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# *Letica Land Company, LLC v. Anaconda-Deer Lodge County*: A Modest Property Dispute

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# PRECAP; Letica Land Company, LLC v. Anaconda-Deer Lodge County: A Modest Property Dispute

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No. DA 14-0780

Montana Supreme Court

Oral Argument: Wednesday, September 16th, 2015, at 9:30 AM in the Courtroom of the Montana Supreme Court, located in the Joseph P. Mazurek Justice Building, Helena, Montana.

## I. QUESTIONS PRESENTED

Did the district court err in determining that the "lower branch" of Modesty Creek Road was a petitioned county road?

Did it also correctly determine that a prescriptive easement existed for the "upper branch" of the road?

## II. FACTUAL AND PROCEDURAL BACKGROUND

The land relevant to this case involves the area surrounding Modesty Creek, located approximately 10 miles north of Anaconda, between Deer Lodge Valley and National Forest Land. The contested roads, the upper and lower branch of Modesty Creek, cross through the property of Appellants Letica Land Company, LLC ("Letica") and Don McGee, as well as the property of a non-party, Joe Launderville. (See Fig. 1).

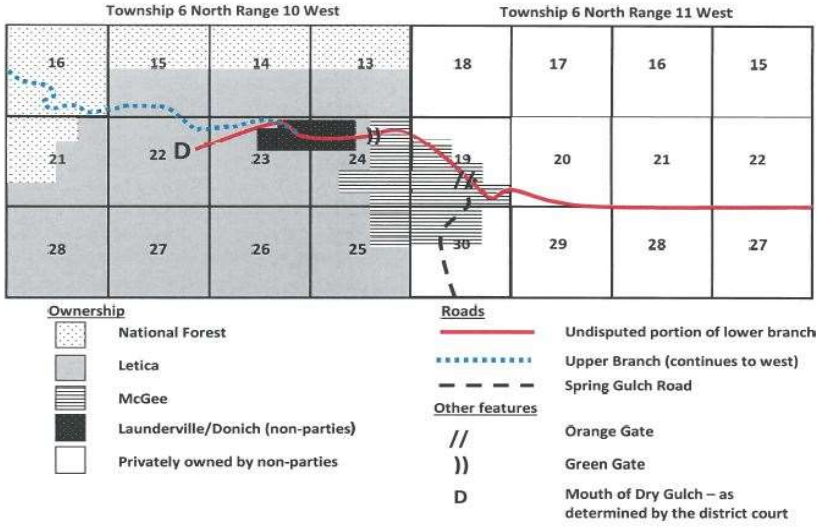

*Figure 1: Map of the Modesty Creek roads and neighboring property. (Appellee's Ans. Br. 7, June 1, 2015). Though the key says that the lower branch is "undisputed," it should say that is where the district court determined the road ended, since Letica does dispute the road's terminus. (See Appellant Letica's Opening Br. 42–43).*

The Modesty Creek roads were first used in the 1860s for mining activities and have a complicated history of use and ownership.[1] In early 2012, after a complaint that the landowners were blocking an allegedly public road, Appellee Anaconda-Deer Lodge County ("the County") hired local attorney Susan Callaghan to research the legal status of the road. Ms. Callaghan found that the lower branch of Modesty Creek Road was created in 1889 by the "Nelson petition," and the upper branch was created in 1902 by the "Scott Petition."[2] She reported that the lower branch ran west through McGee, Letica, and Launderville's property, respectively, while the upper branch traversed Launderville's property and ended in the Beaverhead-Deer Lodge National Forest.[3] The Modesty Creek area became National Forest Land in 1905, and was later given to the Anaconda Mining Company by a federal land patent in 1937.[4] After the Anaconda Mining Company sold the land in 1965, the land passed through several owners until it was finally purchased by Ilija Letica in 1989.[5] Appellant McGee purchased the adjacent land in 1997.[6]

Notably, at some time in the early 1980s, the owner locked the access gates to the lower branch, posted "No Trespassing" signs, and put notices in the local newspapers stating the roads were no longer open to the public.[7] Additionally, appellants stated the roads were "unused, inaccessible, obviously overgrown, and filled with deadfall" when they inspected and bought their property.[8]

On March 7, 2012, after a vote by the Anaconda-Deer Lodge County Commissioners to reaffirm the two roads as petitioned county roads, the County cut the locks off two private gates blocking the public roads.[9] Shortly afterward, Letica filed a Complaint for Declaratory Relief and for a preliminary injunction against the County, which was denied by the district court in July of 2012.[10] Letica later filed an amended complaint, which added McGee as a plaintiff and also added constitutional and tort claims against the County.[11]

