IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0145

PUBLIC LAND/WATER ACCESS ASSOCIATION, INC.,

Plaintiff and Appellant,

v.

MARK L. ROBBINS and DEANNA M. ROBBINS; ROBERT "ROBIN" E. FINK (a/k/a ROBERT "ROBIN" ELI FINK) and KATHIE FINK; DAVID D. MURRAY; CLEO BOYCE, MARY D. BOYCE, DAN BOYCE and LAURA BOYCE; JOANNE OWENS PIERCE, and the MARABETH OWENS OSTWALD REVOCABLE TRUST DATED NOVEMBER 27, 2012; and THE STATE OF MONTANA; FERGUS COUNTY, MONTANA,

Defendants and Appellees.

OPENING BRIEF OF APPELLANT

On Appeal from the Montana Tenth Judicial District Court, Fergus County, DV 14-2012-0085K, The Honorable Brenda Gilbert, Presiding

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STATEMENT OF ISSUES

1. Whether the district court failed to apply the "record as a whole" standard set forth in *Reid v. Park Cnty*., 192 Mont. 231, 234, 627 P.2d 1210, 1212 (1981) to the question of whether the disputed portion of Mabee Road is a public or county road?

2. Whether it failed to make required findings of fact and conclusions of law under the appropriate standard before denying PLWA's claim for a public prescriptive easement?

3. Whether, applying the proper legal standards, PLWA established the entirety of Mabee Road is public?

STATEMENT OF CASE

This case presents a public access dispute to a portion of Mabee Road (Road), located north of Roy, Montana, which meanders approximately twenty miles through private and public lands south of the Missouri River and provides access to vast public lands, including the Upper Missouri River Breaks National Monument (Breaks) and the Charles M. Russel National Wildlife Refuge (CMRNWR). In 2007, landowner/Appellee Mark Robbins locked a gate across the Road, blocking public access.

After a bench trial September 10-14, 2018, the District Court ruled against Appellant Public Land/Water Access Association, Inc. (PLWA) in favor of private

landowners/Appellees Mark and Deanna Robbins, Robert "Robin" and Kathie Fink, David Murray, Cleo, Mary, Dan, and Laura Boyce, Joann Owens Pierce, and the Marabeth Owens Ostwald Revocable Trust (collectively Landowners). Appellees State of Montana (State) and Fergus County (County) participated minimally at trial.

On January 9, 2020, the district court entered its Final Judgment denying PLWA's claims for relief, determining the disputed portion of the Road (north of Section 14) (Disputed Portion) was private. (Doc. 343, attached as Appendix A[1]). PLWA appeals from this Judgment and the court's Findings of Fact, Conclusions of Law, and Interim Order. (Doc. 317, attached as Appendix B).

STATEMENT OF FACTS

PLWA, a non-profit organization dedicated to promoting citizen access to public lands and water, initiated this action. (FOF #1). Undisputedly, vast areas of public land, including the CMRNWR,[2] managed by the U.S. Fish and Wildlife Service (USFWS), and the Breaks,[3] managed by the Bureau of Land Management

[1] References hereafter will cite page numbers, FOFs, or COLs.

[2] The Court may take judicial notice pursuant to Rule 201, M.R.Evid., that CMRNWR is one of the largest wildlife refuges with hunting and fishing opportunities in expansive and varied landscapes. https://www.fws.gov/refuge/Charles_M_Russell/about.html

[3] The Court may take judicial notice the Breaks covers approximately 400,000 public land acres in northcentral Montana, with an array of wildlife, recreational opportunities, and an area of historical/cultural importance. https://www.blm.gov/visit/upper-missouri-river-breaks-national-monument

(BLM) are "impacted" by the Disputed Portion. (FOF #17). The Disputed Portion provides hunting and recreational access to this federal public land. (9/13/18 Tr. 174:9-16). While the court determined it did not provide public access to these lands, and noted "various other public roads" did, it did not delineate or describe them. (Order, pg. 41).

Parties and Land Ownership

Trial Exhibit 1, a map of the subject land area and Road, including the Disputed Portion, shows the public and private land the Road traverses. (Tr. Ex. 1). Landowners own property in the disputed area and while ownership has changed somewhat, ownership at trial is set forth in Appendix C. (FOF # 2).

Upon commencement of his lease, Robbins impeded public access in September 2007 by erecting "no trespassing" signs and locking the gate at the corner of Section 35. He told hunters camping on nearby public land there was "a new sheriff in town" and they could no longer traverse the Road. (9/10/18 Tr. 49:23-50:3). In May 2016, Robbins locked the livestock gate in the southwest corner of Section 14. (9/13/18 Tr. 215:4-11; 22-23).

Murray inherited Bea Murray's property and owned and operated the ranch until he sold to Robbins in 2016. (FOF #5). Neither Murray prevented public use. (9/11/18 Tr. 167:17-20). At trial, Murray owned no relevant property. (FOF #6).

Robert E. "Bob" Fink, Kathie Fink's late husband and Robin's father, owned and operated the Finks' family ranch prior to his death in August 2013. (FOF #7). Bob believed the Road was public and informed hunters requesting to use it accordingly. Bob also informed them the Road was historically used by Native Americans, families travelling by horse and wagon, by Roy residents to gather firewood and hunt, and government officials for fire suppression. (9/10/18 Tr. 43:18-44:5; 50:13-17; 149:4-15; 204:12-205:6).

On July 7, 2000, Bob wrote the following regarding the Road:

> The road in question crosses private and public land for seven miles. It has provided access for 90 years. No attempt to close this road was ever made. Man has never closed this road. However, mother nature and her elements close this road for months at a time at the confluence of Fargo and Armell's….

(Tr. Ex. 45, p. 27; 9/10/18 Tr. 150:23-151:15).

His daughter, Toni Keller, confirmed the Road was public and they never blocked the Road nor prohibited public use. (9/10/18 Tr. 144:9-149:19; 158:16-159:5). The court disregarded statements attributed to Mr. Fink as hearsay and irrelevant, despite no objection by the defense. (FOF #120-121, COL #KK-LL; 9/10/18 Tr. 144:9-159:5).

Appellees Joan Owens Pierce and the Marabeth Owens Ostwald Revocable Trust, dated November 27, 2012 (Owens) were served but never appeared. (FOF #10).

Despite applying for and receiving an easement in 2015 to access Section 36, the County's trial position was the Disputed Portion was not a county road.

Disputed Portion of Mabee Road

Evidence was introduced during trial regarding each segment of the Disputed Portion, discussed more specifically below. The court characterized the Disputed Portions as "the disputed trail" and declined to recognize it as an extension of Mabee Road, and characterized it as "a two-track trail through pasture land and sage brush, with grass and sage brush growth growing between the tracks . . . not graveled [or] "regularly maintained in any other way." (FOF #13-14). Existence of these tracks establishes considerable historical use.

The Disputed Portion continues northeasterly from the end of the declared Road in Section 14 and intersects various CMRNWR and BLM roads on adjacent public land before connecting with Knox Ridge County Road. (Tr. Ex. 1). Much of the Disputed Portion is located on the 1913 Bolles Survey route. (Tr. Ex. 1). The Disputed Portion comprises the following:

a. Section 14, Township 20 North, Range 22 East
b. Section 11, Township 20 North, Range 22 East
c. Section 2, Township 20 North, Range 22 East
d. Section 35, Township 21 North, Range 22 East
e. Section 36, Township 21 North, Range 22 East
f. Section 25, Township 21 North, Range 22 East
g. Section 18, Township 21 North, Range 23 East
h. Section 11, Township 21 North, Range 22 East

Livestock gates exist along the Disputed Portion.

