



PLWA

The **KEY**

Unlocking access to public lands & waters

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SEYLER LANE CASE TRIAL - JANUARY 22, 2012

Final Portion of Madison County Litigation

The Seyler Lane portion of the Madison County Lawsuit was heard in early January of 2012 in the Montana 5th judicial district - Madison County district court with Judge Tucker presiding.

The original Madison county suit involved three bridges over 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 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 for Seyler lane are the “scope” and width of the easement created during the prescriptive period.

SCOPE. The opposing attorneys argue that the scope of the easement is just for ordinary vehicular travel for a 16ft right of way. PLWA contends that the scope of use on the easement includes all legal uses such as herding cattle, road maintenance involving the borrow pit, recreational use, etc., - all of which require much more than 16 ft.

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. PLWA also contends that whatever the width of the prescriptive road, it does not narrow at a bridge.

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.

Court case heard on Sheridan bridge debate

Access fight resumes

By Nick Gevock of The Montana Standard
Wednesday, January 11, 2012 12:00 am

VIRGINIA CITY — A court case over accessing streams from rural bridges that has simmered for years continued before a judge in Virginia City Tuesday after sitting dormant since 2004.

The Public Lands/Water Access Association sued Madison County and James Cox Kennedy, a multimillionaire media mogul and ranch owner near Sheridan, in 2004. The access group said Kennedy's fencing of the Seyler and Lewis lane bridges amounted to shutting off anglers from public roads to the Ruby River.

Kennedy contended the bridges aren't suitable for safe public access and opened him up to liability if someone was injured using the steep embankments.

The lawsuit prompted the Legislature in 2009 to pass a law guaranteeing the public access rights to streams from bridges on county roads. Landowners can fence up to bridges, but must provide a reasonable access point.

But the Madison County case, while dropped for Lewis Lane because it's a county road, remained alive on Seyler Lane. That's because it's not a county road, but rather one based on a prescriptive easement after decades of use by area ranchers to move cattle, as well as by the public.

Both sides agree there's a prescriptive easement for the route, located several miles northwest of Sheridan.

But Kennedy contends it is a narrow one that only applies to the road surface and doesn't give any stream access rights to the public. The PLWAA, however, argues the easement applies to the borrow pit beyond the roadway and therefore gives the public the right to use the right of way to get to

the river.

Tony Schoonen, of Butte, a longtime PLWAA member, testified Tuesday in Virginia City district court during a bench trial that he long used the bridge while working as a ranch hand to move cattle. And that didn't just include the road surface.

"They were all over the borrow pits trying to get a mouthful of grass," he said.

Schoonen also recalled using the bridge since the late 1940s to access the river to trap, fish and hunt waterfowl along the Ruby River.

However Judge Loren Tucker in the morning struck down PLWAA's contention that recreational use constituted a prescriptive right under Montana law. Tucker during a break in testimony reviewed state Supreme Court rulings and rejected PLWAA's contention. He said the case is centered on the width of the right of way.

"This judge is simply unable to find a basis to use recreational use to establish a right," he said. "I'm not aware of anybody's dispute of people's right to use the bridge; the dispute seems to be about terra firma around the bridge."

Devlan Geddes, a Bozeman lawyer representing the group, worked to show that the prescriptive easement on Seyler Lane goes beyond the road surface. One of the exhibits included a survey map showing the road as a county right of way that Kennedy had signed.

Schoonen testified under cross examination that through the years he never asked for permission when putting a boat in at Seyler Lane bridge. (Court Case continued)

It was in the right of way," he said. "I didn't step onto any private property."

Peter Coffman, an Atlanta lawyer representing Kennedy, brought up editorials that Schoonen has written over the years advocating for stream access rights. Coffman contended that makes him a biased witness.

Schoonen said he was unapologetic for sticking up for the public and that Kennedy's ranch workers have harassed anglers often.

Colleen Dowdall, a Missoula attorney also representing Kennedy, put registered surveyor Ken Jenkins on the stand to question the official certificate of survey that shows Seyler Lane as a county right of way.

