



PLWA

The **KEY**

Unlocking access to public lands & waters

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UPOM and PERC Join Lawsuit Against Montana Stream Access

By NICK GEVOCK Montana Standard

BUTTE - Conservative property rights groups and conservation organizations have become involved in the bitter, eight-year legal fight over access to Montana streams from bridges.

Two conservative groups - the United Property Owners of Montana and the Political Economy Research Center - have filed friend-of-the-court briefs in the case between a sportsmen's group and Madison County. In addition, Montana Trout Unlimited has entered the fray on the other side to support the Public Lands Access Association in the case.

The lawsuit, originally filed in 2004, was against the county over access to the Ruby River, near Sheridan, from a bridge on the property of James Cox Kennedy, a billionaire media heir. The case prompted the passage of a law by the Legislature that guaranteed bridge access from established county roads, but this year a Madison County district judge ruled that access for recreational use is not guaranteed on roads established by a historic use through a prescriptive easement.

Bruce Farling, Montana Trout Unlimited executive director, said the case has become the latest in a series of attempts to overturn the state's stream access law. That law guarantees anglers and recreationists the right to access public waters by staying within the ordinary high water mark of rivers and streams.

They want to wreck the stream access law to keep people off of three bridges, he said. It could have some pretty big implications around the state. □

But Reed Watson, a Political Economy Research Center research fellow and applied programs director, said his group filed the brief as a statement that allowing public access to all waters can harm a fishery. That was at issue in the Mitchell Slough case, where rock star Huey Lewis had made major habitat improvements on a side channel of the Bitterroot River - before the Montana Supreme

PLWA Membership Meeting December 3rd in Billings

PLWA will be hosting a General Membership Meeting on Saturday, December 8th, 2012 at the Region 5 Montana Fish, Wildlife and Parks headquarters at 2300 Lake Elmo Drive in Billings. The meeting is scheduled from 10 am until noon.

There will be a review of current public access issues around the state, then the floor will be opened to membership concerns. We want your input on the ever increasing number of public access to public land issues arising frequently now across Montana. In December, with hunting season drawing to a close, there is a good chance that some of you will have recently been cut off from accessing tracts of public land. Come on, meet the PLWA leadership and let's talk about it.

Court ultimately ruled the public had access to the waterway after a legal fight with sportsmen..

In some instances, private ownership leads to good stewardship of environmental resources, he said. In many cases, such as the Mitchell, there were measurable, definite public benefits that flowed out of the private land and into the public river - the Bitterroot River. □

Watson added that the slough is a spawning ground for trout and anglers can step on the eggs. And he said that as public access to water is continually expanded, it takes away the incentive for private landowners to make improvements.

Having public access to a lot of water is not driving the fact that there;s a lot of good fishing, he said.

Margot Ogburn, a Bozeman lawyer representing the United Property Owners of Montana, said her client filed its brief because it wants to protect property owners rights in Montana.

We were just asking the Supreme Court to affirm the district court’s most recent decision, she said.

Farling, however, disputed the assertion from Watson that private ownership of waters is a recipe for better habitat. He said Montana has the most liberal stream access law in the nation and the best trout fishing and that’s because when the public has a stake - it cares for the resource.

Matt Clifford, a lawyer who filed the brief for Trout Unlimited, said the case and how it could affect the stream access law also could have implications for Montana’s trout fishing industry.

We’ ve got a huge recreational fishing industry that’s established here that’s built up around stream access, he said. This is just the latest challenge and we certainly hope this puts it to bed once and for all. □

Bullock files lawsuit over Tenderfoot Access Dispute

PLWA President John Gibson calls attention to the action of Attorney General Steve Bullock to file a civil complaint against the landowner who placed locked gates across the South fork of Tenderfoot County Road in Meagher County. He has asked the court for an injunction to keep the road opened during the legal proceedings. Gibson said “Attorney General, Steve Bullock has brought the A.G.’s office into a road access issue for the first time in the thirty years that I have been involved in access issues. PLWA has always been on our own up to now.”

The October 14 item from the Great Falls Tribune quoted below tells the story :

Montana Attorney General Steve Bullock has filed a lawsuit in district court to ensure what he says is the public’s right of access to Lewis and Clark National Forest via Tenderfoot Road near White Sulphur Springs in Meagher Cunty.

