



**PLWA**

# The **KEY**

*Unlocking access to public lands & waters*

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**Issue 16**

## **Madison County Lawsuit - Adverse Ruling on Seyler Lane**

### **Strange Legal Theory Advanced**

### **PLWA appeals - James Cox Kennedy cross appeals**

### **Headed to Montana Supreme Court**

In a finding of April 15, 2012 Judge Loren Tucker of the 5th Judicial District Court of Madison County ruled against PLWA. The court held the prescriptive easement for the road was in effect, two easements - one a public easement for just the road surface itself and a secondary easement of the full 60 feet for repair and maintenance. Thus, there would be no recreational legal access at bridges on prescriptive roads if this ruling holds.

PLWA strongly disagrees with this theory and, on advice of the Goetz law firm, will appeal this ruling to the Montana Supreme Court. We believe that case law supports the policy that prescriptive rights include all legal uses within the prescriptive right-of-way. If the two easement theory were to hold it would mean school kids waiting for a bus would be trespassing - or a guy pulled off the road to fix a flat would be trespassing.

In the latest event of this case, on May 30 2012, Kennedy cross appealed, and included constitutionality of the 2008 Tucker decision in his appeal. It is clear he will not be happy until our bridge access laws and perhaps stream access are gone.

Montana is lucky to enjoy the best stream access in the U.S. We cannot stand by and see it eroded by this case or any other cause. Keep in mind that our current stream access law came about when an adverse lower court ruling was overruled by the supreme court. Many times the lower courts deliver a "home town" verdict.

The George Grant Chapter of TU has started a Stream Access Defense fund for this case with a contribution of \$1,500. Please consider chipping in generously. You can send it by mail to: PLWA

Box 80987 Billings, Mt 59108- or on line at  
[www.plwa.org](http://www.plwa.org).

## **Stream Access Fight in Utah**

by Ben Lamb - Outdoor Life Blog

Unless your state is like Montana, Idaho or just a few others, strolling onto a top trout stream is no easy task. You have to rely on state access sites, which often times are few and far between. Think combat fishing situations where elbows get thrown alongside spinners and flies.

But some states are trying to buck this trend, and Utah is one of them. Back in 2010, the Utah Stream Access Coalition fought the Utah Legislature which took away stream access rights that had been granted by a court earlier.

Unfortunately, the Utah Stream Access Coalition was unable to kill the attempt to eliminate the public from public waters.

Luckily, the anglers of the Beehive state aren't quitters. (Continued on Page 2)...

**Utah** ... Recently, the 4th District Court in Utah ruled in favor of the Stream Access folks who challenged the constitutionality of HB 141, the “Public waters Access Act.” While the decision handed down by the court didn’t clear all of the issues associated with stream access in Utah, the judge did ask for a briefing on whether or not HB 141 violated the Public Trust. This is a positive sign that progress is being made to put anglers back on the rivers and streams of Utah.

Strangely enough, this effort is being opposed by a sportsman’s group called The Sportsmen for Fish and Wildlife. This group’s founder has declared the North American model of fish and wildlife conservation to be socialism and outdated.

The fight’s not over, but this ruling helps pave the way for the Utah Stream Access Coalition to continue its fight to allow for the public to utilize its resource.

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## **Sportsmen for Fish and Wildlife Seeking Privatized Wildlife - Spreading Misinformation**

by VITO QUATRARO Montana Sportsmans Alliance

Recently there has been an onslaught of misleading information brought forth by the Sportsmen for Fish and Wildlife and their sister organization, Big Game Forever. The Montana chapter of this Utah-based organization seems to be taking marching orders from Utah. They are here in Montana, endorsing and supporting legislative candidates to carry their radical positions.

First, a little history. We have a wolf season in Montana due to the Simpson-Tester rider that was approved by Congress last year. Sportsmen for Fish and Wildlife tried to kill that legislation in Washington, D.C. It went so far as to issue a news release blatantly misrepresenting that the National Rifle Association, Safari Club International and the Congressional Sportsmen’s Foundation also opposed the Simpson-Tester rider, when in fact NRA, et al., supported the Simpson-Tester rider. About as low down and underhanded as it gets, but no surprise from the Sportsmen for Fish and Wildlife.

