No. DA 20-0145

IN THE

Supreme Court of the State of Montana

PUBLIC LAND/WATER ACCESS ASSOCIATION, INC.,

Plaintiffs and Appellant,

VS.

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, AND FERGUS COUNTY, MONTANA,

Defendants and Appellees.

ON APPEAL FROM THE TENTH JUDICIAL DISTRICT COURT,
FERGUS COUNTY, HON. BRENDA GILBERT, PRESIDING
CASE NO. DV14-2012-0085K

APPELLEE BRIEF OF THE RANCH FAMILIES

WILLIAM W. MERCER
MATTHEW H. DOLPHAY
HOLLAND & HART LLP
401 North 31st Street, Ste. 1500
P.O. Box 639
Billings, MT 59103-0639
Telephone: (406) 252-2166
wwmercer@hollandhart.com
mhdolphay@hollandhart.com

Counsel for Appellee Ranch Families Robin Fink, Kathie Fink, Mark Robbins, Deanna Robbins, Cleo Boyce, Mary Boyce, Dan Boyce, Laura Boyce, and David Murray

ADA CORDELIA MONTAGUE
DANNA R. JACKSON
Special Assistant Attorney General
MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
1539 Eleventh Ave.,
P.O. Box 201601
Helena MT 59620-1601
Telephone: (406) 444-0503
amontague@mt.gov
jacksondanna@mt.gov

Counsel for Appellee State of Montana

Additional Counsel Information on Following Page

PAUL GRIGSBY
GRIGSBY LAW PLLC
777 E. Main Street, Suite 203A
P.O. Box 6356
Bozeman, Montana 59771
Telephone: (406) 587-9440
Fax: (406) 219-2476
pgrigsby@grigsbylaw.com

J. TROY REDMON
KEELEY MCKAY
REDMON LAW FIRM, P.C.
1716 West Main Street, Ste. 5
Bozeman, MT 59715
Telephone: (406) 585-0440
Facsimile: (406) 586-5752
troy@redmonlawfirm.com
keeley@redmonlawfirm.com

Counsel for Appellant Public Land/Water Access Association, Inc

KENT M. SIPE
Fergus County Attorney
801 W. Broadway
Lewistown MT 59457
coattorney@fergus.mt.us

Counsel for Appellee Fergus County

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STATEMENT OF THE ISSUES

1. Does substantial credible evidence support the District Court's determination that the Disputed Trail is not a statutorily created public road by landowner petition?

2. Does substantial credible evidence support the District Court's determination that the Disputed Trail is not a public road by public prescription?

STATEMENT OF THE CASE

This case involves a dispute concerning the status of segments of a trail ("Disputed Trail" or "Trail") off Mabee Road. Mabee Road is a well-maintained county road that begins near Roy and ends 12.67 road miles to the north at the common quarter section between Sections 14 and 15. The Disputed Trail is an unmaintained ranch trail that begins at a historical gate off Mabee Road and ends 12 or so miles to the north at Knox Ridge Road. The Trail is passable at times with a four-wheel drive pickup but is best navigated by horseback or ATV.

In 2008, after a dispute between two seasonal hunters and local family ranchers owning land on the Trail, PLWA sought a declaration from the Fergus County Commissioners that the Trail is a public road. The Commissioners referred the matter to the County Attorney for a legal opinion. On January 12, 2010, the County Attorney issued a detailed legal opinion letter, finding the Trail is not a statutorily created road.

On August 30, 2012, PLWA filed suit in the Tenth Judicial District Court, suing the local ranch families owning land on the Disputed Trail, Bob and Kathie Fink ("Fink Family"), Mark and Deanna Robbins ("Robbins Family"), Cleo and Mary Boyce and Dan and Laura Boyce ("Boyce Family"), and David Murray ("Murray Family") (collectively, "Ranch Families"), among others, requesting a declaration that the Trail is public by landowner petition or prescription.

The District Court commenced a five-day bench trial on September 10, 2018. The court heard testimony from 27 fact witnesses and two expert witnesses, considered over 80 exhibits, and conducted a site visit of the Trail using a four-wheel drive ATV. Following trial, the court issued an order with 42 pages of thorough findings of fact and conclusions of law in July 2019. The District Court found that the "overwhelming weight of the evidence" shows the Trail is neither a statutorily created road nor a public road by prescription.

FACTUAL BACKGROUND

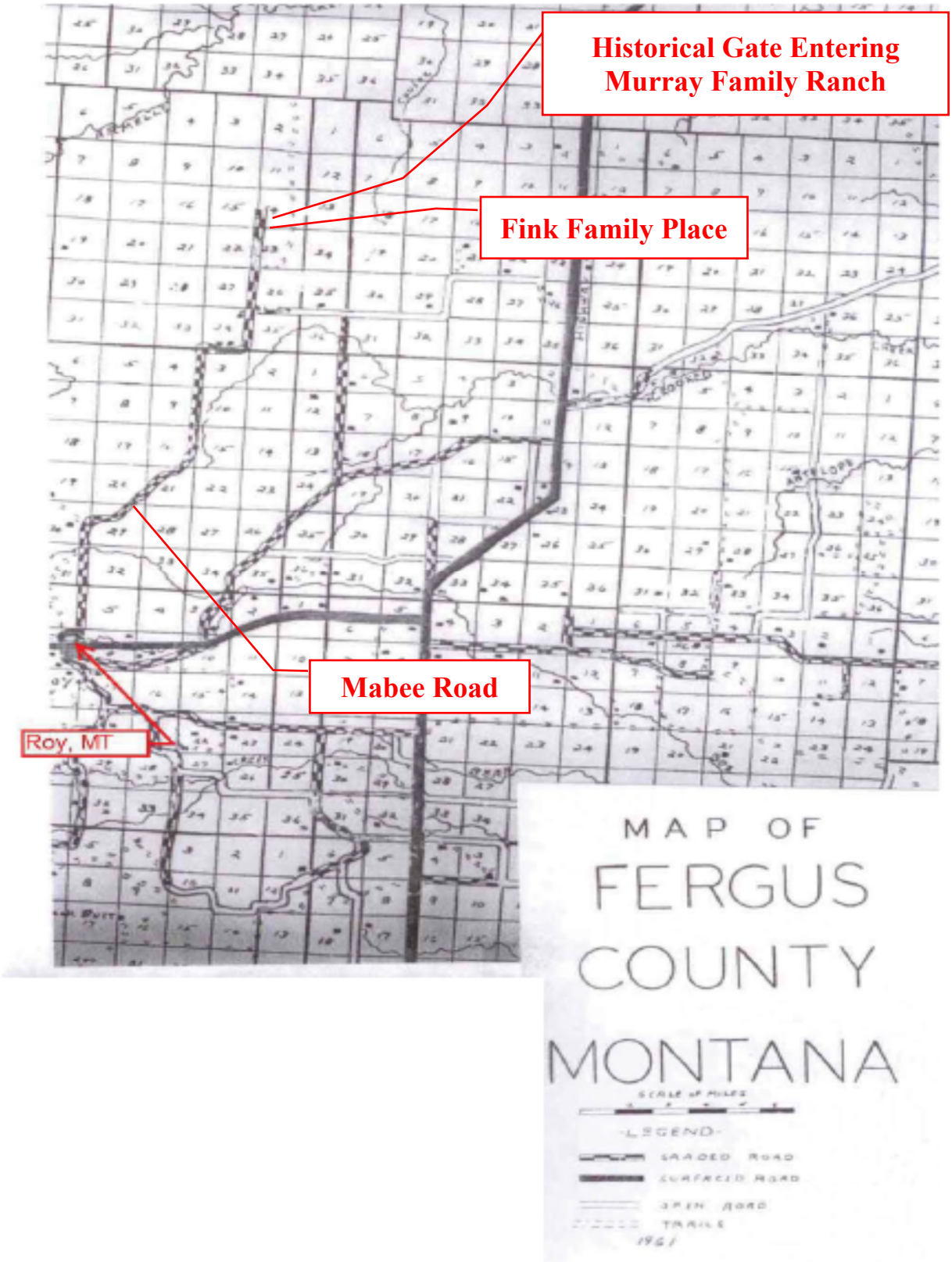
The Ranch Families are local Montanans who have ranched north of Roy for generations. The Fink Family are original homesteaders laying claim in 1912; their house sits off Mabee Road below the beginning of the Trail. Tr. 9/13-63:21-25, 65:1-3. The Robbins Family has ranched north of Roy and owned land off Mabee Road for decades and expanded their family ranch in 2007 purchasing land on the Trail after leasing it since 1998. Tr. 9/13-183:8-10;135:13-14. The Boyce Family's ownership dates back three generations to their grandfather, who in 1967, granted access across another of his properties to create Knox Ridge Road. Tr. 9/13-98:22-25. Before David Murray sold his stake amidst the litigation, the Murray Family had owned land on the Trail since 1940. Tr. 9/11:165:16-18. The Murray Family's historical gate stands guard at the entrance of the Trail. FF, ¶115.

