond that as a legislative body. Senator Towe asked if he had problems with leaving any distance out of the bill as far as hunting and putting it in a statement of intent. Senator Crippen stated yes, he did. Senator Towe asked what he proposed. Senator Crippen stated he didn't know. Senator Towe then withdrew his motion and made a new motion-- insert "swimming (except within 100 yards of any habitable building)". Senator Crippen stated he wanted to leave it up to the department to decide if we can hunt within 50 or 500 yards. The motion to allow swimming within 100 yards of any habitable building carried with Senator Yellowtail voting in opposition.

Senator Towe moved that the word "hiking" be added to the language which was just adopted. Senator Galt stated he would be opposed to it. Senator Yellowtail stated anyone that is determined enough to hike up any stream very far should be allowed to do so. Senator Towe stated if he puts a fishing pole in his hand, then he can do it, but if he doesn't, then he can't. The motion carried with Senator Galt voting in opposition.

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Chairman Yellowtail then suggested that the subcommittee recess and convene on Wednesday evening, March 20, 1985, at 7:00 p.m.

There being no further business to come before the subcommittee, the meeting was adjourned at 10:00 p.m.

William P. Yellowtail Jr.
Subcommittee Chairman

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Montana Land Reliance

107 W. Lawrence, upstairs Helena, Montana 59624 P. O. Box 355 (406) 443-7027

March 18, 1985

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. B-4
DATE 032785
BILL NO. HB 265

Senate Judiciary Committee
Montana State Legislature
Helena, MT 59620

Dear Senator Mazurek and Committee Members:

We commend the committee for deleting "natural objects" as barriers from HB 265, as we urged you to do ten days ago.

As a nonprofit conservation organization holding conservation easements on 38,000 acres in Montana, we are responsible for enforcing fishing restrictions on many miles of high quality, small stream fisheries. In the interest of long-range fishery conservation landowners have legally promised to maintain the quality of their fisheries, restricting fishing methods, numbers of fish permitted to be killed, and numbers of people allowed to fish. In light of the court decisions, the Reliance and landowners will now be unable to enforce these restrictions.

Virtually all small streams are fragile fisheries that will undergo rapid decline as a result of unlimited access. This, in turn, has impacts on tourism, recreation, and local economies. Your help is needed to provide small streams with as much protection as possible while staying within the boundaries of the court decisions. Removing "natural objects" will certainly help.

The other step you can take is, as you are doing, to make certain the "high water mark" is defined as narrowly as possible. The court seems to give the legislature a good deal of latitude in this regard. At least on water where the level does not fluctuate, i.e., spring creeks, the current water level should be the high water mark.

It is important that 265 passes and passes in such a way that it will stand up in the courts. The landowners need to be able to define these terms, not the courts, which sided so strongly with recreationists. Landowners need the certainty these definitions provide, and finally 265 provides an important avenue of appeal should usage by the public result in deterioration of habitat or fisheries. We urge you to clearly spell out that such deterioration is damage to private property.

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Thank you for your consideration of these matters. Please call upon us if we can be of further help with respect to protection of small stream fisheries.

Sincerely,

William H. Dunham

William H. Dunham
Executive Director

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URGENT NOTICE TO SPORTSMEN AND WOMEN

The Montana State Supreme Court, during 1984, rendered decisions on two separate cases (Hildreth and Curran) which defined among other things, the rights of individuals to utilize the streams in Montana.

Several groups of Montana sportsmen and agricultural interests have been working to draft legislation which clarifies certain areas not made clear by the Supreme Court decision while maintaining the basic principle in this decision. The result of this effort is House Bill 265.

House Bill 265 was passed by the Montana House of Representatives by a vote of 91 in favor and 6 opposed. House Bill 265 has now gone to the Senate, where it was assigned to the Senate Judiciary Committee. This Committee has assigned it to a Subcommittee of four members:

Tom Towe	-	Billings
Bruce Crippen	-	Billings
Bill Yellowtail	-	Hardin
Jack Gault	-	Martinsdale

The Senate Subcommittee proposes to substantially amend the Bill. So far, the changes are:

1. The definition of barrier has been changed to exclude natural obstacles. This means the public could not portage around obstacles such as fallen trees.

2. The distinction between Class 1 and Class 2 streams has been eliminated so that landowner permission will be necessary for virtually all types of recreation on virtually all Montana streams.

These restrictions are not consistent with the Montana Supreme Court decision and should substantially reduce the ability of the public to utilize surface waters within the state.

If you are concerned about your continued recreational use of Montana's rivers, please write each member of the Senate Judiciary Subcommittee today! A sample letter and their addresses are attached. Your letters must reach Helena no later than Monday, March 18.

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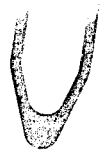

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MONTANA STATE SENATE
JUDICIARY SUBCOMMITTEE ON STREAM ACCESS
MINUTES OF THE MEETING

March 20, 1985

The third meeting of the Senate Judiciary Subcommittee on Stream Access was called to order at 7:27 p.m. on March 20, 1985, by Chairman Bill Yellowtail in Room 325 of the Capitol.

ROLL CALL: All subcommittee members were present.

FURTHER CONSIDERATION OF HB 265: Representative Bob Ream, sponsor of the bill, addressed the subcommittee. He stated he did not tell the media the bill should not be tampered with. He believes the committee and subcommittee process are necessary. He does believe the bill will require some fine tuning now and in the future. Representative Ream believes HB 265 or any other legislation is a narrowing down of the supreme court decisions, particularly in this area of portage and barriers. With the portage language we put in the bill, we're defining what the public can't do in its pursuit of recreation. The language "the least intrusive manner possible" means just that. If we want to get more specific, we can say the portage route can only be used for the time necessary, or it can only be the shortest route. The portage is clearly not ten or twenty miles up a stream.

Representative Ream was concerned about the action the subcommittee took on natural barriers. He thinks there is a reason for it and thinks as floaters are going down a stream, if they come to a waterfall, they need to get around it. He thinks we have to have some possibility for getting around natural barriers. He can't think of many situations where you would in fact have to go above the high water mark to get around a barrier. As to the taking question, the more he thinks about condemnation, the more he thinks it would be a disadvantage. They would be giving up a lot of rights to control how that portage would be used. He feels somehow or another natural barriers have to be included in the bill. He referred to the Curran decision. He believed the subcommittee should consider reinstating in some form, natural barriers in the bill. It seemed the subcommittee had been wrestling again with differentiating between the different kinds of streams. He believes we should go back again to some kind of Class I and Class II situation. The reason they did that was to limit some

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of the uses on some streams in Montana. On those streams where there are controversies, we may have to adopt further rules that would deal with the problems at hand.

Senator Towe stated two things concerned him. First, Representative Ream's comments about natural barriers. There is no question that in some instances portage around a natural barrier seems clear and obvious. In deference to the argument about the issue of taking, it occurs we have not heard the final word on that subject from the supreme court, so he questioned whether we should say anything on that issue one way or another until the supreme court has so decided.

Representative Ream stated we could avoid that language, but if so, we would be right back into court very soon. If a recreationist brought suit on that issue, they would prevail. He thinks there is a precedent in other states and on the boundary waters treaty between the United States and Canada, that makes the boundary waters as well as portage routes on either side, open to citizens of either nation. By doing that, they recognize there are natural barriers that have to be gotten around one way or another.

Senator Towe went on to say his second question concerned classification of waters. He asked if Representative Ream thought they needed separate classifications in terms of referring to them, or is it helpful to have a classification in the bill to have a better understanding of stream access in general.

Representative Ream stated he thought so. He didn't like the classification system at first. The more he thought about it, he thought it was a tool that could be used conceptually to see the difference between those smaller streams and the larger streams. The grey area in between will be a problem. It helps conceptually and it provides a framework for the rule-making process that comes later.

Mr. Petesch then reviewed what the subcommittee had done in its past meetings. They eliminated natural barriers and classification of waters; defined high water mark; added some restrictions on recreational use and added hiking to the concept; added other private impoundments to the prohibition of the public's right to use surface waters; proposed overnight camping within 500 yards of a habitable building; modified the definition of duck blinds; and provided a person no right to use a dry streambed as an access corridor. The major areas

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still to be examined would be to address the proposed changes to the definition of surface water and the area of portage.

Senator Towe commented we spoke about this last time, and the further we get into the bill, if we are going to change the subcommittee's initial determination on classification of waters, we should do that now. Senator Galt thinks doing away with it was a good motion. Senator Towe stated the problem is people have suggested that, as Representative Ream just did, even if we don't use it, it has some helpfulness in understanding the system, and it puts in some language in the statute that may be a drop-off point for further regulation. It might also be helpful in taking up some other questions such as overnight camping. Senator Towe commented Ron Waterman indicated he had some refinement of the proposal and the bill. Senator Towe referred to page 3, line 17, of the bill defining recreational use. He thinks we are putting some things in there that we're allowing on all waters that he thinks on certain waters shouldn't be in there at all. He doesn't know how to handle that without getting into some classification system.

Senator Galt stated he still thinks waters are waters, no matter where they are. If you want to do it, go back to page 2 and add lines 1-6 back in. Ron Waterman stated with reference to the Class I water definition, their suggestion is they find themselves in agreement to dropping out subsection (c), which is a redundancy. Also subsection (a) has some problems. It does catch some streams thought to be navigable. If you drop out subparagraphs (a) and (c), then you are left with three alternative definitions of navigable. If you just go to subparagraph (b), you don't even reach the headwaters of the Missouri River. Subparagraph (d) is every description of what navigable means, and subparagraph (e) is a reiteration of the federal navigability test without looking to its consequence of a judicial degree.

Senator Galt asked if he would admit that on any navigable stream, the state owns the streambed to the low water mark. Mr. Waterman responded that is correct. Senator Galt asked if it were true that before the state could own the streambed, it had to be declared navigable. Mr. Waterman replied he did not think so. Senator Galt asked if the supreme court ever changes its mind. Mr. Waterman replied, on occasion.

Senator Crippen suggested we approach it with more classifications. Class I would be the broadest term where we would allow the most. Class II would be more restrictive. Classes III and IV would be totally restricted. On Fishtail Creek, you don't want anyone swimming in it because it goes through the farmer's pasture land. Hunting would be inappropriate. We should take that and try to define it. Then we would go up one step further where you may allow some of the things we have allowed, maybe hiking. You might have to include some of the lakes. He realized Mr. Strope would say it is private land no matter where it is. Mr. Waterman stated he thinks the idea you have tossed out is conceptually a good idea. The reason is the statement of intent guides the commission to consider a number of other alternatives. Those give the commission the authority and direction to look specifically at where recreational uses can be considered. That is why we put in the statement of intent. Senator Galt asked which are Class I and which are Class II. Mr. Waterman replied the Missouri and the Yellowstone could be Class I. Tributaries to the Big Hole would be Class II. Senator Galt asked who made those determinations. Senator Towe replied the courts would. Senator Towe believes there is merit to do so, even though we may not actually use the definitions, although he suspects we may. There is merit in making a simple classification determination, then leave the details to the hierarchy. He likes the new idea of using three widely accepted definitions of navigable and limit Class I waters to navigability and all other waters are non-navigable. He believes that would be subsections (b), (d), and (e).

Senator Crippen had some concerns about leaving it up to the Fish, Wildlife and Parks. He would just as soon have the legislature be more involved in it. He was going to suggest we might have to inventory every one of them and put them in a classification. He has a problem with navigable. If you apply subparagraph (d) to the broadest category, he asked where that will put the largest lakes and rivers like the Stillwater and Boulder Rivers. Senator Towe asked if he wanted to separate classifications of navigable waters. Senator Crippen replied we may have to. Mr. Waterman referred to the language in subparagraph (d). He went through every case he could find that dealt with what was navigable under the federal test and pulled from that the activity that they said was commercial activity and rolled those into this definition.

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Mr. Waterman stated they have a proposal to take lakes out of the impact of this bill. Senator Crippen asked how they can do that when they are talking about all surface waters. Mr. Waterman did not suggest that the lakes and the waters in the lakes are not public waters, but he did suggest there is a way to limit this bill only to the stream access issue and set aside the issue of lake frontage for another time. It may be justified to say this bill applies only to the streams and leave the lakes to another day. He recognizes the lakes are public waters. For the most part, lakes already have public access, and members of the public have the ability to reach the surface waters. They propose this as a way to address a problem by not addressing the problem. Senator Crippen felt this would leave us open for another decision from the supreme court, and he felt they didn't show a lot of thought for these others. They are usurping the legislature's responsibility as a legislative body. Senator Crippen wants to get a message to them to keep their hands off and to do the jobs they are elected to do and be judges and not legislators.

Mr. Petesch pointed out that by eliminating the classification, all you have changed is overnight camping and semi-permanent objects.

Senator Towe replied that is probably right. The question that was bothering him the first night is where are we using them. Representative Ream said there are two additional benefits. First, there is a better understanding of the whole situation even though we don't actually use it. Second, we do establish the groundwork for further refinement of this issue. The Fish and Game Commission may well decide to utilize that distinction. We may, as we go through the bill, decide that it is helpful. He is interested in suggesting to Senator Galt that in doing that, we might be able to eliminate some of these things we do not want to happen on those dinky streams that flow near the farmer's house. Senator Galt stated he thinks we should do away with the classification and deal with all of the waters of the state. Conrad Fredericks stated Senator Galt's suggestion is probably the simplest one. The federal meanderings are already laid out. If they need further refinement, you can get the Fish and Game to decide that. Using subparagraph (b), as a practical matter, that will be simple. If you use subparagraphs (d) and (e), the only way you are going to determine if they are applicable is through a court case. If you want to simplify things, then logically Senator Galt's suggestion has a lot of merit -- by just using subparagraphs (a) and (b) and leaving off (c), (d), and (e).

Senator Towe asked about subparagraphs (d) and (e) and then all others. Mr. Fredericks stated subparagraphs (d) and (e) will determine what they are. Senator Galt moved that we classify the waters Class I, which would be all of those listed under subparagraphs (a) and (b) on page 2.

Senator Crippen addressed subparagraph (a). He asked if it should not really read that they actually have been officially recorded. Senator Galt replied it says that. Senator Towe stated his thought was that maybe the use of the words, Class I and Class II, would get us off base. Maybe we should use the words navigable and non-navigable, with navigable waters including subparagraphs (a), (b), (d), and (e). People seem to understand that better. Whereas what does Class I mean? Senator Galt stated navigability is what these cases are about. Senator Towe pointed out that Conrad Fredricks said subparagraph (b) is judicially determined to be state owned by the federal navigability test. If these streams are judicially recognized, they will move from one class to another. He asked why we should not just say navigable streams. Senator Towe moved as a substitute motion that we define in section 1 navigable waters and say navigable waters mean surface waters that (a) lie within the officially recorded federal government survey meander lines thereof, (b) flow over lands that have been judicially determined to be owned by the state by reason of application of the federal navigability test for state streambed ownership, (d) are or have been capable of supporting the following commercial activities: log floating, transportation of furs and skins, shipping, commercial guiding using multiperson watercraft, public transportation, or the transportation of merchandise, as these activities have been defined by published judicial opinion as of (the effective date of this act), and (e) are or have been capable of supporting commercial activity within the meaning of the federal navigability test; and non-navigable waters mean all surface waters that are not navigable. Senator Crippen pointed out you are then going to have two classifications. Senator Towe replied we might want to say a Class I navigable and Class II navigable and a Class I non-navigable. Senator Towe replied he would ban all overnight camping and all placement of permanent or semi-permanent objects and all non-water related activities. Senator Crippen asked about swimming and hiking. Senator Towe replied yes to swimming but no to hiking. Ron Waterman stated, only as an example, in Class II waters you would be banning the use of the dry streambeds. Senator Galt pointed out the Smith River, which will be classified as navigable, goes dry. Mr. Waterman stated that also gives the regulatory framework in

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which to work.

Mr. Strope stated what is not spoken here but is implied is the effort made by Mr. Waterman and his group is to create a recreational use in property without compensation. If you want to get down to how to define those waters, you should read the language in the Curran decision. He suggested the subcommittee take advantage of that language. This committee should make up its mind whether or not it is going to confirm Section 70-16-201, MCA. He does not think this committee should ignore that. Senator Towe asked if he were suggesting that we concur in the idea there are two classes of waters: one navigable and one non-navigable. Mr. Strope suggested they leave it with one class of water and then define navigable by using the decision cited by the court. Senator Towe asked if they were to stay with the definition of the supreme court, does that cover all of the waters contemplated in Class I as it was passed through the House. Mr. Strope asked what is Class I and II -- they are artificial creatures devised in the minds of people. By leaving Class I and II out and merely defining navigable and confirming that statute, you say where the rights of the landowners begin and end and where the rights of the public begin and end. The minute you get a stream that cannot support commerce of a pecuniary nature, you have a non-navigable stream. Senator Crippen asked what recreational uses he felt should be allowed on the Yellowstone River. Mr. Strope replied then you say what you want as water-related uses on a navigable stream. Senator Crippen asked what he would envision. Mr. Strope replied the landowner community would prefer that it would be confined to the fly fisherman with his creel. Senator Crippen asked if they felt that way in view of the decisions. Mr. Strope replied under the decisions, if you want to restrict it, you say the only recreational use is fishing. But he thinks you will say it includes not only that, but two or three other things. When you get into land-related uses, you have stepped well beyond Curran, and you are in the area where you are taking private property for a public use, for which you had better prepare for the just compensation these people will demand. Mr. Strope didn't think the landowners have to fear the courts of this state will take private property for public use without just compensation. Senator Crippen stated in his reading of the Curran and Hildreth cases, you could interpret those to imply they did just that, because they related to not only surface water-related activities, but some other activities. Mr. Strope disagreed with his reading. Senator Towe stated the best

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thing to do is use the definition in the Curran case and stop with that. Mr. Waterman believed the problem is it doesn't take into consideration that in both Curran and Hildreth, the supreme court said the recreational use of water is limited by their use.

Senator Towe asked why we shouldn't just say navigable is as subparagraph (c) says it is. Then we don't have to go through the long laundry list. He felt we would have less dispute and less problems in making our classifications that way. Senator Yellowtail referred the subcommittee to the Hildreth case, page 12. Ron Waterman referred to page 12 of the Curran decision and stated if you take that smaller portion of that case out of context, you buy into the litigation. Senator Towe reverted to his substitute motion. Senator Crippen asked if it were his intention to use subclassifications. Senator Towe responded we could do that. Senator Yellowtail suggested we leave that to the rule-making authority. Senator Towe replied he didn't want to do that at all. Senator Galt suggested subparagraph (d) be taken out. Senator Towe responded, on that issue, after Mr. Strope and Mr. Waterman started talking about what the court says is navigable, maybe we should have even said in subparagraph (d) such things as a sailboat. Senator Towe was satisfied to leave it that way. Senator Galt stated subparagraph (d) must be determined in court, so why put them in there. Senator Towe stated that is what it says as these activities have been defined. Senator Galt stated they have been defined by not referring to a specific stream. Senator Galt asked who would make that decision. Senator Towe replied the courts of this state would do that.

Senator Crippen stated rather than making a motion, let's assume we have that. Let's say if you have it that way, take the Missouri River and the Yellowstone River. Senator Towe stated those would be navigable Class I streams. Senator Crippen stated you are going to have a criteria of allowed uses set up under that. Then you might have navigable Class II, which may be part, but not all, of the others. We are reducing it. Ben Stein thinks you are wrestling with nitpicking. We created a state system of recreational waterways. Why can't rivers be named specifically by the full river or segments, and you don't have to define anything. Senator Crippen replied we are getting to that. Mr. Petesch pointed out that was done by resolution. Senator Crippen stated on a navigable water, the owner owns it down to the low water mark. He asked what we would be allowing on Class I and Class II. Senator Yellow-tail stated the original bill approached it in a similar way,

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but not in the direction of prohibiting, rather in what would be allowed. Maybe that makes more sense than exhaustively listing what will be prohibited. Senator Crippen stated prior to that, it says recreational use means so much, and then we went on to say what we prohibit. Senator Yellowtail assumed that means on navigable streams, all of those recreational uses are allowed with the following exceptions. Mr. Waterman stated when we first drafted this bill, it did exactly as you proposed. Class I waters means the following; Class II waters means the following. They found that cumbersome and went back to what you say. When they first talked about it, waters were classified as public and private. They took that out and then put in Class I and Class II. Senator Crippen said if we could subdivide it any further, you are including navigable streams. You should put in fishing and eliminate hunting, swimming, and hiking; you should add floating; and you should strike other water-related activities. In those streams you shouldn't allow any type of hunting whatsoever. If we broaden the uses and broaden hunting, you are going to see ranchers and landowners in that area saying fine, forget it; I won't let you in on my land to do anything; you have to get on by public access. Senator Yellowtail stated he thinks we are probably getting toward an understanding of needing a classification system of some sort. The question now before us is shall we have a classification system. We have one proposal. Senator Crippen stated we are only going to allow fishing and floating. All we have to do is discuss portage and natural barriers and go on. If we go on the definition of navigable, you are taking those streams into consideration. He can see where you will allow duck hunting on the Yellowstone River, because you don't have the hazard problem, but you have it on the entire stretch of Rock Creek and other similar streams.

Senator Towe stated it occurs to him we discussed that question of hunting and swimming and other uses that are not as clearly related to water as fishing and boating, and then we were not talking about any classification, so we would have allowed it on any river. Senator Galt stated he had not gotten back to that. Senator Towe replied he doesn't have any problem of further going in and simply saying navigable Class I rivers are the Missouri, Yellowstone, and Clark Fork Rivers. Navigable Class II are defined in subsections (a) and (b), and navigable Class III are all the rest. Senator Yellowtail suggested an alternative might be to provide further classifications. Senator Towe commented maybe it is

not wise to do that until we decide how we're going to do that. Mr. Petesch stated he thinks the court opinions say the waters determine their use. You can put restrictions on them. If you think Class I and Class II help the department when someone requests a closure, it does not expand their authority one way or another. He saw no problem with either the motion or the bill the way they were at that point. The motion to define surface waters as navigable and non-navigable, with subsections (a), (b), (d), and (e), carried with Senator Galt voting in opposition.