Documents filed with the court Friday show that Tenderfoot Road was petitioned and accepted as a county road in 1900, and that the public has used that road to access thousands of acres of state, public and private land in the Tenderfoot Creek drainage for more than a century.

Jennifer Anders, an assistant attorney general, said land owner Howard Zehntner originally erected a gate across a county road adjacent to state trust land on which he has a grazing lease. About six months

ago, the office negotiated with him through Meagher County officials to reopen the road. The gate was opened but Anders said Zehntner recently erected a new gate adjacent to his private land a few miles up the road from the original gate, prompting the lawsuit.

No matter who owns the land, Anders said, a private landowner can't block a public road. She said the new gate is a barbed wire gate that's pulled across a road and has a lock on it.

According to the state's brief, Tenderfoot Road is "a public road that has provided homestead access and access for fishing, hunting and other recreational activities in the Tenderfoot Creek drainage for generations." Trails at the end of Tenderfoot Creek provide motorized and non-motorized access to thousands of acres of public land, including a point overlooking the Smith River canyon and two popular National Forest System trails, Tenderfoot Creek Trail No. 342 and Bald Hills Trail No. 345.

"Access to wild lands, rivers and streams is part of who we are as Montanans and, when in conflict, should be decided by our courts, not one individual. As Montanans, we appreciate concern for private property rights, but state law makes it clear that public access to thousands of acres of public lands that have been used by hunters for generations can't be controlled by a private landowner," Bullock said in a statement.

In addition, the state alleges, the locked gate is hampering the work of the Tenderfoot acquisition project, a joint effort by the Forest Service, the Rocky Mountain Elk Foundation and the Tenderfoot Trust, a volunteer group, Bullock said. These groups are working together to acquire lands owned by the Bair Ranch Foundation in an effort to consolidate ownership of checkerboard lands in the Tenderfoot Creek area.

To date, 1,920 acres have been purchased in the area for \$2.4 million.

Bullock's lawsuit asks the court to order the landowner to remove the gate and to prevent him from otherwise interfering with the public's right of access. It asks a judge to order the gate removed while the issue is litigated. Anders noted that hunting season begins this weekend.

Presidents Message

A.G. is Enforcing State Law

John Gibson

In a recent Tribune guest editorial by Hertha L. Lund she says Attorney General Steve Bullock is "misusing his office" when he filed an official complaint regarding closure of the South Fork of the Tenderfoot road in Meagher County. Ms. Lund claims the road in question is as private road belonging to Mr. Howard Zehntner who owns some land along the road. Neither is true. Mr. Bullock was doing his duty as Montana's chief law enforcement officer and the road is, in fact, a county road.

She claims that since Mr. Zehntner has had a locked gate on this road for years and therefore it must be a private road. First, let's look at some facts about the road. Records show that this has been an officially recorded County Road for decades - long before the current landowner purchased the two homesteads that accommodate the road. County roads often go through private property and do not change into private roads regardless of level of maintenance or use. A formal abandonment procedure with a public hearing, is required before a public road can become private. There is no evidence that abandonment of this road ever occurred.

The Meagher county commissioners are the “public trustees” of all Meagher county roads. They have a legal duty to protect the public’s right to use the road as well as the undeveloped portion of the easement beyond the travel way. All such actions must be documented in the commissioners official journals located in the county court house. Mr. Bullock in his role as chief law enforcement officer also has a duty to see that laws are enforced and it is in this capacity that he stepped in. That is exactly his job and he did not misuse his office.

The applicable state laws clearly state that no county road can be encroached upon by “ fence, building, or otherwise” , and that “the board may not abandon a county road or right-of-way used to provide existing legal access to public land or waters, including access for public recreational use as defined , unless another public road or right-of-way provides substantially the same access”. (MCA 7-14-2134.) Another state statute places a duty on the board to remove of obstructions on county roads. (MCA 7-14-2133.) If there is a location change involving a portion of the road, the commissioners must execute or approve the relocation. Ms. Lund is a lawyer. Does she think officials can just look the other way?

(I attended a meeting at the Meagher County Courthouse where the Commissioners claimed Mr. Zehntner could go ahead and install a locked gate at the point where this County Road entered his land. This was a clear abdication of their duty.)