Subsequent to the group lying about the NRA position, the NRA issued a news release that gives the best advice you can find related to anything presented by the sportsman group. I quote from that release: “Congressional offices and members of the media should exercise caution in accepting as fact, or repeating, any claims made by Sportsmen for Fish and Wildlife, Big Game Forever or any person claiming to represent them. Due to the blatant misrepresentation contained in the press release circulated by these two groups, any claims they make in the future should be thoroughly investigated and independently confirmed.” The complete press release can be viewed at [www.montanasporsmenalliance.com](http://www.montanasporsmenalliance.com). I encourage all voters to follow the advice of the NRA and not accept anything from the Sportsmen for Fish and Wildlife as fact.

On the Montana Sportsmen Alliance website listed above is an article from the Anchorage Daily News regarding the founder of the Sportsmen for Fish and Wildlife’s Alaska and Alaska Wildlife Division Director Corey Rossi. Rossi got his job via this organization’s political connection, then resigned in haste this January, in the face of 12 illegal hunting and outfitting violations. The article also discusses Rossi’s plan to give “landowners special hunting permits to use or sell, perhaps with special authorizations such as the ability to hunt outside normal hunting seasons on their land.” Further evidence of the damage this group has been inflicting on the western states.

Don Peay, founder, is quoted in that same article saying, “it’s time to revisit the widely accepted principle in the United States and Canada that game is a public resource” and further described “that egalitarian doctrine, found in Alaska’s state constitution and laws throughout the West, as ‘socialism’.” Make no mistake how Peay and the Sportsmen for Fish and Wildlife feel about public wildlife and public hunting - not the way most in Montana feel about it.

This organization is making a concerted effort to make inroads into Montana using the wolf as their rallying cry. The group has advocated wolf management positions that could result in wolf RELISTING. The wolf is the group's "cash cow," helping fund their efforts to privatize wildlife for the benefit of the few. All to the detriment of the average Montana hunter.

Please talk to your candidates and ask about their involvement with the Sportsmen for Fish and Wildlife. Ask them if they share the same radical views. If so, take the advice given by the NRA "exercise caution in accepting as fact, or repeating, any claims made by Sportsmen for Fish and Wildlife.

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## **Tenderfoot Creek Land Acquisition / Road Closure**

PLWA officers and President John Gibson have been active in advocating for this major access opening to both public land and water in central Montana. This is both by John's advancement of funding through his position on the the "Canyon Ferry Trust" advisory board, lobbying for funding through the Land and Water Conservation Fund, and working with Attorney General Bullock in regard to action on the closed gate. (Yup, it is a complex situation but don't give up - read on for more information.)

The Smith River canyon running from just north of White Sulpher Springs to just south of Great Falls, is one of great natural features of central Montana. The west side is mainly private land but the east side is primarily Lewis and Clark National Forest. The Tenderfoot creek runs into the Smith, and the South Fork Tenderfoot Creek road opens access to a large chunk of adjacent National Forest . A great opportunity exists to execute a land purchase which would open up even more of the National Forest and add to it.

Tenderfoot Creek Road area is included in a proposed land purchase in which the Bair land foundation has offered alternate sections of land to the U.S. Forest Service. Funds are available from the Land and Water Conservation Fund. On April 6, 2012 the Forest Service announced that \$2 million had been allocated for Part 1 of the project as part of the FY 2012 Land and Water Conservation Fund allocation. Other involved organizations include the Forest Service, the Montana Fish Wildlife Trust (" Canyon Ferry Trust") , the Tenderfoot Trust, and the Rocky Mountain Elk Foundation. We are following this closely and doing all we can to lobby for finalization of the deal !

