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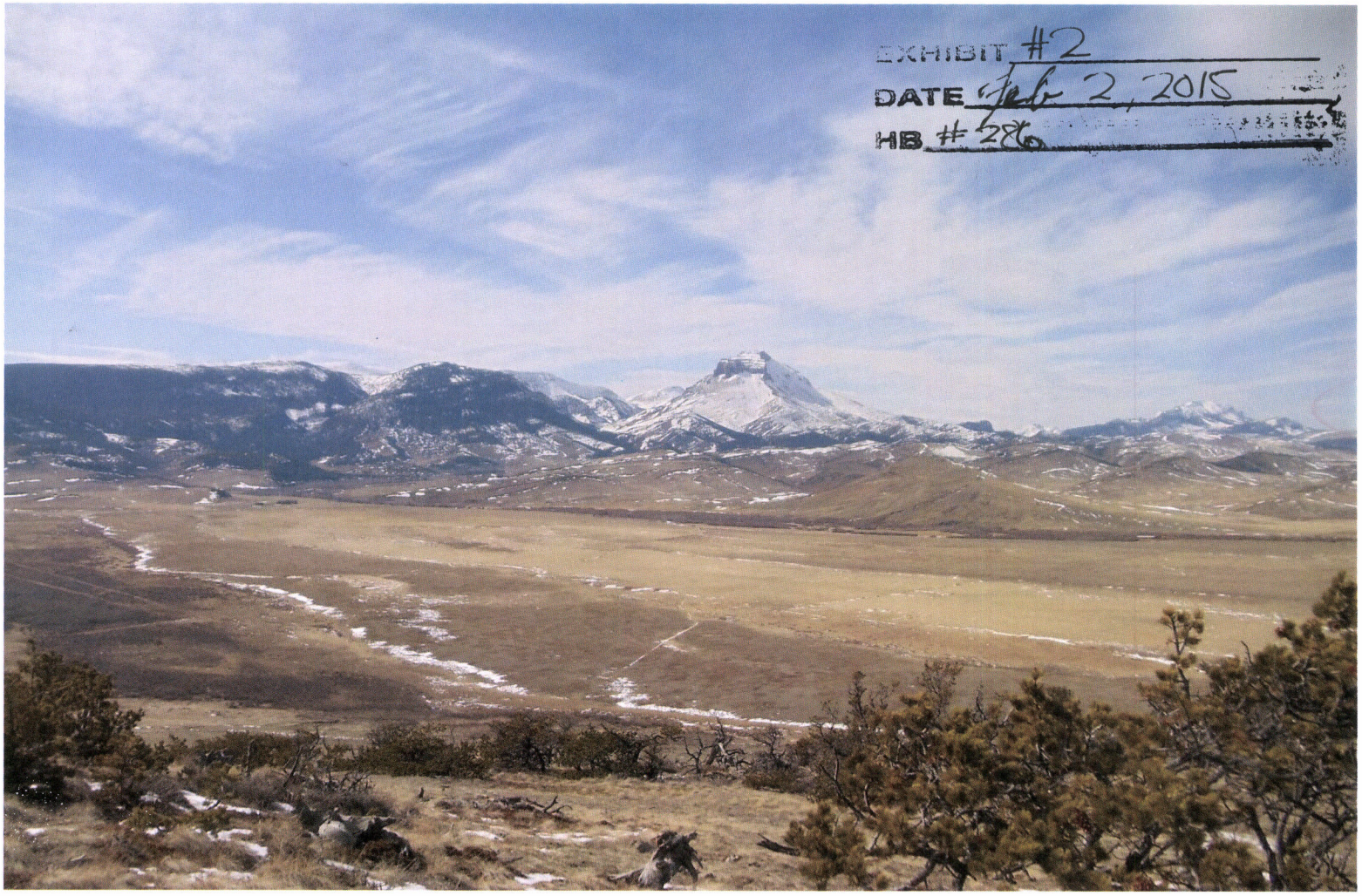