County Road Records

The court correctly determined the County acquired the public right-of-way and dedicated and approved construction of Mabee Road. (FOF #12). However, while the court found the County lawfully acquired a right-of-way and constructed the Road, it then strictly interpreted the evidence to find it terminates where the County stopped construction. (FOF #18-21).

The court found "[t]he history of Mabee Road is readily ascertainable from Fergus County records, and the findings regarding the Mabee Road are supported in large part by Petition 842, filed in 1919; Petition 2041, filed in 1949, and County Resolution 29-2003, filed in 2003." (FOF #24). The court found Petition 2041 was filed by the predecessors in interest, including Fred Mabee, the Road's namesake, but covered only "the last seven miles of the Mabee Road, before it terminates." (FOF #25). As support, the court relied on commission minutes from a December 28, 1949, meeting, declaring the county road and the 2003 Resolution which it claimed "confirms that the Mabee Road comes to a definite end in this readily defined location." (FOF #26, 27). However, these commission minutes indicate only that the declared Road exists in "Twn 19 & 20, Rg. 22." (FOF #26). This historical record does not limit the Road to a specific endpoint. Indeed, the evidence reveals otherwise.

The court relied on an absence of historical evidence and a 1965 petition which sought a different location for a new road, which the Commissioners denied. (FOF #28-35). The court speculated it is "reasonable to infer" and "reasonable to assume" that had a public trail or road existed at the time, the petition "would have identified it" or "stated as such." (FOF #37-39). The 1965 petition was submitted on a standardized "Petition for New Road" form. Landowners petitioned for approximately 2 ½ miles of road designation. The petition contains nothing to justify these inferences and assumptions. The only potential inference is the "new road" was to be a realignment of the existing road to run east along the south boundary of section 14 thence north along the east boundary of sections 14, 11, and 2 where it joins BLM land. Comparing the plat attached to the 1965 petition to the current map, it becomes clear landowners wanted to move the road, which traversed through their property, to the section lines.

Based on these speculative findings, the court found in "weighing the evidence before the Court, PLWA did not prove the disputed trail is a county road or part of the Mabee Road." (FOF #42). The court did not apply, let alone mention, the "record as a whole" standard. The court discounted the 1913 Bolles Survey, finding "PLWA did not prove by clear and convincing evidence that the road depicted in the Bolles Survey was ever built, laid out or used by the public" and that "PLWA did not prove by clear and convincing evidence that the road

surveyed by Bolles is the disputed trail." (FOF #92). The "clear and convincing" standard applies only to PLWA's claim for public prescriptive use, and this finding is clearly erroneous. Trial Exhibit 4, prepared by PLWA's expert witness, clearly shows the Bolles survey and the Road on the ground today are nearly identical.

The Bolles Survey

Fergus County obtained the Bolles Survey after the commissioners awarded a bid for the surveying of un-platted roads in Fergus County in April 1913. (FOF #86). L.C. Bolles, a contractor for H.C. Tilzey, performed the survey in July 1913. (Tr. Exs. 3, 5, 11, 13-16, 50; 9/12/18 Tr. 18:1-3; 11-19:7; 19:13-17; 23:7-25:6; 25:14-26:9; 27:21-25).

While the court's findings mentioned the Bolles Survey, its consideration was overly strict, requiring strict geographical precision. (FOF #87-92). The Bolles Survey depicts a road travelling generally north approximately two miles east of Roy and intersecting the current route in the northern portion of Section 14. From there, it follows the current Disputed Portion, to the surveyed route's terminus at Mitchell Crossing. (Tr. Exs. 1, 3, 11-15, 9/12/18 Tr. 20:12-20). The Bolles Survey is memorialized in County records in the "Surveyor's Record of Roads" books and appears in subsequent maps. (9/12/18 Tr. 21:19-26:12). The Bolles Survey was created while the curative statute was in effect. (9/12/18 Tr. 136:4-9). This statute provides:

> [a]ll highways, roads, lanes, streets, alleys, courts, places and bridges laid out or erected by the public or now traveled or used by the public or if laid out or erected by others dedicated or abandoned to the public or made such by the partition of real property are public highways.

(9/12/18 Tr. 138:18-23; Sec. 2600 of the Political Code of 1895).

Record as a Whole.

Additional evidence in the record as a whole, discounted or ignored by the court, supporting the existence of a public road over the Disputed Portion includes the: 1) existing route in 1903 to access the U.S. Post Office at Delos; 2) April 1913 Commissioners minutes accepting H.C. Tilzey's bid for surveying and platting unplatted roads: the bid under which the July 1913 Bolles Survey was completed; 3) 1914 U.S. Surveyors map; 4) 1914 Montana road map; 5) 1914 County Map and subsequent annotated versions identifying it as a county road; 6) 1919 County Map; 7) 1954 U.S.G.S. Lewistown Quadrangle Map; 8) County Planning Department's Ownership Map Books designating it as one of the "Fergus County Roads"; 9) 1918 Zuley Petition #842; 10) November 1, 1965 maintenance Petition and corresponding Commissioners' journal entry acknowledging performance of requested maintenance; 11) various road claims for surveying and maintenance; 12) Right of Way Application #16532; 13) Easement #D-15029; and 14) tax deeds showing the County held property along the Road which it later sold with implied access. (Tr. Exs. 3, 5, 7-9, 10, 11-15, 17-28, 30-31, 33, 36-39, 42, 48, 50 at App. C, Exs. 15-25, 53, 58). Maps referenced above all depict the Road.

The court acknowledged some of this evidence, but only as support for its determination Mabee Road ended where the County stopped construction. (FOF #18-26). Its rationale in this regard was based on lack of additional evidence:

> …there is no evidence that predecessors in title to the defendant ranch families named herein, or other residents in the area, ever filed petitions seeking a county road over the property and purported route where PLWA claims a public trail exists.
>
> Sharpening that contrast, PLWA presented no evidence that Fergus County acted on such a petition; it presented no evidence of a viewers' report, nor notice of a Board of County Commissioners' meeting to consider such a petition, or minutes of such meeting where a petition was accepted or rejected. . . there is no evidence that the landowners were ever paid for having a public right-of-way across their land.

(FOF #28-29).

As argued below, this reasoning does not comport with *Reid's* "record as a whole" standard for historic public roads, and placed an undue burden on PLWA, and the public access interests it represents. Moreover, the court's rationale is circuitous. A lack of records or omissions in subsequent landowner petitions supports the conclusion that a county road already existed. A mere change in physical characteristics does not determine a road's status.

The court acknowledged a post office operated from 1903-1905 at Delos, and observed the same during its site visit. (Order, pg. 2). However, it failed to make associated findings despite being presented with evidence, such as the 1903 Postal Map and GLO maps showing the postal route operated from Roy to Delos,

and generally follows the same route as Mabee Road. PLWA's expert, Bernard Hallin, testified the mileage of the routes is reasonably similar. (Tr. Ex. 42; 9/11/18 Tr. 270:11-16; 9/12/18 Tr. 5:23-7:17; 10:9-12; 13:16-14:12; 16:1-10). Disregarding Hallin's uncontroverted testimony, the court again claimed a lack of evidence, despite PLWA's evidence about the postal route, and accused PLWA of engaging in "speculation." (FOF #95).

