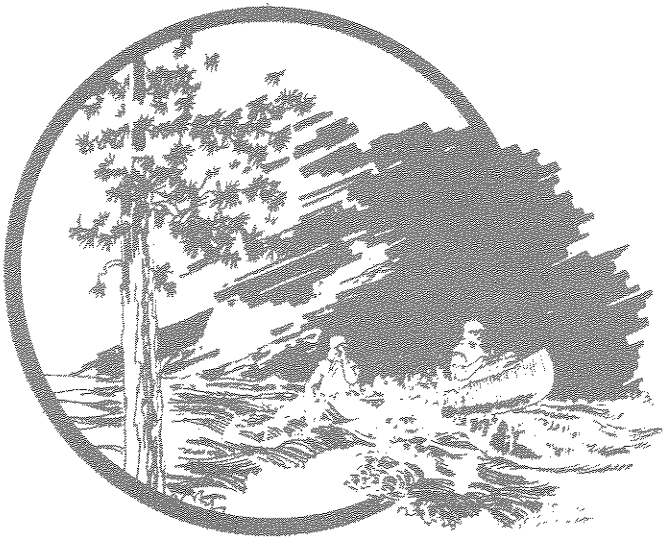
STREAM ACCESS
IN MONTANA

Rights and Responsibilities of Landowners and Recreationists



This brochure summarizes the ways in which Montana's 1985 stream access law affects the recreational use of the state's rivers and streams and incorporates the ways the law has been interpreted by the courts in Montana.

The law states that rivers and streams capable of recreational use may be so used by the public regardless of streambed ownership. It also states that certain activities require landowner permission. Because the law affects your rights and responsibilities as a landowner or recreationist, the information that follows may be of interest to you.

COURTESY – Making the law work. Before discussing the law in detail, the Department of Fish, Wildlife & Parks stresses its belief that no amount of legislative action or rulemaking can do more to promote harmony between landowners and recreationists than the individual actions of the parties concerned. Because the success or failure of the law hinges on the behavior of the landowners and recreationists, we cannot overemphasize the need for cooperation and mutual respect.

Please remember. If you are a recreationist, we encourage you to seek landowner permission before pursuing any activities on private lands. Doing so is always good policy.

Also, please:

1) Respect the rights of landowners whenever you recreate on waterways that cross or flow adjacent to their properties.
2) Remember that the law permits recreation only within the ordinary high-water marks. If you must portage around obstructions, do so in the least intrusive manner possible.
3) Leave all fences intact – they are there for a purpose.
4) Remember that overnight camping between the ordinary high-water marks of Class I waters bordered by private land is only permissible when it is necessary for the enjoyment of the water resource.
5) If you must build a fire, choose a safe location, and if possible, use an existing fire ring. Attend to the fire at all times and be sure it is completely out before leaving. Remember that you have no right to gather firewood above the ordinary high-water marks without landowner permission.
6) If a dog accompanies you on your outing, keep it from harassing livestock and keep it within the high-water marks of the stream.
7) Know that you must always obtain permission from the landowner to hunt, including nongame and predators, on private property. Also note that the stream access law does not authorize big game hunting on private land between the high-water marks. For waterfowl hunting and all other hunting other than big game hunting, keep safety in mind at all times, and ask permission to retrieve game above the ordinary high-water marks. Do not discharge firearms near dwellings or livestock.
8) Note that your activities must be restricted to those that are water-related pleasure activities. It is your responsibility to find out in advance if the river or stream you plan to use can support the water-based recreational activities you have in mind at that time of the year.
9) Note that the Department interprets the Stream Access Law to allow hiking in streams only if the land is not posted as required by trespass legislation, which is discussed later in this brochure. If the land is posted as required by law, hiking without landowner permission and using the stream as a right of way or to gain access is prohibited unless it is incidental to other water-related recreation, such as fishing, being pursued by the recreationist between the ordinary high-water marks.
10) Note that it is illegal to trespass to get to a stream.
11) Remember that littering is strictly prohibited.
12) Note that Montana's Attorney General has held that the stream access law does not apply to the trapping of fur-bearing animals.
13) Remember that your water-related activities between the high-water marks MUST be of minimal impact and necessary to the utilization of the water itself.
14) Above all, keep the rights of landowners in mind, and if you have any doubt concerning the activities you can legally pursue on waterways next to private lands, make it a habit to ask permission first from the owners of these lands. Remember, asking first is always a good policy.

