



40th Public Land Law Conference

October 26-27, 2023

Gathering Wisdom:
Building on 40 Years of Public Land Discourse

GOOD MORNING.

OUR FIRST EVENT TODAY IS DEPUTY DIRECTOR NADA
CULVER'S MORNING KEYNOTE AT 9:00 AM.



U.S. Department of the Interior
Bureau of Land Management

University of Montana – Public Land Law Conference

A wide-angle photograph of a desert landscape at sunset or sunrise. The foreground is filled with low-lying green and yellow shrubs. In the middle ground, there are rolling hills and mesas of reddish-brown sandstone. The sky is a mix of blue and orange, with some light clouds.

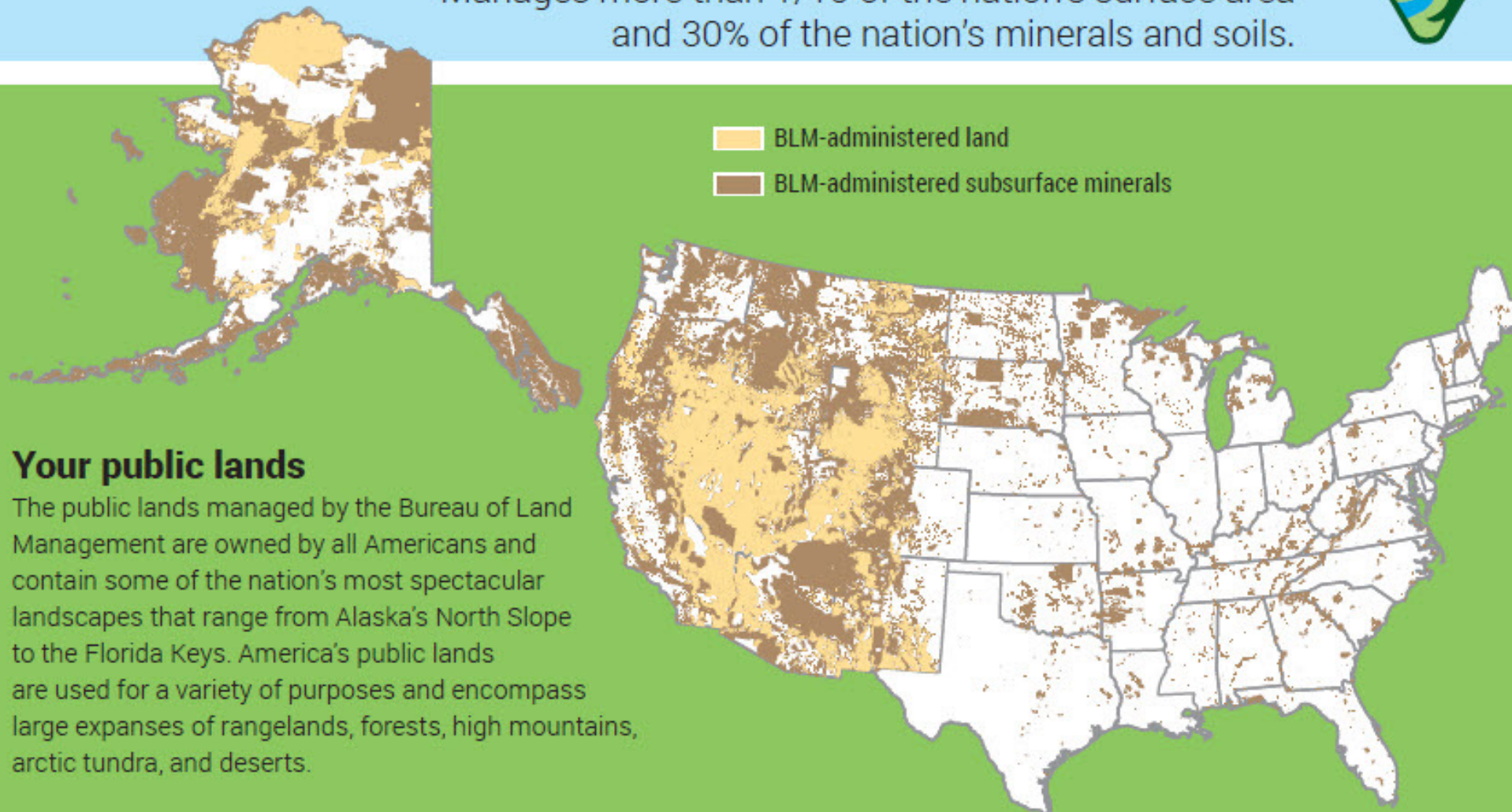
Future of Public Lands

Nada Wolff Culver, Principal Deputy Director
Bureau of Land Management



The Bureau of Land Management

Manages more than 1/10 of the nation's surface area
and 30% of the nation's minerals and soils.



Your public lands

The public lands managed by the Bureau of Land Management are owned by all Americans and contain some of the nation's most spectacular landscapes that range from Alaska's North Slope to the Florida Keys. America's public lands are used for a variety of purposes and encompass large expanses of rangelands, forests, high mountains, arctic tundra, and deserts.





Renewable Energy Development



Renewable energy

- Permitting goals
- Solar Programmatic EIS update
- Proposed regulation
 - Codify reductions in rents/fees
 - Provide discretion on holding competitive sales
 - Codify prioritization approach
 - Incentive for domestic content
 - Potential incentive for union labor



Proposed Rule on Fluid Mineral Leases and Leasing Process





Proposed oil & gas regulation

- Implementing Inflation Reduction Act
- Updating fiscal terms and increasing bonding rates
- Clarifying sideboards on lease suspensions
- Setting term/removing extension for APDs
- Updating competitive leasing process
 - Preference criteria
 - Public engagement
- Requested input on addressing GHG emissions



Proposed Public Lands Rule





Proposed Public Lands Rule

Implements FLPMA's direction: manage public lands to ensure multiple use and sustained yield, acknowledging BLM must conserve natural resources at a level that maintains or improves *ecosystem resilience*

The rule would ensure ecosystem resilience through:

- **Restoration** of degraded habitat
- **Informed management decisions** based on science and data, including Indigenous Knowledges
- Protection of **intact landscapes**

Input on potential implementation of Executive Order 14072 on mature and old-growth forests



Promotes Restoration

- Builds on investments under the **Inflation Reduction Act** and **Bipartisan Infrastructure Law**; directs land managers to identify and prioritize lands and waters for restoration
- Supports the resilience of public lands through “conservation leasing” for the purposes of restoration or mitigation
- Responds to state, local, and industry partners who requested a clear path for compensatory mitigation to facilitate balanced development – and provides for durable mitigation to take place on public lands





Provides for Responsible Development

- Applies existing landscape health standards across all public lands, in line with best practices used at other state and federal land management agencies
- Balances development with other uses like recreation and conservation
- Avoids impacts that degrade land health, and requires justifications when those impacts are unavoidable



Protects Intact and Healthy Landscapes

- Maintains intact lands to support wildlife habitat, migration corridors, and ecosystem function
- Promotes locally driven and locally led conservation
- Provides consistent direction to land managers to prioritize designation and protection of Areas of Critical Environmental Concern (ACEC), as required by the Federal Land Policy and Management Act





Supports Tribal Co-stewardship

- Tribal consultation and engagement incorporated as part of managing for ecosystem resilience.
- Opportunities for co-stewardship discussed in context of evaluating management of intact landscapes, ACECs, and conservation leases.
- Indigenous Knowledge defined and identified as part of high-quality information to underpin decision-making and actions.



Alaska





America the Beautiful





Land Use Planning





Managing public lands for the future





The Long View

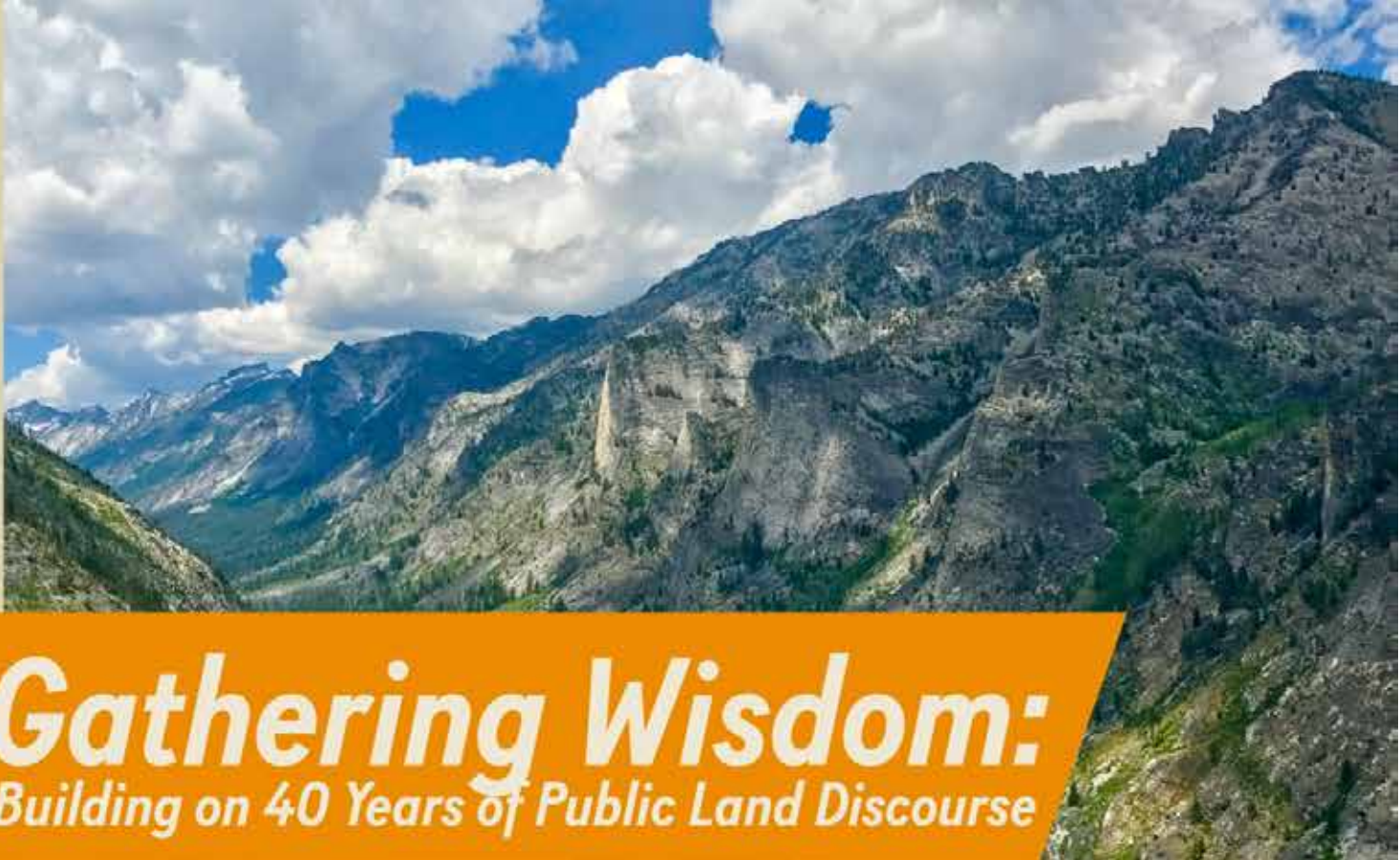




40th Public Land Law Conference

October 26-27, 2023

Gathering Wisdom:
Building on 40 Years of Public Land Discourse



10:15-11:30 AM
THE ACCESS CONUNDRUM:
DEFINING PUBLIC,
DEFINING RIGHTS



STATE BAR OF MONTANA

Environmental Section

PANEL SPONSOR



The Access Conundrum (Panel)

Martin Nie, W.A. Franke
College of Forestry &
Conservation, University
of Montana

40th Public Land Law Conference

University of Montana,
Alexander Blewett III
School of Law

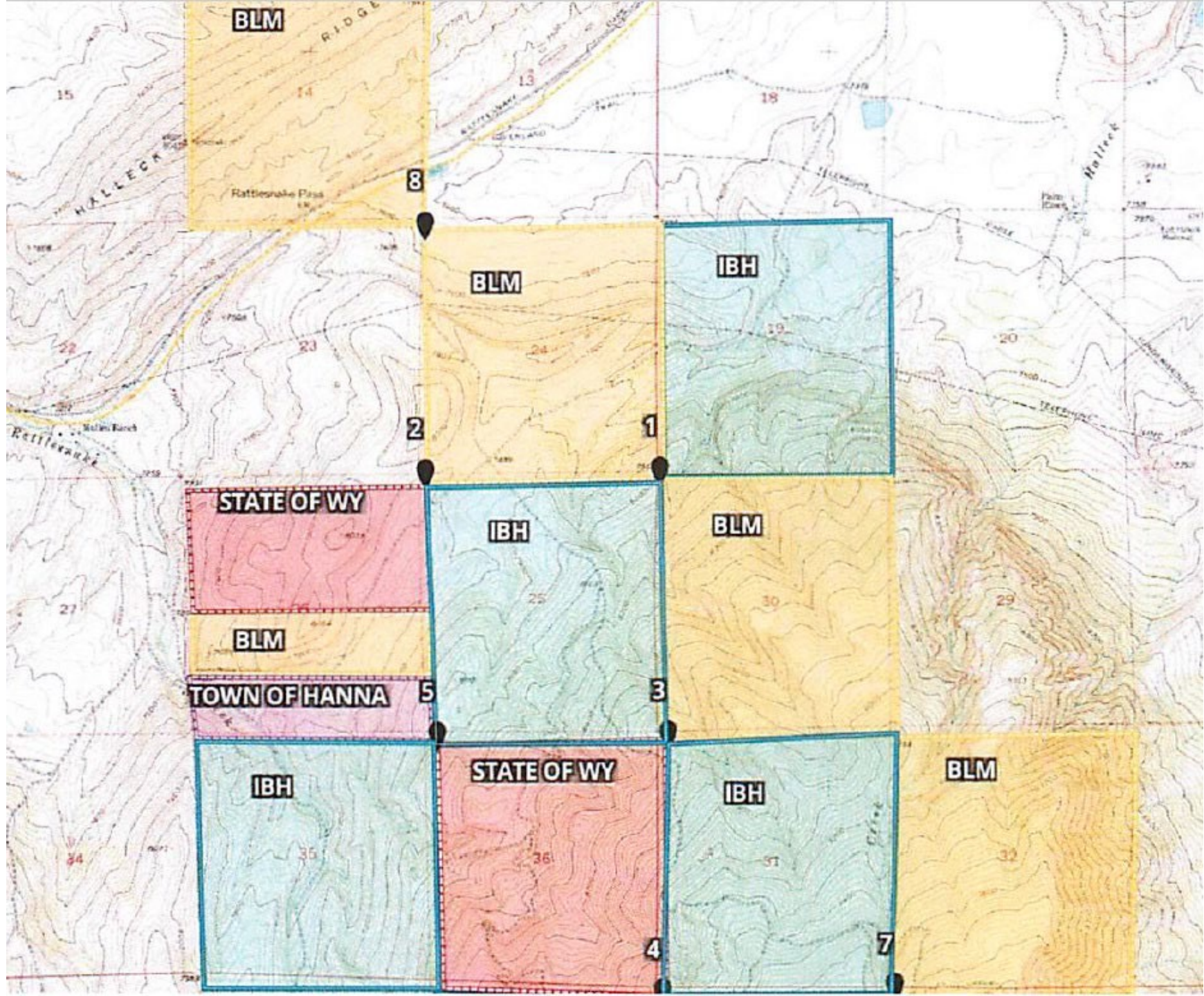
October 27, 2023

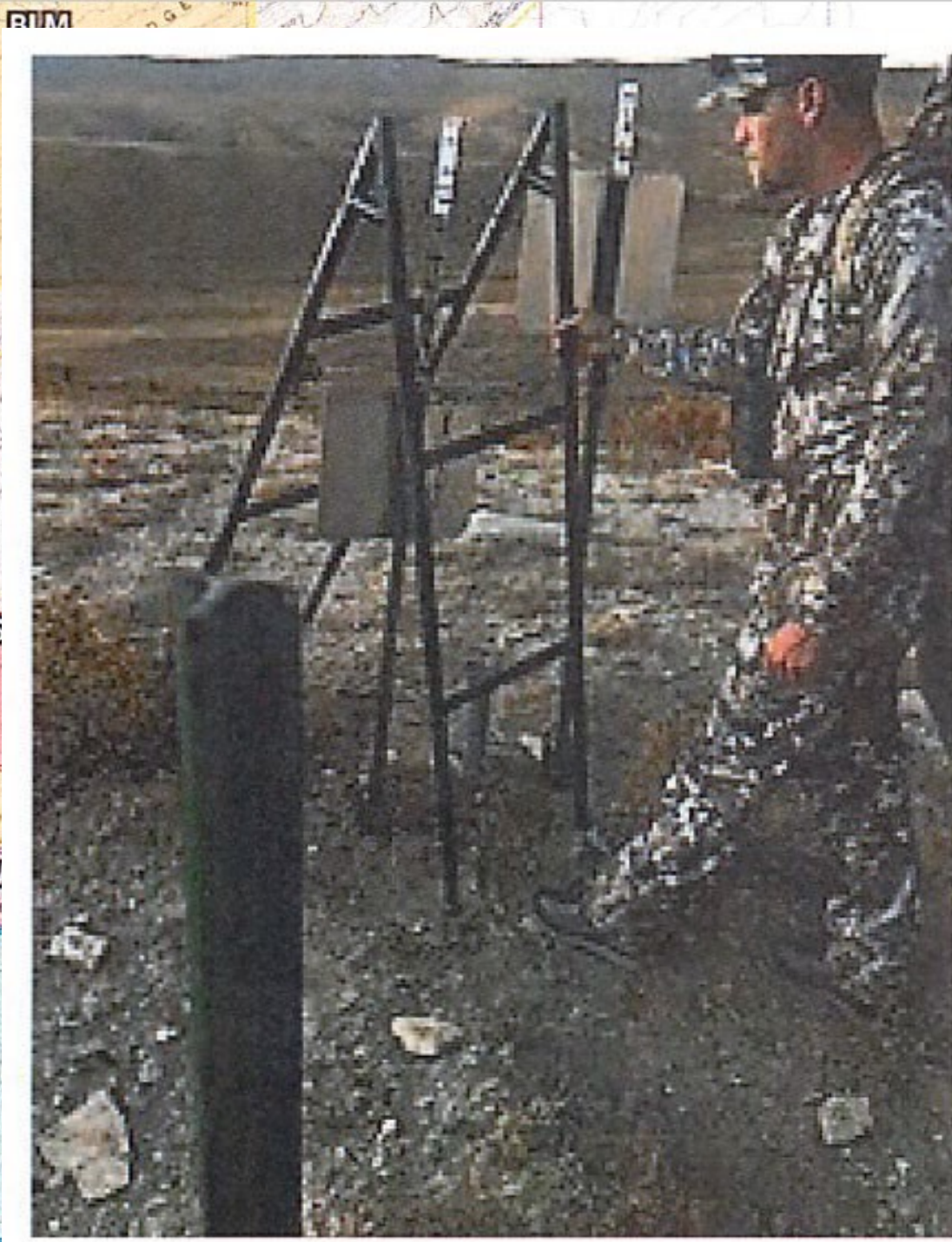
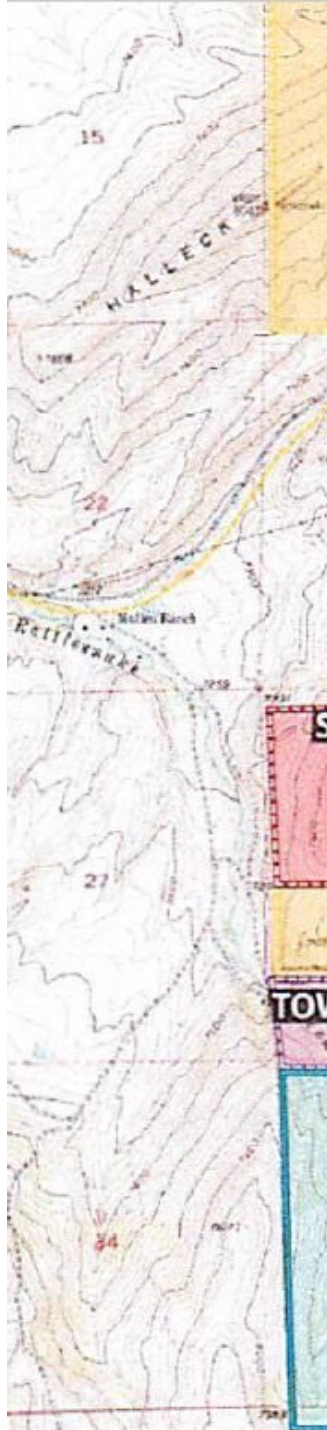




Corner Crossing, Elk Mountain in Carbon County, Wyoming

Iron Bar Holdings v. Cape et al. (2023)





MONTANA TENTH JUDICIAL DISTRICT COURT, FERGUS COUNTY

UNITED PROPERTY OWNERS OF
MONTANA, INC., a Montana non-profit
corporation,

Plaintiff,

vs.

MONTANA FISH AND WILDLIFE
COMMISSION and MONTANA
DEPARTMENT OF FISH, WILDLIFE &
PARKS,

Defendant.

Cause No.: DV-22-36

Judge: Jon A. Oldenburg

COMPLAINT AND RULE 5.1 NOTICE

by Amanda Eggert
09.08.2022



WILDLIFE

Elk management in the crosshairs

How a lawsuit, two coalitions and a public trust petition are shaping Montana's elk management debate.

MONTANA **MTFP** FREE PRESS



Montana Public
Trust Coalition

KEEP ELK PUBLIC™

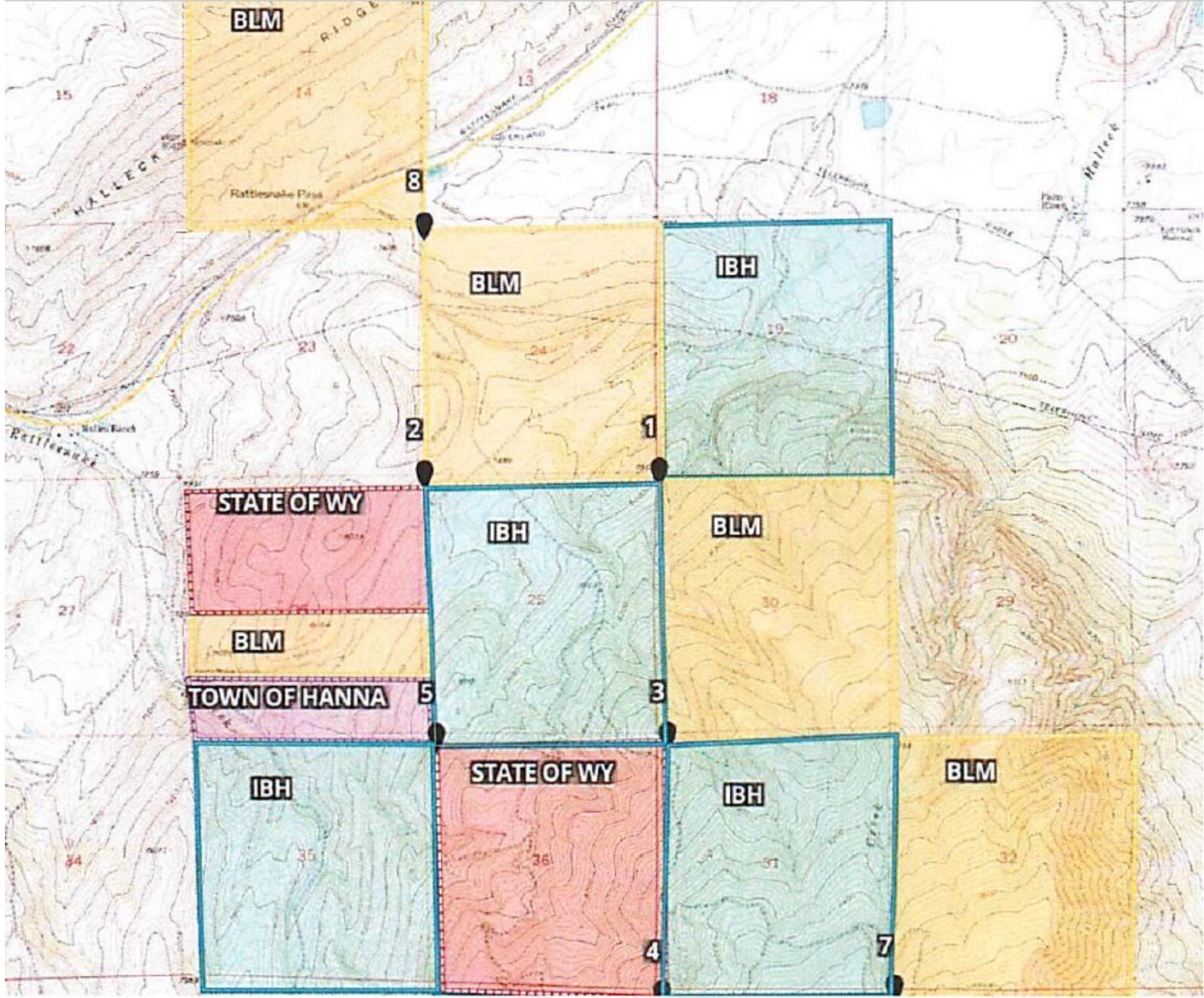


Bill tweaks controversial 'bulls for billionaires' program to make it more acceptable



BILLINGS GAZETTE

Brett French Feb 22, 2023 0



This land is your land Public lands

Class war in the American west: the rich landowners blocking access to public lands

Private landowners present a rising threat to the millions of acres set aside for public use by blocking access to public lands



Public land access over private land has always been a fairly fraught issue, but with the west growing more crowded, it has taken on a new urgency Photograph: Alamy

Kathleen McLaughlin

Private Property Rights and Community Goods: Negotiating Landowner Cooperation Amid Changing Ownership on the Rocky Mountain Front

LAURIE YUNG

College of Forestry and Conservation and Wilderness Institute,
University of Montana, Missoula, Montana, USA




JILL M. BELSKY

College of Forestry and Conservation and Bolle Center for People
and Forests, University of Montana, Missoula, Montana, USA

Census data: Montana saw drastic rise of high-income households during pandemic

David Erickson Oct 11, 2022 11

Rural Land Concentration & Protected Areas: Recent Trends from Montana and Greater Yellowstone

Julia H. Haggerty^a , Kathleen Epstein^b , Hannah Gosnell^c , Jackson Rose^a,
and Michael Stone^a

^aDepartment of Earth Sciences, Montana State University, Bozeman, MT, USA; ^bAtkinson Center for Sustainability, Cornell University, Ithaca, NY, USA; ^cCollege of Earth Ocean and Atmospheric Sciences, Oregon State University, Corvallis, OR, USA

JOHN D. LESHY

OUR COMMON GROUND

A History of
America's
Public Lands

"A brilliant rendering of what 'the open space of democracy'
must be if we are to survive its present state of erosion."

—Terry Tempest Williams, author of *The Hour of Land*

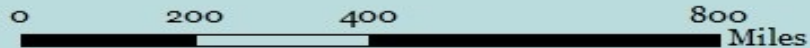
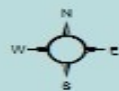
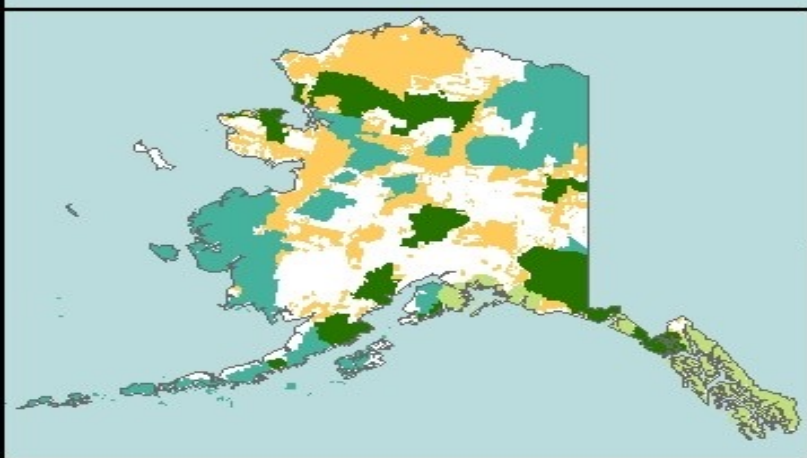
THIS AMERICA OF OURS

Bernard and
Avis DeVoto
and the
Forgotten Fight to
Save the Wild

NATE
SCHWEBER

Federal Public Lands

-Private, commercial use
of public land



Legend

-  Bureau of Land Management
-  Fish & Wildlife Service
-  Forest Service
-  National Park Service



Jim Magagna is executive vice president of the Wyoming Stock Growers Association. He often moves his sheep herds across the checkerboard.

“For us as ranchers, those boundaries between private land and public land and state trust lands and that, they exist on a piece of paper,” he said. “In most cases, they don't exist in terms of how you manage a ranching operation.”

However, he argues that allowing the public to move across those corners could severely damage his economic well being, safety and personal freedoms. His association has filed briefs in court supporting the trespassing charges.

“If the federal government is gonna control it, then we've devalued private property in the state in many instances because you no longer have control of your private property that we have all assumed we had,” he said.



Rangeland Administration System Reports

									NUMBER	
LLWYD03000	RAWLINS FO	4903253	T.A. RANCH OPERATIONS LIMITED PARTNERSHIP	PO BOX 788		SARATOGA	WY	82331	1 - RELEASE OPERATOR NAME, ADDRESS, PHONE NUMBER	
LLWYD03000	RAWLINS FO	4903254	IRON BAR HOLDINGS, LLC.	PO BOX 36		ELK MOUNTAIN	WY	82324	307-348- 7140	1 - RELEASE OPERATOR NAME, ADDRESS, PHONE NUMBER
LLWYD03000	RAWLINS FO	4903256	LOWELL WOLFE LIVING TRUST	BOX 18		WALCOTT	WY	82335	2 - RELEASE OPERATOR NAME AND ADDRESS	
LLWYD03000	RAWLINS FO	4903257	WOOLF RANCH INC	1442 STATE HWY 230	C/O LANE LINDLEY	LARAMIE	WY	82070	1 - RELEASE OPERATOR NAME, ADDRESS, PHONE NUMBER	



United States Department of the Interior
Bureau of Land Management
ALLOTMENT MASTER REPORT
WY00850 HOME RANCH

Authorization Cross Reference						
Authorization Office	Authorization Number	Operator Name	Active AUMs	Suspended AUMs	Temp Suspended AUMs	Permitted Use
LLWYD03000	4903254	IRON BAR HOLDINGS, LLC.	585	0	0	585

Allotment Terms and Conditions

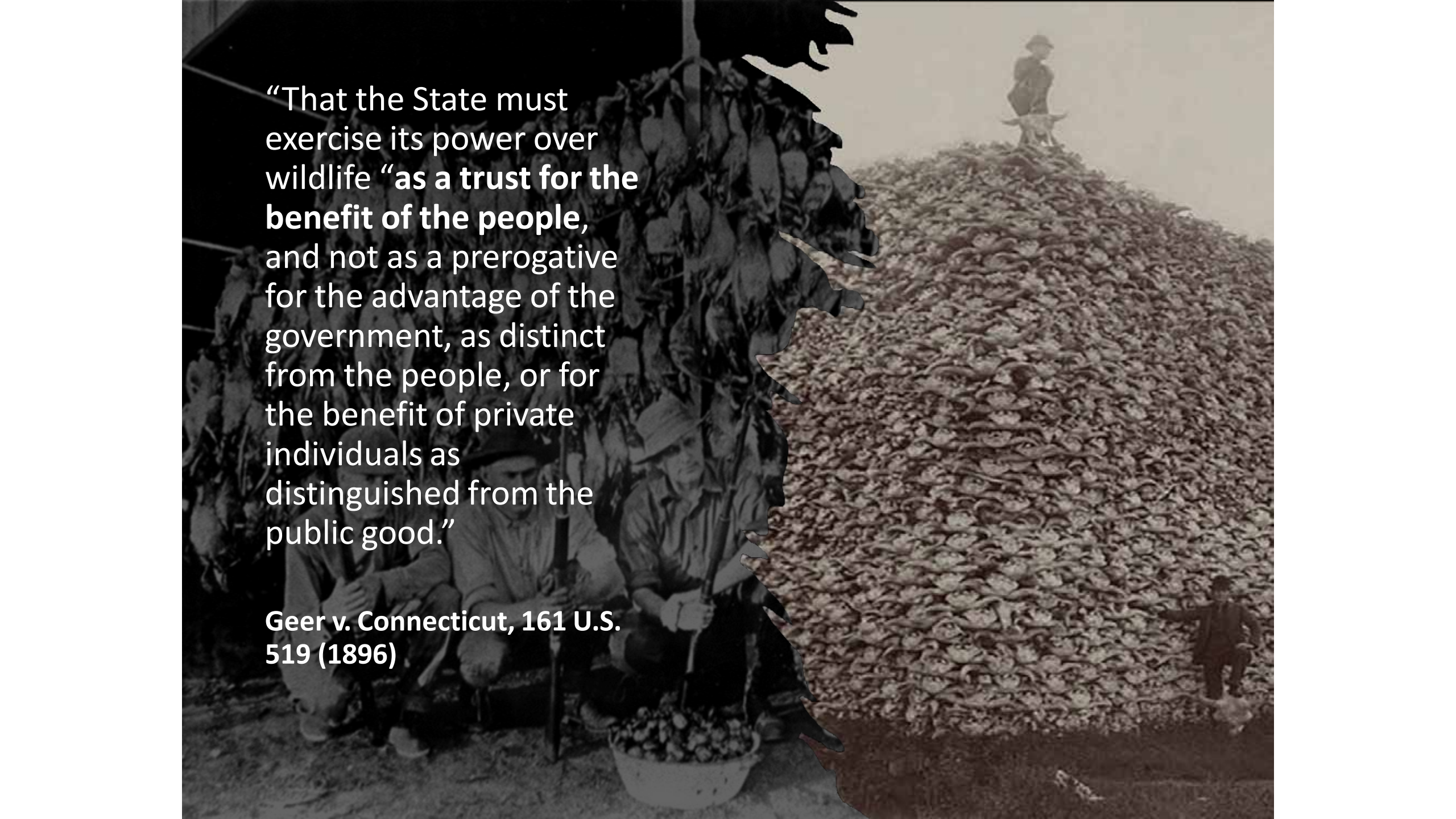
Terms and conditions include grazing schedule lines and also any text terms and conditions. The allotment terms and conditions below will print on bills and courtesy applications issued to permittees and lessees.

Terms and Conditions

Insert here: public access to public lands provision

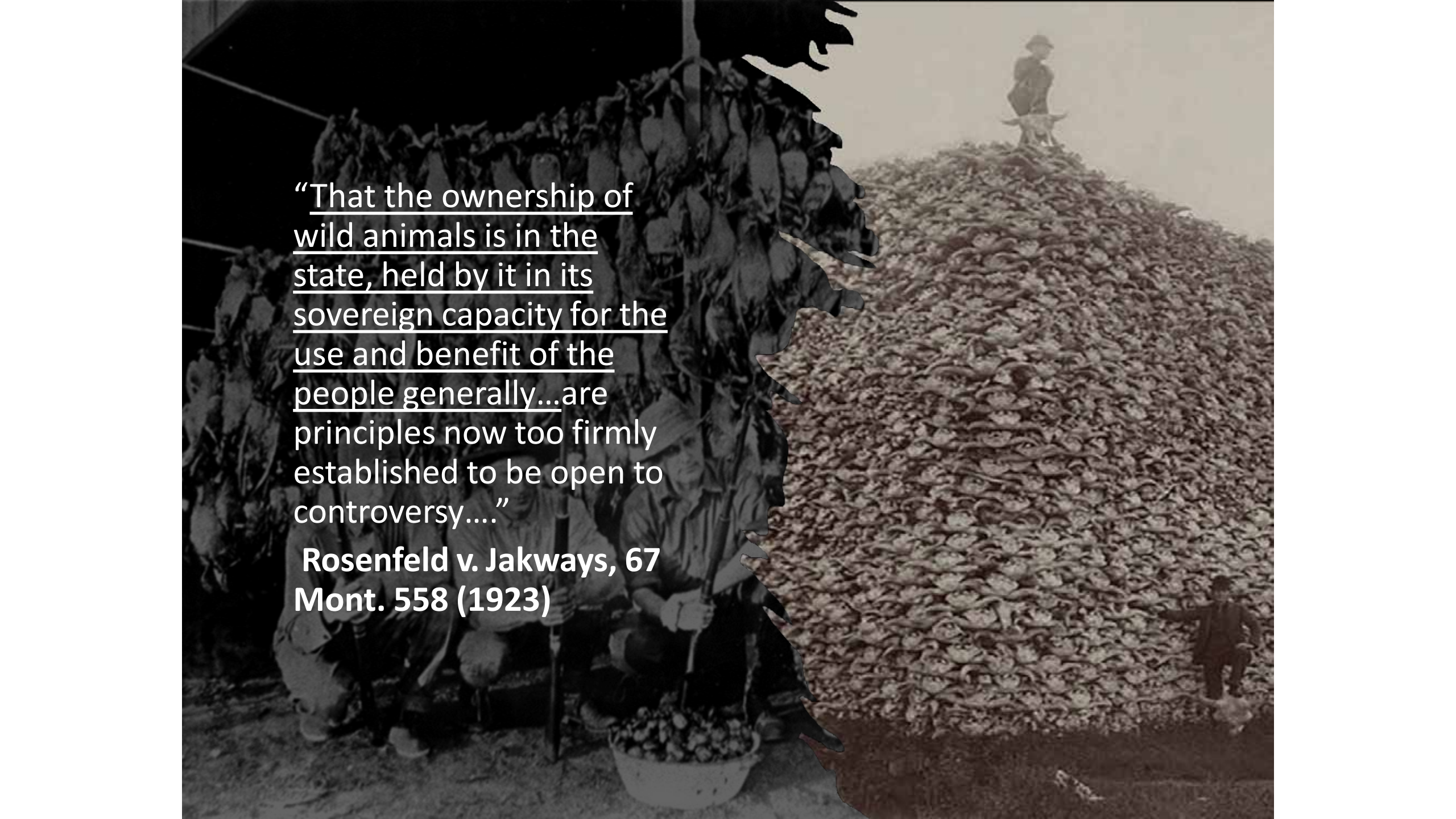


The Wildlife Connection



“That the State must exercise its power over wildlife **“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.”

