

STREAM ACCESS IN MONTANA



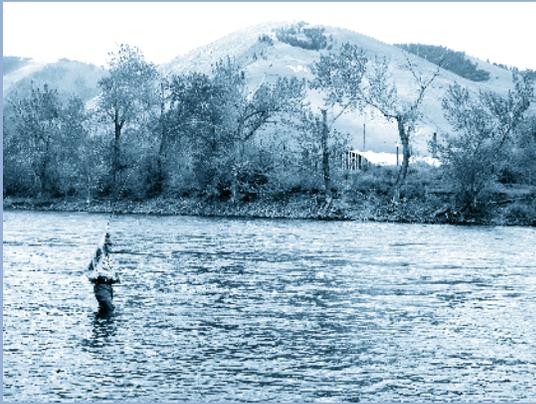
MONTANA POLICY REPORT 1

PUBLIC POLICY RESEARCH INSTITUTE

THE UNIVERSITY OF MONTANA

MAY 2006





**Coordinated by
Will Harmon**

© 2006 PUBLIC POLICY RESEARCH INSTITUTE
THE UNIVERSITY OF MONTANA

PHOTOS BY KEVIN R. FREDENBERG, TODD GOODRICH, AND SHAWN ROBERTSON

TABLE OF CONTENTS

Preface	1
Executive Summary	2
Introduction	3
Montana’s Stream Access Law	5
Interview Findings	7
Private Property Rights and the Public Trust Doctrine	7
An Inventory of Current Conflicts Over Stream Access	8
Trespass	8
The High Water Mark and Portage Provisions	8
Stream Access at Roads and Bridges	9
What Do We Mean by “Safe and Reasonable” Access?	9
Riparian Conservation	9
The Need for Education	10
Options for Improving the Situation	11
Conclusion	12
Appendices:	
A: Stakeholder-Suggested Options for Resolving Concerns	13
B: Case History and the Stream Access Law	14
C: Private Property Rights vs. the Public Trust Doctrine	17



The Public Policy Research Institute is an applied research and education center at The University of Montana. Its mission is to foster sustainable communities and landscapes through public processes that are inclusive, informed, and deliberative. The Institute is impartial and nonpartisan; it is not an advocate for any particular interest or outcome.

One way the Institute pursues this mission is to produce Montana Policy Reports on some of the most compelling public policy issues facing the state. These reports are designed to inform and invigorate public policy in Montana by integrating scholarly research with the views and opinions of people interested in and affected by any particular policy issue. The Institute uses various means (such as interviews and surveys) to engage stakeholders

in naming problems and framing options, and then supplements this understanding with the best available information and ideas in the literature.

In some cases, a Montana Policy Report may serve as a catalyst for a multi-party dialogue or negotiation. In other cases, it may simply capture the status of a particular public policy issue and provide a useful analysis of the past, present, and options for the future. The Institute carefully selects topics to address after consulting with citizens, leaders, and other scholars.

This Montana Policy Report – Stream Access in Montana – was completed as part of an Advanced Natural Resources Conflict Resolution seminar at The University of Montana during fall 2005. This issue was selected by the Institute because it was frequently in the headlines during 2005, and is a critical piece of the heritage and quality of life in Montana.

EXECUTIVE SUMMARY

Twenty years after passage of Montana’s Stream Access Law, people are still talking—and, in some cases, arguing—about its provisions. This policy report aims to illuminate the unresolved issues and misunderstandings regarding the law, and to lay out options for moving forward, based on interviews with 34 people representing a cross section of recreationists, landowners, and state and local officials.

Most of the people we talked with—recreationists and landowners alike—said that the Stream Access Law works well and has been very successful, as evidenced by the hundreds of thousands of anglers, boaters, and other recreationists using Montana streams each year with few if any conflicts with landowners. A few landowners, however, said that the law is fundamentally flawed because it contradicts legal precedent; strips landowners of their right to control entry onto their property; creates disincentives for landowners to practice good riparian stewardship; and is unenforceable due to vague language and the practical impossibility of monitoring dispersed recreational use.

Most people acknowledged that some misunderstandings and unresolved issues remain, but they also agreed that these are relatively minor and can be addressed through continued educational efforts and fine tuning through legislation. Chief among these is the idea of facilitating access at public bridges by allowing legal fencing (as

defined in 81-4-101, MCA) up to bridge abutments. For landowners, such fencing is generally easier to install and less expensive to maintain than fencing across the stream channel because it isn’t subject to seasonal runoff and debris jams. For recreationists, fencing to the bridges means fewer fences across the stream, which is safer, more convenient, and more aesthetically pleasing. This and other ideas for improving implementation of the Stream Access Law are listed in Appendix A.

On some issues, such as improving education and outreach, people seem to share a common understanding of the problem and may be able to work together in good faith without a neutral facilitator. For talks on other issues, such as access and fencing at bridges, a facilitator may be helpful. A facilitator can also shuttle between the groups working on different issues to help coordinate efforts. The facilitator could be a credible legislator, staff person at MFWP, or a professional mediator.

Whatever steps are taken to resolve the remaining issues surrounding stream access, we believe they can be solidly based on the significant areas of common ground identified in this report. We encourage Montanans to work together, reaching across the lines that separate interests, to seek mutually satisfying and sustainable solutions.



Twenty years after the state legislature passed Montana's Stream Access Law, people are still talking about its provisions. Of the people we talked with—recreationists and landowners alike—most say the law is a success, that it works very well. Each year, they note, more than 200,000 licensed anglers and uncounted numbers of boaters and other recreationists take to Montana's streams and rivers, with few if any conflicts with landowners over access or use.

