

# MRA

State of the State's

# Rivers 2008

## MONTANA RIVER ACTION

*The clean flowing waters of Montana belong to the people and are held in trust by the State for the health, safety, and use of the people, guaranteed by our constitution.*

# Stream Access From Bridges

Landowners in Madison County built elaborate barbed wire fences that attach to public bridge abutments with the purpose of keeping fishermen, floaters and recreationists from accessing public streams. In 1995, following loud complaints from the public, Madison County Commissioners enacted an ordinance which forbade this activity. In 1996, Madison County Commissioners were sued by landowners who said the ordinance was a taking of private property without compensation, and in 1997, the Commissioners rescinded the ordinance. Then, in 2004, the Commissioners gave permits to landowners to attach fences to bridges and required sportsmen to pay for construction of gates or stiles to allow access, and pay for public education to teach recreationists about their responsibilities. These unfair requirements so angered fishermen that the Commissioners rescinded the permits. By June, 2004, Madison County Commissioners had been sued twice by landowners determined to deny the public access. County bridge right-of-ways have traditionally been used by fishermen as long as they stay within the high-water mark. The Department of Fish, Wildlife and Parks asked the Montana Attorney General for an opinion on the issue.

## Attorney General Ruling

In May, 2000, Attorney General Joe Mazurek ruled that County Commissioners have the power to compel landowners to remove barbed wire, orange paint and "No Trespass" signs, used to keep people from accessing streams along county bridges. The right of access is limited to the road or bridge right-of-way.



1994 – Gallatin River above Interstate bridge. Dike across river diverting down Baker Ditch.

Use of county road right-of-way to access streams and rivers is consistent with the reasonable incidental use and the public's right to travel on county roads.

A bridge and its abutments are a part of the public highway and are subject to the same public easement of passage as the highway to which they are attached. Therefore, recreationists can access streams and rivers by using the bridge, its right-of-way and its abutments.

A recreationist must stay with the road and bridge easement to access streams and rivers. Absent definition in the easement or deed to the con-

trary, the width of the bridge right-of-way easement is the same as the public highway to which it is attached.

Access to streams and rivers from county roads and bridges is subject to the exercise of the County Commission's police power. The Attorney General's ruling has the weight of law.

November 26, 2003, the fiddle-string tight barbed wire fences were still up in Madison County, illegally prohibiting river floaters and anglers to access streams as ordered by the Attorney General. Madison County Commissioners ignore the Attorney

General's ruling and allow landowners/developers to break the law for personal profit. County Commissioners are fearful of being sued for infringing on landowners' illegal activities.

In May, 2005, the public won another access issue when the Court ruled that public access to streams and county bridges was legal. Hopefully, this will cause the disgruntled landowners to put some slack in their tight barbed wire fences which are permanently nailed to bridge abutments and are tough on rubber rafts, arm and leg skin, to say nothing of snagged clothing.

## Senate Bill SB 78

# Public Access at Public Bridges

The state owns easements associated with county roads held in trust for the public. County right-of-way R/W at bridges have many public uses. Parking cars, piling snow, utility installation, sidewalks, stoplights and irrigation ditches. SB 78 allows a landowner to fence as long as a reasonable provision such as a gate or pass-through are provided to accommodate the public access. It is a reasonable resolution between competing interests. The width of country roads has historically been 60 feet unless otherwise stated in the R/W petition. This has been law since 1874 (Sec. 1061, 5th Div. Rev. Statute 1879). On October 13, 2000, the Attorney General's opinion was "the width of a bridge R/W easement is the same as the public highway to which it is attached."

SB 78 is consistent with the Stream Access Law passed in the 1985 legislature and establishes a peace-

ful and fair method to accommodate fencing to bridges for livestock control and to ensure use of the county road R/W for traditional access to rivers and streams. SB 78 was tried in the 2007 legislature.

Now comes PERC (Property Environment Research Center) intervening in support of locking out the public access at public bridges. They couch their arguments that access is an attack on private property. Private property adherents are historically the ones that are taking public lands and waters and converting them into private property. PERC's arguments are weak, poorly conceived and self serving. PERC believes a system of conservation based on economic self interest. Montana River Action believes this is lopsided. PERC in their feverish views on the sanctity of private property is against public access to public streams and favors fences. But when a fence is

used as an offensive weapon – not for the purpose of controlling cattle but for the purpose of harassing floaters – the common law has been ignored. PERC believes that the riparian landowner owns the bridge abutments. Their central theme is that public access to rivers undermines sound conservation. Their mantra is that private property owners, if left alone to themselves, will accomplish great feats of conservation. PERC realizes it is good business for them, as they depend on wealthy benefactors for funding their research center, to continually and loudly cry against the public trust and the public use of research we hold in common. Courts have upheld that any surface water capable of use for recreational purposes are available for those purposes by the public, irrespective of streambed ownership under the public trust doctrine and the Montana State Constitution.

## Stream Access Law

These court rulings opened the way for passage in the 1985 Legislature of House Bill 265, The Stream Access Law, credited to the hard work of the late Jerry Manley and Tom Bugni and Tony Schoonan, fishermen from Butte whose abiding belief in the public trust led to passage of this law. HB 265, passed in the 1985 Legislature (also introduced in the 1981 and 1983 Legislatures), says "The public may use rivers and streams for recreation up to the ordinary high water mark, without regard of the ownership of the land underlying the waters." It also gives the right to access streams within the road right of way, where bridges cross. The law permits recreationists to move freely within the ordinary high water mark. This is the line that water makes on the shore when it covers it for a sufficient time to cause different characteristics below the line, such as little soil or vegetation. The law gives access to many Montana streams and has opened a wealth of opportunities with little inconvenience to streamside landowners.

Stream access is an important foundation for the lifestyle and mindset of Montanans. There have been many challenges to dismantle public stream access laws and rules by ultra-right adherents and disgruntled anti-government landowners. Defense of the public trust and public rights did not come easy. There were some attacks by fringe groups that fought viciously every step.

## Lawsuits by Mountain States Legal Foundation (MSLF)

On July 7, 2000, the Colorado based MSLF, led by James Watt and Gail Norton – both ex-Secretaries of Interior under President Reagan – filed a lawsuit aimed at striking down our Stream Access Law of 1983. The MSLF has been soliciting rich, disgruntled landowners wishing to sue Montana in Federal Takings Court. Watt is trying to drum up a prolonged court case to bleed wealthy landowners of their money, by trying an extended grievance that will result in an expensive court case benefiting only MSLF. MSLF is representing three landowners on the Ruby and Stillwater Rivers and Odell Creek on the Madison River. Their claim is that the law deprives them of their privacy from floaters and denies them income from leasing their property to outfitters and private fishing clubs. MSLF carry the Wise Use property rights banners into prolonged court cases. On January 4, 2001, District Judge Charles Lovell dismissed the three suits in their entirety. The MSLF then appealed to the 9th Circuit Court and they dismissed the case. In 2003 the U.S. Supreme Court refused their appeal and let stand the 9th Circuit decision upholding our stream access laws.

MSLF was created by Coors Brewing Corp whose board of

directors are owners of extractive corporations of oil, gas, mining, timber, cattle and farm bureaus. A listing of MSLF contributors include Amoco, Chevron, Texaco, Exxon, Phillips Petroleum, El Pomar Foundation and Ford Motor Co.

Pat Davidson of Billings, a one time candidate for state governor and lobbyist for Bechtel, Burlington Northern Santa Fe and Haliburton, tried to overthrow our Stream Access Law in court. Jack Galt, a Martinsdale rancher filed a court suit against access to the Smith River, and Lowell Hildreth of Dillon closed the public out of the Beaverhead River. In 2005 the east branch of the Bitterroot River was closed by Rucker Huey Lewis and Broker Charles Schwap through double barbed wire fences to keep fishermen out of what used to be public waters, but now is theirs. The local Soil & Water Conservation District (fox watching the hen house) and DNRC sided with the landowners in court. MT Dept. of Fish, Wildlife & Parks sided with the fishermen.

James Cox Kennedy of Atlanta Cox Media Enterprises bought 3,200 acres in Madison County along the Ruby River where two public roads and bridges cross. He attached barbed wire fences fiddle string

tight to public bridge abutments to keep fishermen off the Ruby River. Kennedy placed much of his land in a conservation easement but he is the president of the land trust supposedly enforcing the easement. There is something very wrong when a wealthy man buys a ranch, gets an easement tax break and then chases the locals off the river. If land and water conservation and wildlife protection is seen as only benefiting the rich, it will reinforce the general perception that conservation is only the luxury of the elite.

Recently on March 10, 2007 the Property Environmental Research Center (PERC), a Bozeman right-wing think tank, grandstanding to generate more money from its government-hating, wealthy backers, attempted to discredit our stream access laws and rulings. PERC's staff, masked in college scholarship, weave the slick half-truths that favor privatization of public waters. They unfortunately are burdened with fundamentalist economic myths that cloud their thinking. They are trained to prove by words that black is white and white is black according to who pays them. They live by contributions from rich people who will not abide by the public trust and won't be happy until all public resources are privatized.

