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New Prescriptive Easement Law: The Montana Supreme Court Expands Public Access to Private Land in Public Lands Access Ass'n v. Board of County Commissioners of Madison County

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NOTES

NEW PRESCRIPTIVE EASEMENT LAW: THE MONTANA SUPREME COURT EXPANDS PUBLIC ACCESS TO PRIVATE LAND IN *PUBLIC LANDS ACCESS ASS'N V. BOARD OF COUNTY COMMISSIONERS OF MADISON COUNTY*

Elijah L. Inabnit*

I. Introduction

In *Public Lands Access Ass'n v. Board of County Commissioners of Madison County*,[1] the Montana Supreme Court decided an issue of first impression in Montana by holding that a public road right-of-way established by prescriptive use was not limited to the use through which the easement was acquired, but could include "any foreseeable uses," including recreational use.[2] In reaching this conclusion, the Court also made significant decisions affecting well-established laws regarding public prescriptive easements in Montana. The Court's conclusion gives the public an unfettered right to access the maintenance area of a public prescriptive easement. Moreover, the Court held non-historical use of the easement could inform a determination of the easement's width. While the Court's decision that public easements are not limited to historic uses is consistent with numerous other states that have determined the scope of use for public prescriptive

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1. 321 P.3d 38 (Mont. 2014).

2. *Id.* at 49.

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easements as expansive enough to include reasonably foreseeable public uses,[3] the right the Court granted the public and the means for defining the right are inconsistent with Montana's established easement laws. By so holding, the Court has extended means for the public to access surface waters and tacitly promoted Montana's "cultural and economic necessity" of recreational stream access.[4] The Court's expansion of the public's rights in prescriptive easements comes at a high cost to landowners' rights and demonstrates a failure of the Court to balance the interests of the public with those of private landowners.

This note discusses the Court's holding in *Public Lands Access Ass'n* in relation to Montana's established easement law. Part II describes the legal backdrop to *Public Lands Access Ass'n* that influenced the Court's decision. Part III of this note summarizes the factual and procedural background of *Public Lands Access Ass'n*. Part IV discusses the parties' arguments, the Court's reasoning and holding, and Justice McKinnon's dissenting opinion. Part V explains two reasons why the Court's holding is flawed when compared to precedent. This note concludes with a summary of *Public Lands Access Ass'n*'s significance, especially considering the well-established prescriptive easement law in Montana.

II. Backdrop: Prescriptive Easements and The Montana Stream Access Law

Montanans pride themselves on their many outdoor recreational opportunities, the common complaint being that there is not enough time to do everything Montana has to offer. Living in a state that seems to provide endless recreation can make it easy to forget that not every draw is open for hunting, not every trail is open to riding, and not every bridge is open for fishing access. Where Montanans may recreate has been a constant controversy that spans many different recreational pursuits.[5] However, increasing public access to Montana's rivers by expanding public prescriptive easement rights needlessly burdens the private landowner in a way that is inequitable and inconsistent with the laws of prescription. The Supreme Court's

3. *E.g.*, Lovvorn v. Salisbury, 701 P.2d 142, 144 (Colo. Ct. App. 1985); Boykin v. Carbon Cnty. Bd. of Comm'rs, 124 P.3d 677, 685–686 (Wyo. 2005); Bentel v. Cnty. of Bannock, 656 P.2d 1383, 1386 (Idaho 1983).

4. Sarah K. Stauffer, Comment, *The Row on the Ruby: State Management of Public Trust Resources, the Right to Exclude, and the Future of Recreational Stream Access in Montana*, 36 Envtl. L. 1421, 1424 (2006).

5. *See, e.g.*, Perry Backus, *Off-Road Riders Say They Are Being Shut Out*, Missoulian (Feb. 16, 2006), http://perma.cc/U5C7-XHFT (off-road riding area controversy); Cavan Williams, *Bitterroot Locals and Climbers Seek a Solution*, Montana Kaiman (Sept. 24, 2014), http://perma.cc/8B59-67TM (rock climbing area controversy); Marshall Swearingen, *Private Property Blocks Access to Public Lands*, High Country News (Feb. 2, 2015), http://perma.cc/4XN9-E36V (hunting access dispute).

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decision in *Public Lands Access Ass'n* impacts the long dispute over where Montanans may access the surface waters that are held for public use by the State. The Court's decision raises questions over the Court's interpretation of established prescriptive easement laws. To analyze these issues, it is necessary to first examine the laws concerning prescriptive easements as well as the legal morass behind the Court's decision.

A. Prescriptive Easements

Today's prescriptive easement is a product of centuries of English and American common law dating back to before 1275.[6] Prescription gives a property interest to "someone who makes an unauthorized use" of another's property for a "sufficiently long period of time."[7] The English courts developed the fictional "lost grant" as a way to effectively allow prescriptive use; the fiction being that, after a set number of years, the adverse users of land were presumed to have lost their "grant conveying the right of use."[8] As a result of the fictional lost grant, prescriptive easements could only exist if the adverse use "could have been the subject of a grant" in the first place.[9] The law of prescriptive easements has been accused of rewarding the "ad hoc use of a trespasser" over the planned use of a landowner, raising the question: "Can it be fair to reward a wrongdoer and punish an innocent property owner?"[10] The fact that American jurisprudence has continued to uphold prescriptive easement law indicates that the answer is yes. However, each state validates the law of prescription in different ways.

In Montana, prescription invokes over one hundred years of common law jurisprudence that governs the creation, breadth, and scope of prescriptive easements.[11] A public or private prescriptive easement is "created by operation of the law."[12] To establish either easement, the party claiming the easement must show "open, notorious, exclusive, adverse, continuous and uninterrupted use of the easement . . . for the full statutory period."[13] The statutory period for adverse use is five years.[14] Establishing a public road by prescription further requires that the public "have pursued a definite,

6. Michael V. Hernandez, *Restating Implied, Prescriptive, and Statutory Easements*, 40 REAL PROP. PROB. & TR. J. 75, 103 (2005).

7. *Id.*

8. *Id.* at 103–104.

9. *Id.* at 104.

10. Warsaw v. Chi. Metallic Ceilings, Inc., 676 P.2d 564, 593–594 (Cal. 1984) (Reynoso, J., dissenting).

11. *Pub. Lands Access Ass'n*, 321 P.3d at 58 (McKinnon, J., dissenting).

12. Swandal Ranch Co. v. Hunt, 915 P.2d 840, 843 (Mont. 1996).

13. *Id.*

14. MONT. CODE ANN. § 70–19–404 (2013).

fixed course, continuously and uninterruptedly."[15] This definite and fixed path may not "permit of any deviation."[16] Accordingly, the public's use of one part of the road does not give the public any claim to land beyond what has been publicly occupied.[17] The public can gain a prescriptive easement through adverse use of only that land used during the full statutory period.[18] Further, the public's acquired right "can never exceed the greatest use made of the land for the full prescriptive period."[19] A "secondary easement" is granted incident to the grant of a prescriptive easement for the purpose of repairing and maintaining the easement.[20] This secondary easement gives the owner of the easement the right to "enter upon the servient estate and make repairs necessary for the reasonable and convenient use of the easement."[21] However, this right "can be exercised only when necessary" and must be exercised in a way that does not "needlessly increase the burden upon" or unnecessarily injure the servient estate.[22] This standard for reasonable use of a prescriptive easement is well-established in Montana.[23] The Supreme Court's decision in *Public Lands Access Ass'n* upsets the established precedent regarding prescriptive easements and raises questions about future application of the law of prescription.

