

PLWA

The KEY



Unlocking Montana's access to public lands & waters

Summer 2016

Issue 22

PLWA 2016 Officers and Directors



April 2, 2016, PLWA held its annual meeting in Bozeman. Elections were held and we would like to introduce you to your 9 new officers and board members (line up above). These dedicated men are passionate about public lands and waters, even spending this beautiful Saturday afternoon indoors for the annual meeting!

2016 PLWA Board (left to right): Colter Pearson, Ray Pearson (Treas.), Dennis Grundman, Glenn Elison, Dale Spartas (Vice Pres.), J. W. Westman (Sec.), John Gibson (Pres.), Lou Goosey and Tony Schoonen.

President's Message

by John Gibson

We are all elated by the victory on the Ruby River, but I can't help but wonder where we might be if PLWA had not challenged the electric fences and no trespassing signs on the road bridges that ran through a billionaire's ranch?

I am afraid Kennedy's actions would be common place across Montana. If the local road authority refused to take action and the Justice Dept. in Helena turned their back, who was left?

Personally, I see it as a sad state of affairs when violations of state law are allowed to continue for any reason. On the other hand, I am proud that we, as a bunch of volunteers, stepped in and filed a lawsuit. PLWA is beholden to all of the individuals and businesses who contributed to our legal

The KEY is published by the
Public Land/Water Access Association
www.PLWA.org

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efforts, and to the Goetz Law Firm, who's people have allowed us to win every access case we have undertaken.

Many members of PLWA will never fish on the Ruby River. But we have fought this legal fight for decades, in order to ensure that present and future generations have the opportunity to enjoy the greatness of Montana's waters. Our Stream Access Law and our state Constitution clearly state these waters belong to the Citizens of Montana and not to a single individual or corporation.

ACCESS UPDATES by Bernie Lea

The **Mabee Road** case is ongoing. Paul Grigsby, our attorney, is continuing to review the evidence, as well as preparing answers to the complaints filed by the defendants. We are locating persons who have knowledge of the history of the road, as well as historical documents. If you have information or documents on the Mabee Road you would like to contribute to the fight for our public access, please call 406-698-6021 or email us at membership@plaaai.org.

As of the first week of August, the gate is still blocking public access on the **Hughes Creek Road**, even after PLWA reached out last winter to the Ravalli County Commissioners with the proof that their own Commissioner Journals stated Hughes Creek Road had been declared a county road in 1900! PLWA is working diligently to get this issue resolved and public access restored.

Ruby River Stream Access Victory

Yet Another Win!

PLWA, once again, has been victorious in the battle for the public's stream access on the Ruby River, from the Seyler Lane Bridge, likely the original stagecoach route from Salt Lake City, north to Virginia City and Helena.

It has been over a decade that PLWA (formerly known as PLAAI) has been involved in a lawsuit over public access to the Ruby River from Seyler Lane and the Seyler Bridge, a public prescriptive easement right-of-way in Madison County.

In PLWA's January 2014 victory, the Montana Supreme Court reaffirmed Montana's Stream Access Law, clarifying that the public may use the entirety of the public prescriptive easement right-of-way for all lawful public purposes. It also remanded the Ruby River action back to the District Court to determine the "definite width of a single, unified" public road right-of-way that was not determined at the previous trial. Per the Supreme Court, the width must include whatever land is "reasonably necessary" to maintain and support the established public road and bridge and the land that has historically been used by the public.

Which brings us to the present District Court ruling. In the June 27, 2016 filing, District Court Judge Loren Tucker determined the easement widths over the various parts of Seyler Lane and the bridge. From Judge Tucker's ruling, "Now therefore it is hereby ordered as follows: 1. The width of the county road known as Seyler Lane at sections described and shown on Exhibit 1-A are as follows: A-A 50 feet, B-B 50 feet, C-C 39 feet, D-D 47.5, E-E 47.5 feet, F-F 44 feet, G-G 65 feet, H-H 50 feet, I-I 50 feet."

