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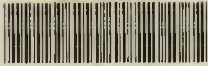
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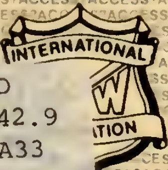
ACCESS?

Robert Allen

INTERNATIONAL RIGHT OF WAY ASSOCIATION
INCORPORATED



MONTANA Big Sky CHAPTER 45

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CHAPTER #45
International Right-of-Way Association

in cooperation
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USDI, Bureau of Land Management
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EXECUTIVE SUMMARY

"There is one thing stronger than all the armies in the world, and that is an idea whose time has come." (Victor Hugo)

Steven P. Shuck, 1986 President of Chapter 45, International Right of Way Association (IR/WA) opened the forum, welcomed attendees, and introduced several VIPs. His opening comments led with an overview of the emergence of the Access issue, IR/WA's offer to moderate a forum of the divergent interests, and of the Governor's endorsement of the "Access in Montana" program.

A total of 130 people attended these proceedings. One attendee summarized the forum thusly, "the level of discussion was very high and—the conference was excellently organized in, in fact, we've never been to one better organized."

This publication is a complete set of all presentations, dialogue between panelists, and audience input.

The forum and these proceedings are offered with the intent of providing crisp and correct understanding of basic title interests and property rights as matters involved in the greater Access issue are legislated, litigated, and administered within the state.

Success of the endeavor is established. The primary objective was to create dialogue and bring focus to divergent ideas. One participant observed, "This forum is a remarkable testimony to the advancement of our natural resource culture in Montana. Fifteen years ago such a gathering would have resulted in severe confrontation."

Our sincere thanks is extended to the many individuals who donated their skills, time, and in some cases, personal expense toward the success of the forum.

We also want to thank the many corporations, private consultants, and government agencies that provided key employee skills and support services. Without this help, the forum would not have been so easily orchestrated.

One area of concern was the near total absence from the proceedings by the state and national legislature delegations. Several specific invitations were extended but only one state senator attended. From the severe turmoil that erupted following action of the last state legislature, exposure to these proceedings might have been useful to the legislators and the interests of their constituents.

A list of attendees follows:

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Panelist

SUMMARY RECOMMENDATIONS
"ACCESS IN MONTANA"

1. *The establishment of an intergovernmental committee/task group* to design a sound and equitable access management program for Montana. This group should be given a charter that includes perspectives of the landowners, commodity interests, administrative interests, and recreational points of view. The charter should be careful to avoid the appearance of allegiance or tie with any particular interest or point of view.

The committee/task group could operate under the umbrella guidance of the Governor's Natural Resource Council.

Once the group has designed the program, it should then be used in oversight of the program and its application.

2. *A close look should be given to the need for legislative corrections to the road title mechanisms in Montana.* Anyone working Montana title records will concur with the conclusion that Montana road title research is unnecessarily complex—often impossible.

One neighbor state has effected a greatly simplified system, placing control in the counties, providing for conversion on the county's timetable, and establishing one uniform and easily retrieved title reference to continue into the future.

Should such an effort seem prudent, land title specialists in Chapter 45 will be available to assist.

ACCESS IN MONTANA

A Historical Issue!

ACCESS IN MONTANA
Problems and Solutions

Colonial Inn
Helena, Montana

Goal: Through this forum we will examine the elements of the *access* issue being debated in Montana, tie sub-issues and interests into one cohesive program and suggest the design of a federal, state, and county action plan.

Moderator:
Dan MacIntyre, Rancher
(Retired U. S. F. S. Supervisor)
Roundup, Montana

Tuesday, November 11, 1986

6:00-8:00 p.m.
Registration
Wine and Cheese Party, Courtesy of IR/WA Montana Chapter 45

Wednesday,November 12, 1986

8:00-8:30 a.m.
Registration

8:30 a.m.
Welcome - Moderator

8:35-9:00 a.m.
History and Evolution of Access Questions in Montana -*Dr. Gordon Britton*, MSU - Internationally Recognized Historian/ Philosopher

9:00-9:30 a.m.
The Importance of Access to Montana and the West - *Ted Schwinden*, Governor of Montana

9:30a.m.
Coffee Break

10:00 a.m.
Property Rights Panel
Claude Roswurm, SR/WA presiding

Federal Constitutional Law
JamesHuffman, Lewis and Clark Law School - Portland, Oregon

Montana Constitutional Law
Margery Brown, U of M Law School

Landowner Perspective
Tom Sheehy, Rancher, Lawyer, Past President of Landowners Association

Commodity Perspective
Dave Schaenen, Oil and Gas Industry Consultant

Recreational Perspective
Steve Woodriff, Outdoor Writer, Missoulian

Ten minute presentation by each panelist followed by an open Question/Answer session.

Concerns:
- Fifth Amendment
- Public Trust Doctrine Eminent Domain
- Prescriptive and Dedicated Access
- Enabling Act - Montana
- Access to or through Federal Lands

12:00 Noon to 1:30 p.m.
Lunch - Colonial Inn
Keynote Speaker
Raphael Christy-(Charlie Russell's Views)

1:30 p.m.
The Importance of Land and Its Owners - *Kevin Coyle*, American Land Resources Association

2:15
Coffee Break

2:30 p.m.
Public Access and Private Property Panel - *Bill D. Noble*, Presiding

Montana Outdoors
E. Zaidlicz, Montana Coordinator

Road Network and Needs
M. Greely, Montana Attorney General

Recent Montana Law
Judge Nat Allen, Retired Jurist

Game Ranchers
W. McNeill, Pronghorn Ranch

Ten Minute presentation in each topic area with Question/Answer session to follow.

5:30 p.m.
Waterhole - No Host Bar
Entertainment-Compliments of Mt. Rural Electric and Telephone Co-Operatives

Thursday, November 13, 1986

8:30 a.m.
Creative Access Tools Panel - *Al Evans*, presiding

Land Exchange and Fee Acquisition
Bruce Bugbee, APLE, Inc.

Easements
Bob Keisling, TNC

Conservation Reserve/Easements
Everett Snortland, ASCS

Federal Road Easements
Jerry Sutherland, USFS

County Road Easements
P. Funk, Lewis and Clark Co.

Non-Vehicular Access
R. Lommen, North Dakota

Ten Minute presentation followed by Question/Answer session.

11:30 a.m.
Recess for Hotel Check Out

12:00 noon to 1:30 p.m.
Lunch - Colonial Inn

1:30 p.m.
Federal/State/County Access Action Plan - *Jim Couture, SR/WA*, Presiding

State of Montana
G. Turman, Lieutenant Governor

U. S. Forest Service, Reg. 1
J. Overbay, Regional Forester

BLM - Montana
D. Stepanek, State Director

Mt. Association of County Officials
Mrs. T. Hagener, President

Ten Minute position statements followed by Question/Answer session.

Concerns:

Analysis of Need
Recognizing Opportunity
Planning for Action
Acquisition Methodology
Implementing Access
Management of Access
Ongoing Program Use

3:00 p.m.
Open Forum - Audience

Attendees not on the agenda are encouraged to provide position statements on any aspect of the access issue at this time. Papers for these presentations should be turned in to the moderator for incorporation in the forum record.

A record of the proceedings will be published and made available to the participants.

In addition, the **American Land Resources Association** will report on these proceedings in an article in their national magazine *American Land Forum*.

Information

☎ **406-657-6561 or ☎ 406-323-2888**

Artwork by R. Allen, Billings Mt.

Access in Montana

Access has emerged as the dominant land, resource, and property rights issue in Montana and across the West for this decade. At stake are principles and definitions of constitutional rights running to the core of our heritages in Montana and America.

In recent months a series of public forums have been held in Montana, each examining different elements of the greater access question. The several include:

- Montana Outdoors - several locations, Jan. and Feb.
- Public Lands Access - Bozeman, March
- Fee Hunting and Public Access - Fairmont, April
- Recreational Access - Billings (MWF), May
- The Public Trust Doctrine and Property Rights - Bozeman, May
- Stream Access Revisited - Kalispell (MSGA), May

Each forum has seen substantial participation and wide ranging perspectives.

This forum will bring together the consensuses of earlier forums and examine the issue(s) in a way intended to provide a crisp and correct understanding of the basic considerations involved. With this, a proper foundation will be set for future adminis trative and legislative action in Montana.

Leaders in state government, federal agencies, counties, and interest groups all are working toward common understanding and an action plan. This forum is especially targeted to benefit the 1987 Montana legislative session.

International Right-Of-Way Association

Who And What Are They ?

Throughout the United States and Canada, billions of dollars are expended annually in the acquisition, management, and transfer of rights of way. The technical skills required for proficiency in this complex activity embrace the fields of appraisal, engineering, law, negotiations, public relations, property management, and public service administration.

It is a logical sequitur, therefore, that the foundation of the IR/WA is a vigorous, continuing educational program. To date, the IR/WA has over 20 courses it offers to members and nonmembers which are taught by certified and qualified instructors from diverse fields.

The IR/WA was founded in Los Angeles, Ca., in 1934 and today has 73 chapters in the U.S. and Canada comprising over 9,000 members.

Any person is eligible for membership in this association if of lawful age and good repute, high moral and ethical character, who is principally engaged in the acquisition or disposition of real property or interests therein, in connection with public, quasipublic, or private activities, upon a majority vote of a quorum of a Chapter Executive Board. We urge your participation in this highly skilled body of professionals.

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ACCESS: AN UNPRINCIPLED ACCOUNT

Dr. Gordon Britton

ACCESS: AN UNPRINCIPLED ACCOUNT
DR. GORDON BRITTON

My friends often kid me that I've chosen the two least lucrative careers known to mankind, teaching and ranching. But I also like to think that this combination gives me a relatively broad view of things. That's my role here today, to provide a relatively broad view. I want to talk mainly about the philosophical foundations of access policy. It will be left to those who follow to get down to the specific and practical issues.

I'll assume that there are deep differences of opinion about access policy in Montana. That, after all, is presumably the motive for our meeting. The philosopher's task when confronted by such conflict is threefold: to put the conflict into a larger context, to make appropriate distinctions, and to find principles on the basis of which the conflict may be resolved. This, briefly, will be my task today.

LARGER CONTEXT

The access issue is not new in Montana. Indeed, there was an issue before the white man came, although it was not stated in anything like contemporary terms. Indians generally had no system of fee simple property, hence did not have our concept of exclusionary rights. Rather, Indians living in particular areas had something like "in use" rights to the game, the fish, the fruit, and so on, of those areas. Access as such was never a question; only certain uses of that access, invariably connected with the tribe's means of sustenance, were challenged. For a long time, in fact, Indians who sold lands to white settlers thought that they were selling particular use rights, to build a road for example, and could not understand these settlers' subsequent attempts to fence off and exclude others from their territory.[2]

Even in contemporary terms, the issue is not new. Ten years ago the state Subcommittee on Agricultural Lands studied "the scope and possible solutions of the problem of public access to public and private lands and waters, including fishing and hunting." Moreover, the Subcommittee noted in its report that the testimony given in an earlier hearing (before the U.S. Senate Committee on Interior and Insular Affairs) in 1959 was "remarkably similar" to the testimony of participants in the 1976 hearings, 17 years later! My guess is that many of the same things will be said here during the next two days. Our job will be to move the whole discussion to new and higher ground.

On the other hand, several new factors have been added to it in recent years. The most important of these is the so-called "public trust" doctrine, the doctrine that the public possesses inviolable rights in certain natural resources, that is, has a "trust interest" in them. It is this doctrine that lies at the heart of the Montana Supreme Court decisions in the Curran and Hildreth cases on stream access and which led to HB265 in the last legislature.

In fact, the "public trust" doctrine is not new, in American law or in Montana. In this country it was apparently first articulated in an 1821 New Jersey case. "The sovereign power . . . cannot . . . make a direct and absolute grant of the waters of the state, divesting all citizens of their common right." It was also recognized in Montana as early as 1895 in the Montana Supreme Court's ruling in *Gibson vs. Kelly*: "the public have certain rights of navigation and fishing upon the river . . ." What is new is that the geographical reach of the doctrine has been expanded as have the judicial tests for its application. In the Curran and Hildreth decisions, the state Supreme Court extended the public trust doctrine to include recreational use, an extension which effectively blurred the line between navigable and non-navigable streams on which the public trust

doctrine has traditionally depended, and it linked it to the 1972 state Constitution. "In essence, the question is whether the waters owned by the State under the Constitution are susceptible to recreational use by the public . . . The Constitution and the public trust doctrine do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters.[3] Also new is the extent to which the question of access is discussed against the background of a general movement in the 1970's to preserve natural resources. From this point of view, the access question is simply one aspect of the larger question of land-use planning. Thus in the last 10-15 years there has been a great deal of state and federal legislation directed to environmental protection, there has been an expanded judicial interpretation of existing statutes in the same direction, and perhaps most important, there has been a shift in the role and attitude of the often unrecognized 4th branch of government, the various administrative commissions and agencies.

For the rest, the access conflict in Montana has merely sharpened in intensity, although this is difficult to document precisely. In former times, to generalize broadly, people entered private property without any assumption that they had a "public right" to do so and without their thereby becoming liable for criminal trespass. Thus the state Supreme Court in *Herrin vs. Sutherland* in 1925: "In country life a multitude of acts are habitually committed that are technically trespasses. Persons walk, catch fish, pick berries, and gather nuts on another's land, without strict right. Good-natured owners tolerate these practices until they become annoying or injurious, and then put a stop to them." But in the last twenty years or so there has been greatly increased interest in access to public lands and the state's waters. For one thing, even in Montana a larger percentage of the population lives in cities than in the country. For another, the population is generally more affluent than it was, has more leisure time and larger plans, a development accompanied by the introduction and widespread use of trail bikes, snowmobiles, and 4-wheeled vehicles. For a third thing, there are steadily diminished opportunities for outdoor recreation in other states. More and more tourists are coming here, spending dollars that the Montana economy needs, attracted by the prospect of wide open spaces.

On the other hand, while interest in access has increased greatly, there are, according to most accounts, steadily decreased access possibilities, particularly to School Section, BLM, and National Forest lands. There are at least two reasons why private landowners are less willing to open their own lands to the public and why, in a number of instances, they have gone so far as to close roads and established trails through their property to public lands. One reason has to do with sheer resistance to increased numbers of people seeking access, with the carelessness, degradation, even vandalism which this brings. And landowners are now aware, as they have not been previously, of the extent to which they are liable for accidents that happen to people on their property. In short, increased numbers have brought more costs, both direct and indirect. A second reason has to do with the question of benefits. There is a new appreciation of the fact that control of access to recreational land, private or public, is becoming more and more valuable.

Economists sometimes like to think of property rights as a bundle of sticks, "each of which specifies actions which can be taken by the holder."[4] The value of these sticks changes over time, as does an owner's possession of them. For a long time, the "access stick" was relatively worthless. There was much land and few people. But now the ratio is changing, particularly of high-quality recreational land to those who can afford to enjoy it. As a result, the "access stick" is worth a great deal more, and property rights adjoined to it are now being asserted and enforced. By the same token, public use of roads and trails over the years without problems meant that no members of the public worried about claiming or filing legal access; now the question among those claiming access is, what is the best strategy to use to regain in law what has always existed in fact. Increasingly, large ranches in Montana are moving to a Texas-type hunting lease (more money, fewer problems than simply leaving the front gate open), even more valuable when the ranch controls access to public land.

It should be added that the public consciousness has been raised over the last generation. Whereas once judicial, legislative, and (particularly) administrative decisions concerning land use were made in such a way as to attract the attention of only those immediately involved, there is now a general awareness, and closer scrutiny, of these decisions and of their implications.

In any case, Montana is not alone. The question of access has become a national issue. The last week alone has seen reports from Maine and Wyoming on the national news, in the one case concerning the closing off of a large privately-owned recreational area, in the other case having to do with the necessity of a new state policy. For the reasons already cited, there is no doubt that it will be more and more in the national news.

But there are reasons why the access question should be particularly controversial in Montana. There is so much public land, so many blue-ribbon trout streams. There is, too, the scattered, often checkerboard nature of public holdings, involving a variety of agencies and a number of different jurisdictions. There is, in fact, no coordinated policy among these agencies. There are even incompatible policies. It is often alleged, for example, perhaps unfairly, that Fish and Game wants to sell as many licenses as possible and to have as little game taken as possible. Most important, there are very strong traditions, of virtually unlimited access, on the one hand, and of extensive private property rights, on the other. The former is held to be part of a Montanan's birthright, not a function of wealth or privilege, to enjoy to the full the resources of the state and without restriction. The latter are often earned by the sweat of one's brow; they are, after all, necessary to earn a living and to preserve independence. This is the paradox, two aspects of what we commonly understand as "freedom." They provided twin motives for people to leave Europe in the first place, to roam where they would and to own property, and they are responsible for the felt conflict within most of us when it comes to consideration of the access question. We want things both open and closed.

As a final part of the larger perspective, I can't resist adding that we now see all human activities as inter-related and somewhat transitory. The whole question should not be considered apart from our history, our culture, our environment, or our destiny.

DISTINCTIONS

There are many distinctions that must be made, but let me begin with three. I will come back shortly to the first two. The first distinction is between access to publically owned lands and access to resources which in some sense are "public goods" but which are located in or, in the crucial case of water, flow through privately held land. The second distinction is between rights which the ownership of land, either public or private, confers and rights which the ownership of public and private land does not confer. This distinction recognizes that property rights come as bundles of sticks, possession of one of which does not entail possession of all of the others. There are, after all, a variety of things we cannot do, individually or collectively, with what we own. Unless it is made, extreme positions — no access vs. unlimited access — are taken, between which there is little hope of compromise. Moreover, all of the important issues are obscured. People start claiming "public rights" and "private rights" (and often mingling in the emotion-loaded notion of "freedom"), without noticing that it is not simply a question of rights and that what sorts of rights the public and individuals enjoy are both qualified in a number of ways. The third distinction is, as with the Indians, between types of access, the purposes for which the access is used, and the means employed. We need to distinguish between hunting, fishing, and picnicking and between hiking, snowmobiling, and trail biking.

I might add to this list of distinctions one between what the Curran and Hildreth distinctions and HB265 actually say and what they are widely interpreted as saying. In particular, in both court decisions the fact was underlined that "nothing herein contained in this opinion shall be

construed as granting the public the right to enter upon or cross over private property to reach State-owned waters held available for recreational purposes." Furthermore, there are important limitations on the ways in which easements, prescriptive or otherwise, can be established.

PRINCIPLES

Here we come to what is for me the meat of the issue and where I am going to concentrate my remarks. Much of the recent discussion of the access issue has revolved around the doctrines of public trust and private property rights as principles on the basis of which the important conflicts could be resolved. I want to consider each in turn.

The public trust doctrine. I have already indicated some of its history. The crucial fact is that by the beginning of this century most states, including Montana, recognized that navigable waters were held "in trust" for the public and that, in consequence, the public had a right to use them for commerce or fishing without limitation by the state or private owner. This doctrine was broadened, along with the idea that there is a public trust in a variety of natural resources other than water, in the 1970's, largely in the attempt by certain interested parties to protect the environment and preserve resources. To understand how this broadening was justified, and in order to assess its strengths and weaknesses, it is necessary to look in some detail at the philosophical foundations of the public trust doctrine. As I understand it, they can be brought under four headings.

1. *The requirement of justice*: certain interests are so instrinsically important to every citizen that they must be freely available to all, that is, it must not be possible for an individual or group to acquire control over them. One would never freely choose to live in a society in which they were not freely available. Thus they can be considered as "natural rights." Among them are mobility, navigation, and fishing, all of them "public" (since not restricted to particular pieces of ground) in their nature.

2. *The reservation of God's bounty*: "certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole populace."[5] Thus it was that in the 1700's in Massachusetts so-called "great ponds" (larger than 10 acres in extent) were set aside so that everyone was assured of free and equal access and that in the last hundred years or so the system of national parks has been created.

3. *The retention of rights*: public rights preexist any private property rights in an affected resource. It was held in a recent California case, for example (*National Audubon Society vs. Superior Court, 1983*)[6], that "(P)arties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust." Sometimes an ownership rationale for this idea is supplied: state and federal ownership of the land came *before* private ownership. When individuals took possession of property, in this part of the country largely by way of homestead, it was with the implicit understanding that the public retained certain rights "in trust" with respect to that property (which the government, in its role of trustee, *could not* sell or alienate). Thus, under the public trust doctrine, there can be no question of *taking*. The assertion of public rights does not take away anything from a private property owner because the private property owner never had the private rights in question. In some sense, individuals, too, hold the public's resources in trust.

4. *The rationality of review*: "Public trust problems are found whenever governmental regulation comes into question, and they occur in a wide range of situations in which diffuse public interests need protection against tightly organized groups with clear and immediate goals."[7] The public trust doctrine provides for a procedural check on legislative and (especially) administrative agencies; no action of theirs may narrow or neglect the public interest. It thus involves a kind of democritization, a broadening of views to make sure that all aspects of a particular decision

have been taken into consideration. This check is administered by the judiciary who then, typically (and in Montana in the Curran and Hildreth cases) refer the matter back to the legislature and the administrative agencies. As a procedural rule it has positive and negative uses, positive to protect the public's interest in a healthy environment, negative to indicate skepticism about certain administrative procedures.

But in my view, each of these foundations has certain problems that make the public trust doctrine inappropriate as a guide to access policy, still less as a principle on the basis of which access conflicts can be resolved.

No one, I take it, rejects the requirement of justice. But there are other, better ways in which it can be satisfied. In particular, the "police powers" which the various states enjoy under the Constitution, more sharply defined and limited than the somewhat vague notion of a "public trust," can be, in fact are being, used to protect the public's "interest" and evolving resource law serves to preserve both resources and the environment.[8]

No one, I take it, rejects the reservation of God's bounty, but again (as the example of national parks makes clear) there are other ways to secure it for the benefit of all.

It is with the third foundation of the public trust doctrine, that having to do with the retention of rights, that we must pause. The *traditional* public trust doctrine is tied very closely to the question of ownership. The state owns the water generally and the streambed in particular of *navigable* streams and hence has "sovereign rights" with respect to them. Which is to say that the public trust doctrine finds its rationale in property law. But "public ownership" of natural resources (and of the land where they are located) is a murky doctrine (if the land is not in fact public land). More important, this way of putting it not only does not solve the access question; it gives rise to a head-on conflict with the private rights doctrine, pitting ownership against ownership, rights against rights.

There are also serious problems with the fourth foundation of the public trust doctrine, that have to do with the rationality of review. The public trust doctrine is avowedly procedural. This is its strength. But as such, it gives rather unclear (substantive) direction to public policy. This is its weakness. In fact, the doctrine has been *used* mainly to give increased environmental protection. But there is no reason why it *should* be used in this way; the results to date have depended on the existence of an environmentally-sensitive judiciary. It can be used to promote environmental protection, but it can also be used to guarantee public access and to support economic development. It all depends on a perception of where the public's "trust interests" lie. These various interests, and the uses attached to each of them, are often, in fact, incompatible. At least in certain cases, increasing access leads to environmental damages, attempts to control such damage, or even to preserve the "quality" of recreational experiences, lead to restricting access or the uses thereof. In connection with recent stream access legislation in Montana there has been an attempt to reconcile these two by making Fish and Game personnel responsible for the viability of small streams, but this attempt recognizes the inherent incompatibility of various "trust" uses, and as a practical matter seems mostly unworkable. And who, finally, within the framework of government, is the ultimate *trustee* of the public trust and what are the criteria on the basis of which its decisions in behalf of the trust are to be made?

Thus, I don't think that the public trust doctrine, in its *broadened* form, helps very much, and in certain areas it hurts by obscuring issues and by putting the whole question of access in conflict-guaranteeing property ownership terms.

The private rights doctrine. There is no point in detailing either the history or the philosophical foundations of the private rights doctrine. They are too well known for that. There are two aspects of it which should be recalled, however. One is that the private rights doctrine, to the extent that it is one of the traditional anchors of individual freedom, security, and autonomy,

needs to be somewhat insulated from changing political and judicial fashions. Private property rights, in particular, should not be at risk simply because the mood of the electorate changes. The other aspect of the doctrine is that private property ownership is often, in fact, the best way to protect what might be taken to be the "public interest." The restriction of access, which is a natural although not a logical corollary of private ownership, is often the best way to insure that a local environment is protected. Along the same lines, when the landowner can benefit by so doing, then he will preserve habitat, improve fisheries, etc., especially when his long-range expectations are guaranteed with respect to his rights in property.