If you are a landowner, please respect the rights of recreationists to enjoy our rivers and streams and take their safety into consideration.

THE STREAM ACCESS LAW. The law says that, in general, all surface waters capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters. It also states that recreationists can use rivers and streams up to the ordinary high-water mark. The law does not address recreational use of lakes; it applies only to rivers and streams.

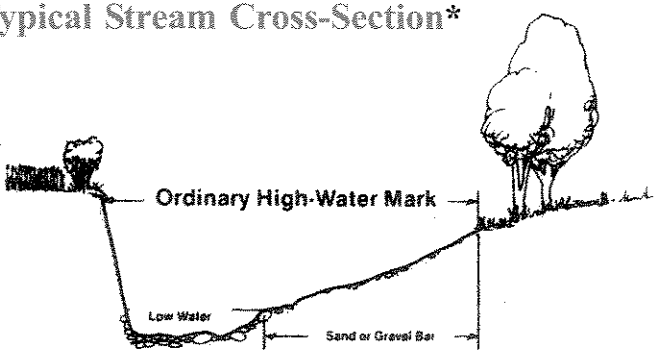
The law defines surface water, recreational use, and ordinary high-water mark as follows:

Surface water means a natural river or stream, its beds and banks up to the ordinary high-water mark.

Recreational use means fishing, hunting, swimming, floating in small craft or other flotation devices, boating in motorized craft (except where prohibited by law), boating in craft propelled by oars or paddles, other water-related pleasure activities, and related unavoidable or incidental uses. The law imposes certain restrictions on some forms of recreation. These restrictions are listed later in this brochure.

Ordinary high-water mark means the line that water impresses on land by covering it for sufficient time to cause different characteristics below the line, such as deprivation of the soil of substantially all its terrestrial vegetation and destruction of its value for agricultural vegetation. Flood plains next to streams are considered to be above the ordinary high-water mark, and are not open for recreation without permission.

Typical Stream Cross-Section*



* Although this is typical of some stream cross-sections, many other situations exist. Also, vegetation such as grass, sedges or willows can exist within the ordinary high-water marks. When in doubt, refer to the definition of ordinary high-water mark.

Water Classification. Class I and class II waters are also defined in the law. These definitions are important in determining the recreational uses that require permission.

Class I waters are defined as those which are capable of recreational use and have been declared navigable or which are capable of specific kinds of commercial activity, including commercial outfitting with multiperson watercraft. The Department has developed a preliminary list of rivers that meet at least one of the criteria listed in the law for class I rivers (see section (1)(2) of the law). This preliminary list includes the mainstems of the following waters, as described:

Kootenai River Drainage:
- Kootenai River - from Libby Dam to the Idaho border
- Lake Creek - from the Chase cut-off road to its confluence with the Kootenai River
- Yaak River - from Yaak Falls to its confluence with the Kootenai River

Flathead River Drainage:
- South Fork of the Flathead - from Youngs Creek to Hungry Horse Reservoir
- Middle Fork of the Flathead - from Schaffer Creek to its confluence with the mainstem of the Flathead River
- Flathead River (mainstem) - to its confluence with the Clark Fork River

Clark Fork of the Columbia River Drainage:
- Clark Fork River - from Warm Spring Creek to the Idaho border
- North Fork of the Blackfoot - from Highway 200 east of Ovando to its confluence with the mainstem of the Blackfoot River
- Blackfoot River - from the Cedar Meadow fishing Access Site west of Helmville to its confluence with the Clark Fork
- Bitterroot River - from the confluence of the East and West forks to its confluence with the Clark Fork
- Rock Creek - from the confluence of the West Fork to its confluence with the Clark Fork

