

2017

The Best in the West: Stream Access in Montana

Public Land/Water Access Association



High Water by Mary J. Maxam

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For the Public Land/Water Access Association

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PLWA

Overview

Montana's Stream Access Law is widely considered "the best in the west," arguably the strongest law in the nation in terms of ensuring public access. In short, the public can access any river or stream capable of being used for recreation between the high-water marks, regardless of the navigability of the river or the ownership of the streambed and adjacent property, as long as the user avoids trespass in order to reach the stream.



The Yellowstone River flows through Paradise Valley, south of Livingston, Montana. Photo courtesy Brent Zundel

This document provides a history of stream access in Montana, beginning with the original conflicts on the Dearborn and Beaverhead Rivers and continuing to the recently decided battles over access at bridges and the most recent challenge to the Stream Access Law.

Early conflicts in the late 1970s and early 1980s led to the groundbreaking *Curran* and *Hildreth* cases in the Montana Supreme Court.

These cases laid the foundation for the groundbreaking 1985 Stream Access Law, which codifies the strong public access rights enjoyed by all Montanans today. Immediately upon passage of the law, it was challenged in district courts, the state supreme court, and even appealed to the federal level. It has withstood all challenges.

In the past decade, those fighting against public access have shifted to focus on stream access at bridges, with much of the controversy centering on the iconic Ruby River. In 2000, then-Attorney General Joseph Mazurek issued an Opinion clarifying the public's right to access streams at public bridges and road rights-of-way.

In the meantime, Atlanta billionaire James Cox Kennedy began blocking off access to the Ruby River, installing well-reinforced barriers and electric fences. The Public Land/Water Access Association (PLWA) took the case to court, where it has undergone a series of decisions and appeals. In 2009, the Montana Legislature passed the Bridge Access Law, stating that the public may access streams from county or public bridges.

Eventually, the Ruby River case made it all the way to the Montana Supreme Court, where Kennedy challenged not only the specifics of the case, but also the entire Stream Access Law. The Supreme Court rebuked Kennedy, ruling overwhelmingly in favor of public access and

Keeping the public on public lands and waters

telling Kennedy that his “argument does not hold water.” In the same decision, Montana’s highest court also provided guidance on prescriptive easements, again ruling strongly in favor of the public trust.

While Kennedy’s deadline to appeal this decision has passed downstream — like water under a bridge — the only defense against future challenges is the tireless fight of individuals and organizations like PLWA. The price for the world-class recreational opportunities that Montanans enjoy is one of constant vigilance. Stream access is here to stay in Montana, but we’ll have to fight to keep it that way.

Public Land/Water Access Association

The Public Land/Water Access Association, or PLWA, is a citizen group comprised of dedicated volunteers. PLWA is organized and operated under the Montana nonprofit corporation act. The mission of PLWA is to maintain, restore, and perpetuate public access to the boundaries of all Montana public lands and waters. For more information, to join the organization, or to make a donation in support of Montana’s public lands and waters, please visit our website at plwa.org.

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Acknowledgements

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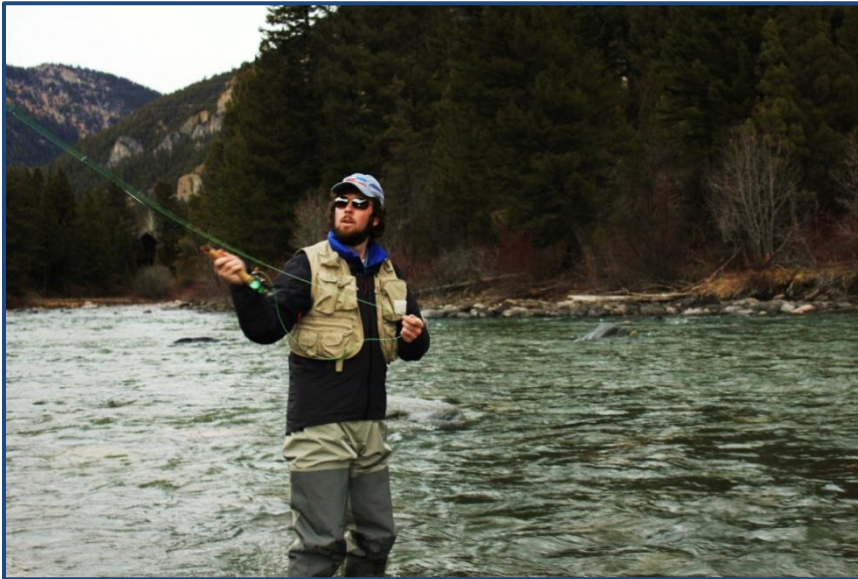
A Note on Versions

A version of this stream access history was originally published in March 2014. This version has been updated to reflect the definitive victory regarding the bridge access lawsuit on the Ruby River; it is accurate as of April 2017.



The Best in the West

Whether you are fishing one of the state's blue ribbon trout streams, kayaking or canoeing through its cold, clear waters, or just "tubing" a lazy stretch of river with friends, Montana's stream access laws are the envy of the nation, the "best in the west."



A fly fisherman on the Gallatin River, southwest of Bozeman, Montana. Photo courtesy Brent Zundel

But it was not always this way. The benefits that we enjoy today stem from the tireless work of many individuals who began fighting for better public stream and river access in the late 1970s. This group of dedicated citizens — mostly living in or around Butte at the time — left a legacy of the best and most egalitarian stream access law in the country.

