

Examples of Damage to Public Easements

Due to Public Use Without Public Maintenance

(c) Roberta Manter 6/18/2024

How not to preserve a road

People who are not aware of how to preserve a road tend to drive in the same two ruts rather than using the whole road surface. Over time they end up with two ruts, and the high spot in the middle keeps getting higher until they bottom out. People will swear they don't do this, but the tire tracks don't lie.



The mechanics of road damage due to public use

On a road that has at least some gravel, and where the residents are more careful to use the whole road surface, the damage may not be obvious after just one trip by someone just passing through. But repeated use and/or use by heavy trucks even in the best of conditions compresses the road into a sort of W shape. The tires push soil up at the edges of the road, obliterating the crown, and causing runoff to run down the road instead of running off the sides.



This subtle damage becomes more obvious when it rains hard - “gully washers, trash movers, and toad stranglers”. Where there is a long hill, the water that cannot escape from the road gathers volume and momentum, resulting in erosion. Note that there’s a ditch to the left, but the water can’t escape from the tire tracks to get there.



Same hill as in previous picture. This is the result of that runoff. Now that there is an established runoff route, it will get washed out more with every storm.

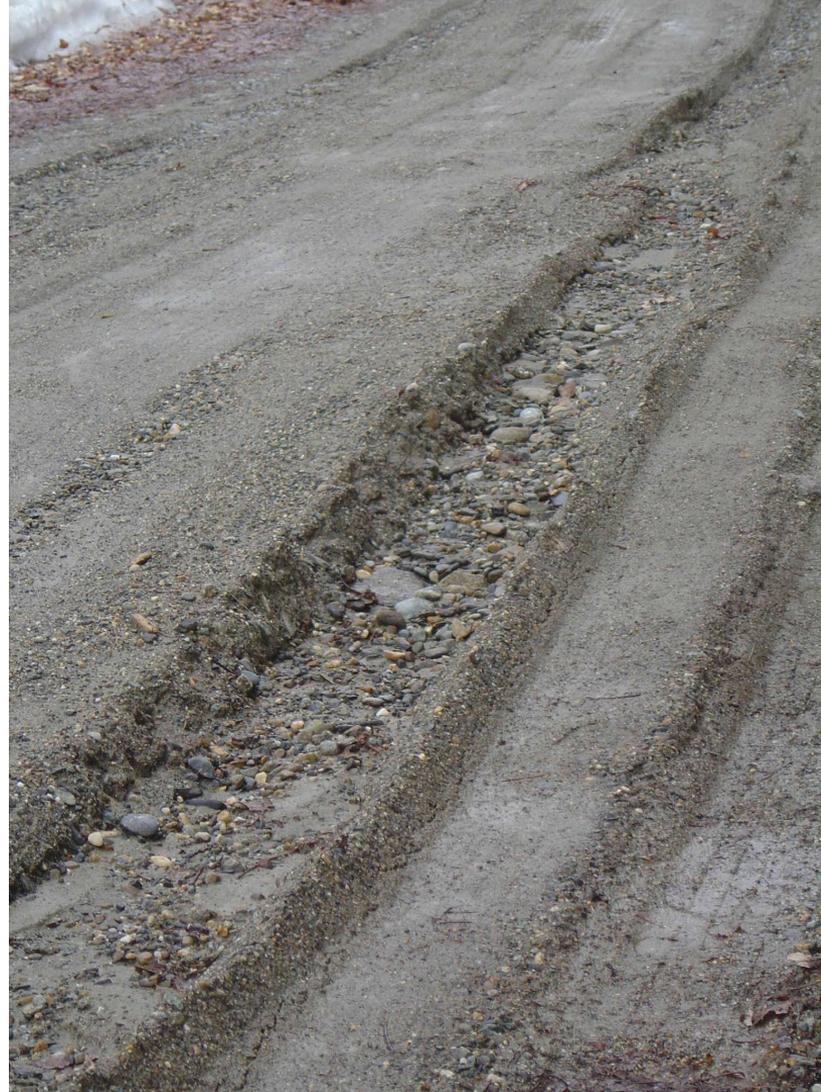


Eventually it can look like this. How much will it cost the landowner to repair the damage?

