



The **KEY**

Unlocking access to public lands & waters

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Presidents Message

Although most of our members are probably hunters and anglers it is important to understand that when the Public Land and Water Access Association challenges a road closure we are representing everyone who might use that road for any number of purposes.

One such use would those of bird watchers. Within the great bird migration corridor that runs north and south along the east side of the Rocky Mountains bird watchers can observe many birds of prey such as golden eagles and several species of hawks. Some of the best observation points along this corridor are accessed by roads long used by the public but without official status.

In that vast prairie region that is central and eastern Montana the numerous prairie dog towns support burrowing owls. There are other species such as the prairie grouse that are indigenous to this land. Due to the enormous size of this area, the road system, both formal county roads and otherwise, is critical to those who would observe and study these species.

Frankly, I believe every one of my sightings of snowy owls has been from the window of my pickup while driving on a prairie road.

Rockhounds and geologists also use the road system to collect and expand their understanding of geologic processes.

My point is, that when a road is closed it is usually closed to everyone. Conversely, when we are able to open that road to the public, it is open to everyone.

The same is true for access to public water. The court decision we won on the Ruby River means that everyone can access the stream at those bridges regardless of the water based activity they intend to engage in.

I don't have to tell birders how important river bank (riparian) habitat is to many species of birds.

One more point. As our fire seasons become longer and drier, the firefighters ability to quickly reach and suppress a small fire is critical. For the fire suppression people, one locked gate can make the difference between a small fire and a conflagration. Those who would say that excluding people and traffic from the land would mean no fires are forgetting that seventy to eighty percent of the fires in the northern Rocky Mountains and great plains are caused by lightning.

Let me be clear about our mission. PLWA does not condone off road travel. Likewise, we seldom challenge travel restrictions imposed by land management agencies on the public land or water. What we do challenge are those roads being closed by individuals and corporations who would privatize and commercialize Montana's land and wildlife for profit or personal use. - John Gibson

Illegal Hunting Convictions Cost Phillips County Landowners \$50,000

MALTA, Mont. – Members of a Minnesota family that owns property in southern Phillips County have agreed to pay \$50,000 in restitution and fines for illegal baiting of big-game animals, hunting without licenses and/or permits, outfitting and other wildlife-related crimes.

Albert “Will” Carlson, 67, owner of the Blue Ridge Ranch in the Larb Hills area south of Malta, and son Todd Anthony Carlson, 41, of the Minneapolis suburb of Inver Grove Heights, recently pleaded guilty to multiple misdemeanor charges in Phillips County Justice Court.

In total, the Carlson family was ordered to pay a total of \$42,615 in restitution to the state of Montana and \$7,385 in fines. Albert “Will” Carlson and Todd Carlson will forfeit their hunting, fishing and trapping privileges for three years in Montana and states involved in the wildlife violator compact. Another son, Troy Albert Carlson, 45, and Sandra Pearl Carlson, 49, also of Inver Grove Heights, will not be allowed to hunt in Montana for three years.

In addition, the family cannot accompany other hunters in the field during the period of their privilege revocations and/or suspensions; forfeited any future right to work as licensed outfitters or guides in Montana; forfeited any right to benefit financially from the sale of the outfitting business associated with their ranch property; forfeited seized property, including a full-size body mount of a bighorn sheep and a trophy class, shoulder-mount bull elk.

In the fall of 2008, Dirk Paulsen, a Malta based field warden with Montana Fish, Wildlife and Parks (FWP), began investigating complaints of the Carlsons allegedly leading illegal elk hunts at baited sites within the ranch, which borders the Charles M. Russell National Wildlife Refuge and the U.S. Bureau of Land Management’s Burnt Lodge Wilderness Study Area.

Albert “Will” Carlson, who is not a legal resident of Montana, had arranged for a hunting outfitter to become his license sponsor, as well as his employer. The Carlsons then became licensed guides -- as well as clients -- under the outfitter.

