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## Public Lands Access Association v. Board of County Commissioners of Madison County

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**Graham Coppes**

**I. ABSTRACT**

On January 16, 2014, the Supreme Court of Montana reversed and remanded a district court decision that had foreclosed the public’s right to access the Ruby River. The Court held that the right of way was a public prescriptive easement, which extended beyond the road surface itself to include such area as necessary for the county to maintain the road in the interest of the public. Furthermore, the Court concluded that once a public right-of-way is established by prescriptive use, the scope of current and future use of such an easement is not limited to those historic adversarial practices which gave rise to the easement, but rather is subject to uses that are incidental to original uses or “reasonably foreseeable.” Finally, the Court found the adjacent landowner’s takings claim to be without merit because any compensable interest had been expressly severed by his predecessor in title and the enactment of the state’s Stream Access Law, which encumbered his deed with an inalienable public servitude. This decision clarifies potential ambiguities surrounding the public’s right to use roads and bridges for recreational access to Montana’s public lands. Ultimately, the Court protected Montana’s legacy of public access to its world famous rivers, consistent with its decisions on the issue over the past several decades.

**II. Introduction**

This case involves modern public use of several public roads in Madison County, Montana (“the County”) and the relationship of those permissible uses to property rights of landowners whose parcels abut such roads. The Public Lands Access Association (PLAA) appealed the decision of the district court that public roads created by prescriptive easement carry a diminished right-of-way width, allowing only public use of the road surface itself. On appeal, the Montana Supreme Court determined that the trial court erred in determining that the road carried two distinguishable rights-of-way, held by the

public and the county, respectively.<sup>1</sup> The Court found that the dimensions of a right-of way created by prescriptive use are not limited by the width of that road’s physical surface, but extend out to and include “whatever land is reasonably necessary to support and maintain the road and for the road to be safely and conveniently used.”<sup>2</sup> Similarly, the Court held that once established, modern use of public prescriptive roadway easements are not limited to the historic adversarial uses, but rather, the scope of these types of easements are more properly defined by “public uses that are reasonably incident to the uses through which the easement was acquired and uses that are reasonably foreseeable.”<sup>3</sup> Ultimately, the court concluded that using Seyler Lane to access the Ruby River at its intersection was a foreseeable use of a public road right-of-way that crosses a river.<sup>4</sup>

Addressing the case’s final issue, the Court determined that the takings argument raised by cross-appellant landowner James Cox Kennedy (Kennedy) was precluded by the express right-of-way granted to the county by his predecessor in title, which was attached to his deed at the time of his acquisition.<sup>5</sup> Furthermore, the Court held that the state of Montana could not have taken a compensable property interest from Kennedy through the enactment of the Stream Access Law because at the time title was transferred to him, the property already carried with it a dominant estate in favor of the public, and thus no right to exclude had been taken from him.<sup>6</sup>

### **III. Background**

The three roads at issue in this case (Duncan, Lewis and Seyler) cross the Ruby River (“the river”) in Madison County. All three bridges were originally built by and are currently maintained through the resources of the County. Kennedy owns the land immediately adjacent to the rights-of-way

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<sup>1</sup> *Public Lands Access Association v. Board of County Commissioners of Madison County*, 2014 MT 10, ¶ 24, \_\_\_ P.3d \_\_\_, 2014 WL 17316. [Hereinafter “PLAA”]

<sup>2</sup> *Id.* at ¶ 26.

<sup>3</sup> *Id.* at ¶ 51.

<sup>4</sup> PLAA, at ¶ 52.

<sup>5</sup> *Id.* at ¶ 60.

<sup>6</sup> *Id.* at ¶ 70.

on both Seyler and Lewis Lane.<sup>7</sup> In May of 2004, PLAA filed suit against the County, seeking a declaratory judgment in favor of the public’s right to access the river from those bridges after local landowners erected fences to prevent such use.<sup>8</sup> Kennedy intervened as a defendant, along with the Montana Stockgrowers Association and Hamilton Ranches.<sup>9</sup> Both parties moved for summary judgment and in October 2008 the district court issued an order stating that both Duncan District Road and Lewis Lane carried public rights-of-way, each 60 feet in width, but because the right-of-way on Seyler Lane was created through prescriptive use, additional fact finding was necessary to delineate the width of its easement as well as to ascertain the public’s right of access to the river from it.<sup>10</sup> Consequently, both parties’ motions for summary judgment were denied and a trial was set to resolve the remaining issues.<sup>11</sup>