B. The Montana Stream Access Law

In the years leading up to the Court's decision in *Public Lands Access Ass'n*, tensions rose along the Ruby River as riparian landowners repeatedly attempted to block public access to the river at bridge abutments.[24] Fishermen, guides, and trappers have used county bridges and their abutments to access the Ruby River since at least 1946.[25] In July 2005, over 200 people accessed the Ruby River at various bridges in an effort to publicize the mounting tensions between riparian landowners along the river and recreational users.[26] Access to Montana's streams has been so controversial that

15. Violet v. Martin, 205 P. 221, 223 (Mont. 1922), *overruled by* Simonson v. McDonald, 311 P.2d 982, 986 (Mont. 1957); *see also* Johnson v. McMillan, 778 P.2d 395, 396 (Mont. 1989) (quoting Kostbade v. Metier, 432 P.2d 383, 385 (Mont. 1967)), *overruled by* Warnack v. Coneen Fam. Tr., 879 P.2d 715, 722 (Mont. 1994).

16. Descheemaeker v. Anderson, 310 P.2d 587, 589 (Mont. 1957).

17. Maynard v. Bara, 30 P.2d 93, 95 (Mont. 1934).

18. *Id.*

19. State v. Portmann, 423 P.2d 56, 58 (Mont. 1967).

20. Laden v. Atkeson, 116 P.2d 881, 883 (Mont. 1941).

21. *Id.* (internal quotations omitted).

22. *Id.*

23. *See* Mattson v. Mont. Power Co., 215 P.3d 675, 689 (Mont. 2009).

24. Stauffer, *supra* note 4, at 1422.

25. Appellant's Opening Brief, *Pub. Lands Access Ass'n v. Bd. of Cnty. Comm'rs of Madison Cnty.*, 2012 WL 3757862 at *10–11 (Mont. 2014) (No. DA 12-0312).

26. Stauffer, *supra* note 4, at 1422.

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some have described it as a "class war" pitting the recreating public against those fortunate enough to own land along a Montana river.[27]

The dispute over public access to Montana's rivers played out through litigation and legislation spanning the last 20 years.[28] In 1985, Montana's Legislature passed the Montana Stream Access Law[29] (MSAL), which recognized the public's constitutional right to use "all surface waters capable of recreational use . . . without regard to the ownership of the land underlying the waters."[30] The Legislature passed the MSAL shortly after two Montana Supreme Court decisions declared Montanans have a constitutional right to Montana's surface waters. In *Montana Coalition for Stream Access v. Curran*,[31] the Court held the public had a right to use surface waters for recreation and declared ownership of the riverbed and surface waters was a "public trust" conferred upon the State "upon statehood."[32] Similarly, in *Montana Coalition for Stream Access v. Hildreth*,[33] the Court stated Article IX, Section 3(3), of the Montana Constitution "clearly provides that the State owns the waters for the benefit of its people" and "does not limit the waters' use."[34] However, both cases make clear that the public's right to recreate on surface waters should not be "construed as granting the public the right to enter upon or cross over private property" to access the waters.[35] Although these cases and the MSAL grant the public the right to use surface waters for recreation, it is not clear how the public might access those waters.

While the recreating public is free to walk along the river up to the high water mark,[36] getting there can be difficult without a nearby access point. In *Galt v. Department of Fish, Wildlife and Parks ex rel. State*,[37] the Montana Supreme Court declared there was "no attendant right" to the public's use of surface waters for recreation to be as "convenient, productive, and comfortable as possible."[38] The Court further stated that while both the real property interests of private landowners and the public's property interest in water are important and constitutionally protected, when in competition they "must be reconciled to the extent possible."[39] Providing reasona-

27. *Id.* at 1427 (internal citation omitted).
28. *See* Mont. Coal. for Stream Access v. Curran, 82 P.2d 163 (Mont. 1984).
29. MONT. CODE ANN. § 23–2–302 (2013).
30. *Id.* § 23–2–302(1).
31. 682 P.2d 163 (Mont. 1984).
32. *Id.* at 170.
33. 684 P.2d 1088 (Mont. 1984) *overruled by* Gray v. City of Billings, 689 P.2d 268 (Mont. 1984).
34. *Id.* at 1091.
35. *Id.*; *Curran*, 682 P.2d at 172.
36. *Curran*, 682 P.2d at 172.
37. 731 P.2d 912 (Mont. 1987).
38. *Id.* at 915.
39. *Id.* at 916.

ble access is a balancing act that requires the state to "account for the 'existing uses' of private landowners."[40]

The Legislature's adoption of House Bill 190 in 2009, codified in the Montana Code Annotated at § 23–2–312, was a legislative effort to balance private landowners' rights with the public's right to access surface waters.[41] On one hand, the statute provides any person can "gain access to surface waters for recreational use by using: (a) a public bridge, its right-of-way, and its abutments; and (b) a county road right-of-way."[42] On the other, the statute "neither create[s] nor extinguish[es] any right related to county roads established by prescriptive use."[43] By providing reasonable access points where feasible and refusing to alter prescriptively gained roads across private property, the statute protects private landowners from further public encroachment onto their property. The Montana Attorney General Opinion upon which the statute was based[44] explains that a prescriptive road or bridge's amenability to stream access "is dependent upon their width and use during the prescriptive period."[45] Therefore, the subsection regarding prescriptive easements protects servient landowners in Montana from having an increased burden placed upon their property by the public. The statute's explicit grant of access to Montana streams at county road and bridge right-of-ways was an even-handed allowance providing reasonable access to the public while also protecting private landowners' interests. However, the Court's decision creates a right related to a road established by prescription despite the language of the statute.

While the Court and the Legislature recognized the public's constitutional right to use Montana's surface waters, the MSAL has been criticized for not providing the access necessary to enjoy this constitutional right.[46] Consequently, some suggest the Montana Constitution creates an "affirmative duty" for the state to provide the public with reasonable access to Montana's streams.[47] It is unclear whether this affirmative duty means landowners must make accommodations for reasonable access. Nonetheless, critics have argued the Montana Constitution demands that the State require landowners to provide reasonable accommodation to the recreating public.[48] Because both private property interests and public stream interests are con-

40. Stauffer, *supra* note 4, at 1439 (citing Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701, 712 (1995)); *see also Galt*, 731 P.2d at 916.

41. *Pub. Lands Access Ass'n*, 321 P.3d at 68 (McKinnon, J., dissenting).

42. MONT. CODE ANN. § 23–2–312(1).

43. *Id.* § 23–2–312(3).

44. H.R. 190, 61st Reg. Sess. (Mont. 2009).

45. Mont. Att'y Gen. Op. No. 13, 2000 WL 689341 at *7 (May 26, 2000).

46. Stauffer, *supra* note 4, at 1421.

47. *Id.*

48. *Id.* at 1443.

stitutionally protected, however, providing increased access through private property is easier said than done.

Traditionally, landowners did not have to be concerned for their property interests when fishermen or other recreationists crossed their private property.[49] However, the holding in *Public Lands Access Ass'n* has expanded public access to Montana's rivers by treading upon private landowners' property interests. By holding that a use other than the historical use through which the easement was gained may be considered a factor in determining the width of a prescriptive easement and expanding the public's right of access into a prescriptive easement's incidental maintenance area, the Court has interfered with the delicate balance between private property interests and the public's right to access streams. Further, the Court has created an access right where none should exist.