This business arrangement opened the door for the ranch to have a steady supply of guaranteed, outfitter-sponsored hunting licenses that were then made available to Carlson family friends and business associates. In all, this resulted in about 40 out-of-state clients a year obtaining the licenses, as well as exclusive rights to hunt the Blue Ridge Ranch for trophy bull elk.

A search warrant from the Montana 12th Judicial District Court allowed Paulsen and fellow FWP Warden Mike Lee of Malta to use video surveillance of suspected baiting stations, which were strategically placed near elevated hunting stands on the ranch. The illegal baiting led to an artificial concentration of game animals near the hunters.

Further investigation revealed a variety of criminal violations, including the hunting of big-game animals without valid licenses and other outfitting-related infractions. Additional illegal luring, baiting and feeding of elk were documented through video surveillance.

Last October, other District Court search warrants were served on the Carlsons and their outfitter by wardens from FWP Regions 4, 6, and 7, as well as officers from the U.S. Bureau of Land Management, the U.S. Fish & Wildlife Service and the Phillips County Sheriff’s Office. Information and evidence collected during the search led to dozens of other nonresident suspects in Minnesota and Wisconsin.

Evidence seized during the search included oats, salt blocks, trail cameras containing images of the hunters with illegally harvested game animals, outfitter records and licenses, among other items.

Misdemeanor criminal citations were issued to Albert “Will” Carlson and Todd Carlson for the illegal use of

radios for hunting; the use of trail cameras for illegally tracking big game during the hunting season; hunting of game animals with the use of bait; feeding game animals; and soliciting the hunting of game animals with the use of bait, among other outfitting-related charges.

Earlier this year, Montana wardens went to Minnesota and Wisconsin and conducted nearly 50 interviews with hunters who were suspected of illegally killing or illegally possessing elk that had been taken from the ranch. The Montana wardens were assisted by officers from Minnesota and Wisconsin's state wildlife agencies. Paulsen said charges are still pending against 11 out-of-state residents and the outfitter.

During the investigation, an illegal full-body bighorn sheep mount was also discovered in the Blue Ridge Ranch's hunting lodge. An interview with a taxidermist in Minnesota led to him admitting that he'd prepared the mount for the Carlson family after the 2008 season, even though the taxidermist knew the animal was unlawfully possessed.

The Blue Ridge Ranch cases were prosecuted by Steve Gannon of the Chouteau County Attorney's Office and Kathleen Jenks of the Montana Attorney General's Office.

Initiative 161

Although PLWA has not taken an official position, many of us are in support of Initiative 161 which would take away the ability of outfitters to sponsor several thousand non residence hunters with a guaranteed big game license. Strictly from the standpoint of access to public land, I oppose the Outfitter Sponsored Licenses because I am aware of a number of roads to public land that were closed by outfitters and landowners seeking to control public land and wildlife for profit. The guaranteed income from these licenses obviously provide incentive and funds to carry out many of these closures.

But there are a number of other valid reason why these licenses should go into the regular draw like all the other non residences big game hunters. (1- 161 does not reduce the number of non-resident big game licenses nor does it reduce the funding for Block Management)

Here are some other consequences of the guaranteed client base these licenses provide....

Large ranches can operate in a manner much the same as programs such as Ranching for Wildlife do in states such as Utah, Colorado and New Mexico where tags and licenses are issued by landowners. The landowner can recruit on line or at big sport shows and, thru an outfitter, guarantee a licenses to all those willing to pay up to \$14,000 for a bull elk..

The same is true for ranches that have been subdivided with lots being sold to non resident hunters. These lot owners can all be guaranteed a license any year they chose to hunt in Montana.

It's also true for hunt clubs from out of state that lease or buy a ranch in Montana for hunting purposes. An outfitter can sponsor any and all club members who wish to hunt on a given year.

Under the OSL program our wildlife is for sale and money, rather than a fair and equal draw, is dictating who can hunt Montana's biggest and best wild game animals.

A great example of public wildlife for sale is shown at a website, arnaudoutfitting.com

I, for one, do not believe this is the way our wildlife should be managed.

