In the Supreme Court of the State of Montana

DA 18–0249

LETICA LAND COMPANY, LLC,
a Michigan Limited Liability Company;
and DON MCGEE,

Plaintiffs-Appellants

v.

ANACONDA-DEER LODGE COUNTY,
a political subdivision of the State of Montana,

Defendant-Appellee.

Appeal from Montana Third Judicial District Court
Anaconda-Deer Lodge County
DV–12–24
Honorable Randal Spaulding

APPELLANT LETICA LAND COMPANY'S OPENING BRIEF

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ISSUES PRESENTED

I. Anaconda-Deer Lodge County illegally invaded Letica's private property and then encouraged unrestricted public use across it for years. The use stopped only after this Court held there was no public right-of-way through Letica's property. Did the government's direct physical invasion, damaging, and encouragement of public use over Letica's property without legal authority violate the takings clauses of the United States and Montana Constitutions?

II. Is Letica constitutionally entitled to attorney fees under Article II, § 29 of the Montana Constitution where it initiated litigation and was successful in regaining its right to exclude the government and the public from its private property?

III. Did the district court err when, on remand, it refused to vacate the costs awarded to the County following the trial?

STATEMENT OF THE CASE

This is the second time this case has been before this Court. The first time, following a bench trial, this Court affirmed the district court's conclusion that a county road extended into and then dead-ended on the Letica family's property. This was the so-called "lower branch" of Modesty Creek Road. *Letica Land Co., LLC v. Anaconda-Deer Lodge Cty.*, 2015 MT 323, ¶ 31, 381 Mont. 389, 362 P.3d 614.

But this Court also reversed the district court's determination that a public prescriptive easement extended across Letica's property from that county road to the National Forest on the so-called "upper branch" of Modesty Creek Road, concluding that if such an easement had ever existed, it had long since been extinguished by reverse prescription. *Letica*, ¶¶ 47–49. The Court then remanded for consideration of Letica's takings claim. *Letica*, ¶ 50.

On remand, the parties filed cross-motions for summary judgment on whether the County's actions were a taking or a damaging under the Fifth Amendment and Article II, § 29 of the Montana Constitution.[1] (Docs. 254–263.) The district court directed the parties to file proposed

[1] Letica's motion was for partial summary judgment. It requested a judgment on liability only, along with further proceedings to determine its damages and the amount of attorney fees it was constitutionally entitled to under Article II, § 29 of the Montana Constitution.

orders, eventually adopting almost all the County's proposed order verbatim. In that order, the district court found that despite the undisputed fact that neither the County nor the public had any right to use so-called "upper branch" road, the County's illegal invasion and damaging of Letica's property, and its encouragement of public use for a period of over three years—which stopped only after Letica prevailed in this litigation—did not constitute a compensable taking because it was only "temporary." (Doc. 280, App. A.) Letica appeals from that order.

Letica also appeals from the district court's earlier order awarding costs to the County from the trial and the earlier appeal, because the County cannot be considered a prevailing party where it lost the fundamental question: whether there was a public right-of-way through Letica's property over the upper branch. (Doc. 277, App. B.)

STATEMENT OF FACTS

In early 2012, several County residents were involved in a trespassing dispute with Letica. Those residents asked the Anaconda-Deer Lodge County Commission to "reaffirm" that two primitive roads on Letica's property were statutorily created county roads. *Letica*, ¶ 9. The County did so, and immediately cut open a series of gates on the lower branch and sent in heavy machinery to remove a berm on the

upper branch. *Letica*, ¶ 39; (App. A. at 7.). The County then began encouraging public use over both branches of the road.

Letica immediately filed a complaint, and sought a preliminary injunction barring public use, until and unless the County obtained a judicial ruling that there was some public right-of-way over either or both branches. (Docs. 1–2.) The district court denied Letica's application, concluding that both branches were likely statutorily created county roads established by petition in the late nineteenth century. (Doc. 35.) In that order, the district court declined to address whether there was a public prescriptive easement over the upper branch, observing that "the public's acquiescence of locked gates placed across Modesty Creek Road for more than 30 years likely extinguished any public prescriptive easement, if one ever existed." *Letica*, ¶ 9 n.5.

Public use continued over both roads.

