



**PLWA**

# The KEY



Unlocking Montana's access to public lands & waters

Fall 2015

Issue 21

## Patagonia Awards PLWA an “Earth Tax” Grant

### Public Access Grassroots Rewarded

On November 6<sup>th</sup>, at the Patagonia outlet in Dillon Montana, PLWA was presented with a 30 x 40 facsimile check for \$6000. They also received a real one, of course.

Patagonia donates 1%, what they call their Earth Tax, to hundreds of grassroots groups each year that are making a positive difference in their communities. Public Lands/Water Access Association's mission to maintain, restore, and perpetuate public access to the boundaries of all Montana public land and waters is a benefit for a variety of public recreational opportunities.

We would like to thank Patagonia's leadership in recognizing PLWA's contribution to the recreating public in Montana, as well as their generous gift, which helps our grassroots efforts. Thank you Patagonia!

## Outdoor Life's Access Program Recognizes PLWA as an Access Champion

### Public Access Visionaries

Outdoor Life's Open Country (Dec-Jan), praised PLWA, chosen as a nonprofit of the year, “Luckily, there are far-sighted people among us who are looking out not only for our beloved public parcels, but

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who also speak up for the larger idea of the public's right to access public land...

Outdoor Life's Open Country awards, presented each year, celebrate these visionaries who have demonstrated their longterm commitment to advocating for public access (to be presented at SHOT Show in January, Las Vegas)...

PLWA got its start in the 1970s, litigating to defend angler access to Montana's blue ribbon trout streams. Its landmark cases led to the state's Stream Access Law in 1985. But the PLWA didn't stop at streams. In 1988, the group successfully sued for public access to state school-trust lands and members continue to fight road closures."

Note: The stirrings of what would later become PLAAI/PLWA did begin in the 1970's, but Gene Hawks officially founded PLWA on March 26, 1986.

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## **Boadle Road/Bridge Case Settled After 15 Years of Litigation**

### **Don't Mess With Public Property Rights**

On October 15th the Montana Supreme Court delivered a stunning 8 to 1 decision Boadle Decision in favor of PLWA in a case that has been around for 15 years.

The court ruled that the defendant, a Mr. Jones, had flagrantly and repeatedly violated court rulings by closing roads and tearing out a bridge on a public road. The court agreed with a lower court jury finding that Mr. Jones not only had to come up with funds to rebuild the bridge but also pay damages and reimburse PLWA for attorney fees. The attorney fees award is unusual but the court did so because the defendant acted with malice and "intent to do damage" to PLWA. They said "Given the now-15-year- history of this case, Jones' continuous efforts to thwart the public's easement rights and his persistent disregard of the multiple judicial decisions rendered in favor of PLWA, the law fully supports the award of attorney fees."

It all started in 2000 when hunters and the late PLWA stalwart, Jim McDermid of Great Falls (above), noticed the road to one of their favorite duck hunting spots, Pishkun Reservoir, was blocked and posted. PLWA sued and won a judgment that the Boadle Road was indeed a public road. But Jones persisted and blocked a further section of the road known as the Canal road. Again PLWA sued and got a favorable judgment.

In the meantime, in an odd twist to the story, the Boadle road bridge burned down and Jones replaced it. But apparently angered by the road decisions, Jones tore out his replacement bridge on the basis that if he built it he could do whatever he wanted. Image on right is what it looked like:

PLWA again went to the courts arguing that one cannot destroy an improvement on a public road regardless of how it came about. PLWA also claimed "tortious interference" with the road and asked for damages and attorney fees. We will spare the reader of all the details of the case in and out of District Court and arbitration but suffice it to say that PLWA eventually prevailed on all counts as noted above. Altogether it went to the Montana Supreme court 5 times. (Do you suppose the Justices might be getting a little annoyed ?)

Settlement funds are dedicated to bridge replacement and, when complete, the road will again be open to the public. But you never know. Maybe Mr. Jones wants to spend more money and waste more court time on this?

In the meantime maybe, just maybe, the court has sent a message to the privateers not to mess around with your public property rights. As Rodney King said we "just want to get along."

( The roads provide access to Pishkun Lake Wildlife Refuge, the 918,000 acre Rocky Mountain Front Conservation area, Tunnel Lake, and several Montana state sections - some of the wildest public land in the U.S.)