III. Factual and Procedural Background

In May 2004, the Public Lands Access Association, Inc., (PLAA) sued Madison County, seeking a declaratory judgment that the public could use Seyler Lane, Duncan District Road, Lewis Lane, and their respective bridges and abutments to access the Ruby River.[50] Along Seyler Lane at Seyler Bridge, James Kennedy, a riparian landowner, obtained a permit from Madison County to build fences in the right-of-way of Seyler Lane up to the abutments of Seyler Bridge.[51] Kennedy erected electric fences pursuant to his permit that kept his livestock on his property and off of Seyler Lane.[52] Kennedy's fences also blocked public access to Ruby River at Seyler Bridge.[53] Although Kennedy removed the electric fences that prompted PLAA's lawsuit,[54] he intervened in PLAA's litigation to defend his property rights.[55] Kennedy contended the existing right-of-ways allowed use by the public only upon the travelled surface between the fences and the bridge. According to Kennedy, when the public stepped off the road to scramble down to the river, they were overstepping the bounds of their easement.[56]

49. *See, e.g.*, Oates v. Knutson, 595 P.2d 1181, 1184 (Mont. 1979) (holding that fishing and other recreational use was "insufficient to raise the presumption of adverse use.").

50. *Pub. Lands Access Ass'n*, 321 P.3d at 40.

51. *Id.* at 41.

52. *Id.* at 45; Appellant's Opening Brief, *supra* note 5, at *10.

53. Appellant's Opening Brief, *supra* note 25, at *1.

54. *Id.* at *3, 10.

55. *Pub. Lands Access Ass'n*, 321 P.3d at 40.

56. Brief of Appellee, *Pub. Lands Access Ass'n v. Bd. of Cnty. Comm'rs of Madison Cnty.*, 2012 WL 5248695 at *7–8 (Mont. Oct. 12, 2012) (No. DA 12-0312).

The parties each moved for summary judgment in the Fifth Judicial District Court for Madison County.[57] In regards to Duncan district Road and Lewis Lane, the district court held that the public could use the entire right-of-way because both were committed to the public and defined by either statutory petition or grant.[58] The district court denied summary judgment in regard to Seyler Lane because Seyler Lane's right-of-way was established by prescriptive use.[59] Additional fact-finding was necessary to determine the actual width of the Seyler Lane right-of-way and whether the public was free to use the right-of-way to access the river.[60] The parties stipulated to the following facts: first, Kennedy owns the land underlying Seyler Bridge and its approaches along with the bed and banks of the Ruby River; second, Seyler Lane and Seyler Bridge are within a county road right-of-way that was gained by prescription; third, Madison County assumed jurisdiction over Seyler Lane and Seyler Bridge and is responsible for maintaining both the travelled surface and "the areas beyond the travelled surface and adjacent subsurface, by mowing, snow plowing, and weed spraying."[61]

On April 16, 2012, the district court held the public prescriptive easement provided a right for the public to travel only upon the travelled way between the fences along Seyler Lane and Seyler Bridge. Madison County had an extended right in a secondary easement, separate from the public use, to "lateral and subjacent support" as was necessary for "maintenance and repair."[62] The district court determined PLAA had failed to prove the public prescriptive easement extended beyond Kennedy's fences; thus, the district court could not permit public access past the narrowed fences at the abutments and down to the river.[63] The district court further held recreational use was insufficient to establish a prescriptive easement. Accordingly, the court did not allow PLAA to present evidence of recreational use to establish a prescriptive right beyond the existing roadway.[64] Finally, the district court specified that use of a prescriptive easement is limited to the use during the prescriptive period giving rise to the easement.[65]

PLAA appealed the district court's decision, taking issue with the district court's conclusions that (1) the public easement was limited to the area

57. *Pub. Lands Access Ass'n*, 321 P.3d at 40.
58. *Id.* at 40–41.
59. *Id.* at 41.
60. *Id.*
61. *Id.*
62. *Id.* at 41–42.
63. *Pub. Lands Access Ass'n*, 321 P.3d at 41.
64. *Id.* at 45.
65. *Id.* at 47.

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within the fences,[66] (2) evidence of recreational activity could not be considered in determining the extent of the easement,[67] and (3) usage of a prescriptive easement is limited to the usage giving rise to the easement.[68]

On appeal, PLAA asserted that, because Seyler Lane and Seyler Bridge are within a county road right-of-way acquired by prescriptive use, the public obtained by prescription the right to use the full right-of-way, including the area necessary for maintenance of the roadway.[69] PLAA argued that the district court's delineation of the County's secondary easement "improperly limited the public's use" of its acquired rights.[70] Further, PLAA argued the district court erred in excluding historical evidence of recreational use at Seyler Bridge.[71]

In response, Kennedy argued the district court's decision that the public did not have a right to use the maintenance area "legally established the public's right" to travel only on the surface of Seyler Lane and Seyler Bridge and was not error.[72] Additionally, Kennedy asserted that the district court's determination that Madison County had a secondary easement past the bounds of the public's easement should not be reversed because the County had an undisputed duty to maintain and repair the public easement that necessitated the use of additional land beyond the public's travelled way.[73]

IV. The Montana Supreme Court's Decision in *Public Lands Access Ass'n*

A. The Majority's Decision and Reasoning

The Court reversed the district court's delineation of a primary and secondary easement at Seyler Lane and Seyler Bridge by finding that a county right-of-way acquired by prescriptive use conferred public access to the entirety of the easement.[74] The Court held the district court incorrectly relied upon cases defining secondary easements in regard to private easements to support its finding of a secondary easement. The Court noted a secondary easement is incident to a private party's prescriptive easement for the maintenance and use of the easement.[75] Consequently, the secondary

66. *Id.* at 42.
67. *Id.* at 45.
68. *Id.* at 46–47.
69. *Pub. Lands Access Ass'n*, 321 P.3d at 42.
70. *Id.*
71. *Id.* at 45.
72. Brief of Appellee, *supra* note 6, at *7–8.
73. *Id.* at *8–10.
74. *Pub. Lands Access Ass'n*, 321 P.3d at 42.
75. *Id.* at 43.

easement is limited to the area necessary for maintenance of the prescriptive easement.[76] Although the Court noted established easement law limiting the use of secondary easements, the Court distinguished this law as pertaining to private rather than public easements.[77] However, because Seyler Lane and Seyler Bridge are a county road, the whole easement should be subject to Montana Code Annotated § 7–14–2107(3), which does not distinguish between the public's use of the area of the road itself and the land "necessary to enjoying and maintaining [the road]."[78] To support its holding that a county road gained by prescription included the maintenance area, the Court cited several cases that took into account the maintenance of the road in determining that adverse use existed.[79] Further, the Court cited numerous out-of-state decisions that held the width of a prescriptive public road includes the area necessary for maintaining the road.[80] Because there was no question as to whether Seyler Lane was a county road, the Court determined there should be no differentiation between the prescriptive easement for the travelled way and the maintenance area.[81] Accordingly, the width of the single, public road easement needed to be determined on remand.[82]