However, a local landowner/outfitter has placed a locked gate on the county road leading to much of the land involved in this purchase. The Meagher County Commissioners apparently refuse to confront the landowner. Research by the Gallatin National Forest and The State of Montana (Department of Natural Resources & Conservation ) shows that the road in question is an official county Road, established December 5, 1889 ( and recorded in the County Commission Journal Book 6, page 22. )

PLWA recently received a copy of a letter from Attorney General Steve Bullock's office to the Meagher County Commissioners relative to the closed road. It included the following; "In order to to ensure public access, this office is prepared to bring litigation if the county is unwilling to fulfill its duties to properly manage the road". It very satisfying that the Attorney General's office stepped up to the plate and is resolving this case without PLWA having to pursue further legal action.

The Forest Service Officer working on this is Bob Dennee from the Gallatin National Forest @ 587-6914 .

Stay tuned.

# **Boadle Road - Back to the Supreme Court - Again**

## **Adverse Ruling and Appeal**

As readers and members are no doubt aware , the Boadle Road in Teton County has been an endless saga of the associated landowner losing round after round in the courts and defying court rulings.

The latest developement was that he tore out a bridge on a public right of way, scoffing at a Montana Supreme Court decision. The PLWA action to sue for punitive damages, and reconstruction of the offending bridge went to initial stages of trial on March 7, 2012.

However, in April of 2012, Judge Nels Swandal ruled that there was, in effect, no foul when Jones destroyed the bridge because the bridge was “personal property”.

PLWA strongly disagrees with this opinion . We do not see how any “improvement” permanently affixed to the surface of the earth could be deemed personal property, and what’s more, how anyone could remove an improvement or bridge on a public right-of-way without the consent of the public - particularly when the Montana Supreme court had told him on two occasions to quit messing with the road and right-of-way.

For these reasons, on May 9th 2012, Judge Swandal’s decision was again appealed to the Montana Supreme court.

(For the complete history of this case refer to the articles in the HOT TOPICS and ISSUES sections of our website - [www.plwa.org](http://www.plwa.org).)

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## **New Fishing Access on Sixteen Mile Creek**

Efforts underway since 2006 to acquire 5 miles of railroad right-of-way stretching west from Ringling along Sixteenmile Creek, and accessing an otherwise isolated section of DNRC land for another mile, are now nearing conclusion. Funding has been provided by the Montana Fish and Wildlife Conservation Trust, and the land is under contract with the Western Rivers Conservancy to act as an intermediary. It’s now up to Montana Fish Wildlife and Parks to complete the land acceptance process and close the deal.

Past public support from sportsmen for this project has been overwhelmingly positive, and essential in moving it forward. (A February/March Northwest Fly Fishing article on Sixteenmile Creek mentions this acquisition and quotes a FWP staffer saying The proposed project generated more public comments than any other project in my entire career.)Your continued support will help make fishing access to this fabled and historic water a reality. It’s time to push this to a conclusion.

A second round of public comments closed April 30, 2012. From what we understand thousand of comments were again received and have been evaluated by Region 3 of Montana FWP. We understand the comments have been about 2/3 positive but as usual, the local nearby landowners are negative. FWP staff who are directly involved with this project include Allan Kuser, Pat Flowers, Ray Heagney, and Travis Horton. Joe Maurier, FWP Director, is also well aware of this effort. A draft “Notice of Decision” is in process for action by R3 director Pat Flowers . Biologist Ray Heagney is the point staff person on this at R3 . Phone is 406-994-4042 .(Big Sky resident Steve Johnson at 406-539-6660 is also active and knowledgeable about the project. Without the Montana Fish and Wildlife Conservation Trust this would not have been possible . This trust was set up by Sen, Max Baucus to hold funds coming from sale of Canyon Ferry cabin lot lease holders. PLWA

President John Gibson serves on the trust advisory board which recommended allocation of income to this project. The appraised value and purchase price of the property is \$315,000 .

At the Meagher County Commissioners hearing, some of the locals said the acquisition was a bad deal because there are no fish in there. However, here is what a real estate ad for a near by property had to say:

The live water on the property can only be described as exceptional. It is very rare in Montana to find truly private trout water with Montana stream access laws. Fishing on Sixteen Mile Creek Ranch is virtually private water; anglers can fish this property all season and not see another person, let alone another angler. This is due to the large landowners that surround Sixteen Mile Creek Ranch and the limited access. Pick your favorite dry attractor or terrestrial pattern and head out for a day of some of the best top water action found anywhere. At about 25 feet wide, Sixteen Mile Creek is the classic fishery to wear your wading sandals and walk the creek casting 15 to 30 feet to eager trout. The fish do not pay attention to anglers, thus are quick to take any well-placed offering.

