

## **The Stream Access Law**

In 1984, the Montana Supreme Court ruled that recreationists and scientists are entitled to use streams capable of supporting recreation activities. This was followed by the 1985 Stream Access Law HB-265 (also introduced in the legislature in 1981 and 1983) which says: "The public may use rivers and streams for recreation up to the ordinary high-water mark, without regard of the ownership of the land underlying the waters." It gives the right to access streams within the road right-of-way, where bridges cross. Its passage in the legislative can be credited to Jerry Manley, Tom Bugni and Tony Schoonan, fishermen from Butte whose hard work and abiding belief in the public trust enabled its success. The law permits recreationists to move freely within the ordinary high-water mark. This is the line that water makes on the shore when it covers it for a sufficient time to cause different characteristics below the line, such as little soil or vegetation. The law gives access to many Montana streams and has opened up a wealth of opportunities with little inconvenience to streamside landowners.

## **Profit at Expense of Montanans**

As landowners discover the high-dollar value of Montana's recreational opportunities, efforts to carve out pieces for exclusive commercial exploitation are popping up regularly. From 1889 to 1985, it was common for river boaters and fishermen to encounter tight barbed wire fences stretched across many streams. The publicly stated reason was to control cattle, but private opinion was that some disgruntled landowners wanted to keep floaters and fishermen from floating past privately held land and houses. Landowners made dire predictions of trespass damage by fishermen and wildfires to fight the Stream Access Law. They also complained that recreationists damage property and fish populations and diminish their opportunity to profit by charging for fishing.

Should access be limited while the value of property along streams is skyrocketing? Is this a ploy by self-appointed landed gentry to restrict public use and to privatize fisheries? But fisheries are clearly best served when access to fish and wildlife is equal — you can't expect the public to protect fish and their habitats, if they are not allowed to enjoy it. There is a Montana tradition for equal access to fishing

streams for all.

### **Public Stream Access**

In 1889, Montana was granted statehood and the U.S. Supreme Court under the federal Equal Footing Act granted to states ownership of the beds of navigable streams, lakes, islands and accumulations of land up to the average high-water flow line. Article IX of the Montana State Constitution states: "All surface, underground, flood and atmospheric waters are the property of the state for the use of its people." Each state took title to the streambeds underlying its navigable waters which are held subject to a public trust benefit and cannot be given away. The federal test for navigability is sustained commercial use, including floating logs, fur trade, mail routes, transportation of goods, floating, fishing, outfitting and guiding, float boat rentals, adventure floating. There are 42 streams considered navigable in Montana and their beds are owned by the state for the use, safety, health and enjoyment of the people.

### **Access from Bridges**

Landowners in Madison County built elaborate barbed wire fences that attach to public bridge abutments with the purpose of keeping fishermen, floaters and recreationists from accessing public streams. In 1995, following loud complaints from the public, Madison County Commissioners enacted an ordinance which forbade this activity. In 1996, Madison County Commissioners were sued by landowners who said the ordinance was a taking of private property without compensation, and in 1997, the Commissioners rescinded the ordinance. Then, in 2004, the Commissioners gave permits to landowners to attach fences to bridges and required sportsmen to pay for construction of gates or stiles to allow access, and pay for public education to teach recreationists about their responsibilities. These unfair requirements so angered fishermen that the Commissioners rescinded the permits. By June, 2004, Madison County Commissioners had been sued twice by landowners determined to deny the public access. County bridge right-of-ways have traditionally been used by fishermen as long as they stay within the high-water mark. The Department of Fish, Wildlife and Parks asked the Montana Attorney General for an opinion on the issue.

### **Attorney General Ruling**

In May, 2000, Attorney General Joe Mazurek ruled that County

Commissioners have the power to compel landowners to remove barbed wire, orange paint and "No Trespass" signs, used to keep people from accessing streams along county bridges. The right of access is limited to the road or bridge right-of-way.

Use of county road right-of-way to access streams and rivers is consistent with the reasonable incidental use and the public's right to travel on county roads.

A bridge and its abutments are a part of the public highway and are subject to the same public easement of passage as the highway to which they are attached. Therefore, recreationists can access streams and rivers by using the bridge, its right-of-way and its abutments.

A recreationist must stay with the road and bridge easement to access streams and rivers. Absent definition in the easement or deed to the contrary, the width of the bridge right-of-way easement is the same as the public highway to which it is attached.

Access to streams and rivers from county roads and bridges is subject to the exercise of the County Commission's police power. The Attorney General's ruling has the weight of law. November 26, 2003, the fiddle-string tight barbed wire fences were still up in Madison County, illegally prohibiting river floaters and anglers to access streams as ordered by the Attorney General. Madison County Commissioners ignore the Attorney General's ruling and allow landowners/developers to break the law for personal profit. County Commissioners are fearful of being sued for infringing on landowners' illegal activities.

In May, 2005, the public won another access issue when the Court ruled that public access to streams and county bridges was legal. Hopefully, this will cause the disgruntled landowners to put some slack in their tight barbed wire fences which are permanently nailed to bridge abutments and are tough on rubber rafts, arm and leg skin, to say nothing of snagged clothing.