Since those early days, the mindset favoring expanded access has taken root across the state in the minds of its citizens. Many groups have fought to strengthen or protect stream access rights throughout the intervening decades, and members of the Public Land/Water Access Association (PLWA) have inherited much of the responsibility for preserving these cherished traditions. Prior to 2007, this organization was known as the Public Land Access Association, Inc. or "PLAAI."

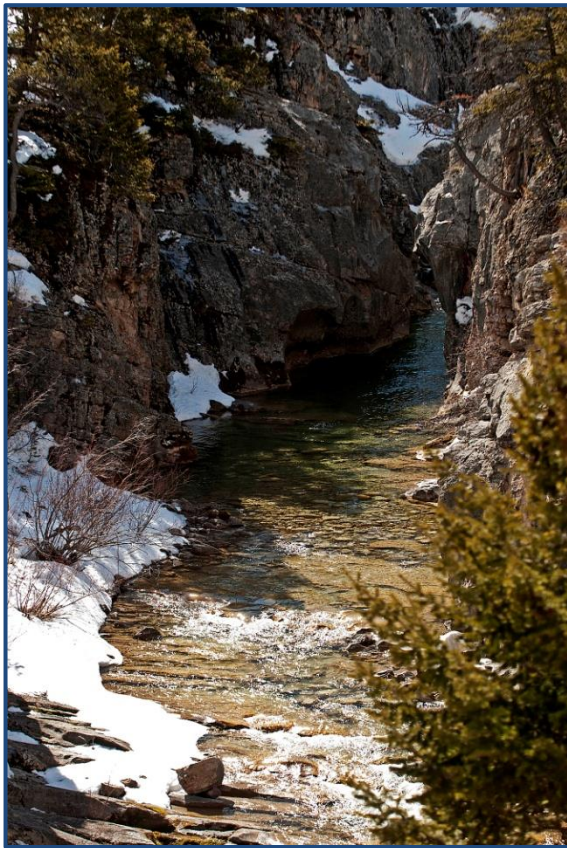
After the open range disappeared, fences and barriers in and around stream, rivers, and bridges have sometimes barred the way for fishermen and recreationalists. Landowners legitimately claimed that these were necessary to control cattle, but they were also starting to realize that "private" blue ribbon trout streams could prove extremely lucrative and valuable as real estate amenities.

In the late 1970s, reports of angler harassment on the Dearborn and Beaverhead Rivers in Western and Southwestern Montana reached a crescendo. Butte fishermen Jerry Manley and Tom Bugni stepped forward to take on the battle. In 1979, the pair met with a young Bozeman lawyer named Jim Goetz at the Steer Inn near Three Forks. Goetz suggested that they form a statewide organization dedicated to expanding stream access. Just starting his law career at the time, Goetz agreed to represent the new organization for half the going rate. Tony Schoonen joined the group shortly thereafter, and the Montana Coalition for Stream Access was born.

At the time, Montana stream access law appeared straightforward: “The streambed between low water marks on navigable streams belonged to the state in trust for the people of the state” (Hunter). Title on adjacent lands belonged to the landowner, but this title was subject to easements acknowledging the public’s common law right to navigation, fishery, and commerce (*Gibson*). However, landowners with property bordering streams that did not fit the federal definition of “navigability” owned up to the middle of the stream with no right to public access.

All that changed with two groundbreaking legal victories in 1984. The Montana Coalition for Stream Access brought a pair of historic cases to district court and, from there, to the state Supreme Court: *Montana Coalition for Stream Access, Inc. v. Curran* and *Montana Coalition for Stream Access, Inc. v. Hildreth*. Usually referred to as *Curran* and *Hildreth*, these decisions laid the groundwork for stream access in the state.

The *Curran* Case: Public Trust Doctrine and the Montana Constitution



The Dearborn River tumbles out of Devil’s Glen in the Rocky Mountain Front. Photo courtesy Tom Bauer/Missoulian

The Dearborn River tumbles out of a gorge in the Lewis and Clark Range and, before reaching its confluence with the Missouri some 70 miles later, passed through six to seven miles of Dennis Curran and his Curran Oil Company’s land. Claiming ownership of the banks and streambed — and thus the right to restrict public access — Curran harassed and interfered with fishermen and floaters on the Dearborn, even running over a recreationalist’s inflated raft with his vehicle in one instance according to witnesses.

Members of what would soon become the stream access coalition filed suit against Curran in 1977, and the case wound its way to the Montana Supreme Court in 1984. Using the “log-floating test,” the court determined that the Dearborn was navigable when Montana entered the Union in 1889 because it had previously been used to move logs and railroad ties downstream. Under the federal definition of navigability, the state owned the riverbed and held it in trust for the good of the public (*Curran*).

Perhaps the most crucial concept to emerge from the court’s decision was a broad definition of navigability of state waters: “any surface waters capable of use for recreational purposes are available for such purposes by the public. . . .” (*Curran*). The court based its reasoning on the public trust doctrine and Montana’s 1972

Constitution. The public trust doctrine, a concept dating back to Roman times, posits that the state must maintain certain resources, like “navigable waters and soils under them,” for the public’s use (*Illinois Central Railroad*). Montana’s 1972 Constitution states that “all surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law” (Montana Constitution).

