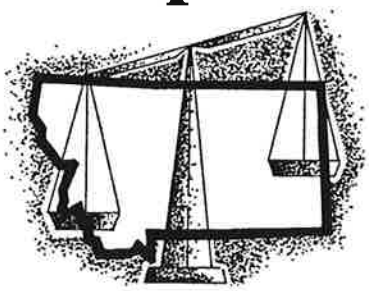
ACCESS IN MONTANA

Access: An Unprincipled Account



Gordon G. Brittan, Jc., Ph.D.

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.

Gordon G. Brittan is on the staff of the Department of History and Philosophy, Montana State University, Bozeman, MT. After receiving his Ph.D. from Stanford University in 1966, Mr. Brittan was at the University of California, Irvine, for 7 years before moving to Montana in 1973. He was named Regents Professor of Philosophy by the Montana University System in 1986.

For the rest, the access conflict in Montana has merely sharpened in intensity, although this is difficult to document precisely. In former times, to generalize broadly, people entered private property without any assumption that they had a "public right" to do so and without their thereby becoming liable for criminal trespass. Thus, the state Supreme Court in *Herrin vs. Sutherland* in 1925: "In country life a multitude of acts are habitually committed that are technically trespasses. Persons walk, catch fish, pick berries, and gather nuts on another's land, without strict right. Good-natured owners tolerate these practices until they become annoying or injurious, and then put a stop to them." But in the last 20 years or so, there has been greatly increased interest in access to public lands and the state's waters. Firstly, even in Montana, a larger percentage of the population lives in cities than in the country. Secondly, the population is generally more affluent than it was, has more leisure time and larger plans, a development accompanied by the introduction and widespread use of trail bikes, snowmobiles, and 4-wheeled vehicles. Thirdly, there are steadily diminished opportunities for outdoor recreation in other states. More and more tourists are coming here spending dollars that the Montana economy needs, attracted by the prospect of wide open spaces.

The "access stick" is worth a great deal more.

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

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

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

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

Large ranches in Montana are moving to a Texan-type hunting lease.

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

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

Distinctions

There are many distinctions that must be made. The first distinction is between access to publicly owned lands and access to resources which in some sense are "public goods" but which are located in or, in the crucial case of water, flow through privately held land. The second distinction is between rights which the ownership of land, either public or private, confers and rights which the ownership of public and private land does not confer. This distinction recognizes that property rights come as bundles of sticks, possession of one of which does not entail possession of all of the others. There are, after all, a variety of things we cannot do, individually or collectively, with what we own. Unless it is made, extreme positions—no access vs. unlimited access—are taken, between which there is little hope of compromise. Moreover, all of the important issues are obscured. People start claiming "public rights" and "private rights" (and often mingling in the emotion-loaded notion of "freedom") without noticing that it is not simply a question of *rights*

and that what kinds of rights the public and individuals enjoy are both qualified in a number of ways. The third distinction is, as with the Indians, between types of access, the purposes for which the access is used and the means employed. We need to distinguish between hunting, fishing, and picnicing and between hiking, snowmobiling, and trail biking.

"Police powers" . . . are being used to protect the public's interest.

I might add to this list of distinctions one between what the Curran and Hildreth distinctions and HB265 *actually* say and what they are widely *interpreted* as saying. In particular, in both court decisions the fact was underlined that "nothing herein contained in this opinion shall be construed as granting the public the right to enter upon or cross over private property to reach State-owned waters held available for recreational purposes." Furthermore, there are important limitations on the ways in which easements, prescriptive or otherwise, can be established.

Principles

Much of the recent discussion of the access issue has revolved around the doctrines of public trust and private property rights as principles on the basis of which the important conflicts could be resolved.

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

1. *The requirement of justice:* certain interests are so intrinsically important to every citizen that they must be freely available to all; that is, it must not be possible for an individual or group to acquire control over them. One would never freely choose to live in a society in which they were not freely available. Thus, they can be considered as "natural rights." Among them are mobility, navigation, and fishing, all of them "public" (since not restricted to particular pieces of ground) in their nature.
2. *The reservation of God's bounty:* "certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole populace."[5] Thus, it was that in the 1700's in Massachusetts so-called "great ponds" (larger than 10 acres in extent) were set aside so that everyone was assured of free and equal access and that in the last 100 years or so the system of National Parks has been created.
3. *The retention of rights:* public rights pre-exist any private property rights in an affected resource. It was held in a recent California case, for example (*National Audubon Society vs. Superior Court*, 1983)[6], that "(P)arties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust." Sometimes, an ownership rationale for this idea is supplied: state and federal ownership of the land came *before* private ownership. When individuals took possession of property, in this part of the country largely by way of homestead, it was with the implicit understanding that the public retained certain rights "in trust" with respect to that property (which the government, in its role of trustee, *could not* sell or alienate). Thus, under the public trust doctrine, there can be no question of *taking*. The assertion of public rights does not take away anything from a private property owner because the private property owner never had the private rights in question. In some sense, individuals, too, hold the public's resources in trust.
4. *The rationality of review:* "Public trust problems are found whenever governmental regulation comes into question, and they occur in a wide range of situations in which diffuse public interests need protection against tightly organized groups with clear and immediate goals."[7] The public trust doctrine provides for a procedural check on legislative and (especially) administrative agencies; no action of theirs may narrow or neglect the public interest. It thus involves a kind of democratization, a broadening of views, to make sure that all aspects of a particular decision have been taken into consideration. This check is administered by the judiciary who then typically (and in Montana in the Curran and Hildreth cases) refer the matter back to the legislature and the administrative agencies. As a procedural rule it has positive and negative uses, positive to protect the public's interest in a healthy environment, negative to indicate scepticism about certain administrative procedures.

