MONTANA FIFTH JUDICIAL DISTRICT COURT, MADISON COUNTY

PUBLIC LANDS ACCESSS ASSOCIATION INC.,

Petitioners,

vs.

THE BOARD OF THE COUNTY COMMISIONERS 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

ORDER REGARDING MOTIONS FOR SUMMARY JUDGMENT

PROCEDURAL BACKGROUND

Public Lands Access Association, Inc. ("PLAA") filed a second amended complaint alleging breach of public trust (Count One), breach of the doctrine of custom (Count Two), declaratory judgment regarding Seyler Lane (Count Three), declaratory judgment regarding public access to rivers and streams at public bridges, bridge abutments, and rights of way (Count Four), alternative writ of mandamus (Count Five), and attorney fees (Count Six). (June 30, 2006).

Madison County and intervenors Montana Stockgrower's Association ("MSA"), Hamilton Ranches, and James Kennedy responded to the second amended complaint.

Count Two and Five have been dismissed by Court order Feb. 21, 2007 and Nov. 20, 2006.

All parties moved for summary judgment. The summary judgment motions involve Count One, Count Three, Count Four, and Count Six. The parties responded. The parties replied. A hearing was held. The Court denied each party's summary judgment motion regarding Seyler Lane (Count Three).

FACT BACKGROUND

Duncan District Road, Lewis Lane, and Seyler Lane are county roads in Madison County, Montana. Duncan District Road became a county road by the statutory petition process. Lewis Lane is a county road acquired by either dedication or grant. Both Duncan District Road and Lewis Lane are 60 feet wide. Seyler Lane was acquired by prescription.

All three of the county roads cross the Ruby River by way of bridges. Apparently each bridge is less than 60 feet wide.

Fences built by adjacent landowners extend along each county road to the ends of each bridge. At the ends of the bridges the fences narrow from the width between the fences along the roads. The County gave permission to the adjoining landowners to erect the fences to control the landowners' livestock. The fences on Seyler Lane were once electrified. Now all the fences are wooden.

The public has crossed the fences attached to the ends of the bridges to reach the Ruby River from the respective county roads.

ISSUES

The summary judgment motions involve four main issues: (1) Whether the 60 foot wide road rights of way are less wide at the bridges, (2) what use may be made of the rights of way, (3) whether the fences are "encumbrances" within the meaning of Section 7, Chapter 14, Part 21, M.C.A., and (4) whether PLAA is entitled to attorney fees.

ANALYSIS

Summary Judgment

> Summary judgment is only appropriate when no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c). The moving party bears the burden of establishing that no genuine issue of material fact exists. (Citation omitted) Once the moving party meets that burden, then the non-moving party must provide substantial evidence that raises a genuine issue of material fact in order to avoid a grant of summary judgment in favor of the movant. (Citation omitted).

Fisher v. Swift Transportation & J&D Truck Repair, 2008 MT 105, ¶ 12, 342 Mont. 335, ¶ 12, 181 P.3d 601, ¶ 12.

"[T]he non-moving party must set forth *specific facts* and cannot simply rely upon their pleadings, nor upon speculative, fanciful, or conclusory statements." *Thomas v. Hale* (1990), 246 Mont. 64, 67, 802 P.2d 1255, 1257.

Affidavits are considered. Rule 56(c), M.R.Civ.P. "The court must consider the depositions, answers to interrogatories, admissions on file, oral testimony and exhibits presented, and other similar material to determine whether any of the issues are real and genuine." *Brown v. Thornton* (1967), 150 Mont. 150, 155, 432 P.2d 386, 389.

Mootness

Kennedy, MSA, and Hamilton Ranches contend PLAA's claims are moot because the fences do not intimidate the public or impede access to the Ruby River. *See infra.* PLAA contends its claims remain viable because Kennedy, MSA, and Hamilton Ranches still impede the public's claimed right of access to the Ruby River next to the bridges by erecting fences which are encroachments

"A matter is moot when due to an event or happening, the issue has ceased to exist and no longer presents an actual controversy." *Hilands Golf Club v. Ashmore*, 2002 MT 8, ¶ 23, 308 Mont. 111, ¶ 23, 39 P.3d 697, ¶ 23. "Where a court's judgment will not

effectively operate to grant relief, the matter is moot." *Clark v. Roosevelt County*, 2007 MT 44, ¶ 11, 336 Mont. 118, ¶ 11, 154 P.3d 48, ¶ 11 (Citation omitted).

