



BRIDGE ACCESS: A HISTORIC REALITY

In the last edition of Montana Wildlife (Feb/March 2009) we provided a legislative update on the 'Clarify Bridge Access Law' legislation (House Bill 190) running the gauntlet at the 2009 Montana Legislature. HB190 is the third citizen's attempt at legislation in five years to resolve and clarify public access opportunities at bridges; MWF has been a leading partner in these efforts each and every legislative session. When we last reported, HB190 had passed out of the House with strong bi-partisan support. Since then it has not only been heard in the (S) Fish and Game Committee, and passed out of the committee with acceptable amendments to the Senate Floor but it also past muster on the Senate Floor with a Third Reading 48-2 vote. The bill then moved back to the House floor for favorable Second and Third Reading votes. The final Third Reading vote on legislative day 75, April 6 was 96-3. Representatives Lee Randall, Joel Boniek and Harry Klock were the only 'nay' votes. Montana Governor Brian Schweitzer passed the measure into law with his signature April 13. ***The public may now access streams and rivers from a county road or right-of-way by crossing a fence that extends to the bridge.***

In introductory comments when the bill was heard by the (S) Fish and Game Committee, the bill sponsor Representative Kendall Van Dyk recognized the bill crafting efforts that took nearly sixteen months with "due diligence to bring all of the stakeholders to the table". This comment was in reference to a working group of interested parties that began working on the bill at the urging of Governor Schweitzer within months after the end of the 2007 legislative session where a similar, but more complicated public access at county bridges bill (SB78) failed.

Initially the working group consisted of one representative from Montana Wildlife Federation, Montana Association of Counties, Trout Unlimited, Montana Fish, Wildlife and Parks, and the strongest opponents to past bridge access legislation, Montana Stockgrowers Assoc. and MT Farm Bureau Federation. Later as discussions became more contentious, three more groups in support of a public access at county bridges clarity bill joined the group, Montana Farmers Union, Public Lands and Waters Access Association and the Montana Cattlemen's Association. Former FWP director Jeff Hagener should be given credit for his group guidance and leadership and for efforts to hold the working group together as it sometimes struggled with differences of opinion.

Tracking the legislative record of HB 190 this session, it's clear that something was different and it is important to explore the influences.

A Different Bill; the Same Intent and the Influences

A more concise bill crafted through collaboration, including the input brought to the working group with the addition of other farm and ranch groups and outdoor interests, had a major influence on why the bill passed regardless of Montana Stockgrowers Association opposition. The Farm Bureau eventually re-analyzed their opposition and supported the bill in the House and in the Senate.

The long and hard partnership work by TU and MWF to make the bill agreeable to the many interests while maintaining and standing strong for the public right to access public waters from public rights-of-way was a sizable factor. Having anglers, river recreationists, and local sportsmen clubs express their opinions loud and clear in public forums, letters to editors and through personal communications to not only incumbent legislators but also those running for office was also influential. Moreover, the resulting political pressures following partisan polarization that killed two prior attempts to pass a bridge access clarity bill for more than five years created some sensitivity that probably also helped in both the House and Senate. Speaking to legislators, Rep. Van Dyk repeatedly urged across the aisle support for the measure. "Years and years of ideological differences and partisanship drove an enormous wedge in this issue". "With HB190 we have removed partisan politics from the debate," said Van Dyk.

Two other significant factors to the bill passage were Montana court rulings released within seven weeks of each other this past fall that upheld public opportunities to use and access Montana waterways; both set noteworthy precedent often referenced in legislative debates between decision makers.

The rulings addressing public use, access and a determination that the Mitchell Slough of the Bitterroot River is a public waterway was released November 18 by the Montana Supreme Court. A legal challenge heard in a District Court over public access at county bridges and their right-of-ways on the Ruby River was released October 3.

The rulings uphold three significant provisions in Montana:

1) 1972 Montana Constitution "which expressly addressed the state's ownership of all waters," Article IX, Section 3 (3) states:

"All surface waters, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people..."

2) Montana Stream Access Law, 23-2-302 MCA: “all water capable of recreational use can be so used by the public (between the ordinary high water marks) without regard to the ownership of the land underlying the waters.”

3) 2000 Montana Attorney General Opinion regarding public access to waterways crossed by a county bridge: “...the public may gain access to streams and rivers by using the bridge, its right-of-way, and its abutments.”

The Mitchell Slough decision was the result of a citizens group, hunters, anglers, and river recreation enthusiast lawsuit filed by the Bitterroot River Protective Association. The Ruby River ruling, the more powerful ruling that influenced decision makers when considering HBI 90, was also a result of a law suit filed by hunters, anglers, river recreation and outdoor enthusiasts, the Public Lands and Water Access Association. This suit against Madison County in 2004 resulted in a precedent setting ruling that reaffirms a 2000 Montana Attorney General opinion that the public is entitled to access streams and rivers by using a county bridge and the associated right-of-way. The judge basically ruled against opponents including the Montana Stockgrowers Association and media mogul, James Cox Kennedy that had argued the public could not cross a private fence in a county right-of-way for legal access to a stream or river. Judge Tucker said their arguments were unsupported by authority or logic. The public, according to Tucker was not trespassing when it walked down a right-of-way, a public easement, and crossed a fence attached to a bridge to access a stream or river; that county road rights-of-ways are 60 feet wide easements running parallel to a roadway “unless otherwise ordered by the board of county commissioners” and they are available for legal public activities including access to a waterway.

Lastly, Rep. Van Dyk, who not only sponsored HBI 90 but also chaired the (H) Fish, Wildlife and Parks Committee, was a driving force for why the bill passed and is well deserving of accolades. Van Dyk worked across the aisle for bill support, with opposing ranchers to craft acceptable amendments, and with FWP and the Association of Counties to ensure cross jurisdiction clarity.

MWF, unwavering in its support of legal clarity upholding the right of the public to access waterways from the intersection of two public thorough-fares, the easement and the waterway, actively shaped HBI 90. Regardless of some groups questioning or opposing the need for yet another attempt at legislative clarity, MWF stayed its course. Believing that the status-quo under the Attorney General opinion and the Tucker ruling did not adequately make clear public access through rights-of-way statewide and believing that landowner’s too needed precise guidelines and side-boards dedicated hundreds of hours through the years to pass HBI 90.

MWF and its many members that sent hundreds of emails, appeared and provided testimony at hearings, and made just as many phone calls should be proud of their participation in the public process to make public access at county bridges a historic reality.

HBI 90 is a win-win Montana solution – a non-partisan solution as it should be. Public access, like wildlife management is not nor should it be a partisan issue.

MWF extends it deepest thanks to the participants on the working group, to Hugo Tureck, the many citizens that communicated with legislators and especially to Rep. Kendall Van Dyk, Sen. Jim Shockley, Senator Jeff Essmann, the Public Lands and Waters Access Association, TU and all those legislators that have supported HB 190.