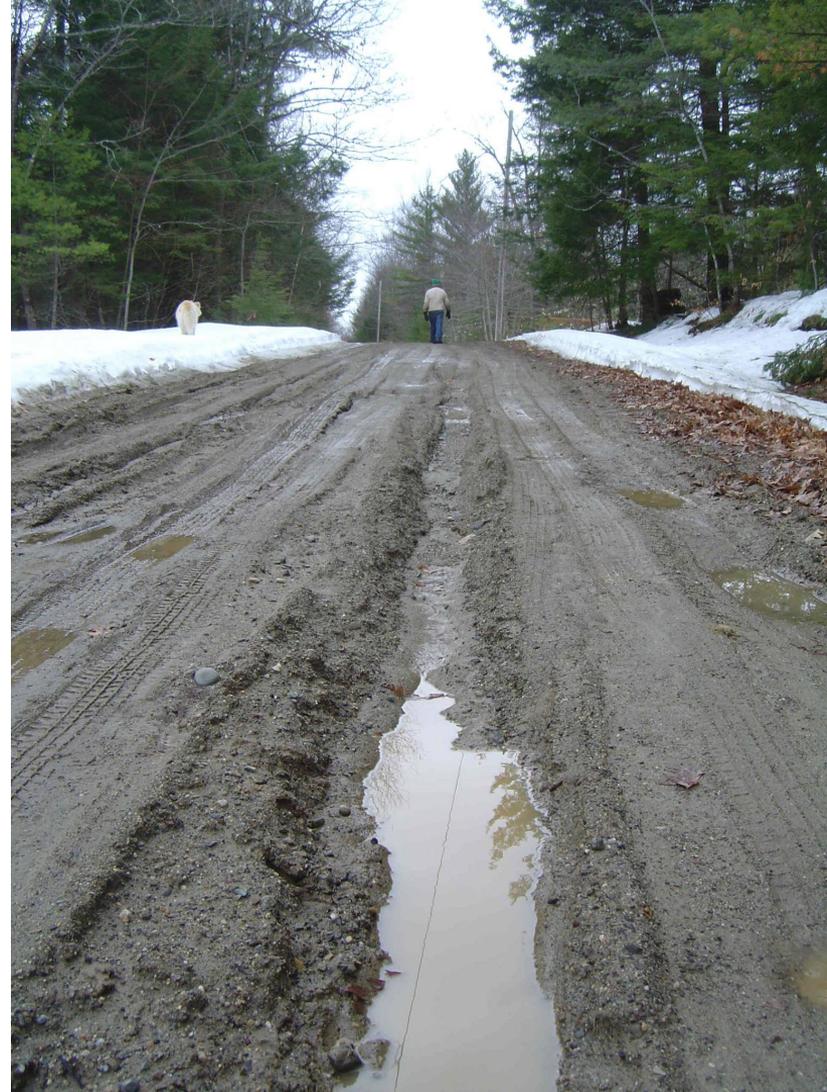


If the road is used when it's too soft, the damage is more serious. This tire track was left by someone using the road when it was too soft. Then it rained.

Another example of erosion due to water being unable to escape from a tire track.



Water that can't escape from a rut keeps the road saturated, prolonging mud season. Note that where the residents drove, straddling the middle-of-the-road ruts where everyone else drives, (and avoiding using the road during the warmest part of the day,) they barely left tire tracks. But someone else drove in and out again in the same two ruts while the road was soft.



When we ask people to stay off the road because the frost is going out of it, their usual response is, "Oh, that's okay, I've got 4wd." That's not the point. Just because you CAN get through doesn't mean that you should. With the small equipment we have available, it will take days of unpaid labor to get this smoothed out once mud season ends.