I. Mabee Road

Mabee Road is a statutorily created, well-maintained, gravel road that originates near Roy, heads due north, and ends about 13 miles to the north between Sections 14 and 15 in Township 20 N, Range 22 E. FF, ¶¶20-24, 49. Relevant to the appeal, two landowner petitions created the northern end: (1) Petition 842 and (2) Petition 2041. FF, ¶24. Petition 842, approved in 1919, ended the Road at "SE corner of the SW ¼ section 14." Petition 842, p.3. Petition 2041, submitted in 1949, extended the Road south and slightly north to "the 1/4 corner between Sections 14 and 15." Petition 2041, p.19. Mabee Road serves as access to a Malmstrom Intercontinental Nuclear Missile Silo and a Roy Public Schools bus route. FF, ¶49; Tr9/13-33:23-25;83:1-5; Trial Exhibit 49,p.36. The 1961 Fergus County Map, provided on the next page, shows the Road (the County Map does not show the Trail, although other trails are shown).

[The remainder of this page is intentionally left blank][1]

[1] Petition 842 documents are at Exhibits 33-35 and Appendix ("App.") 001-08; Petition 2041 documents are at Exhibit AA-18 and App.009-34; and the Failed 1965 Petition documents are at Exhibits 38-39 and App.044-46. At times, this Brief cites the petition document by name, and the Appendix provides cross-references to the trial exhibits where appropriate.



[**Figure 1** – Trial Exhibit DD, p.10 (annotations added)]

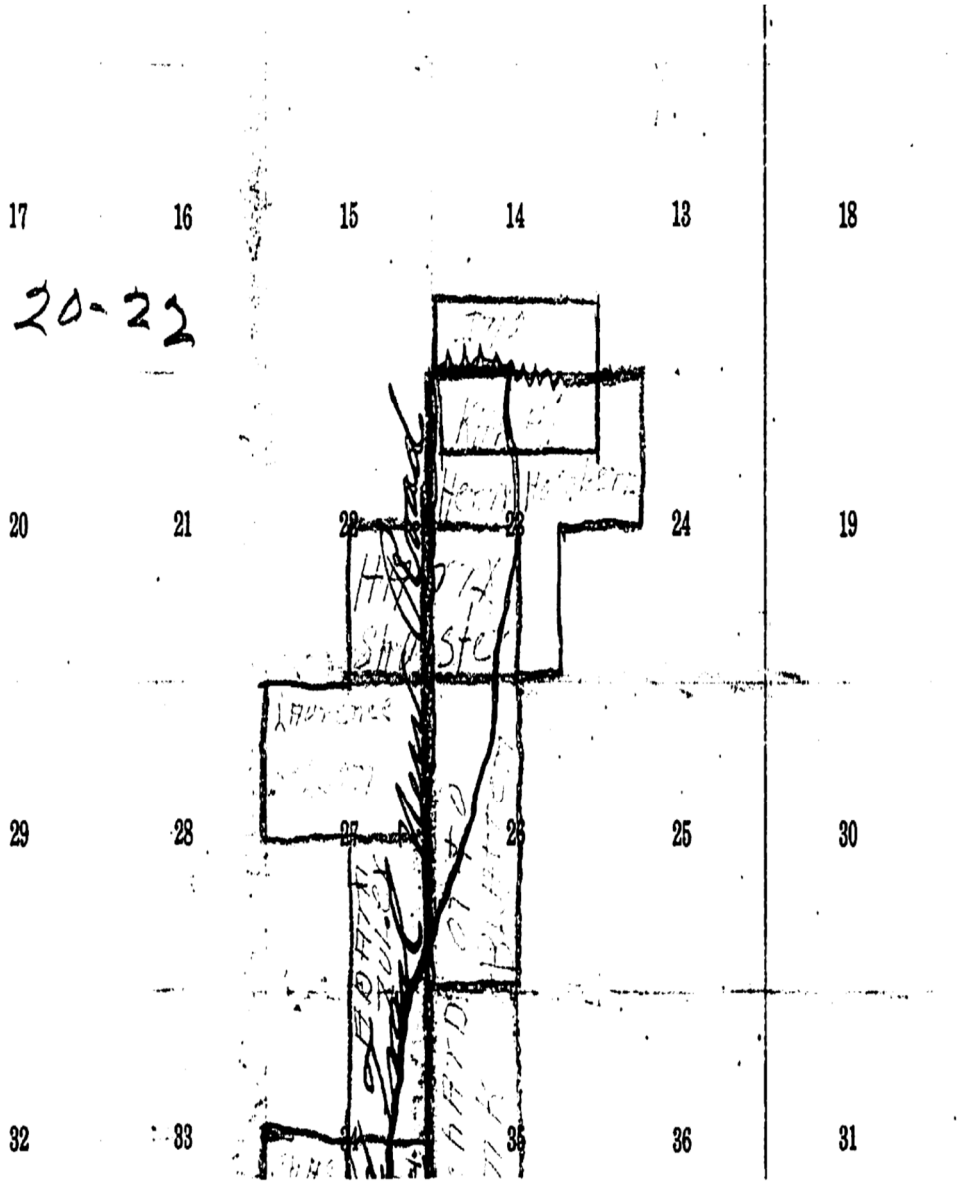
A. Petition Process

Mabee Road is named after Fred Mabee. FF, ¶25. Born in 1887, Fred lived at his homestead north of Roy from 1912 until his death in 1972. FF, ¶24; Tr.9/13-230:20-23; Exhibit DD, pp.14,17,18. Fred's sister, Ida Mabee, arrived after her brother.[2] The two Mabees were signatories to Petitions 842 and 2041, respectively; Fred was also a signatory to another failed 1965 petition that requested northward extension. FF, ¶24; Petition 842; Petition 2041; Failed 1965 Petition.

1. Petition 842

In 1918, with Petition 842, Ida Mabee, along with other landowners, petitioned to abandon another road and establish Mabee Road from the "SW corner sec. 34" to "the SE corner of the SW ¼ section 14." Petition 842, p.3. The Commissioners approved Petition 842 in 1919. *See* Commission Declaration, p.1. As clearly stated in the Petition, it ended the Road to the north at "the SE corner of the SW ¼ section 14, T. 20N, R. 22E." Petition 842, p.3. The Report of Road Viewers likewise defines the end "at the SE corner of the SW ¼ section 14, T. 20N, R. 22E." Road Viewers' Report, p.1. Lastly, the petition map prepared by the road viewers, which the northern part is provided below, similarly shows the terminus at Section 14. Petition 842 Map; Tr.9/12-45:1-3.

[2] The trial court record does disclose their familiar relationship, but based on study completed by PLWA, they were brother and sister, not husband and wife.

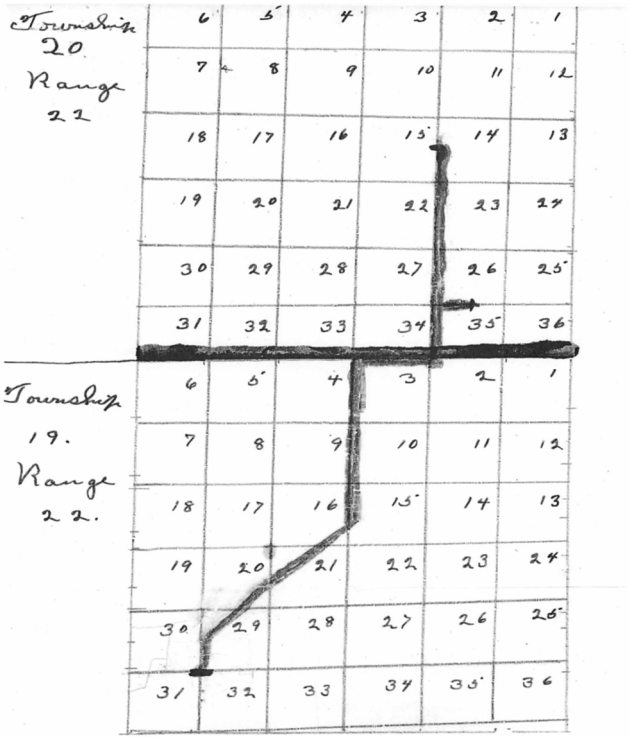


[**Figure 2** – Excerpt of Trial Exhibit 35]

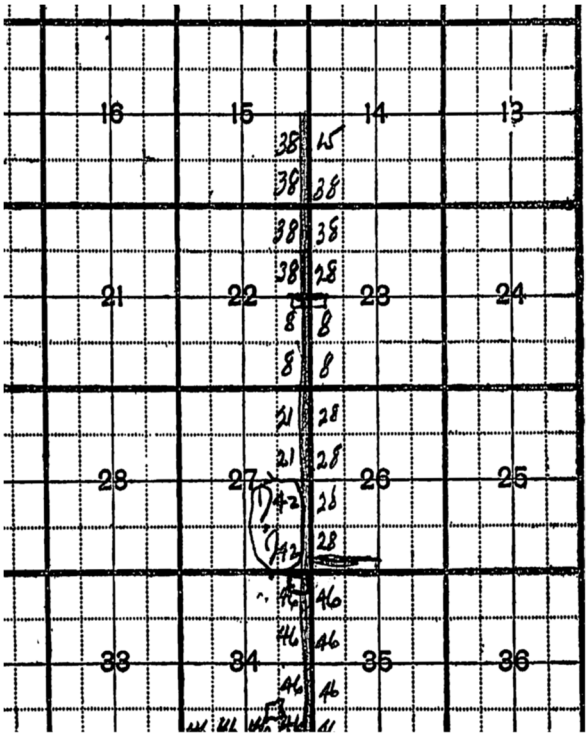
The county records document Petition 842's exacting compliance with then-applicable Montana statutory elements and procedures. CL, ¶F. Contained within the records are the (1) petition, which is signed by the requisite freeholders; (2) names of the road viewers; (3) the road viewers' report; (4) amount of compensation; and (5) the commission declaration. CL, ¶F.