Senator Yellowtail suggested we now apply that to use. He suggested we take a serious look at what was done before us and see if it holds any realistic merit. The approach was to prohibit certain activities rather than taking the other approach and trying to allow all activities. Senator Towe commented he didn't think we wanted to eliminate those things we have already decided, such as overnight camping. Senator Towe moved we add a new subparagraph (3) stating: "The right of the public to make recreational use of non-navigable waters does not include, without permission of the landowner, (a) overnight camping; (b) the placement or creation of any permanent or semipermanent object such as a duck blind or boat moorage; or (c) other activities which are not water-related. Mr. Petesch stated the way subsection (2) currently applies, those activities listed in (b) and (c) are already prohibited on all surface waters.

Senator Towe moved as a substitute motion that we insert a subparagraph (3) stating: "The right of the public to make recreational use of non-navigable waters does not include, without permission of the landowner, overnight camping, unless the camping is clearly out of sight of occupied dwellings." Senator Crippen stated he would like to add swimming. Senator Towe stated he thinks that is reasonable. Senator Crippen asked about hiking. Mr. Waterman stated he has no problem with swimming, but he does have a problem with hiking because of the language in subparagraph (c). Mr. Petesch stated you have to stay below the high water mark to hike on it. Senator Crippen commented the landowner owns to the center of the stream on these non-navigable waters. Senator Towe pointed out that under subparagraph (c), you can use it for recreational use. He believes swimming is okay. Dan Hines stated it has never been their intention to invade the privacy of the homestead. He asked how they could harm the landowner by swimming. Mr. Strope stated if you go back to subparagraph (c), they say the division of waters into navigable and non-navigable

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is but a way of defining them into public and private waters. Senator Yellowtail asked that Mr. Strope please respond to the language in the Hildreth decision on page 5. He felt Mr. Strope was reading selectively. Mr. Strope replied if you will read on from that opinion, it says Curran, supra, that means the court in rendering the Hildreth decision was citing Curran as the authority for the statement Senator Yellowtail just read. Therefore, you must read Curran to fully understand the brief statement you just read. And if you read Curran, that is a requirement, because they put in Curran, supra. The same judge rendered both opinions, and Mr. Strope is confident he knew what he was saying. Senator Towe referred to page 15 of the Curran decision and the language that began "in sum we hold that . . . ." He suggested that is the law of the land. Mr. Strope responded no, he is going to suggest that in citing Curran eight times in the second opinion, Curran is the dominate opinion. Mr. Fredricks stated he thinks the legislature is not bound by the Curran and Hildreth decisions and has the power constitutionally and otherwise to regulate the surface waters of the state. Senator Towe stated his motion is to ban camping on non-navigable waters. Senator Crippen moved as a substitute motion to include along with camping, swimming and hiking. The motion failed on a tie vote with Senators Crippen and Galt voting in favor and Senators Towe and Yellowtail voting in opposition.

Chairman Yellowtail then reverted to the original motion. Senator Crippen felt that with reference to swimming, even though you may be quite a ways away from the landowner, those are the waters he would submit are the ones the landowners are very concerned about because they don't want people swimming and doing other recreational activities other than perhaps fishing. That is fine, and he wants to keep it just that way. This is the lowest classification of water now because there isn't any lower. Senator Galt stated we are talking about non-navigable waters, but we have left overnight camping allowed on the navigable waters. Senator Crippen suggested we keep it to the non-navigable streams. He stated we have agreed upon overnight camping. Senator Crippen feels on the facts of the Curran and Hildreth cases, they are not talking about somebody that was denied his right to swim, they were talking about people floating and fishing. He thinks for a non-navigable stream, it should be restricted. Hunting, swimming, and hiking should be excluded. Mr. Waterman stated with reference to hunting, last time the subcommittee met, there was a direction placed in the statement of intent that referred to non-big game hunting on the smaller streams. He

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stated the proposal we have before us and the reason we are sponsoring this particular language is because of the indication we have in Curran and what Curran said approvingly about this. In reference to waters, he referred to pages 9 - 13. Senator Crippen stated the supreme court exceeded its bounds. It was legislating. It went beyond where it should have gone. He will not accept that from the court. If we did, he questioned why the legislature would be here. He wants to say you can write all the decisions you want, but we will come back and write our laws and you can interpret them. Hiking is a trespass, because on those small streams, the landowner owns not to the low water mark but to the center of the stream, and you have to be restrictive. Senator Galt stated on line 4, page 6, we are talking of non-navigable waters. Mr. Petesch pointed out the things listed from page 5, line 15, through subparagraph (h) on page 6 cannot currently be done without permission of the landowner. We haven't adopted anything on the non-navigable streams yet. Senator Crippen stated we are to some extent making a concession on fishing. He believes that is a large concession. Senator Galt commented that the public, outside of the use of the surface water, has no right on non-navigable streams.

As a substitute motion, Senator Galt moved that we insert a new paragraph stating the right of the public to make recreational use of non-navigable waters does not include, without permission of the landowner, overnight camping or any use other than use of the surface water. He asked if they could accept the fact that according to the state law, the landowner owns to the middle of the stream, and according to the decisions, the people own the waters, so give them the waters and keep the land. Senator Crippen agreed. Senator Yellowtail stated the court was pretty clear about the beds and banks. The motion failed with Senators Crippen and Galt voting in favor and Senators Towe and Yellowtail voting in opposition.

The subcommittee then reverted to Senator Towe's motion. Senator Towe withdrew his motion and suggested the subcommittee move on to another subject. He suggested they go to section 3, page 7, dealing with portage. He suggested subparagraph (1) is just general language and doesn't say anything one way or the other as it is just restating the decision. He did not see any problem with subparagraph (2). Senator Crippen suggested inserting the word "artificial" on line 15. Senator Towe suggested the word "artificial" should also be

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inserted on page 8, line 1. Senator Crippen stated we have defined barriers and may not need to put "artificial" in there.

Senator Towe responded he will go with putting it in on page 8, line 1, but suggested we leave it alone on page 7, line 15. Senator Crippen felt we were then by implication including all barriers. Senator Towe moved that the words "an artificial" be inserted on page 8, line 1. He stated that if you are going to build a barrier some compensation is going to have to be taken in terms of route.

Senator Crippen stated it was the problem in the Hildreth case that caused all of this to begin with. A landowner should have the right to put a barrier up for good cause, but if he does, it should be incumbent upon him to provide a method of portage around it. We are talking about artificial barriers.

Mr. Petesch pointed out that other proposed amendments were suggested by the Stillwater Protection Association which were adding the word "artificial" in the two places suggested. Western Environmental Trade Association also suggested removing the supervisors entirely. They would also strike on page 8, subsections (b), (c), and (e) in their entirety. With what the subcommittee has done so far, it needs to strike on page 8 the last sentence of subparagraph (e), and if it strikes subparagraphs (b), (c), and (e), there are suggestions on subparagraph (c) to strike "reasonable and safe" and on subparagraph (d) to strike "of the most appropriate" and insert new language. On page 8, as an alternative, it is suggested that they just strike "natural" and put in "existing artificial." Mr. Petesch went on to say that Mr. Waterman has a suggestion at the end of subparagraph (e) which is No. 5 on his amendments. Senator Crippen felt that was a good amendment. Mr. Petesch stated he didn't think it added anything to the bill because artificial barriers are the only barriers you are addressing right now. Senator Towe agreed with Mr. Petesch, but he thinks there is some merit in re-enforcing that we are talking about artificial barriers. His rationale for not putting it in the other one is we're just picking up the supreme court language. Senator Crippen stated he would go along with that if they would add the caveat of "nothing contains." The motion carried with Senators Crippen and Towe voting in favor, Senator Yellowtail voting in opposition, and Senator Galt not voting.

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Senator Towe moved that the following language be added to the end of page 1, following line 24: "Nothing contained in this act addresses the issue of natural barriers or portage around said barriers. Nothing contained in this act makes it lawful or unlawful." Mr. Waterman suggested putting that language at the end of section 3 as a new subparagraph (4) rather than in the definition. You are speaking in terms of substantive matters at that point. Senator Crippen agreed. Senator Towe amended his motion to state that it would follow line 23 on page 9 as a new subparagraph (4).

Senator Crippen commented that he could see the need for lawful, but he did not see the need for unlawful. As a substitute motion, Senator Crippen moved that we strike the phrase "or unlawful" from the Senator Towe's motion. Mr. Petesch suggested it should say "portage around said barriers lawful or unlawful." Senator Crippen stated it should say "Nothing in this act will be construed to make portage around natural barriers lawful." Senator Towe stated the supreme court may well come down and say it is lawful. Senator Crippen moved as a substitute motion to strike "unlawful" in the suggested motion by Senator Towe. The motion failed with Senators Crippen and Galt voting in favor and Senators Towe and Yellowtail voting in opposition.

Chairman Yellowtail then reverted to the main motion with Senator Towe's amended language. Senator Yellowtail stated as a practical matter, it is unwise for the legislature to outlaw portage around any manner of barrier. That is by implication what we do by doing this. The motion failed with Senator Towe voting in favor and Senators Crippen, Galt and Yellowtail voting in opposition. Senator Towe moved that we insert on page 9, following line 23, a new subparagraph (4) which would read "Nothing contained in this act addresses the issue of natural barriers or portage around said barriers." Senator Crippen replied that is a neutral statement. We took natural barriers out. He would like to leave it as the intent of the committee that we reject anything as far as the Curran and Hildreth cases pertaining to natural barriers so far as we want them to apply to artificial barriers. If we take out natural barriers, we should have a pretty specific statement of law that there is no right to go around natural barriers. Senator Towe stated it was his intent to exclude that issue from the bill, that is too volatile an issue to get into in this bill. Senator Crippen asked if we were really accomplishing anything then. We are accomplishing

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something as far as artificial barriers. We may end up with a new set of laws foisted upon us by the supreme court regarding natural barriers. Senator Towe thinks that is too hot an issue. He thinks if we put in portage around natural barriers, we are not likely to get the bill passed through the Senate. If we take all references to barriers out, he thinks that is more important. No matter what we decide, he is convinced it will go back to the court. Let's not give the court any hint of how the legislature feels. The motion failed with Senator Towe voting in favor and Senators Crippen, Galt, and Yellowtail voting in opposition.

Senator Towe suggested the subcommittee then consider Mr. Waterman's amendment No. 5 on page 8. Mr. Waterman stated for consistency, the subcommittee should strike the last line on page 8, which entails lines 21-22 of the bill. Senator Yellowtail asked that they clarify what such costs might be. Mr. Petesch stated the costs would be where you have requested the department and the supervisors to establish a specific route, there could be some improvements, and the bill further provides the landowner has to bear those costs. The department then provides signs.

Senator Galt asked if we were talking about the supervisors' getting in on this decision. Mr. Petesch stated yes, at this point. Ron Jackson, President, Montana Association of Conservation Districts, stated the supervisors around the state do not feel this is a conservation issue and do not feel they should be involved in this bill. They would recommend the definition of supervisors be removed from the bill and where the name of supervisor is, add the department's name in its place. As long as the arbitration is still there, there is protection of the landowner that is sufficient. Senator Crippen stated it's not that the department of Fish, Wildlife and Parks could do a good job, it is funding it. He asked about the county commissioners. Mr. Jackson asked why you needed anybody other than the landowner and the person from the Fish, Wildlife and Parks. Senator Crippen stated the final decision is made by the supervisors. Mr. Jackson stated as he understands it, it is a decision made by the supervisors, the landowner, and a person from the Department of Fish, Wildlife and Parks. Mr. Petesch stated the supervisor makes the decision. If someone objects, the three-member panel comes in. Senator Galt asked if his association has taken a stand on this bill one way or the other. Mr. Jackson responded, no. Senator Towe moved that

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the subcommittee adopt Mr. Waterman's amendment No. 5 and strike the last line on page 8 encompassing lines 20-22 of the bill. Director Flynn stated the discussion that centered around the portage issue and eventually got to the conservation district supervisors was the discussion that he personally feels stimulated this whole process, which turned a portage issue into a navigability issue. That problem and that question still exist on that river. It was the concern of the department that we needed to set up some mechanism for a decision-making process where a decision could be arrived at that could be accepted and not have to get into the supreme court. That mechanism is what we see before us in section 3 as it was presented. That did not seem to be acceptable. The board of county supervisors has a very fine and deserved reputation as being fair, and that was the reason that body was suggested. It has also been pointed out there was a concern some supervisors may not want to accept that responsibility, and that is why the county commissioners are in there. The amendment would be acceptable. Mr. Petesch stated he thinks the other thing this amendment does is if you were putting the portage route on another person's land, you were taking. Therefore, you must take by eminent domain. Mr. Jackson stated the conservation districts do have a good rapport with the landowners, and this is what they are trying to keep. Senator Crippen stated if you are that concerned and don't want to get involved, you just refuse. Mr. Jackson thinks in most cases that is what will happen, so why should they not just take them out completely. He thinks Director Flynn is just looking for a scape goat. Senator Crippen stated he doesn't think he would do that. Mr. Jackson stated this is not part of their charge. Senator Towe thinks they do have a good reputation for not only representing landowners, but also persons concerned about conservation measures. That is the kind of perspective the bill wanted. Senator Crippen commented the supervisors came in and asked for money, now we are going to give them a responsibility and a way out. The motion carried unanimously.

Mr. Petesch pointed out one suggestion was to delete subparagraphs (b) and (c) and take supervisors out of the bill. Senator Crippen moved on page 8, line 12, following "determine", the following language be inserted, "to determine if a portage route is necessary." Mike Micone, Western Environmental Trade Association, stated he wants to strike the arbitration procedure and inasmuch as they had recommended the deletion of natural barriers. The bill provides the landowner has the right to create an artificial barrier and when he does, he has to

provide portage. They don't argue with that. But if the landowner can build a barrier and the public can portage around it, there is no need for an arbitration process. Senator Towe asked why there would be no need; obviously there is a need if there is a right to portage. Mr. Micone responded the public has the right to portage around barriers. If they have a right to portage, there is no need for a recreationist to go to a board of supervisors to request where they are going to portage. Senator Towe asked who will determine what is the least intrusive manner. Mr. Micone responded if the landowner does not determine that, the recreationist will. Senator Crippen suggested you may be putting the landowner in a little bit of a risk. He doesn't know if he were a landowner whether he would want the public to determine the portage route. Mr. Micone responded what he is saying is put the responsibility on the landowner to provide a gate or ladder for the recreationist to cross that barrier.

Mr. Micone stated he doesn't think writing a piece of legislation will resolve the situations that are experienced with the landowner that you mentioned. If the department cannot resolve that with a supreme court decision, he doubts the legislature can resolve that. We are talking about a piece of legislation that affects every landowner and every recreationist in the state of Montana. He believes a landowner putting in a barrier will provide a means for the recreationist to get around it. Senator Crippen suggested taking the situation where they have to portage around the barrier that was placed there by a party. He asked who will make the determination exactly what that portage route will be so that the compensation will adequately be given to the landowner. Mr. Micone replied he doesn't believe so, because he believes if the state of Montana wanted to put some type of barrier on his land, it will have to pay for it and should have to go through a condemnation procedure. Senator Crippen replied they may already have in fact taken an easement, put the barrier in, but didn't provide any way to get around it. Mr. Micone stated it would be short sighted for the state to do that, but it should be worked out with the landowner. Everything doesn't have to be put in a bill every step of the way. Senator Towe replied he felt that was correct. The question might be whether one is necessary. He asked what do we do about the reasonable and safe route of several different routes; if a portage route is necessary and if so a reasonable and safe portage route. Mr. Petesch pointed out

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Senator Towe's concern is addressed in subparagraph (d). He also stated there is a companion amendment to subparagraph (d).

Mr. Strope stated it is his view the whole elaborate procedure for this arbitration would be unconstitutional. Private property shall not be taken or damaged for public use without just compensation for the full extent of the loss. Just compensation shall include necessary expenses of litigation. Mr. Waterman stated with reference to this specific language proposed which would require not only a finding as to the location of the reasonable route, but also whether or not one is needed, they did not put that former language in because of the concerns of the supervisors of fact-finding. Mr. Morris thinks this whole system is geared to something you may find troublesome, and that is arbitration. Senator Crippen withdrew his motion.

In view of the lateness of the hour, the subcommittee adjourned its meeting and agreed to reconvene on Monday at 7:00 p.m.

There being no further business to come before the subcommittee, the meeting was adjourned at 11:08 p.m.

William P. Yellowtail Jr.
Subcommittee Chairman
Senator Bill Yellowtail

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MONTANA STATE SENATE
JUDICIARY SUBCOMMITTEE ON STREAM ACCESS
MINUTES OF THE MEETING

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March 25, 1985

The fourth meeting of the Senate Judiciary Subcommittee on Stream Access was called to order at 7:30 p.m. on March 25, 1985, by Subcommittee Chairman Bill Yellowtail in Room 325 of the State Capitol.

ROLL CALL: All subcommittee members were present.

FURTHER CONSIDERATION OF HB 265: Greg Petesch began by stating where the bill presently stood. The bill now only deals with artificial barriers; waters have been classified into two classes: navigable and non-navigable; in the navigable area, any stream flowing through public lands has been eliminated from former Class I; high water mark has been redefined; recreational use has been limited for swimming purposes to within 100 yards of habitable buildings; hiking has been added to recreational uses; using a stream as a right-of-way has been prohibited; and the subcommittee has just gotten into the portage area.

Senator Crippen had suggested the subcommittee have the proponents and opponents come in with their own recommendations pertaining to navigable streams and waters. In response to this Exhibit 1 was submitted to the subcommittee by Conrad Fredricks. Senator Bob Brown addressed the subcommittee and stated during the Judiciary Committee hearing on the bill, in spite of the fact both court cases pertain to problems that arose concerning disagreements over access to streams, the bill as drafted includes access to lakes. The ownership is different around lakes than streams. Chuck Abell, of Whitefish, stated he was surprised the press didn't make it more known this bill includes lakes. He's concerned about the implications there may be in this bill to their rights in front of their property on lakes. He stated Whitefish Lake fluctuates six feet a year. His front yard is the lake. He has a few feet of grass and then the lake. He is willing to share the lake with anybody, but he is not sure he wants to share his front yard. Senator Matt Himsl asked whether the stream access bill referred to lakes. Senators Towe and Galt responded yes. Senator Himsl stated then they are very concerned what happens to the shore line. The beach of Flathead Lake may go down 75 feet. They didn't worry about someone's camping on the beach in the summer, but a good share of the year it is dropped down. The value of lake property is because of the beach. That is what they paid for. Land on the lake is sold by the foot that has beach frontage. He would be up-

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set if someone put a duck blind on his beach when the water was down. They fish off the breakwaters, and they have no problem with that if they don't abuse it. Senator Himsl hoped the subcommittee could eliminate the lake shores from the stream access bill.

Ron Waterman addressed the subcommittee and stated a general overview with respect to what the supreme court said is the origin of the problem. The supreme court in its language gave the public the right to use all of the waters in the state and the adjacent lands up to the high water mark. We are brought to the language by the court. In light of Senator Brown's concern, they agree to exclude lakes from the consideration of HB 265 and say nothing in this act controls one way or another the public's right to use the waters, beds and banks of natural lakes. They will allow litigation to determine that. It was his understanding this subcommittee did not have a majority concensus to proceed in that fashion. Senator Crippen said you say there is a difference between the lake front property and stream banks. Say you have a series of cabins or residences that have a streambed as their front yard. He was interested in knowing his rationale why you can take out lakes and related that to cabin sites and home sites, and yet leave in similar property with people with smaller concerns and yet make a distinction with those and not invite a lawsuit. Mr. Waterman replied he is not suggesting by taking out lakes we do not avoid another lawsuit. He is suggesting from a practical point of view lakes and lake access are different than stream access. There is little use on most streams. On our lakes, the Department of Fish, Wildlife and Parks over the years has had a program which has been funded and has acquired a great deal of access to assure the public has a right to the waters. He will submit that the language of the supreme court would suggest lakes are public waters. The question is whether there is a real problem with respect to the lakes and if we can avoid for a period of time the lake issue and pass a piece of legislation which addresses only stream access. Senator Crippen replied if we did that, and we limited the scope of this bill to just streams and not lakes, and if we made some definitions and then down the line some group of individuals brings a lawsuit pertaining to lakes, wouldn't the court be able to look at what the legislature did with respect to very similar property. They could then say, the legislature has addressed that, and this situation regarding lakes is no different. If the legislature has a rule in relation to those situations, it would be easy for them to legislate and say the legislature really intended to deal with lakes. Mr. Waterman replied if we leave the bill silent as to lakes, the supreme court might say you intended to

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deal with lakes as well. His suggestion is to be clear the purpose of the bill is neutral in respect to the lake issue. Would what the body does be seen as a legislative direction?

Senator Towe stated he is inclined to accept what Mr. Waterman says and would like to propose that but would like to hear Mr. Abell's comment. He asked about lakes. He asked if he would consider the public has any access rights at all to the beach below the high water mark. Mr. Abell replied when he purchased the property it was indicated his rights to the property followed the water line. Senator Towe stated that is ancient history. Mr. Abell said once it becomes dry land, it comes under the jurisdiction of himself as a landowner. Senator Towe commented that he sympathized with him, and he thought most people would accept that. But realistically, we will probably have to treat it like ocean property, and while you have very expensive property, it is public property. Mr. Abell questioned how Washington would do it. Senator Towe stated we might be able to address it on a lake-by-lake process, but like Mr. Waterman says, we should probably leave lakes out for now.

Senator Crippen asked Mr. Abell, assuming you own that same amount of frontage on a river, would you feel any different than you do now with your lake front property on Whitefish lake? Mr. Abell responded we have already addressed that question many times. In front of his house, he would feel strongly about it. But on the east shore where he owns property there is access, and the public uses it all of the time, although they have not put it in the paper they have not put it in the paper they are welcome to use it. They have some concern about it, but they do not restrict public access to that area. Senator Crippen said let's assume your home is on that river. Mr. Abell responded if his home faced the river, he would be concerned about public access to that, although he would allow public access to an undeveloped piece of land along the river just as he does to his undeveloped land on the lake. Senator Towe questioned what kind of use he saw as acceptable to any of the lake front below the high water mark. Senator Himsl responded a stream has a bed and a bank and a lake has beach. Virtually every foot along the lake is owned by someone. Water isn't flowing by, and nobody is going up and down it. As far as deeds are concerned, they go to the low water mark. He has no objection to someone's boating up to the beach. He has problems with someone's having the right to occupy that beach.