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## A Rift Runs Through It

### **PLWA's Letter To Ducks Unlimited**

Don Thomas (E. Donnall Thomas), a nationally recognized journalist from Montana, wrote an article in the Outside Bozeman October 2015 magazine, A Rift Runs Through It. The article was about an out of state land owner, James Cox Kennedy and his continuing litigation efforts against Montana's Stream Access, which have been championed by Public Lands/Water Access Association. The Thomas article was not in a Ducks Unlimited publication, did not address waterfowl or Ducks Unlimited.

However, James Cox Kennedy is a major DU contributor, past president of their conservation easement program, Wetlands America Trust. So DU chose to get involved, terminating their longtime working relationship with Don Thomas, citing DU's relationship with James Cox Kennedy as the reason, for Thomas' unrelated article on PLWA's efforts on the Seyler Lane/Ruby River in Montana's Madison County.

Thomas' account, Ducks Unlimited's reply to upset members and Thomas' DU reply began to circulate the internet, including an interview with Associated Press, picked up by the New York Times. The following is PLWA's letter to Ducks Unlimited.

Dear Mr. Hall (Chief Exec. Officer, Ducks Unlimited):

I am president of the Montana Public Land and Water Access Association, PLWA. We are a volunteer based, grassroots organization of dedicated hunters, anglers, conservationists, outdoor enthusiasts, and supporters and defenders of the Nation's public lands. The mission of PLWA is to maintain, restore, and perpetuate public access to the boundaries of all Montana public land and waters. We take the mission very seriously.

PLWA and our many supporters, including many who are, or at least were DU members, are surprised and baffled by DU's discharge of Dr. Don Thomas for an article he wrote in the magazine, Outside Bozeman, taking James Cox Kennedy to task for his actions and opposition to stream access in Montana and in turn public access to the streams and lands of our cherished state.

While Dr. Thomas' discharge by DU is the proximate reason for writing to you, the issues that concern PLWA vis-a-vis Dr. Thomas' discharge are much bigger. I see the events involving and leading up to his discharge as emblematic of the corrosive and compromising effect of big money in conservation, politics and too many other aspects of American life. I have been advised that Dr. Thomas' discharge was not requested by or influenced by Mr. Kennedy. I am not sure I believe that but I am sure that

many people don't believe it.

In Montana, Mr. Kennedy is the face of wealth fueled arrogance and a symbol of the privatization of fish, wildlife and outdoor recreation. Montana has a well-crafted stream access law, which PLWA was instrumental in enacting and subsequently defending multiple times in courts at various levels often with Mr. Kennedy on the other side. Montana's stream access law arguably is the best in the country and certainly the best in the West. The law has been challenged repeatedly in the courts including trips to the Montana Supreme Court and an attempt to get the issue into the U.S. Supreme Court with Mr. Kennedy as a major, maybe the key antagonist. The law has been upheld repeatedly but Mr. Kennedy is unaccepting of the law, and apparently the democratic process that produced it or the judicial process that upheld it.

In discharging Dr. Thomas, DU criticized him for not seeking comment from Mr. Kennedy for the Outside Bozeman article. Dr. Thomas nor anyone else that can read the public record needs to seek comment from Mr. Kennedy. His actions speak.

PLWA is a nonprofit like DU albeit with a tiny budget and no paid staff. We have great empathy for generous supporters as Mr. Kennedy is apparently to DU. However, DU, through its dismissal of Dr. Thomas, in effect, chose a wealthy patron over the legions of outdoors people and users of the public lands and waters in Montana and indeed all the users of the public lands from across the Nation.

I am not sure what message DU is intending to send by its actions but the message that is being received is that DU is increasingly elitist, valuing the hyper wealthy over the broad base of hunters, anglers and outdoor users that truly are the backbone of political support for fish, wildlife, habitat and the North American Model of Conservation.

One of the DU public statements coming out of this issue is, "DU has no position on the stream access issue in Montana." From my perspective and I believe many other hunters, anglers, and DU members, this translates to not supporting public access. In Montana, stream access has become code for public access. If an organization is not for it, then it is against it. I don't believe there is neutral ground for a preeminent conservation organization such as DU on this issue, especially when the issue involves established law and multiple affirming judicial decisions. The electorate, legislature, and judiciary have spoken on this issue to the great benefit of the people in Montana and visitors from across the Nation and indeed around the world. How can DU not have a position supporting public access to public lands and waters?

