



The **KEY**

Unlocking access to public lands & waters

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

Spring 2014

Issue 19

Montana Supreme Court Opinion in PLWA vs. Madison County (and James Cox Kennedy)

A Grass Roots Success

On January 16, 2014 the Montana Supreme Court overturned a lower court decision and assured public access to the Ruby River from bridges on land owned by Atlanta media mogul James Cox Kennedy. The decision sets a precedent that validates all Montana stream and bridge access laws. The Court affirmed a previous decision that two of the county road bridges - Duncan Road and Lewis Lane - have a 60-foot wide public easement intersecting the high water mark of the river. This is the decision that led to the Montana Bridge Access law.

What's new is that the court essentially threw out the District Court ruling on the third bridge - a bridge on the Seyler lane road. The lower court had mistakenly ruled there was no recreational access on the bridge because it was on a road created by prescription or regular public use and recreational use was not a basis for creation of the prescriptive right-of-way.

On Seyler Lane, the case was sent back to District Court with instructions to determine the width of the public road right-of-way which had been established by prescriptive use. Significantly, the Court held that once a prescriptive easement is established, access extends to all public uses including recreational use.

The Supreme Court justices rejected the District Court ruling that a secondary easement existed to accommodate maintenance by state and county crews and recognized recreation travel as a legitimate use to help qualify a road for prescriptive easement status.

The Court also emphatically upheld Montana's stream access law, stating "that the State owns all the waters in trust for the People . . . and that a riparian owner takes his property interest subject to a dominant estate in favor of the public."

John Gibson, President of PLWA, stated "Today's

Annual PLWA Membership Meeting Bozeman Montana April 26, 2014

The annual membership meeting of the Public Lands/Water Access Association ("PLWA") will be held on 9 am Saturday April 26th 2014— at the Holiday Express, 2306 Catron Street, Bozeman, MT.

Attendees will get an update on issues, legislation, and court cases involving public access as well as an opportunity to share thoughts with access leaders.

The keynote speaker of the day will be Bruce Farling, Executive Director of Montana Trout Unlimited.

ruling from the Montana Supreme Court confirms once again that our streams are public resources, and not the exclusive playgrounds for the select few. The public's right to wade or float any river or stream in the state has been recognized, as well as the right to access those streams at bridges crossed by public roads. We want to thank Montana Trout Unlimited and the Montana Wildlife Federation as well as our loyal members for their contributions. “

“We have been involved in this case for over ten years and this decision has justified our efforts,” Gibson says. He went on to say that “Much of our success is due to the great work of the Goetz Law Firm in Bozeman who lead us through the legal maze surrounding access to the public waters of Montana.”

What does all this really mean ? Stay tuned as the implications reverberate. Maybe it will cause some Rolex Ranchers and misguided legislators to quit messing around with established law. The people have spoken and the law has spoken.

Big Win for Montana Sportsmen

Presidents Message

by John Gibson

The recent ruling by the Montana Supreme Court upholding our state's stream access law and the ability of everyone to get to streams from county roads is a victory of all Montanans and all who enjoys our public waters. It also illustrates the stark difference of views about who should get to enjoy public land and water.

The case, (Public Access v. Madison County), challenged a landowner's ability to block off access to the Ruby River at three bridges used by the public for decades. James Cox Kennedy, a Ruby Valley landowner and media mogul, intervened in the case and challenged not only the road issue but also our state's stream access law.

There are those, like Kennedy, who claim they own the rivers as well as the wind that blows across the valley. They claim this must be true because they own a deed to the land. They see themselves as part of the chosen few destined to stand above the masses. Look carefully at that deed. See if you can find where it says you own the river or the air. The same omission includes the wildlife and the fish in those rivers.

Landowners don't own the river any more than you own the wind. Both are conditions of the land, as laid out in state law. They knew or should have known about wind and water ownership when they acquired the land. They can use them but they don't own them. These are public resources much like the public road network that we all use every day. They are part of the public estate. But the most important condition at the time of acquisition is the will of the people as expressed by our constitution, laws, and decisions of our courts.

References to the recent U.S. Supreme Court decision in PPL Montana v. Montana have nothing to do with stream access. The state argued navigability and that it obtained title to the relevant streambeds at the time of statehood under the "equal footing" doctrine. The U.S. Supreme Court struck down that idea. Montana's 1985 Stream Access Law is based on the "public trust" doctrine where states can reserve certain resources to the public itself.