In a few instances, however, recreationists and landowners have gone to court to resolve disputes over the public's recreational use of streams. Recent headlines highlight disputes on the Ruby River and

Mitchell Slough. These ongoing court cases hinge on specific legal issues regarding road easements and private fences in public rights of way on the Ruby, and the distinction between a natural stream and waters diverted into a ditch on Mitchell Slough. But they also call attention to broader misunderstandings and a number of unresolved issues related to the Stream Access Law and recreational use of streams in Montana. This policy report aims to illuminate those misunderstandings and unresolved issues, and to lay out options for moving forward, as suggested by interested stakeholders.

Assessing the Situation

When the Public Policy Research Institute is asked to help people grapple with an issue, we first conduct a situation assessment. We visit with as many people as is practical and appropriate to learn about the issues involved, identify the people concerned about them, understand their interests and concerns, and determine how the issues are being addressed and how they are likely to be addressed in the future. We then use this information to help people determine (and perhaps design) their best course of action, whether it be a public forum for deliberation and negotiation, mediation, or some other strategy to address the issue.

In this case, we visited with about 34 people who expressed an interest in Montana’s Stream Access Law and issues related to the recreational use of streams in Montana. Interviewees included representatives of Montana Fish, Wildlife and Parks; Montana Department of Transportation; Montana Stockgrowers Association; the Montana Farm Bureau Federation; Public Lands/Water Access Association; Montana Trout Unlimited; Fishing Outfitters Association of Montana; Montana Wildlife Federation; Montana Association of Counties; Montana River Action Network; and individual recreationists, ranchers, and other landowners. We also attended a working session of the Montana Fish, Wildlife and Parks Commission that focused on stream access at bridges. This is a small sample of the people interested in stream access in Montana, but we believe it represents a fair cross section of those interests.

The results of these interviews and additional literature review and research are summarized in this report. Based on the interviews, we have organized a matrix of people’s concerns and their suggestions for addressing those concerns (see Appendix A). We also offer some suggestions for moving forward. Think of this report not as an exhaustive study, but as a starting place for further conversation.



MONTANA'S STREAM ACCESS LAW

In 1985, the Montana Legislature passed a law governing the “recreational use of streams,” widely referred to as the Stream Access Law (Title 23, Chapter 2, Part 3 of the Montana Code Annotated).

To understand this law, it is helpful to first understand the legal principles that underpin it. Under U.S. and Montana law, all property is either privately owned, or is held by the government in the public trust. The Montana Constitution addresses water specifically, stating that “The use of all water...shall be held to be a public use,” and “All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people” (see Article 9, Section 3). (In Montana, the holder of a water right does not own the water, but has a right to put the water to beneficial use.)

The right of the public to access navigable waters is well established in U.S. law. Montana’s Stream Access Law addresses navigability in its definition of Class I waters, which are “surface waters, other than lakes, that:

- (a) lie within the officially recorded federal government survey meander lines thereof;
- (b) flow over lands that have been judicially determined to be owned by the state by reason of application of the federal navigability test for state streambed ownership;
- (c) are or have been capable of supporting the following commercial activities: log floating, transportation of furs and skins, shipping, commercial guiding using multiperson watercraft, public transportation, or the transportation of merchandise, as these activities have been defined by published judicial opinion as of April 19, 1985; or

(d) are or have been capable of supporting commercial activity within the meaning of the federal navigability test for state streambed ownership” (23-2-301, MCA). (The law addresses non-navigable streams as Class II waters.)

In *Madison v. Graham*, the Montana Supreme Court held that touching the land under the water, by a wading angler, for example, “causes no more interference with private property rights than does a floater,” and so is permissible within the provisions of the Stream Access Law. (Other court cases that have shaped the law are briefly described in Appendix B.)

The law further defines recreational use as “fishing, hunting, swimming, floating in small craft or other flotation devices, boating in motorized craft unless otherwise prohibited or regulated by law, or craft propelled by oar or paddle, other water-related pleasure activities, and related unavoidable or incidental uses” (23-2-301, MCA). The law also expressly states that “recreational use of surface waters does not grant any easement or right to the public to enter onto or cross private property” (23-2-301, MCA).



Petition Procedure

The Administrative Rules of Montana spell out a process where any person may petition the Montana Fish, Wildlife and Parks (MFWP) Commission to “temporarily close or restrict recreational use on a stream or on any part of a stream if the failure to do so would result in irreparable damage to property, irreparable disruption or alteration of the natural areas or biotic communities, or irreparable degradation of the water body” (12.4.103, ARM). According to MFWP, in the last 12 years the commission has received only two petitions to close access on a stream—on the Ruby River, and on Big Sheep Creek near Dillon. After review, both petitions were denied.

Ditches – Waters Diverted for Beneficial Use

The Stream Access Law does not entitle the public to use waters diverted away from a natural water body for beneficial use. Such waters include ditches for irrigation and other uses. The dispute in the Mitchell Slough case centers on whether the slough is a natural stream or a ditch conveying diverted water. This case will likely help refine that distinction. Previously, the courts have noted that the Streambed Preservation Act and the Stream Access Law each use entirely different definitions for designating what bodies of water are covered under their respective provisions.

Definition of High Water Mark

The ordinary high-water mark is defined in the Stream Access Law 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 include, when appropriate, but are not limited to deprivation of the soil of substantially all terrestrial vegetation and destruction of its agricultural vegetative value. A flood plain adjacent to surface waters is not considered to lie within the surface waters’ high-water marks” (23-2-301, MCA).

Portage Provisions

The Stream Access Law states that “A member of the public making recreational use of surface waters may, above the ordinary high-water mark, portage around

barriers in the least intrusive manner possible, avoiding damage to the landowner’s land and violation of his rights.” The law further clarifies that the public may not go above the ordinary high-water mark to portage around an artificial structure which does not interfere with the public’s use.

Other portage provisions deal with who establishes and pays for portage routes. The statute expressly states that it does not “address the issue of natural barriers or portage around said barriers, and nothing contained in this part makes such portage lawful or unlawful.”