PLWA's attorney, Devlan Geddes explained, "We asked for 47.5 feet and 46 feet in width at the ends of the Seyler Bridge. He granted us 47.5 feet at both ends (see decision at D-D' and E-E'). The other widths are mostly irrelevant to our concern of access to the river."

"This is a victory for PLWA, because the Court confirmed that Montanans may lawfully access the Ruby River

from within the Seyler Lane right of way. The 47.5' width determination provides a sufficient path at the corners of the bridge that members of the public may access the river," stated Geddes.

When the Montana supreme court remanded the case back to district court they said: "We further determine that the scope of use of the public road right-of-way is not limited to the adverse usage through which it was acquired and that any foreseeable uses of a public road right-of-way, including recreation use, is allowed..." Thus the final element is now in place for the recreational stream access law – both statute and case law. It now applies to bridge access at all bridges on county roads and public roads created by public prescription.

The long and hard fought access battle against Madison County and Intervenors: Montana Stockgrowers Association, Hamilton Ranches, Inc., and Atlanta billionaire, James Cox Kennedy, who stated he owns the air space above the river, that stream access was a "taking", and that Montana's Stream Access Law was "unconstitutional", makes this victory all the sweeter.

Did You Know You Have A Public Trust Duty?

A SHORT HISTORY OF YOUR MONTANA'S STREAM ACCESS LAW

There's some misinformation floating around this election cycle, some candidate co-opting of the stream access issue, as well as some general lack of understanding of how Montana achieved some of our recreational access. We didn't have it handed to us on a silver platter, it was fought for and at times paid for by some key individuals who were passionate about access. We thought it a good time to shine a light on some truths, otherwise, we could be looking at an "Access" Ground Hogs Day in our future. Let's break this down to bite size pieces.

Since 1933, Montana Code Annotated (MCA, law) recognized the public's right to use the water and banks up to the "high water flow line" of "navigable" rivers, streams, and sloughs for fishing.

Stream Access and the Public Trust Doctrine even entered into Montana's 1972 Constitutional Convention discussions, adopting two proposed constitutional provisions involving a clean and healthful environment, now a part of the ratified Constitution by the people of Montana. One became an inalienable right – Article 2, Sec. 3, "All persons are born free and have certain inalienable rights. They include the **right to a clean and healthful environment** and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities." The 2nd, a duty, Article 9, Sec. 1(1), "The state and **each person** shall maintain and improve a clean and healthful environment in Montana for present and future generations."

That's right, you not only have a right, but as a responsible citizen, you have a duty to "maintain and improve a clean and healthful environment in Montana for present and future generations." So think about that when you vote in this and future elections – what elected officials will best represent you in achieving this objective?

An access visionary legislator, and an attorney, Cedor B. Aronow from Shelby, MT, served from 1949-1953. Aronow was voted the temporary president of the 1972 Constitutional Convention, and authored the amendment "for the use of it's people." In the discussion of the amendment, Aronow was questioned as to a private landowner fencing off public access so that a person couldn't fish, boat or go up and down the river? Aronow replied, "No, that is not the sense of my remarks. You can go up and down that stream all you want to. But the only thing is, you can't drive across the rancher's lands willy-nilly in order to get to it. You can go along the county roads or wherever there's access. And you certainly may boat. You may hike up and down that stream."

Curran

In the late 70's, Dennis Curran and his oil company harassed and interfered with the public's recreational use of the Dearborn River. So on April 14, 1980, a passionate group of men from the Butte area led by Tom Bugni and Jerry Manley, joined by Tony Schoonen (beginning with their own money) and the Skyline Sportsmen Assoc., formed the Montana Coalition for Stream Access, Inc. They decided to fight back. MCSAI filed a lawsuit in Montana's First Judicial District Court – MCSAI vs. Curran, asserting the public had a right to float, fish and recreate between the high-water marks. Fish, Wildlife & Parks and the State of Montana joined as plaintiffs. The District Court decision was that members of the public have the right to float and recreate in non-navigable streams, that the public may wade and use the banks up to the ordinary high-water, and that these rights are founded in statutory language. That passionate group of hunting/angling conservationists won.