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Senator Crippen stated the constitution provides all surface, underground, flood, and atmospheric waters within the state are the property of the people of the state. Senator Himsl replied that would be taking without due process. He asked if it were reasonable, sensible, and practical to do that. Senator Towe responded that is what Senator Galt has been saying on the rivers. Senator Himsl replied they cannot take that unless it is reasonable and proper to use that. Senator Towe felt we should address the problem. Senator Towe moved the bill be amended as follows:

1. Page 5, line 3.
Following: "MARK"
Insert: ", see, however, section 7 as it relates to lakes"

2. Page 11.
Following: line 24
Insert: "NEW SECTION. Section 7. Lakes. Nothing contained in this act addresses the issue of the use of surface waters, as defined herein, on lakes."

Senator Galt contended you cannot separate some waters from other waters. We have the same problem on streams as on lakes. If we are dealing with the waters of the state of Montana, let's deal with all of them. Senator Towe replied it's the exact same thing he proposed for natural barriers for the same reason. There are some things we will not be able to solve in this piece of legislation or in this legislative session. He thinks if we leave lakes in, we may not have a bill. He thinks Senators Brown and Himsl have raised some very bonafide points that lakes and the consideration of ownership thereon are a little different than streams. There are some similarities, and he would guess that the supreme court eventually will require the same thing on lakes as it is requiring on streams. But until it does, prudence says we should stay out of the issue. Senator Crippen pointed out that is why he asked Mr. Abell what his thoughts would be if he owned property on a lake compared to owning property on a river. He expressed they would be the same. He doesn't see how we can say as a legislative body that we will sacrifice those people on streams and say there is a difference between them and those on a lake. That is not the way this legislative body should go. If we cannot address the problem of lake ownership, he would object to that, because we are leaving them high and dry and leaving them open to a lawsuit so they will have to come back in.

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Senator Yellowtail pointed out that at the last meeting Senator Crippen was adamant about the fact we had to focus on the facts of the case. He asked how he related that issue with lakes. Senator Crippen replied then we should deal only with barriers. In one case we should talk about artificial barriers and in the other solely with rapids. Unfortunately, the supreme court mentioned all surface waters. Conrad Fredericks stated there has been a considerable amount of wrestling with the lake problem. His approach would be to treat the lake with the same restrictions as the stream that flows in and out of it. He suggested changing the definition of navigable waters and using the current statutory definition of navigable rivers and streams, but substituting the federal test of navigability for navigability. Using this test, there are approximately 1,900 streams in the state of Montana which have been identified by the Corps of Engineers by that test, so there would be generally little non-navigable water in the state of Montana. Class A would be all non-navigable. Class B are all navigable waters except those in Class C, including lakes. Class C waters are specifically named rivers. Senator Crippen asked from what main stream of what river did the Flathead derive its waters. Mr. Fredericks replied the Flathead River. Some other rivers like the Swan also flow into it. Senator Crippen asked if Flathead Lake would fall into Class C waters. Mr. Fredericks responded yes. The lake would be treated the same as the river. Senator Towe asked about fishing. Mr. Fredericks responded yes, definitely. Senator Crippen stated they could put up their boat, stop, fish, and camp for the day. Mr. Fredericks replied yes, where the use is temporarily necessay to accomplish the permitted recreational use of the waters or for purposes of safety.

Phil Strope stated he would like to suggest to the committee that the concerns of Senators Brown and Himsl are addressed in the Curran opinion and were not overruled in the Hildreth decision. The Curran decision cited the 1895 statute that says the landowner owns the property down to the low water mark. In the Hildreth decision, the court quoted the Curran decision with approval. If you adopt 1895 statute, you would take care of the concerns of the lake people and his people. Then all of these things where you are trying to accommodate these recreational purposes seem to violate the constitutional right of just compensation. If this subcommittee wants to bring out any kind of bill at all, it should affirm the language of the Curran decision rather than trying to override it. He referred to page 4, line 25, through page 5, line 3, of the decision,

except for the exclusion of the beds and the banks provided for in Section 70-16-201, MCA. Senator Towe did not feel that addressed the issue. That begs the question, because the supreme court very clearly stated in both Curran and Hildreth that they are speaking to the ownership. They didn't care who owns below the high water mark. They are saying the public has the right to use it to the high water mark. Mr. Strope responded the language is always couched in the public's right to use the water, irrespective of the beds and the banks. What he is saying is the person who pays the taxes can do whatever.

Senator Crippen asked how he would handle the comments that were made in those cases about portage around barriers. Mr. Strope stated it would be his view that the committee should handle portage and do nothing more than the court said. It said there was a right to portage around barriers, but it did not say they could do it free. If you want to reaffirm the concepts of creating a portage route, you should reaffirm the other statute by saying you must pay for it. You should pay for the taking. Senator Crippen replied taking that theory, he can see it if we are dealing with natural barriers. If you had a natural barrier, there would be a taking because that barrier was there through no fault of the landowner. Then the landowner should be compensated. Where you have a stream and an owner has a fence across the stream, that property owner is essentially restricting the right of the public to recreate on the surface of the water, and as a compromise, the landowner should be required to provide portage as close to the high water mark as possible. If that can't be done and you extend it beyond that, there would be some compensation. Mr. Strope replied there is no question in the case of the natural barrier that if it is the desire of the public to acquire a portage route, then they can acquire it by purchase or by eminent domain and pay just compensation. In the case of the Hildreth bridge, there isn't any doubt that the Hildreth bridge is not the subject of the lawsuit. What was the subject is Mr. Hildreth's actions on the water. The bridge is above the water. If it is the desire of society to take it out, they are going to have to condemn it out. He put it there in good faith. You had to buy that access if they were using it. Senator Crippen asked about future impediments. Mr. Strope responded that would be your function as a legislature to say. Senator Towe stated it occurs that is a pretty good indication how streams and rivers are different than lakes. You wouldn't have various portage problems, different uses, different high water marks, more land ownership devoted to homes and home use. He thinks the whole thing is different, and we should stay out of it right now. Senator Galt felt this was a political ploy.

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If this bill gets to the Senate floor, that will buy a few senators from western Montana. It should be rejected out of hand. Water is water. The motion failed with Senator Towe and Yellowtail voting in favor and Senators Crippen and Galt voting in opposition.

Senator Towe commented that navigable and non-navigable waters are defined. He asked what a lake was. Senator Galt repled either one or the other. Senator Towe stated it doesn't appear lakes fit into navigable or non-navigable. His suggestion is a third alternative: lakes. Senator Galt stated lakes have huge log floats. There is no doubt Flathead lake is a navigable body of water. Senator Towe suggested making a third category. Then we can say what does or doesn't apply to it. Senator Yellowtail responded we have two classifications now to which we cannot assign any usefulness. Senator Towe moved that HB 265 be amended as follows:

1. Page 1, line 25.
Following: "waters"
Insert: ", other than lakes,"

2. Page 2, line 21.
Following: "waters"
Insert: ", except lakes"

3. Page 3.
Following: line 9
Insert: "(7) "Lake or lakes" means a body of water where the surface water is retained either by natural or artificial means and the natural flow of water is substantially impeded."
Renumber: subsequent subsections

Mr. Fredericks asked about beaver dams. There is a definition of lakes in the statutes, Section 75-7-202, MCA. Senator Towe replied the only thing that is helpful is it refers to is as standing water. We have talked about non-navigable and navigable waters, and this would be a third category. Then the impact of that is that when we get into recreational use, use is permitted in section 2 and it says the right of the public to make recreational use of surface waters does not include without permission of the landowner a bench of prohibition on all three classes. Senator Crippen replied if we talk about that, he would say lakes would have a highly restricted use. He asked that he define what he would permit on it. Senator Towe responded all terrain vehicles, big game

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hunting, overnight camping within 500 yards of an occupied dwelling, permanent and semi-permanent objects, other activities which are not water related, and the use of the streambed when it is not flowing. Senator Towe suggested the following amendment:

1. Page 6.
Following: line 19
Insert: "(4) The right of the public to make recreational use of lakes does not include, without permission of the landowner:

(a) any use of the land below the high water mark; or
(b) any use of the surface of the water within 100 yards of an occupied dwelling."
Renumber: subsequent subsections

Senator Galt stated that would apply to all waters. Senator Crippen asked what he was doing with lakes that make them more restrictive than navigable waters. Would he allow fishing, hunting, swimming, and biking? Senator Towe replied yes, except within 100 yards of any occupied dwelling. Dick Josephson stated he would suggest that everyone understands the concept of historically boatable waters. If you get away much from that, you will end up in a morass. You could apply that standard initially. He is concerned about overnight camping in our public watershed. At this late night, we should not try to reinvent the wheel. Chairman Yellowtail stated this is an executive session, but not a public hearing. We must complete our work tonight. Mr. Waterman stated he has no problem with the proposal. Mr. Strope responded as recreationists, they have no problem with that. The constitution says all surface, underground, and flood waters are subject to the public, and it is irrational to break them out. The lake owners have the same rights as the stream owners. Bill Morris stated they feel sympathy for the lake owners, but it wouldn't make any difference.

Senator Towe reminded the subcommittee it had a motion before it. Senator Crippen asked if it were Senator Towe's intention to redefine the uses of navigable streams and rivers to conform to the uses you have now suggested for lakes. Senator Towe stated, it was not his intention to add anything further, but he might support something that might be proposed. Senator Crippen asked if it were his intention to leave the uses as we have them in here now for navigable streams. Senator Towe stated it was always his hope we would be able to prohibit certain activities on non-navigable waters. He had proposed to prohibit overnight camping, swimming, and hiking. Senator Crippen asked if he would intend to have the same restrictions on non-

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navigable streams as on lakes. Senator Towe responded he is not proposing to prohibit the uses within 100 yards of occupied dwellings on navigable streams. The motion failed with Senators Towe and Yellowtail voting in favor and Senators Crippen and Galt voting in opposition.

Senator Crippen stated it should be noted that to make a distinction between the two really then is setting up a different class and an arbitrary one where he feels there is not any rational reason for doing that. He would submit he would feel the same on a navigable river as a person would on a lake. For us to do any different is repugnant to him. Senator Yellowtail asked if he meant to say he read Hildreth as meaning lakes as well as streams. Senator Crippen replied you are going to go back to the facts of the case. We have heard about the angling statute.

Mr. Petesch stated on navigable rivers or streams, as used at that time, meaning navigability for title, the public has the right on those waters to fish and go upon the banks to fish between the ordinary high water flow lines or within the meandering lines. Along the Missouri River, you can angle between the high water marks or from the top of a vertical bank. State ownership is the result of the federal test for navigability. Senator Crippen stated you were talking about navigable from the basis of title not use. Senator Galt stated if the supreme court says it is navigable, the stream bed goes back to the state. Senator Crippen said starting there, we obviously have one class. Mr. Petesch responded navigable for federal title purposes. Senator Yellowtail stated it is consistent. Senator Crippen asked if the definition of subsection (c) on page 2 would cover the federal test. Mr. Petesch responded no; it is much broader. The federal test is essentially log floating. The question is are we talking about commercial activity for the federal test. Senator Crippen said let's assume we cross subsection (c) out entirely. Now we have one classification everyone would agree on, and the angling statute applies to that. Then we could put in fishing, because they right now have the right to go up to the high water mark. If we did put in fishing, we would have to look at some of the other areas and see if we want to include them Based on your definition, there should not be that many rivers on the title test. Mr. Petesch replied he is not sure how many streams are capable of supporting the test. Senator Crippen stated that would handle the problem on the Yellowstone River. The angling statute does not apply to hunting.

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Senator Towe suggested the subcommittee use the words occupied dwelling instead of habitable property. He felt it should be used for human dwelling once a year. He would propose we prohibit all uses except fishing, floating, and boating within 100 yards of such an occupied dwelling. He would put that in section (I) on page 6, following line 19. Senator Towe suggested the following amendment:

Page 6.
Following: line 19
Insert: "(I) any use other than fishing, floating, or boating within 100 yards of an occupied dwelling."

Mr. Petesch suggested that might be put on page 3 by defining recreational use. Senator Crippen stated on any non-navigable stream, he will resist the right to do anything, because he does not think that is what the Hildreth case said. He will not allow that. Senator Towe replied that was not the intent of his suggestion. It is to make the navigable water use and lake water use the same. Senator Crippen stated he would say as we defined non-navigable, that would be all rivers and streams which are not navigable waters, and he supposes the angling statutes don't apply on any non-navigable lakes; therefore, he doesn't think the Curran or Hildreth cases really apply to those in his opinion, and none of this should be allowed without consent of the landowner. Senator Towe suggested we leave that issue out of it. Instead of making it a new subsection (I), let's make it a new subsection (4), which is not covered by the introductory language. Senator Towe suggested it be new subsection (3), which would say for navigable waters and for lakes, all uses, including all recreational uses, except fishing, floating, and boating within 100 yards of any occupied dwelling, are prohibited. Senator Crippen asked how he would define navigable. Senator Towe replied the same way it is defined in the bill. Senator Crippen asked if that were excluding subparagraph (c). Senator Towe responded no, because that is the definition of federal navigability. Mr. Petesch stated he is not sure everything in subparagraph (c) has been held to be federally navigable for title test but seems to apply to navigable for commerce. Senator Crippen stated he wouldn't allow any recreational use on non-navigable waters without the consent of the landowner. Senator Yellowtail also stated he couldn't agree.

Senator Towe asked if he wanted to declare an impasse and dissolve the subcommittee. Senator Crippen replied maybe

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that would be the way to go about doing it. He stated he would not go along with those things that really were not allowed by the angling statute or by any other law. He doesn't think either case went to that point. He thinks we can easily eliminate non-navigable streams. He stated if you are willing to work on this bill, you will have to lay that issue aside, because we have an impasse. We should see if there are some areas we can work on. Senator Galt stated let's decide what is allowed or not allowed on the non-navigable waters. On non-navigable waters, there is no use outside floating on the water. Senator Towe asked if Senator Crippen were willing to allow floating. Senator Crippen asked if they can't float, would we be allowing them to portage. Senator Towe thinks you should say "fishing."

Senator Galt stated the supreme court stated the waters belong to the state of Montana. Mr. Fredericks said Senator Crippen wants s definition limited to navigability for title purposes. By changing the definition that was suggested in those amendments so it is clear, it is navigable for title and not navigable for commerce, and subsection (d) seems to apply. Senator Towe asked if there were a difference. He suggested one thing we might be able to do is to agree on those issues we disagree on and let the Judiciary Committee vote on each of them separately. Senator Crippen stated that would be inherent in the subcommittee role. Chairman Yellowtail stated we would agree at least to alternatives and then present them to the whole committee, or if we can reach some agreement here to some amendment, that would be presented to the whole committee. Senator Crippen replied he had no problem submitting alternative approaches to the committee. Senator Towe stated he would suggest one of the alternatives we would present to the committee is the banning of all uses on non-navigable waters. Another would be the definition of lakes and prohibiting all uses within 100 yards of occupied dwellings. A third would be barriers stating "Nothing contained herein addresses the issue of portage around natural barriers." The question for the Judiciary Committee would be the second sentence stating "Nothing contained in this act makes portage around natural barriers lawful or unlawful." Senator Towe moved HB 265 be amended as follows:

Page 10.
Following: line 7
Insert: "Nothing contained in this act addresses the issue of natural barriers or portage around said barriers. Nothing contained in this act makes portage around natural barriers lawful or unlawful."

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Senator Galt replied his concern is it implicitly implies portage is a viable thing on streams. Personally, he thinks you need compensation. You need due process for condemnation or taking of private property. Senator Yellowtail stated it is essentially a disclaimer. He opposed that originally because he hoped we would be reasonable and hoped we would get natural barriers covered. Senator Crippen stated we have two different approaches on portage, and they are clear and distinct on that. Senator Towe stated we agreed on artificial barriers. Our bill now only addresses portage around artificial barriers. He wants to make it clear that by not mentioning it, we don't ban it. Senator Crippen stated we are saying that by implication we are allowing it. Senator Crippen asked why we should even mention it. It is already prohibited. Senator Crippen stated if we did that we are still talking about artificial barriers and portage around artificial barriers. What Senator Galt is saying is if we talk about those at all, the portage route should be paid for by the state. Senator Crippen stated he will resist the placing of subsection (4) in there. He agrees with Senator Galt that by placing that language in there, it would be indicative we discussed the issue, while the issue is actually still in doubt and up in the air. By mentioning natural barriers, we have considered it. The motion failed with Senators Towe and Yellowtail voting in favor and Senators Crippen and Galt voting in opposition. Senator Towe suggested that it be a deadlock issue to be given to the committee as a whole.

Senator Crippen stated going on with the portage issue, Mr. Strope has no objection to portage around an artificial barrier as long as it is established compensation is given to the landowner for that portage. Mr. Strope stated it would be their opinion that if public policy were to create an access for recreational purposes, it could create that policy, but the policy would carry with it just compensation. Mr. Strope suggested the following amendment:

> Page 7, line 25, through line 4, page 10.
> Strike: line 25, page 7, through line 4, page 10, in their entirety
> Insert: "Portage routes shall be acquired in the following manner and no other, to-wit:
> (1) by securing the approval of the affected landowner to use a portage route;
> (2) by purchase from the affected landowner of the portage route; or
> (3) by condemning in the court pursuant to the provisions of Article II, section 29, of a portage route."

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Mr. Strope went on to say if you did that, you would clearly establish in the law the public policy that society can make a recreational use of property. You would also affirm the right of the property owners who would bear that burden to be paid for it. Senator Towe asked if he were suggesting that if a farmer were to put a fence across the water, we will have to pay for portage around that. Mr. Strope responded any farmer who has a fence in place now has the right to be compensated for it. If you do not enact something there is nothing in another section of the law that prohibits landowners who own property on both sides of the stream from putting up a fence next summer, and next fall it is the desire of the public to take it out. Senator Towe thought the suggestion was a much too restrictive reading of the Curran and Hildreth cases. He didn't think one could interpret that into the cases at all. Senator Crippen stated he is willing to put that as an alternative, but he is not willing to say that once this act is passed the landowner should be compensated unless that fence or barrier was put up because of a state action or local action for some reason or another. We are going to get back to navigable streams, and there is a good argument for saying the public can float down navigable streams. There are barriers there now, and they are legal, and if we provide portage, landowners should be paid for that portage. If they are put up afterwards, then he has a question about it and is not willing to go that far. Senator Galt stated on the non-navigable streams where the owner owns the bank and the bed, he should be able to do whatever he wants to, but he would agree on navigable streams.

Mr. Strope addressed the just compensation issue. It is quite generally accepted that unless the adequate easement is acquired and unless there is a prohibition for the public to build within the corridor for traffic, then they have a right to complain about the airport that was there before they put it up. He asked if that analogy wouldn't apply to this situation. Is there a burden to compensate the property owner who would deliberately put up a fence? Mr. Waterman referred to Section 45-8-111, MCA, defining public nuisance. Senator Towe referred to page 5 of the Hildreth case. With the use of the words "possible limitation of use" and "control of use," you are controlling or limiting the use and he would agree. Mr. Strope stated he finds that argument very reasonable. Mr. Petesch pointed out the supreme court held Judge Shanstrom properly dismissed Hildreth"s counterclaim for inverse condemnation. Senator Galt moved the amendment suggested by Mr. Strope. The

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motion failed with Senators Crippen and Galt voting in favor, and Senators Towe and Yellowtail voting in opposition. Senator Galt asked that that issue be brought before the committee for its consideration as one of the subcommittees deadlock issues.

Senator Crippen also asked that there should be some discussion of the fact that the landowner has to provide for the portage between the low and the high water marks for any artificial barriers placed subsequent to the enactment of this act, but if it is beyond that, then you flip a coin. As a possible compromise, the landowner be required to provide portage between the low and the high water marks for any future artificial barriers, and if it is beyond the high water mark, then we need to discuss that area.

Senator Towe moved that on page 3, line 22, and on page 6, line 12, we strike the words "habitable building" and insert the words "occupied dwelling." He further proposed the following definition of occupied dwelling: "Occupied dwelling means a building used for human dwelling at least once a year." The motion carried with Senator Crippen voting in opposition.

Senator Towe moved that on page 6, line 7, we insert before the semicolon the words "except by bow, shotgun, and muzzle loader, provided it is not within 100 yrads of an occupied dwelling." The motion failed with Senator Towe voting in favor and Senators Crippen, Galt, and Yellowtail voting in opposition.

Senator Crippen referred to page 10 which deals with liability of the landowner. He wants to be sure that language is the same as that Senator Story had in the Senate bill. Mr. Petesch stated it is not the same. Senator Story's bill has "agents" included, which this bill doesn't. Senator Towe moved that the bill be amended as follows:

1. Page 10, line 15.
Following: "landowner"
Insert: ", his agent, or his tenant"

2. Page 10, line 17.
Following: "landowner"
Insert: ", his agent,"

He explained the only change is putting in "his agent," and he thinks the testimony given by Senator Story pertaining to that use of agent was persuasive. He doesn't think you are making any particular difference. The motion carried unanimously.

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Senator Crippen referred to page 11, line 3, section 5, which deals with prescriptive easements. Senator Yellowtail stated SB 424 relates to use of land or water for recreational purposes, while this one is limited to water. Mr. Petesch suggested they look at subparagraph (b). Senator Crippen asked if that were the same. Senator Yellowtail responded it accomplishes the same for your purposes. Senator Crippen asked if they were satisfied. Senator Crippen moved the following amendment:

Page 9, line 16.
Following: "court"
Insert: "within 30 days of the decision"

Mr. Petesch commented that is the same time frame in the bill to appeal the arbitration panel's decision, so it is consistent. The motion carried with Senators Crippen, Towe, and Yellowtail voting in favor and Senator Galt not voting.

Senator Galt moved the adoption of the following amendment:

Page 10, line 21.
Following: "supervisor"
Insert: "or any member of the arbitration panel"

The motion carried unanimously.

Senator Towe moved that a new section entitled "Land Title Unaffected" be inserted on page 11, following line 24. Senator Galt stated you are not giving the title away; you are giving everything else away. The motion carried with Senators Crippen, Towe, and Yellowtail voting in favor and Senator Galt voting in opposition. Senator Galt stated we are taking everything away from the landowner except the title.