Before trial, the parties stipulated to several facts, including that Seyler Bridge and its approaches on Seyler Lane are located on land owned in fee by Kennedy and both hold a county road right-of-way, established by prescriptive use.<sup>12</sup> The public’s right to use the paved portions of both was undisputed.<sup>13</sup> On April 16, 2012, the district court held that “PLAA failed to prove the existence of a public prescriptive easement beyond the fences<sup>14</sup> at Seyler Bridge by clear and convincing evidence”<sup>15</sup> and that the logical result of this failure was that “there is no public right whatsoever on either side of Seyler Lane outside the fences or beyond the traveled way where there is no fence.”<sup>16</sup> The district court’s final judgment further provided that “Madison County has a prescriptive right independent and separate from public use to lateral and subjacent support for Seyler Lane and Seyler Bridge, together

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<sup>7</sup> *Id.* at ¶ 4.

<sup>8</sup> *Id.* at ¶ 5.

<sup>9</sup> *Id.*

<sup>10</sup> *PLAA*, at ¶ 6.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at ¶ 10.

<sup>13</sup> *Id.*

<sup>14</sup> “In June 2004, Madison County issued Kennedy an “Encroachment Permit for Fence on County Bridge Right-of-Way Madison, Montana” (the “Encroachment Permit”). Pursuant to the Encroachment Permit, Kennedy installed private fences at three of the bridge corners at Seyler Bridge.” *PLAA*, at ¶ 8.

<sup>15</sup> *Id.* at ¶ 11.

<sup>16</sup> *Id.* at ¶ 12.

with such additional land as is reasonable and necessary for maintenance and repair.”<sup>17</sup> PLAA appealed; Kennedy cross-appealed the court’s denial of his motion for summary judgment.

#### **IV. Analysis**

The Montana Supreme Court reviews findings of fact for clear error. Rulings on motions for summary judgment are reviewed *de novo*. At the outset of its discussion, the Supreme Court synthesized PLAA’s appellate contentions into a single foundational question: “May the public use the Seyler Lane right-of-way to access the Ruby River?”<sup>18</sup> The Court then broke this issue into two separate sub-questions: “What is the width of the Seyler Lane right-of-way, and may the public use the right-of-way for recreational purposes?”<sup>19</sup>

##### **A. Width of the public right-of-way at the intersection of Seyler Lane and the Ruby River**

Because the trial court based its ruling on finding two distinct easements, the Court was compelled to analyze the difference between private and public rights-of-way that were created through prescriptive use. Highlighting that the district court relied exclusively on case law relating to private easements, the Court engaged in a review of its past decisions involving analogous public prescriptive easements.<sup>20</sup> Citing both statutory<sup>21</sup> and common law authority<sup>22</sup>, the Court held that it was improper for the trial court to uncouple a road’s maintenance easement from the public’s easement for travel.<sup>23</sup> The Court held that the applicable rule for public easements is that “the width of a public prescriptive roadway extends beyond the traveled portion of the road to include areas necessary for its support and maintenance”<sup>24</sup> and “for the road to be safely and conveniently used.”<sup>25</sup> This conclusion left the exact dimensions of the easements at issue here to be decided in accordance with the above stated principles.

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<sup>17</sup> *Id.* at ¶ 12.

<sup>18</sup> *Id.* at ¶ 16.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at ¶ 24.

<sup>21</sup> See Mont. Code Ann. § 7-14- 2107(3).

<sup>22</sup> See Rasmussen v. Fowler, 245 Mont. 308, 312, 800 P.2d 1053, 1056 (1990), Smith v. Russell, 2003 MT 326, ¶¶ 14-17, 21, 318 Mont. 336, 80 P.3d 431, and LAA v. Jones, 2004 MT 394, ¶ 33, 325 Mont. 236, 104 P.3d 496.

<sup>23</sup> *PLAA*, at ¶ 24.

<sup>24</sup> *Id.* at ¶ 25.

<sup>25</sup> *Id.* at ¶ 26.

The Court began this inquiry by laying out the foundational rule that “the width of a roadway acquired by prescription is ‘determined as a question of fact by the character and extent of its use and may be more or less than the width of highways established by statute.’”<sup>26</sup> As a result, the Court found the district court’s determination was further in error because it “must consider, in addition to the land necessary to support and maintain the road, historical evidence of the nature of the enjoyment by which the public acquired the right-of-way.”<sup>27</sup> As to the bridge structure itself, the Court found that based on substantial precedent “a bridge is a part of the public road upon which it is built.”<sup>28</sup> To this end, the Court ruled that the controlling authority made clear that “Seyler Bridge, including its appurtenances, additions, alterations, improvements and replacements and the approaches to the bridge, lands used in connection with the bridge, and improvements incident or integral to the bridge, is part of the Seyler Lane county road right-of-way.”<sup>29</sup>