The Stream Access Law allows the public to move up and down any water course large enough to accommodate water-based recreation as long as the use takes place below the high water mark. However, the public cannot trespass on private land to reach these streams and rivers. It is the most pro-public stream access law in the country. Sportsmen and women nationwide look to as a model.

That is one reason the road decision by the Supreme Court is of such great importance. Kennedy's strategy to privatize the river was if you can't stop people from using the river, perhaps you can stop them from getting to it. If the easement on a public road can be made so narrow that it did not intersect the stream high water mark then no legal access is possible.

Thanks to our Supreme Court, that tactic has been rejected by determining that the easement on a public road can extend the full width of the roadway and is limited to the just road surface. And the ruling will have implications for land access too. The Court said that when a road has been used by the public, even for recreational purposes, it's public forever. We in PLWA take action statewide where people put gates over county roads and block off thousands of acres of public land. We hear often about private property rights, but there are also public property rights to enjoy public resources, including public land, water, and the fish and wildlife that inhabit them.

I am part of a team of Magic City Fly Fishers teaching elementary school students fly tying as we have done for the past two decades with the hope they will become tomorrow's anglers. As PLWA president, I plan to protect their right to get to Montana's rivers and streams as long as I am alive.

The state constitution states the waters of Montana are held in trust for the benefit of all of our people. Is it so hard to accept the idea that all the people should be allowed to enjoy them?

I hope these youngsters are prepared to defend their rights. There will always be those who want to claim control of what is not theirs.

Bozeman Chronical Stream Access Editorial

by Parker Heinlein

Reprinted with permission - Friday, January 24, 2014 9:10 am

A recent Montana Supreme Court ruling upheld the state's stream access law and established that longstanding recreational use of a road can make such a road public. That's a big deal, a very big deal for the public's right to access streams and public lands.

Lawmakers and activists in the 1980s were eminently forward thinking when the state's stream access law was enacted. The law provides that the public has a right to access all rivers and streams between high water marks when the water passes through private land. Since it was enacted, subsequent legislation and court rulings in response to challenges to the law have established public access to streams and rivers where they intersect public roads.

This month's high court ruling found that a road is public if it has been historically used for such purposes along with other established uses. At issue was a road that was historically used by the public and maintained by Madison County. The road crossed private land owned by media executive James Cox Kennedy.

After purchasing the expansive Seyler Ranch, Kennedy closed off public access to the Ruby River from county roads and the road that had historically been used by the public. The high court reiterated that the public clearly has access to the river from the county bridges and sent the question of the historically public road back to the lower court to determine the width of that road's right-of-way. Any reasonable amount of right-of-way will certainly intersect the river's high water mark and therefore will provide public access to the water.

The Kennedy case is just one of many around the state that finds landowners systematically trying to cut off access to public lands and waters via roads the public has used historically. These landowners are excluding the public in order to turn their land into private playgrounds for the well-heeled. This month's Supreme Court ruling could have implications in some of these other cases.

These challenges are just going to keep on coming. The Public Lands Access Association, the private non-profit organization that sued for access to the Ruby River, is to be commended for remaining vigilant on these issues. And they should earn widespread public support for their efforts.

PLWA Attorney's Interpretation of the Seyler Lane Supreme Court Decision

by LAURA LUNDQUIST

Reprinted with permission from The Bozeman Chronicle

The Montana Supreme Court upheld the state's stream-access laws Thursday, adding that landowners can't close routes to public land or water where recreationalists have a history of use.

The 5-2 ruling allows continued public access to the Ruby River along Seylor Lane in opposition to the claims of millionaire landowner James Cox Kennedy.

After moving to Montana and buying his Madison County ranch, Kennedy closed off three public bridges leading to his land across the Ruby River and denied fishermen access through a public right of way to get below the river's high-water mark.

The Supreme Court sided with the plaintiffs, the Public Land and Water Access Association, who sued Madison County in 2004 to have the bridge barriers removed.

"It was about everything we could have hoped for. The idea that recreational use can qualify a road for a prescriptive easement is very important to us," said association president John Gibson. "We all won this one. Everyone that fishes or floats or enjoys the streams - it's a great victory for the public trust."

Writing for the majority, Justice Michael Wheat ruled that all Montanans have the right to use a public road plus the surrounding right of way, regardless of how the road was established.

