IN THE SUPREME COURT OF THE STATE OF MONTANA

CASE NO. DA 12-0312

PUBLIC LANDS ACCESS ASSOCIATION, INC.,

Petitioner and Appellant

v.

THE BOARD OF COUNTY 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 HAMILSON RANCHES, INC.,

Defendant Intervenors.

UNITED PROPERTY OWNERS OF MONTANA'S *AMICUS CURIAE* BRIEF

On Appeal from Montana Fifth Judicial District Court,
Madison County – Cause No. DV-29-04-43

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INTRODUCTION

United Property Owners of Montana ("UPOM") files this *Amicus Curiae* Brief in the above-captioned matter to address the public prescriptive easements at issue at Seyler Lane and the Seyler Bridge. As an initial matter, the parties never agreed, and the District Court never found or held, that any easement in existence actually extends to the Ruby River. Since no such easement exists, the remaining arguments of the Appellant Public Lands Access Association, Inc.'s ("PLAA") are nothing more than red herrings.

Even so, the easements that do exist are public prescriptive easements limited to (1) an easement for travel over a paved road to cross Seyler Bridge, and (2) a secondary easement for the County's maintenance of the road and supporting areas inside the fences, comprised of some mowing, snowplowing, and weeding. The travel and the maintenance are all limited to areas inside the fences, which tie to the bridge railings and do not reach the river. The law in Montana is and has been that prescriptive easements, regardless of whether they are public or private, are limited to the use by which they were acquired. Neither the Court nor the legislature has the right to expand the use, and, as a result, unduly burden the landowners.

Finally, this Brief addresses the undue burdens that will be imposed on Montana's landowners if the District Court's April 16, 2012 Findings of

Fact, Conclusions of Law, and Final Judgment ("Final Judgment") are reserved and PLAA's arguments are adopted.

IDENTITY & INTEREST OF AMICUS UPOM

UPOM is a coalition of landowners, allied businesses, and supporters dedicated to the preservation of private property rights in Montana. UPOM is a 501(c)(6) organization with a tiered membership in which landowner members have voting rights in the organization as controlling members.

Originally founded in 2007 by a group of Montana farmers and ranchers to advocate against punitive measures taken by Montana Fish, Wildlife, and Parks, UPOM is a grassroots organization in every sense of the term. In the past five years UPOM has grown into a comprehensive property rights organization, representing nearly two million acres of privately-owned land in Montana. Our members, like most Montana family farming operations, prefer to focus on making a living in agriculture rather than battling in the legal and regulatory arenas. But as long as government continues to find new ways to intrude on the rights of property owners, a role exists for a group like UPOM as a unified voice for the landowners.

UPOM has been involved in a variety of different advocacy efforts regarding land use issues that directly impact our members. These efforts include both legislative and legal action. UPOM has spearheaded legislation

to establish a regulatory takings law in Montana, reform the zoning process, strengthen trespassing laws, and protect property rights in relation to state-issued hunting permits. In the 2011 Legislature, UPOM successfully lobbied to pass a revision to the Private Property Assessment Act to require state agencies to disclose to the public the findings of property assessments.

More recently, UPOM filed an *amicus curiae* in the case between Citizens for Balanced Use and the Montana Department of Fish, Wildlife, and Parks. *See Citizens for Balanced Use, et.al. v. Joseph Maurier, et.al.*

In the current case, UPOM has a strong interest in the outcome of the issues because reversing the Final Judgment will further jeopardize and sacrifice the rights of landowners. This Court's holding will either protect the current law on prescriptive easements or turn the law on its head and allow uses that are greater than those used to acquire the prescriptive easement. This will not only circumvent § 23-2-322(2)(b), MCA, and disregard past Montana law, but it will also detrimentally impact and unduly burden private landowners. Therefore, the members of UPOM have a vested interest in the outcome of this case.

ARGUMENT

I. PLAA's attempt to obtain access to the Ruby River over private property should not be allowed since the District Court did not find, and PLAA cannot point to, clear and convincing evidence of public access to the Ruby River from Seyler Lane or Seyler Bridge.

The public does not have the right to cross over private property to access rivers and streams. *See,* § 23-2-302(4), MCA. *See also, Montana Coalition for Stream Access, Inc. v. Hildreth,* 211 Mont. 29, 36, 684 P.2d 1088, 1091 (1984); *Montana Coalition for Stream Access, Inc. v. Curran,* 210 Mont. 38, 55, 682 P.2d 163, 172 (1984). Yet this is exactly what PLAA wants this Court to allow.