It must also be mentioned that the U.S. Forest Service, working with organizations and agencies such as the Rocky Mountain Elk Foundation and the Montana Fish and Wildlife Conservation Trust have allocated in excess of \$5 million to acquisitions of checkerboard sections from the Bair Family Trust which will open up 8.2 million acres to the public for logging and recreation. It is my understanding that the Zehntner family is directly or indirectly involved with a big game hunting outfitting business behind the locked gate. Do they really expect that the public should foot the bill so they can have unfettered commercial access to that national treasure – and that he can act as the benevolent keeper-of-the-keys?

In short, Attorney General Bullock is doing just exactly needs to be done for the greater good of the greatest number of citizens - and enforcing the law he has sworn to uphold.

Holgren Fishing Access Site

Famtastic Acquisition

In yet another sterling effort by the stalwart staff of Region 5 Fish Wildlife and Parks , a critically needed fishing access site on the Yellowstone River between Reed Point and Columbus is now complete. It is about 6 miles upstream from Columbus and 6 miles downstream from the access at “twin bridges” on the Yellowstone. (Twin bridges is an informal access site located where the interstate crosses the river.)

The site has a signal RR crossing, a good gravel road deep into the site, a vault toilet, and a boat ramp leading to open water.

Long recognized and advocated by PLWA, this site adds immeasurably to the river access in that reach of the river. We tip our hats to all FWP staff associated with this acquisition. These guys are good !

Many thanks to Regional Director Gary Hammond and his crew.

PLWA Files Complaint to have Fergus County Road Reopened

By Brett French - Billings Gazette 9/5/2012

Four years after failing to persuade Fergus County to declare a road north of Roy a public route, a land access group filed a complaint last week in Fergus County District Court seeking to have the northern portion of the Mabee Road reopened to the public.

The road has been gated and posted by a group of landowners for almost five years. According to the Public Land/Water Access Association, the plaintiff in the suit, the road accesses federal and state lands valuable to hunters, including the southwestern corner of the Charles M. Russell National Wildlife Refuge.

Landowners along the road have contended that the public right of way stops well short of their portion of the road and that there is no basis for declaring the route public.

The PLWA contends that the route, before it was closed, had been used by the public continuously for more than 80 years.

The group had petitioned the county commission to take action and declare the route public. But two years ago, after reviewing documents from lawyers representing the PLWA and the landowners, Fergus County Attorney Thomas Meissner advised the commission to let the closure stand.

Meissner said Tuesday he has not yet had a chance to talk to the county commissioners about the recently filed complaint. He said he has seen no reason to change his previous opinion on the matter.

John Gibson, president of the PLWA, said the decision to take the next step and file a complaint was prompted by concerns over the length of time the road has been closed. The group is worried that if the closure isn't litigated within five years, it may be harder to get the road reopened.

"We're not happy with filing lawsuits, but it's about the only way we can get things done," Gibson said. "Otherwise, we lose access to public land and water."

The PLWA is seeking a declaration that the road is a public road; to have the landowners enjoined from ever closing the road again, and to have the county remove any obstructions from the road.

"We believe it should have a prescriptive easement on it," Gibson said. "There's a lot of public land back there that's tied up."

The plaintiffs have 20 days to respond. No hearing has been scheduled on the matter.

Named in the complaint are the Fergus County Commission, Meissner, and landowners Mark and Deanna Robbins; Robert and Kathie Fink; David Murray; Cleo, Mary, Dan and Laura Boyce; Joanne Owens Pierce, and Marabeth Owens Ostwald.

The Robbins family runs a hunting outfitting business, Armells Creek Outfitters, which has further inflamed debate over the road closure.

The issue of public access to public land and wildlife has become a hot-button issue in Montana, in some cases pitting outfitters and landowners against resident hunters, as well as resident hunters against their

nonresident counterparts.

The last legislative session featured a flurry of retaliatory bills aimed at resident sportsmen by some lawmakers who were angered over the passage of a voter initiative that raised nonresident hunting license fees. Some landowners lease their land to out-of-state hunters or outfitters. The initiative was seen as an attack on that income source.

The state Department of Fish, Wildlife and Parks has been seeking to find common ground between the groups, but the issue remains divisive.

