Montana Legislative Council
State Capitol
Helena, MT. 59620
(406) 449-3064

Minutes

JOINT INTERIM SUBCOMMITTEE NO. 2

HJR 40 - State Lands
HJR 36 - Navigability

Fourth Meeting — July 30, 1984
Old Supreme Court Chambers
State Capitol — Helena, Montana

The Subcommittee convened at 8:30 a.m.

Members present were: Representatives Marks, Ream, and Keyser and Senators Boylan, McCallum, Galt, and Conover. Representative Jim Jensen had informed staff that he would arrive on an airline flight about 11:30 a.m.

Staff present were: Paul Verdon and Anne Brodsky, researchers, Brenda Desmond, attorney, and Ellen Garrity, secretary.

Minutes of March 31 Meeting

Chairman Marks asked the members to take a few moments to review the minutes of the last meeting, after which he asked if any member wished to request any changes or additions. Since no changes were requested, Representative Ream's motion to approve the minutes as submitted was approved.

HJR 40 - State Lands Study

Chairman Marks called upon Commissioner of State Lands Dennis Hemmer for a report on the agenda items: phasing in equalization of forest fire protection with the U.S. Forest Service; recommendations for assessments of costs of fire protection to forest landowners; and recommendation for funding to increase timber harvest from state forests.

After responding to a question from Chairman Marks with the information that about 14 percent of forest fires are

1 preceding the regular session of the Legislature of the assessment anticipated for the next biennium.

After discussion of whether the 2:1 public to private cost share ratio should be in the statute, Representative Keyser moved to amend Senator Galt's motion to provide that the private landowners should bear only one-third of the fire protection costs. The amendment was approved 7-0.

Representative Ream again questioned the fairness of raising the $30 minimum without raising the 16 cents per acre charge. He said that the 29 percent of the forest land in ownerships of less than 188 acres experiences 28 percent of the fires and would pay $1,008,600 at $30 per owner or 62.5 percent of total collections. Commissioner Hemmer said that the charge is equitable because the value at risk on small ownerships is much greater and because the larger landowners make additional contributions by providing equipment and manpower to fight fires.

The vote on Senator Galt's motion, as approved, was 6-1 with Senator McCallum opposed.

The chairman requested the researcher to read HJR 40 to determine if the request for an additional appropriation to increase the timber harvest is within its scope. After hearing the resolution, Chairman Marks ruled that the request could be considered.

Senator McCallum moved that the Subcommittee recommend funding to increase the annual harvest from state forests. Representative Ream moved to amend the motion to approve option 1 of the Department of State Lands proposal which requested appropriations increases of $315,000 from the general fund and $540,000 from the earmarked revenue fund each year to increase the annual harvest by 15 mmbf and to earn $1,125,000 for the permanent school trust fund with a total expenditure of $855,000.

The motion as amended was approved 5-2 with Representative Keyser and Senator Boylan voting "no".

Chairman Marks announced that this completed the Subcommittee's work on HJR 40 and asked the researcher, Paul Verdon, to draft the bills necessary to implement the recommendations.

Chairman Marks called a 10-minute recess at 10:15 a.m.

HJR 36 - Water Recreation Study

Public Trust Doctrine Presentations -- John Thorson and Margery Brown

The subcommittee next began its work on the subject of recreational use of Montana's waterways. Chairman Marks

introduced John Thorson, Natural Resources Consultant and attorney on contract with the Legislature's Select Committee on Water Marketing. He presented information from his paper, The Public Trust Chautauqua Comes to Town: Implications for Montana's Water Future. This paper is on file at the Legislative Council. These minutes summarize only matters not directly stated in his paper.

Mr. Thorson stated that the public trust doctrine (a basis for the Montana Supreme Court's decisions affirming the right of the public to use Montana's surface waters for recreational purposes) is important to legislators for three reasons: (1) it suggests limits on what the Legislature can do regarding regulating public access to waters; (2) it provides guidelines and ramifications as to how the Legislature may form and evaluate the state's water policy; and (3) it may herald an integration with the appropriative water doctrine.

Mr. Thorson explained that the doctrine requires that government officials exercise a "high level of care," almost a "fiduciary care," when dealing with resources of such importance to the public. The public trust doctrine has been held by courts to apply to public rights of bathing and swimming, recreational boating, aesthetics, scientific study, environmental quality, and wildlife protection. Mr. Thorson emphasized that the doctrine is not new. What is new are its application in arid western states and its merger with the prior appropriation doctrine.

Mr. Thorson discussed the public policy rationale behind the public trust doctrine. Proponents of the doctrine believe that it is not new or radical; it protects public uses in natural resources and encourages conservation. Further, proponents believe the doctrine is not static. However, change in it must be well reasoned. Opponents believe that judicial declaration of the public trust doctrine is inappropriate legislation by that branch of government. Courts do not have the expertise to manage natural resources. Further, opponents argue that public trust decisions are political ones.

Mr. Thorson explained some of the ramifications of the public trust doctrine on the committee in its task of legislating on the recreational use subject. He said that because the Supreme Court used the doctrine as a basis for its decisions, the Legislature cannot substantially modify the result of those decisions. Had the court based its decision on narrower grounds (e.g., statutory grounds), the Legislature would have been able to modify the result of the decisions by changing statutes.

Mr. Thorson said the Legislature cannot modify the definition of "recreational navigability." Also, the Legislature would be taking a risk if it legislates as to the type of recreational use allowed. For example, the bill allowing for use of waters that were floatable by certain crafts that was introduced last session would be risky under this court's decisions.

Mr. Thorson said the Legislature can: (1) establish or modify rules of liability; (2) provide civil or criminal remedies for conduct that interferes with landowners' property; (3) provide civil or criminal remedies for interference with the public's use of the waters; and (4) provide for education of the public as to the public's rights and responsibilities.

Mr. Thorson acknowledged that although the delegates to the constitutional convention rejected adopting the public trust doctrine (under Article IX -- Environment and Natural Resources), they did recognize the importance of waters, and this importance did find its way into the constitution.

Chairman Marks next introduced Margery Brown, Associate Dean, University of Montana, School of Law, who presented her paper on the public trust doctrine, "...The Doctrine is Out There Awaiting Recognition." This paper is on file at the Legislative Council, and the summary in these minutes includes only material not contained in her paper.

Dean Brown explained that the Montana Supreme Court drew its explanation of the public trust doctrine primarily from U.S. Supreme Court decisions related to the transfer of the beds and banks of navigable waters from the federal government to the states at the time of statehood. Having elucidated the public trust doctrine in its traditional setting, the court then tied it to the language in Montana's 1972 Constitution and imposed the doctrine on all surface waters. Thus, the court used an old doctrine within the framework of a new constitution. She said it is important for legislators to understand the court's ruling that the only possible limitation of use arises from the characteristics of the waters.

Dean Brown raised the question as to whether the framers of the new constitution could have predicted these court decisions. She thought the answer was both yes and no. On the one hand, the delegates rejected the public trust doctrine under the constitutional provision for a clean and healthful environment. The delegates also rejected a proposal to list in the constitution beneficial uses of water, including recreational use. On the other hand, the delegates rejected efforts to strike the language "for the use of its people" in the water section. The convention transcript reveals that the framers understood that they were doing something new by using this language, and that "for the use of the people" was a broader statement about water than a statement that would merely make the water susceptible to appropriation for historic water rights.

Dean Brown said that all broad court decisions leave room for future questions. The court did: (1) extend the public trust doctrine to recreational use of all waters; and (2) make the waters themselves the basis of the public's right to use them. The court decisions did not: (1) involve the claims of the right of an appropriator versus the right of a recreationist; or (2)

involve the right of a recreationist versus the sale of water. However, the Curran decision does incorporate the appropriation right of a landowner in saying that the use of the surface waters is available to the public except to the extent of the landowner's prior appropriation of water for irrigation purposes.

As to the role of the Legislature, Dean Brown stated that it may alter existing statutes not only to protect this newly enunciated public right but also to underscore the public responsibilities that go with these rights, insofar as protection of adjacent landowner property rights is concerned.

Questions from the Committee

Representative Marks asked what the ramifications would be if the Legislature considered a bill and then rejected it. Does this mean that the Legislature is not in favor of it or not in favor of doing anything? What is the legislative intent when a measure is rejected?

Dean Brown responded that the prudent course of the Legislature might be to do nothing. She said that the court has invited a stream-by-stream test in saying that the waters themselves determine their susceptibility of use. The court is almost saying that the work is done.

Representative Marks asked whether or not it would be better to define anything, for example "recreational use." Should the public rely on cooperation or specific legislation?

Dean Brown responded that under the opinions it is futile to create a definition of navigability for recreational use. One opening for legislative action is that the public trust doctrine is tied to the water resource; therefore it could be that permissible recreation under the decision must be related to the water resource.

Mr. Thorson commented that the Legislature might be able to define recreational use. In practical terms, however, he asked how much of the controversy was brought on by use of the waters and how much by the litigation itself? If the controversy is really because of the court cases, perhaps the better course is to sit back, perhaps educate the public as to what the decisions mean.

Senator Galt stated that in Wyoming the waters are open to public use but the beds are not. Can we do this in Montana?

Mr. Thorson said he did not think so. The basis and result of the court's decision in Montana are different from that in Wyoming.

Senator Galt asked whether prohibition of use of the bed would be illegal.

Mr. Thorson responded that the public's right to use the bed is like an easement or a public right that has always been there, and that there is nothing the Legislature can do to get rid of it or transfer it to the private owner. The right is so fundamentally related to the public's interest in the water that even the Legislature cannot take it away.

Representative Keyser asked whether the Legislature should try to define high-water mark.

Mr. Thorson stated that the Legislature does have the ability to define the term but not to define it as the low-water mark.

Senator Galt asked whether the Legislature can define recreation.

Dean Brown stated that the Legislature can relate it to the water resource. For example, skating would be OK and hunting would not, although duck hunting would probably be permitted.

Senator McCallum asked who owns the bed.

Dean Brown responded that the court did not make any changes in the historic test used to determine streambed ownership.

Senator McCallum asked whether ranchers can build their fences to the low-water mark.

Dean Brown responded yes, and the public has the right to portage if necessary.

Senator McCallum asked if the public can tear down fences.

Dean Brown said no, but a portage right must be recognized.

Mr. Thorson stated that there may be a risk that the person would get hurt. Perhaps there is a duty to put a path around the fence. He also said that the public's right to portage is like a right-of-way or an easement. An interference with this could possibly be considered a public nuisance.

Senator Boylan asked what the public's rights are if the high-water mark changes or the water dries out. On some of the waterways, the water channel is quite spread out. He asked about beaver dams and whether the landowner had to maintain the stream in its natural condition. He talked of the problems there are in calling the county sheriff or throwing your money into the court system. He said there is a frustration that the legislators and landowners cannot do anything and must rely on the good will of the recreationists. There are always the four or five who ruin things.

Mr. Thorson stated that there is nothing in the decision related to maintenance of the stream in its natural condition. Perhaps the high-water mark definition should be more detailed.

Representative Ream referred to Mr. Thorson's comments on the things the Legislature may do. He asked whether on the subject of liability, for example, Mr. Thorson was suggesting that further clarification is needed of existing laws.

Mr. Thorson responded that perhaps protections of private landowners should be more specific, for example the litter or nuisance laws. He said he has not closely examined the Montana code, however.

Representative Keyser stated that small streams are not federally navigable but can be used for recreation. Isn't this a conflict which needs resolving by the court?

Dean Brown stated that the court has split the test. The federal test for title is different from the state test for recreational use.

Mr. Thorson had another comment with regard to fences. The Legislature could limit the liability of landowners for damage related to such obstructions, say to $10,000 or $20,000.

Representative Marks remarked that in the Curran case, the court specifically said that Mr. Curran's water rights were superior to the recreational use rights. No mention was made by the court of Mr. Hildreth's water rights. Does this imply that Mr. Hildreth's water rights are less secure than Mr. Curran's? Representative Marks further asked whether the public would have the right to use water that has been diverted by a ditch or a canal or some other aqueduct or whether the right of the public ceases at the point of diversion.

Dean Brown quoted Al Stone, who feels that the doctrine applies in the natural waterways and not in ditches. In response to Representative Marks' questions regarding the security of Mr. Hildreth's water rights, Dean Brown stated that she does not draw a distinction between the two cases on this point. (She does not conclude that Mr. Curran's rights are protected and Mr. Hildreth's are not.) There is much protective language in the Montana Constitution regarding appropriative rights. She did anticipate, however, that a clash between the prior appropriation doctrine and the public trust doctrine will occur in the future.

Representative Marks asked whether a dry streambed would be considered a public way.

Dean Brown stated that while the court ruled that the public may use the bed and banks of the stream, both cases emphasize the characteristics of the waters in allowing recreational use. The courts do not emphasize the bed, and she thought use of a dry streambed would be a hard case to prove.

Senator Conover asked what a navigable stream is. Can the Legislature spell this out?

Dean Brown said that that would be an empty exercise. Navigability regarding recreational use is a meaningless concept. She added that there already are statutes on the meaning of navigability, and, at any rate, the court has said that we are looking at recreational use of waters, not navigability.