2. Petition 2041

In 1949, with Petition 2041, Fred Mabee petitioned, along with other landowners, to extend the Road south to "the south side of sections 29 and 30" and north to "the 1/4 corner between sections 14 and 15." Petition 2041, p.19. As clearly stated in the Petition, it requests the Road to "end[] at the 1/4 corner between Sections 14 and 15. . . . This is in township 20 range 22." *Id*. Likewise, the maps show the terminus between Sections 14 and 15:[3]



[**Figure 3** – Trial Exhibit AA18, p.25]



[**Figure 4** – Excerpt of Trial Exhibit AA18, p.21]

[3] Although irrelevant to the appeal, Petition 2041 requests gravel to the 1/4 section, while maps (and other petition documents) grant jurisdiction to the 1/2 section. Thus, the Road terminates at the 1/4, but the County holds an easement to the 1/2, which a road was never constructed upon. FF, ¶21.

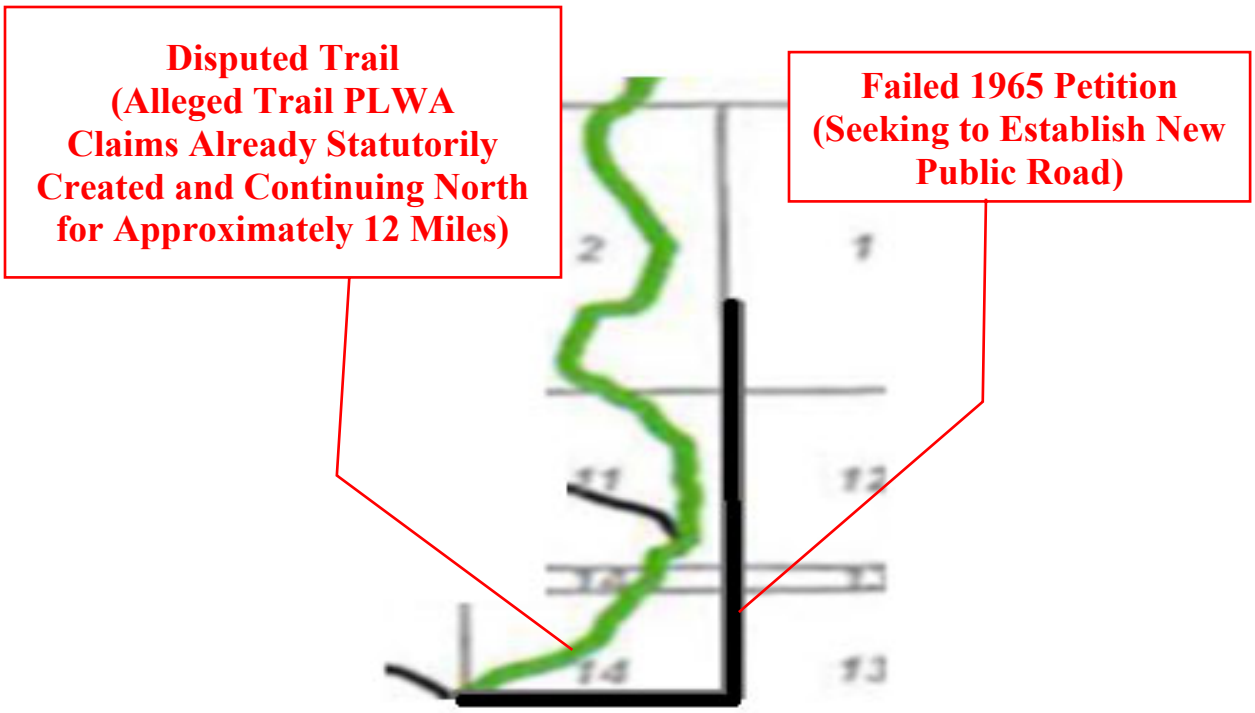
Just like Petition 842, Petition 2041 achieved compliance with Montana statutory procedures. CL, ¶F.

3. 1965 Failed Petition

In 1965, Fred Mabee again petitioned, along with other landowners, requesting further northward expansion of the Road from the "SW 1/4, Section 14" – set by Petition 2041 – "thence east 1 mile" to the "section line between Sections 14 and 13" and then "North 2 1/4 miles" to Sections 1 and 2. *See* 1965 Failed Petition; 1968 Commission Journals, p.1; FF, ¶33.

But this time, the Commissioners turned Mabee back, rejecting the petition and the approximate 2 miles of northward expansion. FF, ¶31. The Commissioners denied the Petition during a public meeting on September 25, 1968. FF,¶35. As documented in the Commission Journals, the Commissioners found "insufficient use and cost too great" to justify even slight northern movement. *See* 1968 Commission Journals, p.1; FF, ¶36. The Commissioners explained a road going north from Mabee Road would "only be used in summer and by hunters." *Id*.

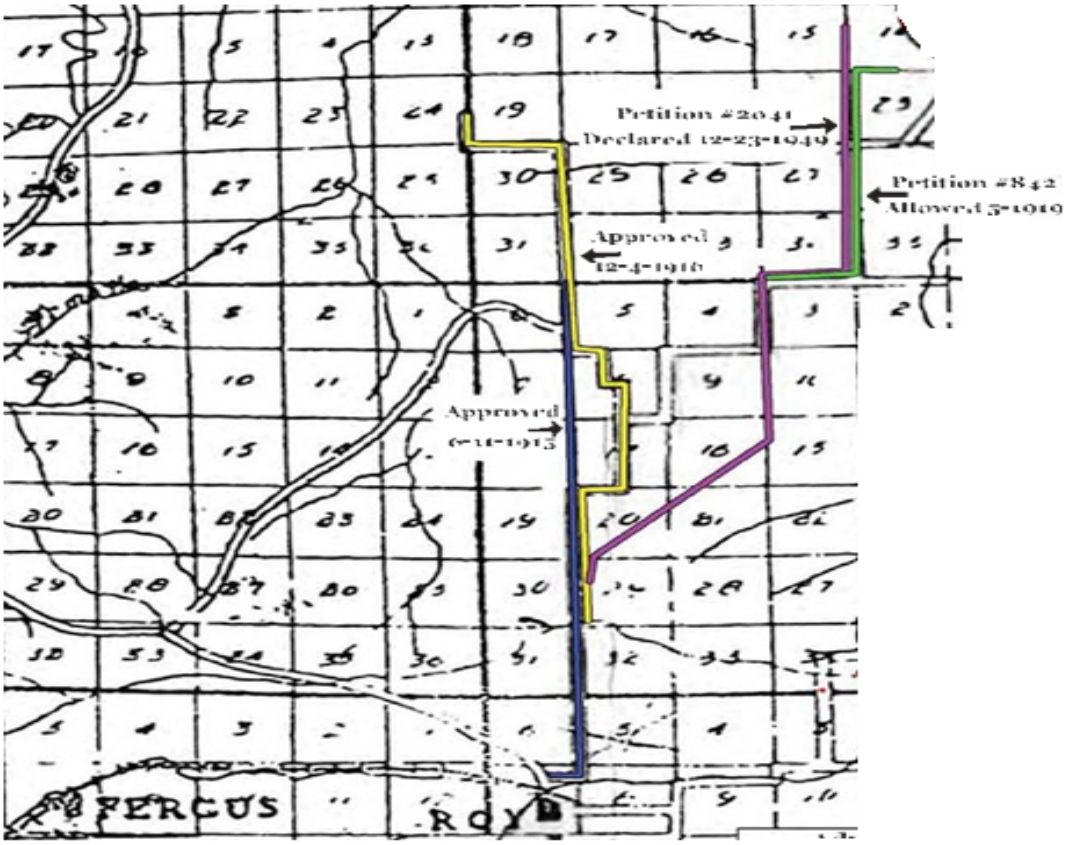
Though the failed Petition requested an extension north, it would not have followed the Trail that PLWA alleges already existed off Mabee Road for 12 miles to the north. FF, ¶34. Nor does the Petition mention the Trail. FF, ¶37. An excerpt of a map with a portion of the Trail juxtaposed with the Petition is shown below.



[**Figure 5** – Excerpt of Trial Exhibit 49
(Sold Black Line Added as Failed 1965 Petition Location)]

4. End of Petition Process

The petition process creating Mabee Road thereby ended. FF, ¶24. An excerpt of a map created by PLWA's initial expert, Lawrence Lahren, PhD, combining Petition 842 and 2041 is shown on the following page with green representing 842 and purple 2041. Tr.9/13-8:1-9:2. (Blue represents Petition 502, which created the southern approximate 2 miles of Mabee Road as part of another road). Tr.9/13-6:4-15. No annotations have been added to the exhibit created by Lahren and affirmed by the Ranch Families' expert, Ken Jenkins, with respect to the petitions.



[**Figure 6** – Excerpt of Trial Exhibit X-75][4]

In accord with the petitions, Fergus County constructed the Road to the end of the common quarter of Sections 14 and 15. FF, ¶¶19-22.