Importantly, the court held that “any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes” (*Curran*). The justices decided that if a river or stream can be used for recreational purposes, then that alone suffices to designate it as a “navigable” river for recreational uses. Further, they ruled that anyone may use the stream up to the normal high water mark for recreational purposes, and he or she also has the right to portage around stream barriers in the least intrusive manner.

The Hildreth Case: Recreational Use and Navigability



The confluence of the Beaverhead River with the Ruby River, its major tributary, just outside of Twin Bridges, Montana.

The second case to lay the framework for the Stream Access Law dealt with the Beaverhead River. Along its 69-mile length, the Beaverhead passed through about one and one-half miles of land owned by Lowell Hildreth.

A second request took the fledgling coalition by surprise: A group of fishermen and outfitters asked the organization to take on a lawsuit against Hildreth, alleging that he had installed a fence blocking access to the river from the bridge and had planned to install a cable across the river in preparation for blocking floaters on

the opening day of fishing season. In 1981, the coalition filed a complaint against Hildreth.

A few weeks after deciding *Curran* in 1984, the court ruled on *Hildreth*, its companion case. Their reasoning upheld the *Curran* case but did not address navigability for title, instead relying entirely upon the recreational use test. The justices advised that determining “navigability for title is not necessary or proper when the issue is one of navigability for use” (*Hildreth*).

In short, if the stream is navigable for recreational purposes, it can be used up to the high water mark without regard to ownership of surrounding lands.

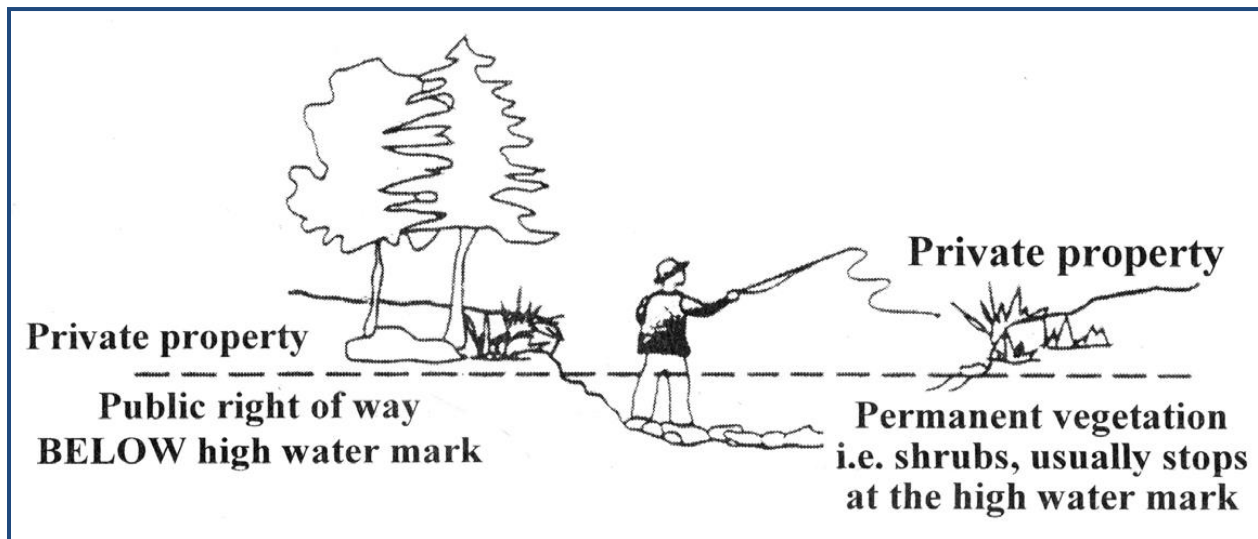
The 1985 Stream Access Law

Within months of the historic *Curran* and *Hildreth* decisions, nine bills concerning stream access were introduced in the 1985 Montana Legislature. Developing legislation to codify the court's reasoning into law was crucial.

Tony Schoonen and Jerry Manley, both original members of the Montana Coalition for Stream Access and long-time members of the PLWA Board of Directors, were assigned to a sub-committee to help draft the law. A diverse group of legislators, landowners, stockmen, farmers, recreationalists, hunters, and anglers worked together to develop House Bill 265. In addition to the stream access coalition, members from organizations like the Montana Stockgrowers Association and 17 other groups helped develop the legislation.

That bill, notable for its bipartisan support, eventually became the treasured Stream Access Law that Montanans continue to enjoy. The law distilled the court's reasoning, based on the Montana Constitution and the public trust doctrine, into the West's strongest law protecting public access.

In the most basic sense, the Stream Access Law allows full public use of most perennially flowing waterways between the ordinary high water marks. If a stream is capable of being used for recreation, it can be so used regardless of underlying streambed ownership. Recreationalists cannot cross private land to enter the river, but once in the river, they can portage around natural and man-made obstacles in the least intrusive manner.



Montana's Stream Access Law allows full use of most natural waterways between the high-water marks, regardless of the ownership of the ownership of the underlying streambed. Illustration courtesy PLWA

In 1985 Montana senator and Martinsdale rancher Jack Galt, along with nine other landowners, asked a state district court to declare the new law unconstitutional. After the district court found against Galt, the case went to the Montana Supreme Court, where the justices agreed

with the district court and reaffirmed their *Curran* and *Hildreth* decisions, stating that the public does have a recreational access right to use the state's waters.