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[1] Appellee's Ans. Br. 2, June 1, 2015, No. DA 14-0780.
[2] Appellant Letica's Opening Br. 5, Apr. 7, 2015, No. DA 14-0780.
[3] *Id.* at 9.
[4] Appellee's Ans. Br. 9.
[5] *Id.* at 9.
[6] *Id*.
[7] Appellant Letica's Opening Br. 10.
[8] *Id.* at 11 (internal quotations omitted).
[9] Appellee's Ans. Br. 3.
[10] *Id*.
[11] Appellant Letica's Opening Br. 6.

At a week-long bench trial, the district court addressed only the legal status of the Modesty Creek roads pursuant to a stipulation which bifurcated Letica's constitutional and tort claims.[12] On October 6, 2014, it issued a 74-page Findings of Fact, Conclusions of Law, and Order which concluded that the lower branch was a publicly-petitioned road and that a public prescriptive easement existed on the upper branch.[13]

## III. SUMMARY OF ARGUMENTS

Appellants argue the district court incorrectly ruled on each issue. First, the appellants state that the court misinterpreted the "record taken as a whole" and ignored inconsistencies in the record, such as an unfulfilled condition precedent in the 1889 petition, records outside the county records, and the use of County-created maps which did not clearly indicate where the road ended.[14] Secondly, with respect to the upper branch, the appellants contest that the court could not have found a prescriptive easement because of the lack of adverse use of the land or use otherwise sufficient to establish an easement.[15] Alternatively, they argue that any such easement would have been eliminated by reverse prescription because the landowners had locked the gates for over 30 years.[16] Letica also contests the district court's bifurcation of the constitutional and tort claims against the County.

### *A. Interpreting the Record as a Whole*

When determining whether a public road was created by statute, the court must analyze whether the "record taken as a whole" shows the county road was created.[17] Both Letica and McGee focused a significant portion of their briefs on analyzing the 1889 Nelson Petition, which defined the lower branch as a public highway.[18] They argue the court simply ignored a conditional declaration in the petition which required the county to exert interest in the road.[19] The minutes from the 1889 meeting state that the lower branch "is hereby declared a public highway with the provision that all parties interested in or benefitted by said road bear all expenses conducted with opening and building the same."[20] In order to claim jurisdiction over the road, the appellants contest that the

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[12] Appellee's Ans. Br. 4.
[13] *Id.* After discovery closed, the County found a document wedged behind a shelf which contradicted the Scott petition. The County therefore admitted the upper branch was not a petitioned road, but still contested that an easement existed. *Id.* at 4.
[14] Appellant Letica's Opening Br. 30–31; Appellant McGee's Opening Br. 8, Apr. 1, 2015, No. DA 14-0780.
[15] Appellant Letica's Opening Br. 32; Appellant McGee's Opening Br. 8.
[16] Appellant Letica's Opening Br. 53.
[17] *Reid v. Park County*, 627 P.2d 1210, 1213 (1981).
[18] Appellant Letica's Opening Br. 34–42; Appellant McGee's Opening Br. 8–16.
[19] Appellant McGee's Opening Br. 8.
[20] Appellant Letica's Opening Br. 34.

County needed to assert some control over the road, either by financial support or by maintaining the road.[21] Letica states that the County "conducted a trivial amount of maintenance on the lower branch between 1956 and 1965," which was only at the request of landowners and ceased entirely after 1965.[22] Appellants claim that the court "shrugged off" the County's failure to provide evidence supporting compliance with this provision.[23]

Additionally, Letica argues that the court overlooked evidence that the County did not recognize the road for over a century, referencing the fact that neither the 1913 county map nor any county map after 1896 ever acknowledged the existence of this road.[24]

*1. Analysis*

While the County provides a copious amount of evidence to support "the record as a whole," the Court will have to determine whether or not it appropriately addressed the language of the conditional declaration. The relevant statute provides "the county shall refuse establish the [road] as a public highway, unless the expenses and damages . . . shall be paid in advance by the petitioners."[25] The County does not directly address the appellants' argument, rather, it simply says the statute has "no bearing" and that "Modesty Creek Road was unconditionally declared a public highway on June 3, 1889."[26] It then moves on to say that because the road was already built, "no damages were owed to private landowners and it is doubtful whether any expenses of opening and building the road were necessary."[27] Finally, the County relies heavily on *Powell County v. 5 Rockin' MS Angus Ranch*, 102 P.3d 1210 (2004), which coincidentally held that the same June 3, 1889 meeting created a different road with the same conditional declaration and statutory requirement.[28] Letica points out, however, *5 Rockin' MS* is readily distinguishable because the parties in *5 Rockin' MS* explicitly agreed that the road was a county road.[29] The County seems to rely on the amount of evidence and testimony it provided to the district court rather than directly addressing the appellants' contentions. The Court will have to sort through the relevant evidence to determine the applicability of the statute before addressing any other issues regarding the lower branch.

