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Stream Access Remembrance

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While individuals may concentrate on the Stream Access legislation passed by the 1985 Legislature as being an amazing piece of legislation preserving stream usage for all Montanans, the whole story is one which reaches back substantially before the year 1985.

The start of the journey, at least for the purposes of this subject, is Art. IX, Sec. 3(2) of the 1972 Montana Constitution. The drafters stated clearly that "the use of all waters . . . shall be held to be a public use." This simple yet clear and concise statement secured for the public the use of all waters of the state for the benefit of the people.

In the decade after the Montana Constitution was adopted by the citizens of Montana, various groups set out to test this and other constitutional provisions.

At the time, I was in private practice, working for a variety of clients including the Montana Stockgrowers Association. This organization had a long history in the state protecting the rights and interests of its membership, which was made up of ranchers large and small who were primarily land-based rural constituents. For the most part, stock grower members were good stewards of the land and ready and willing to share those resources with members of the public who asked permission to enter and fish, hunt, or recreate, and were responsible users of the land.

There were, however, two small groups who did not welcome recreationalists onto their land. One group was a hand-full of older ranch owners who had lands located near a valuable wildlife resource, be it a fishery or property that provided access to publicly held lands. Often these ranchers had borne the brunt of irresponsible recreationists who had both abused and trashed the land. It is impossible to describe how just one act of leaving a gate open can disrupt a landowner's operations, especially if this resulted in the death of an animal. Those landowners responded, first by contacting the Department of Fish and Game, and ultimately by closing their land and creating barriers on the streams to interrupt users of the waters.

The other group was new landowners who had made their wealth elsewhere and had then come to Montana to secure their piece of heaven. Paying good money for large pieces of acreage, these landowners did not buy the property for its operating capacity but rather for the resource which they wished to use by themselves and which they felt they owned, just as they owned their houses and outbuildings. Water and the fish in the

waterways were assets which these landowners paid dearly for and they were not about to see those assets being used by others without their permission.

By the middle of the 20th century, Montana had a number of people who wanted to simply lock up the resource and keep it for themselves.

Within a decade after the adoption of the 1972 Constitution, there were growing reports of conflict between representatives of these groups of landowners and recreationists.

One of the individuals in the former group, Lowell Hildreth, had ranched along the Beaverhead River, just downstream from Clark Canyon. I do not know the origins of the tensions between Hildreth and sportsmen who fished the Beaverhead, but at least before 1983, the Stockgrower's Executive Director Mons Tiegen had asked me to look into issues about the ownership and use of waterways and how to either limit such use or at least develop a sound position should the problem develop into actual litigation.

Another representative of these resistant landowners working to keep recreationists off their land was D. Michael Curran. Curran, an oil pipeline developer, owned a large segment of land outside of Wolf Creek north of Helena. The Dearborn River traverses this land. Unfortunately, the Dearborn is not a particularly deep river nor one which supports full time floating; by July or August, the Dearborn's flow meant that those floating on the river frequently had to exit their boats and either portage or pull the boats over low points in the river. Also, because the Dearborn is a particularly long float, boaters would often stop and pull up their rafts on sand or gravel bars to rest and eat lunch while enjoying the experience. In one memorable incident, Curran came upon a group of floaters sitting with their rafts out of the river. Curran ran over the rafts with his Jeep, destroying a raft and frightening the floaters.

Two lawsuits were filed by Jim Goetz on behalf of a coalition of recreationists calling themselves the Stream Access Coalition. These suits, one pending in Dillon and the other pending in Helena, were before two good jurists. In Gordon Bennett, Goetz had found his judge—one who would view the actions of Curran with disfavor and who would be willing to rule to recognize rights of fishermen, as members of the public, and protect their use of the waters of Montana. The other case was presided over by Judge Shanstom, a long sitting District Judge from Livingston but a known hunter, trapper, and fisherman.

My research told me that especially given the poor set of facts, either or both of these cases were likely to be lost. The only question was the range and scope of the decisions and how broad the rulings would be.