Nevertheless, there are difficulties with the private rights doctrine as well. In the first place, private property rights by themselves do not suffice to resolve all access policy questions. At that, such rights are already qualified in a number of ways, a fact which indicates that other considerations are at stake. In the second place, to the extent that private property rights are justified by the efficiency of market mechanisms in the allocation of resources, there are well known cases of "market failure" and a number of "externalities" more detrimental to the public than the private interest. In the third place, fact, if not also theory, teaches that the private does not always coincide with the public interest, and that private property rights, by themselves, will not secure satisfaction of the requirement of justice which, I think, we all subscribe to. Accidents of birth and wealth, the foundation of much ownership, should not, by themselves, determine who gets to enjoy acknowledged "public goods."

Is there, then, a *principled* way in which to resolve access conflicts? I don't think so. Certainly the two principles discussed won't work, among other things because each *side* in the controversy appeals to one or the other of them. If we take the public trust doctrine to *its* logical conclusion, then there would seem to be eventually no way in which access could be limited or restricted. If we take the private rights doctrine to its logical conclusion, then there would seem to be eventually no limits or restrictions on exclusion. Chief Justice Shaw of the United States Supreme Court gave us good advice back in 1839 (Boston Water Power vs. Boston and Worscester R.R.): "It is difficult, perhaps impossible, to lay down any general rule, that would precisely define the power of government, in the acknowledged right of eminent domain. It must be large and liberal so as to meet the public exigencies; and it must be so limited and constrained, as to secure effectually the rights of the citizen. It must depend, in some measure, upon the nature of the exigencies as they arise, and the circumstances of particular cases." That is to say, decisions must be made on a case-by-case basis, weighing the several large principles that are relevant in a balance. To quote still another Chief Justice, Roger Taney (in the Charles River Bridge case): "While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation."

To what, then, may those who want to enter or exclude appeal? Without going into the details of individual cases, are there any further generalizations that might help? Here are four unprincipled suggestions for you to consider.

1. Access will surely have to be limited in the future for certain purposes and in certain areas. The latest *Montana Outdoors* (November-December 1986) talks about elk and deer hunting in the state and notes that in the last generation the number of deer hunters has doubled; the number of elk hunters increased by 30%. To protect the resource, less than 1% of the huntable elk habitat is now open to season-long either-sex hunting, down from 67% in 1963. The same sorts of trends are underway, even here in Montana, with respect to wilderness use, firewood gathering, etc. Is the best way to limit access to public lands or to streams held in the "public trust" to enforce property rights or to adopt some sort of lottery permit system? I don't know. In any case, I don't think any *one* answer can be given to this question. What is important is that the requirement of justice and the reservation of God's bounty be respected. This means both that access not be limited to those who can pay their own way and that environmental factors be taken seriously.

2. Both the public trust and private property rights doctrines emphasize the necessity of "preventing the destabilizing disappointment of expectations" on the part of the public or the private landowner as the case may be.[9] I agree that these expectations are important. What the idea involved implies is that changes, what might broadly be viewed as "takings," proceed with great caution on both sides. In particular, where the public has a customary expectation to access, a landowner should not, simply on virtue of his property rights, close it off, particularly if no more is involved than locking a gate; the owner must also be able to prove extensive uncompensated harm, and so forth.

3. The various factions in the controversy often claim that their opponents are getting "something for nothing." Thus, private landowners complain that public access through their property brings plenty of costs, but no benefits. And sportsmen's groups complain that landowners who restrict access to public lands enjoy the private private use of those same lands free of charge. The solution? Private landowners should be compensated for public access (a principle already generally accepted). Ideally, the various agencies purchase land for a public access; much access has been acquired in this way. But they could also lease access, perhaps on a user-basis. If we are going to see more Texas-type fee hunting in Montana, why not take some of it public? On the other hand, at least in a few carefully selected areas, hunting fees might be charged private landowners who use public lands to which access is otherwise restricted.

4. What application of access policy, whether by an administrative agency or a property owner, often comes down to is a "test of reasonableness." This is, of course, a very difficult notion to define. A start is made with the concept of "least intrusion" (which, for better or worse, is rarely identical with "least cost"). Possible additions we might make to the "test of reasonableness" include environmental compatibility and a careful calculation of benefits and costs which perhaps should be user-absorbed). "Reasonableness" works only when people are reasonable, that is, when they respect both the public interest and private property rights, most importantly respect the land and its native populations. This in turn depends on education, the responsibility of those of us who teach. I think great progress has been made. To cite but one example, over the past decade or so the number of visitors to Yellowstone National Park has doubled; during that same period, garbage collection has decreased about fourfold. It takes time, but people can be brought to see the consequences of their individual actions.

As a resource becomes increasingly valuable, there are greater and greater attempts to control it. Such is certainly the case with respect to the purely recreational uses of land and the access to them. Other uses of land which have economic benefits have traditionally been the concern of interested parties: farmers, ranchers, miners, loggers. What separates recreational use is that just about everyone is an interested party, and many different groups have an economic stake of one kind or another in it. This makes for large-scale conflict. Perhaps we can learn from other such conflicts in our past, for example, concerning who was going to control the river bottoms and the springs. Attempts to over-reach generally come a-cropper. In some very general sense of the word, they constitute "takings." Solutions are worked out piecemeal, depending on the specific locale and the type of land involved; as far as access is concerned, this will increasingly involve distinctions between types and means of access. No one is ever completely happy. The days of unrestricted access or absolute property rights are over. Counties will have to use their best judgment with regard to claims concerning old county roads and prescriptive easements, and agencies will have to proceed, to the extent possible, by minimizing rivalries and fending off organized pressure groups. Insofar as one side or another "takes," and county governments and administrative agencies are not prudent, of course, there will inevitably be a "purely political," and perhaps less than desirable, resolution of access conflicts.

Thank you very much.

[1]Among the most helpful things I have read in preparing this talk are the following: *Western Resources in Transition: The Public Trust Doctrine and Property Rights* (Political Economy Research Center, 1986); Richard J. Lazarus, "Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine" (*Iowa Law Review*, 1986); John E. Thorson, Margery H. Brown, and Brenda C. Desmond, "Forging Public Rights in Montana Waters" (*Public Land Law Review*, 1985); *Public Access to Public Lands* (Report to the 45th Legislature by the Subcommittee on Agricultural Lands, 1976); *Recreational Use of Montana's Waterways* (Report to the 49th Legislature by Joint Interim Subcommittee No. 2, 1984); Rick Applegate, *Public Trusts: A New Approach to Environmental Protection* (Exploratory Project for Economic Alternatives, 1976); Joseph Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" (*Michigan Law Review* 1970); *Montana's Water* (Montana Environmental Quality Council, 1985). Recent conversations with Terry Anderson, Lewis Hawkes, Richard Josephson, and especially Vanessa Brittan have helped to focus my views.

[2]See William Cronon, *Changes in the Land* (Hill & Wang, 1983), an extremely interesting account of the changes brought about in American ecology by the coming of white settlers and English conceptions of agriculture and property.

[3]For a discussion of the evolution of Montana judicial opinion, and a critical account of the public trust doctrine from a Constitutional point of view, see James L. Huffman, "The Public Trust Doctrine: Judicial Evasion of Constitutional and Prudential Limits on the Police Power," in *Western Resources in Transition*. References to the various Montana opinions I cite can be found in Huffman's article.

[4]Terry L. Anderson, "The Public Trust vs. Traditional Property Rights: What are the Alternatives?" in *Western Resources in Transition*, p. 3.

[5]Joseph Sax, "The Public Trust In Natural Resource Law," p. 484.

[6]Cited in Richard Lazarus, "Changing Conceptions of Property and Sovereignty in Natural Resources," p. 649.

[7]Sax, p. 556.

[8]For a very detailed and persuasive account of the ways in which contemporary legal developments are undermining the need to invoke the public trust doctrine, see Lazarus.

[9]Sax, pp. 188-89.

THE IMPORTANCE OF ACCESS

Gov. Ted Schwinden

THE IMPORTANCE OF ACCESS
GOVERNOR TED SCHWINDEN

Back in the '40's, Joseph Kinsey Howard's "High, Wide and Handsome" captured in print something Montanans have long considered essential to our Western Lifestyle. In Montana, Howard wrote, I have ". . . room to swing my arms and to swing my mind." His notion that here "We have room . . . We can be individuals," still shapes our identity today. It's one of the things that sets us apart and makes us Montanans.

And yet times change. Were Howard here today, he could still find room to swing his mind, but I have a hunch he'd feel the room to swing his arms restricted by a circle of fence posts liberally doused in orange. Access is important to Montana and the West for a good many reasons to do with management and finances, but none of those more practical concerns are any more important than what access means to us as a people.

Neighborliness in the past meant that owners freely opened their lands to others. That sentiment is no less important today but, in the 1980s, with an agricultural recession and the tendency for some access points to look suspiciously like parking lots for four-wheel-drives, neighborliness may well come to rest more heavily on the recreating public. As participants in the Governor's Forum on Montanans Outdoors recognized, it is no longer reasonable to expect private landowners or public land managing agencies to subsidize the public's recreational activities.

In the midst of hunting season is a particularly appropriate time to hold a forum on access. By now some of the enthusiasm and impatience of opening day have worn off. But during this month, other frustrations will no doubt peak. Ranchers will be riled by locks cut and gates left open; hunters will be outraged to find the road to their favorite area barred and posted.

After a century of relying on common sense and common courtesy, access is suddenly "an issue" — one about which almost everyone has very definite opinions. Landowners who have traditionally allowed whole communities to enjoy their land are understandably beginning to question whether continuing that practice is inviting a lawsuit. When it comes to public land that, because it is surrounded by private holdings is virtually "locked up" as a private preserve, emotions run particularly high. The theory that whoever buys land bordering large tracts of public land is really buying the whole chunk has certainly been well used by some in the real estate industry. Some less scrupulous folks in this and other states have even tried to "buffalo" the public by illegally posting legitimate access to public lands.

But that is by no means the only important or controversial concern. Access issues in Montana range from those associated with recreational activities to transmission and pipeline rights-of-way to the development of minerals that lie beneath private or public land surfaces. Restricted access may be based on management decisions related to wildlife, to the potential for forest fires or to an area's designation as roadless or wilderness. The increasing contribution that diverse use of our public lands makes to local and regional economies cannot be ignored.

Today, our ability to "swing our arms and minds" has become newly important as a valuable and limited commodity; a potentially significant financial consideration, especially in states like Montana where abundant public lands boast equally abundant attractions.

Increasing demand for access to Montana's public lands is playing an important role in shaping the future management of these lands. With state and local budgets straining to deal with economic recession and federal spending cuts, access to public lands may be eroded simply because the funding necessary to maintain existing roads is not there. Federal agencies are today struggling to implement management plans based upon fiercely competing needs for access to

the resources our public lands offer. Access for timber harvest, recreation, mining, oil and gas, grazing and a miriad of other activities must all be dealt with in a fair manner.

Clearly, access is a complicated problem, one that bears out the philosophy that "For every problem there is one solution which is simple, neat, and wrong." It is naive to hope that, if we stick our heads in the sand for long enough, we can somehow magically return to the "good old days." The growing popularity of outdoor recreation coupled with demographic trends and decreasing opportunities in other states guarantee that pressure on Montana's recreational resources will increase dramatically in the years ahead. Nor is it realistic to hope that folks back in Washington, D.C., will devise a formula capable of solving all our problems. If we want a solution that will benefit all Montanans — landowners, fishermen, weekend hunters, outfitters and birdwatchers —it's up to us to find it.

Montanans are clearly ready to take on that responsibility. Early this year, a thousand people from across the state attended the Outdoors Forum. One thousand respondents may not impress folks on the Potomac, but in January in Montana, that ain't bad. The point Montanans came to the forums to make was that they take their recreational opportunities very seriously and that they want greater local involvement in the decisions that affect those opportunities.

As Max Edgar, president of the Flathead County Parks and Recreation Board testified, "The key is cooperation and coordination in an overall recreation plan for a given area. Grassroots management is often much more effective than a large bureaucracy. However," Edgar acknowledged, "standards must be insured and therefore federal and state organizations are necessary." The state recreational council I recommended to the President's Commission meets both those requirements. Greater cooperation would be encouraged by involving each state's governor and chief federal land managers in the council. Decisions about outdoor recreation priorities would no longer be made in Washington D.C., or in state capitols. Instead, each state council would be responsible for developing a mechanism to involve the public in its decision making process.

That coordinated, cooperative and essentially local approach makes sense, especially on issues such as access. Montanans have the advantage of knowing all the players and of understanding the background necessary to implement workable, case-by-case solutions. We also have the decided advantage of having federal counterparts in Montana who are equally committed to working with — not agin — us.

Although confrontational access situations are more likely to make the newspapers, there are a number of encouraging joint efforts underway. This fall, a map showing open and closed road in the Swan Valley was published by the Forest Service, Plum Creek Timber Company, and the Montana departments of State Lands and Fish, Wildlife and Parks. Cooperative agreements between private landowners and DFWP have opened 29 miles of the Blackfoot River and 50 sections of largely private land north of Garrison as walk-in areas. In another agreement, landowners in southeastern Montana have "pooled" private holdings and public hunting access for 3/4 million acres. DFWP administers permission grants and enforces landowner requirements. One block north of Rosebud includes guaranteed public hunting access to 288,000 acres of land, including public lands which would otherwise be "land-locked" by private holdings.

We can't go back to the "good old days" of a handshake and a promise, but that doesn't bar us from taking the qualities we value from the past and using them to shape the future. Montanans have the tools we need to successfully address the access issue — land ownership adjustments, purchases, easements, leases and the like. Unfortunately, a box full of first-class tools doesn't automatically produce a master craftsman. If we are to arrive at a workable Montana solution — one that assures access to public lands, recognizes local customs and respects private property rights — we need to proceed with skill and patience. Our ability to take the information obtained from this and other access-related forums and shape it into responsive administrative and legislative solutions will determine whether our state remains true to Howard's description, "high, wide and handsome."

PROPERTY RIGHTS PANEL

FEDERAL CONSTITUTIONAL LAW
DR. JAMES HUFFMAN

My subject is federal constitutional law. But before I begin, I wanted to explain that I'm really not a nationally recognized federal law expert. The problem with federal constitutional law is that there are many people working with it and therefore national recognition is difficult to achieve. I do feel, however, that I can bring to this discussion on "Access in Montana" a constitutional law perspective that relates to constitutional issues and natural resources problems. Natural resource is an area I have been known for working in; one that the other nationally recognized federal law scholars have not delved into.

Montana has been extensively involved with several issues dealing with federal constitutional law as of late, which raise an assortment of constitutional law questions.

Let me state my position in a nutshell, and I hope this is the reason that you have gone outside of Montana for a federal law speaker and not because you couldn't find someone in Montana who didn't share my point of view. I do hope there are some of you who agree with me. Basically, there are three propositions that I will mention, and then I will briefly expand on these.

First of all, the federal Constitution provides no right of access. I don't think anybody who is arguing the interest in access can look to the Constitution and say they have a federal constitutional right. I'm not sure anyone is saying that. But I think you should be clear about that.

Secondly, I think it is clear that the federal Constitution authorized both the state and federal governments, and also the local governments, to provide for access. The Constitution doesn't say anything about access.

It does say that the federal government can do an assortment of things, articulated in an article on Section 8 of the Constitution. It doesn't say much about what states can do; it says virtually nothing about what states can do in an affirmative sense. It obviously is interpreted to mean that the states can exercise police power and they obviously have alot of authority. And among them is a constitutional matter to provide access. The question is how do the states go about doing this?

My third general proposition would be that the federal Constitution imposes express limits on the purposes for which government can provide access, and the means which can be used by state, federal and local governments to provide access.

I can't elaborate too much on those without using my allotted time. I'll just briefly say that in defining what the federal Constitution says, we can take the Attorney General's point of view, which agrees with what the U.S. Supreme Court says the Constitution means. If you read through this, he is not wrong. But we all know that as dynamic as the courts have been on this issue, they are subject to change.

My interpretation of the Constitution is based on what I read the Supreme Court of the United States has said the Constitution means. As I said, it is clear there is no constitutional right of access. In particular, it is clear that the public trust doctrine is not rooted in the federal Constitution. I have views about the Montana Supreme Court's decisions, which have some roots in the Montana Constitution, but that is not my department. I'll wait and see what Marjorie Brown says about that and whether I'll disagree with her.

The federal Constitution authorized federal and state governments to provide access in several ways. State, federal and local governments can go out and buy access. That is one alternative. The government can go out and regulate for access without compensation. That is the heart and soul of the constitutional issue that we face with respect to the access issue and federal constitu-

tional law. There is no question that government has the authority to acquire access so long as they are acquiring access for public use. The public use provision of the Constitution has been so broadly interpreted by the U.S Supreme Court in a recent Hawaii decision that I would have to say that the public use limitation is no limitation at all. The public use limitation as the Supreme Court interpreted in this Hawaii case is that if the legislature says it is a public use, it is a public use; total deference to what the state legislature decides. So, if that is not a limit, although I would argue it should be, the limit then is this: If it is for public use, which is anything the legislature says, then all the government has to do is compensate for it, if it is a taking of private property. And if there isn't private property, then you do not have to compensate because there wasn't any private property there in the first place. That, I think, is the real core question.

Now there is pending before the Supreme Court of Montana a well known case which has been argued on the "takings" question with respect to the earlier decisions on the public trust doctrine. That question can be interpreted either under the Montana Constitution or the federal Constitution. I assume the Court will address both. In terms of federal constitutional law, I think that what the "takings clause" means is that in total is a little different than what the "public use clause" means.

There are certain limits. It is clear the government cannot acquire and occupy a piece of private land to provide access without compensation. I don't think there is any question this is a taking of private property. This is where the public use doctrine comes in. The public use doctrine, as Dr. Britton stated, says by definition that there is no taking because there was no right to be taken. Public use is a mechanism that defines the boundaries of private property rights and as soon as we say there is a public right of access pursuant to the Public Trust Doctrine, I think we have eliminated the takings question.

Apparently, the Montana Supreme Court does not agree with that because I understand that is the question they are considering. And it is puzzling to me as a matter of theory how the Public Trust Doctrine authorized this access, but that the takings question is yet to be answered. That is the reason I am a critic of the modern application of the Public Trust Doctrine because I think it circumvents the Constitution as far as the language of the Montana Supreme Court.

Also, I wanted to mention that there is a case pending in the U.S. Supreme Court on the question of access: *Nolland vs. California Coastal Commission*. The issue as it was resolved by the California Court of Appeals is not directly addressed to the takings question. It is hard to know on what basis the U.S. Supreme Court will render it's decision. The case involves a private landowner who lives in an old house of 1000 square feet on the California coast. He wants to build a new house. He went to the Coastal Commission for the necessary permits. He was told that since his house will be larger than 1600 square feet, this is considered new construction by California law. If it was reconstruction, he would be fine, but new construction right-of-way must be dedicated for access to the coast. The owner and his wife believe that this is a taking of private property. The Supreme Court will resolve this, but they are known for resolving tough issues like this on some other ground by avoiding it.

There are alot of questions, but the central one is the one dealing with private property in the federal constitutional sense. If there are any questions on that, I'll be happy to answer them during the question and answer period.

Thank you

MONTANA CONSTITUTIONAL LAW
DR. MARJORIE BROWN

My assignment is Montana constitutional law. I'm going to devote it to two subjects only. Briefly, the treatment of property rights themselves from the Montana Constitution of 1972 and then I will examine the Public Trust Doctrine and how the Montana Constitution of 1972 dealt with it. And finally, how the Montana Supreme Court reached it's decisions tied to the Section 3, Clause 3, the water rights portion of the Montana Constitution.

First, the manner in which property rights themselves are treated in the Declaration of Human Rights in the 1972 Montana Constitution I can briefly tell you that Section 3 of the Declaration of Human Rights sets forth basic rights set forth earlier in the 1889 Constitution, including the inalienable right to acquire, possess, and protect property. New to the section and reflecting the concerns of the 1972 Constitution for environmental protection, is the right to a clean and healthful environment. There is also a final sentence that is new. It provides that those enjoying these inalienable rights, all persons recognize corresponding responsibilities.

There was a limited debate on Section 3 and no debate addressed references to the property rights clause. Section 17 carries forth the familiar due process of law provision of the l889 Constitution and federal Constitution without change. In presenting this section to the full convention, the Committee on the Bill of Rights expressed its belief that the earlier, traditional due process of law clause should remain as it was. It did and there was no debate and it was readily approved.

Section 29, the eminent domain section of the Declaration of Rights, provides that private property shall not be taken or damaged without just compensation, to the full extent of the law. A final sentence changed Montana's earlier constitutional law by providing that just compensation would also include necessary expenses of litigation be awarded by the Court where the private property owner prevails. There was limited debate, and that section too passed.

There was far more contention in the conventions discussion and treatment of the Public Trust Doctrine, and ultimately the Doctrine was not incorporated directly into the Constitution.

Two proposals were considered by the Natural Resources and Agriculture Committees. One declared environmental rights for the system upon which the health and welfare of the people depend was to be a public trust for the present and future generations. Another proposal declared a public trust for all aspects of environmental quality, including but not limited to air, water, land, wildlife, minerals, forest and open space, for the benefit of the citizens. After deliberation, the Committees rejected both proposals, partly because of a disinclination to include privately owned land within the public trust concept. Also, while it was recognized that the Public Trust Doctrine applied to the federal law, the bed and banks of navigable waters, the Committee was reluctant to apply the Doctrine constitutionally to other resources.

The entire convention then had the opportunity to discuss the Public Trust Doctrine when an amendment was introduced that would have rewritten the first section. This amendment would have the section on the natural resources and environment begin "The state of Montana shall maintain and enhance the trust and the right to protect and enforce it by appropriate legal proceedings against the trustee." There was a long debate on that measure before it was defeated on a vote of 58-31 before the convention. The supporters, and there were 34 of them, felt that it would be desirable, mostly as a clear way to express the conventions seriousness in addressing environmental concerns, and the fact that citizens could help enforce the trust by bringing a suit to help government agencies in their work at protecting the environment. I suppose it is self evident what the opponents chief positions were. I think the primary opposition came from those

who objected to the fact that land was going to be placed in the public trust and that they would place the shelter of the public trust over private property. The concept seemed to over commit.

As our Constitution articles should, and definitely do, protect the environment, there were strong arguments that there should be flexibility to leave the matter of the public trust and the public trust designations to legislative action in the future. In hind sight, it made good sense, to the fact that several made the argument that it would be an error to elevate the public trust to constitutional status, because then the courts would have an opportunity to determine its meaning and the legislature would not have the opportunity to alter its judiciary interpretations.

There was a final argument that the Doctrine was not clearly understood; it meant many things to many people and probably still does. There has been rousing debate in Montana the past few years over the Public Trust Doctrine. The path for which that debate lies through in particular the water rights section of Article 9, the section on the environment and natural resources. That section initially protects all existing water rights, which is essential to do in Montana. It then declares that appropriated water and diversions and right-of-way to be public uses. It then sets forth in Clause 3, and with language that is extremely important, "All surface, underground, flood and atmospheric waters 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 for by law." That section was extensively defeated as was the section that was proposed by the committee that would have set in the Constitution a listing and designation for beneficial uses of water that would be declared public. That would have included specifically recreational uses. This listing, placing the list of beneficial uses in the Constitution, was defeated and left for future legislative action.

Much debate and discussion went on.

There were concerns about private land being crossed to get to these waters. The Dearborn River was found to be navigable under federal test. There are three key points to the Court's decision:

1. All waters of the state susceptible for recreation use or are capable of sustaining recreational use will be open and available for recreational use.

2. Bed and banks of navigable waters are held in trust by the states upon admission to the Union.

3. Finally, the courts recognized that many states in the last decade have developed recreational tests, floating craft tests, and thus open to the state.

The Court ultimately went back to the bare bones language of the 1972 Constitution. "Waters of the state are the property of the state for the use of its people."

The debate is far from over with the case currently before the Supreme Court on ownership between the high water and low water marks.

LANDOWNER PERSPECTIVE
TOM SHEEHY

Summing up the problem before us today, it is not simply a problem of *access*, but it is many times a problem of *excess*.

To talk about access therefore, we really have to talk about excess. That really is the crux of the problem in Montana. What to do about excess and what, in fact, are examples of excess.

It is at the point now where many ranchers are asking themselves: do I even want to allow any access when recreationists come to our doors and ask? The answer I think is yes, from what I've heard today and from a historical perspective. Landowners are willing to allow access to their land; access for a number of reasons and access for various benefits to society as well as themselves.