## Profit from Restricting Access

As landowners discover the high-dollar value of Montana's recreational opportunities, examples of efforts to carve out pieces for exclusive commercial exploitation are popping up regularly. From 1889 to 1985, it was common for river boaters and fishermen to encounter tight barbed wire fences stretched across many streams. The publicly stated reason was to control cattle, but private opinion was that disgruntled landowners wanted to keep floaters and fishermen from floating past privately held lands and houses. Landowners made dire predictions of wildfires and trespass damage by fishermen to fight the Stream Access Law. They also complained that recreationists damage property and fish populations and diminish their opportunity to profit from charging for fishing.

Should access be limited while the value of property along streams is skyrocketing? Is this a ploy by self-appointed landed gentry to restrict public use and to privatize fisheries? But fisheries are clearly best served when access to fish and wildlife is equal – you cannot expect the public to protect fish and fish habitat, if they are not allowed to enjoy them. There is a Montana tradition for equal access to fishing streams for all.

### Bitterroot River Access

## Mitchell Slough Access Shut Off by New Landowners

Known historically as the “East Branch” of Bitterroot River, the Mitchell Slough has for generations been a favorite fishery for local folks and sustains wild native westslope cutthroat, eastern brook, rainbow, brown trout and whitefish. Bull trout (Dolly Varden) were caught in the past. Wealthy, out-of-state landowners (Rocker Huey Lewis, Broker Charles Schwab and others) bought up the land along the slough and other landowners, who cater to paying fishing and private friends, erected double fences to keep out the floaters and waders saying that Mitchell Slough is a private ditch. The MT Department of Fish, Wildlife & Parks says that historically the slough channels are a natural stream and meander within the riparian area of the Bitterroot River, and was first identified as a channel in the 1800s.

In 2005, the Bitterroot River Protective Association filed a suit in District Judge Mizner's Court in Deerlodge, claiming Mitchell Slough is a historic, 11 miles long side channel of the Bitterroot River and has been used by fishermen and floaters for generations. The case centers on a 1990 incident where the Mitchell Slough was the scene of the arrest of two residents for trespassing to fish. Judge Ted Mizner sided with Lewis, Schwab et al. If Judge Mizner's opinion stands, then landowners could manipulate streams and get them declared “not natural” and steal them from the public. This challenges our 1985 Stream Access Law which says that even when a river or streams flows through private land, it is open to all if reached from public property, because the land between the normal high water line belongs to the public. The local Soil & Water Conservation District (fox watching the hen house) and the MT Department of Natural Resources & Conservation (DNRC) sided in court with the landowners. The question was: did the Soil & Water District have the authority to determine the East Branch was an irrigation ditch? MT Department of Fish, Wildlife & Parks entered the suit on the side of the public.

On January 9th, 2007, the Bitterroot River Protection Association asked the MT Supreme Court to overturn Judge Mizner's decision that blocked fishermen and stream walkers from access to the Mitchell Slough. If left unchallenged, his ruling would open the way to remove any stream or river channel in Montana from protection under the Natural Streambed and Land Preservation Act of 1975 (310 Law). As a result, on October 10, 2007, oral arguments were made in the MT Supreme Court. On March 10, 2007, PERC with office in Bozeman and certain connections with MSU has grandstanded in favor of Lewis and Schwab against our Stream Access Law. PERC is stroking wealthy landowners for funding by favoring privatization of public rivers.

## Navigable Rivers and Public Access

Since statehood in 1889, under the Federal Equal Footing Law, Montana has owned the beds of navigable rivers that have sustained commercial use. The Federal Tests for commercial use include float-ing logs, fur trade, mail routes, transportation of goods, float-fishing, outfitting and guiding, float-boat rentals, adventure floating and guiding and all other commercial uses.

The Federal Supreme Court said that states held ownership of navigable river beds and that all new states would enter the Union under “equal footing” and would own the lands beneath the navigable streams, lakes, islands and accumulations of land formed in the beds of navigable streams up to the average water flow line.

The following streams are considered navigable and their beds are owned by the State of Montana for the use, safety, health and enjoyment of the people:

Big Hole River	Lolo Creek
Big Horn River	Madison Creek
Bitterroot River	Marias River
Blackfoot River	Milk River
Boulder River of the Yellowstone River	Missouri River
West Boulder River of the Yellowstone River	Nine Mile Creek of the Clark Fork River
Bull River of the Clark Fork River	Rock Creek of the Clarks Fork of the Yellowstone River
Clark Fork of the Columbia River	Rock Creek of the Clark Fork River
Clearwater River of the Blackfoot River	Smith River
Dearborn River	Sheep Creek of the Smith River
Flathead River except within the boundaries of Flathead Indian Reservation	Dupuyer Creek
Flathead River Middle Fork	Stillwater River of the Flathead
Flathead River North Fork	Sun River
Flathead River South Fork	Swan River
Fortine Creek	Teton River
Gallatin River	Tobacco River
Graves Creek of the Tobacco River	Tongue River
Jefferson River	Whitefish River
Kootenai River	Yaak River
Little Missouri River	Yellowstone River
	Musselshell River
	Powder River



## Check out our web site!

Montana River Action now has an informative web site! In addition to the online version of this report, you will find other interesting and useful information about MRA and Montana's waters. MontanaRiverAction.org also offers many direct links to other important sites. For example, just follow the links to generate your own detailed maps that will focus on the rivers, lakes, or wells in any area of the state. And our site has convenient forms to use in sending your comments to MRA. Or use our site to join MRA!

Web site:

[www.MontanaRiverAction.org](http://www.MontanaRiverAction.org)

MRA

## Four Corners Area

# MRA Water Objections and Court Suits

2003 – 2008

A dried up river is a symbol of failure. There are more than 5,000 claims filed on water in the West Gallatin River, with 32.7 miles of the river classified by Montana State Department of Fish, Wildlife & Parks as a chronically dewatered stream. De-watering refers to a reduction in stream flow below the point where stream habitat is adequate for fish.

On January 12, 2008, Department of Natural Resources & Conservation (DNRC) rejected an application by Utility Solutions Company for a permit to increase pumping capacity of their wells to supply their subdivisions. At present their riverside wells provide more than 40 million gallons of water a year to more than 300 residential and commercial lots in the area. DNRC ruled that Utility Solutions failed to prove that other water users (MRA fishermen) would not be affected and the nearby Gallatin River would not be dewatered. Recently Utility Solutions has asked to supply water and sewage services for Black Bull Run, a 391-lot subdivision of the Leachman family Ranch, Flikkema Ranch and the Middle Creek Park Lands 276-lot subdivision. MRA has spent long hours and days pursuing objections and complaints in the following actions:

**A. Jan 10, 2008:** Objection filed with DNRC against the granting of a Beneficial Water Use Permit to Mr. Bostwick's Lazy J. Subdivision at Big Sky on the West Fork of the West Gallatin River because of negative effects on instream flows and thermal pollution impact on fisheries.

**B. June 19, 2007:** Objection filed with DNRC against Utility Solutions' application to appropriate ground water in a closed river basin because the river is already grossly over-appropriated.

**C. December 27, 2006:** Objection to DNRC for granting Utility Solutions appropriation of 900 gallons per min. up to 348.25 acre feet of water per year from groundwater along the Gallatin River.

**D. August 7, 2006:** Objection to DNRC against Utility Solutions' application for a permit to increase pumping of 6 wells year round, whereas applicant wants to make up for the loss through augmentation for 71 days from 2 clouded water rights when and if the water is available in May, June and July.

**E. August 6, 2006:** Objection filed to DNRC stating that Utility Solutions is not a municipality. but a subdivision.

**F. March 3, 2006:** Objection filed to DNRC because Utility Solutions is applying for water permits impacting the Gallatin River with no long range plan. Applications are being applied for in fits and starts and have excluded the major home owners in the Four Corners area.

**G. September 13, 2005:** Objection filed to DNRC against water well applications without adequate assurance for augmentation of water loss in the Gallatin River.

**H. June 26, 2005:** Objection filed to DNRC for Bozeman Hot Springs (BHS) proposed change of water right use for a fish pond to complement their subdivision. BHS has been accused by DEQ of discharging chlorinated water into a ditch which dewateres into the Gallatin River.

**I. August 11, 2003:** Water Use Complaint filed to DNRC for Zoot Co. pumping of water from their 6 shallow wells along the Gallatin River without a DNRC permit, while depleting the aquifer on the Gallatin River classified by MT Department of Fish, Wildlife & Parks as a chronically dewatered stream.

**J. August 7, 2003:** Complaint filed with Gallatin County Health Department regarding Zoot Company's dewatering of the Gallatin River through adjacent wells and causing thermal pollution.

# Murphy Water Rights

Established by the Montana State Legislature in 1967, Murphy Water Rights appropriated stream-flow amounts necessary for the preservation of fish and wildlife habitats, which have a priority of right over other uses until a local District Court determines that the waters are needed in a way more beneficial to the public. Named for the legislative author, Jim Murphy of Kalispell, Murphy Rights go back only to 1970 and only protect flows when senior water rights have been satisfied. They really have limited value.