### **Mountain States Legal Foundation (MSLF)**

Based in Colorado, the MSLF has been soliciting disgruntled landowners wishing to sue Montana in Federal Takings Court to destroy the Stream Access Law. MSLF was created by Coors Brewing Co. with James Watt (President Regan's Secretary of Interior) as its founder. The Board of Directors are owners of extractive corporations of oil and gas, mining, timber, cattle and farm bureaus. A listing of MSLF contributors include Amoco, Chevron, Texaco, Exxon, Phillips Petroleum, Coors, El Pomar Foundation and Ford Motor Co. Watt is

trying to drum up a prolonged court case to bleed discontented landowners of their money by trying to extend a grievance that will result in an expensive court case benefiting MSLF but not the landowners. On June 7, 2000, they filed a lawsuit aimed at striking down our Stream Access Law. The right-wing MSLF is representing three landowners on: 1. Ruby River, 2. Stillwater River, 3. Odell Creek on the Madison River, claiming the law deprives them of their privacy from floaters and denies them income from leasing their property to outfitters and private fishing clubs. On January 4, 2001, District Judge Charles Lovell dismissed the suit in its entirety. The MSLF then appealed to the 9th Circuit Court, and the case was dismissed. In 2003, the U.S. Supreme Court refused their appeal and let stand the 9th Circuit decision upholding our Stream Access Law.

### **Court Suits**

James Cox Kennedy of Cox Media Enterprise of Atlanta bought 3,200 acres along the Ruby River, where two public roads and bridges cross. He has reinforced his fences designed to keep people from accessing the river at public bridges in Madison County. Kennedy placed much of his land in a conservation easement but he is the president of the land trust that is supposed to enforce the easement. There's something wrong when a wealthy man buys a ranch, gets an easement tax break and then chases the locals off the river. If land and water conservation and wildlife protection is seen as only benefiting the rich, it will reinforce the perception that conservation is only the luxury of the elite. In May 2004, Kennedy filed a suit challenging access from public bridges.

Jack Galt, a Martinsdale rancher, opposes stream access and filed a court suit. D. Michael Curren disputed public access on the Dearborn River. Lowell Hildreth of Dillon tried to close the public out of the Beaverhead River.

### **Access in the 2005 Legislature**

House Bill 560 would have guaranteed the public's right to gain access to streams at public bridges, its right-of-way or its abutments. It would have allowed recreationists to portage around barriers on private land and give authority to Department of Fish, Wildlife & Parks to investigate whether a fence, barrier or obstruction across a stream constituted a public safety violation and to direct the landowner to remove the barrier. When the bill was heard in the House Fish & Game Committee, ten democrats voted in favor and ten republicans voted against the bill. Scott Sales, Roger Koopman and

Bill Warden, all from Bozeman, voted against public access to streams. We must hold our representatives accountable when they ignore the public's request to legally gain access to our streams. Since November 5, 2005, there is a movement toward a Voter Initiative which would by-pass the recalcitrant legislature on the bridge access issue. Suffering from legislative failures, drafting a Voter Initiative may be the next best solution. Montanans must remain vigilant to uphold the right of the public to access our streams. We must not return to the regressive times when fishermen, floaters and stream hikers had to thread their way through tight barbed wire fences designed to keep the public out.

### **Navigable Rivers and Public Access**

Since statehood in 1889, under the federal Equal Footing Law, Montana has owned the beds of navigable rivers that have sustained commercial use. The federal test for commercial use includes floating logs, fur trade, mail routes, transportation of goods, floating, fishing, outfitting and guiding, float boat rentals, adventure floating and guiding and all commercial uses. The Federal Supreme Court said "that states held ownership of navigable river beds and that all new states would enter the Union under "equal footing" and would own the lands beneath the navigable streams, lakes, islands and accumulations of land formed in the beds of navigable streams up to the average water flow line. The following streams are considered navigable and their beds are owned by the State of Montana for the use, safety, health and enjoyment of the people:

1. Big Hole River
2. Big Horn River
3. Bitterroot River
4. Blackfoot River
5. Boulder River of the Yellowstone River
6. West Boulder River of the Yellowstone River
7. Bull River of the Clark Fork River
8. Clark Fork River
9. Clearwater River of the Blackfoot River
10. Dearborn River
11. Flathead River except within the boundaries of Flathead Indian Reservation
12. Flathead River Middle Fork
13. Flathead River North Fork
14. Flathead River South Fork
15. Fortine Creek

16. Gallatin River
17. Graves Creek of the Tobacco River
18. Jefferson River
19. Kootenai River
20. Little Missouri River
21. Lolo Creek
22. Madison Creek
23. Marias River
24. Milk River
25. Missouri River
26. Nine Mile Creek of the Clark Fork River
27. Rock Creek of the Clarks Fork of the Yellowstone River
28. Rock Creek of the Clark Fork River
29. Smith River
30. Sheep Creek of the Smith River
31. Dupuyer Creek
32. Stillwater River of the Flathead  
River
33. Sun River
34. Swan River
35. Teton River
36. Tobacco River
37. Tongue River
38. Whitefish River
39. Yaak River
40. Yellowstone River
41. Musselshell River
42. Powder River

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