I encourage all of you to contact Kurt Kephart at (406) 248 7050 and agree to gather signatures at a polling place on Primary Election Day. Let's get I -161 on the ballot.

John Gibson

PLWA Members Lost

We recently lost two important members of PLWA. They will be hard to replace.

Dave Pavlicek was killed in an auto wreck in April. He was a long time member and one of those dedicated sportsmen who could see the threat of commercialization of public wildlife.

Dave traveled extensively in central and northern Montana. He was often the first to report a public road closure. Dave also communicated well with archers trying to get them to see the big picture rather than their own personal wishes.

Grant Davis lost his fight against cancer in mid April after years of treatment. Grant, a member in good standing, represented the best role model I know. After his retirement he spent hundreds of hours helping to educate young people about the joys and responsibilities of hunting and fishing. Grant and I were the last two active members of the original team of fly tiers that started the program in Billings elementary schools over twenty years ago. More than a thousand youngsters have had tying and casting lessons with a good dose of sportsmanship and conservation included. By the way, the original fly tying program is alive and well, with 12 schools participating this year.

Both of these outstanding members will be missed. I only hope young people will follow in their footsteps and keep our commitment to access and the public trust alive.

PLWA Annual Membership Meeting - April 10, 2010

At our annual meeting the keynote speaker was Hal Harper, the governor's political and natural resources advisor. He assured us that governor is still strongly access oriented. Hal indicated the governor would be willing to put additional pressure on AG to get involved in road closures and inactivity by county attorneys.

John Novotny of Big Timber gave thorough briefing on the status of Cherry Creek eminent domain action. Comments to Senators and Rep Rehberg are needed urgently. There is no specific deadline, but the issue could be overcome by events if not resolved. (For further information see www.plwa.org website.)

Alan Charles of FWP advised that the "Access Montana" program to acquire access easements across private land to public had been initiated by Fish, Wildlife and Parks. Funds are available for acquisition as well as contract services for title searches. The department could also be party to litigation in selected cases of road closures.

George Bauer of Billings and Jim Olson of Hamilton were elected as PLWA directors to fill vacancies left by the departure of Tom Harmon and Bill Holdorf. Tom and Bill will continue on as "advisors" to the board. We thank them and all directors for their willingness to serve, and many hours of tireless efforts.

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.

Name _____

Address _____ Zip _____

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Membership (\$20) _____ Contribution _____

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

Mabee Road closure generates controversy

Public access disputed

by ROBERT WITHAM

Lewistown News-Argus Staff Writer

Controversy continues to swirl more than two years after Fergus County landowners closed a section of road that has been used to access the Upper Missouri River Breaks for many years. Meanwhile, the Fergus County Commissioners find themselves between a rock and a hard place, with landowners on one side and a public access group on the other. The Fergus County Attorney, Thomas Meissner, has advised the commissioners against making any determination on the section of road in question.

"In my opinion, it would be a mistake for you to do so," Meissner wrote in an opinion to the Commissioners.

Mabee Road proceeds north from Roy, eventually crossing BLM-managed land, state land, and several parcels of private land that are owned by three separate landowners. Mabee Road eventually intersects with Knox Ridge Road. Mark and Deanna Robbins own and lease land that Mabee Road crosses. The Robbinses locked a gate across the road in 2007, where the road crosses their property.

Public Lands/Water Access Association (PLWA) petitioned the Fergus County Commissioners about the road closure in January 2008. PLWA researched the history of the road in the Fergus County records, and submitted old maps and affidavits from people who have traveled over Mabee Road to access the Missouri Breaks. PLWA requested that the Fergus County Commissioners accept responsibility for the entire road to prevent unauthorized road closures from occurring.

PLWA spokesman Bernard Lea said the group just wants access to public land. Lea said they have obtained maps from 1913, 1919 and 1921, along with aerial photos from 1972, and that all of these maps and photos show the road in existence. PLWA has argued that Mabee Road is part of the Old Missouri Trail and has been used by the public to access public lands for decades. PLWA's position is that the road should be declared a public road under prescriptive use. Lea cites a recent case involving Perkins Gulch Road in Deer Lodge County. Lea said the Perkins Gulch Road case is similar to the Mabee Road case, and that a district court judge issued a prescriptive easement ruling in that case. A prescriptive easement allows a road on private land to be declared a public road in certain cases where the road has been used publicly for a period of time.

