



PLWA

The **KEY**

Unlocking access to public lands & waters

Published by the Public Land / Water Access Association
www.plwa.org

Fall 2009

Issue 7

The Fight for Access Continues

PLWA is being overwhelmed by new road and trail closures. We are notified about a new closure almost every week, sometimes more often than that. For the most part, these closures are occurring on roads that the public has been using for years. We must face reality and realize that Montana land and wildlife is becoming more valuable every day. Control of public land and water by road and trail closures is becoming the tactic of choice for those who seek to lockdown the public domain. Regulations to prevent these closures are both slow and inadequate. We need several things to happen before we can effectively stem this closure tide.

The first item, and probably the most important, would be new legislation that says, "If anyone desires to close a road presently being used by the public they must appear before the local road authority with compelling evidence that the road is, indeed, private and not public. This appearance must occur prior to any sign or barrier to travel being placed upon the road at issue. The local road authority will advertise the meeting and appearance of the individual or other entity proposing to affect the closure with advance notice sufficient to allow road users to who might object to the closure to prepare evidence"

The second thing that should happen concerns land management agencies such as the Forest Service, Fish and Wildlife Service and the BLM as well as the Montana State Dept of Lands. These agencies should be prepared to claim prescriptive rights in the name of the public on access roads leading to the land and water they administer.

The third thing would be a willingness by these agencies to enter into any proposed road or trail closure early with strong arguments that access is critical to their land management programs. This is particularly true of access needed to suppress wildfires. One locked gate could easily cause a delay resulting in the difference between a small lightning fire and a blaze that covers thousands of acres.

The agencies should also close private roads on public land. That is, any road unavailable to the general public but used by a few adjacent land owners and outfitters should be closed. The exception would be for limited entry by permit holders to manage permits. While they are at it, the land management agencies should not issue outfitting permits to those who block access to large segments of public land. Such permits allow those who deny access to profit from excluding the public from public land.

Going back to number one, we should be looking for legislators willing to sponsor and carry a bill that will change the way road and trail closures are addressed.

Outfitter Censured for Public Land Incident

County Attorney refuses to prosecute Hunter Harassment

On August 4, 2009, the Montana Board of Outfitters "Adjudication Panel" censured an outfitter for what in effect was hunter harassment, for running legal hunters off of public land. The 2007 Big Horn County incident involved a PLWA member. An outfitter from Buffalo Wyoming "escorted" the hunter, his son and grandson off a state section where they had killed a deer. The board, which is not a court of law, could not convict the outfitter of violation of the state hunter harassment statute. However they did find him in violation of the "unprofessional conduct" under the administrative rules of the department and levied a small fine. It would seem to be a clear case of hunter harassment. (Continued >>>)

We understand the hunter pressed charges but the County Attorney would not prosecute. This seems to be the case in most of these incidents. Note that the law also applies to harassment of anglers. We also often hear of angler harassment cases., including threats of physical violence. If this happens to you, stay calm, get all the facts you can and ask others with you for affidavit statements. Then present this information to FWP law enforcement and the local sheriff's office with a request to press charges.

Here is the exact language of the hunter harassment law:

MCA 87-3-142. Harassment prohibited. (1) A person may not intentionally interfere with the lawful taking of a wild animal or fishing by another. (2) A person may not, with intent to prevent or hinder its lawful taking or its capture, disturb a wild animal or engage in an activity or place in its way any object or substance that will tend to disturb or otherwise affect the behavior of a wild animal. (3) A person may not disturb an individual engaged in the lawful taking of a wild animal or fishing with intent to prevent the taking of the animal or the capture of the fish.

The Stream Access Fight- It isn't over yet folks

Many folks have the idea that the stream and bridge access is settled for good with the PLWA victory in court and passage of HB190. Well, it isn't! HB 190 applies only to "county roads". The status of right-of-way and access on prescriptive roads is not settled. (Prescriptive road right of ways are those acquired by public use rather than by petition.) In the Ruby River case Judge Tucker did not rule on the Seylor Lane road and bridge portion of the PLWA case. It is likely to go to a trial which will determine access on roads deemed 'prescriptive easements'. The prescriptive status of Seylor Lane is an issue as is the width of the right-of way at the bridge. Even if Judge Tucker finds that Seylor Lane has a prescriptive easement (which is likely) he could still rule that the easement narrows at the bridge and public access is not possible without trespassing. What's more, our anti-access adversaries may choose to appeal Judge Tucker's rulings. While they have little chance of success, they have deep pockets.