After seventeen months of litigation, and just before trial, the County discovered a road record book in its own possession that showed—just as Letica had argued from the outset—that the upper branch had *never* been a county road. *Letica*, ¶ 10. The County conceded that point, and began asserting instead that the upper branch was

subject to a public prescriptive easement.[2] Letica filed an amended complaint and again sought a preliminary injunction barring use over the upper branch, which the County resisted and the district court once again declined to grant, despite its previous determination that any public easement would have long ago been extinguished by reverse prescription. *Letica*, ¶¶ 9–10.

In that same order, the district court *sua sponte* bifurcated Letica's takings claims, finding it inappropriate to address before "the ultimate determination of ownership." (Doc. 140 at 15.) The case proceeded to trial as discussed above, with the district court finding there was a public right-of-way over both branches of the road.

And so unrestricted public use of the upper branch continued until this Court held in November 2015 that even if there had once been a public prescriptive easement over the upper branch, it was long ago extinguished by reverse prescription—just as the district court originally opined in July 2012. Now, following trial and appeal, it is established that the lower branch is indeed a county road that dead-ends on Letica's property, providing no access to any other public road or public land.

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[2] Before the discovery of the road record book, the County's public prescription theory was limited to a one-sentence affirmative defense in its answer.

But it is also now established that there is no public right-of-way over the upper branch. As a result, it is undisputed that (a) the County physically invaded Letica's private property and used heavy equipment to destroy a berm on it to make access easier; (b) allowed and encouraged public use in areas where the Letica family had long exercised its fundamental constitutional right to exclude the public; (c) that public use would have continued indefinitely but for this litigation; and (d) Letica prevailed in the litigation related to the upper branch.

STANDARD OF REVIEW

This Court's review of constitutional issues is plenary. *City of Missoula v. Mountain Water Co.*, 2018 MT 139, ¶ 9, 391 Mont. 422, 419 P.3d 685. It reviews orders granting summary judgment de novo, applying the same standard as the district court. *Richland Aviation, Inc. v. Montana Dep't of Revenue*, 2017 MT 122, ¶ 7, 387 Mont. 409, 394 P.3d 1198.

SUMMARY OF THE ARGUMENT

The right to exclude is a fundamental property right, and when the government takes an easement in property, it eviscerates that right. So when the government wrongly and illegally claims there is a public-right-way over private property and encourages public use, it is a

categorical taking under the Fifth Amendment and Article II, § 29 of the Montana Constitution.

It does not matter how long the taking lasts, because even if the taking ends—for whatever reason—the government is still obligated to pay just compensation for the period when the taking was effective. A so-called "temporary" taking is therefore only different from a permanent taking in the context of the *amount* damages that are due—not whether those damages are required in the first instance. They are. The district court therefore erred when it concluded that because the County's and the public's use of the easement across Letica's property was of a finite duration, it was not a taking and thus not compensable.

Next, the Montana Constitution's takings provision is broader than the Fifth Amendment, mainly in that it requires the government to pay for the prevailing property owner's necessary costs of litigation, including attorney fees. The only requirements to trigger that obligation are (1) litigation and (2) the private property owner prevailing.

Here, it is undisputed that the government illegally appropriated a claimed right to use what it first alleged was a county road. After admitting it was wrong, the County continued to assert that there was a public easement across Letica's property, even though the district court had previously determined otherwise. During that entire time—a

period of well over three years—the County allowed and encouraged public use and caused physical damage to Letica's property.

Letica initiated litigation and it prevailed on its claim that there was no public right-of-way across its property. Letica is therefore constitutionally entitled to its litigation expenses, including attorney fees. It is also entitled to compensation under the Montana Constitution for the damage it suffered while the taking was in effect.

Finally, the district court erred when it ignored this Court's mandate to enter an amended judgment consistent with its earlier opinion, because the district court refused to vacate its earlier costs award to the County.

Letica therefore requests that this Court vacate the district court's judgment on takings liability, direct entry of judgment on Letica's takings claim under both the United States and Montana Constitutions, vacate the costs award, and remand for further proceedings to determine Letica's compensatory damages and its necessary expenses of litigation, including attorney fees.

ARGUMENT

I. The County's actions in illegally invading Letica's property and allowing and encouraging public use violate the Takings Clauses of both the United States and Montana Constitutions.

The Fifth Amendment[3] provides that private property shall not "be taken for public use, without just compensation" being paid to the owner. Similarly but more broadly, Article II, § 29 of the Montana Constitution guarantees that "private property shall not be taken or damaged for public use" without just compensation being paid to the owner. Because the Montana takings clause is in Article II's Declaration of Rights, it is a fundamental constitutional right that deserves the highest level of scrutiny and protection. *See e.g. Kortum-Managhan v. Herbergers NBGL*, 2009 MT 79, ¶ 25, 349 Mont. 475, 204 P.3d 693 (collecting cases).