Geer v. Connecticut, 161 U.S. 519 (1896)



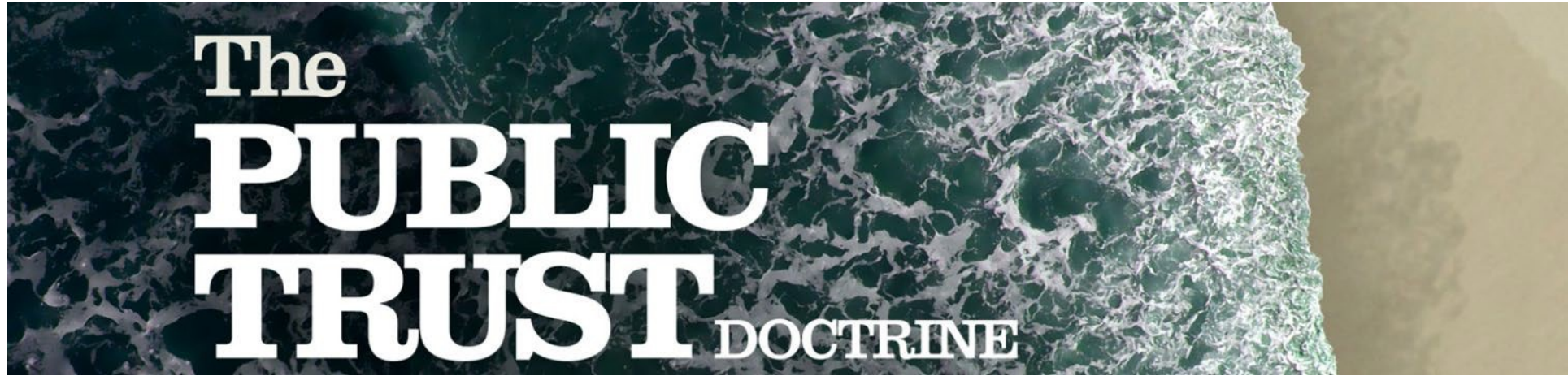
“That the ownership of wild animals is in the state, held by it in its sovereign capacity for the use and benefit of the people generally...are principles now too firmly established to be open to controversy....”

Rosenfeld v. Jakways, 67 Mont. 558 (1923)

THE PUBLIC TRUST DOCTRINE AND WILDLIFE MANAGEMENT IN MONTANA: A PRIMER & CITIZENS GUIDE

Martin Nie*

The public trust doctrine (PTD) is legal bedrock of wildlife management in the State of Montana. The earliest PTD cases in the U.S. involve wildlife and place restrictions on the privatization and monopolization of trust resources. The PTD, based on a state's sovereign ownership of wildlife, was in part a response to commercial exploitation and private capture of wildlife, and part a direct repudiation of an English system that privileged land owners over the public-at-large. In contrast to other resources and issues in the State, such as water management and stream access, there is a relative lack of PTD case law specifically applied to wildlife in Montana. Though at times dormant, the Doctrine is alive and well in the State. As carefully applied by the Montana and U.S. Supreme Courts, the PTD is not a magic bullet or panacea that can resolve all of the trade-offs that are inherent in wildlife law and management, a field renowned for its complexity and "nearly unique status" in the law.⁴ Neither is the PTD an invitation to run roughshod over private property interests. Rather, it provides an assurance that the public interest in wildlife is not surrendered or relinquished to private monopolization or undue private control of the wildlife trust. Viewed through a political lens, the PTD opens a door and provides leverage to find a range of pragmatic and feasible solutions to the problems presented by public wildlife on private lands. Without the PTD, private interests—and the political influence they wield in the state legislative and executive branches of State government—could undermine the public's sovereign ownership of wildlife and the special trust duties that go along with it. Though the PTD pre-dates the 1972 Montana Constitution, it is also rooted within it and the Constitution's "clean and healthful environment" protection—provided as an inalienable right— further bolsters the application and enforcement of the PTD to wildlife management in the State.



Trustees (state legislatures; wildlife commissions acting as agents of legislatures)

Corpus/assets of trust (fish and wildlife)

Beneficiaries (present and future generations)

**The
CONSTITUTION
of the
STATE OF MONTANA**

PREAMBLE

We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution.

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.

Montana Coalition for Stream Access, Inc. v. Curran, 682 P.2d 163
(Mont. 1984)

The PTD as foundation of State wildlife management



“The public trust concept, also called the public trust doctrine, derives from the long-held societal belief that certain natural resources are so important to everyone that they should be off limits to individual ownership, or privatization. The concept also maintains that it’s the government’s responsibility to steward these public resources for the fair and equitable enjoyment and use by current and future generations.”

Where the public trust concept began

A defining characteristic of the United States is that it protects and conserves wildlife (including fisheries) for the common good. Canada and several other countries also steward wildlife for the benefit of all. But nowhere has the idea of wildlife as a commonly shared resource, a concept known as the public trust, been as legally and legislatively secured as it is here.

The public trust concept arrived in this country with European immigrants who came seeking freedom of religious practice and escape from a class system that gave control of land, wildlife, wealth, political power, and even thought to a privileged few. The nation's founders sought to establish a new social and political environment where everyone was granted both the opportunity to own property and the right to equitably share certain natural resources.

Recognizing its vital importance, America's founders protected private property in the U.S. Constitution, especially with the Fifth Amendment's "takings" clause, which requires the government to compensate landowners when taking their property for public use. But the founders didn't include wildlife as part of private property, as was the case in Europe. Though later federal law allowed private ownership of coal, minerals, timber, oil, and gas, no administration or court has ever authorized the privatization of commonly shared resources like water and wildlife that move across property boundaries.

Originating in late Roman times and later incorporated into English law, the public trust concept originally applied to waterways and shorelines. The concept was strengthened in the United States during the 19th century by three Supreme Court rulings: *Martin v. Waddell* (1842), *Illinois Central Railroad v. Illinois* (1892), and *Geer v. Connecticut* (1896). The first two rulings solidified the idea that government is responsible for ensuring that shorelines and navigable waters are protected for the equitable use of current and future generations, with *Martin* also including shoreland wildlife (in this case, oysters) as a public trust resource. In *Geer*, the high court recognized wildlife as a public resource held and managed by the state for the benefit of all.

Land-based wildlife like deer and elk were not explicitly included with water and shorelines as public trust resources in federal law until the late 19th century. That's when Americans began realizing that seemingly limitless populations of those species, as well as beaver, bighorn sheep, and pronghorn, were being hunted to near extinction.

Elected officials responded to this conservation awakening by embracing a more expansive notion of the public trust to include wildlife.

The relevance of the public trust, and wildlife as part of that trust, became manifest in the late 19th and 20th centuries with a series of federal laws aimed at protecting trust resources and ensuring their equitable use. These include the Unlawful Enclosures Act (1890), Lacey Act (1900), Migratory Bird Treaty Act (1918), Clean Water Act (1972), and Endangered Species Act (1973). Montana's Stream Access Law and Stream Protection Act, as well as the Montana Constitution and guiding principles included in the North American Model of Wildlife Conservation, further bolstered the public trust concept.

As wildlife was incorporated into the public trust, state and federal leaders began recognizing the need to create conservation agencies like Montana Fish, Wildlife & Parks to conserve and manage

Our nation's founders sought to establish a new social and political environment where everyone was granted both the opportunity to own property and the right to equitably share certain natural resources.



wildlife as a trust resource at the state level.

That was PWT's original mandate, and it continues to this day. The point of all this is that the fishing, hiking, hunting, boating, and other outdoor experiences we enjoy in Montana exist in large part thanks to widespread acceptance of the public trust concept. For the past century, Montanans and other Americans have supported a system of laws founded on the shared belief that wildlife and waters should be protected and managed for the common good, today and far into the future.

In my next director's message, I'll write about the essential role of private property and property owners in Montana's wildlife conservation legacy; the inherent tension between the public trust and private property rights; and how courts, the Montana Legislature, and Montanans themselves have attempted, for the most part successfully, to fairly and equitably resolve that tension.

—Martha Williams, Director, Montana Fish, Wildlife & Parks

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

WILDEARTH GUARDIANS and PROJECT
COYOTE, a project of the Earth Island
Institute,

Plaintiffs,

vs.

STATE OF MONTANA, by and through the
MONTANA DEPARTMENT OF FISH,
WILDLIFE AND PARKS; and the
MONTANA FISH AND WILDLIFE
COMMISSION,

Defendants.

Case No.: DDV 2022-896

DEFENDANTS MOTION TO DISMISS

A. PTD is a Specific Legal Doctrine That Does Not Apply to Wolf Management.

Plaintiffs state that “cultural and natural resources subject to the [PTD] are referred to as “public trust resources” or “trust resources,” and the government entities with responsibility for managing trust resources are referred to as “trustees.”” Pl. Compl. at 7. Plaintiffs allege that the 2021 wolf laws and regulations, as well as the 2022 wolf quota, “violate the [PTD] as *enshrined* in the Montana Constitution by prohibiting Respondents from exercising the discretion conferred upon them” and violate Respondents “constitutional and statutory responsibility to conserve and manage state wildlife for current and future generations....” *Id.* at 21. In arguing for this novel and unsupported application of the PTD to wolf management, Plaintiffs recklessly blur distinct legal concepts such as the PTD, the prior appropriation doctrine for water right appropriation, the wildlife trust, and general trust law. The result advocated is an unprecedented expansion of the PTD which, to date, Montana has not adopted.

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

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COYOTE, a project of the Earth Island
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COMMISSION,

Defendants.

Case No.: DDV 2022-896

DEFENDANTS MOTION TO DISMISS

underpinnings in water and streambed law and the equal-footing doctrine. No Court has found the PTD in Mont. Const. Art. IX, §1(1), or ever pondered the expansion Plaintiffs posit in their complaint, namely, application to terrestrial wildlife. This is because the specific evolution of the PTD, from Justinian law to the 1972 Montana Constitution, pertains only to the use of State waters.

Q What does the law say with regard to corner crossing?

There is no specific state or federal laws regarding corner crossings. Corner crossings in the checkerboard land pattern area or elsewhere are not considered legal public access.

WYOMING
Public Land



GUIDE

BLM
www.blm.gov/wy



2013

WILDLIFE

Elk management in crosshairs

How a lawsuit, two coalitions and a public trust petition are Montana's elk management debate.



PUBLIC LAND & RESOURCES LAW REVIEW

Volume 43 2020

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ALICE CREEK

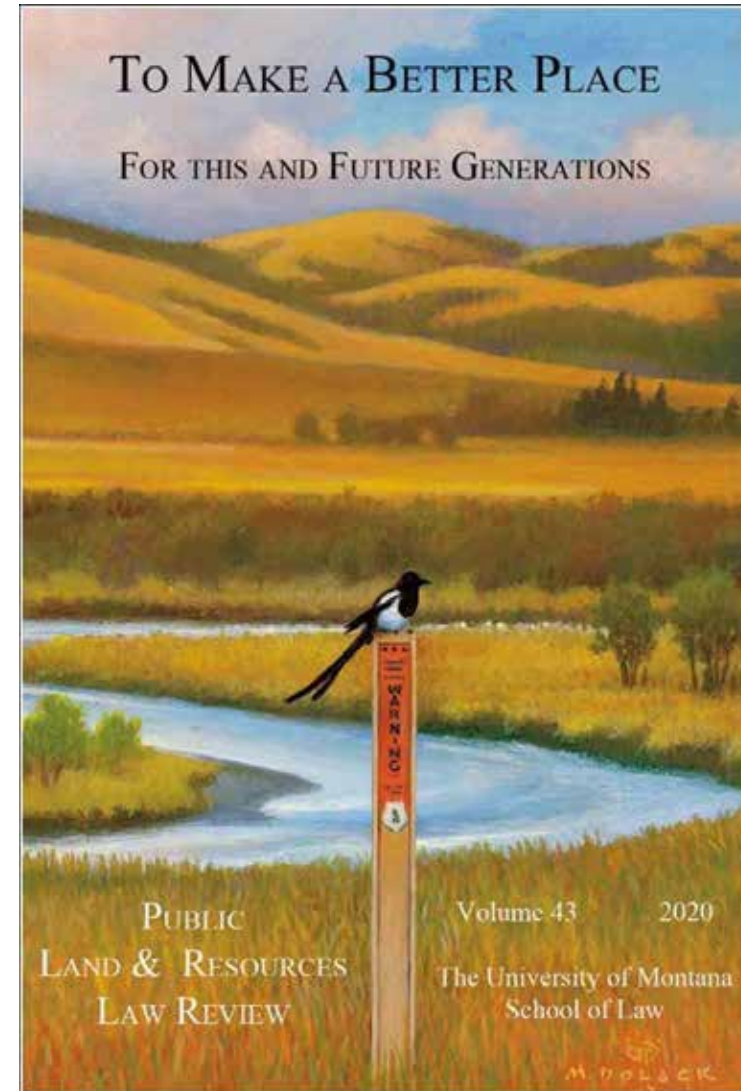
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40th Public Land Law Conference

October 26-27, 2023

Gathering Wisdom:
Building on 40 Years of Public Land Discourse

PROFESSOR LAUREN VAN SCHILFGAARDE
(COCHITI PUEBLO)
UCLA SCHOOL OF LAW



40th Public Land Law Conference

October 26-27, 2023

Gathering Wisdom:
Building on 40 Years of Public Land Discourse

NEXT:

OUR NOON ADDRESS FROM J. DEVLAN GEDDES

12:00-1:00 PM









GOETZ & MADDEN
ATTORNEYS AT LAW
522 WEST MAIN STREET
BOZEMAN, MONTANA 59715

Memorandum

TO: Jerry Manley and others
cc: Don Bianchi, Montana Fish and Game
Al Stone, University of Montana Law School

FROM: James H. Goetz

RE: Enlarging public access to streams in Montana through
a test lawsuit.

NOTE: This memorandum is an attorney-client document and
should be kept confidential because it discusses
litigation strategy.

Summary of Conclusion

The goal of this group is to establish in the state an expanded legal right on the part of the public to access to streams for recreational purposes. There are several legal theories in Montana which provide a strong basis for a test case to expand public access to streams--navigability, and public waters/public easement. The public waters/public easement approach is preferable for our purposes because it avoids questions of stream bed ownership, is not dependent on a history of commercial use, and is more expansive. The most appropriate test case is probably a declaratory judgment action on a stream with little or no history of commercial use--such as the Beaverhead, Big Hole, or Upper Clarks Fork.

When each of the original Thirteen Colonies declared their independence, they “became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use.”

Martin v. Waddell, 41 U.S. 387, 410 (1842).

Those States entering the Union after 1789 did so on “equal footing” with the original Thirteen, possessing the same ownership over sovereignty lands.

Pollard v. Hagan, 44 U.S. 212, 228-229 (1845).

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

The Daniel Ball, 77 U.S. 557, 563 (1870)

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.

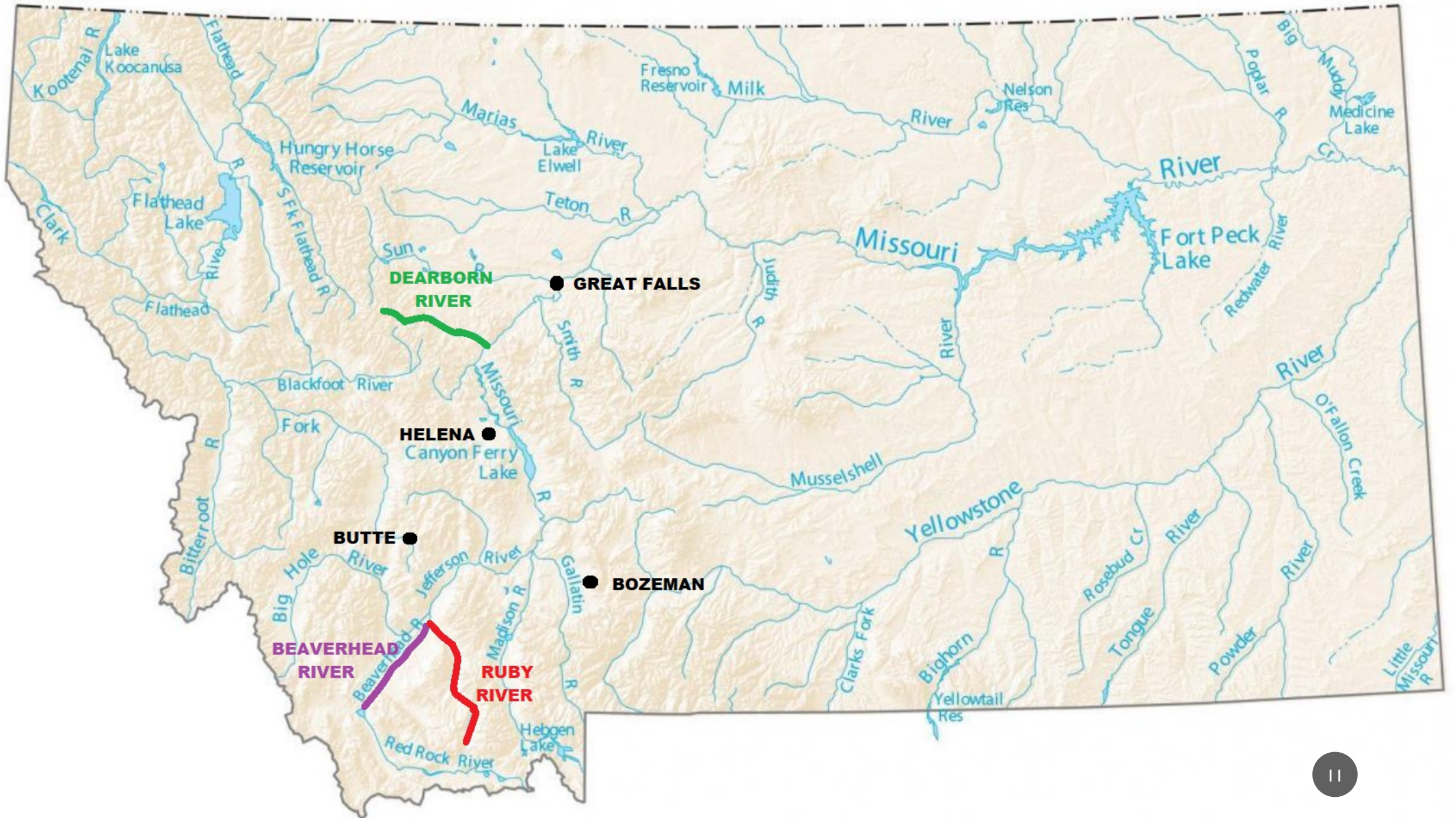
Article IX, sec 3 (3), 1972 Montana Constitution

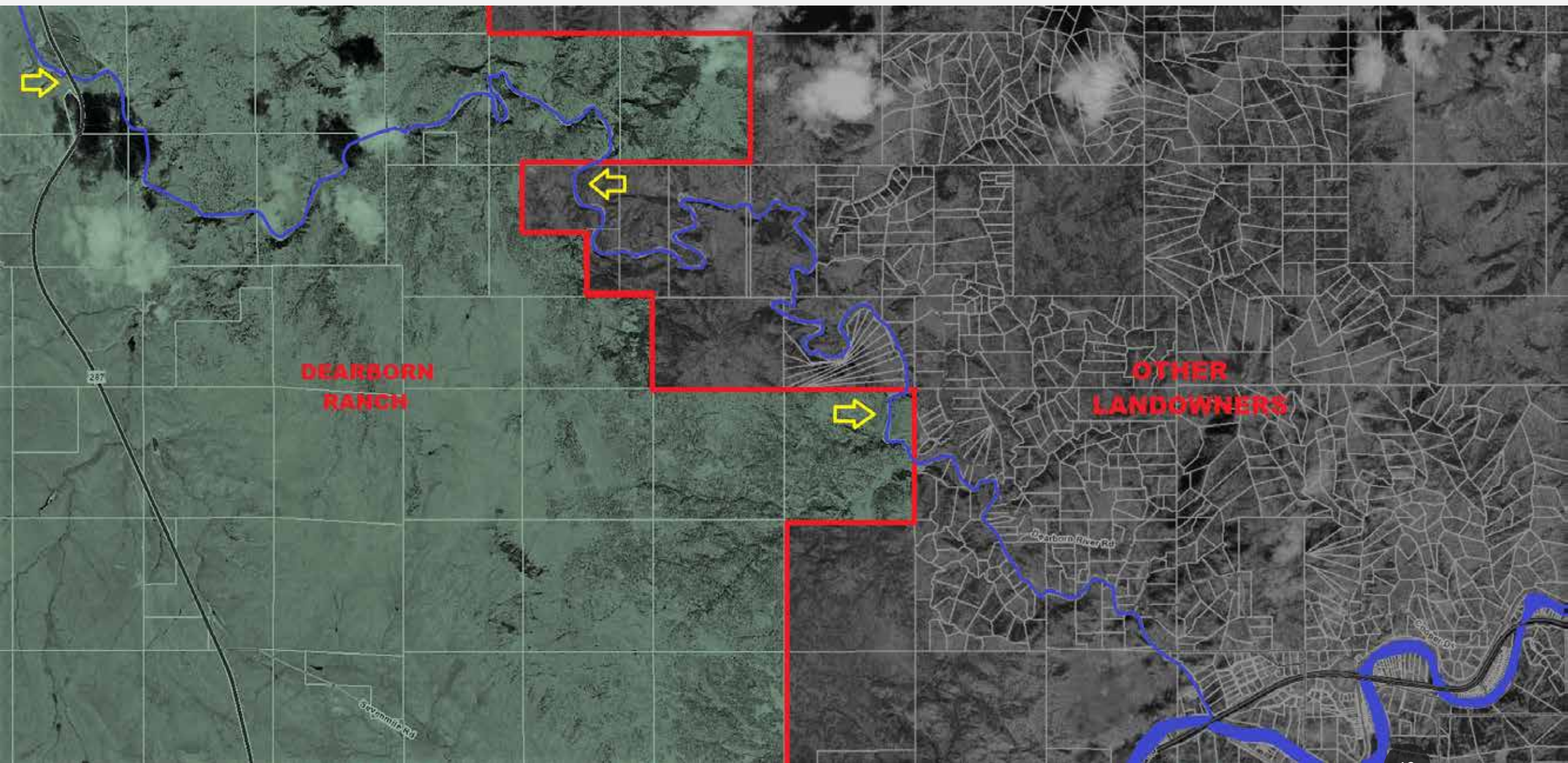
Recommendation:

I recommend procedure 3 (declaratory judgment). By this procedure we do not have to generate (or wait for) an actual incident. Moreover, we would have better control over the actual issues presented. For example, we could ask for a declaratory judgment that plaintiffs have a right to (1) boat; (2) wade; (3) use the stream bank to the high water level; (4) use the stream bank above the high water level in a reasonable way as a secondary easement, etc.

D. Miscellaneous Housekeeping Matters.

Care should be taken in selecting the right defendant. Find one rich enough and irascible enough to take the case all the way. Find one who will not have the sympathy of the judge or of the public--such as a nonresident corporate landowner who is selling fishing rights.





**DEARBORN
RANCH**

**OTHER
LANDOWNERS**

Deposition of Michael Curran

Q. Have you ever yourself floated that stretch of the river?

A. Yes.

Q. In other words, you have a section that's isolated—that the river runs through, that's isolated from the rest of your ranch?

A. That's right.

Q. Lets take the ownership of the land between that isolated section and if you go up stream to the next place you own land. Who owns the land in between?

A. I really can't tell you. I believe it's subdivided also.

Q. When you say "I believe it's subdivided," there would be various land owners right on the river?

A. Yes.

Q. And you don't know who they are?

A. No.

In essence, the question is whether the waters owned by the State under the Constitution are susceptible to recreational use by the public. The capability of use of the waters for recreational purposes determines their availability for recreational use by the public. Streambed ownership by a private party is irrelevant. 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.

Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984).

Under the 1972 Constitution, the only possible limitation of use can be the characteristics of the waters themselves. Therefore, no owner of property adjacent to state-owned waters has the right to control the use of those waters as they flow through his property. The public has the right to use the waters in the bed and banks up to the ordinary highwater mark.

[I]n case of barriers, the public is allowed to portage around such barriers in the least intrusive manner possible, avoiding damage to the adjacent owner's property.

The public trust doctrine is of ancient origin. Its roots trace to Roman civil law and its principles can be found in the English common law on public navigation and fishing rights over tidal lands and in the state laws of this country. See *Coeur d' Alene*, 521 U.S., at 284–286, 117 S.Ct. 2028; *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 458, 13 S.Ct. 110, 36 L.Ed. 1018 (1892); D. Slade, Putting the Public Trust Doctrine to Work 3–8, 15–24 (1990); see, e.g. *National Audubon Soc. V. Superior Court of Alpine Cty.*, 33 Cal.3d 419, 433–441, 189 Cal. Rptr. 346, 658 P.2d 709, 718–724 (1983); *Arnold v. Mundy*, 6 N.J.L. 1, 9–10 (1821). Unlike the equal-footing doctrine, however, which is the constitutional foundation for the navigability rule of riverbed title, **the public trust doctrine remains a matter of state law**, see *Coeur d'Alene*, *supra*, at 285, 117 S.Ct. 2028 (*Illinois Central*, a Supreme Court public trust case, was “necessarily a statement of Illinois law”); *Appleby v. City of New York*, 271 U.S. 364, 395, 46 S.Ct. 569, 70 L.Ed. 992 (1926) (same), subject as well to the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power. While equal-footing cases have noted that the State takes title to the navigable waters and their beds in trust for the public, see *Shively*, 152 U.S., at 49, 15–17, 24, 46, 14 S.Ct. 548, the contours of that public trust do not depend upon the Constitution. Under accepted principles of federalism, the States retain residual power to determine the scope of **the public trust over waters within their borders**, while federal law determines riverbed title under the equal-footing doctrine.

PPL Montana, LLC v. Montana, 656 U.S. 576, 603-604 (2012) (emphasis added).



**PUBLIC LAND
WATER ACCESS
ASSOCIATION INC**
· EST 1985 ·

**PLWA works every day to make sure
access to your public lands and waters
is safe for tomorrow.**

The mission of PLWA is to
maintain, restore, and
perpetuate public access to the
boundaries of all Montana's
public lands and waters.



Elect
Fence





Seyler Ln



Lewis Ln



Duncan District Rd

If any highway is encroached upon by fence, building, or otherwise, the road supervisor or county surveyor of the district **must** give notice, orally or in writing, requiring the encroachment to be removed from the highway.

MCA § 7-14-2134(1)

23-2-312. Access to surface waters by public bridge or county road right-of-way. (1) A person may gain access to surface waters for recreational

use by using:

(a) a public bridge, its right-of-way, and its abutments; and

(b) a county road right-of-way.

(2) When accessing surface waters pursuant to subsection (1), a person shall stay within the road or bridge right-of-way. Absent definition in an easement or deed to the contrary, the width of a bridge right-of-way is the same width as the right-of-way of the road to which the bridge is attached.

(3) The provisions in [7-14-2134](#), [23-2-313](#), and this section related to public access to surface waters for recreational use neither create nor extinguish any right related to county roads established by prescriptive use that exist on April 13, 2009.

(4) For purposes of determining liability, a person accessing surface waters for recreational use pursuant to this section is owed no duty by a landowner or an agent or tenant of that landowner other than for an act or omission that constitutes willful or wanton misconduct.

STREAM ACCESS ALLOWED

PUBLIC ACCESS ALLOWED TO SURFACE WATERS FOR
RECREATIONAL USE FROM A COUNTY ROAD
RIGHT-OF-WAY OR BRIDGE.

PROCEED DIRECTLY
TO WATER

STAY WITHIN THE
ORDINARY HIGH-WATER
MARK

THE PUBLIC MAY USE RIVERS AND STREAMS FOR RECREATIONAL
PURPOSES UP TO THE ORDINARY HIGH-WATER MARK. THE LAW
DOES NOT ALLOW THEM TO ENTER POSTED LANDS
BORDERING THOSE STREAMS OR TO CROSS PRIVATE LANDS
TO GAIN ACCESS TO STREAMS.



Montana Fish
Wildlife & Parks



8042 5971

www.mt.gov

1000 N. 10TH ST. SPOKANE, IDAHO 83402-1000



¶51 When a public roadway is acquired through prescriptive use instead of a grant or dedication, the same issue pertaining to usage arises: Should public use of that easement be limited to the usage that existed at the time the easement was established, or, rather, should usage accommodate the passage of time and the public's ongoing needs? Just as the Court has determined that the uses of a dedicated public highway change over time, so do the uses of a public roadway acquired by prescription. Pursuant to the above discussion, we determine the scope of a public road right-of-way established by prescriptive use is not strictly limited to the adverse usage through which the easement was acquired, as it is in the case of private prescriptive easements. The scope includes public uses that are reasonably incident to the uses through which the easement was acquired and uses that are reasonably foreseeable. Hence, once a public prescriptive road is established, the fact that a certain public use was not adverse does not mean that the use is not permitted.

Public Lands Access Association, Inc. v.
Madison County, et al, 2014 MT 10

Don't Fence Me Out : Much of the West Is Still Public Land, but You Can't Always Get There From Here

BY GRACE LICHTENSTEIN

DEC. 9, 1990 12 AM PT

The controversy “verges on open warfare,” according to a recent study by the National Wildlife Federation. Who are the combatants? On one side are the people for whom government property is one enormous playground. Hunters, fishermen, backpackers and bird-watchers flock to the open spaces in a quest for trophy elk, fat rainbow trout or simply a bit of solitude. Many of these outdoorsmen arrive on foot and don't want roads to their favorite places built. Yet each season, they are disturbed to find new fences smeared with orange paint--the Montana no-trespassing symbol--which prevent them from reaching thousands of acres they have visited in the past.

Outdoor Life

In a Tale as Old as the West, Wealthy Californians Moved to Montana and Blocked Historic River Access

A conflict in the state's richest valley pitted out-of-state landowners against local hunters and anglers over a few crucial feet of land

BY [KATIE HILL](#) | UPDATED AUG 8, 2023 4:34 PM EDT



The public acquired the right to use the “Boadle Road” by prescriptive easement prior to 1959. This acquisition of a right to use the road satisfied the condition precedent of Section 32-103, RCM 1947, for public travel or use before the statute would operate to declare a road a public road (“highway”). Consequently, the “Boadle Road” became, and was, a public road prior to 1999 when actions were first taken to attempt to restrict public use.

[The Boadle Road] is a public road and until abandonment may be used by the general public without interference from the owner of the underlying land.

Public Lands Access Association, Inc. v. Roger Jones and Teton County, Ninth Judicial District Court, Cause No. 00-DV-026

[W]hen the District Court concluded as a matter of law the public has acquired a prescriptive easement to use the Boadle Road, it is clear the easement includes access to that portion of Jones' property that crosses the canal and intersects with the Canal Road on the other side of the Boadle Bridge.

Additionally, the evidence presented at trial clearly established the public used the Boadle Road, including the Boadle Bridge, to access the Canal Road at the western terminus of the Boadle Road. In *Han Farms[, Inc. v. Molitor*, 2003 MT 153, ¶ 24, 316 Mont. 249, 70 P.3d 1238] this Court held that the scope of a prescriptive easement is based upon its use during the statutory period. Under our holding in *Han Farms*, the Boadle Bridge is clearly within the scope of the easement. Therefore, the public has a right to access the bridge and the land under the bridge without interference from Jones as the easement burdens the servient tenement, Jones' land, not merely the physical structure connecting the Boadle Road to the Canal Road. See § 70-17-103, MCA.

Public Lands Access Association, Inc. v. Roger Jones, 2004 MT 394, ¶ 7

The [Canal Road], from the intersection with Boadle Road up to Pishkun Reservoir, is a public road until abandonment and may be used by the general public without interference from the owner of the underlying land.

A public prescriptive easement has already been established on the Boadle Road, including the bridge. See [PLAAI I]. In that case, the Montana Supreme Court held that the public had acquired a right to use the bridge without interference from Jones. *Id.*, at ¶ 31. Boadle Road ends in the middle of Jones' property where it intersects with Canal Road.

Public Lands Access Association, Inc. v. Jones and Teton County, Ninth Judicial District Court, Cause No. 03-DV-030, affirmed by 2011 MT 236N





NOTICE
NO ACCESS TO PISHKUN
THROUGH PRIVATE LAND

BRIDGE
OUT
USE ALT ROUTES

10/03/2011



000002

EXHIBIT
122

Proceed to Question No. 2.

Question No. 2: Is Roger Jones liable for public nuisance?

Yes X No _____

If you answered "Yes" to either Question No. 1 or Question No. 2, or both, please proceed to Question No. 3. If you answered "No" to both Question No. 1 and Question No. 2., sign this Special Verdict and notify the bailiff.

Question No. 3: How much money must Roger Jones pay to restore the Boadle Bridge?

\$ 375,000

Proceed to Question No. 4.

Question No. 4: Separate from the cost of restoring the Boadle Bridge, how much was Public Lands/Water Access Association, Inc. damaged by Roger Jones's removal of the Boadle Bridge?

\$ 25,000

Proceed to Question No. 5.

Question No. 5: Did Roger Jones act with malice?

Yes X No _____

Sign this Special Verdict and notify the bailiff.

Dated this 25th day of June, 2014.


Foreperson (signature)

Gregg Funk
Please print name

CERTIFICATE OF SERVICE

I hereby certify that I served a true and accurate copy of the foregoing document by: mailing faxing hand-delivering it to the following person(s) in accordance with the Montana Rules of Civil Procedure and Uniform District Court Rules.

Plaintiff: J. DeVan Guder
Defendant: J. Baumgardner

On the 25th day of July 2014
Clerk of Court

(Court Seal) Teton County, Montana
By [Signature]
Deputy Clerk



**WARNING
NO TRESPASSING**

You quite possibly could
get shot or hurt and
then try to sue resulting
in a long drawn out
court battle.

You Will Lose.

Because this sign
will be:

"EXHIBIT A"



NO TRESPASSING
PRIVATE PROPERTY
NO PUBLIC ACCESS
THE COUNTY ROAD RIGHT-OF-WAY DOES NOT INTERSECT THE ORDINARY HIGH-WATER MARK
THE PUBLIC MAY NOT CROSS PRIVATE PROPERTY TO ACCESS THE RIVER PURSUANT TO WCA 29-9-302.4
ALL VIOLATORS WILL BE PROSECUTED

DA 21-0402

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 150

THOMAS MANN POST NO. 81 OF THE
AMERICAN LEGION, DEPARTMENT OF
MONTANA, a Montana public benefit corporation,
and the TOWN OF CULBERTSON, a political
subdivision of the State of Montana,

Plaintiffs, Counterdefendants,
and Appellees.

v.

KNUDSEN FAMILY LIMITED PARTNERSHIP,

Defendant, Counterclaimant,
and Appellant.

APPEAL FROM: District Court of the Fifteenth Judicial District,
In and For the County of Roosevelt, Cause No. DV-16-13
Honorable David Cybulski, Presiding Judge

1 James H. Goetz
J. Devlan Geddes
2 **GOETZ, GALLIK & BALDWIN, P.C.**
35 North Grand Avenue
3 P.O. Box 6580
Bozeman, MT 59771-6580
4 Tel: (406) 587-0618
Fax: (406) 587-5144

5
6 Attorneys for Petitioner
PUBLIC LANDS ACCESS ASSOCIATION, INC.

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MONTANA FIFTH JUDICIAL DISTRICT COURT, MADISON COUNTY

PUBLIC LANDS ACCESS
ASSOCIATION, INC.
Petitioner,

v.