Following are the 12 streams and their reaches that are included within Murphy's Rights:

**Big Spring Creek**, Fergus County, from its mouth to the state fish hatchery.

**Blackfoot River**, Missoula and Powell Counties, from its mouth to the mouth of its North Fork.

**Flathead River**, Flathead County, from its mouth to the Canadian border on the North Fork.

**Gallatin River** in Gallatin County from its mouth to the junction of the East Fork.

**West Gallatin River** in Gallatin County from the Beck and Border ditch intake to Yellowstone National Park boundary.

**Madison River** in Madison and Gallatin County from its mouth to Hebgen Dam.

**Missouri River** in Lewis and Clark, Broadwater and Cascade Counties from its junction with Smith River to Toston Dam.

**Rock Creek** in Granite and Missoula Counties from its mouth to the junction of the East and West Forks of Rock Creek.

**Smith River** in Cascade and Meagher Counties from the mouth of Hound Creek to the Fort Logan bridge.

**Yellowstone River** in Stillwater, Sweetgrass and Park Counties from the North-South Carbon Stillwater County lines to where it leaves Yellowstone National Park boundary.

**Middle Fork Flathead River** in Flathead County from its mouth to the mouth of Cox Creek.

**South Fork Flathead River** in Flathead and Powell Counties from its mouth at Hungry Horse Reservoir to its source at the junction of Danaher and Youngs Creeks.



## Volunteers Needed

MRA is looking for volunteers to watch Montana's rivers and report on dewatering, bulldozing, gravel removal and pollution of rivers. As a river watcher, you would monitor your favorite stream, river, lake or wetland for signs of degradation, mis-use, pollution or any harm occurring to it. We have been building a network of such river watchers to report on the health of our waters or to follow up on suspected violations of our water laws.

If you live near a water body or feel a special kinship to a stream or reach of river, consider being a watcher. While our rivers are constantly threatened by commercial exploitation, the challenges are not constant. By refining their public relations strategies, old hazards are repackaged by polluters and developers to make them seem more palatable. Officials can be co-opted with new ways of pandering to economic interests for support and money.

Call Joe Gutkoski at (406) 587-9181 to volunteer.

# A SALUTE TO BUD LILLY



**BUD LILLY**

Bud Lilly, pioneer sportsman and director of Montana River Action, is renowned as a river, stream and trout conservationist and widely known as trout's best friend. Bud started the "catch and release" philosophy in the Northern Rockies in order to preserve one of the region's most precious resources. Catch and release started over 30 years ago and thus began quiet revolution that changed fishing to a sport and spawned an industry. He has since become a passionate and persuasive spokesman for the wise use of cold water resources.

Whalen Frances "Bud" Lilly grew up in Manhattan, Montana, where as a youngster he fished the forks of the Upper Missouri River. He is a fishing pioneer descended on his mother's side from pioneer stock that lived in Nevada City, Montana, in 1864. His father, a transplanted Californian, was the local barber and taught his son at an early age how to fish using worms, lures, and sucker meat. Eventually, he taught Bud how to fly fish and to appreciate its subtleties. There was a rule that no fish would be thrown away and all had to be eaten. Bud's forays on his bicycle to find dinner for his friends became wide ranging and friends and neighbors around Manhattan and Three Forks soon tired of his abundant harvest.

Bud was a tall, skinny kid, who was an excellent baseball player and played semi-pro second base. Satchel Paige, the legendary pitcher in the black leagues brought his team to Anaconda, where Bud got a hit off him in a tournament. Bud was fast, but when he tried to steal a base off Paige, this was too much and quicker than lightning Satchel threw him out. Bud gained new respect for older players. Bud served in the Navy in WWII and graduated from MSU in 1948. He had a distinct talent for teaching and was a popular math and science teacher in Roundup, Deerlodge and Bozeman for 25 years.

Back in the "good old days", says Bud, we were stocking the rivers with hatchery trout for a put and take fishery policy. We were not aware of the value of wild trout and wild fisheries perpetuated by natural spawning. Following pressure on the legislature by Bud and his buddies, hatchery trout stocking was legislated out of the rivers in the 1970s. This was a time of environmental awakening in the nation. Montana made a decision to do its best to maintain clean cold waters in which trout thrive and naturally reproduce. Although the wild trout policy is the height of logical thinking and has support from the majority of Montanans, it is very difficult to bring it to full fruition. Surface streams are impacted by irrigation, stock watering, developers drilling high production wells next to rivers, subdividers drilling myriads of wells for homes, municipalities dumping treated sewage for mixing zones, streamside home builders re-channeling streams, sewage from homes scattered along the rivers, tapping of ground water and lowering it's levels.

Bud Lilly has invested years in Helena, Montana's state capitol, working to fend off threats to our rivers so that future generations have the opportunity to enjoy our incredible natural streams and wild fish. While pursuing his teaching career, Bud supplemented his income as a fishing guide and in 1952 opened his fly fishing shop in West Yellowstone. Through the next 30 summers, thousands of fishermen passed through the doors of Bud Lilly's shop en route to Yellowstone National Park. By the mid-1950s Bud sensed that the fishing pressure was impacting trout populations. Hatchery fish were being dumped into the rivers to accommodate fishermen's creels and this pressure was threatening wild trout. He made a brave suggestion: Western fishermen must put back the fish they catch to preserve the existence of wild trout for future generations. It was not greeted enthusiastically, but Bud persisted in his belief. Eventually, the radical thought of releasing fish caught on and as a result fly fishing has become an exalted sport more concerned with giving than taking away.

It was difficult to foresee the pressure on fish and streams in the recent 20 years, but Bud predicts that in order to accommodate the growing numbers of fishermen, there will eventually be a lottery to fish some of the West's blue-ribbon streams. Lilly maintains it is in our DNA to want to be in natural open spaces and we must be responsible for keeping our ecosystem intact.

Bud was the first president of Montana Trout Unlimited, first chairman of the International Fly Fishing Center, and a founder of the Montana Trout Foundation. In 1999, the American Museum of Fly Fishing honored Lilly with its prestigious Heritage Award in recognition of his lifetime achievement in the sport. The Heritage Award has only been given four times. Bud is the author and co-author of several books, including in 1972 Bud Lilly's Tackle Catalog and Handbook for Western Trout Fishing, which has since served as Montanans fly-fishing bible.

Bud raised his children to be fishermen. Son Mike earned his way through Law School as a fishing guide and is now a successful Bozeman attorney. Daughter Annette Lilly Ross, now a CPA, was the first licensed fishing guide in Montana and son Greg is a guide and outfitter who runs a fishing lodge at Twin Bridges, Montana. Bud has become a fly-fishing senior statesman, a position he used for the protection of rivers, increased fishing access and research into trout diseases. Bud refurbished his late mother's rooming house at Three Forks into a fishing hotel and anglers' retreat. He also has a book out, Bud Lilly's Guide to Fly-Fishing in the New West, co-authored with Paul Schullery and he helped with the Anglers All exhibit on display at the Museum of the Rockies in Bozeman.

On May 12th, 2001, Bud received an honorary doctorate degree from Montana State University during the one hundred and fifth commencement ceremonies. On October 27, 2007, Bud was honored by the Federation of Fly Fishers and its affiliated organization Headwaters Fly Fishers by enshrining him into the Fly Fishers Hall of Fame and The Legends of the Headwaters at the Annual Autumn fly-fishing Festival Legends Banquet.

One of Lilly's latest and most satisfying projects is as director of Warriors and Quiet Waters Foundation, where seriously wounded and disabled war veterans are helped to experience the healing qualities of flowing waters with fishing and fly casting therapy. The sport of fly fishing is closely linked to Montana and Bud Lilly's life has been closely linked to Montana and fly fishing.



# MRA

**MONTANA RIVER ACTION**

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**Montana River Action** is a nonprofit river advocacy, conservation organization formed to protect Montana's streams from misuse, pollution and overuse.

**MRA** is governed by a board of directors. Directors, as well as members, are active water conservationists and river users.

**MRA** is committed to fair and equitable sharing of water resources so that adequate flows of clean water will sustain wildlife, recreation and local economies.

**MRA** works cooperatively with public, private and other non-profit organizations to develop and support watershed interest groups that will strive to find long-term solutions to problems.

**MRA** supports programs that benefit fish, wildlife, recreation and economic needs of local areas.

**MRA** is a member of the NW Energy Coalition with offices in Seattle and Portland. The coalition's mission is promoting a clean and affordable energy future for the Northwest.

**MRA** is a partner of River Network with offices in Portland, Washington DC and Helena. River Network is a national, non-profit, non-membership organization whose mission is to build effective local organizations for river protection throughout the United States.

**MRA** is a member of the *Clean Water Network* with offices in Washington, D.C.

## MRA

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# Public Trust Acquisition in River Corridors

A stream is more than flowing water. It includes headwater drainage basins, tributaries, wetlands, the floodplains with their gallery cottonwood bottoms, all the way down to its confluence with larger waters. Riparian areas are a shelter and food source for fish and wildlife. They act as a filter against water pollution, they store flood waters and release water for late summer temperature buffering.