First, I think there are several reasons why access is desired by landowners concerned. There is a strong tradition, as we have already discussed today, of access in Montana. A tradition landowners do not take lightly. In addition, landowners having lived on the land, having seen nature in all its grandeur and all its pleasure, have a desire to share that with society. While to some degree feeling that it is their birthright, and since Montana has been a landowning agrarian society, they are willing to share that.

Secondly, I think economics enter in in allowing access. Benefits from use of public roads, or monetary compensation from easements such as pipelines, oil and gas exploration.

So, I don't think you can say landowners have reached the point of no more access in Montana. I think they are saying yes, . . . access, *but*. The problem I think is the *but*.

The sheer number of those who wish to have access to our land these days is staggering. Pressure is creating much of the problem. The list of individuals is quite long and the landowner sees all of these: sportsmen, recreationists, utility companies, county government, commodity groups, state and federal governments, tree hunters, etc. In the past year, everyone of those groups have been on our ranch.

I would like to share an example of access on our ranch, and it is dealing with hunting which seems to be one of the key reasons society wants access for these days.

Opening day, Sunday, family friends asked to hunt and I said fine. I asked where they would like to hunt and they referred to a far corner of the ranch where the cattle weren't and a stream separated them from the livestock operation. Later that day, I was monitoring cattle and I noticed my friends hunting clear over to the south of my ranch, opposite of where they had said they'd be.

Here I am, good enough to allow them on my land, and they misrepresent themselves by going to other places on my ranch! It is due to this and other abuses that landowners are starting to take a hard look at allowing access. This is the exception of course; a majority of the hunters, oil and gas people, etc., are very responsible.

This brings me to the point where we ask ourselves: do we pass more rules and regulations? Blanket rules to solve our problems is not the answer, and I don't think that most of you think that is the answer. I believe what is needed is cooperation and communication. When there is communication, explicit of what you will do when hunting on a ranch, problems are avoided. More rules and regulations will only hamper me from being able to restrict some of these people who need to be restricted; the person too drunk to hunt, the person who hunts in places he isn't supposed to be and ends up getting stuck somewhere, or lost.

I think that the key lies in responsibility. If there is going to be a right of access, then I think that you need to also speak about a responsibility of access.

Only through cooperation, communication and careful, thoughtful consideration, can we avoid the problem of access in Montana becoming a problem of excess.

COMMODITY PERSPECTIVE
DAVE SCHAENEN

In discussing the relative importance of federal lands to the United States, it must be remembered that approximately one-third of all the land in the United States is owned by the Federal Government, and this entity is the primary landowner over an area encompassing all of the Rocky Mountain States as well as Alaska, Washington, Oregon, and California. In our own State of Montana, approximately 29.7% of all the lands are federal lands, and therefore in looking at the problem of access in Montana, obviously those lands owned by the Federal Government must be considered of primary importance.

The problem of public land access really falls into two categories. The first being a consideration of the lands which are actually open for commodity development, and secondly, the problems which specifically relate to those lands which are open for such exploitation.

In Montana alone, approximately seven (7) million acres have been effectively withdrawn from mineral leasing, by virtue of these lands being located in Forest Service and Bureau of Land Management (BLM) wilderness areas, National Parks, RARE II wilderness recommendations, National wildlife refuge wilderness and BLM wilderness study areas. This withdrawn land totals approximately 25% of all the public domain in Montana and points up part of the problem facing the commodity developer.

From the perspective of such commodity development, it is most important that mineral resources need to be identified and/or inventoried so that the trade-off decisions of development vs. non-development can be made. In looking at the potential for oil and gas development, the U.S. Geological Survey has estimated that federal onshore lands in the lower-48 states may contain nearly one-third of the crude oil and one-fourth of the natural gas yet to be found here. The USGS and the General Accounting Office have identified some 63% of the federal lands in the lower-48 states as being "prospectively valuable on gas lands."

More specifically, up to 70% of the undiscovered oil and gas in the eight non-coastal western states may underlie federal lands. The Federal Government's ownership of lands in these lands ranges from 29% in Montana to 85% in Nevada. Unfortunately, approximately 300 million acres of federal lands — about 40% of all such lands — are effectively closed to oil and gas development, and consideration is currently being given to closing off additional millions of onshore federal lands. This increasing closure of federal lands to energy development is occurring at the very time when the United States is again importing more and more foreign oil with ever-increasing federal deficits.

Oil imports have increased approximately 43% from those imports occurring approximately one year ago, and our nation is rapidly becoming much more dependent on foreign sources of supply. Little recognition is being given to the fact that today's oil surplus exists not because the United States is self-sufficient in energy, but rather because there is a surplus of oil on world markets.

The whole problem of access ties back into nationwide perspective of what has occurred in the oil and gas exploration industry in recent years. The 50-60% reduction in the price of crude has caused a decline in the number of rotary rigs from 4,520 rigs working in December of 1981 to approximately 800 rigs today. Exploratory drilling is at a virtual standstill and we are already experiencing a relatively rapid decline in our domestic oil and gas reserves. Unfortunately, at the same time, U.S. oil consumption has now begun to climb, given the public perception that the days of cheap oil have returned.

As heretofore mentioned, it is critical that decisions be made which take into account the trade-offs of development vs. non-development. In the area of strategic minerals, this country is now dependent to a great extent on other sources within the world for many of its critical minerals for both industrial and defense purposes. We are continuing to look for certain of these minerals in the U.S., and obviously where such minerals can be found, it is imperative that the necessary access be available for the exploration and development of such minerals. A current example of this activity is the mine presently being planned in the Stillwater Complex, which will enhance our supply of certain of these minerals.

Land ownership patterns in Montana, and throughout the West, require a thorough understanding of fee, federal, and state ownerships. In any given area, access might be required through all three types of lands, via rights-of-way, county roads, etc. Because of these varying ownership patterns, withdrawal or no leasing decisions should be based on imperical data showing what resources are to be foregone by a non-development decision.

For instance, in a BLM Wilderness Study Area in Utah, the Bureau of Land Management thought that the area had no resource potential because it had not allowed access for exploration. Nevertheless, enormous reserves of CO^2 have been discovered adjacent to this wilderness study area and will be developed in the future. A review of the proposed Montana Wilderness Act indicates that Congress could be making the same type of mistake by locking up substantial amounts of additional land without having any knowledge as to what resources might underlie them.

There is an additional problem of the impact of overly restrictive environmental covenants in the development of some of our federal lands. Some of these unreasonable constraints on development are no leasing areas, stipulations on certain of the leases which provide for no surface occupancy at all, and a combination of seasonal or wildlife restrictions which will greatly inhibit the ability of an operator to develop his resources.

There are a substantial number of issues leading to restrictions of access to public lands for mineral development and many of these issues lead to public misconceptions. There is a public perception that mineral development cannot co-exist with wildlife and is incompatible with a sound environmental policy. Nonetheless, there are many cases where commodity development is compatible with the environment. As an instance, the oil industry some years ago drilled several wells in the Gros Ventre Wilderness Area in Wyoming, before this area was so designated as wilderness, and an inspection of the drillsites today will reveal absolutely no environmental damage to the land. The Audubon Society owns the Raney Wildlife Refuge in Louisiana, and this refuge is leased not only for the grazing of cattle, but also for the development of oil and gas reserves, from which the Society derives a very healthy royalty income.

At the time that Prudhoe Bay was being developed, there was a great fear among the environmental groups that the caribou herds would be greatly impacted by the Alaska Pipeline and that this pipeline would inhibit their migrations, which had been going on for centuries. What happened in fact was that the herds were not impacted, and the migrations were not inhibited. It seems that the caribou discovered that the pipeline could be used for shade in the summer and for warmth in the winter and that the pipeline was actually beneficial to the herds rather than the converse.

There is certainly a public misunderstanding as to what constitutes unconstrained development by the lessee or permitees and what rights and responsibilities are permitted or created by the obligations to those individuals or companies. The oil and gas lease does not convey either the surface or the minerals to the lessee. It does not give the lessee the right to "rape, ruin, and run away." It does require the lessee on federal lands to operate within the constraints of the lease and under the Federal Land Policy and Management Act (FLPMA). The federal oil and gas lease itself contains specific restrictive stipulations as regards operations on the lease and, in addition,

the operator is required to file specific data with his Application for Permit to Drill, which will permit the federal managing agencies to review the prospective operating procedures. The odds of a well being drilled on a specific tract of land within a particular lease are extremely remote. Even when a lease is drilled, the odds of finding commercial production on that tract of land are probably not even 50 to 1, and therefore the odds of there being full-field development on a particular lease are extremely low and certainly cannot be formalized prior to the drilling of the initial test well.

Unfortunately, the current surplus of oil and the low price of crude has led to enormous complacency on the part of the American public. As history will show, this complacency not only on the part of the public, but also on the part of the present Administration, will lead to a situation similar to that which occurred in 1973, but probably on a greatly expanded scale and to a degree of much greater severity. Our foreign sources of supply have long pegged the price of crude oil at such a point that we cannot develop our alternative fuels at a reasonable price within the private sector. Therefore, I do not look for a rapid development of a synthetic fuels industry which would include coal gasification, oil shale, etc., and we will continue to fall further behind in our search for energy self-sufficiency.

Access across federal lands in Montana is deemed critical by the minerals industry as far as the development and exploitation of such minerals within the State. One has only to look at the reports from the State Revenue Department to ascertain the impact of our mineral industry on jobs, taxes, royalties, etc., to the State of Montana. There is a great need for improvement in the economic climate in our State. There exists a perception in the minds of many business people outside the State that Montana is not necessarily a good place to conduct business. We need to create a tax climate which will encourage industry to look at Montana as a viable place to do business. The Governor recently sent an invitation to the oil and gas industry pointing out certain changes in the economic climate as far as the taxation to our industry is concerned. Unfortunately, the substantial drop in crude prices was followed by a decrease in drilling activity and therefore Montana has not been able to take full advantage of this improvement in the tax climate to the oil and gas industry.

When the economic climate improves to a point at which we again become competitive with our neighbors, then the value of public land access will become more valuable not only to the commodity interests, but also to the public as a whole.

Any access must be acquired within the legal authorities and constraints which exist at that point in time. These include not only the use of condemnation for the required access, but also adverse possession, prescriptive rights, trespass laws, etc. Access may be acquired through rights-of-way, easements, exchanges, or sale and purchase of such rights. There are substantial questions to be considered in determining the feasibility of public land access. One must determine the value of such access and who will benefit and who will pay. It is necessary that we review the initial acquisition costs of such access and the development and maintenance thereof. What is the economic importance of public access to the wildlife, recreation, and tourism industry, and to the commodity based interests? It is important to review how access (or lack of) will affect public resource management. Certain items to be considered under this review would encompass wildlife, range management, cultural/historical, recreation, timber, oil and gas, and mining. It is necessary to review the affects of public land access on private property values and their specific management objectives.

Montana state lands belong to all Montanans, and its federal lands belong to every citizen in the United States. Use of the lands cannot be viewed solely as a backyard issue, as is the OCS in California, but must be seen nationally from the standpoint of needed resource development with careful environmental control and natural resource and wildlife protection. At the same time it is important that we recognize that the environmental values in some areas will outweigh the need for multiple use in commodity development and vice versa.

RECREATION PERSPECTIVE
STEVE WOODRIFF

I appreciate the opportunity to join you this morning in the search for solutions to the increasingly serious problem of public land access. And I am most eager to speak with you about property rights — not just about those of the private landowner but also about my property rights as a recreationist.

Writing about the outdoors, natural resources and public land policies is what I do for a living. Recreating is what I live to do. In that way, I am like most Montanans. Hunting, fishing, hiking, skiing and canoeing are not mere amusements. They are part of my identity, my soul. I will not live without them.

We recreationists require — we demand — access to public lands. Just as important, we demand access to a wide range of recreational opportunities — from ski areas to wilderness areas and everything in between.

Access to different recreational opportunities requires public lands with various degrees of accessibility. For example, when I go huckleberry picking with my wife and my labrador retriever, I need a network of forest roads that will take me to where the berries are. At the opposite extreme, when I go elk hunting, I want access to roadless areas that can only be reached by foot or horseback.

As we ponder the issue of public land access, it's important that we remember that recreationists need this access to different opportunities, as well as the physical access to the land.

As I mentioned at the outset, virtually all of us in Montana are recreationists in one way or another. And there are more of us every day. For example, last year nearly 393,000 people bought state conservation licenses, which are required to hunt or fish. That's 41,000 more conservation licenses than the state sold just 10 years ago. More than 4.6 million people visited state parks and recreation areas last year — up 39 percent from 1980. There are lots of different ways to count recreationists. But by any measure, the numbers are increasing, and that's part of our problem.

The growing numbers of recreationists are putting increasing pressure on public and private lands and resources. Understandably, many ranchers have responded by posting private lands that traditionally have been available for public use. Others have been quick to capitalize on the growing demand for recreation by allowing access only to those who are willing to pay substantial fees.

The ever-declining amount of private land open for public recreation means more of us are turning to public lands in pursuit of our outdoor life. As human pressures increase on public lands, a number of things happen. The greater number of people affects the quality of my outdoor experiences, so I naturally range farther and wider to escape the crowds. When the number of people using an area becomes great enough, land managers must act to restrict access in order to protect valuable resources. When that happens, recreational demand doesn't disappear. It simply transfers to other lands.

There are some 94 million acres in Montana. More than 1/2 million acres are private; the public has no claim to them or to the more than 5 million acres of Indian trust lands. Fortunately, Montana is blessed with more than 32 million acres of public lands administered by federal and state agencies.

To satisfy the demands of recreationists and to protect our natural resources, land managers must work from the full slate of public lands — not just those for which clear access already exists.

I expect access to all public lands. As a citizen of the United States and a resident of Montana, I hold title to these lands. To deny me access to public lands is to violate my property rights.

The U.S. Forest Service tells me that 20 percent of the national forest lands in this region are inaccessible. In the six national forests east of the Continental Divide, 3 million of 9 million acres of public forests are, for all practical purposes, inaccessible. I am also locked out of many public lands administered by the Bureau of Land Management. Nationally, one in four acres managed by the BLM has no public access.

Often, the lack of access to these public lands stems from private landowners refusing to grant easements through their property. These same property owners make great use of the rights-of-way the rest of us have yielded to make way for federal, state and county highways and roads, yet they claim some sort of superior right to deny us right-of-way to our public lands. The public is required to give landowners reasonable access to their property through public lands. It's not unreasonable to expect landowners to grant us reasonable access to our public lands.

Our public land managers have grown timid in the politically unpopular exercise of eminent domain, and even when access is available for the asking, our agencies often lack the money needed to pay for rights-of-way.

Still another access problem exists on the more than 5 million acres of school trust lands in Montana. Much of that land is off-limits to recreationists as a result of a questionable state policy that allows farmers and ranchers who lease those lands to post them against public access. Just a few years ago, recreationists went to the Supreme Court and won broad access rights to rivers and streams. I think we are just a lawsuit away from a ruling of similar implications regarding recreational access to school trust lands.

As the Governor stated this morning and Sen. Max Baucus told Congress last June, Montana is losing public land access faster than it is acquiring it. Strapped for money to maintain roads, many counties are abandoning public rights-of-way needed to reach state and federal lands.

Clearly, some changes are in order.

Public land managers must become more aggressive in their efforts to obtain easements. They must act in the public's behalf to protect our property rights. Where too much access threatens wildlife and recreational quality, as it does in the westernmost portion of the state, land managers must continue using road closures and other vehicle restrictions to maintain access to high-quality outdoor opportunities. While state and federal agencies should work with the public to determine the appropriate level of access, all public lands should be available for public use.

It's also time the Department of State Lands adopted a more enlightened policy for public access to school trust lands.

Finally, recreationists must be willing to pay for the access we want. Let's raise the price of the conservation license a dollar or two. We'll call it a state land access fee and earmark the proceeds for the school trust fund.

Let's also amend the federal Sikes Act and require recreationists to buy a permit to use federal lands in Montana, using the fees to acquire rights-of-way to inaccessible federal lands.

Recreationists don't intend to confiscate anyone's property. They don't want to interfere with anyone's livelihood. All we want is what we're legally entitled to — reasonable access to our public lands. We can obtain that slowly and painfully through the courts and Congress and the Legislature, or we can settle it like neighbors through cooperation and negotiation. Either way, we're going to insist on access to what we already own.

PROPERTY RIGHTS PANEL

PANEL MEMBER DISCUSSION

Q. James Huffman for Steve Woodriff:

How much are recreationists willing to pay? The Public Trust is the alternative that would not require us to pay, so are you talking about purchasing rights-of-way? Clearly the State can acquire these rights of access by eminent domain. It disturbs me to hear you say that counties are strapped for funds and so are abandoning these routes of access. If we are not willing to pay for it through government, will we be willing to pay for it through private industry; or not pay for it at all?

R. Mr. Woodriff:

I don't know how you would determine willingness to pay. My willingness to pay is considerable. I would pay $25 to $30 per year for access. I think the amount I pay for my hunting and fishing licenses is reasonable. I think what it comes down to is charging recreationists a fee to buy rights-of-way, if necessary, to reach the lands. I think they would do that. As far as the government abandoning the rights-of-way, I think that is not necessarily a reflection of the publics disinterest.

Q. Dan MacIntyre for Steve Woodriff:

Do you think the recreating public would be willing to pay a fee for quality access?

R. Mr. Woodriff:

Considering the success of fee hunting, yes, they would be willing. But I do not think that is necessarily the approach we should take. We cannot divide up a mountain into quality areas and charge a special fee for that.

Q. Steve Woodriff for Tom Sheehy:

You mentioned the problem of excess. Is the answer to eliminating some of this excess to make you a policeman, allowing you to decide who is going to have access through your lands, your public lands? Is there a better way to solve this?

R. Mr. Sheehy:

I don't know if there is a simple way to solve this problem. To some extent, I would like to have the ability to restrict access, sometimes. I look at this access problem as being somewhat analogous to the drug and alcohol problem in our society today. We are passing more and more laws and we see that laws don't always solve the problem. I think educating society is more effective. Yes, I want to be a policeman to some extent, but I would like to also be an educator. We are not unreasonable with our access; in fact, most farmers are not unreasonable.

R. Mr. Woodriff:

I agree with you that more laws will not solve the problem. We need to instill a better sense of values in our sporting public. But I think those are problems of use and those related to access should be dealt with separately.

R. Mr. Sheehy:

I think they are related. If it was not for the problem of excess, I don't think we would have a problem with access. The problem with access is excess.

R. Dave Schaenan:

We understand in our own state the increasing need for education. Multiply this across the country because the majority of federally owned lands are in the west and the votes are east of the Mississippi. I think we will have to educate not only the people in our own country, but the people in the east concerning some of the problems which are created and relate to land access. Unfortunately in the east, the people with the most money have access to premier recreational places. In some cases they set up hunting and recreational leases. As this occurs more frequently in the east, more people will be coming out here and this will add to the problems of access.

Q. James Huffman for Marjorie Brown:

My focus and most of the focus here is on public ways of providing private access. I think the State can and wants to acquire by eminent domain access for any public purpose. But I do not think we should overlook the ability of private individuals to acquire access privately.

My question is on this constitutional root of the Public Trust Doctrine in Montana. My interpretation of Section 3 of the Montana Constitution does not add or change anything from the way the law always was. If the 1972 Section 3 is a basis of the Public Trust Doctrine, it seems to me that it had to be there all along and it is not a constitutional concept at all. The court has just used that as an extra handle to try to justify what I see as a significant change in the doctrine itself.

R. Ms. Brown:

Bozeman lawyer Ben Berg attended the 1972 Montana Constitutional Convention and he spoke against the deletion of the phrase "the water is the property of the state for the use of the people." He wanted "use of the people" to remain. But he also felt that it was just a restatement of where the water rights have always been: the State does hold the water for the use of its people and no one owns the water outright. He felt it was vital for that statement to remain so that the State could not go out and market water without the beneficiaries being able to agree. I tend to agree with you.

AUDIENCE QUESTIONS AND COMMENTS

Q. Terry Anderson for Marjorie Brown:

You mentioned in an article when the Public Trust Doctrine is opposed to the law that there is no such thing as a vested water right. I would like you to elaborate on that and also comment on the implications of water marketing, which the Governor of Montana and those of other western states strongly advocate. I have a second question. The water is considered the property of the State, held for the people. Now the people have access to that water even when it flows across private land, in the case of nonnavigable streams. Does it follow then that the wildlife, which is also held in trust for the people by the State, but yet flow over private lands, ought to be open to access for the people without Tom Sheehy or others regulating the access as they now cannot do in the case of water access?

R. Ms. Brown:

There were three authors to that article and your quote is not mine. I would like to focus on the whole Section of water rights of the Constitution that clearly does protect all existing rights to water, including the right to divert and appropriate water up front. I think it is also important to know that the water that was being diverted from the Dearborn River was exempt out of the water that was available to recreationists.

As for your second question; the Court, just as the Convention had done, was explicit and stern about saying there is no right to cross public land to get to that water.

Q. Terry Anderson for Ms. Brown:

As the Court has already resolved, I have access to my water, even if that water is on top of private land. Couldn't I approach the court on my behalf as an elk hunter to argue that elk, though they stand and flow across private lands are something to which I have access to? Why doesn't the Public Trust Doctrine perhaps open that door, subject to the rules and regulations of the Fish, Wildlife and Parks Department?

R. Ms. Brown:

I certainly wouldn't stop you from filing a lawsuit on your behalf.

R. Mr. Huffman:

The question is less if you could file a suit, but rather what your prospects of winning are. I would be very interested in hearing what the court says the difference is, if they are not willing to go that far.

Q. Bob Marks for James Huffman:

How can you justify, for whatever reason, the taking of 660 feet on either side of an interstate highway for right-of-way, but then not be able to use that land for advertising? It is a case of property rights and condemnation without just compensation for the taking of highway land.

R. Mr. Huffman:

Speaking as a lawyer, the rationale is that those signs are a nuisance. Historically, police power regulates public nuisance. You may debate if that is a nuisance, but that is the legal theory.

It is different from giving people a right of access to walk up a stream because no one is claiming that any harm is being suffered from the closure of that stream; whereas they are saying there is a harm suffered from those signs being there. There is an excellent book for those who are into this taking issue. The book is entitled *Taking Private Property and Public Domain*, and is written by Richard Epstein.

Q. Jo Kwong for Steve Woodriff:

I am a bit confused about what you are advocating when you say that you as a recreationist demand access to all public lands and yet you turn around and tell Mr. Sheehy that you respect his right to not want people on his land. There is a conflict between private landowners and those who demand total access. Can you comment on this conflict? Also, in light of your earlier comment about your willingness to pay, you mentioned how county roads and others are not being kept up due to lack of funds, and yet you are willing to pay. Why don't we focus on the roads that already lead to public land and put our money there rather than trying to get more that is already in a conflict?

R. Mr Woodriff:

I don't want access to Tom Sheehy's land, I want access to my land. Access to public land may require access through private land.

Q. Ms. Kwong:

But if he as a landowner does not want to grant you access through his land, for any number of good reasons, then what?

R. Mr. Woodriff:

Then we condemn it. We use our power of eminent domain to secure what is ours. If a landowner is denying reasonable access to public land, then he is violating the public's rights.

Q. Ms. Kwong:

So in other words, the public's rights are greater than the rights of the private landowner?

R. Mr. Woodriff:

Yes. I think the law is clear in the opposite direction. The public cannot deny the landowner access to his land. It only seems logical that it could work both ways.

R. Mr. Sheehy:

It seems that both Ms. Kwong and Mr. Anderson are asking the same question. What are the courts going to use as a rationale in saying that wildlife does not carry the same legal rights as those for streams. We have seen the courts use a balancing test as a mechanism for avoiding these issues. But when pressed hard enough, they will see the problem and at some point there will be a balancing test applied to wildlife. They will consider the rights of the private landowner and the rights of the public and try to provide a happy median. Hopefully the common sense judgment of the people will help to decide where that balance lies.

Charlie Russell's Yarns

Words & Pictures by
C.M.Russell

Charlie Himself (c.1915)
wax model by C.M.Russell
Amon Carter Museum of Western Art

Edited & Performed by
Raphael Cristy

L.A. Times: ". . vividly brings to life the people and scenes of Montana when Helena was simply Last Chance Gulch . . ."

Lindsay, Calif. Gazette: "If you liked Hal Holbrook's Mark Twain, then you will enjoy Cristy's Charlie Russell."

"Due to Cristy's ingenuity, the slides of Russell's art coincided with the yarns. The storyteller was so magnetic that it was difficult at times to tear your eyes off him to look at the pictures."

Helena Independent Record: ". . . an intriguing and authentic portrayal of the famous Western artist."