**THE BOARD OF COUNTY
COMMISSIONERS OF MADISON
COUNTY, STATE OF MONTANA,** and C.
TED COFFMAN, FRANK G. NELSON,
and DAVID SCHULZ, constituting
members of said Commission; and ROBERT
R. ZENKER, in his capacity as the County
Attorney of Madison County, State of
Montana,

Respondents,

and

THE MONTANA STOCKGROWERS
ASSOCIATION, HAMILTON RANCHES,
INC., and JAMES C. KENNEDY

Intervenors.

Cause No. DV-29-04-43

**SECOND AMENDED COMPLAINT
FOR DECLARATORY JUDGMENT**

and

**PETITION FOR AN
ALTERNATIVE WRIT OF
MANDAMUS**

Richard J. Dolan
GOETZ, GALLIK, BALDWIN & DOLAN, P.C.
35 North Grand
P.O. Box 6580
Bozeman, MT 59771-6580
(406) 587-0618

Attorneys for Plaintiff

FILED
RECEIVED
JUN 19 2001
GOETZ, GALLIK
& BALDWIN, P.C.
5/22/01 Date
by Patricia Dolan
Deputy

MONTANA NINTH JUDICIAL DISTRICT COURT, TETON COUNTY

PUBLIC LANDS ACCESS ASSOCIATION, INC,

Plaintiff/Petitioner,

v.

Cause No. 00-DV-026

ROGER JONES; BOARD OF
COUNTY COMMISSIONERS
OF TETON COUNTY; and GREENFIELD
IRRIGATION DISTRICT,

Defendants.

FIRST AMENDED COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER
APPROPRIATE EQUITABLE RELIEF

-14-

J. Devlan Geddes
Kyle W. Nelson
GOETZ, BALDWIN & GEDDES, P.C.
35 North Grand/P.O. Box 6580
Bozeman, MT 59771-6580
Ph: (406) 587-0618
Fax: (406) 587-5144
email: devlan@goetzlawfirm.com
knelson@goetzlawfirm.com

Attorneys for Plaintiff/Petitioner

MONTANA TWENTY FIRST JUDICIAL DISTRICT COURT, RAVALLI COUNTY

PUBLIC LAND/WATER ACCESS
ASSOCIATION, INC.

Plaintiff/Petitioner,

vs.

**RAVALLI COUNTY and BOARD OF
RAVALLI COUNTY COMMISSIONERS,**

Defendants/Respondents.

Cause No. DV-41-2021-0000433-WM
Hon. Howard F. Recht

**COMPLAINT FOR DECLARATORY
JUDGMENT AND PETITION FOR
ALTERNATIVE WRIT OF
MANDAMUS**

NOW OPEN
PUBLIC STREAM
ACCESS RESTORED
MONTANA





40th Public Land Law Conference

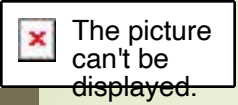
October 26-27, 2023

Gathering Wisdom:
Building on 40 Years of Public Land Discourse

NEXT:

**EVERYTHING, EVERYWHERE: ADDRESSING CLIMATE IN
PUBLIC LANDS MANAGEMENT**

1:15-2:30 PM



Gathering Wisdom

Everything, Everywhere: Addressing Climate in Public Lands Management



Sandra B. Zellmer

Professor and Director of Natural Resources Clinics

ABIII School of Law | University of Mont. | Missoula, MT 59812



Nat'l Park Service Organic Act of 1916

54 U.S. Code § 100101 (was 16 U.S.C. § 1)

- ▶ The Secretary, acting through the Director of the National Park Service, shall promote and regulate the use of the National Park System by means and measures that conform to the fundamental purpose of the System units, which purpose is to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.



Forest Service Organic Acts

16 U.S. Code § 475 (1897)

- No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber....

16 U.S. Code § 528-529 (1960)

- [T]he national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The[se] purposes ... are supplemental to ... the purposes for which the forests were established as set forth in [section 475](#)....
- The Secretary is authorized and directed to develop and administer the renewable surface resources of the forests for multiple use and sustained yield of the several products and services obtained therefrom....

Forest Service Organic Acts

NFMA, 16 U.S. Code § 1604 (1976)

- (b) In the development and maintenance of land management plans for use on units of the National Forest System, the Secretary shall use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences.
- (e) In developing, maintaining, and revising plans for units of the National Forest System pursuant to this section, the Secretary shall assure that such plans—
 - (1) provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960, and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness....



Bureau of Land Management Organic Act FLPMA, 43 U.S. Code § 1701 (1976)

➤ (a) The Congress declares that it is the policy ... that—

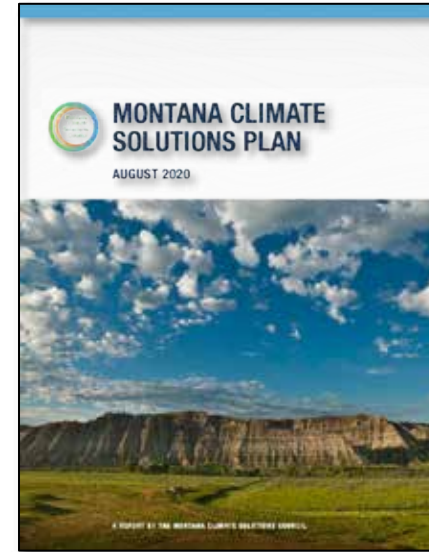
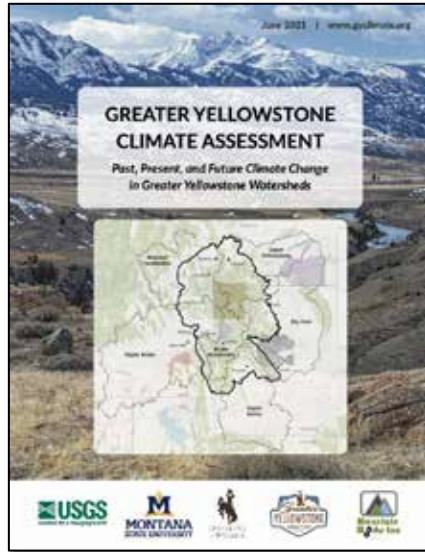
(7) [M]anagement be on the basis of multiple use and sustained yield unless otherwise specified by law;

(8) The public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use....

CLIMATE CHANGE & PUBLIC LANDS

Cathy Whitlock
Regents Professor Emerita, Earth Sciences
Montana State University

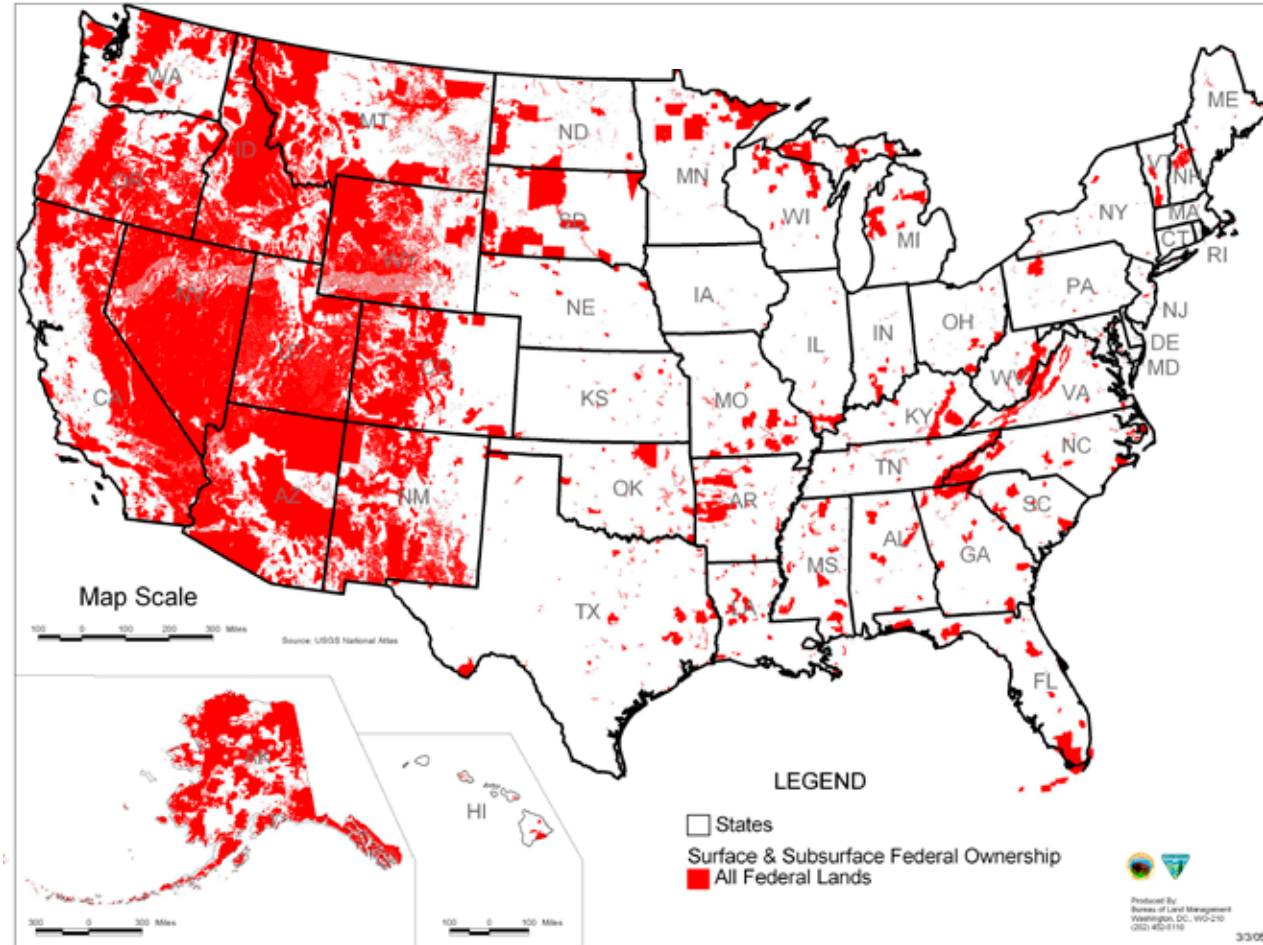


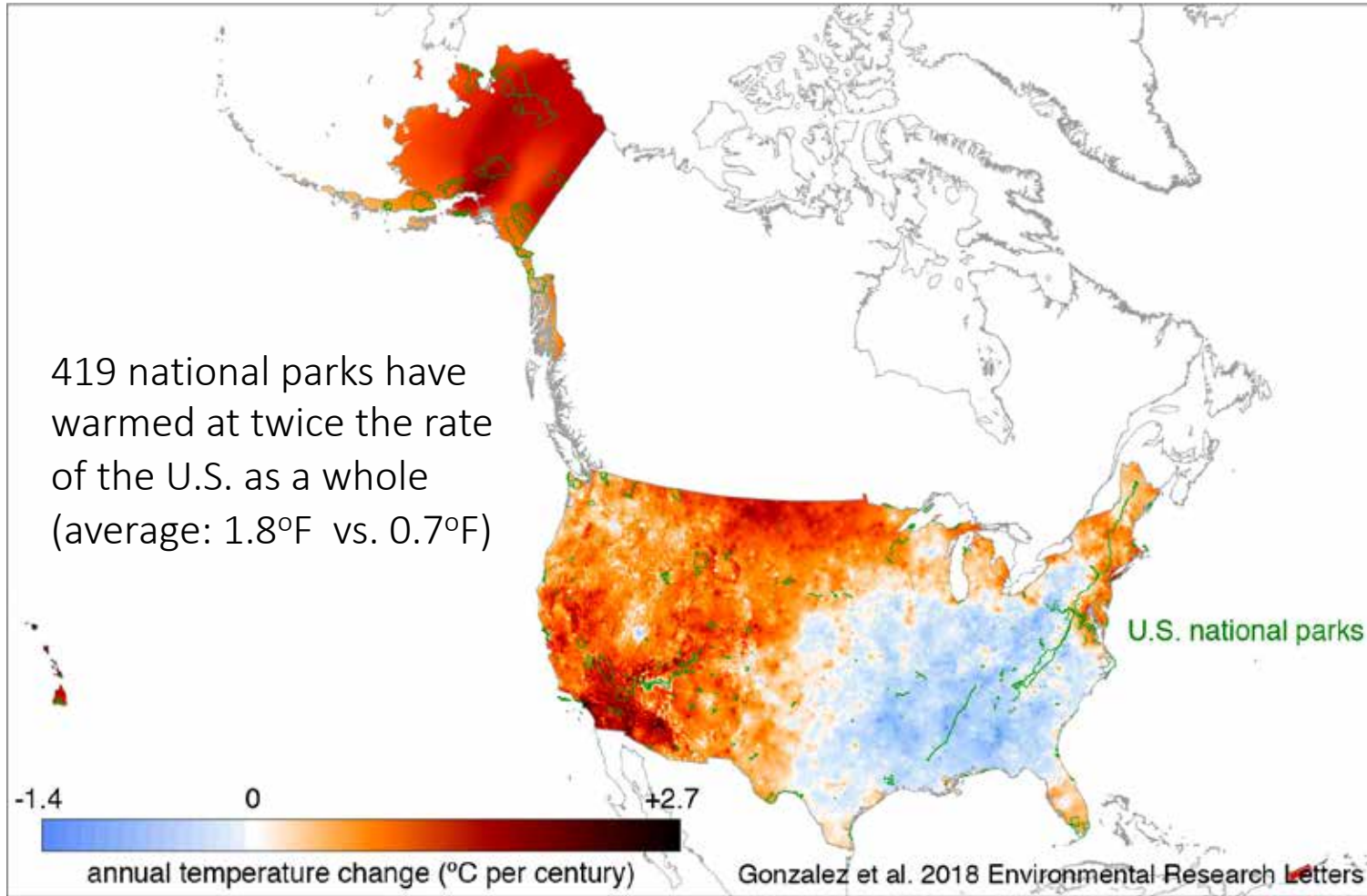


www.montanaclimate.org



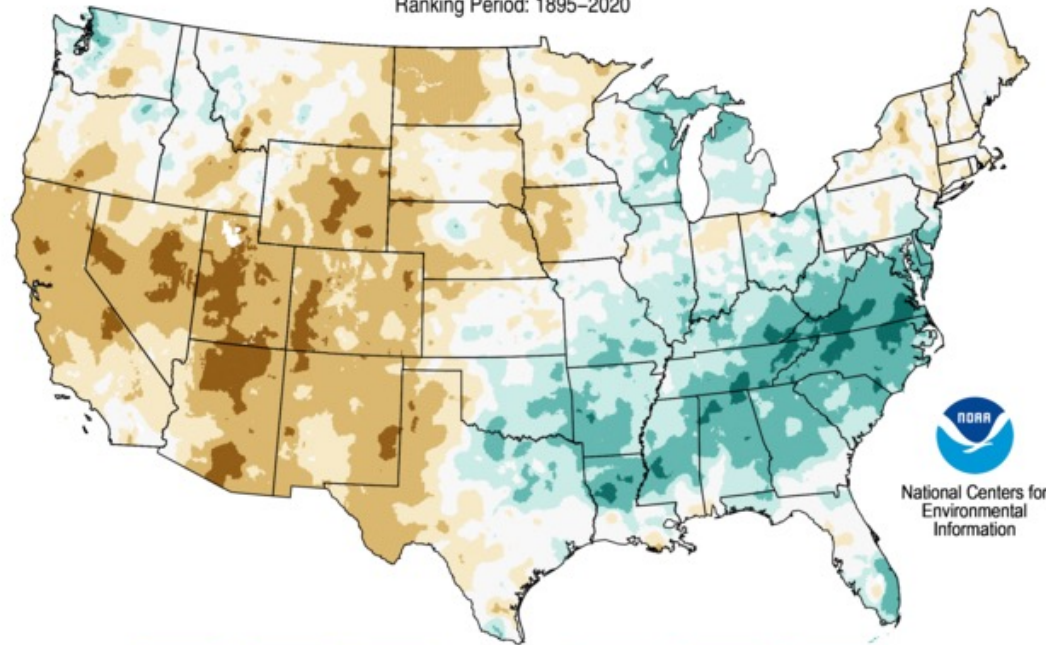
Federal Public Land Surface & Subsurface



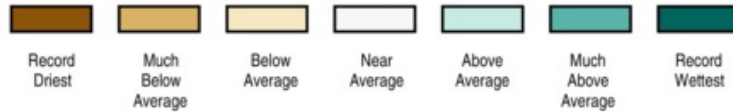


Precipitation Rankings (1895-2020)

Total Precipitation Percentiles
January–December 2020
Ranking Period: 1895–2020



Dry regions have gotten drier



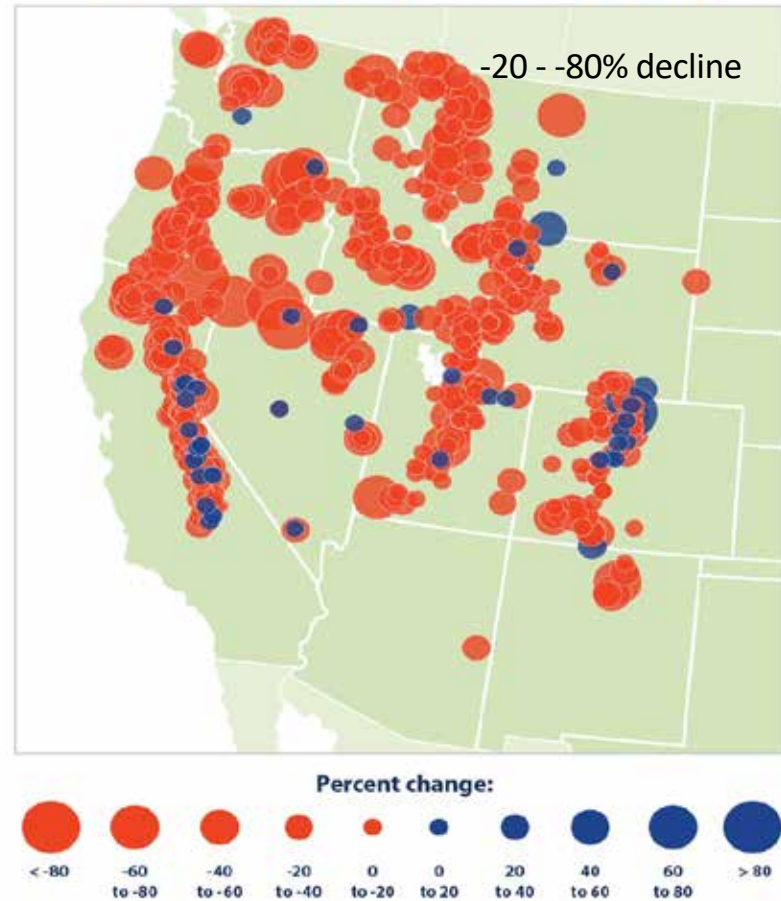
Created: Wed Jan 06 2021

Data Source: 5km Gridded Dataset (nClimGrid)



photo: Rick & Susie Graetz

April 1 snowpack (1955-2022)

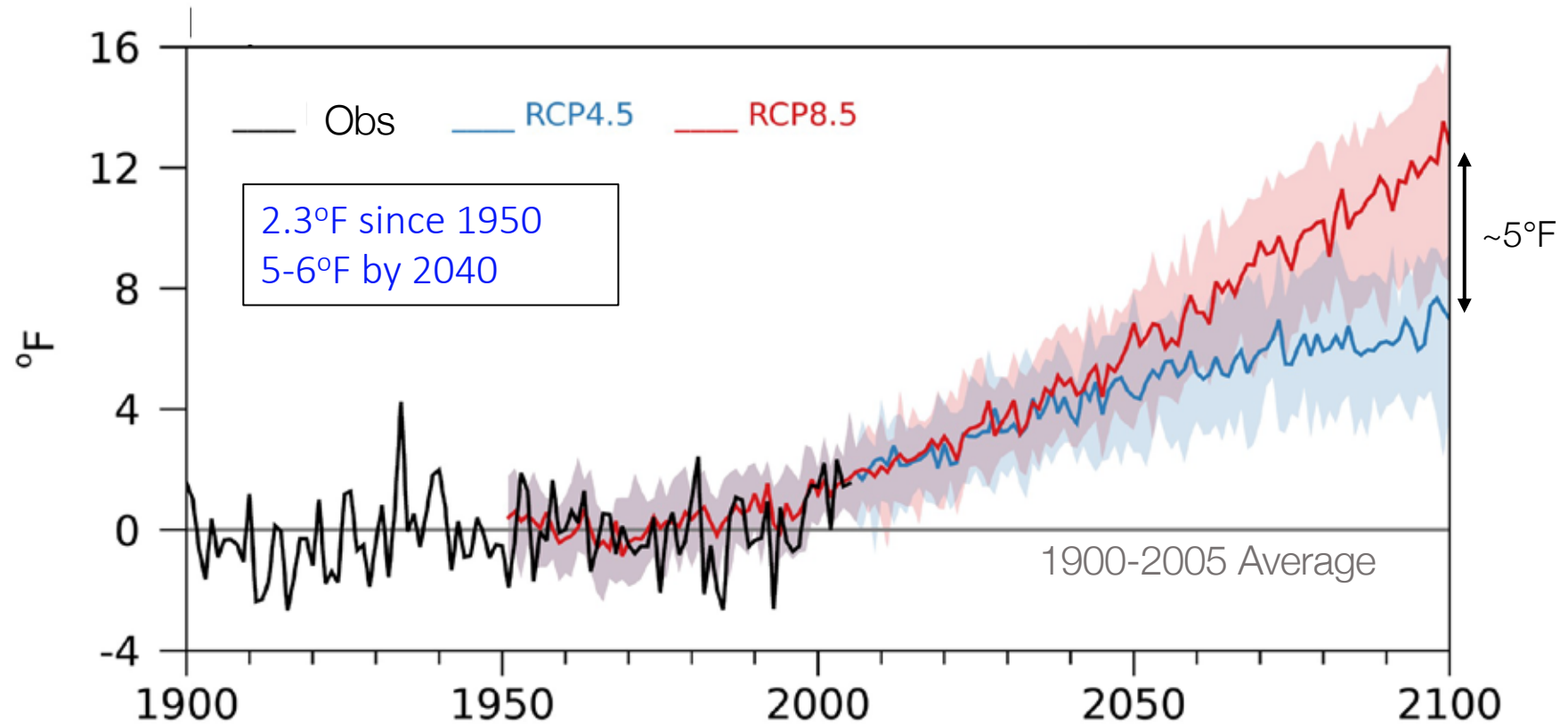


USDA Natural Resources Conservation Service, 2022

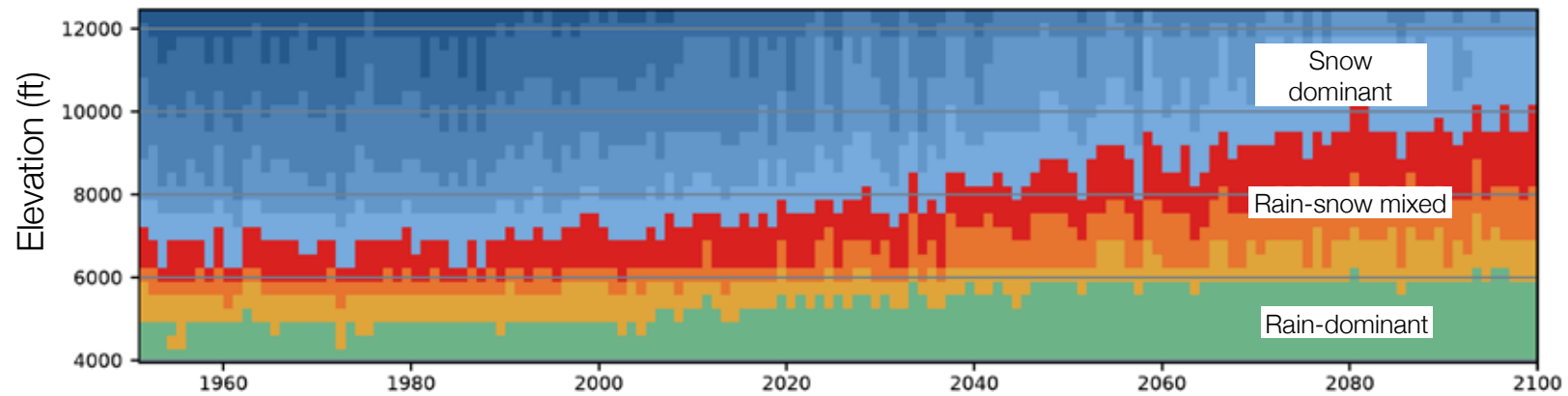
WHAT DOES CLIMATE CHANGE MEAN FOR PUBLIC LANDS?



Yellowstone Annual Temperature Change



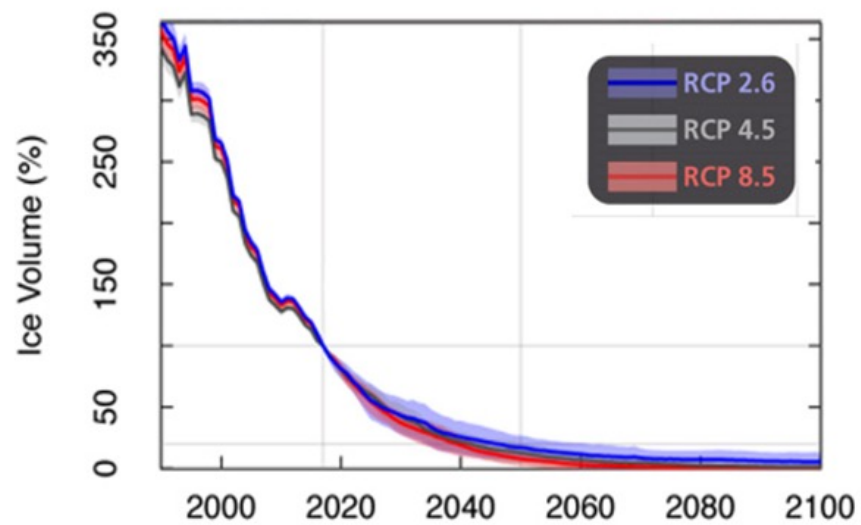
Yellowstone: Snow-to-rain Transition (RCP4.5)



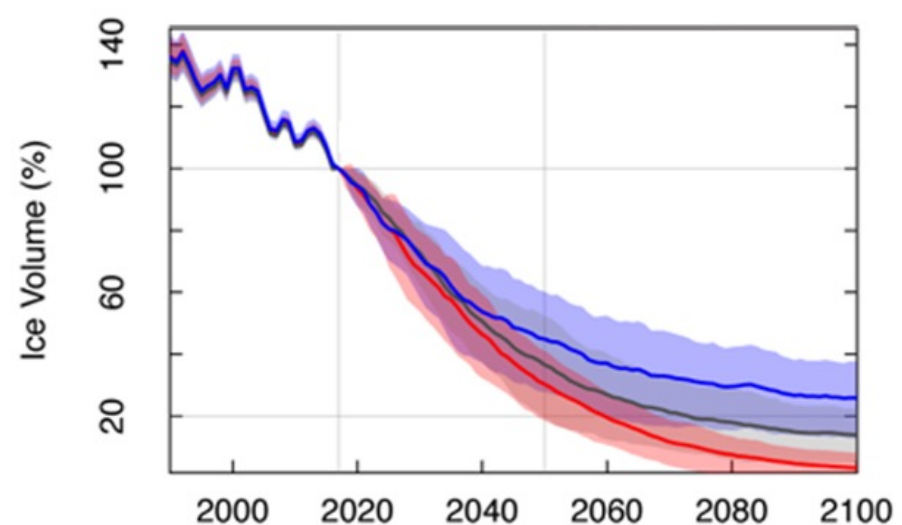
Greater Yellowstone Climate Assessment, 2021

Vanishing glaciers

Waterton-Glacier Int'l Peace Park



Olympic National Park



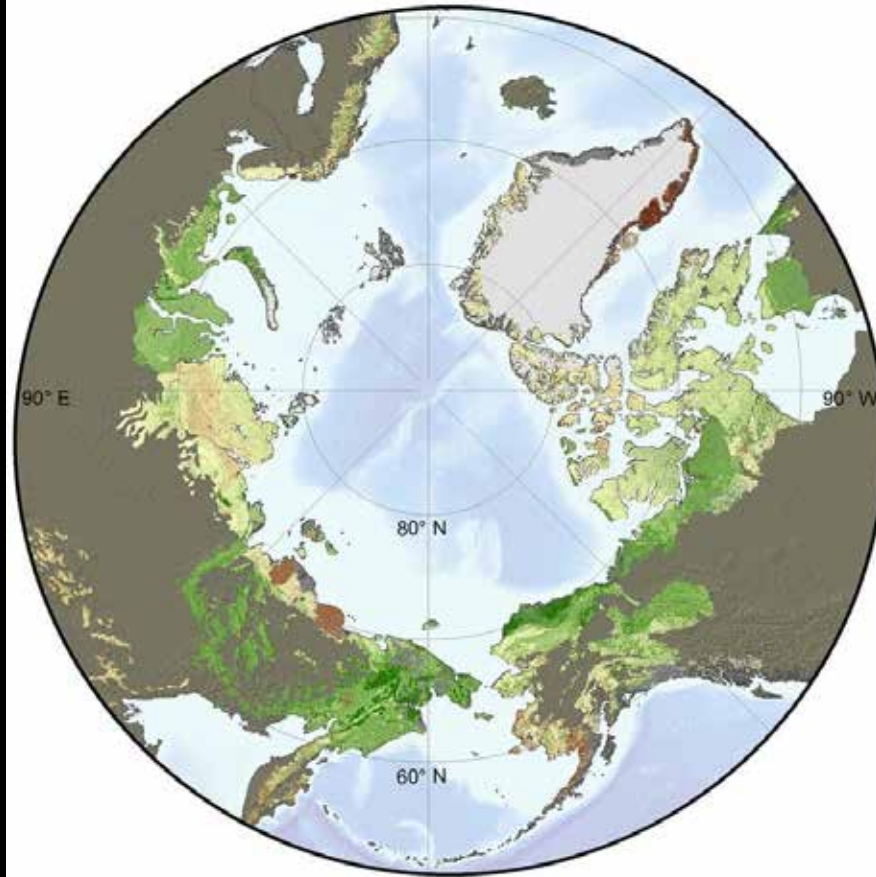


LIVING WITH ECOLOGICAL CHANGE



Change in tundra greenness 2000 to 2016

Browning No change Greening



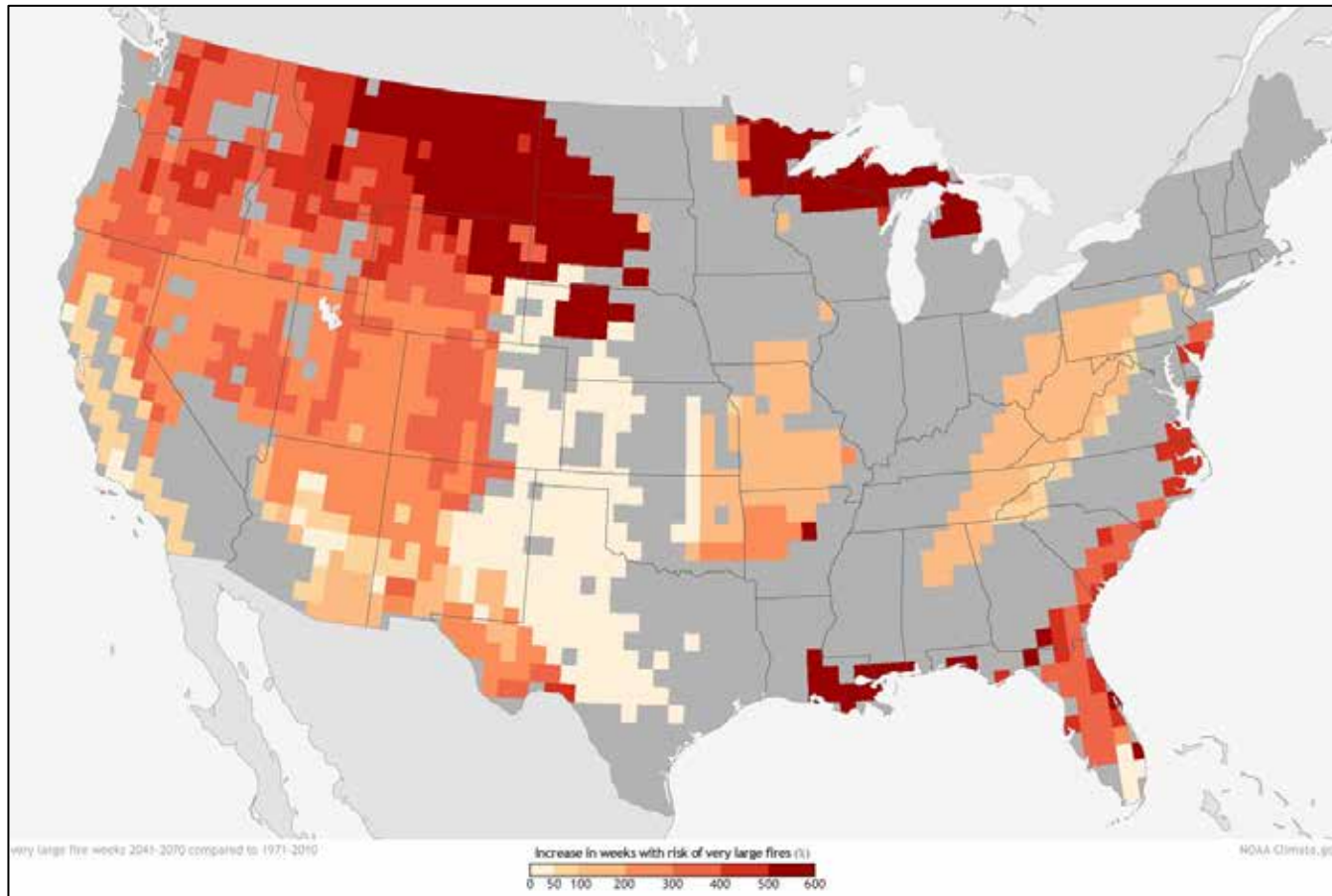
Berner et al. 2020, Nature Comm



LIVING WITH
WILDFIRE

© Janice Gaedtke

Risk of Very Large Fires (mid-century, RCP 8.5)



climate.gov

CULTURAL RESOURCE LOSS



Casa Grande Ruins NM

LIVING WITH PEOPLE



credit: NPS/Jacob W Frank



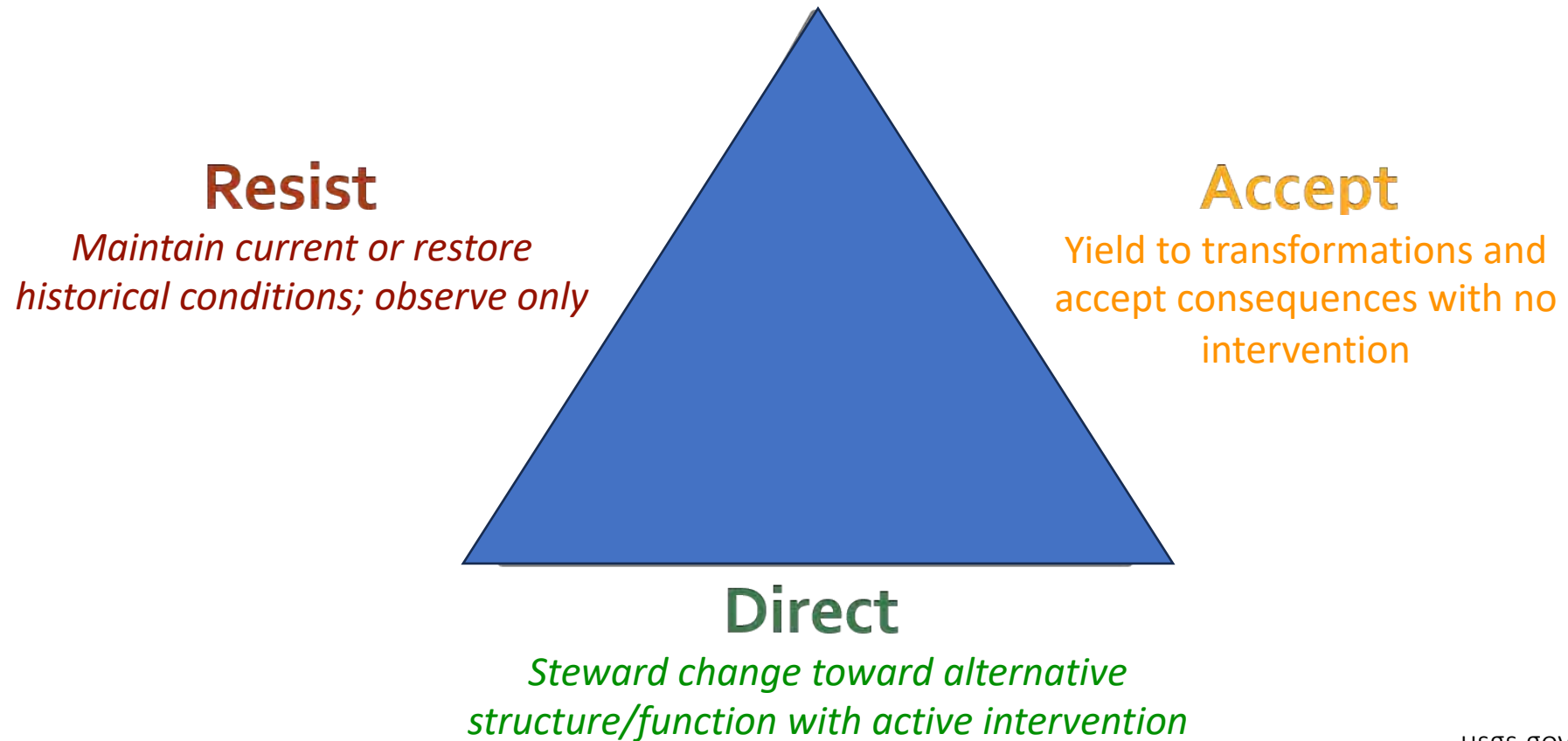
credit: NPS/Neal Herbert



LIVING WITH UNCERTAINTY

credit: CHBD/iStock

Adaptive Management Framework



Operationalizing RAD ...