However, the court invalidated small parts of the newly passed law. The court held that some subsections, like those which provided for a right to build duck blinds and boat moorages, to camp overnight, and to hunt from below the high water mark, were too broad. The most important components of the law, however, remained untouched; in fact, they were strongly reaffirmed.

The next year, on March 26, 1986, Gene Hawks, a former Gallatin National Forest supervisor, founded Public Lands Access Association, Inc. — PLWA's first name — as a nonprofit corporation. The nine individuals who attended the meeting at the Bozeman Library became the original board of directors. At first the group focused on public lands issues, but their approach soon expanded to include rivers and streams. Membership with the stream access coalition also overlapped — as Schoonen said, "We're all fighting the same fight."

Challenges to the Stream Access Law

Later challenges to the Stream Access Law emerged, such as the 2001 *Madison v. Graham*, a case that sought to overturn the entire law. Instead, the case was dismissed in district court. The Montana Supreme Court held that touching the streambed underneath the water, by a wader or a boat's oar, for example, "causes no more interference with private property rights



Unfavorable signage in 2004 on a Ruby River bridge, where the public was later determined to have access. Photo courtesy PLWA

than does a floater" and is thus permissible under the Stream Access Law (Harmon). The U.S. 9th Circuit of Appeals affirmed the district court's dismissal.

At the same time, The Mountain States Legal Foundation, a conservative organization funded in large part with money from Coors Brewing Co., had begun soliciting disgruntled landowners hoping to sue Montana in federal court. They filed suit in 2000 on behalf of landowners on the Ruby and Stillwater Rivers

and the Madison tributary Odell Creek in an effort to destroy the Stream Access Law. The case was dismissed in district court and dismissed by the 9th Circuit of Appeals. Finally in 2003, the

U.S. Supreme Court refused to hear their appeal and let the 9th Circuit decision stand. The nation's highest court shot down a very broad challenge.

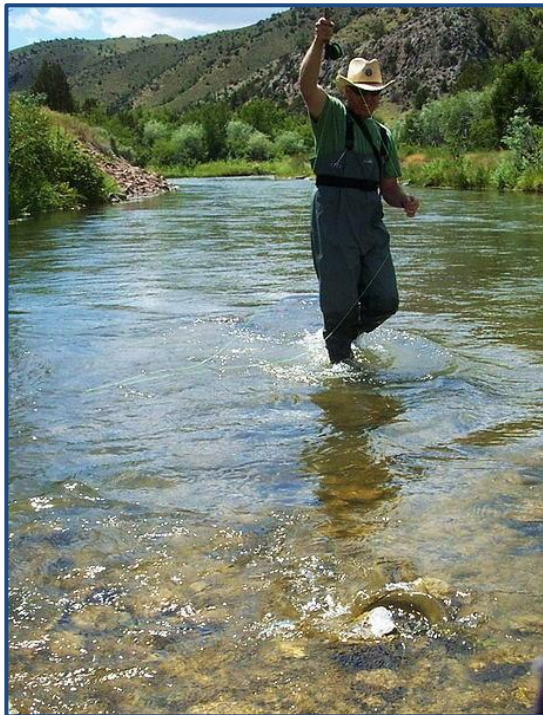
The Supreme Court's refusal to hear the appeal is tantamount to finding against the appealing party and should signify that the law is safe from future challenge. Afterward, former Montana Attorney General Mike McGrath said, "I'm glad this issue is finally put to rest."

Through the constant vigilance of dedicated sportsmen and recreationalists, Montana's Stream Access Law has withstood every challenge from those who would deny the public access to their own lands and waters.

Stream Access at Bridges: The Next Battle for Public Waters

With the Stream Access Law well established, the battle turned to access at bridges and was waged primarily by out-of-state landowners. Hundreds of river miles in Montana flow through private property, and sometimes the only access point is a bridge crossing. Anglers and recreationalists rely on these bridges to get to public streams and have done so, in many cases, since the bridge was built.

In some instances, people who grew up fishing a certain river now found they could no longer even get on the river. As wealthy out-of-staters bought up ranches along prime trout streams and leased exclusive "trespass rights" to commercial outfitters, more and more average Montanans were getting locked out.



A fly fisherman on the Ruby River.

Some landowners "erroneously are trying to lay claim to a public resource," Dick Oswald, a Montana Department of Fish, Wildlife, and Parks fisheries biologist in Dillon, said as the conflict was intensifying in the late 1990s. "I suspect they didn't do their homework before they bought land. This is America, not feudal Europe."

At the forefront of the conflict over stream access at bridges ran the Ruby River, a small tributary of the Beaverhead that flows through four iconic, pine-covered mountain ranges in Madison County. Access to the Ruby had been challenging since early problems in 1995.

Those problems persisted, and in 2000 another Montana Attorney General, Joseph Mazurek, issued an Opinion on stream access at bridges specifically to address the controversies stemming from access

at the Ruby River. In it, he upheld the legal concepts for which PLWA and other groups have been fighting for years. In essence, Mazurek held that the public “may gain access to streams and rivers by using the bridge, its right-of-way, and its abutments” (Mont. Op. Attn’y Gen.). In other words, the public has a right to access streams and rivers at bridges along publicly owned roads.

