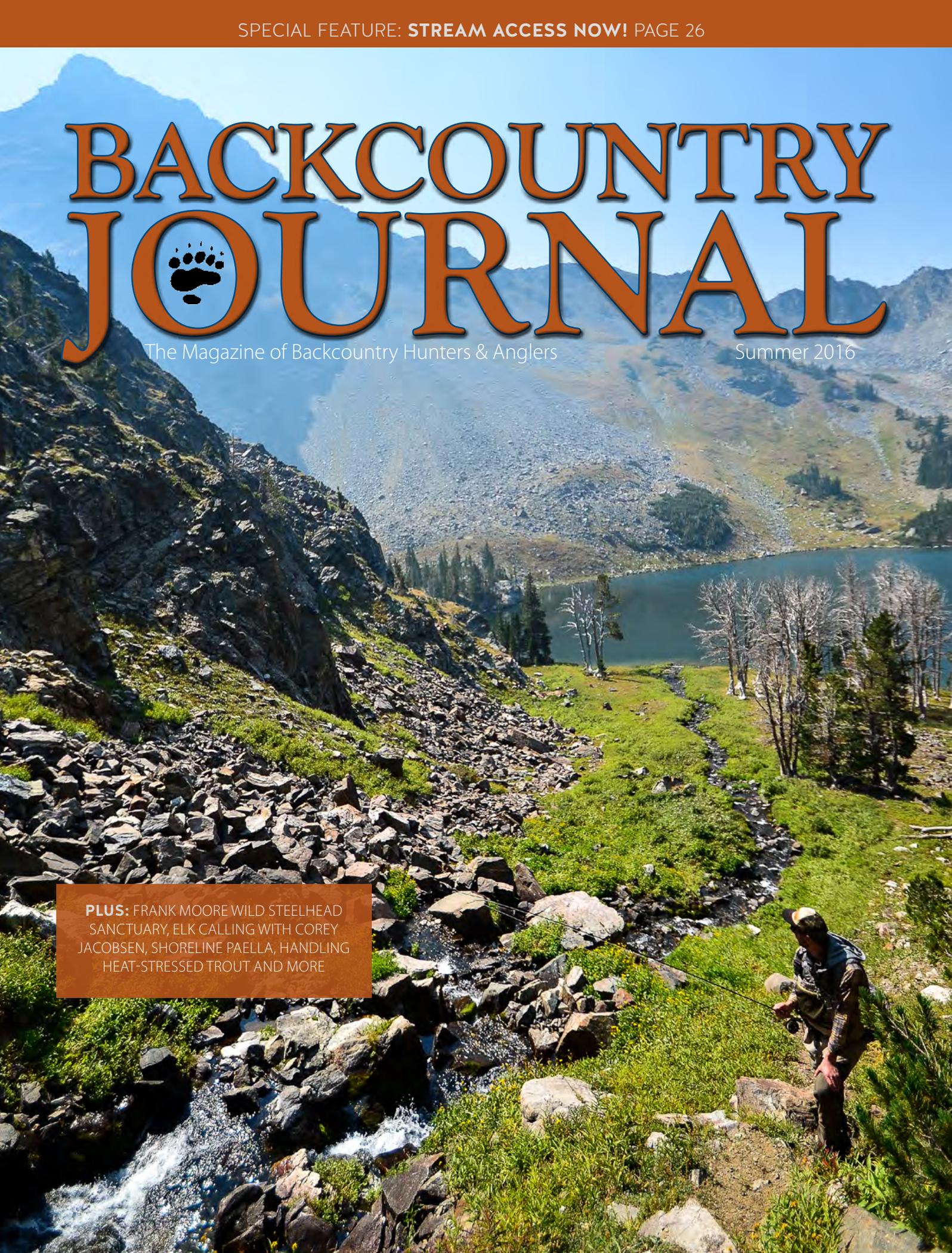


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The Magazine of Backcountry Hunters & Anglers

Summer 2016

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THE SMITH RIVER

YOU'RE CRAZY! What are you thinking? You know the weather in May can be dicey? Snow? Driving rain? How old are your kids? You're crazy!

I heard these questions and unsolicited comments from just about everyone when I told them my wife and I were taking our two young kids on a 60-mile backcountry float in the middle of May.

Granted, May weather in Montana can be temperamental, but we had a chance to float the famed Smith River! A childhood friend had drawn a golden ticket and invited us along.