Taking advantage of sudden opportunities in acquiring riverine lands into public ownership sometimes requires fast action. A major land holding that is critical to fish and wildlife may suddenly come on the market and require immediate real estate action on behalf of the river and the public for permanent protection, not short-term stewardship. Conservation land acquisition is a partnership of private conservation groups and government. The key to success is involving local folks in the appraisal so that the public knows that a reasonable price is being paid for the land. Tax benefits to the seller may accrue if the land is purchased by the public for below appraised value.

Land trust organizations can use the "conservation buyer" strategy to acquire riverine lands. The conservation buyer then donates a conservation easement that limits development.

Electric utilities, in order to justify their dam relicensing, can be required to buy and conserve river lands. Carbon sequestration can be used to limit

effects of CO2 emissions to counter global warming treaty limitations.

Industries and utilities can be required to buy

forest and riverine land for conservation in order to earn "carbon credits" to mitigate their CO2 emissions.

## Conservation Easements

Local and regional land trusts and government entities hold title to easements that they own and manage and must show ability to uphold their permanent commitments to the legal easements. The number of land uses that are available to a landowner are restricted, usually forever, thus reducing property taxes. Once negotiated, the conservation easement is recorded along with the property deed. The landowner retains property ownership subject to the terms of the conservation easement.

Conservation easements reduce property taxes.

To protect the stream the conservation easement may prohibit the cultivation of eroding farmland thereby reducing sediment in the stream. Or, an unfarmed buffer zone along the stream with erosion reducing plantings may be required.

Monitoring the easement over time is costly and enforcement of the easement may be difficult. maintenance fund endowment from the seller may be necessary to cover for easement violations and to help protect the conservation easement program.

Inspection of the easement, frequency of inspection and method must be established. An "inspection notice letter" should be written to alert the landowner, giving at least 2 weeks advance notice and encouraging the landowner to participate. An inspection form, checklist and map should reflect the organization's standard easement provisions. Assistance from those on the property should be elicited and findings of the inspection accurately recorded. Completed inspection forms should be kept on file for future reference and as updates to the easement's original documents. Clear and serious violations must be acted on immediately.

After acquisitions of these river corridor lands following projects would be undertaken:

- Pulling out dams
- Restoring flood plains
- Fencing livestock out of streams
- Creating greenways
- Creating wildlife refuges

## Upper Missouri River Breaks National Monument RMP and Final EIS

Montana River Action made following recommendations limited to flood plain, riparian areas and riverine habitats.

Livestock grazing must not be separated from the management of the Monument EIS and left to the Watershed Plans, EA's. Grazing impacts virtually every acre and implicated as a major disruption to the Monument's vegetative community. Grazing has a direct relationship with wildlife, fish, recreation and hunting. Therefore grazing as the dominant use is receiving a lower level of consideration in the Watershed Plans EA.

Cottonwood tree gallery habitats must be protected from cattle grazing to give cottonwood an opportunity to regenerate.

Grass stubble height is a valuable measure of impact from livestock. Stubble height is an indicator to range managers, hydrologists and riparian scientists of the health of riparian areas in preventing soil erosion, river sediment trapping, vegetative diversity, bank stability, wildlife habitat and flood plain protection. Please use 4 inch stubble height as a proper measure for western wheatgrass, prairie cord grass, rushes and sedges in riparian area grasses. Four inches of stubble height can decrease flood velocities causing the river to drop its sediment load more readily, resulting in

flood plain riparian expansion, flood plain stability and wild bird nest predation.

A cottonwood gallery forest should consist of an overstory and a dense understory of *Cornus* (dogwood), *Amelanchier alnifolia*, *prunus virginiana*, *salix* (willow), *ribes* (gooseberry). What we have now is an understory of *rose* (rose) and *symphoricarpos* (ninebark) indicative of a downward trend degraded to herbaceous ground cover as livestock grazing damages the more palatable wildlife forage with the ultimate disappearance of the cottonwood galleries. Clearly the riparian vegetative communities are in a crisis situation.

Upstream dams – four at Great Falls, Holter, Hauser, Canyon Ferry, Toston, Ennis and Hebgen, Ruby, Clark Canyon and Lima Dams – do not have the impact on riparian vegetation as does livestock grazing. It is fine for the BLM to secure timed releases of water to simulate spring flooding, but without control of grazing in riparian areas it will make no difference. Plans must be in place, shared with livestock permittees, to enhance cottonwood sprouting following a natural flood through shutting off grazing in discrete areas to protect the sprouts.

The Upper Missouri River is losing its cottonwood, box elder, green ash and willow as a result of grazing. Bird

populations must be enhanced and the potential natural vegetation communities for birds must be protected from grazing in riparian areas. Avian habitat must be maximized with an empha-

sis on robust tree and shrub regeneration. Cattle grazing in the riparian areas is not a right but a privilege and the objects of the Monument must be protected.



# BIG SKY

## BIG SKY LAND

The mountains and forests around majestic Lone Mountain and the development on the West Fork of the Gallatin River were originally owned by the American public under the care and management of the U.S. General Land Office as a result of President Jefferson negotiating the Louisiana Purchase. In the 1860s, following the Civil War conflict, congress passed a law and the federal government began to grant land to railroad companies for building and maintaining railroads from east to west. Northern Pacific Railroad was one of the first to receive this largess. In the beginning of this give-away, every other section (640 acres) 10 miles north and south of the main line was given away. Then certain laws were passed in the post Civil War congress extending the distance 60 miles north and south of the main line, Big Sky in the Madison Range included.

A certain amount of lying, land grabbing, stealing and murder went on, taking land when there was an opportunity. The federal government finally put a stop to it and in the early 1900s, the U.S. Forest Service took the railroad companies to court and returned some of the land fraudulently acquired by the rail road companies back to public ownership. Red Stewart, a historic figure in lands work in the U.S. Forest Service with an abiding belief in the public trust, worked through the courts in the 1920s and 30s to return these stolen lands back to the public trust.

Following WWII and the building of President Eisenhower's Interstate Highway System, the large transcontinental truck companies took over the Interstate Highways and due to cheap diesel fuel they took cargo transportation away from the railroads. The railroad companies began to dismantle the nation's Western railroad system. The Northern Pacific Railroad Company began to sell its lands cheap until they woke up to the fact that lodgepole pine, spruce and Douglas fir were valuable as boards and studs.

In the early 1950s, the environmentalists began to sue the railroad corporations to have them return their lands to the public because they failed to maintain a good railroad system in the West. The Northern Pacific Railroad immediately formed a spin-off land company, Plum Creek Timber Co., and Plum Creek fell heir to 1,200,000 acres, worth \$70 million, in Washington, Oregon, Idaho and Montana. This was a strategy to avoid having to return this immense amount of land to the public and to gain a tax dodge. Soon the logged off lands became more valuable for subdivision speculators than for logging, grazing and mining. Plum Creek Timber Co. morphed into the largest real estate company in Montana and the nation. Overnight, foresters became real estate agents. Environmentalists could not wrest the railroad lands back into public ownership due to the tangled web of interconnected corporations. Thus the land granted railroads for building and maintaining national transportation began to be sold off to land speculators.

## BIG SKY RESORT SEWAGE

The Montana Department of Environmental Quality (DEQ) issued a surface water pollution discharge permit to dump treated sewage waste water into the West Gallatin River, using it as a mixing zone. This caused a huge outcry of protest from environmental organizations, including Montana River Action. Big Sky then voted to allow land owned by the Yellowstone Club Resort and Lone Moose Meadows Condominiums into the Big Sky Water and Sewer District, so it would not be necessary to use their discharge permit. The agreement allows Yellowstone Club to purchase drinking water from the Water and Sewage District and in exchange the District is entitled to pumping treated waste water into lined winter storage ponds at Yellowstone Club and spray-irrigate it later on their golf course.

MRA requested DEQ to withdraw their permit to use the West Gallatin River as a mixing zone. DEQ answered that they do not have the authority to do it. MRA then asked the Big Sky Water and Sewage District to relinquish their dumping permit back to DEQ. They refused and said they may have to use the permit some day. The Gallatin Valley communities hope that Big Sky's sewage system will never fail which would pollute the river downstream. The West Gallatin River is suffering from depleted flows due to water use at Big Sky. With decreased flow, the river is less capable to act as a mixing zone for treated sewage. The cumulative impacts could force the river toward a tipping point where our blue ribbon fishery will disappear through chemical and thermal pollution.



## BIG SKY RESORT

In 1968, Chet and Tippi Huntley (Huntley Brinkley News), following Chet's retirement, were looking around Montana for something to do. They were vacationing at Jim and Patty Goodrich's 320 Ranch, when Jim showed Chet the checkerboard national forest land around "Magnificent Lone Mountain" on the West Fork of the Gallatin River. Chet thought the area had resort potential and convinced Chrysler Motor Co. to invest in the enterprise. In the 1960s the common belief was that corporations should diversify. Chrysler formed a realty company and soon bought out the Don Corcoran Pulp company's 6,834 acres of checkerboard land in the West Fork.