Attorney General’s Opinion

In May 2000, Montana Attorney General Joe Mazurek issued an opinion on stream access at roads and bridges in response to a request from the director of MFWP and the Madison County attorney. The request arose from a series of controversies between recreationists and riparian landowners along the Ruby River in Madison County. Mazurek outlined the situation: “Recreationists assert that they may use county road bridge crossings as access points to fish and float the Ruby River. Individual landowners have asserted that the public does not have access, and have requested that local law enforcement and the wardens employed by the Department of Fish, Wildlife and Parks cite the public for trespass when the recreationists gain access to the Ruby through the use of bridge crossings.”

Mazurek’s opinion, which functions as law until it is overturned in court or addressed by legislation, holds that:

1. Use of a county road right-of-way to gain access to streams and rivers is consistent with and reasonably incidental to the public’s right to travel on county roads.
2. 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, the public may gain access to streams and rivers by using the bridge, its right-of-way, and its abutments.
3. A member of the public must stay within the road and bridge easement to access streams and rivers. Absent definition in the easement or deed to the contrary, the width of a bridge right-of-way easement is the same as the public highway to which it is attached.

4. Access to streams and rivers from county roads and bridges is subject to the valid exercise of the county commission's police power and its statutory power to manage county roads.

5. Access to streams and rivers from county roads and bridges created by prescription is dependent upon the width and uses of the road during the prescriptive period.

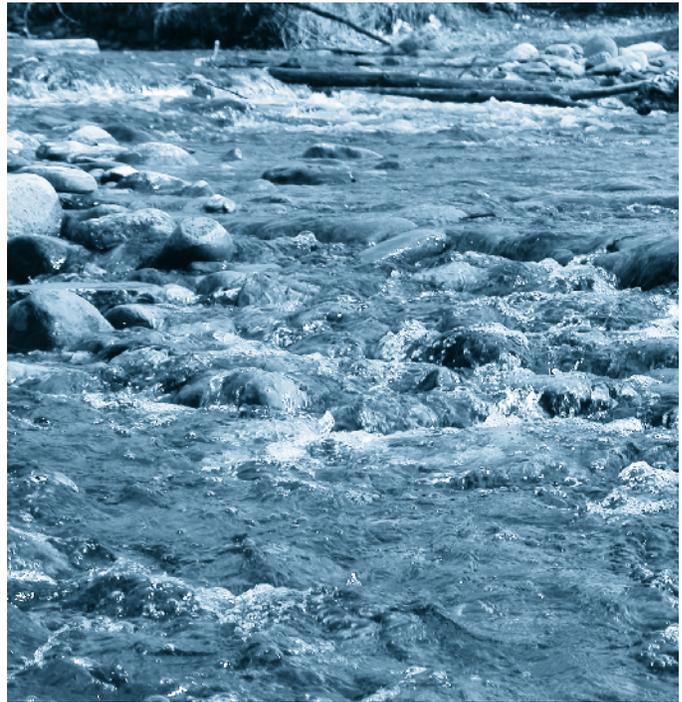
Interview Findings

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

Most people acknowledged that some misunderstandings and unresolved issues remain, but they also agreed that these are relatively minor and can be addressed through continued educational efforts and fine tuning through legislation.

A few landowners, however, said that the law is fundamentally flawed because it:

- Contradicts legal precedent;
- Strips landowners of their right to control entry onto their property;
- Creates disincentives for landowners to practice good riparian stewardship, particularly on smaller Class II streams (while state conservation efforts focus almost exclusively on Class I rivers and streams); and
- Is unenforceable, both due to vague language (e.g., disagreement over what "normal high water mark" means), and the practical impossibility of monitoring recreational use to prevent trespass, littering, unauthorized camping, and other illegal activities.



Private Property Rights and the Public Trust Doctrine

Some people see stream access issues as a fundamental debate between private property rights and the public trust doctrine. On one side are landowners who say a private property right has little meaning when an owner cannot control who enters and traverses his or her property. On the other side are recreationists who say that without public access to public resources, the public trust is not served. Both sides worry that any decision in favor of the other may lead to a "domino effect" and further inroads upon their interests.

Others say it's misleading to frame the debate this way because the Stream Access Law expressly protects private property rights while providing for recreational use of an established public resource.

While some tension will always exist wherever these two broad interests are in play, Montana's Stream Access Law offers one way of balancing private and public rights that seems to work for many recreationists and landowners we talked with. Recreationists said they support the exercise of legitimate private property rights, but they also say that private property owners should not govern access to the public resources of streams and fisheries. Instead, they see the law as a framework for cooperating with landowners to facilitate stream access.

Many of the landowners we talked with said that the Stream Access Law adequately protects their property rights, but that efforts should be increased to educate people about the law and to improve compliance.

Appendix C further examines this issue in light of the Stream Access Law.

An Inventory of Current Conflicts Over Stream Access

The situations on the Ruby River and Mitchell Slough have generated no shortage of media attention, but other conflicts over stream access also crop up occasionally. Here is a list of both specific and generic types of conflicts we uncovered through the interviews and a review of the literature.

Specific conflicts include:

- Mitchell Slough – dispute over whether a body of water is a natural stream (and therefore open to access under 23-2-301, MCA) or a diversion channel.
- Ruby River – dispute over the status of access at bridge easements.
- Riverside Inn Bridge on the Stillwater– dispute over where access occurs when a new bridge is built and the old bridge is abandoned.
- Bundy Bridge on the Yellowstone – dispute over ownership of right of way when a bridge is abandoned.
- A collapsed county bridge in Sweet Grass County, where the Montana Department of Transportation (MDT) would not approve a replacement design without provisions for stream access (parking and fence pass-throughs), but the landowner refused to those provisions on his land, and county officials cannot get an answer on what their options are.

Generic conflicts include instances where:

- Landowners use “aggressive” fences to discourage access.
- Recreationists cut or otherwise dismantle fences to facilitate access.
- Landowners post “no trespassing” signs or paint at public rights of way to discourage access.