"Certificates of survey cannot by themselves establish a right of way," Jenkins said.

The testimony is expected to wrap up Wednesday before it goes to Tucker, who could take weeks to issue a ruling.

Seyler Lane Trial from the PLWA Perspective

John Gibson, George Bauer and I attended the trial on the Seyler Lane trial in which is the last bridge to be decided in the Ruby River Law Suite. George attended on Monday, John on Monday and Tuesday and I stayed until it was concluded on Wednesday.

Probably the most disappointing part of the whole situation was the lack of any support or input from Madison County. They had hired an attorney to represent them at the trial, and she asked approximately 4 questions during the 2 days.

This can lead to a more serious problem. If we are forced to sue the counties because they will not defend the public right to access public land and water, and the landowners pay all the bills, what is the responsibility of the county?

These people, commissioners and the county attorney are elected by taxpayers of the county. They take an oath of office which I have not read but I assume states they will protect the public and taxpayers rights. I think one of those rights is to provide a transportation system that allows the public to travel the county for emergency services, such as fire and police protection, floods, school bus routes, mail routes, transporting goods such as livestock and farm crops, allow people to travel the roads for recreation, such as fishing, hunting, visiting with neighbors, etc.

PLWA attorneys, the Goetz Law Firm, did an excellent job of presenting evidence that the road has existed for approximately 100 years, the road has been maintained by the county, the bridge is inspected every 2 years by the State of Montana and repairs made if necessary.

The existing right of way fence lines have been established by Certificate of Survey Plats (COS) ordered and paid for by private land owners. Our attorneys entered into evidence the COS and every one of them showed the right of way fences for the road. Property boundaries have been established by surveys along the fence lines.

We don't know how the judge will rule on the evidence presented, but if he rules against our evidence, we will in all probability, appeal to the Supreme Court.

Bernard Lea
PLWA Director

PLWA Files Lawsuit Over Bridge Destruction

Landowner Ignores Montana Supreme Court Decision

The following is a press release issued by PLWA on Monday Dec 5th. As you will note the action includes a claim for damages -in this case punitive damages. Punitive means just what it says.

This is one of the most blatant refusals to abide by the decisions of both the District and Montana Supreme Courts that we have encountered.

The Public Land/Water Access Association (PLWA), a Montana non-profit organization dedicated to preserving public access to public land and water, has filed its third lawsuit in Teton County District Court against Roger Jones seeking to reopen access to Pishkun Reservoir via the Boadle Road and bridge over the Sun River Slope Canal.

In 2003, Teton County District Court Judge Marc Buyske declared the Boadle Road, in use since the early 1900's to be a public road and enjoined Jones from interfering with the public's use of the road. The District Court's decision was affirmed by the Montana Supreme Court in 2006.

Despite the 2003 order, landowner Jones recently destroyed the Boadle Bridge crossing the Sun River Slope Canal thereby rendering the Boadle Road unusable. He also posted "NO ACCESS . . ." signs adjacent to the Boadle Road in an effort to prevent the public from using Boadle Road.

PLWA filed its lawsuit to enforce of the District Court's prior order, to end Jones' interference with the public right of way, to force Jones to reconstruct the bridge, and to recover damages.

John Gibson, PLWA's President, commented: "This is one of the most blatant refusals to abide by decisions of both the District and Montana Supreme Courts that we have encountered." He continued, "PLWA prides itself on standing up for the right of Montanans to use Montana's public roads to access public land and water. It firmly believes that once the judiciary renders declares a road to be open for public use, that decision should apply to everyone regardless of wealth or position."

When asked what PLWA hopes to accomplish by filing this lawsuit, he stated: "We hope that all of those folks who used the Boadle Road in the past, including those who stepped forward to testify at trial, will feel that justice has been done. Although it may have taken over a decade to obtain a final resolution from the courts, we were finally successful and we won't let Mr. Jones undo what we accomplished."