Montana Historical Society: "I highly recommend this outstanding performance." (Steve German, Chief Curator)

Background

Charlie Russell never "performed" his stories and yarns. He shared them in conversations with friends and people with whom he sensed a spontaneous rapport. When forced onto a stage or into the limelight, he froze. In his few documented "performances", Russell told his stories silently with his hands forming Indian sign language while his wife, Nancy, or another friend translated the flowing gestures into verbal narrative. It was a rare party or gathering when Russell would tell his stories to strangers.

As far as is generally known, Russell never used a slide projector. Apparently, he kept no picture file, photographs or other records of the thousands of artworks which passed from his hands into the world. When paintings or sculptures were sold or given away, he seldom saw them again. Outside of his own imagination, it is unlikely that Russell ever saw as many of his works in one place as we can show with slides in one evening. Today, a single painting by C.M.Russell commands a price of as much as one million dollars.

Of Russell's story-telling, his friend, Will Rogers has written, "I always felt that painting gag was a sort of sideline with Charlie...If he had devoted the same time to writing that he had to the brush, he would have left a tremendous impression in that line... He was a great story-teller. Bret Hart, Mark Twain or any of our old traditions couldn't paint a word picture with the originality that Charlie could... What a public entertainer he would have made. ... I never met a person yet that ever heard him that didn't say he was the greatest story-teller they ever listened to."

Setting

It's the time of the "Roaring Twenties" with prohibition laws, bootleg liquor, wild jazz music, an even wilder stock market, Model T Fords, Hollywood movies and modern-day changes coming faster and faster.

In a Montana town, things move slower, yet the times are changing. Here, a former cowboy recalls his days out on the open range:

Act I
1880-1891

Old Nighthawk's Memories
The Dog Eater
Liars of the Old West
Waiting for a Chinook
Finger-That-Kills
Charlie Green's Offer
The Crooked Deal

intermission

Act II
1891-1926

How Lindsay Turned Indian
Whiskey & Saloons
Bronc Riders
Married to Mamie
Travel & the Art World
Hollywood Cowboys
Health & Dying
Epilogue

Performing Charlie Russell's Yarns

This program is an assembly of direct quotes by Charles M. Russell, "The Cowboy Artist" (1864-1926). The quotes have been gleaned from dozens of sources including five biographies, two volumes of illustrated letters and three art books, as well as Russell's own short stories.

The complete show features approximately 350 color slides selected from the estimated 4,500 works of art produced by Russell during his lifetime. The selected works include oil or watercolor paintings, pen & ink sketches, wax or plaster or bronze sculptures, as well as informal illustrations which Russell frequently added to personal letters just to amuse his friends.

Some of the works included in this performance were created by Russell to illustrate specific stories while others provide the right image by coincidence. Several black and white photos are included showing Charlie or Nancy Russell themselves.

Raphael Cristy

Mr. Cristy is a writer/performer who grew up on a Michigan horse-farm. After graduating from Stanford in 1969, he opened a book store where he first discovered stories by and about Charles M. Russell. This encounter sparked Cristy's on-going research into Russell's life and works. Many years of experience as a professional musician and entertainer led him to realize the theatrical potential in the Russell materials. Since first performing some Russell stories in 1976, he has found certain tales, which made leather-tough Montana cowboys bust out laughing in the 1880's, can still amaze people 100 years later. An essential ingredient in the success of this program is Mr. Cristy's ability as a story teller, bringing Charlie Russell's Yarns to life again.

Slides of paintings, sketches and sculptures have been supplied by
- The C.M. Russell Museum, Great Falls Montana
- The Montana Historical Society, Helena, Montana
- The Buffalo Bill Museum, Cody, Wyoming
- The Amon Carter Museum, Ft. Worth, Texas
- The Thomas Gilcrease Museum, Tulsa, Oklahoma
- The Sid Richardson Collection, Ft. Worth, Texas
- The National Cowboy Hall of Fame, Oklahoma City
- The Southwest Museum, Pasadena, California
- The Rockwell Museum, Corning, New York

Charlie Russell's Yarns
©1985 by Raphael Cristy

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THE IMPORTANCE OF LAND & ITS OWNERS

Dr. Jo Kwong

THE IMPORTANCE OF LAND & IT'S OWNERS
DR. JO KWONG

The importance of land ownership is a very broad topic, so I chatted with several conference planners to try and isolate aspects of land ownership that might be most valuable for the purposes of this conference. In particular, I was then asked to address the relationship between land ownership and social and economic development. That is, how do changes in land ownership lead to changes in social and economic structures?

Even this narrowing down of the topic was quite broad, so I've tried to relate this whole issue to some of the broader issues at hand which pertain to access. Since we are looking at the access issue from a historical perspective, I thought it would be both informative and useful to discuss the importance of land ownership by drawing upon examples of land policy in our nation's history. Specifically, I'll be talking today about different aspects of public lands history by focusing upon several different land policies that were designed to transfer public lands to private interests. I'll talk largely about the development of the western frontier in the mid to late 1800s.

In particular, a review of the homestead era reflects a long debate about land ownership concerns. During this era, there were many conflicts between actual farming settlers and business interests (whether individual speculators or corporate developers). I'll develop the argument that the way in which property rights were defined during the 1800s had important implications for land ownership, and thus, the efficient use of land. These observations, then, can be useful in designing current land policies, such as access conflict resolution.

In the first part of my talk, I will discuss how different land policies sought to influence social and economic structure by the way of land ownership. I'll discuss how the settler/speculator debate emerged, and how the various land policies affected each group. I'll conclude by offering several brief recommendations for designing land policy based on the observations from past land policies.

THE IMPORTANCE OF LAND OWNERSHIP UPON SOCIAL AND ECONOMIC STRUCTURE

Land owners, acting in response to their individual values, economic incentives, etc., clearly have a direct impact upon the manner in which their land is used. This link between ownership and use has provided the basis for many social and economic policies in our nation's history. Since questions and issues about land access are ultimately rooted in public land issues, it is illuminating to look at the evolution of the public land system. Pivotal laws such as the Preemption Act of 1841, the Homestead Act of 1862, the Pacific Railway Act of 1862, and the Desert Land Act of 1877, each illustrate the intent of Congress to influence social and economic structure by influencing land ownership patterns.

One of the important chapters in early American history deals with the policies to turn the public domain over to private citizens. For at least a century following the Revolution, acquisition and disposal of land were of primary importance at both the federal and state levels. Between 1790 and 1900 the land area of the U.S. more than tripled, and until very late in that period, nearly all of the land was available for private ownership and settlement. By the turn of the century, however, federal land policy became one of reservation.

The survey and disposal of the public lands first became a matter of concern to Congress after New York (1780) and Virginia (1784) ceded their claims to western lands to the central govern-

ment. These lands comprised the initial public domain. By 1802, the remaining states ceded their claims to the federal government, enlarging the public domain. This was further expanded by later land purchases, such as the Louisiana Purchase in 1803, the acquisition of West Florida in 1811, East Florida in 1819, the Oregon settlement in 1846, the Mexican cession of 1848, and the Texas, Gadsden (South NW and AR), and Alaska purchases of 1850, 1853, and 1867.

Congress pledged that all lands ceded by the states would be disposed of for the common benefit of the United States, making it clear that the public lands belong to all the people. According to Robbins (5, 6), the cession of the state claims placed the federal government in a position of trustee of society, holding the rights of individual ownership. Robbins claims that it became the anxious desire of the government to transfer the title to private hands. Congress, then, faced the important task of deciding how to distribute the lands — who should get the land and who should benefit from their rents?

The various options for disposing of the lands had obvious and important consequences for the social and economic development of the nation. Some people argued that the lands could be given to soldiers in exchange for their service, or they could be kept for future use, or sold to generate revenues to pay off war debts. The U.S. could make extensive land grants to individuals or corporations, or the area could be divided into states. The lands could be opened to settlement and made easily available at land offices where settlers and investors could purchase them. Or they could be free with the owner paying but a small fee to secure title.

The philosophies which guided the land disposals have had a lasting impact on the development of our nation. Thomas Jefferson and Alexander Hamilton, in particular, are often noted for their philosophical influences upon land policy.

The Jeffersonian ideals about agrarianism sought to develop a nation of small, independent farmers. As a firm believer in Democracy, Jefferson believed that the democratic distribution of the public lands to the landless, so they could become independent farmers, would assure the preservation of the American republic.

Alexander Hamilton, on the other hand, who was closely associated with rich merchants and land company officials, believed that land investors and stock companies were essential in drawing people to the west by their investment in roads, mills, and factories, and that the government should sell its land in large blocks to such men.

These ideas are reflected in the early debates regarding public land disposal. One of my co-workers, Terry Anderson, an economic historian, for example, argues that for the first 50 or 60 years of public land policy, much of the debate centered around whether land should be allocated through speculation or through squatting. The idea of who was to own the land, i.e., the importance of land ownership, was an important issue even back in the 1700 and 1800s.

We can see the range of some of the ownership concerns in the Land Act of 1796. This Act, for example, was designed to discourage speculators by setting a minimum price per acre beyond that which speculators would be willing to pay. The Act set a minimum price of $2.00 per acre supposedly under the idea that individual homesteaders could afford this price on individual parcels, but speculators could not afford to buy large holdings at this price. The lands were to be sold through an auction system, and provided credit with one-twentieth down. The terms of this Act were so much less attractive than those offered by states or private landowners that little land was sold. Congress then, had to continually refine its land legislation.

By the mid 1800s, there were two primary ways in which individuals could compete for rents, i.e., two ways in which land ownership could be achieved. Squatting was permitted under the Homestead and Preemption Acts, and speculating was permitted by acquisition through direct purchase.

The Homestead Act of 1862 was designed to secure homesteads to actual settlers on the public domain. Fite (1966:10) describes the Act as a "victory for those who believed that it was socially and economically important to people the land with small proprietors." Under the Act, a male or female citizen over 21 years old, the head of a family, or a person who had declared his intention to become a citizen, was permitted to file on 160 acres of the public domain. The only cost was a filing fee of $10, plus some other miscellaneous charges. After making improvements and residing on the tract for 5 years, the applicant could apply for the final title. Under the Commutation Clause of the Act, homesteaders who did not want to fulfill the 5-year residence requirement could gain title to the lands by paying the government $1.25 an acre in cash after 6 months residency on the land (Fite 1966:16-17).

Settlers could also obtain land under the preemption law of 1841. This measure permitted a qualified person to acquire 160 acres of government land for the minimum price of $1.25 an acre. The preemptor also had to make some improvements and live on the land about 14 months before he could gain final title. Similar to the Homestead Act, the preemptor had to swear that the land was for his own exclusive use and that it was not being acquired for sale or speculation. The laws permitted a settler to file for both a homestead and preemption claim, making it possible to acquire a total of 320 acres directly from the federal government (Fite 1966:17).

The third principal method of acquiring land was through purchase. Despite the existence of a variety of laws such as the Homestead Act and the Preemption law which were designed to help settlers acquire farms for little or no cash, there was much less land open to public entry than was generally assumed (Fite 1966:17). Much of the public lands were given away to the states for educational and other purposes. Moreover, millions of acres acquired when Indian titles were extinguished were put up for sale and specifically barred from homestead and preemption entries. In addition, substantial quantities of land were given to the railroads in order to stimulate the rapid building of transportation facilities in the west. All of these lands were held for sale to the highest bidder.

In 1862, the same year that the Homestead Act was implemented, President Lincoln signed the first Pacific Railway Act. Reflecting the philosophy of Alexander Hamilton, this Act is another example of a land policy which was designed to transfer the public lands into private ownership. Similar to the Homestead Act, the Railroad grants were developed under the premise that private landownership would stimulate the social and economic development of the frontier in a manner that would prove beneficial to the nation as a whole.

This law provided for the construction of a transcontinental railroad by two corporations — the Union Pacific which would build westward from Council Bluffs, Iowa, and the Central Pacific, which was to build eastward from Sacramento, California. The Act pledged liberal aid in the form of alternate sections of public lands to the depth of ten miles (and later twenty) on either side of the road, and loans ranging from $16,000 to $48,000 for every mile of track completed. (Morison et al 1980:32.)

As described by Morison et al (1980), the combination of federal bounties and land grants stimulated a race between the two competing corporations to push forward in record time. The 20,000 laborers of the Union and the Central Pacific roads layed as much as eight miles of track in a day in the last stages of the race, which ended at Promontory Point, Utah, in May 1869.

The alternating pattern of land distribution to the railroads established the foundation for the current checkerboard pattern of private/public land ownership in many areas of the west. The railroad corporations were free to buy, swap, or sell lands in order to raise revenues and consolidate land holdings for the rail road construction. The consolidation process is illustrated by an 1800s circular for homes in the Northern Pacific Country which advertised that "millions and millions of acres low-priced land were for sale by the Northern Pacific R.R. Co. and equal amount

of government lands lying in alternate sections with the railroad land, are offered free to actual settlers, under the Homestead, Pre-emption and Tree Culture laws."

Thus, even though Congress enacted a number of laws which were designed to distribute land to the cash-poor settler, the giveaway programs were not overwhelmingly successful in the goal of distribution land to actual settlers. Many settlers, arriving on the frontier lands found that much of the best land was already owned by the state, corporations, or land speculators and was unavailable for homesteading and preemption. Generally, the land that was available for homesteading was far from transportation lines and other minimal services that were important to establishing a land claim.

Throughout this time, the debates continued over whether the land should be settled by actual settlers or by speculators. By the late 1860s and early 1870s, criticisms of land monopoly, along with a growing concern about the disappearance of good public land upon which settlers could establish a farm under the homestead or preemption laws, prompted congress to review its land policies. In March 1870, William S. Holman of Indiana offered a resolution in the House of Representatives stating that "the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued . . .," and that public lands should be held for the "exclusive purpose of securing homesteads to actual settlers under the homestead and preemption law . . . The next year, Congress discontinued granting land to railroads. Moreover, both major political parties became concerned with the land question by 1872.

Although the grants to railroads were discontinued, Congress passed a number of other land policies in the following years that once again illustrate the importance of different aspects of landownership concept in the development of the nation during the homestead era. Although each of the following acts were designed to assist homesteading settlers, many of the acts were relatively infeasible. In addition, several acts spurred the recurrent concerns against land monopoly and speculation persisted.

The Timber Culture Act of 1873 provided 160 acres of government land in return for the planting and cultivation of 40 acres of trees. The Act was premised on the idea that it would be desirable to increase timber growth in order to reduce winds, increase rainfall, and provide timber for building and fuel. Title to the land was transferred to the settler after ten years of growth. Despite the fact that the requirements were softened to 10 acres of land that had to be cultivated for 8 years, a relatively small amount of land was obtained under this act (Fite:20).

The Desert Land Act of 1877 provided for the sale of 640 acres of land at $1.25 per acre to a settler who promised to irrigate it. (Although Congress may have had the best intention of trying to promote the establishment of individual farms in the semiarid and arid West, where the environment ruled out the traditional homestead of 160 acres, the Act actually had little or no value to actual farm settlers in the 11 western states and territories where it applied. The average settler with limited capital was in no financial position to undertake the heavy expense of irrigation to bring arid land into production) (Fite:23).

From this brief review, it is evident that despite the fact that the homestead era is often connoted as a romantic segment in our nation's history in which public land was given away to the landless population, the era was actually characterized by conflicting attitudes and values towards land ownership. Far from romantic, many historians have focused on the disappointment, hardships, and disasters that most of the homesteaders faced. In fact, many people are surprised to hear that approximately two-thirds of the homesteaders gave up their stakes to land, as they were economically, physically, and socially unable to fulfill the required residency. Gilbert Fite's book *The Farmers' Frontier 1865-1900*, graphically describes the plight of the homesteaders as they face the hardships of frontier life. In addition to problems arising from the social and economic difficulties of establishing a homestead in relatively barren regions, many

settlers faced year after year of natural disasters such as prairie fires, hail, droughts and grasshopper destruction of crops. The destitution of homesteaders was so great that voluntary, state and federal relief programs were established to assist the frontier farmers. (Could read quote on page 60 of Fite.)

Attacks upon the public land system continued on into the 1880s. In addition to concerns about land speculators, there was a growing interest in the conservation of the nation's remaining natural resources. These concerns led conservationists to insist that parts of the public heritage in lands should be saved from the despoiler, and be put into national parks, national forests, or other forms of public ownership. This tipped the start of an entirely new era — the Progressive Movement.

The Progressives argued that retention of public lands was desirable for two primary reasons. First, some conservationists contended that the government would do much better than the private sector in achieving the scientific management of natural resources. This was largely a reaction to concerns that private individuals and companies were responsible for the rapid depletion of wildlife, forests and other natural resources. Secondly, Progressivism is noted for its general antagonism to large concentrations of private power.

The Bankhead-Jones Act of the 1930s is an example of legislation that arose to respond to the dual problem of economic hardships faced by settlers competing with business interests, and the environmental destruction resulting from farming on lands that were not suitable for cultivation under the existing technologies and practices. As the economic problems of the homesteaders continued into the 1900s, many homesteaders abandoned their land claims; others foreclosed on their purchases. The Bankhead-Jones Act was devised to acquire land from individuals, and foreclosed lands from county governments in order to alleviate some of the economic hardships and to minimize environmental destruction caused from undue pressure on the farmland. Under the act, the federal government purchased the lands from the owners at fair market value under the condition that they never be put back into cultivation. In eastern Montana alone, approximately two million acres of land were purchased under the program. Similar lands were also purchased in Nevada, South Dakota, North Dakota, and Kansas. These lands have since become part of the National Grasslands. Thus, this act illustrates part of the reversal process of land policy in which the federal government required or retained ownership of the nation's lands.

In this short length of time, it is difficult to try to provide a framework for analyzing some of the land policies that I have just reviewed. Yet, it is important to do so in order to take these lessons from history to our current land use problems. One approach is to break down the speculator-settler disputes in terms of the basis of how the rights to capture returns from the land were competed for. (Anderson, p. 29.)

Speculation implies that competition occurs through a bidding process wherein rights to the land are exchanged for money from the highest bidder. Squatting, on the other hand, implies that enterpreneurs must bid in terms of getting to the land prior to all other setters and sitting on it the longest. Their bid is in the form of an expenditure of resources. Valuable resources used in the settlement process became the price paid by squatters for the land rents. Thus, where speculators would exchange money with the government for land, squatters would expend time, effort, and other resources to gain rights to the land. Although both groups are seeking to maximize their returns, a primary and important difference is that the speculator's bid becomes a gain to the federal government when the land is sold. However, the squatter's expenditures are not received by anyone, and represent a net loss to society.

When we consider the hardships faced by many of the homesteaders, we see how generally inefficient the homestead program was. By requiring residency requirements virtually on a first come first right basis, homesteaders were encouraged to try and settle on the frontier before

anyone else got the best land. In realty though, this proved to be a real catch-22. The first ones on the frontier lacked essential services for setting up a home and business. Yet, the threat of waiting loomed over their heads with the possibility that no land would be available.

Some of this can be better put in perspective if we consider the concept of the "farm frontier." This refers to the geographic boundary beyond which farmers, even on free land, could not cover their costs of farming because transportation to and from markets was too costly. Thus, a sufficient market for a farmers goods was lacking, and also, the farmer was unable to purchase the necessary capital inputs from the existing market.

Willingness to endure the added pains of settlement ahead of the frontier — before the transportation network, supplies, and markets were within the reach of the homestead — was rewarded by land claims which later became valuable. But the failure rate, and misery endured by the homesteaders illustrate some of the inefficiencies of the land distribution program.

Speculators, on the other hand, who purchased the lands, were free to select the time of sale or settlement on the land. They could coordinate their activities with the movement of the frontier. Those who purchased lands long before they were valuable, paid less for them. In contrast, homesteaders who settled on lands long before they became valuable, paid more for them.

In addition to the inflexibilities of the residency requirements, several of the other acts that I mentioned entailed other requirements, such as irrigation, tree planting, etc. These requirements lead to another type of inefficiency. Many of the lands that were relatively unsuitable for crop cultivation (in comparison to other lands) were irrigated. Similarly, lands that were relatively unsuited for tree cultivation were planted. Had more of the lands been sold through auction, there would have been greater flexibility on the part of the landowner to improve efficiency in two respects: (1) they could have paid for the land and chosen the optimal time to arrive on the land and commence farming — once a critical mass of people and services had accumulated, and (2) the owner could have selected the optimal use of the land. (Save for questions? Of course, it is often argued that many settlers could not afford to purchase land, but this tends to overlook the fact that those settlers who chose to homestead had to have a substantial savings in order to attempt homesteading. It cost a fair amount of money to move out to the frontier, and it took savings to support families until they could get sufficient returns from their first crops, etc.)

CONCLUSION

I have presented a relatively brief history of the Homestead era and public lands development in the 1800s. In summary, the way in which we define property rights will have important implications about who owns the land and how efficiently the land is used. It is difficult to give away valuable land systematically, since nonprice competition for the value, unlike competition in exchange (as in a purchase price), will tend to waste resources up. In some cases, the waste exceeds the value of the resource. For example, even though the homestead lands were given away to those who could meet the residency requirements, the efforts that were expended and wasted in acquiring title to the land were often greater than the value of the land. Many homesteaders might have been better off simply working to save up enough cash to purchase lands, and to set up on them during the optimal time in conjunction with the farming frontier.

The access issue is somewhat different. Here the conflict does not center around initial access and ownership. But conflict exists as private land owners expend resources to maintain their rights, and as sportsmen groups and others concerned with access to public lands expend resources to acquire access. It is possible that the total value of these efforts may exceed the value of the private lands that pose barriers to public lands.

The way in which property rights are defined in the access conflict, then, can affect the efficient use of resources. There remains a large gray area in which property rights are not clearly defined. Although the nation has generally adopted a private property rights approach to land ownership, there are several ways in which the federal government is able to act on behalf of the public as a whole, even when this conflicts with the wishes of affected individual landowners. This may mean acquiring a right-of-way through the police power of eminent domain. What we need to do is to stress alternative, coordinating mechanisms between public and private landowners. CEs selling inaccessible public land to private landowners, etc. Reverse the process when mutually agreeable solutions can not be reached.

For example, if landowners are clearly given the right to exclude trespassers from their land, regardless of public landholdings, then the law has presented an institution upon which bargaining may commence. Interested hunters will gradually realize and begin to accept the fact that they will have to give up something in order to cross private land. They may have to bargain with the landowners either in terms of contributing to an upkeep fund, or somehow compensating the landowner for the expense of providing access. (Landowners, after all, pay taxes on the land, clean up after inconsiderate users, provide general upkeep, support wildlife feed and habitat — all of which provide side benefits to the hunters on the public lands.)

If landowners are not given the right to prevent user access, than they have to bargain with users. This, of course, is a more difficult situation. However, this type of ruling would force landowners to look at the various options of providing access and enticing users to use particular paths, etc.

However, if public access is acquired as a result of political battles, say through lobbying and court battles, then the resulting resolution is not necessarily an outcome. Instead, it is a temporary situation which can be undermined by future battles over property rights. This can lead to a never ending expenditure of resources over defining ownership rights.

In summary, there is no doubt that landownership is important to the social and economic development of our society. However, the nature of the development with regard to current issues, such as the access issue, will be heavily influenced by the way in which we define and determine ownership rights, just as it did in the homestead era.

PUBLIC ACCESS AND PRIVATE PROPERTY PANEL

MONTANA OUTDOORS
ED ZAIDLICZ

INTRODUCTION

Several years ago it was my privilege to participate in one of the IRWA annual conferences. I was very impressed by the quality of the program, especially the high caliber of the participants. Receiving today's agenda and speakers, I can only say I'm very flattered to be asked to take part.

In your brochure, you have a listing of public forums held in 1986. My assignment today involves the first held in January. In keeping with your conference mission: "Access in Montana, Problems and Solutions", I plan on addressing the first part: *Problems*. My more learned, worthy associates on this panel will handle the solutions.

Almost 25 years ago, President Kennedy established the first National Review of Recreation. Under it he formed the Outdoor Recreation Resources Review Commission (ORRRC). After four years of deliberation, many notable programs resulted: L.W.C.F, Bureau of Outdoor Recreation, Wilderness Preservation Act, Wild and Scenic Rivers Act, National Trails System Act, etc. Because some key programs of that effort are soon to sunset and because of changing economic and social conditions, President Reagan, by executive order, on January 31, 1985, set up the second Presidential Commission on Outdoor Recreation Resources Review.

The President appointed Governor Alexander of Tennessee to be the Chairman. His charge is to report back by the end of 1986 on two basic questions:

1. What will America want to do outdoors over the next generation?
2. How can the public and private sectors ensure that there will be appropriate places to do it?