The Smith is the only permitted river in Montana. It slices through a gorgeous limestone canyon in central Montana, flowing north until it joins the mighty Missouri. I've been lucky to float the Smith eight times over the years. Some of my fondest memories come from this storied river, and I couldn't wait to show it to Glenna, Colin and Cidney. To watch them experience things for the first time is nothing short of magical. It fills my bucket.

We experienced some scattered showers on the first day but nothing the kids couldn't handle. As we made it to our first camp the rain started in earnest. We quickly set up shelter and put on rain gear. The kids were unfazed by the weather and explored our campsite filled with boulders, bones and bugs. After a hearty meal and s'mores around the campfire it was time for bed. Crawling into our teepee with a fire in the stove was nothing short of Eden. We all slept well that night as the rain pattered on the tent walls.

The days that followed brought sunshine and stunning canyon views around every river bend. We melded into the flow of the river and our daily routine. Countless moments are etched into my memory: cliff-dwelling geese and mergansers, a great horned owl in a small cave, a plethora of wildflowers and dangerous hike to see some pictographs that was cut short when saner minds prevailed ... the kids are 5 and 7, after all. We cooked up fantastic fare of tri-tip, chili, tacos and even some caribou from friends in Alaska. On the last day we got more rain, all day, with

a stiff wind blowing upstream – less-than-ideal conditions for even a seasoned river rat. The kids and Glenna took it in stride, however, never complaining once.

My decision now to write about the Smith River – to put it on the map, so to speak – will draw some of the same comments I've heard before. "You're crazy!" "What are you thinking?" "It will be over-run!" Yet I feel compelled to write about the Smith because it's under threat. An international mining company is pushing hard to develop a sulfide gold mine at the head of Sheep Creek, the largest headwater tributary of the Smith. "You're crazy!" "What are you thinking?" "Why would you want to put a mine here?"

These questions deserve answers – and drive BHA's efforts to protect this backcountry treasure. We aren't against all mines and support responsible development on public lands – but in the appropriate places. Stay tuned as we ramp up our efforts to save the Smith. If you didn't know about the Smith before you opened this issue of *Backcountry Journal*, I hope you understand now why protecting it – and the outdoor opportunities it offers – is important.

Speaking of special places, I'm pleased to share some good news about the Boundary Waters Canoe Area Wilderness. My last column addressed this iconic wilderness – and the proposal to develop sulfide mines within the Boundary Waters watershed. The Forest Service recently decided to review – and allow public comment on – a proposal to renew mining leases for the project. BHA members are actively engaged in building awareness of the threats these mines would pose to the Boundary Waters and to an irreplaceable outdoor legacy. Raise your voice for the backcountry and sign our petition today: www.backcountryhunters.org/petition_boundary_waters. This is what we do at BHA. We step up for the resource. We step up for our heritage. And we step up for those future generations who will reap the benefits of what we sow today. Some may think we are crazy, but we're just getting started! 🐾



Glenna, Cidney, Land and Colin Tawney ready for their last day on the Smith, with smiles all around. The Smith is under threat of a proposed sulfide mine at its headwaters and BHA is working to make sure that doesn't happen.

Onward and Upward,

Land Tawney
President & CEO

STREAM ACCESS NOW!

A SPECIAL FEATURE ABOUT AMERICA'S RIVERS AND BHA'S NEW CAMPAIGN

Introduction

BY SAM LUNGREN

PUBLIC OWNERSHIP OF FLOWING WATERS IS AN UNDISPUTED DEMOCRATIC PRINCIPLE.

Even before Americans decided to stop obeying the rest of Britain's antiquated laws and Old World traditions, our rivers were used by all members of society – for hydration, transportation, sanitation, power, commerce, agriculture, hunting and angling. And that was before the sporting pursuits were simply for sport. On the frontier, to bar another man from drinking from a river or catching a fish might very well kill him.

Living conditions have changed these centuries later, but flowing waters are no less valuable. And thankfully, the citizens of America still own her streams. Yet in a regression toward European ideas of propriety, the ground below those streams is no longer universally public. Each state has the right to define such laws, and while some have governed in favor of their citizens, others favor their waterfront landowners. While anyone may walk below the high water mark on any river in Montana, to do so on the same stream in Wyoming might get you fined. This is a disparity of freedom to wander the wild reaches of a river, freedom to drop anchor to eat lunch. As the sportsmen's voice for our wild public lands, waters and wildlife, Backcountry Hunters & Anglers calls foul on that disparity.