PLWA Raffle Results

The winners for the PLWA 2011 Fundraising Raffle held on 12/23/2011 in Billings were:

- 1.) Browning 300 WSM Rifle - Rod Bullis, Helena MT
- 2.) Orvis Fly Rod - Mark Ozog, Great Falls MT
- 3.) 32" 12 ga. Trap Gun - oni Dittman, Great Falls, MT
- 4.) \$50 Scheels Gift Card - Dick Spalding, Billings MT
- 5.) \$50 Scheels Gift Card - Rick Lyons, Butte MT

Thank you all for your generous support,. The movement to close off public access to public land and water grows daily. Our opponents have virtually unlimited resources. We promise to spend your dollars wisely and prudently in the fight to stem that tide.

Rocky Mountain Front Access Imperiled

Up against more Wall Street money.

The article below from the Choteau Acantha newspaper describes in part what is going on with several roads leading to the Rocky Mountain Front in Teton county. PLWA, although not cited in the article, has been very involved with this. John Gibson and folks from the Russell Country Sportsmen, have made several trips to the location. It is a very complicated situation in that there are several roads involved – all with somewhat different status. The attorney from Seattle mentioned is Tim Callahan, a former local from the area. He has been a great resource and owe him much for his dedicated professional efforts. Without him, this situation would have likely just been passed over by the county commissioners, and the Goldman Sachs money allowed to prevail. We are up against billionaires – literally – all the time.

With permission and full credit to Choteau Acantha

Published: Wednesday, January 11, 2012 1:13 AM MST

County hears mixed comments on roads

The topic of maintaining public roads on the Rocky Mountain Front west of Choteau drew a courtroom full of area residents to Choteau last week to give the Teton County Commissioners their input.

The commissioners invited citizens to attend their regular meeting on Jan. 5 and give comments on two roads west of Choteau in the Deep Creek area – the Elizabeth Road and the Stafford Road.

County Commission Chairman Arnie Gettel of Power told about 32 citizens that the county has at various times in the past two decades fought battles in the court system to keep open what it considered county or public roads on the front when landowners sought to close them.

In this situation, the new owners of the former Jack Salmond ranch, Gordon and Jill Dyal, contend that the Elizabeth and Stafford roads are private and should not be open to the public.

Speaking to the commissioners, Gordon Dyal, a Goldman Sachs executive, said his research does not show a clear county road established for the Elizabeth Road, which serves as a driveway to his home, or for the Stafford Road past a missile base.

His attorney, Allan Karell of Billings, said his research on the roads has not turned up any clear evidence that the roads were actually “opened” by the county.

In fact, he said, the Elizabeth Road “would be the classic road to nowhere” as it ends at his clients’ home and does not provide access to any public lands.

He said his research on the Stafford road shows a county easement up to a certain point, and then a private easement for the U.S. Air Force to access a missile base, and then nothing further to the west or south.

Eleven citizens, including the Dyals and two of their attorneys, spoke in favor of abandoning any public right of way on the Elizabeth Road and on the Stafford Road beyond the missile base. Seven citizens

spoke against abandoning the roads and urged the county to help maintain access to public lands along the Rocky Mountain Front.

Choteau attorney and rancher Justin Lee, representing the Dials, said of the Elizabeth Road, "The reality here is that this is the Dials' driveway."

"The Stafford Road, we call it a road, but there is no road there. I guess if the county wants to go through the expense of building a road, I think it would be a terrible waste of taxpayers' money," Lee said. "I would encourage us not to consider these roads public."

Ranchers Wayne and Judy Gollehon, who live west of Choteau also spoke against pursuing access on these roads. "Seems foolish to waste county money on something like this. It doesn't make any sense to me at all," Wayne said.

Rancher and outfitter Dusty Crary, who lives west of Choteau along the Teton Canyon Road, said he was concerned that "access creep" by people pushing to get onto federal lands is impacting private ranchers.

"No one has lost anything that they were ever entitled to in the first place," Crary said. "Any able-bodied person can hunt that federal land in Deep Creek."

