THE ROW ON THE RUBY: STATE MANAGEMENT OF PUBLIC TRUST RESOURCES, THE RIGHT TO EXCLUDE, AND THE FUTURE OF RECREATIONAL STREAM ACCESS IN MONTANA

BY

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In 1985, the Montana legislature passed the Montana Stream Access Law, recognizing a public right to use surface waters "capable of recreational use" irrespective of streambed ownership. Although the Montana Stream Access Law has become a defining feature in a state that places considerable value on its trout streams and riparian landscapes, the law does not confer access rights to the water resource. As a result, tensions have escalated in recent years between riparian landowners and those who do not own streamside land, but who, nonetheless, hold rights to use the water resource. Accordingly, many fear that the state must resolve the controversies over recreational stream access before tensions escalate further.

This Comment highlights the problems associated with recreational stream access in Montana and examines a range of potential solutions. Although not explicit in Montana's Stream Access Law, this Comment argues that the state has an affirmative duty to provide for reasonable access to the state's streams because access is necessary for the public's enjoyment of its water ownership.

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I. INTRODUCTION

On July 17, 2005, approximately two hundred people descended on southwest Montana's Ruby River[1] with kayaks, rafts, and inner tubes to take part in Stream Access Float Day.[2] Sportsmen and access groups organized the event to call attention to escalating tensions between riparian landowners and access advocates over access to waters held in trust by the state for its citizens.[3] Organizers chose the Ruby because of a high-profile dispute between riparian landowners and anglers over barbed-wire and electric fences that some landowners have attached to county bridges where anglers typically access the stream. Landowners claim these fences are to keep livestock in;[4] anglers, however, believe landowners erected the fences to keep the public out.[5]

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[1] The Ruby River is a red ribbon trout stream located near Twin Bridges, Montana. The Ruby is a popular fishing destination because it boasts brook trout, brown trout, rainbow trout, and westslope cutthroat trout. MONT. FISH, WILDLIFE & PARKS, MONTANA FISHING GUIDE, http://fwp.state.mt.us/fishing/guide/q_Ruby_River__1123453455129.aspx (last visited Nov. 12, 2006). Streams are rated as either Class I (blue ribbon), Class II (red ribbon), or Other Streams. This "fishing value" is determined by the Montana Fish, Wildlife, and Parks Department and is based on: "fish abundance, fishing pressure, aesthetics, and ingress." MONT. FISH, WILDLIFE & PARKS, MFWP STREAM FISHERY CLASSIFICATION: 1999 FINAL SPORT FISHERIES VALUE, CLASS I AND II STREAMS, *available at* http://fwp.mt.gov/FwpPaper Apps/fishing/class 1and2.pdf.

[2] Thad Kelling, *200 Attend Ruby River Float*, MONT. STANDARD, July 20, 2005, *available at* http://www.mtstandard.com/articles/2005/07/20/newsbutte/hjjejchjjcfcec.prt (describing Stream Access Float Day and its relation to the anniversary of the Montana Stream Access Law).

[3] Leslie McCartney, *Public Access Awareness Marks Ruby River Float Event*, MONT. STANDARD, July 14, 2005, *available at* http://www.mtstandard.com/articles/2005/07/14/newsthree rivers/hjjejcifjjfffc.prt (noting the purpose and significance of Stream Access Float Day).

[4] Some landowners maintain that the fences protect riparian habitat. *See, e.g.*, Jonathan Weber, *Cox Magnate Speaks out on River Battle*, NEW W., July 25, 2005, http://www.new west.net/index.php/main/article/kennedy_addresses_ruby_access_issues/ (last visited Nov. 12, 2006) (describing interview with James C. Kennedy, owner of 3,200 acres along the Ruby River, in which Kennedy predicted that unrestricted access at the contested bridges would harm fish populations).

[5] *See, e.g.*, Toney Schoonen, Letter to the Editor, *No Compromise on Stream Access*, MONT. STANDARD, July 31, 2005, *available at* http://www.mtstandard.com/articles/2005/07/31/news opinion/hjjejcgijbejhf.txt (describing how participants in the Ruby River float "were fed up with the way the Ruby River has been blocked off over the past decade to any type of recreational activities").

Although the controversy over stream access in Montana is not new,[6] the current dispute on the Ruby is different because it hinges not on the public's right to use the stream but on the public's right to access the stream. In 1985, the Montana legislature passed the Montana Stream Access Law, codifying the public's constitutional right to use "all surface waters capable of recreational use" irrespective of streambed ownership.[7] The legislature passed the law on the heels of two 1984 Montana Supreme Court decisions which recognized a public right to use waters capable of recreational use based on the public trust doctrine as implied in the Montana constitution.[8] In the first decision, *Montana Coalition for Stream Access v. Curran* (*Curran*),[9] the court looked to the state constitution, [10] which provides that surface waters "are the property of the state for the use of its people,"[11] and reasoned that the landowner contesting public access did not have the right to exclude people from using the river because, under federal law, title to the bed and banks of navigable waters were transferred to the state at statehood and "burdened by [the] public trust."[12] The court went beyond federal law, however, holding that navigability for recreational use is a matter of state law.[13] The *Curran* court opined that public recreational use of surface waters is "limited only by the susceptibility of the waters for that purpose."[14] Thus, waters that were not navigable for title under the federal navigability test were nonetheless burdened by the public trust under state law.[15] In *Montana Coalition for Stream Access v. Hildreth*,[16] the second decision, the court noted that the Montana constitution "clearly provides that the State owns the waters for the benefit of its people," and affirmed the public right to use all waters susceptible to recreational use.[17]

After the Montana legislature passed the Stream Access Law in 1985, the Montana Supreme Court, in *Galt v. Department of Fish, Wildlife, & Parks*,[18] rejected a challenge to the constitutionality of the law because "under the public trust doctrine as derived from the Montana constitution the public has a right to use any surface waters capable of use for recreational purposes."[19] The court's holding in *Galt* was significant because

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6 *See, e.g.*, Jim Robbins, *Montana Landowners Fight Public on Access to Trout Streams*, N.Y.TIMES, June 1, 1997, § 1, *available at* 1997 WLNR 4889804 (describing the controversy on the Ruby in 1997).

7 MONT. CODE ANN. § 23-2-302 (2005).

8 MONT. CONST. art. IX, § 3, cl. 3.

9 682 P.2d 163 (Mont. 1984).

10 *Id.* at 172.

11 MONT. CONST. art. IX, § 3, cl. 3.

12 Mont. Coalition for Stream Access v. Curran (*Curran*), 682 P.2d at 170.

13 *Id.* ("Navigability for use is a matter governed by state law. It is a separate concept from the federal question of determining navigability for title purposes.").

14 *Id.* (citing the Wyoming Supreme Court's decision in Day v. Armstrong, 362 P.2d 137 (Wyo. 1961)).

15 *Curran*, 682 P.2d at 170.

16 684 P.2d 1088 (Mont. 1984).

17 *Id.* at 1091.

18 731 P.2d 912 (Mont. 1987).

19 *Id.* at 913.

the court concluded that the public trust doctrine was implied in the Montana constitution.[20]

Strengthened by the Montana Supreme Court's affirmation in *Galt*, the Montana Stream Access Law has become a defining feature in a state that places considerable value on its world-class trout streams and pristine landscapes.[21] The law, however, does not confer access rights to trust resources,[22] and some maintain that the state must work to resolve the access disputes on the Ruby and elsewhere before tensions between landowners and anglers escalate further.[23] Regrettably, a solution to the tenuous state of recreational stream access in Montana does not flow from the Stream Access Law itself. While anglers may, at present, use traditional access points at county bridge right-of-ways to reach the river,[24] legislators and landowners alike are unsure whether the Montana constitution places an affirmative duty on the state to provide reasonable access to trust resources, what sort of accommodations landowners must make to provide for such access, and, if landowners are required to make feasible accommodations, whether the state is obligated to provide compensation to them.