- Landowners confront recreationists below the high water mark.
- Recreationists cross private land without permission to gain access to the stream.
- Recreationists leave litter, weeds, human waste, and other use-related impacts.
- Recreationists leave gates open, creating hazards for the public and livestock, extra work for the landowner, and the potential for unintended livestock breeding and grazing.
- Recreationists cause wildfire risks or actual damage.
- Recreational use is concentrated and damages plants, soil, and habitat in the riparian zone, and may reverse conservation measures taken by the landowner.
- The status of a road/bridge easement is undocumented or otherwise unclear.
- Landowners assert that recreationists may not set foot on the stream bed.

Trespass

Some landowners said that, while most recreationists aim to be law abiding, some think that the Stream Access Law gives them the right to cross private land. A few “bad apples” know it’s wrong, but trespass anyway. This can lead to infringements on the landowner’s privacy, litter, damage to fences, the spread of weeds, disruption of livestock management, and other problems.

The High Water Mark and Portage Provisions

Some landowners report that river users sometimes trespass onto private property above the ordinary high water mark. This can lead to litter, erosion, the spread of weeds, and impacts to livestock and crop management. They also said that it’s difficult, time intensive, and costly to enforce compliance and to apprehend and prosecute trespassers.

Several recreationists and landowners said that, on streams where the ordinary high water mark is in dispute, it should be surveyed and mapped, perhaps even posted with markers in the ground. Others said that recreationists should simply err on the side of staying in the water whenever the high water mark is unclear, as they must when flows are at or above the high water mark.

One person cited the example of the Blackfoot Challenge, where a coalition of riparian landowners voluntarily granted easements for limited recreational access above the high water mark. In return, MFWP provides and maintains parking and other limited access facilities, with fencing and other measures to contain use within the designated area. It's hard to say how many landowners would be willing to take this approach.

Stream Access at Roads and Bridges

Everyone we talked with agreed that a public bridge crossing a stream is an intersection of two public rights of way. Many landowners and recreationists alike said that the Attorney General's opinion should be codified in statute to clarify this very point.

In years past, many people resisted the idea of allowing landowners to string fences across the public right of way and connecting directly to bridge abutments. They saw this as an encroachment on a public right of way, and cited instances where "aggressive" fences (more than four strands of wire, taller than 48 inches, and some with electrified strands) had been installed, apparently intended to keep people out rather than to keep livestock in. Such fences, they said, made access impossible for the disabled and elderly and unsafe for all.

Recreationists and landowners alike are now acknowledging the advantages of allowing legal fencing (as defined in 81-4-101, MCA) up to bridge abutments. For landowners, such fencing is generally easier to install and less expensive to maintain than fencing across the stream channel because it isn't subject to seasonal runoff and debris jams. For recreationists, fencing to the bridges means fewer fences across the stream, which is safer, more convenient, and more aesthetically pleasing.

Legislators tried to address the legal encroachment issue during the 2005 Session through House Bill 133, which said counties could allow fencing up to bridge abutments as long as it wasn't actually in the roadway. HB 133 died in committee, but now that the concept of fencing to bridge abutments has broader support, several people said a similar bill would likely fare better in the future.

What Do We Mean by "Safe and Reasonable" Access?

Wherever fences run between a stream and another public right of way, questions arise over exactly what it means to have access to the stream. During the interviews, people wondered aloud about:

- What constitutes "safe" access.
- What constitutes "reasonable" access and who decides this on a case-by-case basis.
- How to decide which access accommodations to install at which sites.
- How to accommodate parking.

MDT and MFWP said that they have a legal responsibility to ensure safe access for their employees, including bridge inspectors and game wardens, as part of their working environment. They say the public is welcome to use such access wherever it occurs on public rights of way.

Some people say that a standard legal fence does not unduly impede access, but most recreationists prefer some sort of pass through, stile, gate, or rollers (for boat access). Many landowners also acknowledge the advantages of such accommodations—as long as the fence will contain livestock, pass throughs and other measures allow public access with less wear and tear on fence wires and posts. Some people said that consideration should be given to the elderly and disabled, while others said that some access points may simply be too rugged due to natural terrain. In most cases, they said, other nearby access points provide more practical options.

Most people on all sides of the issue acknowledge that safety, cost, and terrain issues may make it impractical to provide access at every point where access may be legally possible.

Riparian Conservation

At least one landowner has argued that the right to exclude people from the land can be a valuable conservation tool. This person said that the private owner of a riparian zone can apply certain tools that government on public land cannot. Political demands

for access and use limit conservation options and ultimately impair our ability to meet conservation goals. Overuse from unconstrained access can lead to serious degradation, particularly in fragile riparian areas. Before we grant blanket access, this person argued, we should consider the public benefit we can gain from giving landowners incentives to conserve and restore riparian areas and by closing public access in these areas.

Other people pointed out that public riparian conservation programs, funded by tax dollars, are available for such work, and that recreational use levels on most Montana streams are not high enough to warrant closures. When impacts are significant, landowners can petition to close the stream. Some people said livestock and rip rap often cause far more damage to riparian areas than does recreational use.

The Need for Education

Most recreationists and landowners we talked with are generally satisfied with the way the law works, but they also agreed that efforts to educate people about the law should be expanded. Ongoing education, they say, would help calm the situation, sort out facts from myth, and help frame public dialogue around issues that are of legitimate concern rather than issues that are not really about stream access and use.

People on all sides of the issue say that the public and the media need to understand what rights the Stream Access Law conveys to recreationists and what protections it affords landowners. This information, some said, should be presented in the context of how well the law has worked for 20 years. Education should also address trespass, littering, wildfire prevention, weed control, camping, human waste disposal, and portaging.