The United States Supreme Court has repeatedly recognized that the right to exclude is "perhaps the most fundamental of all property interests." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–180 (1979). This right is so "universally held" to be a fundamental property right that it "falls

[3] The Fifth Amendment was incorporated against the States by the Fourteenth Amendment. *See e.g. Nollan v. California Coastal Comm'n*, 483 U.S. 825, 827 (1987).

within th[e] category of interests that the Government cannot take without compensation." *Kaiser Aetna*, 444 U.S. at 179–180.[4]

And so a *per se* Fifth Amendment taking occurs when the government gives itself or third parties an easement—"a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed"—in what was previously private property. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 832 (1987); *Kaiser Aetna* 444 U.S. at 180; ("And even if the government physically invades only an easement in property, it nonetheless must pay just compensation."); *United States v. Causby*, 328 U.S. 256, 267 (1946) (holding there is a taking when "a servitude has been imposed upon the land").

Takings can be temporary or permanent, but once the government's actions have worked a taking of private property, "no subsequent action by the government can relieve it of the duty to

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[4] In the seminal case of *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court cited with approval a discussion of direct physical invasions: "The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, *never* deny compensation for a physical takeover. The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership." 458 U.S. 419, 428 n.5 (1982).

provide compensation for the period during which the taking was effective." *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 33 (2012) (citation omitted). That is, once a taking occurs, the compensation remedy is required by the United States Constitution, regardless of the duration of the taking. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 316 (1987).

It is also required when, like here, the government does not initiate the statutory condemnation process in Title 70, Chapter 30 of the Montana Code and instead acts in a way that leads to an "inverse condemnation" claim.[5] *Wohl v. City of Missoula*, 2013 MT 46, ¶¶ 54–55, 369 Mont. 108, 300 P.3d 1119. This is true even where the taking is premised on the government's "good faith belief" that its right-of-way "included the land in question." *Id.*

The district court's conclusion that no taking occurred here is premised on two erroneous conclusions. First, the district court found that Letica failed to establish "that the duration of the [public's] use

[5] The suit is "inverse" because it is brought by the affected owner, rather than by the condemnor, as contemplated by statute. A property owner's right to bring such a suit derives from the self-executing nature of both the Fifth Amendment and Article II, § 29. *See e.g. Wohl*, ¶ 55; *First English*, 482 U.S. at 315–16.

was significant in the context of the character of that property or that it rose to the level of a taking considering its temporary nature." (App. A at 12.) The district court also believed that because Letica eventually prevailed and the invasion was time-limited, Letica had to provide evidence related to the causation and severity of damages it suffered. (App. A at 15–16.) But as explained below, the County's actions were a categorical taking despite Letica's eventual litigation success, and both the United States and Montana Constitution require that Letica be compensated for that taking. The district court should therefore be reversed and the case remanded for a trial on damages and further proceedings to calculate the attorney fees to which Letica is entitled to under the Montana Constitution.

A. There is no authority for the district court's conclusion that the County can escape takings liability just because the taking was time-limited or because the County allegedly acted in good faith.

Just because Letica eventually prevailed in this litigation and, as a result, can once again exclude the public from its private property does not change the fact that a taking occurred in the first instance. This was addressed squarely by the Supreme Court almost 75 years ago, in *Causby*. There, when considering whether the easement taken by the government was temporary or permanent, the Court noted the only reason it mattered was because it would affect the *amount* of

compensation to which the landowners were entitled. *Causby*, 328 U.S. at 268. How long the servitude was in effect did not affect whether a taking occurred. Nor did how long the servitude was in effect determine whether the government was liable for that taking.

The Supreme Court reiterated this rule in 1987, when it held that the government's revocation of an ordinance that had worked a regulatory taking, "though converting the taking into a 'temporary one,' is not a sufficient remedy to meet" the Fifth Amendment's requirement that the government pay just compensation. *First English*, 482 U.S. at 318. The government was therefore required to pay damages for the period during which the taking was effective—even after the government changed course and the taking ended. *Id.* at 318–19.

More recently, the Supreme Court once again restated the "solidly established" rule that temporary takings are compensable. *Arkansas Game & Fish*, 568 U.S. at 33. It then traced the history of that rule, noting that "ever since" the *Causby* era, the Court had "rejected the argument that government action must be permanent to qualify as a taking." *Id.* Finally, it reiterated that once a taking occurs, nothing the government does after that point can "relieve it of the duty to provide compensation for the period during which the taking was effective."

