

**MINUTES**  
**REGULAR MEETING OF THE BOARD OF LAND COMMISSIONERS**  
**Monday, December 16, 2013 at 9:00 am**  
**Capitol Building**  
**Helena, MT**

**Please note:** *The Land Board has adopted the audio recording of its meetings as the official record, as allowed by [2-3-212, MCA](#). These minutes provide an abbreviated summary of the Land Board discussion, public testimony, action taken, and other activities. The time designations listed are approximate and may be used to locate the referenced discussion on the audio recording of this meeting. Access to an electronic copy of these minutes and the audio recording is provided from the Land Board webpage at <http://dnrc.mt.gov/LandBoard>. The written minutes summary, along with the audio recordings, are listed by meeting date on the Land Board Archive webpage.*

**Members Present**

Governor Steve Bullock  
Attorney General Tim Fox  
Secretary of State Linda McCulloch  
Superintendent of Public Instruction Denise Juneau

**Members Absent**

Commissioner of Securities and Insurance Monica Lindeen

**Testifying Staff**

John Tubbs, DNRC Director  
Hugh Zackheim, FWP Lands Program Manager  
John Grimm, DNRC Real Estate Management Bureau Chief  
Patti Furniss, Department of Labor and Industry (DLI) Bitterroot Job Service Manager  
Joe Lamson, DNRC Deputy Director

**Attachments**

Related Materials, Attachment 1 – Sign-in sheet  
Related Materials, Attachment 2 – Handout from Randall Knowles – Maps  
Related Materials, Attachment 3 – Handout from Richard Knowles – Article

**Call to Order**

00:00:00 Governor Bullock called the meeting to order.  
00:00:04 Ms. McCulloch moved to approve the November 18, 2013, minutes. The motion was seconded by Ms. Juneau and carried unanimously.

**Business Considered**

**1213-1 FWP: Land Acquisition – Otter Island Fisheries Conservation Area**

00:00:10 Mr. Tubbs gave an overview of the item.  
00:01:07 Governor Bullock  
00:01:16 Mr. Zackheim  
00:04:15 Ms. Juneau moved to approve item 1213-1. The motion was seconded by Mr. Fox and carried unanimously.

**1213-2 Oil and Gas Lease Sale (December 3, 2013)**

00:04:33 Mr. Tubbs gave an overview of the item.

00:05:15 Ms. McCulloch moved to approve item 1213-2. The motion was seconded by Ms. Juneau and carried unanimously.

**1213-3 Communitization Agreement: Denbury Onshore, LLC – MPG NCT 91AH Well**

00:05:28 Mr. Tubbs gave an overview of the item.

00:06:03 Mr. Fox moved to approve item 1213-3. The motion was seconded by Ms. McCulloch and carried unanimously.

**1213-4 Administrative Rule Adoption – Sale of Cabin and Home Site Leases**

00:06:15 Mr. Tubbs gave an overview of the item.

Public Comment

00:07:23 Margaret Morgan, Montana Leaseholders Association

00:08:02 Randall Knowles

00:08:40 Governor Bullock

00:08:47 Mr. Knowles

00:10:02 Ms. McCulloch moved to approve item 1213-4. The motion was seconded by Mr. Fox.

Board Discussion/Comments

00:10:10 Governor Bullock

00:10:36 Ms. McCulloch

00:11:55 The motion to approve item 1213-4 carried unanimously.

**1213-5 Land Banking Parcel: Preliminary Approval for Sale**

00:11:00 Mr. Tubbs explained item 1213-5 had been withdrawn from the agenda (12/11/13).

**1213-6 Department of Labor and Industry: Set Minimum Bid for Sale – Bitterroot Job Service**

00:11:12 Mr. Tubbs gave an overview of the item.

00:12:00 Mr. Fox moved to approve item 1213-6. The motion was seconded by Ms. Juneau.

Board Discussion/Comments

00:12:07 Governor Bullock

00:12:15 Mr. Tubbs

00:12:27 Patti Furniss

00:12:54 The motion to approve item 1213-6 carried unanimously.

**1213-7 Land Exchange: Final Approval – DNRC/Montgomery Exchange**

00:13:00 Mr. Tubbs gave an overview of the item.

00:13:52 Ms. McCulloch moved to approve item 1213-7. The motion was seconded by Mr. Fox.