Stream Access Now is BHA's latest endeavor to improve public fishing and hunting access and opportunity nationwide. We believe that streambed walking access, so essential to fishing and waterfowling opportunity, is not being discussed or defended at a national level – and sportsmen are literally losing ground in some states. Many organizations are already doing great work on these issues at a local level. We want to support and magnify their efforts. In places where no such organizations exist, we want to empower a constituency to engage in the stream access debate.

BHA aims to elevate the issue of public streambed access using the following approach:

1. Educate: Serve as a resource for informing and generating awareness within the sportsmen's community about the challenge of stream access – establishing it, upholding it, and defending it – state by state.

2. Motivate: Give sportsmen and women the tools, knowledge and impetus to speak up on the issue of stream access. Illustrate what's at stake for our community if we fail to gain – or we lose – the ability to access the public waters flowing through the nation's rivers and streams. Highlight this issue and spark conversations about access.

3. Activate: Build an army of hunter-angler advocates who can react quickly and nimbly to potential threats and take advantage of opportunities to improve public access. Leverage the power of BHA's on-staff resources to advance these efforts, providing targeted assistance to achieve policy objectives in the state and national arenas.

To accomplish this, we're joining forces with the outdoor industry – businesses with a vested interest in free public stream access. Many already are committed to Stream Access Now. Their support is helping us jumpstart our efforts via a crowdfunding campaign to provide Stream Access Now with a reliable foundation. The hope is that, by giving concerned sportsmen a stake in the process, we will simultaneously create an army of boots-on-the-ground conservationists to demand the public streambed access that is our birthright as Americans.

Make no mistake. Though the opponents of public access may be a minority, their influence often exceeds our own. Through well-funded lobbying and political clout, these individuals are constantly seeking to erode the public's rights to access our waterways. We have an upstream hike ahead of us, through heavy current. But who better to take those strides than a group of backcountry hunters and anglers?

Visit streamaccessnow.com to learn more and support this new effort. Sign the **Stream Access Pledge** and join others who are committed to upholding our rights to access America's streams.

STREAM ACCESS PLEDGE:

I believe that, as flowing water is the property of the people, so too is the earth it flows over in normal course. Private property rights must be respected and hunters and anglers should be allowed to wade and float below the high water mark. I will defend the democratic principle of public access and join other dedicated sportsmen and women in defense of our rights and traditions.

Protecting What's Ours:

Montana Public Land and Water Access Association's Decades-long Battle for Access

BY E. DONNALL THOMAS JR.

A HUNTER HEADS OUT EARLY ONE MORNING to visit a favorite duck blind on public property, only to find a new gate across a public road. Two elk hunters drive toward public land in the Missouri River Breaks and run into a locked gate across a road they'd traveled freely for years. Fly fishermen arrive at a bridge over a famous trout stream and find the route to the water barred by No Trespassing signs and electric fences. Welcome to the New West.

All of these events took place in Montana. The wildlife resources beyond those newly erected barriers lie in the public domain. Recreationists had utilized those routes to reach them for decades, and a large body of evidence supported their status as legal rights of way. But there stood the gates and fences, more tangible than any dusty court record. And they would probably remain there indefinitely save for tireless effort by a small, all-volunteer non-profit group called the Public Land and Water Access Association, or PLWA.

Stream Access: One State's History

In 1977, future members of what would become the Montana Coalition for Stream Access Inc. (and subsequently, after a series of name changes, PLWA) filed suit against a streamside landowner who was harassing recreational floaters on the Dearborn River. After the usual legal delays and maneuvering, the state supreme court, citing the public trust doctrine, ruled in MCSAI v. Curran

that "any surface waters capable of use for recreational purposes are available for such use by the public." The same year, the court addressed another suit against a landowner who planned to string a cable across the Beaverhead to prevent anglers from floating the river. In MCSAI v. Hildreth, the court held that if a stream is navigable for recreational purposes it can be used for such up to the mean high water mark without regard to adjacent ownership of land.

These key cases led to the 1985 passage of Montana's Stream Access Law, which survived multiple landowner appeals to higher courts. Today that law allows anglers and other recreationists to enjoy some of the country's best fishing and is crucial to the state's economically vital outdoor recreation industry. One might think that after these dramatic victories in both the courts and the legislature we could all just relax and go fishing. One would be wrong.