Arkansas Game & Fish, 568 U.S. at 33 (quoting *First English*, 482 U.S. at 321).

The district court failed to apply this long-established and straightforward rule. Instead, it reasoned that unlike the recurrent flooding at issue in *Arkansas Game & Fish*,[6] the repeated physical invasions of Letica's property were of "short duration," "minimal," and "insignificant." (App. A at 12.) But these conclusions—even if they are correct—are irrelevant to whether a taking occurred. Letica is unaware of any case where the Supreme Court or this Court have ever weighed the *amount* of use across an easement to determine whether there was a taking. Instead, the rule is simple: if the government asserts and allows use of an easement in private property, eviscerating the owner's fundamental right to exclude, a taking occurs and the owner is constitutionally entitled to compensation. No further analysis is

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[6] The district court appears to give significant weight to this case, but it does nothing actually to help the County's position. Instead, it *reinforces* each of the key reasons the County's action constituted a taking. And to be sure, the Supreme Court reversed the Federal Circuit's earlier holding that flooding could be exempt from takings liability, holding "*simply and only*, that government-induced temporary flooding gains no automatic exemption from Takings Clause inspection." *Arkansas Game & Fish*, 568 U.S. at 38 (emphasis added). The case was then remanded, at which point the Federal Circuit concluded that the recurrent flooding did, in fact, constitute a taking. *Arkansas Game & Fish Comm'n v. United States*, 736 F.3d 1364, 1375 (Fed. Cir. 2013).

necessary to conclude that takings liability exists. *Nollan*, 483 U.S. at 832; *Kaiser Aetna,* 444 U.S. at 180 (1979) *see also Chmielewski v. City of St. Pete Beach*, 890 F.3d 942, 949 (11th Cir. 2018) (taking occurs where government action authorizes or encourages de facto public access easement on private property even if a court eventually enjoins that access).

Here, it is undisputed that the government physically and illegally invaded Letica's property, and that it sent in heavy equipment to remove a berm on the upper branch. It did so without legal right, and so a categorical taking occurred. The damages Letica suffered during that time can never be undone—especially the constitutional damages Letica suffered when the government's actions eviscerated its most fundamental constitutional property right: the right to exclude.[7]

The County also argued below that because it allegedly had a good-faith belief that the upper branch was a county road and that it therefore acted under a "claim of right," Letica's remedy must sound in tort rather than as a constitutional taking. (App A. at 14.) As *Wohl* explained, however, the government's motivations and intentions are

[7] *See e.g. Loretto,* 458 U.S. at 435 (holding that an invasion constitutes a *per se* taking, in part because the "power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.").

irrelevant to a takings analysis in the context of an inverse condemnation action under the Montana Constitution. *Wohl*, ¶ 54.

Yet the theory alleged by the County, and adopted by the district court, actually encourages unilateral and illegal invasions of private property by the government without legal process. If the government could escape takings liability whenever it believes it has the right to take specific action, then the government could unilaterally invade private property without risk, because if it was wrong, property owners would be without a constitutional remedy. This is even truer if the government could evade liability on the theory that its invasion was only "temporary." This theory, however—as adopted by the district court—would write a new exception into the both the Fifth Amendment and the Montana Constitution.

Avoiding this problem is straightforward. All the government needs to do is file a declaratory judgment action and wait for the legal process to play out. Eventually, there will be a final judgment that the government and public either have a legitimate right-of-way or they don't. If the County had done that here, then there never would have been an illegal invasion of the upper branch, there never would have been a taking, and this case would be over. Instead, however, the County unilaterally and illegally invaded Letica's private property.

That is a taking, and both the United States and Montana Constitutions require that the government pay Letica just compensation.

B. The County's actions also constituted a taking and a "damaging" under the Montana Constitution, and Letica is therefore constitutionally entitled to attorney fees and other damages.

Beyond the coextensive "takings" protections in the Fifth Amendment and Article II, § 29, the Montana Constitution provides more protection than the Fifth Amendment for two distinct reasons.