Implementation of HB 190 is already being attacked by opponents who say that FWP overstepped its authority in facilitating access at bridges. This attack is led by Senator Debbie Barrett of Dillon. Stay tuned for the next round.

Lodgepole Road Stillwater County Access Victory

The northern end of this Stillwater county road which extends northerly from the town site of Limestone, northwest of Nye, MT, has been an issue for many years. It is now open for public travel. The last two miles which access thousands of acres of the Beartooth front and an extensive trail system, had been gated off by an adjoining landowner / outfitter who attempted to control the road. After extensive negotiations and action by PLWA and FWP, Stillwater County acknowledged that it was a county road. (It was also critical for access in fighting the Derby fire in 2006.)

The road had fallen into disrepair and dropped off the county road system. Culverts were washed out and the road was impassable much of the year. PLWA and other sporting groups, as a coalition with FWP, Stillwater County and the Forest Service have worked to rehabilitate the road and reestablish the access. The County road crews repaired some of the worst spots and FWP provided five cattle guards to replace the gates. Gary Hammond, Region 5 FWP Supervisor estimates FWP's contribution at around \$9000. Those cattle guards have now been installed.

Since that time, contributions from PLWA, Billings Rod and Gun Club, Greater Yellowstone Backcountry Horsemen and FWP were combined to purchase culverts to be installed at the two stream crossings on the road. The culverts have been purchased and are being stored by Stillwater County. They have also obtained the proper installation permitting.

In the meantime, a portion of the road became deeply rutted from use while wet. That issue has been addressed by FWP. A source of gravel has been located and FWP has provided funds to the county for them to gravel that portion of the road.

Stillwater County has advised that they have scheduled the graveling and installation on the culverts in early October. It should be an ideal time for the project with low late season stream flows, barring early snows. Hopefully, we can look forward to completing the project before the opening of general hunting season.

Lodgepole road is an example of how citizen perseverance and governmental interagency cooperation can get things done.

USFS Considers Using Eminent Domain to Reopen Cheery Creek Rd. 1999 Easement Agreement with PLWA Expires

By Brett French, The Billings Gazette, October 13, 2009 (with permission)

After years of negotiations have failed to gain access across one mile of private land to reach 16,000 acres of the Gallatin National Forest, the agency is considering pursuing an easement through the use of eminent domain.

"We certainly don't approach the use of eminent domain lightly," said Marna Daley, the Gallatin's public-affairs officer.

The agency has never used the big-stick approach to gain access in Montana, and it has rarely used it elsewhere in the United States. Even now, Gallatin Forest officials are hesitant to use the word, but they say there are limited courses of action left.

"There's a discussion right now with the Washington office about our next course of action," said Bill Avey, Big Timber District ranger. "I explained to my boss that it appears we're out of options at this time."

Battleground

The land at the center of the negotiations is located about nine miles south of Big Timber, east off of Highway 298, which parallels the Boulder River. The valley's scenic terrain at the eastern base of the Beartooth Mountains was featured in the Robert Redford movie "The Horse Whisperer."

The Cherry Creek Road crosses about a quarter-mile of Lee Smoot's property and then three-quarters of a mile of George Matelich and Michael Goldberg's ranch before reaching the forest boundary. Matelich and Goldberg work for Kelso & Co., a New York equity investment firm.

According to Forest Service research, public use of the road dates back to 1896.

A ranger cabin existed on the forest in the early 1900s. Because it is the closest forest access to Big Timber, the road and mountains it leads to are popular with big-game hunters.

In the Gallatin's travel plan, the area is specifically geared to motorcycle use, offering a number of loop routes on single-track trails.

Despite the well-documented historic use, in 1991 the Sweet Grass County commissioners declined to declare the road a public route.

In 1997, the Smoot family sold a portion of its ranch to Matelich and Goldberg. The new owners locked the gate across the Cherry Creek Road where it crossed their property, denying the public access to the forest lands they'd enjoyed for more than 100 years.

Although the Forest Service was able to negotiate a temporary easement in 1997 and 1998, it allowed public access only between June 1 and Aug. 31. When the road was closed again, a petition drive rounded up 500 signatures supporting reopening the road to the public.

Threat of court

In 1999, the Public Land/Water Access Association stepped in to fight for public access to the forest.

Initially, the Gallatin National Forest joined in the lawsuit, but was later told by the Department of Justice that it had compromised its standing with a 1994 document it signed when conducting logging operations that used the route. So the agency backed out.