The parties agreed that Seyler Bridge and its approaches on Seyler Lane constitute a county road right-of-way that was established by prescriptive use. (Doc. 267, FF No. 3.) The parties also agreed that the public has the right to use the *paved* portion of Seyler Road for travel across Seyler Bridge. (Doc. 267, FF No. 4.)

However, these facts do not give the public the right to leave the paved road and walk onto private property in order to access the Ruby River.

Other facts confirm that James Kennedy owns the land underlying Seyler Bridge and the bridge approaches on Seyler Lane, including the bed and banks of the Ruby River. (Doc. 267, FF No. 5.) "The ordinary high

water mark of the Ruby River is well below the deck of Seyler Bridge, the paved surface of Seyler Lane, and the filled approaches to the bridge." (Doc. 267, FF No. 17.) In fact, "[i]t is impossible for someone remaining on the paved surface of Seyler Lane to reach the Ruby River." (Doc. 267, FF No. 22.) Furthermore, although the County maintains some area off the paved road, "[n]o area beyond the three fences and down to the ordinary high water mark is maintained by Madison County." (Doc. 267, FF No. 19.) Finally, no evidence showed that the public used the area between the paved way and the fences and beyond the fences to the high water mark to drive or walk. (Doc. 267, FF Nos. 20-21.)

In other words, PLAA never met its burden of proving by clear and convincing evidence that a prescriptive easement existed from the paved road, across the maintained area, and over Mr. Kennedy's private property to the Ruby River. Thus, any attempt to cross over Mr. Kennedy's private property is an unlawful trespass.

II. The prescriptive easements at issue- for travel across a paved road and for County maintenance- should not be expanded beyond those uses since those were the uses relied upon to acquire the prescriptive easements.

Although the Court does not have to reach the next issue since the easement upon which PLLA relies does not exist, it should be discussed since PLAA raised the argument. PLAA wants this Court to ignore decades

of law regarding easements and statutes and hold that every public prescriptive easement can be used for any public purpose regardless of past use. (Appellant's Opening Brief, p. 13.) Not only would this constitute a judicial taking of private property without just compensation, but it will turn the law of easements upside down and open the floodgates to an enormous amount of litigation.

"The extent of a servitude is determined by the terms of the grant or the nature of the enjoyment by which it was acquired." § 70-17-106, MCA. *See also, e.g., Montana State Fish and Game Comm'n v. Cronin,* 179 Mont. 481, 490, 587 P.2d 395, 401 (1978) (limiting scope of a public easement by prescription" to the "character of use made during the prescriptive period"); *O'Conner v. Brodie,* 153 Mont. 129, 138, 454 P.2d 920, 925 (1969) ("the extent of a servitude is determined by the nature of the enjoyment under which it was acquired"); *State v. Portmann,* 149 Mont. 91, 96, 423 P.2d 56, 58 (1967) ("the rights acquired by adverse user can never exceed the greatest use made of the land for the full prescriptive period).

Contrary to PLAA's argument, the statutory and common law restricting a prescriptive easement to the use under which it was acquired has not distinguished between "private" or "public" easements. *See, Portmann,* 149 Mont. at 96, 423 P.2d at 58. *Cronin, supra,* is particularly

instructive because the landowner contended that a public road easement should be limited to the use by which it was acquired. This Court agreed:

> Generally, the scope of a prescriptive easement is governed by the character of the use made during the prescriptive period and should not exceed the greatest use then enjoyed.... The order [on remand] should clarify that the scope of the prescriptive easement shall be reasonably related to the use during the prescriptive period.

Cronin, 179 Mont. at 490, 587 P.2d at 401. Furthermore, per § 23-2-322(2), MCA, "[a] prescriptive easement cannot be acquired through: . . . (b) the entering or crossing of private property to reach surface waters."

In this case, the easements at issue were not granted in writing; they were acquired by prescriptive use. Thus, as established by § 23-2-322(2)(b), MCA, the easements could not be acquired by the public's use of Mr. Kennedy's private property to reach the Ruby River. Since the easements could not be acquired by this use, this use is obviously not within the scope of the easement.

Instead, the District Court found that one easement was acquired for travel across the paved portion of Seyler Road and Seyler Bridge. (Doc. 267, FF No. 4.) As with any easement, that primary easement carries with it the incidental right to maintain and repair it "when necessary and in such a reasonable manner as not to needlessly increase the burden upon the servient

tenement." *Laden v. Atkeson*, 112 Mont. 302, 306, 116 P.2d 881, 883 (1941); *accord, Guthrie v. Hardy*, 2001 MT 122, ¶¶ 59-60, 305 Mont. 367, 28 P.3d 467. Therefore, by operation of law Madison County may maintain Seyler Road, Seyler Bridge, the Toe of the Fill, and the area that is mowed, snowplowed, and weed sprayed. (Doc. 267, FF Nos. 10-11.) The District Court specifically found that "the County did not use the maintained area for general travel." (Doc. 267, FF No. 11 and No. 36.) The Court also found that the public did not use the area between the paved way and the fences to drive or walk. (Doc. 267, FF Nos. 20-21.)