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## **Opening the gate on Modesty Creek Rd.**

### **Deer Lodge County**

PLWA pioneer Tony Schoonen has done it again. With the help of PLWA affiliated Anaconda Sportsman and Skyline Sportsman Clubs, Schoonen took action to open a road closed for decades. As we understand it, Tony led the effort to research road history and keep the issue in front of the Anaconda -Deer Lodge commissioners . Eventually the commissioners hired a private attorney who corroborated the law and facts..

The case was so strong , the commissioners personally went and cut the lock off the gate. We understand the landowners are trying to get a court injunction to close it again, but Tony thinks they have little chance. What a guy ! See the Montana Standard stories below. (For those of you not familiar with Tony and his legacy. He and his cohorts were the guys who fought to get the stream access we enjoy today.

**By George Plaven of The Montana Standard | Posted: Thursday, March 8, 2012 12:00 am**

ANACONDA - With two snips of the bolt cutters, Anaconda sportsmen unlocked public access to Modesty Creek Road Wednesday for the first time in more than 20 years.

Joined by county officials, including Chief Executive Becky Guay and commission Chairman Mark Sweeney, they removed the locks from a pair of private gates that had long closed a stretch of the road to Forest Service land. Modesty Creek Road is located about eight miles northeast of Anaconda. It intersects with Racetrack Road and Spring Gulch Road, running to Dry Gulch.

The commission unanimously reaffirmed Modesty Creek Road as a county road at its meeting Tuesday evening, following the recommendation of Butte attorney Susan Callaghan. Callaghan, hired by the county to help with research and legal standards, concluded the road is a county road based on records dating as far back as the late 1800s. Furthermore, there is nothing to suggest the county ever abandoned the road, Callaghan told commissioners.

Sweeney asked to open the gates as soon as possible, which landowners put up sometime in the 1980s. Lorry Thomas, president of the Anaconda Sportsman Club, told The Montana Standard he began fighting for access on Modesty Creek Road from the beginning. To finally see the road open is like a dream coming true, Thomas said. Now, kids can come up here to hike these mountain lakes like we used to do, he said.

Residents Dale Schafer and Shawn DeMers, caretakers on nearby property owned by Bozeman doctor Hugh Hetherington, took up the cause in October with renewed persistence.

But landowners in the area have previously stated they are concerned about vandalism and theft if the road is allowed open to the public.

**Modesty Road** ... Attorneys for one landowner, Ilija Letica, of the Michigan-based Letica Corp., previously sent a letter requesting they come before the commission March 20.

The letter, signed by Kevin Jones of Christian, Samson & Jones in Missoula, said he was unable to attend the meeting Tuesday.

“In the interest of fairness, and because the issue of the county road has a significant impact on the Letica Land Company property, we would like the opportunity to be heard and present additional information,” Jones stated in the letter.

Jones could not be reached for further comment Wednesday. Ron Peterson, caretaker for Letica, also declined comment.

It is not yet known whether they will file for court action.

Sweeney told The Montana Standard that any additional information should have already been brought forward. “It’s been on our agenda several times, and (Callaghan) has been in contact with them on a regular basis,” he said. Larry Sturm, county road shop supervisor, said he will wait until spring to address maintenance on the county road to make it passable. The sportsman club also offered to help put up new signage, he said.

Tony Schoonen, with the Skyline Sportsman Association, has been involved with Modesty Creek Road and said he is encouraged with the outcome.

“It’s great. When you talk about all the money involved in these road closures, to have a win here is a really big deal,” he said. “This is the kind of attitude it takes, to not give up on these.”

Reporter George Plaven may be reached at 496-5597, or via email at [george.plaven@lee.net](mailto:george.plaven@lee.net). Follow him at [Twitter.com/@George\\_Plaven](https://twitter.com/@George_Plaven). Copyright 2012 Mtstandard.com.