B. 2003 County Resolution

In the early 2000s, the Commissioners comprehensively reviewed county records to ensure all county roads were properly petitioned. Tr.9/11-225:6-226:21. *See also* FF, ¶27. Upon doing so for Mabee Road, the Commissioners found the records showed it ending at Sections 14 and 15, but also noted defects with the south

[4] The record does not reveal what the yellow line represents. A red line also appears on the full exhibit, but it is also unclear from the record what that line represents.

portion (Petition 502) might exist. Tr.9/10:288:1-11;9/13-6:4-15. By resolution, in 2003, the Commissioners accordingly reaffirmed the Road as a county road beginning near Roy and ending between Sections 14 and 15:

> Beginning in Section 7 of Township 18N, Range 22E, at Hwy 191 N between mile markers 35 and 36, . . .[description of route]. . ., ***ending*** in Township 20N Range 22E ***between Sections 15 and 14*** for a total mileage of about 12.67 miles.

2003 Resolution, p.2 (emphasis added).

II. Disputed Trail

The Trail falls off Mabee Road at the Road's northern end at the common quarter of Sections 14 and 15 and begins at the historical gate entering the Murray Family Ranch. FF, ¶¶51, 155. The Trail meanders north for about 12 miles until intersecting Knox Ridge Road. FF, ¶52-66. Between beginning and end, the Trail is intercepted by 7 separate gates. FF, ¶107.

A. Physical Characteristics

The Trail is "readily distinguish[able]" from "Mabee Road and the Knox Ridge Road." FF, ¶48. Unlike those maintained roads, "[t]he disputed trail is a two-track trail through pastureland and sage brush, with grass and sage brush growing between the tracks. The disputed trail is not graveled, nor regularly maintained in any other way." FF, ¶13. The Trail is "primitive at best" and "impossible to navigate in a passenger car and difficult to navigate in some places with a truck." FF, ¶45, 66

The Trail is instead "best negotiated in an ATV" or by "horse[] and foot travel." FF, ¶¶45, 66. Even then, in "fall, winter and spring," the Trail is often "impassible for a good bit of the time." FF, ¶46. PLWA's testifying expert, Barney Hallin, was never able to drive the Trail. Tr. 9/12-160:8-25. Despite multiple attempts with a chained-up pickup in the fall from the south and the north, Hallin was forced back. *Id*.

B. No Evidence Statutorily Created

No evidence exists evincing the Trail is a petitioned road. In stark contrast to the documents showing Mabee Road, there is no evidence – no petition, no road viewer reports, no compensation paid, no commission declaration, or any mention of these in public or private writings, through testimony, affidavit, or maps – suggesting or tending to suggest the Trail is a statutory road. FF, ¶¶28-29.

C. Relationship to Public Lands

Public lands exist near Knox Ridge Road, which are accessed by multiple access points off that road. CL, ¶VII;9/10-57:11-15; Exhibit DD, p.23; DNRC Exhibit B. Given its physical characteristics, the Trail is an exceptionally poor route to Knox Ridge Road, which is instead accessed from the west by taking the Winifred Highway or from the east by taking Highway 191 and turning at the Fred Robinson Bridge. Tr.9/13:253:22-25;182:8-23;9/10-57:11-15; Exhibit DD, p.23. However, as the court noted, federal lands are "impacted" by the Trail because it crosses federal

land. FF, ¶65. PLWA does not seek to quiet title or a declaration the Trail is public across the federal lands, instead its Complaint selectively seeks only a declaration as to the status of non-federal lands.[5] Dkt.39.

D. Public Use

Because of the other easier routes to Knox Ridge Road (FF, ¶66; CL, VII), the Murray Family gate, (FF, ¶115), the 6 livestock gates (FF, ¶107), and the fact that it does not lead to anywhere of historical significance (CL, ¶N), the Trail does not lend itself to much use. FF, ¶48. The earliest credible evidence of nonlandowner use first occurs around the "mid-1980s" with seasonal hunters in the fall. FF, ¶103.

And given the gate at its entrance and the proximity of the Fink's house, hunters (about 10 every season) typically request permission. FF, ¶105; Tr.9/13-52:11-13. PLWA's witnesses admitted the same. "PLWA's testimony of public use consists almost entirely of seasonal recreation purposes, namely hunters who testified they used the disputed trail." FF, ¶47. A few out-of-state hunters testified they entered absent permission, but most admitted they "did not proceed beyond [the] Gate for fear that they would be trespassing" and instead "turned around" to go ask "permission to use the private land behind the gate." FF, ¶¶117, 105, 109.

[5] Unless context indicates otherwise, this Brief refers to the Trail to mean only the non-federal portions, which are the subject of the Complaint.

III. Present Dispute

A. Dispute Between Ranch Families and Two Hunters

This case initially arises from a dispute between the Ranch Families and two seasonal hunters—Russell Offerdahl ("Russell") and Richard Hjort ("Richard"). As neighbors, the Ranch Families have long enjoyed a good and protective relationship amongst themselves. Tr.9/13-65:13-14. Looking out for each other is part of it, as Cleo Boyce testified, "[i]t's a long ways between yard lights out there. The more neighbors you got, the better neighbors you got, the better off everybody is." Tr.9/13-101:16-17.

The Fink Family, in particular Bob Fink, had also enjoyed a friendly, good relationship with a few seasonal hunters, primarily Russell and Richard, and had permitted the pair to hunt on the Fink Family Ranch. Tr.9/10-216:1-8; 78:1-6. But the relationship soured after the hunters hunted without permission, destroyed a livestock gate owned by the Murray Family, and then denied it. Tr.9/10-74:7-25; Tr.9/13-56:16-57:10. The relationship continued to deteriorate into 2006 after Bob told the pair to "stay out" of his private property and the Robbins Family's leased property but "they hunted it anyway." Tr.9/13-56:4-10

In 2007, after the Robbins Family purchased the leased ground, they placed a "no trespass" sign across the gate at Section 35 that the hunters had used as access to hunt the private property. Tr.9/13-118:20-21;166:1-2;FF, ¶132. But in September

2007, Russell and Richard returned, ignored the "no trespass" sign bearing the Robbins' phone number, and proceeded down the Trail. FF, ¶137.

Mark confronted the two hunters. Accounts differ regarding what was said. Russell testified Mark angrily told them to leave because there was a "new sheriff" in town. Tr.9/10-49:23-25. Mark disputed the testimony, testifying instead he told the pair to stop using the Trail, and as he turned away, Russell stated "we've gotten a road open before, we can do it again." Tr.9/13-168:16-22. Judge Gilbert heard the whole of the two men's testimony, looked both men in the eyes, and found Russell not credible as a witness. FF, ¶106; CL, ¶KK.

The two returned the next day. FF, ¶140. Having disregarded his warning and the no trespass sign again, Mark alerted FWP, and the game warden confronted Russell and Richard. Tr.9/13-169:21-23; FF, ¶140. Left with no other choice, other than to surrender the Ranch Families' property to the two hunters, Mark locked the gate at Section 35 entering his and Fink's property. Tr.9/13-171:11-13. Later that week, the game warden issued Russell and Richard tickets for criminal trespass arising out of their earlier use of the Trail. CL, ¶YY;Tr.9/10-53:20-21;209:8-21.

B. Opinion Letter

In January 2008, PLWA requested the Fergus County Commissioners to declare that the Trail is statutorily created. Tr.9-13-47:16-22. On January 12, 2010, after an exhaustive review of county records and applicable law, the County

Attorney issued a legal opinion, finding the Trail is "not a 'petitioned' road." Fergus County Legal Opinion, p. 2. The County Attorney found no evidence to support PLWA, explaining "neither petition addresses any portion of the [Trail] as it travels through the property." *Id*. The County Attorney did not address prescription but noted, based on PLWA's affidavits, it was "highly unlikely" PLWA could show prescription. *Id*. at 3.

C. PLWA Sues Ranch Families

On August 30, 2012, PLWA sued the Ranch Families, seeking a declaration the Trail is a statutorily created road by landowner petition or public by prescription. Dkt. 1. PLWA withheld service for almost three years before amending its complaint on August 7, 2015, issuing summonses to the Ranch Families, and prosecuting the suit. Dkt. 20-38. The Ranch Families closed ranks, answered, and began defending. Dkt. 41-46.

D. Creation of Post-Dispute Evidence

After the dispute arose, manufactured evidence favorable to PLWA developed at the hands of the County Commissioners, namely Commissioner Ken Ronish, who "evidence at trial" showed "favored" PLWA. FF, ¶76. Kent Sipe, Fergus County Attorney, invited the court to attribute it to "human error" rather than "malice" to harm the Ranch Families. Tr. 9/11-259:4-6. The record strongly tests that theory.

1. Easement Application

In 2015, Fergus County submitted a "pile" of some 40 applications for easements across school sections to DNRC, inundating DNRC with applications at one time. FF, ¶16; 9/13-218:21; 9/14-97:3-4. Contained within the bundle was one for an easement across the Trail as it crosses school section. *Id*. The application falsely claims the Trail is "well-maintained and graveled road" and a "Public Traveled Way." FF, ¶78; DNRC Exhibit B. DNRC granted the application based on the County's representations absent independent analysis. Tr. 9/14-100:8-18. The application bears Ronish's sworn signature. FF, ¶76; DNRC Exhibit B.