Not every landowner can afford to own a tractor with a grader blade or a York rake. They make do with what they have, whether that means dragging a pallet, bed spring, or section of chain link fence weighted down with rocks. One family resorted to hitching their riding horses to a tractor tire and having them drag that up and down the road.

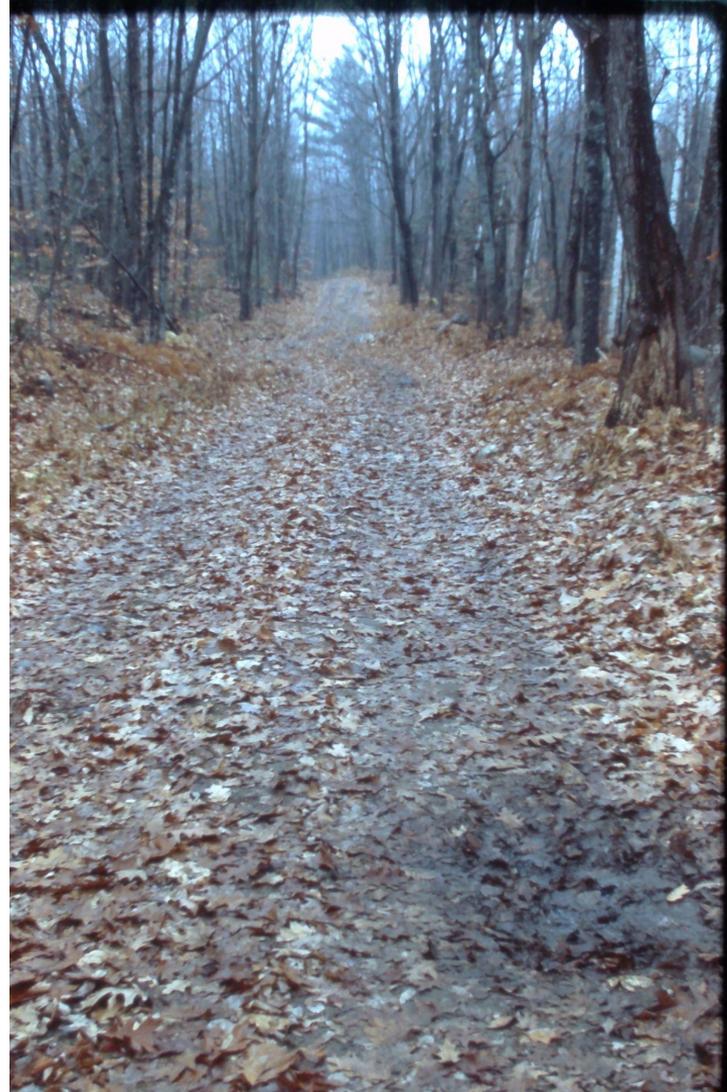


Driving on a road that has minimal gravel during mud season cuts through the gravel to the clay underneath, mixing it all together. Water won't drain through clay, and the crown has been destroyed, so the water stays trapped in the ruts for weeks.



Repeated damage

Entrance to Young Road, November 3, 1982.



Same spot as above, March 20, 1983. While we were staying at a neighbor's to avoid using the road, someone drove in and out again in the same two ruts during a hard all-day rain at the height of mud season. The water couldn't escape from their ruts, so instead of draining off into the woods it gained volume and momentum down a 1/4 mile slope, and when all that water finally spilled over into the ditch and hit the culvert at the entrance to the road, it blew out the culvert. When we returned we couldn't get within half a mile of our house. We had no idea who it was, so there was no way to hold them accountable. Without the funds to replace the culvert, we towed the pipe out of the way and forded the stream for over a year.



Finally on December 18, 1984, a logger who wanted to use the road replaced the culvert.



In the spring of 1987, the culvert washed out again. The discontinuance process does include a provision for awarding damages at the time of discontinuance, but how does that compensate residents for future repeated damage? Or how could damage that was awarded in the 1940's compensate for the unanticipated damage caused by repeated logging operations from the 1970's through the present using skidders, feller-bunchers, and 80,000 to 100,000 lb log trucks which didn't exist in the 1940's?



