



Winter 2008 - 2009

# The Key

*Unlocking access to public lands & waters*

Published by the Public Land \ Water Access Association

## **New name and logo bolster identity of a growing public access group**

Our organization has been known for years as the PLAAI, Public Lands Access Association, Inc. Happily, the past few years have shown great growth and change in our group and our mission. In addition to land battles, we've taken on the challenges of access to public waters with a deep commitment.

Recognizing that our work had outgrown our name we added a W for water to our name and became the Public Land / Water Access Association. Since this didn't match up with the PLAAI nickname, we recently adopted the PLWA abbreviation as our new nickname.

Most recently, since the last issue of this newsletter was sent, we've adopted a new logo to identify PLWA on all our communications. The new logo now appears on the banner atop this newsletter.

Our thanks to PLWA member Karl Schwartz of Billings for donating his professional services (His company is Toasty Designs of Billings and Bozeman.) We believe our new name and logo gives us much room for growth for many years to come - well past the time that we unlock the last closed public road and gain access to the last public waterway.

## **Recent court victories crown years of battle to gain stream access**

Back-to-Back state court victories by public access advocates highlight the news of 2008. In Madison County a district judge sided with PLWA in a bridge access lawsuit. Later, the State Supreme Court ruled in favor of public access in the Mitchell Slough dispute in Ravalli County.

### **RUBY RIVER**

The public has the right to get to rivers from county bridges ruled State District Judge Loren Tucker. But he also determined that landowners can attach fences to bridges in a split decision on the 4-year-old Ruby River access lawsuit filed by the nonprofit Public Lands Access Association (PLWA) against Madison County.

Judge Tucker said that county road rights of way remain 60 feet wide across rivers. That means the public can use bridges to get to public waters under Montana's stream access law.

Atlanta media tycoon James C. Kennedy, an intervener in the case as a Ruby River landowner, had argued that county rights of way 'hourglass' - narrow down to the actual bridge surface. He contended that the land below the bridges is private property and therefore the public is trespassing when it crosses fences built up to a bridge.

Tucker soundly rejected that argument.

"His implicit argument is that a county road may not be utilized in the vicinity of water," Tucker said. "That argument is unsupported by authority or by logic."

John Gibson, PLWA president, called the decision a major victory for Montanans.

"It destroys some of the arguments that these people have made regarding the width of the right of way," he said. "The judge has definitely proven that access to the stream is a legal activity."

### **MITCHELL SLOUGH**

In a unanimous decision Nov 17 the Montana Supreme Court decided the Mitchell Slough is open to recreation under the state's stream access law. The court ruled the 16-mile long slough/side channel roughly followed the century old historic course of a waterway and therefore was subject to public access and permitting like other natural waterways.

Local ag interests and residents of an affluent subdivision which was crossed by the side channel, had closed access, claiming the slough was essentially a ditch belonging to them. They claimed their improvements on the ditch changed the nature of it to

**(Continued on Page Two)**

## Court Victories (Continued from Page 1)

the point that it was not subject to stream access law. The plaintiff Bitterroot River Protection Association argued that the "slough" was, and remains, a natural side channel of the Bitterroot branching from and returning to the main stem of the river. Montana FWP joined in the suit and argued that if landowners could manipulate waterways, they then could get them declared "not natural" and subsequently declared private property.

The decision overturned two earlier rulings by state district courts that ruled the slough was not a "natural, perennial-flowing stream." If these decisions had not been overturned, the implications for stream access could be very dangerous. They could easily be used to bar public access to many portions of Montana river and streams.

While PLWA was not directly involved in the litigation, PLWA supported the plaintiff Bitterroot River Protection Association both financially and with the sharing of information.

### *President's Message.....*

## STATE LEGISLATURE KEY TO WINNING THE PUBLIC ACCESS WAR

### From John Gibson

We have won two very decisive legal victories in the last few months. These decisions have helped to clear up the stream access picture. With the District Court decision on the Ruby River followed by the Supreme Court opinion on Mitchell Slough recreation water users are in a far better shape than we were before.

But it is not over yet! The State Legislature has the power to undo our gains.

As I write, FOUR BILLS have been drafted by state legislators to deal with stream access at bridges on county roads. You can bet they are not all favorable to fishermen and boaters.

As I look at the makeup of legislative committees it's a mixed bag. In the State House the Chairman is a real advocate for public access. The remainder of the committee, however, contains many of the same names of those who worked hard to defeat SB 78 during the last legislative session. There are also new members who's views are not known and we are missing some strong supporters who have moved to other committees.

The District Court Judge stated that fences on the easement and tied to the bridge railing were not encroachments as long as they have been authorized by the County Commissioners. Keep in mind, however, that many of these fences were authorized before the Commissioners were aware of the legal decision that the

public could access the stream along the entire 60 foot wide easement.

There are statutes on the books that define a legal fence in Montana. MCA-1999, 81-4-101 defines the maximum height of a legal fence to be between 44 and 48 inches. It would seem doubtful that county commissioners would authorize illegal fences at bridges since, with their authorization, the liability has shifted to them.

Many bridges still bear orange paint and signs to prohibit access within the 60 foot county road easement: No question that these holdovers have to go.

And of course there is the monster lurking behind the curtain... the 20 to 25 percent of the well-traveled and county-maintained roads out there that have never been accepted as formal county roads. Their status is unknown. Likely, there is a prescriptive easement on many of these roads but the easement width and other conditions are unknown. The average Montanan cannot tell a petitioned county road from one of these non-status roads.