Furthermore, Mazurek clarified that without a definition in the easement or a deed to the contrary, the width of the right-of-way easement of a bridge is the same as the width of the public road easement to which it is attached and does not narrow at the bridge (Mont. Op. Attn’y Gen.). This provision was a very crucial legal pillar of the opinion.

Easements for most county roads are 60 feet wide, which extends well beyond just the paved surface. This width includes land necessary for access and maintenance, like the borrow pit. Because of the Stream Access Law, there is also an implied recreational easement up to the high water mark in rivers and streams. Thus, where these two easements intersect, the public may legally move from one to another. All this is a complicated legal way of saying that the public can access streams at bridges.

Barbed Wire and Electric Fences: Access along the Ruby River



PLWA Board of Directors member Tony Schoonen inspects an electric fence erected at Lewis Lane on the Ruby River in this 2004 photo. Photo courtesy Tony Schoonen

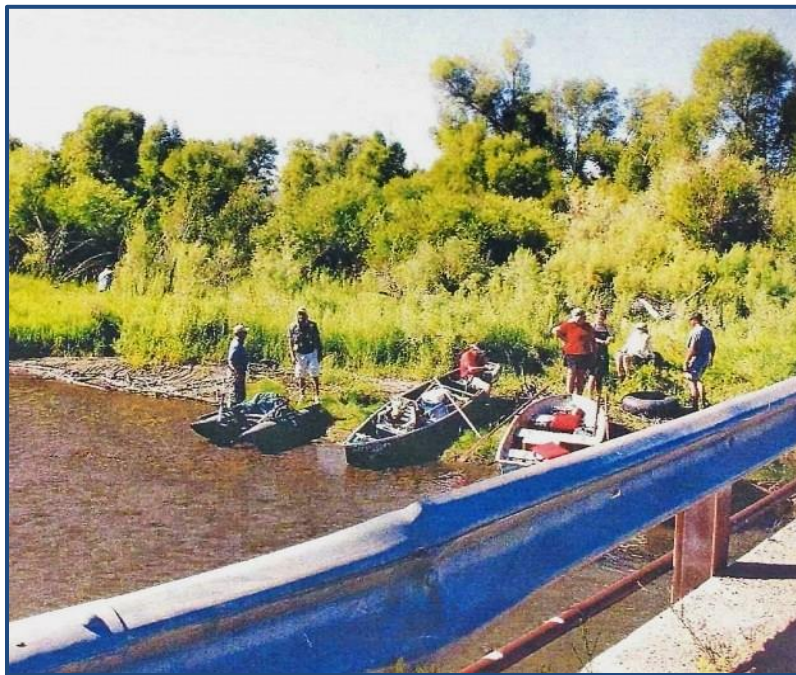
An already tense situation boiled over in 2003 when James Cox Kennedy, an Atlanta media mogul with \$7 billion in his own pockets who heads a media conglomerate worth \$25 billion, began trying to warp Montana’s laws to suit his own personal whims. And none of those whims includes allowing the public anywhere near what he considers his own private river.

In addition to owning more than 3,000 acres of land, including eight miles along the Ruby itself, Kennedy owns the elaborate and expensive Crane Meadow Lodge, which advertises “private water ... lease[d] for the exclusive use of our guests” and lies barely a mile from the Ruby.

Kennedy had repeatedly and illegally blocked public access to the river for two decades. In 2003, he began erecting well-reinforced barriers with barbed wire at bridges on Seyler Lane and

Lewis Lane. He even went so far as to string electric wires across the public right of way and attach them directly to the guard rails, blocking access. Perhaps big-city Atlanta is different, but in Montana electrocuting fishermen is considered bad form.

Fed up with Kennedy's harassment of recreationists, PLWA filed a lawsuit against Madison County in 2004 over its lack of action, attempting to gain access to the Ruby at the Seyler Lane Bridge. As noted, Seyler Lane and Lewis Lane were the two roads with barricaded bridges bordering Kennedy's property. Kennedy and the Hamilton Ranches expanded the suit to include the bridges at Lewis Lane and Duncan District Road, the latter of which did not border Kennedy's property. PLWA contended that since these bridges are on established public or county roads, the public had a right to access.



Anglers and recreationalists prepare to float the Ruby River at Seyler Lane Bridge on July 17, 2005, to demonstrate their support for public stream access at the "Stream Access Celebration Day Float," organized by Tony Schoonen. Photo courtesy Tony Schoonen

On July 17, 2005, nearly 200 anglers and recreationalists turned out to float the contested stretch of the Ruby right below Seyler Lane. Organized by Tony Schoonen, a member of the PLWA Board of Directors, and billed as the "Stream Access Celebration Day Float," the event drew public attention to fences that Kennedy had erected to restrict access to the stream.

Schoonen said, "We had families, legislators, anglers and non-anglers, kayakers, and business owners. The overwhelming support was a great display of people who wanted to celebrate the stream

access law and who wanted to protest what we believe are illegal fence restrictions at county bridges."

Seyler Lane is what is known as a prescriptive easement — that is, a right-of-way that is created by regular, historic use over a period of at least five years. The original landowner, Bud Seyler, allowed people to travel across his land to reach the stream, creating the easement. It also follows, essentially unchanged, an important stagecoach route from Salt Lake City to Helena, dating from the 1860s and 1870s.