Before going to trial, Matelich offered PLWA a 10-year easement, which the group signed.

"Our thinking at the time was that in 10 years the Forest Service would do something," said John Gibson, PLWA president. "They left it up to us, and we didn't have the money to fight another lawsuit."

Forest Service officials claim PLWA shouldn't have signed the agreement without consulting them. But Gibson said the group had no choice. It was a one-time offer, take it or leave it.

"They should have been the ones fighting for access, not PLWA," Gibson said. "Their office of general counsel was very timid at the time. We can only go up against so many millionaires."

Negotiations fail

Over the past 10 years, the Forest Service has been making offers to the landowners in hopes of finding a compromise. In addition to outright purchase, the dollar amount of which is limited by law, the agency also sought other access points and considered land exchanges.

Because of the topography, the Forest Service had few options.

Building a new road by coming in from the east by Lower Deer Creek would cross an inventoried roadless area and require expensive road building. In fact, out of 13 different routes identified as possible access points to the forest in the Big Timber District's transportation analysis, only four survived scrutiny, and three of those used the same Cherry Creek route.

Without willing landowners, the Forest Service couldn't find any other access points. Landowners turned down the Forest Service's offers for a variety of reasons, including the traffic, low cash value offered and a perceived loss of value to their land if the road were opened to the public.

"We tried to (negotiate) years ago, but they don't want to pay any money for it," said Smoot, who owns the property next to Highway 298.

"They offered my dad \$5,000, and he said he'd give them that much to stay out."

Smoot said his family always assumed the road was public until his father was approached by the Forest Service to sign papers guaranteeing public access.

"We tried to control access after that," he said. "We never tried to keep anybody out."

But Smoot did erect a sign saying the road was not owned by the Forest Service. Smoot's fence is also adorned with anti-Semitic and anti-government signs, prompting locals to call it the "hate gate."

Next option

Smoot said he doesn't care if the Forest Service claims eminent domain.

Under the procedure, he would be paid for the easement what the U.S. Department of Agriculture agrees to pay, an amount constitutionally required to be "just compensation."

Matelich and Goldberg couldn't immediately be reached for comment.

Avey, the Big Timber District ranger, said Matelich and Goldberg are aware that the agency is considering the use of eminent domain but hopes it doesn't come to that. He praised the landowners for always amiably discussing the issue.

The forest's request to wield the big stick of eminent domain now goes to Tom Tidwell, chief of the USDA and the former Northern Region forester in Missoula. If approved by Tidwell, the request would then go to Ed Schafer, the secretary of agriculture.

"At that point, if we end up going down that road, it's handled by the Department of Justice," Avey said.

"Meanwhile, we're still pursuing other options to find a negotiable solution to this," he added.

Mabee Road Update

PLWA Report Sent to Fergus County Commissioners

After extensive research we are finally got the Mabee Road report in the mail to the Fergus County Commissioners and County Attorney. There are several people to thank for their efforts in completing this project. First, Billings attorney Todd Gunderson. He has put extraordinary effort into getting the report together, along with all the exhibits, and writing the letter to Fergus County officials, to Tonya, Todds secretary, for putting 10 copies together in 3-ring binders for easy reading, and Mike Chapman for his help in obtaining affidavits from people who have used this road over the years. We also need to thank Barney Hallin for help in acquiring the aerial photos and Neal Grey of Selbys for overlaying the

section lines and section corners and the original 1913 road survey to the photo.

We believe we have presented a very strong case to prove Mabee Road is and always has been a public road. Does this submittal guarantee that we have won the case? Absolutely not. The commissioners can still either rule in favor of the public or for the landowner. If either the landowner or PLWA sue over the decision, then it will be left up to the courts to decide. This is a high priority case for us. We will keep you informed of developments.

Anatomy Of A Win

Finley Basin Rd. - Granite County

We recently received notification from one of the County Commissioners in Granite County in Philipsburg Montana. It seems that a long established road had been closed and barricaded by the owner of a patented mining claim. This road known as the Finley Basin Road predated the patented claim based on old records. In this case the Commissioners and the local Forest Ranger worked together and the County attorney was directed to write a letter to the landowner instructing him to remove the barriers. As of today the barriers are down. If there is a legal challenge it will occur with the road open, not closed. This is a good example of how road closures should be handled.

We do not suggest that any individual remove barriers that close a road. It is proper, however, for citizens to request that the County Attorney and /or the County Sheriff notify those responsible for the closure to remove the barriers by a certain date. If the deadline is not met, the authorities will remove the barriers at the expense of those responsible for installing the barriers.