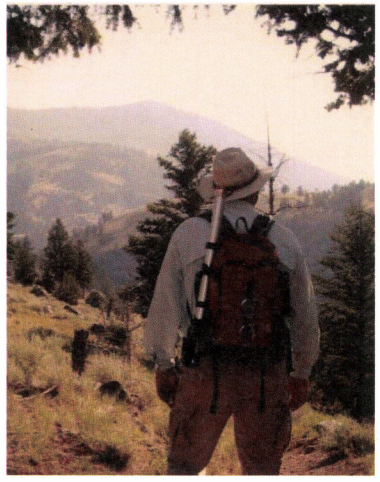

ROADBLOCKED & LANDLOCKED

how Montanans are being kept out of their public lands

MONTANA WILDLIFE FEDERATION

PLWA

SEPTEMBER 2014

Montana Wildlife Federation

Founded in 1936, the Montana Wildlife Federation is Montana's oldest, largest, and most effective sportsmen's conservation organization. MWF works to protect and enhance Montana's public wildlife, lands, waters and fair chase hunting and fishing heritage.

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Public Land/Water Access Association

The mission of PLWA is to maintain, restore, and perpetuate public access to the boundaries of all Montana public land and waters.

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INTRODUCTION

Montana is home to abundant wildlife found on some of the best habitat in the United States. Our stunning mountains, rivers, foothills, forests and prairies support numerous big game species, upland birds, waterfowl, fish, and other animals. That abundance of wildlife makes Montana a paradise for hunters, anglers, wildlife watchers, and other outdoors enthusiasts. It's a big reason that Montanans live here. It's also a primary reason that more than 10 million people visit the Treasure State each year.

Montanans overwhelmingly support public land, and hunters and anglers are among the biggest supporters. The 2014 Conservation in the West poll conducted by Colorado College found that Montana has more hunters and anglers than any other state, with 63 percent identifying as sportsmen or sportswomen and 47 percent saying they are both a hunter and an angler. And Montanans love to recreate on their public lands, with a full two thirds (66 percent) saying they visit public land at least six times a year. Even more telling, 38 percent of Montanans said they visit public land more than 20 times a year.[1]

The wildlife abundance in Montana and public land to enjoy it on also supports a healthy and growing outdoor recreation industry. Outdoor recreation pumps a total of $5.8 billion into our state's economy and supports 64,000 jobs, according to data from the Outdoor Industry Association.[2] That includes a wide range of activities including hunting, fishing, hiking, wildlife watching, skiing, ATV riding, snowmobiling, camping, bicycling and other activities. That money supports local hotels, restaurants, gas stations, stores, services, gear shops and more. It also serves as a powerful recruiting tool for businesses looking to attract the best and brightest to our state.

Public lands are essential to our wildlife heritage. Montana is roughly one third public land, including a mix of U.S. Forest Service, Bureau of Land Management and other federal lands, as well as state Department of Natural Resources and Conservation school trust lands and state Wildlife Management Areas. These are the places where many Montanans and non-residents come to enjoy our wildlife abundance to hunt, fish and recreate in a variety of ways.

Unfortunately some people are intent on keeping the public out of public lands. These efforts can include blocking public roads that lead to large blocks of public land, fencing off bridges that lead to public streams and keeping other areas of public land off limits by posting signs indicating – falsely – that it's private land. The resulting loss of access to our cherished public lands has a ripple effect on hunters, anglers and all outdoors enthusiasts.

Even as they are closed off to the public, these areas are sometimes outfitted by professional guides, which privatizes the public's wildlife on public lands. The loss of opportunity also sends more hunters and anglers onto the areas of public land that are open to the public. The result is crowding of some areas while others receive almost no hunting pressure. Animals respond, and eventually the crowded areas lack game as the wildlife moves to adjoining private land or public land that's off limits. This can cause problems not only for hunters, but also for landowners who get overrun with large numbers of wildlife. That can lead to damage to fences and crops.