MFWP provides a brochure explaining the law and a short DVD video, "Owning Eden," aimed at new landowners, that touches on general access issues. Some realtors use the DVD to familiarize prospective buyers with issues common to rural life in Montana. The agency says it routinely educates and informs people about stream access through its Landowner/Sportsman Relations program. But some said that

MFWP could do much more on this front, such as posting information at popular access points and providing clear, concise educational materials at fishing license vendors, raft and canoe rental shops, and other likely contact points.

Advocacy groups also recognized their role in educating their constituents on the law and on improving relations between recreationists and landowners. Most recreation and conservation groups said that they regularly include educational pieces on the ins and outs of the Stream Access Law in their newsletters and other outreach materials. They also agreed that they could improve on these efforts. Similarly, landowner organizations said they occasionally include information about access laws in their newsletters and other materials.

Everyone we talked to mentioned the difficulties of reaching the continually changing audience of recreationists and landowners in the state. This audience includes tourists, newcomers, and people who don't belong to any membership organizations. Turnover within this audience means that educational efforts must be ramped up each year to reach a new batch of people. To be effective, the information must also come at people from different, audience-appropriate angles.

At least one person we talked with said that educational efforts should also address the factual and case history of how the Stream Access Law came into being (see Appendix B for a preliminary attempt to do just that).



OPTIONS FOR IMPROVING THE SITUATION

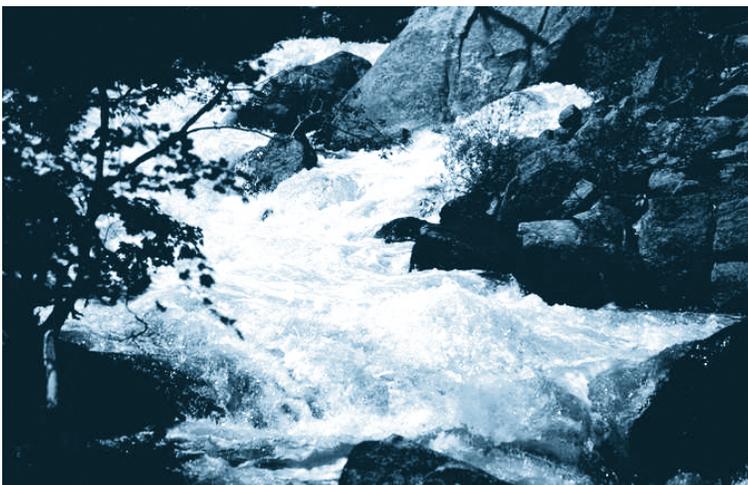
The interviews revealed that recreationists feel secure in their rights under the law, as supported by the string of court decisions. Nearly all the landowners we interviewed also say they support the Stream Access Law because it protects private property rights and they too enjoy access to Montana's streams. A few landowners have challenged the law, either in court, or in the field (by confronting recreationists, installing aggressive fencing, etc.).

People on all sides of the table acknowledge that some unresolved issues remain. Yet the situation is not ripe for a public forum or formal dialogue for several reasons:

- Some key stakeholders are engaged in ongoing court cases. Statements made in good faith in an open forum could later be used against them in court.
- Some people—recreationists and landowners alike—say there is no significant issue to discuss; they say that the law works very well. They feel their interests are unlikely to be advanced—and in fact may be threatened—by negotiating.

- Some people say that the few minor unresolved issues can be dealt with most appropriately in the courts, through relatively simple legislation, and by ongoing efforts.
- For some people, any publicity on stream access as an “issue” for deliberation only plays into the hands of a few people trying to create a controversy where there is none.

Options other than a public dialogue or forum do exist, and one or more of these may help stakeholders to improve the situation while safeguarding their interests. During the interviews, we asked people to suggest how they might address their concerns in ways that would also satisfy the diversity of interests. We've summarized their ideas and strategies in a table on the following pages. Some strategies appear more than once—they may be applied by different actors, or jointly by several actors working together. Some strategies may also be used to address more than one concern. Note that in the “NGO Action” column, we are referring to both recreation and landowner advocacy organizations. Some actions may apply to both, and some more to one than the other.



CONCLUSION

Crafting—or even fine tuning—public policy is a delicate business of balancing competing interests, staying within the bounds of law, and reaching for an ideal with practical solutions that will work on the ground. We typically recommend some sort of policy dialogue or other public forum that meets these process requirements by way of being inclusive, informed, and deliberative.

In this case, for the reasons stated earlier, a broad public forum may not be appropriate at this time. Yet diverse interests still need to work together to address unresolved issues and fine tune specific aspects of stream access policy.

Based on what we heard during the interviews and our years of experience assessing situations and helping people deliberate public policy, the most promising strategy appears to be for stakeholders to work together in small groups of two or three on one piece of the policy puzzle at a time.

On some issues, such as improving education and outreach, people seem to share a common understanding of the problem and may be able to work together in good faith without a neutral facilitator. For talks on other issues, such as access and fencing at bridges, a facilitator may be helpful. A facilitator can also shuttle between the groups working on different issues to help coordinate efforts. The facilitator could be a credible legislator, staff person at MFWP, or a professional mediator.

Whatever steps are taken to resolve the remaining issues surrounding stream access, we believe they can be solidly based on the significant areas of common ground identified in this report. We encourage Montanans to work together, reaching across the lines that separate interests, to seek mutually satisfying and sustainable solutions.