Board Discussion/Comments

00:13:57 Ms. McCulloch

00:14:13 Mr. Tubbs

00:14:49 Ms. McCulloch

00:14:54 Mr. Tubbs

00:15:01 Mr. Grimm

00:15:43 The motion to approve item 1213-7 carried unanimously.

**1213-8 Timber Sale: Lower McGinnis**

00:15:50 Mr. Tubbs gave an overview of the item.

**Public Comment**

00:17:31 Chuck Roady, F.H. Stoltze Land and Lumber Vice President

00:18:12 Mr. Fox moved to approve item 1213-8. The motion was seconded by Ms. McCulloch.

**Board Discussion/Comment**

00:18:21 Governor Bullock

00:18:37 The motion to approve item 1213-8 carried unanimously.

**1213-9 Easements**

00:18:45 Mr. Tubbs gave an overview of the items.

00:19:35 Ms. Juneau moved to approve item 1213-9. The motion was seconded by Ms. McCulloch and carried unanimously.

**General Public Comment**

00:20:35 Mr. Knowles

**General Land Board Comments**

00:32:18 Governor Bullock

00:32:53 Mr. Fox

00:33:40 Ms. McCulloch

00:34:44 Joe Lamson, DNRC Deputy Director

00:35:48 Ms. Juneau

00:36:26 Governor Bullock

**Adjournment**

00:36:32 Adjournment

PRESIDENT

ATTEST

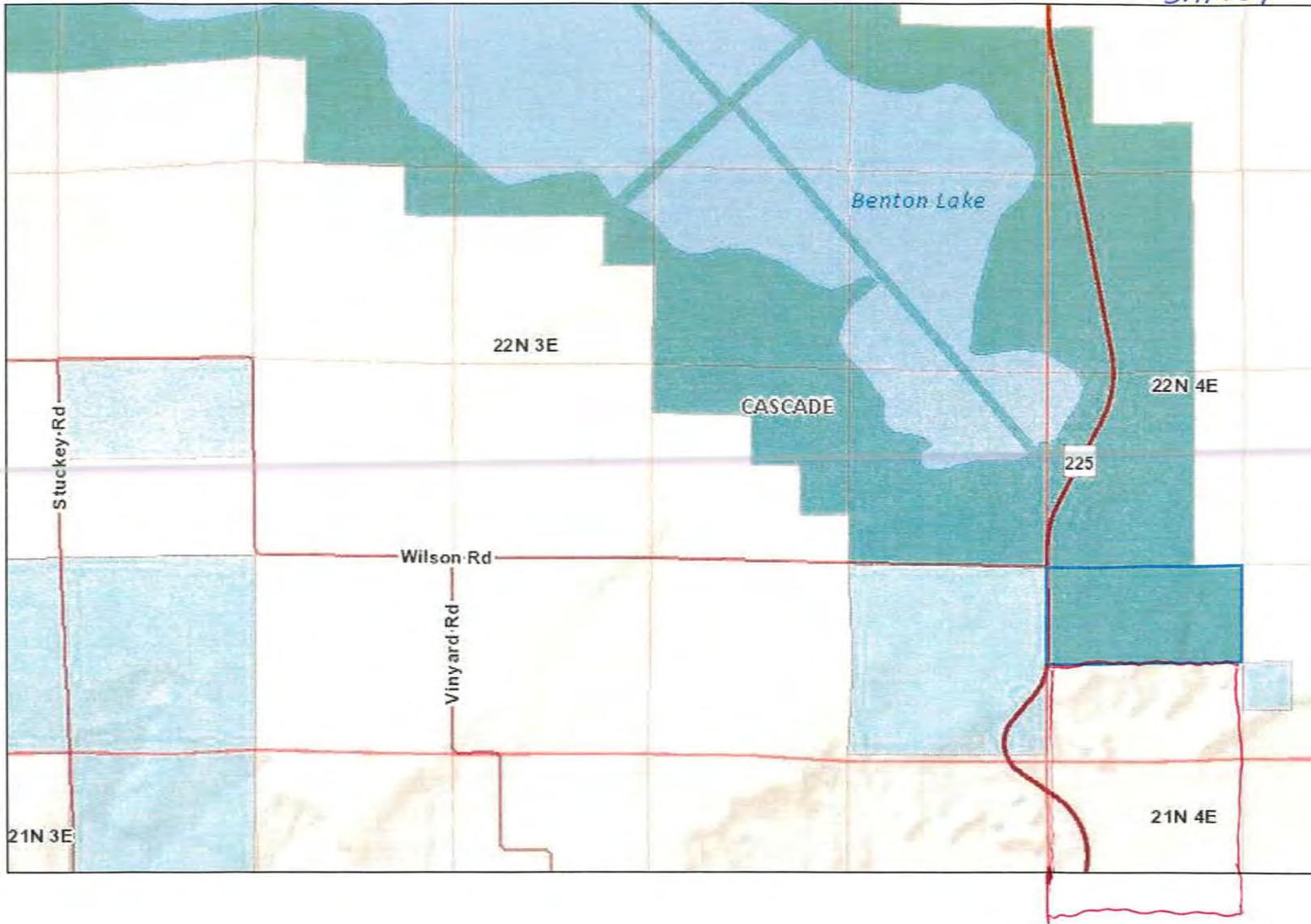
/s/ Steve Bullock  
Steve Bullock, Governor