This Comment evaluates the current state of recreational stream access in Montana by looking at the dispute between riparian landowners and anglers over access on the Ruby River and elsewhere in Montana.[25] Part II examines the significance of the access problem in Montana, traces the evolution of the public trust doctrine in the United States, evaluates the doctrine as implied in the Montana constitution, and assesses the application of the public trust doctrine, as interpreted by the California Supreme Court

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[20] *Id.* at 913–15.

[21] *See, e.g.*, Bureau of Labor Statistics, U.S. Dep't of Labor, Montana Economy at a Glance, http://www.bls.gov/eag/eag.MT.htm#FnoteP (last visited Nov. 12, 2006) (reporting that in August 2006, 57,600 people were working in leisure and hospitality in Montana, as compared with only 8,300 working in natural resources and mining).

[22] MONT. CODE ANN. § 23-2-302(4) (2005) ("The right of the public to make recreational use of surface waters does not grant any easement or right to the public to enter onto or cross private property in order to use such waters for recreational purposes.").

[23] *See, e.g.*, Jonathan Weber, *The Cox Heir and the Ruby River*, NEW W., June 16, 2005, http://www.newwest.net/index.php/main/article/the_cox_heir_and_the_ruby_river/ (last visited Nov. 12, 2006) (arguing that "we should not only err on the side of public access but fight like hell for it").

[24] 48 Op. Mont. Att'y Gen. 13 (2000), *available at* http://doj.mt.gov/resources/opinions2000/48-013.asp (holding use of right-of-way to access stream "incidental" to public right to travel on road). For an interesting commentary on the dispute over access at county right-of-ways, see Perry Backus, *Bridges of Madison County Controversy Heats up*, MONT. STANDARD, Mar. 23, 2004, *available at* http://www.montanastandard.com/articles/2004/03/23/newsbutte_top/hjjfjghgijfhfi.txt.

[25] The controversy on the Ruby is emblematic of access disputes occurring in riparian zones across Montana. For example, a similar dispute on western Montana's Bitterroot River made headlines in 2005 when rockstar Huey Lewis and other riparian landowners along the Bitterroot sought to exclude anglers from a backwater slough which the landowners successfully contended was not covered by the Montana Stream Access Law. Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist., No. DV-03-476, 2006 Mont. Dist. LEXIS 576, at *6–*7 (D. Mont. May 9, 2006).

in the Mono Lake case, *National Audubon Society v. Superior Court of Alpine County* (*Mono Lake*).[26] Part III looks at other states' interpretations of access rights to trust resources and considers the state's duty to both provide for and protect access to trust resources in light of the New Jersey beach case, *Matthews v. Bay Head Improvement Ass'n*.[27] Part IV argues that the Montana constitution requires the state to provide for reasonable access to trust resources and imposes a duty on riparian landowners to make feasible accommodations to accomplish that result. In addition, Part IV notes that in requiring riparian landowners to make feasible accommodations for access, the state is not obligated to provide compensation because the public trust is a background principle of Montana property law. The Comment concludes that by providing for and protecting access to trust resources, as required by the surface water provision of the Montana constitution, Montana will maintain a way of life and protect an important part of the Montana economy for future generations.

II. BACKGROUND

Recreational stream access is a cultural and economic necessity in Montana. Thus, the state must work expeditiously to resolve the conflicts between riparian landowners and access advocates. This "work" begins with an overview of the public trust doctrine, and a discussion of other states' reliance on the doctrine in response to similar access disputes.

A. Fishing As a Way of Life and Means to Prosperity

Norman Maclean began his celebrated novel, *A River Runs Through It*,[28] writing, "[I]n our family, there was no clear line between religion and fly fishing." Maclean understood Montanans: when it comes to rivers, there is no lack of "religious" zeal. This reverence for both the streams and the institution of fishing itself is commonplace for many Montanans and is one reason access advocates are opposed to those riparian landowners who would dare to come between Montanans and "their" streams.[29]

But fly fishing is more than a way of life in Montana. Fly fishing, specifically, and outdoor recreation, generally, have become increasingly important to the economic health of the state because the agriculture, timber, and mining industries have fallen on hard times.[30] Although

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[26] 658 P.2d 709 (Cal. 1983).

[27] 471 A.2d 355 (N.J. 1984).

[28] NORMAN MACLEAN, A RIVER RUNS THROUGH IT AND OTHER STORIES 1 (1976).

[29] *See generally Landowner Pokes at Montana Attitude*, BILLINGS GAZETTE, May 11, 2005, *available at* http://www.billingsgazette.com/index.php?display=rednews/2005/05/11/build/state/57-poking-fun.inc ("The ill will over outsiders in Montana is not new. For years, Montanans have complained that rich people looking for a new lifestyle move to the state, then have the nerve to question Montana's way of doing things when it comes to hunting and fishing.").

[30] Harry W. Fritz, *Montana in the Twenty-first Century*, *in* MONTANA LEGACY: ESSAYS ON HISTORY, PEOPLE, AND PLACE 341, 342–45 (Harry W. Fritz, Mary Murphy & Robert R. Swartout, Jr. eds., 2002) (tracing the "convulsive death rattle of a natural-resource-based economy"). Fritz

communities across the state continue to feel the effects of job losses in extractive industries[31] the dramatic expansion of eco-tourism in Montana has helped to ease the impact of job loss in the traditional sectors of the economy.[32] A 2001 study conducted by the Montana Wildlife Foundation, for example, concluded that "fishing and wildlife recreation contribute at least $1.7 billion to Montana's economy each year."[33] Regarding Montana's transforming economy, one historian aptly noted, "The Treasure State has become Big Sky Country."[34] Thus, stream access is important not only to those Montanans who wish to spend their vacation days on the state's trout streams, but to all Montanans, as the state becomes increasingly dependent on dollars generated from eco-tourism.

As a result of a population influx in the 1990s[35] and the increasing popularity of Montana's trout streams, Montanans, visitors, riparian landowners, and anglers frequently compete for use of and access to the same scarce resources.[36] Times have changed. In the last thirty years, many Montana landowners have become less willing to allow locals access to the river through their property. Instead of allowing local anglers to pass freely, some riparian landowners market the waters to wealthy, out-of-state visitors. For example, the Ruby Springs Lodge boasts ten miles of "private water"[37] along the Ruby, even though the Ruby is susceptible to

observes:

> Despite recurrent booms and brief periods of prosperity, the natural resource extractive industries of Montana have been declining, relatively, for more than eighty years. Technological improvements in every one of the state's bedrock industries have enhanced labor productivity and corporate profits at the expense of jobs and income. Structural changes in international manufacturing and commerce—globalization—have placed Montana at a permanent disadvantage. Once there were fifteen thousand underground hard-rock miners in Butte. In 2001 there were none.

Id. at 344.

31 *See, e.g.*, Jon Axline, *Bearcreek, Montana*, 54 MONT.: THE MAG. OF W. HIST. 74 (2004) ("Montana is dusted with towns that never made it. Although founded with the greatest expectations, these communities succumbed to economic depression, drought, or lack of interest, dwindling until they all but disappeared from the landscape.").

32 *See* U.S. DEP'T OF LABOR, *supra* note 21.

33 Nat'l Wildlife Foundation, *Montana Wildlife a 'Value for All Time*,' INT'L WILDLIFE, Sept.–Oct. 2001, *available at* http://www.findarticles.com/p/articles/mi_m1170/is_2001_Sept-Oct/ai_77627994/print.