Senator Conover stated that at the time of the constitutional convention, there was no mention of navigability for recreational use. The only concern was protecting Montana's water from downstream states.

Dean Brown again stated that the court used two bases for its decision and they are linked. The constitutional language opens the door to the public trust doctrine on all surface waters.

The committee recessed for lunch from 12:00 to 1:30 p.m. When the committee reconvened, Representative Jensen was present, as were all the other committee members.

Senator McCallum asked what makes the public trust doctrine the supreme law. It is not in the U.S. or Montana Constitutions. From where does its authority come?

Dean Brown responded that it comes from Roman and English law. Certain resources, such as air and water, have public value. It is a common-law doctrine from our heritage, and it is applied to the 1972 Montana Constitution.

Senator McCallum stated he thought courts must rule on statutes and the constitution.

Dean Brown responded that courts have traditionally based their rulings on common law and case law. Judges can look to various sources of law. The public trust doctrine as applied to water is an old doctrine.

Mr. Thorson said that negligence and liability law, for example, are based on our common-law heritage and have been developed by the courts. The right of privacy is another right the courts say is inherent, even though it is not stated specifically in our constitution. The public trust doctrine is an inalienable right which is so basic and fundamental that a Legislature or even the people, by amending their constitution, cannot eliminate it.

Representative Marks stated that one of the concerns the legislators have is that of separation of powers. He feels the legislators may have been infringed upon a little bit and are having some trouble accepting that. He asked if there is a limit on how broadly the trust doctrine can be taken by the court. For example, a concern is that the court will eventually allow access across private property.

Dean Brown stated that the court was very clear in not allowing the public to cross private property. She does not predict any

extension of these decisions in this way. There has never been access across private property to navigable waters such as the Missouri River.

Mr. Thorson commented that the court based its decision on very broad grounds. By tying recreational use to the public trust doctrine, the court has opened things up perhaps in more ways than it was aware. For example, questions will arise related to competing public trust interests. The court was not briefed on all these problems.

Representative Jensen asked Mr. Thorson to expand on his statement that the court has opened things up.

Mr. Thorson responded that there are unanswered questions regarding other public trust uses and regarding the clash between appropriative rights and the public trust doctrine. He raised the question as to whether the public trust doctrine in Montana is retroactive before 1972.

Representative Jensen asked whether Mr. Thorson could foresee future litigation on the question of extending the public trust doctrine as it now stands to allowing greater public access.

Mr. Thorson responded that it would be difficult in this state to extend the public trust doctrine in this way, and, as Dean Brown stated, the court is very clear on this question. He mentioned a New Jersey Supreme Court decision in which access was allowed across the private dry sandy beach area to reach the ocean.
Senator Galt asked whether the Legislature would have authority to set up criteria for "capability of use of the waters."

Dean Brown said yes.

Senator Galt asked whether the Legislature could establish stream flow as a criterion, for example, or other criteria.

Dean Brown said she would be skeptical of this as a criterion. Perhaps if a body of water were susceptible to recreational use for a very, very short time -- but even then it would be difficult to limit the waters that are capable of use.

Senator Galt referred to language in the Natural Streambed and Land Preservation Act, in which the law speaks of "continually free flowing" waters.

Dean Brown stated that the Legislature can do what it wants to protect the resource. For example, if recreational use of a resource is causing damage to the resource, the Legislature can act to protect the resource.

Representative Jensen asked what the limits are in defining recreation. What is not recreation?

Dean Brown stated that recreation can be defined by its relation to the water resource. It can also be defined so as not to harm the resource.

Representative Jensen asked whether floating toy boats would be considered recreation.

Dean Brown stated yes, if you are into floating toy boats.

Representative Jensen asked, "It would be difficult, then, to limit the definition of recreation?"

Dean Brown said no, as long as you are protecting the resource. If the water can float a toy boat, but the presence of people on that streambed will harm the resource, then recreation can be limited. The water resource itself is the issue.

Senator McCallum asked if there was a contradiction in prohibiting trespass but allowing portaging.

Dean Brown said that portaging is an exception. The public cannot cross private lands to get to the water, but portaging around a barrier is permissible .

Staff Reports -- Brenda Desmond and Anne Brodsky

Brenda Desmond, staff attorney, presented her report, Prescriptive Easements. Her report and a copy of her oral presentation to the committee are on file at the Legislative Council. Following the report, Chairman Marks asked if the Legislature would be in danger of curtailing retroactive rights if they addressed prescriptive easements.

Ms. Desmond replied that it would be important to carefully draft such a bill to make it clear that it is prospective in nature and is not intended to cut off past rights. It would be a drafting matter. If a prescriptive easement has been established as of today, even though the court hasn't ruled on it, and the Legislature passes a bill curtailing prescriptive easements, a person whose property right had ripened prior to passage of that bill could still have a court establish that that person had a prescriptive easement.

Ms. Desmond continued with her second report, Issues of Landowner Liability. This report and a copy of her oral presentation are on file at the Legislative Council. Following this report, Senator McCallum asked if a landowner would be liable if he put a fence, visible to stream users, on a straight stretch of stream.

Ms. Desmond explained that she could only guess as to how a court would look at the situation. The court would probably look at whether or not that landowner behaved reasonably. One of the questions that would have to be determined would be the exact circumstances under which the landowner put the fence across the

stream and whether or not the fence had been built for a reasonable ranching purpose. If there is a barrier, which in Ms. Desmond's opinion includes a fence, then, because members of the public have a right-of-way on these streams, they have an ancillary right to portage around that fence. The landowner can fence his stream for a legitimate farming purpose, and the recreationist can use the stream.

Chairman Marks wondered how many landowners are concerned that they are not covered by some sort of insurance.

Ms. Desmond thought the landowner was very likely covered. It is certainly something that can be covered in an insurance policy.

Representative Ream asked if a stream could be looked at in the same sense as a county road where there is an easement across land. The landowner may put up a cattle guard or even a gate, as long as he doesn't impede traffic on that road. Similarly, the same kind of situation seems to exist on a river.

Ms. Desmond agreed that this was a fair analogy. When the Supreme Court clearly provided for portaging rights in the opinions, one of the things that the justices probably had in mind was a fence creating an impediment on a stream. However, there is nothing wrong with a legitimate agricultural fence.

Senator Boylan asked if the landowner has any liability when the public owns the streambed and the water to the high-water mark.

Ms. Desmond replied that she interprets the landowner's liability over a place of public access (e.g., a portage route) or a public easement over the streambed (which is still owned by the landowner) as limited to situations in which the landowner has created a dangerous condition and has failed to repair it. If a landowner creates a dangerous condition on what is a public way (e.g., a stream) and fails to repair it, it is likely that that landowner has breached his duty of reasonable care toward people who have legitimate rights to be using the streambed.

Chairman Marks said he was concerned because the liability report seemed to indicate that in the case of the trespasser, there is less liability on the part of the landowner than for invited guests. On the other hand, it is to the landowner's advantage to give permission to enter the land so that the person cannot acquire a prescriptive easement. Perhaps this is a no win situation for the landowner.

Ms. Desmond said that this question was one reason why the Legislature passed sections 70-16-301 and 70-16-302, MCA, the statutes that limit a landowner's liability when recreation is permitted for free. On the one hand, the Legislature wanted to encourage landowners to permit the public to cross their property. On the other hand, the Legislature was aware that if it didn't pass the statute, it was putting the landowner in a

position of either increasing potential liability or setting the landowner up for a later claim for a prescriptive easement.

Senator Boylan said he felt that landowners shouldn't have any liability between the high-water marks.

Ms. Desmond commented that committee members might want to think about whether or not they want to have any disincentive for a landowner to build or cause a situation that is dangerous. To the extent that legislation is passed completely eliminating landowner liability within the streambed and on any public routes across the landowner's land, there is nothing to stop a landowner who doesn't like people coming through his land from setting up something dangerous. Such legislation would make it clear that the landowner doesn't have liability for anything that happens.

Anne Brodsky presented her report entitled Terms and Activities that May Be Associated with Recreational Use of Waterways: Access, Trespass, Litter, Criminal Mischief, and Public Nuisance Laws. This report is on file at the Legislative Council.

Chairman Marks asked Ms. Brodsky if she had some indication from talking to the people at Fish, Wildlife, and Parks how often game wardens must enforce criminal trespass laws pursuant to section 87-1-504, MCA. He also asked whether it is necessary for the landowner to file charges.

Ms. Brodsky replied that in talking with the law enforcement people and others at Fish, Wildlife, and Parks, the indication was that that provision (87-1-504) was used by landowners to request game warden enforcement about six times during the course of a year. Ms. Brodsky said that some of those landowners may group together and cooperatively arrange for permitted recreation and then contact the Department as a group to request that a game warden enforce the trespass laws. Entities such as Burlington Northern (which permit recreation on their land) have also contacted the Fish, Wildlife, and Parks Department to request enforcement of the trespass laws under this section.

Ms. Brodsky presented a report entitled Department of Fish, Wildlife, and Parks' Authority over Recreational Use of State Waters. This report is on file at the Legislative Council.

Representative Keyser asked Jim Flynn, Director of the Department of Fish, Wildlife, and Parks, how many violations the Department handles in a year that deal with littering on rivers and river banks.

Mr. Flynn replied that he couldn't give a rough estimate at this time, but the figures are available.

Chairman Marks asked Ms. Brodsky if, as a result of the Supreme Court decision, there were more streams in Montana now that are the responsibility of Fish, Wildlife, and Parks.

Ms. Brodsky replied that the Supreme Court decision made it clear that all surface waters in the state capable of recreational use are open to such use.

Chairman Marks referred to the letter to Mr. Flynn of June 7, 1984 (on file), asking Mr. Flynn to comment on the same question --are there more streams in Montana now that are the responsibility of Fish, Wildlife, and Parks? Chairman Marks said that the Department's response to that letter on July 26, 1984 (on file) basically said that the Department did not have additional responsibility. However, if the court says that the streams are public for recreation, and Fish and Game is charged in several statutes with responsibility for boating safety, fishing rules, and littering -- Chairman Marks said he was surprised at the Department's response which seemed evasive and indicated that it does not have any additional responsibility.

Mr. Flynn said that the Department does not view the court decision as necessarily expanding the Department's authority. For example, under the Department's statutory authority, he does not feel the Department has the ability to say there shall be this many people on a river on a given day (a permit system).

Chairman Marks asked if the Department had had an expansion of responsibility. Mr. Flynn said the answer to that would be yes.

Chairman Marks asked whether the Department was anticipating that additional responsibility in its budget preparation.

Mr. Flynn said his Department had been waiting to see what this committee was going to do. He thought that with some of the comments he heard today, there could be a large number of dollars and a large number of people involved.

Chairman Marks asked Mr. Flynn to respond to the letter of June 7, 1984 in the context of additional responsibility rather than additional authority. He said that some of the decisions that this committee will make will have a price tag on them. Chairman Marks said that with the hundreds of miles of streams that are now involved, it seems to him that if Fish, Wildlife, and Parks is going to live up to its responsibilities as a Department under the statutes, then it will have to prepare to handle this responsibility in some fashion. Some of the decisions that this committee ultimately might make will have a price tag. Chairman Marks asked Mr. Flynn to prepare a response before the next meeting of this committee.

Mr. Flynn replied that he would so respond. At the same time, the Department needs to have a sense of direction as to where this thing might end. Are there going to be more responsibilities for the Department? Will the committee be considering limiting the number of people who are permitted to use a stream?

Chairman Marks commented that Fish, Wildlife, and Parks is in the budget process right now. The court cases have been out for some period of time. He asked Mr. Flynn if his budget requests had taken into consideration the Supreme Court decisions--regardless of whether or not this committee or the Legislature will do anything. He said that the Department knows that the court did something. What was the Department's response with respect to budget and personnel?

Mr. Flynn answered that the committee today has talked about trespass problems and what the Department's responsibilities are for enforcement of trespass laws. As far as cleaning up litter and regulating people on the river --

Chairman Marks asked whether the Department will be trying to anticipate what the demands for these things will be, whether or not the committee does anything. Mr. Flynn responded yes.

At this time, Chairman Marks asked committee members if they had any questions of Anne Brodsky on her reports.

Senator Galt had a question on the subject of access in her Terms and Activities paper. He said that the lessee of state lands controls the ingress and egress to and from them.

Dennis Hemmer replied that, strictly speaking, whether or not there is access through state lands is a decision that is reserved to the Land Board. He responded that, to his knowledge, the court decisions never gave access through these leased state lands.

Chairman Marks said that in the recent case, the state acquired the bed of the Dearborn River. If the owners of the adjacent Dearborn property, which are numerous, were to apply for a lease on that bed, what would be the state's position on that?

Dennis Hemmer said that in that instance, landowners would have to apply for an easement to put a fence across that river.

Chairman Marks said that the state is charged with getting the highest price for all land. Sometimes that is difficult to accomplish. In the case of streams, recreational users may apply for a lease on them.

