



PLWA

The **KEY**

Unlocking access to public lands & waters

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

Spring 2011

Issue 13

A SPORTSMANS VIEW OF THE 2011 MONTANA LEGISLATURE

I am a member of the Montana Wildlife Federation Board of Directors as well as the Board of the Billings rod and Gun Club. I am also President of the Public Land / Water Access Association. Being in those positions gives me a pretty good understanding of what's going on with the wildlife resource in our state. Here is my take on it.

The opportunity to gain profit from those wishing to hunt big game, particularly nonresident elk hunters, in Montana, is encouraging property owners and outfitters to enact legislate policies that allow them to dictate who may hunt in this state. A combination of this dictate and trespass laws would provide them with a system very much like those found in Europe.

Sportsmen, on the other hand, believe wildlife is held in trust for citizens of the state and that State Fish and Wildlife agency should determine who can legally hunt. In the case of nonresidents, we insist the selection to be accomplished by a fair and random draw.

We further understand that residents have agreed to share big game hunting opportunities with nonresidents by allowing them ten percent of the opportunities available. If, however, land ownership, the price of access, or road closures threatens to overwhelm the ten percent quota, we expect the Fish and Game Commission to implement the existing permit system which only allows ten percent of the opportunities to be legally available to nonresidents.

Resident sportsmen will not accept wildlife policies that allow nonresidents to hunt and harvest the biggest and best of Montana game animals. That is what Initiative 161 was all about.

In the May 20 Gazette article on this subject Mr. Denowh, lobbyist for the United Property Owners, claims that certain deficiencies in the state wildlife agency and commission prompted much of the legislation directed at wildlife management. Following are a few of the legislative remedies the United Property Owners proposed or supported to eliminate said deficiencies:

- HB 309 Gut the Stream Access Law
- SB400 Add 2000 more nonresident licenses
- HB 285 Eliminate archery permits in several hunting districts.
- SB 303 Stop FWP purchase of new public access without selling off equivalent lands.
- SB 255 To limit the power of the F&G Commission to determine wildlife mgt.

THANKS TO MONTANA SPORTSMEN, ALL OF THESE BILLS DIED OR WERE VETOED BY THE GOVERNOR.

But to all of those sportsmen and others who voted for In initiative 161, let me warn you that this is a struggle between those who believe the wildlife resource is held in trust for the benefit of all citizens and those who believe the money from hunting and harvesting big game should go to landowners and outfitters. If the group who wants to profit directly from our wildlife can hold on to their majorities in the legislature and then elect a sympathetic governor we are likely to have their agenda crammed down our throats.

John Gibson

President, Public Land / Water Access

44 CLUBS SIGN ON TO PLWA LETTER

Cherry Creek Road - Sweetgrass County

16,000 acres of public land at risk

IN AN UNPRECEDENTED ACTION, 44 SPORTING AND OUTDOOR CLUBS SIGNED ON TO A PLWA LETTER URGING CONGRESSIONAL DELEGATION SUPPORT OF THE EMINENT DOMAIN ACTION TO OPEN THE CHERRY CREEK ROAD.

The action was unprecedented in that it was the first time so many clubs have spoken with a unified voice on an issue of this type.

"We think it's an important issue," said John Gibson, president of the Public Land/Water Access Association, who authored the letter. "There are so many other things going on that it dropped off the radar, but it hasn't for sportsmen."

PLWA Vice President Dennis Grundman of Big Sky Montana spearheaded this effort.

April 7, 2011

Senator Jon Tester Representative Dennis Rehberg
204 Russell Senate Office Building 516 Cannon Office Building
Washington, D.C. 20510-2604 Washington, D.C. 20515

RE: Cheery Creek Road Access

Dear Senator Tester & Representative Rehberg:

On behalf of the sportsmen and sportswomen of Montana we are collectively corresponding with you concerning an issue that we believe should have been resolved long ago - Cherry Creek Road.

The Cherry Creek Road is approximately 8 miles south of Big Timber, MT and accesses 25 square miles of U.S. Forest Service lands. The first mile of the road is mostly owned by two owners who purchased the property in 1997. At the present time, these new owners have gated the road to prevent unrestricted public access.

The unrestricted public use of the Cherry Creek Road dates back to 1898. We are aware of numerous documents, plats, aerial photos, and gas tax revenue documentation that all indicate this is a public road by prescriptive easement and has been used for generations by outdoor recreationists.