I was directed to find options and allow the board of MSGA to decide what direction to take. Upon consideration and following my instinct that the two cases were probably going to be adjudicated against the landowners, I was directed to work to get into law some type of a floating bill which would allow recreationalists to use the water but keep them off the land.

Late in the 1983 Legislative session, I managed to find a sponsor and had HB 888 introduced. This was a pure floating bill, which would allow people to float rivers and streams without seeking the permission of the landowner over whose land the water flowed, so long as they did not touch the beds or banks of the rivers. By midterm break, both the Hildreth and Curran decisions had come down, as predicted, adverse to the landowners, but I had managed to get HB 888 through the House and referred to the Senate for further consideration. I managed to get this done because, while the Stream Access Coalition had raised money to hire Jim Goetz, the coalition then did not represent a broad base of the recreational community. At that time, it was largely made up of sportsmen and women from Butte, Anaconda, and Helena. Thus, working with other recreationists, I managed to get some sports groups who did not have complete confidence in the litigation to support HB 888 since it promised to provide a sensible solution to most sports groups and to protect their rights to recreate on the waterways of Montana.

Transmittal gives groups impacted by pending legislation time to evaluate and react to what has passed. By the time transmittal was done and by the time the second half of the session had started, both Curran and Hildreth had approached the board of MSGA, urging that they were good dues paying members and that the MSGA needed to stand with them. They argued that passage of HB 888 would weaken their court arguments about the rights of private landowners and might lead to defeat on appeal which they were certain they would otherwise win. I cautioned the Board that if MSGA withdrew from the legislation, HB 888 would die. Also, if the Montana Supreme Court were to affirm the cases, we would have lost the best chance to lessen the impact of what I believed would be an overwhelming defeat for landowner interests.

The Board directed me to abandon HB 888, and I did so as the bill was being heard before the Senate Judiciary Committee. HB 888 died shortly after the hearing since there was no longer any group working on its passage. By this time the other recreation groups were more optimistic about the odds before the Montana Supreme Court, and, given the District Court rulings in the two cases, it is questionable to me whether I could have held together the coalition of stock growers and recreationists that I had patched together in the effort to pass HB 888.

In 1984, the Montana Supreme Court did what I had predicted—they affirmed Hildreth and Curran in sweeping decisions. An application to the United States Supreme Court seeking a Writ of Certiorari was denied, and now landowners had to deal with those cases, with the promise of litigation across Montana addressing recreationists' rights to use the waters and the lands over which the water flowed.

By the summer of 1984, I was tasked with trying to pull together both agricultural and recreationist groups to see if we could begin some dialogue, using the offices of the Director of the Department of Fish and Game, Jim Flynn, as a convener and facilitator. Flynn was reluctant to get involved and he provided a staff lawyer Stan Bradshaw to monitor and report, but not lead or otherwise become involved.

Fortunately, Trout Unlimited hired a lawyer—Mary Wright, new to the state but with a background in facilitation, to be its spokesperson and lobbyist. She was
willing to listen to the concerns of my clients, and to work to try to find a compromise, understanding that a clear law defining the rights of all parties would, in the end, be better than the vague and imprecise pronouncements of the courts. She especially understood that if this was solved by the courts there would be a series of decisions which could be interpreted differently even by the parties to the same litigation, with no promise that the positions of the sports groups would prevail. Long, expensive, and imprecise litigation appeared to be the promise of a future relying solely on litigation to solve this dilemma.

It took at least three meetings before the sports groups were willing to engage in realistic discussions about future solutions to the problems and indicate a willingness to work to develop legislation to secure the rights extended by Hildreth and Curran into law. While the Stream Access Coalition ultimately became involved, it refused to allow its lawyer, Jim Goetz, to participate. The members wanted to keep him isolated from the legislation in the event that they might become convinced that they had to either abandon the legislative process or attack it in the courts should the language and concepts be something they could not support.

By December a small working group including Mary Wright, Stan Bradshaw, and I had developed a working draft, much along the lines of what finally passed as law during the 1985 session. The draft allowed recreationists to use the beds and banks of streams and rivers up to the highwater mark. This language restricted them to a clearly defined area which did not support any agricultural activity and thus minimized the impact to the land.