Fortunately, most loggers are now more responsible than they were in the 1980's when this is what was left for residents after yet another logging operation. 17 MRS 3853-D and 23 MRS 3029-A would probably have helped here, but they didn't exist yet. Unfortunately those laws still don't help when someone damages the road while no one is around to identify who did it.



Public use in the absence of public maintenance

Yes, *Jordan v Canton* was about the “Limited User Highway” law, which was repealed - but what the Court said in that case is nevertheless true:

“...cases involving loss of access depend on the practical and factual consequences of governmental action rather than the legal status of the highway.”

“In short, it is actual and practical discontinuance rather than technical discontinuance that destroys the easement.”

“The fact that a [road] continues to have a legal status as a "public way" over which there continues to be a public easement of travel is meaningless if there is no longer any public responsibility for maintenance and repair. Without maintenance or repair, it is only a question of time before a public road will become impassable or unsafe for travel. The rigors of Maine weather, the action of frost and the erosion from rain and melting snow will speed the process of disintegration. The ability to use the road for vehicular travel and thus the abutter's easement of access to and over the road to the public road system will inevitably be destroyed.”

Use of this public easement in Oxford County by ATV's has left it rutted and holding water, which keeps it soft, hampering landowner access. (Photo taken May 27, 2022, well after mud season.)



Impact of other uses on residential access

Bolin Hill Road in Liberty. Access to seasonal and year-round residences destroyed by ATV's and mud runners, and by a commercial blueberry grower coming in with a tractor during mud season. (Again, this was before 17 MRS section 3853-D and 23 MRS 3029-A, but that would only have possibly helped against users who could be identified, and then only if it could be proven to what extent they were responsible for the damage.)

Photo courtesy of Raven Photography.



© Raven Photography

Runoff from Bolin Hill Road dumps silt into Lake Saint George. Should the landowners be held liable for environmental damage if those who damaged the road could not be identified?

Photo courtesy of Raven Photography.



Discontinued roads *could* be posted “heavy loads limited,” but they rarely are. Such posting is usually lifted when paved roads are ready to take the load, but discontinued roads, often being shaded and having little or no gravel, need more time to firm up. Even with posting, trucks are allowed to haul when the temperature is below freezing. But if it was above freezing most of the night and only dipped below 32 just before dawn, the road will be nowhere near firm enough to support a log truck. On top of that, if a landowner calls to report someone violating the posting, in rural areas a truck driver can load his truck and leave before law enforcement arrives.

Use by sportsmen

The discontinued Ed Rose Road in Wayne, where one trapper drove in to the beaver dam and went back out in the same two ruts. Pictures were taken soon after it happened, about ten years ago.

Fortunately, once word got around that you couldn't get past the beaver dam, no one else has tried to drive in since. But due to that one set of tire tracks, now the whole hill is washed out. (See next page.)



Ed Rose Rd June 2024. Up until 1989 when the culvert at the beaver dam went out, this was a nice horseback trail. Now the stones would hurt their feet and be a tripping hazard.



Kennebec Land Trust would like to prohibit motor vehicular travel on the Surry Road which abuts their land, but they can't because it's a public easement.



Along the road by Kennebec Land Trust land.
The damage starts at the top of the hill.
Recreational trails intended for hiking, biking,
etc. should not be open to 4wd trucks.