34 Fritz, *supra* note 30, at 345.

35 *Id.* at 347. People flocked to Montana in the 1990s not for economic opportunity but for "recreation, education, privacy, [and] security." *Id.* at 348.

36 *See Going Against the Flow: Private Landowners Continue to Fight State's River Law*, BILLINGS GAZETTE, Aug. 14, 2005, *available at* http://www.billingsgazette.net/articles/2005/08/14/state/export220016.txt (describing continuing conflict between anglers and riparian landowners over access to Montana's waters).

37 The Ruby Springs Lodge is located near Alder, Montana, offering lodging and a variety of fishing packages. The lodge's website boasts, "[w]e have over 10 miles of private water on this river, said by many to be the finest small-water trout fishery in the state." Ruby Springs Lodge, http://www.rubyspringslodge.com/fishing.html (last visited Nov. 12, 2006). This type of marketing is used by other lodges in the area. *See, e.g.*, Crane Meadow Lodge, http://www.cranemeadow.com/angling.htm (last visited Nov. 12, 2006) (extolling the lodge's "private water").

"recreational use,"[38] and therefore held in trust for the public under the public trust doctrine as implied in the Montana constitution.[39]

When Montana's dependence on eco-tourism is placed in the context of current controversies on the Ruby and elsewhere in Montana, the need to resolve the dispute over stream access seems evident. In fact, the tension between wealthy riparian landowners trying to keep people from accessing the streams and locals trying to gain access to those same streams has escalated to the point that some commentators think the controversy amounts to a "class war."[40] While all involved may not agree that the controversy over access is a class conflict, most individuals familiar with the controversy agree that a failure to resolve the access issue could impair Montana's economy and alter a practice that has become a way of life for many in the Treasure State.[41]

B. Illinois Central *and the Emergence of the Public Trust Doctrine*

In order to adequately evaluate the state of recreational stream access in Montana, it is necessary to understand the public trust doctrine. It is difficult to pinpoint the origin and trace the evolution of the public trust doctrine in the United States, however, because the concept has "ancient roots"[42] and is applied differently in each state.[43] As applied in the United States, the public trust doctrine can be traced to English common law, which separated the *jus privatum*, lands held by the crown that could be alienated, from the *jus publicum*, lands vested in the king "as the representative of the nation and for the public benefit."[44] English common law held that title to the sea and rivers within reach of the tide were

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[38] MONT. CODE ANN. § 23-2-302 (2005).

[39] Mont. Coalition for Stream Access v. Hildreth (*Hildreth*), 684 P.2d 1088, 1091 (Mont. 1984).

[40] *See, e.g.*, Jonathan Weber, *A Class War Runs Through It*, N.Y. TIMES, Sept. 6, 2005, § A, *available at* 2005 WLNR 13994888 (noting that the controversy over the stream access law is ultimately a class conflict and calling for a "deeper sense of noblesse oblige among the ultra-rich as they buy up great swaths of the American West"). Even if the conflict does not constitute a "class war," the friction between wealthy riparian landowners and those seeking access to Montana's rivers represents a dramatic departure from historians' depictions of mid-20th century Montana. Characterizing Montana as a "land of space and beauty," for example, K. Ross Toole noted in 1959 that "the average Montanan is open and friendly. . . . There is a singular lack of class distinction and stratification . . . . Because Montanans are so few and the land is so large . . . , the Montanan is unusually mobile, unusually informed about what his neighbors are doing, and in spite of close personal relationships, uncommonly tolerant." K. ROSS TOOL, MONTANA: AN UNCOMMON LAND 256–57 (1959).

[41] Weber, *supra* note 40.

[42] Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 431 (1989) (suggesting that "[t]he real headwaters of the public trust doctrine . . . arise in rivulets from all reaches of the basin that holds the societies of the world").

[43] *Id.* at 425. Wilkinson explains that the doctrine is especially "complicated [because] there are fifty-one public trust doctrines in this country alone." *Id.*

[44] Shively v. Bowlby, 152 U.S. 1, 11 (1894) (holding Congressional grants to citizens of public lands did not convey title to lands below the high water mark).

"incapable of ordinary and private occupation, cultivation or improvement" and were reserved for use by the public.[45]

The United States Supreme Court's decision in *Illinois Central Railroad Co. v. Illinois*[46] is the leading case on the public trust doctrine.[47] In *Illinois Central*, the Court considered the validity of an 1869 conveyance of submerged lands from the State of Illinois to the Illinois Central Railroad Company. According to the Court, the lands were submerged beneath a navigable water and were therefore burdened by the public trust. In other words, title was not absolute. Even though fee simple title transferred to the railroad company, the Court reasoned that the "exercise of the trust by which the property was held by the State can be resumed at any time."[48] Writing for the majority, Justice Field noted: "The State can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."[49] Even though the State of Illinois granted the Illinois Central Railroad Company the submerged lands in 1869, the Court concluded that any conveyance of lands burdened by the public trust was revocable.[50]

C. The Legacy of Illinois Central

In the wake of *Illinois Central*, judges, legislators, and academics have struggled to ascertain the limits of the public trust doctrine and the implications of the doctrine for states and the federal government.[51]

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[45] *Id.*

[46] 146 U.S. 387 (1892).

[47] Charles Wilkinson asserts that Justice Field's opinion in *Illinois Central* "belongs on any short list of great natural resource opinions." Wilkinson, *supra* note 42, at 450.

[48] *Illinois Central*, 146 U.S. at 455.

[49] *Id.* at 453. Interestingly, the Court did not address whether the obligation to manage submerged lands arose from state or federal law. In *Appleby v. City of New York*, the Court reasoned that the public trust doctrine in *Illinois Central* arose under Illinois law. 271 U.S. 364, 393–95 (1926) (noting that "the conclusion reached [in *Illinois Central*] was necessarily a statement of Illinois law," but acknowledging that the general principle has been recognized throughout the country). More recently, however, the Court, in *Idaho v. Coeur d'Alene Tribe of Idaho*, appeared to interpret the *Illinois Central* holding as a matter of federal law. 521 U.S. 261, 285 (1997) (opining that even though the holding in *Illinois Central* was a statement of Illinois law, "it invoked the principle in American law recognizing the weighty public interests in submerged lands").

[50] *Illinois Central*, 146 U.S. at 463.

[51] *See, e.g.*, Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799, 800 (2004).

> For environmentalists and preservationists who view private ownership as a source of the degradation of our natural and historical resources, the public trust doctrine holds out the hope of salvation through what amounts to a judicially enforced inalienability rule that locks resources into public ownership. For those who view private property as the bulwark of the free enterprise system and constitutional liberty, the doctrine looms as a vague threat.

Id.

Understanding the limits of the public trust doctrine is particularly difficult because the doctrine has expanded to include uses, such as recreation and aesthetics, that were not protected interests under the traditional doctrine.[52] The public trust doctrine historically protected only the public's right to pursue fishing, commerce, and navigation.[53] In addition, the doctrine historically extended only to navigable waters and the underlying lands under the federal navigable-for-title test.[54] But the doctrine has evolved in many states to safeguard waterways for recreational use, to protect aesthetic values, to preserve habitat,[55] and, in some cases, extends beyond navigable waters to non-navigable tributaries.[56]

The limits of the public trust doctrine are also difficult to characterize because the doctrine has evolved differently in nearly every state.[57] Unlike the state sovereign ownership doctrine,[58] which developed as a matter of federal law, the public trust doctrine is largely a matter of state law.[59] Although the divergent nature of the doctrine frustrates some academics,[60]

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[52] *See, e.g.*, *Mono Lake*, 658 P.2d 709, 719 (Cal. 1983) (quoting Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971)).