PLWA called Ronish as its closing witness. But testifying under oath before a court, Ronish repudiated the application. FF, ¶81. He testified the application had to be a "mistake," (Tr. 9/13-46:18-19), "d[id]n't know how it got through the process," (40:12-18), had "no idea" why the application was submitted (47:10), and, when pressed once again on cross to admit he signed it, refused to answer affirmatively yes, instead offering "[i]t's my handwriting." 46:11.

Commissioner Carl Seilstad also testified. He noted no memory of discussing an easement across the school section, it had to be a "mistake," and he and the other Commissioners only learned of the application after DNRC issued the easement. FF, ¶¶78-82. He likewise disavowed the application and its false information. *Id*.

2. Gas Tax Map

The Commissioners submitted a Gas Tax Map to MDOT requesting road funding for the Trail. FF, ¶84. To receive funding, as indicated in the DOT letter, a road must be open and passable by a passenger vehicle. *Id*.; Exhibit 47. The Map falsely claims the Trail is open and passable by a passenger car. *Id*. Ronish testified he must have looked at the submission ("I guess."). Tr. 9/13-42:3-6. When asked to verify the accuracy of the easement and Map, Ronish flailed:

> Q: Okay. But in your opinion was this a public road at the time that you purchased the easement?
>
> A: It was ***either*** **a *public* road** ***or*** **a *private* road**[.]

Tr.9/13-40:8-11 (emphasis added). Seilstad disavowed the Map, testifying he did not review it in depth, and admitted the Trail does not qualify for funding because it is unmaintained and not passable by a two-wheel drive. FF, ¶¶84-85.

E. Bob Fink's Alleged Statements

During the litigation, Bob Fink's health began to fail. Bob's son, Robin Fink, was summoned back home to manage the family ranch. Tr. 9/13-64:16-17. PLWA did not move to depose Bob. FF, ¶120. He died before trial. *Id*. With Bob now dead, Russell and Richard testified as to statements Bob allegedly made, including that Bob stated the Trail was public and he believed it was public. CL, ¶FF

Kathie Fink – Bob's widow and wife of 41 years – took exception. Tr. 9/13-53:12. She disputed the veracity of their statements and their insight into her

late-husband's statement of mind. CL, ¶HH. Kathie made clear that her husband believed the Trail was "private" and "[n]ever" stated it was public. Tr. 9/13-53:16-54:2. Bob's widow further described the deteriorated relationship that the couple had with the hunters after Bob became angry with them for hunting without permission and then telling the hunters to "stay out" of their property, but "they hunted it anyway." Tr. 9/13-56:6-10. Likewise, Robin challenged the hunters attributing such statements to his late father, CL, ¶HH, testifying "he never said it." Tr. 9/13-75:21. Robin explained, "[Dad] never said it was public because he never believed it was public." Tr. 9/13-75:21-22.

F. Two Hunters' Inconsistent Testimony

PLWA's two lead witnesses, Russell and Richard, testified extensively. They contradicted their sworn affidavits and each other's testimony, from everything to when they began using the Trail, to how many people used it, to where they accessed it. FF, ¶¶106, 108, 114. *E.g.*, Tr. 9/10-61:12-15; 67:12-25; 69:18-23; 213:1-2, 214:4-9. Russell's testimony collapsed to the point he tried escaping his affidavit altogether telling the court he had "no memory" of it. 62:8-11.

IV. District Court Decision

The District Court roundly rejected PLWA's theories for a public road. The court first found that the Trail is not a petitioned road. The court explained the end of Mabee Road is "readily ascertainable" from Petitions 842 and 2041. FF, ¶24.

Based on the two petitions, the court found the Road's endpoint is "the spot the county stopped building the road – the common quarter corner on the common section line between Section 14 and 15." FF, ¶22.

Taking the record as a whole, the court further found "weighting the evidence before the Court, PLWA did not prove the disputed trail is a county road or part of Mabee Road." FF, ¶42. The court found, "in stark contrast" to Mabee Road, there are no "petitions seeking a county road over the [Trail]." FF, ¶28. The court easily distinguished *Reid v. Park County*, explaining, unlike in that case, "here there is no petition to create a road, no minutes of a commissioners' meeting regarding such a road, no notice to the public, no viewers appointed, no viewers report, and certainly no Order by Commission directing that the road be opened." CL, ¶S.

Lastly, the court rejected PLWA's public prescription theory. The court found "no competent evidence" of continuous public use of the Trail in "1903 or in the subsequent decades prior to the 1980s." FF, ¶98. From the "mid-1980s" forward, the court found the use generally permissive and for "seasonal recreation purposes, namely hunters." FF, ¶¶47, 103.

STANDARD OF REVIEW

This Court applies the "record taken as a whole" standard to a claim of a statutorily created road. *Letica Land v. Anaconda-Deer Lodge*, 2015 MT 323, ¶16. In reviewing whether the record shows the road is a petitioned road, this Court's

review is limited to whether "substantial credible evidence" supports the district court's determination. *Id*.; *Jefferson Cnty. v. McCauley Ranches*, 1999 MT 333, ¶35 ("substantial credible evidence supported the District Court's determination that McCarty Creek Road is a county road"). This Court reviews "evidence in the light most favorable to the prevailing party." *Lewis & Clark Cty. v. Schroeder*, 2014 MT 106, ¶12. "This Court will not reweigh the evidence or the credibility of witnesses." *Barrus v. First Judicial Dist. Court*, 2020 MT 14, ¶13. The "weight of evidence and credibility of witnesses is exclusively within the province of the trier of fact." *State v. Urness*, 239 Mont. 58, 60 (1989). In the case of conflicting evidence, "it is within the province of the [trial court] to determine which will prevail." *Barrus*, ¶13.

SUMMARY OF THE ARGUMENT

As below, PLWA raises two public road theories on appeal. First, PLWA asserts the Trail is a petitioned road. Substantial credible evidence supports the District Court's rejection of that argument. The only two petitions in the record – Petitions 842 and 2041 – show Mabee Road ends at Sections 14 and 15. Nothing in the record shows the Trail is statutorily created. Taking the record as a whole, PLWA failed to demonstrate that the Trail is a statutory road.

PLWA persists with its argument that the burden lies with the Ranch Families to prove a negative (i.e., the Trail is not a petitioned road). That argument is inconsistent with *Reid* and every other road case ever decided by this Court. In any

event, no matter the burden allocation, taken as a whole the record shows that the Trail is not a statutory road.

PLWA next argues that this Court should reweigh evidence and testimony provided over the course of a 5-day trial. That is not this Court's function on appeal. The Ranch Families nonetheless discuss PLWA's evidence and place it in context for the Court to conclude that the District Court gave it the appropriate weight.

PLWA's second theory is the Trail is public by prescription. To make that showing, PLWA must provide "clear and convincing" evidence of hostile use. The first credible nonlandowner use began in the mid-1980s with seasonal hunters and continues that way with most requesting permission. Under settled Montana law, this type of generally permissive, seasonal, recreational use falls far short of proving public prescription by clear and convincing evidence. This Court should affirm.

ARGUMENT

I. The District Court's Determination That the Record, Taken as a Whole, Does Not Show the Disputed Trail Is a Statutorily Created Road Is Supported by Substantial Credible Evidence.

Historically, under Montana law, "[t]here are three ways by which a road may become open and public: [1] common-law dedication by the private owners; [2] adverse user or prescription; and [3] statutory [landowner petition] [and] dedication by the county." *Carbon Cty. v. Schwend*, 212 Mont. 474, 476-77 (1984).

Accord Heller v. Gremaux, 2002 MT 199, ¶9. PLWA first argues that the court erred by not finding the Trail is a public road by "landowner petition." (Br., p.22).

A. Neither Petition 842 Nor 2041 Statutorily Create the Trail.

Initially, PLWA tries to confuse the Court by implying it is an open question as to whether the two petitions – Petition 842 and 2041 – create the Trail. (Br. p. 6). It is not. As made clear above, "[t]hese Petitions do not identify, reference, or otherwise have any bearing on the PLWA's disputed trail." CC, ¶G. Petition 842 ends Mabee Road at the "SE corner of the SW 1/4 of Section 14, Township 20, R 22." Petition 842, p.3 (App.003). *See also* Road Viewers Report; and *supra* Figure 2. Petition 2041 extends it to the north to "the 1/4 corner between section 14 and 15." Petition 2041, p.19 (App.027). *See also supra* Figure 3 and 4.

Expert testimony confirms the same. Jenkins testified that Petition 842 ends at Section 14 and 2041 ends at Sections 14 and 15. Tr. 9/14-8:1-9:14. PLWA's own expert agreed when asked:

> Q: And it, the petition described [842], do you recall that that was the one that ended in 14?
> A: That's where it **ends on the south boundary of 14, yes**
> Q: Okay. So it doesn't extend any further than that?
> A: As far as the petition is concerned, no.

Tr. 9/12-128:1-6(emphasis added). When asked the same question regarding Petition 2041, Hallin likewise confirmed that it ends between Sections 14 and 15:

> Q: And what did that petition [2041] do?
>
> . . .

A: So it was, the **petition 2041** was filed to [declare][6] the 1919 realigned county road **ending at the 1/4 between sections 14 and 15**.