/s/ John E. Tubbs  
John E. Tubbs, DNRC Director



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P.8*

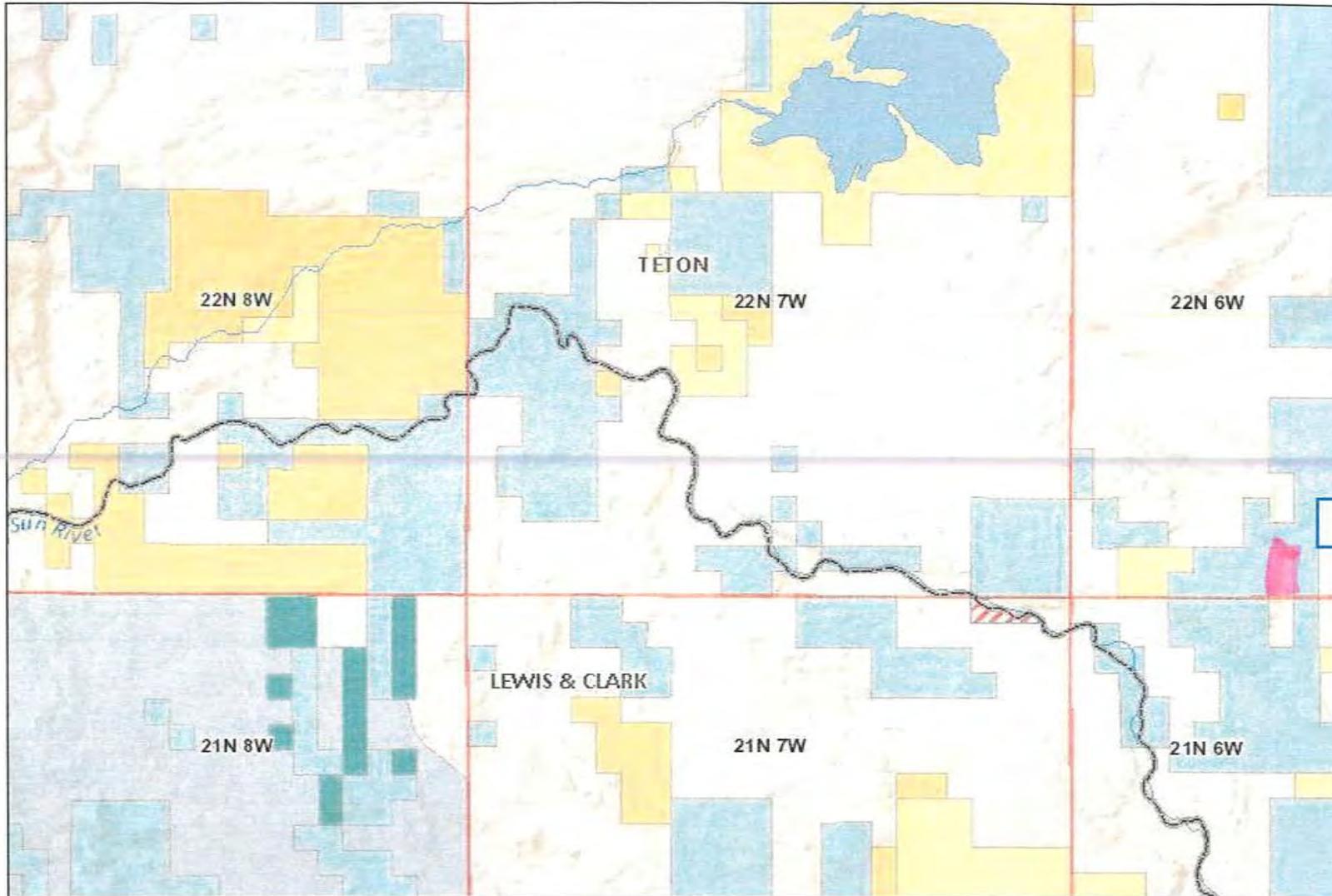






*Ken Morris*

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The University of Montana School of Law, The Scholarly Forum @ Montana Law, Faculty Law Review Articles, Faculty Publications 1-1-2012. The Public Trust Doctrine and the Montana Constitution as Legal Bases for Climate Change Litigation in Montana by Gregory S. Munro, [greg.munro@umontana.edu](mailto:greg.munro@umontana.edu)

Montana Law Review Vol. 73 pages 136-142

#### IV. ORIGIN OF THE PUBLIC TRUST DOCTRINE AND THE COURTS' RECOGNITION OF IT.

##### A. Ancient Foundations of the Doctrine

Professor Mary Christina Wood argues that law can only address the atmospheric pollution causing global warming by imposing common-law trust theory on the air we breathe.<sup>98</sup> The public trust doctrine has an ancient lineage that reflects that certain resources are, by their nature, public. As the New Jersey Supreme Court aptly put: "The genesis of this principle is found in Roman jurisprudence, which held that '[b]y the law of nature' 'the air, running water, the sea, and consequently the shores of the sea' were 'common to mankind.'"<sup>99</sup> The Roman Emperor Justinian is credited with having laid the foundation for this doctrine by declaring that certain elements of the environment should be protected: "The things which are naturally everybody's are: air, flowing water, the sea, and the sea-shore."<sup>100</sup> The public trust doctrine requires the government to act as a trustee, to maintain some level of quality in the resources, and to protect those re-sources from being depleted by private interests or expended to the detriment of future generations."<sup>101</sup>

The foundation of the public trust doctrine is the government's authority to supervise and control the natural resource that is the subject of the trust.<sup>102</sup> Normally, political leaders, in the exercise of their offices, have wide latitude to balance interests and mediate disputes between competing interests. However, they are much more restricted when they wear the hat of a trustee over a public resource. A trustee has the duty to protect the trust property.<sup>103</sup> A trustee may not act in his own interest or the interest of any third party but must act with utmost good faith toward the beneficiary.<sup>104</sup> Hence, a trustee's duty may forbid balancing of interests or trade-offs that would damage or deplete the resource.