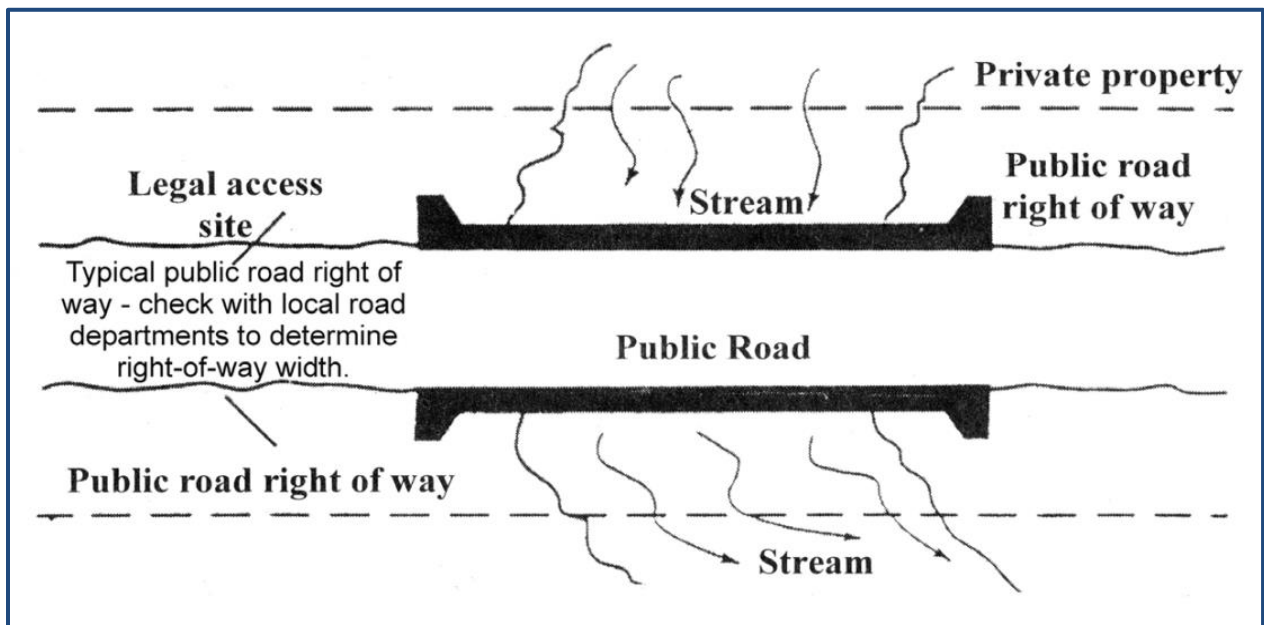
In March of 2007, Kennedy intervened in the lawsuit and issued a counterclaim asking for the judge to bar all public access at the bridges in question. The hearing took place during 2008

with Montana District Judge Loren Tucker for Madison, Beaverhead, and Jefferson Counties presiding. He ruled in favor of PLWA for two of the bridges, Lewis Lane and Duncan District Road, in September 2008. Tucker agreed that they were located on established county roads with the standard 60-foot county road easement, and acknowledged that “the public may utilize any portion of the 60-foot right-of-way regardless of the Ruby River intersection with it” Tucker’s finding that the road right-of-way is not restricted or narrowed at the bridges was crucial and, as discussed later, resulted in a change to Montana law.

However, Tucker did not rule on access at Seyler Lane Bridge because it is located on a prescriptive road easement, and he believed a separate hearing was required to determine the facts and law.

The 2009 Bridge Access Law

In the intervening years, Montana’s legislators acted to codify Montanans’ right to access streams and rivers at bridges by passing the 2009 Bridge Access Law. A varied group of stakeholders met during 2007 – 08 to craft a solution to the controversies that had arisen around stream access. Kennedy’s efforts to fence off access at the Ruby River hung heavily over the state, making clear the need for such a law.



The 2009 Bridge Access Law clarified that the public may access streams and rivers using the right-of-way at bridges along public roads. Illustration courtesy PLWA

In the 2007 Legislature an almost identical bill was killed on a party-line vote, but during the next session, the bill’s sponsor, Billings Sen. Kendall Van Dyke, worked with all sides to reach consensus and pass the bill with overwhelming bipartisan support. PLWA, along with other like-minded organizations, mustered a considerable group of sportsmen and recreationists, urging Montanans and our legislators to support the bill.

It was the first piece of stream access legislation that Montana had seen in 24 years. It stated that the public must be able to access streams and rivers from public roads and bridges (Mont. Code Ann. § 23-2-312). The law also allows landowners to string fence along that public right of way to the bridge abutment, something landowners believed necessary for livestock control.



From left to right: State Senator Kendall Van Dyk, then-Attorney General and current Governor Steve Bullock, PLWA President John Gibson, then-Governor Brian Schweitzer, and Billings Rod and Gun Club President Irv Wilke pose for a photo to celebrate the signing of House Bill 190, which became the Bridge Access Law. Photo courtesy PLWA

However, the law provides that if fencing makes access difficult, landowners are to be notified and asked to provide access with structures such as stiles, gates, or walkovers. If the landowner and the Montana Department of Fish, Wildlife, and Parks (FWP) cannot resolve the situation, FWP will provide the landowner with options. If that still does not work, FWP may then install the structure themselves, with funds from their department or other sources (Mont. Code Ann. § 23-2-312).