To provide guidance on a determination of the width of the easement, the Court acknowledged that roadways gained by prescriptive use are not subject to the statutory minimum width of 60 feet.[83] The Court noted the width of a prescriptive roadway is "determined as a question of fact by the character and extent of its use."[84] Evidence of the County's maintenance would show the extent of the use.[85] Since Seyler Bridge is connected to Seyler Lane, the Court advised that land necessary to maintain the bridge and its abutments should also be considered in determining the road's right-of-way at the bridge.[86] Further, the Court held the district court erred by excluding evidence of recreational use in determining the width of the public right-of-way.[87] The Court clarified that, although it has held that use by fishermen and other recreationists is "not sufficient to establish prescriptive use,"[88] it has not held that "recreational use may never be considered."[89]

76. *Id.* at 42–43.
77. *Id.* at 43.
78. MONT. CODE ANN. § 7–14–2107(3) (2013); *Pub. Lands Access Ass'n*, 321 P.3d at 43.
79. *Pub. Lands Access Ass'n*, 321 P.3d at 43.
80. *Id.* at 43–44.
81. *Id.* at 44.
82. *Id.*
83. *Id.*
84. *Id.* (quoting State v. Portmann, 423 P.2d 56, 58 (Mont. 1967)).
85. *Pub. Lands Access Ass'n*, 321 P.3d at 45.
86. *Id.*
87. *Id.* at 46.
88. *Id.* (quoting Leisz v. Avista Corp., 174 P.3d 481, 489 (Mont. 2007)).
89. *Id.*

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The difference is that a fisherman's use of an abutment cannot create an easement, in accordance with Montana Code Annotated § 23—2—322(2)(b), but may be "one factor" used to determine the width of an existing prescriptive easement.[90]

Having determined the travelled way and the maintenance area were all part of a single public right-of-way with a width to be determined by evidence of maintenance and recreational use, the Court needed to determine whether the public could use the prescriptive roadway to access the Ruby River. The issue was one of first impression in Montana and boiled down to whether the use of a public prescriptive easement could be expanded beyond the historical use that gave rise to the easement in the first place. The Court determined that the use of a public road right-of-way established by prescription is not limited to the "adverse usage through which the easement was acquired."[91] The Court held that, unlike a private prescriptive easement, the scope of use for a public prescriptive easement includes both "reasonably incident" and "reasonably foreseeable" uses.[92] The Court noted that in past instances where a public prescriptive road easement had been established, the Court had not limited the scope of use to the historic use through which the easement was acquired.

In determining that the use of a public prescriptive easement was limited to the historic use during the prescriptive period, the district court erred by relying on *Montana v. Portmann*.[93] *Portmann* held the use of a prescriptive easement could never exceed the greatest use during the prescriptive period. However, the Court in *Portmann* was concerned with defining the width of a public prescriptive easement, not the scope of its use.[94] Accordingly, *Portmann* further justified the Court's conclusion that "public uses should be considered in determining the *width* of the public road right-of-way."[95] The Court also noted that other states had not limited the use of a prescriptive easement to the historical use during the prescriptive period based on the logic that limiting the use of public highways would defeat the "very nature of a public road system."[96] The Court determined that public roadways gained by prescription should not be treated differently than public highways in general and should be amenable to "all uses to which [they] might reasonably be put in view of . . . the increasing needs of the public."[97]

90. *Id.*

91. *Pub. Lands Access Ass'n*, 321 P.3d at 49.

92. *Id.*

93. *Id.* at 47; 423 P.2d 56, 58 (Mont. 1967).

94. *Pub. Lands Access Ass'n*, 321 P.3d at 47.

95. *Id.* (emphasis in original).

96. *Id.* at 48; Boykin v. Carbon Cnty. Bd. of Comm'rs, 124 P.3d 677, 686 (Wyo. 2005).

97. *Pub. Lands Access Ass'n*, 321 P.3d at 48–49 (quoting Kipp v. Davis-Daly Copper Co., 110 P. 237, 240 (Mont. 1910)).

Therefore, the Seyler Lane right-of-way should be amenable to foot traffic down to the Ruby River because such use is a "reasonably foreseeable use" of a roadway crossing a river.[98] Thus, PLAA was not required to present evidence of adverse travel along a fixed path down to the Ruby River in order for the public to continue using Seyler Bridge to access the river.

B. Justice McKinnon's Dissenting Opinion

Justice McKinnon pointed out that the majority opinion was based on an incorrect stipulated fact. Justice McKinnon stated that the parties' agreement that Seyler Lane is a county road established by prescriptive easement is incorrect for two reasons. First, county roads cannot be established by prescriptive use. The methods for establishing a county road are codified in Montana Code Annotated § 7–14–2101(2) to (3) and do not include prescriptive use.[99] Second, for Seyler Lane to be established as a county road, Madison County needed to express through its board of commissioners its intent to establish Seyler Lane as a county road.[100] At trial, however, Madison County asserted "its right to maintain Seyler Lane and Seyler Bridge" was "separate from the general public's prescriptive easement to travel on the roadway."[101] Justice McKinnon discerned that if Madison County had adopted Seyler Lane as a county road these "separate prescriptive easements for maintenance would have been unnecessary."[102] Further, referring to Seyler Lane as a county road right-of-way while also acknowledging it was established by prescriptive use was "legally inconsistent."[103]

As a result of the incorrect stipulation that Seyler Lane was a county road, the Court incorrectly applied county road statutes to determine what could be considered to define the width of the Seyler Lane right-of-way. Justice McKinnon noted that a determination of the prescriptive easement using county road or public highway statutes would be inconsistent with *Portmann*.[104] In *Portmann*, the Court held the public could "obtain title by adverse possession of that only which it has occupied during the full statutory period."[105] McKinnon asserted that when the Court claimed county road statutes applied to Seyler Lane the Court not only misapplied the law to a public highway gained by prescription but also twisted the language of the statute to expand the width of a prescriptive public right-of-way.[106]

98. *Id.* at 49.
99. *Id.* at 57 (McKinnon, J., dissenting); MONT. CODE ANN. § 7–14–2101(2)–(3).
100. *Pub. Lands Access Ass'n*, 321 P.3d at 57–58 (McKinnon, J., dissenting).
101. *Id.* at 58.
102. *Id.*
103. *Id.*
104. *Id.* at 60.
105. *Portmann*, 423 P.2d at 58.
106. *Pub. Lands Access Ass'n*, 321 P.3d at 60 (McKinnon, J., dissenting).

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Claiming that Montana Code Annotated § 7–14–2107(3) is inapplicable to Seyler Lane, Justice McKinnon noted that the statute was intended to limit the public's acquisition to "'*only*' the right-of-way and the incidents necessary to enjoying and maintaining it."[107]

Justice McKinnon specified that common law principles governing the acquisition of prescriptive easements should define the width of the right-of-way at Seyler Lane and Seyler Bridge. Since Justice McKinnon held that county road statutes are inapplicable, remand for a determination of the width of the right-of-way was unnecessary because the prescriptive public road had already been defined by the physically paved way itself, and the public's right to travel is constrained to that definition.[108] The cases cited by the majority in support of the notion that the public's prescriptive easement necessarily contains the maintenance area "do not hold that the maintenance and support area may also be used for public travel."[109] Justice McKinnon argued that common law principles do not support the notion that a public prescriptive road may be expanded beyond the area occupied during the prescriptive period because this could effectively turn the maintenance area into the new travelled way.[110] This new travelled way would then require an expansion of the maintenance area and a further imposition on private property.[111] Further, Justice McKinnon claimed the majority's opinion disregarded common law precedent regarding public prescriptive easements that clearly confined the prescriptive right to only the path travelled during the prescriptive period.[112] Justice McKinnon concluded by claiming the Court's decision embroiled it in the stream access controversy by facilitating stream access where both precedent and the Legislature had concluded none should exist.[113]

V. ANALYSIS

The Court has created a public stream access point where none should exist. Although the Court has not increased the breadth of the right-of-way necessary for maintaining Seyler Lane, the Court has expanded the area to be publicly travelled by drawing an untenable distinction between private and public prescriptive easements. In particular, two aspects of the Court's holding fail to withstand close scrutiny. First, the Court inappropriately de-

107. *Id.* (quoting MONT. CODE ANN. § 7–14–2107(3) (emphasis added)).