Dennis Hemmer said that a parallel case is the state's position on a navigable lake. The Department of State Lands does not control the activities on the surface of that water. The state has ownership of the bed, but State Lands does not control the surface activities.

Public Testimony

Bill Asher, representing the Agricultural Preservation Association, Park County Legislative Association, and the

Sweetgrass County Agricultural Preservation Association (testimony on file).

Nancy McIlhattan, dairy farmer from Park County and representing the Park County Legislative Association (testimony on file).

Tom Milesnick, a member of the Agricultural Preservation Association who resides north of Belgrade, said he was somewhat shocked by the Supreme Court's ruling. He knew that the state owned the water. When the court started taking the banks too, he felt that was an infringement on his property rights. He said he feels the same way as somebody in town would if there got to be too many bicycles on the sidewalks so they decided they would make a corridor and run their bicycles on everybody's lawn. Anybody who has a natural obstruction will have to allow portaging around it. The landowner will have to assume the liability for people getting around it.

He felt the landowners "got a raw deal." He was afraid that there is not a lot that anyone can do about what is going on right now. This morning, the people making presentations indicated that there is no recourse to change the court decisions. This seems to be contrary to what he learned in history class about the three branches of government. He hoped the committee would be able to come up with an answer on how to alleviate part of the problem.

He heard the staff report that if you fenced the creek with barbed wire, you could be liable for it unless you had a sign. He described a scenario in which a landowner has a fence across the creek, the water rises, the top wire is just underneath the surface of the water, someone comes along in a boat, snags the boat, and sinks. The landowner is liable. Not because he intentionally put the fence up to sink someone, but because the river rose, and he didn't see the fence. He felt there were some real problems that need to be addressed to protect the landowner along these streams.

Mr. Milesnick said that for years he has allowed people to use his property. He has experienced little if any problems with the sportsmen this year. In the past, he closed his place and told people they could not go on the streams, whether they had their boat or not, until the second Saturday in June. He has lots of water and lots of fences. He fences off a narrow area to let the cattle into the streams. He is not in a position right now to have somebody come through and cut a bunch of fences. He said he hoped the committee can help out the landowners somehow.

Chairman Marks asked Mr. Milesnick if he has had difficulty with public use of his property since the decisions have come down. Mr. Milesnick replied that he had not had much difficulty.

Representative Jensen asked if there were any sporting associations in Mr. Milesnick's area.

Mr. Milesnick answered yes; Trout Unlimited and Fish and Game had furnished some stiles. He said that 10 or 15 years ago some sportsmen's groups wanted to come in and assist in putting some dust oil on the road on his land--a private road. Mr. Milesnick said he declined because he feared that if he accepted money for dust control, the recreationists might demand access all of the time.

Mr. Milesnick brought up another problem: the noxious weeds that the fishermen pack around. He has some knapweed on his property. The only place he has knapweed is where the fishermen change their boots. "If they stayed in the boat, they wouldn't spread noxious weed."

Peg Allen, Mill Creek Road, stated: "We have Russian knapweed at every trail head . . . . It is coming in with horses; it is coming in on saddle blankets, pickup trucks, and trailers. The Russian knapweed carries its own herbicide. Wherever those flowers and seeds go, the natural herbicide devastates any greenery growing in a two-foot area beneath it. That is one single plant. Then you get a concentration at all your trail heads and at your public camp sites, and it is spreading into the back country. Our game and wildstock are hungry because we have allowed this little purple flower with a silver leaf to extinguish everything that is edible protein for animals."

Franklin Grosfield, rancher from Big Timber, representing the Sweet Grass County Preservation Association (testimony on file). He added to his written testimony the recommendation that this committee write a resolution to urge the Supreme Court to return to its duty of interpreting the laws. He felt that legislating outside of the third floor of the Capitol had gotten out of hand.

Representative Orval Ellison, District 81, stated that the Supreme Court decision has narrowed the Legislature's ability to enact any statutes pertaining to this issue. He doesn't think the Legislature should be intimidated. He thinks there are several areas in which it can legislate. It can support recreation that doesn't create environmental damage and doesn't deteriorate water quality. He thinks that the Legislature can close streams that are too small to support large populations without creating environmental or water quality damage. Doing so would ease the landowners' problem somewhat.

He said that one of the previous witnesses spoke of portages, and that was worrying him. What is a reasonable distance for the recreationist to portage? He thought the Legislature could address that problem. He thought there would have to be a reasonable distance for portaging to be permissible. He wanted to limit portaging to boats, instead of applying it to anglers and other recreationists.

On the subject of prescriptive easements, he recalled a previous bill to prohibit the acquisition of these through recreational

use. He felt that such a law would take a burden off landowners. He mentioned the bill he introduced last session that placed all hunting under the same trespass law as big game hunting.

Larry Dodge, Helmville (testimony on file).

Ted Lucus, a rancher from Highwood, asked whether the Legislature could, within the bounds of the constitution, modify the decisions or delete parts of them. He asked whether the Constitution of the State of Montana gave the court the right to take private land along the streambeds and banks away from the landowner.

William Dana, rancher near Livingston (testimony on file).

Lorents Grosfield, Sweet Grass County rancher (testimony on file).

Norm Starr, rancher, stated that in March the committee held a "marathon" meeting, and he wanted to compliment the committee on the way it was conducted. He went home thinking that those in attendance had accomplished something. Now that the Supreme Court made its decision, he doesn't think this situation is going to be settled for a long time. He felt that what was happening now was never the intent of the people who wrote the constitution.

Mr. Starr felt that because the landowners pay taxes on the land, the public is in a different situation than it is on county roads or state highways. He has 8 miles of stream through his land, and, as the law now reads, recreationists have a right to camp near his back porch. It occurred to him that a trespasser now doesn't even have to leave his ranch; he just has to get back in the creek. He felt that we need a strong trespass law where the burden of proof is on the trespasser, not on the landowner. The landowners need some liability coverage. The average rancher can't afford a law suit. They deserve some protection and help in matters of trespass, liability, and portage.

Bill Pruitt, rancher, south of Big Timber (testimony on file).

Mike Micone, Executive Director of the Western Environmental Trade Association (WETA) stated: "Our board of directors and the association of WETA has been involved in the stream access issue for some time. This past winter our board adopted a resolution reaffirming our position in support of the property owner's rights. We certainly believe that the actions taken by the courts are detrimental to the private property owners. We have been instructed to pursue any remedies that may be beneficial to the property owners. We are supporting the actions taken by the Sweet Water (sic) County Association to strengthen the trespassing laws, provide a lead for liability to the property owners, and provide compensation to the property owners in the event of damage. In addition, we support identifying the

high-water mark. We offer our assistance in developing any recommendations for the upcoming Legislature."

O. Jackson, a rancher from Harris, stated that he would like to see some action taken during this next Legislature while the issues are still fresh in everyone's minds. He asked whether a prescriptive right could be inherited.

Chairman Marks asked Brenda whether a prescriptive right could be inherited. Ms. Desmond replied that she would research this question for the committee.

Mark Knops, consultant from Livingston, stated that in many counties in the state, tax relief is granted by the county to landowners who have public road easements through their land. He suggested that to help landowners swallow the decisions, the Legislature could make it possible for landowners to claim, on a statewide basis, some kind of a tax credit for that portion of their land that is subject to an easement. He thought this would be a small symbolic gesture.

Chairman Marks read into the record a letter from Pete Test, President, Montana State Council of Trout Unlimited. The letter is on file at the Legislative Council.

Chuck Ryan, Sweetgrass County, stated he wished to take exception to Mr. Knops' statement. He said he believes the land the streams flow over is his land, and therefore he is going to continue to pay taxes on it.

The Committee recessed for dinner and reconvened at 7:10 p.m.

Committee Discussion

Chairman Marks asked Ms. Desmond if it would be possible for this committee to request the Supreme Court to define or issue a declaratory judgment to define terms in the opinions such as "recreation" and "high-water mark."

Ms. Desmond said that she would have to look at the civil procedure rule on declaratory judgments. Ordinarily, a request for a declaratory judgment must first be filed in district court. She also pointed out that the Supreme Court seemed to make it clear in the Hildreth case that the Court wasn't inclined to define recreational use. Historically, on issues such as liability, the law is not codified. Ms. Desmond said that the reason liability law isn't codified is that it is very difficult to anticipate every single situation. She said she would research the question regarding a request for a declaratory judgment for the next meeting.

Chairman Marks said that it would help the committee and the Legislature to have some clarification as to the meanings of these terms.

Representative Keyser moved that the committee recommend a bill be drafted that states that Montana does not recognize a prescriptive easement acquired through recreational use.

Ms. Desmond asked for clarification on the motion. Was it Representative Keyser's intention in the motion to say that, in the future, it will no longer be possible to establish a prescriptive easement by recreational use? She said she was concerned about the question that Representative Marks raised earlier that this could be taking away a right that is already vested.

Representative Keyser corrected his motion to read from the date of the passage of the bill, no prescriptive easements will be allowed through recreational use.

Chairman Marks explained that the question he raised was whether a bill would exclude rights that may have accrued prior to the passage of the bill.

Representative Keyser said he didn't think it was possible to take away a prescriptive easement that had been established prior to passage of a bill. The law would have to apply from the time that the bill passes.

Ms. Desmond explained that if the Legislature passes a statute saying "in the future there will be no prescriptive easements," a court could rule that a prescriptive easement was established in the years 1950-55. This type of legislation can only be prospective. It cannot be retroactive. Otherwise, the Legislature would be taking away a legitimate property right.

Committee members voted on Representative Keyser's motion, and the motion passed unanimously.

Representative Keyser moved to define "'ordinary high-water mark' as 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 may include, but are not limited to, lack of terrestrial vegetation, lack of agricultural crop value, or shelving."

Representative Ream asked Anne to explain the two different high-water mark definitions that she mailed to committee members.

Ms. Brodsky explained that she had sent out the first definition in February at the committee's request. In putting that one together, she had looked at things such as: the definition contained in Montana's administrative rules under the Natural Streambed and Land Preservation Act; a number of cases in which the high-water mark was defined; Black's law dictionary; and other sources. The definition she sent out in February was so frequently used that she assumed it would be acceptable.

However, Brenda Desmond pointed out certain deficiencies, which Anne discussed with several resource experts. There were two deficiencies in particular. One relates to the difficulty of defining high-water mark because the location varies depending on the physical layout of the land. In the definition Anne mailed out in February, the language required that the listed conditions defining "high-water mark" be met. That was the first problem; it set up required conditions to distinguish what the high-water mark is. The other deficiency was in not defining the type of vegetation that will not grow below the high-water mark. Anne recommended that if the committee did adopt the first definition, it say that the soil below the line is deprived of its terrestrial vegetation, since it is known that various aquatic vegetation grows in water.

Ms. Brodsky explained that the new definition attempts to encompass more situations and be more flexible because the nature of the high-water mark is a changing thing. By saying that "these are characteristics that may define the high-water mark," the definition is not limited to these characteristics. The most important sentence in this definition is the one that says it is 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." The essence of the definition is the recognition that there are different physical characteristics of the area below and above the high-water mark.

Chairman Marks suggested deleting the word "may" in the phrase "characteristics of the area below the line 'may'" and inserting the word "shall." Senator Galt moved to amend the motion to change the word "may" to "shall, where applicable." The motion for the amendment passed.

Committee members voted on the motion to define "high-water mark, as amended." The motion carried unanimously.

Chairman Marks brought up the subject of liability. Representative Ream asked Ms. Desmond if there was anything that can or should be done with liability.

Ms. Desmond replied that that may be more of a practical question than a legal one -- whether or not people feel that what there is, which admittedly is relatively vague and not written down in statutes, is sufficient to cover the practical problems. There are rules that can be changed if the committee members want to change them. Or they can be left the way they are. This is not a legal question, and it would be up to the committee to determine if these changes are needed.

Senator McCallum suggested placing money from fishing or hunting licenses in a fund to be used to cover damages caused by recreationists for which landowners are liable, such as fire.

Ms. Desmond commented that this might be similar to the uninsured motorist fund. The amount of money in the fund might need to be substantial.

Chairman Marks recalled a bill from 1979 or 1981, introduced by the landowner-sportsman advisory council, which took money from hunting licenses to ameliorate problems, such as livestock being shot.

Anne Brodsky read from the 1983 SCORP report (Statewide Outdoor Comprehensive Recreation Plan), in which this property damage reimbursement proposal is summarized. "It was considered by the 46th Session of the Montana Legislature, but failed to receive legislative approval. The proposal would have established a $2.00 mandatory fee to be paid by hunting and fishing license buyers, with the money earmarked for damage reimbursement."

Representative Ellison thought that the Stockgrowers did not support the proposal.

Senator Galt wondered whether a similar reimbursement program could be developed, not for all landowner-sportsman situations, but for situations related to the stream access issue.

Representative Ream mentioned that his HB 877 had a similar provision, but it pertained to damage to things such as fences. He recognized that fires posed a difficult problem because of the costs involved in putting them out.

Representative Ream said that he would not recommend any changes at this time. The three categories of nonprivileged persons entering land -- invitees, licensees, and trespassers -- are already covered. He doesn't believe there is a specific problem in the liability laws related to river recreation.