A bipartisan, common-sense triumph, the Bridge Access Law stems directly from PLWA's tireless efforts to provide public access on the Ruby River. Billings Rep. Robyn Driscoll called the law the "real highlight of this session." Within a year of its passage, FWP had already completed over 23 projects to improve public access using funds it received from the Legislature specifically for that purpose.

Jim Kropp, law enforcement chief for FWP, said that they have had good cooperation among all involved parties. Many requests came from private landowners looking to fix gates on their land, while others came from sportsmen hoping to improve the safety of some sites. Still others came directly from FWP personnel with previous experience in locations that need improved public access.

Bridge over Troubled Waters: Access on Trial at Supreme Court

The Seyler Lane portion of the Madison County lawsuit, upon which Judge Tucker initially declined to rule, was heard in January 2012. A few months later, in April, Tucker ruled against PLWA, creating a fallacious two-easement legal theory. He essentially decided that two easements exist on Seyler Lane: one for the county to use and another separate one for the public. The county's easement was a normal easement width and allowed access to road components like the borrow pit for maintenance. The public easement, however, included only the paved surface of the road itself.

Such a concept would mean that the county could perform road maintenance or bridge inspections, but that, since the road lies along a school bus route, children standing on the side of the road for the bus would technically be trespassing, as would someone who pulled over to change a flat tire, for example.

In May 2012, PLWA appealed the Seyler Lane decision to the Montana Supreme Court. Kennedy cross-appealed the district court's ruling regarding the right-of-way at Lewis Bridge and, in a strange move, challenged the entire Stream Access Law as an unconstitutional taking of his property. The court heard the case in front of a large crowd on the Montana State University campus on April 29, 2013.



The seven members of the Montana Supreme Court, shown in 2013.
Photo courtesy courts.mt.gov

Devlan Geddes, the attorney representing PLWA, argued that Seyler Lane constituted a prescriptive easement and that “once the width (of an easement) is established, it can then be used for all lawful public purposes,” like stream access. The supreme courts of Idaho, Colorado, and Wyoming have all used that same reasoning, he noted.

While both sides agreed that Seyler Lane is a prescriptive road, Peter Coffman, Kennedy's Atlanta lawyer, claimed that the road right-of-way on

a prescriptive road narrows at the bridge. Thus, no access at the abutments would be allowed.

Coffman further claimed that Kennedy owns not only the land below the Ruby, but also the water and the air above it. Justice Patricia O'Brien Cotter immediately asked if he was requesting that the court declare part of the Montana Constitution unconstitutional. “Yes,” he said.

Coffman went on to admit that his client was seeking to overturn Montana's 28-year-old Stream Access Law, which relied on the court's own *Curran* and *Hildreth* decisions, and to nullify Article IX, Section 3 of the Montana Constitution, which defines water ownership in Montana. An audible gasp escaped the mouths of disbelieving recreationalists and landowners, who had packed every chair and formed standing rows that wrapped around the room twice. Such an assertion is truly breathtaking.

Like the robber-barons from Montana's earliest days, who pillaged the resources of our state for personal profit and then retreated to faraway cities, Kennedy apparently believes he controls all rights to the soil, the water, and everything above them.

A Victory for Public Access at the Supreme Court

After sportsmen across the state endured nearly eight months of nervous waiting, the Montana Supreme Court delivered a resounding victory for public access and a stinging defeat for Kennedy in January 2014. The court upheld the Stream Access Law and clarified the public's rights to use certain rights-of-way.

In unanimously rejecting Kennedy's challenge of the Stream Access Law, not even Montana's highest court could resist an easy pun, noting that his "argument does not hold water." The



In this 2013 photo, a new sign erected by Montana Fish, Wildlife, and Parks at Lewis Lane on the Ruby River informs anglers and recreationalists that stream access is allowed in this location. Photo courtesy PLWA

court told Kennedy his claim that the Stream Access Law was a taking of private property was invalid because there was no property to take.

With regards to Kennedy's cross-appeal of the right-of-way width at Lewis Bridge, the court found that when Kennedy bought the property, it was subject to the recreational access easement agreed to by the previous landowner in deed.

In a 5 – 2 decision, the court also rejected District Judge Tucker's previous two-easement ruling on Seyler Lane. Instead, they found that only one easement exists, an easement that extends beyond the width of the paved surface. The case was remanded to the district court in order to determine the actual width of the easement.

Once a public prescriptive right-of-way is established, the justices held, it may be used from edge to edge for all reasonable purposes, including access to rivers and streams. Geddes explained that this decision applies to every public prescriptive right-of-way in Montana.

Long-time PLWA President John Gibson threw the importance of this finding into stark relief. "A lot of the roads in central and eastern Montana in particular are not county roads, but people use them as if they are. These roads have never gone through the formal process of becoming county roads," he said. "Some of them have been here for 100 years." While no official count exists, some estimates place the number of these roads in the hundreds.



Long-time PLWA President John Gibson. Photo courtesy John Gibson/PLWA

Furthermore, the court ruled that when establishing the width of a public prescriptive right-of-way, the width extends beyond the traveled way to include all areas necessary to maintain and safely use the right-of-way. None of this allows trespassing across private property — only access through legal easements.

Finally, this decision confirmed that recreational use can help establish a prescriptive easement. On its own, it is likely not sufficient, but recreational use is an important factor that should be considered in addition to other public uses.