108. *Id.* at 64–65.

109. *Id.* at 62.

110. *Id.* at 65.

111. *Id.*

112. *Pub. Lands Access Ass'n*, 321 P.3d at 64–65 (McKinnon, J., dissenting); *e.g. Portmann*, 423 P.2d at 58; *Maynard*, 30 P.2d at 95.

113. *Pub. Lands Access Ass'n*, 321 P.3d at 68 (McKinnon, J., dissenting).

termined that a single expansive easement exists that is entirely open to public travel. Second, the Court unfittingly declared that a non-historical recreational use could be considered in determining the width of the expanded easement.

A. The Maintenance Area is Incident to and Distinguished From the Travelled Way

The majority held the public acquired a single public right-of-way at Seyler Lane and Seyler Bridge.[114] To reach this conclusion, the majority asserted county road and public highway statutes support the expansion of the public's right to use Seyler Lane and Seyler Bridge.[115] However, the public's right to access Seyler Lane and Seyler Bridge is limited by the fact that Seyler Lane and Seyler Bridge are within a public prescriptive easement. Therefore, the public's acquired right should be established and limited by the common law authorities that govern private and public prescriptive easements.

The majority incorporates the parties' stipulation that Seyler Lane and Seyler Bridge are a county road and applies county road statutes to support the assertion that the public acquired one expansive easement through prescription.[116] If Seyler Lane were a statutorily established county road, there would not be a distinction between the easement gained by travel and the easement gained by maintenance.[117] Instead, as provided in Montana Code Annotated § 7–14–2107, the public would gain access to the entire roadway, including the incidental maintenance area.[118] While § 7–14–2107 governs county roads "lawfully acquire[d]" by the board of county commissioners, it does not govern prescriptively acquired public easements.[119] Section 7–14–2101(4)(b) lists the ways by which a county road may be acquired. As Justice McKinnon observed, the enumerated list of methods by which a county road may be acquired does not include prescriptive use.[120] Because prescriptive use is not a means of establishing a county road and it is not disputed that the public acquired its right to Seyler Lane through prescriptive use, Seyler Lane is not governed by county road statutes.

114. *Id.* at 42 (majority opinion).

115. *Id.* at 43.

116. *Id.* at 42–44.

117. *See* MONT. CODE ANN. § 7–14–2107.

118. *Id.* § 7–14–2107(3).

119. *See id.* § 7–14–2107(1).

120. *See id.* § 7–14–2101(4)(b); *Pub. Lands Access Ass'n*, 321 P.3d at 57 (McKinnon, J., dissenting).

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Further, in *Pedersen v. Dawson County*,[121] the Court recognized that "implicit in all of Title 7, Chapter 14 as well as our prior decisions is that county roads cannot be created without the county's intent, expressed through its board of commissioners, to do so." [122] Rather than designating Seyler Lane as a county road, however, Madison County asserted that its right to maintain, repair and replace the paved portions of Seyler Lane and Seyler Bridge arose through the County's own prescriptively established easement.[123] As Justice McKinnon observed, Madison County's assertion is inconsistent with the laws governing the creation of county roads and would have been unnecessary if Seyler Lane were indeed a county road.[124] In short, the parties' stipulation that Seyler Lane and Seyler Bridge are a county road is contrary to the laws regarding the establishment of county roads. The Court is bound to the parties' stipulations "unless contrary to law, court rule, or public policy."[125] Accordingly, the Court was not bound to the parties' stipulation and should have refrained from applying county road law. For these reasons, § 7–14–2107(3) cannot support the assertion that the public has acquired one expansive and unconstrained right-of-way that includes unlimited access to the maintenance area.

The majority opinion uses public highway statutes to support the expanded public right at Seyler Lane and Seyler Bridge.[126] Despite the Court's assertion, these statutes support the use of common law as the means for determining the public's right. Section 60–1–103(22) provides that the public may acquire a public highway, including a bridge, by the public's adverse use when jurisdiction has been assumed by "any political subdivision of the state."[127] A "public highway" is also a general term defined as a public way "for purposes of vehicular travel" and includes "the entire area within the right-of-way."[128] The term "highway" includes "rights-of-way or other interests in land" while "right-of-way" is defined as "a general term denoting land, property, or any interest in land or property . . . acquired for or devoted to highway purposes."[129] Accordingly, the interest the public gained is the land devoted to highway purposes. However, this general definition of what the public has acquired should yield to the

121. 17 P.3d 393 (Mont. 2000).

122. *Id.* at 396.

123. *Pub. Lands Access Ass'n*, 321 P.3d at 58 (McKinnon, J., dissenting).

124. *Id.*

125. Sch. Dist. No. 4, Lincoln Cnty. V. Colburg, 547 P.2d 84, 86–87 (Mont. 1976).

126. *Pub. Lands Access Ass'n*, 321 P.2d at 45.

127. MONT. CODE ANN. § 60–1–103(22)(d) (2013).

128. *Id.* § 60–1–103(19).

129. *Id.* §§ 60–1–103(18), (23) (emphasis added).

specific definition of what has been acquired, especially when the two are inconsistent.[130]

Specifically, when the public takes land for a highway, the public "may acquire a fee simple *or any lesser estate or interest*."[131] The Court recently reiterated the understanding that "an easement is *an interest* held by one person in lands owned by another, consisting of the right to use the land for a specific purpose."[132] Because the public's acquisition of both Seyler Lane and Seyler Bridge was through a prescriptive easement, the interest the public acquired is the lesser interest defined by the easement. Statutorily, the establishment of an easement is "determined by the terms of the grant or the enjoyment by which [the easement] was acquired."[133] In other words, because it is undisputed that the public gained access to Seyler Lane and Seyler Bridge through a prescriptive easement, the interest the public gained should be determined and limited by the laws governing public prescriptive easements, not highway laws.

As previously discussed, the laws governing the establishment of prescriptive easements are well established in Montana.[134] In order to establish a prescriptive easement, "the party claiming the easement must show 'open, notorious, exclusive, adverse, continuous and uninterrupted use of the easement'" for the full five-year statutory period.[135] A public easement does not require exclusivity of use.[136] However, when a public prescriptive easement is established, there must be convincing evidence that the public has "pursued a definite, fixed course, continuously and uninterruptedly."[137] The parties did not dispute the fact that the public acquired the right to use Seyler Lane and Seyler Bridge through prescription; therefore, these elements must have all been met at the time the easement was established.[138] It is also undisputed that when a prescriptive easement is gained there is an incidental area also acquired for maintenance.[139] The issue, then, is whether this area is a limited secondary easement when the prescriptive easement is public.[140]

130. *See id.* § 1–2–102 (2013); Mont. Stockgrowers Ass'n v. Mont. Dep't of Revenue, 777 P.2d 285, 290 (Mont. 1989) ("In construing statutory definitions according to the intent of the legislature, it is fundamental that the specific prevails over the general.").