Reduced access to places to hunt and fish has long been identified by numerous studies as one of the primary reasons that participation in these outdoor activities is declining. Mr. Kennedy is merely one of the most visible of an increasing number of wealthy land owners who are illegally blocking public access to public lands and waters that too often goes unchecked. That discourages, indeed thwarts, participation in these activities by the broad public. Privatization of fish, wildlife, angling and hunting are increasing and devolving into the European model for these resources and activities. The North American Model of Conservation is steadily eroding.

DU purports to be a grassroots organization. Anyone can leaf through the DU Magazine and see that the advertising is aimed at the typical hunter who buys and values his pump or automatic shotgun and related gear. The average DU member makes up the bulk of the membership that DU points to in its multifaceted efforts to demonstrate the breadth of its mission support and political muscle; but DU's actions in this instance fly in the face of the grassroots members, especially in Montana.

I encourage DU to join PLWA in publicly and substantively supporting public access to the public lands and waters in Montana and throughout the United States. We all have a heritage of broad

citizen participation in conservation, hunting, fishing and outdoor recreation to defend and perpetuate or it will disappear.

Very truly yours,  
John Gibson  
President

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# Seyler Bridge Easement

## More Than Just Recreation

Update - Kennedy's attorney requested a postponement of the September 21 hearing. A future hearing date has yet to be determined.

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 county road right-of-way in Madison County. In January 2014, 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. This was a great victory for PLWA and the public.

Previously in the lawsuit, when the District Court initially determined that Madison County held a wider and independent "secondary easement" than the public's right to the paved road, Madison County was all for "wider". Madison County stated it had an "uncontroverted" prescriptive right to maintain "the subjacent and lateral support for Seyler Lane and Seyler Bridge, together with such additional land as is reasonable and necessary for maintenance and repair", which includes the "bridge abutments, wing walls and bridge spans." So what happened to "that" Madison County? Well, since the Supreme Court ruled the general public may use the entire right-of-way, wider is no longer better for Madison County.

In a briefing, Madison County stated it would rather obtain a license to do work outside the right-of-way, admitting that future maintenance work was a reasonable expectation. That doesn't sound like the Supreme Courts guidance that the width must include whatever land is "reasonably necessary" to maintain and support the established public road and bridge right-of-way.

Most people think of "recreation" when they hear this access lawsuit brought up, but there is more to this story than just recreation, were talking saving taxpayers money and public servant safety. What fiscal conservative would object to that? And who would want our public servants taking unnecessary risks when serving the public?

Last August, PLWA even sought the assistance of Montana Attorney General, Tim Fox, and the Assistant Attorney General, Matthew Cochenour to intervene, taking over Madison County's defense, since the duty of the State of Montana is the safety of the public on its roadways and bridges.

In June 2015, Madison County and Intervenor James C. Kennedy argued the already presented evidence was insufficient to determine the precise width of the easement, as required by the

Supreme Court. They argued that PLWA must come forward with additional evidence. So PLWA sought two witnesses that testified at the 2012 trial, one of which had since retired from the Montana Department of Transportation. It was determined that Madison County and Kennedy should have limited additional time to name a rebuttal witness, so the June 15th hearing was continued until August 3, 2015.

During the hearing PLWA/PLAAI Attorneys, Devlan Geddes and Kyle Nelson, called Shane Escott to testify, offering exhibits which are admitted. Then they call Dan Gravage to testify, who testified in 2012 and is now retired from the MTDOT. Kennedy objects, having issues with him being an "Expert Witness." It is determined that he can testify as a "Hybrid Witness." A motion from Kennedy to strike Gravage's construction testimony is denied. PLAAI attempts to call its 3rd witness, Barney Hallin, one of the original witnesses. A discussion of two witnesses per court order ensues. Kennedy's attorney said he had two witnesses, witnesses that had not been deposed by PLWA yet. So the court determined a continuance of the proceedings, providing time for the deposition of Kennedy's two witnesses.

At the rescheduled hearing only 3 witnesses will be allowed to testify.

The Seyler Bridge will not last forever. At some point it is going to require repairs or replacement. This court case will decide the "definite width of a single, unified" public road right-of-way. Hopefully, the Court will find the entire 60 foot full width proposed by PLWA, which would not only be "reasonably necessary" to maintain and support the established public road and bridge right-of-way, but would also allow the general public to access the Ruby River. Yes, that includes the recreation part.