Senator McCallum stated that the Supreme Court has ruled that anybody can go down any stream. If they cause property damage, we are going to say "tough luck." He doesn't believe this is right.

Chairman Marks responded that we do have laws that protect property.

Senator McCallum asked what could be done if a fire was caused by someone and the person couldn't be caught.

Chairman Marks responded that, as with any law, if you don't catch the person who breaks it, you can't punish him.

Senator McCallum felt that the person is not often caught. He suggested that a state fund be set up to help relieve those whose property has been damaged.

Ms. Brodsky read Montana's law on criminal mischief, section 45-6-101, which is referenced in her Terms and Activities paper.

Some committee members expressed concern about the danger of fires caused by recreationists.

Ms. Desmond pointed out there could be a problem obtaining a conviction under 45-6-101 because there is a requirement under that section that the offense has to have been committed "knowingly or purposely."

Senator Galt suggested that the landowners get together and work on this a little more.

Peg Allen testified that in Sweet Grass, Park, Stillwater, and Carbon Counties there are vast areas of land that abut the national forest. The U.S. Forest Service holds that any landowner is responsible if a fire originates on a landowner's property, with or without his knowledge, and spreads to the national forest. The landowner must pay for fighting the fire as well as for the timber destroyed. "We have got to be relieved of that burden if we are having the public move in on us where we have no control."

Larry Dodge brought up a hypothetical situation in which a fire starts on the strip of land between the high- and low-water marks. This is the land on which there is a public easement. He felt that if the fire does start there and causes considerable damage, there should be a public responsibility for the public trust that has been violated. He thought that under this situation, the landowner would have a sufficient basis for closing the land to the public, since members of the public, in pursuit of their public trust rights, could not be trusted.

Dennis Hemmer commented that it is very difficult to prove negligence and collect damages for fire.

Chairman Marks said he had been considering the trespass laws in Title 87. Section 87-3-304 is the big game law, which requires that permission be obtained to hunt on private property. The trespass laws in Title 87 are limited now to big game and birds.

Committee members discussed the present laws limiting the liability of landowners in cases in which the landowners have permitted recreation (sections 70-16-301 and 70-16-302). Senator Galt asked where the theory of attractive nuisance fits.

Ms. Desmond explained that an attractive nuisance is an exception to these rules that she did not go into in her paper. Under certain circumstances, when a landowner maintains a condition on his private property, and the condition is particularly attractive to children, if a child gets injured, the landowner will be held to a higher standard of care.

Senator Galt asked about a stream -- is that an attractive nuisance?

Ms. Desmond said that an attractive nuisance includes only things that are inherently hazardous. In her opinion, a stream is not something that is inherently hazardous.

Representative Keyser stated that he had problems with the whole criminal trespass law. The part that is particularly bothersome is the part that says, "In order for criminal trespass to occur, there must be an active denial of permission to enter the land."

Norm Starr felt the burden should be on the trespasser to prove he has the right to be on the land.

Chairman Marks said that if committee members are considering making every act of being on someone else's property a criminal trespass -- with or without requiring posting, with or without requiring that permission be obtained -- a lot of examples of trespass would exist that members might not want to be termed criminal trespass. For example, ranchers would be trespassing for going through a neighbor's fence to get a cow back.

A man from the audience testified that it wouldn't work this way in his area. "If my neighbor has a bull on my land, I call him. I say, George, you have a bull over here. Can you get him out or shall I get him? There is a good rapport. But before I go on his place, I call him. I think that is the general rule among ranchers."

Chairman Marks spoke of his own experience. He said that if one of his bulls is on his neighbor's place, the neighbor is probably 10 miles from the telephone. "If I go home to call my neighbor (my home is 10 miles away), I probably won't catch him at home because he is out working; and if he is home and says get the bull out, the bull would be gone by the time I got back."

Norm Starr stated that if his bull was on the property of a neighbor with whom he wasn't getting along, he would definitely call the neighbor. If he was getting along with his neighbor, the neighbor wouldn't press trespass charges against him anyway. "We are not after the good guy on this trespass thing. We are after the small percentage that we know is going to give us a problem." He said he wants something that is tough enough that the "bad guy" knows that it is going to cost him some money or a jail sentence or the loss of his license.

Representative Ream said that as he sees it, there are only two forms of recreation that are subject to criminal trespass now. One is trapping and the other is big game hunting. All other recreation is just subject to civil trespass.

Senator Galt suggested putting everything under criminal trespass (i.e., eliminate a civil remedy for trespass).

Chairman Marks said that the problem with this would be that if you had a county attorney who wasn't prosecuting trespassers, you would have no recourse. He questioned what would happen to the person who innocently wandered onto somebody's place. Senator Galt stated that he doesn't believe that anyone is innocently wandering around somebody else's place.

A man from the audience stated that if someone is in the stream and knows he is supposed to stay in the streambed, if he comes out he knows perfectly well that he is trespassing.

Senator Boylan felt the committee could look at trespass laws specifically related to water access.

Representative Keyser said that criminal trespass is a misdemeanor, punishable by a fine not to exceed $500, imprisonment in the county jail not to exceed 6 months, or both. "This is a little more than a slap on the wrist. If in fact you can't do anything, then you had better go to your county attorney. If the county attorney doesn't want to take it, it isn't because the law isn't on the books.... The law is there, and the punishment is plenty. Get your county attorneys to do their jobs."

Representative Ream stated that it is not criminal trespass though, unless you specifically forbid that activity.

Representative Keyser asked whether, if land is posted, the standard is met. Senator Galt commented that signs are often destroyed or taken down.

Chairman Marks felt there would be a problem with Senator Galt's suggestion if the county attorney doesn't want to prosecute.

Representative Ellison commented that posting has always been a problem.

Representative Ream suggested criminalizing trespass above the high-water mark. There could still be allowances for portaging and getting around fences. Perhaps anything above a certain boundary, such as 100 feet from the waterway, could be considered criminal trespass. He suggested tying a tougher trespass law to actions committed while in the pursuit of water-based recreation.

Chairman Marks questioned the difference in importance between trespassing onto property from a stream as opposed to trespassing from a road.

Senator Galt stated that he would make it all criminal trespass.

Senator McCallum felt the trespass law should be similar to the law on drunk driving: 24 hours in jail. This would stop a lot of people from trespassing. The trespassers who are caught would be an example for others.

Senator Galt moved to instruct staff to draft a bill to do away with the civil trespass law, making all trespass a criminal offense (i.e., regardless of whether or not the land is posted). Roll call vote on motion: Senator Boylan, aye; Senator Conover, aye; Senator Galt, aye; Senator McCallum, aye; Representative Keyser, no; Representative Ream, no; Representative Marks, no; (Representative Jensen, absent). Motion passed 4-3.

Chairman Marks stated that he felt members were making a terrible mistake. The worst mistake is eliminating an action for civil trespass. This remedy is the only alternative that some people have in certain jurisdictions where the law enforcement or the county attorney will not act. Chairman Marks said that after the bill is drafted, committee members will be able to look at it.

Senator McCallum was concerned about whether or not a rancher can fence below the high-water mark. Chairman Marks said that it seems that the court didn't address that issue in the Hildreth case. Senator Galt thought that the court addressed it in saying that a recreationist could portage around any barrier across the river.

Chairman Marks quoted from the Beaverhead decision: "Further, as we held in Curran, in case of barriers, the public is allowed to portage around such barriers in the least intrusive manner possible, avoiding damage to the adjacent owner's property and his rights."

Representative Ream suggested going along with existing law to see how things work. Chairman Marks agreed.

Norm Starr stated he feels that the committee has covered some important things. He believes that the whole key is to have a very strong trespass law, which will provide the incentive "for that guy to stay off my place."

Ms. Desmond said that it occurred to her on the motion that passed eliminating civil trespass that it could very well be in violation of a provision of the Montana Constitution, Article II, Section 16, which is entitled, "The Administration of Justice." That section states in part: "Courts of Justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character." Ms. Desmond suggested that a person could make a pretty good argument that to eliminate the cause of action for civil trespass is not to afford a speedy remedy for every injury, because a person could say that there is a substantive difference between a cause of action for civil trespass, in which the individual is controlling the case, and a criminal action, in which the county attorney is in control.

Senator Galt did not agree with Ms. Desmond.

Larry Dodge stated that he would like a remedy which gives him something to do, other than eliminating the option to file a civil suit.

Chairman Marks suggested leaving intact the civil and criminal remedies. Senator Galt stated that he was not backing off the motion. The problem with having a civil cause of action is that the county attorneys then will not prosecute.

Ms. Desmond said that she thinks the reason that there is now the requirement that the land be posted or that the person be personally notified is because of the underlying theory in criminal law that in order to commit a crime, because of the very serious consequences attached to it, a person must be well aware that he is committing a crime. Would you be punishing people for something -- making something a crime -- without their knowing they had committed a crime? If that is the effect of what you are doing, then you would be imposing absolute liability on someone for going on private land. If you do impose absolute liability on someone for a criminal act, under Title 45 there is a maximum penalty that can be imposed, which is $500 and no imprisonment.

Senator Galt said the key words are "should know" -- anyone out hunting and fishing "should know."

Representative Ream said that with the passage of this motion, committee members have gone beyond what they were trying to do. The motion relates to all areas of trespass, not only trespass related to water-based recreation. He said he was afraid that members were killing the chance of passing something related to trespass as a result of water-based recreation.

Representative Keyser said that the committee was not being very realistic. This legislation will not go through the House and Senate. He suggested the committee try to come out with a piece of legislation that has a chance of passing the House and Senate and getting the signature of the Governor.

Chairman Marks suggested letting the staff draft the bills, which would give committee members time between now and the next meeting to think about it. Chairman Marks told visitors that copies of these bills will be sent out before the next meeting. It would be worthwhile for the committee to receive some feedback on the bill drafts before final adoption.

Chairman Marks wondered if the committee would be interested in excluding certain types of waterways, such as irrigation ditches, from public use.

Senator Galt said that he could take care of that problem with a motion he would make. In the Dearborn decision, the Supreme Court quoted the Wyoming case of Day v. Armstrong as support for its decision. The Montana Court did not include another portion

of the same Wyoming decision, which reads: "On the other hand, where the use of the bed or channel is more than incidental to the right of floating use of the waters, and the primary use is of the bed or channel rather than the floating use of the waters, such wading or walking is a trespass upon lands belonging to a riparian owner and is unlawful."

Senator Galt moved that the staff draft a bill consolidating this part of the Wyoming decision [and incorporating this part of the Wyoming decision into Montana law]. He said this would restrict the water activity to floating and would prohibit the angler from walking up the stream.

Chairman Marks said that he was concerned about this motion. The Curran case talked about floatability and navigability. It seemed that the Hildreth case went far beyond that.

There was a roll call vote: Senator Boylan, aye; Senator Conover, aye; Senator Galt, aye; Senator McCallum, aye; Representative Keyser, no; Representative Marks, no; and Representative Ream, no; (Representative Jensen, absent). Motion passed 4-3.

Chairman Marks asked if there was interest on the part of the committee to draft language prohibiting the recreational use of diverted water, including the reservoirs that water runs into. There was a brief discussion as to whether to prohibit use of "diverted" water or "appropriated" water. A consensus was reached to prohibit use of "diverted" water.

Representative Keyser moved to adopt language so that the Supreme Court decision will not pertain to diverted water. That water would not come under recreational use.

Brenda asked if he meant water that is diverted to irrigation ditches and also water that is diverted into a storage reservoir. Representative Keyser responded yes.

Representative Ream said he thought the committee was told this morning by Marge Brown through Al Stone that this is presently the case (i.e., the public right to use waters does not include the right to use diverted waters).

Chairman Marks said he thought Mr. Stone's position was that if a lawsuit arose, that is probably what the finding of the court would be. Chairman Marks hoped this might preclude having someone make a case out of it. He said he was concerned about taking questions such as this to the Supreme Court.

Representative Keyser said that if there is a statute, the Supreme Court will not be fooling around with it.

The motion passed unanimously.

Chairman Marks invited members of the audience to propose legislation for the committee's next meeting. Anyone doing so could mail it to the staff beforehand.

Lorents Grosfield asked about the status of the public trust doctrine.

Senator McCallum stated that he was concerned about the public trust doctrine. The people of Montana had the opportunity to include the public trust doctrine in the 1972 Constitution and rejected these proposals.

Chairman Marks asked if it would satisfy the committee to ask the staff to research the areas in which the public trust doctrine was discussed in the drafting of the 1972 Constitution. This report would be ready for the committee's next meeting.

Representative Keyser asked which states around Montana have or have not recognized the public trust doctrine.

Representative Ream felt that this would be "beating a dead horse." This is not something that has been thrust on Montanans just by this recent decision. The public trust doctrine is just that -- a doctrine, a concept, an idea. The idea behind it appears in the U.S. Constitution. It is an idea that certain things are held in trust by the government, supposedly for the good of the people.

Chairman Marks suggested that if some research were done on the public trust doctrine, it might be productive to show the point raised by Representative Ream. The committee, by consensus, asked that that research be done.