131. MONT. CODE ANN. § 60–4–101 (emphasis added).

132. Woods v. Shannon, 344 P.3d 413, 368 (Mont. 2015) (emphasis added).

133. MONT. CODE ANN. § 70–17–106.

134. Rasmussen v. Fowler, 800 P.2d 1053, 1055 (Mont. 1990).

135. Pub. Lands Access Ass'n v. Boone and Crockett Club Found., 856 P.2d 525, 527 (quoting Keebler v. Harding, 807 P.2d 1354, 1356 (Mont. 1991)).

136. Hitshew v. Butte/Silver Bow Cnty., 974 P.2d 650, 654 (Mont. 1999).

137. *Violet*, 205 P. at 223.

138. *See* Appellant's Opening Brief, *supra* note 25, at *19.

139. *Pub. Lands Access Ass'n*, 321 P.3d at 42–43.

140. *Id.* at 43.

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The Court deviates from precedent by finding that when a *public* prescriptive easement is at issue, there should be no distinction between the different areas of public control.[141] The majority cites several Montana cases as authority for the position that there is one undivided public road right-of-way.[142] However, these cases merely stand for the holding that maintenance of the road by the county is sufficient to show adverse control by the public, not that there is one undivided road right-of-way. In *Rasmussen v. Fowler*,[143] the Court accepted adverse use by the public as well as maintenance by the county as "sufficient to show adverse control" to establish an easement by prescription. [144] In *McClurg v. Flathead County Commissioners*,[145] the Court again considered the county's maintenance of a publicly used road to be evidence supporting the establishment of a public prescriptive easement.[146] The Court reached similar holdings in *Public Lands Access Ass'n v. Jones*,[147] *Hitshew v. Butte/Silver Bow County*,[148] and *Swandal Ranch Co. v. Hunt*.[149] However, in all of these cases, the issue was not the width of the easement, nor whether the public could use the secondary easement for travel, but whether there was a prescriptive easement at all.[150] The Court cited *Smith v. Russell*[151] as further support, but the issue in that case was whether a public right-of-way given to the city had been abandoned by the city, and the case does not discuss adverse use at any point, making it irrelevant to the current discussion. The cases relied upon by the Court did not take into account evidence of maintenance to determine *what* area was conferred, but rather, to determine *whether* a prescriptive easement existed at all. Consequently, these cases do not support the assertion that when a public road is established by a public prescriptive easement, there is no distinction between the areas acquired by the public. In holding otherwise, the Court provided increased access across private property by asserting that both the primary and secondary easements were acquired by the public when the easement was established.

141. *Id.* at 43–44.

142. *Id.* at 43.

143. 800 P.2d 1053 (Mont. 1990).

144. *Id.* at 1056.

145. 610 P.2d 1153 (Mont. 1980).

146. *Id.* at 1156.

147. 104 P.3d 496, 502 (Mont. 2004) (holding that adverse use by the public coupled with county's maintenance of the road to be sufficient to establish a public prescriptive easement).

148. *Hitshew*, 974 P.2d at 654–655 (finding that the county's maintenance of the disputed road, as well as other adverse uses by the public, established a public prescriptive easement).

149. *Swandal Ranch Co.*, 915 P.2d at 844–845 (finding that the county's maintenance of the disputed road without permission, as well as public uses of the road, supported a finding of adverse usage).

150. *Rasmussen*, 800 P.2d at 1055; *McClurg*, 610 P.2d at 1156; *Hitshew*, 974 P.2d at 653; *Swandal Ranch Co.*, 915 P.2d at 842–843; *Jones*, 104 P.3d at 498.

151. 80 P.3d 431 (Mont. 2003).

The rules governing the establishment of public prescriptive easements do not contemplate establishing an overly broad area for general use by the public; instead, the rules serve to constrain what the public acquires. When the public is establishing a prescriptive easement, the definite and fixed path it pursues cannot deviate.[152] When the public acquires an easement by using one part of a road, the public may not then claim a right to a portion beyond what was occupied.[153] Further, the public cannot gain title through adverse use of any land that was not used during the statutory period,[154] and the public's use may not become a greater imposition upon the landowner than the greatest imposition recognized during the prescriptive period.[155] Leaving the road to travel down to the river certainly qualifies as a deviation that could not have led to a prescriptive right. If this beaten path down to the river were part of the original public use that established the easement, then there would be no contest about whether the public could continue to use the path because it would not be a use in excess of the greatest use made during the prescriptive period. However, without evidence that the path down to the river was part of the original prescriptive use, there can be no dispute that the path is a use in excess of the use that established the easement. Accordingly, the public's claim that the path is part of the easement should be barred because it is a claim to another portion of the easement not occupied by the public.[156]

When the public acquired the right to use Seyler Lane and Seyler Bridge, the public necessarily gained lands adjacent to the travelled way for the support and maintenance of the newly acquired public right. The Court in *Mattson v. Montana Power Co.*[157] cited with approval the assertion in *Crutchfield v. F.A. Sebring Realty Co.*[158] that "*every* easement carries with it by implication the right, sometimes called a secondary easement, of doing what is reasonably necessary for the full enjoyment of the easement itself."[159] Notably, there is no distinction between private and public easements. Common sense dictates that this incidental right is necessary whether the prescriptive easement is being acquired by a private individual or by the public and should not be expanded simply because the easement is public. In *Laden v. Atkeson*,[160] the Court stated that a secondary easement is to be used "only when necessary and in such a reasonable manner as not to

152. *Descheemaeker*, 310 P.2d at 589.
153. *Maynard*, 30 P.2d at 95.
154. *Id.*
155. *Portmann*, 423 P.2d at 58.
156. *Maynard*, 30 P.2d at 95.
157. 215 P.3d 675 (Mont. 2009).
158. 69 So. 2d 328 (Fla. 1954).
159. *Mattson*, 215 P.3d at 687 (quoting *Crutchfield*, 69 So. 2d at 330 (emphasis added)).
160. 116 P.2d 881 (Mont. 1941).

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needlessly increase the burden upon the servient tenement."[161] To limit the private use of an incidental easement area but allow unfettered use of the same area when the easement is public does not make sense given the burden allowing an unlimited number of people to traverse the maintenance area would place upon the servient tenement. The maintenance area is intended for maintenance and repair of the travelled way and should not become the object of maintenance and repair itself. Allowing unfettered public access into the maintenance easement would increase the effects of erosion, consequently causing a greater need for maintenance and repair within the maintenance area itself. Such increased use would be outside the scope of the incidental maintenance easement and would inevitably burden the servient tenement in an unnecessary manner.

The majority notes the established law recognized in *Laden*, that an incidental easement is to be sparingly used so as not to unduly burden the servient tenement, but draws a distinction based upon the fact that the easement in *Laden* was a private one.[162] The majority then states that there has not been a distinction in Montana law between the areas gained in a public prescriptive easement and cites numerous Montana cases.[163] However, as previously discussed, the cited authorities do not support this position because they never had cause to address the issue.[164] Although there is not a distinction between private and public prescriptive easements, the longstanding principles applicable to prescriptive easements establish that secondary easements are only given for necessary maintenance purposes. It does not make sense to expand access simply because the easement is public and not private. Accordingly, the majority's distinction between public and private appears artificial because it is inconsistent with longstanding easement principle.

