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August 28, 2014

**VIA EMAIL FOLLOWED BY U.S. MAIL**

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Re: Request for State of Montana to Intervene  
*Public Lands Access Association, Inc. v. The Board of County Commissioners of  
Madison County*, Montana Fifth Judicial District Court, Madison County, Cause  
No. DV-29-04-43

Dear Messrs. Fox and Cochenour:

Public Land/Water Access Association, Inc. (“PLWA” or “PLAAI”), requests that the Montana Attorney General’s Office take over Madison County’s defense in *Public Lands Access Association, Inc. v. The Board of County Commissioners of Madison County*, Montana Fifth Judicial District Court, Madison County, Cause No. DV-29-04-43 (the “Ruby River Action”). Intervention<sup>1</sup> by the Attorney General’s Office is necessary because Madison County has adopted a litigation strategy that appears to be aimed at unreasonably narrowing the scope of its—and the public’s—prescriptive easement to maintain and support the public’s road and bridge at Seyler Lane. Given the State of Montana’s interest in the safety of the public on its roadways and bridges, PLWA believes the State Attorney General’s Office is better suited to represent the interests of the public and Madison County in determining the “reasonably necessary and convenient” width of the Seyler Lane right-of-way at Seyler Bridge.

Below I set forth some basic background information on the Ruby River Action, its trial, the appeal to the Montana Supreme Court and the status of the pending remand proceedings. The purpose is to provide helpful context for your assessment as to whether intervention is necessary. From PLWA’s perspective, intervention from the Attorney General’s Office is critical to representing the State’s and the public’s interest in establishing a width that complies with the Montana Supreme Court’s decision *Public Lands Access Ass’n v. Bd. of Cty. Commrs. of Madison Cty.*, 2014 MT 10, 373 Mont. 277, 321 P.3d 39 (“PLAA”). Absent State intervention,

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<sup>1</sup> PLWA is not request that the State Attorney General’s Office formally intervene under Rule 24. Rather, PLWA requests that the State Attorney General’s Office assume Madison County’s defense in this action to fully protect the public’s interest in its roadways and bridges.

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the public entity responsible for maintaining and repairing the Seyler Lane public right-of-way will advocate for an unreasonably narrow right-of-way to its own detriment and the detriment of the public.

### Background on the Underlying Lawsuit

This action began in May 2004 as a petition for a *Writ of Mandamus* to order Madison County to remove multi-strand electrified fences, barbed-wire fences, orange paint and no trespassing signs as unlawful encroachments under MCA § 7-14-2134(1). PLWA members were confronted by these unlawful fences and signs after they were attached to the public bridges where the Duncan District Road, Lewis Lane, and Seyler Lane cross the Ruby River in Madison County, Montana. A map depicting the locations of these public highways and their bridges is attached as **Exhibit 1**. Some photographs of the bridges showing the condition of the fencing and signage in 2004 are attached as **Exhibit 2**.

The fences and signs plainly prevented members of the public from accessing the Ruby River. Madison County declined PLWA's request remove the unlawful fences, and instead issued James Kennedy an Encroachment Permit authorizing installation of fences within the county road rights-of-way.<sup>2</sup>

The District Court denied PLWA's mandamus request, holding that Madison County had discretion to permit the unlawful fences. PLWA, however, also sought a determination that members of the public may safely use the Seyler Lane, Lewis Lane, and Duncan District Road, including their bridges and abutments, to access the Ruby River. That issue became the focus of years-long litigation that culminated in a trial before the Honorable Loren Tucker in January 2012.

Before trial, in May 2008, the parties filed motions for summary judgment. Broadly speaking, the parties asked the District Court to determine: 1) The widths of Lewis Lane, Duncan District Road, and Seyler Lane right-of-ways at the bridges crossing the Ruby River; 2) Whether members of the public may use a public highway right-of-way to access a river or stream in Montana; and 3) Whether a county may permit a private landowner to erect a fence within a public highway right-of-way if the fence impedes the public's ability to access a river or stream in Montana.

The District Court ruled on the summary judgment motions in October 2008. On the first issue, the Court held the widths of the right-of-ways at the Lewis Lane and Duncan District Road bridges were 60 feet. Disputed issues of fact prevented a determination of the width at Seyler Bridge, and that matter was reserved for trial. Addressing the scope of permitted uses within the Lewis Lane and Duncan District Road right-of-ways, the District Court held "[t]he public is

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<sup>2</sup> James Kennedy, the landowner that attached the electrified fences to the bridges removed those fences from the right-of-ways in the face of significant public scrutiny after PLWA's suit was filed, and replaced them with wood pole fences.

entitled to use the entire 60 foot width” of the right-of-ways, “not just the beaten path.” Therefore, the District Court held the public could access the Ruby River from the Lewis Lane and Duncan District Road bridges from within the right-of-ways. Finally, the District Court held Madison County may authorize landowners to erect fences within the public highway right-of-ways.