Governor Alexander appointed 15 national leaders to his Commission and requested each of his peers in state government to present their state recommendations.

Typically, most of the governors set up a blue ribbon committee of their state's experts. Governor Schwinden did not, I am happy to say! In true Montana fashion he opted to go directly to our citizens for their views. He assembled a small group to solicit and aggregate the Montana response. Their instruction was to meet in eight cities during January and report back by early February.

The Forum Steering Committee was composed of myself and the following:

— Keith Colbo, Director of the Montana Department of Commerce

— Jim Flynn, Director of the Montana Department of Fish, Wildlife and Parks

— Brace Hayden, Senior Policy Analyst of the Governors Office

Public response surprised everyone. It was in the dead of winter; bad weather, travel hazardous, flying uncertain. Instead of eight, we held eleven meetings. At several meetings attendance exceeded seating and space. At two meetings, requests for additional oral presentations could not be honored because of time limitations, so we asked for written comments to be sent to the Governor. The Governor received quite a volume of written responses.

Overall, 1,000 Montanans participated personally. Two hundred sixteen gave oral testimony and 260 others submitted written positions. The participation was spirited. Every facet of Montana's outdoor recreation was surfaced and explored. Clearly, Montanans considered outdoor recreation as essential in our way of life. Strong, reasoned positions were vigorously and effectively presented.

All presentations, both written and oral, were then carefully reviewed and recorded. Governor Schwinden made his Montana report to Governor Alexander and the National Commission on February 15, 1986; the first state to make its official recommendation.

THE GOVERNOR'S REPORT

Key elements of Montana's position are:

1. Montanans in general are dissatisfied with the stewardship of our recreational resources.

2. Recreational decision making must be brought closer to home. Decisions involving priorities should no longer be made in Washington, D.C., or state capitals (Helena).

3. Each state should create its own Council on Recreation, chaired by the Governor and composed of the chief federal land managers of that state.

4. Councils would set priorities and coordinate the spenditure of federal and state recreational dollars in their state. He stressed that the Councils would allow for public involvement on an ongoing basis.

5. To ensure a reliable source of funding for outdoor recreation facilities, the Governor endorsed creation of a *National Assets Trust Fund* with matching funds for federal, state, and local recreation projects. The federal trust fund would be financed by revenues from liquidation of non-renewable natural resources and by the assessment of excise taxes on those types of recreation equipment not currently taxed. Governor Schwinden affirmed that Montana's recreation infrastructure (roads, trails, campgrounds, boat ramps, etc.) were sorely in need of better stewardship, "if we are to maintain the quality of recreation as well as continued development of Montana's recreation and tourism industry."

6. He also proposed that recreation user fees be employed on a broader scale than at present to help maintain and develop our outdoor recreation opportunities.

The presidential Commission holds its last meeting next month and then make their recommendations to President Reagan.

Apparently our Montana report was well received. I have had several complimentary expressions from my peers in other states as to the Governor's innovative recommendations. The Governor's strategy to submit the first report was sound. Our sister states were compelled to analyze Montana's proposals before their own had jelled. Hopefully they will support Montana's position.

IMPRESSIONS

I would like to share my impressions of the public meetings, particularly those aspects involving access, public and private rights and management concerns.

Most participants were realistic about accepting greater responsibility for protecting our recreation resource, for sharing higher costs of stewardship, for being personally involved in planning and development. They demanded the full, equitable use of our priceless resources be made available to all.

The vigorous but orderly presentations surprised and pleased me. Historic opponents, of many Montana conflicts of the past, were courteous, if somewhat impatient, and let their opposites state their case. If anything, most were over eager to supply additional data. The emotional tirades of righteous indignation that I recalled from early BLM public meetings was absent.

Federal Agencies and State Departments got their full share of castigation for not doing enough to open access to public lands and waters for all. Also, these agencies did not recognize that their inaction unfairly favored a select, affluent few; often out of state.

Guides and outfitters were blasted for excessive commercialization of hunting and fishing. Criticism was made of their undue influence on the Legislature and the Department of Fish, Wildlife and Parks; 563 outfitters and guides compared to 200,000 resident sportsmen.

Some felt Montana and Wyoming had too many outfitters and guides based on available public land acreage.

Excessive leasing of private lands controlling traditional access routes as well as charging hunting fees or trespass fees that encompass public lands concerned many.

"Montana is developing hunting preserves like European Baronies of old."

Others rebutted "Have recreationists done anything to ease the burden of small family ranches? You know he is broke and about to go out of existence as an American way of life. If you don't care enough to help a little, don't complain when big corporations take over."

Many felt that because of unaccessible, unavailable public lands, remaining private lands are being over run. This in turn would encourage more fee hunting and fishing.

One suggested solution was PRMI, Private Ranches of America, Inc. Leasing private lands for hunting is a good solution. This would open lands to hunting for the average Montanan that might not otherwise be available or under control of outfitters. They believed they were offering an affordable package of services and benefits to fill the gap between run-of-the-mill public lands and expensive outfitting.

Others said "Hunting is a part of American heritage. We Montanans take our hunting seriously. We will not tolerate selfish economic interests or political maneuvering to rob us of our heritage."

Out-of-state taxpayers protested that they are unfairly treated and do not get equitable use of their federal lands.

One suggestion given was that the issue of the State's school lands currently under exclusive grazing leases should be opened for recreational use as well.

A Bozeman rancher lamented "In summer, it's the hikers, backpackers, and rock hounds. In fall, it's the hunters. In winter, the skiers and snowmobilers. The only time we are free of "them" is in the spring when it is too muddy to get in."

One group stated "Fish and wildlife management by authorized State and Federal agencies is seriously jeopardized by controlled access. Private interests have no right to decide that they can manage the wildlife."

Advocates of "recreation rights" and those of property rights were strongly polorized. This was evident at all the meetings.

BOTTOM LINE — WHAT NOW?

My distillate of the current situation as presented at the 11 meetings:

Montana is lucky. It has an internationally recognized recreational heritage.

Tourism is an industry of great economic promise but is not adequately developed.

There is a very large number of interests involved in trying to advance their segment of the state's recreational destiny. Also, many of these disparate efforts are on collision tracks. This is counter-productive to Montana's interest.

Economic circumstances strongly favor pooling of Montana's resources, both natural and human, to solve our needs. Past methods are not adequate for today's circumstances.

Endless litigation is not our answer from the standpoint of cost, time, or consistency of solution.

If Governor Schwinden's innovative proposal to the President's Commission is accepted, our list of identified problems could be cut significantly. But my experience with the federal sector and eastern interests dictates that I curb my optimism.

Having now identified Montanan's concerns and needs after long years of confusion and uncertainty, it would behoove us to get our own differences in order and accept these problems as ours and contrive our own remedies, even if we must use bailing wire and rawhide thongs.

This conference is a real start to lay some track. The timing is perfect. Our problems are not going to become less difficult over time.

I wish you much luck in your deliberations.

SCHOOL TRUST LANDS
MIKE GREELEY, ATTORNEY GENERAL

It is truly a pleasure and a great personal honor for me to address the Big Sky Chapter of the International Right-of-Way Association, as part of a panel on a very important subject of public access to private property. I thought I'd give you some perspective as a member of the State Land Board on some questions of access and state lands.

School trust lands are those lands that the federal government granted to the state of Montana at the time it became a state.

The Federal Enabling Act that created the states of Montana, North Dakota, South Dakota and Washington did not simply give the land to those states without any strings attached. The biggest string was a requirement that the states use these lands to generate money to support the public schools. Moreover, the Montana Constitution says clearly that the state must receive fair market value in return for any of the assets that these state lands produce.

In recent years, the question of public access to school trust lands has become a real hot one as we all know. It is an issue that has been centered primarily around hunting and fishing on state lands. This issue got rolling in the mid-60's, therefore, it is not a new one.

About 20 years ago, the Board of Land Commissioners examined the issue of public access, and decided that such access was a compensible asset to the school trust, that is something the state could make money on, in some fashion or other. At the very least, the public is entitled to the return for the recreational use of these lands. The Board also decided it was not in the trust's best interest to dispose of any of these assets.

Then in 1979, the Board of Land Commissioners adopted its present policy on surface leasing rules. A policy that reserves hunting and fishing access, while stating that the lessee may post his lease, to protect the leasehold interest.

Even though the Board has reserved hunting and fishing access, the Department of State Lands has not required lessees to prohibit access. State land lessees cannot charge people to hunt or fish on state lands. Once a lessee posts his land, no one can hunt or fish on that land, including the lessee himself. If he does not post it, he may not restrict people from access, but may require people to check in with him.

The Department of State Lands has taken a more realistic approach in applying these rules. For the simple reason that some lessees may choose to post their leases while others will not. Some will choose to police their leases while other may not. On one point however, both the Board and the Department of State Lands are immovable. The lessee may not charge for hunting and fishing on state land.

With the Constitution mandating a fair market return for uses of state land, and the multiple use concept also being emphasized, when we do that, we see that we need a land policy that emphasizes a multiplicity of uses on state lands, while selecting the highest and best use.

Now, as distasteful as some people find it, the policy of maximizing the return for long term benefit is good stewardship and a guarantee that the land will maintain its pertinent value and productivity.

Let's return to the question of access. There are two kinds of access. The first is simply across state lands to federal lands. To ensure access across state lands to federal lands, the federal government should choose to obtain an easement. The federal government can also acquire

access through a trade or land exchange. We currently have active exchange programs with the Bureau of Land Management and the U.S. Forest Service.

The second kind of access, hunting and fishing access on state school trust lands, the kind referred to earlier, is somewhat less straight forward and quite a bit more complicated.

Only 172,000 acres out of 4.5 million acres of school trust lands have any recreational potential. That is less than approximately four percent of the total trust land available. The controversy appears a little overrated when viewed in these terms.

Recreationists have stated they only want access to the grazing lands. It is not quite that simple, as many of the state leases are a combination of both grazing and agriculture leases.

The Constitution says that state government must make sure that the school trust received compensation for hunting and fishing on school trust lands from someone. And that the compensation be sufficient enough to represent fair market value.

I subscribe to the common sense approach to land management. This means that I, as a member of the Land Board, would never support unrestricted vehiclular access to school trust lands, despite considerations of hunters and fishermen. Let's face it, unlimited driving just is not good management.

Secondly, I believe the Board of Land Commissioners must be prepared to restrict access to those parcels that it would be incompatible with. Take commercial leases for instance. They might not be able to survive unrestricted public access.

Finally, I would never support imposing access across private lands. Private owners enjoy constitutional rights too.

In closing, the furor over access to state lands between ranchers and recreationists shouldn't be there; for many of your ranchers are sportsmen. The solution is close consideration of each individual parcel of land, without yielding to the temptation of imposing blanket restrictions across all state lands.

I believe we have the creativity and resources to resolve controversies that involve really only 4 percent of our state's trust lands, and ultimately we have made much headway in this regard.

Thank you very much.

RECENT MONTANA LAW
JUDGE NAT ALLEN

It's difficult to know where you are going if you don't know where you have been. With that in mind, I think we should take a look at one of the first and certainly the most exhausting case on access. The case is Herron vs. Sutherland 74 Mont. 587 (1925). While it is highly probable that it was not a justiciable case, nevertheless, the court accepted it as a legitimate case and ruled on all 8 causes of action, as follows:

1. Defendant rowed his boat up the Missouri River thru plaintiff's land and fished and shot wild ducks on the surface of the water and overhead. This was not a trespass. However, defendant got out and went upon plaintiff's land above high water mark and tramped on the grass. THIS WAS A TRESPASS.

2. The defendant went up Fall Creek (15 feet wide and 2 feet deep) from the mouth thereof in the Missouri River and waded up the creek on plaintiff's land and fished and tramped along its banks. This was a trespass, since the riparian owner (plaintiff) owned the land beneath the water.

3. The defendant, while standing on another's property, repeatedly discharged a shotgun at ducks in flight over plaintiff's premises, his dwelling house and over his cattle, too. This was held at least a technical trespass since, Plaintiff, owning the land, possesses the space upwards to an indefinite extent, although looking ahead, they forsaw the airplane and high powered artillery as instruments that might not come under this technical rule.

4. The defendant, in hunting sage hens, went on the land of plaintiff which was fully enclosed by a legal fence, he tore the fence out to get on, but no signs were posted warning him not to trespass. Held unquestionably, a trespass. No one can hunt or fish on another's land.

5. The defendant, in hunting and fishing, went on another's land which was fenced on three sides, and was posted with "no trespassing" signs. Held — this is a trespass and is also a criminal trespass with a fine of not less than $10.00 and jail not more than 6 months.

6. Here defendant knew of good hunting ground on government land and he broke plaintiff's fence down and walked across plaintiff's land to get to the same. This is surely a trespass also.

7. Here plaintiff was the owner and in possession of a tract of land "entirely surrounding a small pond of water and a small stream flowing therefrom." Defendant fished in these and caught a lot of fish. Held, a trespass, since the owner had the exclusive right to catch fish here.

8. Here plaintiff alleged that during the year 1924, wild ducks of all kinds built their nests and hatched their young on this land and irrigation ditches and he fed them and protected them from natural enemies. Held — plaintiff need not allege a qualified ownership in the wild game, defendant cannot come on his land and shoot them even in the air.

Thus was the common law, the law in Montana in 1925 and up to 1984, when Montana coalition for stream access vs. Curran was decided. 682 Pac 2nd 163. In Curran, plaintiffs were floating down the Dearborn River and were harassed by defendant Curran for so doing. Historically, the Dearborn River was a navagible stream since even before the State was admitted to the union, it was used commercially for floating logs to market. Therefore, under the common law in Sutherland, they were within their right in floating the river, but the court went further and adopted the Public Trust Doctrine which says the public has complete control of the waters and beds of navigable streams and the public has full rights to use the stream to high water mark and bed

also, because these were granted to the state by the federal government when it was admitted to the union and the state has no power to grant such rights away to anyone for private or business needs, because they constitute trust property.

The next case the same year (1984) was Montana Coalition for Stream Access vs Hildreth 684 Pac 2nd, 1088. Here plaintiff filed suit vs Hildreth alleging the public had a right to float the Beaverhead River through Hildreth's land. He was trying to stop them by building fences and putting a cable across the river. Defendant insisted he owned the bed of the stream because his patent gave him title. The Court held that "the question of title to the underlying streambed as immaterial in determining navigability for recreational use of state owned waters." They held this in Curran too, but that was a historically navigable river. They quoted the Montana constitution "All surface, underground flood and atmospheric waters within the boundaries of the state are property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law". Art IX sec. 3(3) of the 1972 constitution.

Then in 1985, the legislature enacted MCA 23-2-301 and 302 which did little more than affirm what these two cases just mentioned said. The legislature has a habit of doing that — I don't know why, since they are so rushed all the time. They did the same thing with the exclusionary rule too, 46-13-302, although neither add anything to the law, but it does take a lot of time and money to do this.

The ranchers don't give up easily. They got a good attorney in Helena (Mr. Phil Strope) to sue the State, contending 23-2-301 and 302 are unconstitutional because it takes private property (the streambed) without just compensation and violates MCA 70-16-201 which says * * * * the owner of land takes (by grant) to the middle of the lake or stream (when nonnavigable). He also attacks the statute because the heading in the legislative bill does not properly describe its contents and lastly because the statute violates the landowners right of privacy — the right to be let alone. This is his strongest argument — it could succeed — who knows? The case will be orally argued October 8, 1986, and a decision could not be expected much before the first of the year.

PUBLIC ACCESS AND PRIVATE PROPERTY PANEL

AUDIENCE QUESTIONS AND COMMENTS

Q. Bob Korizek for Mike Greely:

In the example of a state streambed going across someones land, that river has been possessing it. Does this state-owned river have some sort of prescriptive right attached to it?

R. Mr. Greely:

A stream does not in itself have any possessory interest, it must be used by an individual to develop any rights. To have a prescriptive easement, the stream would have to have had use on it by someone, say for a powerline for example. The state however closed the navigable beds to prescriptive rights when they received title to them at statehood.

Q. Mr. Korizek:

When I say "state," I mean the people of the state of Montana. Why wouldn't we have an established right?

R. Mr. Greely:

Actually, you are correct. People have to use the parcel to establish a prescriptive right. You must use the parcel for a period of five years in a hostage situation (getting from one point to another, not in anyway intended by the person who owns the property). In this case, the stream, which is owned by the state, gives you the right to use the stream, but you cannot establish prescriptive easements on it by law.

Q. Dan MacIntyre:

As Montana Citizens, we are all interested in solving these access problems. It seems to me there are two implied approaches that have been described. One of them is confrontation.

"I'll stand up for my rights and go to court if I have to." The other is a cooperative approach. Would anyone on the panel like to comment on this?

R. Ed Zaidlicz:

From my experience in dealing with the public in our meetings we held, most of the public is dissatisfied with the litigation process as a means to solve the problem. I have a feeling that they are willing to sit down and work out the problems through cooperation, piece by piece if necessary, rather than formal court action. In my opinion, there won't be any progress made until we have more gatherings like this IRWA forum, where the problems can be identified and ideas can be exchanged.

R. Mike Greely:

I would agree that confrontation does not always lead to the best results. Unfortunately litigation is costly for both parties and is sometimes unnecessary. I think that most people want to sit down and talk but in some cases that does not occur.

Q. Paul Berg for Mike Greely:

I'm with the Billings Rod and Gun Club. What the sportsmen are looking for is access through private land to the border of public land that has recreational value. We have been working with the landowners and federal agencies but it is at a snails pace. Concerning condemnation, Section 2.5 of MIPA already provides the authority to do it. Condemnation is the last resort. However, if

some rancher won't give the access at all, we'll try our best to come to some type of agreement if possible before going that route. We do not want access everywhere. As a rule of thumb, we are looking for access to the border of Forest Service land at maybe five mile intervals. We think there should be some walk-in areas created too. The biggest objection we have is major landholders locking the gates so we can't get into say 10,000 acres of federal land and then renting his land to a guide outfit. He is profiteering from the public land.

Q. Ed Zaidlicz for Mr. Berg:

Regarding the Council that the Governor has recommended, would that Council, composed of the Governor and leading federal land managers, tend to help solve some of the things you are talking about?

R. Mr. Berg:

Yes, I think it would. We need some high power people to do high power stuff. I think this meeting is a step in the right direction.

R. Mr. Greely:

State land that is landlocked, we can get access to for administrative purposes. As a result of that access I am confident that the public could also be allowed to that access. The state could try and get an easement to those pieces of land that do not already have access if there was a reason for use, such as hunting and fishing. In no situation, legally, can a lessee of state land allow a guide to hunt and fish on his property and keep others off. On state land, you have a choice. You can post your land, but then you can't select who you want to hunt or fish on the lands. You can open it up, but you must allow everyone access. So, that problem you described should not exist on state land.

Q. Bob Lund for Ed Zaidlicz:

How can Montana compete fairly with other states for the use of money from the National Trust?

R. Mr. Zaidlicz:

I am optimistic about that. There is a tremendous amount of truly terrific recreational opportunities recognized not only in Montana, but in other states and internationally. So, Montana has good of political climate to getting our fair share as anyone. I'm encouraged about another thing as well. The Administration may be dragging their feet about setting up that type of a trust fund. Apparently the Governor's action has tripped off other governors and the President of the Commission is going to go with that aspect. So, if that goes through and they follow the Governor's second recommendation, those funds will be funneled back to the state and the decision of priority and allocation of those funds will be made between federal and state land managers.

Q. Mr. Lund:

You say that it is a political decision from the federal fund down to the states or is it more of an administrative decision?

R. Mr. Zaidlicz:

I can't answer that because I don't know what the mechanics of this may be. Don Hyppa will be going back to look over the draft, but nothing about that has surfaced yet.

R. Don Hyppa, Montana Department of Fish, Wildlife and Parks Department:

There are two or three different proposals that the Commission is looking at right now and they are divided on it. One group doesn't want to get too specific because that tends to polorize and

divide what would otherwise be support for a concept, leaving it to Congress. The other group has a formula in mind for dividing the account. Their formula plan is 30% to federal, 30% to state, 30% to local governments and the remaining 10% to quasi-public groups, such as the National Endowment of the Arts, to fund creative projects in outdoor recreation throughout the country. Right now I don't think there is a concensus.

Q. Al Evans for Mike Greely:

I would like to talk about road network and needs. It was difficult to find someone to address the issues we find quite concerning to us as land title people here in Montana. Defining the ownership of a road in this state is not easy. Many times it's a great source of frustration to the agencies and the landowner alike. It need not be this way. Other states who have the same problems we do have tackled the issue and created solutions that have made it a lot easier to work with. The lack of definitions, the lack of clarity, codes or procedure, questions of prescriptive right are all involved. If we are serious about diving in and solving some of the problems of access in Montana, this is a good place to start. I would like to ask Mike Greely if he has a response to this?

R. Mr. Greely:

What you have described sounds like a legislative issue. A group such as the IRWA might want to draft some proposals and present them. I can't think of any one agency that would be in the position to solve all the problems that relate to road ownership.

R. John Gibson:

I represent the Billings Rod and Gun Club. We better get this whole idea of access on a cooperative basis. From a legal standpoint, there is no question that the Forest Service or the BLM has the authority to get access to the land, they have been directed by Congress to do so. The point is: what is appropriate access, where is it, and how can we find it with the least amount of inefficiency? The Forest Service, in many cases, is trying to develop a road right-of-way only to discover that it is already a county road. This illustrates the need for cooperation to eliminate inefficiencies.

Q. Claude Roswurm for Mike Greely:

You spoke of prescriptive rights-of-way. Is there anything that describes the width of a prescriptive right-of-way? Where do you go to find what that legal limit is, or has it been defined?

R. Mr. Greely:

I'm not an expert in that area. I hesitate to speculate on this, but to get a prescriptive easement in court, you would bring in your case and describe the type of easement you need, such as walk-in, drive-in, etc. I don't believe there is a definition of what a prescriptive easement is without specifically addressing the subject matter in each case.

Q. Mr. Roswurm:

This is something we need to have. How can it be defined and where can we go for these answers?

R. Judge Allen:

If you go to court, they would tell you that it is a reasonable width for the use you make of it.

R. Mr. Greely:

It would be hard to define anything in the statutes except to refer to the normal width of the roads. There are some definitions there.

R. Ed Zaidlicz:

I wanted to comment on an earlier question by John Gibson. You are correct, the federal government has all the legal rights to go and get the access. What is happening is personnel and dollars. We have broken the land up into tiny pieces with the Forest Service, BLM, and counties all having some. This is why the Governor suggested this Resource Council. It does two things: it brings together key people to make decisions affecting access or recreation, and it gives a backing to support decisions and funding. What is needed is this Council's cooperative effort to review all the possibilities, discover the greatest good, set the priorities and then pool together to be effective.

Q. Bruce Bugbee for Judge Allen:

It seems to me that the access problem we are addressing is a modern issue. It has emerged with the increase of leisure time and recreational use of public and private property. Is it possible for the law to recognize the emergence of a new facet of the domain of property ownership? Secondly, if it is recognizable, how do you expect the tradition of the Montana interpretation of property rights to respond to that?

R. Judge Allen:

I can't answer that. I don't think it can be done.

Q. Terry Anderson for Ed Greely and Judge Allen:

In essence, the Public Trust Doctrine applies to water because we hold the water in trust for the people in the state and therefore they cannot be denied access. It seems to me it would be logical to apply the same doctrine to wildlife and allow myself, as a recreationist, to gain access to wildlife using the same doctrine. What limits are there on the Public Trust Doctrine? Is that something that landowners have to be concerned with if they have wildlife, which is held in trust, on their property?

R. Mr. Greely:

There is some established law in wildlife. The game cannot be owned or possessed by the landowner. Because it is considered to be a public resource. Game is public property.

Q. Mr. Anderson:

That is precisely my point. Given that it is public property, does that open the door for the hunter to argue since it's his in the first place, you cannot deny him access, even if it is on your land? This is true with public streams. Do you think this is a reasonable argument for someone to make?

R. Judge Allen:

No, I don't. The Constitution provides for the ownership of the water. It does not for the ownership of elk; Common Law did that.

R. Mr. Greely:

One difficulty about this is the question of mobility. A stream stays in the same place relatively speaking, but game is migratory. I can't think of any legal theory that would give you access to private property for game if you did not otherwise have access.

Q. Paul Berg for Judge Allen:

According to the Department of Fish, Wildlife and Parks lawyers, no one owns the game until it is legally killed and tagged. Then the hunter owns the game. Can you comment on that?

R. Judge Allen:

We do own the game, just like we own all the water. It is the same thing but they came from different sources. One is the Constitution, the other is Common Law.