The 1914 County Map, created by the County Surveyor, shows the Road traveling north in the general location of the 1913 Bolles Survey route. It further shows that Township 20 North, Range 22 East was not surveyed or settled at the time. (Tr. Ex. 7, 9/12/18 Tr. 35:16-36:7, 38:4-10). Annotated versions of the map show it in the same location, but show Township 22 North, Range 22 East, as surveyed and settled. (Tr. Exs. 8-9, 9/12/18 Tr. 37:1-38:1, 38:5-10).

The 1918 Zuley Petition #842 was a Petition for Change of Established Road, requesting a change in the Old Missouri River Trail in Sections 23, 26, 27, 34, and 35 in Township 20 North, Range 22 East. On September 28, 1918, a County Commissioner and Surveyor approved the realignment, noting that "Established Road Number 842" was located:

> Beginning at the SE corner of the SW 1/4 section 14, Twp 20 R22, thence west one half mile, thence south three miles to the SE corner of Sec. 34, T 20, Rge 22, thence west one mile to SW cor. Sec. 34 T 20 Rge 22, thence west to intersect present road. . that Old Missouri River Trail be abandoned.

(Tr. Ex. 33; 9/12/18 Tr. 42:1-43:7).

On the map submitted with the Petition, the portion of the Old Missouri River Trail/Mabee Road that was not abandoned as part of the realignment, in Section 14, and which connected to the Wilder Road, continues northerly from the mid-section of the southern boundary of Section 14 to the 1914 Wilder/Cimrhakl County road survey, where it joins this road at approximately the Bolles Survey station #80 in Township 20 North, Range 22 East. (Tr. Exs. 1, 35, 50). The County "allowed" this Petition. (9/12/18 Tr. 46:7-10). As part of the realignment process, the landowners agreed to "gratuitously grant a right of way through their property" in exchange for abandonment of this portion of the Old Missouri River Trail through their property. The requested change was a realignment of the county road along section lines in place of the original, diagonal route through the landowners' property. (Tr. Ex. 33).

Petition 842 was made pursuant to House Bill Number 145, which ordered highways be laid out and opened when practical on subdivision or section lines. (Tr. Ex. 33; 9/12/18 Tr. 43:8-19). The County granted petitions for maintenance, realignment, and abandonment of portions of the Road, however, these petitions did not include the entirety of it. (Tr. Exs. 33-37). The portion of the Old Missouri River Trail/Mabee Road from the approximate mid-section of the southern boundary of Section 14 running north to where it intersects the Bolles Survey

Route at approximately survey station #80 was not subject to realignment or abandonment. (Tr. Exs. 33-35).

The 1919 County Map illustrates the Road going from Roy through Mitchell Crossing to Knox Ridge Road. The Bolles Survey route is illustrated on this map where it joins the Road at the corners of Sections 13, 14, 23, and 24. (Tr. Ex. 30). An unnumbered petition requested gravelling and elevation of the Road where needed and was signed by Russell R. Murray, Duane R. Murray, Fred Mabee, Roy O. Umstead, Robert L. Fink, and Charlie J. Bishop. (Tr. Ex. 36; 9/12/18 Tr. 81:6-11).

The Murrays' homestead was located in the S 1/2 of Section 11, north of Section 14. (9/12/18 Tr. 81:12-22). The Commissioners granted the petition for gravelling and elevation of the road on November 15, 1965. Commissioners identified the road and requested work as "a road north of Roy past Bishops, Ydes, Mabees, Umsteads, Finks and to Murrays, which has been completed. This road is by Charles J. Bishop's in Section 30, Twp. 19, Rge. 22 E." (Tr. Ex. 37; 9/12/18 Tr. 82:6-23). This evidences the County's maintenance of the Road to the Murray homestead. (9/12/18 Tr. 83:1-2).

The undated County Snow Plow District Routes book states the County plowed 13 miles of the Road. (Tr. Ex. 49, pg. 36). The court found a county snow removal map showed Mabee Road ending at Section 14, but acknowledged it also

showed the "disputed trail depicted on the map," but not necessarily a snow plow route. (FOF #93). The court did not find, despite being presented with evidence of the same, that the County identified the Road as a County road beyond Section 14 in its February 2014 Ownership Maps books. (Tr. Ex. 48, pg. 4).

Claims from the County Surveyor's Office show the surveyors viewing roads, fixing maps, and otherwise conducting surveying duties on roads north of Roy. They further show individuals performing work on the Road. These claims run from approximately 1914 to 1937. (Tr. Exs. 17-28, 57; 9/12/18 Tr. 27:17-20; 33:14-34:10; 49:6-17; 50:17-51:22; 52:11-53:6; 56:22-57:10). The record also established the County expended funds to maintain the Road during the 1930s in an effort to sell properties via tax deeds along the Road it acquired pursuant to landowner abandonment or foreclosure. (Tr. Ex. 50; 9/12/18 Tr. 60:22-61:3). The Boyce property, Murray property located at Mitchell Crossing, and Fink property were all held by the County and offered for sale during the 1930s. (Tr. Ex. 50; 9/12/18 Tr. 61:21-62:5; 62:9-24; 63:4-12).

A homestead patent for the S1/2 of Section 35, Township 21 North, Range 22 East was issued to Leonard Ellis on October 9, 1920. (Tr. Ex. 44; 9/12/18 Tr. 67:11-21). His application stated "Rights of way: designated" based on GLO maps showing the Road as access to the S 1/2 of Section 35. (Tr. Ex. 44; 9/12/18 Tr. 68:22-69:14).

The County applied for a right-of-way over Section 36 in Application #16532, wherein it identified the portion of the Road through Section 36 as a "Public Traveled Way" (County Road) Mabee Road" that provided access prior to 1997. (Tr. Ex. 31; 9/10/18 Tr. 288:12-289:21; 289:22-290:6; 290:12-16). The stated condition of the Road was "improved or graveled." (9/10/18 Tr. 296:1-2). In 2015, the State granted Fergus County a right-of-way "upon and across State land for a public county road known as Mabee Road" in Section 36 via the Right of Way Deed, Easement #D-15029. (Tr. Ex. 31). The County identified the Road in Section 36 as a "Public Traveled Way (County Road) called the Mabee Road" and submitted the application and payment for the right-of-way. (Tr. Ex. 31). The court was suspicious of this evidence, insinuating that the State and DNRC collaborated to bolster PLWA's position. (FOF #76-77).

Testimony established that BLM employees considered the Road to be a county road, at least during the 1980s and 1990s when it was bladed and had a berm. (9/10/18 Tr. 250:18-251:8). A BLM map shows it as an open, continuous road from Knox Ridge Road to Birdwell Road. (9/10/18 Tr. 75:17-76:12). Representatives from USFWS, the County, and the Sheriff's office informed inquiring hunters that they believed the Road to be public. (9/10/18 Tr. 50:21-51:19).

Former USFWS employee Bill Berg testified he used the Road to hunt and understood it to be public. The Road was maintained from Roy to Knox Ridge Road. (9/10/18 Tr. 89:22-90:2; 114:1-5). In his professional capacity, Berg directed USFWS employees to improve and maintain the Road at Armell's Crossing and routinely maintained it as it crossed CMRNWR. (9/10/18 Tr. 82:1-12; 91:16-92:10). Berg's use of the Road was open and notorious. (9/10/18 Tr. 96:7-97:12). Evidence indicated the County, BLM, and USFWS worked together to keep it passable. (9/10/18 Tr. 94:24-25). USFWS bladed the entire length. (9/10/18 Tr. 101:1-2). BLM, CMRNWR, and FWP employees historically used and maintained the Road from Knox Ridge Road to approximately Armells Creek in conjunction with official responsibilities, including patrolling, maintenance, inspecting grazing leases, and wildlife monitoring. (9/10/18 Tr. 248:11-249:21; 261:22-262:11).