During the 2009 Legislative Session, the District Court’s ruling was essentially codified as the “Bridge Access” law. *See* MCA §§ 23-2-312, 313 and 7-14-2134. The Bridge Access law was compromise legislation regarding public access to state waters from county roads and bridges. The recreating public sought passage to surface waters through county bridge right-of-ways, while adjacent landowners sought permission to erect fences abutting county bridges to control livestock. 2009 Mont. Laws Ch. 201 (H.B. 190).

As codified, the law permits public access to surface waters for recreational use by using a public bridge, including its right-of-way and abutments. MCA § 23-2-312(1). The Bridge Access law permits fences in a public bridge right-of-way for livestock control or property management if the fence is not in the roadway. MCA § 7-14-2134(4). Any such fences must also provide for public passage to surface waters for recreational use. MCA § 23-2-313.

The only issues remaining for trial involved Seyler Bridge. Specifically, the District Court needed to determine: 1) the width of the existing right-of-way at Seyler Bridge; and 2) whether the public may use the Seyler Bridge right-of-way to access the Ruby River.

Significantly, prior to trial, the parties stipulated “Seyler Bridge and its approaches on Seyler Lane is a county road right-of-way that was established by prescriptive use.” The parties also stipulated “Madison County has assumed jurisdiction over Seyler Lane and Seyler Bridge and is responsible for maintaining them.” In other words, the parties agreed it was a county road that was subject to a public prescriptive easement.

Since there was no dispute regarding Seyler Lane’s status as a public prescriptive right-of-way, PLWA contended the only factual issue to be decided at trial was the width of the existing right-of-way. PLWA argued there was no need to examine the scope of historical uses made of the Seyler Lane right-of-way because, unlike a private prescriptive easement, a public prescriptive easement may be used for all lawful purposes, including accessing rivers and streams. *Id.*

The District Court rejected PLWA’s argument. Although the parties stipulated there was sufficient adverse public use of Seyler Bridge to establish a prescriptive easement, the District Court required PLWA to prove a separate public prescriptive easement for access to the Ruby River from Seyler Bridge. Also, in the middle of trial, the District Court precluded PLWA from introducing any evidence of recreational use, including evidence that members of the public routinely accessed the Ruby River from Seyler Bridge. Consequently, PLWA was limited to presenting evidence of vehicular travel, cattle drives, county maintenance, and certificates of surveys delineating the boundaries of the right-of-way.

The District Court ultimately ruled the public had a prescriptive right to use Seyler Lane, but only between the existing fences (i.e., the public could not access the Ruby River). The District Court further ruled that Madison County had a prescriptive right independent and separate from public use to the lateral and subjacent support for Seyler Lane, together with such additional land as is reasonable and necessary for maintenance and repair. The District Court did not, however, establish a definite width for the County's "secondary" easement. Finally, the District Court concluded there is no public right whatsoever on either side of Seyler Lane outside the fences or beyond the traveled way where there is no fence, with the exception of Madison County's independent and separate prescriptive right.

By granting the County—a subset of the public—an independent and separate prescriptive right in the areas it maintains off of the paved portions of Seyler Lane, the District Court ensured the broader public could not use the County's independent "secondary" prescriptive easement to establish a right to access the Ruby River.

### The Appeal

PLWA appealed the District Court's decision regarding Seyler Lane. Mr. Kennedy appealed the District Court's decision regarding the Duncan District Road and Lewis Lane. In his appeal, Mr. Kennedy challenged the constitutionality of Montana's long-standing Stream Access law. Attorney General Steve Bullock intervened on behalf of the State of Montana to defend against Mr. Kennedy's attack on the Montana Stream Access law. Thank you.

As you are aware, PLWA and the State of Montana prevailed on appeal. *See generally PLAA*. The Montana Supreme Court reaffirmed Montana's Stream Access law and clarified that the public may use the entirety of a public prescriptive easement right-of-way for all lawful public purposes, including accessing public waterways such as the Ruby River. The Montana Supreme Court's opinion was a great victory for Montanans.

The Montana Supreme Court remanded the Ruby River Action to the District Court for the sole purpose of determining the "definite width of a single, unified" public road right-of-way that was not determined at the trial. *PLAA*, ¶ 32. The Court stated:

Here, the parties stipulated that there is a county road right-of-way established by prescriptive use at Seyler Lane and Seyler Bridge. The issue is thus not whether a public road right-of-way exists, but rather the width of that already existing right-of-way. Pursuant to the above discussion, we determine the Seyler Lane public right-of-way is not confined to the portion of the road actually travelled. Instead, its width extends beyond the traveled way and includes whatever land is reasonably necessary to support and maintain the road and for the road to be safely and conveniently used.

*Id.* at ¶ 26 (emphasis added). In other words, while the Seyler Lane and Bridge public right-of-way is already conclusively established as a matter of law, the District Court must consider evidence regarding the lands that are “reasonably necessary and convenient” to maintain and support the established public road and bridge right-of-way.