> In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another . . . . [O]ne of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in the natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.

Id.

[53] In *Illinois Central*, the court noted that title to the submerged lands was held by the state "in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing." 146 U.S. at 452.

[54] In *Illinois Central*, the submerged lands were burdened by the public trust because the State held title "under the navigable waters of Lake Michigan . . . in the same manner that the state [held] title to soils under tide water, by the common law." In other words, the public trust applied because Lake Michigan was navigable. *Id.*

[55] *See, e.g.*, Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc., 671 P.2d 1085 (Idaho 1983) (holding that public trust doctrine did not preclude Idaho Department of Lands from granting permit for construction of a yacht club on Lake Coeur d'Alene because agency determined there would be no "adverse affect . . . [on] property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty or water quality").

[56] *See, e.g.*, *Mono Lake*, 658 P.2d 709 (reasoning that public trust doctrine extends to nonnavigable tributaries as a means to protect navigable waterways).

[57] *See* Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 577 (1989) (arguing that the flexibility of the public trust doctrine is a source of its strength).

[58] Under the state sovereign ownership doctrine, the 13 original states, as sovereigns, held title to submerged lands within the ebb and flow of the tide. Shively v. Bowlby, 152 U.S. 1, 43 (1894) (stating that the state sovereign ownership enables "public authorities . . . to have entire control of the great passageways of commerce and navigation [and] to . . . exercise[] [that control] for the public advantage and convenience"). In *Pollard's Lessee v. Hagan*, the Supreme Court reasoned that state sovereign ownership of submerged lands applied to all states, not simply to the original 13; new states came into the union on "equal footing" with the original states. Pollard's Lessee v. Hagan, 44 U.S. 212, 216 (1845).

[59] *See* Blumm, *supra* note 57, at 576–77.

[60] *See, e.g.*, Richard J. Lazarus, *Chancing Conceptions of Property and Sovereignty in*

the flexibility of the doctrine is what makes it powerful, allowing New Jersey to reserve dry sand portions of beaches for public use[61] and Montana to grant public use rights even when the streambed is not navigable for title.[62] Although the public trust doctrine is not easily cabined because it varies from state to state, a legal analysis of the Montana public trust doctrine is vital to understand, and ultimately to resolve, the recreational access disputes in Montana.

D. The Public Trust Doctrine and the Montana Constitution

The public trust doctrine is relevant to the resolution of recreational access conflicts in Montana because the doctrine is implied in the Montana constitution. In 1972, the people of Montana ratified a new constitution that reflected an emerging commitment to protect Montana's physical environment.[63] For example, the preamble states that the people of Montana are "grateful to God for the quiet beauty of [the] state, the grandeur of [the] mountains, the vastness of [the] rolling plains . . ." and "[desire] to improve the quality of life . . . for this and future generations."[64] The 1972 Montana constitution also states that citizens of Montana have "the right to a clean and healthful environment."[65] Most importantly, the 1972 document contains a provision governing surface waters, which provides, "[a]ll 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."[66] The language of the provision indicates that the people of Montana entrusted the surface waters to the state and, in so doing, placed an affirmative duty on the state to manage those resources for the use of its people. Thus, by demanding that

Natural Resources: Questioning the Public Trust Doctrine, 71 IOWA L. REV. 631, 715–16 (questioning the workability of the public trust doctrine and reasoning that "even if aimed at promoting needed resource conservation and environmental protection goals, [the public trust doctrine] is a step in the wrong direction").

61 Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984).

62 *Curran*, 682 P.2d 163, 171 (Mont. 1984).

63 *See, e.g.*, MONT. CONST. pmbl., MONT. CONST. §3. Harry W. Fritz described the 1972 Constitution, noting, "The new document represented a fundamental turning point, perhaps as symbolic as substantive, in the history of Montana—the centerpiece of an era of reform that began well before 1972 and continues, however attenuated, today." Harry W. Fritz, *The 1972 Montana Constitution in a Contemporary Context*, 51 MONT. L. REV. 270, 270 (1990). For an interesting overview of the environmental quality provisions contained in the Montana constitution, see John L. Horwich, *Montana's Constitutional Environmental Quality Provisions: Self-Executing or Self-Delusion?*, 57 MONT. L. REV. 323 (1996). *See generally* Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157 (2003) (containing an overview of how the Montana Supreme Court has interpreted the environmental provisions in the Montana constitution).

64 MONT. CONST. pmbl.

65 MONT. CONST. art. II, § 3.

66 MONT. CONST. art. IX, § 3, cl. 3 (emphasis added).

the state safeguard its surface waters for its people, those waters are impliedly burdened by the public trust.

The Montana Supreme Court examined this provision in *Curran,* when the Montana Coalition for Stream Access challenged riparian landowner Dennis Curran's claim that he could restrict use on portions of the Dearborn River flowing through his land.[67] The Dearborn River was navigable under the federal navigable-for-title test,[68] and thus title to the bed and banks transferred from the federal government to Montana upon Montana's admission to the Union.[69] Nonetheless, the Montana Supreme Court did not rest its holding on the navigable-for-title test.[70] Instead, the court based its holding on the surface water provision of the Montana constitution and the public trust doctrine.[71] The court ruled for the Montana Coalition for Stream Access, concluding that "any surface waters that are capable of recreational use may be so used by the public *without regard to streambed ownership or navigability for nonrecreational purposes*."[72] Thus, according to the Montana Supreme Court, in order for a surface water to be burdened by the public trust, the water need only be capable of recreational use.[73]

The court heard a similar case later that year, in which the Montana Coalition for Stream Access challenged riparian landowner Hildreth's attempt to restrict recreational use on the Beaverhead River adjacent to his property.[74] The Montana Supreme Court again held for the Coalition, citing *Curran* and the surface water provision of the Montana constitution.[75] In both cases, the Montana Supreme Court based its decision on the Montana constitution, opining, in *Curran*, that "[t]he 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."[76] Similarly, in *Montana Coalition for Stream Access v. Hildreth*, the court wrote that "[t]he Montana constitution clearly provides that the state owns the waters for the benefit of its people."[77] Thus, the Montana Supreme Court opined that the Montana constitution reserved the state's surface waters for the use of its people.

The Montana legislature enacted the Stream Access Law in 1985 in an attempt to define terms left unspecified by *Curran* and *Hildreth*,[78] and the

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67 *Curran*, 682 P.2d at 164.

68 *Id.* at 166.

69 *See* Enabling Act, ch. 180, 25 Stat. 676 (1889) (authorizing donations of public land to Montana). The Enabling Act noted that Montana would be "admitted into the Union on an equal footing with the original States." *Id.* For a discussion of the "equal footing" doctrine, see discussion, *supra* note 58.

70 *Curran*, 682 P.2d at 172.

71 *Id.*

72 *Id.* at 171 (emphasis added).

73 *Id.*

74 *Hildreth*, 684 P.2d 1088, 1090 (Mont. 1984).

75 *Id.* at 1094.

76 *Curran*, 682 P.2d at 170.

77 *Hildreth*, 684 P.2d at 1091.

