ACCESS IN MONTANA

Access: An Unprincipled Account

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Assuming that there are deep differences of opinion about access policy in Montana, the author puts the conflict in a larger context, makes appropriate distinctions, and identifies principles which could form a basis for resolving the conflict.

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 purpose—to provide a relatively broad view by discussing mainly the philosophical foundations of access policy.

I'll assume that there are deep differences of opinion about access policy in Montana. The philosopher's task when confronted by such conflict is three-fold: 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.

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, they did not have our concept of exclusionary rights. Rather, Indians living in particular areas had something like "in use" rights to the game, fish, 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]

There are steadily decreasing access possibilities.

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!

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 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 fourth branch of government, the various administrative commissions and agencies.

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