Public use of right of way next to roads has been challenged in a number of other Montana cases.

"Where this ruling will be cited is the easement issue," said association attorney Devlan Geddes. "The Montana Supreme Court had never decided what the scope of a public prescriptive road is up to this point. They've (now) said the public may use a right of way from edge to edge."

The previous owner of Kennedy's property, Bud Seyler, had allowed the public to travel across his land on Seyler Lane, thus creating a prescriptive easement.

Prescriptive easements are not based upon documented agreements but are developed through an established history of use. In an earlier time, landowners granted such use with handshakes and the permission was local knowledge. Such use is never questioned or formalized until a new landowner such as Kennedy challenges it.

A lower court sided with Kennedy's argument that the Seyler Lane easement had two parts: one for the public and one for the county.

Madison County District Judge Loren Tucker said the county could use the road plus the adjacent right of way to do maintenance, but the public was confined to the road.

That left fishermen without access to the Ruby River because the road surface doesn't intersect the river's high-water mark.

Geddes appealed the ruling and argued the case before the Montana Supreme Court in Bozeman during a special Law Day hearing on April 29.

Another significant part of the Supreme Court ruling was that recreational use was given more weight in establishing whether the public use justifies a prescriptive easement.

Attorneys arguing against public access repeatedly echo a phrase from a 1993 Supreme Court decision, *Public Lands Access v. Boone and Crockett*: "Occasional recreational use doesn't count."

Geddes said this ruling modified that.

"The Supreme Court has said, yes, occasional recreational use isn't good enough to establish a prescriptive easement. But when combined with other uses, it may count," Geddes said. "We needed that to establish the width of the easement, and now we'll get to present that evidence."

The Supreme Court sent the case back to the District Court to determine the width of the Seylor Lane easement.

For the past decade, the case was often cited as a stream-access challenge, because Kennedy also claimed Montanans have no right to use the Ruby River that flows through his property. He claimed that he owned the land below the river and the water and airspace above. He claimed allowing the public to use the streams was a taking of his property.

The Supreme Court upheld Montana's stream-access laws, which say streams are accessible to all as long as people stay within the high-water marks.

"Kennedy's takings argument does not hold water," Wheat wrote. "He presents no persuasive argument that a compensable property interest has been taken from him or that we should overturn our precedent and disrupt long-settled constitutional law."

PLWA Raffle 2013

The Annual PLWA Raffle was held on December 23rd in Billings. The lucky winners were:

- 1.) Marilyn Woodhull, Livingston, MT - Tika T3 Lite .338 Cal. Rifle (donated by Scheels Sports, Billings, MT)
- 2.) David Orth, Missoula, MT - Simms G4Z GORE TEX Waders (donated by Simms Corp., Bozeman, MT)
- 3.) Dan Gall, Billings, MT - Sage 490-4 One Flyrod (donated by Sage Rods, Bainbridge Island, WA)
- 4.) Russ Vance, Bozeman, MT - Guided Fishing Trip (donated by Sweetwater Fly Shop, Livingston, MT)
- 5.) Dave Glaoer, Missoula, MT - Nikon Action 10 X 40 Binoculars (donated by Dennis Grundman, Big Sky, MT)

This year, for the first time, all prizes were donated. PLWA extends our thanks to all of our generous sponsors and to everyone that participated in our most successful raffle to date. We promise to spend your money wisely to preserve, protect and improve access to public lands and waters in Montana.

Cherry Creek Road Project Makes Progress

Draft EA Open for Comment

The Yellowstone District of the US Forest Service has just released the Draft Environmental Assessment (“EA”) for the construction of the “Cherry Creek Road” leading into the Deer Creek area of the forest south of Big Timber. Although the proposed road is only a mile and a half long, it is a big deal as it connects with the road being built by the landowner, opens up about 16,000 acres of the national forest, and has been in contention for over 17 years. The new route will be called West Deer Creek Road No. 421. If approved, construction will start this summer.

This has been a PLWA effort from the very beginning. But without the cooperation of the Forest Service and the adjacent landowners, Mr. Matelich and Mr. Goldberg, it would not have happened.

As District Ranger Sienkiewicz said “It just feels good to me when the public comes together to solve a public land problem with a public solution.”

(For those readers not familiar with the term, an EA is a study required by federal law on all significant construction projects to establish all impacts - either positive or negative. It includes analysis of the technical environmental aspects, the economic impact and social results, and possible long term adverse environmental effects, even after mitigation. If warranted by the EA, a full blown Environmental Impact Statement (“EIS”) may be required.)