Mr. Petesch stated the subcommittee had reserved two questions on the statement of intent, one related to limiting access to private impoundments (certain ones had been granted a license) and the other referred to the distance on hunting limits. Senator Crippen stated that private impoundments is a non-navigable point. Senator Towe stated that is not excluded at the present time. Mr. Petesch stated because of intermittent flow. Senator Towe still thinks that is appropriate and moved the amendment to the statement of intent stating that we are suggesting that without putting it in the statute they address that question by regulation. Senators Crippen and Galt wanted it in the statute. The motion carried unanimously.

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Mr. Petesch stated the distance limits on hunting near occupied dwellings had not yet been addressed. Senator Towe moved we ask Mr. Petesch to draft language for the statement of intent which would request that the commission address the question of distance from occupied dwellings for prohibiting hunting if it is addressed at all. The motion carried unanimously.

Mr. Petesch stated when we prohibited uses of streambeds as corridors, the streambed doesn't actually flow. Senator Towe moved the following amendment:

Page 6, line 19.
Following: "WHEN"
Strike: "IT"
Insert: "water"
Following: "FLOWING"
Insert: "therein"

The motion carried unanimously.

Senator Galt asked why hunting was in there when we were talking about water. Senator Crippen moved that we eliminate hunting on navigable streams. Senator Towe state when you eliminate all hunting, there are some rivers in which there are substantial areas between the high water marks in which there is a substantial amount of space available and what you are saying is you can't hunt on those areas even though it might be a quarter mile away from any adjoining landowner. Senator Crippen didn't have any problem with people deer hunting on the islands. He asked who they belong to. If they belong to the state, there is no problem. Senator Towe stated islands crop up above the high water mark. If it belongs to the state or federal government, it is the public's, and then you can hunt on it in any event. The other kind is that which is below the high water mark. It is those areas we are now addressing. He thinks it is a mistake to ban hunting on those areas. Senator Yellowtail pointed out you have effectively eliminated waterfowl hunting on all waters of the state. Senator Crippen responded that is without permission of the landowner. Senator Yellowtail begged to differ. You need to put it elsewhere. By removing hunting from the definition of recreational use, then you have banned all hunting. Senator Crippen moved that on page 3, line 21, you strike the word "hunting" and on page 6, line 7, you strike the words "big game." Then as a matter of courtesy, hunters will get permission. The motion failed with Senators Crippen and Galt voting in favor and Senators Towe and Yellowtail voting in opposition.

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Senator Crippen stated the definition of navigable waters may be much broader than we think. He wants this bill as narrowly interpreted as we reasonably can because that will be the only way we can continue our good relationship between the landowner and the recreationist. He would prefer the more restrictive, because that will protect the recreationists from more than opening it up. Senator Galt questioned what subparagraph (G) on page 6 meant. He thinks we had in mind that that would be on non-navigable waters. Senator Yellowtail stated as we stand now, we have defined two classes of waters but have done nothing with them. Senator Towe stated he would add non-navigable waters after activities on line 17. Senator Galt stated that implies they have them on navigable waters. Senator Towe commented that if everything is included in recreational use, that is not needed, then we will have moved that more restrictive concept to non-navigable waters. Senator Galt stated then you open it up to navigable waters. Senator Yellowtail replied it will be hard to itemize every possible use. Senator Crippen stated he would oppose that. Senator Towe still questioned what we meant by subparagraph (G). Senator Yellowtail responded anything not water-related. Senator Crippen asked if that included gather asparagus. Senator Towe suggested we wither strike line 16 and 17 on page 6 or limit it to non-navigable waters. Senator Galt stated he would disagree with that. Senator Towe stated from a techical standpoint, he still did not know what that meant. Senator Galt replied if you put your caveat in about non-navigable waters, it still means the same thing. Senator Towe suggested that subparagraph (G) be deleted. Senator Yellowtail asked if we strike that if it implied we allow those activities without landowner permission. Senator Towe replied we have recreational uses of surface water defined elsewhere in the bill. If we are not going to use the non-navigable category, we should strike it from the bill. Recreational use the way the bill is structured appears to mean something beyond what water-related pleasure activities means. Therefore, we have prohibited some recreational uses with respect to surface waters. Mr. Petesch pointed out recreational uses as defined are water-related things, and the prohibitions are those that are not water-related. He doesn't think there is any redundancy there. Senator Towe stated everything we have defined in recreational use is included in water-related activities. Senator Towe moved that the words "as defined in subsection (8)" be added on page 6, line 17, after the word "activities." Senator Galt stated you put hunting in everywhere with that, and it is not a water-related activity. The motion failed with Senator Towe and Yellowtail voting in favor and Senators Crippen and Galt voting in opposition.

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Senator Crippen moved that on page 3, line 25, the words "other water-related" be stricken. The motion failed with Senators Crippen and Galt voting in favor and Senators Towe and Yellowtail voting in opposition.

Senator Crippen asked that hiking and swimming on navigable streams be submitted to the committee as a whole as a discussion topic only. It is allowed in recreational use when talking about navigable streams.

Chairman Yellowtail then stated that the subcommittee would report as follows: First, those items the subcommittee could agres on; second, the cover items on which it could not reach full concensus, third, the one discussion point suggested by Senator Crippen. His concern is that we not carry on at the committee meeting as extensively as we have in the four subcommittee meetings. He would ask that the subcommittee members exercise whatever restraints are within their powers to exercise. Chairman Yellowtail stated he would present the items discussed.

Senator Crippen pointed out Senator Towe also had an issue to present to the committee as a whole. Senator Crippen moved that we eliminate subsection (c) and (d) on page 2. The motion failed with Senators Crippen and Galt voting in favor and Senators Towe and Yellowtail voting in oppostion. Chairman Yellowtail stated that would then also become a deadlock issue to be presented to the committee as a whole.

There being no further business to come before the subcommittee, the meeting was adjourned at 11:17 p.m.

William P. Yellowtail, Jr.
Subcommittee Chairman

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D stmt of intent
P hunting

As of 032085

HOUSE BILL NO. 265

INTRODUCED BY REAM, MARKS

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY DEFINING LAWS RELATING TO RECREATIONAL USE OF STATE WATERS; PROHIBITING RECREATIONAL USE OF DIVERTED WATERS; RESTRICTING THE LIABILITY OF LANDOWNERS WHEN WATER IS BEING USED FOR RECREATION; ESTABLISHING THE RIGHT TO PORTAGE; PROVIDING THAT A PRESCRIPTIVE EASEMENT CANNOT BE ACQUIRED BY RECREATIONAL USE OF SURFACE WATERS; AMENDING SECTION 70-19-405, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

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

NEW SECTION. Section 1. Definitions. For purposes of [sections ~~2~~ 1 through 5], the following definitions apply:

(1) "Barrier" means an artificial obstruction located in or over a water body, restricting passage on or through the water, ~~or a natural object~~ IN OR OVER A WATER BODY which totally or effectively obstructs the recreational use of the surface water at the time of use. A barrier may include but is not limited to a bridge or fence or any other manmade obstacle to the natural flow of water ~~or a natural object within the ordinary high water mark of a stream~~.

(2) "~~Class I~~ NAVIGABLE waters" (B) other than lakes, means surface waters

that:

(a) lie within the officially recorded federal government survey meander lines thereof;

(b) flow over lands that have been judicially determined to be owned by the state by reason of application of the federal navigability test for state streambed ownership;

~~(c)--flow--through--public--lands,--WHERE--WHEN---THE BOUNDARIES-OF-SUCH-LANDS,~~

~~(d)~~(C) are or have been capable of supporting THE FOLLOWING commercial ~~activity~~ ACTIVITIES: LOG FLOATING, TRANSPORTATION OF FURS AND SKINS, SHIPPING, COMMERCIAL GUIDING USING MULTIPERSON WATERCRAFT, PUBLIC TRANSPORTATION, OR THE TRANSPORTATION OF MERCHANDISE, AS THESE ACTIVITIES HAVE BEEN DEFINED BY PUBLISHED JUDICIAL OPINION AS OF [THE EFFECTIVE DATE OF THIS ACT]; or

~~(e)~~(D) are or have been capable of supporting commercial activity within the meaning of the federal navigability test.

(3) "~~Class-II~~ NONNAVIGABLE waters" means all surface waters that are not ~~class-I~~ NAVIGABLE waters, except lakes;

(4) "COMMISSION" MEANS THE FISH AND GAME COMMISSION PROVIDED FOR IN 2-15-3402.

~~(4)~~(5) "Department" means the department of fish, wildlife, and parks provided for in 2-15-3401.

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

(a) an irrigation or drainage canal or ditch;

(b) an industrial, municipal, or domestic water system;

(c) a flood control channel; or

(d) a hydropower inlet and discharge facility.

(B) (7) face or face" means ...

~~(6)~~(7) "Ordinary high-water mark" means the line that water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it. Characteristics of the area below the line include, when appropriate, but are not limited to ~~diminished--terrestrial vegetation-or-lack-of-agricultural-crop-value~~ DEPRIVATION OF THE SOIL OF SUBSTANTIALLY ALL TERRESTRIAL VEGETATION AND DESTRUCTION OF ITS AGRICULTURAL VEGETATIVE VALUE. A FLOOD PLAIN ADJACENT TO SURFACE WATERS IS NOT CONSIDERED TO LIE WITHIN THE SURFACE WATERS' HIGH-WATER MARKS.

~~(7)~~(8) ~~(a)~~ "Recreational use" means with respect to ~~class--I~~ SURFACE waters: fishing, (R) hunting, swimming (EXCEPT WITHIN 100 YARDS OF ANY ~~HABITABLE BUILDINGS~~), HIKING, floating in small craft or other flotation devices, boating in motorized craft unless otherwise prohibited or regulated by law, or craft propelled by oar or paddle, OTHER (T)

WATER-RELATED PLEASURE ACTIVITIES, and related unavoidable or incidental uses~~,-within-the-ordinary-high-water-mark-of the-waters.~~

~~(b)--Recreational-use-means-with-respect--to--class--II waters--all--of--the--uses--set--forth-in-subsection-(7)(a),~~ ~~except-that-it-does-not-include,-without-permission--of--the landowner:~~

~~(i)--overnight-camping;~~

~~(ii)-big-game-hunting-or-upland-bird-hunting;~~

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

~~(iv)-the-placement-or--creation--of--any--permanent--or semipermanent--object-such-as-a-permanent-duck-blind-or-boat moorage;-or~~

~~(v)--other---activities---which---are---not---primarily water-related-pleasure-activities.~~

~~(8)~~(9) "Supervisors" means the board of supervisors of a soil conservation district, the directors of a grazing district, or the board of county commissioners if a request pursuant to [section 3(3)(b)] is not within the boundaries of a conservation district or if the request is refused by the board of supervisors of a soil conservation district or the directors of a grazing district.

(10) "SURFACE WATER" MEANS, FOR THE PURPOSE OF

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DETERMINING THE PUBLIC'S ACCESS FOR RECREATIONAL USE, A NATURAL WATER BODY, ITS BED, AND ITS BANKS UP TO THE ORDINARY HIGH-WATER MARK. (X) except for the exclusion of the beds + the banks provided for in 70-16-20

NEW SECTION. Section 2. Recreational use permitted -- limitations -- exceptions. (1) Except as provided in ~~subsection (3)~~ SUBSECTIONS (2) THROUGH (4), all ~~class II~~ SURFACE waters that are capable of recreational use ~~as defined in section 1(7)(a), including the beds underlying them and the banks up to the ordinary high-water mark,~~ may be so used by the public without regard to the ownership of the land underlying the waters.

~~(2) Except as provided in subsection (3), all class II waters that are capable of recreational use as defined in section 1(7)(b), including the beds underlying them and the banks up to the ordinary high-water mark, may be so used by the public without regard to the ownership of the land underlying them, except that recreational use does not include those activities excluded in section 1(7)(b).~~

~~(3)~~(2) The right of the public to make recreational use of surface waters does not include ~~the right to make recreational use of waters~~, WITHOUT PERMISSION OF THE LANDOWNER:

(a) THE OPERATION OF ALL-TERRAIN VEHICLES OR OTHER MOTORIZED VEHICLES NOT PRIMARILY DESIGNED FOR OPERATION UPON THE WATER;

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(B) THE RECREATIONAL USE OF SURFACE WATERS in a stock pond or other PRIVATE impoundment fed by an intermittently flowing natural watercourse; or

~~(b)~~(C) THE RECREATIONAL USE OF WATERS while diverted away from a natural water body for beneficial use pursuant to Title 85, chapter 2, part 2 or 3; OR

(D) ~~BIG GAME HUNTING~~;

~~(3) THE RIGHT OF THE PUBLIC TO MAKE RECREATIONAL USE OF CLASS II WATERS DOES NOT INCLUDE, WITHOUT PERMISSION OF THE LANDOWNER:~~

~~(A)~~(E) OVERNIGHT CAMPING WITHIN 500 YARDS OF ANY HABITABLE BUILDINGS;

~~(B)~~(F) THE PLACEMENT OR CREATION OF ANY PERMANENT OR SEMIPERMANENT OBJECT, SUCH AS A PERMANENT DUCK BLIND OR BOAT MOORAGE; OR

~~(C)~~(G) OTHER ACTIVITIES WHICH ARE NOT PRIMARILY WATER-RELATED PLEASURE ACTIVITIES~~;~~ OR

(H) USE OF A STREAMBED AS A RIGHT-OF-WAY FOR ANY PURPOSE WHEN ~~IT~~ water IS NOT FLOWING.

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

(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~~ NAVIGABLE AND NONNAVIGABLE 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; AND

(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).

~~(5)~~(6) The provisions of this section do not affect any rights of the public with respect to state-owned lands that are school trust lands or any rights of lessees of such lands ~~under lease on (the effective date of this act)~~.

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

(2) A landowner may create barriers across streams for

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purposes of land or water management or to establish land ownership as otherwise provided by law. If a landowner erects a ~~barrier~~ STRUCTURE pursuant to a design approved by the department and the ~~barrier--is--designed--not--to--and~~ STRUCTURE does not interfere with the public's use of the surface waters, the public may not go above the ordinary high-water mark to portage around the ~~barrier~~ STRUCTURE.

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

(b) A portage route may be established when either a landowner or a member of the recreating public submits a request to the supervisors that such a route be established.

(c) Within 45 days of the receipt of a request, the supervisors shall, in consultation with the landowner and a representative of the department, examine and investigate the barrier and the adjoining land to determine a reasonable and safe portage route.

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

(e) The cost of establishing the portage route around artificial barriers must be borne by the involved landowner,

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except for the construction of notification signs of such route, which is the responsibility of the department. The cost of establishing a portage route around ~~natural~~ ARTIFICIAL barriers NOT OWNED BY THE LANDOWNER ON WHOSE LAND THE PORTAGE ROUTE WILL BE PLACED must be borne by the department.

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

(g) If either the landowner or recreationist disagrees with the route described in subsection (3)(e), he may petition the district court (1) w/in 30 days of the decision to name a three-member arbitration panel. The panel must consist of an affected landowner, a member of an affected recreational group, and a member selected by the two other members of the arbitration panel. The arbitration panel may accept, reject, or modify the supervisors' finding under subsection (3)(d).

(h) The determination of the arbitration panel is binding upon the landowner and upon all parties that use the water for which the portage is provided. Costs of the arbitration panel, computed as for jurors' fees under

3-15-201, shall be borne by the contesting party or parties; all other parties shall bear their own costs.

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

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

(F) (4)...

NEW SECTION. Section 4. Restriction on liability of landowner and supervisor. (1) A person who makes recreational use of surface waters flowing over or through land in the possession or under the control of another, pursuant to [section 2], or land while portaging around or over barriers or while portaging or using portage routes, pursuant to [section 3], does not have the status of invitee or licensee and is owed no duty by a landowner other than that provided in subsection (2).

(J) his agent, or tenant

(2) A landowner or tenant is liable to a person making recreational use of waters or land described in subsection (1) only for an act or omission that constitutes willful or wanton misconduct.

(M) or any member of the arbitration panel

(3) No supervisor who participates in a decision regarding the placement of a portage route is liable to any person who ~~while--making--recreational--use-of-the-surface waters-is-injured-while-using~~ IS INJURED OR WHOSE PROPERTY IS DAMAGED BECAUSE OF PLACEMENT OR USE OF the portage route

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except for an act or omission that constitutes willful and wanton misconduct.

NEW SECTION. Section 5. Prescriptive easement not acquired by recreational use of surface waters. (1) A prescriptive easement is a right to use the property of another that is acquired by open, exclusive, notorious, hostile, adverse, continuous, and uninterrupted use for a period of 5 years.

(2) A prescriptive easement cannot be acquired through:

(A) recreational use of surface waters, including:

(I) the streambeds underlying them; ~~and~~

(II) the banks up to the ordinary high-water mark; or ~~of~~

(III) ANY portage ~~routes~~ over and around barriers; OR

(B) THE ENTERING OR CROSSING OF PRIVATE PROPERTY TO REACH SURFACE WATERS.

Section 6. Section 70-19-405, MCA, is amended to read:

"70-19-405. Title by prescription. ~~Occupancy~~ Except as provided in [section 5], occupancy for the period prescribed by this chapter as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all."

(A) (N) NEW SECTION. Section 7. Severability. If a part of

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this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 8. Applicability. Sections 5 and 6 apply only to a prescriptive easement that has not been perfected prior to [the effective date of this act].

NEW SECTION. Section 9. Effective date. This act is effective on passage and approval.

-End-

SENATE JUDICIARY SUB COMMITTEE
EXHIBIT NO. 1
DATE 032585
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#1

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. D-5
DATE 032785
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Amend House Bill No. 265 by striking all language, from the beginning of line 25, page 1 of the current (March 21) draft to and including line 20, page 2, and inserting, in lieu thereof, the following language:

"(2) 'Navigable waters', for purposes of this act, means all rivers and streams which have been meandered and returned as navigable by the surveyors employed by the government of the United States and all rivers and streams which satisfy the federal test of navigability for purposes of state ownership, including all lakes or reservoirs located therein.

(3) 'Nonnavigable waters', for purposes of this act, means all rivers and streams which are not navigable waters, including all lakes and reservoirs located therein."

Amend House Bill No. 265 by striking all language, from the beginning of line 15, page 5 of the current (March 21) draft to, but not including, line 13, page 6, and inserting, in lieu thereof, the following language:

"(2) The waters of the state are classified as follows and the recreational uses permitted on each class of water, without permission of the landowner, are as follows:

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(a) Class A waters are all nonnavigable waters, including any lakes or reservoirs located therein regardless of whether such lakes or reservoirs are navigable. The recreational use permitted on Class A waters is floating in small craft or other flotation devices, together with use of the land underlying such waters when such use is temporarily necessary for purposes of safety.

(b) Class B waters are all navigable waters, including any lakes or reserviors located therein, except those waters specifically designated as Class C waters in subsection (2)(c) hereof. The recreational uses permitted on Class B waters are the use permitted in Class A waters, boating in craft propelled by oar or paddle, and angling where permitted by 87-2-305, together with use of the land underlying such waters when such use is unavoidable and incidental to the permitted use of the water. Use of such land is unavoidable and incidental only when the use is temporarily necessary to accomplish the permitted recreational use of the waters or for the purposes of safety.

(c) Class C waters are the main stem of the Yellowstone River, the main stem of the Missouri River, the main stem of the Flathead River, and the main stem of the Kootenai River, including any lakes or reservoirs located therein, but excluding the tributaries of any of those rivers. The recreational uses

permitted on Class C waters are those uses permitted in Class A and Class B waters, boating in motorized craft unless otherwise prohibited or regulated by law, swimming except within 100 yards of any habitable buildings, overnight camping except within 500 yards of any habitable buildings, and fishing below the ordinary high-water mark, together with the use of the land between the ordinary high water marks when the use is temporarily necessary to accomplish the permitted recreational use of the waters or for purposes of safety.

(d) All other recreational uses of the waters of the state, except those specifically permitted herein, are prohibited, without the permission of the landowner. Prohibited recreational uses include but are not limited to the following: (i) the operation of all-terrain vehicles or other motorized vehicles not primarily designed for operation upon the water; (ii) the recreational use of surface waters in a stock pond or other private impoundment fed by an intermittently flowing watercourse; (iii) the recreational use of waters while diverted away from a natural water body for beneficial use pursuant to Title 85, chapter 2, part 2; (iv) big game hunting; (v) the placement or creation of any permanent or semipermanent object, such as a duck blind or boat moorage; and (vi) the use of a stream bed as a right-of-way for any purpose when water is not flowing therein."

MONTANA STATE SENATE
CONFERENCE COMMITTEE ON HB 265
MINUTES OF THE MEETING

April 10, 1985

The Conference Committee on HB 265 was called to order at 2:55 p.m. on April 10, 1985, by Senate Chairman Fred VanValkenburg in Room 325 of the State Capitol.

ROLL CALL: The following conference committee members were present: Senator VanValkenburg, Senate Chairman; Senator Yellowtail; Senator Galt; Representative Keyser, House Chairman; Representative Krueger; Representative Mercer; and Representative Ream.

CONSIDERATION OF HB 265: Senator VanValkenburg stated the procedure he felt would be best to follow would be to ask the House Chairman to make some opening statements as to the reasons they rejected the Senate amendments and where they would like this conference committee to go. Representative Keyser stated rather than referring to the amendments, he would rather just refer to the page in the salmon colored bill. He then referred to page 5, lines 14 and 15, which in effect are Senator Galt's committee of the whole amendment. That was the first amendment he wanted to address. Senator VanValkenburg asked if there were other issues they intended to raise with respect to the bill as it came out of the Senate other than Senator Galt's committee of the whole amendment. Representative Keyser responded yes, the other problem occurred at page 4, line 1. The House would like to have its language put back in. Senator VanValkenburg asked if that included the language on page 4, lines 5 and 6, which in effect would add the stricken language back in and strike after swimming, "except within 100 yards of any occupied dwelling, and hiking." Representative Keyser replied yes. Senator VanValkenburg asked that he explain why. Representative Keyser replied they had some problems with the hiking language, but they would like to take out some of the objectionable language. However, since this is not a free conference committee, they have to reject the Senate amendment that was adopted and go back to the way the House presented it to the Senate to start with.