Q. Dennis Benda for Judge Allen:

I have a question concerning prescriptive and prescription rights. Are we talking prescriptive easements or are we talking that the county claims it by prescription and has never established the rights? If they have gotten the easement then it would be defined, is that correct? And if they haven't defined it, you are saying that they do have a road there by prescription that has never been established and it would be uncertain as to the width of the easement. We have the right to take a road through prescriptive rights and establish that road through prescription. Unless they actually go into the courtroom and have that defined, it is never finalized and the width is never defined. Will you comment on this?

R. Judge Allen:

The court will not define a width. It is a reasonable width for whatever you need the easement for.

Q. Steve Durkee for Mike Greely:

How does state law address the old prescriptive easement across federal domain under RS 2477? How does Montana law address the assumption that you have that right in the federal government and can that prescriptive right in Montana have any residual effect once that public domain was through?

R. Mr. Greely:

I can't answer that question.

R. Judge Allen:

I question whether you can get an easement against the state or federal government.

R. Bill Noble:

That is something I've been working on in Southern Utah and Nevada, in those situations where the county or state roads had a right-of-way and we wanted to put our cable within their right-of-way. We wanted to know how wide their right-of-way was. We didn't challenge what they told us.

Q. Martin Briggeman for Judge Allen:

I don't see how a utility can come in and bury a cable on a prescriptive right road without getting an easement from the landowners? They are asking for a free right-of-way and I can't see why they would have to give it to them.

R. Judge Allen:

Public utility doesn't have any right to put in poles unless it is a public road. An easement is not a public road. It would be a public prescriptive right but it isn't a public road as a public road is defined. A public road involves ownership and fee, an easement doesn't.

Q. Ralph Hollman for Judge Allen:

Isn't a prescriptive easement limited through previous use?

R. Judge Allen:

Yes, there is no question about that.

Q. Roy Johnson for Mike Greely:

Why can't public access be a stipulation in the agricultural lease?

R. Mr. Greely:

The Constitutional mandate that the Board of Land Commissioners and the Department of State Lands has is to receive compensation for any use of state land. And for us to withhold an easement such as public access through the state land lease would be to withhold something we are not getting compensation for. To have an easement there would have to be compensation. You might be able to negotiate that with any individual lease holder.

R. Dan MacIntyre:

As far as the Forest Service goes, currently the law does not allow for the administrators to wheel and deal on this.

CREATIVE ACCESS TOOLS PANEL

LAND EXCHANGE & FEE AQUISITION
BRUCE BUGBEE

INTRODUCTION

Issues relating to access have been presented. To the extent access remains a desirable objective of public land managers, the public, and private landowners, what solutions exist to acquire access? I will talk about fee acquisition by land exchange and purchase. Trends for public purchase dollars have been downward. Therefore, acquisition capability has been increasingly dependent on exchange. Land exchange historically has been a difficult resource management tool with a record of long time periods for accomplishment, high risk of failure, and confusion and suspicion on the part of the public.

Why, then, should land exchange be offered as a creative solution to a problem which this forum has demonstrated has support by some, opposition by others, and has historical trends suggesting the issue will be forced to a solution?

I'd like to present brief examples of some recent land exchange activities in Montana. I believe these examples contain ingredients for a creative solution to the access problem.

Questions relating to access arise within a broader context. For this presentation, I will assume that whatever your individual position, we share a common goal. That goal is the responsible stewardship of public and private lands while preserving the strengths of a constitutional system and historic tradition which respects and protects private ownership and has preserved an irreplaceable legacy of public wealth through the public land system.

The choice of how to acquire access when it is determined desirable can be answered either of two ways. The first is by taking — the stronger one wins and the weaker one loses. The second alternative is by negotiation. Negotiation is a process of identifying common goals and building upon the accomplishment of those goals to an acceptable conclusion reached voluntarily by all parties. All parties win. The techniques I will talk about presume transactions that are entered voluntarily through a negotiated process. Each of the examples I'll present bear common components that, at least intitially, positions were taken which appeared to be contradictory and irreconcilable. As with most land-related issues, their successful, negotiated solution depended on a careful examination and gathering of information about the land and related ownership positions.

KEY ISSUES RELATING TO LAND EXCHANGES

Performance and Safety. To be a useful solution for fee acquisition, land exchanges must be successful. To be successful, the land exchange process must minimize risk, achieve equity for all parties, accomplish clearly defined and highly desirable goals, and be predictable in outcome.

A. Example #1: Ox Bow transactions

1. Ownership situation at start (slide)

Multi-jurisdictional; included both exchange and purchase; federal and state lands were traded; multiple objectives including wildlife, recreation access, range management, ag land management; trespass control, fire danger reduction, livestock management facilitation.

2. Ownership position upon conclusions (Slide 2)

Clearly defined objectives by all parties, high motivation by all parties to accomplish objectives; strong leadership; interim financing by NWF.

3. Result: Three purchases and four trades leading to the consolidation of a 10,000 acre recreation and wildlife management area (only ACEC in Montana); elimination of almost all incidents of trespass; livestock and range management objectives have been successfully negotiated between lessee and BLM; private landowner was compensated for nonagricultural values of the ranch; project formed catalyst for related conservation transactions in the larger region (Hilger easements)

B. Example #2: Rattlesnake Exchange

Image. To be a useful solution for fee acquisition, land exchanges must be supported by the public. To be supported, they must be understood, incorporate the reasonable goals of special interests, the private landowner, and the public agency.

1. Beginning condition (slide 3)

21,000 acres of checkerboard inholdings within the Lolo National Forest; designated Wilderness and Recreation area with Congressional direction to acquire inholdings; high levels of public use which would be precluded by subdivision development of the private property; public watershed; wildlife values; educational values. MPC willing to convey to the public, but with fair market compensation.

Several solutions were sought simultaneously — land exchange, exchange for minerals, public purchase.

2. Ownership position upon conclusion (slide 4)

3. Result: exchange for coal bidding credits

Upon conclusion, a celebration was held in which special interests which had never been in the same room before found themselves congratulating one another for the success of the project.

C. Example #3: Missouri River Exchange Pooling

The test case becomes a program. The transition from test case to program allows decentralization of authority, minimization of overhead expense; in house training; realization of comprehensive (multiple-use) objectives; capable response to opportunity; support from private sector.

1. General ownership in Lewistown District (slide 5); Missouri River area (slide 6)

Programatic direction assumed by Lewistown BLM. Lands qualifying for exchange systematically analyzed and processed for exchange purpose; priorities for acquisition within the Upper Missouri Wild and Scenic River identified; Congressional direction for acquisition; incidences of trespass, difficulties of range management, general recreation and scenic values (threatened by long term recreation development).

In each case the acreage selected was derived through a program of systematic review for those tracts having the least public value and most difficult to manage. In most instances, these were isolated tracts without access which caused management problems for the surrounding landowner. Each exchange was subject to public review, then received strong public support.

By processing a larger number of acres than necessary to complete the exchange, as problems were encountered, that acreage could be set aside without risk of failure of the exchange program and optimizing trade off gains to the public.

2. Acquisitions completed to date (slide 7) Exchanges and purchase

3. Results: Five of the top priorities acquired totalling almost 5,000 acres, protecting about 10 miles of shoreline, providing public access, and preserving undeveloped status of the land. Approximately the same number of acres disposed. Acquisitions were accomplished where very limited success had been previously realized. The acquisition program was treated as a specific program element for the annual work plan.

SUMMARY

Fee acquisition accomplishes substantial public access goals, as demonstrated in the Ox Bow, Rattlesnake, and Missouri River examples. In the Ox Bow and Missouri River examples, purchase was a supporting technique. Success was dictated by clearly defined objectives for the private sector and public land managers. Risk was minimized by maintaining several reimbursement alternatives and allowing the acquisition process itself to dictate the final method to be used in completion of the acquisition, thereby avoiding compromise of public and private values in the process. All of the acquisitions involved compensation and were negotiated to accomplish successful transactions. Various support groups that began the exchange process with apparently competing or opposite goals discovered a common ground on which they were able to build a successful conclusion to the transaction. Long-standing public goals were accomplished where previous attempts had met with failure. These goals were accomplished with less risk than previous attempts. All parties were given credit for success.

Land exchange pooling offers a programatic system that can accomplish public access goals along with other public and private land management objectives. Purchase remains a necessary component. Multiple objectives on the private and public sector are often necessary to mount sufficient incentive for successful exchanges. Multiple objectives generally suggest fee acquisition as opposed to less-than-fee acquisition.

Additional comments as time permits:

Two efforts at the national level deserve the special attention of this group. The first is legislation to overhaul the land exchange process used by all federal agencies with special attention to the way in which values are established on public and private lands for exchange purposes and allowing land exchange expenses incurred in the private sector to be incorporated into the exchange values. This legislation has passed the House as HR 4814. Action came too late for the Senate and will need to be reintroduced next year.

Secondly, the President's Outdoor Recreation Commission is nearing the completion of their study. Among their recommendations is one to consider the establishment of a Natural Assets Trust Fund to replace the existing Land and Water Conservation Fund. A creative application of such a fund could provide interim financing for key acquisitions while a particular exchange is organized and executed, allowing the fund to be reimbursed through multiparty land exchange and be used again for other acquisition.

Fee acquisitions through voluntary, negotiated trade or purchase techniques preserve the strengths of the private landowner system as well as the public land management system, while maintaining a responsible stewardship of the land base.

EASEMENTS
BOB KEISLING

First of all I'd like to explain what a conservation easement is:

Picture property ownership as owning a bundle of sticks. Each stick represents a right to use the land in a certain way. Any of these sticks, or rights, can be removed from the bundle and transferred to someone else. Water, mineral, timber rights, and utility and road easements are examples of severable property rights familiar to most people. Ownership of these limited rights gives the holder permission to do something (divert water, mine, cut trees, drive) on land owned by another person.

A conservation easement differs in purpose and function. It conveys certain development rights or other rights of use; these rights are held in trust by a government agency or private, nonprofit conservation organization. Conservation easements are used to protect *wildlife habitats, ecosystems*, and *open space*, as well as *recreational and historic features of the land*. When a conservation easement is given, some of the sticks in the landowner's bundle of rights are voluntarily conveyed to the government agency or private conservation organization in order to keep the land basically as it is. Only those rights which the landowner chooses to convey are included in a conservation easement. The major benefit of a conservation easement is the protection it provides against development and other land uses potentially destructive to the property's conservation values.

The agency or group which receives the easement does not have the authority to use the rights conveyed to it. Instead, it assures those rights held in trust are not exercised on the property. A conservation easement might limit subdivision and development rights, commercial timber harvesting rights, or the right to build new roads. Each easement is different because each parcel of land is different, and each is designed in consultation with the landowner. All land uses not specifically given up in the easement deed remain with the landowner.

Conservation easements are a voluntarily conveyed, partial legal interest in land. They are most effective in maintaining natural resources which are compatible with existing land uses. As such, a conservation easement is the formal expression of the property owner's concern for continued responsible land use and stewardship.

It has often been assumed that conservation easements automatically imply public access. Such is not the case. Public access to and over and on property or buildings protected by easements is a function of the qualifying purpose of the easement.

Because easements can be granted for a number of different reasons, among which are, (1) scenic and open space purposes, (2) historic preservation, (3) recreation and educational purposes, (4) protection of environmental systems (rare species, significant habitats, etc.), it follows that public access to and enjoyment of the easements should be on a case-by-case basis.

To the extent that a landowner voluntarily gives an easement to a qualified private or public donee organization *and* wishes to claim a charitable donation for tax purposes, the easement must qualify on the basis of one of the above four criteria.

Recognizing that different easement purposes would imply different access considerations, Congress and the Treasury Department (IRS) drafted different regulatory language regarding access as it relates to each of the easement qualifying purposes.

In terms of scenic and open space easements, the Internal Revenue Code Reg. Sec. 1.170A-14(d)(4)(ii), the access provision reads as follows:

(B) Access. To satisfy the requirement of scenic enjoyment by the general public visual (rather than physical) access to or across the property by the general public is sufficient. Under the terms of an open space easement on scenic property, the entire property need not be visible to the public for a donation to qualify under this section, although the public benefit from the donation may be insufficient to qualify for a deduction if only a small portion of the property is visible to the public.

In terms of recreational or educational easements, Reg. Sec. 1.170A-14(d)(2), (3) reads as follows:

(ii) Access. The preservation of land areas for recreation or education will not meet the test of this section unless the recreation or education is for the substantial and regular use of the general public.

And in terms of easements that protect environmental systems, significant habitats or ecosystems, the same section reads as follows:

(iii) Limitations on public access to property that is the subject of a donation under this paragraph (d)(3) shall not render the donation nondeductible. For example, a restriction on all public access to the habitat of a threatened native animal species protected by a donation under this paragraph (d)(3) would not cause the donation to be nondeductible.

In the case of historic easements the deductibility of the easement donation is a function of whether the Department of the Interior has decided that the building(s) is in fact historic. If it is historic, then the "substantial and regular" public access to the property becomes a function of good judgment in balancing the public access rights with the preservation values involved.

Quite clearly, access should be a function of easement purpose on a case-by-case basis. Since each easement is "tailor made" for a particular property, access, too, should be addressed individually and should not be assumed as automatic with any and all easements.

Because easements, particularly conservation easements, are relatively new devices in statutory and regulatory law, questions regarding their applications, purposes, deductibility, and valuation are many. It will undoubtedly take several years before private and governmental donees, private landowners and governmental regulatory entities work out the major interpretive bugs in the easement system.

Nevertheless the conservation easement as a protector of public values on private properties has a rosy future. Used judiciously the conservation easement can protect significant public values at extremely modest social and economic cost.

Public and private landowners and managers would be well advised to familiarize themselves with federal and state easement statutes and regulations. Cognizance of easement success stories such as the protection of Montana's Blackfoot River corridor will enhance future easement attempts. Easements should not be seen as tickets to public access, though of course in some instances an easement's primary function might be to secure and enhance public access. In other circumstances the public values derived by protecting scenic or habitat values through easements would be diminished if public access was required. Access taken to excess diminishes public good.

As with most tools, easements are usually utilized best in the context of good data, a clear sense of purpose and substantial inter-party cooperation. The Nature Conservancy stands ready to assist any and all landowners and agencies in exploring the potential or real applications of the tool.

CONSERVATION RESERVE/EASEMENTS
EVERETT SNORTLAND

Ladies and gentlemen, it is indeed a pleasure to be here. It is my intention to present the purpose of the Conservation Reserve Program, which is to protect the nation's natural resource base by removing highly erodible cropland from production.

Farmers will receive annual rental payments for the ten year period as long as they voluntarily sign the contract, and put that land into permanent cover, either through introduced grasses, trees and shrubs, native grasses, or some combination of those plants mentioned. We will cost share 50 percent for the cost of establishing this permanent cover. And then for ten years, we will pay them an annual rental payment that has ranged from $10 per acre to $45 per acre, depending upon which pool you are in. Not everyone initially has bid the maximum allowed for that pool.

In return, the producers must agree to reduce some of his crop acre base, so we would also provide conservation to the land. We would also reduce some of the overall production, which ultimately continues to add to the surplus at the present time.

Now, public access is not required for a farmer to enter into the agreement. Nor is the farmer prohibited from charging for access to this land for hunting or fishing. Provisions are made for the contract modification to permit oil and gas exploration activities, roads, pipelines, etc. As a general rule, ASCS has no authority under any of its programs to require public access, or to eliminate farmers options to charge for hunting and fishing. A producer does allow ASCS employees access to the properties under the Crop Reduction Program so that we can monitor the program.

Many of you probably remember, we had in the 1950's what we called the Soil Bank Program. The only criteria a producer had to fall under was that the land being set aside had to be cropland. The only major problem that came out of this was the weeds.

Under the Conservation Reserve Program, the producer would have to control noxious weeds. Also, producers must control harmful insects, grasshoppers, etc. I mention this only to explain that producers are having a hard time determining how much to bid with these additional expenses.

373,000 acres are already enrolled in this program. Producers must have a conservation plan prepared with assistance of the ASCS by 1990 for any cropland that is of erodible nature, but not enrolled in the program.

For those who have broken ground out after December 1985, they will have to have a conservation plan before they can qualify for any of the federal benefits.

These contracts are binding, and if a producer fails to meet the conditions, he must be faced with liquidation of his assets. There is a payment limitation of $50,000 per family and corporation.

FEDERAL ROAD EASEMENTS
JERRY SUTHERLAND

Thank you for the opportunity to join the Big Sky Chapter, International Right-of-way Association's forum to examine the elements of the access issue in Montana. I am Jerry Sutherland, Lands Group Leader, Recreation, Wilderness and Lands Division, Northern Region USDA Forest Service. With a more complete understanding of all that must be considered in the access issue, particularly the components of the issue discussed yesterday, we look forward to positive results from this forum.

My presentation is directed at federal road easements and their contribution as tools in resolving the access issue.

As background to my presentation and as an aid in establishing the Forest Service role in a discussion of the issue, there are a few facts I want to acquaint you with.

The Northern Region of the Forest Service has a gross land area within its boundaries of 28,196,637 acres. That 28,196,637 acres consists of 25,307,151 acres of National Forest System land and 2,889,486 acres of other ownerships such as private land, etc.

Within Montana there are 19,090,813 acres within National Forest boundaries. That area consists of 16,798,395 acres of National Forest System land and 2,292,418 acres of private and other types of ownerships (exhibit A).

Components of what we call our total transportation system consist of Federal Highways, State Highways, County roads, and Forest Development roads. In Montana our Forest Development Roads exceed 28,000 miles. Annually we add about 528 miles of new road construction. Over the past 4 years our average costs in securing rights-of-way for this transportation system has been $1,216,872 per year (exhibit B).

The protection, management and utilization of resources from this large land base requires a large access program.

One more item I feel compelled to discuss is to distinguish between innovative and creative applications of these tools. Within our agency we want to be and try to be as innovative in the application of our policy, regulations, and the laws that govern our access program as we possibly can. In other words, the framework within which we must work is set by these various laws, regulations and our policy.

Being creative, I believe, goes beyond what we as a single agency can do. Being creative cannot be done independently but can only happen when you bring together several viewpoints, from those viewpoints develop a common understanding of the problem, appreciation of the other points of view, and then together formulate a common approach to resolve the problem using all tools available to those assembled. This forum is an excellent catalysis for such creativity. It is therefore you people participating in this forum who have the opportunity of being creative in addressing the access issue.

Now, I would like to briefly mention some of the tools we use in our access program. I will tell you that we believe that with these tools we have what is necessary to accomplish our right-of-way program.

I will start by mentioning P.L. 91-646, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. This act sets forth the requirements on how we will deal with private landowners when seeking to acquire a property interest. It addresses how the property will be appraised and contacts that will be made between the federal agency and the landowner.

Two authorities we use for the acquisition of easements are the National Forest Road and Trails Act of October 13, 1964 (FRTA) and Section 205 of the Federal Land Policy and Management Act of 1976 (FLPMA). With these we have the necessary authority for the acquisition of road and trail easements to National Forest System Land.

I must also mention the authorities we have to exchange lands. Land and/or interest in land exchanges are an excellent way to resolve access issues.

There are an array of other tools which also come into play as we put together our access program.

These tools begin with the "Forest Plan" which generally identifies access needs. Then the District Ranger, through a Transportation Planning Analysis, focus on specific access systems in a area or drainage. It is through this process we analyze the total transportation needs for an area and begin to focus on our specific needs (exhibit C). It is this tool, the Transportation Plan Analysis, that is the most significant in our process of addressing access needs.

Other types of documents we use in our access program include:

a. Forest Development Road Cooperative Agreement, used to develop joint road systems between National Forest System Land and county road agencies (exhibit D).

b. Memorandum of Understanding for jointly developing access and resolving access problems (exhibit E).

c. Interagency Right-of-way and Road Use Agreement used with other federal agencies to provide means for granting and acquiring access (exhibit F).

d. Road Right-of-way Construction and Use Agreement used where there are large areas of intermingled land owned by a few individuals or the state (exhibits G and H).

e. Road rental agreements on existing roads.

A breakdown of these various tools by categories of use in our program reflects:

a. Cost Share agreements	65%	
b. FRTA easements	2%	(exhibit I)
c. FLPMA easements	1%	(exhibit J)
d. Interagency agreements	1%	
e. Negotiated easements	26%	
f. Condemnation actions	5%	

Were it just a matter of having the tools to do the job, we would be in good shape. We have the hammer and nails to build the box; however, sometimes we have difficulty in agreeing on a design for the box to be built.

COUNTY ROAD EASEMENTS
PETER FUNK

I would like to mention a couple of factors concerning why county attorney offices are not as active with access as they could be. One of these factors is land ownership. There is very little land owned outright by counties in Montana. In general, regarding the roads, we work mainly in upkeep of county roads in subdivision areas or rural county roads.

The other factor that contributes to the county's inactivity in access issues is the very poor records many county courthouses have.

I would like to share one case that I worked on with the United States Forest Service and the private landowners. This road was located along the Dearborn River southwest of Augusta. Landowners have bought numerous sites for cabins and ranchettes along here as you follow this drainage toward Forest Service land, especially the last three miles of fee land.

Problems for this road were created in the early 1960's when they removed the bridge which crossed the Dearborn River. Then in the late 1970's, a private landowner put up a cable. Due to decades of historical recreational use, an outcry began.

The County was not finding this to be too great of a problem since our road crews could maintain the road to the cable. But the Forest Service was hearing a lot of public outcry.

The Forest Service attempted to negotiate a foot and horse easement from the cable through the remaining three miles to public land, but couldn't agree with the landowners on the market value of that land.

In 1984, the public began to pressure the Lewis and Clark County Commissioners regarding their lack of access to the public land. The private landowners had started to tell the recreationists they could not park at the cable, even though it was county right-of-way.

Forest Service representatives researched county records and interviewed long-time local residents. They concluded there was a good case for a prescriptive right to this road.

There were several factors that were keys in getting this problem worked out. First, no one involved wanted that road open to vehicles, including the Forest Service, County and private landowners. And secondly, we were able to use our prescriptive easement as a bargaining tool.

We eventually worked out an agreement for perpetual easements 15 feet wide to the Forest Service land. In exchange, the County waived their prescriptive easement. This easement was for foot and horse traffic. Parking facilities were worked out with the neighboring BLM lands.

The last item needed was for the County to obtain a one quarter mile easement from the private landowners to this parking area. That was granted by them a short time later.

Momentum is crucial in solving access issues like the one I have described. I believe all parties involved came away from this problem as winners.

I would like to thank the Association for inviting me, and I'd be glad to answer any questions you may have for me.

NON-VEHICULAR ACCESS
RICHARD LOMMEN

I went with state government in 1973 and we had the very same problems circulating in North Dakota that you have in Montana today. We also had special interest groups lobbying for access to public lands; school lands in particular. This seems to be an ongoing problem.

This went on for eight or ten years. There were several times I approached my Land Board: this being a political board composed of the Governor, Secretary of State, Attorney General, Superintendent of Public Instruction, and the State Auditor. But the political ramifications were such that they didn't want to face it. Finally, in 1982, the Game and Fish Commissioner and I approached the Board with a rough plan on public access policy. Without much time to go over this plan, the Board instructed me to take some of my staff and hold public meetings around the state with this as an advocating policy.

Most of the state-owned lands in North Dakota are in the western part of the state. Many are leased by grazing associations and many are surrounded by Forest Service lands. The policy on Forest Service lands was of multiple use and this created many problems as to land management of state-owned lands. We would have a 640 acre piece of land completely surrounded by Forest Service lands. In North Dakota we also had a dedicated road right-of-way. Each section line was granted to the Dakota Territory 20 years prior to the State becoming a member of the Union. But how do you access state school or Forest Service lands on a section line running straight up and down?

We relied heavily on grazing associations to take care of the lands. We started attending their meetings. The grazing associations met us with open arms. They were leasing much of the federally-owned land that had a multiple use policy in affect, and they allowed public access.

About that time the federal government was starting to designate parcels of land as roadless areas. This was a problem for the State because we were really involved in leasing our lands for oil and gas purposes.

We drew up and promulgated what I think is a very good lease that allowed the oil driller to utilize as much of the surface of that land as he needed for the production of that mineral. The developer did not have to acquire easements for production access roads; this was written right into the lease and was inherent when he bought that lease.

We started out in March or April of 1982 with public hearings. We also attended the annual North Dakota Stockmans Association meeting and talked to that group, advocating our non-vehicular access policy. Non-vehicular meaning that no one except the State Land Department and the tenant are allowed to drive on that land and then only for managerial purposes. Of course if there's an eased road going across that line that is a different situation. We were talking about unnecessary use of the surface.