Montana Department of Natural Resources and Conservation (DNRC) employees also believed the Road was public. Clive Rooney, who manages the school trust land sections, including Section 36 at issue, testified it has been used as access by state employees and officials and DNRC leased Section 36 for grazing. (9/14/08 Tr. 105:11-19; 109:11-14; 111:1-12; 113:6-15).

Physical Characteristics of the Road

The court distinguished the physical characteristics of "the disputed trail"

from its deemed endpoint of Mabee Road. (FOF #43). Specifically, it described the Road as "two tire ruts that meander across prairie gumbo soil" which it presumed passenger cars, school busses, or delivery trucks might have difficulty navigating. (FOF #44-46). It faulted PLWA for failing to provide evidence that such vehicles historically used the Road and limiting its evidence of public use to hunters and seasonal recreational users. (FOF #47-49). As argued below, the evidence was clear that the public had not used the Road for many years prior to the court's visit in the fall of 2018. While the court's personal observations may have been helpful in determining the general route and topography, they should not outweigh witness testimony in determining the condition of the Road when it was being used, prior to Robbins' unprecedented closure.

The presence of established tracks indicates considerable historical use. Overgrowth is unsurprising as witnesses testified they had not used the Road for approximately five to ten years prior to trial. (9/10/18 Tr. 49:4-6; 166:10-12; 194:3-6; 208:3; 9/11/18 Tr. 9:20-21; 86:22; 102:17-20). There was evidence that in the 1980s, the Road was in fair condition. (9/10/18 Tr. 186:7-14).

Historical Use of the Road

The Boyces donated a public road easement to BLM to create a road, which the court found did not include the disputed access urged by PLWA "for access from Knox Ridge Road to nearby BLM land." (FOF #67-68). The court found

Boyce granted only "permissive public use" to hunters, relying exclusively on a sign that likely did not exist prior to 2012 that "expressly states that public access across it is granted by permission of the private landowners." (FOF #69-70). Landowners offered no evidence the sign existed prior to 2012. The court also relied on the fact that the Boyces' land is enrolled in the State Block Management Program to reason that "the public's use of the [road] is clearly permissive." (FOF #71). This is not evidence of permissive use because, as Dan Boyce testified, that land has been in Block Management for only 10-15 years. (9/13/18 Tr. 97:15).

Ultimately, the court found that "[t]hough PLWA presented testimony from witnesses who say they used the Boyce property, the Court finds that PLWA failed to provide clear and convincing evidence that such use was open, notorious, adverse, and hostile to Boyces. In addition, the evidence of seasonal recreational use presented by PLWA also fails to demonstrate that alleged public use was continuous and uninterrupted." (FOF #72).

PLWA introduced several witnesses, including Russell Offerdahl and Richard Hjort, who used the road they called the "Knox Ridge Loop Road" since 1985, to access public lands, until Robbins locked the gate in 2007. (9/10/18 Tr. 38:20-22; 40:11-41:12; 44:8-11). Another witness, Jacob Lalli, began using the Road in 1994 or 1995. (9/10/18 Tr. 120:11-17). Eric Argotti used it from Roy to Knox Ridge Road approximately twelve times, beginning in 1997 or 1998, for

recreation, hunting, and firewood. (9/10/18 Tr. 162:19-163:24). Boyd Bergum used it in the 1950s. (9/10/18 Tr. 262:7-20). They all believed the Road was public and testified that no one precluded their access. They did not conceal their use of the Road, nor observe any "no trespassing signs" on it. (9/10/18 Tr. 43:19-44:5; 46:1-48:2; 124:6-11; 263:2-3).

These individuals observed a sign that indicated the Road accessed "Knox Ridge Road." (9/10/18 Tr. 48:20-49:3; 122:18-25). In 1985 or 1986, BLM erected a sign in Section 2 which read "Knox Ridge Road" with an arrow pointing north. This sign indicated public access over the Road to reach the public land beyond. The sign still exists, although it fell down in 2015 or 2016. (9/13/18 Tr. 143:24-145:14). The court discounted this testimony wholesale on the basis that recreational use was limited to seasonal hunting and that not all witnesses' testimony corresponded, especially with regard to the existence of livestock fences and locations. (FOF #104, 106, 108). It made scant findings regarding PLWA's claim for prescription, intermingled factual findings in its legal conclusions, and failed to discuss Montana law relevant to each *prima facie* element of a public prescriptive claim.

Expert Witnesses

Hallin opined the entirety of the Road was "used as a public thoroughfare" from 1903 on and existed as a County road after 1913. He testified it was the most

direct route and a preferential route of access to other routes to the east and west. (9/12/18 Tr. 107:8-108:23). Landowners' expert, Ken Jenkins, disagreed and opined the disputed trail is not the same trail identified in the historical documents, records, and maps. (FOF #100). The court agreed with Jenkins, rejecting maps, and finding insufficient evidence of public use. (FOF #101-103).

STANDARD OF REVIEW

Whether a district court applies the correct legal standard in determining whether a particular road is public is reviewed for correctness because it implicates a conclusion of law. *Sayers v. Chouteau County*, 2013 MT 45, ¶ 28, 369 Mont. 98, 297 P.3d 312; *State v. Fisher*, 2003 MT 207, ¶ 8, 317 Mont. 49, 75 P.3d 338. The same standard applies to a court's legal conclusion regarding the public or private nature of a disputed road. *Roe Family, L.L.C. v. Lincoln County Board of Commissioners*, 2008 MT 70, ¶ 24, 342 Mont. 108, 179 P.3d 514. To the extent the court's legal conclusions are based on implicit factual findings, such findings are reviewed under the "clearly erroneous" standard. *Roe*, ¶ 24.

Findings are clearly erroneous if not supported by substantial evidence, if the court misapprehended the effect of the evidence, or if a review of the record leaves this Court with the definite and firm conviction that a mistake was made. *Public Lands Access Assn. v. Boone & Crockett Club Foundation*, 259 Mont. 279, 283, 856 P.2d 525, 527 (1993). These standards apply to a prescriptive easement.

Leisz v. Avista Corp., 2007 MT 347, ¶ 14, 340 Mont. 294, 174 P.3d 481. A court's failure to make the requisite findings of fact and corresponding conclusions of law can serve as a basis for reversal. *Leisz*, ¶¶ 34-35.

SUMMARY OF ARGUMENT

This Court recognizes that "[p]ublic roads in particular [should be] protected in that '[n]o other kind of public property is subject to more persistent and insidious attacks or is less diligently guarded against seizure.'" *Baertsch v. Cnty. of Lewis & Clark*, 256 Mont. 114, 124, 845 P.2d 106, 112 (1992). Litigation surrounding the existence, location, and nature of a public road is common in Montana, especially considering that the available historic record is not usually clear or concise due to the passage of time.