PLAA contends the public is entitled to access to the Ruby River next to the bridges. Kennedy, MSA, and Hamilton Ranches dispute this. PLAA contends the fences are "encroachments" that must be removed. Kennedy, MSA, and Hamilton Ranches dispute this as well. Although the fences apparently do not prevent access to the Ruby River or intimidate the public, fences remain at the respective locations. The issues whether the public has access to the Ruby River on county road rights of way at the bridges and whether fences are "encroachments" still exist and present an actual controversy. The Court's judgment could grant relief on the above issues.

Kennedy, MSA, and Hamilton Ranches' position is unpersuasive.

Standing

Kennedy contends PLAA lacks standing because PLAA admits the fences do not impede or intimidate the public. Therefore, Kennedy contends there is no injury.

The second amended complaint alleges a right to reach the Ruby River by way of county roads, and that Madison County has failed to remove "encroachments." PLAA has alleged a past, present, and threatened injury to its right of access and failure of Madison County to follow the law. PLAA's interest is sufficiently significant that the court should examine its claims. Kennedy's position is unpersuasive.

Justiciable Controversy

Kennedy contends PLAA's claims are nonjusticiable because the fences do not impede or intimidate the public and the public has access to the Ruby River at other designated fishing access sites.

"The existence of a justiciable controversy is a threshold requirement in order for a court to grant relief." *Powder River County v. State*, 312 Mont. 198, 229, 60 P.3d 357, 379 (2002). The test of whether a justiciable controversy exists contains three elements:

1. First, a justifiable controversy requires that parties have existing and genuine, as distinguished from theoretical, rights or interest.
2. Second, the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion.
3. Third, it must be a controversy the judicial determination of which will have the effect of a final judgment in law or decree in equity upon the rights, status or legal

relationships of one or more of the real parties in interest, or lacking these qualities be of such overriding public moment as to constitute the legal equivalent of all of them.

Northfield Ins. Co. v. Mont. Ass'n of Counties, 301 Mont. 472, 475-476, 10 P.3d 813, 816 (2000).

When utilizing this standard it is clear that: (1) the parties' respective rights of access and possession regarding the Duncan District Road, Lewis Lane, and Seyler Lane have created a genuine controversy of the availability of access at other designated sites; (2) the controversy over the scope of those rights is one upon which the judgment of the court may effectively operate; and (3) judicial determination over the controversy can have the effect of a final judgment in law.

Kennedy's position is unpersuasive. The Court should rule on the motions.

Public Trust Doctrine

PLAA contends that the theory of the public trust doctrine entitles the public to access the Ruby River from public rights of way. Kennedy, MSA, and Hamilton Ranches contend otherwise. PLAA's argument is not compelling. However, the Court need not consider this theory. The analysis set out below controls.

Road Abandonment Statute

PLAA contends Section 7-14-2615(3) evidences a legislative intent to preserve the public's right to access the Ruby River from public highway rights of way. Section 7-14-2615(3) involves the abandonment of county roads. Kennedy, MSA, and Hamilton Ranches contend that the abandonment statute is irrelevant. It appears that intervenors may be correct. However, the Court need not consider this theory. The analysis set out below controls.

Stream Access Law

Kennedy, MSA, and Hamilton Ranches contend the public's right to use surface waters does not grant any easement or right "to enter onto or cross private property in order to use such waters for recreational purposes." Section 23-2-301(4), M.C.A. Kennedy, MSA, and Hamilton Ranches contend that allowing access to the Ruby River by the public at bridges would contravene the statute. No one seriously argues that the

public has a right to cross private property. This argument need not be analyzed. Instead the issue the Court must determine is what property is private and what is public.

Statutory Access Sites

Kennedy, MSA, and Hamilton Ranches contend the public has sufficient access to the Ruby River at designated state fishing access sites. Kennedy, MSA, and Hamilton Ranches contend that statutory provisions for such sites would be superfluous if the public is also entitled to reach the Ruby River on the rights of way for Duncan District Road, Lewis Lane, and Seyler Lane.

The fact that the legislature created a mechanism by which the State may acquire other public access across private lands for purposes of fishing does not in any way define the extent and scope of existing rights of way for the roads in question. *See* Sections 87-1-285 and 87-1-286, M.C.A. Kennedy, MSA, and Hamilton Ranches' position is unpersuasive.