In 1999, there was a negotiated settlement that allowed unrestricted public access for ten years. During these ten years the U.S. Forest Service was to explore options with the landowners that would have resulted in public access opportunities into the future; from what we understand the landowners have not been receptive to the terms explored. It now appears the only option left for the USFS is to use eminent domain to obtain a permanent easement. Before this process could be initiated, however, the USFS was required to complete a very thorough analysis; this has been accomplished.

A law passed in 1996 allows any one of Montana's Congressional delegation to start or stop an eminent domain procedure. During the past year we have, to no avail, contacted the offices of Senator Tester and Representative Rehberg asking for a review of and assistance with this matter. We are deeply concerned that this matter will be forgotten and or not addressed in an appropriate time-frame and therefore, we may permanently lose access to more than twenty five square miles of our public estate. If the USFS and landowners cannot reach an acceptable agreement after ten years, it appears that eminent domain is the only tool remaining to ensure public access to our public land.

Public access is one of the most crucial and important issues for your Montana hunting, fishing, and outdoor recreating constituents. It is also a major factor in job creation for our tourist industry and management of the isolated public lands.

Senator Tester and Representative Rehberg, each of you has expressed commitment to public access.

To this end, we need and therefore request your support to allow the U.S. Forest to initiate the eminent domain process unless there can be resolution of the matter in the next 30 days. We will all appreciate your timely attention to this matter and an early reply.

Respectfully, John Gibson - President
Public Land / Water Access Assoc.

Supporting Organizations:

Montana Wildlife Federation and affiliate clubs
Madison-Gallatin Trout Unlimited
Backcountry Horsemen of Montana
Billings Rod and Gun Club
Laurel Rod & Gun Club
Custer Rod and Gun Club
Butte Mineral and Gem Club
Skyline Sportsmen's Club
Magic City Fly Fisherman
Headwaters Sportsman's Assoc. - Bozeman
Russell Country Sportsmen Assoc.
Billings Gem and Mineral Club
Montana River Action
Teton County Sportsmen Assoc.
Rosebud/Treasure Wildlife Assoc.
Dawson County Rod and Gun Club
Makoshika Bowhunters
Gallatin Wildlife Association
Big Sky Upland Bird Assoc.
Bozeman Gem and Rock Club
George Grant Chapter of TU
Yellowstone Buffalo Foundation
Patch Top Mountain Club

Libby Rod and Gun Club
Yellowstone Audubon Society
Beartooth Sportsmen
Meagher County Sportsmen
Beaverhead Archery Club
Anaconda Sportsmen's Assoc.
Flathead Wildlife, Inc.
Park County Rod and Gun Club
Traditional Bow Hunters of Montana
Big Sky Hikers
Safari Club Great Falls Branch
Bitterroot Gem and Mineral Society
Helena Hunters and Anglers
Northwest Rock Chucks
Bitterroot Houndman's Assoc.
Missouri River Fly Fishers
Upper Missouri Breaks Audubon
State Land Access Coalition.
Prickly Pear Sportsmen
Bud Lilly - Legendary West Yellowstone Angler
Hellgate Mineral Society
Great Falls Archery Club

SEYLER LANE CASE TO GO TO TRIAL SOON

PLWA attorney Devlan Geddes advises that pre-trial motions for the Seyler Lane portion of the Madison County Lawsuit are scheduled for July of 2011 – and trial shortly after that. (The Madison county suit involved bridges over three bridges on the Ruby River. In 2008 the court ruled for PLWA on two of the roads –Duncan Road and Lewis Lane - which were established county roads. The court ruled that the right of way did not narrow at the bridges and thus the stream access law was in full force at the bridge abutments.

However, the court did not rule on Seyler Lane because of its prescriptive status. These bridges were on roads crossing the river on the property of James Cox Kennedy, an Atlanta communication mogul, (who joined in the suit on the side of the county.)

Seyler Lane is an old established road – probably used for over 100 years by all sorts of uses. It has also been maintained by the county and bridges on the road have been built by the county. It is

clearly a “public prescriptive easement” and that has been “stipulated” (agreed upon) by the other side. So the prescriptive status is not an issue. The key issues are the width and the “scope” of the easement.

Width. The other side contends that the width of the road is the “travel way” or the 16 or so feet of the hard surface – unlike county roads which have a 60 foot right of way. PLWA contends that it is at least 40 feet based on historical use during the prescriptive period, but could be as much as 66 feet if RS2477 standards apply. PLWA also contends that whatever the width of the prescriptive road, it does not narrow at a bridge.