The Bridges of Madison County

There isn't much to Seyler Lane, and most of us would never know of its existence save for several accidents of geography. The road runs across a bridge over the Ruby River in southwestern Montana's Madison County. The road and the bridge long enjoyed an established prescriptive easement that provided recreational floaters and anglers access to the water. The private property on either side of the bridge is now part of a trophy ranch owned by James Cox Kennedy, an Atlanta-based media billionaire who has expressed little love for the public.

In 2000, state Attorney General Joseph Mazurek issued an opin-



Members of the Public Land and Water Access Association. Don Thomas photo.

ion stating that the public may gain access to Montana streams by using a bridge, its right of way and abutments, and that the road easement does not narrow at the bridge. Nonetheless, Kennedy erected fences between the bridge and the water in 2003. When Madison County commissioners refused to remove these impediments, PLWA filed suit in 2004. So began a long, drawn-out legal battle whose complexity and duration threaten to rival the case of Jarndyce and Jarndyce in Charles Dickens' *Bleak House*.

In 2007, Kennedy filed a motion formally asking the court to bar all access at Seyler Lane and two other bridges over the Ruby that border his property. The district court ruled in favor of PLWA on the other two bridges but delayed ruling on Seyler Lane on procedural grounds. In 2009, the state legislature passed the Bridge Access Law, which states that the public must be allowed to access streams from public roads and bridges. Nonetheless, in 2012 the district court issued a delayed ruling on Seyler Lane that held against the PLWA position.

On appeal by PLWA, the state Supreme Court overturned the lower court decision and directed it to establish public access to the Ruby at Seyler Lane. During those proceedings, Kennedy's attorney acknowledged that their goal was to overturn Montana's 1985 Stream Access Law, which many regard as the most progressive and enlightened in the nation. During argument, Justice Patricia Potter pointed out that the Montana constitution states, "All the waters are the property of the state for the use of the people," and asked Kennedy's attorney if he was requesting the court to rule the constitution unconstitutional. He said yes, leaving many observers baffled by the notion of an unconstitutional constitution.

Again, one might think that a decisive Supreme Court ruling would leave the matter settled, and again one would be wrong. Thanks to endless delaying tactics, the remedy the Supreme Court ordered the lower court to provide in the matter of Seyler Lane has yet to materialize. Perhaps this should come as no surprise, given that one side in the dispute has virtually unlimited financial resources at its disposal while the other relies on small donations from the outdoor community to cover its legal costs (and I would note that the Montana-based attorneys representing PLWA have been exceedingly generous with their time and their fees). Maybe someday a definitive resolution will be handed down... but that's what Dickens' characters said of Jarndyce and Jarndyce, and it

hadn't happened by the end of the book.

An Eye to the Future

In this piece I have concentrated on PLWA's work on streams and rivers simply because of BHA's current (and most welcome) focus on stream access. It is important to appreciate that the group works on behalf of hunters as well as anglers. While its biggest victories to date may have involved stream access, it is currently involved in multiple cases in which outfitters and landowners have impeded access to areas that offer some of the best public land hunting in the country.

While no one at PLWA is interested in personal publicity, a few individuals deserve mention. Tony Schoonen and Jerry Manley played key roles in drafting the 1985 Stream Access Law. John Gibson has provided years of effective leadership. Bernie Lea is a master at researching old court records for documentation of public use. The only reward they have received for their work is the satisfaction of knowing they have served the public interest and made Montana a better place.

PLWA is a small, grassroots organization that runs on the enthusiasm and energy of its volunteers. Most of us recognize that despite important past victories, the fight is just beginning. Land ownership patterns are changing dramatically throughout the West. Attempts to privatize and commercialize public wildlife resources have become commonplace, and attacks on the North American Model and the public trust doctrine are accelerating in intensity. PLWA and its supporters are up against big money, and when vast financial resources face off against the public interest, the default position isn't pretty.

I'll close with two specific suggestions. First, visit plwa.org and offer whatever help you can. The group's leadership is aging and would welcome new blood. Second, get involved with your state BHA chapter and advocate for working on stream access. The issues PLWA is tackling are not just Montana issues. They involve all of us. BHA National can provide a tremendous framework of support, but there is no substitute for action at the state level. These are indeed the times that try men's souls, and no one can assume that someone else is solving our problems for us.

After spending his adult life in Montana and Alaska, Don and his wife Lori now winter in Arizona with their bird dogs. Don writes about the outdoors for numerous publications. He is a BHA member.