Taking of Private Property

The argument advanced by intervenors that their private property will be usurped by the public misses the mark. The first consideration is whether the disputed area is public or private. As set out below, that determination is dispositive.

Stream Bed ownership

Stream bed ownership is not an issue in this case. The issue is whether the disputed area next to the stream is available for public use. Therefore, the Court need not consider any contention regarding stream bed ownership.

Indispensible Parties

Kennedy, MSA, and Hamilton Ranches contend PLAA's claims must be dismissed because indispensible parties were not joined. The contention remains unpersuasive for the reasons stated in the Order of June 11, 2008.

Exhibits

PLAA submitted two exhibits at the summary judgment hearing for the Court's consideration. Kennedy objects. MSA and Hamilton Ranches do not object, but they argue the exhibits have limited applicability to the substantive issues presented. The parties filed supplemental briefs stating their positions.

The exhibits involve the legislative history of House Bill 269. The Court did not rely upon the exhibits. Therefore, the admission of the proposed exhibits is moot.

Issue One – Whether the Width of Right of Way at the Bridges is 60 Feet

PLAA contends the public has the right to reach the Ruby River by using Duncan District Road, Lewis Lane, and Seyler Lane. Madison County does not oppose PLAA's position on this point. Fact finding is necessary regarding Seyler Lane. This analysis and ruling applies only to Duncan District Road and Lewis Lane.

Kennedy disagrees. Kennedy contends that fences attached to bridges terminate the public right of way and separate the right of way from private property owned by the adjacent landowners.

MSA and Hamilton Ranches echo Kennedy's contentions. MSA and Hamilton Ranches contend the width of the rights of way at the respective bridges is not 60 feet. They argue that the right of way is limited to only the width of the bridge. They conclude that the public does not have access to the river at bridges.

Duncan District Road

The parties agree that Duncan District Road is a county road established by petition. Transcript 10:2–11:3 (July 25, 2008). The parties agree that the Duncan District Road right of way is 60 feet. *Id.* It is unrefuted that the public may travel the full width of the 60 foot right of way on Duncan District Road. *Id.* at 75:8-77:15, 131:1-6.

The parties disagree about the width of the Duncan District Road right of way at the bridge.

Section 7-14-2101(2)(a) M.C.A. provides, "'Bridge' includes rights-of-way or other interest in land, abutments, superstructures, piers, and approaches except dirt fills." Section 7-14-2112(1) provides, "The width of all county roads, except bridges, alleys, or lanes, must be 60 feet unless a greater or smaller width is ordered by the board of county commissioners on petition of an interested person." Kennedy, MSA, and Hamilton Ranches rely upon these sections to support their contention that the right of way across the Ruby River on Duncan District Road is less than 60 feet and is thus limited strictly to the width of the bridge.

There is no doubt that the bridge on Duncan District Road is part of the Duncan District Road right of way. *See* Section 7-14-2101(2)(a) and Section 60-1-201(c) (public

highways include county roads); see also *State ex rel. Judith Basin County v. Poland* (1921), 61 Mont. 600, 604, 203 P. 352, 353 ("It is conceded, as it must be, that a complete bridge used by the public is a part of the public highway.") *State ex rel. Furnish v. Mullendore* (1916), 53 Mont. 109, 113-15, 161 P. 949, 951-52 ("a bridge is part and parcel of the highway upon which it is built. . . . If the highways belong to the public, it must follow that anything permanently affixed to them, either in the way of repairs or in the form of completed structures, such as bridges and the like, become a part of them, and as much of public right as the highways themselves."); *State ex rel. Foster v. Ritch* (1914), 49 Mont. 155, 156-57, 140 P. 731 ("A bridge is to be treated as but a portion of a public highway."). Therefore, the only issue to be resolved is the width of the right of way at the location where a bridge exists upon a county road.

Section 7-14-2112(1) provides that bridges may be excepted from the general requirement that county roads shall be 60 feet wide unless otherwise ordered by the board of county commissioners. The statute does not mandate either a greater or lesser width at bridges. It is already demonstrated that a bridge is part of a county road. The cases have held that a bridge encompasses a part of the county road. By definition a part is less than the whole. Therefore, there can be no conclusion that a right of way at a bridge is automatically less than 60 feet wide. In contrast the right of way, of which the bridge is a part, shall be 60 feet wide unless otherwise ordered. No order otherwise has been pointed out to the Court for any portion of the Duncan District Road. Therefore, the right of way for its full length must be 60 feet, including that portion upon which is located the bridge across the Ruby River.