Appropriate scale of action

Regulatory constraints in different jurisdictions

Needed baseline information

- usable/useful climate projections at scale
- ecological/management legacies
- species resilience and vulnerability

Regular review and update of actions/objectives

Monitoring, experimentation, and pilot studies

Climate change response in national parks—and beyond

40th Public Lands Law Conference, October 27, 2023

- Tom Olliff, Program Manager, Landscape Conservation and Climate Change, NPS Intermountain Region



Administration Executive Order and Guidance

BRIEFING ROOM

Executive Order on Tackling the Climate Crisis at Home and Abroad

JANUARY 27, 2021 • PRESIDENTIAL ACTIONS

Federal Sustainability Plan
Catalyzing America's
Clean Energy Industries and Jobs
December 2021



DEPARTMENT OF THE INTERIOR
CLIMATE ACTION PLAN

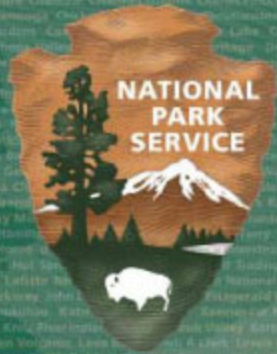
2021





NPS Policy

Management Policies 2006



United States Department of the Interior

NATIONAL PARK SERVICE
1849 C Street, N.W.
Washington, D.C. 20240

IN REPLY REFER TO:

N42

MAR 06 2012

Memorandum

To: National
All Super
From: Director
Subject: Applying
Change



United States Department of the Interior

NATIONAL PARK SERVICE
1849 C Street, N.W.
Washington, D.C. 20240

This memorandum a the guiding principle follow regarding ma planet is warming an change will increasit

Policy Memorandum 14-02

To: All Employees
From: Director *Jeanne Garofalo*
Subject: Climate Change and Stewardship

This policy memorandum provides guidance resources in relation to climate change. It fol *National Park Service Management Policies*, the implications of climate change on the gui resource management. Additional guidance, Strategy, will be forthcoming.



United States Department of the Interior

NATIONAL PARK SERVICE
1849 C Street, N.W.
Washington, D.C. 20240

IN REPLY REFER TO:

JAN 20 2015

Policy Memorandum 15-01

To: All Employees
From: Director *Jeanne Garofalo*
Subject: Addressing Climate Change and Natural Hazards for Facilities

This Policy Memorandum provides guidance on the design of facilities to incorporate impacts of climate change adaptation and natural hazards when making decisions in national parks. It is the third "policy pillar" of our Service-wide climate change response. It joins the March 6, 2012, Policy Memorandum 12-02, [Applying National Park Service Management Policies in the Context of Climate Change](#), which addressed the implications of climate change on the guiding principles of National Park Service (NPS) natural resource management. It also joins the February 10, 2014, Policy Memorandum 14-02, [Climate Change and Stewardship of Cultural Resources](#), which provided guidance and direction on the stewardship of cultural resources in relation to climate change.



NPS Guidance: the Climate Change Response Strategy

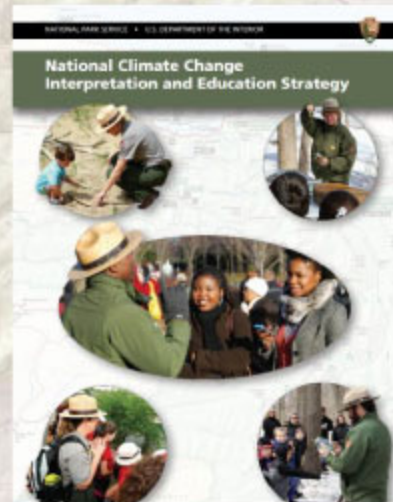
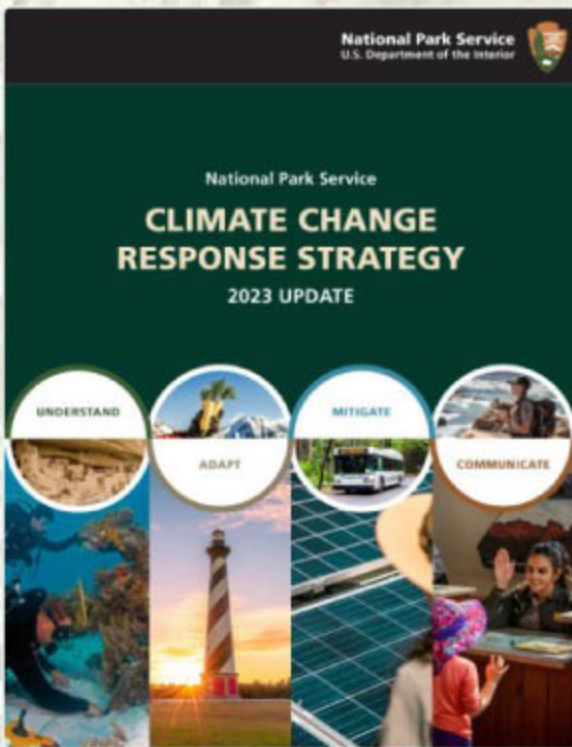
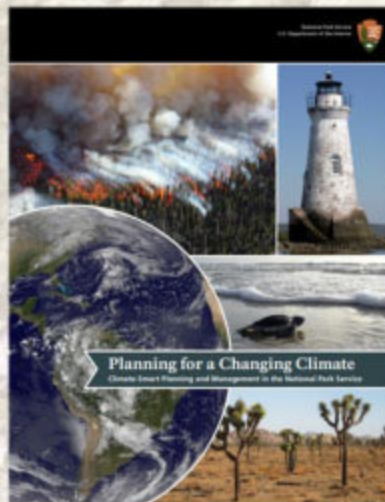
Understand

Adapt

Communicate

Mitigate

	Warm Wet	Common Across Climate Futures	Hot Dry
Warming	Average temperature increase - 3.4 °F Extremely hot days increase by 29 days (171% increase)	Warming in all seasons Decrease in days below freezing Increase in days above 95th percentile for heat	Average temperature increase - 5.9°F Extremely hot days increase by 55 days (324% increase)
Precipitation	More overall precipitation	Increased high-intensity rainfall Increased variability	Similar rainfall overall, decreasing mostly in summer
Drought	Slight increases in duration, intensity, and severity	Drought conditions will increase Higher intensity droughts resulting in increased aridity	Significant increasing drought duration, more intense and severe droughts



Mitigation—Green Parks Plan Goals



Be Climate Friendly and Climate Ready

Combat the climate crisis by achieving **net-zero GHG emissions**



Be Energy Smart and Water Wise

Achieve **net-zero water use and net-zero energy** for facilities and operations



Buy Green and Reduce, Reuse, Recycle

Achieve **net-zero waste and sustainable procurement**



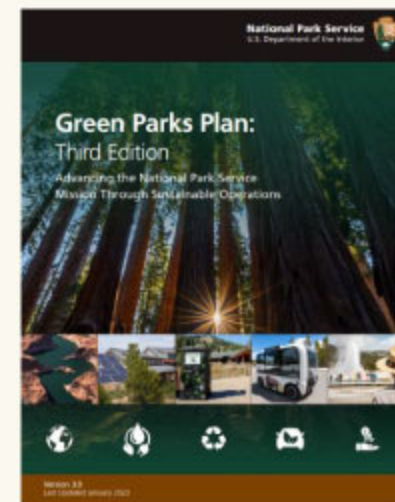
Green Our Rides

Adopt and support **zero-emissions transportation methods**




Foster a Sustainability Ethic


Engage the NPS workforce, partners, visitors, stakeholders, and communities to **support and participate in sustainability, climate resilience, and environmental justice**




Progress Since 2016 GPP Edition


The NPS made considerable progress towards achieving the 2016 GPP measurable objectives. As of 2022, the NPS has:


 **Reduced** service wide **building energy use** (energy intensity) by 25 percent from the 2015 baseline;

 **Reduced potable water use** intensity by 36 percent from the 2007 baseline.

We were also on track to:

 **Reduce Scope 1 and 2 GHG emissions associated with NPS operations** by 36 percent from the 2008 baseline (29% currently);

 **Reduce the fleet-wide average GHG emissions per mile traveled by vehicles** in the NPS fleet by 30 percent from the 2014 baseline;

 **Diverting at least 50 percent of solid waste from landfills** (23% currently).



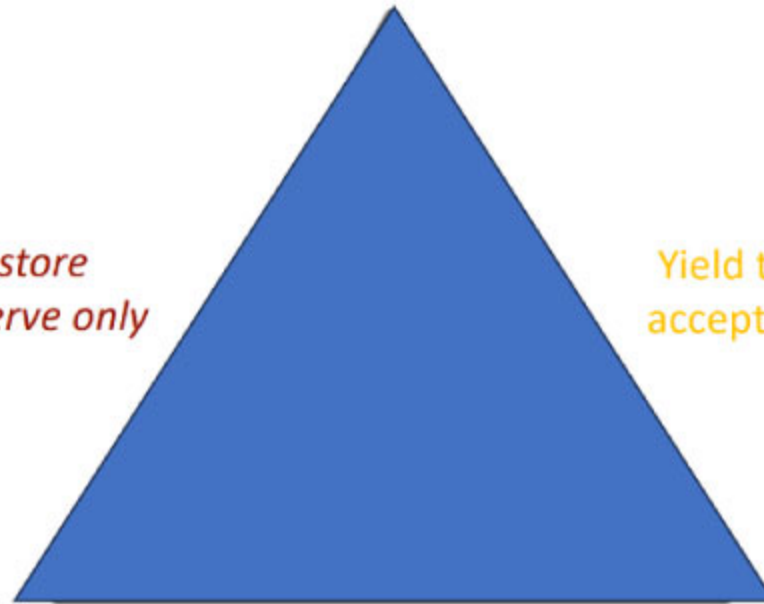


Adapt to climate impacts using RAD

RAD Management Framework

Resist
Maintain current or restore historical conditions; observe only

Accept
Yield to transformations and accept consequences with no intervention



Direct
Steward change toward alternative structure/function with active intervention



Resist

GUNSIGHT LAKE PROJECT

- NON-NATIVE RAINBOW TROUT THREATENING DOWNSTREAM NATIVE FISH POPULATIONS
- OPPORTUNITY TO CREATE A NATIVE FISH REFUGE
- REMOVED RAINBOW TROUT IN SEPTEMBER 2023
- PLANT GENETICALLY PURE LOCAL STOCK WESTSLOPE CUTTHROAT TROUT, BULL TROUT, AND MOUNTAIN WHITEFISH IN 2024-2030
- ESTABLISH NEW CONSERVATION POPULATIONS SECURE FROM NON-NATIVE FISH AND WITH ADDITIONAL SECURITY FROM CLIMATE CHANGE





NAT Lake Trout Suppression – Quartz Lake

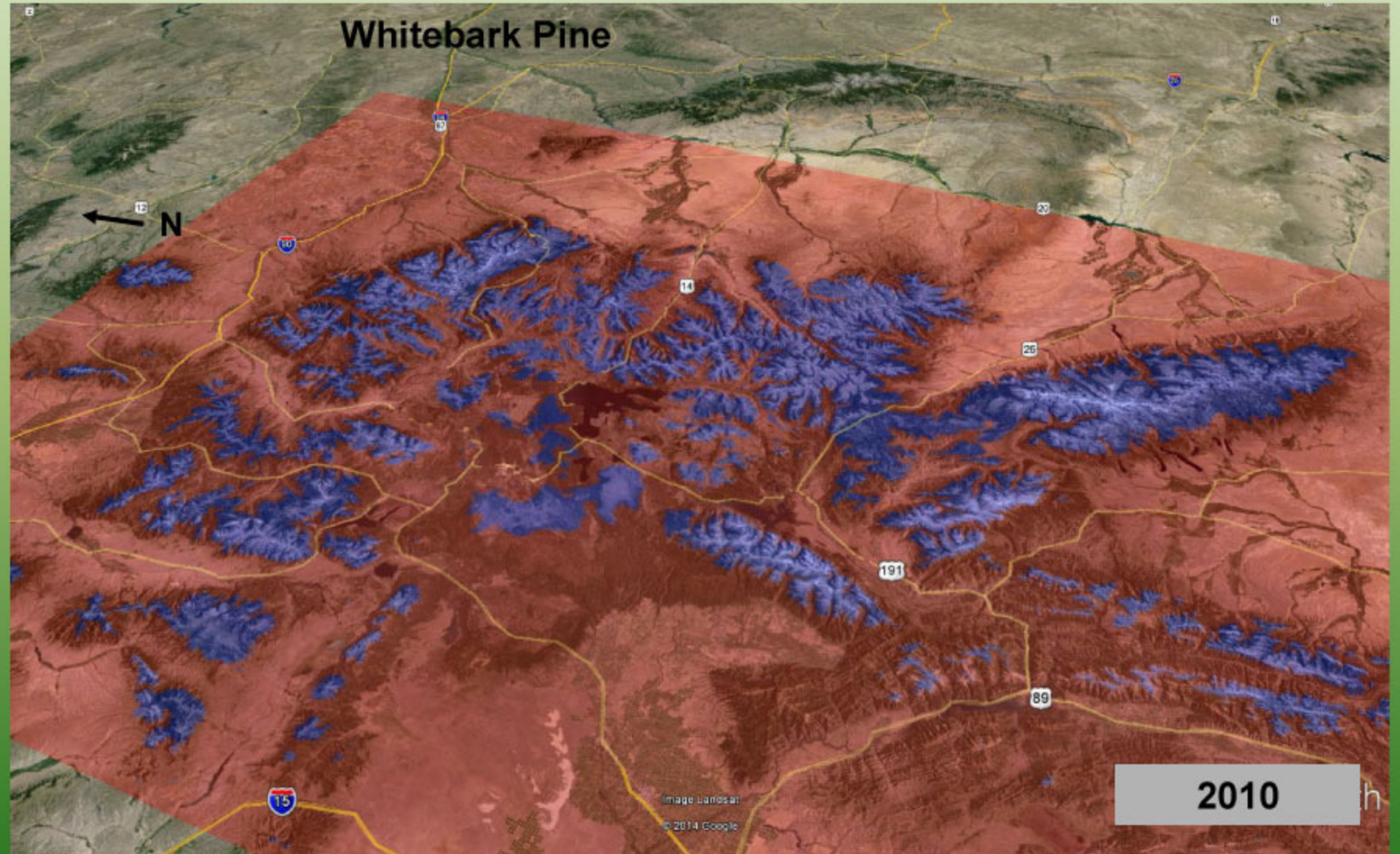
Resist

Bull trout population remains strong



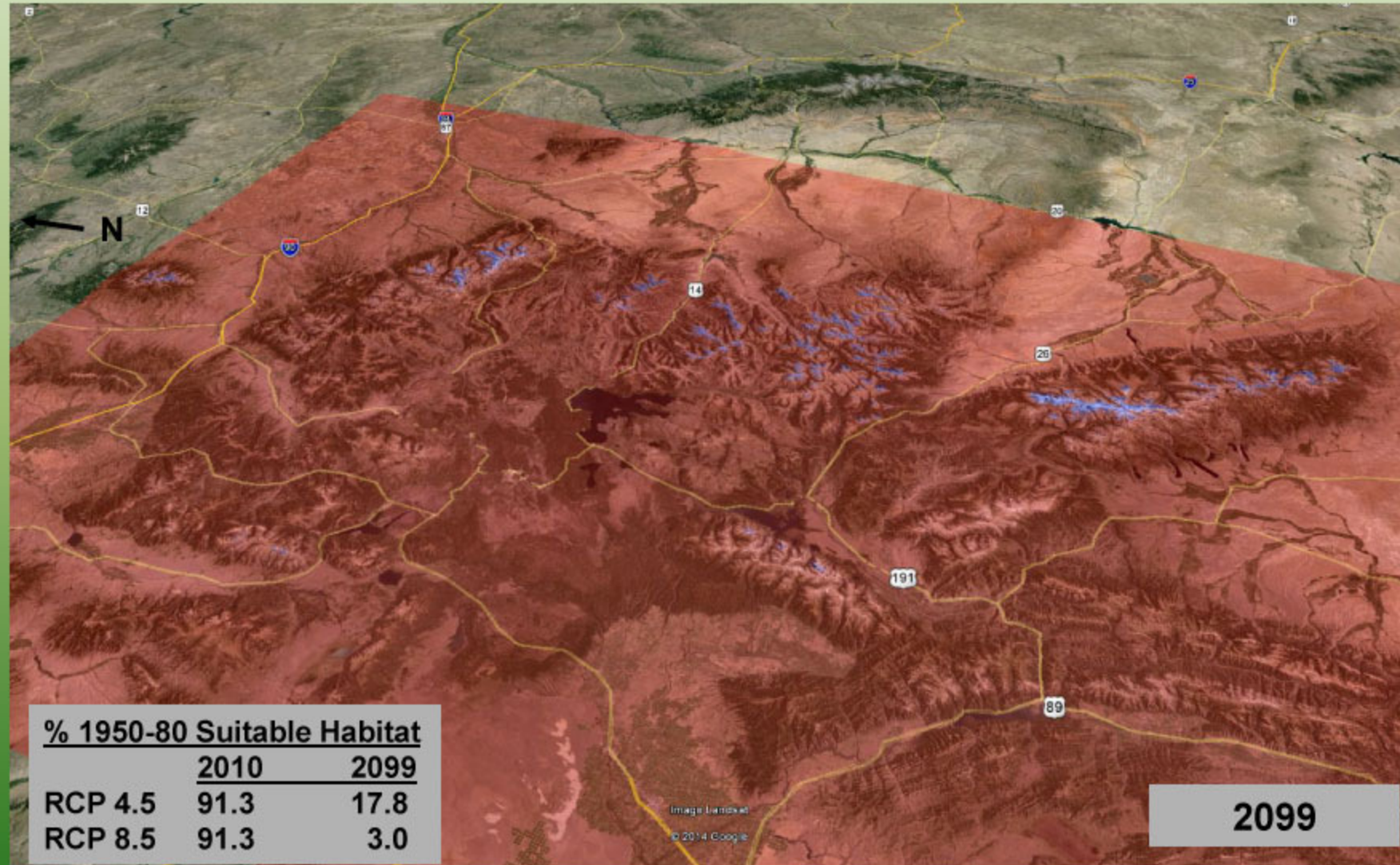
Downs et al. (2023)

DIRECT:
Whitebark
Pine in
Greater
Yellowstone



Courtesy Andrew Hansen, MSU

DIRECT:
Whitebark
Pine in
Greater
Yellowstone





Lost 80% adult WBP 2006-2010



C. Wann

Nancy Bockino rigged to climb into the upper branches of a whitebark pine.



C. Wann

Whitebark Warriors assess a whitebark pine in winter.



DIRECT and RESIST: Protecting infrastructure

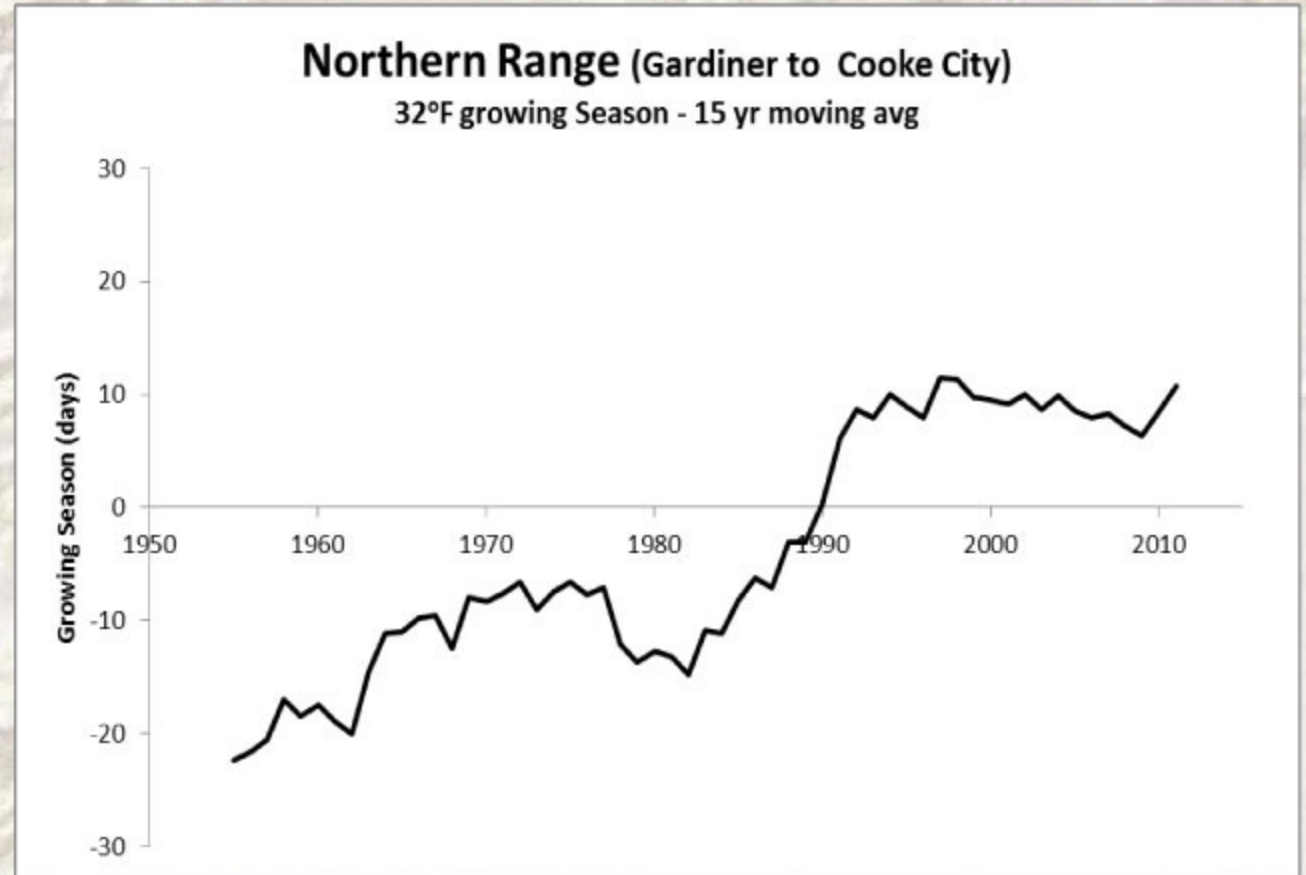
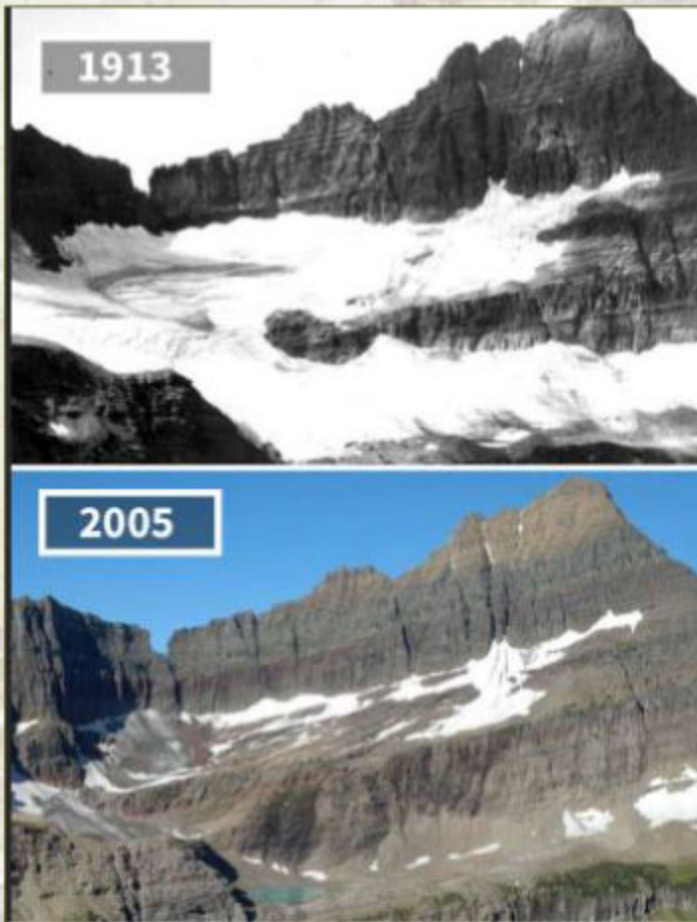


[Video \(U.S. National Park Service\) \(nps.gov\)](https://www.nps.gov)



ACCEPT

- Probably how we will manage most of our resources because (1) we don't have the capacity to manage all resources and (2) management won't influence the outcome





IRA and BIL = New Capacity

- **Park-based position(s)**
- **CC Vuln Assessments (potable water, Wildland Fire)**
- **Cultural Resources**
- **Climate ready monitoring data**
- **Adaption and restoration**
 - **Whitebark pine**
 - **Arid Lands and sagebrush systems**



Questions and contact info



Tom Olliff

**IMR Climate Change and
Collaborative Conservation Lead**

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406.581.2763

Bozeman, Montana

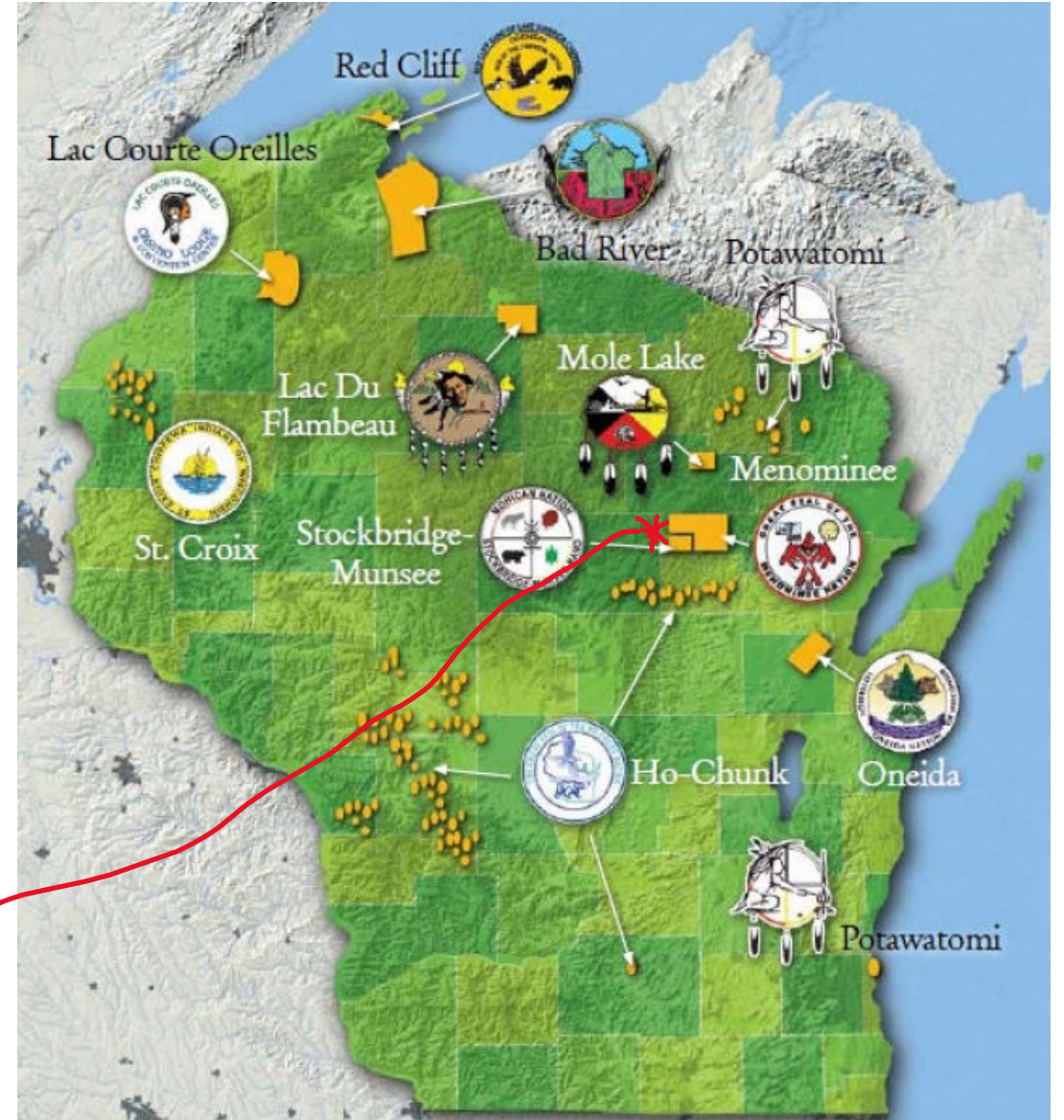


Hello everyone |

A dark, atmospheric landscape featuring a dense forest of evergreen trees reflected in a calm body of water. The sky is filled with heavy, grey clouds, and the overall scene is dimly lit, creating a somber and reflective mood.

**My name is Starlyn
Miller.**

I live in a southern place (Shawano), in a good place to live (Wisconsin) near the Menominee Reservation and Stockbridge Reservation.



**My father is Scott Tourtillott (passed on)
and my mother is Antoinette Vele.**



**My paternal grandfather is Roger Tourtillott (passed on)
and my paternal grandmother is Kay Richmond (passed on).**



**My maternal grandfather is Merton Vele (passed on) and my maternal
grandmother is Carol Ludin (passed on).**



**Beau Miller is
my husband.**





**My sons are
Miles Aupaumut and
Moss Campbell.**





**My daughter
is Meryl Blue.**



- **University of Wisconsin
Madison Alumni**
- **Tribal Attorney**
- **Little Shell Chippewa
Tribal citizen**
- **Descendant of
Menominee &
Stockbridge Mohican**
- **TWS NLP Director**



Roadmap

- **The Wilderness Society**
- **Native Lands Partnerships**
- **Climate Change, Tribes, & Hope for a Better Future**



**The
Wilderness
Society**

1935



- The Wilderness Society is founded to save America's dwindling wildlands
- "organization of spirited people who will fight for the freedom and preservation of the wilderness."

1964

- The Wilderness Act is signed
- Established a National Wilderness Preservation System for the permanent good of the whole people



2016

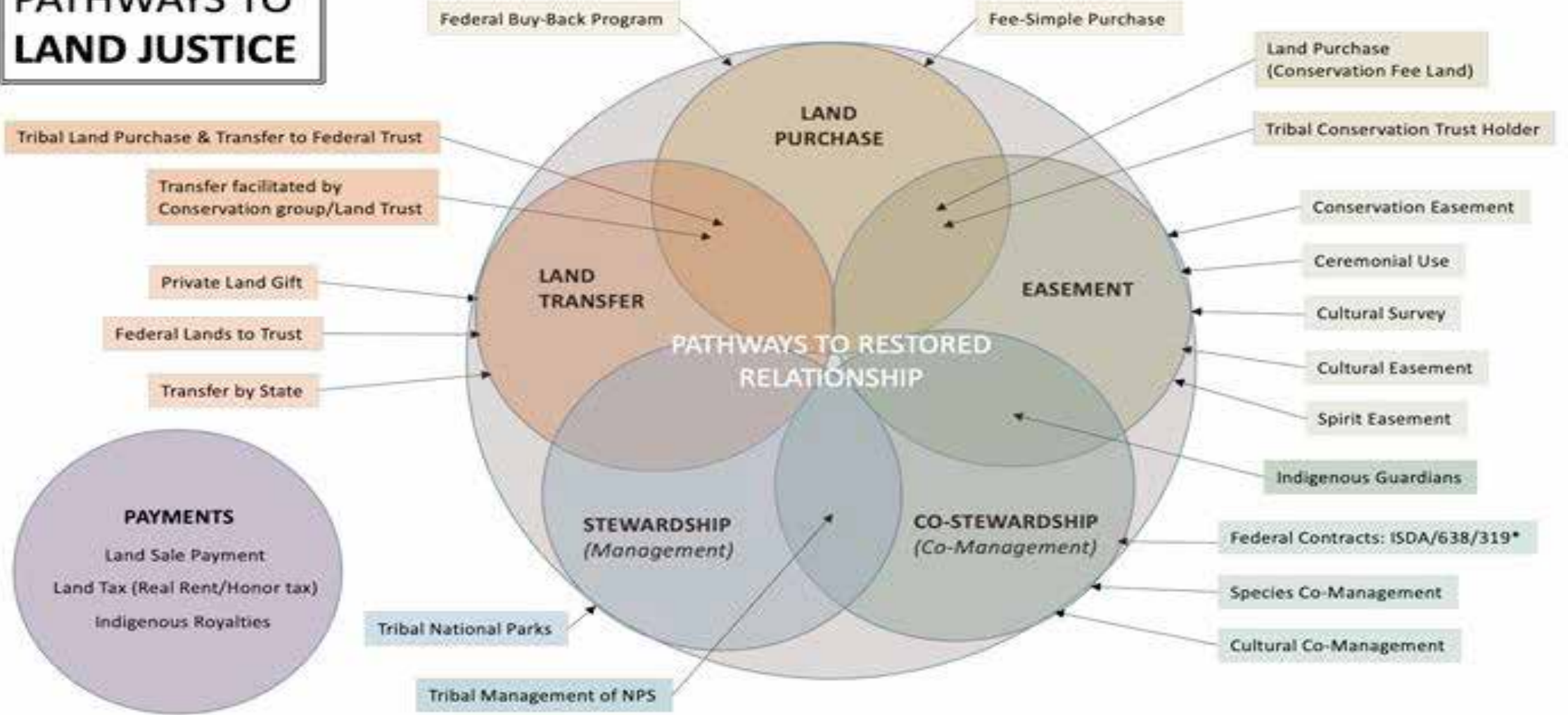


- Diversity, Equity, & Inclusion Commitment launched



Native Lands Partnerships

PATHWAYS TO LAND JUSTICE



NLP WORK PRIORITIES

Increase

- representation of Indigenous perspectives at TWS (staff, volunteers, contractors, and partners)

Elevate and incorporate

- Indigenous perspectives and knowledge into models of applied conservation

Assist

- Tribes in building capacity where mutual goals align and where TWS is invited to participate

Cultivate

- respectful and resilient relationships with Tribes and Indigenous communities

Achieve

- meaningful conservation outcomes advanced through place-based work, policy, and administrative steps



Badger-Two Medicine Days courtesy Jen Ferenstein



**Climate
Change, Tribal
Nations, &
Hope for
Better Future**

Tribal Nations, Indigenous People & Climate Change Effects of Land Dispossession and Forced Migration*



Citation:** Justin Farrell *et al.* ,Effects of land dispossession and forced migration on Indigenous peoples in North America.*Science374**,eabe4943(2021).DOI:[10.1126/science.abe4943](https://doi.org/10.1126/science.abe4943)