A copy of the draft EA is available upon request at the Yellowstone Ranger District, Big Timber Office, and on the Gallatin National Forest website: <http://www.fs.usda.gov/projects/gallatin/landmanagement/projects>.

Additional information on the project can be obtained from Barbara Ping, ID team leader, at 406-522-2558 or e-mail bping@fs.fed.us.

Comments on the proposal can be sent to Alex Sienkiewicz, Yellowstone District Ranger, by writing to: PO Box 1130, Big Timber, MT 59011; phoning 406-932-5155, faxing: 406-932-5777, or emailing: comments-northern-gallatin@fs.fed.us (put “Comments on West Deer Creek Road Project” in the subject line).

Two Recent Significant Donations

Montana TU and a Half Section of Land

Montana Trout Unlimited recently donated \$10,000.00 to PLWA to assist us in the ongoing Ruby River access case. While we had hoped that the Supreme Court decision would be the end of it. The Supreme Court remanded the issue of the width of the prescriptive easement back to District Court. We expect that to be heard in the coming months. In addition, it now appears that Mr. Kennedy intends to use his fortune to prolong the litigation for as long as he can. Thank you TU.

In late December PLWA received a generous donation of 320+ acres of agricultural land in Sweet Grass County from the grandson of the family that homesteaded the land in the early 1900's. This hill and pasture land parcel lies along the Yellowstone River east of Big Timber and is under a conservation easement that bars it from being subdivided. The PLWA Board of Directors is currently exploring ways to best use the donation to continue our mission to protect your public access to our public resources.

What Members Have To Say About The Public Land / Water Access Association

The results of a mid 2013 PLWA member survey showed just how much they appreciate the organization and what it does. Here are some of the representative comments:

“Our public lands are what make this a great state. I would have left after high school but even though Montana has low wages, it offers a wealth of outdoor experiences.”

“MONTANANS WITHOUT ACCESS TO PUBLIC LAND & WATER ARE BANKRUPT!”

“We need PLWA. Often local or county government officials are not interested in getting involved in access. It takes strong prodding by PLWA to get them to take any action.”

“PLWA is the sole public interest organization dedicated primarily to our access to public lands.”

“Access to public land is absolutely the issue that will define and sustain the Montana economy.”

“PLWA is a critical resource for the Montana outdoor lifestyle. Many do not realize its value.”

“Unfortunately, aggressive legal action is often the only way to solve public lands access problems. I applaud PLWA’s efforts in this arena.”

“Thanks for all your hard work. I am confined to a wheelchair but I know that without PLWA the younger generation will not have the chance to enjoy the activities I enjoyed.”

“I consider PLWA the number one protector of the Stream Access Law.”

“I served seven terms in the Montana Legislature from 1979 to 1993 and learned that access was the major issue during those sessions and it is the major issue facing Montana’s sportsmen .”

“PLWA has been doing an awesome job fighting for access and being the ‘watch dog’ over landowners trying to turn Public Lands into their own hunting sanctuaries.”

“If it wasn’t for PLWA I doubt anything would be getting done regarding access.”

“Keep fighting the good fight for Montana’s sons and daughters! “

“PLWA is the only organization that I know of that is standing up for the rights of the common working person in Montana who enjoys hunting and fishing.”

“Thank you for your outstanding efforts! You are protecting the interests of all Montana sportsmen.”

“PLWA is the only legal agent out there fighting for the public. Without it, the public will lose to big money and political pressure privatizing our fishing, wildlife and public land and water.”

“I support several conservation organizations. The last one I’ll ever stop supporting is PLWA. It does more ‘on the ground’ than any of the others.. I can’t thank you enough.”

“Not only does PLWA talk big, this organization backs up their words with aggressive action.”

“Your organization is exactly in line with my interests.”

“I am very proud of what PLWA has accomplished and the passion for the job is unequalled! Thanks for all you do!”

“Awesome news guys... really awesome!! Thanks so much for all the hard work and heavy lifting you’re doing on these issues.”

RMEF Acquisition in Big Snowy Mountains

Land buy will improve forest access

A 40-acre acquisition by the Rocky Mountain Elk Foundation will improve access to nearly 18,000 acres of national forest public land in the Big and Little Snowy mountains.