In connection with this holding, the Court held the district court’s universal exclusion of historic evidence of recreational use by the public in error.<sup>30</sup> Acknowledging its own exclusion of such evidence in prior cases, the Court explained that it never intended to bar this type of evidence indefinitely.<sup>31</sup> Rather, the Court clarified that historical evidence of recreational use “may be one factor in determining ‘the nature of the enjoyment’ by which the public road right-of-way was acquired.”<sup>32</sup> Thus, the exact width of the “single, unified, public road right-of-way at Seyler Lane” was left to be established on remand, including evidence of recreational use.<sup>33</sup>

### **B. The Scope of Permissible Uses on Roadway Right-of-Ways Created by Prescriptive Use**

Next, the Court turned to the question of whether “PLAA is required to show that particular areas within the public road right-of-way have been used adversely to access the Ruby River in order for

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<sup>26</sup> *Id.* at ¶ 28, *See Kephart v. Portmann*, 259 Mont. 232, 855 P.2d 120 (1993).

<sup>27</sup> *PLAA*, at ¶ 28, MCA § 70-17-106.

<sup>28</sup> *Id.* at ¶ 29, *See State ex rel. Foster v. Ritch*, 49 Mont. 155, 156-57, 140 P. 731, 731 (1914).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at ¶ 33.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at ¶¶ 36-38.

<sup>33</sup> *Id.* at ¶ 32.

the public to now use them as such.”<sup>34</sup> The Court found that “the scope includes public uses that are reasonably incident to the uses through which the easement was acquired and uses that are reasonably foreseeable.”<sup>35</sup> Thus, the Court found that once a public prescriptive road is established, future uses are not restricted to only those which were adversely held.<sup>36</sup> In conclusion, the Court stated, “foot travel over a roadway is, and has always been, a foreseeable use of the road surface as well as any shoulders, embankments and abutments supporting the roadway[,]” and thus, using the road to access to the Ruby River was also reasonably foreseeable.<sup>37</sup>

### **C. Kennedy’s Cross-Appeal on his Motion For Summary Judgment for Taking**

The Court upheld the district court’s ruling rejecting Kennedy’s takings claims. The Montana Constitution provides that the state owns navigable and non-navigable waters in public trust and, as a result, the Court found Kennedy’s reliance on federal law to be misguided. Highlighting case law construing proper deed interpretation and the continuity of attached easements,<sup>38</sup> the Court focused on the intent of the parties in drafting, ultimately finding no evidence that Kennedy’s predecessor in title “did not intend to authorize access to the Ruby River from Lewis Lane for public fishing, wading, hunting or other uses”<sup>39</sup> because the deed itself expressly stated that the land was to be used as a “public highway” and held no further restrictions on public use.<sup>40</sup>

The Court swiftly rejected Kennedy’s claim that the state’s Stream Access Law itself acts to divest him of his constitutionally protected right to due process by taking his compensable interest in exclusion without compensation. The Court based this rejection on two fronts. First, because “Kennedy’s predecessor in interest deeded Lewis Lane to the County, he also granted the swath of

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<sup>34</sup> *Id.* at ¶ 42.

<sup>35</sup> *Id.* at ¶ 51.

<sup>36</sup> *Id.* at ¶ 51.

<sup>37</sup> *Id.* at ¶ 52.

<sup>38</sup> *Id.* at ¶ 59.

<sup>39</sup> *Id.* at ¶ 60.

<sup>40</sup> *Id.*

riverbed underlying the bridge and within the right-of-way to the public.”<sup>41</sup> Second, because Kennedy’s predecessor did not exclude the land underlying the bridge from the deed conveying the right-of-way, the public retains the right to use this “bought-and-paid-for right-of-way.”<sup>42</sup> The Court also explained that even if Kennedy’s predecessor had not expressly granted a public right-of-way to the County, the law surrounding the state’s Stream Access Law is well settled and dictates that the public has a right to use the beds of non-navigable rivers, up to the high water mark, for recreation.<sup>43</sup> Since title to non-navigable riverbeds did not pass to the public through the enactment of the Stream Access Law, the public holds no ownership interest in private streambeds.<sup>44</sup> Because “Kennedy never owned a property right that allowed him to exclude the public from using its water resource” which includes the riverbed and banks up to the high water mark, the Court concluded that nothing had been taken from him.<sup>45</sup>

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<sup>41</sup> *Id.* at ¶ 62.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at ¶ 69.

<sup>45</sup> *Id.* at ¶ 70.