Moreover, it is clear from explicit statutory language that the board of county commissioners could have ordered the right of way to have been more than 60 feet wide. Thus, the analysis set out above demonstrates that the right of way at the bridge could have been greater than 60 feet wide.

For these reasons the argument cannot succeed that a right of way either generally or in this case is limited to the width of the bridge. There is no evidence to the contrary so the Court must conclude that the right of way is 60 feet wide at the bridge.

Lewis Lane

Fences and the bridge on Lewis Lane are situated essentially the same as on Duncan District Road.

Kennedy contends the language of the deed does not grant or intend to grant the public access to the Ruby River. Kennedy contends the deed only grants a 60 foot strip of land for purposes of a county road. His implicit argument is that a county road may not be utilized in the vicinity of water. That argument is unsupported by authority or logic. It is unpersuasive.

The analysis applied to the Duncan District Road applies with equal force to Lewis Lane in determining the width of the right of way at the bridge.

Issue Two – Use of the Right of Way

The public is entitled to use the entire 60 foot width of Duncan District Road, not just the beaten path. See *Butte v. Mikosowitz* (1909), 39 Mont. 350, 357, 102 P. 593, 595-596 (citing *Burrows v. Guest* (Utah 1887), 5 Utah 91, 98, 12 P. 847, 850).

It also has been conceded in this case that the public may utilize and travel upon the full width of the county road right of way.

It is true that *Howard v. Flathead Independent Telephone Co.*, 49 Mont. 197, 141 P. 153 (1914) held that when a "sufficient" portion of the highway is graded or otherwise prepared for use the duty then devolves upon the traveler to keep within that portion prepared for his use. The disputed use in that case involved a lady driving her horse to a buggy and who ran a wheel onto a utility guy wire off the graded portion of the road but within the right of way. The court concluded that she was not entitled to recover damages . Negligence issues and damages are not involved in this case.

Further, *Howard* did not hold that the public was prohibited from using any portion of the right of way.

Moreover, the *Howard* court considered facts in which a "sufficient portion of the right of way" was graded or otherwise prepared for use. The issue here is to determine what constitutes the right of way and whether a sufficient portion has been prepared for use. *Howard* is not helpful.

Other cases have held that the public may travel upon waters of the state between the high water marks. Therefore, where a county road intersects state waters, the portion

of each which is congruent with the other creates two over lapping public rights of way. There has been no law nor cogent argument presented to the contrary. The argument that the public is not authorized to cross private property to reach state waters simply does not address the issue of what property constitutes the public right of way. That argument assumes that the property in question is "private." The argument is not remotely helpful to the analysis. The same reasoning applies to the argument that the Court must consider alleged private ownership of the bed of the stream. That is not an issue in this case. The issue is the width of the county road right of way.

Summary judgment should be awarded to PLAA on Count Four regarding Duncan District Road and Lewis Lane.

Issue Three - Encroachments

PLAA contends that the fences within the highway rights of way at the ends of the bridges across the Ruby River on Duncan District Road, Lewis Lane and Seyler Lane are encroachments, that Madison County has a duty to remove the alleged encroachments, and that Madison County has violated its duty by failing and refusing to remove them.

Madison County, Kennedy, MSA, and Hamilton Ranches contend Madison County did not breach any duty because Madison County has discretionary power to manage county roads and highways. They collectively contend that the fences are not encroachments but devices to manage the best interests of the county roads and road districts.

Section 7-14-2134 provides,

> (1) 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.
> (2) If the encroachment obstructs and prevents the use of the highway for vehicles, the road supervisor or county surveyor must immediately remove the same.
> (3) The board of county commissioners may at any time order the road supervisor or county surveyor to immediately remove any encroachment

Whether the fences at the intersections of the respective county roads and the Ruby River are encroachments is a question of law. The Court's role "is to interpret the meaning of the terms included in a statute, not to insert what has been omitted. Section 1-

2-101, MCA." *In the Matter of the Mental Health of E.T.*, 2008 MT 299, ¶ 22, __Mont.__, ¶ 22, __P.3d__, ¶ 22.