The property contains a 30-foot common boundary with a corner piece of the Lewis and Clark National Forest.

“This is a big win for hunters and other members of the public because there was realistically no easy way to reach this part of the Snowys,” said David Allen, RMEF president and CEO.

The transaction is a cooperative effort between the RMEF, Montana Fish, Wildlife and Parks, LCNF and landowners Marshall and Leslie Long.

“This small but critical piece of land offers both big-game habitat and exceptional access to public land that supports a prized elk population,” said Gary Bertellotti, FWP Region 4 supervisor.

RMEF purchased the land, known as the Red Hill property, for \$190,000 and will offer it to Montana Fish, Wildlife and Parks for \$50,000, in effect donating the remaining balance of \$140,000 to FWP. To complete the land transfer, FWP will launch a public environmental analysis to get the land acquisition approved by the FWP Commission and the Montana Land Board.

RMEF and its partners signed an agreement that sets the stage for the FWP to provide an entrance, parking area, signage and a defined access trail into the forest. The goal is to have the improvements in place by Oct. 26, opening day of the 2013 general big-game rifle season.

“This strikes at the heart of what RMEF is all about,” Allen said. “We are committed to opening more land for hunting and other year-round recreational public access and now the gate is open for hunters to more easily access thousands of acres of elk country previously almost impossible to reach.”

Aerial surveys conducted by FWP this past February revealed a population count of about 4,000 elk in the Big and Little Snowy mountains with a calf to cow ratio of 30:100.

“This public access will allow hunters to play a more active part with management of an elk herd that is over objective,” Allen said.

The transaction conserves a diverse mixture of aspen and forest, grasslands, meadows, wetlands and a spring and intermittent stream; and provides important habitat for elk, mule deer, white-tailed deer, black bear, grouse and other wildlife.

Funding for the project came from the Torstenson Family Endowment which is used solely to further RMEF’s core mission programs of permanent land protection, habitat stewardship, elk restoration and hunting heritage.

Old Dunn Road Opened to Public

Power of a PLWA Hat

The Old Dunn Road is now a trail but it provides access to a mile and a half of the upper Yellowstone River near Emigrant, Montana. Other roads on different locations now serve the purpose once provided by the Old Dunn road.

Because of access and historic values the Park County Commissioners did not abandon the 60 foot easement on the road . Instead, they turned it into a non motorized trail.

In 2007 a developer, planning a large subdivision, requested the easement be abandoned. The commissioners refused and a Memorandum of Understanding was signed to the effect that the trail would remain open to the public with interpretative signs and trail head facilities.

Recently members of the public reported that all public signs had been removed and a locked gate had been installed at the trail head of the Old Dunn Trail. No notice had been given to the commissioners or other government agencies.

A meeting was held in early September 2013 and a number of local residents testified including County Historian Jerry Breckke and PLWA representative Lou Goosey. The Commissioners upheld the public ownership of the trail and insist the gate be removed and the signs be replaced. They are considering bringing a Criminal Mischief Complaint against Yellowstone River Ranch Estates who admitted installing the gate and removing the signs. The company claimed all this was large "misunderstanding".

It was interesting to note that Mr. Breckke stated the following ."It is amazing how the atmosphere of the meeting changed when PLWA Director Lou Goosey entered the room wearing his PLWA hat." Park County folks deserve a vote of "thanks".

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

PRESORT STD US POSTAGE PAID BILLINGS MT PERMIT NO. 104
--

HELP WANTED

PLWA is essentially an all volunteer organization. Board members and volunteers spend thousands of hours every year making it work. But the organization and workload is growing. New challenges appear all the time. We need to expand our volunteer force to take on these new challenges, free up senior board time for higher and better uses, and increase the participation base of our membership.

Specifically some of the areas we could use help with are:

Researching and writing news articles and newsletter pieces on issues and activities. (Journalism or English skills.)

Graphic Design

Researching county records on road status. (No particular skill – just smarts and hard work.)

Non-profit accounting and compliance. (Accounting or bookkeeping skills.)

Legal research and case following. (Legal or Para-legal skills.)

Event organizing (Again just time and smarts.)

These are just some of the possibilities. Right now most of our volunteer corps is in Billings, but that is both a strength and a weakness. We need help in the outlying areas. If you have some specific skill, time, or talents that you think could help, let us know. Contact membership@plwa.org or call George Bauer @ 406 294-5499.