When determining whether a historical road is public, this Court has acknowledged it is "an unrealistic burden on the public to prove" with certainty the available public record establishes a public road. *Reid*, 192 Mont. at 234, 627 P.2d at 1212. This Court has eschewed "strict" standards for proof of a public road and determined "it is sufficient if the record taken as a whole shows that a public road was created." *Reid*, 192 Mont. at 234, 627 P.2d at 1212. The district court failed to apply this standard to Mabee Road and improperly held PLWA to a higher burden of proof.

As in *Reid*, the record as a whole establishes the entirety of Mabee Road is

public. Specifically, PLWA established the record as a whole evidences it was created by the County, and/or, additionally that "the public acquired a prescriptive use of the road in question." *Reid*, 192 Mont. at 234, 627 P.2d at 1212. As argued below, the court's determinations to the contrary constitute reversible error.

ARGUMENT

I. UNDER THE RECORD AS A WHOLE, THE ENTIRETY OF THE DISPUTED PORTION IS A PUBLIC/COUNTY ROAD.

A. To Serve the Public Interest, this Court Established the "Record as a Whole" Standard in *Reid*.

Sections 7-14-2601 through -2614, MCA, establish the procedural requirements for the opening, establishment, construction, change, abandonment, or discontinuation of a county road by a board of county commissioners pursuant to a landowner petition. The statutory method to establish a county road remained the same from at least 1895 to 1922. *Sayers*, ¶ 25. Section 26-1-602(5), MCA, creates a disputable presumption that the County has regularly performed its official duty in this regard. *Reid*, 192 Mont. at 233, 627 P.2d at 1212.

The *Reid* case is instructive and persuasive. It involved a road created by the Park County Commissioners in 1905 south of Livingston. The "Little Mission Creek Road" traversed the landowner's property and continued beyond, with one fork providing access to public land. The landowner gated the road, but evidence established the County intended to create the road despite failing to comply with

various statutory requirements. *Reid*, 192 Mont. at 238, 627 P.2d at 1215.

This Court overruled prior precedent to the extent it imposed an onerous and unrealistic requirement for the public to prove on the face of the record that its public officials had jurisdiction to create a public road. Rather, "it is sufficient if the record taken as a whole shows that a public road was created." *Reid*, 192 Mont. at 234, 627 P.2d at 1212. Otherwise, the "burden on the public in a particular case to prove a public road was created so many years ago may well be unsurmountable." *Reid*, 192 Mont. at 234, 627 P.2d at 1212. Under this standard, the party opposing the road's public status bears the burden of providing conclusive proof that the road is not a county road. *Roe*, ¶¶ 21-23. If there is "inconclusive proof" in the record as to the precise historic location of a county road, a court should err on the side of the public, and should not assume intent on the part of the County. *Roe*, ¶¶ 21-23.

This Court has often considered *Reid* and has identified the following considerations as relevant to determining whether the record supports the establishment of a public road: (i) petition to open/establish a county road; (ii) commission minutes discussing the petition; (iii) appointment of road viewers; (iv) road viewers' report; (v) commission minutes regarding viewers' report; (vi) official commission action opening the road; (vii) easements granted by landowners; (viii) compensation paid to affected landowners for right-of-ways; (ix)

public hearing noted in commission minutes; (x) proof of notice of the public hearing; (xi) county action demonstrating jurisdiction over the road, such as maintenance of the road; (xii) significant public historical use; (xiii) whether the road in question provides direct access to public lands; and (xiv) maps depicting the road in question. *Sayers*, ¶¶ 22-28; *Garrison v. Lincoln Cnty.*, 2003 MT 227, ¶¶ 8-19, 317 Mont. 190, 77 P.3d 163; *Lee v. Musselshell Cnty.*, 2004 MT 64, ¶¶ 13-17, 320 Mont. 294, 87 P.3d 423; *Powell Cnty. v. 5 Rockin' MS Angus Ranch, Inc*., 2004 MT 337, ¶¶ 15-28, 324 Mont. 204, 102 P.3d 1210; *Jefferson Cnty. v. McCauley Ranches, Ltd. Liab. Pshp*., 1999 MT 333, ¶ 34, 297 Mont. 392, 994 P.2d 11; *Sheldon v. Flathead Cnty.*, 218 Mont. 270, 271-274, 707 P.2d 540, 541-43 (1985).

This Court has considered many statutory conditions of road creation for which specific evidence was lacking. It has never held the failure to satisfy one or more conditions defeats a road's public or county status. *Reid*, 192 Mont. at 234; *Lee*, ¶ 16; *McCauley v. Thompson-Nistler*, 2000 MT 215, ¶ 29, 301 Mont. 81, 10 P.3d 794; *Letica Land Co., LLC v. Anaconda-Deer Lodge Cnty*., 2015 MT 323, ¶ 15, 381 Mont. 389, 362 P.3d 615. Once established, a county road remains public unless formally abandoned. *Fisher*, ¶ 12. Abandonment requires an official act. Extended nonuse does not constitute abandonment. *Soup Creek LLC v. Gibson*, 2019 MT 58, ¶¶ 32-33, 395 Mont. 105, 439 P.3d 369; *McCauley*, ¶ 31.

As argued below, the court failed to consider and/or properly apply the "record as a whole" standard. Properly applied, this standard reveals the entirety of the Road is public.

B. The District Court Committed Reversible Legal Error By Failing to Apply the *Reid* Standard.

Reviewing the court's findings and conclusions reveals it failed to consider or apply the *Reid* "record as a whole" standard. The majority of its findings and conclusions mirror those proposed by Landowners, with the exception of the *Reid* standard, which they did not include. (Doc. 315). The court briefly noted *Reid*, but determined it was inapplicable. (COL #R, S).

This Court "disapprove[s], heartily and stoutly, the verbatim adoption of proposed findings and conclusions" submitted by the prevailing party. *Sawyer-Adecor Intl. v. Anglin*, 198 Mont. 440, 447, 646 P.2d 1194, 1198 (1982). It "require[s] trial courts to make specific and accurate findings which consider all relevant factors" and therefore "discourage[s] the verbatim adoption of findings and conclusions presented by one of the parties to the litigation." *Marriage of West*, 203 Mont. 469, 471, 661 P.2d 1289, 1290 (1983); *Rathbun v. Robson*, 203 Mont. 319, 324, 661 P.2d 850, 853 (1983).

"The losing party is entitled to know that he received the thoughtful consideration of the judge deciding the case rather than the partisan consideration of the attorney representing the other side of the lawsuit." *Marriage of West* 203

Mont. at 469, 661 P.2d at 1290. "The purpose of the findings and conclusions is better served if the court prepares its own findings and conclusions, relying on the parties for guidance and assistance." *Billings v. Pub. Serv. Commn.*, 193 Mont. 358, 365-66, 631 P.2d 1295, 1301 (1981); *United States v. El Paso Nat. Gas Co.*, 376 U.S. 651, 656-57 (1964) (noting "mechanically adopted" findings and conclusions are "not the product or the workings of the district judge's mind" and "[t]hose drawn with the insight of a disinterested mind are [] more helpful to the appellate court").

While there is no less deferential standard for reviewing verbatim findings and conclusions, and the practice does not necessarily mandate reversal, *Searight v. Cimino*, 230 Mont. 96, 101, 748 P.2d 948, 951 (1988), the same should be viewed with skepticism in a bench trial where the court's ultimate decision must be based on a consideration of "the record as a whole." In such circumstances, it is not apparent the court conducted an independent assessment of the evidence, in derogation of its fact-finding responsibility.