Senator VanValkenburg commented this particular language was never an issue on the floor of the Senate. Senator Yellowtail stated the language "except within 100 yards of

any occupied dwelling" related to swimming. The Senate felt it was inappropriate for swimmers to carry on such activities in close proximity to someone's house. Hiking should be included to cover the case where the fisherman were fishing up the stream and his small child were along for the trip. Senator Galt pointed out the 100-yard distance was accepted in the committee unanimously. Representative Keyser stated they had no problem with the 100-yard language, but the whole amendment was thrown in with one amendment, and they didn't feel hiking was a water-related activity. They don't like the word hiking, and they don't feel it refers to water-related activities.

Representative Mercer felt Senator Yellowtail's concern about a child's hiking around with a fisherman would be covered by the language on lines 6 and 7 that speaks to related incidental uses, and, therefore, they would not need hiking in the bill. Representative Ream believes what happened was the words "other water-related activities" were struck and then hiking was inserted to cover the kinds of concerns Senator Yellowtail referred to and that is why the two together were important. They would like to see the original language in that portion restored. Senator Galt asked if the conference committee could address the standing committee amendments. Senator VanValkenburg responded yes, as the vote in the House was to reject the Senate amendments.

Representative Krueger stated if we start opening it into other areas, that would also include natural barriers. Representative Keyser didn't mind the language "except within 100 yards of an occupied dwelling" if it had swimming in, but hiking should be out.

Senator VanValkenburg commented he said the House language got in on a split vote. He asked if Senator Galt supported hiking. Senator Galt responded no. Senator VanValkenburg stated if we strike the Senate language and put in other water-related pleasure activities, that would have the effect of taking hiking out, but it would not provide the 100-yard protection for swimming. He asked if that would be acceptable. Senator Galt responded it is an improvement. He asked what other water-related pleasure activities might include.

Representative Krueger stated it would include the very situation outlined. It was intended to have some corresponding relationship to the water. Representative Ream thought the language is consistent with the supreme court and that is

probably why it went in originally. He doesn't think there are any other water-related activities. Senator Galt asked if duck hunting would be a water-related activity. Representative Krueger stated it would be. Representative Keyser assumed it would be included also.

Senator VanValkenburg stated one of two motions would be in order. Either the Senate recede from amendments 11 and 12 and that they accede in the amendments of the House that correlate to that same area, or that the House accede in Senate amendments 11 and 12. The first motion would have the effect of taking the House language, and the second would have the effect of taking the Senate language. Representative Kreuger stated he would prefer to take the other amendment first before we vote. Chairman VanValkenburg felt that the bulk of the conference committee's discussion would take place with Senator Galt's amendment, and this one is no big deal.

Senator Yellowtail moved that the Senate recede from standing committee amendments 11 and 12. The motion carried with Senator Galt voting in opposition. Senator VanValkenburg then moved to Senator Galt's committee of the whole amendment. Representative Keyser stated the supreme court in its decision talked about the beds and the banks up to the high water mark. Senator Galt's amendment handled first class streams. In effect, something which has been taking place for 100 years all of a sudden cannot take place. Senator Galt responded it does not apply to any streams that are navigable because the fishing statute which is on the books is still there. Representative Keyser stated you set up a conflict between this law and the fishing statute. That would mean the floaters that we have had on the Madison River could no longer step out of that boat, they would basically have to stay on the water. If you can't use the bank up to the high water mark, then you take that away from every floater. Senator Galt disagreed.

Representative Krueger stated he would like to hear the Senator's basis for striking the beds and the banks. Senator Galt replied in all of the rivers not declared navigable, the beds and the banks belong to the adjoining landowners, and by not striking this, you are taking away property rights. Justice Haswell stated they should not misconstrue these things; the court was talking about two separate cases. Representative Krueger replied they addressed a good portion of that concern with regard to the prescriptive easement. When they applied a stronger prescriptive easement, they were

not changing the ownership of this land. Senator Galt replied you are not taking the ownership, but you are taking the use of it. The supreme court decisions just related to the Dearborn and the Beaverhead Rivers. They admonished not to overanalyze the case in terms of what the court might do in the future. Senator VanValkenburg asked if that were a transcript of some remarks Justice Haswell made last December to some public gathering. Senator Galt replied yes, and Justice Haswell is also the judge who wrote the decisions. Senator VanValkenburg pointed out he is not on the court any longer. Representative Krueger stated there was some concern with relation to smaller streams and their usage. We effectively addressed that issue by allowing the Fish and Game to promulgate rules and making provisions for individuals to have hearings. We may have problems, but by doing this, we are especially addressing those types of concerns on how those smaller streams will be addressed. Senator Galt stated the average landowner doesn't want the Fish and Game promulgating rules about those streams. That is where their corrals and pens are. Representative Keyser asked if the Fish and Game can make restrictions on the streams now. Senator Galt replied they probably could.

Senator VanValkenburg stated as he reads this legislative directive, page 8, lines 10 on, and in particular page 9, lines 1-5, the legislature already said these rules would be to give the commission the authority to limit the public use to protect the landowners' use. Senator Galt asked who protects the landowner and the use he wants to make of it. Senator VanValkenburg responded without any rules, it is really a case-by-case determination in the courts. Representative Krueger stated an individual landowner would have the right of redress through the Fish and Game Commission, although there might be problems in terms of timeframes. That was their attempt, which was to give some protection to landowners and give them some ability to have some input. Senator Galt stated it was nice to allow them to have some input into the land that they paid taxes on and they own. Representative Mercer thought one of the big problems they were running into is the difference between Class I and Class II streams.

Senator Galt's amendments don't work on Class I, but they would on Class II. As broad as the definition of Class I waters is, that means Class II waters are pretty small creeks. Something that is that small should always require the landowner's permission to use the creek. Senator VanValkenburg asked if he meant to use the water itself. Representative Mercer stated or the bed or the bank. Senator VanValkenburg asked if they thought you could have the legislature prohibit the use of Class II streams under the Curran and Hildreth

decisions. Representative Mercer replied if the Fish and Game can, the legislature can. It is unconstitutional for any individual landowner to prevent someone from re-creating on a stream. All waters are owned in trust for the public. That makes the state the trustee. That means if it is in the best interests of the landowner to prohibit use, they can do that. He does not think it would be unconstitutional. Representative Keyser agreed, but stated Senator Galt's amendment did not do that. The amendment applies to both Class I and Class II waters. Representative Krueger disagreed with Representative Mercer's analogy. Senator Galt was saying the House, in establishing the Fish and Game procedure was saying it was very generous to allow input. The purpose was to try to establish a means of regulating those types of uses that would not be appropriate on those streams. They spent a long time examining that type of procedure. There was a consensus it was an equitable means of regulating those types of streams. By excluding beds and banks, you are effectively managing them. Senator VanValkenburg pointed out two problems with Senator Galt's arguments. In reading Hildreth in particular, but also Curran, the court says public use of the waters and the bed and the banks of the Beaverhead was not determined by title. The word "and" causes him to say the court is saying something further than just the water. Senator Galt's amendment doesn't conform to the court's decisions. All it does is create a lot of confusion. Second, it in many cases conflicts with Senator Yellowtail's floor amendments. He is not sure what happened in the Senate the day they voted on these amendments. The Senate had a lengthy debate on Senator Yellowtail's amendments, to which Senators Crippen and Galt were opposed. Thereafter, the Senate had a short discussion about Senator Galt's amendment. Going back and reading one against the other, there are conflicting portions. Senator Galt stated in Hildreth, the court held navigability for recreational purposes is limited. It refers to the Curran case as authority for that rule. Curran gave them authority to only use the surface waters. Therefore, Hildreth was referring to surface waters. Senator Van Valkenburg asked if that were Mr. Bottomly's opinion. Senator Galt replied yes. Representative Ream stated Representative Keyser mentioned something that is important and that is the angling statute. If there were any taking of property, it goes back to 1933. He thinks we are also flying in the face of the angling statute read. Representative Ream then read the text of the statute. Senator Galt stated the statute talks about the high water marks on navigable streams, lakes, and sloughs. Representative Mercer agreed with what Senator Van Valkenburg said in that the supreme court decisions speak of the water, the beds, and the banks. The amendment has to come out. If we were free to do what we wanted to do,

we would be able to restrict the uses. Unfortunately, we must deal only with the amendments. The bill says the commission may regulate the use of surface waters, and they would not be able to restrict the use of the bed and the banks. It is critical Senator Galt's amendment come out, but he would like to address Senator Galt's concern. Tied into a non-free conference committee, there is not much this conference committee can do.

Senator Galt asked for one of two motions: that the House accede to Senator Galt's floor amendment or the Senate recede from that amendment. Representative Ream moved that the Senate recede from Senator Galt's floor amendment. The motion carried with Senator Galt voting in opposition.

Senator Yellowtail then pointed out that what remained would be the Senate standing committee amendments and his floor amendments. He gathered from the earlier discussion that the House would be inclined to accede to the remainder of the Senate amendments. If not, the House needed to speak to those to which it would not agree. Representative Keyser responded they don't agree with the lake amendments, but they would not get into that now because he realizes the political ramifications. Senator Galt moved that lakes be reinserted in the bill -- in other words, everything that took lakes away from this bill would be placed back in it. Mr. Petesch stated the Senate standing committee amendments No. 5, 7, and 8 would be affected. However, amendment No. 8 also includes the definition of occupied dwelling. Senator VanValkenburg stated the motion would be that the Senate recede from Senate standing committee amendments No. 5, 7, and 8.

Mr. Petesch stated that a portion of Senate amendment No. 33 also deals with lakes. Senator VanValkenburg interpreted Senator Galt's motion to be the Senate would recede from amendments No. 5, 7, and 8, and 33. Senator Galt stated that was correct. Representative Mercer stated since Flathead Lake sits in his district, he is concerned about this. The supreme court talked about surface waters, and Flathead Lake is surface water. The public has the right to use the beds and banks, and that gives him some concern. By excluding lakes from the bill, that leaves lakes under the supreme court decisions, and there are no regulations. By including lakes, there are some rights. Senator Yellowtail commented the feeling of the Senate Judiciary Committee was that lakes present a bit of a different situation and a new set of problems. HB 265 is tailored to streams and ownership patterns that surround the streams. To address lakes in HB 265

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would have necessitated substantial reworking of the bill to accommodate some special situations, and perhaps HB 265 was not the appropriate place to do that. Rather than do anything with HB 265 in terms of trying to mix streams and lakes, it was felt it would be best to avoid that issue. Senator Galt addressed the political implications. He felt that if you got the western legislators involved, the bill would die. He felt that if we were so devoted to the supreme court decisions and they say surface waters, we should put all surface waters into this. Senator Yellowtail suggested perhaps another bill might be the vehicle with which to do that. He thinks there is a realistic problem and situation that does arise under the Curran and Hildreth. He asked what the difference would be between one riparian owner and another. Representative Mercer stated he has a hard time seeing the difference between streams and lakes. The main distinction he sees is in July and August of the summertime when rivers and streams are down and there is a big area for recreation, but lakes tend to always be kept at a full level. That is a major distinction, and they really do need to be dealt with separately. He is satisfied with the issue. The motion to put lakes back into the bill failed with Representative Keyser and Senator Galt voting in favor of the motion. Representative Ream moved that the House accede to all of the remaining Senate amendments. Senator VanValkenburg replied that would be a proper motion and would deal with all of the remaining issues before the conference committee if it were to pass.

The motion carried with Senator Galt voting in opposition. Chairman VanValkenburg stated that completed the matters that would be before this conference committee. Representative Keyser moved that the conference committee be adjourned.

The motion carried unanimously.

There being no further business to come before the conference committee, the meeting was adjourned at 3:45 p.m.

Chairman, Senator VanValkenburg

cs

PROPOSED SUBCOMMITTEE AMENDMENTS TO HB 265:

1. Statement of Intent, page 3, line 9.
Following: "recreation."
Insert: "The commission shall prohibit all recreation on private impoundments which have been licensed for a private use."

2. Statement of Intent, page 3, line 10.
Following: line 9
Insert: "The commission shall protect the safety of the public by prohibiting hunting within a specified distance of occupied dwellings."

3. Page 1, line 19.
Following: "water,"
Strike: "or a natural object IN OR OVER A WATER BODY"

4. Page 1, lines 23 and 24.
Following: "water" on line 23
Strike: remainder of line 23 through "stream" on line 24

5. Page 1, line 25.
Following: "(2)"
Strike: "Class I"
Insert: "Navigable"

6. Page 2, lines 7 and 8.
Strike: subsection (c) in its entirety
Renumber: subsequent subsections

7. Page 2, line 19.
Following: "(3) ""
Strike: "Class II"
Insert: "Nonnavigable"

8. Page 2, line 20.
Following: "not"
Strike: "class I"
Insert: "navigable"

9. Page 3, line 8.
Following: line 7
Insert: "(7) "Occupied dwelling" means a building used for a human dwelling at least once a year."
Renumber: subsequent subsections

10. Page 3, line 13.
Following: "to"
Strike: "diminished"
Insert: "deprivation of the soil of substantially all"

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11. Page 3, line 14.
Following: "vegetation"
Strike: "or lack of"
Insert: "and destruction of its"
Following: "agricultural"
Strike: "crop"
Insert: "vegetative"

12. Page 3, line 18.
Following: "swimming"
Insert: "(except within 100 yards of any occupied dwelling), hiking"

13. Page 5, line 23.
Following: "other"
Insert: "private"

14. Page 6, line 2.
Following: "3;"
Strike: "OR"

15. Page 6, line 3.
Following: "HUNTING"
Strike: "."
Insert: ";"

16. Page 6, lines 4 through 6.
Strike: lines 4 through 6 in their entirety
Renumber: subsequent subsections

17. Page 6, line 7.
Following: line 6
Strike: "(A)"
Insert: "(e)"
Following: "CAMPING"
Insert: "within 500 yards of any occupied dwelling"

18. Page 6, line 8.
Following: line 7
Strike: "(B)"
Insert: "(f)"

19. Page 6, line 9.
Following: "A"
Strike: "PERMANENT"

20. Page 6, line 10.
Following: "MOORAGE;"
Strike: "OR"

21. Page 6, line 11.
Following: line 10
Strike: "(C)"
Insert: "(g)"

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22. Page 6, line 12.
Following: "ACTIVITIES"
Strike: "."
Insert: "; or"

23. Page 6, line 13.
Following: line 12
Insert: "(h) use of a streambed as a right-of-way for any purpose when water is not flowing therein."

24. Page 6, line 20.
Following: "OF"
Strike: "CLASS I AND CLASS II"
Insert: "navigable and nonnavigable"

25. Page 7, line 7.
Following: "SUBSECTION"
Strike: "(5)"
Insert: "(4)"

26. Page 8. line 1.
Following: "over"
Strike: "a"
Insert: "an artificial"

27. Page 8. line 21.
Following: "around"
Strike: "natural"
Insert: "artificial"

28. Page 8. line 22.
Following: line 21
Insert: "not owned by the landowner on whose land the portage route will be placed"

29. Page 8. line 7.
Following: "court"
Insert: ", within 30 days of the decision,"

30. Page 10, line 6.
Following: "landowner"
Insert: ", his agent, or his tenant"

31. Page 10, line 8.
Following: "landowner"
Insert: ", his agent,"

32. Page 10, line 12.
Following: "supervisor"
Insert: "or any member of the arbitration panel"

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33. Page 11, line 16.
Following: line 15
Insert: "NEW SECTION. Section 7. Land title unaffected. The provisions of [this act] and the recreational uses permitted by [section 2] do not affect the title or ownership of the surface waters, the beds, and the banks of any navigable or nonnavigable waters, or the portage routes within this state."
Renumber: subsequent sections

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Subcommittee

STATEMENT OF INTENT

HOUSE BILL 265

House Judiciary Committee

A statement of intent is required for House Bill 265 because section 2(5) directs the fish and game commission to adopt rules governing recreational use of surface waters.

In its implementation of this bill, the long-range goal of the commission must be to preserve, protect, and enhance the surface waters of this state while facilitating the public's exercise of its recreational rights on surface waters. The commission shall strive to permit broad exercise of public rights, while protecting the water resource and its ecosystem. In adopting the procedural rules required by section 2, the commission shall emphasize that in close cases the decision must be to protect the environment by restricting or continuing to restrict recreational use, since it is easier to prevent environmental degradation than it is to repair it.

In developing the rules implementing House Bill 265, the commission shall make every effort to make the process uncomplicated and clear. As provided in subsection (5)(b), the commission must issue written findings and an order whenever a request is made for restrictions on recreational use of a surface water or for the lifting of previously

imposed limitations on recreational use of a surface water. The commission may adopt rules providing for summary dismissal of requests when a substantially similar request has been received and acted upon within a brief time prior to the second or subsequent requests if, during the time period since the first request, it is unlikely that there has been a change in the situation upon which the commission based its earlier decision.

In developing the rules establishing criteria for determination upon a request made under subsections (5)(a) or (5)(b), the commission shall require that each of the following factors that is relevant to the decision must be considered in the determination:

(a) whether public use is damaging the banks and land adjacent to the water body;

(b) whether public use is damaging the property of landowners underlying or adjacent to the water body;

(c) whether public use is adversely affecting wildlife or birds;

(d) whether public use is disrupting or altering natural areas or biotic communities;

(e) whether public use is causing degradation of the water quality of the water body; and

(f) any other factors relevant to the preservation of the water body in its natural state.

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In making its decision after a request has been made for restrictions of recreational use, the commission may impose any reasonable limitation on the recreational use of surface waters including complete prohibition of a particular type of recreation, prohibition of a particular type of recreation in certain specified areas, such as within a specified distance of a residence or other structure, or in an appropriate case, prohibition of all recreation. THE COMMISSION SHALL PROHIBIT ALL RECREATION ON PRIVATE IMPOUNDMENTS WHICH HAVE BEEN LICENSED FOR A PRIVATE USE.

THE COMMISSION SHALL PROTECT THE SAFETY OF THE PUBLIC BY PROHIBITING HUNTING WITHIN A SPECIFIED DISTANCE OF OCCUPIED DWELLINGS.

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HOUSE BILL NO. 265

INTRODUCED BY REAM, MARKS

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY DEFINING LAWS RELATING TO RECREATIONAL USE OF STATE WATERS; PROHIBITING RECREATIONAL USE OF DIVERTED WATERS; RESTRICTING THE LIABILITY OF LANDOWNERS WHEN WATER IS BEING USED FOR RECREATION; ESTABLISHING THE RIGHT TO PORTAGE; PROVIDING THAT A PRESCRIPTIVE EASEMENT CANNOT BE ACQUIRED BY RECREATIONAL USE OF SURFACE WATERS; AMENDING SECTION 70-19-405, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

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

NEW SECTION. Section 1. Definitions. For purposes of [sections ~~2~~ 1 through 5], the following definitions apply:

(1) "Barrier" means an artificial obstruction located in or over a water body, restricting passage on or through the water, ~~or-a-natural-object~~ IN-OR-OVER-A-WATER-BODY which totally or effectively obstructs the recreational use of the surface water at the time of use. A barrier may include but is not limited to a bridge or fence or any other manmade obstacle to the natural flow of water ~~or-a-natural-object within-the-ordinary-high-water-mark-of-a-stream.~~

(2) "~~Class-I~~ NAVIGABLE waters" means surface waters

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that:

(a) lie within the officially recorded federal government survey meander lines thereof;

(b) flow over lands that have been judicially determined to be owned by the state by reason of application of the federal navigability test for state streambed ownership;

~~(c)--flow--through--public--lands,--WHILE--WITHIN---THE BOUNDARIES-OF-SUCH-LANDS;~~

~~(d)~~(C) are or have been capable of supporting THE FOLLOWING commercial ~~activity~~ ACTIVITIES: LOG FLOATING, TRANSPORTATION OF FURS AND SKINS, SHIPPING, COMMERCIAL GUIDING USING MULTIPERSON WATERCRAFT, PUBLIC TRANSPORTATION, OR THE TRANSPORTATION OF MERCHANDISE, AS THESE ACTIVITIES HAVE BEEN DEFINED BY PUBLISHED JUDICIAL OPINION AS OF [THE EFFECTIVE DATE OF THIS ACT]; or

~~(e)~~(D) are or have been capable of supporting commercial activity within the meaning of the federal navigability test.

(3) "~~Class-II~~ NONNAVIGABLE waters" means all surface waters that are not ~~class-I~~ NAVIGABLE waters.

(4) "COMMISSION" MEANS THE FISH AND GAME COMMISSION PROVIDED FOR IN 2-15-3402.

~~(4)~~(5) "Department" means the department of fish, wildlife, and parks provided for in 2-15-3401.

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

(a) an irrigation or drainage canal or ditch;

(b) an industrial, municipal, or domestic water system;

(c) a flood control channel; or

(d) a hydropower inlet and discharge facility.

(7) "OCCUPIED DWELLING" MEANS A BUILDING USED FOR A HUMAN DWELLING AT LEAST ONCE A YEAR.

~~(6)~~~~(7)~~(8) "Ordinary high-water mark" means the line that water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it. Characteristics of the area below the line include, when appropriate, but are not limited to ~~diminished terrestrial vegetation or lack of agricultural crop value~~ DEPRIVATION OF THE SOIL OF SUBSTANTIALLY ALL TERRESTRIAL VEGETATION AND DESTRUCTION OF ITS AGRICULTURAL VEGETATIVE VALUE. A FLOOD PLAIN ADJACENT TO SURFACE WATERS IS NOT CONSIDERED TO LIE WITHIN THE SURFACE WATERS' HIGH-WATER MARKS.

~~(7)~~~~(8)~~(9) ~~(a)~~ "Recreational use" means with respect to ~~class I~~ SURFACE waters: fishing, hunting, swimming (EXCEPT WITHIN 100 YARDS OF ANY OCCUPIED DWELLING), HIKING, floating in small craft or other flotation devices, boating in

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motorized craft unless otherwise prohibited or regulated by law, or craft propelled by oar or paddle, OTHER WATER-RELATED PLEASURE ACTIVITIES, and related unavoidable or incidental uses~~,-within-the-ordinary-high-water--mark--of the-waters~~.

~~(b)--Recreational--use--means--with-respect-to-class-II waters-all-of-the--uses--set--forth--in--subsection--(7)(a), except--that--it-does-not-include,-without-permission-of-the landowner:~~

~~(i)--overnight-camping;~~

~~(ii)-big-game-hunting-or-upland-bird-hunting;~~

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

~~(iv)-the--placement--or--creation--of--any-permanent-or semipermanent-object-such-as-a-permanent-duck-blind-or--boat moorage;-or~~

~~(v)--other---activities---which---are---not---primarily water-related-pleasure-activities.~~

~~(8)~~(9)(10) "Supervisors" means the board of supervisors of a soil conservation district, the directors of a grazing district, or the board of county commissioners if a request pursuant to [section 3(3)(b)] is not within the boundaries of a conservation district or if the request is refused by the board of supervisors of a soil conservation district or

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the directors of a grazing district.