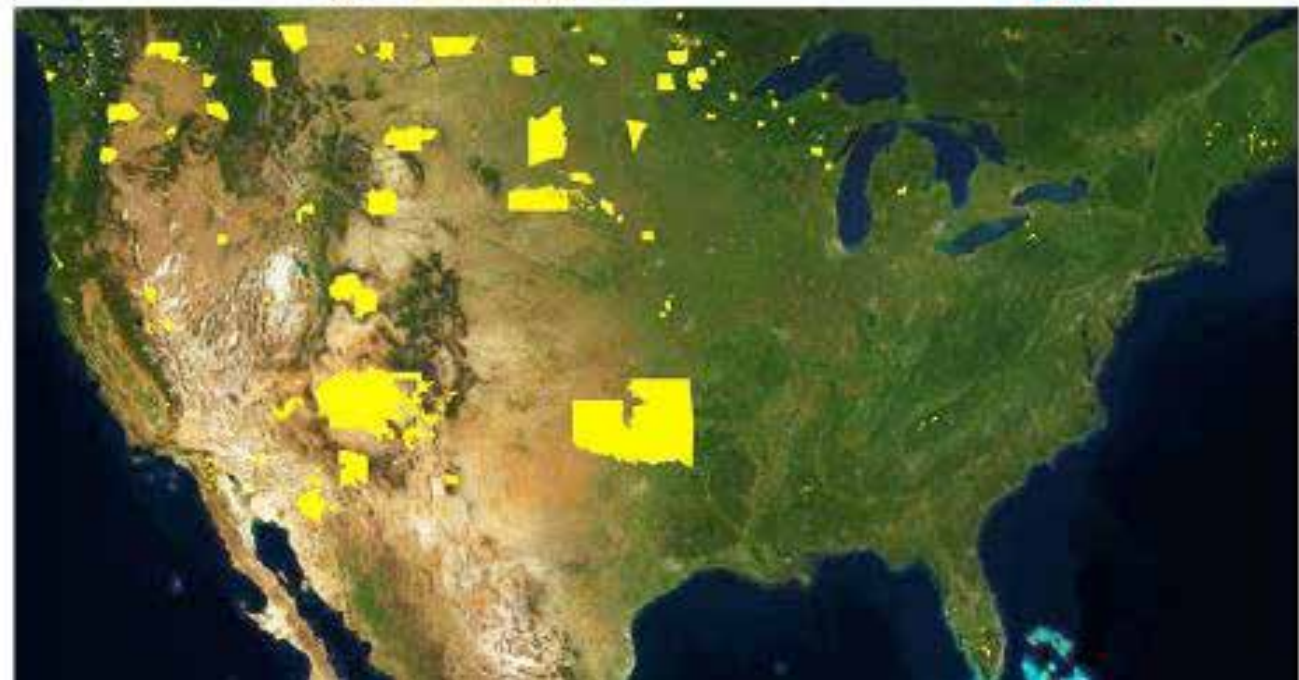
Historical and present-day locations for Tribal Nations *

* From: Farrell et al., Science 374, (2021) 29
October 2021

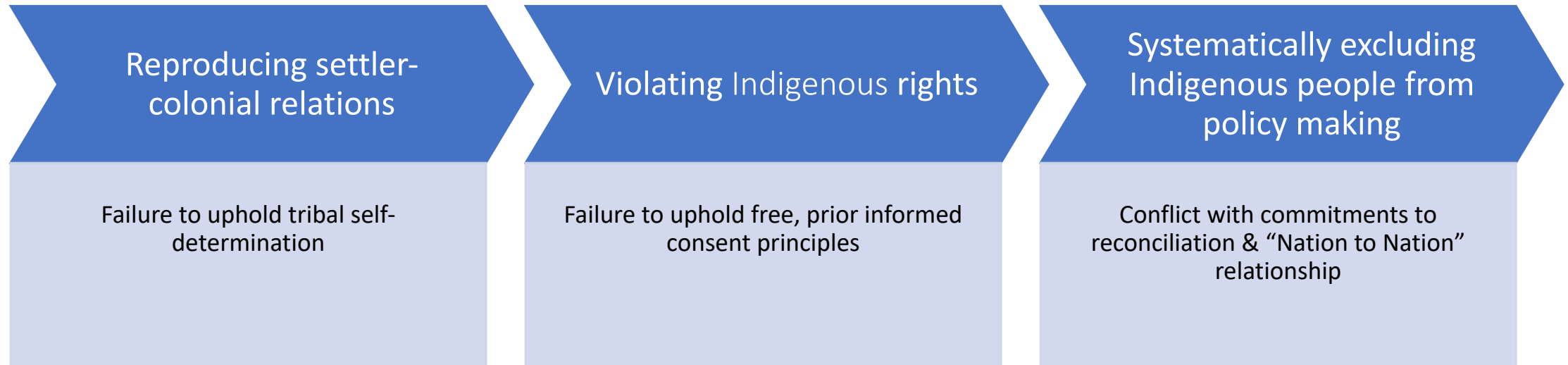
Historical



Present Day



Tribal Nations, Indigenous People & Climate Change: Indigenizing Climate in Canada*



***Citation:** Reed G, Gobby J, Sinclair R, Ivey R and Matthews HD (2021) Indigenizing Climate Policy in Canada: A Critical Examination of the Pan-Canadian Framework and the ZÉN RoadMap. *Front. Sustain. Cities* 3:644675. doi: 10.3389/frsc.2021.644675

Tribal Nations, Indigenous People & Climate Change: Recentering Indigenous Knowledge in Climate Change Discourse*



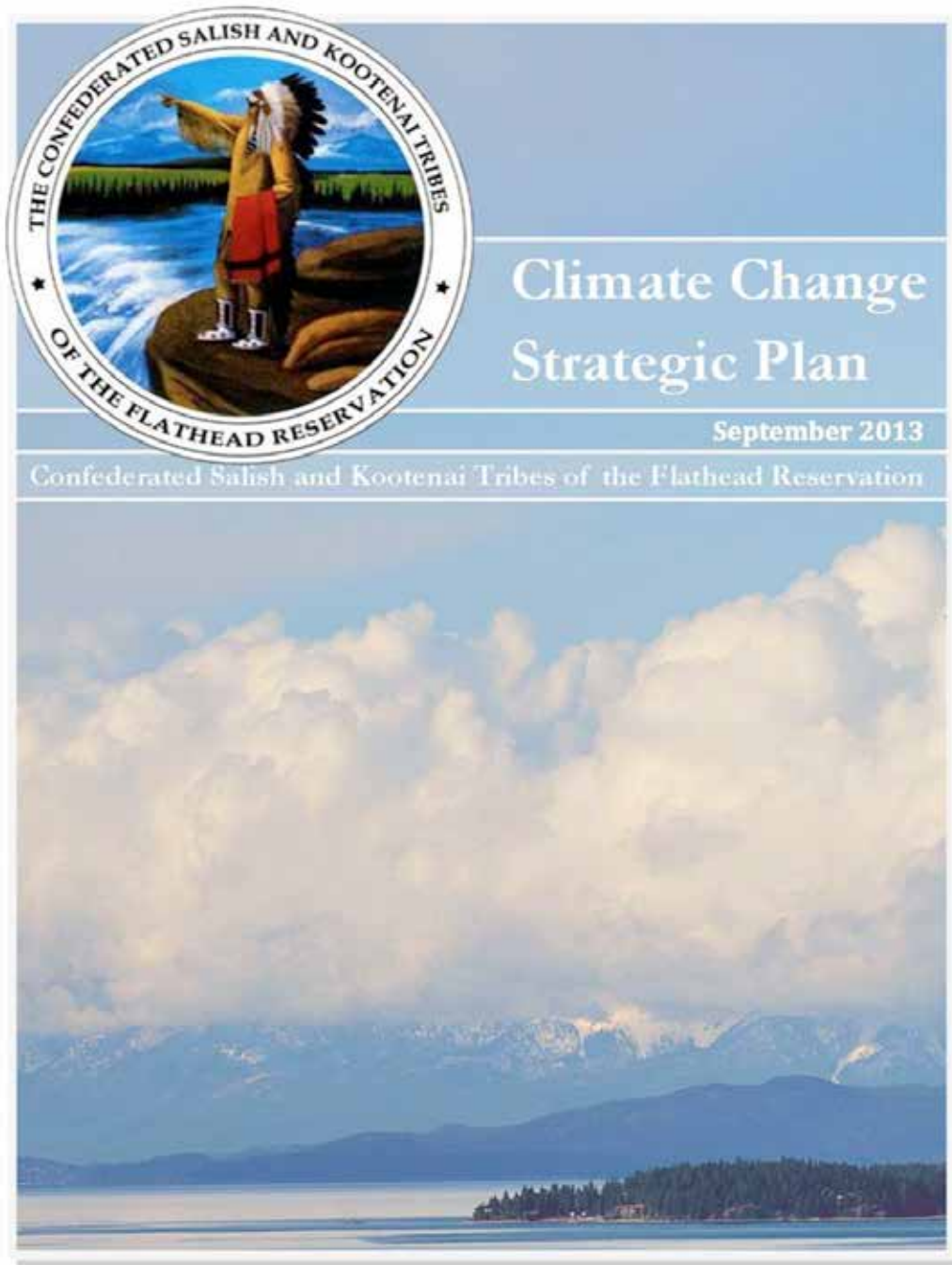
***Citation:** Hernandez J, Meisner J, Jacobs LA, Rabinowitz PM (2022) Re-Centering Indigenous Knowledge in climate change discourse. PLOS Clim 1(5): e0000032. <https://doi.org/10.1371/journal.pclm.0000032> Editor: Jamie Males, PLOS

BIDEN-HARRIS ADMINISTRATION INVESTING \$120 MILLION TO SUPPORT TRIBES DEALING WITH IMPACTS OF THE CLIMATE CRISIS



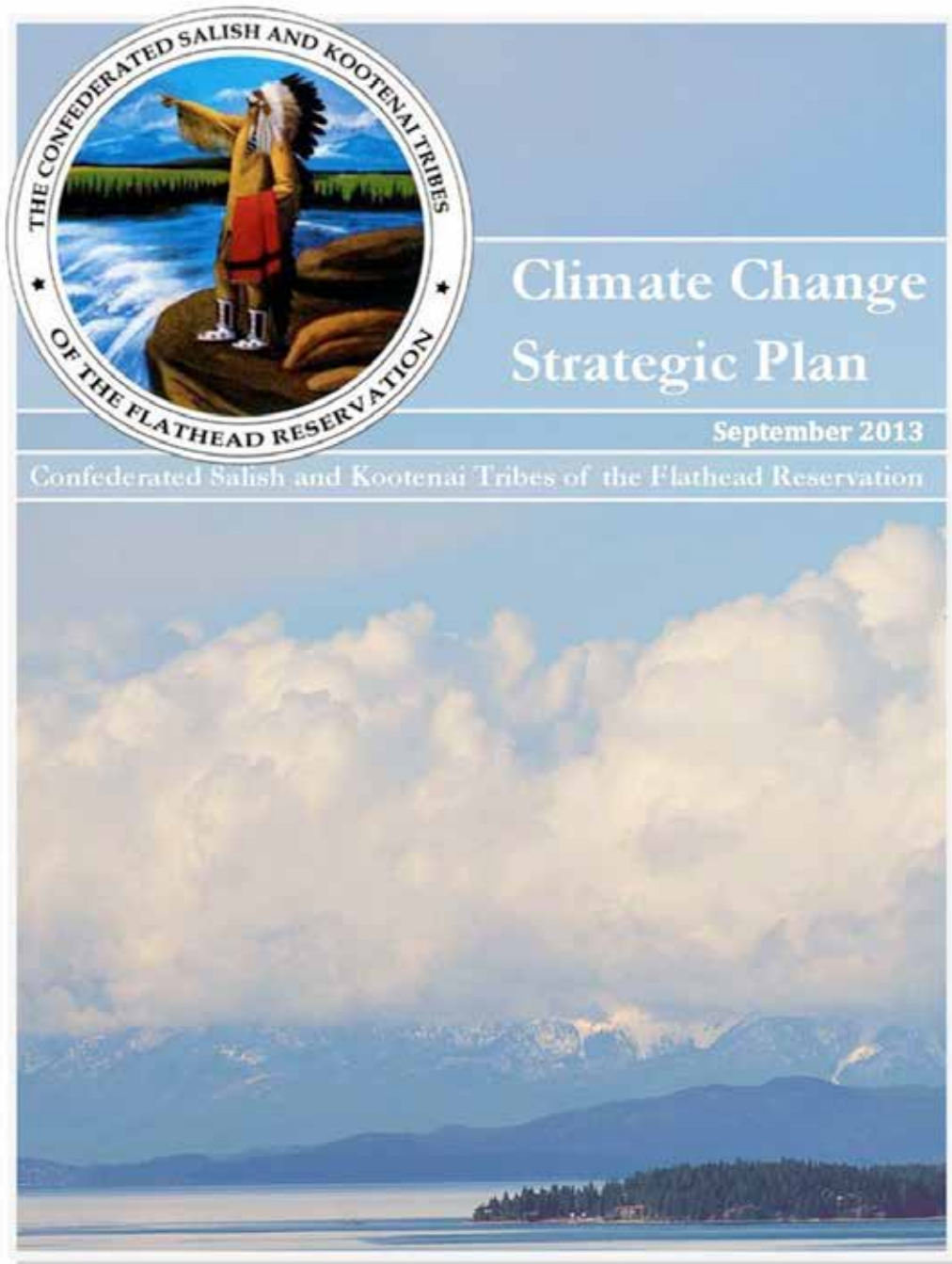


DOI Initiatives



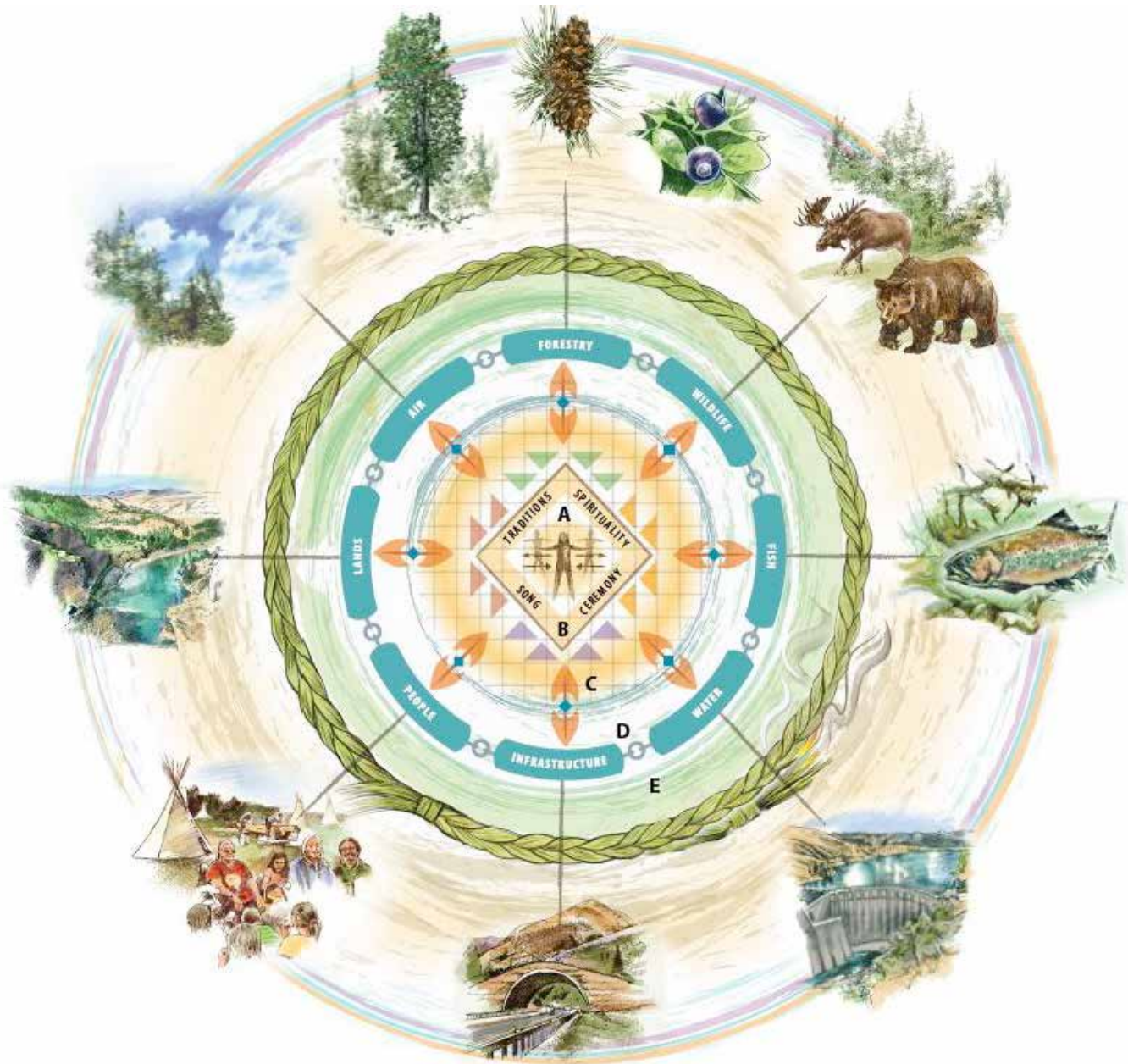
Confederated Salish & Kootenai Tribes (CSKT) Climate Change Strategic Plan

“This Confederated Salish & Kootenai Tribes (CSKT) Climate Change Strategic Plan represents an early step towards addressing the impacts of climate change on the Flathead Reservation in Montana. This initiative’s purpose is to improve the Tribal community and Natural Resource resiliency by effectively informing climate change impact planning decisions made by Tribes.”



CSKT Climate Change Strategic Plan

- Scientific and Technical Advisor to CSKT during development of their first Strategic Climate Adaptation Plan (released in 2013);
- Member of CSKT Climate Change Advisory Committee since 2013 - which works on implementing that plan, revising it at regular intervals, etc. as needed;
- Joint fundraising: they write a lot of federal grants as a committee and have had almost all of them funded



A. Individual / Family B. Community / Culture C. Tribe D. Nation E. World

CSKT-led publications and presentations

- New book chapter: “*Sčitpálqʷ: Biocultural Restoration of Whitebark Pine on the Flathead Reservation.*”
- Frequent workshops, Gatherings, and conferences, including the 2017 Northwestern Tribal Climate Summit.

MOHICAN SUGAR
BUSH
TRADITIONS
ENDURE



Waewaenen! (Thank you!)

Starlyn Miller

Native Lands Partnerships Director

Starlyn_miller@twc.org

715-881-0503





40th Public Land Law Conference

October 26-27, 2023

Gathering Wisdom:
Building on 40 Years of Public Land Discourse

NEXT:

THE EVOLUTION OF WATER: IMAGINING A NEW FUTURE
FOR AQUATIC ECOSYSTEMS

2:45-4:00 PM



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Elaine Harvey

Watershed Department Manager, Columbia River Inter-Tribal Fish Commission



Update on Columbia River Treaty Negotiations

Elaine Harvey – Watershed Department Manager – Columbia River Treaty
Columbia River Inter-Tribal Fish Commission
Public Land Law Conference October 27, 2023



Columbia River Treaty

- Treaty came into force in 1964, no end date
- Canada builds three dams, US builds Libby – no passage
- Twin goals:
 - optimize hydropower
 - coordinate flood control
- Coordinated flood control ends in 2024
 - Default is Called Upon
- Treaty may be terminated with a 10-year notice
- Ecosystem not a consideration, no fish & wildlife coordination*



Coordinated Flood Risk Management

- Canada provides 8.45* maf of assured storage in 3 Treaty reservoirs under coordinated plan
 - Arrow/Keenleyside 7.10 million acre feet
 - Duncan 1.27 million acre feet
 - Mica/Kinbasket 80,000 acre feet
 - ***Note** – initially assured storage was 8.45 maf but the U.S. and Canadian Entities agreed in 1995 upon a reservoir storage swap of up to 3.5 maf from Arrow to Kinbasket

Called Upon Flood Risk Management

- The U.S. must effectively use its reservoir storage before it can “call upon” Canada for additional storage (8.95 maf or ~21.5 maf?)
 - U.S. position is that this obligation kicks in when flows at The Dalles Dam exceed 450 kcfs
 - Canadian position is that the obligation does not kick in until flows exceed 600 kcfs at The Dalles Dam
 - U.S. position is that this is limited to 8 reservoirs (Libby, Hungry Horse, SQK/Kerr, Albeni Falls, Dworshak, Brownlee, Grand Coulee, John Day) while Canada says it covers all U.S. reservoirs.

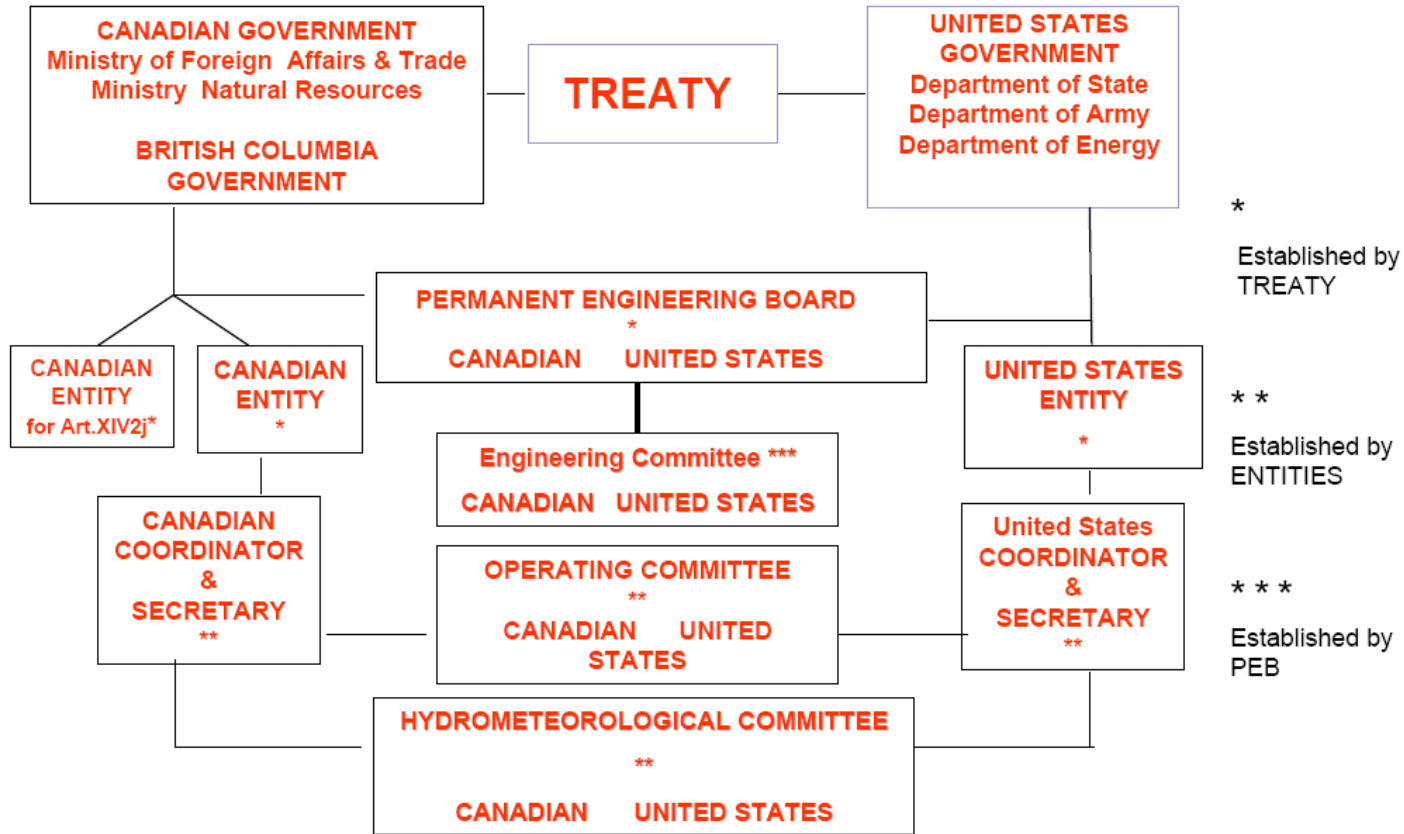
Downstream Benefits and the Canadian Entitlement – *What is it?*

- U.S. has a base system of hydropower dams, Canada built 3 new dams under Treaty
- Canadian Treaty reservoir flows coordinated to optimize hydropower production in U.S.
- Increased increment of hydropower produced in the U.S. system is the downstream benefit
- Canada receives 50% of downstream benefit
 - U.S. consortium bought first 30 years of Canadian Entitlement for ~ \$255 million
 - Canadian Entitlement returned by 2003, they now get power

Ecosystem function

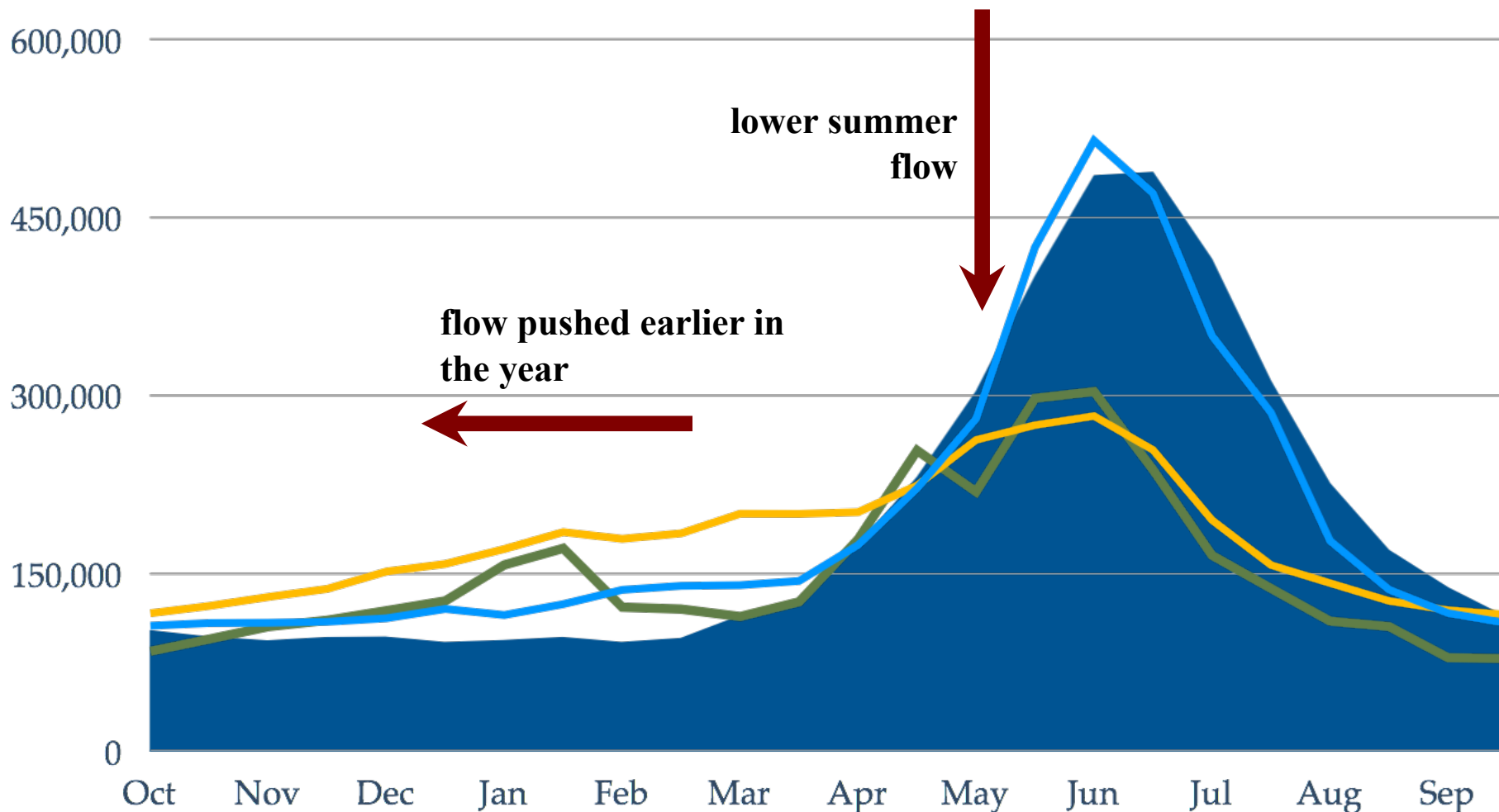
- Under a mutual benefits agreement, the U.S. and Canadian Entity have agreed to allocate 1 million acre feet of water that can be used for to support salmon migration in the U.S. while supporting whitefish and trout spawning in B.C.
- An attempt by the U.S. and Canadian Entities to implement a regionally developed “water budget” in the early 1980s was overruled by the Permanent Engineering Board as being inconsistent with optimizing power generation.

Organizational Chart for Treaty



River Level at The Dalles Dam

- Pre-Treaty Observed (1948-1968)
- Post-Treaty Observed (1974-1992)
- Federal Biological Opinion (WY 2009)
- Historical Observed (1900-1920)



Bilateral Talks

- Informal procedural meeting in early 2018
- Formal talks start in May 2018
 - 18 negotiating rounds so far
 - National positions first exchanged in 2020
 - U.S. position March 2020
 - Canadian position June 2020
 - Break for elections and confirmations
 - ~July 2020 to November 2021
 - Next negotiating session – October 2023?
- U.S. goal – agreement in principle by Fall 2023

Canada's negotiating position

“British Columbia Decision”

- Continue current sharing of downstream power benefits
- Implement Treaty's called upon flood control provisions
“Supplement” with a coordinated flood risk management
- British Columbia wants greater flexibility managing its' three Treaty reservoirs
- Ecosystem values continue to be important and mechanisms within and outside the Treaty will be explored
- Greater coordination on Libby Dam operations
- Canada is not being adequately compensated for downstream benefits currently provided to U.S.

U.S. negotiating position

“guided by the Regional Recommendation”

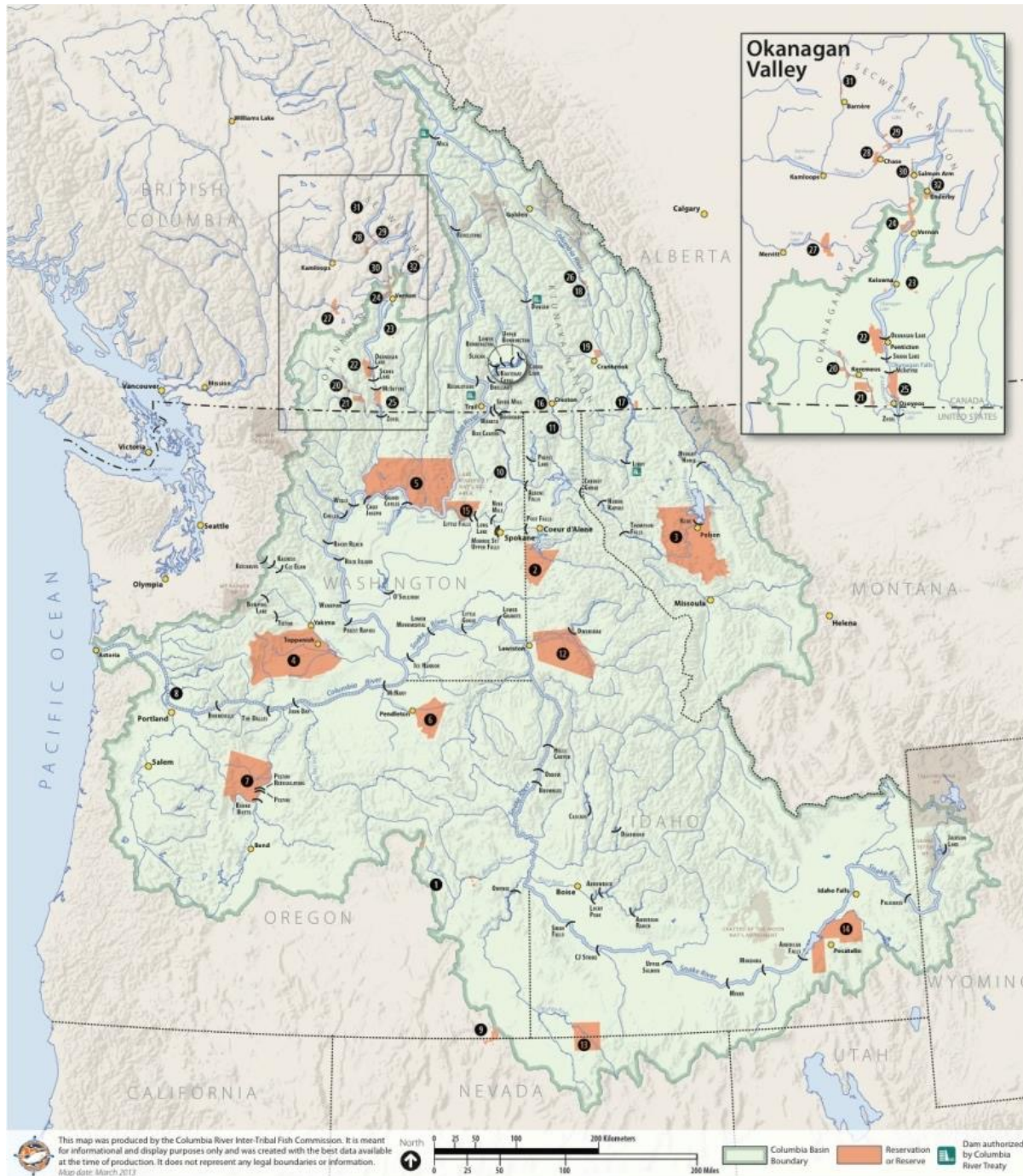
- Maintain coordinated hydropower operations, compensating Canada for coordination.
- Secure another term of coordinated flood risk management
- Model scenarios to integrate ecosystem function.
- Regional needs for irrigation, municipal and industrial use, in-stream flows, navigation and recreation.
- Adaptative management and flexibility to address changes, such as climate change and regional needs.

Compare and Contrast positions 'compensation'

- Going to “Called Upon” creates too much uncertainty for both parties, focus on securing another term for coordinated FRM
- Calculation was present value of 50% of future damages avoided in U.S.
- While continuing to coordinate on power generation the U.S. proposes paying the value of coordination rather than returning the Canadian Entitlement ~\$30 million vs ~\$180 million

Indigenous Nations and Tribes roles

- Indigenous Nations receive formal observer status – April 2019
 - 5 party agreement – consensus based
 - Indigenous Nations lead development and presentation ecosystem function positions
 - B.C. (November 2019) and Canada (July 2021) adopt United Nations Declaration on the Rights of Indigenous Peoples (free, prior, and informed consent)
- Tribal representatives invited to participate as technical experts – August 2019



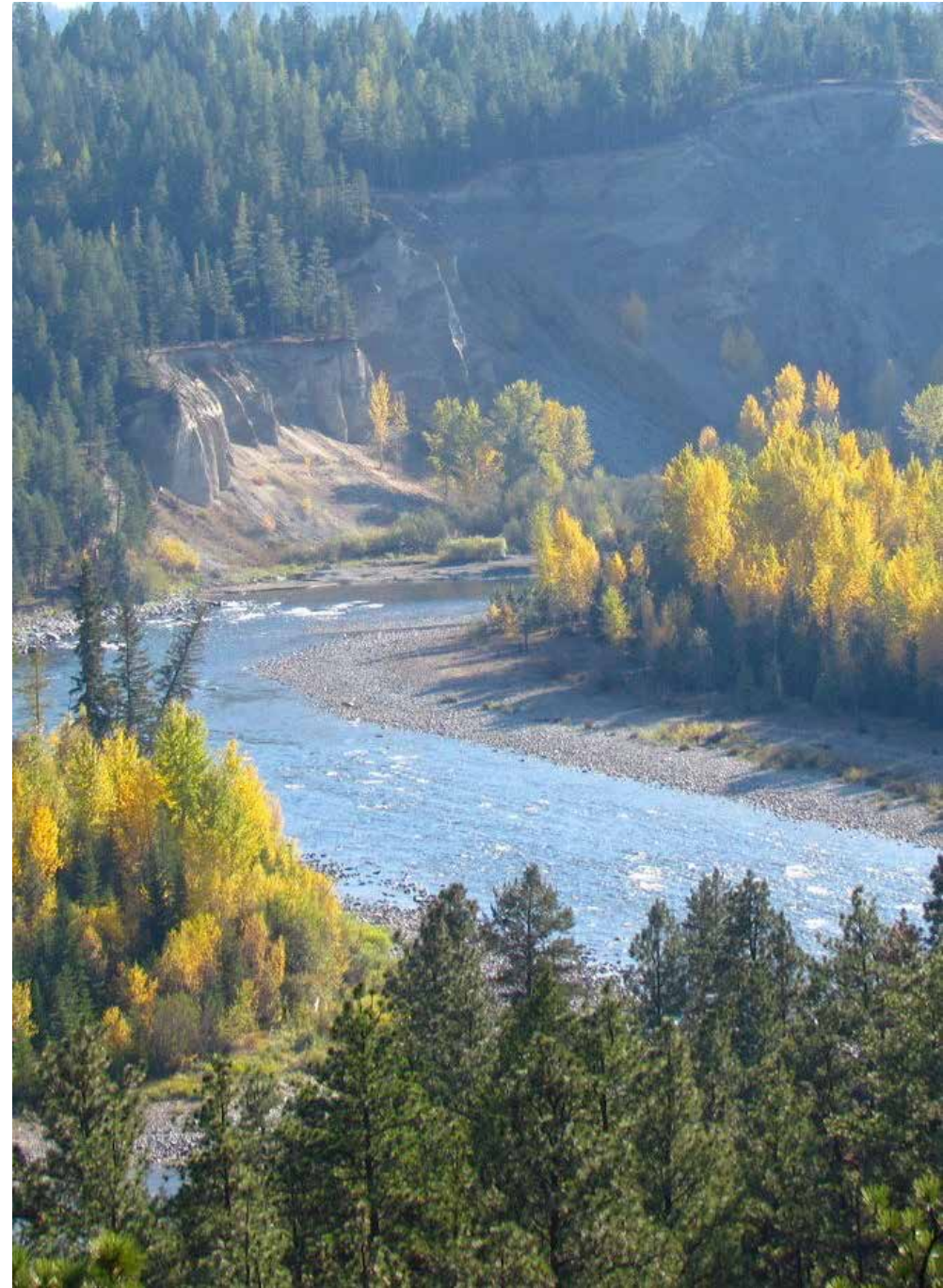
Columbia Basin Tribes

15 tribes with management authorities and responsibilities affected by the Columbia River Treaty

Tribal Coalition formed 2009
Common Views February 2010
First Nations Outreach 2011

Tribes Advocated for an Ecosystem Management Approach

- Restore and preserve tribal natural and cultural resources
- Restore spring and early summer freshets:
 - Helps to restore estuary
 - Helps move fish
- Minimize draw downs at upper reservoirs
- Restore fish passage to all historical locations.