While the court made brief mention of *Reid*, it did not give it the consideration required as controlling precedent. It dismissed *Reid* and its "record as a whole" standard on the erroneous basis the case was distinguishable and limited to its facts:

> Plaintiff relies heavily upon *Reid* in support of its position, but the facts in this case put the *Reid* standard out of reach when compared to the facts before the Court.
> . . .
> The Court in *Reid* used the "record as a whole" standard only because the County could not prove that the required number of petitioners signed the Petition and that each of them were freeholders. Under those facts the Court stated that the "record taken as a whole standard" was sufficient and that otherwise, "the burden on the public in a particular case to prove a public road was created so many years ago may well be insurmountable." *Reid* at 192 Mont. 231, 236.
> . . .

(COL #R, S).

The court did not mention the "record as a whole" standard in any of its findings. Rather, it found "[i]n sum, weighing the evidence before the Court, PLWA did not prove that the disputed trail is a county road or part of the Mabee Road." (FOF #42). More telling is the court's reliance on the absence of evidence as proof of the same, a practice this Court has cautioned against since *Reid*. *Danreuther Ranches v. Farmers Coop. Canal Co*., 2017 MT 241, ¶¶ 22-23, 389 Mont. 15, 403 P.3d 332 ("proof of precise facts as to persons' activities over one hundred years ago is often not possible, even where written records are kept").

Even when the court referenced the "record" of the Road it misstated clear facts. It stated there was no evidence in County records of "the appearance of the [disputed] road in the surveyor's road book." (COL #Q). This finding is contrary to clear, undisputed evidence PLWA presented. Hallin testified about the details of the Bolles Survey's surveyor's field notebook. (9/12/08 Tr. 18:24-21:10). He

detailed where each piece of the Bolles Survey was plotted in the County Surveyor's Records of Roads. (9/12/08 Tr. 21:11-25:24).

The *Reid* standard, coupled with the statutory presumption in § 26-1-602(5), MCA, establishes that Mabee Road is a public road from Roy to its endpoint at the intersection with Knox Ridge Road. The court's contrary determination was based on an erroneous standard and must be reversed because it held PLWA, and the public interests it represents, to a "strict compliance" standard which this Court "abandoned" in *Reid*. *Galassi v. Lincoln Cnty. Bd. of Commrs*., 2003 MT 319, ¶ 12, 318 Mont. 288, 80 P.3d 84. Further, it failed to shift the burden of proving the Road's allegedly private status to Landowners and failed to "err on the side of the public" as required by *Roe.*

C. The Record as a Whole Establishes That Mabee Road Extends to Knox Ridge Road.

The record as a whole, including County records, witness testimony, official maps, and other documents admitted into evidence, establishes the entirety of Mabee Road is a public or county road. The court agreed the County constructed it, but speculated it ended where the County stopped construction. However, as conceded by the court, only the absence of documentary records supports this determination. (COL #Q). Ample record evidence supports a determination that a county road existed prior to the County's declaration in 1949 and it proceeded beyond Section 14. The court adopted Landowners' proposed findings and

conclusions, rejecting this evidence. It disregarded extensive evidence of the Road, substituting instead its own speculation, for which no evidence exists.

The record as a whole establishes the Road existed prior to 1903, as the U.S. Postal Service determined that Delos merited an office. The court determined "PLWA superficially claims the public used the disputed trail as early as 1903, but introduced no evidence of public use circa 1903 or decades prior or after." (COL #V). The record does not support this conclusion. The presence of a post office indicates the need for local mail delivery. Homesteaders lived in the area and the 1917 Ellis homestead patent application stated the Road was already platted. (Tr. Ex. 44; 9/13/18 Tr. 18:18-19:1). Fink testified his family homesteaded there and ranched the area since 1912 or 1913. (9/13/18 Tr. 65:1-3). Deanna Robbins testified homesteaders settled along the Road and used it as early as 1912. (9/13/18 Tr. 125:13-16, 150:16-151:4).

Hallin testified the Road to Delos followed the same route and the mileage was reasonably similar. (Tr. Ex. 2; 9/11/18 Tr. 270:11-16; 9/12/08 Tr. 5:23-7:17; 10:9-12; 13:16-14:16; 15:23-16:10). PLWA also argued that such a "post road" established its legal status of a county road pursuant to R.S. 2477.[4] (Doc. 314,

[4] R.S. 2477 refers to § 2477 of the Revised Statutes of the United States, whereby the public accepted the federal government's offer by establishing a public highway in a manner recognized under state law.

Proposed COL #2(i)-(l), 3(a)-(h)). In concluding the 1903 postal map only represented the route with a "dashed line" and did not detail "how the mail was conveyed between Roy and Delos," the court disregarded PLWA's factual evidence, including Hallin's testimony. (FOF #95, COL #M). Such rationale is clearly erroneous and fails to comply with the "record as a whole" standard. The court also failed to explain how R.S. 2477 did not render the Road a public way in 1913 when the County platted and surveyed it and placed it on the 1914 Map.[5] Maps verify the creation of a road. *Lee*, ¶ 15.

The court essentially rejected all map evidence PLWA presented, finding "lines representing old roads on old surveys and old maps" are not "evidence of actual public use" or "of physical use of the routes they depict" and concluding that "[t]he appearance of the disputed trail on various maps does not carry great weight." (FOF #101, COL #O). This is contrary to post-*Reid* cases that rely in part on the existence of old maps showing roads in question. *Roe*, ¶ 22 (expert witness examined a "plethora" of maps); *Lee*, ¶ 15 (state highway map, county maps, and U.S.G.S. Quadrangle map were among "several documents verifying the creation" of the road in question); *McCauley*, ¶ 34 (depiction on 1903 geological survey map was part of whole record).

[5] "All that is required for title to pass are acts on the part of the grantee sufficient to manifest an intent to accept the congressional offer." *The Wilderness Soc. v. Kane County, Utah*, 632 F.3d 1162, 1165 (10th Cir. 2011).

The court also cited the Road's physical condition as indicative of its non-use. However, "the existence of worn tracks and ruts in the earth tends to establish there was considerable travel on the road sometime in the past." *Breiner v. Holt Cnty*., 581 N.W.2d 89, 94 (Neb. App. 1998). Failure to maintain a county road is not evidence it is not public. *Galassi*, ¶ 15. It is undisputed the route advocated by PLWA exists on numerous government-issued maps and the 1913 Bolles Survey, memorialized in the "Surveyor's Record of Roads" and which preceded the 1914 County map. It appears on the 1914 Montana Highway Map as a "County Road." (Tr. Ex. 10). The 1919 County Map illustrates the Road from Roy through Mitchell Crossing to Knox Ridge Road. This map depicts the Bolles Survey route where it joins the Road at the corners of Sections 13, 14, 23 and 24. (Tr. Ex. 30).

The court also declined to acknowledge PLWA's expert witness testimony about the County acquisition of property along the Road via tax deeds and expending funds to maintain the Road to sell those properties. (Tr. Ex. 50; 9/12/08 Tr. 60:11-16). Likewise, the court did not factor into its ruling that the Road provides access to public land. *McCauley*, ¶ 34 (factor was that road provided public land access).

The court discounted or ignored credible evidence and/or misapprehended its effect as to the Road's existence. It also applied an erroneous standard of proof ("clear and convincing") to the Bolles Survey when considering it as evidence of a

county road. (FOF #92). After repeatedly and erroneously rejecting PLWA's evidence showing the Road existed as early as 1903, and thereafter a county road was established over the same or similar route, the court faulted PLWA for not providing explicit documentary evidence from the County. The *Reid* Court rejected this overly strict standard as too great a burden on the public.