On March 31, 1980, a number of the same hunters and anglers also began addressing our public access to state lands. Tony Schoonen, Jack Atcheson Sr. and Jack Jones formed and filed the Montana Coalition for Access on State Public Lands, Inc., out of their own pockets. The name would later be changed to Montana Coalition For Appropriate Management of State Lands, Inc. They led the charge for our state lands access, but this is a whole other beautifully detailed story.

Hildreth

About a year later they took on Lowell Hildreth, who had installed a dangerous fence across the stream and was preparing to install a cable across the river further upstream, and was also harassing and interfering with the public. The District Court held, "The Beaverhead River, where it runs through the property of the Defendant, is navigable under the pleasure-boat test of navigability, and as such, members of the public have the right to float the river and use its banks up to the ordinary high water mark free from interference from the Defendant." The Court also held that the Public could portage around obstacles. Again, the Coalition won for the Public.

Montana Supreme Court

Both cases were appealed and ended up in the Montana Supreme Court, which issued their decisions in the summer of 1984. Concerning the Curran case, the Court affirmed the lower District Court's ruling, "In sum, we hold that, under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for recreational purposes." Additionally, "states hold title to navigable waterways in trust for public benefit...all the waters of the state are owned by the state and are held in trust for the people."

This is very important. See the States, as sovereigns, were given **title** to the beds of **navigable** waters – to be held in trust for future states under the Equal Footing Doctrine, conferred by the United States Constitution. This is kind of like the bogus argument of the Sagebrush Rebellion stating they want the western State's land back from the Fed. It was never theirs to begin with. Back to the waters though, don't be confused, Montana has Class 1 waters and Class 2. Class 1 waters are navigable, Class 2 are non-navigable. But, regardless of title, **Montana Stream Access Recreation Is Not Dependent On Title!** Don't be sucked into that landownership argument.

A little over a month later the Montana Supreme Court, in the Hildreth case, reinforced Curran and stated, "the capability of the use of the waters for recreational purposes determines whether the waters can be so used. The Montana Constitution clearly provides that the state owns the waters for the benefit of its people. The Constitution does not limit the waters' use. Consequently, this Court cannot limit their use by inventing some restrictive test."

The Court further addressed the public's right to bed and bank, "Under the 1972 Constitution, the only possible limitation of use can be the characteristics of the waters themselves. Therefore no owner of property adjacent to state-owned waters has the right to control the use of those waters as they flow through his property. The

public has the right to use the waters and the bed and banks up to the ordinary high water mark.” Hildreth's claim for inverse condemnation was dismissed, “public use of the waters and bed and banks of the Beverhead up to the ordinary high water mark was determined, not title... Hildreth has never owned and does not now own the waters of the Beaverhead River... he was not deprived of a property right by the district court.”

The Legislature

In 1983 the Legislature sought to address stream access issues. Four bills were introduced, with only one passing, HJR 36, a bill to study the rights of the public to access and use public lands and waterways. One of the failed bills, HB 799, would have violated the US Enabling Act, the Montana Constitution and our Public Trust Doctrine by transferring title of the river/stream beds to private riparian landowners. Sound like Ground Hogs Day? With the Supreme Court's rulings in 1984, this threw the study in a quandary with the legal and policy landscape changed radically. The Legislature was advised, that since the Court based the decision on the Public Trust Doctrine, “the Legislature cannot substantially modify the result of those decisions. Had the court based its decision on narrower grounds (e.g., statutory grounds), the Legislature would have been able to modify the results of the decisions by changing statutes.”

Senator Jack Galt, a vocal opponent to Stream Access, asked if prohibiting use of river beds would be legal and was advised, “... the right to use the bed is so fundamentally related to the public's interest in the water that even the legislature cannot take it away.”

Who really voted for Stream Access?

Now comes another fallacy of Stream Access, that it is “us against them, the haves versus the have nots”. Opponents of Stream Access continually try to make it a landowner or agriculture versus recreationist issue; it is not, it is a Public Trust Doctrine issue that benefits all.