To my surprise I didn't get too much flack. Maybe they thought the policy would never come about and they had nothing to worry about. But as time went on several of those outspoken against the policy were attending the different meetings. After doing a little research I found that these people were actually leasing these lands for hunting purposes and posting the land up tight. After about six months of holding these hearings, we brought the policy back to the Land Board. We advertised to the public that the Land Board would be considering this public access policy. No one showed up at that meeting.

The Land Board was very concerned about the political ramifications of such policy. In my mind I don't think there were any political ramifications. I think the majority of people understand that good husbandry could and should allow walking or non-vehicular access. There were some constitutional questions regarding this access policy.

Can you allow the use of these lands without some kind of compensation? We sat down to discuss ways of solving this serious constitutional question.

One solution was to use Game and Fish agents who were stationed in various places around the state to inspect the lands and observe for violations of good husbandry, overstocking, noxious weeds or whatever. The Game and Fish Commissioner agreed to have his wardens take on this extra duty.

This, in our judgment, comprised a very valuable enhancement to the Trust of land management. The policy has not been challenged to this day. We do allow posting upon the Commissioner's approval. This is done for winter range or an ongoing feedlot or similar operation. But if this land is posted no hunting or trespassing, even the tenant is not allowed to hunt this land. No hunting means no hunting. Another poster that goes on the land gives the recreationist the name and address of the lessee. In many cases the lessee wants to know who is on his land. We have found this to work quite well.

Our leases in North Dakota are staggered over a five year term. It will be 1988 before the final leases are issued under these new terms.

It was mentioned that we should take it to the Legislature and have them pass a statute. If you can avoid going to the Legislature by all means do it. We in North Dakota were elected and appointed to manage as fiduciaries to those Trusts that were given to the state. And as fiduciaries, we promulgate whatever rules and regulations are necessary for good husbandry and administration of these lands. We feel it is not quite as locked in cement as a statute would be. If there are areas that need touching up or changing, our Land Board can do it much easier than a legislative session. I think you'll find in Montana the same ongoing public access problems until you grab the bull by the horns.

Thank you for allowing me to speak on this important issue of access.

CREATIVE ACCESS TOOLS PANEL

PANEL MEMBER DISCUSSION

Q. Bruce Bugbee for Everett Snortland:

I have a question concerning the Conservation Reserves. I heard that conservation easements could be traded for farm debt under certain qualified situations. Is that the case in Montana?

R. Mr. Snortland:

That was part of the debate process in the actions past, but other than that I haven't seen any material on it. That is a negotiable right for a producer who voluntarily enrolls in the Conservation Reserves and he must sell to public or private.

AUDIENCE QUESTIONS AND COMMENT

Q. Martin Briggeman for Bob Keisling:

How would your conservation easement affect utilities who want their power lines in that area or pipeline or roadway?

R. Mr. Keisling:

Conservation easements are usually subordinate to rights of eminent domain. So, in the case of utilities or the Highway Department, those corridors can be run over the top of conservation easements, legally. But let's use for example the State Department of Natural Resources Environmental Impact Statement process on the Northern Tier Pipeline. The DNRC examined a number of prospective corridor routes across Montana; one of which would have run up the Blackfoot.

Questions were raised about the protective status of that corridor. When it was discovered that conservation easements were in place along the group, it lowered the attractiveness of that as a corridor group. Likewise with the BPA transmission corridor, the Blackfoot was dropped, I think, because of the easement program.

Q. Mr. Briggeman to Mr. Keisling:

One follow-up question then. Do conservation easements tend to inhibit or slow down development?

R. Mr. Keisling:

It can do that, but it need not do those things from a legal standpoint. The virtue of the conservation easement is that it does hinder development in some cases.

Q. Mr. Briggeman for Mr. Keisling:

Not just along the Blackfoot but all over Montana. If a power company has to go around the area to build a power line, the people are going to pay for that conservation easement through their utility costs.

R. Mr. Keisling:

In some cases it is a trade-off of public values. The public may pay more in its rate base to run the power line along a different route. But what it loses there the ratepayer may gain in public benefits; by having a protected wild and scenic river corridor. This is a judgment call.

Q. Pat Asay for Bob Keisling:

How did the tax deduction for donating conservation easements fare in the new tax bill?

R. Mr. Keisling:

The new tax provisions don't affect the ability of a landowner to deduct a conservation easement as a charitable contribution. The only thing that has changed about a landowner claiming this deduction is that the tax benefit is reduced somewhat because the maximum tax brackets are lowered. As an example, a taxpayer who donates an easement worth a half million dollars may not be able to claim the entire half million dollars because of the lower tax bracket.

Q. Bob Kriezek for Bob Keisling:

What happens to the counties taxes? Is that land still taxable or is it taken off the tax rolls?

R. Mr. Keisling:

Some people resist conservation easements because they assume that it is taken off the tax rolls. The land stays on the tax rolls and continues to be taxed at the classification rate that the land was in before the easement was attached to it.

Q. Mr. Kriezek for Mr. Keisling:

After the donor dies, who pays the taxes? Could you continue to earn income off it if you bought this piece of property from the estate of the original owner?

R. Mr. Keisling:

For the conservation easement to be a charitable deduction, the easement has to run in perpetuity. The deduction is a one-time gift and the original donor of the conservation easement claims the deduction.

Subsequent landowners in the chain of title are subject to the provisions of the easements and they continue to pay the taxes on the land. You can continue to use the land for whatever use existed at the time the easement was donated. For example, some conservation easements might preclude harvesting timber on the south forty. Future owners could not harvest timber on the south forty but they could continue to plant, graze, all kinds of things.

Q. (unidentifiable):

Is it fair to say then that the conservation easement would be an encumbrance against the deed?

R. Bruce Bugbee:

No. Technically the conservation easement is a separate deeded interest of property. Just as the utility easement is an encumbrance, so are conservation easements. But technically they are separate deeded rights to the property which is different than a restrictive covenent.

Q. Dan MacIntyre:

Can this be summarized by saying that regardless if it is two deeds or not; for the buyer the conservation easement amounts to a legal encumbrance which he acknowledges and is willing to pay for if he buys the property?

R. Mr. Keisling:

Practical experience indicates that in some instances properties with easements on them may be reduced by ten or twenty percent of their market value. When resold, they fetch ten or twenty percent less than unencumbered property. But that shouldn't hinder their resale except by narrowing the market of buyers interested. I'm concerned that you may have the impression that the landowner is totally restricted from using that property. Each easement consists of a certain

set of restrictions peculiar to the values of that property. For example, a conservation easement may be set up to protect ten acres of critical grizzly bear habitat. Each subsequent landowner is subject to the restrictions set up to protect those particular values.

Q. Al Evans for Peter Funk and Jerry Sutherland:

I have a question that ties in with Mr. Zaidlicz's presentation yesterday of an innovative proposal for combined program and funding between federal and state agencies. Experience has shown many times that in right-of-way acquisition, the limiting factor is the facility of the county to research records. Would it be desirable to allocate or set aside funds to aid counties in this effort and secondly, would it be legal under the Governor's combined federal-state attack on the problem?

R. Mr. Funk:

It would be greatly desirable from my point of view. The biggest single problem to getting action on the county level is the research involved. In our office there are not people with either the time or the expertise to do this research. If we get into a dispute which needs attention, we would hire an abstractor to handle it.

Q. From audience:

The county doesn't have the time or the expertise to do it? Isn't it in the Statutes that the county maintain records of their roads? If it is part of your responsibility, then why don't you get the expertise and time and do it?

R. Mr. Funk:

As far as Lewis and Clark County is concerned, everything is done according to Statute, and the roads are created at this point. But many of these disputed roads were created early in this century or before. As anyone with experience in working with county records back from 1920 and even earlier can tell you, these roads are not in the county road indexes or the deeds and conveyances filed back then. You have to pull information from many different resources and that is confusing at best.

Q. Dan MacIntyre to Jerry Sutherland:

If we managed to put together an innovative program and funding approach three way between the BLM, Forest Service and the State, would it be possible to help the counties with some of those things?

R. Mr. Sutherland:

Yes, I don't know why we couldn't do this kind of thing. We know that the counties are shorthanded in this area of research and when we work with the counties on a right-of-way the research usually falls to the Forest Service. In many cases we do have the expertise and can help out.

C. Bill Tolliver:

I've been involved a great deal in trying to research county records. Some records don't ever make it into the commissioners journals unless all the steps are completed and they declare it a county road. Sometimes information has been thrown out unknowingly. I feel there is more research that can be done by the counties in this area.

FEDERAL/STATE/
COUNTY
ACCESS ACTION PLAN

STATE OF MONTANA
GEORGE TURMAN, LT. GOVERNOR

I arrived this morning essentially with a blank page. Not that we didn't have plenty of time to prepare; Al Evans put this on my agenda before anything else was on the agenda for the month of November, and for that matter the month of July.

I took advantage of that time and circulated an inquiry to our department directors and others who would be interested in this process. All I got back from them, and realize this is over a course of several months, was a list of things not to say. To some degree, and following their advice, I came, as I said, with this blank page. But the fact that they submitted this list might tend to reinforce in your opinion a comment made by Steve Woodriff yesterday morning. He said "Politicians have been timid," in terms of access. I would rather suggest to you, it is a matter of being aware of the manifold problems which attach to this issue of access. In that regard this conference has served us well. By bringing in the range of interests and the broad spectrum of participants, you have revealed the range of perceptions and the range of problems.

I recall from the record here Dr. Gordon Britton, first thing yesterday, making the observation that "As the value of a property is increased, the entity having responsibility for that property is going to increase the level of control."

Tom Sheehy, a perceptive young rancher and lawyer, an interesting combination, made the observation that additional rules would not be helpful to him, they might in fact hinder his opportunity to enforce.

Dave Schaenan commented on the fact that many lands are now tied up, inaccessible to those who would extract commodities.

Steve Woodriff made reference to the amount of land now inaccessible to recreationists.

I would take issue with the last two observations to some degree, not entirely of course. Lands are tied up and we acknowledge that. But we are favored in Montana by our scale of things. We do, afterall, have vast lands under consideration for access, and that vastness is an insulation in this process. It is as well an aspect of our relative youth; I mention that as a way of introducing a metaphor which has to do with the maturation of a process. You are contributors to the maturation.

We have the time, I would suggest, to do things right. And based on many of the things we have had presented to us as potentials for solutions in the course of this conference, we can do things right. I'm thinking particularly of the Creative Access Panel this morning.

At the same time the conference has revealed that we have many different constituencies pursuing variations of the same goals. Pursuing them in different ways and in different contexts. In the vernacular of this season we are seemingly taking the shotgun approach, and this leads me to my one substantive point and that is to reiterate the Governor's invitation yesterday to plan with him, to plan with us; us meaning collectively to address the issue of access. We have, in the presence of the participants on this panel, suggested to you a format under which a planning process might proceed.

We can build on what exists now, and I'm thinking of the "Zaidlicz Mechanism." His review of recreationists concerns as you know eventuated in the Governor's proposal for a council on recreation. That is a body in the process of formation, and represents to you a device in process into which your concerns might be plugged.

Finally, I would like to say congratulations, as others have, to the organizers. They have put together an interesting panel situation; instructive and ultimately productive.

U.S. FOREST SERVICE
JOHN DRAKE, REGION 1

INTRODUCTION

Thank you for inviting me to participate in your access forum. For the next few minutes I will very briefly acquaint you with the Forest Service access program and our overall management objectives.

As I discuss the Forest Service access program, please keep in mind we are not a public road agency. With the large land base we manage and our need for access, we do accept a large role in developing access to and within the National Forests.

DIMENSION

Access has many dimensions and means a lot of things to different people. For purposes of this discussion, I will be referring to access as a "legal right" to enter upon or cross the land of another.

COMPLEXITY

Based on our experience in the Forest planning process and other public meetings on outdoor recreation, such as the Governor's Meetings, access to public lands has been identified as a key issue.

The complexities of the access issue become evident when you consider that:

1. Jurisdiction and administration of the various "public lands" reside in many agencies and levels of government.

2. These various land management agencies have varying authorities and charters.

3. Intermingled with these "public lands" are private land holdings. These private land holders have their particular management objectives.

4. There are public agencies at the county, state, and federal level that have responsibilities to provide for public access.

In every way possible we want to cooperate with intermingled and adjacent landowners and public road authorities in the development of a mutually satisfactory road system. Our particular concerns are for a road system adequate for the protection, administration and utilization of the National Forests.

It is evident that when each of the parties involved in a road development venture bring in their own specific needs and concerns for the road, the path to an agreeable solution can be quite complex. Our desire, however, is to develop a system that not only serves the National Forest needs, but also accommodates the utilization and development of resources in other ownerships upon which communities depend.

In addition to the simple things which I have just mentioned that complicate the access issue, there are other contributing factors that must be considered:

1. An increasing population with greater mobility is increasing the demand for outdoor recreation opportunities. This translates to a demand for more access to the National Forests.

2. A lack of well distributed access to Federal lands is causing over-crowding and overuse of more accessible areas.

3. Some private lands, close to National Forest land, are also being impacted. In many cases private landowners have felt the need to close their land to the public to avoid costly damage to livestock and fences, to control litter, dust and noise, and to avoid liability exposure.

4. As budgets become tighter, local governments are finding it more and more difficult to manage large road systems and are abandoning parts of their existing system.

These are just some of the factors that contribute to the complex access situation we are faced with today. Realizing these complexities and difficulties, we find in the majority of the situations common objectives and satisfactory resolutions to the access concern.

BASIS

The basis of our access program is found in the planning process. It begins with the National Forest Management Plans. In our planning process, Forest plans set the direction, assess needs and provide management criteria. All of this is done in conjunction with other agencies and public involvement. This is the level where we analyze what our needs are and identify opportunities for cooperative road access development.

From the National Forest Management Plans we develop Area and Project Transportation Analyses. This is done at the Forest and District level. It's important to remember that our Forest plan doesn't change at this point—the analyses focus on specific project areas. At this point, a special task force may be assembled to look at continuity, consistency and uniformity in our decisions.

Planning and implementing an access program is done on a Forest by Forest basis. Individual Forests prepare their rights-of-way acquisition schedule. This is done by inventorying all rights-of-way needed. Then these needs are arranged in order of importance to the Forest. Finally, schedules and priorities are matched with available financing.

CLOSING

Our access program is managed at the local level by the Forest Supervisor. As has always been the case, we believe it is at this level where the program and people are the most responsive in recognizing and carrying out identified needs. A real key to a successful access program is the cooperation/coordination by the various agencies and landowners at the local level.

BUREAU OF LAND MANAGEMENT
DEAN STEPANEK, STATE DIRECTOR

I was quoted in the January 2, 1986, Wall Street Journal story "Battle in the West" as saying that the public lacks access to at least 60 percent of the 8 million surface acres managed by BLM in Montana. The Journal, choosing to do a major front page story on this western issue, is just one indication to me that the access question has ripened for action. You heard earlier about access concerns voiced during Governor Schwinden's Montana Outdoors Forums. Several other meetings and conferences have concentrated on various access questions in Montana this year, again suggesting to me we have a real issue.

Following the Governor's Forums this spring, we conducted an internal review on access using a questionnaire which was sent to 169 employees. The fact that 142 questionnaires were returned indicates high employee interest in the issue. While employees differed in their views as to what BLM should do about access, they generally agreed that increased management direction is needed.

A few of the comments directed to BLM policy were:

— Need better balance — rights of landowner vs. public.
— Forget policy, program procedure, etc. Too much already. Let's do something!
— Access is No. 1 priority. Let's move out to do what public is telling us.
— Must have full Access Program before we can successfully manage the public lands.
— Continue blocking public land. Acquire access to the larger blocks.
— Need program. Each day complicates the problem.
— Must use great care with historical land users or any new thrust will blow up in our face.
— Ensure protection of private property rights in any policy.
— Access Program must be joint federal/state/county, with each responsible for their part.

At an August Bureau Management Team meeting, BLM Director Burford asked each State Director to list his state's two or three top concerns needing attention over the next 5 years. I was the only person to list access. That suggests to me that Montana BLM had better forge ahead to meet this state's needs without waiting on direction from Washington.

This year, we will concentrate on inventorying the existing situation on BLM lands, and defining apparent needs. To be most useful, this inventory needs to consider adjacent federal, state, county, and private lands. We will consult with those owners throughout the process.

I don't want to leave you with the impression that Montana BLM is currently ignoring the access question. We have several ongoing initiatives:

— Improved maps with better public land identification.

— Public land boundary signing.

— Joint Ownership Access Management (i.e., S-60 Powell Co., Musselshell Co.).

— Joint Road Development (i.e., 18 mile Crooked Creek Road being built by Petroleum Co., Corps of Engineers, USFWS and BLM connecting Winnett and Fork Peck Lake).

— Researching county records to validate public status of roads.

— Land Adjustment Program (since 1981, we have repositioned 740 isolated unmanageable tracts into higher value multiple-use blocks). Better access for the public and for administration has been a key consideration in these exchanges. Over 87,000 acres of high value, manageable

multiple-use lands have been acquired, while over 127,000 acres of isolated tracts have been disposed. Total value of these lands exceeds $32 million.

More than 4,300 acres were added to the public domain in Montana this year. Among the land the BLM received in eight exchanges, is 400 acres along the Upper Missouri Wild and Scenic River near Fort Benton. This stretch of land includes the nationally known geologic feature Hole-in-the-Wall. Near the western boundary of the Wild and Scenic corridor, the 40-acre Fisher Island, which contains important wildlife habitat, also came under public ownership.

Other lands received through exchanges include:

— About 80 acres along the Big Hole River, 20 miles southwest of Anaconda. This scenic area provides good salmon fishing, floating, camping, and hiking opportunities.

— About 50 acres on the Sun River 5 miles north of Augusta. The exchange provides legal fishing access in a scenic area.

— About 340 acres 18 miles northeast of Winnett, providing wildlife habitat and access to larger parcels of public land. The major recreational opportunity in the area is hunting.

In exchange for these and other lands, the BLM disposed of about 5,500 acres of small isolated tracts with little or no recreational or wildlife habitat value. Only those tracts identified as suitable for disposal through land-use planning can be sold or used as trading stock in exchanges. The monetary value of lands exchanged is equal.

Obviously, we can't manage general public use on scattered 40-acre parcels without failing the good neighbor test. Blocking of the public lands in Montana remains a high priority.

Let me close by saying we are working on the access issue; we have most of the tools in place to get the job done. At this point, we see a need to tie our program together better with other federal agencies, with the state, and the counties.

Thank you.

MONTANA ASSOCIATION OF COUNTY OFFICIALS
TONI HAGENER, PRESIDENT

Thank you for the opportunity to present a County Commissioner's point of view on problems of access and encroachment. Counties do not traditionally hold large areas of land, but they do have a role, partly through road systems, in the overall concerns of access.

If you were to ask the average person what counties are involved with, the initial and most common response would refer to roads. Though that response is not totally accurate because counties are involved in far more activities than roads, roads and access or encroachment is certainly a continuing and major concern. The 1985 legislative session added even more concerns when it passed HB 791 which requires a review of appropriate access on every 20 acre plot of land that is subdivided within a county.

In Hill County we have over 3,250 miles of road, more than any other county within the State. If you think I am bragging, I am not. I am actually cringing when I make that statement because it is a tremendous amount of responsibility. The topography of a county, as well as its economic patterns historically influenced the development of roads within the county. In Hill County an extensive grid system of roads was intended to provide access to every homesteader on every 320 acre parcel of land. We definitely are aware of problems with access.

The requests and problems of access will vary with each area of the State, but wherever county commissioners are located, they must deal with the problems of access and encroachment on an almost daily basis. Each county has its own patterns and its own policies and a solution to a problem is dependent upon the answers to a multiplicity of questions.

The questions a county commissioner must ask when confronted with a question of access must begin with what *kind* of access? For what purpose? When? For what period of time? What *kind* of use is involved? How many people or how much equipment is involved? And, who will it benefit or impact?

The kinds of access can be varied. Is it for foot traffic? Dirt Bike? Snowmobile? Motorcycle? Car? Truck? Airport clear zone? Seismic work? Weed and pest control? Fire control? Recreation? Utility line? Are there other utilities already there? Does it require altering a road? Cutting it as for a utility line or cattleguard? If so, how big a cut or change is required? Is maintenance involved? If so, how much, when, and for how long? The time of the required access or period of time involved may be important if it conflicts with weather conditions, movement of produce, construction, or other possible land or road use. If a master plan exists, the access may have to conform to it. The type of use and number of people served or impacted will have a bearing on the decisions made.

The next major question the commissioners must ask is *where*? This is where history and records come into play and this is not an easy task. Not only must there be an accurate description, sometimes involving a survey, but there must be a knowledge of the surrounding terrain. Is it a field access? Is it adjacent to an irrigation ditch or canal or other type of drainage? Are culverts or bridges involved? Is it in mountainous area, involve a deep coulee, steep hill or other impediment? If a road is involved they may have to determine if the road was created by petition, by deed, by prescriptive use, or by dedication. If by dedication, was it accepted? This is a very important point. The dedication of a road to a county can be analogous to the dedication or willing of a junk vehicle to a friend or relative. They may not want to be stuck with it. County commissioners must demand that a road be built to a specific standard before it is accepted.

Is it a section line? What kind of easements or rights-of-way are currently on the road? What is the width of the easement? Is the easement for a specific time or purpose that would limit any other use? If so, have the landowners granted their permission? Whatever happens with the request, it will need to be documented for future reference. Records are desperately important.

The next area of concern would involve the protection of the county and its taxpayers from unnecessary damages and costs along with protection from accidents, liability and continuing repairs or maintenance. Road work is expensive. With public demand for reduced taxes, it is difficult to meet all demands. Commissioners have to prioritize. They must always keep in mind the number of mils required.

The commissioners will also have to be concerned with the rights of property owners in the immediate vicinity of the request as well as the overall picture and attitude of the residents of the county. They must consider long range impacts and the affect on long range plans as well as possible changes in use. Commissioners are reluctant to abandon roads and extremely reluctant to enter into condemnation procedures. Both may require expensive and lengthy legal processes as well as having many other disadvantages.

By and large, commissioners try very hard to use and plan county roads as tools to encourage the most beneficial use of the land. They are the persons most directly involved with the public in considering problems of access within the county. They are the ones in the front lines when it comes to costs, liability, and long term effects. They must be able to justify every action taken and every expenditure made to all the people of the county as well as to those in the specific area in question. If you think elk are on the firing line, try being a county commissioner! They are bound to be cautious. They are bound to want to be included in the decision process if it involves county roads or land. They have many things to consider but they are reasonable persons, otherwise *you, the citizens*, would not have elected them. They are willing to listen and cooperate where practical and possible.

I am sure by this time in this session, that you are aware that the entire issue of access is a complicated one. It is in other states as well as Montana. There are no simple solutions. There are no pat answers and no all encompassing policies at any level. There are bound to be areas of difference, some of which may defy solution at this time. That does not mean we cannot work toward solutions.

There definitely needs to be a better understanding of the issues involved by all persons and agencies involved. I would hope that your sessions of yesterday and today have helped to achieve that better understanding.

FEDERAL/STATE/COUNTY ACCESS ACTION PLAN

AUDIENCE QUESTIONS AND COMMENTS

Q. Paul Berg for Dean Stepanek:

What is your position on the Silver Run elk herd exchange proposal?

R. Mr. Stepanek:

Management is the responsibility of the State. I will provide professional assistance in any way I can.

Q. Ed Hansen for Toni Hagener:

How do you justify use of county funds for snow removal or repair on a road the county will not accept as a county road?

R. Mrs. Hagener:

It is difficult to answer that question without knowing all the information. I suggest you talk to your county commissioner about it.

Q. Al Evans for Lt. Governor George Turman:

What would be the possibility of expanding the Natural Resources Council to include counties?

R. Lt. Governor Turman:

There is no reluctance to include counties. As you know, a responsibility of mine is to provide a liason with local governments. We have attempted to include county, city and town representatives in most of the state's councils and tribunals. There is no objection to an expansion of that.

Q. Paul Berg for Toni Hagener:

Years ago county residents paid for a good many county roads. Many of those roads went to the public land border, Forest Service, and some through BLM lands. Quite often the road has been petitioned for closure. Over the years many have been closed. Now the Forest Service and BLM are studying these roads, spending public money again to try and open them. This means we are paying a second time for studies and sometimes with no results. Now it looks like, if we are lucky, maybe 25 years from now we will pay for that road a third time to get to the border of public land. Do you think that the problem is hopeless because of what you suggested or do you think that the problem is worthy of our best intentions and forward drive?