Something has to be done about the many miles of roads in this category. There are lawyers who are making a career of challenging public use of these roads. Montana citizens are being shut out of access to public land and water.

If there is one thing we need to tell our legislators it should be that this mess must be cleaned up.

### ANNUAL RAFFLE A HUGE SUCCESS

Our annual raffle to raise funds was another huge success! We offered a rifle, painting, book of photography and a fishing pole as prizes and received an enormous response. Tickets were mailed from North Carolina, Connecticut, Indiana, California and many other states. This shows how our web page is being used. All of the prizes were donated except the rifle for which we paid \$500. The total income was \$3,575 minus the \$500 for the rifle. -- **Bernard Lea, Treasurer**

## **Terry community outraged over Scenic View Road closure**

Prairie County commissioners are in a quandary about what to do after a landowner erected a gate, installed a cattle guard and posted a sign across a road that leads to a popular scenic overlook northwest of the town of Terry. In dispute is whether a legal public right-of-way exists across the private property to reach the overlook. (As of October 2008, we understand the gate is now locked.) PLWA has been exchanging information with interested parties, but has taken no action on this issue while waiting to see if local mediation efforts are successful.

According to Kay Braddock, editor of The Terry Tribune, Scenic view road was built in 1965 with public funds for the specific purpose of allowing residents and

tourists an opportunity to view the outlook area which rests on about 26 sections of public lands. A former road leading to the outlook area was not as accessible or as in as good condition. Scenic View Outlook is advertised in Custer Country, birding maps and other various tourist pamphlets throughout the state.

The Terry community is showing strong support for opening the road. A Terry citizen by the name of Joe Johnson, gathered over 200 signatures on a petition from county residents who opposed this gate. He did this in less than two weeks, alone, before a commission meeting addressing the issue – over 60 residents attended this meeting. The County Commission now has this petition.

## **Access to State Land Northwest of Billings Opened After Long Fight**

By law, state lands are open to recreational public access unless very special safety issues dictate otherwise. Two sections near Billings, however, had been closed by the local State DNRC Office for nearly 20 years without a clear relationship between the closure and safety issues. DNRC Area Office Manager, Dick Moore, decided this summer to open the sections to the public with specific restrictions.

Hunting will be restricted to ‘archery only’ because of the close proximity to Indian Cliffs and Lone Eagle Subdivisions. Both sections are bisected by Highway 3. Section 8 is bounded on the north by Alkali Creek Road.

Section 20 lies north of the Indian Cliffs Subdivision. The land consists mostly of grassland, sage, pine trees and sandstone formations populated by a variety of wildlife.

The original land closure apparently came about when leasees of the land obtained a total closure to the public on both section in their original leases. The leasees also later succeeded in defeating an attempt by public citizens to open the land in the mid-1990s. PLWA suspects that significant political pressure had been brought to keep these state sections off limits to the public.

### **Boadle Road Update**

## **PLWA Engaged in Court-Ordered Arbitration Aimed At Settling Dispute**

As this newsletter is going to press PLWA is participating in court-ordered arbitration to seek a negotiated settlement for access over the Boadle Road in Teton County. PLWA President John Gibson said arbitration may or may not produce any results but the district judge has made it a mandatory part of the litigation process.

Boadle Road leads to Pishkin Reservoir, a State Wildlife Management Area, and other public lands beyond. It has been illegally locked off by a private party claiming ownership. PLWA brought suit in 2003 based on testimony that gas tax money had been used for public maintenance of the road and that it had been used by the public continuously for many years. PLWA won a court decision to get the road open. Later however, the landowner again blocked the road at another location not covered by the court decision. A subsequent District Court ruling contended that PLWA did not have standing at the second blocking.

PLWA appealed that decision to the Montana Supreme Court in early 2008. The Supreme Court ruled that PLWA has standing and sent the case back to district court. That court then ordered compulsory arbitration before setting a trial date.

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## BECOME AN ACCESS ADVOCATE

PLWA is an all-volunteer force; we have no paid staff. The work of PLWA involves many hours of volunteer effort including inspecting access problems in the field, researching public records, meeting with government officials and a variety of other tasks.

Often, it becomes necessary to obtain the services of professionals to investigate and pursue legal remedies. This can incur considerable expense. All too often, lack of finances becomes an overriding factor in deciding the extent to which a case will be pursued.

We need your help. You can make a donation in addition to your membership dues and become an 'Access Advocate.' In addition, you may have a business, or know of a business, that believes in the PLWA mission and wants to make us part of their giving program.

Professionals who want to donate a needed service can make in-kind donations.

PLWA qualifies as a tax-exempt organization under Section 501 (c) (3) of the U.S. Tax Code and thus is a public charity. Contributions are deductible under section 170 of the tax code. The IRS determination for PLWA is on file and is available for inspection by you or your accountant.

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## YEAR END DONATIONS

If you are considering year end tax deductible donations strike a blow for public access by giving to PLWA. Where else can you get a better return investment for the future than PLWA. We are the only private organization who bears the financial burden of maintaining public access to our land and streams. We are a 501(c) 3 tax deductible organization

Go to [www.plwa.org](http://www.plwa.org) or write to our address above to make things happen.

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## EMAIL - FAST, GOOD AND CHEAP

E-mails Addresses Needed.

PLWA uses email for fast, reliable communications with members. If you are not receiving our e-mails, please forward your email address to [pwla.membership.com](mailto:pwla.membership.com). Also, you will soon have the option of receiving this newsletter by email rather than snail mail – another reason to sign up for our email list now.