Missouri River Drainage:
- Missouri River - from Three Forks to the North Dakota border
- Beaverhead River - from Clark Canyon Dam to its confluence with the Jefferson
- Big Hole River - from Fishtrap Fishing Access Site downstream from Wisdom to its confluence with the Jefferson
- Gallatin River - from Taylors Fork to its confluence with the Missouri
- Jefferson River - to its confluence with the Missouri
- Madison River - from Quake Lake to its confluence with the Missouri
- Dearborn River - from the Highway 434 bridge to its confluence with the Missouri
- Sun River - from Gibson Dam to its confluence with the Missouri
- Smith River - from Camp Baker Fishing Access Site near Ft. Logan to its confluence with the Missouri
- Marias River - from Tiber Dam to its confluence with the Missouri
- Judith River - from the confluence of Big Spring Creek to its confluence with the Missouri

Yellowstone River Drainage:
- Yellowstone River - from Yellowstone National Park to the North Dakota border
- Bighorn River - from Yellowtail Dam to its confluence with the Yellowstone
- Tongue River - from Tongue River Dam to its confluence with the Yellowstone

Keep in mind that this list is preliminary and that other waters may be added to it in the future as other criteria listed in the law for determining class I waters are addressed. Also keep in mind that there may be times during the year when flow and physical condition of these waters may not permit their use for certain kinds of recreation.

Class II waters are all rivers and streams capable of recreational use that are not class I waters.

What types of activities between the ordinary high-water marks require landowner permission?

On Class I waters, landowner permission is required for the following recreational uses:

* operating all-terrain vehicles or other motorized vehicles not intended for use on the water;
* making recreational use of stock ponds or private impoundments fed by intermittent streams. Although this restriction deals specifically with only those stock ponds or impoundments fed by intermittent streams, the Department recommends, as a matter of courtesy, that recreationists obtain permission from landowners before using any private ponds;
* making recreational use of water diverted away from a stream, such as an irrigation canal or drainage ditch;
* big game hunting;

* overnight camping, unless necessary for the enjoyment of the water resource **AND** it is done out of sight of, or more than 500 yards from, any occupied dwelling. Any necessary camping done on Class I waters within sight of or within 500 yards of an occupied dwelling (whichever is less) requires landowner permission;
* the placement or creation of any **permanent** duck blind, boat moorage, or any other permanent object;
* the placement or creation of any **seasonal** objects, such as a duck blind or boat moorage, unless necessary for the enjoyment of that particular water resource **and** they are placed out of sight of, or more than 500 yards from, any occupied dwelling. Any necessary placement of seasonal objects on Class I waters within sight of or within 500 yards of an occupied dwelling (whichever is less) requires landowner permission;
* using a streambed as a right-of-way for any purpose when no water is flowing.

On Class II waters, landowner permission is required for the following recreational uses:

* operating all-terrain vehicles or other motorized vehicles not intended for use on the water;
* making recreational use of stock ponds or private impoundments fed by intermittent streams. Although this restriction deals specifically with only those stock ponds or impoundments fed by intermittent streams, the Department recommends, as a matter of courtesy, that recreationists obtain permission from landowners before using any private ponds;
* making recreational use of water diverted away from a stream, such as an irrigation canal or drainage ditch;
* big game hunting;
* overnight camping;
* the placement or creation of any **permanent** duck blind, boat moorage, or any other permanent object;
* the placement or creation of any **seasonal** objects, such as a duck blind, boat moorage;
* using a streambed as a right-of-way for any purpose when no water is flowing;
* any other pleasure activities not primarily water related.

These restrictions apply on streams flowing through privately owned land. Of course, if the landowner grants permission for any of the activities mentioned, they would be permitted. Recreation on public lands may take place in accordance with the regulations of the agencies managing these lands.

Portage. The law states that recreationists using a stream may go above the ordinary high-water mark to portage around barriers, but must do so in the least intrusive manner possible, avoiding damage to the landowner's property and violation of his rights. **Barrier** is defined as an artificial obstruction in or over the water which totally or effectively obstructs the recreational use of the surface water. The law does not address portage around natural barriers, and does not make such a portage either legal or illegal.