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

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

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

Access will surely have to be limited in the future.

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

not solve the access question, it also gives rise to a head-on conflict with the private rights doctrine, pitting ownership against ownership, rights against rights.

Private landowners should be compensated for public access.

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

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

The Private Rights Doctrine. There is no point in detailing either the history or the philosophical foundations of the private rights doctrine. They are too well known for that. There are two aspects of it which should be recalled, however. One is that the private rights doctrine, to the extent that it is one of the traditional anchors of individual freedom, security, and autonomy, needs to be somewhat insulated from changing political and judicial fashions. Private property rights, in particular, should not be at risk simply because the mood of the electorate changes. The other aspect of the doctrine is that private property ownership is often, in fact, the best way to protect what might be taken to be the "public interest." The restriction of access, which is a natural although not a logical corollary of private ownership, is often the best way to insure that a local environment is protected. Along the same lines, when the landowner can benefit by so doing, then he will preserve habitat, improve fisheries, etc., especially when his long-range expectations are guaranteed with respect to his rights in property.

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

The days of unrestricted access or absolute property rights are over.

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

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

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

2. Both the public trust and private property rights doctrines emphasize the necessity of "preventing the destabilizing disappointment of expectations" on the part of the public or the private landowner as the case may be.[9] I agree that these expectations are important. What the idea involved implies is that changes, what might broadly be viewed as "takings," proceed with great caution on both sides. In particular, where the public has a customary expectation to access, a landowner should not, simply in virtue of his property rights, close it off, particularly if no more is involved than locking a gate; the owner must also be able to prove extensive uncompensated harm, and so forth.
3. The various factions in the controversy often claim that their opponents are getting "something for nothing." Thus, private landowners complain that public access through their property brings plenty of costs, but no benefits. And sportsmens' groups complain that landowners who restrict access to public lands enjoy the private use of those same lands free of charge. The solution? Private landowners should be compensated for public access (a principle already generally accepted). Ideally, the various agencies purchase land for a public access; much access has been acquired in this way. But they could also lease access, perhaps on a user-basis. If we are going to see more Texas-type fee hunting in Montana, why not take some of it public? On the other hand, at least in a few carefully selected areas, hunting fees might be charged private landowners who use public lands to which access is otherwise restricted.
4. What application of access policy, whether by an administrative agency or a property owner, often comes down to is a "test of reasonableness." This is, of course, a very difficult notion to define. A start is made with the concept of "least intrusion" (which, for better or worse, is rarely identical with "least cost"). Possible additions we might make to the "test of reasonableness" include environmental compatibility and a careful calculation of benefits and costs (which perhaps should be user-absorbed). "Reasonableness" works only when people are reasonable; that is, when they respect both the public interest and private property rights, most importantly respect the land and its native populations. This in turn depends on education, the responsibility of those of us who teach. I think great progress has been made. To cite but one example, over the past decade or so, the number of visitors to Yellowstone National Park has doubled; during that same period, garbage collection has decreased about four-fold. It takes time, but people can be brought to see the consequences of their individual actions.

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

This paper was presented at the "Access in Montana" Conference in Helena, MT in November, 1986.

End Notes

1. *Among the most helpful things I have read in preparing this talk are the following: Western Resources in Transition: The Public Trust Doctrine and Property Rights (Political Economy Research Center, 1986); Richard J. Lazarus, "Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine" (Iowa Law Review, 1986); John E. Thorson, Margery H. Brown, and Brenda C. Desmond, "Forging Public Rights in Montana's Waters" (Public Land Law Review, 1985); Public Access to Public Lands (Report to the 45th Legislature by the Subcommittee on Agricultural Lands, 1976); Recreational Use of Montana's Waterways (Report to the 49th Legislature by Joint Interim Subcommittee No. 2, 1984); Rick Applegate, Public Trusts: A New Approach to Environmental Protection (Exploratory Project for Economic Alternatives, 1976); Joseph Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" (Michigan Law Review, 1970); Montana's Water (Montana Environmental Quality Council, 1985). Recent conversations with Terry Anderson, Lewis Hawkes, Richard Josephson, and especially Vanessa Brittan have helped to focus my views.*
2. *See William Cronon, Changes in the Land (Hill and Wang, 1985), an extremely interesting account of the changes brought about in American ecology by the coming of white settlers and English conceptions of agriculture and property.*
3. *For a discussion of the evolution of Montana judicial opinion, and a critical account of the public trust doctrine from a constitutional point of view, see James L. Huffman, "The Public Trust Doctrine: Judicial Evasion of Constitutional and Prudential Limits on the Police Power," in Western Resources in Transition. References to the various Montana opinions I cite can be found in Huffman's article.*
4. *Terry L. Anderson, "The Public Trust vs. Traditional Property Rights: What are the Alternatives?" in Western Resources in Transition, p. 3.*
5. *Joseph Sax, "The Public Trust in Natural Resource Law," p. 484.*
6. *Cited in Richard Lazarus. "Changing Conceptions of Property and Sovereignty in Natural Resources," p. 649.*
7. *Sax, p. 556.*
8. *For a very detailed and persuasive account of the ways in which contemporary legal developments are undermining the need to invoke the public trust doctrine, see Lazarus.*
9. *Sax, pp. 188–189.*