The Ruby River and the Bridges of Madison County Public Access Lawsuit

At last, after four years since Public Lands and Water Access Association, Inc, (PLWA) filed a lawsuit in 2004 against Madison County – oral arguments were finally presented in a pre-trial where contestants all asked for summary judgments'. Held in Montana's second territorial capital, Virginia City, and the one-time home of Calamity Jane, the pre-trial shoot-out was heard in the District Court of Judge Loren Tucker on July 25.

The controversy over public access to the Ruby River along county roads, bridges and their shoulder right-of-ways has a long history in Madison County. Disputes between landowners preventing public access, boasting and marketing sections of the Ruby as "private water" and every day river recreationists standing up for their rights to access Montana public waterways has become more heated since the first conflicts in 1995.

In 2003, the tension escalated after a landowner, media mogul and billionaire James Cox Kennedy, put electrical fences across county road right-of-ways, across public easements to connect his fenced-in property with two bridges that span the Ruby River thereby creating nearly impassable barriers for the public. Kennedy owns a ranch with more than 3,000 acres running nearly 10-miles on either side of the Ruby River that is crossed by the Duncan Dirt Road Bridge, and the Seylor and Lewis Lane bridges; he also operates a fishing lodge for paying clientele near the Seylor Lane Bridge.

Frustrated by the increasing number of elaborate high-board fences, intimidating signs, barbed-wire, and electrical fencing in public right-of-ways – PLWA filed the lawsuit against Madison County over its lack of action at three bridges that span the Ruby River between Sheridan and Twin Bridges. The PLWA complaint asserts that the county is remiss by not enforcing a Montana statute that directs the county to remove right-of-way "encroachments"- in this case, fencing at Duncan, Lewis Lane, and the Seylor Lane bridges. PLWA contends that the fencing constructed at the three bridges were done in a manner that go far beyond controlling or keeping cattle in but to keep the public out and that the County must comply with state law to remove or require the removal of the fences as "encroachments". In summary, the law (MCA 7-14-2134) states that if a highway "is encroached upon by fence, building, or otherwise…" the county may at any time either remove the encroachment or give notice requiring the encroachment to be removed. Managing public right-of-way easements along county roads fall under the authority of County Commissions.

Lance Lovell, a Billings attorney representing Kennedy and Hamilton Ranches, and the Montana Stockgrowers Association represented by John Bloomquist joined with the county in defense of the complaint saying that fences built in public right-of-ways are not encroachments nor does the public have a right of access to the river via a right-of-way.

More than 30 people, including more than a dozen sportsmen and river recreationists, members of PLWA, Montana Wildlife Federation, Trout Unlimited and others sat among an equal number of ranchers and locals.

Recognized as the leading, legal authorities on stream access having worked on nearly every related court challenge in Montana, Jim Goetz and Devlan Geddes from Bozeman represented PLWA.

Before hearing arguments for nearly four hours, Judge Tucker asked the attorneys several questions for clarification. He began by asking how this case is different from the Dearborn River, Curran case, ruled upon by the Montana Supreme Court in favor of the recreating public in 1984. Jim Goetz and John Bloomquist acknowledged the similarity but point out that that case was about a state highway in comparison to the county roads and bridges before the court.

Addressing the three roads, Tucker asked, the Duncan road is a petitioned road with an established public easement; Lewis Lane has a right-of-way under county authority through a deed, but what about Seylor Lane? Goetz replied that it is either a prescriptive road or a road established by RS2477. Bloomquist replied that it is a prescriptive road. The judge responded by saying that from the information presented can we agree that it is a prescriptive road and therefore we really do not know how wide it is and that there

are questions about the right-of-way? Both attorneys agreed. Therefore, said Tucker, a trial will be necessary to address issues for the Seylor Lane and bridge. He went on to say that, ok, what we have then are issues for Duncan road and Lewis Lane.

The PLWA arguments were herd first with Goetz presenting compelling support for the right of the public to use public highways within the public right-of-ways to access public waters as found in the 2000 Montana Attorney General Opinion (although not binding), the Public Trust Doctrine, the Constitution, Common Law, and legislative testimony at the 1972 Constitutional Convention. His second approach supported Montana statutory law that is quite specific and binding on the counties, they may not allow the construction of fences in public right-of-ways that "impede" public access to public waterways. "If there is encroachment by a fence, it must be removed," said Goetz.

The judge said it appears that the question is that of definition – what is "encroachment" – there is no case law on this issue.

The Madison County attorney weakly disputed the claim of encroachment and raised issues with the lack of definition. The Stockgrowers took the floor saying that fences to bridges in right-of-ways has been a way of life in Montana for years and it is within the authority of counties to allow the fences to prevent livestock from wandering on to roadways. The judge asked if that meant that electric fences could be allowed in the right-of-way. Bloomquist said, "Yes, if it is not impeding vehicle traffic." Further, he said that the county authority to remove encroachments is really so that they can remove obstacles that prevent vehicle travel.