STAKEHOLDER-SUGGESTED OPTIONS FOR RESOLVING CONCERNS

Concern	Legislation	Agency Action	NGO* Action
Improved education	Provides funding for improvement education and outreach	<p>Improve signage at access points explaining stream access law key provisions.</p> <p>Provide clear, concise brochures on stream access laws at fishing license vendors and boat rentals.</p> <p>Improve public and media outreach through printed materials, video, presentations, one-on-one contact.</p>	<p>* (This category includes both landowner and recreationist non-governmental organizations.)</p> <p>Improve public and media outreach through printed materials, video, presentations, one-on-one contact.</p> <p>Meet in small groups with other stakeholders to develop educational materials and strategies.</p>
Access and Fencing at Bridges	<p>Draft a bill codify the 5 holdings of the AG's opinion and give state agencies and counties clear direction for how access is to be accommodated.</p> <p>Define "safe and reasonable access. Address parking, access over or through fences, boat versus foot access, and ADA considerations.</p> <p>Draft a bill to give counties authority to allow fences in the right of way (but not if the actual roadway).</p> <p>Draft a bill clarifying the roles, responsibilities, and liabilities of MDT, MFWP, DNRC, and counties in administering and funding access at bridges, including issues that arise when bridges are replaced.</p>	<p>Educate public on win-win advantages of fencing to bridges (rather than across streams).</p> <p>Identify full range of access accommodation options.</p> <p>Define "safe and reasonable access." Address parking, access over or through fences, boat versus foot access, and ADA considerations. Draft administrative rules for providing and maintaining safe and appropriate access accommodations; stiles, pass-throughs, gates, rollers, etc.</p> <p>Inform riparian landowners on what constitutes a legal fence and help develop best practices for fencing to bridges.</p> <p>Integrate non-FAS access points into strategic planning and management for FAS system.</p> <p>Design a pre-fabricated stile that can be adapted to fit most fencing situations, with non-slip treads and handrails. Standardize pass through design and integrate fencing into bridge replacement design.</p> <p>Provide funding for all or part of access accommodations.</p>	<p>Meet in small groups with other stakeholders to develop a common definition of "safe and reasonable access," build a common understanding of fencing and access accommodations options, and perhaps discuss site-specific access issues and how to resolve them.</p> <p>Inform riparian landowners on what constitutes a legal fence and help develop best practices for fencing to bridges.</p> <p>Provide funding for all or part of access accommodations.</p>
Trepass	Clarify the liability exemption for landowners who allow access across private property.	<p>Improve monitoring and enforcement.</p> <p>In all signs and materials, emphasize that the stream access law does not allow entry to private property.</p>	Improve education and self-policing of members.
Confusion Over High Water Mark		<p>Improve education and outreach explaining and affirming the existing definition, with real-world examples.</p> <p>Map and sign the high water mark on streams or reaches where disputes are common or chronic</p>	Improve education and self-policing of members.
Litter, Weeds Human Waste, Fire, and other impacts of recreational use	Create and fund a program for compensating landowners for actual losses and costs of mitigating recreational use impacts. Funding could be raised through user fees, taxes on fishing licenses, or other from check-off on state tax forms.	<p>Improving monitoring and enforcement.</p> <p>Improve outreach or relevant laws and recreationist best practices.</p> <p>Create and fund a program for compensating landowners for actual losses and costs of mitigating recreational use impacts.</p>	<p>Improve education and self-policing of members.</p> <p>Create and fund a program for compensating landowners for actual losses and costs of mitigating recreational use impacts.</p>

CASE HISTORY AND THE STREAM ACCESS LAW

The following cursory history of the cases most relevant to the Stream Access Law is presented here to provide the basic context for understanding how the law has been shaped by legal decisions. It was compiled by students and PPRI staff, not by legal experts or attorneys, and is not meant to be taken as an authoritative or definitive history. We encourage interested readers to research the actual cases and legislative history.

The Herrin Case

In the 1925 decision *Herrin v. Sutherland* (74 Mont. 587), the Montana Supreme Court held that an angler had no right to leave a navigable river above the low water mark. The case was brought by Herrin, a landowner along the Missouri River, against Sutherland for “walking and trampling along the bank of the river” while fishing and hunting through Herrin’s property. The defendant also waded and fished in a tributary, Fall Creek, that also ran through Herrin’s land. The court held that the waters above the bed or channel of a navigable stream at low-water mark are public waters and thus the public has a right to fish from these navigable waters. Thus, the court found that “the defendant was well within his rights” on the Missouri. He also had the right “to shoot wild ducks upon the surface of the stream or flying thereover, if he did not trespass upon the plaintiff’s adjacent property.”

But the court also found that the defendant went above the ordinary low-water mark and above the ordinary high-water mark, and in doing so, trespassed. The basis for this holding was the court’s understanding of two Montana statutes. The first statute provided that the state of Montana owned the all the land below the water of a navigable stream. The second statute provided that the owner of land that borders upon a navigable lake or stream takes to the edge of the stream at the low-water mark. Because the defendant went above the low water mark of the Missouri River, he trespassed upon plaintiff’s land.

The court also found that the defendant trespassed

when he waded and fished in Fall Creek because it was not a navigable river and the state did not own the bed of a non-navigable river. The plaintiff owned the bed of the river and could exclude the public. The court’s decision did not include an analysis of what constitutes a navigable river, but the court agreed that Fall Creek was not navigable.

The Curran Case

Fast forward 59 years. In the 1984 case *Montana Coalition for Stream Access v. Curran* (210 Mont. 38), the Montana Supreme Court took a direction far different from the Herrin decision.

Curran, a property owner along the Dearborn River, claimed that recreationists floating the river through his property were trespassers. Curran claimed title to the banks and streambed of a portion of the Dearborn River and claimed to have the right, as an owner of private property, to restrict its use. The Montana Coalition for Stream Access sued, arguing that the public had a right to use the river, and the district court granted partial summary judgment for the coalition.

The Montana Supreme Court upheld the summary judgment, writing that “any surface waters capable of use for recreational purposes are available for such purposes by the public, irrespective of streambed of ownership or navigability for nonrecreational purposes.” In *Curran*, and subsequently in *Hildreth*, the court held that the public’s right of use of surface waters is founded upon a provision in the 1972 Montana Constitution that states: “All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law” (Article 9, Section 3, Montana Constitution).