Tribes Issues with Treaty

- No **tribal consultation** during negotiation nor **tribal representation** during implementation
- Adopted hydropower and flood control as management goals, **disregarding fisheries** and other ecosystem elements
- Flood control plan **eliminated annual flooding** and freshets, **moved flood upriver**
- Grand Coulee and Treaty projects **built without passage and eliminated salmon spawning habitat**
- Benefits of Treaty system **not shared** with tribes

Tribes Goals for Modern Treaty

- Secure a seat at the table (Treaty review, negotiation and implementation);
- Manage river for ecosystem function, equal with power production and flood risk management (stabilize reservoirs and provide spring freshet);
- Restore fish passage to historical habitats;
- Equitably share benefits of system; and,
- Equal access to resource development opportunities, consistent with ecosystem function.

Address Flood Control Provisions: Impacts from Dramatic Reservoir Level Changes



Spokane River in Washington State, impacts from Grand Coulee Reservoir Drawdown
Cultural resources impacted, dust (contaminated in some cases)

U.S. Columbia River Basin Flood Risk Policy Review:

Pacific Northwest states and tribes support the pursuit of Congressional authorization and appropriations for a region-wide public process to assess potential changes to the current level of flood risk protection in the Columbia River Basin to enhance spring and summer flows. Any such process should occur between 2014 and 2024. Post-2024 Treaty provisions, including Called Upon, will be designed to adapt to any such changes that may be authorized. If a process is initiated, it will be a comprehensive approach, subject to public input, that addresses all opportunities to manage high flow events, including floodplain management, Columbia River Basin reservoir operations, and strategic improvements to existing levees and the need for additional levees. Potential impacts to other river uses and infrastructure such as navigation, bridges and other transportation features, hydropower, irrigation, recreation, fish and wildlife, and cultural resources also will be evaluated and addressed.

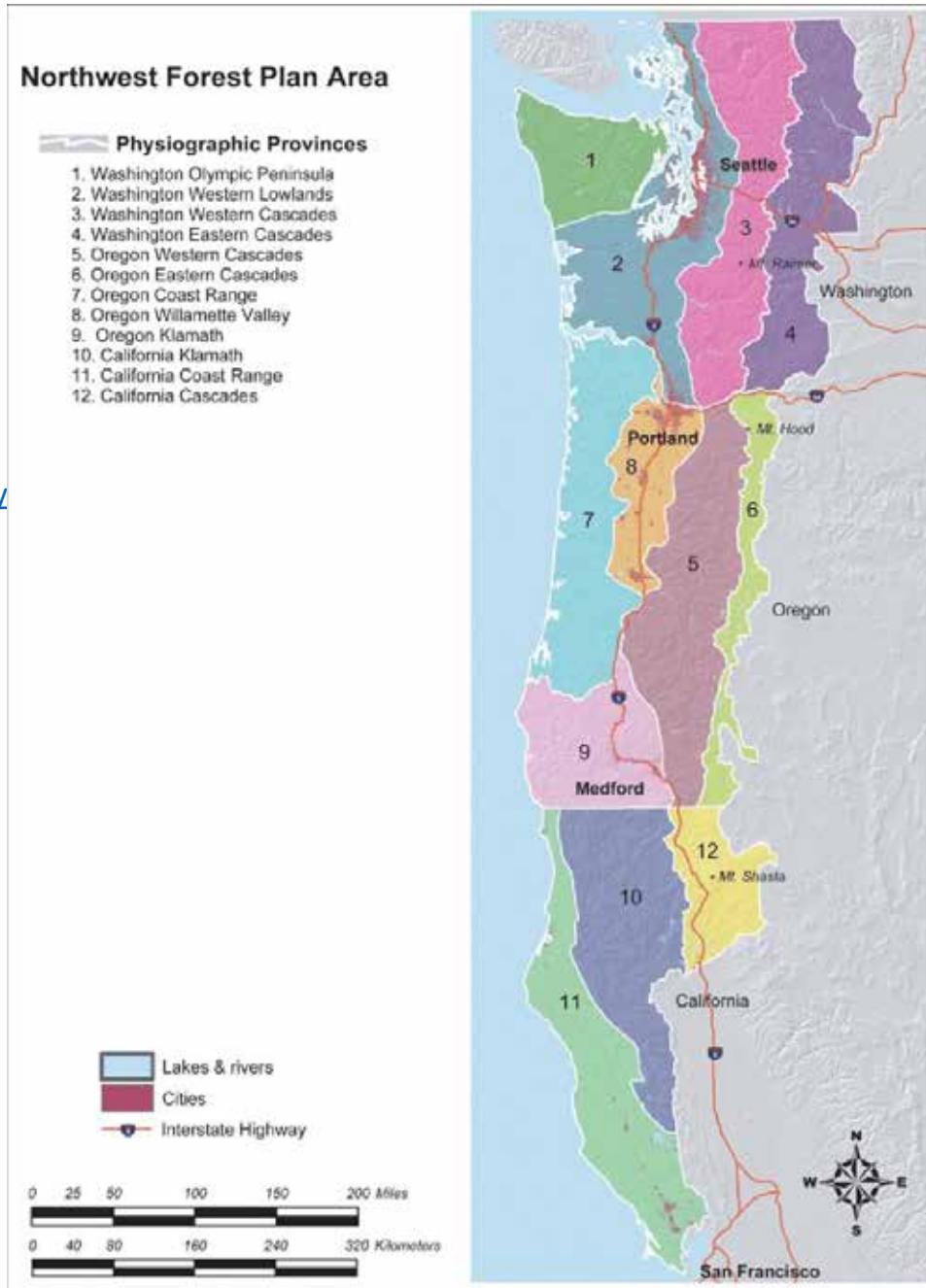
Additional Resources

- British Columbia CRT information page
 - <https://engage.gov.bc.ca/columbiarivertreaty/>
- Columbia Basin Tribes Coalition resources
 - <https://critfc.org/tribal-treaty-fishing-rights/policy-support/columbia-river-treaty/>
- Coordinated Flood Control Operating Plan (aka, Red Book)
(first 7 pages are recommended reading)
- <https://www.nwd-wc.usace.army.mil/cafe/forecast/FCOP/FCOP2003.pdf>
- Columbia River Treaty Permanent Engineering Board
<https://www.nwd.usace.army.mil/CRWM/PEB/>

Northwest Forest Plan Amendment

- Amendment focal areas: Tribal inclusion, climate change, fire resiliency, old growth forest management, and affected communities
- There was no Tribal inclusion in the original Northwest Forest Plan
- The Federal Advisory Committee has 4 Tribal citizens and 1 Tribal attorney

[USDA Forest Service Forms Northwest Forest Plan Federal Advisory Committee | USDA](#)





40th Public Land Law Conference

October 26-27, 2023

Gathering Wisdom:
Building on 40 Years of Public Land Discourse

Erin Sexton

Senior Scientist, Flathead Lake Biological Station

The Science and Policy of Transboundary Mining Issues

Erin Sexton
Sr. Research Scientist,
University of Montana
Flathead Lake Biological
Station

Rich Janssen Jr
Department Head
Natural Resources
Department
Confederated Salish and
Kootenai



© Garth Lenz





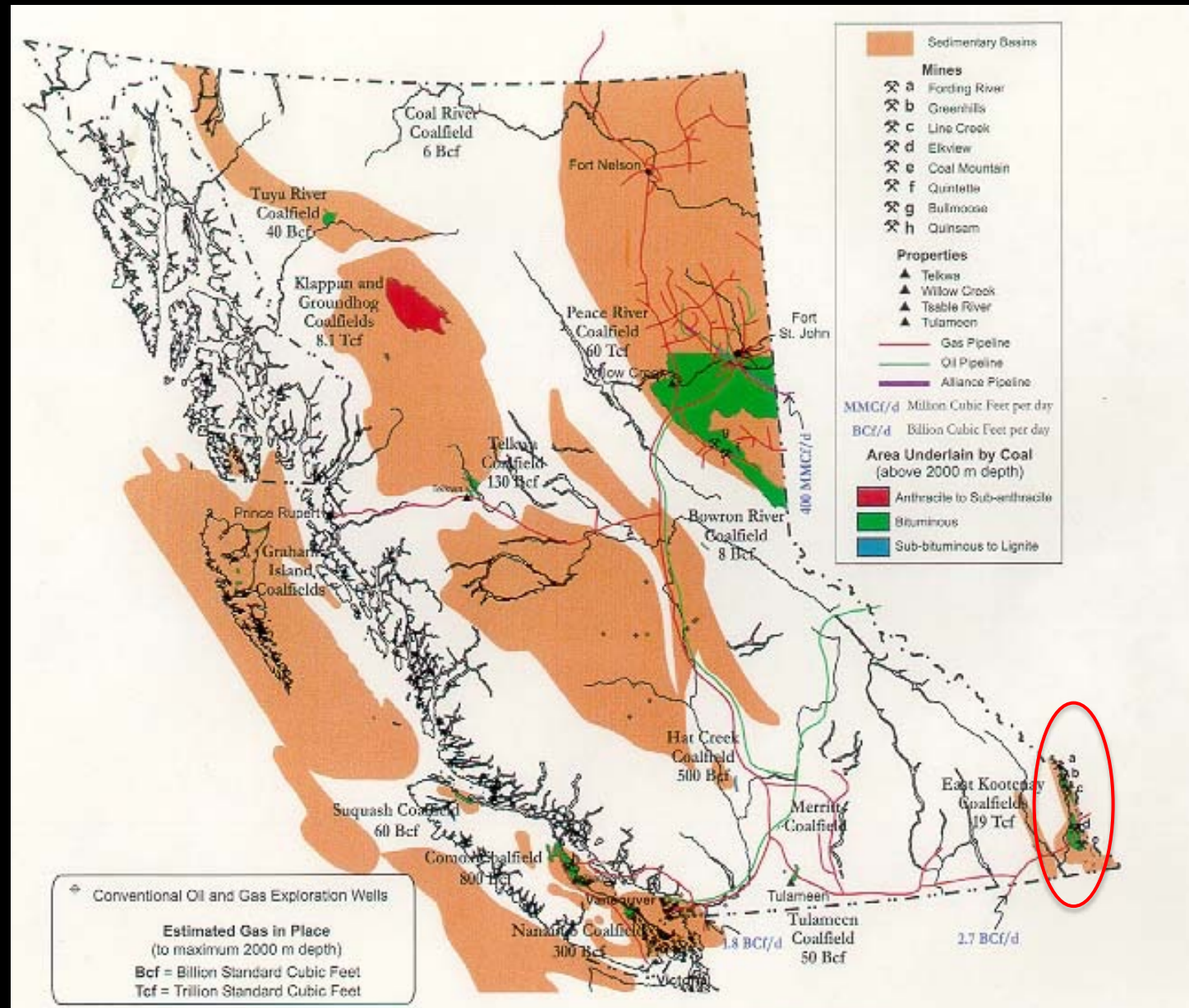


Headwaters of the Columbia River Basin

Coal-bearing Basins of British Columbia

Kootenai and Flathead Headwaters

Elk Valley-
21.5 Million
Tonnes of
Metallurgical
Coal in 2022



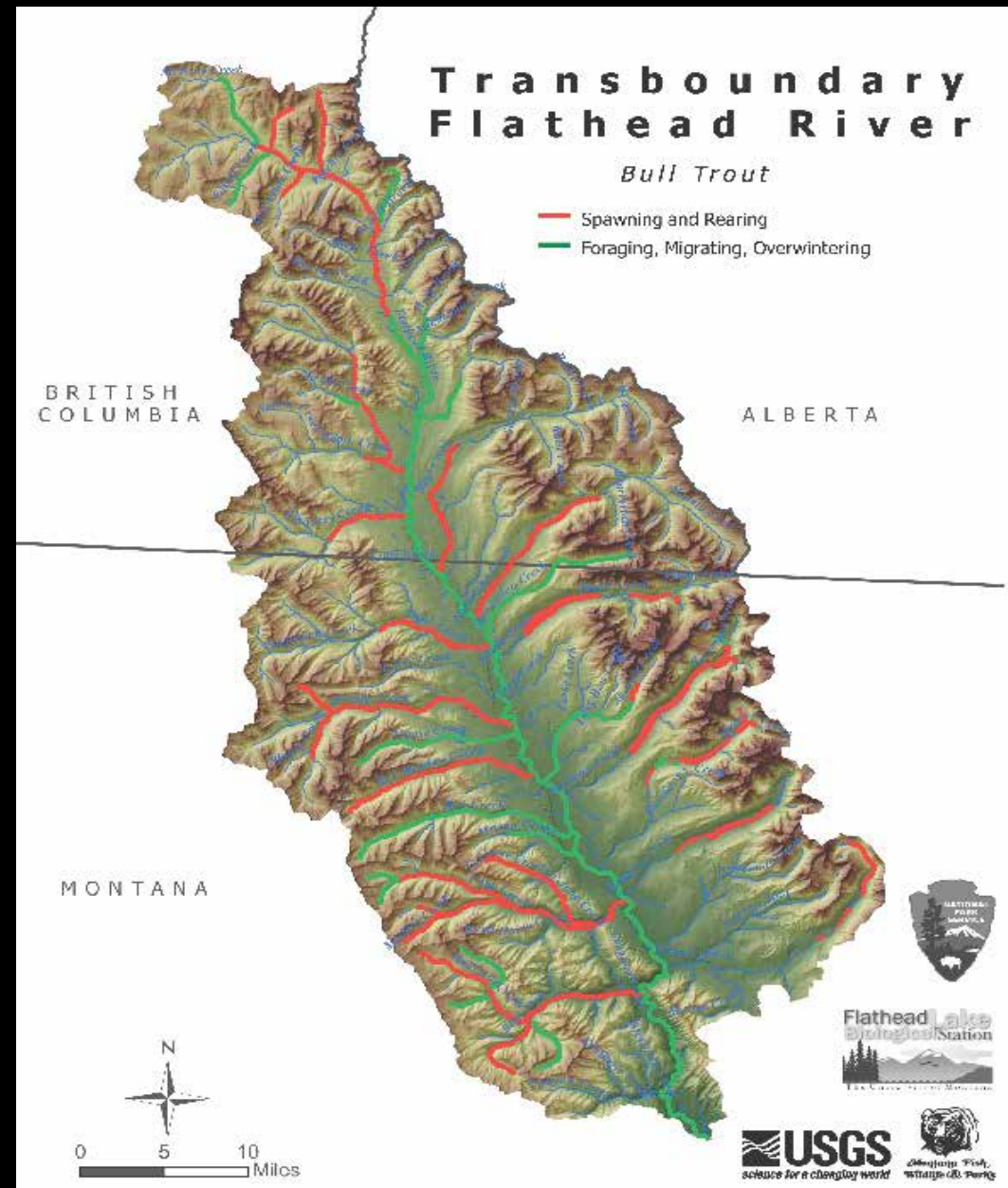
Mining Proposed in the Transboundary Flathead River



Transboundary Bull trout populations

Listed as threatened under the U.S. Endangered Species Act

Migrate over 250 km from Flathead Lake in Montana to spawn in B.C. headwaters



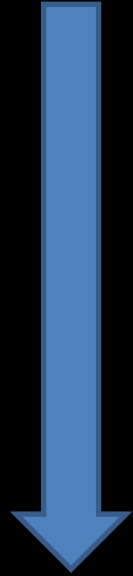
International Joint Commission; Impacts of a Proposed Coal Mine in the Flathead River Basin (1988)



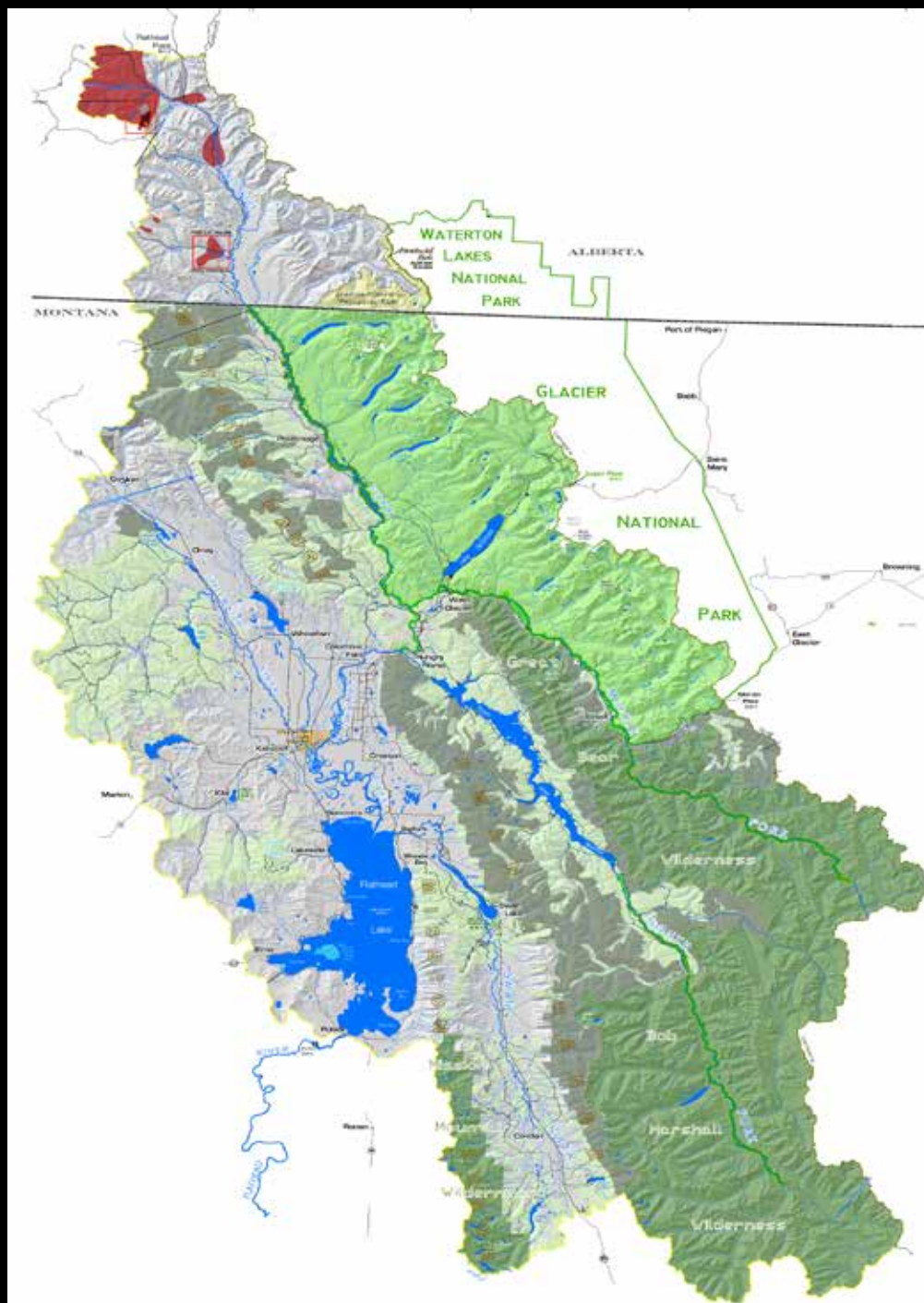
The mine would violate
Article IV of the Boundary
Waters Treaty

- "...waters flowing across the boundary shall not be polluted on either side to the injury of health or property of another"
- "unacceptable consequences to the Bull trout fishery that could not be feasibly mitigated"

2003 - Mines
proposed in the
headwaters of the
Flathead in British
Columbia, CA



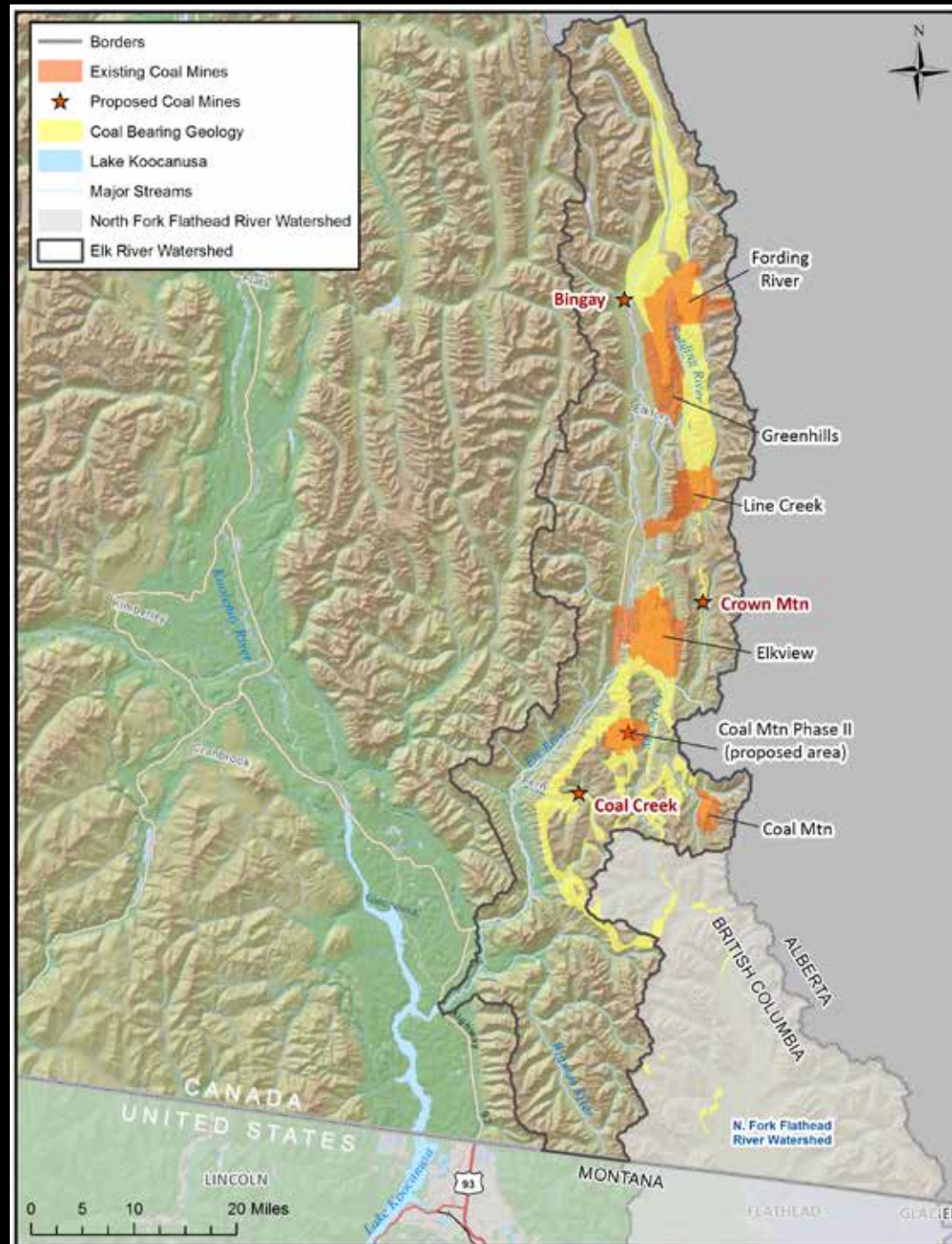
Impacts
transported to
U.S., Tribal and
State Territory





Elk Valley Mines

- Operating at the industrial scale since the 1970s
- Mountain-top removal coal mining
- Leaching Selenium, Nitrates and Sulphates into the Elk and Fording Rivers, Lake Koocanusa and the Kootenai River



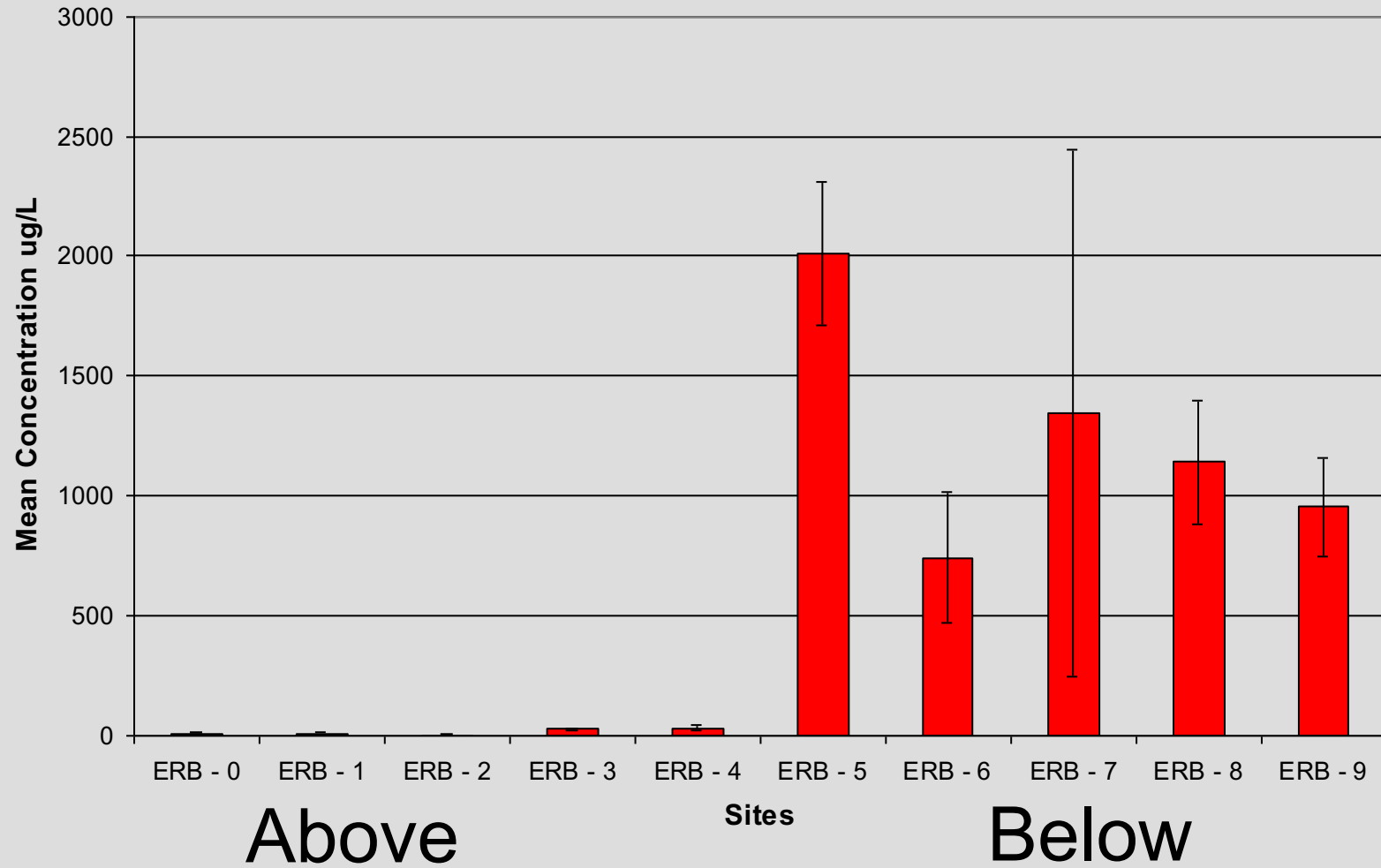


Data Collection Efforts 2005-2011

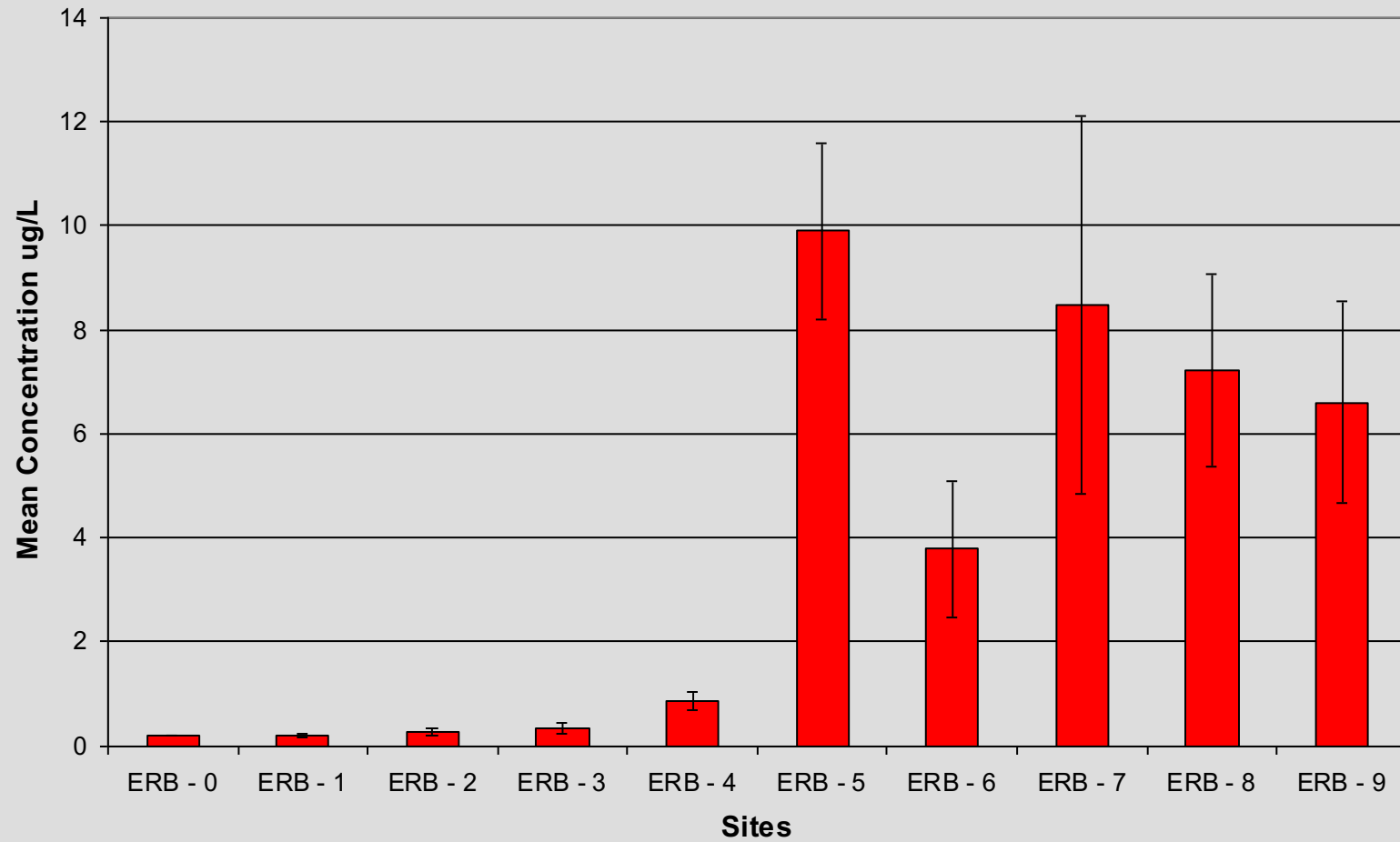
- Water Quality
- Fisheries
- Aquatic Life



Nitrate Nitrogen (NO_3) Above and Below the Elk Valley Mines



Selenium (Se) Above and Below the Elk Valley Mines



Above

Below

Impacts to Aquatic Life

- Loss of sensitive species
- Loss of diversity



Caddisfly - Trichoptera



Stonefly - Plecoptera



Mayfly - Ephemeroptera

B.C. – MT Memorandum of Understanding and Cooperation

Memorandum of Understanding and Cooperation on

ENVIRONMENTAL PROTECTION, CLIMATE ACTION AND ENERGY

between

The Province of British Columbia

and

The State of Montana



THE PROVINCE OF BRITISH COLUMBIA AND THE STATE OF MONTANA,

Sharing a common border and desiring to renew and deepen our long-standing relationship of friendship and trust;

Acting on the obligation of our *Environmental Cooperation Arrangement* of 2003 "to identify, coordinate and promote mutual efforts to ensure the protection, conservation and enhancement of our shared environment for the benefit of current and future generations" and to "enter into specific arrangements necessary to effectively address shared environmental goals";

Recognizing the mutual commitment of British Columbia and Montana to sustaining environmental values in the transboundary Flathead River Basin, including its existing high water quality and aquatic biodiversity, and threatened and endangered species and species of special concern listed under United States and Canadian law;

Recognizing that the transboundary Flathead River Basin includes within its area Glacier National Park and Biosphere Reserve which is part of the world's first International Peace Park and a World Heritage Site, and that this unique area merits special protection in particular from risks posed by drilling, mining and other commercial mineral and oil and gas development;

Recognizing that the transboundary region is also an important wildlife corridor that is home to the highest density of large and mid-sized carnivores and the highest diversity of vascular plant species in the United States, and offers superior opportunities to study, document and preserve species biodiversity as changing climate conditions and shrinking glaciers present adaptation challenges;

Recognizing that the Flathead River Basin in British Columbia is located within that portion of the Ktunaxa territory known as Gamna district; that the Ktunaxa have a documented historical connection to the Flathead, have used and continue to use the Flathead for hunting, fishing, trapping, gathering, recreation and as a travel corridor, and hold an important cultural and historical connection to the landscape; that the Ktunaxa exercise aboriginal rights recognized in Canada's *Constitution Act, 1982*, within this portion of the Ktunaxa territory; that through the New Relationship with First Nations, British Columbia is seeking to engage meaningfully with Ktunaxa Nation in a government-to-government relationship; that Ktunaxa Nation is engaged in treaty negotiations with Canada and British Columbia which may result in Ktunaxa Nation owning lands and having law-making powers in relation to lands within the Flathead River Basin in Canada; and that this Memorandum of Understanding and Cooperation (MOU) and Ktunaxa Nation's support for and participation in activities under this MOU is without prejudice to treaty negotiations with Ktunaxa Nation or any other agreements that may be negotiated between Ktunaxa Nation and British Columbia;

Recognizing that the Flathead River flows through the exterior boundaries of the Flathead Reservation and aboriginal territories, and that a large portion of Flathead Lake lies within the exterior boundaries of the Flathead Reservation, and that Flathead Lake is the largest freshwater lake in the western contiguous United States and one of the cleanest in the world; and that the Salish, Kootenai, and Pend d'Oreille peoples highly value this land and these waters and their quality and purity, and that these Indigenous Peoples have effectively managed these waters and lands for thousands of years previously in a sustainable and non-polluting manner;

Recognizing that the Flathead River Basin is the subject of uses that are important to local residents, and that for approximately 70 years the British Columbia Flathead River Valley has been successfully managed for logging, recreation, guiding and outfitting, and trapping, that has maintained the healthy and diverse eco-system that exists today;

Concerned that climate change is having and will have severe environmental and economic impacts on our shared waters, ecosystems, protected areas and jurisdictions in coming decades, and agreed therefore that action now is both a moral and economic imperative;

Committed to partnering to capture for our citizens the new employment and investment opportunities that action on climate change will create in the areas of renewable and low carbon energy, energy conservation, and clean transportation;

Agreed that the full engagement of our provincial and state governments with our respective federal governments, Ktunaxa Nation, Confederated Salish and Kootenai Tribes, and local governments and the support of local residents and citizens is crucial to acting on these concerns and enhancing a collaborative conservation ethic; and

Committed to sharing information and communicating regularly to improve understanding, prevent degradation of water quality and reach mutually beneficial outcomes on environmental protection, climate action and clean and renewable energy;

NOW THEREFORE DESIRE TO ENTER INTO THIS MEMORANDUM OF UNDERSTANDING AND COOPERATION AND HEREBY AGREE AS FOLLOWS:

Environmental Protection

I. British Columbia and Montana commit to work together to:

A. Remove mining, oil and gas, and coal development as permissible land uses in the Flathead River Basin.

British Columbia and Montana, the latter working with the United States as necessary, will implement measures necessary to prohibit the exploration for and development of mining, oil and gas, and coal in the British Columbia Flathead and the Montana North Fork Flathead River Basin, such action to be completed by July 2010, and subject to agreement on the equitable disposition of the financial implications of this action for the Province of British Columbia respecting existing mining and coal tenure holders.

B. Cooperate on fish and wildlife management.

In collaboration with Ktunaxa Nation and Confederated Salish and Kootenai Tribes, develop baseline resource information, identify potential opportunities to collaborate on fish and wildlife management, and, where possible, coordinate provincial and state management activities in the transboundary region. Areas for consideration include: noxious weed management; management of alien invasive species; and management efforts related to specific fish and wildlife.

