OUR VANISHING ROADS
by Perry Nelson

EDITOR'S NOTE: The following article was written by Perry Nelson who is a member of the Public Lands Access Association. The opinions expressed are those of Mr. Nelson and do not necessarily represent the opinions of the Montana Game Warden Association. We invite any responsible person with a contrasting viewpoint to submit an article for consideration.

In these contentious times, when many people shoot from the hip before learning the laws or facts, I doubt that any one group of people could achieve a consensus on the sun's coming up tomorrow, much less a consensus on the status of legal access to public land and the public road laws that provide our Montana landscape with all the primitive roads to the public land boundaries that are still evident today.

Before any productive discussion about public roads and access can proceed, our thinking about laws, roads, and some legal history needs to be clearly defined. Until everyone, for example, is aware that landowners and the public both have rights and can articulate them clearly, sportsmen/landowner relations will improve very little, in spite of the best efforts of the Department of Fish, Wildlife, and Parks or sportsmen's organizations.

I am a victim of my own experience with the many primitive public roads that once provided all citizens with reasonable access to public land and water. When I first signed on with the Montana Fish & Game Department, a Masters degree was required for a neophyte fish & wildlife biologist. After several years, which seemed like mostly driving a truck and opening and closing all the weird gates landowners had built on public roads, I mentioned to A.A. O’Clair, the State Fish & Game Warden (department director’s title in 1954), something about the job requirements. It seems they forgot to require a course in dealing with old trucks and weird gates. If I hadn’t grown up with cows, horses, pickups, and barbed wire; and used old harness hames, among other things, to make weird gate fasteners, I would have flunked out of the Department during my probationary period.

During probation it was also an unwritten policy that the newest employee was assigned the oldest truck.

Early on, some states required that the public right-of-ways be fenced out from any enclosed private land. Until state and interstate highway systems were developed, Montana was far too practical to require that landowners fence out the public road ROW.

When a landowner fenced in a section of land cut by a public road, two gates saved building two miles of ROW fences. While very practical at the time, it made it easy for succeeding landowners to think that the road on his land was not a public road, and that he could close the road, simply by locking the gates.

In addition to wrestling weird gates and old state trucks, I also attended more sportsmen and civic club meetings in Montana than I can remember. At first, access to public land was not usually a problem. But starting in the late 1950’s, just about all meetings included questions about access problems of one kind or another.

Access to use private land should have been self-evident, something to be worked out between the landowner and the sportsman.

However, legal public road access to the boundaries of public land and water was not so self-evident, probably because the laws that provided for the public roads of the kind now needed to access public places were long forgotten by the citizens, the landowners, and the government agencies responsible for their administration.

I wasn’t much help to the citizens in the audience either, because fish and wildlife management problems occupied all my time and attention. Worse yet, I knew nothing about public road laws. By the time I retired, many of those gates on roads to public land and water had chains and locks on them.

Locked gates first seemed to appear on the roads close to the homestead buildings. At one time, living next to a public road was considered an asset for the landowner. When I first worked for the state, I was often stopped at those gates near the home buildings, not because the landowner wanted to run me off, or block my access to public land, but because he wanted to spend some time shipping the bull with the people driving by to public land, especially after being snowed in for most of the winter.

The Public Land Access Association, Incorporated

After retirement from the state, I vowed that if I were able, and could meet up with enough citizens willing to pass through the hard knocks school of public interest activism, and research the historical laws regarding public roads, and promote their restoration, I would join with them.

That opportunity came during a public meeting called by an ad hoc group of public land users in 1984 when Gene Hawkes, a former Gallatin National Forest Supervisor, threw his $25 on a table at the Bozeman Public Library and said, “Here’s my start-up dues,” “Let’s organize a public land access group!” After more people threw their $25 on the table that night, nine of us from Bozeman, Three Forks, and Livingston signed on as the Founders and first Board of Directors of the Public Land Access Association. PLAAA was incorporated as a Montana Corporation on April 18, 1985 by the Secretary of State.

Since 1985, PLAAA has done a considerable amount of research into public road laws and the status of primitive access roads. Most of the roads I first used to get to public land and water as a state employee are still evident in Montana today. Their status as public or private roads make for a contentious issue today for many reasons, especially for recreation and the extraction of renewable natural resources from public land. Many of the roads are closed, but only closed to public use, and not to private, or commercial recreational use of the public land.

Basic to the problem, is the fact that in more recent years many private landowners, especially those with land adjoining public land or water have ignored or forgotten the law and origin of those primitive roads, and promoted the idea of sovereignty for themselves. Just as many times, state and local governments have acquiesced to the landowners closing public roads. This has happened because citizens are poorly informed about public road laws and government agencies seem to have poor institutional memories for both the laws and the status of the roads. Courts have been more favorable to the legal concept of public roads, providing of course, proper research is done ahead of time.

Meagher County Attorney, Dick Conklin in 1971 had this to say about the access problem on primitive public roads “... I find in Meagher County, hundreds of miles of County Roads ... that have
been closed by the simple expedient of stringing a gate across the road and putting a chain on it." Conklin also went on to say that, "People will constantly complain about the matter, but never come to this office to file a formal complaint. As a consequence, there is no action that I am able to take here" (Ciliberti 1974).