By another example, the court cited the 1918 Zuley Petition 842 as support for its conclusion the Road terminated at Finks' property because the Petition for an eastern access route to federal public lands did not "identify the PLWA's disputed route as existing at the time it was filed." (COL #K). The court ignored evidence that landowners, including Murray and Fink, requested gravelling and elevation of the Road in this very area. (Tr. Ex. 36; 9/12/08 Tr. 80:10-15). It also ignored 1918 county records, in connection with the Old Missouri River Trail realignment, which indicated that "Established Road 842" existed on the same route. It also ignored PLWA's expert testimony.

A significant critical omission is the court's rejection of Bob Fink's 2000 letter, which evidences the public nature of Mabee Road which crossed his property at the precise location the court deemed it terminated. No party objected to this letter and the court's rejection of it as unreliable and irrelevant must be rejected. (9/10/18 Tr. 149:20-151:15). One "must object to improper testimony when it is offered or abide the result; failure to object at the proper time waives the

error." *State v. Gardner*, 2003 MT 338, ¶ 49, 318 Mont. 436, 80 P.3d 1262. Moreover, the statements by Fink are inherently reliable and excepted from hearsay's definition. M.R.Evid. 803(15) (document statements affecting a property interest) and (20) (reputation concerning boundaries/general history affecting community lands).

The court also improperly rejected evidence of the County's 2015 application, payment, and receipt of an easement over State Section 36. The court found this evidence "curious" because County officials later changed their mind about the public nature of Mabee Road and suspected that the State played a role in the process because the evidence favored PLWA's position. (FOF #76-77). The record contains no evidence to support the court's suspicion and there is no dispute the County obtained a right-of-way over a segment of the Disputed Portion, and thereby conceded its county status.

Even if the State and DNRC were at odds with the County, the court erred in accepting the County's testimony that the easement application was "a mistake" and summarily rejecting direct evidence of public access. "[T]he public has a right to rely upon the advice and actions of public employees and officials." *Chennault v. Sager*, 187 Mont. 455, 463, 610 P.2d 173, 177 (1980). Moreover, there is an "overwhelming interest of the public in maintaining public lands" and therefore "[i]rrespective of the negligence of public employees and officials, [] the foremost

consideration [] lies with the protection of the public interest." *Baertsch*, 256 Mont. at 124, 845 P.2d at 112; § 26-1-601(1), MCA (conclusive presumption when a party acts or makes a declaration, and intentionally leads another to believe a particular thing and acts upon that belief, the same is true); § 1-3-208, MCA (person cannot take advantage of own wrong).

In addition to the County's 2015 representation, it claimed the Disputed Portion for fuel tax purposes in 2010 and prior. Further, many governmental witnesses confirmed their understanding that the Disputed Portion was public. The court erroneously rejected this and other ample evidence. Because the entire record is available , this Court may "make [its] own examination of the entire case, and [] make a determination in accordance with [its] findings. *Rennie v. Nistler*, 226 Mont. 412, 415, 735 P.2d 1124, 1126 (1987).

This Court should determine that under *Reid*, PLWA established the entirety of Mabee Road is public. *Galassi*, ¶ 13 ("[t]hese requirements have been substantially met").

II. CONSIDERATION OF EACH REQUIRED ELEMENT REVEALS THE PUBLIC ACQUIRED PRESCRIPTIVE RIGHTS OVER THE ENTIRETY OF MABEE ROAD.

A. Elements of Public Prescriptive Use.

"A prescriptive easement is created by operation of law." *Lewis & Clark Cnty. v. Schroeder*, 2014 MT 106, ¶¶ 18-19, 374 Mont. 477, 323 P.3d 207. A

public road may be declared based on prescriptive use. *Pub. Lands Access Assn. v. Bd. of Cnty. Commrs*., 2014 MT 10, ¶ 24, 373 Mont. 277, 321 P.3d 38 (*PLAA*)*; Swandal Ranch Co. v. Hunt*, 276 Mont. 229, 233, 915 P.2d 840, 843 (1996); *Leisz*, ¶ 37 ("the public may acquire a prescriptive easement which burdens private land"). "A public prescriptive easement is established in the same manner as a private prescriptive easement except that the users of the road are members of the general public rather than an individual who uses the easement for access to his property." *McCauley*, ¶ 37.

To establish the existence of a prescriptive public road, it must be shown the public followed a definite course continuously and uninterruptedly for the statutory period together with an assumption of control adverse to the owner. *Schroeder*, ¶ 18; *Leisz*, ¶ 37. Use of the roadway must be open, notorious, adverse, continuous, and uninterrupted for the complete statutory period of five years. *McCauley*, ¶ 37; *Schroeder*, ¶¶ 18-19; *Heller v. Gremaux*, 2002 MT 199, ¶ 12, 311 Mont. 178, 53 P.3d 1259; § 70-19-404, MCA.

The claimant must establishing each element by clear and convincing evidence. *Schroeder*, ¶ 18. "Clear and convincing proof is simply a requirement that a preponderance of the evidence be definite, clear, and convincing, or that a particular issue must be clearly established by a preponderance of the evidence or by a clear preponderance of proof" and does not require "unanswerable or

conclusive evidence." *Wareing v. Schreckendgust*, 280 Mont. 196, 206, 930 P.2d 37, 43 (1996). Once the claimant has established each element, a presumption of adverse use arises; the burden then shifts to the potential servient owner. *Warnack v. Coneen Family Trust*, 266 Mont. 203, 216, 879 P.2d 715, 723 (1994).

The element of "exclusivity," which applies in private prescriptive easement cases, is not required to establish a public prescriptive easement because the easement, by its nature, involves public use. *Schroeder*, ¶ 18. "To be 'open and notorious,' the use of a claimed right must provide the landowner with actual knowledge of the claimed right, or be of such a character as to raise the presumption of notice." *Schroeder*, ¶ 19; *Downing v. Grover*, 237 Mont. 172, 176, 772 P.2d 850, 852 (1989) ("[o]pen and notorious is defined as a distinct and positive assertion of a right hostile to the rights of the owner and must be brought to [their] attention");

"To be 'continuous and uninterrupted,' the use of a claimed right cannot be abandoned by the user or interrupted by an act of the landowner." *Schroeder*, ¶ 19; *Downing*, 237 Mont. at 176, 772 P.2d at 852 (to establish continuous use, the claimant must show that he used it often enough to constitute notice of the claim to the potential servient owner). Uninterrupted use is use neither interrupted by an owner's act nor by a claimant's voluntary abandonment. *Downing*, 237 Mont. at 173, 772 P.2d at 852.

"To be 'adverse,' the use of the route must be exercised under a claim of right and not merely as a privilege or revocable license; the landowner must know of and acquiesce to such a claim. *Schroeder,* ¶ 19. While seasonal, recreational use is generally insufficient by itself to establish prescriptive use, it is a permissible consideration. *PLAA*, ¶¶ 35-36.

When combined with other uses, such as fire protection or land management activities, such use is sufficient to establish a public prescriptive easement. *McCauley*, ¶ 38. "Further, in assessing the nature of such recreational use, we have recognized that implied acquiescence does not amount to permission, to defeat a showing of adverse use." *PLAA*, ¶¶ 35-36.