PLAA contends the term "encroachment" means "fence" because the word "fence" is used in Section 7-14-2134(1). The statute recites what must occur when a fence (or other) encroaches upon a highway. It does not define a "fence" as an "encroachment."

"Encroached" and "encroachment" are not defined in the statute. Therefore, the Court must interpret the ordinary meaning of the terms. *See Werre v. David* (1996), 275 Mont. 376, 913 P.2d 625, 631.

PLAA relies on the definition of "encroach" in a *Merriam-Webster Dictionary*. The definition PLAA provides without designating the particular dictionary upon which it relies is:

> 1 : to enter by gradual steps or by stealth into the possessions or rights of another
> 2 : to advance beyond the usual or proper limits"

PLAA's Combined Motion for Partial S.J. Re: Public Access to Rivers and Streams from Public Highways and Br. in Support 12:6-9 (May 19, 2008). The Court referred to *Webster's Ninth Collegiate Dictionary* (1984) which provides an identical definition. *See infra.*

Intervenor Kennedy cites to the 8th Edition of *Black's Law Dictionary* which defines "encroach" as "to gain or intrude unlawfully." The Court has only the 4th Edition of *Black's Law Dictionary* which provides, "An encroachment upon a street or highway is a fixture, such as a wall or fence, which *illegally* intrudes into or invades the highways or encloses a portion of it, diminishing its width or area, but without closing it to public travel." *Black's Law Dictionary* 620 (4th ed., West 1951) (emphasis added). All definitions include an element of illegal activity. The Court must determine whether the fence which intrudes or diminishes width is illegal.

Madison County has the power to "maintain, control, and manage county roads and bridges within the county." Section 7-14-2101(1)(a)(i); *see also* Section 7-14-2103. Duncan District Road, Lewis Lane, and Seyler Lane are county roads and public highways in Madison County. *See* Section 60-1-201(c). Furthermore, Madison County

has the power to, "in its discretion do whatever may be necessary for the best interest of the county roads and the road districts." Section 7-14-2102.

Madison County authorized landowners to erect the fences at the respective locations to control livestock. There is no evidence that controlling livestock is an unreasonable illegal goal. The landowners erected fences in compliance with Madison County's directives. Therefore, the fences are authorized. An authorized fence is not an encroachment. Thus the fences Madison County authorized are not encroachments.

PLAA argues, "A highway is 'encroached' if a private landowner erects a fence 'beyond the usual or proper limit.'" PLAA's Combined Motion for Partial S.J. Re: Public Access to Rivers and Streams form Public Highways and Br. in Support 12:10-11 (May 19, 2008). However, the key words in PLAA's definition are "beyond the *usual* or *proper* limits." (Emphasis added).

"Usual" means "1: accordant with usage, custom, or habit: NORMAL[;] 2: commonly or ordinarily uses[;] 3: found in ordinary practice or in the ordinary course of events: ORDINARY." *Webster's Ninth Collegiate Dictionary* 1299 (1984). "Proper", in this context, means appropriate. See *Black's Law Dictionary* 1381 (4th ed., West 1951) and *Webster's Ninth Collegiate Dictionary* 943 (1984).

PLAA argues that fences tied to the ends of bridges are the ordinary situation in Madison County. This position is manifest in its request for relief to be applied to "all roads in Madison County." PLAA's own arguments demonstrate that the fences about which it complains are usual and ordinary. Therefore, private landowners have not erected fences beyond the usual limit. The fences are proper because they have been authorized in the discretion of Madison County.

PLAA contends the particular encroachment provisions (Section 7-14-2134 through Section 7-14-2136) are paramount to and control the general maintenance provisions (Section 7-14-2101 through Section 7-14-2103). *See* Section 1-2-102, M.C.A. That position may be true if the provisions were inconsistent. However, any fence, authorized or not, must be an encroachment to reach the conclusion advanced by PLAA. The fallacy of that conclusion has been demonstrated.

If *Howard, supra*, has effect upon this case at all, it can be only the implication that it is permissible to place telephone poles and guy wires within the right of way, even

when a user of the road suffers physical damages. When such poles and guy wires are authorized there is no reason to prohibit a fence which has not caused physical damage.