78 In *Curran* and *Hildreth*, the Montana Supreme Court held that waters capable of recreational use "may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes." *Hildreth*, 684 P.2d at 1093. In the 1985 Stream Access

constitutionality of the law was subsequently challenged by property owners in *Galt v. State Department of Fish, Wildlife, & Parks*.[79] In *Galt*, the plaintiff filed suit, alleging a "taking of private property without just compensation."[80] The Montana Supreme Court upheld the constitutionality of the Stream Access Law.[81] Although the court determined that overnight camping and the construction of duck blinds—uses originally allowed under the statute—were impermissible under the Montana constitution because they were not "necessary for the public's enjoyment of its water ownership,"[82] the court rejected the landowner's takings claim, and held that both the real property interests of riparian landowner and the public's property interest in water were constitutionally protected.[83]

The importance of the surface water provision of the 1972 Montana constitution and the ensuing Montana Supreme Court decisions finding the public trust doctrine embedded in that provision cannot be understated. Because the Montana Supreme Court concluded that the public trust doctrine is implied in the language of the Montana constitution, the state has an affirmative duty to reserve the state's waters for "the use of its people."[84] The Montana constitution does not allow the state's waters to be reserved for a subset of the citizenry, such as individuals who happen to be riparian landowners. Instead, the language charges the state with maintaining use rights for all its citizens. If the state is to carry out its duty to safeguard use rights for all its citizens, however, it must establish and protect reasonable means of access because access, unlike the construction of duck blinds or overnight camping privileges, is necessary for the public's enjoyment of its water ownership.

Although the Montana Supreme Court recognized use rights in the Montana constitution in *Curran* and *Hildreth*, and the Montana legislature later codified those rights in the Montana Stream Access Law, the state of recreational stream access in Montana remains unclear because the Stream

Law, the Montana Legislature attempted to catalog the uses which are necessary for the "public's enjoyment of its water ownership." Galt v. State Dep't of Fish, Wildlife, & Parks (*Galt*), 731 P.2d 913, 915 (Mont. 1987). The Stream Access Law also charged the Fish and Game Commission with facilitating the public's exercise of its constitutional use rights. The statement of intent attached to the Stream Access Law charged the Montana Department of Fish, Wildlife, and Parks with "preserv[ing], protect[ing], and enhance[ing] the surface waters of [Montana] while facilitating the public's exercise of its recreational rights on surface waters." MONT. CODE ANN. § 23-2-302 annot. (2005).

79 731 P.2d 912 (Mont. 1987).

80 *Id.* at 913.

81 *Id.* at 916. Writing for the majority, Justice Morrison began the opinion by restating the holdings of *Curran* and *Hildreth*, writing, "In *Curran*, we held that under *the public trust doctrine as derived from the Montana Constitution* the public has a right to use any surface waters capable of recreational purposes up to the high water marks and may portage around barriers in the water in the least intrusive manner possible." *Id.* at 913 (emphasis added).

82 *Id.* at 915.

83 *Id.* at 916. In *Madison v. Graham*, the Federal District Court for Montana declined to review the major federal and constitutional challenges to the Stream Access Law raised in *Galt*, thus affirming the Montana Supreme Court's decision on the constitutionality of the Montana Stream Access Law. 126 F. Supp. 2d 1320, 1327 (D. Mont. 2001).

84 MONT. CONST. art. IX, § 3, cl. 3.

Access Law did not grant a public easement over private property. The Montana Stream Access Law notes, "The right of the public to make recreational use of surface waters does not grant any easement or right to the public to enter onto or cross private property in order to use such waters for recreation purposes."[85] Some access advocates are concerned that the express preclusion of public easements in the Stream Access Law authorizes riparian landowners to keep the public from using the state's streams. These fears are unwarranted. Even though the legislature attempted to clarify and codify the constitutionally conferred use rights in the Stream Access Law, the statute is not determinative of the scope of rights conferred in the Montana constitution.

E. Mono Lake *and the State's Duty Under the Public Trust*

To determine the scope of the Montana public trust doctrine, it is useful to examine the current controversy over recreational access in light of other states' interpretations of the public trust doctrine. The California Supreme Court examined the scope of the public trust doctrine in *National Audubon Society v. Superior Court of Alpine County* (*Mono Lake*).[86] The Audubon Society sued to enjoin the Department of Water and Power of the City of Los Angeles (Los Angeles) from diverting water from four streams upstream from Mono Lake, arguing that the "bed and waters of Mono Lake" were protected by the public trust doctrine.[87] In response, Los Angeles argued that the California appropriative water rights system was the "comprehensive and exclusive system for determining the legality of the diversions."[88] Thus, according to Los Angeles, the permit the city received in 1940 to appropriate waters for municipal purposes could not subsequently be revoked or restricted by the public trust doctrine.[89]

In order to determine whether Los Angeles could continue to appropriate water to the detriment of the Mono Lake ecosystem, the California Supreme Court was forced to square the California appropriative

[85] MONT. CODE ANN. § 23-2-302(4) (2005). Addressing the issue of access under the Montana Stream Access Law, the Montana Supreme Court noted that the right to use Lois Lake did not carry with it the right to cross private property to access the lake. Ryan v. Harrison & Harrison Farms L.L.L.P, 306 Mont. 534, No. 00-395, 2001 WL 828068, *3–*4 (Mont. July 24, 2001). The court acknowledged, however, that Lois Lake is not covered under the Montana Stream Access Law because it is man-made. *Id.* at *4.

[86] 658 P.2d 709 (Cal. 1983).

[87] *Id.* at 712.

[88] *Id.* at 718.

[89] *See id.* at 727 (explaining Los Angeles's argument that the public trust doctrine was "subsumed" into the state's appropriative water rights system and has disappeared). Although Los Angeles received permits to appropriate from the streams flowing into Mono Lake in 1940, the diversions did not present an ecological problem until 1970. Between 1940 and 1970, the city appropriated only half of the flow from the streams, but in 1970, the city added a second diversion tunnel and, as a result, began appropriating almost the entire flow from the four streams. The increased diversions led to both a dramatic drop in the level of Mono Lake and a reduction in the surface area of the lake by one third, leaving "little doubt that both the scenic beauty and the ecological values of Mono Lake [were] imperiled." *Id.* at 711.

water rights system with the California public trust doctrine. The opinion was remarkable because the court reasoned that the public trust doctrine was capable of "tempering"[90] prior appropriation principles of California water law.[91] The court opined that the public trust doctrine was not "subsumed in the California water rights system"[92] and stated:

> The public trust doctrine serves the function in [the appropriative water rights system] of preserving the continuing sovereign power of the state to protect public trust uses, a power which precludes anyone from acquiring a vested right to harm the public trust, and *imposes a continuing duty on the state* to take such uses into account in allocating water resources.[93]

According to the California Supreme Court, even though Los Angeles was first in time, the city was not necessarily first in right.[94] Although Los Angeles acquired the right to appropriate from the streams in 1940,[95] that property right in water remained subject to "the interests protected by the public trust."[96] In other words, because the city held water rights that were potentially harmful to interests protected by the trust, those water rights were subject to restriction or revocation.[97]

The *Mono Lake* court noted that once the state approves an appropriation under the California water rights system, that appropriation remains subject to restriction or revocation if the appropriation later impairs uses protected by the public trust.[98] The public trust doctrine demands both that the state retain control over the navigable waters, lakeshores, and tidelands in order to protect trust uses and that the state prevent individuals from acquiring a vested right to divert water in "a manner harmful to the interests protected by the public trust."[99] In other words, the state has a duty to continually reevaluate trust uses, to weigh those uses against the benefits of water diversions, and to try to avoid "unnecessary and unjustified harm to

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90 *Id.* at 717. *See* Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701, 703 (1995) (stating that the Mono Lake opinion "ranks in the top ten of American environmental law decisions"). Blumm & Schwartz note, "[t]he *Mono Lake* decision refused to allow decisions made by past generations to shackle allocations of water resources by this generation. The [court's] invocation of the public trust doctrine to *temper prior appropriation principles* might therefore be thought of as the water law equivalent of the rule against perpetuities." *Id.* (emphasis added).