##### B. United States Supreme Court Adoption of Public Trust Doctrine.

The United States adopted the public trust doctrine from English common law in order to protect public commerce along navigable waters.<sup>105</sup> The United States Supreme Court first recognized the doctrine in 1892 in *Illinois Central Railroad Company v. Illinois*.<sup>106</sup>

The possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide.<sup>107</sup>

In *Illinois Central Railroad Company*, the Court reversed the granting of shoreline property on Lake Michigan to a railroad company:

The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties ...than it can abdicate its police powers in the administration of government and the preservation of the peace.<sup>108</sup>

Hence, in one stroke the Court established that all navigable waters in the United States and the lands under them are held in public trust by the government for the public interest.

The Court furthered the public trust doctrine in *Geer v. Connecticut* in 1896.<sup>109</sup> *Geer* involved ownership of feral game in a case involving hunting violations.<sup>110</sup> The Court discussed ancient law and English common law regarding the public trust over air and water, and, in speaking of those things that remain in common ownership,

quoted renowned 18th-century French legal scholar Robert Joseph Pothier,<sup>111</sup> who said: "These things are those which the juriconsults called 'res communes.' Marcién refers to several kinds, the air, the water which runs in the rivers, the sea, and its shores."<sup>112</sup> Referring to the common property of game, the Court set forth the duty of government:

[T]he development of free institutions had led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.<sup>113</sup>

In 1907, Justice Oliver Wendell Holmes famously stated: "[T]he state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."<sup>114</sup> Recently, the United States Supreme Court has also recognized that "individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."<sup>115</sup>

### C. Recognition of Public Trust Doctrine by the Montana Supreme Court

The Montana Supreme Court has invoked the public trust doctrine to protect its waterways. In 1984, in *Montana Coalition for Stream Access, Inc. v. Curran*,<sup>116</sup> the Court used the public trust doctrine as one basis for its decision to recognize the public's right to use the waters and streambed of a river up to its high water mark as it flowed through a private landowner's property.<sup>117</sup>