If a landowner puts a fence or other structure across a stream, such as a float-over cable or a float-through gate, and it does not interfere with the recreational use of the water, the public does not have the right to go above the ordinary high-water mark to portage.

In all cases recreationists must keep portages to a minimum, and should realize that landowners may place fences and other barriers across streams for purposes of land or water management or to establish land ownership, if otherwise allowed by law.

The Department of Fish, Wildlife & Parks will provide assistance to any landowner in designing and locating fences that do not interfere with recreational use of streams. For assistance call the Department's Portage Coordinator at 444-5334.

Portage routes. The law, as interpreted, sets out a process by which either a landowner or a member of the public may, if necessary, request that a portage route over or around a barrier be established. The Department encourages, however, that portage problems be solved through other means if at all possible. If establishing a portage route is deemed the only workable solution, the request would be submitted to the board of supervisors of the local conservation or grazing district, or to the board of county commissioners. For assistance in determining where to file a request, or for other information regarding portage route establishment, maintenance and signing, contact the Department's Portage Coordinator at 444-5334.

Liability. The Legislature has limited the situations in which a landowner may be liable for injuries to people using a stream flowing through his property. This limitation on liability applies not only to the landowner, but also to his agent or tenant, and to supervisors who participate in a decision regarding a portage route. The law states that landowners and others covered by the restriction on liability are liable only for acts or omissions that constitute" willful or wanton misconduct."

Prescriptive easements and land title. The Legislature stated that a prescriptive easement cannot be acquired through recreational use of rivers and streams, the beds and banks, portage routes or property crossed to reach streams. It also said that the law does not affect title to surface waters, including the beds and banks of any rivers or streams, or portage routes used by the public.

TRESPASS LEGISLATION. This legislation states that a member of the public has the privilege to enter or remain on private land by the explicit permission of the landowner or his agent or by the failure of the landowner to post notice denying entry onto the land. The landowner may revoke the permission by personal communication. (For more detail see H.B. 911 from the 1985 session.)

The law states that any notice denying entry must consist of written notice or of notice by painting a post, structure or natural object with at least 50 square inches of fluorescent orange paint. In the case of a metal fencepost, the entire post must be painted. This notice must be placed at each outer gate and all normal points of access to the property and wherever a stream crosses an outer boundary line.

Montana law further requires that landowner permission is required for all hunting on private property.

The law also extends the authority of game wardens to enforce the criminal mischief, criminal trespass and litter laws to all lands being used by the public for recreational purposes.

NATIONAL PARKS, INDIAN RESERVATIONS AND WILDLIFE REFUGES. Certain waters on national parks, Indian reservations and wildlife refuges may have special rules. Specific information may be obtained from the headquarters of the park, reservation or refuge involved.

ACCESS FROM COUNTY ROADS AT BRIDGE CROSSINGS. Recreationists may gain access to streams and rivers from a county road right-of-way at bridge crossings. However, recreationists should be aware that access at a bridge could be restricted 1) by a county commission for public safety and 2) access at some bridges may be restricted where the establishment of the county road right-of-way did not allow access to the stream or river.

NEED MORE INFORMATION? For further information concerning the contents of this brochure, please contact FWP's Conservation Education Division in Helena at (406) 444-2535, or one of the regional offices at the following telephone numbers:

FWP also maintains a toll-free number (1-800-TIP-MONT), which may be used to report violations.

Region 1 (Kalispell)	752-5501
Region 2 (Missoula)	542-5500
Region 3 (Bozeman)	994-4042
Region 4 (Great Falls)	454-5840
Region 5 (Billings)	247-2940
Region 6 (Glasgow)	228-3700
Region 7 (Miles City)	234-0900

Copies of the law may be obtained by sending a request to the Montana Legislative Services Division, State Capitol, PO Box 201706, Helena MT 59620-1706, or by calling (406) 444-3064.

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