~~(10)~~(11) "SURFACE WATER" MEANS, FOR THE PURPOSE OF DETERMINING THE PUBLIC'S ACCESS FOR RECREATIONAL USE, A NATURAL WATER BODY, ITS BED, AND ITS BANKS UP TO THE ORDINARY HIGH-WATER MARK.

NEW SECTION. Section 2. Recreational use permitted -- limitations -- exceptions. (1) Except as provided in ~~subsection--(3)~~ SUBSECTIONS (2) THROUGH (4), all ~~class-I~~ SURFACE waters that are capable of recreational use ~~as defined--in-section-1(7)(a),-including-the-beds-underlying them-and-the-banks-up-to-the-ordinary-high-water--mark,~~ may be so used by the public without regard to the ownership of the land underlying the waters.

~~(2)--Except-as-provided-in-subsection-(3),-all-class-II waters-that-are-capable-of-recreational-use--as--defined--in section--1(7)(b),--including--the-beds-underlying-them-and the-banks-up-to-the-ordinary-high-water-mark,-may-be-so-used by-the-public-without-regard-to-the-ownership--of--the--land underlying--them,--except--that--recreational--use--does-not include-those-activities-excluded-in-section-1(7)(b).~~

~~(3)~~(2) The right of the public to make recreational use of surface waters does not include ~~the-right-to-make recreational--use--of--waters~~, WITHOUT PERMISSION OF THE LANDOWNER:

(a) THE OPERATION OF ALL-TERRAIN VEHICLES OR OTHER

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MOTORIZED VEHICLES NOT PRIMARILY DESIGNED FOR OPERATION UPON THE WATER;

(B) THE RECREATIONAL USE OF SURFACE WATERS in a stock pond or other PRIVATE impoundment fed by an intermittently flowing natural watercourse; ~~or~~

~~(b)~~(C) THE RECREATIONAL USE OF WATERS while diverted away from a natural water body for beneficial use pursuant to Title 85, chapter 2, part 2 or 3; OR

(D) BIG GAME HUNTING~~.~~;

~~(3)--THE-RIGHT-OF-THE-PUBLIC-TO-MAKE--RECREATIONAL--USE OF--CLASS--II-WATERS-DOES-NOT-INCLUDE,-WITHOUT-PERMISSION-OF THE-LANDOWNER.~~

~~(A)~~(E) OVERNIGHT CAMPING WITHIN 500 YARDS OF ANY OCCUPIED DWELLING;

~~(B)~~(F) THE PLACEMENT OR CREATION OF ANY PERMANENT OR SEMIPERMANENT OBJECT, SUCH AS A ~~PERMANENT~~ DUCK BLIND OR BOAT MOORAGE; OR

~~(C)~~(G) OTHER ACTIVITIES WHICH ARE NOT PRIMARILY WATER-RELATED PLEASURE ACTIVITIES~~.~~; OR

(H) USE OF A STREAMBED AS A RIGHT-OF-WAY FOR ANY PURPOSE WHEN WATER IS NOT FLOWING THEREIN.

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

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~~(5)~~(4) 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~~ NAVIGABLE AND NONNAVIGABLE 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; AND

(B) PROVISIONS REQUIRING THE ISSUANCE OF WRITTEN FINDINGS AND A DECISION WHENEVER A REQUEST IS MADE PURSUANT TO THE RULES ADOPTED UNDER SUBSECTION ~~(5)~~(4)(A).

~~(5)~~~~(6)~~(5) The provisions of this section do not affect any rights of the public with respect to state-owned lands that are school trust lands or any rights of lessees of such lands ~~under-lease-on-[the-effective-date-of-this-act]~~.

NEW SECTION. Section 3. Right to portage -- establishment of portage route. (1) A member of the public making recreational use of surface waters may, above the ordinary high-water mark, portage around barriers in the least intrusive manner possible, avoiding damage to the

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landowner's land and violation of his rights.

(2) A landowner may create barriers across streams for purposes of land or water management or to establish land ownership as otherwise provided by law. If a landowner erects a ~~barrier~~ STRUCTURE pursuant to a design approved by the department and the ~~barrier--is--designed--not--to--and~~ STRUCTURE does not interfere with the public's use of the surface waters, the public may not go above the ordinary high-water mark to portage around the ~~barrier~~ STRUCTURE.

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

(b) A portage route may be established when either a landowner or a member of the recreating public submits a request to the supervisors that such a route be established.

(c) Within 45 days of the receipt of a request, the supervisors shall, in consultation with the landowner and a representative of the department, examine and investigate the barrier and the adjoining land to determine a reasonable and safe portage route.

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

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(e) The cost of establishing the portage route around artificial barriers must be borne by the involved landowner, except for the construction of notification signs of such route, which is the responsibility of the department. The cost of establishing a portage route around ~~natural~~ ARTIFICIAL barriers NOT OWNED BY THE LANDOWNER ON WHOSE LAND THE PORTAGE ROUTE WILL BE PLACED must be borne by the department.

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

(g) If either the landowner or recreationist disagrees with the route described in subsection (3)(e), he may petition the district court, WITHIN 30 DAYS OF THE DECISION, to name a three-member arbitration panel. The panel must consist of an affected landowner, a member of an affected recreational group, and a member selected by the two other members of the arbitration panel. The arbitration panel may accept, reject, or modify the supervisors' finding under subsection (3)(d).

(h) The determination of the arbitration panel is

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

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

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

NEW SECTION. Section 4. Restriction on liability of landowner and supervisor. (1) A person who makes recreational use of surface waters flowing over or through land in the possession or under the control of another, pursuant to [section 2], or land while portaging around or over barriers or while portaging or using portage routes, pursuant to [section 3], does not have the status of invitee or licensee and is owed no duty by a landowner, HIS AGENT, OR HIS TENANT other than that provided in subsection (2).

(2) A landowner, HIS AGENT, or tenant is liable to a person making recreational use of waters or land described in subsection (1) only for an act or omission that constitutes willful or wanton misconduct.

(3) No supervisor OR ANY MEMBER OF THE ARBITRATION PANEL who participates in a decision regarding the placement

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of a portage route is liable to any person who ~~while--making recreational--use--of--the--surface--waters-is-injured-while using~~ IS INJURED OR WHOSE PROPERTY IS DAMAGED BECAUSE OF PLACEMENT OR USE OF the portage route except for an act or omission that constitutes willful and wanton misconduct.

NEW SECTION. Section 5. Prescriptive easement not acquired by recreational use of surface waters. (1) A prescriptive easement is a right to use the property of another that is acquired by open, exclusive, notorious, hostile, adverse, continuous, and uninterrupted use for a period of 5 years.

(2) A prescriptive easement cannot be acquired through:

(A) recreational use of surface waters, including:

(I) the streambeds underlying them; ~~and~~

(II) the banks up to the ordinary high-water mark~~,~~; or ~~of~~

(III) ANY portage ~~routes~~ over and around barriers; OR

(B) THE ENTERING OR CROSSING OF PRIVATE PROPERTY TO REACH SURFACE WATERS.

Section 6. Section 70-19-405, MCA, is amended to read:

"70-19-405. Title by prescription. ~~Occupancy~~ Except as provided in [section 5], occupancy for the period prescribed by this chapter as sufficient to bar an action for the recovery of the property confers a title thereto,

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denominated a title by prescription, which is sufficient against all."

NEW SECTION. SECTION 7. LAND TITLE UNAFFECTED. THE PROVISIONS OF [THIS ACT] AND THE RECREATIONAL USES PERMITTED BY [SECTION 2] DO NOT AFFECT THE TITLE OR OWNERSHIP OF THE SURFACE WATERS, THE BEDS AND BANKS OF ANY NAVIGABLE OR NONNAVIGABLE WATERS, OR THE PORTAGE ROUTES WITHIN THIS STATE.

NEW SECTION. Section 8. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 9. Applicability. Sections 5 and 6 apply only to a prescriptive easement that has not been perfected prior to [the effective date of this act].

NEW SECTION. Section 10. Effective date. This act is effective on passage and approval.

-End-

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excluded lakes

SENATE JUDICIARY SUBCOMMITTEE ON STREAM ACCESS

Issues of Deadlock

carried

1. Prohibit all recreational use on non-navigable streams without the consent of the landowner.

failed & then part passed

Definition of lake - prohibit all recreational uses on lakes within 100 yards of an occupied dwelling.

3. Statement in the bill that natural barriers and portage around them is not addressed. Carried as amended

4. a. Method of determining portage route - as in bill or only through permission, purchase, or condemnation.

carried

b. Barriers subsequent to effective date of act - landowner must provide portage between low and high water marks.

Failed

5. Deletion of hunting as a recreational use.

Failed

6. Insertion, p. 6, line 12, "as defined in (section 1[8]).

Failed

7. Remove "other water-related pleasure activities" from definition of recreational use.

Failed

8. Definition of navigable - remove subsections (c) and (d).

9. Discussion topic -- Whether to include hiking and swimming in recreational use.

reinserted Class I + II

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DEADLOCK ISSUE #1 - AMENDMENT TO GREY BILL:

1. Page 6, line 22.
Following: line 21
Insert: "(3) The public has no right to make recreational use of nonnavigable waters without permission of the landowner."
Renumber: subsequent subsections

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DEADLOCK ISSUE #2 - AMENDMENTS TO GREY BILL:

1. Page 2, line 1.
Following: Page 1, line 25.
Insert: ", other than lakes,"

2. Page 2, line 21.
Following: "NAVIGABLE waters"
Insert: ", except lakes"

3. Page 3, line 9.
Following: line 8
Insert: "(7) "Lake" means a body of water where the surface water is retained by either natural or artificial means and the natural flow of water is substantially impeded."

4. Page 6, line 22.
Following: line 21
Insert: "(3) The right of the public to make recreational use of lakes does not include any use within 100 yards of an occupied dwelling, without the permission of the landowner."
Renumber: subsequent subsections

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DEADLOCK ISSUE #3 - AMENDMENT TO GREY BILL:

1. Page 10, line 8.
Following: line 7
Insert: "(4) Nothing contained in [this act] addresses the issue of natural barriers or portage around said barriers."

and nothing contained in this act makes such portage ~~legal~~ lawful or unlawful

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DEADLOCK ISSUE #4 - AMENDMENTS TO GREY BILL:

1. Page 8, line 2 through page 10, line 7.
Following: "(2)" on line 2
Strike: remainder of line 2 through page 10, line 7, in its entirety
Insert: "Portage routes [around existing barriers] may only be acquired by:

(a) landowner permission;

(b) purchase; or

(c) eminent domain, as provided in Article II, section 29, of the Montana constitution.

(3) If a landowner places an artificial barrier across a water body after [the effective date of this act], he must provide portage between the low and high water marks."

2. Page 10, line 8.
Following: line 7
Strike: "(j)"
Insert: "(4)"

TECHNICAL AMENDMENTS TO CONFORM BILL:

1. Page 9, line 20 through line 1 on page 5.
Strike: subsection 10 in its entirety
Renumber: subsequent subsection

2. Page 10, line 12.
Following: "landowner"
Strike: "and supervisor"

3. Page 10, line 24 through line 5 on page 11.
Strike: subsection (3) in its entirety

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DEADLOCK ISSUE #5 - AMENDMENTS TO GREY BILL:

1. Page 3, line 23.
Following: "fishing,"
Strike: "hunting,"

2. Page 6, line 9.
Following: "(D)"
Strike: "BIG GAME"

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DEADLOCK ISSUES #6 AND #7 - AMENDMENTS TO GREY BILL:

1. Page 4, lines 2 and 3.
Following: "paddle," on line 2
Strike: remainder of line 2 through "ACTIVITIES," on line 3

2. Page 6, line 19.
Following: "ACTIVITIES"
Insert: "as defined in [section 1(9)]"

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DEADLOCK ISSUE #8 - AMENDMENTS TO GREY BILL:

1. Page 2, line 3.
Following: "thereof;"
Insert: "or"

2. Page 2, line 7.
Following: "ownership"
Strike: ";"
Insert: "."

3. Page 2, lines 10 through 19.
Strike: subsections (c) and (D) in their entirety

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DISCUSSION TOPIC - AMENDMENT TO GREY BILL:

1. Page 3, lines 23 and 24.
Following: "hunting," on line 23
Strike: remainder of line 23 through "HIKING," on line 24

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Alliance - Waterman

ref Grey Bill

ALLIANCE PROPOSED AMENDMENTS

1. Page 1, line 25.
   Strike navigable waters
   Insert Class I

2. Page 2, line 1.
   Before that, insert "other than lakes"

3. Page 2, lines 2 & 3.
   Strike & reletter subsections.

4. Page 2, line 20.
   Insert Class II, strike nonnavigable

5. Page 2, line 21.
   Before that, insert "other than lakes"
   Insert Class III, strike nonnavigable.

6. Page 3, line 6.
   After system, insert "at the point where the waters are subjected to treatment"

7. Page 5, line 5
   After mark, insert "except lakes"

8. Page 6, line 9
   After ; insert:
   (E) OVERNIGHT CAMPING WITHIN EITHER SIGHT OF OR WITHIN 500 YARDS OF ANY OCCUPIED DWELLING;
   (F) THE PLACEMENT OR CREATION OF ANY PERMANENT STRUCTURE OR OBJECT SUCH AS A PERMANENT DUCK BLIND OR BOAT MOORAGE.

9. Page 6, lines 10-12, reinsert.

10. Page 6, line 13
    Strike (E), insert (A) and after "camping", strike remainder of sentence

11. Page 6, line 15
    Strike (F), insert (B) and after any, strike "permanent or"

12. Page 6, line 16
    After semipermanent, insert "or seasonal"
    After object strike remainder of sentence.

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13. Page 6, line 18
Strike (G), insert (C)

14. Page 6, line 20
Strike (H), insert (D)

15. Page 7, line 4
Insert "Class I and Class II"
Strike navigable and nonnavigable

16. Page 10, line 10
Insert:
(k) Nothing contained in this act addresses the issue of natural barriers or the portage around natural barriers and nothing contained in this act makes such portage legal or illegal.

17. Page 12, line 8
Insert:
NEW SECTION. Section 9. Lakes. Nothing in this act addresses the recreational use of surface waters upon lakes as such water bodies are defined in 75-7-202.

Renumber remaining sections.

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Alliance Proposed Amendments

HOUSE BILL NO. 265

INTRODUCED BY REAM, MARKS

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY DEFINING LAWS RELATING TO RECREATIONAL USE OF STATE WATERS; PROHIBITING RECREATIONAL USE OF DIVERTED WATERS; RESTRICTING THE LIABILITY OF LANDOWNERS WHEN WATER IS BEING USED FOR RECREATION; ESTABLISHING THE RIGHT TO PORTAGE; PROVIDING THAT A PRESCRIPTIVE EASEMENT CANNOT BE ACQUIRED BY RECREATIONAL USE OF SURFACE WATERS; AMENDING SECTION 70-19-405, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

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

<u>NEW SECTION.</u> Section 1. Definitions. For purposes of [sections ~~2~~ <u>1</u> through 5], the following definitions apply:

(1) "Barrier" means an artificial obstruction located in or over a water body, restricting passage on or through the water, ~~or a natural object in or over a water body~~ which totally or effectively obstructs the recreational use of the surface water at the time of use. A barrier may include but is not limited to a bridge or fence or any other manmade obstacle to the natural flow of water ~~or a natural object within the ordinary high water mark of a stream~~.

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

(a) flow over lands that have been judicially determined to be owned by the state by reason of application of the federal navigability test for state streambed ownership;

(b) are or have been capable of supporting THE FOLLOWING commercial ~~activity~~ ACTIVITIES: LOG FLOATING, TRANSPORTATION OF FURS AND SKINS, SHIPPING, COMMERCIAL GUIDING USING MULTIPERSON WATERCRAFT, PUBLIC TRANSPORTATION, OR THE TRANSPORTATION OF MERCHANDISE, AS THESE ACTIVITIES HAVE BEEN DEFINED BY PUBLISHED JUDICIAL OPINION AS OF [THE EFFECTIVE DATE OF THIS ACT]; or

(c) are or have been capable of supporting commercial activity within the meaning of the federal navigability test.

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

(4) "COMMISSION MEANS THE FISH AND GAME COMMISSION PROVIDED FOR IN 2-15-3402.

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

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

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(a) an irrigation or drainage canal or ditch;

(b) an industrial, municipal, or domestic water system at the point where the waters are subjected to treatment;

(c) a flood control channel; or

(d) a hydropower inlet and discharge facility.

(7) "OCCUPIED DWELLING" MEANS A BUILDING USED FOR A HUMAN DWELLING AT LEAST ONCE A YEAR.

~~(6)~~ (7) (8) "Ordinary high-water mark" means the line that water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it. Characteristics of the area below the line include, when appropriate, but are not limited to ~~diminished vegetation of the~~ DEPRIVATION OF THE SOIL OF SUBSTANTIALLY ALL TERRESTRIAL VEGETATION AND DESTRUCTION OF ITS AGRICULTURAL VEGETATIVE VALUE. A FLOOD PLAIN ADJACENT TO SURFACE WATERS IS NOT CONSIDERED TO LIE WITHIN THE SURFACE WATERS' HIGH-WATER MARKS.

~~(7)~~ (8) (9) ~~(a)~~ "Recreational use" means with respect to ~~waters~~ SURFACE waters: fishing, hunting swimming (EXCEPT WITHIN 100 YARDS OF ANY OCCUPIED DWELLING), HIKING, floating in small craft or other flotation devices, boating in motorized craft unless otherwise prohibited or regulated by law, or craft propelled by oar or paddle, OTHER

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WATER-RELATED PLEASURE ACTIVITIES, and related unavoidable or incidental uses~~; within the ordinary high water mark of the waters~~.

~~(b) Recreational use means with respect to class II waters all of the uses set forth in subsection (7)(a) except that it does not include, without permission of the landowner:~~

~~(i) overnight camping;~~

~~(ii) big game hunting or upland bird hunting;~~

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

~~(iv) the placement or creation of any permanent or semipermanent object such as a permanent duck blind or~~ boat ~~moorage; or~~

~~(v) other activities which are not primarily water-related pleasure activities.~~

~~(8)(9)~~ ~~(10)~~ "Supervisors" means the board of supervisors of a soil conservation district, the directors of a grazing district, or the board of county commissioners if a request pursuant to [section 3(3)(b)] is not within the boundaries of a conservation district or if the request is refused by the board of supervisors of a soil conservation district or the directors of a grazing district.

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(10) (11) "SURFACE WATER" MEANS, FOR THE PURPOSE OF DETERMINING THE PUBLIC'S ACCESS FOR RECREATIONAL USE, A NATURAL WATER BODY, ITS BED, AND ITS BANKS UP TO THE ORDINARY HIGH-WATER MARK, EXCEPT LAKES.

NEW SECTION. Section 2. Recreational use permitted -- limitations -- exceptions. (1) Except as provided in (3) SUBSECTIONS (2) THROUGH (4), all [illegible] I SURFACE waters that are capable of recreational use as [illegible] underlying [illegible] water mark, may be so used by the public without regard to the ownership of the land underlying the waters.

(2) [illegible] II [illegible] in [illegible] and [illegible] so used [illegible] the land [illegible] does not [illegible] 1(7)(b)].

(3) (2) The right of the public to make recreational use of surface waters does not include [illegible] right to make [illegible], WITHOUT PERMISSION OF THE LANDOWNER:

(a) THE OPERATION OF ALL-TERRAIN VEHICLES OR OTHER

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MOTORIZED VEHICLES NOT PRIMARILY DESIGNED FOR OPERATION UPON THE WATER;

(B) THE RECREATIONAL USE OF SURFACE WATERS in a stock pond or other PRIVATE impoundment fed by an intermittently flowing natural watercourse; ~~or~~

~~(B)~~ (C) THE RECREATIONAL USE OF WATERS while diverted away from a natural water body for beneficial use pursuant to Title 85, chapter 2, part 2 or 3; OR

(D) BIG GAME HUNTING;

(E) OVERNIGHT CAMPING WITHIN EITHER SIGHT OF OR WITHIN 500 YARDS OF ANY OCCUPIED DWELLING;

(F) THE PLACEMENT OR CREATION OF ANY PERMANENT STRUCTURE OR OBJECT SUCH AS A PERMANENT DUCK BLIND OR BOAT MOORAGE.

(3) THE RIGHT OF THE PUBLIC TO MAKE RECREATIONAL USE OF CLASS II WATERS DOES NOT INCLUDE, WITHOUT PERMISSION OF THE LANDOWNER:

(A) OVERNIGHT CAMPING;

(B) THE PLACEMENT OR CREATION OF ANY SEMIPERMANENT OR SEASONAL OBJECT; OR

(C) OTHER ACTIVITIES WHICH ARE NOT PRIMARILY WATER-RELATED PLEASURE ACTIVITIES; OR

(D) USE OF A STREAMBED AS A RIGHT-OF-WAY FOR ANY PURPOSE WHEN WATER IS NOT FLOWING THEREIN.

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

~~(3)~~ (4) 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; AND

(B) PROVISIONS REQUIRING THE ISSUANCE OF WRITTEN FINDINGS AND A DECISION WHENEVER A REQUEST IS MADE PURSUANT TO THE RULES ADOPTED UNDER SUBSECTION ~~(3)~~ (4)(A).

~~(3)(6)~~ (5) The provisions of this section do not affect any rights of the public with respect to state-owned lands that are school trust lands or any rights of lessees of such lands ~~under lease on the effective date of this act~~.

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

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(2) A landowner may create barriers across streams for purposes of land or water management or to establish land ownership as otherwise provided by law. If a landowner erects a ~~dam~~ STRUCTURE pursuant to a design approved by the department and the ~~dam~~ STRUCTURE does not interfere with the public's use of the surface waters, the public may not go above the ordinary high-water mark to portage around the ~~dam~~ STRUCTURE.

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

(b) A portage route may be established when either a landowner or a member of the recreating public submits a request to the supervisors that such a route be established.