In February, 1970, Chet Huntley and Governor Forest Anderson announced a ski, golf and subdivision resort development around Lone Mountain. Frank Murry, Montana Secretary of State gave Chet the name "Big Sky" and predicted wealth beyond measure. Chet was chairman of the company with 1% ownership and Chrysler Realty was majority shareholder with 55% shares. Other investors were Montana Power (which later invested all of their assets in bankrupted Touch America), Northern Pacific Railroad, Conoco, General Electric Pension Fund, Meridian Investment and North West Airlines, and Governor Judge was given a condo for his cooperation. The Gallatin National Forest was pressured to trade off their lands in the summer and winter village area. Big Sky got develop-able land and the public got rock and ice.

In May of 1970 construction began on Meadow Village and the golf course. The ski area opened in December of 1973. At that time, skiing was returning about 2% profit on its investment, therefore high-priced real estate sales would make the profits. Then the nation went into an economic depression and real estate sales at Big Sky were nonexistent. Chet died on March, 1974, completely disillusioned and depressed. Chrysler Motor Corp. and Chrysler Realty Co. went bankrupt and sold Big Sky to Everett Kircher of Boyne Mountain Michigan for 30 cents on the dollar. Eventually the depression ended and selling land for real estate development became profitable. In 1980 Reagan became president and wealthy people became wealthier, which resulted in a Western real estate boom which continues to today.

In July 2002, Big Sky Resort faced federal fines of up to \$75,000 for destruction of a wetlands and pollution of tributaries of the West Gallatin River. Under the Clean Water Act, these were very serious violations. U.S. Army Corps of Engineers said the Big Sky Resort filled a wetland near Huntley Lodge and failed to maintain the stream measurement devices and dikes they built in two separate streams causing the streams to carve into banks, wash sediment downstream and damage fish habitat. The resort filled in an entire wetland while building Moose Ridge Road and cut off a small stream that used to flow through the area. The resort also dumped plowed snow and salt from its parking lot into a wetland inhibiting the growth of vegetation.

## BLIXSETH YELLOWSTONE CLUB

In 1992, Tim Blixseth and Mel and Norm McDougal, foresters from Oregon, purchased 165,000 acres of Plum Creek Timber Co. lands for \$25 million. The land was scattered in a checkerboard pattern (railroad grant lands) through the Gallatin National Forest. Blixseth and the McDougals named their company Big Sky Lumber (BSL). BSL quickly began to clearcut their land and hauled the logs to the Belgrade saw mill. BSL then sold some of its land to the Forest Service and in 1998 consolidated land by trading with the Forest Service. BSL then developed a 13,400-acre gated community, the Yellowstone Club under the name Blixseth Group. Members of the Club must be worth at least \$3 million, pay a membership fee of \$250,000 and annual dues of \$16,000. Only members, their guests and employees pass the gate.

Violations of natural resource laws began in 1998 when the Yellowstone Club obtained only nine permits for work that was much larger in scope than was permitted. Seven permits were suspended. In 2002, the Club was accused of 60 violations of the federal Clean Water Act when they dumped dredge and fill material into 2 miles of streams and on 10 acres of wetlands. The Club was also fined \$86,000 for 400 violations of stream pollution, killing of trout, diversion and obliteration of streams, building earth dams across streams, breaking down stream banks and operating heavy earth moving equipment in streambeds, draining and destroying streambeds and pumping water from construction of a golf course, roads, bridges, culverts, ski lifts and ski runs without a permit. State and federal regulators accused the Club of ignoring state stop orders, violation of state and federal water quality laws, state sanitation laws and building more condominiums than permitted.

In 2003, Yellowstone Club was fined \$231,000 for failing to comply with DEQ permit requirements for construction activities. In August 2004, the Club was fined \$1,800,000 by the Environmental Protection Agency for 60 unpermitted construction activities. In 1996, the EPA had met with Blixseth to educate him on permit requirements. He knew the requirements but ignored them. Violations consisted of dumping fill or dredged mud into federally protected wetlands and streams, causing serious erosions with 5 ft. gullies. In November 2005, the EPA announced that Lone Moose Meadows, also owned by the Blixseth Group, Inc. and Jim Dolan, will pay \$165,000 penalty and perform restoration work after destroying wetlands while building this ski-in/ski-out village. Dredged fill mud was discharged onto wetlands near the West Fork of the Gallatin River during construction of two roads, bridges and other structures associated with residential development; culverts and a sewer line were installed in wetlands and 2 bridges built across the West Fork, also without permits. Lone Moose is a condominium and townhouse development between Big Sky's Mountain Village and Meadow Village.

MRA received a letter from an anonymous former employee of Yellowstone Club, describing how staff and/or management's response to his complaints regarding destructive environmental practices was "if you don't like it, leave"



or "don't worry about the EPA, what they can't see won't hurt them." Instructions for EPA personnel arriving at the gate were: "detain them at the gatehouse, call the attorneys and call senior management. EPA doesn't get on Club property unless escorted and we can hide whatever we want." Then he continues to describe how at the shop area vehicles were washed and serviced in the open, oils, grease and fluids drained into the ground and runoff went directly into Muddy Creek, a tributary of the West Fork. Soils saturated with oil, auto fluids and contaminants were scraped off and placed on the hillside next to the shop as fill, slowly draining into Muddy Creek. When cement batch plant and trucks were flushed and drained the water seeped into Muddy Creek. Below the shop and batch plant was a trash pile burning year-round construction material, food waste, oils, rubber tires, wires and the majority of waste produced by the Club. When the nearby dumpster was full, the trash was taken out and burned. Nearby is an automobile and equipment graveyard leaking oil and fluids into the ground next to the water storage pond.

On Pioneer Mountain the septic system serving the cabins and Rainbow Bar and Grill leached into an open field. At the gatehouse used by 12 to 15 employees, the septic system ruptured after filling and freezing and leaked to the surface in the open area between the gatehouse and the parking lot. On Andesite Mountain housing area contractors dumped oil and fluids and burned construction waste. Erosion from golf course construction continuously deposited mud into creeks. Employees were working 10 hours a day just to slow down mud flow and the entire construction area was sloughing into the river. Snowmobile and ATV trespass into the Wilderness is common. A Club member rented a helicopter to scout out elk in the Wilderness, followed up on horseback wounding an elk and retrieved elk and gear with the helicopter!!!

In 2003, Blixseth filed a lawsuit against the Forest Service over who owns the top of Lone Mountain Peak. He claimed the land belonged to him as part of the Big Sky Lumber land exchanges of 1999. He said the peak could support another lift and was worth a fortune. U.S. District Judge Richard F. Cebull dismissed the lawsuit ruling Moonlight Basin has existing domain to the peak because owner patent was issued to Moonlight before BSL land exchanges were authorized by congress. The boundaries of two national forests, as well as the Lee Metcalf Wilderness all converge near Lone Mountain's 11,166 ft. summit.

At present, all is not necessarily happy and serene. For instance, Gary LeMond, the Tour de France champion and other investors in the Yellowstone Club sued Blixseth accusing him of trying to force them to leave the Club and sell their shares for a fraction of their real value. The case has been settled pm 2-20-08 with the Judge awarding LeMond and his friends, who own 4% of the Club \$20 million for their troubles. On January 4th, 2008, the Yellowstone Club announced it was selling its land and assets. The asking price is \$500 million and Samuel Byrne of Boston, a long time member of the Yellowstone Club, seems to be the front runner to become the new owner.

## Pollution Dilution Not The Solution

Pollution mixing zones are bodies of water, usually streams, where polluters can legally request from DEQ a permit to dump toxic bio-accumulative chemicals at high concentrations based on a worthless rule that "dilution is the solution to pollution." Mixing zone rules were adopted in 1995 (ARM Administrative Rule 17.30.501 Sec. 5). Length of mixing zone is usually 10 stream widths. Width of stream is based on low flow for 7 days in the past 10 years. Length of mixing zones are to be as small as practicable. The permits are re-issued every 5 years.

The Big Sky Water & Sewer District holds a

permit for a mixing zone in the main Gallatin River, but chooses not to use it at this time. MRA has asked DEQ to pull this permit and DEQ answered that they do not have the authority to do that. We then asked Big Sky W. & S. District to relinquish their mixing permit (which they do not need) but they refused.

Chemicals dumped into stream mixing zones can include mercury, PCBs, chlordane, BCC, dioxin and mirex as defined under Section r07 of the Clean Water Act. Toxic chemicals can interfere with human reproduction and development, immune response and neurological function. Toxic substances contaminating any river,

stream or lake persist in the stream bottom and accumulate in the substrate of rocks, rubble, gravel and sands and enter the human food chain. The use of mixing zones, while technically legal, circumvents the enforcement of water quality standards. This is not a rational act, let alone a justifiable public policy. Diluting toxic wastes is an inadequate substitute for treatment and removal of pollutants. These mixing zones have become common in Montana. Regulations must be adopted that prohibit authorizations for diluting toxic substances in Montana's rivers and streams. It is to this end that MRA will be working in the 2009 legislative session.