In *Curran*, *Curran and Curran Oil Company* held and along six to seven miles of the Dearborn River.<sup>118</sup> *Curran* attempted to restrict public access for fishing and floating, claiming title to the banks and streambed of the river and the right to restrict public use.<sup>119</sup> The trial court determined the Dearborn River was navigable in 1889, the year Montana gained statehood, by applying the federal "log-floating" test.<sup>120</sup> Because the river was navigable, the trial court concluded the riverbed was owned by the federal government prior to statehood and was transferred to the State of Montana at the time of statehood.<sup>121</sup> The Montana Supreme Court upheld that decision based upon the public trust doctrine.<sup>122</sup> The Court also recognized that the State, as an attribute of its sovereignty, could determine as a matter of local law which rivers were navigable and therefore part of the public trust.<sup>123</sup> Moreover, the Court recognized that public recreational use, such as fishing and floating, was a basis for declaring a river navigable in Montana and, therefore, worthy of public trust designation.<sup>124</sup> Finally, the Court held the public's right to use the river extended up to the high water mark on the banks, thereby determining the boundaries of the public trust.<sup>125</sup>

The *Curran* Court determined that navigability for use, as opposed to navigability for title, is determined under state law.<sup>126</sup> Ultimately, the Court stated:

If the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people. 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.<sup>127</sup>

Most importantly, the Court concluded by expressly founding its decision on the public trust doctrine and the Montana Constitution: "In sum, we hold that, under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for non-recreational purposes."<sup>128</sup>

In the same year as *Curran*, in *Montana Coalition for Stream Access, Inc. v. Hildreth*,<sup>129</sup> the Court again invoked the public trust doctrine after a landowner challenged the public's right to access by way of Hildreth's ranch.<sup>130</sup> Hildreth erected a fence to block floaters on the Beaverhead River where it crossed his land.<sup>131</sup> The Court affirmed the trial court's ruling that the public had the right to access the river up to the high watermark.<sup>132</sup> The Court articulated that the legal foundations for its decision were the public trust doctrine and the Montana Constitution.<sup>133</sup>

Because *Curran* and *Hildreth* established that all Montana waters suitable for recreational use were held and protected in the public trust, damage to navigable waters from climate change implicates the public trust doctrine. The government, as trustee, should not be permitted to ignore climate change that will, for instance, dewater rivers and lakes and raise water temperatures causing the loss of fish and aquatic plants. In addition, the government

should administer the public trust doctrine to prevent Montana's waters from being polluted by discharges, such as mercury and carbon dioxide, from coal-fired electrical generators.

In 2002, in what is known as the "Missouri Drainage Case," the Court expanded the application of the public trust doctrine to protect appropriation of in stream water flows for the public.<sup>134</sup> During adjudication of water claims in the Missouri River Basin, the Montana Fish, Wildlife and Parks Department filed five claims in the Water Court, asserting water rights for fish, wildlife, and recreational purposes.<sup>135</sup>

Although the Montana Supreme Court declined to recognize such a right 14 years earlier in *In re Dearborn Drainage Area* (known as the Bean Lake Case),<sup>136</sup> in the Missouri Drainage Case the Court reversed itself, recognizing that "[u]nder the Constitution and the public trust doctrine, the public has an in stream, non-diversionary right to the recreational use of the State's navigable surface waters."<sup>137</sup> The Missouri Drainage Case Court reasoned that the decision in Curran was based on "not only the 1972 Constitution, but also the public trust doctrine which dates back to Montana's statehood."<sup>138</sup> Overruling the Bean Lake Case, the Court held that fish, wildlife, and recreational use are "beneficial uses" for the purposes of water-appropriation claims.<sup>139</sup> Further, the Court held that water appropriation claims for these non-diversionary uses were valid and existed prior to 1973.<sup>140</sup>

The Missouri Drainage Case is in accord with the California Supreme Court's seminal 1983 decision, *National Audubon Society v. Superior Court of Alpine County*.<sup>141</sup> There, the California Supreme Court held that the public trust doctrine protected non-navigable tributaries of Mono Lake, a navigable water body, from diversions by the city of Los Angeles. The Court rooted its expansion of the public trust doctrine in the doctrine's elastic nature: "The objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways."<sup>142</sup> Likewise, the public trust doctrine in Montana has expanded from protecting only commercial uses to protecting recreational uses and in stream waterflows.<sup>143</sup> Montana's Missouri Drainage Case and California's *National Audubon Society* decision constitute a precedential foundation for protecting navigable waters from damage arising from climate change.