First, unlike the Fifth Amendment, Article II, § 29 of the Montana Constitution provides that in the event of litigation surrounding a taking or damaging, "just compensation *shall include* necessary expenses of litigation to be awarded by the court when the private property owner prevails." (Emphasis added.) A prevailing plaintiff in an action brought under Article II, § 29 is therefore "constitutionally entitled" to the necessary expenses of litigation, which include costs and reasonable attorney fees. *Wohl*, ¶ 60. The only two requirements a plaintiff must meet to show prove this entitlement to fees in a taking case is "(1) litigation, and (2) the private property owner prevailing." *State By & Through Dep't of Highways v. Standley Bros.*, 215 Mont. 475, 482, 699 P.2d 60, 64 (1985). Letica has met these two requirements, and is therefore entitled to its litigation expenses

regardless of the district court's apparent belief that Letica failed to properly establish its compensatory damages.

Second, and also unlike the Fifth Amendment, the Montana Constitution more broadly provides express protection against uncompensated consequential "damage" to private property caused by "public use." *See* Mont. Const. Art II, § 29 ("private property shall not be taken *or damaged*"); *see also San Remo Hotel L.P. v. San Francisco City & County*, 41 P.3d 87, 100-01 (Cal. App. 2002) (holding identical California constitutional "or damaged" provision "protects somewhat broader range of property values than" Fifth Amendment).

Here, it is undisputed that the County physically damaged Letica's property by sending heavy machinery to remove a berm on the upper branch and by allowing, causing, and encouraging an unknown number of people to drive over primitive roads, which caused erosion, loss of established plant life, and the substantial spread of noxious weeds. The County's actions also caused concrete constitutional harm to the Letica family, which lost its right of quiet enjoyment and its fundamental right to exclude others from its private property during the time the taking was in effect.

Below, Letica requested partial summary judgment on takings liability and its entitlement to attorney fees. It also requested further

proceedings to prove these damages—including the reopening of discovery to introduce expert testimony. (App. A at 3).[8] This was necessary because the district court had *sua sponte* bifurcated Letica's takings claim back in 2013, so Letica never had the opportunity to prove those damages with expert-supported testimony and evidence. (Doc. 140.) And there is simply no support for the district court's apparent belief that it could not grant partial summary judgment on liability alone in the absence of quantified damages, especially where specific types of damages—especially attorney fees—are *mandated* by Article II, § 29. Letica's other damages clearly exist, and courts routinely grant partial summary judgment on liability and then have further proceedings to quantify the precise amount of damages to which a party is entitled. The case should be remanded so Letica can introduce the necessary evidence to prove the amounts of its compensatory and consequential damages.

Separate from those damages and all questions surrounding them, however, Letica is constitutionally entitled to its necessary expenses of

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[8] *See also* Docs. 248–254. On remand, Letica requested a scheduling order that would have reopened discovery and provided for expert witness disclosures, specifically to address these issues. The County objected to reopening discovery. The district court never ruled on Letica's motion.

litigation—including attorney fees—under Article II, § 29 of the Montana Constitution. So regardless of the district court's belief about Letica's burden of proof on its compensatory damages, it was error to conclude that Letica had to prove those damages to establish it was owed its litigation expenses under the express terms of the Montana Constitution.

II. The district court erred by refusing to vacate the costs awarded to the County after trial and before the first appeal.

On remand after the first appeal, this Court directed the district court to enter "an amended judgment consistent with this Opinion." *Letica,* ¶ 50. But the district court refused to reconsider its award of costs to the County following the first trial, reasoning that Letica failed to appeal the Court's November 2014 order on costs. (App. B at 6.) Letica's notice of appeal, however, explicitly identified the costs order—by name, date, and document number—as one of the orders that Letica was appealing from.

To properly amend the judgment as directed by this Court, the district court should have considered who the overall prevailing parties were after the first appeal. And it did—but only for purposes of costs *on appeal*, where it concluded that neither Letica nor the County were prevailing parties on appeal. (App. B at 6.) That conclusion was correct,

and the district court should have applied it to the earlier costs order by vacating the award to the County.

Regardless of its decisions on the other issues on appeal, the Court should remand this case with directions that the district court vacate the award of costs to the County, which the district court should have done on remand the first time.

CONCLUSION

Letica requests this Court reverse the district court's summary judgment order and related judgment, vacate the costs order, hold that the County's actions constituted a constitutional taking and damaging, and remand for a determination of Letica's damages and attorney fees.

August 10, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11, I certify that this brief is in a proportionally spaced and sized in 14 point Century Schoolbook typeface, is double-spaced except for footnotes and quoted and indented material, and the word count as calculated by Microsoft Word is 3950, excluding the Tables of Contents and Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Jesse Kodadek

CERTIFICATE OF SERVICE

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