In just a few words County Attorney Conklin cleared away all the phony rhetoric about public roads to public places in Montana, and precisely put his finger on the problem: aggressive landowners asserting a right to close public roads, a right that is not spelled out and protected by law; poorly informed citizens; and governments with poor institutional memories. The governmental problem is most evident in, but not limited to, the counties. Counties were first made responsible for all of the primitive public roads within their boundaries by the State in 1895 (Montana Historical Society).

The Problem Today

Exactly how we got to where we are today in regard to public access to the boundaries of public land is clearly the benign neglect of both public and private rights on the part of just about everyone. I suspect that old laws and old public roads are too easily forgotten. It is easier to sweep them under the carpet than to articulate, enforce, and maintain them. In short, there is enough blame to go around for everyone.

By way of an illustration, public road laws that provide for access to public land are being ignored today like stream access laws passed in 1895 and 1933 were ignored prior to 1980. These old laws, for example, in their entirety: 85-1-111 on public ways-1895, 85-1-112 on navigable waters-1933, and 87-2-305 on Navigable waters subject to fishing rights-1933. In the Department's 1989 Centennial Edition of Statutes (Anonymous 1989) there are provisions for a citizen's right to go on the beds and banks of all streams to fish in Montana. This was also supported by former Attorney General Arnold Olsen's Opinion (25 Op. Att'y Gen. No. 114 (1954)) given to A.A. O'Clare, the State Fish & Game Warden on December 30, 1954.

It makes one wonder why citizens, in this case mostly fishing license buyers, had to keep reinventing the legal basis that allows them to fish from the bed and banks of streams in Montana?

Probably again, it was benign neglect by the government, poorly informed citizens, and certain riparian landowners promoting sovereignty for themselves that caused the Montana Coalition for Stream Access to bring suit on the access issue in the 1980's. This time, the Montana Supreme Court spoke three times supporting the citizen's right to make recreational use of the state's ("our") surface waters.

Much the same situation exists today with public road laws. Citizens are most concerned with legal access to the boundaries of lands managed by the U.S. Forest Service, the Bureau of Land Management, and the State of Montana. These three agencies together administer a total of 30.2 million acres, about 35 percent of the total land area in Montana (Anonymous 1990).

In a letter dated 1/18/89, Regional Forester John Mumma said that 2.5 million acres of National Forest land in Montana are without legal access and directed the Forest Supervisors to initiate access programs. The Bureau of Land Management estimates that 60 percent of its eight million acres in Montana lacks public access (Roederer 1989).

Public lands administered by the State of Montana are not available for public use in the same sense as federal lands because of a long standing policy and legal interpretation of law by the Montana State Land Board which allows a lessee to control state public land leased for agriculture or grazing. The Montana Coalition for Appropriate Management of State Land has challenged this policy. If the state policy were revoked, the Coalition estimates that about 20 percent of the state land, about 1.1 million acres, would still not have legal public road access.

Historical Notes

Public road rights of the kind needed to access public land have historically arisen from at least five sources in law. They include one source from federal law, commonly called R.S. 2477 Rights, and three sources in state law—county statutory dedication, common law dedication, and prescription (Sheldon 1980). In addition, road rights were often granted with many of the railroad deeds which gave a portion of the land from the federal land grants to other private landowners. The deed included public road reservations, often unrelated to state or federal laws.

These public roads are obscure today for many reasons, mostly because the more recent land transfers do not require abstracts. Additionally, many real estate sales people like to exaggerate the private landowner's control over public land, roads, water, fish, and wildlife to the potential buyer of the property. Unless a new landowner makes a point of thoroughly researching county records, he will not be aware, for example, of any public road reservations. Worse yet, county records are also so poorly organized and kept that some judges have simply thrown up their hands in frustration. Occasionally, they find that the presence of a road running through the property, to and from somewhere else, including public land, can be evidence for a public road.

The Unlawful Inclosures of Public Lands Act of 1885 (UIA) needs to also be considered in public access questions. While public road rights do not arise from the act, the UIA documents that "when persons acting individually or in concert prevent, by force or fence, complete access to public lands, the UIA is applicable." This federal law was recently used in the Red Rim Case in Wyoming, where a landowner built an antelope-proof fence on private checkerboard lands that blocked both antelope and people passage to and from public land. The lower court ruled against the landowner, who immediately appealed to the U.S. Court of Appeals for the Tenth Circuit. The case is pending (Lustig 1987).

Research by PLAAI also documents that during the homesteading and settlement of Montana, it was clearly the intent of federal, state, and county governments to establish public roads over all public domain. R.S. 2477 provided for that right-of-way over the public domain. As a result, hundreds of miles of primitive public roads were built by governments, miners, and homesteaders over the public domain. Many acres of that public domain remain as our public lands today, along with the roads to their boundaries. In general, the land management agencies have control of the roads within their boundaries, except in certain situations such as where roads were built on public domain to service patented mining claims that predate the agency.