R. Mrs. Hagener:

There is a need for understanding as I said in my presentation. I think there's one point that needs to be cleared up however. It is rare that a county commissioner would abandon a road unless they are requested to do so. When a road is asked to be abandoned, it is by petition request. You have to advertise it for a period of time. You have to hold public hearings on it. You also have to notify all adjacent landowners. And only when those factors are put together and everyone is in agreement, then the road is abandoned. The closing of some roads can create problems, you are right. Here is where an overall, long-range plan should be considered. But it is difficult to anticipate what uses you are going to make of contigent lands when you can't invision that far into the future. Most of us recognize that Montana is going to move toward more tourism, more recreational development. We have to keep that in mind when it comes to an overall, statewide master plan.

Q. Mons Teigen:

One thing I got out of the sessions yesterday and today is that we all agree we have an access problem. The reason we have that access problem is because of all the colored areas on the map. The way to eliminate that is to make it all white areas, private land, but that is not feasible. Two-thirds of the state of Montana is privately owned. How can we make the landowners aware of this access problem?

R. Jim Couture:

You are right. Maybe you have posed a question that doesn't have an answer. Hopefully, with all this cooperation we have heard expressed we could reach an agreement at some point of time.

OPEN FORUM

PRESENTATION OF RALPH HOLMAN
PRESIDENT, MONTANA LANDOWNERS ASSOCIATION, INC.

I am a Landowner, Rancher and Outfitter. I have lived and enjoyed the outstanding recreation of Montana for over 40 years, probably more extensively than most would think possible. I remember when deer were only in the high country and when there was several times the number of wildlife we now have in many areas.

We are here today because of a deep and steadily widening chasm resulting from the demands of some recreationists for access to and through private property. We are at the point where a landowner, in self defense, must deny access through private property, unless permission is obtained or fee is paid, without the possibility of losing a right-of-way by prescriptive easement. To our mutual detriment, and to the detriment of wildlife, we are on a road that will lead to more and more confrontation, retaliation and litigation. Both sides can spend a few hundred thousand dollars and years of our time providing the basis for others to dictate our future, or we can seek and explore means of realistic and reasonable solutions. To do this we have to face facts concerning existing and potential problems.

We have opposed each other in the Legislature for close to twenty years, that I know of, at considerable cost to both parties and a drain of taxpayer's monies that could have been used to lease or purchase winter range to benefit wildlife and the economy of Montana.

It is as human for the landowners to resist someone for trying to take rights away from them as it would be for the recreationist to resist if I demanded the right to use your house, car, lawn or other private property. Ask yourself: Should I have the right to recreate on your lawn or cross your lawn to recreate on your neighbor? To enter your house because it is a container full of public air? To bathe in your tub because it is a container of public water? Should the owner be denied the right to lock his office because it contains public air? Remember too, that most buildings sit where man and wildlife once existed. Is it wise to start the extreme procedure of confiscations without due process and just compensation, for non-essential use? Where won't this road lead all of us? For extremes we have only to look back a short time in history when the American Indian was shot for denying access and the homesteader denied trespass with a carbine.

The anticipated sweet success of H.B. 265 has boomeranged into a state-wide dilemma of "No Trespassing" signs, "Fee Hunting Only" signs, a brilliant display of orange paint, ranches and blocks of ranches advertising; "Closed to the Public." Controversy and the economy has forced many ranchers to call for more and more wildlife slaughter seasons to protect crops, hay stacks, fences and other property from wildlife and recreationist depredation. How long will the landowner continue to host wildlife if this accelerates possible bankruptcy. Will the rancher in self defense be forced to seek assistance of Fund for Animals to eliminate the source of problems by wildlife birth control? Will they be better off if zero wildlife exists on their land? H.B. 265 also played a significant role in the severe depreciation of Montana property values, resulting in foreclosures, repossession of land, and much of Montana for sale at a time when we are faced with excessive government spending, all contributing to our crippled economy.

Perhaps it is time to ask ourselves; "Not, is there a law whereby I can force my will upon my fellow man," but rather, "Is that law fair and just?" and "what are the repercussions. "Montana has been, and has the potential to be, the top recreation state in America.

I am confident that a large number of landowners, facing a depressed livestock market, would participate in a "Ranch for Wildlife" type program if there was an incentive to do so. Several other states have successfully developed optional wildlife programs with program goals that

include: giving landowners an incentive to practice wildlife management, preserving habitat, improving state, landowner and recreationist relations, cutting wildlife damage costs and gaining public access. In some states sportsmen's clubs are purchasing land and setting up their own programs. Programs in some states are managed by the Fish and Game Department, and some by the Department of Agriculture. Some landowners prefer their own lease or hunting programs and this option, including the right to invite or deny use of property, must be protected. A program could be developed that would compensate the participating landowner a reasonable value for (1) wildlife habitat provided, (2) leasing or opening part or all of property to limited public recreation under landowner's control, (3) leasing or opening part or all of property to public recreation under control of Regulating Department. Funding to come from sources as recommended in the Governor's forum printout.

There are several ways to open doors to increase recreation potential and improve our economy. We spend hundreds and sometimes thousands of dollars on other recreation. (TV, movies, bowling, bars, etc.) In Fish and Game fiscal year ending June 30, 1986, the Fish, Wildlife and Parks Department sold licenses and derived revenue from recreation and the harvest of wildlife, the bulk of which was raised at landowners cost, in an amount of well over twenty-eight million dollars. 411,000 recreationist purchased conservation licenses from the Department in fiscal year 1986. It's time the landowner is compensated for expenses incurred and the cost of raising wildlife.

We have numerous sportsmen's associations in Montana. Some with several thousand members who spend thousands of dollars on recreation. I recall a representative of the Southeastern Montana sportsmen testify they had 5,000 members. If each of their members annually contributed $100 or more into a land purchase fund, they could have the down payment and annual payments to purchase one or more ranches for public access and wildlife habitat. A better time will not arrive as close to half of Montana is for sale at reasonable prices. "I will be happy to help solicit some membership for this cause including my own." There are also other ways; sportsmen's organizations can (1) set up a partnership and purchase land with membership fees and donations, charge access fees, etc.; (2) set up a corporation and sell stock at $10 a share or $1, or set up one east and one west of the divide to purchase land, etc. Give the big corporations some competition. You have a good member attorney friend in Al Bishop. I'll venture he will help with the legal work. You have 411,000 recreationists to approach for assistance, probably as many rural as urban.

Don't confront or threaten the landowners, they are only protecting their rights the same as you would yours. Bear in mind that landowners have as much right as you to the public lands you refer to. That when the landowner goes to the other side of the mountain they are in the same boat you are. Purchase some land and you will learn the problems facing the landowner.

I am sure that the economy of Montana is high on all lists. That recreation is important. We also know that without our enforcement agency we would have little if any wildlife to be concerned with.

Fiscal year, ending June 30, 1986, the Department of Fish, Wildlife and Parks derived revenue from all sources $28,400,000. In 1976 the outfitting industry conducted a state study that showed the following results.

1. The industry was responsible for generating approximately 30 million new dollars into our economy.

2. That just under 70% of license sale revenue (currently close to 60%) was derived from non-resident license sale.

3. The non-resident harvested 15.4% of elk versus 84.6% for the resident. The non-resident harvested 17.6% of deer versus 82.4% for the resident.

Not a bad trade-off. Add this to revenue derived from the non-residents visiting friends or with a landowner, then add the multiplier and you soon realize the importance of our wildlife and recreation. Ask yourself how much would you pay for an elk tag if we eliminated the non-resident?

We also have game bird and fur farms, all licensed by the Department.

Game (including some bird and fur)	45
Bird only	52
Fur only	25
Combination bird and fur	8
Total	**130**

Revenue is derived from the sale of meat, antlers, hunting and fur. What value is game farming? Semi-domesticated deer, elk and birds generally brought in from other states, purchased by the game rancher involved in the raising and marketing of sheep, mule, whitetail and sitka deer and elk, (not to be confused with our wildlife). Yesterday I discussed an operation with the manager of a game farm that is in the planning stage and working on a land exchange with the Bureau of Land Management that will result in access to the public to a large block of land if successful. Operations are predicated on current elk raising costs (primarily for meat sales), over a 30 year period. Quarters of elk meat, elk sausage and jerky sell on today's market for $2.50 per pound average. The ranch would carry 3,500 cow elk at peak season and employ 50 people. Operation will return a profit on investment of 386 percent above the return now derived from this rancher's cow herd. A few trophy bull elk hunts would be sold for $7,000 each. Revenue would be generated to the County from taxes, purchase of equipment, operation costs and jobs.

I do have reliable information to the effect that some New Mexico and Arizona elk hunts are sold for as high as $10,000 for a guaranteed six point or higher bull. These hunts are booked for the next three years.

New Zealand raises approximately three million red deer; a total of 13 countries are raising red deer commercially in addition to cattle, sheep, etc. In New Zealand agriculture was in big trouble until it was bailed out by game farming. I have been informed that elk antlers are also currently being used in cancer research.

If we can assist in the development of other programs, or furnishing information, please contact Montana Landowners Association, Inc., Absarokee, Montana 59001.

Thank you

POSITIONS ON ACCESS
PAUL BERG

The State of Montana spans 93 million acres, of which 17 million are National Forests, 8 million Bureau of Land Management, 5 million State School lands, and 0.3 million acres controlled by the Montana Department of Fish, Wildlife and Parks, including administrative sites, wildlife management areas, fish hatcheries and spawning stations, fishing access sites, state parks, and recreation areas.

In the 6 eastside National Forests (Beaverhead, Custer, Deerlodge, Gallatin, Helena, Lewis and Clark), comprising 9 million acres, about 754 access routes leading to the forest boundaries are blocked from public use by locked gates or other barriers on private land denying public access to 3.7 million acres (41%) of these forest areas. An additional 3.2 million acres (36%) of these forests will likely be isolated from public use in a few years because of fee and lease hunting on adjacent private land, overcommercialization by outfitters, guides, dude ranches, and other economically oriented groups.

If we could buy these 754 access routes today, they would cost an estimated $37.7 million.

Sixty percent (4.8 million) of the 8 million acres of BLM land has no legal public access. We estimate that the 500 access routes to BLM lands needed to provide reasonable public access would cost $25 million.

Public access to the 5 million acres of State School lands for recreational purposes is denied by the State Land Board. This situation must be corrected.

The public demand for hunting, fishing, hiking, camping and other recreational pursuits on the public lands increased dramatically following WWII, and the public land management agencies failed to recognize and satisfy this need for more and better access.

Access and use of public lands is seldom a problem for livestock grazing, timber harvesting, oil and gas and mineral leasing, dude ranching, guides and outfitters, and other economic enterprises, because they make money, and the current administration and the public agencies tend to cater to these economic interests.

Hunters, fishermen, and other recreationists seek recreational and aesthetic values. However, they spend money. For example, based on MDFWP studies, the average daily expenditure by resident hunters in 1982 was about $62 for elk; $44 for deer. Nonresident hunters spent an average of $198 for elk; $114 for deer in 1982.

Resident and nonresident hunters and fishermen devoted over 5 million days and spent over $207 million in Montana in 1982 —much of it on public lands and in public waters. These expenditures generated over $800 million to the economy of Montana in 1982. More hunting, fishing, etc., could be enjoyed with more public access.

Sportsmen want reasonable public access through the private land to the forest boundary at about 5-mile intervals, and to selected parcels of the BLM and State School lands for hunting, fishing and other recreational activities. We do not want too much access. Some areas have too many roads and some of them should be closed during the hunting season and at other times as necessary to protect game animals from harassment and overhunting and habitat from abuse. Walk-in hunting areas should be established at suitable locations. Access sites should be selected on a case-by-case basis with cooperation from federal and state agency personnel, sportsmen, other recreation seekers, and affected landowners. Private property rights must be respected. Section 205 of the Federal Land Policy Management Act (eminent domain authorization) should

be implemented as a last resort to assure fulfillment of public access rights where adjacent private landowners attempt to exploit public lands and resources by blocking public access where public access is needed.

Road access to the boundaries of the public land is essential because most hunters drive to road ends and walk in to hunt and pack out downed game without benefit of horses. Guides and outfitters and others who hunt with horses prefer trails through the private property to the public land boundary because this puts good hunting areas further beyond the reach of walk-in hunters, giving horsemen a major hunting and profit making advantage on the public lands.

As more ranches are sold to out-of-state corporations and other affluent groups, and the economic and commercial interests become more dominant, more locked gates will appear on private and county roads leading to our public lands. People who now enjoy access to these public lands likely will be locked out as ownerships change. Therefore, people who do not now support public access to public lands should consider this accelerating trend and reconsider . . . they, and their children and friends may be locked out in the near future.

Montana has about 1,412 hunting outfitters and guides; over 4 times more than the 310 in Alaska; over 6 times more than the 216 in Idaho. There are 567 in the Bozeman area alone! Guides and outfitters and dude ranches derive their primary source of income from nonresidents. They do not want any competition from hunters who do not hire them.

We, the people, originally paid for a network of county roads to provide access to farms and ranches. Many of these roads lead to the public land boundaries. Over the years some landowners petitioned the county commissioners and the roads were closed to public use a short distance from the public land boundaries. We paid for these roads a second time by financing public agency personnel salaries and expenses for meetings and studies trying to reopen some of these roads to public use — with little success. We will have to pay a third time to get them reopened.

It is a policy of the public land management agencies to grant access to private landowners across public land when there is need. We believe that private landowners should recognize the public need and reciprocate when their land blocks public access to public land.

Some ranchers, guides and outfitters who benefit economically from the use of public lands by blocking public access claim that public access would destroy wildlife habitat and hunting on public lands, and that the public will trash the place. We reject that claim. The Forest Service, BLM and state must have permanent, legal, administrative and public access and management control of public lands and freedom to work in concert with the Montana Department of Fish, Wildlife and Parks, U.S. Fish and Wildlife Service, and other federal, state, and private agencies to satisfy the overall public interests respecting the multiple-use philosophy and sustained yield management principles. The public agencies are capable of maintaining a desirable balance of uses on public lands to perpetuate quality wildlife habitat and public hunting and other recreational pursuits consistent with established management policies, laws, and public input.

Public access is related directly to big game winter ranges. The Montana Department of Fish, Wildlife and Parks currently owns and leases 17 key big game winter ranges (Wildlife Management areas) comprising 227,000 acres. These areas (purchased with money collected since 1937 from a 11% tax on sporting arms and equipment and hunting license fees) winter about 10% of the estimated 100,000 elk in Montana. The remainder of the elk winter on a mixture of Forest Service, BLM, National Park Service, State School, Burlington Northern, Champion International, and other private lands. A few elk winter exclusively on privately owned ranches.

About 80% of the elk are harvested by hunters on public land, mostly National Forests.

If Montana Department of Fish, Wildlife and Parks does not get control of the 32 tracts of winter ranges comprising about 155,000 acres which are threatened with imminent destruction by

intensive agricultural practices, homesite developments, and other causes, the 11,000 elk and 13,000 deer that depend upon these winter ranges for winter food and survival will be lost from the populations within a few years. Current acquisition costs are estimated at $62 million. These acquisitions for public access and winter ranges could be made by extending the Land and Water Conservation Fund Act to the year 2000, and amending it to accomplish a funding schedule to enable completion of agency right-of-way and winter range acquisition by 1995. Grants to the U.S. Forest Service for $37.7 million, and to the BLM for $25 million for rights-of-way acquisition, and of $62 million to the Montana Department of Fish, Wildlife and Parks for winter range acquisition would be required over the time period stated above.

According to the November 15, 1984, National Recreation and Parks Association Newsletter, the Land and Water Conservation Fund contained $5 billion. On January 16, 1986, the LWCF contained $3.143 billion. No one knows what happened to the $1,857 billion. Was it sequestered by the administration for some purpose other than directed by the Land and Water Conservation Fund Act of 1965? Some of this money should be used for access and winter range acquisition.

Public access to our public lands is a basic public right, and the Federal and State agencies are responsible for providing it pursuant to the following laws:

> The Multiple Use Sustained Yield Act of 1960 directs the Forest Service to include outdoor recreation and fish and wildlife in its management programs.
>
> The National Forest Roads and Trails Act of 1960 directs the Forest Service to construct and maintain an adequate system of roads and trails within and near the forests for public recreational use.
>
> Section 6 of the National Forest Management Act of 1976 provides the means for identifying access needs and funding requirements.
>
> The Federal Land Policy and Management Act of 1976 (FLPMA) directs the Bureau of Land Management to manage its lands on a multiple use sustained yield basis.

The Forest Service and the BLM have public access programs, but they are inadequate because of insufficient funding and lack of support by the current administration.

Additional funding should be obtained from the 1908 Forest Service 25% Law, Bankhead-Jones Act, Taylor Grazing Act, Payment in Lieu of Taxes Law, Refuge Revenue Sharing Act, and the 1902 Reclamation Act through appropriate amendments.[1]

For example, the payments from all the federal lands to the seven Montana counties which contain Custer National Forest lands was $1,580,521 in FY84.

Under the Forest Service 25% Law, all of the National Forests in Montana paid $5.8 million in FY84 to all of the Montana counties containing National Forest lands.

The 1902 Reclamation Act established the Bureau of Reclamation to develop irrigation of the arid lands of the 17 western states. At present, 40% of the receipts under the Mineral Leasing Act and various amendments go to the Reclamation Fund, 50% to the states earmarked in Montana for state highway and state school funds, and 10% to the federal treasury.

In FY84 in Montana, the 40% of the Mineral Leasing Act revenues that went to the Reclamation Fund amounted to almost $15 million.

The Reclamation Fund was needed to stimulate settlement of the western states. However, today, there is little water available for new irrigation projects and some of the money could go to other public needs.

Sportsmen and other outdoor recreationists have tolerated this lockout, defacto management and control, and overcommercialization of *our* public lands by a few selfish, profit seeking private landowners and their lessees, and other exploitive groups long enough.

We, the people, value *our* public property just as much as private property owners value theirs. Public land does not serve the public needs when it is not accessible to the public.

There are about 200,000 sportsmen in Montana. We are not well organized. Thus, the powerful ranchers, outfitters and guides, timber, oil, gas, mineral, and other profit seeking groups dominate and wield their *power* in the federal and state legislatures to force the federal and state agencies to respond to their specific needs.

Sportsmen and other recreationists are concerned about equal rights, and we look to justice for leadership in solving our access and winter range problems.

The Honorable J. A. Turnage, Chief Justice of the Montana Supreme Court, said it best in his State of the Judiciary address to the 49th Legislature:

> ". . . Force must give way to reason and power to justice." (January 1985).

Therefore, we recommend that:

1. The Land and Water Conservation Fund Act of 1965 be extended to the year 2000 and amended to establish a funding schedule to enable federal and state agency acquisition or conservation easements of public access rights-of-way and big game winter ranges in Montana by 1995.

2. The Forest Service 25% Law, Bankhead-Jones Act, Taylor Grazing Act, Payment in Lieu of Taxes Law, Refuge Revenue Sharing Act, and the 1902 Reclamation Law be amended to earmark 10% of the funds for Federal and State agency acquisition or conservation easements of public access rights-of-way and big game winter ranges in Montana, all acquisitions and easements to be completed by 1995.

3. Section 205 (eminent domain authorization) of the Federal Land Policy Management Act of 1976 be invoked as a last resort to acquire public access rights-of-way and winter ranges in the public interest.

*Legislative Committees, Billings Rod and Gun Club, Southeastern Sportsman Association; Walleye Unlimited; Conservation Chairman, Yellowstone Basin Group Sierra Club, 3708 Harry Cooper Place, Billings, Montana 59106, phone (406) 656-2015. Representing 11 clubs and 9,300 Montana sportsmen.

[1]Brief summaries of the laws and types of payments made to the state and counties are contained in pages 2-5, and details of the laws on pages 16-28 of the report entitled "Fiscal Year 1984 Payments to Counties and States Under 7 Federal Land Laws for all Federal Lands in the 22 Counties Containing Lands or Minerals Administered by the Custer National Forest," by Dr. Wilson F. Clark, Custer National Forest, P.0. Box 22556 Billings, MT, 59103, phone (406) 657-6361. The other National Forests have similar programs.

ACCESS IN MONTANA — A POSITION
JOHN GIBSON

Access to public land in Montana and other states will become more and more important from an economic standpoint. Our efforts to attract tourists to our state often emphasize resorts and guest ranchers but in reality most people visit Montana because of its wealth of natural resources. The mountains, lakes, and streams that attract people from half away across the continent are largely public resources, as are the fish and game populations that add to their value.

Montana's commodity-oriented economy falters while the service-oriented economy of the costal states florishes. People have money in their regions. A recent study conducted by Clemson University predicts that within five years there will be a three-fold increase in families owning recreation vehicles. Another part of the study states that the age-group in our population that spends more on recreational activities than any other will double within the next ten years. That's the group between 35 and 55. They spend a healthy 25 percent more, not just a few percentage points.

Put these items together with what's going on in the private arena. In 1960 over 90 percent of the private land was open to public use. In 1980 less than 50 percent was open.

The public land and public resources in Montana can play a vital role in the state's economic future, but only if that 45 year old couple described in the study can find a place to park their new RV. We are going to have to ensure the public lands of this state are available to those whose tax dollars have helped support them. Multiple use includes recreation use . . . for everyone.

PROPERTY RIGHTS
CHARLES F. MOSES

THE CONSTITUTION — A DELICATE BALANCE

As an historical fact people who are far wiser than we determined the equal status between the rights of the people and the limited power of government. It was recognized by Thomas Payne, Thomas Jefferson and John Adams that any government would attempt to assume power unless restrained by the Bill of Rights. Accordingly, the rights of the people and the powers of the government were brought into balance. It was a social contact, between the government and the citizens.

At least that was the way it was in the beginning.

PROPERTY RIGHTS

The most fundamental cornerstone of our society and republic is recognition of the right to property of every citizen of the United States. From the time of Locke and Rousseau a democracy of the people, by the people and for the people was created with the concept of life, liberty and property. These principles were specifically set forth in the Constitution of the United States:

> AMENDMENT V
>
> ". . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The State of Montana, in its Declaration of Rights states:

> "**Inalienable rights**. All persons are born free and have certain inalienable rights. They include the right to a clean and heathful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities. Article II, Section 3."

Article II, Section 29, states:

> "**Eminent domain**. Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by court when the private property owner prevails. Article II, Section 29."

The right to property is an inalienable right and cannot be taken away.

LEGISLATIVE ACTION

It is clear that the Legislature cannot take away vested rights of property. In this respect it cannot amend, revise, modify or "water down" constitutional rights. This would not be consistent with our scheme of government where constitutional rights could be eliminated by Legislative action.

Section 1 of the Fourteenth Amendment to the United States Constitution reads as follows:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

In Montana this is clearly the rule.

> "Section 1 of the fourteenth amendment to the federal constitution, and sections 3 and 27[1] of article III of the constitution of Montana, imply, if in need, they do not express, a prohibition against the power of the legislature to enact a law whose effect would be the impairment of a vested right. (Hinds v. Wilcox, 22 M 4, 55 P 355.) State ex rel. Altop v. City of Billings et al., 79 M 25, 45, 255 P 11."

CONCLUSION

If we upset the delicate balance of our Constitution;

If we do not recognize that the right to own and possess property is a part of the fabric of our society and constitutionally protected; and

If the Legislature seeks to destroy vested property rights;

Then we have destroyed the delicate balance and the rights of the citizens in favor of authoritarian government. Inalienable rights should not suffer the stealthy encroachment of the law.

[1]See Article III above (same as Section 3 of Article III of 1889 Constitution) and Section 27, Article III which reads as follows:

> "No person shall be deprived of life, liberty, or property without due process of law."
>
> Now Article II, Section 17, New Constitution.)

OPEN FORUM

AUDIENCE QUESTIONS AND COMMENTS

Q. Jerry Sutherland for Ken Fraiser:

Have the sportsmen groups met with or worked with the landowner groups? Have there been any connection between those two groups?

R. Mr. Fraiser:

We've attempted to do that over a number of years. The greatest stride we have made was the meeting in April of this year. This was during the Landowner-Sportsman Relationship Conference at Fairmont. One of the major issues discussed was access problems and how to remedy those problems, if they even exist. I agree with Mons Teigen, we can't do it by ourselves. We need the support of the people we are representing and without that support we can't accomplish much. We will do anything we can to get these groups to cooperate. We won't get anywhere on this access issue until they do. By the way, a steering group was formed at the end of our conference in April to carry out the mandates that were issued at the conference.

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