C. Collaborate on environmental assessment of any project of cross border significance that has potential to degrade land or water resources. On a reciprocal basis, provide for on-going involvement of interested federal, provincial, state, and First Nations or American Indian Tribes and their designated scientists, in environmental assessments triggered under provincial or state law or regulation with respect to any development in the British Columbia and Montana transboundary area which holds potential to cause degradation of water quality or land resources, as follows:

- British Columbia will invite one or more representatives from state, federal and tribal governmental agencies, as appropriate, to participate in Working Groups established for its environmental assessments. Appropriate agencies may include the Montana Departments of Environmental Quality, Fish, Wildlife and Parks, and Natural Resources and Conservation, and the United States Environmental Protection Agency and Department of the Interior, and the Confederated Salish and Kootenai Tribes.
- Montana will invite one or more representatives from provincial, federal and Ktunaxa Nation governmental agencies to participate in its environmental assessments. Appropriate agencies may include the British Columbia Ministry of Environment, Ministry of Forests and Range, Integrated Land Management Bureau, Ministry of Agriculture and Lands and Ministry of Energy, Mines and Petroleum Resources (or such successor Ministries bearing such responsibilities), and Ktunaxa Nation Land and Resources Council.

D. Share information proactively. Share information proactively, subject to all relevant laws and regulations, exchange authorizations, permits, approvals, licenses, tenures and draft planning documents on proposed projects that have potential cross-border, wildlife or water quality impacts; and develop early notification procedures to identify problems or sources of concern to residents, First Nations, Tribes, or governmental entities in transboundary areas.

E. Collaborate in responding to emergencies.

Establish procedures to cooperatively respond to emergencies that have the potential for environmental harm, especially in transboundary areas.

Climate Action

II. British Columbia and Montana commit to work together to:

A. Facilitate adaptation to climate change.

Build regional capacity to understand and address the challenges posed by climate change to Western North American jurisdictions by enhancing and coordinating climate monitoring networks, regional centers of applied climate science and regional emergency planning within our jurisdictions.

B. Promote a wood building culture for climate action.

Recognizing that a sustainable forest management strategy aimed at both increasing forest stocks and producing an annual sustained yield of timber for wood construction will generate the largest sustained carbon mitigation and economic benefits, enable enhanced building technologies in structural wood designs for residential and industrial construction and wood products in interior and exterior finishing by seeking and supporting appropriate amendments to building codes and encouraging the use of wood in public leasing and public building projects.

C. Measure progress in reducing greenhouse gas emissions.

Participate in The Climate Registry, a collaboration between states, provinces and Tribes aimed at developing and managing a common greenhouse gas emissions reporting system with high integrity that will provide an accurate, complete, consistent, transparent and verified set of greenhouse gas emissions data from reporting entities, supported by a robust accounting and verification infrastructure.

D. Reduce greenhouse gas emissions.

British Columbia and Montana are signatories to the regional goal set by the Western Climate Initiative of reducing greenhouse gas emissions to 15 percent below 2005 levels by 2020, as well as to ambitious individual provincial and state goals for reducing greenhouse gas emissions by 2020 of 33 percent below 2007 levels by British Columbia and to 1990 levels by 2020 for Montana.

Renewable and Low Carbon Energy

III. British Columbia and Montana commit to work together to:

A. Pursue cooperative clean and renewable transboundary energy policies.

Support and seek adoption of cooperative transboundary approaches to creating more renewable and low carbon energy development in western and continental North America including hydropower, solar, wind, geothermal, biomass, and tidal/wave energy.

B. Harmonize definitions of low impact renewable resources.

Seek and support common definitions of renewable and low carbon resources in state, provincial and federal legislation and regulations that facilitate trading of renewable energy from hydropower, solar, wind, geothermal, biomass, and tidal/wave energy between all jurisdictions within western and continental North America.

C. Support the Western Renewable Energy Zones (WREZ) Project.

Collaborate to ensure the cost-effective and environmentally sensitive development and transmission of renewable and low carbon energy through participation in the Western Governors' Association Western Renewable Energy Zones (WREZ) Project.

D. Encourage a "Conservation First" Utility Framework.

Encourage electricity and natural gas utilities to undertake comprehensive conservation potential studies and set goals for implementing demand-side management (DSM) programs. Utilities will be encouraged to prioritize DSM measures to address energy demand growth. British Columbia and Montana will share information on DSM program performance and will cooperate on the development of harmonized approaches for measurement and evaluation.

E. Leverage energy efficiency through building codes.

Share information on energy performance standards in building codes, with a view to developing collaborative strategies to improve energy efficiency requirements.

F. Enable clean transportation solutions.

Support policies, and share information on standards and best practices to promote biofuels, natural gas, hydrogen, and electricity as transportation fuels, and promote consistent roadside signage for alternative fuel stations.

Partnerships

British Columbia and Montana commit to work together with Ktunaxa Nation, Confederated Salish and Kootenai Tribes, federal and local governments, and with leaders from business, environmental advocates, and scientists to assist with the accomplishment of these goals.

Definitions

For further certainty, "mining" as referred to in this MOU does not include small quarry or sand or gravel operations where the area of activity is two hectares or less, and not more than 20,000 tonnes per annum is removed or to be removed.

Responsible Parties

The Premier of British Columbia and the Governor of Montana are responsible for oversight and implementation of this MOU.

- The Intergovernmental Relations Secretariat, a branch of the Office of the Premier, is designated lead entity for British Columbia. The Secretariat will act as the lead and coordinating entity, and will call upon provincial agencies for implementation.
- The Governor's Office is designated the lead entity for Montana. The Governor's Office will act as the lead and coordinating entity, and will call upon state agencies for implementation.

Term and Amendment

This Memorandum of Understanding and Cooperation is effective when signed by both the Premier and the Governor and as specifically provided for in this MOU it may be amended at any time by agreement between the parties and may be terminated by either party upon one year written notice to the other.

AGREED as to form and content and signed and dated in two (2) duplicate originals in Vancouver, British Columbia this 18th day of February 2010.

GORDON CAMPBELL
Premier of British Columbia

BRIAN SCHWEITZER
Governor of Montana

WITNESSED this 18th day of February, 2010:

KATHRYN TENEESE
Chair of Ktunaxa Nation Council

MICHEL KENMILLE
Council Member, Confederated Salish and Kootenai Tribes

*BC - Montana Memorandum of Understanding
February, 2010*

A new partnership with Montana will sustain the environmental values in the Flathead River Basin in a manner consistent with current forestry, recreation, guide outfitting and trapping uses.

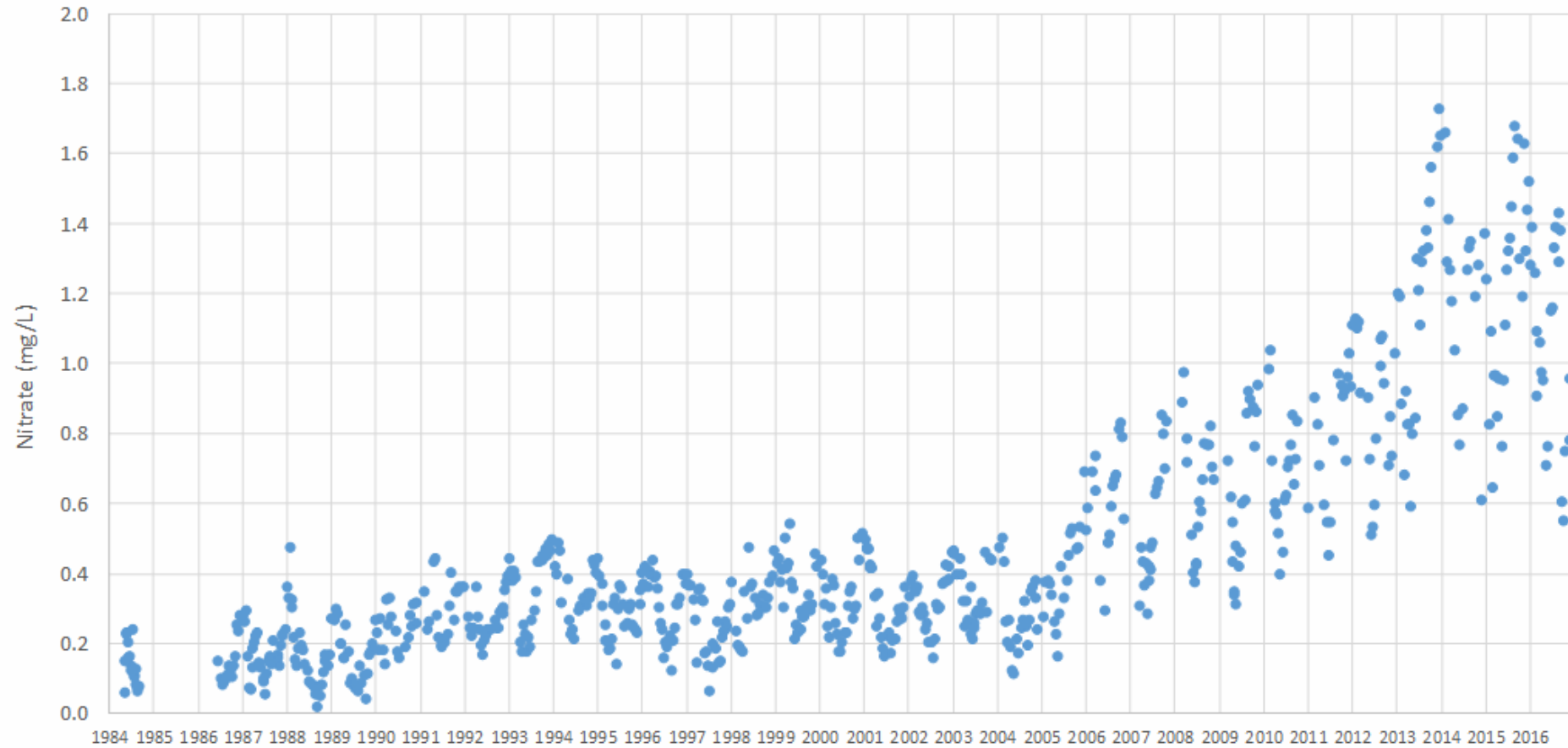
It will identify permissible land uses and establish new collaborative approaches to transboundary issues.

Mining, oil and gas development and coalbed gas extraction will not be permitted in British Columbia's Flathead Valley.



Nitrates in the Elk River from 1984-2016

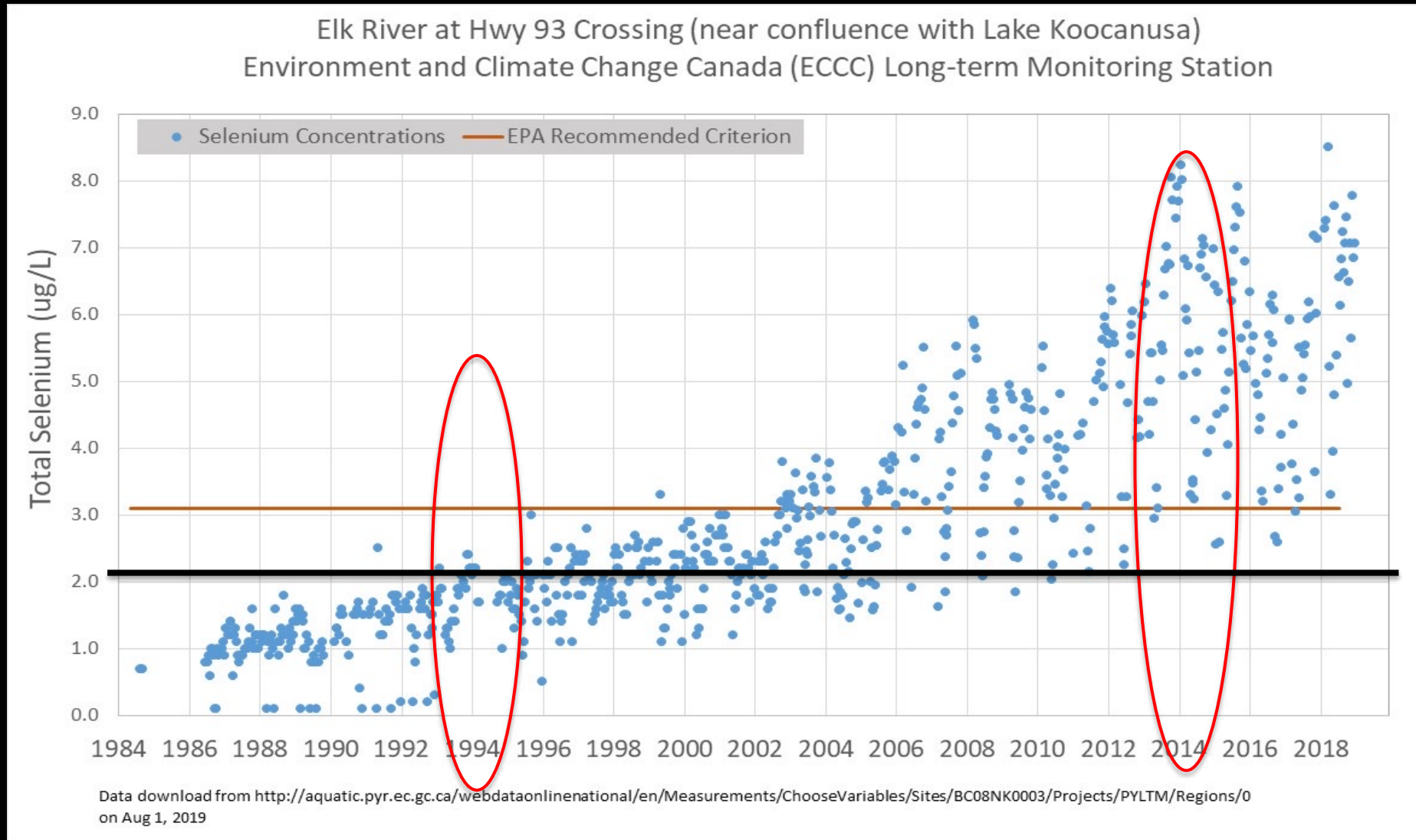
Elk River at Hwy 93 Crossing (near confluence with Lake Koochanusa)
Environment and Climate Change Canada (ECCC) Long-term Monitoring Station



Data download from <http://aquatic.pyr.ec.gc.ca/webdataonline/national/en/Measurements/ChooseVariables/Sites/BC08NK0003/Projects/PYLTM/Regions/0>
on June 13, 2017

Water Quality Trend for Total Selenium in the Elk River; 1984-2018

2 ug/L = BC threshold for *protection of aquatic life*

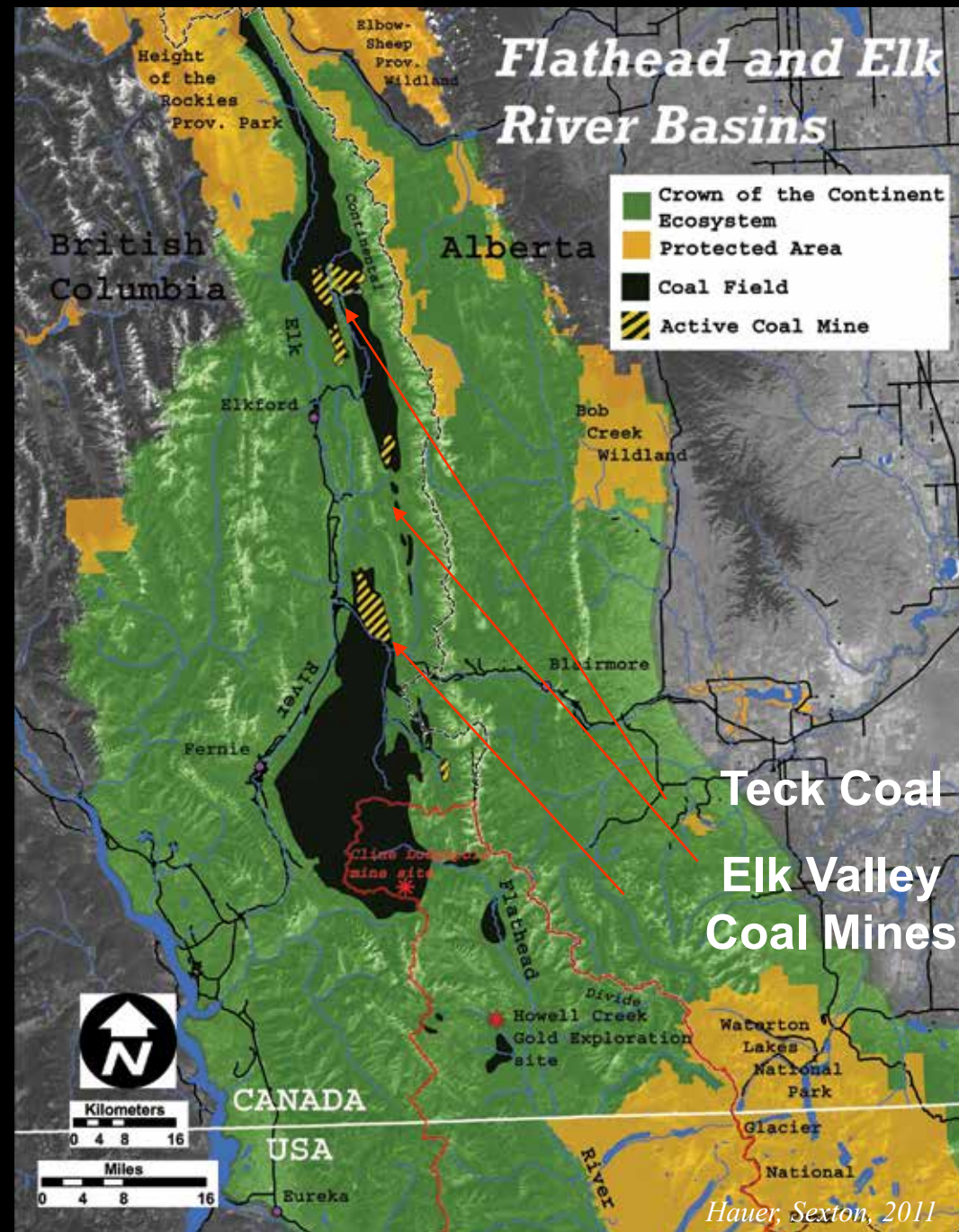


2014

Province of B.C.
directed Teck Coal Ltd
stabilize and reverse
increasing contaminant
trends.

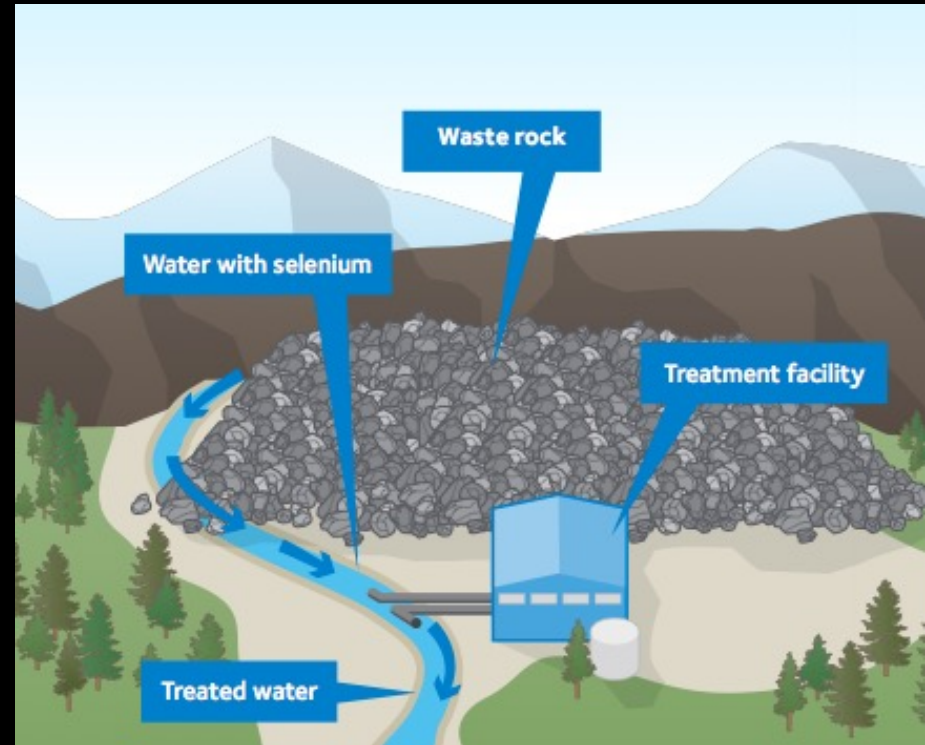
Constituents of Concern:

- Selenium*
- Cadmium
- Nitrate*
- Sulphate*



Active Wastewater Treatment Facility

First plant built in 2013, plan for a new plant every two years from 2018 until 2034



Challenges with Active Water Treatment



- 2014
74 westslope cutthroat trout killed at outlet of the facility
- 2016
converted selenium to a more toxic form- impacts in bull trout and insects
- Plant shut down until late 2018
- Additional plant construction delayed by 3-5 years

*New reports shed light
on Fording River
pollution problems*

VANCOUVER — The Globe and Mail
Published Sunday, Oct. 12 2014, 9:44 PM
EDT

*Elk Valley watershed:
Why has this unfolding
disaster been ignored?*

VANCOUVER — The Globe and Mail
Published Sunday, Oct. 19 2014, 8:22 PM
EDT

*Teck Resources water-
treatment plant shut
after
dead fish found*

VANCOUVER — The Globe and Mail
Published Tuesday, Oct. 28 2014, 8:13 PM
EDT

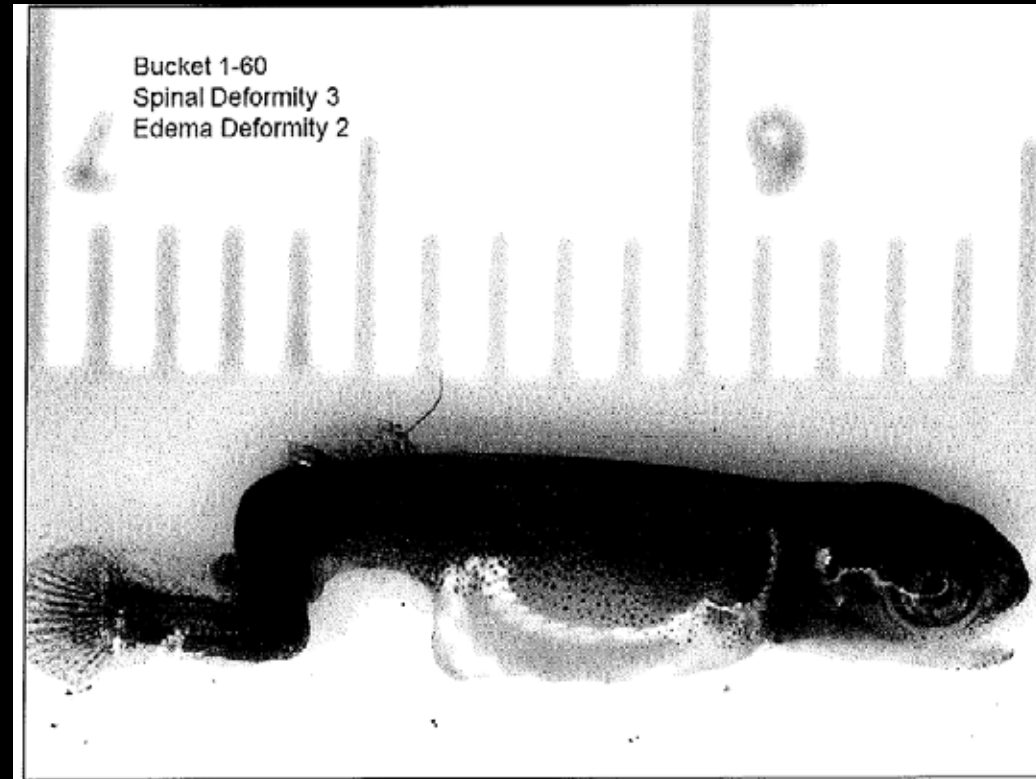


Figure 5A. Environment Canada Photos –
Upper Fording River Westslope Cutthroat
sample; presents marked spinal
deformities (Lemly, 2014)

*International commission asks
Canada to join probe of
selenium flowing from Elk Valley*

CBC, June, 2022

*First Nations angered by
delays in joint probe of
cross-border
contamination from coal
mines*

By Bob Weber The Canadian Press
October 21, 2022



*U.S. wants Canada to join
investigation of cross-border
pollution from B.C. coal mines*

June, 2022 Canadian Press

*Ktunaxa Nation pushed for an
international inquiry into coal
mining pollution for more than a
decade. Is B.C. now on board?*

Narwhal, August, 2023

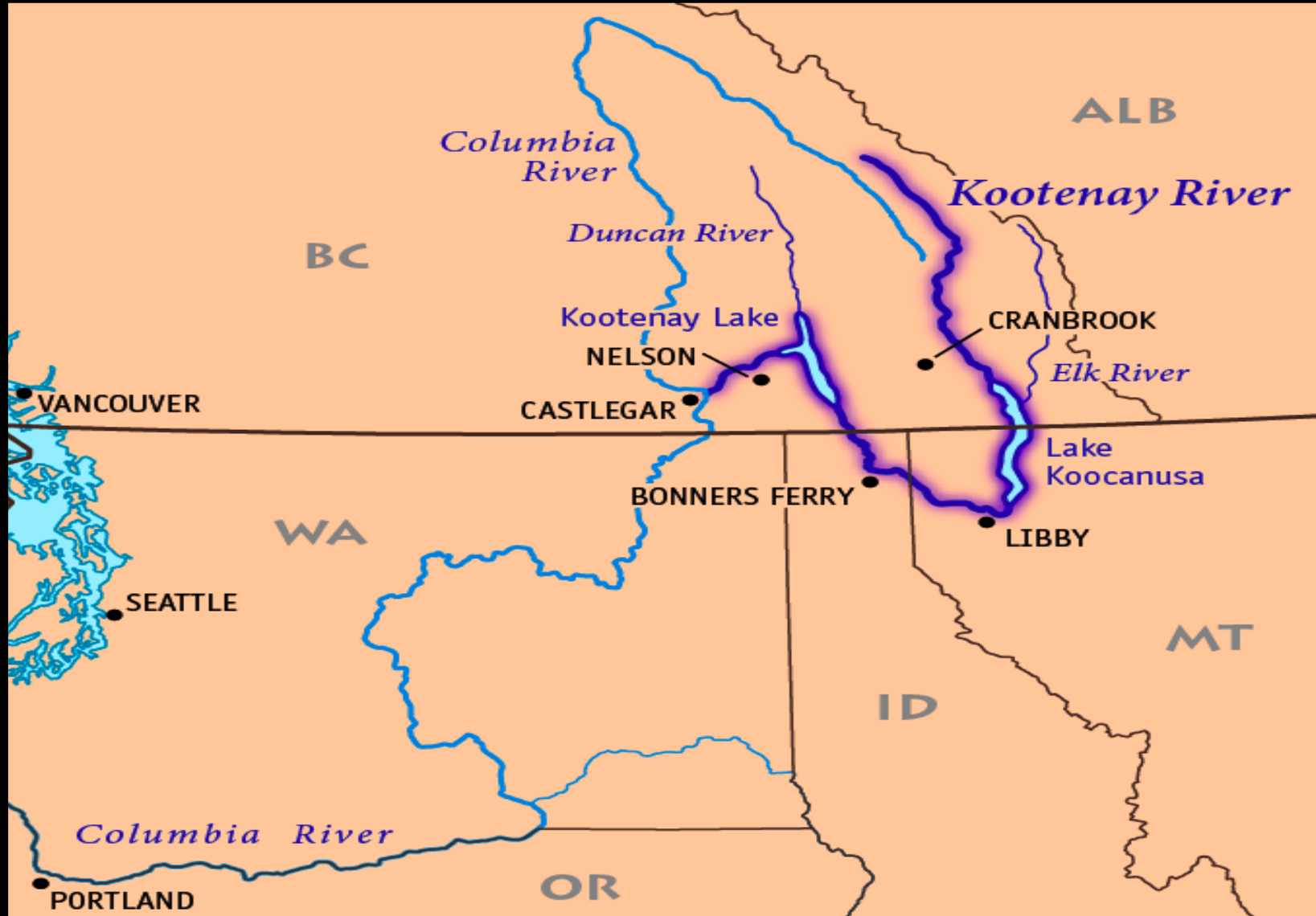


Where are we today...

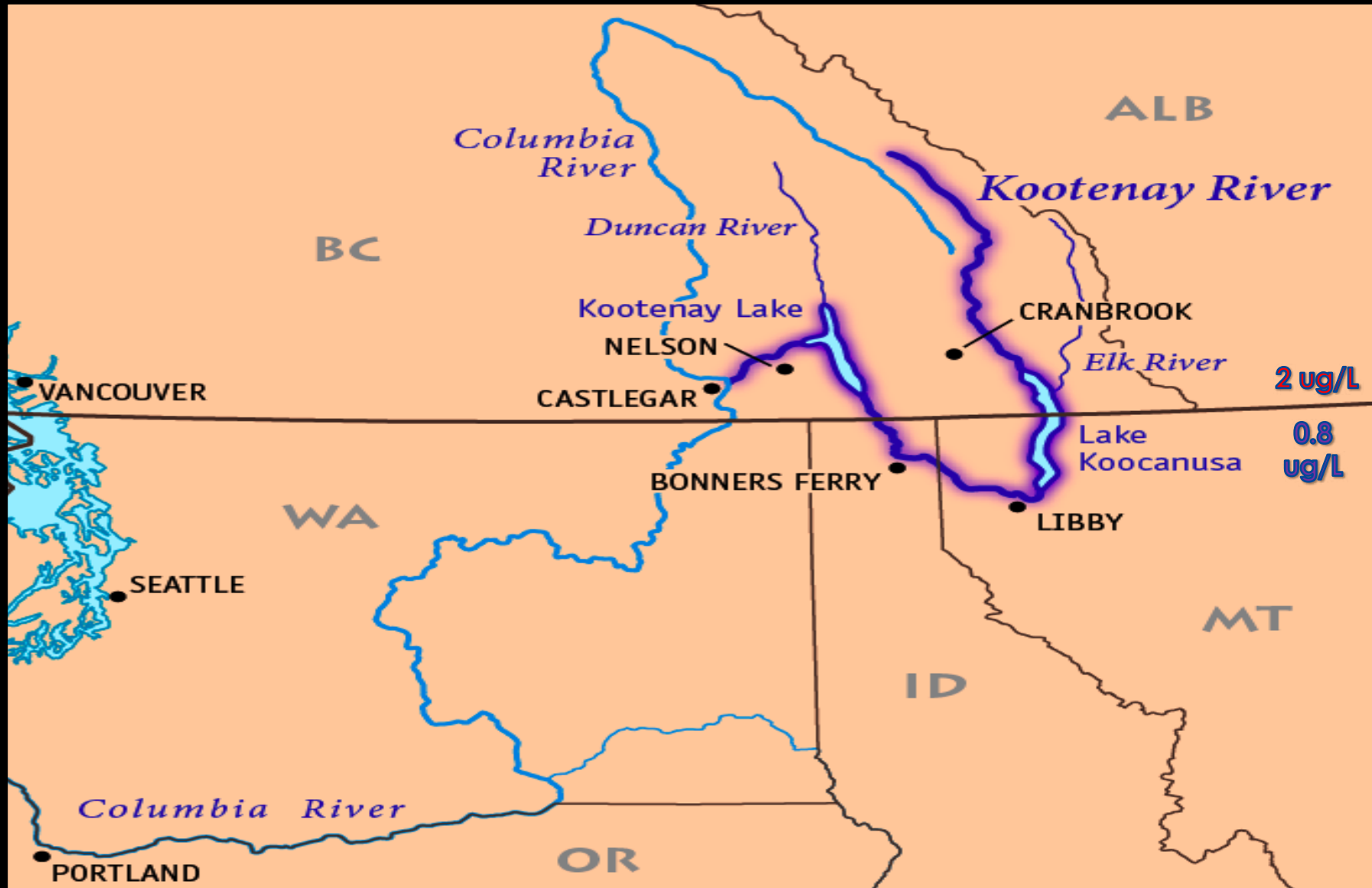
*The Boundary Waters Treaty of 1909 is being
violated in the Kootenai Watershed*



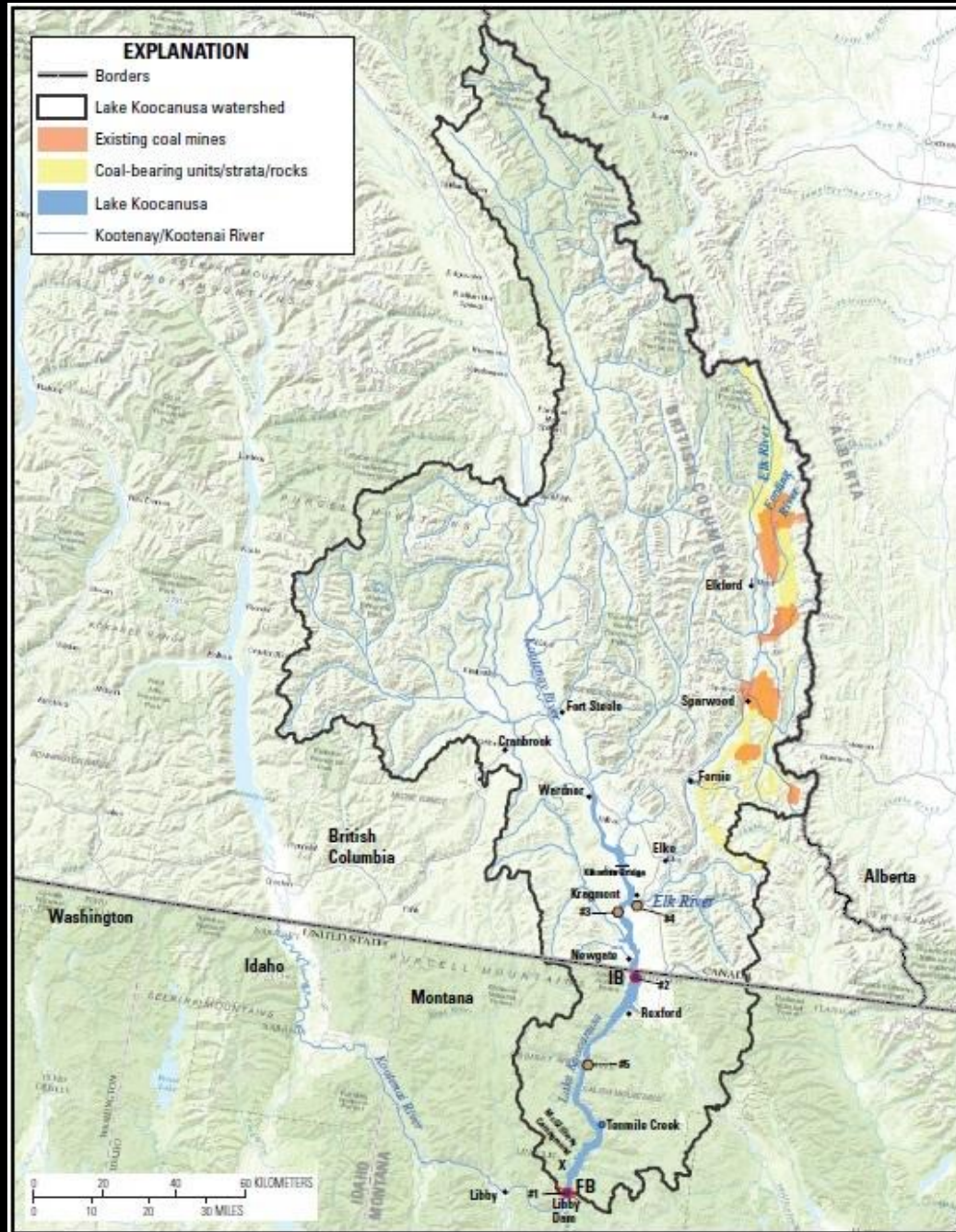
Mine contaminants transported hundreds of km down river into US and Tribal Territory – reaching the Columbia River in B.C.