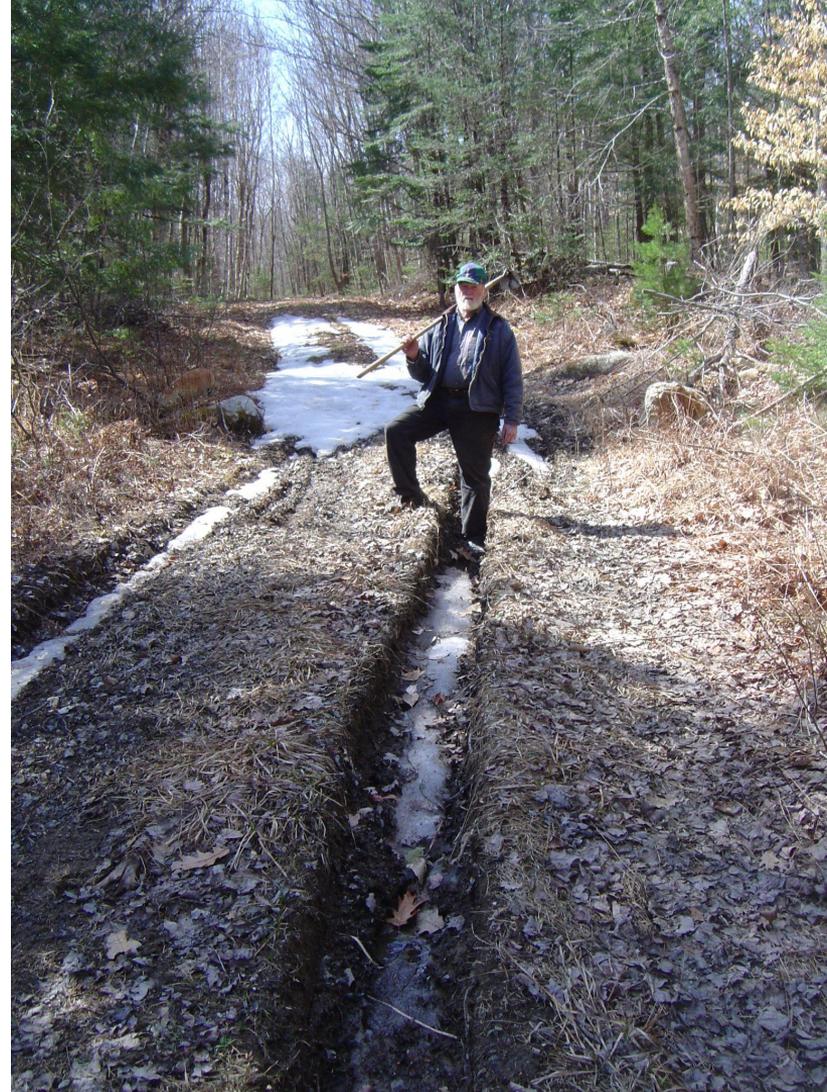
The runoff continues down the hill. There's plenty of dropoff on the other side of the road where this water could drain to, but it can't get there. Someone had dug cutouts at intervals to let the water drain off, but the next time someone drove through when it was soft, their tires pushed dirt up along the sides of the road and established a new channel down the road.



Along road by
Kennebec Land Trust
land. Farther down the
hill, the water has
gained volume and
momentum.



Farther along Surry Road, going up the slope on the other side of the low point. Again, one vehicle at the wrong time, April 2022.



Same spot as in previous picture, April 2024.



Same spot June 8, 2024. The grass hides it, but it's washed out even more. Up until last year it was possible to mow this road to reduce ticks. That's no longer practical. On a 2 ½ mile walk I picked up 39 ticks. Good thing I didn't have the dog with me - he's an expert tick sweeper!



More areas on the same road.



There is lower ground where the water could drain off, but it can't get there because the mud runners have trapped the water in the road. Surrey road was a pleasant walking trail until a year ago. Even the logging operation did only minimal damage, but then the mud runners ruined it.



Someone bought land abutting this abandoned road in Mount Vernon, and fixed it up so he could have better access. But once the public saw that it was opened up so they could use it, they did. They crushed his culverts and chewed ruts into the road so the water couldn't get to the ditches, resulting in this long hill washing out badly. If the purpose for retaining a public easement over an abandoned or discontinued road (as opposed to private access) is to provide recreational access and fire access, will leaving it open to all vehicular use fulfill that purpose? This is now a safety hazard, and not through any fault of the landowner..