PUBLIC ACCESS TO PUBLIC LANDS

Montana has a large network of public roads that allow us to get to public lands. These go beyond the highway system and include thousands of miles of country roads that pass through private land. They are roads that are managed by a public agency, whether it's the county, a federal land management agency such as the U.S. Forest Service, or another public agency. Although these roads can sometimes be less developed than a paved highway, the public has a recognized legal right of passage on them. These roads have been used for decades by the public, including by ranchers to move livestock, businesses to deliver goods and services, as well as hunters, anglers and other recreationists. In many cases, these roads are maintained by local governments.

But some people are intent on denying that these public roads even exist. Those disputes often lead to gates across public roads and other barriers to public use of public lands.

Public access to public lands does not mean that everyone who uses public lands should be allowed to take their vehicles wherever they like. Of course, no one should be allowed to travel on private land without permission. And on public land, managers have the responsibility to plan appropriate travel routes on those lands through travel planning processes. That's important, because public land managers need tools to ensure that our cherished public lands are best managed for multiple use, including for healthy habitat, security for wildlife and quality hunting and recreation opportunities.

GATED PUBLIC ROADS

Over the past two decades, the problem of roadblocked public lands has only grown. Hunters, anglers and other outdoors enthusiasts sometimes show up at their favorite place only to find a new gate marked with a "No Trespassing" sign. In many cases, one road can cut off thousands and even tens of thousands of acres of public land. And these areas often offer excellent fair chase hunting, fishing and recreation for the general public.

Grassroots volunteer activists led by the Public Land/Water Access Association have been fighting for years to maintain public access. Often they're forced into court to fight lengthy, and costly, legal battles. But they're being overwhelmed by the number of cases throughout the state. These cases are sometimes waged against billionaires with the resources to drag them out in court for years. And even when public access advocates win, they lose, because the cases are exceedingly expensive for everyday people to fight in the courts. That allows people who've gated a public road to have exclusive use of those public lands, effectively privatizing them.

Private Property and Public Access: Two Fundamental Montana Values

Respect for private property is as essential to Montana's outdoor way of life as the right to access public lands. Hunters, anglers, and other recreational users have a legal obligation and an ethical responsibility to absolutely respect private property. The intent of this report is to point out instances where people are blocking public roads and the effect that these closures can have on public access while they are being resolved.

ACCESS DENIED WHILE CASES DRAG ON

People gating public roads and blocking the public out of their lands is a growing problem in Montana. And it's costing hunters, anglers and outdoor recreationists opportunities to enjoy their public lands, waters and wildlife. Sometimes illegal road closures are resolved and access is restored. Other cases are still entangled in court, costing the public unnecessary legal expenses.

When these illegally closed roads end up in the news, it often looks like just an isolated incident. Local hunters and anglers are outraged, and eventually the problem fades from view. Taken as a whole, however, illegal road closures are a significant threat to public access to public land.

Adding to the problem is the fact that local elected officials, including county commissioners and sheriffs, face challenges in acting on illegal roadblocks. The reasons vary, but throughout Montana local officials have been unable or unwilling to enforce public access to public lands. In other settings, like within a city, a road getting blocked would be dealt with immediately and decisively. This has not been the case in rural areas. Here are examples of cases in which the public has lost access, or is still being kept out of public lands.

Mabee Road, Fergus County north of Lewistown

Roy, Montana is described in real estate brochures as a "lively Western town" with a population of 108. If you only have an old pickup, it's a one hour drive northeast from Lewistown. As the crow flies, the Missouri River and the Charles M. Russell National Wildlife Refuge are 25 miles north. The Mabee Road runs due north out of Roy, Montana, and connects to the Knox Ridge Road running west out of Robinson Bridge. The 20 mile stretch passes through a typical Montana checkerboard of private and BLM land.

In Fergus County records, the Mabee Road is a "fuel tax road" and is listed in the 2010 inventory of roads as "open to public travel." The Mabee has been listed on county maps as a county road since 1919. Maps dating to 1915 clearly show this road, commonly referred to as "The Old Missouri Trail," connecting the old wagon road along the north end of the Judith Mountains with the Missouri River.