The Court then asserts that this lack of distinction between the primary and secondary easement is consistent with the general rule recognized in other jurisdictions and cites to multiple out-of-state cases.[165] Nevertheless, these cases do not establish that the incidental area is undistinguished and may be used at the whim of the traveling public. Rather, the court in *Nikiel v. City of Buffalo*[166] stated that the incidental area is included *as necessary* for "highway purposes."[167] Uninhibited travel by the public over the shoulders of the road certainly should not qualify as highway purposes. In *Keidel*

161. *Id.* at 883 (internal quotations and citations omitted).

162. *Pub. Lands Access Ass'n*, 321 P.3d at 42–43.

163. *Id.* at 43.

164. *Rasmussen*, 800 P.2d at 1055; *McClurg*, 610 P.2d at 1156; *Hitshew*, 974 P.2d at 653; *Swandall Ranch Co.*, 915 P.2d at 843; *Jones*, 104 P.3d at 501.

165. *Pub. Lands Access Ass'n*, 321 P.3d at 43–44.

166. 165 N.Y.S.2d 592 (N.Y. App. Div. 1957).

167. *Id.* at 597 (emphasis added).

v. Rask,[168] the court first noted that, as a general rule, the use of a prescriptive easement is fixed and "no use can be justified . . . unless it can fairly be regarded as within the range of privileges asserted by the adverse user and acquiesced in by the owner of the servient tenement."[169] The court then stated that the width is determined by the actual use for roadway purposes but also "necessarily includes" adjacent land "*which is needed for the prescription to be maintained* as a public road."[170] Beating a trail down to the river is not a necessary use of the incidental area for maintenance, and the current controversy demonstrates that it is not a use "acquiesced in by the owner of the servient tenement."[171] In *Campbell v. Covington County*,[172] the Mississipi Supreme Court stated that the public is "not limited" to the actual width of the "beaten path" because the "prescriptive right carries with it the beaten path and whatever is *necessary* to make the beaten path a usable highway."[173] However, the court then clarified that just because the public was not limited to solely the beaten path "does not mean that the prescriptive right carries with it the right in the public to lay out and construct an extended and enlarged highway; *they are confined to the prescriptive right*." [174] This clearly establishes that the public is not at leisure to traverse the maintenance area at will or to establish a new path. Instead, these authorities bestow the incidental area to the public exclusively for necessary uses, distinguishing the incidental easement from the prescriptive easement by the limitation on its use. None of these cases support the notion that the adjacent land gained for maintenance may become an expanded area for public travel.

The out-of-state authorities cited by the Court make clear that the public gains an incidental area *as necessary for maintenance* and, although it is public and not consistently labeled a "secondary easement," this does not mean that the public may use the area at the public's whim and for non-maintenance purposes. Rather, this incidental area is distinguished by the means through which it was acquired. The majority does not recognize this incidental right as a separate secondary easement because this would limit the public's use of the area conferred under this right. By holding that the public has gained one unrestricted easement, the Court is seizing an opportunity to increase access across a landowner's property while avoiding an express requirement that the landowner accommodate public access. Regardless of what the incidental area is called, the public derived the right to

168. 290 N.W.2d 255 (N.D. 1980).
169. *Id.* at 258.
170. *Id.* (emphasis added).
171. *Id.*
172. 137 So. 111 (Miss. 1931) (emphasis added).
173. *Id.* at 112.
174. *Id.* (emphasis added).

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use it from a secondary easement and the public's right should be confined to the rights acquired in a secondary easement, notwithstanding the fact that the secondary easement is public. For these reasons, the public has not gained one expansive and unrestricted roadway but has gained a public prescriptive easement with an incidental maintenance area that may be used only as necessary for maintenance and in accordance with secondary easement laws.

By holding that the public has gained one expansive easement, the Court is allowing the public to use the incidental area to access the Ruby River under a purportedly already acquired right of use. However, the Court is expanding the right the public gained in the maintenance area and creating access where none should exist. The maintenance area gained by the public should be used strictly for necessary maintenance and should not be open for public stream access.

B. Recreational Use Should Not Define the Right-of-Way of Seyler Lane or Seyler Bridge

Since the Court decided the public had gained one unrestricted easement that would allow public travel down to the Ruby River, the Court next needed to ensure that the width of the easement would be expansive enough to accommodate this stream access. The majority remanded the case to the district court to determine a "definite width of the public road right-of-way at Seyler Bridge."[175] To aid the district court in its task of determining the various widths, the majority instructed the district court to consider § 60–1–103(2) when determining the width at the bridge, § 7–14–2107(3) when determining what was necessary for maintenance and enjoyment, and § 70–17–106 to allow historical use including recreational use to further determine the width.[176] As previously discussed, county road statutes are not applicable and public highway statutes suggest the use of common law to determine the interest gained by the public. Consequently, § 7–14–2107(3) and § 60–1–103(2) should not be used to dictate the width of the easement. This leaves § 70–17–106 as the only appropriate authority left to guide the district court's determination of the width of the Seyler Lane and Seyler Bridge right-of-way.

Section 70–17–106 provides that "the extent of a servitude is determined by the terms of the grant or the nature of the enjoyment *by which it was acquired*."[177] The "enjoyment by which it was acquired" language points to established prescriptive law in Montana dictating that the width of

175. *Pub. Lands Access Ass'n*, 321 P.3d at 46.

176. *Id.*

177. MONT. CODE ANN. § 70–17–106 (emphasis added).

the public's prescriptive easement should be limited to the width established by use during the prescriptive period. As early as 1936, Montana recognized that the public could obtain the right to use private property through adverse possession but that the public right would be limited to only the land occupied during the prescriptive period.[178] Additionally, when defining the public easement, it should be only as wide as is "reasonably necessary and convenient for the purpose for which it was created," its historic use.[179] Despite these established laws, the majority failed to recognize that where § 70–17–106 provides that an easement is determined by "the enjoyment by which it was acquired," it limited the evidence that could be used to define the easement to evidence of the historical use during the prescriptive period.[180] Accordingly, unless it can be proved that public recreation was one of the historical uses through which the easement was gained, evidence of recreational use should not inform the district court's determination of the width of the easement.

The majority cites to *Brown & Brown of MT, Inc. v. Raty*,[181] *Schmid v. Pastor*,[182] and *Public Lands Access Ass'n v. Jones* to support the assertion that recreational use may determine the width of the right-of-way at Seyler Lane and Seyler Bridge.[183] While these cases all consider recreational use in relation to establishing a prescriptive easement, these cases all confine their consideration to recreational uses that were a historical use through which the easement was established. In *Brown & Brown*, the Court considered recreational use only when determining whether or not the contested prescriptive easement could be used for recreational purposes.[184] Finding that recreational use was one of the uses through which the prescriptive easement had been gained, the Court remanded the case to the district court to limit the recreational use "to those historical uses established during the prescriptive period."[185] In *Schmid*, the Court considered recreational uses that "occurred in conjunction" with residential use to determine that a prescriptive easement existed and limited the width of the easement to that dictated by the historical use.[186] Although the Court in *Schmid* considered recreational use to determine the width and scope of the easement, the Court limited itself to the historical recreational use that was a factor in

178. Peasley v. Trosper, 64 P.2d 109, 110 (Mont. 1936).

179. Leffingwell Ranch, Inc. v. Cieri, 916 P.2d 751, 757 (Mont. 1996).

180. MONT. CODE ANN. § 70–17–106.

181. 289 P.3d 156, 164 (Mont. 2012).