### Remand Proceedings

As discussed above, the only issue left to be decided in the Ruby River Action is the width of the right-of-way at the Seyler Bridge. The Montana Supreme Court’s guidance provides the width of the right-of-way must include whatever land is “reasonably necessary and convenient” to maintain and support the established public road and bridge right-of-way. *PLAA*, ¶ 26.

This determination should be a simple task: how much land beyond the traveled portion of Seyler Lane is reasonably necessary to support and maintain the road and bridge for the safety and convenience of the public? It is obvious the right-of-way must be wide enough to allow a person to walk beside the Seyler Bridge and into the Ruby River because Montana Department of Transportation inspectors and Madison County road maintenance employees have historically walked into the Ruby River from the Seyler Bridge for years. *See PLAA*, ¶¶ 9, 30. But the ability of a single person to walk from the road to the river cannot be the extent of what is reasonably necessary to support and maintain the road and bridge. Unfortunately, establishing the right-of-way width has been complicated because of the appearance of an alliance between Madison County and Mr. Kennedy aimed at making the public right-of-way as narrow as possible. Specifically, Madison County appears willing to disregard the extent of right-of-way reasonably necessary to support and maintain the road and bridge for the safety and convenience of the public. Madison County’s position is particularly troubling because it is the public entity delegated by the State of Montana to support and maintain public roads within Madison County.

Madison County has not always claimed an unreasonably narrow easement width. Back when the District Court initially determined Madison County held a “secondary easement” that was wider and independent of the public’s right to use the paved surface of the Seyler Lane, Madison County argued it was “uncontroverted” that it had a 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.” Appeal Brief of Appellee Madison County at 8–9. The areas of support, of course, included “the bridge abutments, wing walls and bridge spans.” *Id.* (**Exhibit 3**). But now, on remand after the Supreme Court held the general public may use the entire right-of-way to access the Ruby River, including the area used for maintenance of the bridge, Madison County seeks to limit its (and the public’s) prescriptive right. Madison County is willing to accept a maintenance license from Mr. Kennedy or to require its maintenance folks to figure out how to work within an unreasonably narrow easement, even if that “makes [the maintenance work] more expensive.” Transcr. of Proceedings 29:2–6 (Aug. 4, 2014) (**Exhibit 4**).

For example, in recent briefing Madison County stated that it would just obtain a license to do work outside of the right-of-way, tacitly admitting that such maintenance work is reasonably anticipated in the future. County's Reply to Positions on PLAAI's Demand for Additional Evidence on Remand, p. 3-4 (**Exhibit 5**). Worse yet, Madison County recently advised that it is willing to have its road maintenance crew to scale along the Seyler Bridge guard rail and jump off the bridge wing walls in order to access the Ruby River. Madison County's position on remand is not congruent with the Montana Supreme Court's dictate that it is entitled to a "reasonably necessary and convenient" width.

Madison County's willingness to give up the full extent of the public's right-of-way at Seyler Bridge is alarming to PLWA and should be alarming to the State of Montana. First, the Seyler Bridge will not last forever; it will require repair or replacement in the future. Common sense dictates that if the right-of-way is unreasonably narrow it will cost the County, and therefore the taxpayers, more money to perform that work. Second, it appears Madison County is willing to limit and, potentially, prevent members of the public from accessing the Ruby River for recreational purposes.

Madison County's interests are (or, should be) the interests of the public. The interests of the public in this remand are to establish a definite width of the Seyler Lane public right-of-way that includes the lands that are reasonably necessary to support and maintain the road and bridge for the safety and convenience of the public. Unfortunately, Madison County's current position in the remand action is effectively abandoning those interests. It is therefore necessary for the State of Montana to intervene to protect its and the public's interests.

### Conclusion

The Ruby River Action has been long and onerous (spanning the last decade). PLWA understands Madison County is tired of spending money paying its lawyer, especially when faced against Mr. Kennedy's seemingly endless pocketbook. However, PLWA does not understand why Madison County is willing to turn its back on the recreating public, especially after such a resounding victory for Montanans at the Montana Supreme Court. The law is now clear – Madison County, and therefore the public, is entitled to a "reasonably necessary and convenient" easement width at the Seyler Lane Bridge. PLWA has worked too hard on behalf of Montanans to obtain this result to allow Madison County to willingly throw the public's rights away.

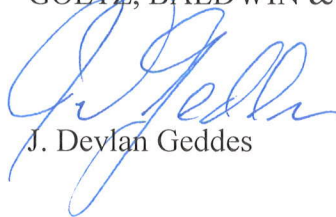
PLWA implores the Montana Attorney General to step in on behalf of Madison County and protect the public interest. The State of Montana cannot allow Madison County, one of its political subdivisions, to divest the public of its lawful right to use the public prescriptive easement at Seyler Bridge for all lawful purposes, including accessing the Ruby River, by advocating for more restrictive easement rights than the public is permitted under the law.

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Please do not hesitate to contact me if you have any questions. Thank you for your consideration of this letter. PLWA and its members look forward to your response.

Sincerely,

GOETZ, BALDWIN & GEDDES, P.C.



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