# REFORM 1872 MINING LAW



## GENERAL

There is a national need for Congress to reform the antiquated Federal Mining Law of 1872. For over 124 years mining companies have removed billions of dollars worth of gold, silver and other minerals from our public lands and forests. Many of these companies are foreign owned, yet none have paid any royalties back to the public treasury. Hardrock and placer mining abuses have been permitted on public land for much too long.

Now is the time to stop this free lunch at public expense. The General Mining Law of 1872 was passed during President Grant's term. The cost to the public has been enormous in terms of rivers and streams polluted, mountain sides permanently scarred, hazardous and toxic wastes endangering the public health and safety. The 1872 mining law gives the industry license to loot and pollute.

Claims of mass unemployment due to mining reform are a fabrication from an industry anxious to defend its subsidized and privileged status. The Congressional Budget Office has estimated that reform induced mining cutbacks will put 1,400 people out of work temporarily but the proposed abandoned mine reclamation program will provide jobs for 2,600, a net gain of 1,200 jobs. Reclamation and restoration will create thousands of jobs in rural western communities.

## PATENTING

Since 1872, more than 3.2 million acres of public land has been patented into fee title private ownership by mining companies, for \$2.50 an acre for placer hydraulic claims within stream riparian areas. It is \$5.00 an acre for hard rock claims. Mining companies, very cheaply, claimed these lands into private ownership. Patenting public land into private ownership should be eliminated and all pending patent applications must be made public information. A mineral leasing system must replace the mining and patenting system. For example, Canada leases mining claims for an annual fee and the land does not leave public ownership. The system does not dampen the vigorous mining industry in Canada. That way, the public retains ownership of the land and the claimant secures the opportunity to develop the mine.

Mining is a boom and bust industry. When lands are mined out, the public is burdened by private property within public land boundaries. Taxpayers have been burdened by buying back old patented claims that are needed for public purposes.

## ROYALTIES

Mining does not pay a royalty on public owned minerals. They should be required to pay a fair share of their profits back to the public trust. An 8 percent gross royalty on locatable minerals should be assessed with 50 percent of the proceeds earmarked for the abandoned mine lands reclamation fund. Mining companies get an additional free tax ride in the depletion allowance since mining depletes their ore body. Oil and gas leases on federal land now pay a 12 ½ percent royalty on their net proceeds. Coal leases pay an 8 to 12 ½ percent royalty. Mining on private land may pay up to an 18 percent royalty. If 50 percent of royalties and leasing fees collected would go into reclamation, then taxpayer bailout for reclamation would end.

## LAND MANAGERS DISCRETION

Present time federal land managers cannot deny a mining company the right to mine. If the 1872 Mining Law is reformed with a law that allows the land manager to consider environmental impacts and to determine if an area is suitable or unsuitable for mining, then public land managers would be allowed to determine if an area is too sensitive to certain types of mining. A system should be adopted where the land managing agency can deny a proposed mining operation if its environmental costs outweigh its benefits. The land manager must be allowed to conduct a land planning process to review the suitability of lands for mining.

## RECLAMATION AND BONDING

Montana has 150,000 acres of un-reclaimed mining lands. Eroding waste dumps and leaking tailings ponds are poisoning surface and ground water. Mining produces more than 50 billion tons of solid waste nationwide each year. More than 10,000 miles of streams are degraded by acid mine drainage, heavy metal contamination and mine chemical pollution. It is common knowledge that mining practices have been so destructive that the states and federal government have had to finance rehabilitation programs to save the nation's assets. The cost has fallen on the taxpayer.

The Summitville pit gold mine in Colorado was opened by Canadians in 1986, was subsequently patented, then abandoned in 1992 in bankruptcy. Taxpayers are left with \$60 million in cleanup costs and Summitville is now on the Superfund program. There are currently 52 mining related sites on the Superfund National

Priority list. An abandoned mine reclamation fund should be created to restore land damaged by hardrock mining and paid for from mineral royalties. Cyanide solution is used to leach gold from 15-foot lifts of low-grade ore. Acid mine drainage occurs when high sulfide ore bodies react with oxygen and form sulfuric and hydrochloric acid. Strong measures to protect surface and groundwater must be put in place. True reclamation of some mined lands may not be possible.

Federal reclamation standards for all surface disturbances must be established. States should then be given the responsibility to enforce reclamation law and to exceed minimums if necessary. Re-vegetation, erosion control, fish and wildlife habitat protection should be mandated following the end of mining operations. Best available technology should be required to prevent acid or toxic drainage in waterways. Full reclamation should be structured into the ongoing mine operation costs. Bonds should guarantee the taxpayer would not have to bear the cleanup costs and long-term maintenance and monitoring for waste rock dumps, spent heap leach pads and tailings dams.

## RECREATION, CASUAL AND SMALL MINING EXEMPTION

Eliminate the 5 acre small mine exemption. All mining operations shall be treated the same whether large or small. Eliminate the term "casual use" from regulations. There is no such thing as casual or recreation mining. All mining will increase in scope and disturbance if discoveries are made. Require advance approval of all "Plans of Operations", whether less or larger than 5 acres in size. All mining exploration activity must meet with the land manager's approval and be covered under the permit system, however small it may initially appear. One thousand small miners each digging up their reach of gold bearing stream is a public land manager's nightmare.

## VALID MINING CLAIMS

Full environmental costs must be considered in determining whether a mining claim is valid, including natural resource damage, long and short-term environmental costs and the loss of public use of mined lands. Validity must be based on more than just the marketable value of the mineral.

Allow a citizens challenge of all claims on public lands.

A temporary cessation of all mining claims should be in place until Congress makes a comprehensive reform of the 1872 Mining Law.

There is a flood of new mining claims now being staked on federal land to try to get under the restrictions that may come with mining law reform.

Require a surface disturbance fee of \$50 per acre.

Do away with the yearly \$100 destructive "prove up" work now required on not patented claims.

The annual charge to retain a valid mining claim should be \$100 an acre. This will eliminate the trespasser using the loose 1872 Mining Law for a recreation residence.

## MINING PLANS

Approval of operation plans should be required before active mining is allowed. Complete plans will eliminate the numerous expansion permits that are epidemic in the industry.

## PENALTIES

The only recourse for federal land managers to deal with mining violations is to file court suits against the violator. This is an expensive, time consuming, laborious way to deal with immediate violators and polluters. Efficient action is necessary to stop land degradation. Land managers must be allowed to give administrative penalties for violations and mine plan non-compliance.

## SUMMARY

The antiquated Federal Mining Law of 1873 is a rip-off of public land and resources. A committed minority of miners can fend off the casual majority of citizens. We can continue to turn a blind eye to the abuses occurring daily, or we can stop the abusive mining practices to which the industry has become addicted.

Reforming mining laws will prevent the giving away of public resources and allow citizens to more clearly review and influence what mining companies do on public lands. The government should have broad authority to consider environmental costs of metals mining on public land and to protect the safety and health of the public from damage to land and water. Sooner or later Congress will act to reform this archaic 1872 law and hopefully it will be sooner. The new 2007 Congress is discussing oversight of anti-environment initiatives by the present Administration and strengthening laws ignored by them. Representative Nick Rahall (D-WV) may be the new chairman of the House Resources Committee. The congressman has a history of trying to end giveaways under the 1872 mining law.

## Polluted Rivers and Streams our Legacy

## 1872 LAW REVISION DEBATED IN U.S. SENATE

On November 1, 2007, the U.S. House of Representatives passed and sent over to the Senate HR 2264, the Hard Rock Mining and Reclamation Act. The bill ends the give-away of public minerals to mining corporations by the following measures:

It levies a fair royalty for gold, silver, copper, uranium and other precious metals of 4 percent of gross revenue on existing mines and a 8 percent royalty of gross revenue on all new mines.

It provides for the denial of mining permits for ill-conceived mines.

It gives impacted or nearby communities a voice in the decision making.

It focuses more scrutiny on the process of mine claiming and development.

It forces the U.S. Forest Service, the Bureau of Land Management and the U.S. Fish & Wildlife Service to consider impacts on the land, water and air quality in advance of mining and to deny claims based on environmental concerns, even when the land lacks protection, requiring mine operators to submit reclamation plans before obtaining a permit to mine on federal land.

It includes guidelines for reclamation. Mines must be reclaimed, pits backfilled, high-walls reduced and graded to slopes that will allow growth

of healing ground cover. The entire sites must be regraded and the many acres of exposed toxic waste capped with 4 feet of impermeable clay with a non-acid generating material and topsoil so that groundwater can no longer be polluted.

There are 500,000 abandoned hard rock mines around the West that need reclamation at a cost of \$32 billion. Mine reclamation can be an important source of jobs in Montana (e.g. Milltown Dam), but DNRC has a responsibility to collect sufficient funds in bonding to cover reclamation costs when mines are abandoned to ensure that cleanup costs are not added to the taxpayers' burden.

