



## Courts Set Waterway Access and Use Precedents

Montana is a state with incredible fish and wildlife wealth and diverse outdoor recreation opportunities. It is a state with proud traditions rooted in sharing and managing its natural wealth for all people. The challenges of maintaining this wealth for the benefit of all people today are far different from those of the past. Some characterize the greatest challenge as preventing the 'robbery of our public estate'. Increasingly, the policies and traditions of public ownership and rights and public access hand shakes are colliding with attempts by private interests to clutch and hold tight public resources for private benefits.

Within seven-weeks of each other two Montana courts of law have upheld public opportunities to use and access Montana waterways; both set noteworthy precedent. The debates relating to public access to the Ruby River in Madison County and the Mitchell Slough of the Bitterroot River have been ongoing since the early 1990s.

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."

### Mitchell Slough

The most recent ruling has come from the Montana Supreme Court responding to an appeal filed by the Bitterroot River Protective Association, Inc., Montana Fish, Wildlife and Parks and Sportsmen's Groups to a 2006 district court decision that prevented the public from accessing and using Mitchell Slough near Stevensville. That district court decision was in response to a lawsuit filed in 2005 by the Association that held the Mitchell Slough was a branch of the Bitterroot River, and not simply a private irrigation ditch, and therefore, it was subject to the provisions of the state Stream Access Law. The lower court disagreed with sportsmen and ruled that the Slough was not a natural stream under the Natural Streambed and Land Preservation Act of 1975, referred to as the "310 Law" and that it was not subject to public access.

Overturing the lower court ruling, all seven justices and Helena District Judge Dorothy McCarter sitting in place of Justice W. William Leaphart, unanimously ruled that the Slough is a natural, perennial flowing waterway "subject to stream access and public recreation as provided by the Stream Access Law".

The dispute has been on going between many local sportsmen and sportswomen that became fed up with efforts to block public access to the Slough by Siebel Systems software magnet, Ken Siebel, rock-'n-roll star Huey Lewis, San Francisco discount stock broker tycoon Charles Schwab and Anthony Marnell II, owner of one of the largest construction companies in Las Vegas that has built the Mirage, Excalibur, Ceasar's Palace, Treasure Island and many other large gambling - hotel establishments.

Perhaps the best response to the Slough debate can be attributed to legislator, angler, and local resident Jim Shockley as he stated back in 2004, "As a lawmaker, an attorney, a sportsman and Montana resident these attempted manipulations nauseate me." He said, "The laws and regulations protecting our water resources apply to everyone - no matter how much money you have or how well connected someone might be politically. The statutory directives Montanans have established to protect the public interest and our

invaluable water cannot be ignored. We don't want to have to file law suits, it's sad that we do and it's really against our good neighbor sentiments, but we feel that we must to protect the river and public access."

Retired Ravalli County Justice of the Peace, Ed Sperry, takes it one step further, "The privatization of a river or stream is a mistake - no man should own a stream, Mitchell Slough is a stream – and it is not for sale."

## **Ruby River**

In early October another controversial legal debate was answered, in part, by District Judge Loren Tucker who ruled that county road right-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 stream or river.

The ruling was a result of a lawsuit filed by the MWF affiliate Private Lands and Waters Access Association against Madison County in 2004 that focused on activities at three county bridges. The judge made the split-ruling relevant to only two of the three bridges in question because one of the bridges was not an established road by petition or deed, it was established by what is known as prescription and further fact finding is necessary to determine how it was created, the right-of-way width, and its use.

Nevertheless, the ruling is precedent setting and 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 county right-of-ways and therefore public use narrowed or hour-glassed to the actual bridge or roadway. Judge Tucker said their argument was unsupported by authority or logic and that the public 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; the easement runs parallel to the roadway and bridge to the high water mark of the waterway. Or as the Attorney General Opinion suggested, a road and bridge crossing a stream or river is the intersection of two public thoroughfares or rights-of-way.

The ruling went further by saying that while county commissions may allow or approve the construction of fences in the right-of-way and landowners may attach to bridges with approval, the public still has the legal right to access the waterway in the right-of-way easement.

## **What Now?**

The question for Montanans, river recreation enthusiasts and landowners with county roads crossing streams and rivers remains: What now, what next? Will costly legal battles continue? Or can landowners, farmers, ranchers, and river recreationists come to some resolve?

The courts have provided clarity. The Montana Stream Access Law has held up to legal scrutiny and challenges through the years. The Attorney General Opinion has now been affirmed, at least concerning the issue of public access in dedicated county right-of-ways. Can Montana come to terms with fences in right-of-ways to control livestock while also allowing public passage? Will legislative measures at the 2009 session cause greater rift between landowners and waterway enthusiasts or between parties or will legislators recognize the value of a collaborative approach?

Sportsmen, sportswomen and river recreationists do not want to battle with farmers and ranchers or county governments over the related issues and are truly looking for opportunities to resolve the issues just as was attempted in 2005 with HB560 and in 2007 with SB78. There is no intent of diminishing or taking property rights. In 2009, a group of landowners, ranchers, farmers, and recreationists that have been working since 2007 will present a new bridge access and fencing allowance bill seeking legislative support. How will your legislator vote?