Chairman Marks requested that the assigned work be mailed out for members to study prior to the next meeting. The next meeting was set for September 28, a one-day meeting.

The meeting adjourned at 9:40 p.m.

hm/PEV/#2 Minutes 7/30/84

July 30, 1984
(name)

Joint Interim Subcommittee #2
(date)

NAME	REPRESENTING
Tom C. Milesnick	A.P.A. and self.
Bill Pruitt	self
Wilbur D. Dana Jr	self
Bobbie Pacha	APA PCLA - SCPA.
Pete Story	rancher
Land Lindbergh	self
Hank Goetz	self
Jerry Dodd	Self
Evelyn Dodd	Self
Charles McKeon	Self
Jon North	Dept. of State Lands
Larry Dodge	Self / Dodge for Governor
Tom Stacy	Self
Ralph M. Holman	self.
Lorents Grosfeld	self
John Delano	Mont RR assn
Greg Allen	Self (Box 568 Livingston
Dee Freeman	Augusta, self
Carol Mosher	Augusta, Mt Cow Belles
Stephen VanDeKirk	Augusta - self
Sam B. Hedges	Wolf Creek Lewis Clark
Don W. Hedges	Wolf Creek - Rancher
Walt Carpenter	self Great Falls
Steve Meyer	MACM
MARK KNOPS	
Jo Brunner	W.I.F.E.

Jerry L. Branch		321 8th Ave S, Shelby, Mont
James W. McDermand	Medicine River Canoe Clubs –	Great Falls
Deanne McDermand	self	Great Falls

Visitors' List

July 30, 1984
Joint Interim Subcommittee #2

NAME	REPRESENTING
E. J. Brady	Self
Earl Salmonson	Dept of State Lands
Gary G. Brown	Dept of State Lands, Forestry
Dennis Hemmer	Dept of State Lands
Dick Sandman	"
Andy Lukes	Champion Int.
Chuck Seeley	" "
IVARD JACKSON	JACKSON RANCH
Ron Waterman	MSGA
Orval L. Ellison	Rep HD 8
Perry Weidler (HJR 36)	MSU CE 1531 Stuart (Minute
Mike Micon	WETA
Franklin Grosfield	Sweet Grass Preservation Assn.
Ted Lucas	Self
Ruth Lowe	Agricultural Preservation Assn
Hans Tenjen	Mt. Stockgrowers
Wm Jim Wilson	" " Trout Creek
Lorraine Gillis	Rancher
Patrick R. Underwood	MT. FARM BUREAU
BILL ASHER	APA - PCLA - SCAPA
Mike Taylor	MTO&GCo
Ron Weiss	OBPP
Nancy McIlhattan	Park County Legislative Assoc.
Dick Russell	Park Co. Legislative Assoc.

Brend's oral presentation 5/30/84

CORY

PE Summary/ BREND2

INTRODUCTION

The theory of prescriptive easements is relevant to this committee's study because of a lack of certainty in people's minds as well as perhaps a lack of clarity in the law on the question of the circumstances under which recreationists may establish a prescriptive easement or right of passage across private land to a public body of water. In my discussion it is assumed that there is no doubt that the recreationists have the right to use the body of water in question. Theoretically, under present Montana law a prescriptive easement across private land could be established by a person or group of persons who present sufficient evidence that the use of the pathway has been, [PAUSE] and these are the words that are consistently used by courts in cases in this area, "open, notorious, exclusive hostile, adverse, continuous and uninterrupted" for a period in excess of five

years. However, as I indicated in my paper on this subject, it is relatively difficult to actually establish the existence of a prescriptive easement.

PRESECRIPTIVE EASEMENTS IN GENERAL

It is generally understood that an easement is an interest that one person has in the land of another that entitles the holder of the easement to use the other person's land for a special purpose not inconsistant with the general property rights of the landowner. Of course, by its nature, an easement does limit, however slightly, the rights of the owner. A typical common easement is an easement in a neighbor's private lane. Many easements are acquired through a formal conveyance by the landowner to the easement holder in exchange for money or some other thing of value to the landowner. The advantage of this

method of acquiring an easement is of course, certainty, certainty both in the easement's existence and in its terms.

A less common method of obtaining an easement is that of acquisition by prescription. Prescription is the name given to a manner of acquiring an interest in the property of another by using that property in a way that is adverse to the owner's interest and that satisfies certain legal requirements for a period of five years. These legal requirements, which I listed earlier, will be discussed in a moment. The parallel to acquisition of an easement by prescription is acquisition of title by adverse possession. The requirements of acquisition of title by adverse possession differ somewhat from those of prescriptive easements and the extent of the interest ultimately obtained is of course broader in the case of title by adverse possession but the underlying theories are comparable.

Before discussing the legal requirements of presciptive easements, I would like to point out a couple of general characteristics of prescriptive easements. First, once a prescriptive easement has been established, that prescriptive easement has the same legal validity as an easement acquired by grant or purchase. Ordinarily, one cannot be certain that a prescriptive easement has been established unless a competent court has held that it exists. Second, The use or uses that are made of a right-of-way during the five or more years that the easement is being established are the sole uses for which the right-of-way may be used after a prescriptive easement has been established. So for example, if a prescriptive easement has been established by people crossing property to go fishing in the summer, theoretically, hunters would not have the same right to use the pathway in the fall.

Although there is Montana statutory law on easements in general and on adverse possession, there are no Montana statutes that

specifically govern prescriptive easements. However, there is a fair amount of caselaw on this subject. Once again, under this caselaw, to establish the existence of a prescriptive easement, the claimant must show, "open, notorious, exclusive, hostile, adverse, concinuous and uninterrupted" use of the easement claimed for a period of five years. Since most of these terms are self-explanatory, and mean what they say, I will just clarify the meaning of a couple of them. "Exclusive" means that the right of the claimant must rest on his or her own use, but does not mean that the claimant must have been the only one using the way. "Continuous and uninterrupted" does not mean constant use but rather use by the claimant whenever he or she wished. Adverse means "non-permissive". Under Montana caselaw, proof at trial of open, notorious, continuous, and uninterrupted use of another's land raises a presumption that the use was adverse and shifts the burden of proof to the owner to show that the use was permissive. In other words, if the owner cannot prove that the use was permissive, it will be found to be adverse and the claimant will prevail. There have been cases in Montana that held that the presumption that the use was adverse was not raised by recreational use alone

thus clearly, making it more difficult to establish the existence of a prescriptive easement solely through recreational use of a pathway.

PRESCRIPTIVE EASEMENTS AND ACCESS TO PUBLIC WATERBODIES

Most of the prescriptive easement cases in Montana involve use of a road. The Montana Supreme Court has recognized a prescriptive right in the public to use water for recreational purposes, but it has never ruled that a prescriptive easement can be established in a right-of-way across private land to a public water body. In 1971, the Ninth Circuit, in a case interpreting Montana law held that Montana law permits the establishment of a prescriptive easement through use of a road for hunting, berrypicking, or recreation. However, ultimately it is the Montana Supreme Court that determines state law on a subject and its previous rulings on recreational use have made acquisition of this type of easement more difficult than acquisition of other

prescriptive easements. Yet the Supreme Court has not completely ruled out the possibility of establishing access easements by recreational use.

In conclusion, under present Montana law, assuming proper proof, it appears that an individual or group could establish the existence of an easement by prescription acquired through recreational use of a pathway but that in view of Supreme Court rulings in this area, this would be very difficult.

broader, but the

Brenda's oral presentation 5/30/89 COPY

LLIABSUM/BREND2

ISSUES OF LANDOWNER LIABILITY

INTRODUCTION

As we all know, in recent years there has been a steady increase in the general public's participation in recreational activities. This increase has had an effect not only on the public lands and waters used for recreation but also on the private lands near to and adjoining public areas. Thus there is a growing concern that the rights and liabilities of landowners and recreationists should be clearly understood so that each group may tailor its conduct accordingly. It is the purpose of this discussion to set forth, in general, a landowner's responsibilities with respect to recreationists entering or

crossing the landowner's land insofar as these responsibilities are relevant to recreational activities.

In this area, I will restrict my discussion to the landowner's duty of care toward first, trespassers, second, persons who have been given permission by the landowner to make recreational use of his or her land and third, persons who have an independent right to cross private land or to use a public water body on private land. In my paper I go into greater detail and discuss the landowner's duty toward all persons who enter private land but I think the scope fo the landowner's duty toward the above three groups is of most interest.

Under common law, the duty of care owed by a landowner to persons entering upon the landowner's land was determined by the status of the person entering. As I have said the governing rules in this area, an area that is somnetimes called "premises liability" are found in my paper to the committee. This common law approach, with minor exceptions, has been retained in Montana law. Like the

law governing prescriptive easements, most of the Montana law aplicable to this are is found in cases rather than statutes.

II DUTY OWED BY LANDOWNER UNDER COMMON LAW TO PERSONS WHO DO NOT HAVE THE RIGHT TO ENTER LAND WITHOUT LANDOWNER'S PERMISSION---NON-PRIVILEGED PERSONS.

As I have pointed out, under common law and under Montana caselaw today, to determine the duty of care owed by a landowner on private property towards persons who do not have an independent right to enter the land , the status of the person with respect to the landowner must be examined. Now of course, the reason that it is important to determine the landowner's duty of care in a particular situation is that if the landowner fails to meet the duty of care required of him or her in a particular instance, and someone is injured as a direct result of that failure, the landowner may be held liable for damages in a negligence action brought against the landowner by the injured person.

As an aside, let me point out that my concentration on lawsuits against landowners here is not intended to indicate that in the

situations discussed the landowner does not have grounds for a lawsuit against the injured ~~intruder~~. It is just that that is not a topic of discussion here. Later, Anne Brodsky will cover some of that related area when she discusses civil trespass, and nuisance.

II NON-PRIVILEGED

Generally speaking non-privileged persons entering upon the land of another are divided into three classes, invitees, licensees and trespassers. The landowner owes the greatest duty of care toward invitees and the least duty of care toward ~~invitees~~. The rules applicable to conduct required of a landowner towards invitees and licensees are found in my paper. As I will discuss in a moment, in Montana these rules have been altered by statute in the area of permissive recreational use of private property.Clearly a visitor is a "trespasser" when he or she has no right to be on the land. The duty owed to a trespasser is to refrain from acts of wilfull or wanton negligence.

III MONTANA STATUTORY CHANGES IN COMMON LAW OF DUTY OF CARE OWED TO NON-PRIVILEGED PERSONS.

In 1965, by enacting sections 70-16-301 and 70-16-302 the legislature restricted the application of the general rules on premises liability to the duty of care owed by a landowner towards recreationists using ~~the~~ land for free with the landowner's permission. Copies of these statutes are attached to your copy of my paper on landowner's liabilities. Basically the effect of these statutes is that when a landowner allows someone to make recreational use of his or her property the landowner is not incurring any additional liability towards that recreationist and can be held liable to the recreational visitor only for injuries caused by the landowner's willful or wanton misconduct. Although no Montana case to date has interpreted the meaning of "willful or wanton misconduct" as used in 70-16-302, MCA, it has been defined elsewhere as the infliction of injury either intentionally or with complete indifference to consequences.

IV DUTY OWED BY LANDOWNER TO PERSONS WHO HAVE THE RIGHT TO CROSS LAND OR THE RIGHT TO USE PUBLIC WATER ON

THAT LAND.

In this section I will highlight a few of the considerations that can be used in determining the extent of a landowner's liability towards "privileged" persons who have a right-of-way across the landowner's land or who have a public right to use a water body located on a landowner's land. There are no Montana statutes addressing the scope of a landowner's liability toward these two groups of "privileged" persons. Nor has the issue been addressed by the Montana Supreme Court.

What liability, if any will a landowner have if a person is injured on a right of way across the landowner's land? Since there is no Montana law on this question it can be analogized to the question of the extent of the landowner's liability for an injury occurring on a sidewalk abutting the landowner's land. Generally, (in the absence of specific statutes) the owner or occupant of land abutting a public sidewalk does not, solely by reason of being an abutter, owe to the public a duty to keep the

sidewalk in safe condition. Only where the abutting owner creates some unsafe or dangerous condition through use or otherwise, does a duty to repair arise. As I have already pointed out, under the general rules of negligence law, an injured person can hold another liable for the injury only if the second person owed a duty to the injured person and breach of that duty was the cause of the injury. Therefore, generally speaking, when a person is injured on a sidewalk , the only instance in which the abutting owner can be held liable for the injury is if the injury was caused by an unsafe or dabgerous condition in the right of way that the landowner created but did not repair. I think it is likely that a court would hold a landowner to a similar standard of care with respect to persons holding a right of access across the landowner's land. Further, if the public has the right to use a body of water, then I believe that a court would probably find that the landowner's liability is similarly limited within the area to which the public has a right of access. In other words, if the public has the right to use a stream and its bed

and banks up to the high water mark, then the landowner should be liable only for injuries caused in that area by an unsafe or dangerous condition that he has created and failed to repair.