In *Lunceford v. Trenk*, 163 Mont. 504, 518 P.2d 266 (1974), this Court affirmed a district court's decision of a public prescriptive easement, rejecting the permissive use argument, noting "[the] testimony indicated that the use was not permissive, that no request for permission to use the road was asked nor given to a vast majority of the users. Plaintiffs assumed they had a right to use the road and used it." *Lunceford*, 163 Mont. at 509, 518 P.2d at 268. "'[C]ontinuous use does not mean constant use; rather, if the claimant used the property in dispute whenever he desired, without interference by the owner of the servient estate, the use was continuous and uninterrupted.'" *PLAA*, ¶ 36.

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B. The District Court Failed to Consider or Make Appropriate Findings and Conclusions Regarding Each Element.

In determining whether a prescriptive right exists, a court should consider each element, "set forth the ultimate facts" regarding that element, and make "corresponding conclusion[s] of law." *Wareing*, 280 Mont. at 207, 930 P.2d at 44. "Each element is essential to the claim, and the trial court must make findings relevant to each element in order to sustain a judgment on appeal." *Backman v. Lawrence*, 210 P.3d 75, 81 (Idaho 2009). In *Leisz*, ¶¶ 34-35, this Court reversed and remanded the court's prescriptive easement determination where it failed to make the requisite findings and conclusions regarding historic private roadway use. The court failed to issue explicit findings or conclusions and adopted nearly verbatim Landowners' proposed findings and conclusions.

While the court made a few supporting findings and recited the elements of a public prescriptive right in its Conclusion of Law #SS and determined in Conclusion of Law #TT that "PLWA failed to meet its burden of proof to establish a prima facie case that the disputed trail is a public road based on public prescriptive use," the court did not consider each element separately or make the requisite determination that each element was not established by clear and convincing evidence. Nor did it set forth the appropriate legal authority in its legal conclusions explaining each element.

The court only specifically addressed adversity, determining that "testimony

regarding seasonal recreational use that PLWA introduced is insufficient to constitute adversity." (COL #UU). The court did not indicate whether such a determination was based on "clear and convincing evidence," but noted there was "conflicting and disputed evidence" of permissive use. (COL #UU). This lack of specificity constitutes reversible error. *Curran v. Mount*, 657 P.2d 389, 392 (Alaska 1982) (remanding because the "court's findings of fact and conclusion of law do not indicate what standard of proof it used").

Except for dismissing recreational use, the court did not address, analyze, or make explicit determinations regarding the elements of continuous and uninterrupted use or whether it was "open and notorious." The only reference to this element is the court's unfounded suspicion that "hunters obtained permission to use the landowners' property and kept secret their opinion that their use was hostile and adverse," came to court after landowners passed away, and "revealed their secret understanding that the road is public" and any "permissive use did not apply to the disputed road, and that their use of the disputed trail was undertaken in a hostile and adverse manner to the landowners." (COL #QQ). It also made findings regarding Boyce's property, but did not cite to supporting evidence. (FOF #128-131).

The court's speculation hunters conspired to "privately harbor their intentions" is not supported by the record or law, nor would it be a logical

litigation strategy. The court did not cite any law regarding this element. Hunters testified they did not conceal use of the Road. Decades of use of a road over private property is sufficient landowner notice regardless of permission to hunt on either side of the road. *Breiner*, 581 N.W.2d at 94 ("[t]here was no evidence of any effort by local landowners to stop hunters from traveling on the trail road, nor is there any evidence the hunters' travel was part of trespasses by the hunters upon the private land adjacent to the trail roads").

It is the court's wholesale rejection of hunters' testimony which is suspect. While "many landowners regard hunters as a nuisance," "hunters are members of the public." *Breiner*, 581 N.W.2d at 94. No witness testified they kept secret a belief the Road was public; on the contrary, Offerdahl and Hjort testified they initially asked whether they could use the Road. Bob told them he could not control their use because the Road was public. They continued their use based on this representation.

As discussed below, PLWA established the prescriptive elements with clear and convincing evidence. The court's contrary determination is unsupported and should be reversed.

C. PLWA Established Public Prescriptive Use of the Disputed Portion.

PLWA established the public has followed a definite course continuously and uninterruptedly for the statutory period together with an assumption of control

adverse to the owner. Not only does the existence of worn ruts in the Road evidence considerable historical travel, but the established post road from Roy to Delos in 1903 presumes it. Peter S. Dayton, *Montana Public Road Law*, p. 11 (2017); *U.S. v. Kochersperger*, 26 F. Cas. 803, 803, 1860 U.S. App. LEXIS 458, *1 ("[a] post-road is a public highway, whose use by the post is prescribed or authorized by law").

Historical use, coupled with recreational and other land management uses, over 100 years clearly and convincingly establishes open, notorious, continuous, and uninterrupted public use. PLWA introduced evidence of use for every decade since 1903. While the court discounted seasonal use, such use by hunters and recreationists is appropriately considered with evidence of other use. *PLLA*, ¶¶ 35-36. PLWA established such combined uses for the requisite statutory period, which is sufficient to establish a public prescriptive easement. *McCauley*, ¶ 38. There was no evidence of abandonment.

PLWA also established the hostility element clearly and convincingly. Witnesses travelled the Road assuming it was public and never sought permission, including over the Boyce Property. While Offerdahl and Hjort testified they initially asked Bob Fink whether they could use it, he did not give them permission because he believed it was public. Testimony indicated Murrays did not believe permission was necessary. It is sufficient if the "vast majority of the users" did not

seek permission. *Lunceford*, 163 Mont. at 509, 518 P.2d at 268. Evidence of unlocked gates along the Road used for livestock control does not render it permissive. *Brown & Brown of MT, Inc. v. Raty*, 2012 MT 264, ¶ 28, 367 Mont. 67, 289 P.3d 156 (citing *Lemont Land Corp. v. Rogers*, 269 Mont. 180, 186, 887 P.2d 724, 728 (1994)) (use of gates for the sole purpose of controlling livestock "is insufficient to overcome the presumption of adverse use").

Additionally, "implied acquiescence does not amount to permission, to defeat a showing of adverse use." *PLAA*, ¶¶ 35-36. The evidence clearly establishes the landowners knew of the public's use and acquiesced thereto. *Schroeder*, ¶ 19. Accordingly, the court erroneously determined 2007 was the first instance of hostility, and appeared to add its own confrontation requirement. (COL #XX, BBB). Also erroneous is its corresponding conclusion that the Complaint's filing in August of 2012 fell one month short, as the argument regarding prescriptive use was premised on the public's adverse use from at least 1903 to 2007. (COL #DDD).

Consideration of the entire record reveals the court erred in declaring PLWA failed to prove the public's prescriptive right over the entirety of Mabee Road. Its legal conclusions are in error and its findings of fact are clearly erroneous. The evidence establishes the public's use since 1903 was open, notorious, continuous, uninterrupted, and adverse under controlling law. PLWA respectfully requests the

Court declare the same and reverse the district court.

CONCLUSION

The court erred in determining PLWA failed to establish the public nature of Mabee Road, either as a lawfully established public or county road, or through a claim of prescriptive right. It should be reversed.

Respectfully submitted this 20th day of July, 2020.

/s/ J. Troy Redmon

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this response brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, excluding certificate of service and certificate of compliance.

/s/ J. Troy Redmon

APPENDIX

CERTIFICATE OF SERVICE

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