Several classifications of land would be permanently barred from mining claims, including Wilderness Study Areas, Wild & Scenic Rivers, Areas of Critical Environmental Concern (ACEC), sites sacred to Native Americans.

It creates a fund to clean up abandoned mines.

It puts in place new safeguards for land and water.

The law will generate \$60 million per year but what we really need is \$100 million a year to help deal with the environmental consequences of mining.

When the gold rushers invaded South Dakota and

Montana they only used picks and shovels. The army sent Col. George Armstrong Custer to protect them from the Sioux Indians but also to protect the miners from killing each other in competition for good gold sites and in claim jumping squabbles. Mining in the American West is as old as those dusty codgers looking to stake a lucrative claim and strike it rich. It is older than that if you count the early Spanish conquistadors.

Mining activities have polluted 40 percent of headwaters of Western watersheds. The National Mining Association has fought this bill for years. The royalty provisions have engendered the strongest opposition. The bill needs Senate approval where it faces strong opposition and President Bush has threatened a veto if it passes and Senate Majority Leader Harry Reid said "the bill will not stand over here." Senator Tester sits on the Committee that will hear HR 2262 and we anticipate that Senators Tester and Baucus will support revision of the 1872 Mining Law. It is a relic of the 1800s surviving the 1900s unchanged for 132 years. It is time to bring this law into the 21st century.

Please call, write or email Senators Baucus and Tester to tell them you support the revision of this antiquated law.



In 1803, President Jefferson purchased a large part of the continent west of the Mississippi River from France. Indians at that time traveled within the land recognizing certain loosely defined tribal boundaries and harvesting plants and animals for food, clothing and shelter. White explorers, trappers and traders used the streams without question except when Indians realized there was competition for natural resources.

In 1889, Montana was awarded statehood by Congress. The U.S. Supreme Court, under the "Equal Footing Act" granted the state ownership of navigable streams, lakes and accumulations of land, islands, gravel bars, oxbows formed by dynamic movement in the beds of navigable streams up to the ordinary high water flow line. The federal test for navigability is sustained commercial use, including floating logs, fur trade, mail routes, transportation of goods, floating, fishing, outfitting and guiding, float boat rentals and adventure floating. During the 1920s, '30s, '40s and '50s, the tradition of recreation use was unquestioned. Many floated the Yellowstone, Missouri, Madison, Beaverhead, Smith, Ruby, Clark Fork and Bitterroot Rivers. There is a long Montana history and tradition of public ownership of our streams. Stream access must be retained for river walkers, fishermen, floaters

## STREAM ACCESS

and researchers, scientists and all who want to pass on our Montana stream traditions to future generations with fair and equal access for all.

The Montana Constitution of 1973, Article IX, Sec. 3, reaffirms "all surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." When floating became popular in the 60s and 70s, and with the influx of new landowners, the tradition of public floating became a trespass on private rights. Stream fishermen and floaters commonly encountered tight barbed wire fences stretched across streams ostensibly to control cattle, but really to control fishermen from disturbing the tender sensibilities of landowners. Through the years the public has been giving up their lawful access little by little.

One of the earliest actions in support of public stream access was an incident on October 10, 1980 on the Beaverhead River, when Lowell Hildreth, standing with a gun on his illegal bridge, demanded the fish and game warden to arrest Russ Kipp for trespass. The warden gave Kipp a

ticket but did not do any follow-up. Later court action required Hildreth to take down his illegal fences. Subsequently, his low clearance bridge and its illegal lower cable was removed and replaced with a railroad flatcar bridge.

In the early 1980s, fishermen Russ Kipp, Jerry Manley, Tom Bugni and Tony Schoonan and sportsmen from Silver Bow, Madison, Jefferson, Beaverhead and Gallatin Counties got together and came up with the idea that the 1980 Montana Supreme Court may be receptive to a precedent setting court case on public access to streams. They formed the Montana Coalition for Stream Access in order to raise money for court litigation for public access. Russ Kipp, Steve Lundy, Koke Winters, A.J. Best and John Gierach sold raffle tickets for six 3-day floats guided by Russ Kipp on the Beaverhead and Big Hole Rivers that contributed toward the litigation fund. Jim Goetz, an attorney in Bozeman with roots along the Madison River in Ennis was hired to litigate two seminal cases during the mid-1980s.

Dennis Curran, a wealthy pipe and transmission line builder, strung barbed wire across the Dearborn River to harass and discourage

floaters from launching at state highway 200 bridge. He destroyed an inflatable raft at the public launch point with his 4WD truck. He slandered Fish, Wildlife & Parks director Jim Flynn's family in his raging spite. Curran paid dearly when Goetz gave proof of willful damage and slander against him in court.

Lowell Hildreth, a rancher from Dillon, closed the public out of the Beaverhead River which Lewis & Clark used as a travel way. Goetz, through litigation forced him to take down the barbed wire fences and low bridge with even lower cable designed to block floaters to be replaced by a railroad flatcar. Since then, the Hildreth ranch was purchased by Jaquel Kempton of Microsoft who built an expensive house on it. It was recently sold to a Colorado man who manages the property as a ranch.

Both cases were successful for floaters and fishermen in the District Courts and subsequently were appealed to the Supreme Court which sustained the lower courts' decision. The court ruled "the capability of use of water for recreational and scientific purposes determine their availability for use by the public. The Supreme Court ruled "the public has a right to use Montana's rivers and streams that are capable of recreation use up to the high water mark."

# Letter from the President



January 15, 2008

Montana River Action volunteers respectfully thank our members for their support. We hope you will continue to be advocates for our work of protection of and vigilance for rivers and streams, lakes, ponds and wetlands in these most trying times. Streams supply fish for anglers. They supply most of our municipal drinking waters. They are travel corridors for floaters and recreationists. They provide habitat for a myriad of aquatic life, vegetation and animals that live along and beyond their banks. They support local economies and their value is far beyond measure.

Our great Montana rivers, like the Missouri, Yellowstone, Musselshell, Milk, Clark Fork and Kootenai have been dammed, diverted, dewatered, straightened, ripped, diked and levied to protect development and housing that should never have been permitted and thereby destroying fish and wildlife habitat and recreation opportunities. In urban developments, spring creeks, high water channels and flood ways have been piped and paved over and contained. They are better left open so they can naturally contain heavy rains and flood events, mitigating destructive impacts. During stable times they serve as open space, walkways, skiways, bike trails and riparian environments coursing through urban areas and bringing nature to developed communities. We have drained wetlands in the past and paved over natural drainages, but instead we must design with nature and allow these natural floodways to function and mitigate catastrophic rainfall events which is a certainty in the long run.

Montana River Action is frugal. We cut costs and stretch every dollar as far as practicable. We are an all-volunteer, grassroots, 501 C-3 tax deductible organization with a strong passion for rivers and streams. Working together, our members grow stronger and our voices speak louder. Passing on this newspaper to your friend or neighbor would greatly extend our educational work.

We do not sell, trade, exchange or give away the names, street or email addresses or telephone numbers of our members.

Sincerely, Joe Gutkoski

P.S. The date on your address label is the date your dues are due.

## Wild and Scenic Rivers

2008 marked the 40th anniversary of the National Wild & Scenic River Act (NWSRA) of October 2, 1968. The act achieves river conservation through adding river reaches into the national system. The Interagency Wild & Scenic River Coordinating Council was formed by the Bureau of Land Management, National Park Service, U.S. Fish & Wildlife Service and U.S. Forest Service to improve interagency coordination and to increase consistency in the interpretation and application of the Act. The Council is not a decision making body. Recommendations for Wild & Scenic classification must come from the land managing agency. National Forest and BLM planning processes allow for Wild & Scenic Act evaluation and planning. It is also the responsibility of local grassroots efforts to encourage the analysis of their local rivers.

The National Wild & Scenic River system is credited with preserving many of our best rivers in their natural state over its 40 years history of success. Rivers in the National System are classified either 1) wild, 2) scenic or 3) recreational. These labels actually refer to the degree of development along the river:

Wild rivers represent vestiges of primitive America, free of impoundments, accessible by trail, with shorelines essentially primitive and with unpolluted waters.

Scenic rivers have values listed above, but are accessible by roads in places.

Recreational rivers are readily accessible by road or railroad and may have some development along their shorelines.

Wyoming has declared its portion of the Clarks Fork of the Yellowstone as a Wild River under the Act in 1990. In Montana only 64 miles of wild, 26 miles of scenic and 59 miles of recreational sections of the Missouri River are protected under the NWSRA. On the Forks of the Flathead River only 97.9 miles of wild, 40.7 miles of scenic and 80.4 miles of recreational sections are protected by the Act.

MRA is always working toward obtaining additional protection for rivers, including the Yellowstone, Gallatin, Madison, Jefferson, Clark Fork of the Columbia, Clarks Fork of the Yellowstone, Bitterroot, Blackfoot, Marias, Milk and Swan Rivers. The law says that "rivers which possess outstandingly remarkable scenic, recreational geologic, fish and wildlife, historic, cultural or other similar values, shall be preserved in free flowing condition and they and their immediate environment shall be protected for the benefit and enjoyment of present and future generations."

