

EXHIBIT 3
DATE 2/16/15
HB 467

February 16, 2015

⁴⁶⁷
~~HB267~~: **An act revising laws governing private roads...**"

Introduced by: Mike Miller

Major proponent points:

- safeguard a landowner's ability to protect and maintain his/her roadside while the neighbors use the historic travelled way.
- prevent the County from arbitrarily taking sides when public safety is not an issue.
- clarify how the scope of an easement can be changed.
- provide landowners a mechanism to seek redress in the event of damages.
- Supreme Court can't agree as to what public access means in terms of what can and cannot be done within an easement. To see the Ruby River case:
 - go to <http://searchcourts.mt.gov/>
 - select Supreme Court Case Number
 - enter DA 12-0312
 - click Search
 - click on the link to Public Lands v. Madison Co. Commiss
 - click on the Opinion/Order to see the whole decisionor click on Synopsis to get the 3 page synopsis
- The legislature needs to provide clear definitions for public access, private access, public roads, private roads. This should include how the designations are effected, who pays for maintenance, and what can and cannot be done within each type of designation.

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Appendix A

"Private Access" is defined as any trail, road, easement, or right-of-way that has been built and maintained with funds, assessments, levies, dues paid by landowner(s) to a homeowner's association, subdivision association, special district, etc. Such access:

(1) is created when:

(a) a property is subdivided and/or platted and the recorded and approved plat and/or Certificate of Survey depicts the location, purpose, and width of roadways, trails, easements, utilities, etc.

(b) the sale of the first parcel of the subdivision is recorded and a deed created.

(2) is limited in scope as to the original stated purpose and duration of the access. In the absence of a recorded, stated purpose, vehicular traffic is limited to the established road surface, except in case of emergency or maintenance of the access.

(3) provides access to only those properties located within the association or special district, except in case of emergency.

(4) limits vehicular traffic to the original width of the roadbed, except during road maintenance activities or emergency.

(5) must have properly dated and recorded servient landowner notification and permission for any expansion of scope of the access. An amended plat or Certificate of Survey is not sufficient to amend the scope of any access.

(a) expansion includes, but is not limited to,

(i) widening the roadbed.

(ii) addition or enhancement of an approach (except where the owner of the land is the same as that where the approach is to be added or enhanced).

(iii) starting or operating an enterprise that causes an increase of more than 10% traffic on the access.

(iv) significant change in the topography of the access.

(v) additional burden on the servient tenement.

(6) provides for the collection of fines for damage, littering, and/or misuse of the access.

(7) is extinguished at such time as:

(a) the access is not maintained with funds, assessments, levies, dues paid by landowner(s) to a homeowner's association, subdivision association, special district, etc.

(b) the land adjacent to the access is owned by one legal entity (person, company, trust, organization, etc).

SYNOPSIS OF THE CASE

2014 MT 10, DA 12-0312: PUBLIC LANDS ACCESS ASSOCIATION (PLAA), Petitioner and Appellant, v. THE BOARD OF COMMISSIONERS OF MADISON COUNTY, STATE OF MONTANA, and C. TED COFFMAN, FRANK G. NELSON and DAVID SCHULTZ, constituting members of said Commission; and ROBERT R. ZENKER, in his capacity as the County Attorney of Madison County, State of Montana, Respondents and Appellees. JAMES C. KENNEDY, MONTANA STOCKGROWERS ASSOCIATION and HAMILTON RANCHES, INC. Defendant Intervenors.¹

This case involves several public, county roads in Madison County (Duncan Road, Lewis Lane and Seyler Lane), and the public right of access to the Ruby River where the roads intersect with the river. In 2004 PLAA filed a lawsuit against Madison County claiming that private property owners had erected fences in the public right-of-way along these county roads, near the bridges, that prevented the public from accessing the Ruby River. PLAA sought a ruling from the court declaring the public's right to access the Ruby River without interference from the adjacent landowners. Kennedy, who owns land adjacent to Seyler Lane and Lewis Lane, intervened.

The District Court concluded that by statute the public right-of-way on Duncan Road and Lewis Lane is 60 feet wide, within which the adjacent landowners could not interfere with the public's right to access the river. On Seyler Lane, however, the court determined that because the public right-of-way was established by "prescriptive use" the public only has the right to use the roadway. The court also decided that Madison County has a "secondary easement" for maintenance purposes that is independent and separate from, and larger than the area the public is entitled to use. PLAA appealed the District Court's ruling related to Seyler Lane. Kennedy cross-appealed the District Court's ruling regarding the width of the public right-of-way at Lewis Bridge, arguing that this ruling constitutes an unconstitutional taking of his private property without due process and just compensation.

On appeal, the Montana Supreme Court decided that the District Court incorrectly found that two separate interests exist in the Seyler Lane right-of-way—one for the public and one exclusively for the county. The Supreme Court held that the concept of a limited secondary easement does not apply to public road rights-of-way, whether established by prescription or otherwise, and that the District Court thus erred in finding

¹ This synopsis has been prepared for the convenience of the reader. It constitutes no part of the Opinion of the Court and may not be cited as precedent.

one at Seyler Lane. The Court determined that the public prescriptive right-of-way on Seyler Lane extends beyond the traveled way and includes such width as is reasonably necessary for the construction, maintenance and repair, and for the public's safe and convenient use of the road. The Court remanded to the District Court to determine the width of the public road right-of-way established by prescriptive use at Seyler Lane.

The Court further held that once the existence of a public right-of-way established by prescriptive use is proven, the use of that right-of-way is not limited to the adverse usage through which the easement was acquired. Instead, it extends to such public uses that are reasonably foreseeable, including recreational uses.