Roy Jacobs of Pendroy, a taxidermist, said he thinks the push to keep these roads open is all about hunting. "It's a five-week window and they will hammer it. Anything walking across that road, they'll shoot it and try to get away with it. I think it will be a nightmare during hunting season," he said.

Hiker, mountain climber and scenic photographer Ralph Thornton, who lives west of Choteau along the Teton Canyon Road, said part of the local economy is based on recreation and access to public lands. He encouraged the commissioners to maintain an easement of some kind, particularly on the Stafford Road, that would allow hunters, fishers, campers and recreationists access to the Deep Creek country.

Fairfield-area rancher Chuck Dale said both roads should be kept open, noting that in the old days, the Elizabeth Road went farther from where it stops now, allowing people to loop around to the Pishkun Reservoir. "I'd like to see everything public stay open. Anything that we can keep as a public road, we need to keep," he said.

Bonnie Dale also of Fairfield said, "If there has been one cent of public funds spent on this road, by golly it belongs to the public too and we should never ever close any public road or county road. We are losing the access to the Rocky Mountain Front."

Bruce Coccoli of Choteau, who works for the Montana Highway Patrol, said he and his sons enjoy recreating on public lands and on private lands with permission from the landowners. But he thinks government needs to do a better job of clarifying where legal access exists.

"I want to know for my own edification, what is legal and what is not legal, so that we can help all recreationalists with access," Coccoli said.

Department of Natural Resources and Conservation staffer Erik Eneboe of Conrad said, however, that the Elizabeth Road to his knowledge does not touch state land.

County Commissioner Jim Hodgskiss, however, said that he and Commissioner Joe Dellwo drove the Stafford Road and beyond the missile base there are clear remnants of a built-up road, borrow pits and

culverts. If that road were maintained, Hodgskiss said, it would provide access to a landlocked parcel of state land.

Gettel said the county has been approached by people outside of the county to fight the access battle. An advertisement placed in the Choteau Acantha promoting attendance at the meeting was placed by an attorney in Seattle, for example. "We are getting pressure from the outside," Gettel said.

Garry Williams of Helena with the Montana State Lands office, encouraged the commissioners to address roads providing access to public lands. "I recommend that you concentrate your efforts on those roads that do access public lands. We would support that interest," he said.

County Attorney Joe Coble said the commissioners have opened this dialogue without any agenda, but to get a feeling from constituents about the issue of public access. That input will help the commissioners decide whether to pursue legal action.

"It's not clear cut right now," Coble said, referring to the status of the roads. "I cannot tell you whether these roads are county roads or they are not. ... I think it's important for everyone here as taxpayers to consider what is worth using your money pursuing or what is not, and that is exactly what these guys here have to decide."

The commissioners took no action on the issue, and they will continue to hear public comment on access issues at their Jan. 19 meeting, where they will discuss the Salmond Ranch Road, also located west of Choteau.

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 .)

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Notice of Annual PLWA Membership Meeting Saturday April 14th, 2012 in Bozeman, MT

Vito Quatraro - of the Montana Sportsmen Alliance to speak on Outdoor Interests & the Legislature

Notice is hereby given that the annual membership meeting of the Public Land/Water Access Association, Inc. will be held on April 14, 2012, commencing at 10:00 a.m. at the Wingate by Wyndham Hotel, 2306 Catron Street, Bozeman, Montana, just off exit 305, Interstate 90.

The keynote speaker will be Vito Quatraro of the Montana Sportsmen Alliance. Vito will be talking about access and other outdoors issues that are likely to arise in the next Montana legislature and, even more importantly, HOW TO MAKE YOURSELF HEARD.

The business to be transacted shall include the election of three directors for three year terms to fill the vacancies caused by three expiring terms on the Board of Directors. In accordance with the Articles of Incorporation, the Directors have proposed a slate of candidates to be submitted at the Annual meeting. They are Tony Schoonen, Dennis Grundman, and John Gibson. Additional nominations may be offered by members from the floor. Each member is entitled to one (1) vote for each vacancy.

Members desiring that resolutions or other items of business be considered should notify the PLWA President, John Gibson.