## Funding Native Fish Conservation Efforts

Contributed by Jim Bailey, Belgrade

Montana has 64 native fish species. However, the Montana Heritage Program lists 19 as "species of concern due to declining numbers, threats to habitat or limited distributions." That's a whopping 30% of our native fishes!!!

Of course, the demise of native fishes results from the decline of Montana's rivers and streams through dewatering, alteration of seasonal flows and pollution. Montana River Action joins other conservation organizations in opposing this degradation of our heritage. Opposition should be augmented with proactive measures such as protecting instream flows, restoring natural stream channels and streamside vegetation, removing or modifying stream barriers and improving efficiency of water uses.

Our Constitution states that all Montanans deserve a healthful environment and that our legislature shall provide adequate remedies to prevent degradation of natural resources. In Title 87, the legislature designate MT Dept. of Fish, Wildlife & Parks to establish programs, including acquisition of land or aquatic habitat for management of non-game and endangered wildlife. FW&P's response is Montana's Comprehensive Fish & Wildlife Conservation Strategy. It contains proactive strategies for managing and conserving wildlife and habitats, including rivers and streams. The Strategy identifies all or parts of nine rivers among focus areas where proactive conservation measures are most needed. It also identifies riparian and wetland habitats, mountain streams and prairie streams among the habitat types in greatest need of conservation. And it recognizes 17 fishes and 3 other aquatic animals among 60 Montana species in greatest need.

That's the good news. Montana has a proactive plan to take care of our incredible natural heritage, including our rivers and streams. The bad news is that the Strategy is

largely unfunded. Limited progress has been made using donations, a subsidy from hunters and anglers and matching federal grants. Fish and wildlife are the litmus reflecting status and trends of the biological communities in Montana. Therefore the Comprehensive Fish & Wildlife Conservation Strategy should be a focal point for prioritizing and motivating proactive management and conservation of all our natural resources. Objectives in the Strategy overlap with goals of most of the state's conservation organizations, including Montana River Action.

All Montanans benefit from healthy wildlife populations and habitat. There are economic, recreational, ecological, social and aesthetic values inherent in our wildlife. Furthermore, all Montanans are directly or indirectly responsible to some degree for degrading Montana habitats. Consequently all Montanans are responsible for maintaining and conserving our wildlife heritage. Our Constitution affirms this. And that's the problem. Everyone and all the conservation organizations are responsible for proactive management of wildlife and their habitats, but only the hunters and anglers have effectively stepped forward to fund conservation of game and sport fishes. No organization has volunteered to oversee a coalition of conservation organizations that would promote legislative approval of a consistent funding source for managing and conserving non-game and their habitats.

I believe the most fair and appropriate funding for conservation of non-game and habitat in Montana would be a state income surtax. This Citizens Wildlife Conservation Tax could be \$3 per year for each taxpayer and dependent, maximum \$15 per tax form. (Large families and the poor who do not file taxes get a break.) But it's a TAX! Legislators run from it. Yet, it is only the price of one

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cup of fancy coffee a year. To fund and implement Montana's Comprehensive Fish & Wildlife

Conservation Strategy, we will need a coalition of many conservation organizations, statewide, to lobby the legislature. Effective and consistent funding of the Strategy is a must. We owe it to

our kids.

A copy of Montana's Comprehensive Fish & Wildlife Conservation Strategy may be obtained from the MT Department of Fish, Wildlife & Parks.

## Emergency Stream Flow for Fisheries Bill 2009

### Base Stream Flow Law

Twenty-five percent of the Average Annual Flow (AAF) of an important fishery, spawning and rearing stream is the minimum level for protecting the basic life systems naturally occurring in the stream and supporting fisheries. The AAF of a year-round flowing stream is calculated in cubic feet per second (cfs) and measured at stream gaging stations. Government agencies have installed and maintained a system of gauging stations throughout Montana and have been measuring flows for over 90 years. This stream flow information is easily accessible to the public.

In May, 2005, the MT Dept. of Fish, Wildlife & Parks (FW&P) in their latest inventory revealed that 4,749 miles of "important fisheries" are either chronically or periodically dewatered by irrigation each year, leaving stream flows below the point where stream habitat is adequate for fish. Either the fish move out or die. Because native fish pre-date man's diverting of water, it would be constitutional and not a taking of property to allow a minimum of 25% of the AAF to sustain a native fishery in a year-round flowing stream. This law is justified under the Public Trust.

The Montana Supreme Court on September 24, 2002, delivered a majority opinion that says Montana law prior to 1973 does not require a diversion for a valid appropriation of water. This means that state claims to water rights for instream flows are valid for fish, wildlife and recreation. The Supreme Court said that these uses can be considered equal with irrigation uses when adjudicating water rights on a river, stream, pond or lake. The ruling reverses the 1988 Bean Lake decision that erroneously set a precedent by

implying that the Montana Constitution did not recognize water rights for fish and wildlife. The court ruling legalizes a number of water claims filed by FW&P in the 1980s, when the Montana Water Court began sorting out pre-1973 water rights. Writing for the court majority, Justice William Leaphart said Montana "recognizes fish, wildlife and



recreation uses as beneficial and valid in-stream and in-lake appropriations of water."

The solution to the dewatering problem is to provide some real protection for fisheries without seriously impacting current irrigation uses. The ruling amends the "use it or lose it" water law doctrine, validates the State's claim to water rights for in-stream flows and protects irrigators' right to leave water in streams (that is, not to use up their share) while their water right is still secure. The ruling will be a support for Montana River Action's Emergency Stream Flow for Fisheries Bill in the 2009 Legislature. When a fishery is destroyed by dewatering for thermal pollution, it may take eight years for the aquatic life to naturally reestablish to where a fish can reasonably live in a stream, whereas an irrigator called to cut back on crop irrigation may only have one diminished har-

vest rather than a total loss for that irrigation season.

The Emergency Stream Flow for Fisheries Bill applies to year-round flowing streams listed on the May 1, 2005 inventory of dewatered streams, which only includes those streams that support important fisheries, spawning and fish rearing habitats by FW&P.

The Emergency Stream Flow for Fisheries Bill would take no authority away from District Judges, Water Courts, Water Commissioners, Water Masters, ditch companies or ditch riders, or from any legal system that manages water rights. Authority is rested in their legal judgments to control all water diversions. When an individual stream reaches a low flow of 25% of the AAF, then Water Commissioners would begin limiting water diversions – first in time, first in right – so that 25% of the AAF remains in the stream to sustain fisheries.

FW&P game wardens would NOT be involved. Enforcement is in the hands of the existing water rights system.

No additional water management personnel or water measures would be needed and no new gauging stations be installed. The existing water right management system will be responsible for assuring that 25% of the AAF remains in the stream to support fish.

Sharing water in drought emergencies to sustain important fisheries, spawning and fish rearing habitats is a fair, acceptable and beneficial use of water. It is in the interest of Montanans to provide the protection of law to fish through a reasonable instream flow of water that is accorded through irrigation water rights under the present first in time, first in right appropriations system. It would be an effective and efficient method of satisfying the public interest in water sharing.

## MRA's History

On March 14, 1992, as a result of stream de-watering in 1991, a number of statewide and locally concerned organizations came together and formulated plans to protect Montana's streams against drying up and de-watering to destructive levels.

On May 28, 1992, *Montana River Watch* was formed with a full-time paid coordinator and an 1-800 toll free number for reporting low stream flows due to de-watering, which causes fish kills and thermal pollution.

On January 1, 1993, Montana River Action was formed as a result of the experience gained during the River Watch effort. It was realized that a statewide river action organization was needed that could deal with water issues. MRA's first president, Deborah Smith, guided the organization in its first attempts to protect the integrity of Montana's river systems.

In the summer of 1998, MRA became an all-volunteer organization.

Montana's river systems are threatened by misuse, overuse, de-watering and pollution. MRA is committed to action against these threats by exposing them to public scrutiny, networking with other organizations and devising action plans to protect or remedy the threats.



I want to support **Montana River Action's** continuing efforts to protect Montana's rivers, streams, and lakes. Enclosed is my membership contribution. I look forward to receiving **MRA's** newsletter, Montana River action, legislative updates, and action alerts.

Name \_\_\_\_\_  
 Address \_\_\_\_\_  
 City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_  
 Phone \_\_\_\_\_  
 E-mail \_\_\_\_\_

Please make checks payable to Montana River Action. Membership dues are tax deductible.  
 Mail to: MRA, 304 N. 18th Avenue, Bozeman, MT 59773.

### Membership Dues

- Individual \$25
- Family \$35
- Limited Income \$15
- Supporting Member \$100
- Patron \$250
- Benefactor \$500
- Founder \$1000

To help MRA a little more, I've added \$\_\_\_\_\_ to my check.

### Retain for your Records for income tax purposes.

Remittance amount \_\_\_\_\_

Date remitted \_\_\_\_\_

Your check or money order is appreciated.