Property Taxes Paid by FWP in 2008

Over One Half Million Dollars

Critics of any Fish Wildlife and Parks land acquisitions are quick to argue that they take property off the tax rolls . PLWA did some research and found this to be almost entirely untrue . FWP continues to pay taxes just like any other property owner . This includes Fishing Access Sites , Wildlife Management Areas and , after 2009, on State Parks. In 2008 these taxes amounted to \$522,655 - over one half million dollars. This includes payments to the following counties:

Lake County - \$74,047
Anaconda - Deer Lodge County - \$56,729
Yellowstone County - \$49,993
Lewis and Clark County - \$47,553
Gallatin County - \$40,575
Flathead county - \$27,628
Teton County - \$26,061
Missoula County - \$25,577
Beaverhead County - \$25,063
Madison County - \$18,449
Cascade County - \$15,192
Powell County - \$12,661
Fergus county - \$10,381

This is only a partial list. Just about every county received payments.

The law which covers these payments states "Before November 30 of each year, the treasurer of each county in which the department owns any land shall describe the land, state the number of acres in each parcel, and request the drawing of a warrant to the county in a sum equal to the amount of taxes which would be payable on county assessment of the property were it taxable to a private citizen." (MCA 87-1-603) THIS WOULD APPEAR TO BE PRETTY HARD TO MISUNDERSTAND !

The funds for these taxes come entirely from hunters and anglers - either general license dollars or taxes on sporting goods. (Even though the public at large gets great benefit from these areas.) FWP acquisitions get a lot of press, but they are minimal in comparison to private purchases of recreational or high amenity property. Total sales of recreational property are estimated to be upwards of \$300 million to \$500 million per year. It is rumored that one broker alone sold over one hundred million dollars of recreational property in southeast Montana last year.

(Prior to 2009, FWP paid fees on State Parks and was exempt only for the taxes on the property and improvements. However, with the passage of HB674 in 2009, FWP will pay full taxes and fees on acquired State Parks.)

Annual PLWA Raffle

Our annual raffle is one of our critical sources of income. We finance all that we do from membership dues, the occasional endowment from concerned individuals, foundations and estates, and this raffle.

Why should you support PLWA? When you consider the resources of those we battle, this organization performs miracles. The BIG MONEY is all on the other side. We do it through research, patience, tenacity, respect for all and above all a dedication to protecting one of our elemental rights as Americans, access to our Public Domain. We believe this is one of the things that sets the U.S. apart from every other nation on earth. We ALL have a stake in one of the greatest natural resources on the planet; not only our public lands but also the flora and fauna that occupy them. Please help us to insure that this resource will remain free and help to pass it on to future generations.

Fill out your raffle tickets today. Check out the prizes at www.plwa.org/raffle. While you're at it renew your membership too. We have some great prizes for the raffle:

- 1.) Fly Rod - Sweetgrass Mantra Series Hexagonal bamboo 7'9" 5 weight. This is a classic cane flyrod built to the highest standards by and for those who love the sport. It is a rod destined to become a family heirloom. - donated by Sweetgrass Rods, Twin Bridges, MT
- 2.) Rifle - CZ 550 .270 Win. - Walnut Stock - This rifle was made with the American shooter in mind. It features a newly designed classic American pattern stock, with satin finish and a Pachmayer recoil pad. It is supplied with scope rings. - from Fran Johnson Sporting Goods,, Butte MT and PLWA
- 3.) Monte Dolack Print - 'Light in the Wild' - donated by the Monte Dolack Gallery, Missoula MT
- 4.) - 5.) Gift Cards - \$50.00 at Scheels - donated by Scheels Sports, Billings MT

Membership and Support

Encourage a Friend to Join

We owe all that we accomplish to you – our dedicated PLWA members. Without your membership and support we would be a voice in the wind. Unfortunately we really have a small “market penetration” of the many hunters, anglers, paddlers, hikers, and outdoor enthusiasts who we represent. Many don't even know we exist. Like in any enterprise, word-of-mouth is the best advertising. So, as always, we are asking for your help. Give this newsletter or the enclosed brochure to your friends who have a passion for the Montana experience and urge them to join us in protecting their rights.

Public Land/Water Access Association, P.O. Box 80987, Billings, MT 59108.

Name _____

Address _____ Zip _____

Phone _____ Email _____

Membership (\$20) _____ Contribution _____

(You can also join or make a donation via PayPal on our website at www.plwa.org .)