PLWA also argued that Fergus County is still collecting gasoline tax on all of Mabee Road; therefore, the commissioners must consider Mabee Road to be a public road. Montana law allocates state fuel taxes to incorporated cities and all counties in the state. Nearly \$17 million is appropriated annually. The distribution is based on formulas that consider population and rural road mileage. Rural road mileage includes all roads outside of incorporated cities and towns that are open to public travel. The statute does not consider ownership of the road. According to a publication by the Montana Department of Transportation, "a road is considered open to public travel when that section of the road is available for public use, passable by a two-wheel-drive passenger car, and open to the general public for use without restrictive gates, prohibitive signs, or regulations other than restrictions based on the size and weight of the vehicle."

An 8.5-mile section of road, which includes the section of road that has been closed, was considered eligible for gas tax collection from 1960 to 1990. This section of road was not claimed for gas tax from 1991 to 2006. County Commissioner Carl Seilstad said the 8.5-mile section was inadvertently put back on the map as a road that was open to the public (and thus eligible for gas tax collection) while all County roads were being mapped with GPS for the new 911 emergency system several years ago. Gas tax was again collected for this section of road from 2007 to 2009, but this oversight has since been addressed and this section of road is once again considered not eligible for gas-tax collection.

The attorney representing the landowners, Lance Lovell, countered PLWA's argument that Mabee Road is a public road with the argument that the road has never been public. Lovell suggested that any declaration by the

commissioners that the road was public “would constitute an uncompensated taking of private property for a public purpose without due process of law and prior advance payment of just compensation...”

Lovell’s threat about unlawful taking concerned Meissner, and he warned the commissioners that he believed they would “be required to defend against an unlawful taking claim” if they declared the closed section of the road a public road as PLWA requested.

The County Commissioners requested early on that Meissner review the documents and maps from PLWA, from Todd Gunderson, attorney for PLWA, and from Lance Lovell, attorney for the landowners, Mark and Deanna Robbins.

Meissner does not agree with all of the claims made by either attorney, nor is he swayed by the documentation that either attorney presented. Meissner, in fact, is of the opinion that “these old documents raise more questions than they answer.”

Meissner is also aware of the tension inherent in a situation like this. In an interview about this dispute, Meissner said “...both the Board of Commissioners and I are obligated by law to examine these issues objectively and dispassionately, and from a legal perspective, and not an emotional perspective. In other words, we are obligated to not only consider public land access issues, but also issues involving private property rights. These interests are often competing interests, as they are here.”

The County Commissioners, for their part, are left in a difficult position. The Commissioners have been drawn into this dispute because, were they to declare all of Mabee Road to be public, it would represent a victory to those who are primarily concerned with public access rights. However, making such a determination would invariably expose the County to a lawsuit for “inverse condemnation” by the landowners. Even with concerns over liability set aside, County officials are responsible for representing the interests of both landowners and those who seek access to public lands.

This controversy has generated allegations, some printed in other newspapers and on Web sites, that the County Commissioners and County Attorney in Fergus County are not representing the public in this matter. The County Commissioners, for their part, have expressed their commitment to represent all of the public – including landowners and those seeking access to public lands.

County Attorney Meissner also responded to the allegation that he is failing to represent the public. “My job is to represent the Board of Commissioners,” he said.

“While I am certainly interested and concerned about problems encountered by members of the public, I cannot legally represent the public. If that were the case, which public would I represent? Would I represent one group of taxpayers – those interested in access; or would I represent landowners and taxpayers who are concerned about private property rights? If I represented one, would not the other complain that their tax dollars are being used adversely to their legal interests? I do not represent Mr. and Mrs. Robbins, and I do not represent persons interested in crossing their land.”