PLAA's complaint also alleges the fences constitute unlawful encroachments designed to block and/or intimidate the public from accessing the Ruby River. Second Amd. Compl. for Declaratory Judm. and Pet. for an Alt. Writ of Mandamus ¶¶ 20-22. PLAA asks the Court to determine as a matter of law that counties may not allow private landowners to erect fences within the public highway right-of-ways which *impede* members of the public from access to the rivers. PLAA's Combined Mot. for P.S.J 2:3-8. However, Tony Schoonen testified for PLAA pursuant to Rule 30(b)(6), M.R.Civ.P. that the fences are not intimidating to the public. Depo. Tony Schoonen 40:6-8 (April 21, 2008). The wooden rail fences are "good enough" and "fine." Depo. Schoonen 44:6-20. PLAA is "satisfied with the wood rail fences." Depo. Schoonen 46:5. Schoonen's testimony concedes that the fences do not impede, block, or intimidate the public from reaching the Ruby River. PLAA's complaint and request for relief is mooted by its own deposition testimony.

PLAA's encroachment theory must fail.

Conclusion

No genuine issues of material fact exist regarding alleged encroachments at the bridges on Duncan District Road, Lewis Lane and Seyler Lane. Madison County, Kennedy, MSA, and Hamilton Ranches are entitled to judgment as a matter of law regarding Count One.

Issue Four: Attorney Fees

Madison County, Kennedy, MSA, and Hamilton Ranches moved for summary judgment regarding PLAA's request for attorney fees (Count 6). PLAA seeks attorney fees as a successful applicant for a writ of *mandamus* and pursuant to the private attorney general doctrine.

Writ of Mandamus

The Court dismissed PLAA's writ of *mandamus* claim. Or. Denying PLAA's Pet. for a Writ of Mandamus (Nov. 20, 2006). Therefore, PLAA was not a successful applicant. Attorney fees cannot be awarded to PLAA based on its unsuccessful

application. Therefore, Madison County, Kennedy, MSA, and Hamilton Ranches are entitled to judgment as a matter of law.

Private Attorney General Doctrine

There are three factors to be considered in awarding attorney's fees based upon the private attorney general doctrine: (1) the strength or societal importance of the public policy vindicated by the litigation; (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff; and (3) the number of people standing to benefit from the decision. *School Trust v. State ex rel. Bd. of Comm'rs*, 296 Mont. 402, 421-422, 989 P.2d 800, 811-812 (1999). "The [private attorney general] Doctrine is normally utilized when the government, for some reason, fails to properly enforce interests which are significant to its citizens." *In re Dearborn Drainage Area* (1989), 240 Mont. 39, 43, 782 P.2d 898, 900.

The Montana Supreme Court also has limited private attorney general fees to "litigation vindicating constitutional interests." *Am. Cancer Soc'y v. State*, 325 Mont. 70, 77, 103 P.3d 1085, 1091 (2003). The Court in that case found a statute ineffectual rather than unconstitutional and reasoned that "without the vindication of a constitutional interest, this case does not warrant private attorney general fees." *Id.* Constitutional issues must be involved before determining whether private attorney general fees are warranted.

PLAA asserts that Madison County violated the PLAA and the public's constitutional right to access the Ruby River. As has been noted above, Madison County, Kennedy, MSA, and Hamilton Ranches have not impeded or intimidated the public to prevent the public from reaching the Ruby River. Therefore, Madison County has not acted unconstitutionally to do so.

Madison County, Kennedy, MSA, and Hamilton Ranches are entitled to judgment as a matter of law regarding Count Six.

NOW THEREFORE, IT IS HEREBY ORDERED that:

1. PLAA's motion for summary judgment on Count Four as it pertains to Duncan District Road and Lewis Lane is granted to the extent that the public may utilize any portion of the 60 foot right of way regardless of the Ruby River intersection with it and subject to lawful management

by Madison County Commissioners. Count Four is dismissed with prejudice as it pertains to any other county road.

2. Madison County, Kennedy, MSA, and Hamilton Ranches' motions for summary judgment regarding Count One are granted to the extent that Count One of PLAA's second amended complaint is dismissed with prejudice.

3. Madison County, Kennedy, MSA, and Hamilton Ranches' motions for summary judgment regarding Count Six are granted to the extent that Count Six of PLAA's second amended complaint is dismissed with prejudice.

4. PLAA's exhibits P-1 and P-2 are not admitted into evidence for summary judgment purposes.

5. The Clerk of Court will please file this Order and distribute a copy to all parties.

Dated: September 30, 2008.

LOREN TUCKER DV-29-2004-43
District Judge