Legislature vs. Supreme Court:

Utah's Complicated Battle Over Streambeds and Fishing Access

BY KRIS OLSON

IN 2008, FOR THE THIRD TIME, the Utah Supreme Court ruled in favor of the public's rights to use the rivers and streams of Utah, so long as they participate in legal activities. The ruling in *Conatser v. Johnson* set off a firestorm of rhetoric and sky-is-falling bravado by property rights groups and developers of exclusive "trout ranches." Their claim: With this decision, the very foundation of our state constitution had been eroded.

In fact, just the opposite was true. The *Conatser* court, like the courts before them, took their lead directly from Article XVII of the Utah Constitution:

All existing rights to the use of any of the waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed.

Among those rights, the court observed, is the right to utilize the waters of the state (and their respective streambeds), for any lawful activity. This idea is not new and was common knowledge as early as 1920, when Utah Fish and Game Commissioner RH Siddoway reminded anglers and property owners alike that:

Fishermen have rights also. The waters of the state belong to the state. The fish contained therein are also the property of the state. Fisherman may wade any of the streams of the state. If ordered off of the property of any owner thereof, they cannot be ordered out of the streams.

To address this conflict, Rep. Lorie Fowlke held a series of interim meetings in 2009 with any stakeholder on the stream access issue willing to consider the public's rights. Her bill was an expertly crafted touchstone of compromise and held the promise of settling Utah's stream access issue for generations to come.

That was, until a competing bill was introduced in the final days of the 2010 session. Drafted behind closed doors with the explicit purpose of serving private interests, fueled by dark lobbying money, the so-called "Public Waters Access Act" was shoved through the legislature on pre-greased rails. With Gov. Gary Herbert's enthusiastic signature, the exclusive rights to use over 2,700 miles of rivers and streams in Utah (about 43 percent of Utah's fishable waters) were gifted to private interests. The common angler became a criminal if he or she touched privately owned beds without written permission to do so.

The Utah Stream Access Coalition was founded a few short months later. Within 10 months, the coalition had filed two separate lawsuits on two sets of legal grounds. The first lawsuit

challenged the new law in its entirety – alleging that it served no public interest and violated several articles of the Utah Constitution. It named both the State of Utah and Victory Ranch, a private development on the Upper Provo River that aggressively lobbied for the act's passage. The second lawsuit sought to prove that the Weber River was navigable based on its statehood-era use for transporting railroad ties to railroads and prop timbers to mines. If declared navigable, federal law holds that the Weber's beds and banks were sovereign lands open to public use and the trespassing provisions of the 2010 act were moot.

While the lawsuits worked through the courts, the coalition attempted to bring compromise legislation year after year. USAC sought to find an amicable solution that would stand the test of time, yet no parties were interested in coming to the table. The reasonable, sensible compromise being proposed was met with more of the same rhetoric, sky-is-falling claims, misinformation and revisionist history.

Last year, both of these cases at the district court level finally came to an end, and USAC prevailed on virtually all counts. In one case, a one-mile stretch of the Weber River was declared navigable, and in the other, the "Public Waters Access Act" was declared unconstitutional. Anglers and boaters rejoiced in knowing that their rights were upheld though USAC's grassroots efforts and the remarkable work of their pro bono counsel.

A mere 113 days later, one judge from the Utah Supreme Court placed a stay on the lower court's decision and effectively re-closed 2,700 miles of river and streams pending the High Court's review of the lower court's ruling during the appeal process (these two appealed cases present the high court a fourth and fifth opportunity to rule on the public's rights to use the public waters of Utah). Once the Utah Supreme Court rules on both cases, most likely in 2017, it's up to the legislature to get it right and balance private property protections with public use of the waters.

The Utah Stream Access Coalition will continue to be vigilant and fight for the public's rights. The forces that would eliminate all public access to rivers and streams in Utah, Montana or New Mexico are not confined to these three states. They are a cancer that plagues all of us in the West. We must do all we can to snuff out these efforts to privatize public resources. That is exactly what USAC has been doing for the past six years.

Kris is the president of USAC, an avid angler, and a born-and-raised Idaho boy. When not on the river, he's working on his M.D./Ph.D. at the University of Utah.



Threatening signs are commonplace in Utah, including this one on the Governor's in-law's property on the Lower Provo River. Corey Kruitbosch photo.