PLWA has designated the Mabee Road closure as a high priority case for their organization. Lea said PLWA continues to gather documentation to support the case that all of Mabee Road is indeed a public road, and should remain open to the public. The organization recently contacted the National Archives in Washington, D.C., to verify when the land was patented. PLWA plans to submit additional information to the Fergus County Commissioners at a later date, in the hopes that the Commissioners will eventually decide to intervene in this case.

The Bureau of Land Management (BLM) has been aware that there were access issues associated with the Upper Missouri River Breaks National Monument all along. BLM’s Approved Resource Management Plan discusses access issues, and recognizes the need for additional public access.

The plan notes, “The BLM will coordinate with state agencies and county governments to improve public access to BLM land. Easements or fee acquisition opportunities will only be considered with willing landowners to enhance the value of the Monument and provide public access to or within the Monument, or additional public access to meet management objectives, including dispersed recreation use.

“The BLM will consider building or rerouting roads as necessary for additional public access to large blocks of BLM land.”

The access plan also states, “The BLM reserves the right to build new roads if necessary to access blocks of BLM land.”

Interestingly, another section of the road that traverses state land was closed by the state when the Monument was first created. Reportedly, this state road closure was in anticipation of access disputes such as this.

Seilstad noted that Mabee Road is not the only access to the Upper Missouri River Breaks National Monument, though it is the most convenient access for those traveling through Roy.

The Mabee Road controversy is one local example of a debate that is raging all across the West. That debate is over public access rights versus private land ownership rights.

PLWA’s Lea acknowledges that Montana is unique in its stream access law. Other western states lack even this basic public-access protection. Recent news from Colorado tells of rafters being banned from floating down rivers that pass through private property.

The growing frustration over the issue of public access to public land is seen in the growth of organizations such as the PLWA. This frustration is also witnessed to by efforts like Initiative 161, a ballot initiative that would restructure the way Montana issues non-resident hunting licenses. Initiative 161 would effectively ban outfitter-sponsored hunting licenses, and award all non-resident hunting licenses on a lottery basis. This change, it is suggested, would reduce the profit interest of some landowners in blocking public access to public land.

The social and political landscape of the American West is indeed changing, and Montana is changing along with the rest of the West. Public land access issues are becoming an increasing concern as land ownership changes, and new owners do not always share a former owner’s willingness to allow unknown people to pass through their property. In the absence of constructive changes by policy makers and lawmakers, controversies like the one surrounding Mabee Road are likely to continue to fall to county commissions and district judges, as landowners and public access groups spar over access to public land.

PLWA Clarification

I just visited with Robert Witham on his article. I thought it was well written and covered the facts. The only thing that was not clear is that we (PLWA) are not requesting the county to “Declare” the road to be a public road, we are asking them to “Reaffirm” the fact that based on the evidence we presented, it has always been a public road. If they declare it a public road, they are making it a public road today and then they would have to compensate the landowners. As I have said before, there is an important distinction between the 2 words, “Declare” and “Reaffirm”. Robert said he would discuss it with the editor.

Bernard Lea

Land Management agencies step up to the plate

Several positive developments have happened lately that indicate the Federal Land Management Agencies have become more active in protecting access to the land and water under their administration.

The Bureau of Land Management has sent a letter to the Fergus County Commissioners stating that their people use the Maybee Road for all sorts of land management purposes. (Roy, Mt)

The Bureau of Reclamation has notified the Toole County Commissioners that they use the Turner Point Road for land and water management activities. (Tiber Reservoir)

The U.S. Forest Service is working with the Madison County Commissioners to resolve the problem with the Hell's Canyon Road. (Silver Star MT.)

These are important actions for a variety of reasons. One of the most important is that it adds other uses to the need for the access road. An old court case denied a prescriptive easement because only recreation use could be shown on the road history.

These agencies have a number of legal responsibilities other than recreation such as enforcing the Antiquities Act, The Rare and Endangered Species Act, as well as grazing inspections and fire control.

Thanks for the help folks.

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