91 *Mono Lake*, 658 P.2d at 732.

92 *Id.*

93 *Id.* (emphasis added).

94 *See generally id.* (opining "that plaintiffs can rely on the public trust doctrine in seeking reconsideration of the allocation of the waters of the Mono Basin").

95 *See id.* at 711 (acknowledging that the City of Los Angeles was granted a "permit to appropriate virtually the entire flow of four of the five streams flowing into the lake").

96 *See id.* at 726.

97 *See* Blumm & Schwartz, *supra* note 90, at 707.

98 *See Mono Lake*, 658 P.2d at 723 (explaining that the state, as the "administrator of the public trust," has the "continuing power" to revoke "previously granted rights" or to enforce the "trust against lands long thought free of the trust").

99 *Id.* at 727.

trust interests."[100] Thus, the public trust doctrine is capable of tempering the rigid application of the appropriative water rights system.[101]

The California Supreme Court observed that even though the state has a continuing duty to reevaluate appropriations, existing uses will not be ignored.[102] According to the court, there is a feasibility requirement implied in the state's duty which enables the state to balance the competing interests—to account for existing uses even as it seeks to protect interests protected by the public trust.[103] Accordingly, when the state grants water rights, it must "consider the effect of [the diversions] upon interests protected by the public trust, and attempt, *so far as feasible*, to avoid or minimize any harm to those interests."[104] This feasibility standard is important because it allows California to account for existing uses when working to minimize harm to interests protected by the public trust.[105]

Although the public trust doctrine has historically caused property rights advocates to squirm and environmentalists to celebrate, as applied by the California Supreme Court, the doctrine is not nearly as pro-environment as either group believes. Because the doctrine merely requires "feasible accommodation," the doctrine does not force decision makers to err on the side of the environment or to ignore economic factors. Instead, the public trust doctrine requires California to "fulfill[] trust purposes without destabilizing existing users."[106] Although the doctrine demands that public trust uses be protected, the feasibility standard allows the state to accomplish that protection over the long term even if that means periodically favoring existing uses over protected trust uses.

III. THE PROBLEM OF ACCESS ACROSS UPLAND PARCELS

For the public to enjoy its constitutional use rights, recreational access is imperative. To resolve the conflicts over access, it is necessary to examine how other states have dealt with the problem of access across upland parcels. The solutions are many and varied, but they provide a platform from which Montana's recreational stream access disputes appear less daunting.

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100 *Id.* at 728.

101 Regarding the potential for the public trust doctrine to temper the "extreme reaches of prior appropriation," Charles Wilkinson notes: "[f]aced with overriding natural resource calamities such as . . . the drying up of a whole river, the courts understandably respond to a doctrine that can, in a principled way, *provide balance*." He states, "[t]hat is precisely how the traditional doctrine arose [in *Illinois Central*] with the dedication of far too much of Chicago harbor to the private interests." He continues, "[t]hen, as now, judges can be expected to employ old and honored notions of trusteeship in order to fulfill the interests and the expectations of the public." Wilkinson, *supra* note 42, at 471 (emphasis added).

102 *Mono Lake*, 658 P.2d at 712.

103 *Id.*

104 *Id.* (emphasis added).

105 *See* Blumm & Schwartz, *supra* note 90, at 711–12 (suggesting that the feasibility standard allows the state to satisfy trust uses over the long term instead of the short run and noting that the public trust doctrine "seeks coexistence, not defeasance").

106 *Id.* at 712.

A. Access to Trust Resources and State-Specific Solutions

In some states, courts have recognized a public right to gain prescriptive easements across private property. Individuals may acquire the right to access waters by prescription as a result of a use that is open, notorious, and continuous for the prescriptive period.[107] The Montana Stream Access Law, however, expressly prohibits the acquisition of access rights across private land through prescription, providing, "[a] prescriptive easement cannot be acquired through: (a) recreational use of surface waters, including: (i) the streambeds underlying them; (ii) the banks up to the ordinary high-water mark; or (iii) any portage over and around barriers; or (b) the entering or crossing of private property to reach surface waters."[108] Thus, although prescription is a viable means of acquiring access rights to trust resources in some states, the Montana Stream Access Law precludes such a result.

Other state courts have recognized a public right to access trust resources under the doctrine of custom. For example, in *State ex rel Thornton v. Hay*,[109] the Oregon Supreme Court used the theory of custom to prevent beachfront property owners from developing the dry sand areas of their property. The court rejected the theory of prescription and based its decision on custom because "prescription applies only to the specific tract of land before the court . . . [but] [a]n established custom . . . can be proven with reference to a larger region."[110] The court reasoned that the custom of Oregon residents and visitors to use the dry sand areas was "so notorious that notice of the custom on the part of persons buying land along the shore must be presumed."[111] Although one could argue that the custom of Montana residents to use Montana's streams is "so notorious" as to put landowners on notice, courts infrequently rely on the doctrine of custom. In fact, it is primarily used in coastal states to safeguard access to beaches.[112]

B. Matthews *and the State's Duty to Provide Reasonable Access*

Although prescription and custom have gained traction in some states as means to confer access rights to trust resources, access based on the public trust doctrine is more appropriate for Montana because the public's

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[107] *See, e.g.*, Reitsma v. Pascoag Reservoir & Dam, 774 A.2d 826 (R.I. 2001) (holding public acquired prescriptive easement over private property to access boat ramp); Eaton v. Town of Wells, 760 A.2d 232 (Me. 2000) (upholding the public's right to use dry sand and intertidal areas by prescriptive easement).

[108] MONT. CODE ANN. § 23-2-322 (2005).

[109] State *ex rel.* Thornton v. Hay, 462 P.2d 671 (Or. 1969).

[110] *Id.* at 676.

[111] *Id.* at 678.

[112] *See, e.g.*, Hirtz v. Texas, 773 F. Supp. 6, 11 (S.D. Tex. 1991), *vacated*, 974 F.2d 663 (5th Cir. 1992) (holding that the public right to use dry sand portions of the beach was based on prescription and custom); Matcha v. Mattox, 711 S.W.2d 95, 100 (Tex. App. 1986) (reasoning that the custom-based public easement on Galveston Island was migratory, shifting with the "natural movements of the beach").

use rights are based on the public trust doctrine as implied in the Montana constitution.[113] Accordingly, to resolve the recreational access disputes in Montana, it is necessary to survey relevant case law from other states concerning access based on the public trust doctrine.

The Supreme Court of New Jersey faced a similar controversy over access to waters held in trust for the public in *Matthews v. Bay Head Improvement Ass'n*.[114] In *Matthews*, citizens sued the Bay Head Improvement Association because the association was controlling access to the municipal beachfront.[115] From mid-June to Labor Day, members of the public had to purchase and display association badges in order to access and use the public beach. While members of the public could gain access by walking up the beach from either Point Pleasant beach or from the Borough of Mantoloking without purchasing a badge, the association controlled use of and access across the upland dry sand parcels adjacent to Bay Head.[116]

Like individuals interested in using the streams of Montana, beachgoers desiring to recreate in Bay Head faced a problem. The beachgoers could use the beach only if they could gain access to the beach across upland parcels, and the Bay Head Improvement Association had a "virtual monopoly" over the access.[117] Since there were no public access routes, the public had to either walk a great distance to access the beach or pay a premium to the quasi-public association.[118]

Although the *Matthews* court declined to open all privately-owned upland property to the public, the court reasoned that the right to "swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach."[119] The court concluded, "To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith *without assuring the public of a feasible access route* would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine."[120] According to the Supreme Court of New Jersey, use rights could be exercised only if individuals could gain access to the beaches held in trust by the state. Thus, privately-held portions

113 *See supra* notes 63–84 and accompanying text.