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[21] *Id.* at 35.
[22] *Id.* at 36–37.
[23] Appellant McGee's Opening Br. 10.
[24] Appellant Letica's Opening Br. 36.
[25] *Id*. at 34 (quoting Comp. Stat. of Mont.—General Laws § 1819 (1887)).
[26] Appellee's Ans. Br. 22.
[27] *Id.* at 23.
[28] *Id*.
[29] Appellant Letica's Opening Br. 35.

As to the appellants' second argument regarding the County's alleged non-recognition of the road after 1913, the Court would likely disfavor this argument because the inconsistencies on a map can be explained. While it is potentially troubling that a marked county road would not exist on a map, it is too great a leap to say, as Letica does, that a map from 1913 depicts "all known roads" when the map does not show the entire county and has large areas left blank because they not yet been surveyed.[30] Additionally, at trial, the appellants' expert witness "agreed that just because a road is not on a map doesn't mean that there is no county road in that location."[31]

### *B. The End of Modesty Creek Road*

The district court determined a county road existed on the lower branch and that it ended in the eastern portion of Section 22, in National Forest Land.[32] In its brief, Letica contested that the map the district court used to determine the location of the road did not show the road extending into Section 22, but that it actually ended on the eastern edge of Section 23 at "Dry Gulch."[33] Letica states the district had to rely on "hearsay-riddled mining evidence" in order to determine that the road ended over a mile beyond where it believes the road ends.[34]

#### *1. Analysis*

While the Court probably will not dwell on this issue, it is important to note why Letica makes this argument. If the lower branch were to end on the eastern border of Section 23 at Dry Gulch, then it would not reach the alleged prescriptive easement on the upper branch, which would affect the judgment as to the upper branches prescriptive easement.[35]

Letica's evidence, however, relies mainly on expert testimony which the court rejected as unpersuasive. As the trier of fact, the district court dismissed this argument because, after conducting a site view and reviewing mining evidence and other testimony, it found Appellant's expert witness's conclusions to be "inappropriate . . . post hoc rationalizations."[36] It is unlikely the Court will address this in much detail.

### *C. Public Prescriptive Easement on the Upper Branch*

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[30] Appellee's Ans. Br. 26 (quoting Appellant Letica's Opening Br. 17).
[31] *Id.* at 25–26 (citing FOF ¶ 58) (internal quotations omitted).
[32] Order 5, Oct. 6, 2014, No. DV-12-24.
[33] Appellant Letica's Opening Br. 14.
[34] *Id.* at 42.
[35] Appellant Letica's Reply Br. 18, June 22, 2015, No. DA 14-0780.
[36] Appellee's Ans. Br. 36 (citations omitted).

Letica and McGee argue that there was no prescriptive easement on the upper branch because the use was either not adverse or the adverse parties' control was insufficient to create a prescriptive easement.[37] Additionally, appellants argue that the burden for proving the existence of an easement lies with the party seeking the easement, and that the County in this case did not prove the elements by the clear and convincing standard.[38]

From 1905 to 1937, the land was part of the National Forest system, and easements cannot be granted over federal land.[39] From the time the Anaconda Mining Company owned the land, from 1937 to 1965, the district court found in its Findings of Fact that "the public generally knew that they were free to use Anaconda Company property."[40] Appellants emphasize Montana case law which holds permissive use is not adverse.[41] The district court, however, found that adversity did exist "by saying that general, public knowledge . . . is insufficient to establish permissive use," which the appellants argue is unsupported by case law.[42]

Secondly, the appellants argue that the only use of the upper branch was either private, seasonal, or otherwise insufficient to meet the elements of a prescriptive easement.[43] The only uses of the upper branch were: 1) seasonal hunting or fishing and 2) private access to water rights, neither of which satisfy the elements of an easement.[44] Additionally, the Supreme Court has held that limited maintenance outside of official public duty (e.g. done in coordination with the landowners) is not enough to establish an easement.[45]