Hebo Hybo Road in Lebanon was considered private property after its discontinuance in 1928, and was gated. Then in 1994 the Court declared that “subject to gates and bars” meant it was a public easement. Since then it has been used heavily by ATV’s and Dirt bikes. This is the result. Sorry for the blurry image - it’s a screen shot from a video. To see more, go to <https://www.youtube.com/watch?v=Vloc-hPNBX0> from the 15:20 minute mark to the end. ATV clubs are getting more responsible as they realize they will lose permission - but it only takes one rogue to spoil it for everyone.



A great many roads were discontinued or abandoned precisely because they had steep hills that were prone to erosion, or went through bogs that became impassable much of the year, or got flooded out by beavers. So if they were difficult to keep passable while they were being maintained by the county or town, it is only to be expected that public use without public maintenance will do serious damage to the access.

Bear in mind that where there are discontinued roads that people live on that don't look this bad, that's only because the residents have poured their time, money, and effort into holding back the tide of damage. Otherwise, they would look just as bad. People who move in onto these roads generally know they will have to build the road for themselves, and that they may have to walk in mud season until they can get it fixed up, and that's fine with them. What they do not anticipate is that as soon as they make the road passable, the public will use it - and the public won't walk in mud season! In many cases it's the public's use, not their own, that makes the residents want the Town to resume maintenance. Building a road that will hold up under heavy use is too expensive to impose on landowners. Restricting use to that of abutters would greatly reduce the cost.

Roberta Manter
Maine ROADWays
LD 646

Senator Tepler, Representative Doudera, Members of the Committee,

My name is Roberta Manter, I live in Fayette, and I am the founder of Maine ROADWays, which is an acronym for Residents & Owners on Abandoned & Discontinued Ways. I also serve on the Abandoned and Discontinued Roads Commission, (ADRC) but today I am speaking on behalf of Maine ROADWays. I am speaking in favor of LD 646.

I listened to the testimony that was presented on this bill. Several people mentioned "camp roads." The roads I represent may in some cases be thought of as camp roads, but there's more to it than that. Camp roads are generally roads that serve seasonal camps, and they are maintained by those who own the camps, either with or without a road association. Some camp roads started out as logging roads. Others were laid out in a subdivision plan. Discontinued roads, on the other hand, are roads which were formerly town or county ways, but which have been discontinued. In most cases, town ways discontinued after Sept 3, 1965 and county ways discontinued after July 29, 1976 remain "public easements." Roads discontinued before those dates in most cases "ceased to exist" as legal roads, although in many cases the abutting landowners have continued to use them, with the acquiescence of the other abutters.

So, what is a "public easement"? Under Maine law, a public easement is a road that is no longer maintained by the public, but which nevertheless remains open to public use by foot or motor vehicle. Now, think about what that means. In many cases, the reason a road gets discontinued is that it's steep and prone to erosion, and therefore difficult to maintain. So the "solution" many towns and counties have taken is to cease maintenance, but keep the road open to public use. I would think the predictable result would be obvious.

The case of *Jordan v Canton*, 265 A.2d 96 (1970) describes the situation well. It says:

"Without maintenance or repair, it is only a question of time before a public road will become impassable or unsafe for travel. The rigors of Maine weather, the action of frost and the erosion from rain and melting snow will speed the process of disintegration. The ability to use the road for vehicular travel and thus the abutter's easement *100 of access to and over the road to the public road system will inevitably be destroyed."

That is exactly what happens when a discontinued road remains open to public use with no public maintenance. If there is a residence on one of these roads, the resident finds themselves in the untenable position of trying to maintain a road against public use at private expense. We need to find ways to privatize these roads so that continued public use doesn't cause accelerated erosion, and/or to find a way to provide a measure of public funding if the road is to remain public. The Abandoned and Discontinued Roads Commission (ADRC) has been working on it.

In short, if you think camp roads are a problem, look at public easements! I would urge that if this proposed Commission is formed, there should be a directive for them to look at how discontinued roads contribute to uncontrolled runoff into lakes and streams. I would suggest a cooperative effort with the ADRC. I will see if I can attach a slide show Maine ROADWays made showing the results of public use without public maintenance. Thank you for your time.