The next argument by the Stockgrowers said that the underlying land in the right-of-way regardless of a public easement and the land beyond the fence –between the fence and the high-water mark is privately owned. The Montana recreational statute does not allow the plaintiffs (PLWA) claim that they (the public) can cross over private property to access the Ruby River, added Bloomquist. The judge then quickly asked a question which he repeated five times during the pre-trial. He first asked if the attorneys agreed that the public has historically walked down the right-of-way for whatever reason. Then he asked for them to help him understand what is the difference between a person being allowed to walk down the right-of-way for instance with a gas can if he ran out of gas – and a person with a rod in one hand and bucket of worms in the other who comes to the end of the bridge and a fence – is the issue over whether the fisherman continues from the end of the bridge or the fence to the water or the high water mark? Bloomquist responded to the affirmative, that the recreation law only provides public access and use up to the high water mark. Basically saying that if you cross the fence you are on private ground until you get to the high water mark and you are trespassing and that right-of-way easements narrow to the bridge. The dialog went back and forth and the judge explored the right-of-way deed for the Lewis Road that just talks about a 60ft. right-of-way without any mention of the right-of-way narrowing to the bridge.

Perhaps the most unexpected arguments, sometimes a real stretch and frontal assault then came from the attorney for Mr. Kennedy. He first spoke about the integrity of Mr. Kennedy and how he had replaced one of the electric fences before this legal case. He explored how land in the west came into private ownership and then questioned the authorities of governments to use that same land for their purposes. The argument then turned to the Montana Steam Access Law where Mr. Lovell inferred that it was unconstitutional. The judge stopped the argument of Mr. Lovell to ask a question, "is it your opinion that the Stream Access Law is incorrect," said Judge Tucker. Mr. Lovell agreed. The judge countered that it had already been decided by many Supreme Courts – "then is Mr. Kennedy," asked Judge Tucker, "asking this court to conclude that the public is not able to use the waters under the Stream Access Law?" Lovell replied, "No, he is saying the public doesn't have the right to use the land underlying" and that the Montana and U.S. Supreme Courts were wrong, these are private lands – the stream beds under the water. Shockingly, Lovell went on to suggest that this complaint and hearing were "folly." After more exchanges between Lovell and Tucker, Lovell suggested that the core premise of the plaintiffs arguments, that these are two "intersecting" public right-of-ways – the river and the county road - are wrong. "There is no intersection of two public rights-of-way," said Lovell, if they actually intersected you would drive down the road right into the river instead of "over" it, meaning over a bridge.

All of the attorneys presented further and closing arguments – Goetz stating that there is no statute that authorizes the construction of fences to bridges, there is no statute that precludes the public us of the right-of-way but there is a statute that allows the public to use the waterways. Lovell went on to say the judge shouldn't even be ruling on the case and that the public floating over private lands is a takings, no one, including the government has ever paid for that opportunity. Bloomquist concluded by exploring the many failed attempts to resolve the issue by legislation because legislators don't want to give away any rights and yet, he finished by saying this is remains a "legislative issue".

In the end, Judge Tucker told the attorneys that a state wide application ruling as had been requested by PLWA was out and that a trial is necessary to address the unsettled legal issues over Seylor Lane because it appears to be a prescriptive road. He sat quietly for a moment, you could hear birds in the tall, old cottonwood outside, was he going to make a decision on the other two bridges and summary judgment requests. "I have some sense of how this should be resolved," he paused, and then went on to say that until he has more information, briefs and affidavits relative to the arguments and questions brought forth, that he hesitated in making the decisions. Attorneys were given until August 29 to submit the material.

River recreationists across the country owe a great debt of gratitude to the dedicated members and leaders of PLWA. Anglers, family water enthusiasts, and floaters- old or young - we should all be allowed to walk on the public right-of -way attached to a public road and bridge to get into public water. There is NO strategy or intent to rob a landowner of any rights or to expand any law, nor does the public want to engage in litigation measures against counties. River recreationists do not want to violate private property rights – we would simply like access to waterways in the least intrusive manner and at appropriate locations that already exist as a public right.

PLWA, an affiliate of Montana Wildlife Federation is a grassroots 501 (c) 3 organization supported by membership dues and contributions – as is MWF. MWF was one of the original partners that crafted and successfully passed the Montana Stream Access Law and it has favorably advanced every legal challenge upholding the law.

This legal challenge is precedent setting and far from over! Legal costs are significant. If you support public access at county roads, bridges and public right-of-ways – MWF urges financial support. For more information on PLWA or to make a contribution call John Gibson, (406) 656-0384 or go to: www.plwa.org.