If a member of the public, without valid reason, goes beyond the area which the public is entitled to use and is injured on private property, then the landowner's liability is determined by general rules of premises liability for trespassers. If there is a valid reason to go beyond the high water mark, for example, to portage around a fence, then the portage area can be considered a public right-of-way for purposes of analysis.

On the related issue of the extent of a landowner's duty to warn the public of a hazard, e.g. a fence across the stream, it is likely that a determination would be made on a case-by-case basis under the general principles of negligence law. Thus, if a landowner builds a fence across a stream just downstream from a sharp curve, a court may rule that there is a duty to put up a

warning sign. But if a landowner builds a fence on a straight section of a stream and the fence is clearly visible, a court would be less likely to impose a duty to warn on that landowner. Further, in its analysis, a court would probably take into account whether or not a barrier is artifical or natural and require notification of natural barriers only under exceptional circumstances.

CONCLUSION

In conclusion, while there may be only limited statutory and caselaw concerning the exact questions raised by recreational use of private and public land many of the issues raised may be analyzed in terms of and governed by an existing framework of law.

TESTIMONY OF WILLIAM D. DANA, JR.
BEFORE INTERIM SUBCOMMITTEE #2
OF THE MONTANA LEGISLATIVE COUNCIL

JULY 30, 1984

My name is William Dana. I would like to make some comments on the Montana Supreme Court's recent decisions on the Dearborn and Beaverhead River stream access cases. My interest in these cases results from my ownership of a ranch near Livingston. The Nelson Spring Creek rises on my ranch, flows through the property of my neighbor, Edwin Nelson, and reenters my property a few hundred yards from where it empties into the Yellowstone River.

Nelson's, like most spring creeks, is a relatively small stream but has an unusually abundant population of aquatic insects which are very vulnerable to disturbance of their habitat on the streambed. Spring creeks also have unusually large populations of trout relative to their volume of water. This is because of the abundant insect population and also because the creeks are spawning grounds both for the resident trout and trout who enter the creeks from larger streams, spawn, and then return to the larger streams. Nelsons Spring Creek, particularly in the stretch near its mouth, is an important spawning ground for the Yellowstone River Cutthroat, a relatively rare trout species. The shallowness of the Creek, as well as the fact that it rises in and flows entirely through private property, precludes any possibility of floating.

Since acquiring my ranch in 1969, I have expended considerable time and money on improving the trout habitat on my portion of the Nelson Spring Creek with the result that the trout population has increased and fishing conditions are much improved. My policy with respect to access to the Creek has been as follows:

1) Fishermen floating the Yellowstone have been allowed to beach their boats at the mouth of the Creek and fish on foot up to the highwater mark of the Yellowstone at any time without permission. They have not been allowed to fish above the highwater mark without permission.

2) Fishermen in vehicles who ask permission to fish have been granted access to the Creek on my ranch road except when my family or guests are fishing.

If the result of the Supreme Court's Dearborn and Hildreth decisions is to open Nelson's Spring Creek to an unlimited number of fishermen who beach their boats at the mouth of the Creek and wade up the streambed the effect on the fishery will be absolutely devastating. First, the aquatic vegetation and insect life will be severely disrupted by trampling. Second, the trout will be terrorized because the stream is small and shallow and has no deep holes to provide cover for them. The only way they can be caught under optimum conditions is by a very careful and stealthy approach. Third, spawning will be disrupted, particularly the July run of the Cutthroat. Fourth, with no limitations on the number of fishermen in the Creek no one will have good fishing. This is because the trout's habitat will be degraded, resulting in less fish that are almost impossible to catch, and also because in such a small stream the fishermen are bound to interfere with each other. Such interference will be especially bad unless I permit the fishermen to come out of the Creek and walk on my land when they go back to their boats on the river rather than walking down the streambed through each other.

While the spring creeks are the most vulnerable to the effects of the Dearborn decision because of their unique physical characteristics, I believe there will be extremely negative effects on hundred of small streams in Montana. Small trout streams are simply not capable of providing fishing for an unlimited number of fishermen. They may be good for the

first year or two after they are opened, but after that they will be mediocre to poor. Unfortunately, in five years most people will accept this as natural and never realize what has been lost.

The Supreme Court's access decisions raise serious problems for landowners, other than their effect on the quality of fishing, because they fail to recognize the very significant differences between large streams and small streams, and between wading and floating. With respect to fencing, for example, it is difficult and usually unnecessary to put fences for stock control across large streams, but several fences may be necessary on a given stretch of a small stream. Is the landowner required to put in gates or stiles at each fence to facilitate the portage around obstacles called for by the access decisions? Or is it sufficient to allow the fishermen to climb the fences and eventually break them down. Incidentally, the dictionary defines portage as "carrying of boats, goods etc. overland between navigable waters". The word is hardly appropriate as applied to a wading fisherman and is a good example of the confusing nature of this decision.

An even worse problem is that the access decisions fail to recognize the huge difference to the landowner between having boats floating through his property and having fishermen, hunters, birdwatchers or whatever wading up and down the streambed. Take a hypothetical case of a privately owned meandering stream with access by car from a public road or by boat from a large stream. The stream may be close to ranch buildings or run through cultivated land or areas where stock is enclosed. Some parts of it are better than others for fishing or other recreational purposes. Does any one really believe that all those who enter the stream will wade within the highwater mark to get where they want to go? Does anyone really believe they will all stand in the stream when they eat their lunches, when they need to relieve themselves, or on a really cold day when the water is high?

Most fishermen are decent and law-abiding, but every barrel has rotten apples, and there will be some who will take a short cut over the land to reach the better water or to get back to their cars or boats. This will not go unnoticed for long by the well intentioned, law-abiding fishermen, and eventually they too, seeing that others are leaving the streambed with impunity, will leave it themselves.

Defenders of the Dearborn and Hildreth decisions will contend that the landowner has recourse - he can have those who step out of the stream arrested for trespass. In my opinion this is an impractical and unsatisfactory recourse. Landowners cannot possibly watch their streams at all times to see if the people wading in the bed are stepping out. And what if they do observe an act of trespass? Or perhaps two or three at once? Very few landowners relish confrontation with trespassers. They are unpleasant at best and dangerous at worst. Help from the authorities will, in most cases, be out of the question, since it would take hours for them to be brought to the scene of the trespass. Thus, unless the landowner is willing and able to forcibly eject the trespasser he must rely on the trespasser's good nature or his willingness to give his name and address so he can be arrested later.

In short, I believe the Dearborn and Hildreth decisions, if they open the beds of small streams to public wading, will be an open invitation to trespass on private land outside the streambed, and that, while this invitation maybe accepted by only a few at first, it will be generally accepted within a very short time. Furthermore, I believe that, short of keeping their streams under constant surveillance, and engaging in continual confrontation, there will be nothing the landowners can do about it.

Dearborn and Hildreth may create other serious problem whose dimensions are not clear at this time. For example, landowners may

claim that they have suffered economic loss because part of their property is now public rather than private and sue for compensation. They may claim that they are entitled to tax relief because part of their property is now public, and if it is counter claimed that they never owned the streambed then the claim for tax relief could be retroactive. Another question is the landowners' exposure to liability suits by persons who are injured while wading in the streambed. Finally, shooting from the bed of a small stream near buildings or stock would be a nightmare for landowners.

I would like to thank the committee for allowing me to express my views and sincerely hope that it will be able to find a way to protect the small trout streams of Montana from serious degradation and landowners from what I believe will be a completely unacceptable level of intrusion.

William D. Dana, Jr.

-TESTIMONY of Lorents Grosfield, Sweet Grass County rancher, July 30, 1984

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE:

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 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?

TRESPASS AS A RESULT OF ACCESS

Mr. Chairman and Members of the Committee: My name is Nancy McIlhattan. I'm a dairy farmer from Park County and I represent the Park County Legislative Association.

I am here to testify on the inadequacy of our present Criminal Trespass Law #45-6-201. I would like to demonstrate how three different Montana county attorneys have interpreted the rulings passed down by the Supreme Court in the Curran and Hildreth cases as they relate to trespass on private property.

On July 19, 1984, members of the Park County Legislative Association, Bill Asher and several interested persons from the surrounding ranching community met with the Park County attorney, the sheriff and the sheriff's deputy to discuss the current Criminal Trespass Law #45-6-201.

The opening statement made by our county attorney was, "The Criminal Trespass Law as it now stands is impossible to prosecute." He meant that due to the wording contained in this law, unless a a trespasser has been given notice that he is trespassing--either by personal communication or by the posting of one's land in a conspicuous manner--he can't be prosecuted; which means he must be caught on the land illegally at least more than one time.

With the present court rulings, making this happen means ranchers should patrol their waterways at all times if they are to manage their lands. We, the landowners, are running a business that takes a great deal of time and there isn't anyone in our business that can act as a full-time patrolman. Our land is our factory, our office, our business place and our backyard. We do not deface or defecate in the public's business place. We are asking for laws so that we may be treated in the same way. Please help us with laws that will protect us. One possibility could be an adapted version of the big game law which works through Landowner's Permission #87-3-304.

Our tri-county organization (made up of the Agricultural Preservation Association, Park County Legislative Association and Sweetgrass County Preservation Association) asked each of our county attorneys a number of questions concerning rulings stated in the Hildreth and Curran cases; and the questions and responses are as follows:

1) Could recreationists follow water up or down an irrigation ditch? At first the Park County attorney wasn't sure and then he came back with the point that appropriated waters didn't apply in such cases. The Gallatin County attorney concurred with this interpretation. I feel that this may be true, but irrigation takes more than just the appropriated amount of water to get down a ditch to a head gate. That unappropriated amount of water needed to carry the load is what concerns me.

2) The Park County attorney was emphatic that if water can be used for recreation, it may be used for recreation; which to me sets up a quandary over irrigation ditches--why are they different?

3) When the Park County attorney was asked what constitutes a barrier, he felt that if someone is using a waterway and came to water that was too deep to get through, that would be a barrier and they would have to turn around and go back.

4) When asked if portage applied only to the boat or boaters, he didn't answer the question.

5) The question was asked: "What kinds of recreation were intended by the court cases?" The Park County attorney said it only applied to water related activities. He said that the Hildreth case did not imply the use of a dry stream bed--there had to be water in the stream bed.

The Sweetgrass County attorney was asked a similar question and he said he could not prosecute anyone for trespass that was within the ordinary high-water marks of a stream bed regardless of water.

The strongest differences of interpretation over the rulings outlined in the Curran and the Hildreth cases have to do with trespass.

If a duck hunter was floating in a waterway across private land and shot a duck, and the duck falls on private property, may the hunter be prosecuted if he sends his dog after the duck?

The Sweetgrass County attorney said yes. He would base his case on the theory of extension. Anything that the individual has control over or owns is the individual's responsibility. If this were taken one step further, the bullet from the gun is also trespassing.

Our Park County attorney agreed with this and said the dog and the bullet are an extension of the hunter.

The Gallatin County attorney said he could not prosecute because one could not prosecute a dog.

As can be seen by these different interpretations of the same questions, the landowners in our state are faced with a very frustrating situation because there are many interpretations of the same ruling. We need some kind of law that will address these questions in such a way that the landowner can manage his business.

In closing, there needs to be a distinct definition of what is meant by the ordinary high-water mark; a clarification of what is meant by barriers; let's try to define what is the water's capability of use; and last but not least, what recreation is going to be allowed.

I leave you with a question that is paramount to this issue of access and trespass:

"Can stream beds be used as recreational corridors
through private land to gain access to public land?"

TROUT UNLIMITED

July 30, 1984

Legislative Interim Subcommittee #2
Robert Marks, Chairman
Helena, Mt.

Dear Chairman Marks and Subcommittee Members:

With respect to navigability and public recreational usage of Montana waterways, the Montana Council of Trout Unlimited supports the following:

1. limiting recreational usage to the high water mark, so long as fishermen and floaters are allowed to get around obstructions.

2. wording to eliminate prescriptive easements.

3. wording to eliminate any liability for the landowner.

4. some form of recreational management, even if it means higher fishing license fees and fees for watercraft.

5. we want to be able to use all navigable waterways, as allowed by the Supreme Court.

6. We recognize that the broadness of the court decision leaves several questions unanswered, as raised in the letter from Anne Brodsky and Paul Verdon dated June 28, 1984. We will be glad to participate in the resolution of these questions.

7. While we strongly support the Supreme Court decision, we recognize that this decision places a very real responsibility upon the recreational user to respect the property rights of the landowner. Trout Unlimited is interested in doing everything possible to assure that landowners are not unduly inconvenienced by this landmark decision.

Sincerely,

Pete Test

Pete Test, President
Montana State Council
Trout Unlimited

TO: LEGISLATIVE INTERIM SUBCOMMITTEE NO. 2 FROM: LARRY DODGE 7/30/84

SUBJECT: CONSTITUTIONAL REVISION AS A POSSIBLE REMEDY TO STREAM-ACCESS PROBLEMS

As I see it, the Supreme Court rulings on stream access have aggravated an existing, if once minor, property rights problem. In the Dearborn decision, it used historical evidence of commercial use (that is, log-floating) to establish state title to the Dearborn River streambed , then drew upon state constitutional law and invoked the public trust doctrine to give recreationists the right to float any waters capable of being floated, and strengthened its resolve on the public trust with the Beaverhead River decision.