In 2007 a local rancher and outfitter leased half a section of private land the Mabee Road traverses. Shortly thereafter, a locked gate was erected across the public road, blocking public access to some 25,000 acres of public land. The rancher operates an outfitting and guide business on the land to which he now has exclusive access.

Teton County Road 380, Teton County west of Choteau

Teton County Road 380 accesses the stunning country along the Rocky Mountain Front west of Choteau. The road has been blocked off by adjoining landowners for over two decades, creating a large gap in access to the Front for hunters, wildlife watchers and hikers. Local sportsmen became engaged in the issue and today the state of Montana is working to reopen this route. The effort has required hundreds of hours of work by local sportsmen and state and local officials. Until it's resolved, the road closure keeps the public out of this spectacular area for hunting, hiking and other outdoor recreation. The lands accessed by this road lead into the Bob Marshall Wilderness, one of Montana's most incredible natural treasures.

Bullwhacker Road, Blaine County southeast of Havre

The Bullwhacker Road southeast of Havre has been used by land managers, ranchers, and recreationists for half a century. It serves as the only reasonable access to over 50,000 acres of BLM and state land in the Missouri River Breaks. Thousands of dollars of public money had been spent on maintenance. But several years ago the road was closed by a landowner. The road remained closed for several years until PLWA volunteers researched road history and developed voluminous documentation proving it to be a public right of way. This was presented to the county attorney who issued an opinion to open the road.

However, in 2009 the owners of the ranch the road runs through filed suit in district court to overturn the opinion. In March 2011, the judge found the evidence necessary to establish a public prescriptive easement inconclusive and ruled that the road was a private road. Access volunteers are continuing to work to restore access into this popular hunting and recreation area. In the meantime the road remains closed.

Tenderfoot Creek Road, Meagher County north of White Sulphur Springs

Tenderfoot Creek is a tributary of the Smith River, flowing into the Smith a few miles north of Camp Baker, the jumping-off point for river floats. The sole vehicle access to roughly 8,200 acres of public land in this basin is the Tenderfoot Creek Road, a Forest Service road. Local residents petitioned the Meagher County commissioners to formally designate it a county road in 1899. Throughout the years, county maps have identified this road and it appears on National Forest travel plans.

The road runs through a homestead established in 1912, which was sold to a White Sulphur Springs rancher in 1959. Shortly before the next hunting season opened the rancher put up a locked the gate on the county road. The rancher and his son are registered as a Montana outfitter and guide service.

The rancher's roadblock barred public access to this pristine habitat area. When extensive negotiations to remove the gate failed the State of Montana filed a court action in Meagher County district court in 2012. In August 2013 the Court ordered the gate unlocked until the matter could be resolved. In July 2014 the Court heard arguments for summary judgment when both sides argued the court record was complete for a decision and the matter did not need to go to trial. The Court may find for one party or the other or a full trial could be ordered.

ACCESS RESTORED, BUT AT A PRICE

The Mabee, Teton County Road 380, Tenderfoot Creek and Bullwhacker roads are just a few examples of public access being denied. It's difficult to fully determine how many cases there are throughout Montana of public roads being closed off.

Sometimes, through the hard work of volunteers, the public wins and public roads are reopened. Even though this is ultimately a victory, it takes a lot of effort and money; often, the roads remain closed while the issue is being resolved. Here are some of the cases in which volunteers were able to reopen closed roads – after significant time, effort and money were spent.

South Cottonwood Creek, Gallatin County south of Bozeman

This road leads to a spectacular canyon just a few miles southwest of Bozeman and was illegally closed by a landowner for more than two decades. Efforts by a PLWA member with a cabin permit in the area resulted in a ruling by a district judge that the road was a prescriptive easement right of access. Now an established county road leads to the trailhead and 20,000 acres of public land, marking a win for the public.