We took this back to our respective clients with the agreement that we would not introduce this unless all of the major players, landowner

groups and sports groups, agreed with the concepts expressed in the bill. When all of the groups committed to the legislation, we asked Legislative Council to draft a bill for introduction into the legislature.

We also sought a broad base of support for the legislation by seeking out co-sponsors from both parties and individuals known to be willing to work on compromises and consensus. Bob Ream, then a house member from Missoula and a member of the faculty at the University, Bob Brown, Bob Marks, Hal Harper, Bill Yellowtail, and Kurt Kruger were among those who agreed to sponsor.

Before the session commenced, all of the groups who were supportive of HB 265, the Stream Access Bill, made one final agreement. No one would commit to making any changes to the legislation unless the whole group agreed to the changes. In other words, there would be no divide and conquer, and one group would not abandon the coalition because it felt that it could get a better deal.

I was aware that the livestock and landowner groups whom I represented also needed something. They were, of course, getting certainty; the language clarified what they could and could not do in dealing with recreationists who were using the waters that crossed their land. They were also avoiding years of expensive and likely frustrating litigation. Still, they needed something. In talking to these factions, I discovered that almost all landowners disliked the vagueness of the trespass laws, since one had to "conspicuously post the land" to demonstrate that the land was closed. Most county attorneys would not prosecute trespassers because of predictable questions as to whether the land had been sufficiently posted to give notice to those found on the land. A sign could fall down; or, as the hypothetical was often recited (with little actual proof that it had ever occurred), if a person tore down the sign as that person came through a gate or over a fence, then prosecution for trespassing was not going to happen.

The solution proposed was to allow landowners to paint the gateposts and crossings with orange paint, creating a presumption that if an individual saw the paint they would know the land was closed. Painted posts, unlike cardboard signs, were not prone to being destroyed easily or ignored. The sportsmen groups were willing to accept this modification of the trespass laws largely because the Stream Access law gave them what they had wanted and won in the Hildreth and Curran decisions—the freedom to use the water without the necessity of asking for permission. Thus, the revision to the trespass laws were meaningless to them.

Sportsmen with whom I had visited were aware, of course, that in most instances access to their favorite fishing streams were not likely to be denied to them. They had developed relationships with landowners

such that they could readily ask for, and expect to receive, permission to come onto the land. Most sportsmen, very much like their landowner counterparts, disliked those who ruined the experience and were careless and discourteous to landowners, and who left trash on the land and gates open.

HB 265 had good hearings in the House. Of course, this was well before the House's leadership changed from Democrat to conservative Republican and before the partisanship which has now overtaken compromise and consensus building.

Long before transmittal, I knew that HB 265 was going to pass the House and so I started working the Senate. I quickly discovered that some conservative landowner legislators, especially Jack Galt, were very upset with the legislation and that he had enlisted Bruce Crippen from Billings, and to a degree, Bob Brown from Kalispell, and one of the sponsors, to oppose the bill. Brown had been especially concerned that the legislation could apply to lakes. Coming from the northwest part of the state where there are many lakes, his constituents raised concerns about access. By making clear that the law did not apply to lakes (a fight deferred to another day) we regained Brown's support.

Unlike the House hearings, the Senate hearings were extremely contentious. Especially rigid were ranchers from the Big Timber and Absaroka areas. These individuals, some ranchers, some lawyers, some realtors, all predicted dire consequences to the State should the legislation pass. While the group was small it was determined and battled in subcommittee to gut the substance out of Stream Access. Senator Tom Towe on the Judiciary Committee restored some of the original language by amendment and corrections. Senator Bill Yellowtail then succeeded in moving the rest of the amendments on Second Reading on the Senate floor. His motion carried, restoring the bill to close to its original form.