I repeat my earlier regrets that this line of reasoning was followed, because the recreational use of Montana's floatable waters could have been guaranteed without determining the streambed of the Dearborn to be state property and without invoking public trust doctrine--so I regard both of these decisions as legal overkill.

That is, the use of the Dearborn to float some logs about 100 years ago is an unreasonable criterion by which to declare its bed "state property", even if correct by the letter of the law. I expect some very serious consequences. For example, Mr. Curran may be able to demand refund of all taxes paid on that streambed, plus interest, by himself and his predecessors since 1889. Other landowners, whose properties contain similar stretches of stream (once used for log-floating but for many years "unnavigated"),could face similar rulings and make similar claims for refund of erroneously paid taxes, it would seem.

The ruling on streambed ownership, in combination with application of public trust doctrine, and most recently in combination with the Hildreth decision, sets the stage for later rulings in favor of public access to state property (i.e., state rights-of-way to access state land). If the state's powers of eminent domain are ever used to this effect, the result will be complete degradation of private property rights in Montana, especially if "recreational use" (both what it is and what waters it applies to) includes all waterbodies for all uses (which

seems to be the case).

The incentives provided by the Supreme Court ruling and its wide-open interpretations of "recreational use", the angling statute, and what constitutes a "streambed" are for recreationists to go anywhere they want in search of recreation, whether or not they're on private land, as long as they're somewhere near a body of moving water and are carrying a fishpole or paddle.

For landowners the incentives are to make access to that water as difficult and onerous as possible, and to confront anyone who might not be able to establish a legitimate excuse for being there.

That is, the court decision increases the potential for hostility between land owners and recreationists and therefore the potential for enactment of detailed regulations concerning every aspect of water-related recreation in Montana.

I, for one, find that a tragic prospect, destructive of personal, face-to-face arrangements, private property rights, and wilderness values.

To me the optimum outcome for any issue is one which maximizes individual rights and minimizes state intervention. In the case of stream access, the right of individuals to transport themselves and to pursue happiness could have been used as sufficient basis for allowing them to float any floatable waters to which they had gained legal access. That is, there is no need to bring up the idea of public rights to stream access.

And the right of property owners to control uses of and access to their land could have been used as sufficient basis for restriction and regulation of trespass. If individual, not state rights, had been used as a basis for the court's decisions the streambed ownership issue could have been ignored, the potential issue of overpaid backtaxes would therefore have been moot, a potential legal basis for guaranteed public access could have been avoided, and the incentives for all concerned parties would have been to cooperate with each other instead of

to draw lines and ask for state intervention.

A few clarifications of rights concerning streambed use, portaging of manmade and natural obstacles, and definitions of high-water marks might have sufficed.

But perhaps it is unfair to heep all blame for the aggravation of the stream access problem upon the Supreme Court. True, the court could have chosen not to rule on the streambed ownership issue, and still claimed that recreational use was a state issue by virtue of the state constitution's provision (Article IX, Section 3, Part 3) that all waters in the state are state property. But from there it's hard for me to see how the court's decision could have been much different. And that tells me that the issue is probably, at its root, constitutional.

Now that the "commercial navigability" test has been applied to the Dearborn and found both correct and sufficient to determine its bed to be state property, the legislature can do nothing on that front. But it could spawn an initiative to reword those parts of our state constitution which make all "beneficial uses" of Montana water into "public uses" (Article IX, Section 3, Part 2), and which make all waters in the state "the property of the state" (Part 3).

If individual water rights were not subject to evaluation and administration by the state according to their supposed degree of "benefit", and the water, in effect "belonged" to its claimants, then in-stream flow rights could compete in a free market with rights to consumptive use. Mixing one's commercial recreational labor could have the same legal standing as mixing one's other kinds of labor with the water. Non-commercially used streams could be rightfully used by boaters and anglers, below their high water marks, but only when the water would support such use. Such residual, non-commercial users would, of course, have no claim to the in-stream flow rights. Only in situations of scarcity or pollution would the quantity and quality of water be the subject of litigation and in those cases the dispute would have to be between commercial rights holders.

Most of the time recreational and other uses would be compatible or at least non-rancorous, and the only items requiring state participation would be the clarification of access rights (including, as mentioned above, rights of portaging and boundary definitions in terms of water marks). Case-by-case solutions could be found for unprecedented situations.

My estimate is that the legislature, by virtue of the Supreme Court decisions in question, has essentially two options, and they are diametrically opposed. One is to develop a comprehesive regulatory package for stream recreation--identifying and classifying all recreational waters in the state both by location and by time of use, defining all recreational craft, identifying and/or providing public access, [redacted], educating the public, enforcing such a body of law, and collecting the money it would take to accomplish all of the above. This could happen immediately, or after a "wait-and-see" period.

The other option is to change our constitution to remove water from state ownership, redevelop a free market in water, and therefore end all the confusion, complication, confrontation--not to mention [redacted] politicking--which state ownership, in just twelve short years, has brought us, not only in terms of stream access, but in terms of water marketing and water development.

Let me make a short case in favor of the latter option. Regarding some previous testimony today, mainly that of John Thorson's, it should be noted that Los Angeles was first obliged to divert water from Mono Lake by the courts, then obliged to stop doing so by the courts, via public trust doctrine. Note also that a free market in water would supply Los Angeles with water from all sorts of sources, including the nearby Imperial Irrigation District, but has been prohibited from so doing because the federal government owns all the canals in the area, and controls the rights to them and disallows water sales and rights transfers. In short, government interference with a free market in water causes these kinds of problems, and the only solution is to separate water and state.

My question is this: Can a constitutional revision override "public trust doctrine", as invoked by our Supreme Court? If, as we have heard today, the 1972 Constitutional Convention came up with the language that it did regarding "water rights" merely to protect Montana's water from out-of-state claimants, then to do that now by means of a free market (including the withdrawal of the power of eminent domain from private project builders) would not thwart the framers' intent. But it would at this time protect us from the "in-state" loss of rights that is the apparent result of the application of public trust doctrine. Besides, insofar as the state constitution provides for state ownership of all waters within its boundaries, but nowhere defines the boundaries of the state, an amendment to provide for private ownership of water rights would at this time serve the dual purpose of saving our water from government ownership and providing consistency with the rest of the constitution.

If constitutional revision is either inpossible at this point, or would be ineffective in combatting the effects of public trust doctrine, then we might as well concede that we Montanans have irretrievably lost our individual water rights to the state. This may appear as a mere transfer of private to public rights, but it is in fact a transfer of individual to government rights, and I say "STOP!"

Larry Dodge

STATEMENT

July 30, 1984

TO: Legislative Subcommittee No. 2
Chairman Bob Marks

Mr. Chairman & Members of the Committee:

My name is Bill Pruitt, ranch manager of a cattle and guest ranch on the Boulder River, 24 miles south of Big Timber.

The two Supreme Court rulings that caused our current problem are unthinkably wrong. The 6-1 and 5-2 votes are still uncomprehensible to the prudent man.

This unbelievable dictate against landowner private property rights and business management and the wildlife resource itself, must not be accepted in any way. We can't afford either as a business manager or a steward of the land, to turn tail, weaken or accept any compromise that concedes to such a wrongdoing by the Court. This is America; likewise against the Constitution, private enterprise and indeed the "core" for our nation's strength.

We were doing so well with the local grassroots input of stream determinations in this matter. In collecting local data statewide to assist the Legislature in addressing and solving the issue in everyone's better interest.

Specifically, I've lost management control of the waterway thru the ranch for my business. I have cattle in the river bottom year round. I have to have management control to effect sound management. The requirements of my business can cooperate and can coordinate with the desire of public recreational administration agencies, but definitely not under this wide-open ruling that presently exists.

When the river drops to the summer low about August 1st, then I have to fence into the river in several places and across it in one place. Now, I have to make a plea for help and make a "stand" against the rulings that hinder my management for no good reason.

I have also lost management control of the recreational access, use and preserve of the watercourse relative to the fish and game that live there. This naturally includes the fishing, hunting and other recreational pursuits that cause preserve of the wildlife resource. Until now, I've been able to regulate the public preserve on my 4½ miles

of waterway. It's the best way and the only way I provide a quality experience for those we give access to.

When this land, my land becomes accessible to the general public without control, then the resource begins to decline, deteriorate; the outdoor experience quality is shot for those we extend the privilege to, not to mention the harassment and other problems caused by the public user to my management.

Therefore, I urge maximum legislative action to squelch the rulings as much as possible, tougher tresspass laws and penalties, better definition of liabilities, obstruction, high water marks and respect of agricultural ownership.

I fully endorse the statement of Bill Asher and the three appointed spokesmen for the APA. Also, the stream access closure by participating agreement of landowner in Sweet Grass County.

I'm hopeful that these brief contributing comments will be helpful and be supportive to the legislature as you prepare to address the issue for us.

Thank you.

Bill Pruitt

TESTIMONY REGARDING STREAM ACCESS
July 30, 1984

TO: Members of the Interim Committee #2
Bob Marks, Chairman

My name is Franklin Grosfield and I am a rancher from Big Timber representing the Sweet Grass County Preservation Association.

Attached to my statement as part of our testimony is a copy of an ad in the July 29th edition of the Billings Gazette which was composed and paid for by our Association. The ad basically says that we regret that we have no alternative other than to close our ranches to public access in protest against the recent Montana Supreme Court decisions. The names of 222 rural landowners who are joining in the closure are listed. To give that number some perspective, the last agricultural census counted 230 farms and ranches in Sweet Grass County.

The ad is self-explanatory, so you can read through it and if you have any questions, I'll certainly try to answer them.

Even though we've announced a general closure of private land to public access, we recognize that the public must be allowed to come on our farms and ranches and use the beds and banks of any waterway up to the ordinary high mark, and portage around barriers. That is what the Supreme Court has said in its decisions and we will certainly do our best to comply with those decisions for as long as they are in effect.

The practical problem that we face in complying with the decisions is that we have to find ways to manage our land and water resources for agricultural production and at the same time allow the public unrestricted use of our creeks and rivers and their banks.

We've reached the point now that the public land managers have more control over what the public does on public lands than we do on our privately owned ranches. Public lands are often restricted in order to protect the animals and plants from the public,or to protect the public from various hazards. Elk calving grounds can be closed to public use but my calving pasture can't if a stream runs through it. People are forbidden to go into many areas where there are grizzly bears, but I can't stop them from coming into my bull pasture because it has a creek running through it. In addition, I'm probably liable for any damage that my livestock inflicts on the public.

Private landowners need help from the Montana Legislature if we are to have any hope of accommodating some public use on private lands.

The mantle of constitutionality appears to be tightly wrapped around the court's decisions, so they are not subject to being changed by some mere whim of the Montana Legislature.

With that in mind, I am going to suggest four specific areas that I think your committee should consider.

First, we need a well-defined and effective trespass law. Since the public has gained the right to use streambeds between the ordinary high water marks, we think the public has also gained some responsibilities. The burden of responsibility should be shifted to the public to know where private land begins and to require that permission be obtained from the landowner before they come on private land. Montana has such a law that applies to big game hunters and it needs to be expanded to include any public use of private land.

Secondly, we need relief from any landowner liability that might arise out of the public use of waterways. Since the public has a right to be on our ranches, and we can't keep them off even for their own protection, it is clearly unjust to expect us to be responsible for the public's well being.

Third, the public should be responsible to landowners for any damages that arise from the public's right to use the waterways. Again, this is just simple justice and an expression of the concept that there are responsibilities connected with rights.

If the public has the right to come on my ranch and starts fires along the creeks, I expect compensation from public sources when that fire gets away and burns my range or my haystacks or my home.

Fourth, we need understandable and practical definitions for many of the terms that were used in the Supreme Court decisions. I'm not going to attempt a complete list of terms that need clarification, but to illustrate the need for definition, let's look at this language:"in case of barriers, the public is allowed to portage aroung such barriers in the least intrusive manner possible." My dictionary definition is that portage is the act of transporting, especially boats, canoes and goods from one navigable water to another.

What does that mean? Is portaging restricted to boaters? Is it allowable only on navigable waters? If so, which definition of navigable are we supposed to use?

I have similar difficulties with "barriers" and "least intrusive manner". The end result is that I don't have the slightest idea what that part of the decisions means.

We think that the term most in need of definition is "ordinary high water mark." It needs clear and understandable definition because that's the boundary where public rights end and private rights begin. Since the mark most easy to identify is the vegetation line, we would suggest that it be used. If you can step on vegetation, you're above the ordinary high water mark. If you can't, you're below it.

In closing, I would announce that the Sweet Grass County Preservation Association is available to this committee and to the agricultural community to provide any assistance that we are capable of giving.