(c) Within 45 days of the receipt of a request, the supervisors shall, in consultation with the landowner and a representative of the department, examine and investigate the barrier and the adjoining land to determine a reasonable and safe portage route.

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

(e) The cost of establishing the portage route aro

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artificial barriers must be borne by the involved landowner, except for the construction of notification signs of such route, which is the responsibility of the department. The cost of establishing a portage route around ~~NATURAL~~ ARTIFICIAL barriers NOT OWNED BY THE LANDOWNER ON WHOSE LAND THE PORTAGE ROUTE WILL BE PLACED must be borne by the department.

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

(g) If either the landowner or recreationist disagrees with the route described in subsection (3)(e), he may petition the district court, WITHIN 30 DAYS OF THE DECISION, to name a three-member arbitration panel. The panel must consist of an affected landowner, a member of an affected recreational group, and a member selected by the two other members of the arbitration panel. The arbitration panel may accept, reject, or modify the supervisors' finding under subsection (3)(d).

(h) The determination of the arbitration panel is binding upon the landowner and upon all parties that use the water for which the portage is provided. Costs of the arbitration panel, computed as for jurors' fees under

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3-15-201, shall be borne by the contesting party or parties; all other parties shall bear their own costs.

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

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

(k) Nothing contained in this act addresses the issue of natural barriers or the portage around natural barriers and nothing contained in this act makes such portage legal or illegal.

NEW SECTION. Section 4. Restriction on liability of landowner and supervisor. (1) A person who makes recreational use of surface waters flowing over or through land in the possession or under the control of another, pursuant to [section 2], or land while portaging around or over barriers or while portaging or using portage routes, pursuant to [section 3], does not have the status of invitee or licensee and is owed no duty by a landowner, HIS AGENT, OR HIS TENANT other than that provided in subsection (2).

(2) A landowner, HIS AGENT, or tenant is liable to a person making recreational use of waters or land described in subsection (1) only for an act or omission that constitutes willful or wanton misconduct.

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(3) No supervisor OR ANY MEMBER OF THE ARBITRATION PANEL who participates in a decision regarding the placement of a portage route is liable to any person who ~~WHILE/ANY~~ ~~PERSON/IS/INJURED/OR/WHOSE/PROPERTY/IS/DAMAGED~~ IS INJURED OR WHOSE PROPERTY IS DAMAGED BECAUSE OF PLACEMENT OR USE OF the portage route except for an act or omission that constitutes willful and wanton misconduct.

NEW SECTION. Section 5. Prescriptive easement not acquired by recreational use of surface waters. (1) A prescriptive easement is a right to use the property of another that is acquired by open, exclusive, notorious, hostile, adverse, continuous, and uninterrupted use for a period of 5 years.

(2) A prescriptive easement cannot be acquired through:

(A) recreational use of surface waters, including:

(I) the streambeds underlying them; ~~AND~~

(II) the banks up to the ordinary high-water mark; or ~~OF~~

(III) ANY portage ~~ROUTES~~ over and around barriers; OR

(B) THE ENTERING OR CROSSING OF PRIVATE PROPERTY TO REACH SURFACE WATERS.

Section 6. Section 70-19-405, MCA, is amended to read:

"70-19-405. Title by prescription. ~~Occupancy~~ Except as provided in [section 5], occupancy for the period

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prescribed by this chapter as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all."

NEW SECTION. SECTION 7. LAND TITLE UNAFFECTED. THE PROVISIONS OF [THIS ACT] AND THE RECREATIONAL USES PERMITTED BY [SECTION 2] DO NOT AFFECT THE TITLE OR OWNERSHIP OF THE SURFACE WATERS, THE BEDS AND BANKS OF ANY NAVIGABLE OR NONNAVIGABLE WATERS, OR THE PORTAGE ROUTES WITHIN THIS STATE.

NEW SECTION. Section 8. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 9. Lakes. Nothing in this act addresses the recreational use of surface waters of lakes as such water bodies are defined in 75-7-202.

NEW SECTION. Section 10. Applicability. Sections 5 and 6 apply only to a prescriptive easement that has not been perfected prior to [the effective date of this act].

NEW SECTION. Section 11. Effective date. This act is effective on passage and approval.

-End-

7331R

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 6
DATE 032785
BILL NO. HB 265

Amendments to HB 265, Grey Bill

1. Page 1, line 25.
Following: "means"
Strike: "surface waters"
Insert: "rivers and streams"

2. Page 2, line 7.
Following: "ownership;"
Insert: "or"

3. Page 2, lines 10 through 19.
Following: "(C)"
Strike: remainder of line 10 through "test" on line 19
Insert: "have been historically used for floating in canoes, kayaks, or multiperson watercraft"

4. Page 2, line 20.
Following: "all"
Strike: "surface"

5. Page 2, line 21.
Following: line 20
Strike: "waters"
Insert: "rivers and streams"

6. Page 2, line 22.
Following: line 21
Insert: "(4) "Class A waters" means all nonnavigable rivers and streams including any lakes or reservoirs located therein, regardless of whether the lakes or reservoirs are navigable.

(5) "Class B waters" means all navigable rivers and streams, including any lakes or reservoirs located therein, except those waters specifically included as Class C waters.

(6) "Class C waters" means:

(a) the main stem of the:

(i) Yellowstone river;

(ii) Missouri river;

(iii) Flathead river;

(iv) Kootenai river;

(v) Big Horn river; and

(b) any lake or reservoir located in a river enumerated in subsection (a)."
Renumber: subsequent subsections

7. Page 3, line 22.
Following: "to"
Insert: ":"

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1 of 9

8. Page 3, line 23.
Following: "~~Class-I~~"
Strike: "SURFACE"
Insert: "Class C"
Following: "fishing"
Insert: "below the ordinary high-water mark"
Following: "fishing,"
Insert: "waterfowl"
Following: "hunting,"
Insert: "big game hunting with a long bow or shotgun except within 500 yards of any occupied dwelling or other structure impounding domestic livestock or used for agricultural purposes,"

9. Page 3, line 24.
Following: "WITHIN"
Strike: "100"
Insert: "300"
Following: "HIKING"
Insert: "below the ordinary high-water mark"

10. Page 4, lines 2 and 3.
Following: "paddle," on line 2.
Strike: remainder of line 2 through "ACTIVITIES," on line 3
Insert: "day camping below the ordinary high-water mark except within 500 yards of any occupied dwelling, any use allowed on Class A or Class B waters,"

11. Page 4, line 4.
Following: "uses"
Insert: "of the land below the ordinary high-water mark when such use is necessary to accomplish a permitted use or for purposes of safety;"

12. Page 4, line 5.
Following: line 4
Insert: "(b) Class B waters: boating in craft propelled by oar or paddle, swimming except within 300 yeards of an occupied dwelling, hiking below the ordinary high water mark, fishing where permitted by 87-2-305, and any use of the land underlying the water when such use is temporarily necessary to accomplish a permitted use or for purposes of safety; and
(c) Class A waters: floating in small craft or other floatation devices, fishing from the surface of the water, and any use of the land underlying the water when such use is temporarily necessary for purposes of safety"

angling statute

13. Page 5, lines 2 through 5.
Strike: subsection (11) in its entirety.

A. P. 6, lines 4+5.
14. Page 6, line 9,
Following: "HUNTING"
Insert: " except as provided for on Class C waters"

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15. Page 6, line 19.
Following: "ACTIVITIES"
Insert: "as determined by the commission"

16. Page 8, lines 4 through 9.
Following: "law." on line 4
Strike: remainder of line 4 through "STRUCTURE." on line 9

17. Page 8, line 10.
Following: "(a)"
Strike: "A"
Insert: "An exclusive"
Following: "route"
Insert: "above the ordinary high-water mark"

18. Page 8, line 12.
Following: "landowner's"
Strike: "land"
Insert: "property"

19. Page 8, line 15.
Following: "(b)"
Strike: "A"
Insert: "The exclusive"
Following: "route"
Insert: ", referred to in subsection (a),"

20. Page 8, line 22.
Following: "route"
Insert: "when one is determined by the supervisors to be necessary in the interests of public health or safety, or for the protection of public or private property."

21. Page 8, line 24.
Following: "Supervisors"
Insert: "in consultation with the department"
Following: "written"
Strike: "finding of"
Insert: "recommendation concerning whether a portage route is needed, and"

22. Page 8, line 25.
Following: "route"
Insert: "if one is determined necessary"

23. Page 9, line 1.
Following: "(e)"
Strike: "The"
Insert: "Where the landowner agrees to the establishment of the recommended exclusive portage route, the"

24. Page 9, line 2.
Following: "barriers"
Insert: "owned by the landowner that are constructed after [the effective date of this act]"

SENATE JUDICIARY COMMITTEE
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DATE 032785
SB 365

25. Page 9, line 5.
Following: "establishing"
Strike: "a"
Insert: "other"
Following: "portage"
Strike: "route"
Insert: "routes"

26. Page 9, line 9.
Following: line 8
Insert: "(f) where ~~the landowner refuses~~ to agree to the establishment of the recommended exclusive portage route around an artificial barrier that the commission determines constitutes a condition dangerous to public health or safety, the department may condemn an easement for such a route. The cost of establishing such a route must be borne by the department, including the construction and maintenance of notification signs."
Renumber: ~~subsequent~~ subsections

27. Page 9, line 16 through page 10, line 7.
Strike: subsections (g), (h), and (i) in their entirety
Renumber: subsequent subsection

28. Page 12, line 9
Following: line 8
Insert: "NEW SECTION. Section 8. Petition for reclassification. (1) Upon receipt of a petition from 100 persons for reclassification of a river or stream from Class B to Class C, the department shall conduct hearings on the petition. The department shall take testimony on the proposed reclassification and make findings. The department shall make a recommendation to the legislature if it finds that a reclassification is proper. Only the legislature may make the reclassification.

(2) The department may adopt rules prescribing the form and content of petitions."
Renumber: subsequent sections

AMEN/hm/HB 265 Grey

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 7
DATE 032785
BILL NO. HB 265

Crippen

HOUSE BILL NO. 265

INTRODUCED BY REAM, MARKS

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY DEFINING LAWS RELATING TO RECREATIONAL USE OF STATE WATERS; PROHIBITING RECREATIONAL USE OF DIVERTED WATERS; RESTRICTING THE LIABILITY OF LANDOWNERS WHEN WATER IS BEING USED FOR RECREATION; ESTABLISHING THE RIGHT TO PORTAGE; PROVIDING THAT A PRESCRIPTIVE EASEMENT CANNOT BE ACQUIRED BY RECREATIONAL USE OF SURFACE WATERS; AMENDING SECTION 70-19-405, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

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

NEW SECTION. Section 1. Definitions. For purposes of [sections ~~2~~ 1 through 5], the following definitions apply:

(1) "Barrier" means an artificial obstruction located in or over a water body, restricting passage on or through the water, ~~or a natural object~~ IN OR OVER A WATER BODY which totally or effectively obstructs the recreational use of the surface water at the time of use. A barrier may include but is not limited to a bridge or fence or any other manmade obstacle to the natural flow of water ~~or a natural object within the ordinary high water mark of a stream~~.

(2) "~~Class I~~ NAVIGABLE waters" means ~~surface waters~~ rivers and streams

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DATE 032785

that:

(a) lie within the officially recorded federal government survey meander lines thereof;

(b) flow over lands that have been judicially determined to be owned by the state by reason of application of the federal navigability test for state streambed ownership; or

~~(c) flow through public lands, WHERE WITHIN THE BOUNDARIES OF SUCH LANDS,~~

~~(d)~~ (C) ~~are or have~~ been capable ~~of~~ supporting THE FOLLOWING ~~commercial activity~~ ACTIVITIES: LOG FLOATING, TRANSPORTATION OF FURS AND SKINS, ~~SHIPPING, COMMERCIAL GUIDING USING MULTIPERSON WATERCRAFT,~~ PUBLIC TRANSPORTATION, OR THE TRANSPORTATION OF MERCHANDISE, AS THESE ACTIVITIES HAVE BEEN DEFINED BY PUBLISHED JUDICIAL OPINION AS OF [THE EFFECTIVE DATE OF THIS ACT]; or

~~(e)~~ (D) ~~are or have been capable of supporting commercial activity within the meaning of the federal navigability test.~~ (C) have been commonly used for floating in canoes, kayaks, or multiperson watercraft.

(3) "~~Class II~~ NONNAVIGABLE waters" means all ~~surface~~ waters that are not ~~class I~~ NAVIGABLE ~~waters.~~ rivers and streams.

(4) "COMMISSION" MEANS THE FISH AND GAME COMMISSION PROVIDED FOR IN 2-15-3402.

~~(4)~~ (5) "Department" means the department of fish, wildlife, and parks provided for in 2-15-3401.

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

(a) an irrigation or drainage canal or ditch;

(b) an industrial, municipal, or domestic water system;

(c) a flood control channel; or

(d) a hydropower inlet and discharge facility.

(7) "OCCUPIED DWELLING" MEANS A BUILDING USED FOR A HUMAN DWELLING AT LEAST ONCE A YEAR.

~~(6)~~~~(7)~~(8) "Ordinary high-water mark" means the line that water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it. Characteristics of the area below the line include, when appropriate, but are not limited to ~~diminished terrestrial vegetation or lack of agricultural crop value~~ DEPRIVATION OF THE SOIL OF SUBSTANTIALLY ALL TERRESTRIAL VEGETATION AND DESTRUCTION OF ITS AGRICULTURAL VEGETATIVE VALUE. A FLOOD PLAIN ADJACENT TO SURFACE WATERS IS NOT CONSIDERED TO LIE WITHIN THE SURFACE WATERS' HIGH-WATER MARKS.

~~(7)~~~~(8)~~(9) ~~(a)~~ "Recreational use" means with respect to ~~class I~~ CLASS C ~~SURFACE~~ waters: fishing, hunting, swimming (EXCEPT WITHIN ~~100~~ 300 YARDS OF ANY OCCUPIED DWELLING), HIKING, floating in small craft or other flotation devices, boating in

big game hunting with a long bow or shotgun except within 300 yards of any occupied dwelling or other structure normally and reasonably used for human habitation

below the ordinary high water mark

motorized craft unless otherwise prohibited or regulated by law, or craft propelled by oar or paddle, ~~OTHER WATER-RELATED PLEASURE ACTIVITIES~~ day camping below the ordinary high-water mark except within 500 yards of any occupied dwelling; any use of land below the ordinary high-water mark of Class A or Class B waters, or related unavoidable or incidental uses ~~within the ordinary high-water mark of the waters~~ such use is necessary to accomplish a permitted use or for purposes of safety.

~~(b) Recreational use means with respect to class II waters all of the uses set forth in subsection (7)(a), except that it does not include, without permission of the landowner:~~

~~(i) overnight camping;~~

~~(ii) big game hunting or upland bird hunting;~~

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

~~(iv) the placement or creation of any permanent or semipermanent object such as a permanent duck blind or boat moorage; or~~

~~(v) other activities which are not primarily water related pleasure activities.~~

~~(8)~~(9)(10) "Supervisors" means the board of supervisors of a soil conservation district, the directors of a grazing district, or the board of county commissioners if a request pursuant to [section 3(3)(b)] is not within the boundaries of a conservation district or if the request is refused by the board of supervisors of a soil conservation district or

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the directors of a grazing district.

~~(10)~~(11) "SURFACE WATER" MEANS, FOR THE PURPOSE OF DETERMINING THE PUBLIC'S ACCESS FOR RECREATIONAL USE, A NATURAL WATER BODY, ITS BED, AND ITS BANKS UP TO THE ORDINARY HIGH-WATER MARK.

NEW SECTION. Section 2. Recreational use permitted -- limitations -- exceptions. (1) Except as provided in subsection--~~(3)~~ SUBSECTIONS (2) THROUGH (4), all ~~class I~~ SURFACE waters that are capable of recreational use ~~as defined in section 1(7)(a), including the beds underlying them and the banks up to the ordinary high-water mark,~~ may be so used by the public without regard to the ownership of the land underlying the waters.

~~(2) Except as provided in subsection (3), all class II waters that are capable of recreational use as defined in section 1(7)(b), including the beds underlying them and the banks up to the ordinary high-water mark, may be so used by the public without regard to the ownership of the land underlying them, except that recreational use does not include those activities excluded in section 1(7)(b).~~

~~(3)~~(2) The right of the public to make recreational use of surface waters does not include ~~the right to make recreational use of waters~~, WITHOUT PERMISSION OF THE LANDOWNER:

(a) THE OPERATION OF ALL-TERRAIN VEHICLES OR OTHER

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MOTORIZED VEHICLES NOT PRIMARILY DESIGNED FOR OPERATION UPON THE WATER;

(B) THE RECREATIONAL USE OF SURFACE WATERS in a stock pond or other PRIVATE impoundment ~~fed by an intermittently flowing~~ natural watercourse; ~~or~~

~~(b)~~(C) THE RECREATIONAL USE OF WATERS while diverted away from a natural water body for beneficial use pursuant to Title 85, chapter 2, part 2 or 3; OR

(D) BIG GAME HUNTING~~;~~, except as provided for on Class C waters;

~~(3)--THE-RIGHT-OF-THE-PUBLIC-TO-MAKE--RECREATIONAL--USE OF--CLASS--II-WATERS-DOES-NOT-INCLUDE,-WITHOUT-PERMISSION-OF THE-LANDOWNER:~~

~~(A)~~(E) OVERNIGHT CAMPING WITHIN 500 YARDS OF ANY OCCUPIED DWELLING;

~~(B)~~(F) THE PLACEMENT OR CREATION OF ANY PERMANENT OR SEMIPERMANENT OBJECT, SUCH AS A PERMANENT DUCK BLIND OR BOAT MOORAGE; OR

~~(c)~~(G) OTHER ACTIVITIES WHICH ARE NOT PRIMARILY WATER-RELATED PLEASURE ACTIVITIES~~;~~; OR as determined by the commission.

(H) USE OF A STREAMBED AS A RIGHT-OF-WAY FOR ANY PURPOSE WHEN WATER IS NOT FLOWING THEREIN.

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

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{5}(4) 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~~ NAVIGABLE AND NONNAVIGABLE 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; AND

(B) PROVISIONS REQUIRING THE ISSUANCE OF WRITTEN FINDINGS AND A DECISION WHENEVER A REQUEST IS MADE PURSUANT TO THE RULES ADOPTED UNDER SUBSECTION {5}(4)(A).

~~{5}~~{6}(5) The provisions of this section do not affect any rights of the public with respect to state-owned lands that are school trust lands or any rights of lessees of such lands ~~under lease on {the effective date of this act}~~.

NEW SECTION. Section 3. Right to portage -- establishment of portage route. (1) A member of the public making recreational use of surface waters may, above the ordinary high-water mark, portage around barriers in the least intrusive manner possible, avoiding damage to the

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landowner's land and violation of his rights.

(2) A landowner may create barriers across streams for purposes of land or water management or to establish land ownership as otherwise provided by law. ~~If a landowner~~ erects a ~~barrier~~ STRUCTURE pursuant to a design approved by ~~the department and the barrier is designed not to~~ and STRUCTURE does not interfere with the public's use of the surface waters, the public may not go above the ordinary ~~high water mark to portage around the barrier~~ STRUCTURE.

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

(b) ~~A~~ portage route may be established when either a landowner or a member of the recreating public submits a request to the supervisors that such a route be established.

(c) Within 45 days of the receipt of a request, the supervisors shall, in consultation with the landowner and a representative of the department, examine and investigate the barrier and the adjoining land to determine a reasonable and safe portage route.

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

Where the landowner agrees to the establishment of the recommended exclusive portage route, the

(e) ~~The~~ cost of establishing the portage route around artificial barriers must be borne by the involved landowner, except for the construction of notification signs of such route, which is the responsibility of the department. The cost of establishing a portage ~~route~~ around ~~natural~~ ARTIFICIAL barriers NOT OWNED BY THE LANDOWNER ON WHOSE LAND THE PORTAGE ROUTE WILL BE PLACED must be borne by the department.

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

~~(g) If either the landowner or recreationist disagrees with the route described in subsection (3)(e), he may petition the district court~~, WITHIN 30 DAYS OF THE DECISION, to name a three-member arbitration panel. The panel must consist of an affected landowner, a member of an affected recreational group, and a member selected by the two other members of the arbitration panel. The arbitration panel may accept, reject, or modify the supervisors' finding under subsection (3)(d).

(h) The determination of the arbitration panel is

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~~binding upon the landowner~~ and upon all parties that use the water ~~for which the portage~~ is provided. ~~Costs of the arbitration panel, computed as for jurors' fees under 3-15-201, shall be borne by the contesting party or parties; all other parties shall bear their own costs.~~

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

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

NEW SECTION. Section 4. Restriction on liability of landowner and supervisor. (1) A person who makes recreational use of surface waters flowing over or through land in the possession or under the control of another, pursuant to [section 2], or land while portaging around or over barriers or while portaging or using portage routes, pursuant to [section 3], does not have the status of invitee or licensee and is owed no duty by a landowner, HIS AGENT, OR HIS TENANT other than that provided in subsection (2).

(2) A landowner, HIS AGENT, or tenant is liable to a person making recreational use of waters or land described in subsection (1) only for an act or omission that constitutes willful or wanton misconduct.

(3) No supervisor OR ANY MEMBER OF THE ARBITRATION PANEL who participates in a decision regarding the placement

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of a portage route is liable to any person who ~~while--making recreational--use--of--the--surface--waters-is-injured-while using~~ IS INJURED OR WHOSE PROPERTY IS DAMAGED BECAUSE OF PLACEMENT OR USE OF the portage route except for an act or omission that constitutes willful and wanton misconduct.

NEW SECTION. Section 5. Prescriptive easement not acquired by recreational use of surface waters. (1) A prescriptive easement is a right to use the property of another that is acquired by open, exclusive, notorious, hostile, adverse, continuous, and uninterrupted use for a period of 5 years.

(2) A prescriptive easement cannot be acquired through:

(A) recreational use of surface waters, including:

(I) the streambeds underlying them; ~~and~~

(II) the banks up to the ordinary high-water mark; or ~~of~~

(III) ANY portage ~~routes~~ over and around barriers; OR

(B) THE ENTERING OR CROSSING OF PRIVATE PROPERTY TO REACH SURFACE WATERS.