In other words, the user of the road- the public- only obtained the use of the paved road for travel; the user of the maintenance area- the County- only obtained the use of the maintenance area for maintenance.

Consequently, under current statutes and case law, since neither easement was or could be acquired for the purpose of accessing the Ruby River, no such prescriptive easement across Mr. Kennedy's private property exists.

This Court should not accept PLLA's legally flawed invitation to overturn statutes and case law regarding prescriptive easements. This will not only create confusion and litigation in the law of prescriptive easements, but it will also drastically expand public access and further shift the burden

associated with that additional access squarely onto the landowners who suddenly find their property subject to new and expanded uses.

III. Disregarding established easement law and expanding public access places an undue burden on property owners and creates adversarial situations instead of encouraging neighborly accommodation.

Disregarding established easement law and expanding public access places an undue burden on property owners and creates adversarial situations rather than encouraging neighborly accommodation.

When purchasing property, one major consideration is the proximity of the property to rivers, streams, and roadways. Whether for practical or agricultural purposes, many landowners buy or build homes and/or farming operations near a stream, a roadway, or both, and will therefore be affected by this ruling.

The threats that these landowners face if this Court allows public access over private land to any river or stream are three-fold: (1) negative economic impacts; 2) loss of quality of life; and (3) increased civil and financial liability that accompanies additional public intrusion onto private land.

Regarding the potential economic impacts, one such economic impact is the loss of value to the property. The current law limits the use of prescriptive easements to the use by which it was acquired. If the Court

expands the law to allow more uses that were never bargained for, then the landowner's property is devalued and he is the one who suffers economically. Another economic impact is the owner's decreased ability to protect his crops and livestock as the unanticipated use of his property increases. A third economic impact occurs when the landowner's tax burden does not decrease even though the public has now effectively "taken" part of his property for public access.

In regard to the negative impact on the landowner's quality of life, if public access is expanded through prescriptive easements the Court will inevitably sacrifice landowners' privacy, especially where homes are built close to the rivers and streams. Additionally, the degree of public access and the loss of property rights, including the loss of the right to exclude, can also affect how landowners use their property. For instance, a landowner may not be able to maintain his current standard of living since public access threatens his ability to control what occurs on his or her property (i.e., the public often fails to close gates, fences are knocked down, and livestock are set free). And then there is the general anguish and anxiety that arises from knowing that more people are on your property and the fear for their safety and your own. Whether technically liable or not, no rancher would want an

injury to occur on his property, for example, when a fisherman invited by the government to cross livestock fences is injured by a bull.

Finally, there is the loss of neighborly accommodation. Landowners often allow neighbors, County or city employees, or other persons to access their property out of neighborly accommodation. Neighborly accommodation will no longer be provided for fear that it will turn into the public's prescriptive right to use more and more of the landowner's property.

In addition to the economic and quality of life impacts, civil and financial liabilities will also increase. Even if the civil liability of landowners is limited by statute, this does not stop people from suing, and with more people given access to the property the chances of being sued increase, from incidents such as injury from livestock to uneven ground on pathways. It is not uncommon for the defense costs in even a single lawsuit to be $25,000, $50,000, or $100,000. Furthermore, the landowner will inevitably spend more time and money on repairing and mending fences and other damages property, policing the use of the easement, checking on and replacing missing livestock, and paying increased insurance costs.

The economic, quality of life, and civil and financial liability impacts on private landowners should not be ignored, especially in the area of

prescriptive easements where no compensation for the adverse use has changed hands.

CONCLUSION

PLAA never established at the District Court level that an easement over Mr. Kennedy's private property existed to access the Ruby River. Furthermore, in attempting to expand the prescriptive easements that do exist (neither of which actually provide access to the Ruby River), PLAA disregards easement law and encourages an unconstitutional judicial taking of private property. Finally, before expanding the scope of prescriptive easements, the Court should consider the undue burden upon the landowners resulting from the negative economic impacts, quality of life impacts, and civil and financial liability impacts they will suffer.

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Respectfully Submitted this 15th day of October, 2012.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that the foregoing United Property Owners of Montana's *Amicus Curaie* Brief was served upon the following counsel by the means designated below on this 15th day of October, 2012:

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Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word is _____ excluding Certificate of Service and Certificate of Compliance.

DATED this 15th day of October, 2012.

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