The *Curran* case also considered navigability. Curran’s attorney’s hoped to show that the Dearborn was not navigable and people recreating on the river were trespassing, as was the defendant on Fall Creek in *Herrin*. But the court found that the Dearborn River

met the navigability test because the Dearborn had been used in 1887 to float railroad ties and in 1888 and 1889 to float timber. Thus the court determined that the federal government owned title to the riverbed prior to Montana's admission into the Union. The court further held that the "equal footing" doctrine vested Montana with ownership of riverbeds that were navigable in fact upon Montana's admission into the Union.

The court then declared that this analysis was irrelevant to the question of the public's right of use, writing: "In sum, we hold that, under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes."

This is no small step. The court went to some length to decide the case based on the navigability test, then disregarded that test. In its place, the court essentially said that recreational use is allowed on all natural streams capable of supporting recreational use because the water is a public resource. The court does not, however, offer a test for defining which streams are or are not capable of recreational use.

Why the legal sea change? This question is still debated by some, but the most likely answer is that the court's decision reflected a significant shift in Montana law that had occurred between the 1925 Herrin case and the 1984 Curran case. This shift is manifested in the excerpt quoted above from Article 9, Section 3 of the 1972 Montana Constitution.

Montana's constitution had remained unchanged since statehood in 1889, and some of its provisions lagged behind socio-economic trends in the West. The language in Article 9 strengthened the constitution's stance on water rights in response to new and potential threats. The delegates to the 1972 Constitutional Convention felt that the waters of Montana were in danger of being wholly appropriated by downstream states and the federal government. If this happened, they reasoned, Montanans would no longer be able to put the water in their streams to beneficial use because downstream water reservations beyond our borders would claim it first. The new language in Article 9 was drafted based

on previous lawsuits in Colorado and Wyoming, which were also trying to hold onto their water.

While the legislature was anticipating litigation against other states and the federal government, the verbatim transcript makes it clear that some delegates were concerned about private property rights. One delegate attempted to remove the phrase "for the use of its people" to ensure that private property rights were protected. That delegate feared that this phrase would allow the public to run roughshod over private land to access public waters. His amendment was defeated, however, and the committee that drafted the legislation assured the Convention that the issue of recreational access would not be affected by that provision of the new Constitution. The argument was made that "this whole thing is not aimed at access or it's not aimed at anything to do except to say...this is Montana water, we want to keep it for Montana...I don't think we want to get into the recreation access situation in a constitution" (verbatim transcript, March 2, 1972, p. 1309).

Interestingly, the transcripts show that the delegate concerned about private property rights agreed that a landowner could not hinder someone from using a stream, provided the stream could be accessed without crossing private property. The distinction between navigable and non-navigable streams was never mentioned in the transcripts. But the debate clearly foreshadows the issues raised in later court cases.

In Curran the court also took time to discuss the public trust doctrine. They cited a U.S. Supreme Court case that equated the duty of state to hold certain lands in trust to the duty of a state to administer government and use police powers. The court found that ownership of the underlying stream bed was immaterial to the public's right of use because the public trust doctrine and the State Constitution "do not permit a private party to interfere with the public's right to recreational use of the surface of the State's water."

The court also relied on an 1895 case that recognized a public right to access for fishing and navigational purposes to the point of the high water mark and a Montana statute that provided for public access to fish up to the high water mark.

The Hildreth Case

Later in 1984, the court clarified its holding in Curran with a decision on another stream access case, *Montana Coalition for Stream Access, Inc. v. Hildreth*

(211 Mont. 29). The court wrote, “As we held in Curran... under the Public Trust Doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes.”

Hildreth also confirmed the court’s holding in Curran that the public had a right to enter upon private land in order to portage around barriers. The court did restrict this right somewhat, holding that portage around barriers must be done “in the least intrusive way possible, avoiding damage to the private property holder’s rights.”

The Stream Access Law Takes Shape

While the Hildreth case was in court, state legislators met to develop a stream access law that clarified terms left open by the court in Curran and Hildreth. The Stream Access Law was signed into law in 1985 and provides that “all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters” (23-2-302(1), MCA).

In addition to affirming the right of public use of streams up to the ordinary high water mark, the law also provided additional incidental use rights. These included the right to overnight camp, moor boats, build duck blinds that are not within site or within 500 yards of an occupied dwelling, and hunt big game if approved by the state fish wildlife and parks commission.

In 1987, in the case of *Galt v. State Department of Fish, Wildlife and Parks* (225 Mont. 142), the law was challenged as an unconstitutional taking of private property without just compensation. Again, the court reaffirmed the public’s right to use the waters of the state, including use of the bed and banks up to the high water mark. But the Galt decision also declared unconstitutional those sections of 23-2-302 that provided the public with the right to camp overnight, moor boats, hunt big game, and build duck blinds. The court found that the right of use up to the high water mark only included such “use as is necessary to

utilization of the water itself.” The court held that those rights granted by section 302 were not necessary for the utilization of the water itself.

Madison v. Graham

In 2001, landowners again brought suit in federal court in *Madison v. Graham*. Despite the rulings in Curran, Hildreth, and Galt, landowners still felt that public use of streams and banks adjacent to their land was impermissible. Their claim asserted that the Stream Access Law violated their 14th Amendment (U.S. Constitution) right to substantive due process and that the law was void for vagueness. The U.S. District court granted the state’s motion to dismiss for failure to state a claim upon which relief could be granted (126 F. Supp.2d 1320, 2001).

The Ninth Circuit affirmed the district court’s dismissal upon the grounds that the landowners’ claim of a violation of their substantive due process rights was in reality a 5th Amendment takings claim (316 F.3d 867, 2002; cert. denied, 538 U.S. 1058, 2003). The Ninth Circuit found that the landowners’ inability to exclude others from their property falls under the takings clause. The court found that even if they construed the landowners claim as a more generalized 14th Amendment violation of substantive due process claim, the plaintiffs did not adequately allege a substantive due process claim.