Lodgepole Road, Stillwater County northwest of Nye

The status of the northern end of this county road that runs north from the town site of Limestone northwest of Nye has been an issue for many years. It is now open for public travel. The last two miles accesses thousands of acres on the Beartooth front and an extensive trail system. It had been gated off by an adjoining landowner/outfitter who attempted to control the road. After extensive negotiations and action by PLWA and Montana Fish, Wildlife and Parks, Stillwater County acknowledged that it was a county road. A group that included PLWA, other sporting groups and FWP worked with the U.S. Forest Service to rehabilitate the road, and although since then it was washed out, it has again been repaired and is open to the public.

Scenic View Road, Prairie County north of Terry

Although not a party in the litigation, PLWA maintained steady pressure and helped with historic research to help reach a settlement in this case. PLWA also encouraged the Montana Attorney General's office to become involved, which it did. The road is open to the public and provides access to thousands of acres of public land.

Perkins Gulch Road, Deerlodge County west of Deer Lodge

This road leading alongside private property accessed thousands of acres of national forest land west of Deer Lodge. Plaintiffs argued the road had been in existence since 1869, throughout which it had been used by the public for logging, moving livestock as well as hunting access.

The court found that clear and convincing evidence had been presented to prove a prescriptive easement existed on the road during the five year statutory period. It further ordered that scope of access included agricultural purposes, cattle ranching, logging, hunting and recreational purposes, which is significant for the precedent it set.

Carten Creek Road, Powell County northwest of Garrison

Carten Creek Road near Gold Creek is a county road that had been used for decades to access a section of state land as well as a large block of BLM land. In 2003 a new owner installed locked gates at both ends of the road in a blatant attempt to cut off public access. The Carten Creek Protective Association working with Powell County commissioners and private parties brought a lawsuit to challenge the closure and were successful in getting a temporary injunction keeping the road open in mid-2007.

The road is used for logging, mining activities, recreational use and access to private property and in this case, a landowner sought to have the road declared private and closed to the public. Under an April 2008 settlement the road will eventually be closed and the public will use Brock Creek Road instead, which the landowner will help improve to accommodate the additional use.

Highland Road, Silver Bow County near Butte

Although the Highland Road had been open to the public since 1866, a ranch owner locked the gate and declared it private. The ranch owner advertised the ranch for sale at $4 million, touting the exclusive access to thousands of acres of public land. A local PLWA volunteer spearheaded community action that resulted in Butte-Silver Bow County voting unanimously to officially designate the route public. A district judge ruled that the county had acted within its jurisdiction to remove gates and locks from the well-traveled route.

Fergus County Road 606, Fergus County near Lewistown

Fergus County commissioners recognized this route as a public county road from Middle Bench Road to Surenough Road. County Road 606 had been padlocked by a private party. A group of citizens hired an attorney to stop the closure. The evidence was so overwhelming the defendants accepted the commissioner's decision and chose not to go to court. Federal Revised Statute 2477, which presumptively creates a right of way for roads constructed on public federal land prior to

1976, was used to support the case. PLWA was not a party to the litigation, but the case illustrates that citizens can be effective when they work together.

Jellison Road, Yellowstone County south of Billings

The Jellison Road once served as an access to a section of state land near Billings. In 1964 Yellowstone County commissioners closed the road crossing state land. But in 2005 PLWA requested that the closed portion of the road be reopened for public use.

Due to the efforts of PLWA and the Magic City Fly Fishers the road is now open to more than 800 acres of state land with more than one half mile of frontage on the Yellowstone River.

German Gulch Road, Silver Bow County near Fairmount Hot Springs

The road leading to the Rye Ranger Station and the Mount Haggin Wildlife Management Area was locked up by a private landowner. PLWA working with local sportsmen supplied Silver Bow commissioners the information necessary to verify that the road is public. The evidence was overwhelming and no lawsuit was required to get the signs and gate removed.

Washington & Jefferson Gulch, Powell County west of Deer Lodge

These roads lead to extensive public lands and were blocked off by a landowner/outfitter. After extensive research by PLWA the status of the roads as public routes was acknowledged by the county attorney. The county sheriff took action to open the roads permanently.