In 1985, 11 access bills were introduced. The Legislature passed HB 265, sponsored by Bob Ream, which was created and promoted by a coalition of groups representing landowners, agriculture interests, recreationists and Fish, Wildlife & Parks. The bill stated Class 1 and Class 2 waters could be used by the public, “... without regard to the ownership of the land underlying the waters”, for all the defined recreational uses the waters are capable of, including the use of the beds and banks up to the ordinary high-water marks.

Some of the groups supporting HB 265 were The Montana Stockgrowers Assoc., Montana Wool Growers Assoc., Montana State Assoc. of State Grazing Districts, Montana Cowbells, Montana Farmers Union, Montana Cattlemen's Assoc., Montana Cattle Feeders Assoc., Montana Farm Bureau Federation, and the Montana Water Development Association. The discussions with sportsmen were said to be, “... a product of cooperation between significant Montana interest groups.” Senator Galt again tried to interfere by proposing an amendment to remove from the definition of “surface water” the part that allowed recreationist to use the bed and bank of a stream, including navigable rivers. This amendment was removed and HB 265 became our Stream Access Law on April 19, 1985.

One day before HB 265 became law, to address the ongoing issue of the public losing legal access to our federal public lands, retired Supervisor of the Gallatin National Forest, Gene Hawkes, led individual foresters to form and file for the Public Lands Access Association, Inc. PLAAI later changed their name to include Montana's stream access issues to Public Land/Water Access Association. The purpose of the organization was to inform the public about the deteriorating access situation and to take the lead in regaining the right to public access to all the public lands within the state. Many of the Montana Coalition For Stream Access members became PLAAI members, carrying on the access work under this new flag.

Galt Lawsuit Against Stream Access

Nearly 2 months after HB 265 became law, Sen. Jack Galt, his wife and 8 other landowners, including Hildreth,

filed a lawsuit against the State Fish, Wildlife & Parks and the State of Montana, in the 1st Judicial Court, on June 14, 1985. *Galt v. State* challenged the constitutionality of the law. The complaint stated our Stream Access Law was a taking and asked it be declared, "illegal, unconstitutional and void." The district court denied HB 265 was unconstitutional and upheld the Curran and Hildreth decisions. Galt appealed to the MT Supreme Court, whose decision was a mix. The Court upheld the Law, but decided some limitations on the bed and bank while recreating – no big game hunting, no camping, no temporary duck blinds, or boat moorage, and landowners did not have to pay for construction of portage access.

The Access Assault Continues

That was not the end of the Stream Access debate. Attempts through the legislature have continued to chip away at or overturn our public access in one form or another. These newer attempts focused on access from bridges. PLWA was critical in defending the public's access.

Meanwhile, the expansion of police powers and rule making authority over the Public's access and recreational use of Montana's waters have been increasingly handed to our Fish, Wildlife & Parks Commission over the years. The Commission can consider petitions from persons asking the Commission to limit public recreational use for a variety of reasons, such as protecting the ecology of the stream, prevent damage to property or limit use of Class 2 streams to the actual capacity of the stream.

The Smith, Beaverhead and Big Hole are examples. A current example of this Commission authority was the recent petition in April 2016 by a Big Timber landowner and outfitter on the Boulder River where he outfits. He protested the use by the public, citing it was a conflict, asking the Commission, "limit the number of boats floating the Boulder through one of the many options available to the Commission." The FWP analysis said that most of the issues on the river involved private landowners "who have had relatively exclusive use of the river." FWP found "No degradation of the fishery in the Boulder River has been documented and we have no objective indication otherwise that the fishery itself is in jeopardy." The Commissioners voted to deny this particular petition.

In 1988, the Montana Coalition for Appropriate Management of State Lands, Inc. filed a lawsuit against the State for hunting and fishing access to State lands (the other detailed story).

Increasingly wealthy out of state landowners picked up the public land and water access torch, and with deep pockets, have continued this legal battle for decades, despite losing the court battles. One such landowner has been James Cox Kennedy, involving the Seyler Lane bridge access on the Ruby River. On June 2, 2000, Attorney General Mazurek issued an opinion, which functioned as law until it was overturned in court or replaced by legislation (2009 HB 190 Bridge Access Law sponsored by Rep. Kendall Van Dyk), recognizing access at bridges and the public's constitutional right to use all streams and rivers capable of recreational use. Mazurek reasoned that using a public right-of-way road to access a stream or river, which is another public right-of-way, is consistent with and reasonable to the public's right to travel on county roads.