114 471 A.2d 355 (N.J. 1984).

115 For an in-depth discussion of *Matthews*, specifically, and beach access in New Jersey, generally, see Thomas J. Fellig, *Pursuit of the Public Trust: Beach Access in New Jersey from* Neptune v. Avon *to* Matthews v. BHIA, 10 COLUM. J. ENVTL. L. 35 (1985).

116 Like the streams of Montana, the tidelands of New Jersey are vested in the state in trust for the people. In *Borough of Neptune City v. Borough of Avon-by-the-Sea*, the Supreme Court of New Jersey reasoned that the public trust doctrine applied to municipally-held dry sand beaches above the high-water mark. In an effort to determine the scope of the public trust doctrine in New Jersey, the court opined that the public trust doctrine "should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit." 294 A.2d 47, 53–56 (N.J. 1972). The court also recognized that municipalities might need to charge a fee in order to maintain the beach, but that such a fee must not discriminate between residents and non-residents. *Id.*

117 Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 368 (N.J. 1984).

118 *Id.*

119 *Id.* at 364.

120 *Id.* (emphasis added).

of the beach were burdened by the trust and were therefore susceptible to reasonable access by individuals desiring to recreate along the tidelands.[121]

The right to use the upland parcels was not boundless, however. The court did not authorize limitless access to privately-owned land, stating that the "public interest is satisfied so long as there is *reasonable access* to the sea."[122] As applied by the *Matthews* court, nonetheless, "the public trust doctrine has come to stand for the principle that municipal beaches 'must be open to all on equal terms.'"[123] The *Matthews* rationale is compelling: lack of access seriously impinges upon the public's right to use trust resources.[124]

Although custom and prescription are possible solutions to the stream access problem in Montana, the New Jersey Supreme Court's reasoning in *Matthews* is more compelling because the Montana Supreme Court found the public trust doctrine implied in the Montana constitution. Like the beachgoers in New Jersey who have a right to use the tidelands under the public trust doctrine, citizens in Montana have a right to use Montana's streams. A lack of reasonable access seriously impinges upon the constitutional use rights protected by the Montana public trust doctrine. In other words, because the state has a duty to protect public trust resources for use by its citizens,[125] it also has a duty to provide for and safeguard access.

IV. MONTANA'S DUTY TO SECURE AND SAFEGUARD RECREATIONAL ACCESS

The public trust doctrine provides a pathway towards a resolution of the conflict between riparian landowners and anglers on the streams of Montana. Because lack of access impinges upon the use rights conferred in the Montana constitution, the public trust doctrine places an affirmative duty on the state to safeguard access rights for the state's citizens.[126]

A. The Demands of the Montana Constitution

In *Galt*, the Montana Supreme Court reasoned, "The real property interests of private landowners are important as are the public's property interest in water. Both are constitutionally protected. These competing interests, when in conflict, must be reconciled to the extent possible."[127] Thus, much like the *Mono Lake* court determined that the public trust doctrine requires balancing,[128] the Montana Supreme Court concluded that

121 *Id.*

122 *Id.* (emphasis added).

123 Fellig, *supra* note 115, at 37.

124 *Matthews*, 471 A.2d at 364.

125 *Galt*, 731 P.2d 912, 916 (Mont. 1987).

126 MONT. CONST. art. IX, § 3, cl. 3.

127 *Galt*, 731 P.2d at 916.

128 According to the California Supreme Court:

> The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Just as

the Montana constitution demands a careful weighing of the competing interests in recreational stream access disputes.[129] Just as a Ruby River landowner's interest in her property is constitutionally protected, so too are the interests of anglers who hope to gain access to the Ruby for recreational purposes.

If the public does not have access to the waters, however, the state must provide for reasonable access. This does not mean that individuals interested in using the state's streams automatically have the right to cross private property. On the contrary, even in *Matthews*, where the court noted that the right to use the beaches was dependent upon a right to access the beach, the court reasoned that the public trust doctrine was satisfied as long as there was "reasonable access."[130] Moreover, following the *Mono Lake* rationale, riparian landowners are only required to make feasible accommodations.[131] Thus, although riparian landowners must allow for reasonable access, that state must account for the "existing uses" of private landowners and work to balance the competing uses in the long run.[132]

Finally, if the state fails to provide for and safeguard access, the public trust doctrine is a powerful tool in the hands of citizens. In *Mono Lake*, for example, the California Supreme Court reasoned that the general public could access the courts to enforce the public trust doctrine.[133] Rejecting Los Angeles's claim that the National Audubon Society lacked standing to sue, the court explained that "any member of the general public has standing to raise a claim of harm to the public trust."[134] Accordingly, if Montana fails to provide for reasonable access, members of the general public have standing to sue to enjoin violations of the public trust. Public standing—combined with the state's obligation to provide for reasonable access and the duty placed upon landowners' to make feasible accommodations—makes the Montana public trust doctrine a powerful tool capable of providing for and protecting access to the state's trust resources.

> the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests. As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust.

Mono Lake, 658 P.2d 709, 728 (Cal. 1983) (footnote and citation omitted).

129 *Galt*, 731 P.2d at 916. *See also supra* notes 63–84 and accompanying text (discussing the public trust doctrine under the Montana constitution).

130 Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 364 (N.J. 1984).

131 *Mono Lake*, 658 P.2d at 712.

132 *See supra* notes 98–105 and accompanying text.

133 *Nat'l Audubon Soc'y*, 658 P.2d at 716 n.11.

134 *Id.* (citation omitted); *see also* State v. Deetz, 224 N.W.2d 407, 413 (Wis. 1974) (holding that the public trust doctrine "establishes standing for the state, or any person suing in the name of the state for the purpose of vindicating the public trust"); Blumm & Schwartz, *supra* note 90, at 712–13 (arguing that a significant contribution of the *Mono Lake* decision was "its implicit grant of public access to the courts to enforce the [public trust] doctrine").

B. The Public Trust Doctrine and Takings

Some scholars have questioned the prudence and legitimacy of state constitutional provisions, such as the surface water provision of the Montana constitution, which formally declare a public right to use a particular resource.[135] Arguing that "a state constitutional amendment creating public rights in the use of some resource [is] valid only to the extent that it [does] not infringe on any pre-existing, vested property rights,"[136] for example, James Huffman criticized the surface water provision of the 1972 Montana constitution. He noted, "By linking the flexibility of constitutional interpretation with the deep historical roots of the public trust doctrine, it is possible to manufacture new rights while claiming simply to uphold existing rights."[137] The thrust of Huffman's argument was that states are using the public trust doctrine to rewrite state constitutions. In the case of the surface water provision of the Montana constitution, Huffman suggested that the public right to surface waters was created at the expense of private property rights.

Huffman's contention that the public trust doctrine enables states to create new rights is misleading, however, because the surface water provision contained in the current Montana constitution is essentially a restatement of a similar provision in the 1889 Montana constitution. The 1889 Montana constitution stated:

> The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution, or other beneficial use, and the right of way over the lands of others, for all ditches, drains, flumes, canals, and aqueducts, necessarily used in connection therewith . . . shall be held to be a *public use*.[138]

Thus, the surface water provision of the 1972 Montana constitution, which states that the surface waters "are the property of the state for the use of its people,"[139] did not grant new public rights.[140] Instead, the 1972 provision simply restated the public nature of the state's waterways and clarified the state's obligation to protect use rights for its citizens.[141]

In addition, Huffman's solution to the problem—providing just compensation for landowners adversely affected by the public trust—stems from a narrow view of the problem. Huffman is concerned exclusively with

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[135] *See, e.g.*, James L. Huffman, *A Fish out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527, 547–48 (1989) (aruging that state constitutional amendments that create a public right in the use of a resource are only valid if they do not infringe on property rights).