While in Curran and Hildreth the Court appeared to apply the public trust doctrine apart from the Montana Constitution, in the 1987 case *Galt v. State ex rel. Department of Fish, Wildlife and Parks*,<sup>144</sup> the Court indicated that the doctrine arose from the Montana Constitution:

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 use for recreational purposes up to the high water marks and may portage around barriers in the water in the least intrusive manner possible. This holding was reaffirmed in Hildreth.<sup>145</sup>

In fact, the Galt Court identified Article IX, § 3 as the precise location of the public trust doctrine for water rights under the Montana Constitution, stating:

The public trust doctrine is found at Article IX, Section 3(3), of the Montana Constitution which provides: "All surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and subject to appropriation for beneficial uses as provided by law."<sup>146</sup>

While simultaneously invoking the public trust doctrine and identifying its constitutional foundation, the Galt Court actually put its first limits on the doctrine as applied to recreational rights on rivers by overturning statutes which purported to give the public rights to make portages onto private land around obstacles in the river and to build duck blinds and permanent moorings within the high water marks.<sup>147</sup> The Court said those were not within the rights necessary to public use of the waters.<sup>148</sup>

In summary, the public trust doctrine has been repeatedly invoked to protect navigable waters in Montana and has expanded to include even in-stream appropriations. Galt and Hildreth established that the public trust doctrine has its basis in common law and in Article IX, § 3(3) of the Montana's 1972 Constitution.<sup>149</sup> The expansion of public trust by the Missouri Drainage Case to protect in-stream water flow should be heartening to those advocating for public trust protection of the air. The question is: why should we not apply the protections of public trust doctrine in Montana to the air?

## V. PUBLIC TRUST DOCTRINE AS APPLIED TO AIR

## A. The Flexible Nature of the Public Trust Doctrine

The public trust doctrine in Montana should extend to protect the air. Application of the doctrine to waters serves as the doctrine's foundation but not its limits. While the public trust doctrine has never been extended to air, applying the foundational principles of the doctrine will protect the air by creating a cognizable tort action against polluters and restricting the government's licensing of its pollution.

Courts in other jurisdictions have indicated that the public trust doctrine is flexible and can be applied to meet society's changing needs. In 2000, the Hawaii Supreme Court said: "The public trust, by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances."<sup>150</sup> The New Jersey Supreme Court similarly stated in 1984: "Archaic judicial responses are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be 'fixed or static,' but one to 'be molded and extended to meet changing conditions and needs of the public it was created to benefit.'"<sup>151</sup> And the Washington Supreme Court explained in 1998: "Since as early as 1821, the public trust doctrine has been applied throughout the United States 'as a flexible method for judicial protection of public interests ....' "<sup>152</sup>

Several state constitutions include provisions recognizing public trust over air. For example, Article I, § 27 of the Pennsylvania Constitution provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.<sup>153</sup>

Article XI, § 1 of the Hawaii Constitution provides:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.<sup>154</sup> .....

More importantly, the MEIC Court held the right to a clean and healthful environment contained in the Montana Constitution was fundamental,<sup>188</sup> and said the mere degradation of water quality without actual injury is sufficient to implicate the fundamental right, triggering strict scrutiny analysis: <sup>189</sup>

[W]e conclude that the right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at Article II, Section 3 of Montana's Constitution, and that any statute or rule which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective.<sup>190</sup>

Moreover, even though it is not found in the Declaration of Rights, the Court went on to apply strict scrutiny to Article IX, § 1 as well.<sup>191</sup> The Court determined that "the right to a clean and healthful environment guaranteed by Article II, Section 3, and those rights provided for in Article IX, Section 1 were intended by the constitution's framers to be interrelated and interdependent and that state or private action which implicates either, must be scrutinized consistently."<sup>192</sup> The Court consequently stated that it would apply strict scrutiny to actions implicating either Article II, § 3 or Article IX, § 1.<sup>193</sup>

Having established the interdependent relationship between the two provisions after a thorough review of debate and discussion in the 1972 Constitutional Convention, the Court concluded that they must be applied intandem.<sup>194</sup> The Court supported this conclusion by quoting delegate McNeil:

Subsection (3) mandates the Legislature to provide adequate remedies to protect the environmental life-support system from degradation. The committee intentionally avoided definitions, to preclude being restrictive. And the term "environmental life support system" is all-encompassing, including but not limited to air, water, and land; and whatever interpretation is afforded this phrase by the Legislature and courts, there is no question that it cannot be degraded.<sup>195</sup>

The Court then said:

We conclude, based on the eloquent record of the Montana Constitutional Convention that to give effect to the rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution they must be read together and consideration given to all of the provisions of Article IX, Section 1 as well as the preamble to the Montana Constitution. In doing so, we conclude that the delegates' intention was to provide language and protections which are both anticipatory and preventative. The delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked. The delegates repeatedly emphasized that the rights provided for in subparagraph (1) of Article IX, Section 1 was linked to the legislature's obligation in subparagraph (3) to provide adequate remedies for degradation of the environmental life support system and to prevent unreasonable degradation of natural resources. <sup>196</sup> .....

Both proponents and opponents of a self-executing right cite *Columbia Falls Elementary School District No. 6 v. Montana* 225 to support their positions. There, the Court said, "[t]o determine whether the provision is self-executing, we ask whether the Constitution addresses the language to the courts or to the Legislature. If addressed to the Legislature, the provision is non-self-executing; if addressed to the courts, it is self-executing."<sup>226</sup> However, the Court also said that "provisions that directly implicate rights guaranteed to individuals under our Constitution are in a category of their own," giving the Courts, as final interpreters of the Constitution, the "obligation to guard, enforce, and protect every right granted or secured by the Constitution." <sup>227</sup> .....

By their nature, common-law doctrines in general and the public trust doctrine in particular are flexible enough to accommodate extensions of the law to fit the needs of society. There can be no more pressing need than the protection of the air that sustains the biosphere.

#### X. CONCLUSION

By virtue of its strong common-law recognition of the public trust doctrine and the environmental provisions of its 1972 Constitution, Montana is a uniquely suited forum for climate-change lawsuits in the civil justice system. Montana jurisprudence includes ample precedent that recognizes and applies the public trust doctrine in protection of navigational and recreational waters. There appears to be no sound theoretical basis for a government to impose a trust on navigable waters and not navigable air and air-ways. Moreover, the Montana Constitution provides the underpinnings for using public trust doctrine for protection of the atmosphere and air ways. By its nature, common law has historically been flexible and subject to extension. One would be hard-pressed to cite a situation in human history that makes a more compelling argument to extend the law to protect the public than climate change resulting from global warming. If resort to the judicial branch of government is to have any effect on the climate crisis, those litigating the cases will have to move quickly and seek remedies with the highest impact and most visibility. The public trust doctrine and the environmental provisions of the Montana Constitution may be the most effective tools in the litigation arsenal.

#### FOOT NOTES:

98. Wood, *supra* n. 45, at 45.  
99. *Matthews v. Bay Head Improvement Assn.*, 471 A.2d 355, 360 (N.J. 1984) (quoting Justinian, *Institutes* 2.1.1 (T. Sandars trans. 1st Am. ed., 1876)).  
100. Caesar Flavius Justinian, *The Institutes of Justinian*, Book II, Title I, Of the Different Kind of Things 533 (Oxford Press 1996).  
101. For writings about the development of the public trust doctrine in American courts, see Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 558-566 (1990); Harrison C. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 *Env'tl. L.* 515 (Spring 1989); Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State's Natural Resources*, 16 *Duke Env'tl. L. & Policy Forum* 57 (Fall 2005).  
102. *Nat'l Audubon Socy. v. Super. Ct. of Alpine Co.*, 658 P.2d 709, 712 (Cal. 1983).