182. 216 P.3d 192, 196 (Mont. 2009).

183. *Pub. Lands Access Ass'n*, 321 P.3d at 46.

184. *Brown & Brown*, 289 P.3d at 164–165.

185. *Id.*

186. *Schmid*, 216 P.3d at 196.

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establishing the prescriptive easement in the first place.[187] In *Jones*, the Court found that there was "adequate evidence of the historical use" of the contested road to establish a public prescriptive easement, but merely listed recreational use as one of the historical uses through which the public had gained the easement.[188] These authorities make clear the conclusion that while recreational use may be considered in determining the width of the prescriptive easement, the considered recreational use must be one of the historical uses through which the prescription was gained.

The issues in *Public Lands Access Ass'n* did not include whether or not a public prescriptive easement exists.[189] The parties agreed the public had occupied the paved portions of Seyler Lane and Seyler Bridge "openly, notoriously, exclusively, adversely, continuously and uninterrupted for the requisite statutory period."[190] PLAA never asserted recreational use was one of the historical uses through which the public had gained the easement.[191] Instead, PLAA attempted to present evidence of recreational use outside of the occupied portion of the road to expand the area the public had gained by prescription.[192] Since it is conceded that the historic use through which the public gained the prescriptive easement was by travelling the paved portions of Seyler Lane and Seyler Bridge, any use beyond the paved portion of the road would be a use in excess of the use through which the easement was gained. Any evidence of recreational use that is not asserted to be the historic use through which the public gained the easement in the first place is evidence of a use in excess of the historical use. Consequently, such evidence cannot be used to inform the determination of the public right-of-way.

Section 70–17–106 dictates that the extent of the servitude at Seyler Lane and Seyler Bridge is determined by the nature of the enjoyment through which the easement was gained. Since it is not disputed that the prescriptive easement at Seyler Lane and Seyler Bridge was gained by the public's use of the paved portion of the roadway, there is no need for a further determination of the public's acquired right. The public has only acquired the land "which it has occupied during the full statutory period."[193] The public acquired the right to use Seyler Lane and Seyler Bridge by using the paved portion of the road, and consequently, the public's unrestricted right of use extends only as wide as the pavement upon which it was founded.

187. *Id.*
188. *Jones*, 104 P.3d at 502.
189. *Pub. Lands Access Ass'n*, 321 P.3d at 40.
190. Appellant's Opening Brief, *supra* note 25, at *19.
191. *Id.*
192. *Id.* at *36–37.
193. *Peasley*, 64 P.2d at 110.

The public has also gained a distinguishable secondary easement as necessary for maintenance and repair of the travelled way. Since the purpose for which this secondary easement was created is maintenance and repair, the width of this area is limited to the land reasonably necessary for those purposes.[194] However, as Justice McKinnon discerned, the width of the incidental area is not one of the questions presented and did not need to be determined.[195] It is worth reiterating that while this incidental area has been acquired by the public, this does not mean that the public may use this area at will. As stated in *Leffingwell Ranch, Inc. v. Cieri*,[196] "no use may be made of the right-of-way different from the use established at the time of the creation of the easement so as to burden the servient estate to a greater extent than was contemplated at the time the easement was created." [197] Accordingly, the public has a right to use this incidental easement exclusively for maintenance and repair and the width of the easement is constrained to the land necessary for those purposes.

While concluding its discussion on the issue of width, the Court granted PLAA another opportunity to further expand the public easement over Kennedy's property even beyond the land necessary for maintenance.[198] The Court stated that "any recreational uses by the public beyond the width necessary for . . . maintenance and repair . . . would have to be established through clear and convincing evidence for the requisite statutory period."[199] Granting that recreational use alone can establish a prescriptive easement is in direct contradiction to established Montana law. Section 23–2–322(2)(b) provides that "the entering or crossing of private property to reach surface waters" cannot create a prescriptive easement.[200] Nonetheless, the Court granted PLAA the opportunity to put on evidence of recreational use to access the Ruby River as long as it occurred before 1985, the year § 23–2–322 was enacted.[201] However, even before 1985, it was well established that recreational use alone is insufficient to "raise the presumption of adverse use"[202] and "falls short of the type of usage necessary to result in the accrual of a public right."[203] While recreational use may be one factor in determining that a prescriptive easement exists, it cannot be the sole use that establishes a prescriptive easement. Accordingly, any recrea-

194. *See Leffingwell Ranch, Inc.*, 916 P.2d at 757.
195. *Pub. Lands Access Ass'n*, 321 P.3d at 65 (McKinnon, J., dissenting).
196. 916 P.2d 751 (Mont. 1996).
197. *Id.* at 757 (quoting Lindley v. Maggert, 645 P.2d 430, 432 (Mont. 1982)).
198. *Pub. Lands Access Ass'n*, 321 P.3d at 46.
199. *Id.*
200. MONT. CODE ANN. § 23–2–322(2)(b).
201. *Pub. Lands Access Ass'n*, 321 P.3d at 46.
202. *Oates*, 595 P.2d at 1184.
203. Ewan v. Stenberg, 541 P.2d 60, 63 (Mont. 1975).

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tional uses of Kennedy's property should not, standing alone, be sufficient to establish another prescriptive easement.

The Court needlessly confused the well-established laws of prescription in Montana by directing the district court to establish a "definite width of the public road right-of-way at Seyler Bridge" by considering evidence of a non-historic use.[204] The public gained the right to travel across Kennedy's property by using the paved portions of Seyler Lane and Seyler Bridge. Accordingly, the district court need not look further for a definite width of the right-of-way than the measurements of the paved road itself.

VI. Conclusion

The Montana Supreme Court disregarded established prescriptive easement law in Montana by holding that a public prescriptive easement grants unrestrained access to the incidental maintenance area and by allowing evidence of a non-historical use to inform the determination of the easement's width. In concluding public prescriptive easements are not delineated by primary and secondary easements, the Court disregarded established precedent regarding prescriptive easements and drew an untenable distinction between private and public prescriptive easements. By directing the district court to consider evidence of recreational use even after the parties had acknowledged that the prescriptive easement was acquired by use of the paved area, the Court needlessly confused the laws concerning the establishment of prescriptive easements. The Court was correct in discerning that once a public prescriptive easement has been established, the use of that easement should be open to foreseeable uses that include recreational uses. However, the Court confused the laws regarding prescriptive easements by allowing foreseeable uses to occur off the beaten path and into the incidental maintenance area. Granting the public the right to use the maintenance area for more than maintenance and repair unduly burdens the servient landowner.

The Court has disturbed the delicate balance between the public's right to access surface waters and private landowner's property rights. A prescriptive easement, either public or private, needs to be confined to the path that gave rise to the easement in the first place. Otherwise, the definition of the easement may continue to grow and further infringe upon the private property rights of the servient landowner. Further, unrestricted public use should be confined to the paved portion of the roadway acquired during the prescriptive period and should not be expanded into the maintenance area by considering the subsequent use of the easement by recreationists to access the Ruby River. The Court's holding has inequitably expanded the

204. *Pub. Lands Access Ass'n*, 321 P.3d at 46.

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public's acquired right to traverse Kennedy's property by misusing prescriptive easement law to create public access where none should exist.