Finally, the Court determined Kennedy's cross-appeal was foreclosed by well-settled law because Kennedy's predecessor in interest had, by deed, granted an express public right-of-way to Madison County over Lewis Lane for use as a County road. Kennedy, therefore, did not have a compensable property interest in the land he claimed was taken from him for the public's use. The Court also explained that Kennedy's takings argument is precluded by well-settled law in Montana. Montana's well-settled law provides that the State owns all waters in trust for the people; that a riparian owner may not exclude the public from areas that are minimally necessary for the public to use its water resource; and that a riparian owner takes his property interest subject to a dominant estate in favor of the public.

Justice Baker, who also joined the majority, concurred in a separate opinion to emphasize that what is involved in this case—by agreement of the parties—is a public road, not just a public easement. The concurrence pointed out that the law allows public roads to be established by prescriptive use and that, once so established, a definite width of the road must be ascertained in order to prevent continued expansion into the landowner's property. The concurrence expressed the view that the dissenting justices' analysis would be appropriate where only a public easement is at issue.

Justices McKinnon and Rice dissented from the Court's decision regarding Seyler Lane. They disagreed with the Court's application of certain statutory provisions to the analysis of a public road acquired by adverse public use. The dissents pointed out that the width and scope of prescriptive easements are governed by longstanding common law principles and that, under these principles, a public road established by prescriptive use—such as Seyler Lane—is limited in width to the area that the public actually used or occupied during the period of prescription. In Justice McKinnon's view, this width is limited, pursuant to the parties' stipulations, to the paved portion of Seyler Lane. Justice

Rice concurred with the majority in remanding the case for further consideration of historical recreational uses.

The dissents also concluded that a public road acquired by prescription includes, by implication, an incidental right to use adjacent land for purposes of repairing, maintaining, and supporting the roadway, but that the use of this area is limited to that which is reasonably necessary for maintenance purposes and may not be used as an expanded travel area. Thus, the dissenting justices disagreed with the Court's holding that the maintenance area along Seyler Lane may be used for all public purposes, such as foot travel.

With regard to Lewis Lane, Justices McKinnon and Rice concurred in the Court's conclusion that the public may use the 60-foot-wide right-of-way for the purpose of accessing Ruby River. This right-of-way had been granted, without any qualifications, by a prior owner of Kennedy's property. Justices McKinnon and Rice also agreed with the Court's decision to reject the takings issue, although Justice McKinnon provided her own analysis of Kennedy's arguments on this point.

7-14-2101. General powers of county relating to roads and bridges -- definitions. (1) The board of county commissioners, under the limitations and restrictions that are prescribed by law, may:

- (a) (i) lay out, maintain, control, and manage county roads and bridges within the county;
 - (ii) subject to 15-10-420, levy taxes for the laying out, maintenance, control, and management of the county roads and bridges within the county as provided by law;
 - (b) (i) in the exercise of sound discretion, jointly with other counties, lay out, maintain, control, manage, and improve county roads and bridges in adjacent counties, wholly or in part as agreed upon between the boards of the counties concerned;
 - (ii) subject to 15-10-420, levy taxes for the laying out, maintenance, control, management, and improvement of county roads and bridges in adjacent counties or shared jointly with other counties, as agreed upon between the boards of the counties concerned and as provided by law;
 - (c) (i) enter into agreements for adjusted annual contributions over not more than 6 years toward the cost of joint highway or bridge construction projects entered into in cooperation with other counties, the state, or the United States;
 - (ii) subject to 15-10-420, place a joint project in the budget and levy taxes for a joint project as provided by law.
- (2) Unless the context requires otherwise, for the purposes of this chapter, the following definitions apply:
- (a) "Bridge" includes rights-of-way or other interest in land, abutments, superstructures, piers, and approaches except dirt fills.
 - (b) "County road" means:
 - (i) a road that is petitioned by freeholders, approved by resolution, and opened by a board of county commissioners in accordance with this title;
 - (ii) a road that is dedicated for public use in the county and approved by resolution by a board of county commissioners;
 - (iii) a road that has been acquired by eminent domain pursuant to Title 70, chapter 30, and accepted by resolution as a county road by a board of county commissioners;
 - (iv) a road that has been gained by the county in an exchange with the state as provided in 60-4-201; or
 - (v) a road that has been the subject of a request under 7-14-2622 and for which a legal route has been recognized by a district court as provided in 7-14-2622.
 - (3) (a) Following a public hearing, a board of county commissioners may accept by resolution a road that has not previously been considered a county road but that has been laid out, constructed, and maintained with state department of transportation or county funds.
 - (b) A survey is not required of an existing county road that is accepted by resolution by a board of county commissioners.
 - (c) A road that is abandoned by the state may be designated as a county road upon the acceptance and approval by resolution of a board of county commissioners.

History: (1)En. Subd. 4, Sec. 1, Ch. 100, L. 1931; re-en. Sec. 4465.3, R.C.M. 1935; amd. Sec. 12-101, Ch. 197, L. 1965; Sec. 16-1004, R.C.M. 1947; (2)En. Sec. 2-101, Ch. 197, L. 1965; amd. Sec. 69, Ch. 316, L. 1974; Sec. 32-2203, R.C.M. 1947; R.C.M. 1947, 16-1004(part), 32-2203(4), (11); amd. Sec. 1, Ch. 320, L. 1999; amd. Sec. 1, Ch. 440, L. 1999; amd. Sec. 36, Ch. 584, L. 1999; amd. Sec. 10, Ch. 125, L. 2001; amd. Sec. 1, Ch. 342, L. 2007; amd. Sec. 2, Ch. 241, L. 2009.