The landowners also asserted that the Stream Access Law was unconstitutionally vague because it does not address the legality of portage around natural barriers in the streams, yet provides for portage around artificial barriers. The Ninth Circuit held that the claim was precluded because the landowners had not alleged the existence of natural barriers in the streams that cross their property. Even if the proper facts had been alleged, the court held, the legislature’s decision not to address natural barriers would not make the statute unconstitutionally vague.

Current court cases may continue to shape and refine the Stream Access Law. In the case over access on Mitchell Slough, for example, one anticipated outcome is clarification of the distinction between a natural water way and a ditch. Most of the people we interviewed agree that while such issues are important, they are more of a fine tuning of the law rather than an outright challenge to its basic tenets.

PRIVATE PROPERTY RIGHTS VS. THE PUBLIC TRUST DOCTRINE

Some people see stream access issues as a fundamental debate between private property rights and the public trust doctrine. Others say it's misleading to frame the debate this way because the Stream Access Law expressly protects private property rights while providing for recreational use of a public resource.

Some tension between private and public rights may be unavoidable in a society that recognizes both private property and the public trust. The Stream Access Law offers an opportunity to observe that tension in action, which in turn may help us understand the balancing act any such law must attempt.

The following information is provided as context for beginning to build that understanding, not as an authoritative or definitive text. It was compiled by students and PPRI staff, not by legal experts or attorneys.

Legal Underpinnings

In the United States, our current legal understanding of private and public property rights dates back to the Roman principle that “air, running water, the sea, and with it the shores of the sea” were common property to all. Feudal English law adopted this “public trust doctrine,” followed by early American courts, but the complex relationship between private property and the public trust has since been shaped by a variety of forces.

The public trust doctrine recognizes the authority of the government to protect public resources and prohibits private control of waters necessary for public navigational purposes. Regardless of who owns the land beneath a stream or other body of navigable water, the state may prohibit any activities (such as filling) that will interfere with public rights. Court decisions and legislative enactments have recognized a variety of uses as worthy of protection, beyond the traditional articulation of navigation, commerce, and fisheries.

This doctrine has provided an important source

of authority for regulations protecting tidelands, wetlands, and other sensitive water-related lands. In one important case, the California Supreme Court applied the public trust doctrine to find that the state has an affirmative duty to maintain supervision over private uses of water “to protect the people’s common heritage of streams, lakes, marshlands and tidelands....” (*National Audubon Society v. Superior Court of Alpine County*, 33 Cal. 3d 419 (1983)).

Perhaps more so than in the eastern United States, state laws in the western United States have reflected an interest in preventing resources from being monopolized by private landowners. This is particularly evident in the case of western water law that accommodates the allocation of stream water as a public resource for beneficial uses such as irrigation and recreation. The water right holder is granted a right not of ownership but of use, and the water itself remains in public ownership.

Laws that afford some level of protection for public access to streams are common in the western United States. Colorado, Wyoming, New Mexico, Utah, Idaho, and Montana all have such laws, though they vary widely in the rights afforded to private property owners and recreationists. These laws originated through the interplay between state and federal navigability laws, state constitutions, and the public trust doctrine.

Under federal navigability law and the “equal footing” doctrine, states hold title to navigable waters—including those which pass through private property. In addition to possessing exclusive control over activities taking place on these waters, states were not required to compensate private property owners for the use of waters that passed through their property. The states’ exercise of this control depended on how “navigable” was to be defined. Based on the United States Constitution’s Commerce Clause, navigable waters came to be defined through common law as those waters “susceptible of being used, in their ordinary condition, as highways for commerce.”

States are free to define their own tests for navigability of waters within their boundaries, but they do not automatically hold title to the beds and banks of a waterway. Consequently, some stream access laws, such as Wyoming's, grant recreationists access to streams that traverse private property, but prohibit them from stepping onto beds and banks. In effect, recreationists on streams that cross private property in Wyoming are limited to floating or boating. Other states, including Montana, allow recreationists to walk on beds and banks below the high-mark, despite these lands not being held in title by the state.

In Montana, key court cases such as *Montana Coalition for Stream Access, Inc. v. Curran* (1984) and *Galt v. State Department of Fish, Wildlife and Parks* (see full cites in Appendix B) led to the determination that the provisions of the Stream Access Law do not constitute an uncompensated taking of a private right. Montana courts have also held that a private party cannot "interfere with the public's right to recreational use of the state's water" (*Montana Coalition for Stream Access, Inc. v. Curran*). In essence, the courts have set this balance point when private rights and the public trust conflict over the use of Montana streams.

Montana codified its Stream Access Law in 1985 following the Curran decision in 1984. Based on the Curran opinion and the rights granted under the Montana Constitution, the law proclaims that "all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters" (23-2-302(1), MCA). The Galt decision then narrowed the law by limiting uses to "only such use as is necessary

to utilization of the water itself" (*Galt v. State Department of Fish, Wildlife and Parks*). Consequently, the court struck down provisions of the law that permitted overnight camping, construction of duck blinds, hunting, and requirements for compensation for the cost of portaging.

Some Montana landowners, despite the rulings of Curran and Galt, continue to challenge the law, but those challenges have tended to expand the law rather than constrain it. In *Madison v. Graham*, for instance, the court determined that "incidental activities" (e.g., wading in a stream bed while fishing) occurring as a result of stream use, were indeed permissible.

Balancing private and public rights

Montana's Stream Access Law offers one way of balancing private and public rights. In the cases cited here, the courts have adjusted that balance somewhat, while leaving the overall intent of the law intact. The recreationists we talked with support the exercise of legitimate private property rights, but they also say that private property owners should not govern access to the public resources of streams and fisheries. Instead, they see the law as a framework for cooperating with landowners to facilitate stream access and use.

Many of the landowners we talked with said that they can live with and even support the Stream Access Law because provisions are built in that protect private property rights. They also enjoy access to Montana's streams under the law.





Public Policy Research Institute
The University of Montana
516 N. Park Ave.
Helena, MT 59601
406.457.8475
www.umtpri.org



The University of
Montana