Old Dunn Road, Park County south of Livingston

The Old Dunn Road is now a trail but it provides access to a mile-and-a-half of the upper Yellowstone River near Emigrant. Other roads now serve the purpose once provided by the Old Dunn Road. Because of access and historic values Park County commissioners did not abandon the 60 foot easement on the road. Instead, they turned it into a non-motorized trail. In 2007 a developer, planning a large subdivision, requested the easement be abandoned.

The commissioners refused and a memorandum of understanding was signed that the trail would remain open to the public with interpretative signs and trailhead facilities. But sometime after that reports came in that all public signs had been removed and a locked gate had been installed at the trail head of the Old Dunn Trail. Commissioners upheld the public ownership of the trail and insisted the gate be removed and the signs be replaced by the developer.

Wise Lane, Yellowstone County south of Billings

Wise Lane is an official county road leading to the north bank of the Yellowstone River between Billings and Laurel. In addition to leading to the river, PLWA research indicates it also leads to an important public island at that point. The road was created when petitioned by citizens in the early part of the last century. Sadly, it was closed by the adjacent landowner in the 1980s.

PLWA had been unsuccessfully talking with the Yellowstone County commissioners for years on this issue. However, in 2010 PLWA took direct action to again notify the commissioners of the continued closure and demand action. Finally, in a meeting with commissioners in early

November 2010, they agreed there was no doubt that the road was an illegally blocked, official county road.

Swimming Woman Road, Golden Valley County northwest of Ryegate

After several years of uncertainty and negotiation, a settlement was reached on the Swimming Woman Road, leading to thousands of acres of Forest Service land in the Big Snowy Mountains. This will be of great value to hunters and other outdoor enthusiasts because it is one of the few public access points to the Big Snowy Mountains northwest of Ryegate.

The Golden Valley County commissioners and representatives of the ranch the road passes through agreed to reroute the road west of its old easement and onto the Lewis and Clark National Forest. The landowners wanted to close the road but research aided by PLWA showed the county had a legal right and easement to in its existing location.

LANDLOCKED PUBLIC LANDS

Montanans face another obstacle when it comes to enjoying their public lands: parcels that have no legal public access to them. The problem is particularly common in eastern Montana, where numerous pieces of state school trust and federal BLM land is in a checkerboard pattern, interspersed with private lands. In fact, Montana has more "landlocked" inaccessible public land – 1.9 million acres – than any other state in the West, according to a 2013 report by the Center for Western Priorities.[3]

Solutions to this problem aren't easy. Responsible hunters, anglers and other recreationists need to respect private property rights and that means not trespassing. The vast majority of sportsmen and sportswomen are respectful of private property and stay off of it without permission. But hunters, anglers and other recreationists are confronted with a challenge when public lands are inaccessible behind private lands: how can they use and access lands that are owned by the public while also respecting property rights.

In many cases, landowners are willing to provide access to public hunters across private lands. Personal relationships help ensure that sportsmen can cross private land with permission, while also respecting the landowner and their wishes. This model has helped provide public access to landlocked public lands for decades.

Unfortunately, some of this traditional access has diminished as changing patterns of landownership have eroded the personal relationships between landowners and hunters. Hunters who live in urban areas don't have the community connections to local agricultural landowners in the places they like to hunt. At the same time, changing patterns in land ownership are also resulting in the replacement of traditional farming and ranching families with new, and sometimes absentee landownership.

It is still possible for people to work together to maintain the public's right to access public lands while also being respectful of private property rights. Notably, FWP has programs to support

access to isolated parcels. Among them are the popular Block Management program, which provides public hunting access to private land and also helps open up some adjoining public lands. In addition, FWP has a new program to provide tax credits for landowners who allow access to landlocked public lands.

Unfortunately, the economic pressure of privatization/outfitting have also given some landowners an incentive to close access in order to maintain preferential treatment for outfitters on landlocked public lands. That has the de facto effect of privatizing wildlife on public land, a disturbing trend that needs to be addressed. Gaining access to isolated parcels of public land while respecting private property rights is a difficult issue, but these parcels should not be used by private interests to profit from the public's wildlife while the public is kept out of them.