Tr.9/12-171:1-2(emphasis added).

Faced with the clear evidence, PLWA does not argue that either petition creates the Trail, offering only remarks aimed at muddling the question. PLWA notes that the "commission minutes" for Petition 2041 "indicate only that the declared Road exists in 'Twn 19 & 20, Rg. 22.'" (Br. p. 6). Though true, that assertion does not advance PLWA's case. First, the minutes are enough to show that Petition 2041 does not cover the Trail, as over half the Trail lies north of those two townships. Second, the other petition documents do define the endpoint at Sections 14 and 15, and PLWA's expert conceded the same.

PLWA next seemingly suggests that the "map submitted with the Petition [842]" shows the Road "continues northerly from the mid-section of the southern boundary of Section 14." (Br., p.12). The suggestion is misplaced. The map, which is Exhibit 35, does *not* show that the Road "continues" north from Section 14, but rather shows it ending at the bottom of Section 14. *See supra* Figure 2. And again, PLWA's expert conceded Petition 842 "ends on the south boundary of 14." Tr.9/12-128:3.

[6] Hallin inadvertently used the word "maintain" rather than "declare," which he corrected later. Tr.9/12:172:9-10.

In sum, while PLWA tries to confuse the issue, neither Petition 842 nor Petition 2041 – which are the only two successful petitions relating to the northern end of Mabee Road – statutorily create the Trail. Substantial credible evidence supports the District Court's finding that Mabee Road ends at Sections 14 and 15.

B. The Disputed Trail Is Not a Statutorily Created Road.

Left with neither petition creating the Trail, PLWA's argument must be that a third – yet undiscovered – missing petition creates the Trail. But there is no evidence to support PLWA. In "stark contrast" to the petitions showing Mabee Road, there is "no evidence" of "petitions seeking a county road over the [Trail]." FF, ¶28. As the court found, PLWA failed to submit evidence regarding ***any*** statutory element:

> PLWA 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. The physical characteristics of PLWA's purported trail demonstrate it was not built by Fergus County. Finally, there is no evidence that the landowners were ever paid for having a public right-of-way across their land.

FF, ¶29. Likewise, Jenkins testified in his of review county and other public records he could not "find any evidence of a petitioned road" or "any evidence from the mapping" the Trail is a county road. Tr.9/14-35:9-16.

On top of this, there is the testimony of PLWA's own expert, who again had to account for PLWA's shortcomings. After the Ranch Families' counsel confirmed

the two petitions did not cover the Trail, counsel questioned Hallin regarding any other petitions:

> Q: So you didn't find any petitions earlier that established a county road?
> A: **No**[.]

Tr.9/12-165:12-13(emphasis added). Similarly, when asked whether the road he alleged was the Trail was petitioned, he gave the same answer:

> Q: So you don't think that road was created by petition?
> A: I, you know, to the south or the part north, **no it wasn't** created by petition.

Tr.9/12-166:4-6(emphasis added).

In sum, as the court found, PLWA fell far short of proving that the Trail is a petitioned road. It submitted no evidence of a petition (or any other statutory elements) and its expert conceded that one does not exist. Substantial credible evidence supports the court's determination that the Trail is not a statutory road by landowner petition. This Court should affirm.

C. The District Court Correctly Allocated the Burden of Proof.

Recognizing it has no evidence to support its claim, PLWA attempts to shift the burden, asserting that "the party opposing the road's public status *bears the burden* of providing *conclusive proof* that the road is not a county road." (Br. p.23) (emphasis added).

PLWA is mistaken. Under long-settled Montana law, the burden rests with the party arguing the road is public to "show[] that a public road has been

established." *Jefferson Cty. v. McCauley Ranches*, 1999 MT 333, ¶29. *Accord Sheldon v. Flathead Cty.*, 218 Mont. 270, 273-74 (1985); *Letica*, ¶25. No authority exists, in Montana or anywhere, for the proposition that landowners bear the burden of proving their property is private, much less that they do so by "conclusive proof."

PLWA cites this Court's decision in *Reid*. *Reid* does *not* shift the burden but rather "diminishes" – not eliminates – the "burden on a county of demonstrating that it acquired jurisdiction to create a road." *Granite Cty. v. Komberec*, 245 Mont. 252, 259 (1990). Indeed, *Reid* itself states that the burden is on the party arguing the property is public to "show" the road is public. *Reid*, 192 Mont. at 234 ("it is sufficient *if the record* taken as a whole, *shows* that a *public road was created*") (emphasis added).

A contrary reading runs afoul of the Due Process Clause to the United States Constitution. In *Reid*, this Court diminished the burden from "strict" statutory compliance to the "record taken as a whole" standard because gathering recordings from many years ago showing strict compliance may well make the burden unsurmountable. *Id*. at 236. However, if the burden is shifted to landowners, the burden will almost always be insurmountable. If proving something exists is difficult, proving something doesn't is infinitely more so. This is so even on the most outrageous of topics (e.g., prove ghosts do not exist). *See also Vieth v. Jubelirer*, 541 U.S. 267, 311 (2004) ("proving a negative is a challenge in any context").

To give credence to PLWA's unsupported (and unsupportable) argument would see landowners forced to scour through century old records to gather evidence ostensibly showing commissioners considered and decided against creating a road, which is likely to exist only in the rarest of rare cases. No doubt under PLWA's view many landowners will see their private property taken absent any due process at all, but for no other reason than county records did not show something that does not exist. That does not accord with due process of law.

D. Insofar as PLWA's "Conclusive Proof" Standard Can Ever Be Met, the Ranch Families Carried the Burden.

Alternatively, to the extent PLWA's "conclusive proof" in the negative can ever be met, the Ranch Families have done so here. In addition to showing nothing supports PLWA, the Ranch Families introduced evidence affirmatively and strongly showing no other petitions exist.

First, the Ranch Families introduced the failed 1965 Petition. The Trail is not mentioned in the Petition. Had the Trail been public, "it is reasonable to infer that the Petition would have identified it." FF, ¶37. Even more compelling, if the Trail had been public, there would have been *no need* for the Petition, as a road would have *already existed* to the north. Clearly, the citizens of Roy, including the Mabees, who had intimate knowledge of the road system – having submitted petitions in 1918, 1949, and 1965 – did not believe the Trail was a public road.

Accordingly, the failed Petition provides strong evidence that the Trail is not a petitioned road and the Commissioners essentially rejected making it one because it would not be used. Thereby, the Ranch Families have introduced the exact type of evidence necessary to clear the "conclusive proof" hurdle.

Second, the Ranch Families introduced evidence showing that there is no need for a county road. No historical place of significance required use of the Trail. As Jenkins testified, the Trail was not a historical route and other historical routes existed to go north from Roy. Tr.9/13-248:1-25; 261:1-2; 9/14:87:6-89:2. Nor is it a suitable route today. As Commissioner Seilstad testified, the County cannot justify using taxpayer funds on the Trail because it does not go anywhere. FF, ¶41.

Third, the Ranch Families showed that the County has never indicated any passing intent to exercise jurisdiction; the County has never maintained the Trail, plowed snow, or conducted any other functions of a county with respect to the Trail. FF, ¶93; Tr.9:13-229:11-13;52:1-3;42:9-13;201:12-16;Exhibit 49.

Lastly, the Ranch Families introduced evidence showing a complete record. To believe PLWA would mean that the same county records that document exacting compliance with Montana law for Mabee Road somehow lost all remnants of another petition for the Trail. Not only that, the petition has been scrubbed from the collective memory of the landowners who have lived in the area since homestead.

In short, if ever there was a case meeting PLWA's "conclusive proof" in the negative, it is this one.

E. The District Court Did Not Manifestly Abuse Its Discretion in Weighing the Evidence.

Although PLWA couches its argument in terms of *Reid*, the court considered the whole record, including all evidence provided by PLWA, and it made findings regarding PLWA's evidence. This is not a case where a court excluded evidence from its review. Rather, what PLWA is asking of this Court is to reweigh evidence and the credibility of its witnesses.

This Court should refuse to do so. First, if this Court were to do exactly as PLWA asks, it is insufficient to create even "conflicting evidence" assuming it were all credible. At bottom, PLWA's "evidence" is maps allegedly showing the Trail and hearsay statements as to beliefs regarding whether the Trail is public.

That has never been enough under Montana law. To affirm creation of a road, this Court has consistently required evidence documenting "substantial compliance with the statutory procedures for establishing a county road." *Letica*, ¶20. *Galassi*, 2003 MT 319, ¶12 (affirming road because record showed "substantial compliance with the laws then in existence governing the creation of county roads"); *Pedersen v. Dawson Cty*., 2000 MT 339, ¶17 (rejecting road because of "no substantial compliance with the statutory process"). While PLWA notes that the Court has "never held the failure to [show] one" element defeats a road, (Br., p.24), that is

different than contending, as PLWA does, it need not show any. Clearly, there is a distinction between "substantial compliance" and "no compliance."

If PLWA's argument is accepted, the statutory elements are meaningless. This Court, however, has already rejected as a "clear misinterpretation of [its] decision in *Reid*" that the "statutory requirements are insignificant as long as there is a general appearance that the road belongs to the county." *Garrison v. Lincoln Cty.*, 2003 MT 227, ¶16. Indeed, in *Letica*, this Court found "unpersuasive" the argument that county maps, standing alone, are "determinative of whether a county established a road by petition." *Letica*, ¶¶22-23.