[136] *Id.* at 547.

[137] *Id.* at 549.

[138] MONT. CONST. art. III, § 15 (1889) (emphasis added).

[139] MONT. CONST. art. IX, § 3, cl. 3.

[140] Huffman acknowledged that the 1972 provision "was not intended to have any different meaning than a similar provision in the 1889 constitution," but posited that, "if it were intended to grant new public rights where private rights existed previously, there would have to be compensation for those private rights." Huffman, *supra* note 135, at 548.

[141] MONT. CONST. art. IX, § 3, cl. 3.

the rights of property owners, and fails to consider the rights of many who do not own streamside land but who, nonetheless, hold constitutional rights to use the water resource.[142] Huffman's fear is without merit, however, because, as the *Mono Lake* court suggests, the doctrine is capable of balancing existing uses and public trust uses, and thereby making decisions that benefit the public in the long term.[143]

In addition, compensation is not required when landowners are asked to provide reasonable access to trust resources because the public trust doctrine is a background principle of Montana property law. In *Lucas v. South Carolina Coastal Council,*[144] the United States Supreme Court opined that a takings claim can be defeated if the state proves that a landowner's property rights were restricted by "background principles" of property law present at the time of purchase.[145] According to the Supreme Court, "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, . . . it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[146] Although the Court did not list the public trust doctrine as a background principle, the Court's discussion of background principles has led other courts to reject takings claims because the public trust doctrine functions as a background principle.[147] Simply stated, the public trust doctrine is a background principle of Montana property law.[148] Because the public trust doctrine is

142 In response to Huffman's assertion that the public trust doctrine is a "doctrine that justifies the denial of liberty," Michael Blumm asked, "[w]hy isn't the liberty of those who wish to raft without barbed wire fences as relevant as the liberty of the fencers?" Blumm, *supra* note 57, at 599 n.108.

143 *Mono Lake*, 658 P.2d 709, 728 (Cal. 1983).

144 505 U.S. 1003 (1992).

145 *Id.* at 1029–30. For a detailed discussion on background principles, see Michael C. Blumm & Lucas Ritchie, Lucas*'s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 321 (2005) (arguing that "*Lucas*'s principal legacy lies in affording government defendants numerous effective categorical defenses with which to defeat takings claims."); *see also* Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Importance of* Lucas v. South Carolina Coastal Council *on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 5 (1995) (noting that, as a background principle of property law, the public trust doctrine can defeat takings claims, and cautioning that the over-use of the doctrine might undermine the environmental laws the public trust doctrine protects).

146 *Lucas*, 505 U.S. at 1027.

147 *See, e.g.*, Esplanade Properties v. City of Seattle, 307 F.3d 978, 985 (9th Cir. 2002) (noting that the public trust doctrine was a background principle of Washington property law that barred takings claim); R.W. Docks & Slips v. Wis. Dep't of Natural Res., 628 N.W.2d 781, 791 (Wis. 2001) (rejecting takings claim where public trust doctrine prevented issuance of a dredging permit needed for the construction of a marina); s*ee also* Blumm & Ritchie, *supra* note 145, at 366 (arguing that "the background principles defense authorized in *Lucas* is alive and well and will continue to function as a useful tool for government defendants to defeat takings claims.").

148 Because the surface water provision contained in the 1972 Montana constitution was essentially a restatement of the provision contained in the 1889 Montana constitution, the public trust doctrine in Montana arguably has a priority date of 1889 or earlier. Thus, the Montana public trust doctrine is capable of defeating most takings claims arising from a

implied in the surface water provision of the Montana constitution, no compensation is owed to landowners required to make feasible accommodations for reasonable access across their lands.

C. The Public Trust Doctrine and Habitat Destruction

Those troubled by the reach of the public trust doctrine argue that improved and additional access points will result in overuse of Montana's streams and harm to riparian habitat.[149] They contend that limiting access is an effective means to protect those ecosystems.[150] Although the potential for habitat destruction from overuse alarms many, concern over habitat destruction cannot override the mandates of the Montana constitution and should not be used to favor one class of stream user over another.[151] If conservation was placed solely within the control of riparian landowners, the issue of stream access would most certainly become an issue of class, favoring riparian landowners over those who use but do not live along the river.

In addition, "reasonable access" should not lead to habitat destruction. According to the *Matthews* court, reasonable access depends on the circumstances.[152] In the context of access across upland dry sand areas, that court noted, "Precisely what privately-owned upland sand area will be available and required to satisfy the public's rights under the public trust doctrine will depend upon the circumstances."[153] To determine whether use of the upland areas was reasonable the court looked at the "[l]ocation of the dry sand area in relation to the foreshore, [the] extent and availability of publicly-owned upland sand area, nature and [the] extent of the public demand, and usage of the upland sand land by the owner."[154] In other words, reasonable access is not unrestricted access. The public trust doctrine allows the courts to fashion a remedy that accounts for the unique circumstances of the upland parcels, and therefore to prevent overuse that leads to habitat destruction.

V. CONCLUSION

In response to access disputes on the Ruby and across Montana, Montanans have begun to discuss both the problems with and the future of

requirement for riparian owners to provide for reasonable access to trust resources. *See supra* notes 135–39 and accompanying text.

149 Weber, *supra* note 4 (describing Ruby riparian James Kennedy's contention that losing the fight over stream access at the county right-of-ways will lead to overuse "until the fishing is decimated"). In an interview with Weber, Kennedy noted that he had spent thousands of dollars on habitat restoration. *Id.*

150 *Id.*

151 *See supra* notes 63–84 and accompanying text.

152 Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984).

153 *Id.*

154 *Id.*

recreational stream access in the state.[155] Although the talk indicates that Montanans are grappling with the problem of access, the solution lies in the Montana public trust doctrine. To solve the recreational stream access problem in Montana, individuals must begin with an understanding of what the Montana public trust doctrine demands, which may require a definitive ruling from the Montana Supreme Court.

If the state hopes to prevent further disputes on the Ruby, preserve a way of life, and safeguard an important aspect of Montana's economy, the controversy over recreational stream access must be resolved. The Montana constitution places an affirmative duty[156] on the state to protect its surface waters for the use of its people.[157] Accordingly, the state must provide for reasonable access by requiring riparian landowners to make feasible accommodations. The Montana constitution demands such accommodations and, as a matter of practical necessity, the state must act before it is too late.

[155] For example, the Property and Environment Research Center hosted a roundtable discussion on recreational stream access that brought together landowners, public access advocates, and representatives from the Montana Department of Fish, Wildlife, and Parks. Property & Env't Research Ctr., Roundtable Discussion on Stream Access in Montana, (Sept. 19, 2005), http://www.perc.org/perc.php?id=749 (last visited Nov. 12, 2006). A similar discussion hosted by the Montana Department of Fish, Wildlife, and Parks Commission brought together ranchers, state government officials, and anglers. The discussion focused on the issue of access on the Ruby River. Jennifer McKee, *Fish, Wildlife and Parks Commission Meets in Helena*, MISSOULIAN, Nov. 4, 2005, at B4.

[156] *See Mono Lake*, 658 P.2d 709, 728 (Cal. 1983) (noting that "[t]he state has an affirmative duty to take the public trust into account in planning and allocation of water resources.").

[157] MONT. CONST. art IX, § 3, cl. 3.