It's difficult to determine how many acres of state and federal public land that is landlocked is being outfitted. But it's a sizeable acreage, because the latest data collected by the state Board of Outfitters shows that more than 6.2 million acres of private land in Montana has been leased by outfitters for commercial hunting.[4] Much of that land is in central and eastern Montana and these areas are heavily interspersed with public lands.

The inaccessibility of these landlocked public lands harms everyone. They're also a problem for landowner-sportsmen relations. The public can grow resentful when lands are inaccessible, yet being used by adjacent private landowners. While we must respect private property rights, we also need to find a way to protect public property rights to enjoy public resources.

PUBLIC STREAM ACCESS

Montana has the best stream access law in the West. Because the water in our rivers and streams is a public resource, the public can access it by staying within the ordinary high water mark. This law came to pass in the early 1980s after some disputes over stream access. This pro-public law is the envy of anglers and recreationists throughout the country. It provides for excellent public access to public streams and rivers. And it builds support for Montana's world-class coldwater fisheries because the public gets to enjoy them. This in turn helps sustain our recreational fishing industry, which benefits numerous small businesses throughout the state. Fishing in Montana generates $350 million in economic activity and supports more than 5,300 jobs, according to 2013 data from the Congressional Sportsmen's Foundation.[5] Again, fishing is also a key quality of life factor for Montanans and a major draw for companies to attract employees here.

Unfortunately, Montana's stream access is constantly under threat. New landowners who don't understand Montana values have made attempts to privatize public waters by blocking off access to them. And there have been constant pushes in court and in our Legislature to overturn our stream access law.

In a well-publicized case, an adjacent landowner in the Ruby Valley worked to fence the public out of the Ruby River by attaching electric fence to a pair of county road bridges. This started in the early 2000s, and PLWA got involved to defend the public's right to access public waters

from county bridges. The case led to a bill in the 2009 Montana Legislature that established that right. But the legal case drug on, with the landowner and a few well-financed special interest groups using the case to challenge the entire Montana stream access law.

They lost. In early 2014 the Montana Supreme Court upheld the stream access law, ruling that recreation is among the valid uses for public prescriptive roads. The case has big implications not only for stream access, but also for prescriptive county roads leading to public land.

CONCLUSION

Montanans love our public lands and waters. They are places where everybody can go to hunt, fish, watch wildlife, float, hike, backpack, pick berries, ski -- and more. These are the mountains, rivers, streams, prairies and forests and draw so many to our state. They also help sustain a massive outdoor recreation industry that pumps billions of dollars into our state's economy.

Unfortunately, as described in this report, some people have attempted to lay a personal claim on the public's lands and waters. In some cases, these individuals will selectively buy small parcels of private land that serve as bottlenecks, with one road that accesses thousands of acres of public land. By illegally closing these roads, they can erode public access. These are real cases that are happening every day. In other cases, outfitters who enjoy the privilege of making money off of public wildlife are blocking the public out of these areas. They're privatizing public fish and wildlife on public land.

Everyday Montanans are forced to fight lengthy, expensive legal battles to enjoy what's theirs – public land and waters. And even when they win, they lose, because these legal battles can go on for years and even decades. That gives some exclusive access to these public lands for a long time. Current law provides little or no repercussions to cut these areas off.

The problem of illegal road closures is not just a matter of local disputes or isolated conflicts. Taken as a whole, these roadblocks cause a substantial erosion of public access to public land and water. This is especially troubling at a time when public agencies are investing so much time, energy and money to expand public access for hunting, fishing, and other recreation.

Montanans are fed up with this trend. And they're fighting back. It's time Montana lawmakers and elected officials stand up for Montanans and enact laws and policies that put an end to these practices of privatizing our best public resources.

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[1] The 2014 Conservation in the West Poll, The Colorado College State of the Rockies Project
[2] The Outdoor Recreation Economy 2012, The Outdoor Industry Association
[3] Landlocked: Measuring Public Land Access in the West, Center for Western Priorities
[4] Montana Board of Outfitters 2013 data
[5] 2013 Sportsmen's Economic Impact Report, Congressional Sportsmen's Caucus