In any event, tossing that huge legal impediment aside, this Court need not make any remotely tough calls with this one. Even if one assumes that PLWA can create "conflicting" evidence, it is insufficient to prevail on appeal. In case of conflict, the trial court decides who prevails. For PLWA to prevail on appeal, there must exist some sort of manifest abuse of discretion. Nothing in the District Court's Order approaches that standard and PLWA cannot argue otherwise.

Rather, it is PLWA that mischaracterizes the evidence and takes it out of context. The Ranch Families will sort through thirteen of PLWA's partial and incorrect characterizations of the record.

1. 2007 BLM Map

PLWA contends that the court should have relied on a "BLM map" that "shows [the Trail] as an open, continuous road from Knox Ridge Road to Birdwell Road." (Br., p.15). Notably, PLWA does not cite the BLM map. This is because it does ***not*** exist. Russell testified he saw a "2007 BLM Map" showing the Trail as a "continuous road" and "clearly depicted" the Trail to Knox Ridge Road as "open" to the public. Like most of Russell's testimony, his statements regarding the supposed map were unsubstantiated. Over nearly a decade of litigation, multiple rounds of discovery, and an appeal, PLWA has not produced such a map.

2. Bob's Statements

PLWA contends that the court erred by not relying on Bob's beliefs. (Br., p.4, 32, 40, 41). Citing to testimony of seasonal hunters, PLWA asserts that Bob "believed the Road was public and informed hunters requesting to use it accordingly." (Br., p.4). Absent from PLWA's telling of the hunters' testimony is the conflict between it and testimony from Kathie – his widow and wife of 41 years – and Robin – his son and an heir to the ranch. The district court is tasked with assessing the credibility of witnesses. The court had obvious discretion to believe Bob's widow and son as to his beliefs over the hunters. This is particularly true given the unreliability and lack of credibility of Russell and Richard.

3. Bob's Letter

PLWA contends that a "significant critical omission is the court's rejection of Bob Fink's 2000 letter," which it cites as evidence regarding Bob's beliefs. (Br., p.32). If anything, Bob's letter puts an end to PLWA's theory regarding his beliefs.

In 2000, BLM began intimating that it might take unilateral action to obtain an easement across the Trail on the Fink Ranch. Exhibit 45, p.18; 9/13-180:14-19. Bob fought back. In his 2000 letter, Bob rejected BLM's overtures, explaining that his family had allowed the government "access for 90 years" and blasting BLM for trying to take his "private lands" as dangerous government overreach. *Id*. at p.57. As Bob warned in the portions of the 2000 letter PLWA conveniently omits and replaces with an ellipsis: "It is scary when the BLM wants legal access. What they really want is control. This will result in the taking of private lands." *Id*.

Thus, read in context, consistent with the testimony of his wife and son, and in direct conflict with Russell and Ricchard, the letter shows that Bob believed the Trail was private and was willing to fight to ensure it stayed that way.

4. County Maintenance

PLWA contends that the "[Trail] was maintained from Roy to Knox Ridge Road," the "County, BLM, and USFWS worked together to keep it passible," and

"USFWS bladed the entire length." (Br., p.16). PLWA cites the testimony of Bill Berg. *Id*.

Berg's testimony was unsubstantiated with any documentation and contradicted by county records and over a half dozen witnesses, including BLM and County witnesses testifying that the Trail has never been graveled or maintained. FF, ¶93; *e.g*., Trial Exhibit 49; **(1)** Tr. 9/10-199:12-15 (BLM); **(2)** 9/10-252:7-8 (BLM); **(3)** 9/10-156:1-7; **(4)** 9/10-187:2-6; **(5)** 9/13-40:2-7 (County); **(6)** 9/13-51:12-25; **(7)** 9/13-68:11-13; **(8)** 9:13-142:9-13; **(9)** 9/11-229:5-15 (County) ("[T]he [Trail] has never had any taxpayer dollars spent on it.").

Berg continued to lose credibility. The final straw came when he failed to mention involvement with PLWA and testified he did not have a reason not to join PLWA, (9/10-101:6-7), but it came to light in an email during cross he had been working with PLWA the entire time and had not joined PLWA to look more independent:

> ***I did not join PLWA because I thought if I testified it would carry more weight not being a member***. The FWS, badge, public hunting etc[] background I have would seem as important or more important if I testified. I can join now if ***we*** need it for standing or ***our*** attorneys think it best but that was my thought.

Exhibit C-14 (emphasis added). The court had clear discretion to believe other more credible witnesses regarding the lack of maintenance on the Trail.

5. 1903 Postal Map

PLWA contends the court failed to rely on a "1903 Postal Map." (Br., p.11). The 1903 Postal Map, referred to as the "airline" map, is a three-state map identifying post office routes in Montana, Wyoming, and Idaho. FF, ¶94; Exhibit 2. The Map does not identify actual routes but shows routes as dotted, arched lines, like one would see in an airline map showing a flight from Helena to Denver. FF, ¶97. The Map identifies a service route from 1903 to 1905 from Roy to the former town of Delos. *Id*.

PLWA contended that the Trail was part of the route. However, as the court concluded, "the evidence did not prove the postal route to Delos was over the disputed trail." CL, ¶N. Rather, the contention was proven false. First, the service route is identified in the postal bulletins as entering Delos from the *southeast* (Exhibit Z-33 (indicating route from Roy "S.E." into Delos); Tr.9/12-125:14-18), but a route from the Trail would enter from the *southwest*. 9/13-208:16-210:25. Thus, a route using the Trail would enter Delos from the *wrong* direction.

Second, and consistent with the route entering from the southeast, testimony showed easier routes from Roy existed by going to the east. 9/13-239:3-18, 242:6-243:4, 248:9-25, 249:13-15:6; 211:1-11; Exhibit DD, pp.17, 21. To get from Roy to Delos using the Trail, a supply carrier would need to reach Knox Ridge Road, then head northeast across the Breaks down into Delos. 9/13-210:1-25. Even on a

"good horse" that would have been a "dangerous" path, as it is "steep even for a horse," especially with supplies. 9/13-241:1-9, 261:8-10. Given the terrain compared with easier routes, as Jenkins testified, it "makes no sense" the Trail was part of the route. 9/13-261:3.

In short, PLWA's contention is unsupported. The court had clear discretion to refuse to give great weight to the postal map.

6. Bolles Survey

PLWA mentions the Bolles Survey (Br., pp. 8, 12, 13), but fails to explain its legal relevance. It has none. In 1913, a *former* county surveyor, HC Tilzey, surveyed an astounding 1900 miles of un-platted roads/trails FF, ¶86; Tr.9/12:188-1-3. Tilzey compiled the metes and bounds into field notes (just a book full of numbers). The roads were not surveyed to establish county roads but were surveyed as a "planning" tool to understand un-platted roads/trail in the county. Exhibit DD, p.7.

The Survey does not advance PLWA's case. First, the fact that a trail is noted in the Survey does not create a county road. As the court found, "Fergus County took no action to make the survey a County Road." FF, ¶90. "Many of the 1913 routes[] are today open pasture or crop lands." Exhibit DD, p.7. Indeed, if the Survey were held to create public roads, citizens all across Fergus County would "wake up one morning to find" someone has created "public highway[s] through

their back yards based on nothing more than a surveyor's notation of a 6-foot-wide dirt road [i]n a [107]-year-old [field notebook]." *Our Lady of the Rockies, Inc. v. Peterson*, 2008 MT 110, ¶67.

Second, the Survey does not show the Trail. FF, ¶¶90, 92. The Survey instead depicts a separate trail that seemingly passes over a portion of its midsection. *Id*. As the court found, and PLWA's expert admitted, the trail noted in the Survey does not intersect Mabee Road, nor does it follow the Trail north to Knox Ridge Road. *Id*.; 9/12-26:9-12, 9/13-268:1-4.

Thus, even if the Survey shows county roads, it does not cover the Trail. The court had clear discretion not to find that the Survey statutorily created the Trail.

7. Local Mail Delivery

PLWA contends the "presence of [the Delos] post office indicates the need for local mail delivery," insinuating homesteaders near the Trail received mail using the Delos route. (Br.,p.29). The Delos route ended in 1905; homesteaders, including the Fink Family, did not arrive until 1912. FF, ¶97; CL, ¶N; Tr.9/13-65:3. Homesteaders did not receive mail as part of the route.

8. Murray Beliefs

PLWA contends that the "Murrays did not believe permission was necessary" to use the Trail. (Br., p.42). PLWA provides no citation. Nor is there one. David

Murray, the only Murray alive to testify, when asked by PLWA's counsel, stated directly the Trail is private:

> Q: And what was your understanding of the legal status of the [Trail] during the time that you lived on and/or owned the Murray Ranch?
> A: That it was a **private** road.
> Q: That it was a private road?
> A: **That's correct**.

Tr.9/11-167:1-8. Similarly, when asked to give his grandmother's view, from whom he had inherited the property, he testified "[s]he certainly believed" it was private. 178:1-3.

9. 1914 Highway Map (and Other Historical Maps)

PLWA contends that "it is undisputed the route advocated by PLWA exists" on numerous historical maps including the "1914 Montana Highway Map." (Br., p.31).