103. Iverson v. Rehal, 317 P.2d 869, 872 (Mont. 1957)
104. Wild West Motors, Inc. v. Lingle, 728 P.2d 412, 416 (Mont. 1986).
105. Weston & Bach, Recalibrating the Law of Humans with the Laws of Nature at 43.106. Ill. C.R.R. Co. v. Ill., 146 U.S. 387 (1892).
107. Id. at 436
108. Id. at 453.
109. Geer v. ..., S. 519 (1896), overruled, Hughes v. Okla., 441 U.S. 322 (1979).
110. Geer, 61 U.S. at 519.
111. Robert Joseph Pothier was a renowned 18th century French lawyer and professor who arranged the texts of the Roman Law. Auguste Boudinhon, Robert Joseph Pothier, <http://www.newadvent.org/cathen/12321a.htm> (accessed Jan. 16, 2012).
112. Geer, 161 U.S. at 525
113. Id. at 529.
114. Ga. v. Tenn. Copper Co., 206 U.S. 230, 237 (1907).
115. Phillips Petroleum Co. v. Miss., 484 U.S. 469, 475 (1988).
116. Mont. Coalition for Stream Access, Inc. v. Curran, 682 P.2d 163 (Mont. 1894).
117. Id. at 172.
118. Id. at 165.
119. Id.
120. Id. at 166.
121. Id.
122. Curran, 682 P.2d at 170.
123. Id. at 167.
124. Id. at 169.
125. Id. at 172.
126. Id. at 170.
127. Id.
128. Curran, 682 P.2d at 171. Curran is in accord with the famous case of Natl. Audubon Socy. v. Superior Ct., 658 P.2d 709 (Cal. 1983), which held that the public trust doctrine restricted how much water California authorities could divert from Mono Lake's tributaries to be consumed by the city of Los Angeles. The California Supreme Court held that the public trust doctrine applied because the public used the lake for recreation. Id. at 719.
129. Mont. Coalition for Stream Access, Inc. v. Hildreth, 684 P.2d 1088 (Mont. 1984), overruled on other grounds, Gray v. City of Billings, 689 P.2d 268 (Mont. 1984).
130. Hildreth, 684 P.2d at 1093.
131. Id. at 1090.
132. Id. at 1091.
133. Id. at 1093
134. In re Adjudication of the Existing Rights to the Use of All the Water, 55 P.3d 396 (Mont. 2002)[hereinafter Missouri Drainage Case].
135. Id. at 398.
136. In re Dearborn Drainage Area, 766 P.2d 228, 236 (Mont. 1988) [hereinafter Bean Lake Case], overruled, Missouri Drainage Case, 55 P.3d 396.
137. Missouri Drainage Case, 55 P.3d at 404; accord Natl. Audubon Socy., 658 P.2d at 719.
138. Missouri Drainage Case, 55 P.3d at 404 (emphasis added).
139. Id. at 407.
140. Id.
141. Natl. Audubon Socy., 658 P.2d 709.
142. Id. at 719
143. The Montana Supreme Court recently reaffirmed the public trust doctrine's application to non-navigable, in-stream flows of navigable waters in Montana Trout Unlimited v. Beaverhead Water Co., 255 P.3d 179 (Mont. 2011), where it held that a private organization had standing to enforce the public trust protection of in-stream flows of the Big Hole River, id. at 186.
144. Galt v. Mont. by and through Dept. of Fish, Wildlife & Parks, 731 P.2d 912 (Mont. 1987).
145. Id. at 913.
146. Id. at 914-915.
147. Id. at 915-916.
148. Id.
149. Id. at 914; Hildreth, 684 P.2d at 1091
150. In re Water Use Permit Applications, 9 P.3d 409, 447 (Haw. 2000).
151. Matthews, 471 A.2d at 365 (quoting Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972)).
152. Weden v. San Juan Co., 958 P.2d 273, 283 (Wash. 1998).
153. Pa. Const. art. I, § 27.
154. Haw. Const. art XI, § 1
  
189. Id. at 1249.
190. Id. at 1246 (emphasis in original).
191. Id. at 1245-1246.
192. Id. at 1246.
193. Id. at 1246.
194. MEIC, 988 P.2d at 1246.
195. Id. at 1247-1248 (emphasis in original) (citing Montana Constitutional Convention Proceedings, supra n. 163, at vol. 4, 1201).
196. Id. at 1249.
  
225. Columbia Falls Elementary Sch. Dist. No., 109 P.3d 257.
226. Id. at 260 (internal citations omitted).
227. Id. at 260-261 (quoting Robb v. Connolly, Ill U.S. 624, 637 (1884) (ellipses omitted)).
257. Id. at 2. Atmospheric Trust Litigation ("ATL") is a volunteer organization of lawyers from many states and a handful of foreign countries which acted in concert for purposes of filing climate change lawsuits or rule-making petitions in all states in early May 2011. ATL reports to the author that rule making petitions or civil suits were filed in 37 states.
258. Id.
259. See id.