Out of State Interests

In May 2001, an out of state legal organization based in Colorado, the Mountain States Legal Foundation, with an interesting history and agenda (MSLF's director ran for Montana's governor in 2003. Can you imagine what Montana's public access would be like if he won?), picked up the anti-stream access torch in Montana, filing a lawsuit in federal court, on behalf of a handful of landowners against FWP Director, Graham; MT FWP and the FWP Commission. *Madison v. Graham* sought to have "Montana's Stream Access Law declared unconstitutional on the grounds that it (1) violated their Fourteenth Amendment substantive due process rights, and (2) was void for vagueness." The district court listed a variety of reasons why the case must be dismissed, including the complaint for failure to state a claim upon which relief can be granted and statute of limitations. The court reviewed the major federal and state constitutional challenges to the Stream Access Law and found the laws to be constitutional, minus the provisions the MT Supreme Court already addressed in *Galt*. The plaintiffs' complaint was dismissed with prejudice. On appeal, the Ninth Circuit Court affirmed the district court's

decision and disposed of the case.

Montana's Stream Access Law has withstood challenges to its constitutionality in both state and federal courts that Stream Access is not a taking of private property.

Public Policy Report

In May of 2006, the University of Montana, Public Policy Research Institute published a report – Stream Access in Montana, covering the 20 years since the 1985 Stream Access Law. “Twenty years after passage of Montana’s Stream Access Law, people are still talking—and, in some cases, arguing—about its provisions. This policy report aims to illuminate the unresolved issues and misunderstandings regarding the law, and to lay out options for moving forward...”

The findings of their interviews were, “Most of the people we talked with—recreationists and landowners alike—said that the Stream Access Law works well and has been very successful, as evidenced by the hundreds of thousands of anglers, boaters, and other recreationists using Montana streams each year with few if any conflicts with landowners. Several people also said that enactment of the law did not dramatically change people’s behavior—there has been no stampede of anglers and boaters and no avalanche of disputes.”

In Conclusion

Stream Access Law expressly protects private property rights while providing for recreational use of an established public resource. Especially during this election, let's not forget the Public Trust champions that fought for our rights, our awesome stream access history and the duty that we, as individuals, have to “maintain and improve a clean and healthful environment in Montana for present and future generations.”

Don't just be an access user, be an access supporter!

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.

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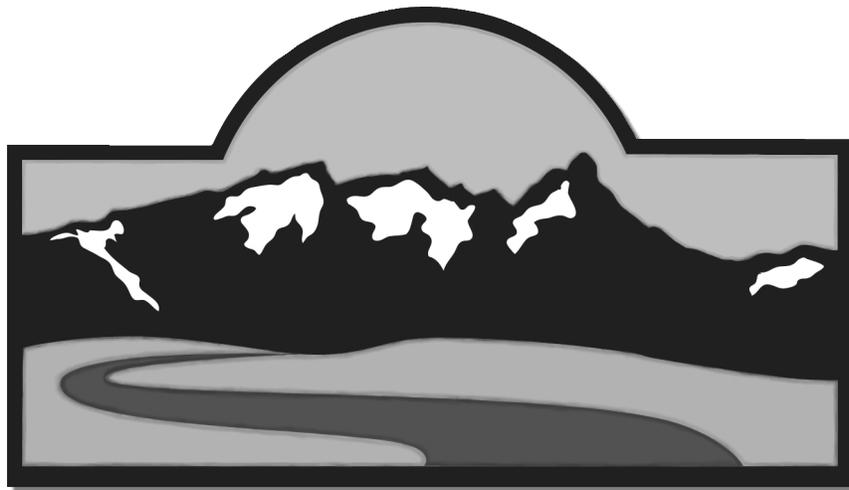
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THE KEY published by
The Public Land/Water Access Association
(PLWA)
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Billings, MT 59108
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