Historical records also substantiate that Montana accepted these public roads under the federal grant offered under R.S. 2477 without formal petitions or surveys. Counties only have powers prescribed for them by the State. Early Montana statutes defined public roads (that includes trails, highways, etc.) and documented that counties, among other things, are responsible for all the public roads and bridges within their boundaries unless totally privately owned and constructed (Montana Historical Society).

While it is difficult to generalize about something as varied as the reasons for the lack of legal public access to public land today, PLAAI has determined that basically county governments, operating with little state oversight, are most responsible for the problems surrounding access to public land. Federal land management agencies have poor access to state courts where public access to federal land boundaries should be solved. As a result, when the federal agencies do decide to take action on access roads to their boundaries, they prefer condemnation to a lengthy record search and legal hassle. As a result, some public roads are paid for by the taxpayer more than once.
The original road system in the counties worked well while Montana was largely a rural society. When a road was needed, or one became impassable, the county was authorized to pay local citizens up to “Three dollars per day for each person and six dollars per day for a team and driver” (Montana Historical Society) to build or make the road passable again. The roadwork was accomplished under the supervision of the county road foreman, with few administrative costs. The road workers, usually adjoining landowners and unemployed town people, either took the money for their labor, or received a credit to offset their county taxes. This accounts for the often heard assertion from some old family landowners saying “I know it’s my private road, my grandfather built it.” Grandfather may well have helped to build or maintain the road, but chances are that Grandfather was paid by the county, or received a tax credit, for working on a public road!

Because of the poor record keeping, limited budgets, and the inability to generate taxes for public roads within their jurisdiction, counties today have adopted a simple, nearly universal policy saying: Their responsibility for a public road ends when the private landowner with land adjoining the public land or water is served with a public road.

The public access problem then occurs on the short length of road that continue on to the boundary of public land after the landowner is served with a public road. The resulting short length of road is usually left unmaintained. An opinion of the Attorney General (Volume 41, Number 32) states that maintenance may be at the discretion of the county. As a result, efforts to maintain the remainder of the public county road are few and scattered. Worse yet, the road ends up under control of the adjoining landowner, often supporting a commercial use on public land for the sole benefit of the landowner. Many of the illegal road closures are closed to the public only, the roads are still often used for private or commercial uses.

Even more onerous for the public, is the fact that Congress has been generous, and provided that all counties containing public lands within their boundaries shall receive payments in lieu of taxes (PILT) from both federal and state governments, which on a per acre basis often exceeds the county taxes collected on similar private land adjacent to the public land. In addition, counties share in state collected gas taxes and federal road monies. Unfortunately, some of our elected officials still can not separate private from public interests, and we hear county commissioners assert, “just because we collect state gas taxes on the road doesn’t mean the road is a public road”.

While certain of the PILT payments are specifically earmarked for schools and public roads, few counties will use the money for maintenance of roads that only provides access to public land once the landowner adjoining public land is served with a public road.

In the Future

PLAAI believes that the existing state and federal legislation, in addition to case law, appears to provide adequate precedent regarding the right of the public to have access to public lands for legitimate purposes. Expanded and more active use of this existing body of law and policy is needed to protect the public’s right to access and use public lands.

For a variety of reasons, citizens have not vigorously applied the law to their access problem when both the state and county governments fail to enforce them. Few citizens realize that in addition to private property rights there are also public rights and resources held in common that need to be articulated and understood.

There are still persistent difficulties hampering effective citizen involvement in government, especially state and county government. Most prominent is the serious shortage of reliable public information about public rights. Agencies often lack basic knowledge of private and public rights and frequently acquiesce to private landowners when they attempt to extend their rights to include control of public roads and land. Frequently, agencies have meetings during the citizen’s working hours, without a clear purpose or format for effective participation. As a result, individual citizens often are treated as commentators when they do bother to take time off from work, and pay their own expenses for hearings and legal aid (Applegate 1976). Conversely, commercially oriented, private landowners, and other opponents of public access to public land are often salaried or reimbursed, and their expenses deductible as a business expense.

Since incorporation, PLAAI has developed and demonstrated that a public interest program including: research of the public road records that exist in county, state, and federal governments; careful negotiation with private landowners and government agencies; and litigation as a last resort can prevent new landowners or governments from attempting to close public roads to public land, and encourage others to reopen illegally closed public roads. By extension of this information to other citizens, non-profit groups, and government, PLAAI can encourage them to conduct successful programs to maintain or restore public access to public land and water. PLAAI also encourages more equitable public use of public land, and management as it was once envisioned by people like President Theodore Roosevelt, Gifford Pinchot and Aldo Leopold (Trefethen 1975).

Sources Cited

ABOUT THE AUTHOR: Perry Nelson began his career in the State Department of Fish & Game working part time as student biologist in the Missoula District in 1948. He also worked in the Bozeman, Billings, Missoula (again), and Great Falls Districts. He says “Hello!” to all his old retired and working friends. He is a Founder and a current member of the Board of Directors of the Public Land Access Association, Inc., P.O. Box 3902, Bozeman, MT 59772-3902.