*1. Analysis*

This issue is a microcosm of the battle between landowners' rights to their property versus the public policy of efficient use of land. The County's argument would compel landowners to actively prevent others from using their property to avoid an easement, while the appellants' argument would make it harder for the public to obtain an easement. The district court found a prescriptive easement was established between 1953 and 1980.[46] The County claims the burden then shifted to the landowners to prove the use was not adverse once the

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[37] *Id.* at 42.
[38] Appellant Letica's Opening Br. 45.
[39] Appellant McGee's Opening Br. 17 (citing *Burcalow Family, LLC v. The Corral Bar, Inc.*, 313 P.3d 182, 186 (2013)).
[40] Appellant Letica's Opening Br. 47.
[41] *Id.* (citing, e.g. *Pedersen v. Ziehl*, 311 P.3d 765, 768–69 (2013)).
[42] *Id.* at 17–18.
[43] *Id.* at 51–52.
[44] Appellant Letica's Opening Br. 52 (See *PLAA v. Madison County*, 321 P.3d 38, 46 (2014); *Leisz v. Avista*, 174 P.3d 481, 489 (2007); *Kessinger v. Matulevich*, 925 P.2d 864, 869 (1996)).
[45] *Id.* at 51 (citing *Leffingwell Ranch v. Cieri*, 916 P.2d 751, 755–56 (1996)).
[46] Appellee's Ans. Br. 42.

district court had heard multiple witnesses testifying as to the adverse use of the land.[47] The County also frames the use as "passive acquiescence" rather than "neighborly accommodation," which puts the onus on the landowner to actively forbid the use or else the court will assume adversity.[48] The Court will likely hear arguments to this issue because of the district court's holding that general knowledge is insufficient to dispute adverse use. It may ultimately decide for policy reasons that general awareness of public use is permissive so as to not require the landowner to actively campaign against public use.

### *D. Reverse Prescription of an Easement*

In the alternative, appellants also claimed if any prescriptive easement did exist, it would have been eliminated by reverse prescription because the parties took action to discourage public use, including installing a locked gate.[49] "[I]f a prescriptive easement exists, subsequent acts inconsistent with the claim by prescription can extinguish the easement."[50] Notably, the district court at one point agreed with appellants.[51] In its earlier decision not to grant a preliminary injunction in July 2012, the district court stated that if there was a public easement, it would likely have been lost through reverse prescription.[52] After determining the lower branch was a statutorily created road, however, the district court held that because the appellants illegally blocked off the upper branch by installing a gate on the lower branch, allowing reverse prescription would defy public policy.[53] In sum, the appellants argue that where the gate is placed is irrelevant; prohibiting public use for the statutory period of five years is enough in itself to extinguish a prescriptive easement.

#### *1. Analysis*

If the Court does affirm a prescriptive easement did exist on the upper branch, it will have to resolve the policy argument of reverse prescription. The County, for the most part, does not contest that the elements were not met, but rather that it is against public policy to allow reverse prescription by illegally blocking roads.[54] Appellants argue that it is enough that there were five years of non-use by the public, regardless of where the gates were locked.[55] It is more likely, however, that if the

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[47] *Id.* at 43.
[48] *Id.* at 44.
[49] Appellant Letica's Opening Br. 53–54; Appellant McGee's Opening Br. 18.
[50] Appellant Letica's Opening Br. 54 (quoting *Dome Mountain Ranch v. Park County*, 37 P.3d 710, 714 (2001) (internal quotations omitted)).
[51] Appellant McGee's Opening Br. 18.
[52] *Id.*
[53] Appellee's Ans. Br. 54.
[54] *Id.*
[55] Appellant Letica's Opening Br. 57.

Court gets this far in the analysis it will again uphold the district court's judgment. If the lower branch is upheld to be a legal public road, the Court will probably affirm that illegally blocking access to an easement is against public policy.

*E. Bifurcation of Letica's Constitutional and Tort Claims*

Letica's objection to the court's *sua sponte* bifurcation of the claims in its July 2013 order meets considerable resistance and will not likely be addressed by the Court. The County points out that the parties had entered into a Stipulation to Bifurcate Liability and Damages Claims until there was a final decision on the status of the roads.[56] The parties agreed that there would be "no reason to consider the other claims or damages at trial" until the parties knew the court's determination of the pending issue.[57] Additionally, the County argues that not only did Letica consent to the bifurcation, but they also did not present evidence at trial regarding these claims and they are therefore untimely and not reviewable.[58]

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[56] Appellee's Ans. Br. 57–58.
[57] *Id.* at 58.
[58] *Id.* at 59.