Scope. The James Cox Kennedy attorneys argue that the scope of the easement is just for ordinary vehicular travel – thus the claim of the 16ft right of way. PLWA contends that the scope of use on the easement includes all sorts of uses such as herding cattle, road maintenance involving the borrow pit, recreational use, etc., all of which require much more than 16 ft.

What this means. The stakes are high. There are many, many roads used by the public and maintained by the public which are neither fish nor fowl. They have not been officially accepted by the county as county roads but have also not been through the courts and found to be public prescriptive easements. If PLWA prevails, it will set a precedent for all public prescriptive easements, and the bridge access law will presumably apply – as it does to all county roads. If the other side prevails, it could mean years of litigation on a case by case basis and the presumption that the bridge access law does not apply to public prescriptive roads.

As with all litigation, costs will run high. With your generous support we have the funds to at least start the case rolling, but we need all the help we can get. This will affect stream access in Montana for generations.

Scenic View Road Opened

County Prevails in Mediation

By Kay Braddock
Terry Tribune

An agreement has been reached between Prairie County and Michael and Terry Karrels, allowing public access to a section of Scenic View Road that crosses property owned by the Karrels. A faxed copy of a Prairie County public access easement, signed by the Karrels on April 11, was received by Prairie County Attorney Becky Convery Tuesday afternoon.

“We’re just glad to get the matter settled,” Convery said. “We think it’s the best solution for all parties involved.”

The documents were received just one week prior to the scheduled April 18 District Court trial date that would have taken up the matter.

A gate installed in the fall of 2007 by Karrels and locked a year later led Prairie County to file papers in District Court in September 2010 seeking a judgment declaring the 7-mile dirt road north of Terry a county road by virtue of prescriptive easement.

Conditions within the agreement require the gate be unlocked and also assure that the county will assume full liability on Scenic View Road.

Attorney Clifford Edwards, who represents Karrels, called the road's liability issue a "sticking point" during negotiation talks with the county.

"Finally the county agreed to accept liability," Edwards said, pointing out the issue needed to be addressed in legal documents, regardless of assurances made in public statements by county officials. A large washout neighboring a portion of the road has been a liability concern brought up by Michael Karrels during previous public meetings.

Devlan Geddes, an attorney from Bozeman, who began assisting the county in the legal matter in November of last year said the county has been willing to assume liability on the road from the beginning. Geddes pointed to state law, which already determines that counties must accept liability on county roads.

"The county has agreed to take on responsibility for Scenic View (Road), no different than any other county road," Geddes said. "That's always been its position."

Prairie County Commission Chairman Todd Devlin said he was glad to see the matter resolved. "I find it very disturbing that those supporting the road closure never took into consideration the intent of the road, state law, and taxes paid to build and maintain the road for 40 years," Devlin said in a written statement.

Convery said the county intends to remove the gate, but will first inspect the road and begin any needed maintenance on the road before the summer tourism season begins.

Bullwhacker Road Closed by Court

Blaine County 2011

In 2007 the Bullwhacker Road southeast of Havre was opened after several years of closure and controversy. The road which serves as the only reasonable access to over 50,000 acres of BLM and state land – much of it in the Missouri River Breaks, had been closed , or open only by landowner

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 _____

Phone _____ Email _____

Membership (\$20) _____ Contribution _____

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

THE KEY published by
The Public Land/Water Access Association
(PLWA)
P.O. Box 80987
Billings, MT 59108
www.plwa.org

US Postage Paid

Permit No. 104

Billings, MT.

permission, for several years. Prior to that it had been used by land managers, ranchers, and recreationists for half a century. Thousands of dollars of public money had been spent on maintenance.

PLWA (formerly "PLAAI") expert volunteers researched road history and developed voluminous documentation proving it to be a " public highway". This was presented to the County Attorney who agreed and issued an opinion to that effect which opened the road.

However, in 2009 the owners filed suit in the 17th Judicial District court (Malta, MT) to overturn the ruling. On 3-25-2011 Judge John C. McKeon found the evidence necessary to establish a public prescriptive easement inconclusive and ruled that the road was a private road.

PLWA believes the decision was incorrect.

Great Falls Offers Support

John Kelley, President of the Great Falls Chapter of Walleyes Unlimited presented PLWA with a contribution of \$1000.00 at the April meeting of the Russell County Sportsmen Association.

Former Director Bryan Dunn enlisted 23 new PLWA members at the 2nd Annual Sportsman's Organization Awareness Day held at Big Bear Sports Center in Great Falls.

Thank you all for your support. Together we can keep Montana the place we want to live.