Geddes called this ruling one of the most important public road law decisions ever made in Montana. "It's going to have a profound impact on public access to publicly owned lands and water in the future," he said. The most important concept in the decision is that once a public road is established, that easement may then be used for all "lawful and reasonable" purposes.

Justice Michael Wheat authored the majority decision. Joining Wheat were Justices Beth Baker and Patricia Cotter, as well as District Judges Kurt Krueger and Mike Menehan, who replaced Justice Brian Morris and Chief Justice Mike McGrath, both of whom recused themselves from the case.

Justices Jim Rice and Laurie McKinnon partially dissented. Rice concurred with the majority that recreational use should be considered in determining an easement, but disagreed that the easement could then be expanded to include "all uses that are permissible" because he feared the easement could then be expanded forever. McKinnon argued that Seyler Lane is not actually a county road because county roads cannot be established by prescriptive use; only public highways can.

Bruce Farling, Executive Director of Montana Trout Unlimited, summed up the decision: "If there is a public easement on a county bridge, whether it's through a deed, petition, or prescriptive, the public can use that easement to access the stream, provided it is physically possible to reach the area below the high water mark from within the easement. No more 'Keep Out' signs."

Gibson captured the spirit of the decision, saying, "We all won this one. Everyone that fishes or floats or enjoys the streams — it's a great victory for the public trust."

Recreational Use and Prescriptive Easements

As mentioned previously, the Montana Supreme Court remanded the Seyler Lane portion of the case back to the district court with specific instructions. The Supreme Court clarified that a prescriptive road does not have a separate maintenance easement; rather, the public right-of-way includes “the areas necessary to support and maintain the road, as well as land needed to make the road safe and convenient for public use” (Lane).



The Ruby River just upstream of the bridge on Duncan District Road. Photo courtesy Brent Zundel

A county road generally requires a 60-foot easement, but the Court explained that the “character and extent” of the road’s use, in conjunction with historical evidence, are what determine the width of a prescriptive easement. Importantly, the Court also held that recreational use could be an important factor in determining the width of the prescriptive easement.

Most significantly, the Court held that future uses were not limited solely to the historical uses that established the prescriptive easement. Instead, the new uses of the road could include historical uses and those “that are reasonably foreseeable” – which would include access to the Ruby River.

Upon review, Judge Tucker decided that the easement reasonably extended five feet upstream and downstream of the bridge abutments. At both ends of the Seyler Lane Bridge, the necessary easement was 47.5 feet in width.

PLWA attorney Devlan Geddes explained, “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 Lasting Legacy of the Ruby River Cases

The importance of the Ruby River cases is hard to overstate. As Robert Lane notes in the *University of Montana Law Review*, as a result of this decision, “established prescriptive use roads are recognized as county roads for all public road purposes now and in the future. The decision means that county commissioners do not face a dilemma over the management and use of a county road that was never formally dedicated because of a narrow limitation on public use.”



The Ruby River near Alder. Photo courtesy Brent Zundel

The Supreme Court indicated that recreational use may be an important part of establishing a prescriptive easement. Upon further review, the district court established a prescriptive easement favorable to public access on Seyler Lane, one that will get recreationalists from the bridge to the Ruby River. These precedents will apply to all future cases that involve prescriptive easements – and Montana may have hundreds of such roads.

Finally, in his cross-appeal, Kennedy argued that the Stream Access Law was unconstitutional. While fightin’ words

like these make the blood of everyday Montanans run cold, this ill-advised challenge resulted in a boon for Montana recreationalists: The Supreme Court opinion went to great lengths to “carefully, explicitly, and definitely explain that the Stream Access Law is not a taking of private property (Lane).

This case provided resounding clarity and completeness in favor of stream access.

The Future of Stream Access in Montana

How did we get to where Montana is now? PLWA and its predecessor organizations certainly have done much of the heavy lifting — especially with respect to the Bridge Access Law — but there have been many other key players.

Without the genius and dedication of the Goetz law firm in Bozeman, many of these efforts would have died an early death. Jim Goetz personally argued both the *Curran* and *Hildreth* cases, and Devlan Geddes, an attorney at the same firm, has worked with PLWA on important cases since 2004.

Keeping the public on public lands and waters

The modest personal financial contributions and the thousands of hours of volunteer effort from grassroots members and donors have kept the effort to preserve and expand stream access rolling in the face of big outside money and political opposition.

Furthermore, many local and state sporting and conservation organizations — such as Montana Trout Unlimited, the Montana Wildlife Federation, and others too numerous to list in this writing — have advanced these goals. And finally, little indeed would have been accomplished without the legislators, judges, and other officials involved who have converted raw materials and public support into law.

Throughout all of this, PLWA has continued to fight tirelessly for public access. Oftentimes, that work takes place behind the scenes — the public access fight can often become seemingly endless and tedious litigation, but it is crucial to protecting every Montanan’s right to access their rivers and streams.

In short, what Kennedy and others in past decades challenged was the very fabric of our state. Had their challenges to the very foundation of the Stream Access Law succeeded, it would have affected the day-to-day lives of untold Montanans. If nothing else has been certain throughout the three-plus decades of the Stream Access Law’s existence, then one thing surely is: Stream access is here to stay in Montana, and we’ll fight to keep it that way.



Fishing the Ruby River just upstream from Lewis Lane. Photo courtesy James Muhlbeier and Bryan Gregson

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