Section 6. Section 70-19-405, MCA, is amended to read:

"70-19-405. Title by prescription. ~~Occupancy~~ Except as provided in [section 5], occupancy for the period prescribed by this chapter as sufficient to bar an action for the recovery of the property confers a title thereto,

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denominated a title by prescription, which is sufficient against all."

NEW SECTION. SECTION 7. LAND TITLE UNAFFECTED. THE PROVISIONS OF [THIS ACT] AND THE RECREATIONAL USES PERMITTED BY [SECTION 2] DO NOT AFFECT THE TITLE OR OWNERSHIP OF THE SURFACE WATERS, THE BEDS AND BANKS OF ANY NAVIGABLE OR NONNAVIGABLE WATERS, OR THE PORTAGE ROUTES WITHIN THIS STATE. → See NEW SECTION ITEM (8)

NEW SECTION. Section 8. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 9. Applicability. Sections 5 and 6 apply only to a prescriptive easement that has not been perfected prior to [the effective date of this act].

NEW SECTION. Section 10. Effective date. This act is effective on passage and approval.

-End-

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 8
DATE 032785
BILL NO. HB 265

Proposed Amendments to Grey Bill HB 265

carried

1. Page 6, line 9.
Following: "HUNTING"
Strike: ";"
Insert: ": (i) on nonnavigable waters; or
(ii) by any means other than long bow or shotgun on navigable waters;"

carried

2. Page 6, line 13.
Following: "CAMPING"
Insert: "within sight of any occupied dwelling or"

carried

3. Page 6, line 14.
Following: "DWELLING"
Insert: "whichever is less"

(#1) except by long bow or shotgun when specifically authorized by the commission

AMEN/hm/HB 265

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 9
DATE 032785
BILL NO. HB 265

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secretary and chairman. Have at least 50 printed to start.)

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time 10:40 pm

NAME	YES	NO
Senator Chet Blaylock		X
Senator Bob Brown		X
Senator Bruce D. Crippen	X	
Senator Jack Galt	X	
Senator R. J. "Dick" Pinsoneault		X
Senator James Shaw	X	
Senator Thomas E. Towe		X
Senator William P. Yellowtail, Jr.		X
Vice Chairman Senator M. K. "Kermit" Daniels		X
Chairman Senator Joe Mazurek		X
	(3)	(7)

Cindy Staley
Secretary

Chairman

Motion: adopt Crippen's amendments

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 10
DATE 032785
BILL NO. HB 265

634

secretary and chairman. Have at least 50 printed to start.)

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time 10:52 pm

NAME	YES	NO
Senator Chet Blaylock	X	
Senator Bob Brown	X	
Senator Bruce D. Crippen		X
Senator Jack Galt		X
Senator R. J. "Dick" Pinsoneault		X
Senator James Shaw		X
Senator Thomas E. Towe	X	
Senator William P. Yellowtail, Jr.	X	
Vice Chairman Senator M. K. "Kermit" Daniels		X
Chairman Senator Joe Mazurek	X	
	(5)	(5)

Cindy Haley
Secretary

Chairman

Motion: adopt Towe's amendments

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 11
DATE 032785
BILL NO HB 265

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C

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time

NAME	YES	NO
Senator Chet Blaylock		X
Senator Bob Brown	X	
Senator Bruce D. Crippen	X	
Senator Jack Galt	X	
Senator R. J. "Dick" Pinsoneault	X	
Senator James Shaw	X	
Senator Thomas E. Towe		X
Senator William P. Yellowtail, Jr.		X
Vice Chairman Senator M. K. "Kermit" Daniels		X
Chairman Senator Joe Mazurek		X
	(5)	(5)

Cindy Staley
Secretary

Chairman

Motion: Crippen's motion to amend p. 5 to bail out banks

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 12
DATE 032785
BILL NO. HB 265

638

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 03.27.85 House Bill No. 265 Time 11:13 pm

NAME	YES	NO
Senator Chet Blaylock		X
Senator Bob Brown	X	
Senator Bruce D. Crippen	X	
Senator Jack Galt	X	
Senator R. J. "Dick" Pinsoneault	X	
Senator James Shaw	X	
Senator Thomas E. Towe		X
Senator William P. Yellowtail, Jr.		X
Vice Chairman Senator M. K. "Kermit" Daniels	X	
Chairman Senator Joe Mazurek		X
	(6)	(4)

Secretary Chairman

Motion: Deadlock issue #1

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE
EXH'BIT NO. 13
DATE 032785
BILL NO. HB 265

639

secretary and chairman. [illegible]

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time 11:54 am

NAME	YES	NO
Senator Chet Blaylock	X	
Senator Bob Brown	X	
Senator Bruce D. Crippen		X
Senator Jack Galt		X
Senator R. J. "Dick" Pinsoneault		X
Senator James Shaw		X
Senator Thomas E. Towe		X
Senator William P. Yellowtail, Jr.	X	
Vice Chairman Senator M. K. "Kermit" Daniels	~~X~~	X
Chairman Senator Joe Mazurek	X	
	(4)	(6)

Secretary Chairman

Motion: reinsert natural barriers in the bill

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 14
DATE 032785
BILL NO. HB 265

640

secretary and chairman. Have at least 50 printed to start.)

F

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time 12:00 pm

NAME	YES	NO
Senator Chet Blaylock	X	
Senator Bob Brown	X	
Senator Bruce D. Crippen		X
Senator Jack Galt		X
Senator R. J. "Dick" Pinsoneault	X	
Senator James Shaw		X
Senator Thomas E. Towe	X	
Senator William P. Yellowtail, Jr.	X	
Vice Chairman Senator M. K. "Kermit" Daniels	X	
Chairman Senator Joe Mazurek	X	
	(7)	(3)

Secretary Chairman

Motion: Mudlock Issue #3 as amended

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 15
DATE 032785
BILL NO. HB 265

641

secretary and chairman. Have at least 30 printed to [illegible]

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time 12:05 am

NAME	YES	NO
Senator Chet Blaylock	X	
Senator Bob Brown		X
Senator Bruce D. Crippen		X
Senator Jack Galt		X
Senator R. J. "Dick" Pinsoneault	X	
Senator James Shaw		X
Senator Thomas E. Towe	X	
Senator William P. Yellowtail, Jr.	X	
Vice Chairman Senator M. K. "Kermit" Daniels	X	
Chairman Senator Joe Mazurek	X	
	(6)	(4)

Secretary Chairman

Motion: pursuant ~~[illegible]~~ Class I & Class II (navigable and nonnavigable)

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE
EXH'BIT NO. 16
DATE 032785
BILL NO. HB 265

secretary and chairman. Have at least 30 printed to start.)

(F)

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 . Time 12:18 am

NAME	YES	NO
Senator Chet Blaylock	X	
Senator Bob Brown		X
Senator Bruce D. Crippen		X
Senator Jack Galt		X
Senator R. J. "Dick" Pinsoneault		X
Senator James Shaw	X	
Senator Thomas E. Towe	X	
Senator William P. Yellowtail, Jr.		X
Vice Chairman Senator M. K. "Kermit" Daniels		X
Chairman Senator Joe Mazurek		X
	(3)	(7)

Secretary Chairman

Motion: Adopt bill as amended

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 17
DATE 032785
BILL NO. HB 265

643

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time 12:31 am

NAME	YES	NO
Senator Chet Blaylock		X
Senator Bob Brown	X	
Senator Bruce D. Crippen	X	
Senator Jack Galt	X	
Senator R. J. "Dick" Pinsoneault	X	
Senator James Shaw	X	
Senator Thomas E. Towe		X
Senator William P. Yellowtail, Jr.		X
Vice Chairman Senator M. K. "Kermit" Daniels	X	
Chairman Senator Joe Mazurek		X
	(6)	(4)

Secretary Chairman

Motion: Deadlock Issue #4 as amended by Sen. Pinsoneault

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 18
DATE 032785
BILL NO. HB 265

644

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time 12:35 am

NAME	YES	NO
Senator Chet Blaylock		X
Senator Bob Brown	X	
Senator Bruce D. Crippen	X	
Senator Jack Galt	X	
Senator R. J. "Dick" Pinsoneault		X
Senator James Shaw	X	
Senator Thomas E. Towe		X
Senator William P. Yellowtail, Jr.		X
Vice Chairman Senator M. K. "Kermit" Daniels		X
Chairman Senator Joe Mazurek		X.
	(4)	(6)

Secretary Chairman

Motion: Qaadlock Issue #5

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 19
DATE 032785
BILL NO. HB 265

045

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 Bruce Bill No. 265 Time 12:40 am

NAME	YES	NO
Senator Chet Blaylock		X
Senator Bob Brown	X	
Senator Bruce D. Crippen	X	
Senator Jack Galt	X	
Senator R. J. "Dick" Pinsoneault		X
Senator James Shaw	X	
Senator Thomas E. Towe		X
Senator William P. Yellowtail, Jr.		X
Vice Chairman Senator M. K. "Kermit" Daniels	X	
Chairman Senator Joe Mazurek	X	
	(6)	(4)

Secretary Chairman

Motion: Deadlock Issue #6 & #7

~~Fail~~ Don't adopt

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 20
DATE 032785
BILL NO. HB 265

646

secretary and chairman. Have at least 30 [illegible]

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time 12:58 pm

NAME	YES	NO
Senator Chet Blaylock		X
Senator Bob Brown		X
Senator Bruce D. Crippen	X	
Senator Jack Galt	X	
Senator R. J. "Dick" Pinsoneault		X
Senator James Shaw	X	
Senator Thomas E. Towe		X
Senator William P. Yellowtail, Jr.		X
Vice Chairman Senator M. K. "Kermit" Daniels		X
Chairman Senator Joe Mazurek		X
	(3)	(7)

Secretary Chairman

Motion: Deadlock Issue #8

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE
EXH'BIT NO. 21
DATE 032785
BILL NO. HB 265

m1

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time 1:15 am

NAME	YES	NO
Senator Chet Blaylock	X	
Senator Bob Brown		X
Senator Bruce D. Crippen		X
Senator Jack Galt		X
Senator R. J. "Dick" Pinsoneault	X	
Senator James Shaw		X
Senator Thomas E. Towe	X	
Senator William P. Yellowtail, Jr.	X	
Vice Chairman Senator M. K. "Kermit" Daniels	X	
Chairman Senator Joe Mazurek	X	
	(6)	(4)

Secretary Chairman

Motion: Towe amendment #1 as changed

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE
EXH'BIT NO. 22
DATE 032785
BILL NO. HB 265

648

secretary and chairman. Have at least ...

N

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032785 House Bill No. 265 Time 1:25

NAME	YES	NO
Senator Chet Blaylock	X	
Senator Bob Brown	X	
Senator Bruce D. Crippen		X
Senator Jack Galt		X
Senator R. J. "Dick" Pinsoneault	X	
Senator James Shaw		X
Senator Thomas E. Towe	X	
Senator William P. Yellowtail, Jr.	X	
Vice Chairman Senator M. K. "Kermit" Daniels	X	
Chairman Senator Joe Mazurek	X	
	(7)	(3)

Secretary Chairman

Motion: BCIAA

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 23
DATE 032785
BILL NO. HB 265

STANDING COMMITTEE REPORT

March 27 19 85

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration HOUSE BILL No. 265

third reading copy (blue color)

(Senator Yellowtail)

STREAM ACCESS

Respectfully report as follows: That HOUSE BILL No. 265

be amended as follows:

1. Statement of Intent, page 3, line 9.
Following: "recreation."
Insert: "The commission shall prohibit all recreation on private impoundments that have been licensed for a private use."

2. Statement of Intent, page 3.
Following: line 9
Insert: "The commission shall protect the safety of the public by prohibiting hunting within a specified distance of occupied dwellings."

3. Page 1, line 19.
Following: "water,"
Strike: "or a natural object IN OR OVER A WATER BODY"

4. Page 1, lines 23 and 24.
Following: "water" on line 23
Strike: remainder of line 23 through "stream" on line 24

5. Page 1, line 25.
Following: "waters"
Insert: ", other than lakes,"

~~XXXXXXXX~~ DO PASS

~~XXXXXXXXXXX~~ DO NOT PASS

CONTINUED

Chairman.

6. Page 2, lines 7 and 8.
Strike: subsection (c) in its entirety
Renumber: subsequent subsections

7. Page 2, line 20.
Following: "waters"
Insert: ", except lakes"

8. Page 3, line 8.
Following: line 7
Insert: "(7) "Lake" means a body of water where the surface water is retained by either natural or artificial means and the natural flow of water is substantially impeded.

(8) "Occupied dwelling" means a building used for a human dwelling at least once a year."
Renumber: subsequent subsections

9. Page 3, line 13.
Following: "to"
Strike: "diminished"
Insert: "deprivation of the soil of substantially all"

10. Page 3, line 14.
Following: "vegetation"
Strike: "or lack of"
Insert: "and destruction of its"
Following: "agricultural"
Strike: "crop"
Insert: "vegetative"

11. Page 3, line 13.
Following: "swimming"
Insert: "(except within 100 yards of any occupied dwelling), hiking"

12. Page 3, lines 21 and 22.
Following: "paddle," on line 21
Strike: remainder of line 21 through "ACTIVITIES," on line 22

13. Page 4, lines 14 through 20.
Strike: subsection (9) in its entirety
Renumber: subsequent subsection

CONTINUED

HOUSE BILL NO. 265

14. Page 5, line 2.
Following: "THROUGH"
Strike: "(4)"
Insert: "(5)"

15. Page 5, line 23.
Following: "other"
Insert: "private"

16. Page 6, line 2.
Following: "3;"
Strike: "OR"

17. Page 6, line 3.
Following: "HUNTING"
Strike: "."
Insert: "except by long bow or shotgun when specifically authorized by the commission;"

13. Page 6, lines 4 through 6.
Strike: lines 4 through 6 in their entirety
Renumber: subsequent subsections

19. Page 6, line 7.
Following: line 6
Strike: "(A)"
Insert: "(e)"
Following: "CAMPING"
Insert: "within sight of any occupied dwelling or within 500 yards of any occupied dwelling, whichever is less"

20. Page 6, line 8.
Following: line 7
Strike: "(B)"
Insert: "(f)"

21. Page 6, line 9.
Following: "A"
Strike: "PERMANENT"

22. Page 6, line 10.
Following: "NCORAGE;"
Strike: "OR"

CONTINUED

23. Page 6, line 11.
Following: line 10
Strike: "(C)"
Insert: "(6)"

24. Page 6, line 12.
Following: "ACTIVITIES"
Strike: "."
Insert: "as defined in [section 1 (10)]; or"

25. Page 6, line 13.
Following: line 12
Insert: "(5) use of a streambed as a right-of-way for any purpose when water is not flowing therein.

(3) The public has no right to make recreational use of Class II waters without the permission of the landowner."
Renumber: subsequent subsections

26. Page 7, line 13 through line 20, page 9.
Following: "(2)" on page 7, line 13
Strike: remainder of line 13 through line 20 on page 9 in their entirety
Insert: "Portage routes around existing barriers may only be acquired by:

(a) landowner permission;

(b) purchase; or

(c) eminent domain, as provided in Article II, section 29, of the Montana constitution.

(3) If a landowner places an artificial barrier across a water body after [the effective date of this act], he must provide portage."

27. Page 9, line 21.
Following: line 20
Strike: "(3)"
Insert: "(4)"

CONTINUED

March 27 19 85

HOUSE BILL NO. 265

28. Page 9, line 24.
Following: line 23
Insert: "(5) Nothing contained in [this act] addresses the issue of natural barriers or portage around said barriers, and nothing contained in [this act] makes such portage lawful or unlawful."

29. Page 9, line 25.
Following: "landowner"
Strike: "and supervisor"

30. Page 10, line 6.
Following: "landowner"
Insert: ", his agent, or his tenant"

31. Page 10, line 8.
Following: "landowner"
Insert: ", his agent,"

32. Page 10, lines 12 through 13.
Strike: subsection (3) in its entirety

33. Page 11, line 16.
Following: line 15
Insert: "NEW SECTION. Section 7. Land title unaffected. The provisions of [this act] and the recreational uses permitted by [section 2] do not affect the title or ownership of the surface waters, the beds, and the banks of any navigable or nonnavigable waters or the portage routes within this state.

NEW SECTION. Section 8. Lakes. Nothing contained in [this act] addresses the recreational use of surface waters of lakes."
Renumber: subsequent sections

AND AS AMENDED

BE CONCURRED IN

(Statement of intent amended)

Senator Joe Mazurek, Chairman

654

Following: "road." on line 24
Insert: "(4)"
Following: "with" on line 24
Strike: remainder of line 24 through "and" on line 25

8. Page 8, line 5.
Following: line 4
Strike: "October"
Insert: "July"

9. Page 8, line 12.
Following: "on"
Strike: "October"
Insert: "July"

10. Page 8, line 14.
Following: "approval."
Insert: "The remaining provisions of this act are effective July 1, 1985."

And, as amended, be concurred in. Report adopted.

JUDICIARY (Hannah, Chairman): 4/11/85
HJR 48, introduced bill, be amended as follows:

1. Page 1, line 20.
Following: "Judges"
Insert: "and establishes the minimum salary requirements for Justices of the Peace"

2. Page 1, line 22.
Following: "bodies"
Insert: ", except for the Small Claims Court Judges, whose salaries are set by the District Judges"

3. Page 2, line 19.
Following: "increases"
Strike: "relative" through "Commission" on line 20

And, as amended, do pass. Report adopted.

REPORTS OF SELECT COMMITTEES

Conference Committee
on House Bill No. 265
Report No. 1, April 10, 1985

Mr. Speaker:

We, your Conference Committee on Senate Amendments to House Bill No. 265 met and considered:

Senate Judiciary Standing Committee Report,

Senate Committee of the Whole Amendments, Galt & Yellowtail.

We recommend as follows:

That House Bill No. 265, reference copy, be amended as follows:

1. Page 4, lines 1 and 2.
Strike: "(EXCEPT" on line 1 through "HIKING" on line 2

2. Page 4, line 6.
Following: ";"

Insert: "other water-related pleasure activities,"

3. Page 5, line 15.
Following: "MARK"
Insert: ", its bed, and its banks up to the ordinary high water mark"

And that this Conference Committee report be adopted.

For the Senate:	For the House:
Van Valkenburg, Chairman	Keyser
Yellowtail	Krueger
Galt	Mercer
	Ream

Conference Committee
on Senate Bill No. 106
Report No. 1, April 10, 1985

Mr. Speaker:

We, your Conference Committee on House Amendments to Senate Bill No. 106 met and considered:

House Amendments to Senate Bill No. 106.

We recommend as follows:

That Senate Bill No. 106, reference copy, be amended as follows:

1. Page 2, line 12.
Following: "OF"
Strike: "AFFINITY"
Insert: "consanguinity"

2. Page 3, line 25.
Following: "OF"
Strike: "AFFINITY"
Insert: "consanguinity"

And that this Conference Committee report be adopted.

For the Senate:	For the House:
Daniels, Chairman	Hannah
Lynch	Thomas
Shaw	Peck
	Rapp-Svrcek

Free Conference Committee
on Senate Bill No. 289
Report No. 1, April 11, 1985

Mr. Speaker:

We, your Free Conference Committee on Senate Bill No. 289 met and considered:

Senate Bill No. 289.

We recommend as follows:

That Senate Bill No. 289, reference copy, be amended as follows:

1. Page 2, line 18.
Following: "legislature"

Respectfully report as follows:

That said appointments be concurred in and confirmed by the Senat and that the attached resolution be adopted by the Senate.

Be concurred in and confirmed. Report adopted.

REPORTS OF SELECT COMMITTEES

Conference Committee
on House Amendments to Senate Bill No. 106
Report No. 1, April 10, 1985

Mr. President:

We, your Conference Committee on House Amendments to Senate Bill No. 106 met and considered:

House Amendments to Senate Bill No. 106.

We recommend as follows:

That Senate Bill No. 106, reference copy, be amended as follows:

1. Page 2, line 12.
Following: "OF"
Strike: "AFFINITY"
Insert: "consanguinity"

2. Page 3, line 25.
Following: "OF"
Strike: "AFFINITY"
Insert: "consanguinity"

And that this Conference Committee report be adopted.

For the Senate:	For the House:
Daniels, Chairman	Hannah, Chairman
Lynch	Thomas
Shaw	Peck
	Rapp-Svrcek

Conference Committee
on Senate Amendments to House Bill No. 265
Report No. 1, April 10, 1985

Mr. President:

We, your Conference Committee on Senate Amendments to House Bill No. 265 met and considered:

Senate Judiciary Standing Committee Report

Senate Committee of the Whole Amendments, Galt & Yellowtail

We recommend as follows:

That House Bill No. 265, reference copy, be amended as follows:

1. Page 4, lines 1 and 2.
Strike: "(EXCEPT" on line 1 through "HIKING" on line 2

2. Page 4, line 6.
Following: ";"
Insert: "other water-related pleasure activities,"

3. Page 5, line 15.
Following: "MARK"
Insert: ", its bed, and its banks up to the ordinary high water mark"

And that this Conference Committee report be adopted.

For the Senate:	For the House:
Van Valkenburg, Chairman	Keyser, Chairman
Yellowtail	Krueger
	Mercer
	Ream

MESSAGES FROM THE GOVERNOR

The Honorable William J. Norman
President of the Senate
State Capitol
Helena, Montana 59620

April 10, 1985

Dear Mr. President:

This is to inform you that I have signed Senate Bills No. 350, 353, and 447 on this date.

Sincerely,

Ted Schwinden
Governor

The Honorable William J. Norman
President of the Senate
State Capitol
Helena, Montana 59620

April 11, 1985

Dear Mr. President:

This is to inform you that I have signed Senate Bills No. 11, 184, 284, 340, and 409 on April 10, 1985.

Sincerely,

Ted Schwinden
Governor

The Honorable William J. Norman
President of the Senate
State Capitol
Helena, Montana 59620

April 10, 1985

The Honorable John Vincent
Speaker of the House
State Capitol
Helena, Montana 59620

Dear Senator Norman and Representative Vincent:

In accordance with the power vested in me as Governor by the Constitution and the laws of the State of Montana, I hereby veto Senate Bill No. 205, "AN ACT CLARIFYING THE COMPENSATION OF COAL BOARD MEMBERS; AMENDING SECTION 90-6-204, MCA; AND PROVIDING A RETROACTIVE APPLICABILITY DATE AND AN IMMEDIATE EFFECTIVE DATE."