Wouldn't it be better for public safety and to truly determine what is a reasonable width, rather than play games with public safety?

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## Land Water Conservation Fund Expired

Disappointingly, after 50 years, the Land and Water Conservation Fund, which takes a portion of federal royalties from offshore oil drilling and uses them for matching grants for acquisition of wildlife habitat, recreation and access, was allowed to sunset at the end of September. The LWCF has funded more than \$400 million in projects in Montana and \$15 billion in projects nationwide.

The public and conservation needs the LWCF restored, fully funded and permanently authorized!

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## YEAR END GIVING

Like all non-profits, we must remind you about year end giving. If you have been getting our communications you know what we are up to so we won't belabor you with long treatises about good works Just keep in mind PLWA is a true grass roots outfit with no major corporations, grantors, or sugar daddies behind us. Every buck and member counts. (We are a tax-deductible 501-c-3 entity.) You can do this on line with PayPal at [www.plwa.org](http://www.plwa.org).

## PUBLIC LAND / WATER ACCESS ENDOWMENT FUND

Long term survival of non-profit causes depends on long term funding! PLWA now has an endowment fund to help insure that funding and is now available to receive donations,

Russell Vance of Bozeman is a long term PLWA member and one of our most enthusiastic supporters. He is also a very astute investor who knows the "ins-and-outs" of "planned giving" in order to meet long term philanthropic goals and take advantage of tax law provisions. With his knowledge and motivation he has been able to give generously to PLWA including the use of "gift annuity" contracts which allow him to receive a high rate of return on his funds as long as he lives.

Because Russell has designated PLWA as the ultimate beneficiary for his annuity contracts with the Montana Community Foundation, an endowment fund now exists with them for the benefit of PLWA. The name is Public Land/Water Access Association, Inc. Endowment Fund. It is a "designated, perpetual endowment" which means that earnings from the fund will be distributed for public land and water access causes in perpetuity to insure the long term viability of the cause.

## GIFT ANNUITIES

You too can realize the high income using the annuities from which Russ has benefited. This can work alone or with the endowment fund.. Any residual funds at the time of the annuitant's death go to PLWA. In the meantime the annuitant (you) get a very high rate of return. For annuitants over age 70 this can range from 6% to 8 1/2 %.

## QUESTIONS?

As you can see this can be more than a little complex depending on how much you want to use these vehicles. . Some may work for you and some may not. A good place to start is with the Montana Community Foundation. They can be reached at: ( 406) 443-8313 (A good contact there is Amy Sullivan.) The website is [www.mtcf.org](http://www.mtcf.org) .

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## **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 \_\_\_\_\_

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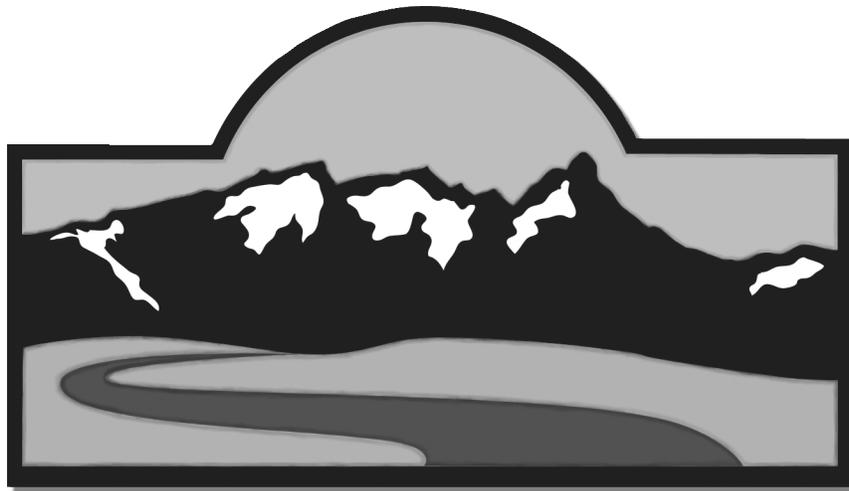
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(You can also join or make a donation via PayPal on our website – [www.plwa.org](http://www.plwa.org) )

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