Koocanusa - one water body –
two different water quality standards;

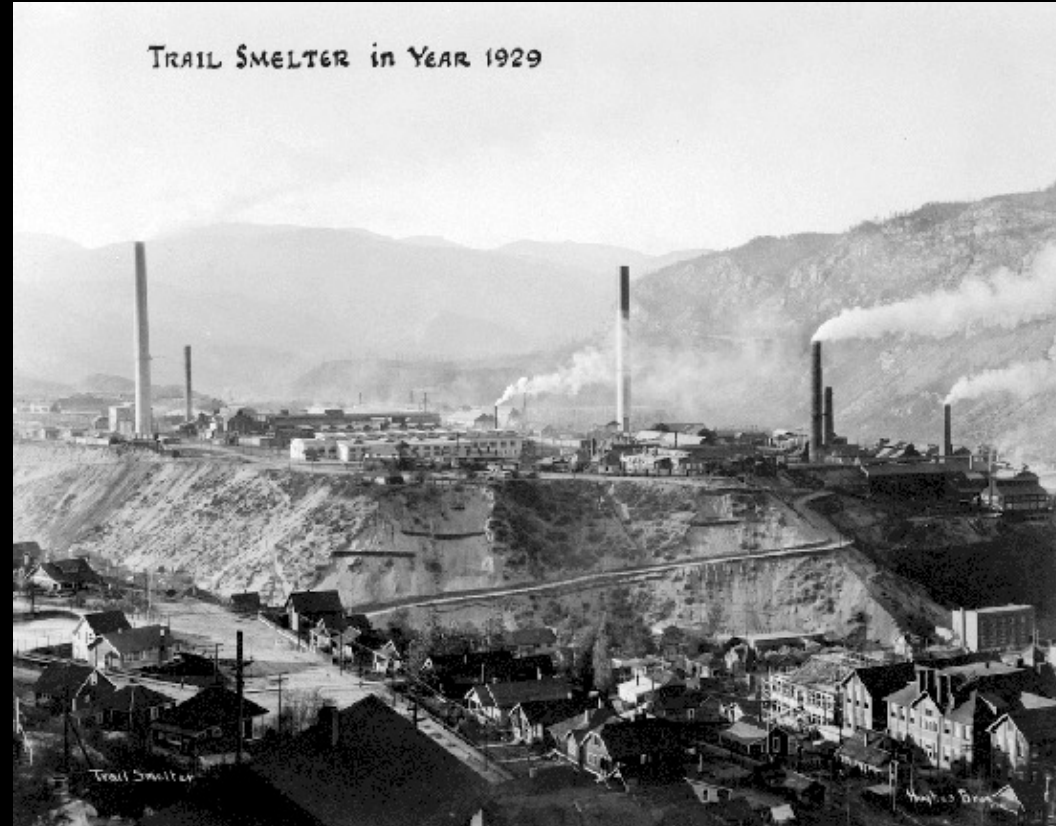


Need: Inclusive Governance and Decision-making



- 8 governments
- Impacted governments are outside of the decision-making process
- Permitting and regulation lacks downstream consideration

*Seeking long-term accountability for damages in the
Kootenai River system*



Canadian mining company to pay
Confederated Colville Tribes for damages to
tribal lands



Exporting lessons learned across important transboundary rivers in North America

Canada's mines pose transboundary risks

Erin K. Sexton^{1*}, Christopher J. Sergeant^{1,2}, Jonathan W. Moore³, Alana R. Westwood⁴, David M. Chambers⁵, Megan V. McPhee⁷, Sonia A. Nagorski⁶, Sarah L. O'Neal⁷, Jill Weitz⁸, Adrienne Berchtold⁹, Marissa Capito¹⁰, Christopher A. Frissell¹¹, Jennifer Hamblen¹², F. Richard Hauer¹, Leslie A. Jones¹³, Greg Knox⁹, Randal Macnair¹⁴, Rachel L. Malison¹, Vicki Marlatt⁹, Jennifer McIntyre¹⁵,

Nikki Skuce¹⁷, Diane C. White¹

¹Flathead Lake Biological Station, University of Montana, Polson, MT 59860, USA. ²College of Fisheries and Ocean Sciences, University of Alaska Fairbanks, Juneau, AK 99801, USA. ³Earth2Ocean Research Group, Simon Fraser University, Burnaby, BC V5A 1S6, Canada. ⁴Mitacs Canadian Science Policy Fellow, Ottawa, ON K1P5A9, Canada. ⁵Center for Science in Public Participation, Bozeman, MT 59715, USA. ⁶Environmental Science and Geography Programs, University of Alaska Southeast, Juneau, AK 99801, USA. ⁷School of Aquatic and Fishery Sciences, University of Washington, Seattle, WA 98105, USA. ⁸Salmon Beyond Borders, Juneau, AK 99801, USA. ⁹SkeenaWild Conservation Trust, Terrace, BC V8G 1M9, Canada. ¹⁰Juneau, AK 99801, USA. ¹¹Frissell and Raven Hydrobiological and Landscape Sciences LLC, Polson, MT 59860, USA. ¹²Takshanuk Watershed Council, Haines, AK 99827, USA. ¹³Alaska Center for Conservation Science, University of Alaska, Anchorage, Anchorage, AK 99508, USA. ¹⁴Wildsight, Kimberley, BC V1A 1Z6, Canada. ¹⁵Department of Biological Sciences, Simon Fraser University, BC V5A 1S6 Canada. ¹⁶School of the Environment, Puyallup Research and Extension Center, Washington State University, WA 98371, USA. ¹⁷Northern Confluence Initiative, Smithers, BC V0J 2N0, Canada.

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LETTERS



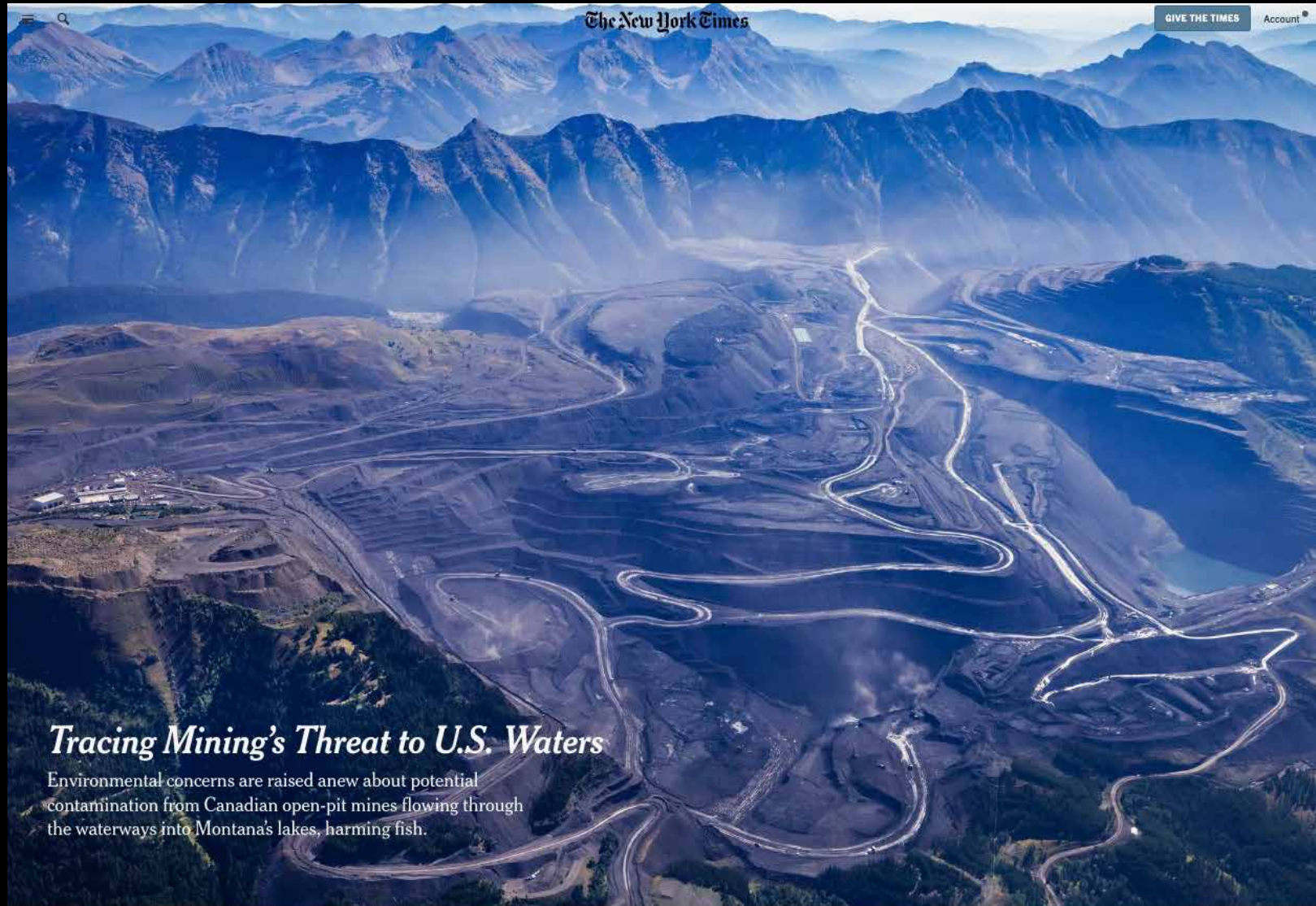
Insufficiently regulated contamination from the Elk Valley mines in British Columbia, Canada, threatens downstream ecosystems in both Canada and the United States.

Since **2012**; The transboundary Ktunaxa Nation has requested a Reference to the International Joint Commission (IJC)



- **Accountability** for legacy damages
- **Cumulative** rather than piece-meal assessment of mines and impacts
- **Wholistic** watershed-scale approach led by the Indigenous governments
- **Inclusivity** for all impacted governments

President Biden and Premier Trudeau commit to a solution in partnership with the transboundary Ktunaxa Nation by Summer, 2023

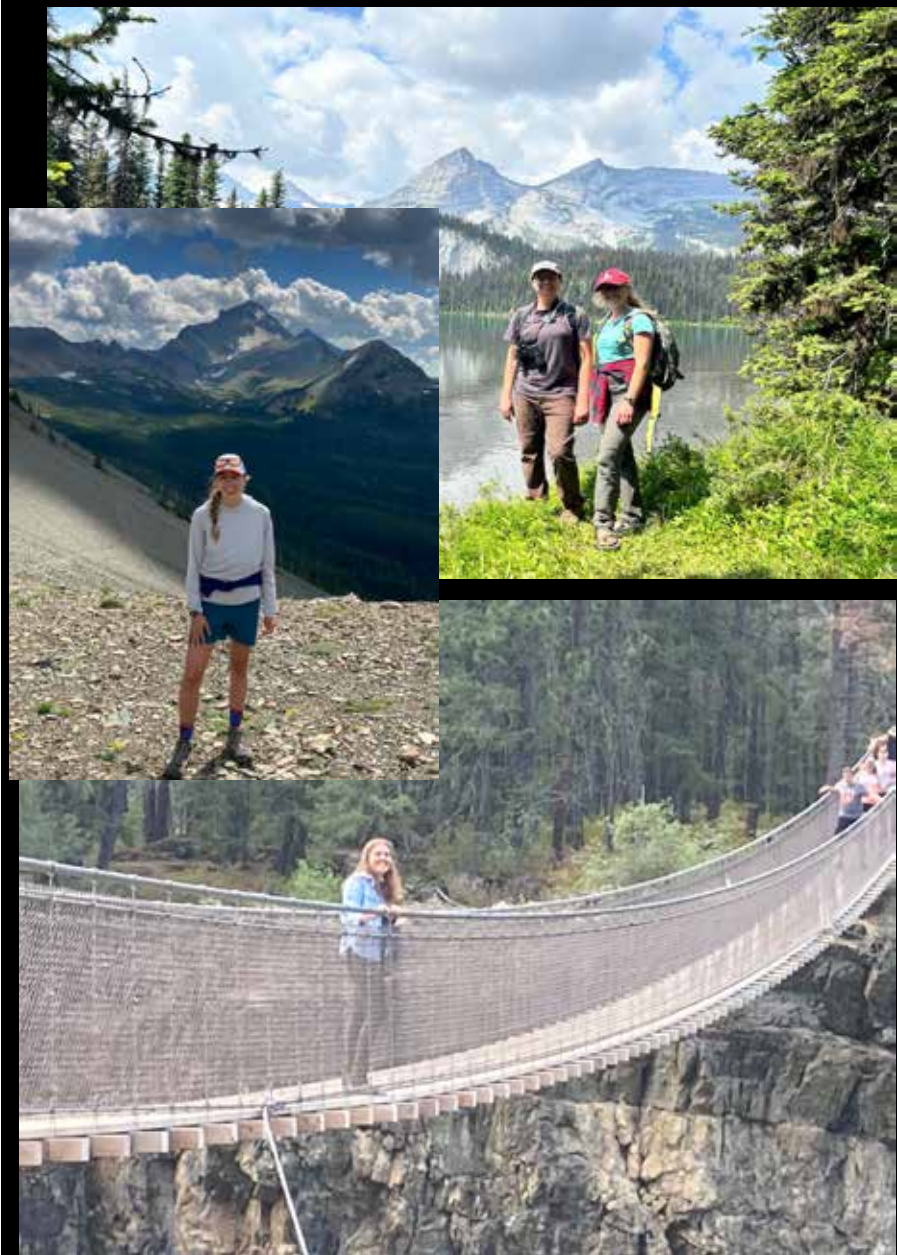


Tracing Mining's Threat to U.S. Waters

Environmental concerns are raised anew about potential contamination from Canadian open-pit mines flowing through the waterways into Montana's lakes, harming fish.

Jim Robbins, New York Times, July 11 2023

UM School of Law, Transboundary Science and Policy Internship



Law Internship Flathead Lake Biological Station



Spend the Summer at Flathead Lake !

This internship is designed to provide a **UM law student** with on-the-ground experience with environmental policy issues in the Flathead Basin, and the greater transboundary region. Work with FLBS personnel to tangibly link science with environmental policy and law while living and working on the shores of beautiful Flathead Lake.

The intern will learn how scientific data informs policy and management, while having the opportunity to contribute legal expertise and capacity to regional environmental issues. Relevant laws and treaties include, the Clean Water Act, Clean Air Act, Endangered Species Act, National Environmental Policy Act, Superfund Law, Boundary Waters Treaty and International Migratory Bird Treaty.

When: June 19-August 11, 2023

Where: Flathead Lake Biological Station

Compensation: \$10.00 per hour plus room and board (valued at \$2600).

Applications accepted through 2/17/23

- ▶ Contact Erin Sexton for more information or to apply: erin.sexton@flbs.umt.edu
- ▶ Visit our website for more information: <http://flbs.umt.edu/urls/si>



**FLATHEAD LAKE
BIO STATION**
UNIVERSITY OF MONTANA



Thank you very much!

Erin K Sexton
Senior Scientist
University of Montana,
Flathead Lake Biological Station
K Sexton



40th Public Land Law Conference

October 26-27, 2023

Gathering Wisdom:
Building on 40 Years of Public Land Discourse

Ada Montague Stepleton

Staff Attorney, Native American Rights Fund

The Evolution of Water: Imagining a New Future for Aquatic Ecosystems



An Unexpected Ecosystem Ally:
State Recognition
of
Federal Reserved
Indian Water Rights

"Bull Trout" Joel Sartore/ National Geographic & Wade Fredenberg/ USFWS

What will be covered in the next 15 minutes:

Why is this important?

- Better understand U.S. water policy

What are federal reserved Indian water rights?

- *Winters v. U.S.*, 207 U.S. 564 (1908)

How can states recognize these water rights?

- Montana Compact Commission

CSKT Compact

- Stevens Treaty & In-Stream Flows

What kind of ecosystem benefits resulted?

- The Milltown Water Rights

Why is this important?



Missoula, Montana
Hells Gate Canyon
Artist: Unknown
Source: Montana State University Index, Indian Peoples of the Northern Great Plains
Date: c. 1860

Why is this important?

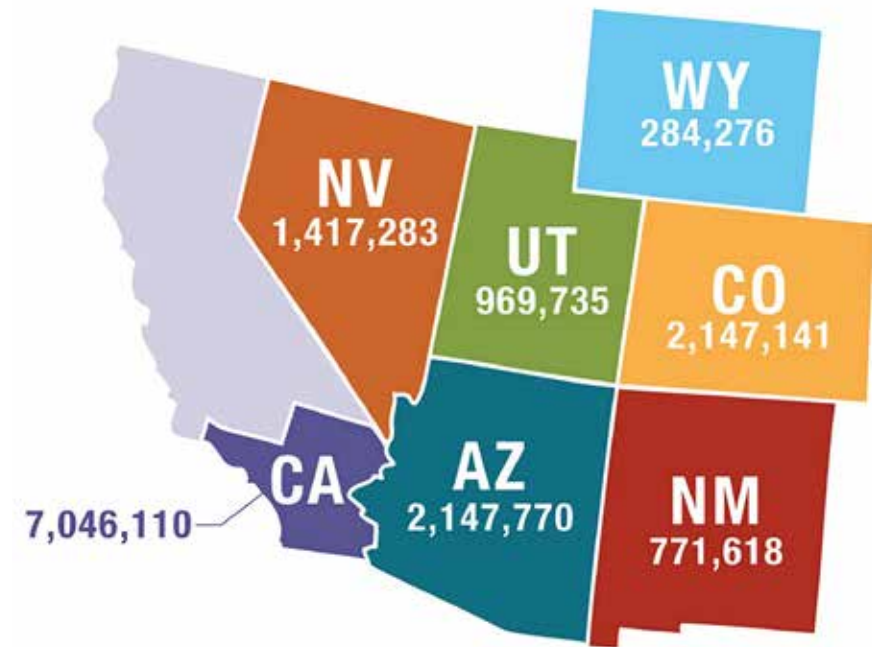
The recent Supreme Court decision in *U.S. v. Navajo* highlights the important role states play in enforcing and managing federal reserved Indian water rights.

Last week [The High Country News](#) reported on documents filed by various states in the 1950s in anticipation of *Arizona v. California*, which adjudicated water right claims to the mainstem of the Colorado River.

The documents show the states involved in the case blatantly sought to downplay and exclude the federal reserved Indian water rights at issue in the basin.

Today, over appropriation of the Colorado River is one of the crises of our generation, especially considering impacts from climate change.

OVER 16 MILLION JOBS
IN THE BASIN REGION RELY ON THE AVAILABILITY
— OF COLORADO RIVER WATER EACH YEAR —



* Seven California counties that receive Colorado River water: Imperial, Los Angeles, Orange, Riverside, San Bernardino, San Diego, and Ventura

CLASS OF SERVICE
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See

WESTERN UNION

W. P. MARSHALL, President

1953 DEC 9 AM 8 27

The filing time shown in the date line on telegrams and day letters is STANDARD TIME at point of origin. Time of receipt is ESTABLISHED TIME at point of destination.

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RAY KILLIAN, ARIZONA INTERSTATE STREAM COMMISSION

HEARD BLDG PHOENIX ARIZ=

GOVERNMENT PETITION REFILED WITH COURT YESTERDAY
OBJECTIONAL PARAGRAPH REGARDING INDIANS DELETED=
HOYT IRVING=

Reproduced with permission from the High Country News. Anna V. Smith and Mark Olalde, "States opposed Tribes' access to the Colorado River 70 years ago. History is repeating itself." Oct. 17, 2023 (https://drive.google.com/file/d/1N0yAh12moHpV4FL3xMUcWWZnAlsZMoxz/view?usp=share_link).

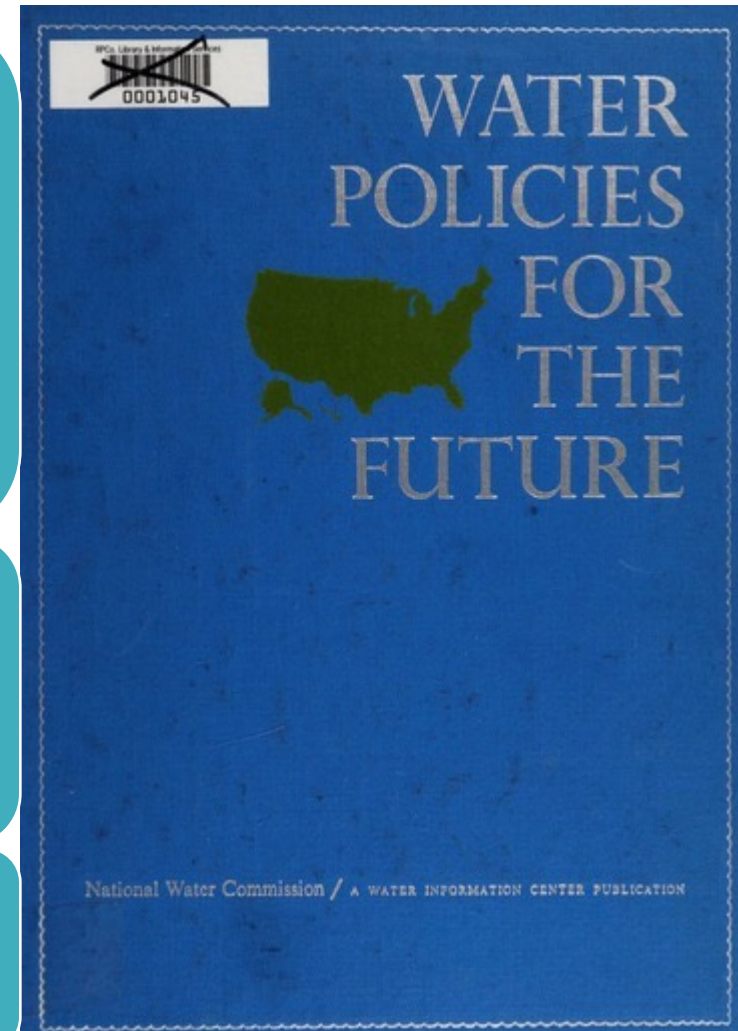
Why is this important?

“... Congress has not enacted overarching water policy legislation since the 1965 Water Resources Planning Act. Instead, water policy has largely evolved through executive and judicial actions, in many cases in response to piecemeal legislation.”

– CRS Report, “Thirty-Five Years of Water Policy: The 1973 National Water Commission and Present Challenges” (May 11, 2009).

The 1973 National Water Commission report, “Water Policies for the Future” recommended states create a process by which federal reserved Indian water rights could be recognized.

To date, only one state has formally followed that direction: Montana



What are federal reserved Indian water rights?

Winters v. U.S. – created the doctrine of implied federally reserved Indian water rights, an inferred necessity based on treaty terms that guaranteed tribes reserved land for a permanent homeland.

For 115 years the Judiciary, Congress and the Executive have all repeatedly and expressly reaffirmed the Winters Doctrine.



Supreme Court Justice, Joseph McKenna, c. 1924
National Photo Company Collection/Library of Congress,
Washington, D.C. (Digital File Number: LC-DIG-npcc-26406)

In the 115 years since *Winters v. United States*, the Doctrine solidified into an integral part of the fabric that makes up Western water management. The *Winters* Doctrine forms the basis for extensive adjudication and settlement of claims by Tribal Nations to water rights. Today, millions of tribal and non-tribal citizens benefit from the certainty provided by the *Winters* Doctrine.

Excerpt from Br. of Tribal Nations and Indian Organizations as *Amici Curiae* in Support of the Navajo Nation, STATE OF ARIZONA, et al., Petitioners, v. Navajo NATION, et al., Respondents; Department of the Interior, et al., Petitioners, v. Navajo Nation, et al., Respondents., 2023 WL 1967314 (U.S.).

Montana Compact Commission

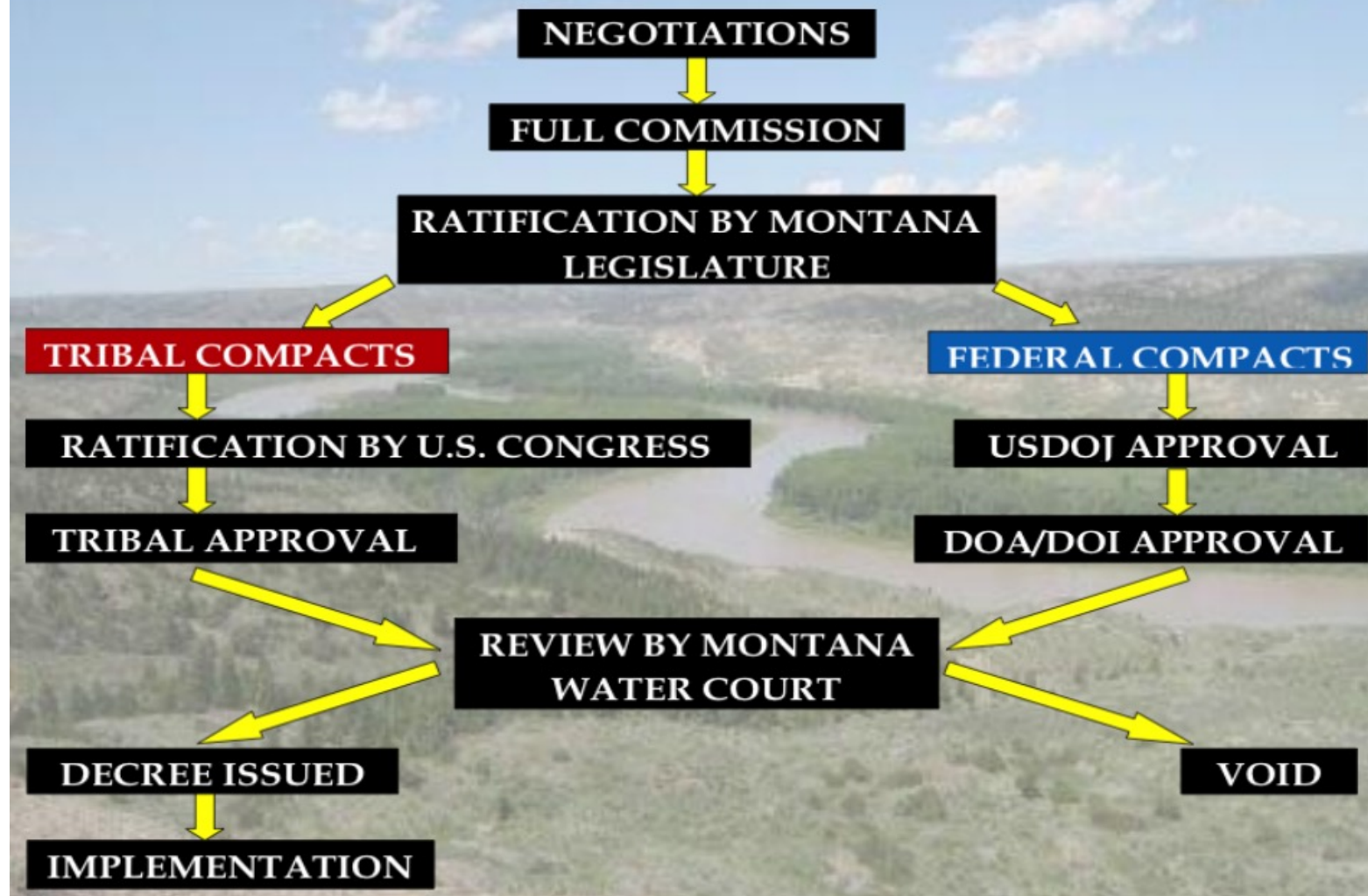
- McCarren Amendment in 1952: States given the power to adjudicate federal water rights in addition to state-based rights, including federal reserved Indian water rights.
- Basin-wide adjudications: Including federal reserved Indian water rights extends the time for final decrees by many decades and offers little in terms of solutions or progress.
- Negotiation & Settlement: Offers better results.
- SB 76 in 1973: Montana simultaneously creates the Montana Water Court and the Montana Reserved Water Right Compact Commission.

Further Reading - DNRC Story Map on the Compact Commission:
<https://mtdnrc.maps.arcgis.com/apps/MapJournal/index.html?appid=63c5e165d5e34681a3cc3b7a615ab442>



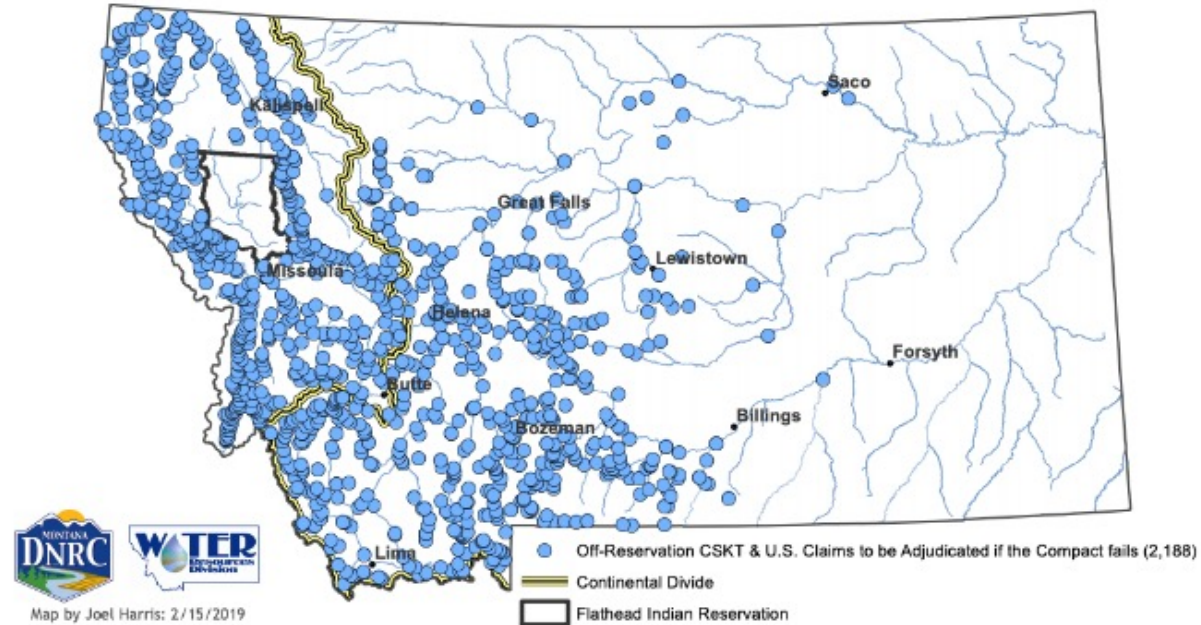
Chris Tweeten, Chair of the Reserved Water Right Compact Commission, fields questions in Polson on the CSKT Water Rights Compact. Source: Valley Journal, Berl Tiskus, “Water rights teams answer questions, field comments” (Dec. 5, 2012).

The Compact Process



Source: Montana Compact Commission Presentation to the Montana Legislature, Environmental Quality Council (EQC) (May 3, 2012) (available at: <https://leg.mt.gov/content/committees/interim/2011-2012/EQC/minutes/May-3-2012/Exhibit07.pdf>).

CSKT Compact



Off-reservation water claims made by CSKT, on hold pending approval of the CSKT-Montana Compact. Credit: Adapted from Montana DNRC

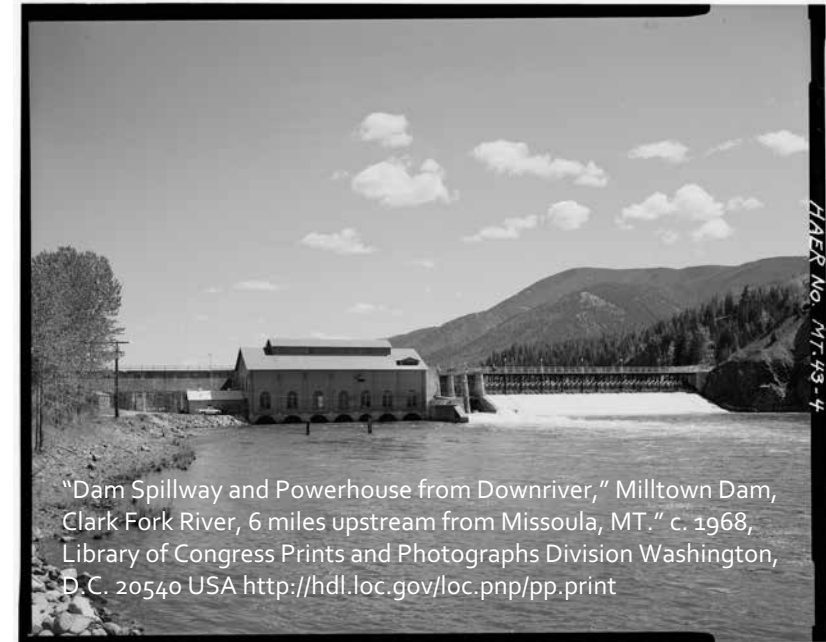
Source: John S. Adams, "Daines Says he'll introduce new agreement to settle CSKT water dispute," Montana Free Press (Dec. 5, 2019) (<https://montanafreepress.org/2019/12/05/daines-says-hell-carry-cskt-water-compact-bill-in-congress/>).

Further Listening - Brian Khan, Common Ground, "Melissa Hornbein On The Challenges Of Negotiating The Flathead Water Rights Compact," Montana Public Radio (July 13, 2015): <https://www.mtpr.org/arts-culture/2015-07-13/melissa-hornbein-on-the-challenges-of-negotiating-the-flathead-water-rights-compact>

The Milltown Water Rights

- Dam was slated for removal in 2010 after 100 years in existence as part of its Superfund site designation.
- The removal left the associated instream flow water right available.
- Through the negotiations, an opportunity was identified for Montana, through Fish, Wildlife, and Parks (FWP), to jointly hold the water rights along side the CSKT.
- The original water right was split into “two separate active and enforceable water rights” and the purpose changed to “support the maintenance and enhancement of fish habitat.” MCA, 85-20-1901(Art. III.D.5).
- The Compact includes two enforceable hydrographs that allow for these rights to be called by both the CSKT and FWP.
- Enforcement of the water rights is deferred until April 24, 2025.
- During the deferral period the CSKT and FWP must engage in drought planning and the exercise of water rights.
- Several listening sessions were held two years ago and since then the CSKT and Montana have been working to develop an Implementation Plan.

Further Reading - Clark Fork Coalition, “Clark Fork/Blackfoot Confluence”
<https://clarkfork.org/our-work/what-we-do/restore-the-best/confluence/>



“Dam Spillway and Powerhouse from Downriver,” Milltown Dam, Clark Fork River, 6 miles upstream from Missoula, MT.” c. 1968, Library of Congress Prints and Photographs Division Washington, D.C. 20540 USA <http://hdl.loc.gov/loc.pnp/pp.print>



The Upper Clark Fork River Basin Steering Committee, “Upper Clark Fork River Flow Story” (August 2006).

Ecosystem Benefits

- 2,000 cfs now available for instream fishery habitat with a priority date of December 11, 1904.
- “We looked only at August flows and identified days where the river flows were below the trigger for the instream water right for **ten consecutive days** and found that this call scenario was met in **five of ten years in the Blackfoot** and in **three of ten years in the Clark Fork.**” FWP “About the Milltown Water Right”

Further Reading – FWP & CSKT, “About the Milltown Water Right”

<https://dnrc.mt.gov/docs/water/Compacts/Milltown-Instream-Facts-2019-03-28.pdf> (March 28, 2019).

	From	To
Water right number	76M 94404-00	Clark Fork: 76M 94404-01 Blackfoot: 76M 94404-02
Priority Date	December 11, 1904	December 11, 1904
Purpose	Hydropower generation	Instream fishery habitat
Minimum flow rate	2,000 cubic feet/second (cfs)	Clark Fork: 500 cfs Blackfoot: 700 cfs
Maximum flow rate	2,000 cfs	Clark Fork: 833 cfs Blackfoot: 1,167 cfs
Initiation of call	Flow falls below 2,000 cfs	Flow falls below daily enforceable flow rate during 4 out of 5 consecutive days
Termination of call	Flow rises above 2,000 cfs	Flow rises above daily enforceable rates during 2 out of 5 consecutive days
Water uses susceptible to call	Any water use junior to Dec 11, 1904	Surface water irrigation and groundwater irrigation over 100 gallons/minute junior to Dec 11, 1904 Any purposed water use junior to April 24, 2015

Source: FWP Presentation, Stephen Begley, Water Conservation/Instream Flow Specialist, FWP, Upper Clark Fork Working Group, “Instream Flow Objectives and Opportunities in the Upper Clark Fork” (Jan. 14, 2021).



Grant-Kohrs National Historic Site



“Bull Trout” Joel Sartore/ National Geographic & Wade Fredenberg/ USFWS

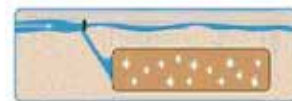
Ecosystem Benefits

- The Upper Clark Fork restoration after the legacy of mining and smelting waste will benefit from the additional flows made available by the Milltown right conversion.
- A 500-year flood the year after the Milltown dam was built in 1908 washed approximately 100 billion kilograms of heavy metal toxic wastes, laced with cadmium, arsenic, copper, lead, and zinc, which has impacted water quality ever since.
- “Due to this contamination, the mainstem of the Upper Clark Fork River (above the confluence with Rock Creek) was **devoid of fish life from the 1890s to the late 1950s.**”
 - Michael Howell, “Upper Clark Fork recovery a very slow process,” Bitterroot Star (Jan. 25, 2023).
- According to the Montana Natural Resources Damages Program (NRDP), flow restoration is the main solution.
- **Split season leasing** is allowing flows to be made available during warm temperature times of the year, but funding is needed to support these unique leases.

Further Reading – Casey Hackathorn, William H. McDowell, “Restoring Migratory Native Trout in the Upper Clark Fork River,” 2015 Clark Fork Symposium (<https://scholarworks.umt.edu/clarkforksymposium/2015/techtalks1/2/>).



During Split Season Instream Lease:



April through June

During Split Season Instream Lease:



July through September

After Split Season Instream Lease:



October through March -
No longer irrigation season

Thanks!

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https://scholarworks.umt.edu/faculty_lawreviews/206

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- Ada Montague Stepleton, Staff Attorney, Native American Rights Fund,
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