In the end, Towe and Yellowtail succeeded in reversing most of the damage that the Senate subcommittee had done to the bill. However, at that point, Senator Jack Galt successfully moved to amend the definition of surface water to delete the very strong language which allowed individuals to use the water and the bed and banks of every river and stream to the highwater mark. This greatly damaged the bill. The Galt Motion passed 27–23, and the bill was sent back to the House with this amendment. The House convened a conference committee, including all of the original sponsors of the bill. Galt's amendment was struck, and the "bed and bank to the highwater mark" language was restored along with two smaller amendments. The Conference Committee Report was accepted by a vote of 29–21 on April 13, 1985. The House accepted the Conference Committee Report by a vote of 85–12.

The committee bill then proceeded to the Governor for signature. Ted Schwinden knew that the bill was the right thing to do to address this issue of stream access and the increasing friction between landowners and recreators. He was fully aware of the contentious nature of the hearings in the Senate and the threats of some landowners to close their lands to hunting and to set up barriers to stop people from using the waters of the State. As the bill was being signed, he congratulated me but also warned that we had ripped a scab off of the growing rift between these two interest groups, and that it would take time to heal if ever it would be resolved.

None of this would have been possible without those mentioned and also others intimately involved with this process, most notably Mons Tiegen and Jimmy Wilson. Tiegen had been a former state land commissioner who had then gone on to become the Executive Director of the Montana Stockgrowers Association. He understood his membership very well and knew that at times he needed to try to lead even as his membership was less than enthusiastic about the particular legislation. Mons knew that most of his members were good stewards of the land and willing to open up their lands to the recreating public, especially those who were careful to respect the landowners' needs and operations, close gates, and clean up any messes made on the property. He also knew that in the end his membership would lose a court fight over access issues. They would lose the legal fights, would lose funds most operations could not afford to spend, and would lose the general support of the public in any public relations contest.

And so, Mons led his members. His legacy has to include the Stream Access bill. Unfortunately, this also became his undoing. Mons was slated to go back to Washington following the 1985 session to work in the Reagan administration dealing with public land issues. Angry and upset because of the compromises Mons had reached in getting Stream Access passed, those who opposed the legislation now opposed him. He did not get the appointment and he had left his position with the MSGA. Shortly thereafter he went into retirement.

Jimmy Wilson was a rancher in Trout Creek, and President of MSGA in 1985. He came to the Capitol and the Legislature to testify and lobby on behalf of the bill. He was genuine and because he was a landowner, he could affirm that there was nothing in the bill which forced him to do anything other than what he had done for years as a landowner. He was right about his assessment. There is nothing in the bill which forced landowners to be anything other than good stewards of the land.

Stream Access could not be passed today. While the landowners have shrunk in size they now represent a disproportionate part of the Legislature and there are no leaders, on either side of the aisle, willing to reach

over and find consensus and compromise. Moreover, Stream Access was a progressive solution to an ongoing problem which required landowners to abandon some ingrained principles about private property which would not be set aside so quickly today. There is no leadership trying to do what is correct for the greater Montana and trying to find common ground between competing groups of citizens.

It was not just landowners who moved towards the middle to find common ground. Recreationists also did. They had won before the Montana Supreme Court in two important landmark decisions and could have ridden those victories to further clarifications of their rights and privileges. It would have come at considerable expense with rights being secured only by returning again and again to court. Further, as recreationists had to see, even the courts changed, to a degree rather quickly. Elements of Stream Access dealing with hunting and camping were removed in the challenge to the law filed shortly after it was signed by the Governor. Although access to streams from county roadways which crossed flowing waters seemed like such an obvious solution, it took numerous lawsuits and three tries at legislation before that issue was largely resolved.

However, like landowners, recreationists compromised on extreme issues and found consensus to move forward and find this solution to guarantee the general public the full use of waters up to the highwater mark on any living stream or other flowing body of water.

In 2018, the Alexander Blewett III School of Law, University of Montana, conducted a symposium of all of the participants then living to discuss Stream Access. The Public Land and Resources Law Review compiled comments from many of those who participated in developing the Stream Access legislation and republished Robert Lane's excellent article on Stream Access.[1] The meeting was a success as those involved looked back and could celebrate over passage of this significant and historic piece of legislation.

1. Robert N. Lane, *The Remarkable Odyssey of Stream Access in Montana*, 36 PUB. LAND & RESOURCES L. REV. 68 (2015).