PLWA Member Russ Vance Talks About Planned Giving

One of the strongest reasons for supporting the mission of PLWA is to insure that future generations can enjoy the Montana outdoor lifestyle tradition. One way to do that is to include PLWA in your will or trust as others have. However, there are ways to do it while you are alive and kicking in this great state. These are often called “Planned Giving”. One of our loyal members, Russ Vance from Bozeman is using a planned giving vehicle called “gift annuities”. Here is what Russ has to say about it:

“I have been involved with PLWA since near the beginning. This included meetings with founders Gene Hawkes and Ron Stephens many years ago. Since then, I always wanted to give more time to the organization, but other activities stood in the way. But there are ways members without time to volunteer can make a big difference. I found that a gift annuity fit me to a tee.

I am a stock trader, and was lucky enough to have a sizeable taxable gain. I was looking for a way to 1 - reduce my taxes, 2 - help my favorite charitable organization, and, 3 - MOST IMPORTANT gain a guaranteed lifetime income at a high interest rate. A gift annuity does all 3.

1. Taxes. Depending on how you set it up, you get an immediate write off of some percentage of the gift. My CPA made the calculations and I was able to completely wipe out my tax liability for 2011. (The amount of benefit depends on whether you have short term gains, long term gains, the ages of you and/or your spouse, and other factors. But as long as you have taxable income it will help you.)
2. For my favorite charitable organization, I chose PLWA. When I pass, an ENDOWMENT in perpetuity to PLWA is set up by the charitable trust, and they can draw the income from it forever.
3. A guaranteed lifetime income for myself and my wife. In my case we will get 7.5% interest as long as we are alive. It will never change. (Pretty good considering all you can get on a CD these days is about 1% if you are lucky.) The interest rate is set nationally and depends on your age and/or the age of your spouse. (You can set it up with one person, or two, but the interest rate is less for two.) Only part of this income is taxable. IRS charts show what is taxable, what is considered a return of your own money, and how much is a charitable deduction.

(The interest rate for the annuity has dropped a half percent for 2013, but still beats the heck out of money markets or CD's)

I have just learned there are other methods that do the same. They are “charitable remainder trusts” and there are several different types of them - some with fixed annuity income and some with a variable rate. You need to check with a tax or planned giving professional as to what would be best for you. (A good

contact for all types of planned giving is Nicole Rush at the Montana Community Foundation, 406-443-8313 .)

But the bottom line is by examining the numbers before 31 Dec. you can make a gift to PLWA, guarantee a lifetime income, AND PAY MUCH LESS - MAYBE ZERO - FEDERAL INCOME TAX.

I plan on doing the same thing this year. Call me at 406-587-4987 if you want to talk about it. My email is russbow98@yahoo.com . Thanks for the opportunity to reach you.

Ranch Owner Sues to Keep Road Leading to Public Lands Closed to Public

October 20, 2012 5:30 pm • Associated Press

GREAT FALLS – A ranch owner in Teton County in western Montana has filed a lawsuit asking a judge to declare a road through the private ranch to public lands off limits to the public.

The Great Falls Tribune reports that Salmond Ranch filed the lawsuit Oct. 10 in Teton County District Court.

“They don’t really want to do this, but they feel they’re forced to do it to get the issue resolved,” said Justin Lee, an attorney for the Salmonds.

The Salmond Road has been posted with “no trespassing” signs since 1988. But sportsmen and public

Membership and Support

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. Please give this newsletter to a friend who has a passion for the Montana experience and urge them to join us in protecting all of our rights.

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

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

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access advocates have contested the legality of barring the public from the road southwest of Choteau. The road leads to state lands that are open for public recreation.

Teton County officials plan to contest the ranch owner's request to ban the public from the road.

"The county will answer that and, yes, make a claim that we have a public easement, a right to a public easement over that land and that road," said Teton Attorney Joe Coble. "That will put it in a posture for a court to decide who has what rights there."

Ranch owners in the complaint contend there is no established road on the property. But public access advocates say Teton County abandoned the road in 1930 on the condition ranch owners grant public access with an easement crossing the property.

"This public grant of right of way belongs to the citizens of Montana and it's the obligation of the state to prosecute it for the benefit for everybody," said Tim Callahan, a Seattle attorney who grew up in Montana and was among the first to contest the road closing on the Salmond Ranch.

In an unrelated case, Attorney General Steve Bullock on Monday announced he was suing a Meagher County rancher for putting up a gate on a road crossing his land in the Little Belt Mountains. Howard Zehntner contends the road is closed to the public, but the state argues it's open to the public.