See Also:

Modesty Creek status argued: County, landowners define sides

By George Plaven of The Montana Standard | Posted: Monday, April 2, 2012

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## **Montana Hunting and Fishing Heritage May Be In Danger**

By JW Westman

Over the last 20 years, the face of hunting and fishing in Montana has changed substantially. Ranches in Montana are no longer bought by Montanans but instead by large out-of-state interests. Wolves have been introduced onto the landscape. Legislation has been enacted requiring big game population objectives be set at artificially low numbers. Fish Wildlife and Parks (FWP) has been charged with management of an increasing number of non-game, non-hunttable species without additional revenue sources to fund that charge. Legislators, with little to no knowledge of hunting and fishing issues, are voting in new laws without understanding the impact on the Montana resident hunters and anglers. And maybe most importantly, landowners and sportsmen and women no longer are the friends and allies that they once were.

The challenge facing Montana hunters and anglers today is “How do we preserve the Montana hunting and fishing heritage?” The unprecedented onslaught of anti-hunter, anti-angler, anti-FWP bills in the last legislature galvanized people from across the state which led sportsmen to organize in a grassroots effort to defeat most of those attacks on Montana’s hunting and fishing heritage. Thankfully, the governor vetoed others. We were lucky because the legislators sponsoring these bad bills were surprised by the outrage of Montana resident hunters and anglers.

What does the future hold for our hunting and fishing heritage in Montana? That will largely be determined by who we elect to the legislature and governor’s office. The Montana Sportsmen Alliance (MSA) was spawned

from the 2011 legislative session with the goal of preserving and enhancing our wildlife resources and protecting the Montana resident hunter and angler. To this end, we hope to encourage greater involvement by Montana sportsmen in the process; provide accurate information on the issues to both sportsmen and legislative candidates; meet with the candidates from both parties to discuss our concerns and provide relevant, accurate data/information; develop a platform of pro hunting, fishing and access bills that both landowners and sportsmen can support; and to participate in the 2013 legislative session to provide the voice of reason on Montana fish and wildlife issues.

What can you do to help? Start by learning about the issues from reliable sources and getting actively involved in your local sportsmen organizations. The Montana Sportsmen Alliance Web site ([www.montanaspportsmenalliance.com](http://www.montanaspportsmenalliance.com)) has links to the bills brought forth in the 2011 session, articles from newspapers, a calendar of events, a list of all the statewide legislative candidates, etc. A major problem is finding reliable, accurate sources of information. Beware of groups and individuals that claim to represent the average hunters and anglers, but upon scrutiny, may not in fact represent the average Joe but instead have their own hidden agenda. "Truth and facts" can be a difficult commodity to find at times.

Find out where your elected officials stand on hunting, fishing and access issues. Discuss your concerns with the candidates. Go to candidate forums and whenever possible have one on one discussions with them. Be sure that they understand your concerns and that you will hold them accountable for their actions in the legislature. When you find a candidate that shares your views and values on wildlife issues, support them and work for their election. At MSA, we believe hunting, fishing and access issues are non-partisan and should be separated from each party's ideology. We want the legislators to vote on the merits of the individual bills and respect for the wishes of their constituents rather than the party designation of its sponsor. (Continued...)

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## 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 \_\_\_\_\_

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

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**(JW Westman** - Continued from Page 7) ... Talk to landowners to start re-building the relationships hunters/anglers once had. Realize that a very small percentage of sportsmen have created real problems for landowners and understand their frustration with hunters/anglers. Recognize the impact hunting season has on landowners with all the people stopping by and/or phoning them. Offer to help out in the off season and send thank you notes after the season. The landowners are not our enemies nor are we their enemies.

Make no mistake. This upcoming election will determine the face of hunting, fishing and access for Montana resident hunters and anglers for many years to come. The threats are real. Special interest groups and individuals are already preparing legislation that will be very detrimental to our children's hunting and fishing heritage. The Montana resident hunting and fishing community is one of the largest voting blocs in the state, and if we stand together, we can create a positive environment for the future.

— JW Westman of Park City is the Secretary of the Public Land / Water Access Association.