The Billings Gazette

Sunday, July 29 1984

P.A. Cramerus
Laurence Allestad
Stuart Moore
Donald Moore
Pauline Mack
Russell Lafond
Victor Tronrud Co.
by Victor Tronrud
George E. Tronrud
Rein Ranch
Charles M. Rein
Morris Tronrud, Jr.
Thorvald Anderson
Wm. & Michelle V.C. Carroccia
Thomas L. Anderson
Kermit Anderson
James R. Cleveland
John A. Adams
Leif Anderson
Norris Johnson
James A. Hanson
Jerry Marstaeller
John A. Green
Don S. Norem
Bar Nothing Ranch
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Sondeno Ranch
Eugene Sondeno
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Bud Arneson
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Kenneth D. Laubach
KA Ranch
David Scheel
Plaggemeyer Ranch
Dan Plaggemeyer
Little Timber Ranch
Leo & Gary Arlian
Laurence F. Larson
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Crazy M Ranch
Beryl Musburger
Simser Ranch
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James Favinger
Ole Oiestad
S-K Ranch
Suzzanne Krieg
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Frank Cosgriff
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Hans Beley
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Robet J. Fitzhugh
Ben J. Raisland
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Tim & Jean Ann Phaler
Opal Stephens Cunningham
Robert & Roberta Flick
Paul L. Gilbert
Robert H. Burns
Alfred Anderson
Jarrett Brothers
Richard Jarrett
Felton Angus Ranch
Raymond Felton
Hammersmark Ranch
Tom Hammersmark
Terland Ranch
Dale-Sharon Schott
Joseph Mahlum
Kenneth Schilling
Lloyd Braughton
John Cooper
Windsor Wilson
Archie Ellison
Harry Andersen
Barney Warp
Ralph Burton
Ron Boe
Floyd Kemph
Ralph Weller
Ed Weller
Tom Brownlee
Virgil Braughton
John H. Titeca
Lee Smoot
Clarence S. Rostad
Jack Mysse
JL Angus Ranch
by John Dolby
Ellis Faw
Raymond Rudd
Thomas R. & Donna M. Smith
Ralph Holman
Mallard Springs
by Dick Josephson
Burnt Leather Ranch

ATTENTION: SPORTSMEN AND OUTDOOR RECRETIONAL ENTHUSIASTS WE NEED YOUR HELP —

Because of the recent extreme Montana Supreme Court decisions regarding public access to private lands alonc streams, WE REGRET that we feel we are left with no meaningful alternative other than to protest by CLOSINC OUR RANCHES to all public recreational access until further notice.

The Court has determined that our traditional rights as landowners to control who is on our property are nc longer valid, in spite of the fact that we have purchased and paid taxes on this property, owning it in some case: for generations. Especially in these hard economic times, we agriculturalists cannot withstand the one-sided ef fects of these decisions, especially the resultant property devaluation and the increased expenses, liabilities, anc worries that we will face because of being forced to allow public recreation on our property. While we can nc longer stop you from wading up and down our streambeds (assuming you can get to them from a public access site), we have decided to join in an organized protest and restrict access tc the rest of our property. We hope that by doing this and explaining why we are doing it, we will gain some under standing and support from the public for balancing this unfair situation with effective legislation protecting us from such things as trespass and liability, not to mention litter and other general nuisances. We do not find it easy to close our land, especially since there are many fine recreational enthusiasts who have derived great enjoymen from using our property. Yet, there comes a time when we can no longer just sit idly by and watch our rights dis appear.

Have you as a recreationist really gained from these decisions? In some cases, you probably have. Perhaps you can go some places you couldn't go before and you don't have to check in with anyone in order to do it — bu then, neither does anyone else. And now, many places that you could go before have been closed. Perhaps you've never enjoyed the luxury of a recreational experience unencumbered by the interruption of the genera public. If you have it's probably something that you hope your grandchildren can also enjoy. But as the popula tion grows and the urban public seeks relief in places like Montana, how much longer do you think that kind o experience will be possible unless there are some private rights and some private property? What will happen tc blue ribbon trout streams where access was formerly controllable? What will happen to quality hunting areas anc your favorite quiet picnic spot?

We feel that paramount among the reasons that this country has endured and is strong and is, in general, a bette place to live than other countries is precisely because of the opportunity to own property privately and to enjoy the constitutionally guaranteed rights associated with it. But if we can't control our private property anymore, i we must allow public use of it, is it really private property? So far, these decisions only apply to lands alonc streams. What will have become of us as a nation if private property becomes a thing of the past and the public acquires rights to use all property?

Do you feel it's fair that these traditional rights property owners have had and exercised for generations are sud denly taken away with no compensation, with not even so much as protection from the increased liabilities anc general nuisances? We hope that you will support us during the 1985 Montana legislative session in attempting tc make this situation more equitable. We hope that you will take the time to discuss it with your friends and legisla tors. We are genuinely sorry that it has come to this, but without some protections and limitations on the one-sid ed effects of these decisions, we have too much to lose and really very little to gain by opening our land to the public.

The situation has gotten out of hand. The Court has dealt a devastating blow to private property rights. We are virtually forced to accommodate to public recreation on the stream portions of our property, and, given our poor trespass law, we're not much better off on the rest of our property. The Supreme Court did not see fit to offer us any relief for the extra liability and expenses we will face as a result, or for the devaluation of our property along streams. But perhaps the Montana Legislature will see fit to give us some of the relief we need.

Based on the ideas presented above, virtually all rural agricultural property owners residing in Sweet Grass Coun ty were approached to sign an agreement to protest by closing their property to all public recreational acces: from August 1st to August 15, 1984 — over 99% signed. (The signers' names appear in the margins of this ad) These signers represent ownership of nearly all the private land in rural Sweet Grass County. Practical access tc most of the over 500 miles of streams in Sweet Grass County is by way of these private lands.

Hopefully, the time has come for sportsmen and landowners to open lines of communication, get together, anc work this out equitably. Please remember that we do not find it easy to close our land — most of us would much rather provide recreational opportunities on a fair and equitable basis. The purpose of this organized closure is tc draw attention to our needs which is something we haven't seemed able to accomplish in any other way.

For further information or inquiries on how you can help, please contact the Sweet Grass County Preservatior Association, Judy Rue-Secretary, Box 26, McLeod, MT 59052, or phone 406-932-6167. The Preservation Associa tion Directors are:

Teddy Thompson
Windsor Wilson
Lorents Grosfield
Raymond Felton
Mary Anderson

Arnold Breck, Jr.
Ben & Shirley Richard
Orval & Emma Ellison
Beaver Meadow Ranch
Bill Pruitt, Manager
Boulder River Ranch
by Steve Aller
Earl Butler
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John M. Pierson
Joseph J. DeCock
John DeCock
7T Land & Livestock Inc.
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Tom D. & June Kolberg
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Robert Miller
Cayuse Livestock Co.
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Marlyn Drange
Danny Halverson
Bud & Arlene Pile
Ria Esp
Duane Mothershead
Glen Mothershead
Bob Faw
Jacob T. Halverson
Kevin Halverson
Rudolf Forster
George Meyers
Terry Terland
R.T. Maclean
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Keith Engle
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Ed Deegan

Jim Woolsey
Pederson Land & livestock
Marvin H. Pederson
Lyle Jones
Phillip Schuman
Tom Agnew
Raymond Pearce
Don Pearce
David Myrstol
Franklin Grosfield
Elmer Myrstol
Paul Haaland
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Dennis Wilson
Tom & Sigrid Jarrett
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Margart & Dale Vermillion
Harry Jabs
Peter L. Rostad
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Two River Ranch
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Jim Scholten
Harold Faw
Bill Harmon
Nina Hoffman
George Clayton
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Martin Petersen
Kenneth Haugstad
Raymond L. Tichner
Andy Richert
Bruce Richert
Robert C. Lewis

TESTIMONY BY WILLIAM E. ASHER, SR., BEFORE THE JOINT INTERIM SUB-COMMITTEE # 2, HELENA, MONTANA - July 30, 1984

Mr. Chairman, members of the Committee:

For the record, my name is Bill Asher, I reside 52 miles South of Bozeman, Montana and I am here today representing the Agricultural Preservation Association, the Park County Legislative Association, and the Sweetgrass County Agricultural Preservation Association.

At the outset of our presentation today, we would like to compliment the committee and its staff for conducting a hearing on March 31st of this year that was high in quality and long on cooperation. We feel that the tone that was set that day - between the two factions and this committee - might well have been the beginning of a new era in the field of landowner/sportsmen relationships. Speaking for myself and my groups, I can say that we would have carried out our end of the bargain in good faith and negotiations in the three counties that I represent would have certainly materialized. However, it is now July 30th and there has been a lot of water under the bridge in the last four months. It is unfortunate that the Supreme Court decisions of May 15th and June 21st had the affect of totally undoing the progress that had been made.

It is no secret that the farmers, ranchers and other landowners of Montana are schocked, angry, and/or bitter over the loss of property and property rights that these two decisions represent. We have no illusions about the severity of these decisions. We have no illusions about the limited avenues of recourse that are open to us. We have no illusions about the far reaching ramifications of the Public Trust Doctrine as it applies to this and other water-related matters, now that it has been injected into the political system of Montana, and we have no illusions about the time, the money and the effort that will be required to attempt to turn these terrible decisions around.

So, in spite of the odds against us, let it be shown in the record that we have no intentions of rolling over dead because of these decisions, that we will not throw in the towel because of the opinions of five or six men, and, that if anything, we are committed to become even more involved in the elective, legislative and pol - icy-making process.

In reviewing and discussing the lower court and Supreme Court decisions in this matter - in a series of sixteen meetings since the 25th of February of this year, it is clear to us, as it should be to anyone, that the Court left a number of areas a bit on the ambiguous side. There clearly is room for some legislative work, such as a major overhaul of the trespass laws. It is my under - standing that the Montana Stockgrowers Association and the Conser - vation Districts, and possibly others, are also on record as sup - porting this endeavor. The liability issue is a major concern of ours and is not addressed by the Court. Definitions of the terms high water mark, ordinary high water mark, normal high water mark, and portage need serious attention from this committee.

Again, as I stated in this room on March 31st, the three groups that I represent, from Sweetgrass, Park and Gallatin Counties, stand ready, willing and able to assist this committee in the drafting of legislation that will make the Court decisions less prone to conflict between the landowner and the recreationist.

Mr. Chairman, I do have a spokesman from each of my groups that would like to testify on behalf of that group and with your permission I could introduce them now, before making a final comment. Nancy McIlhattan will be speaking for the Park County Legislative Asso - ciation, Tom Milesnick will testify for the APA and Franklin Gros - field will represent the Sweetgrass County group.

Mr. Chairmen, members of the Committee, in closing I would like to have entered into the record, a personal comment regarding the Curran and Hildreth decisions and their ramifications.

Not only are they landmark in their nature, they will become his - torical from the standpoint of having ended nearly a century of public apathy in Montana concerning political candidates for the

office of Supreme Court Justice. These decisions have ushered in a new era of awareness where the court is concerned. As an example, three months ago the Court was shrouded in near obscurity. Today, the names of the seven members of the Court are household words - at least out in the country they are - and, the names of the four cand - idates seeking election to the two seats being vacated in January are even better known. Gone are the days when just any lawyer who takes a notion will be elected to the Supreme Court or District Court either for that matter, on the strength of the standard political qualifications and background bio which includes; 27 years of bliss - ful marriage, having raised 6 fine kids of which 5 are college grad - uates, 25 year membership in whatever Christain Church, 3 years active service in World War II, active in community affairs and 30 years law practice. No, Mr. Chairman, this fictitious, but very familiar sounding political biography will no longer be enough. Candidates for the Courts - present and future - will come under the same scrut- inization and exposure that other candidates for public office do, and, rightfully so, as long as they are going to engage in the bus - iness of legislating, which brings me to my point.

There is an area of concern amongst many members of the public in the State of Montana, and it is not limited only to those involved in agriculture. That concern is relative to the direction that our state government is taking.

When the Legislature passed the Administrative Procedure Act in the early 70's - 1971 I believe it was - there can be no argument that that august body abdicated - whether they meant to or not - a certain amount of their legislative authority, literally handing to the Execu - tive Branch law-making powers that rightfully belong to the people through their House and Senate representation.

Now comes the Montana Supreme Court, representing the Judicial Branch with back-to-back decisions that amount to legislation, any way you look at it.

So, now we have all three branches of state government legislating, making a total mockery of the long held concept of the seperation of powers and severly weakening the doctrine of checks and balances.

The only bright side of this situation is that those of us who have consistently argued against annual legislative sessions can now point out that the legislature could probably get by meeting less than every two years, as long as they are going to allow their author - ity to slip from their grasp, and the other two branches are assuming it for their own.

That may seem somewhat facetious, but what I am about to propose is not. I would like to suggest that this committee, when it makes its report to the 49th Legislative Assembly along with your package of Committee bills, that there be included a resolution calling for the Supreme Court to return to its legitimate role as an interpreter of laws and to leave the law making to those who were elected to per - form that task. I would urge you to give this suggestion your serious consideration and to take prompt action before - like in the case of the Administrative Procedure Act and the bureaucracy - the legislating outside the 3rd floor of the Capitol Building gets totally out of hand.