PLWA's contention is misplaced. The "route advocated by PLWA" does not appear until the 1950s. Though evident from the maps themselves, Jenkins furthered the point, (e.g., Tr.9/13:265:11-16,268:1-2), which the court noted, FF, ¶100 ("Jenkins opined that the disputed trail at issue today is not the same trail or road identified or referenced in the early surveys, maps and other records relied upon by PLWA").

PLWA's own expert agreed. According to Hallin, the Trail took its form sometime in the early 1950s and the earliest map showing the Trail's "approximate

location" is a "US topographic from 1953." Tr.9/13-13:6-25. Thus, it is far from "undisputed" the "the route advocated by PLWA" exists on the "1914 Montana Highway Map" or any other historical maps.

10. 1914 County Map

PLWA contends that the "1914 County Map . . . identifies] [the Trail] as a county road." (Br., p.9). It does not. *See* Exhibit 7; App.0146. In addition to the above, the Map does not identify whether roads depicted are county roads; thus, the map does not "identify[]" the Trail or any other road as a county road.

11. Unnumbered Gravel Petition

PLWA contends that the court failed to rely on the "unnumbered [gravel] petition" that shows "maintenance of the [Trail] to the Murray homestead." (Br., p.13). That is not what the petition states. The petition requests gravel "past Bishops, Ydes, Mabees, Umsteads, Finks, ***and to Murrays***." Exhibit 37 (emphasis added). Murray's land begins at the end of Mabee Road, thereby the petition requests gravel to the end of Mabee Road. Nothing in the petition suggests gravel on the Trail.

12. 1930s Road Claims

PLWA contends that the court overlooked "various road claims" for "maintenance." (Br. p.9). The referenced 1930s road claims show requests for gravel on Mabee Road. *E.g.*, Exhibit 27;Tr.9/13-231:9-13. Nothing in the claims mention the Trail or suggest graveling on the Trail.

13. Depression Era Grading

PLWA contends the "record also established the County expended funds to maintain the [Trail] during the 1930s in an effort to sell properties via tax deeds." (Br., p.14). PLWA's expert speculated to this conclusion without any evidentiary support. And Jenkins explained why the speculation was unfounded, explaining "Counties during the depression had no money" and it "defies logic" that "during the depression the county would be spending money blading" to places where no one lived. Tr.9/13-279:9-15.

II. The District Court's Determination That PLWA Failed to Show Public Prescription Is Supported by Substantial Credible Evidence.

To establish an easement by public prescription, the party must show the use was: (1) "open and notorious" over a fixed course; (2) "continuous and uninterrupted" for the full statutory period; and (3) "adverse" to the landowner, rather than a mere privilege revocable by the landowner. *Heller*, 2002 MT 199, ¶15. "Each element of a prescriptive easement claim must be proven by clear and convincing evidence." *Id*.

Under Montana law, a property owner erecting a gate across a road provides "strong evidence" that use past the gate is permissive only:

> The fact that the passage of a road has been for years barred by gates or other obstructions to be opened and closed by the parties passing over the land, has ***always been considered*** as ***strong evidence*** in support of a mere license to the public to pass over the designated way.

PLAA v. Boone & Crockett Club, 259 Mont. 279, 285 (1993) (quoting *Maynard v. Bara*, 96 Mont. 302, 307 (1934) (emphasis added)). It is undisputed that there are 7 gates, including one at the start of the Trail, which have "existed at all times pertinent to the issues before the Court." FF, ¶107. Accordingly, from the outset, given the heavy burden of proving prescription by "clear and convincing evidence," combined with the "strong evidence" against prescription arising from multiple gates, PLWA faces a steep climb to show public prescription over the Trail.

A. Substantial Credible Evidence Supports the District Court.

PLWA does not come close to meeting its burden. As the court found, PLWA introduced "no competent evidence" that demonstrates the general public continuously "utilized the disputed trail in 1903 or in subsequent decades prior to the 1980s." FF, ¶98. Rather, the credible public use in the record lies primarily with permissive "seasonal recreational purposes, namely hunters" beginning in the 1980s and continuing in that fashion. FF, ¶47.

Under settled Montana law, recreational use of this sort is insufficient, standing alone, to establish a public easement. "This Court has held that seasonal use by hunters, fisherman, hikers, campers, use by neighbors visiting neighbors, and persons cutting Christmas trees and gathering firewood are not sufficient to establish prescriptive use." *PLAA v. Comm'rs of Madison Cty.*, 2014 MT 10, ¶35 (brackets

and citation omitted). "Such recreational use is insufficient to raise the presumption of adverse use." *Oates v. Knutson*, 182 Mont. 195, 200 (1979).

Moreover, even if seasonal use of this type were enough by itself, there is almost no nonpermissive use. Most of PLWA's witnesses, including Russell and Richard, testified they received permission, (FF, ¶109,Tr.9/10-43:24-25,205:1-2), thereby defeating a claim for prescriptive use. *Pedersen v. Ziehl*, 2013 MT 306, ¶15 ("if the use begins as a permissive use, it cannot ripen into a prescriptive right, no matter how long it may continue") (brackets omitted).

And the few out-of-state hunters, who testified that they failed to ask permission, hunted in the area so infrequently, (e.g., Tr.9/11-7:22-25 (Washington hunter "2 to 3 days" during hunting season) and 9/11-23:1-7 (Wisconsin hunter "approximately two weeks" during hunting season)), that their use does not approach overcoming by "clear and convincing evidence" the "strong evidence" against prescription created by gates. *Leisz v. Avista Corp*., 2007 MT 347 (no prescription despite significant recreational use "after the mid-1980's" in addition to testimony about "logging operations," "outfitting," and "search and rescue operations").

PLWA persists that it "introduced evidence" of continuous public "use for every decade since 1903." (Br., p.41). In support, PLWA fails to cite to the record. Without knowing what evidence PLWA is relying upon, it is not possible to counter the evidence. The burden is on PLWA to overcome the court's findings with clear

and convincing evidence, and it cannot rely on this Court to make its arguments. *Cutler v. Jim Gilman Excavating, Inc*., 2003 MT 314, ¶22 ("It is not this Court's obligation to . . . formulate arguments for a party").

Even if the Court were to do so, the record does not come close to creating a basis to question the District Court. To start, for prescription, close does not count. The "public use must be shown to have continued over the ***exact*** route claimed." *Parker v. Elder*, 233 Mont. 75, 78 (1988) (ellipsis and citation omitted, and emphasis added). As PLWA's own expert admitted – when asked if he had "formed an opinion as to the length of time of which the route has followed a fixed and definite course" – the Trail first "appears around 1953." Tr.9/13-13:6-25. Even then, Hallin referred to it as an "approximate" location. *Id*. Thus, while no credible continuous public use exists in the record earlier than 1953, even if there was, it would not matter.[7]

From 1953 forward, the first mention of public use in the record is a PLWA witness who thought he used the Trail once to cut a tree when he was 13 in "the late 50s," but his affidavit stated he used it for the first time in "1960," (Tr.9/11-105:10-15), and unsurprisingly he expressed skepticism about his own recall on the details

[7] Additionally, use before 1913 is also irrelevant because a road "could not be established by prescriptive use between 1895 and 1913." *Richter v. Rose*, 1998 MT 165, ¶28 (overruled on other grounds by *Watson v. Dundas*, 2006 MT 104).

of his use. 124:16-17 ("Come on, I have no idea, I was 13."). Aside from some other sporadic, inconsistent testimony, the earliest credible use begins in earnest in the 1980s with permissive seasonal hunters, and, for the reasons explained, is insufficient to show public prescription.

In sum, the court did not err by concluding that PLWA failed to show public prescription. Substantial credible evidence supports the district court. As with its claim of a statutory road, PLWA fell far short of proving its case by prescription.

B. The District Court Made Appropriate Findings.

PLWA makes two final contentions, asserting (1) the court was required to make findings regarding "each element" of prescription; and (2) that it only found PLWA failed to show "adversity." (Br., p.28). PLWA is wrong on both accounts.

First, under Montana law, a court needs only to make findings regarding "each element" if the court ***finds*** prescription. "Each element of a prescriptive easement claim must be proven by clear and convincing evidence." *Heller*, ¶15. "All elements must be proved because one who has legal title should not be forced to give up what is rightfully his without the opportunity to know that his title is in jeopardy and that he can fight for it." *Id*. Thus, if a court finds prescription but fails to make findings showing "each element" is satisfied, the court errs. *Id*.

The reverse is not true. Because each element is necessary, if a court finds a party failed to satisfy one, it need not address the remaining elements. Rather, long

has been this Court's practice – not only regarding prescription but any multi-element test wherein a party must satisfy all elements – to conclude inquiry upon finding a dispositive element unsatisfied. *E.g*., *Heller*, 2002 MT 199 (addressing only adversity); *Riley v. Am. Honda Motor Co*., 259 Mont. 128, 132 (1993)("Because the causation element is dispositive, we do not address whether [the party] presented sufficient evidence on the other elements."). Thus, the court, having found no adversity, did not need to address any other elements.

However, it clearly did so. In its 42-page Order, the court made numerous findings regarding each of the other two elements. *E.g*., (1) open and notorious, FF, ¶123 ("no evidence that Offerdahl said anything that put the private landowners or their agents on notice"), (2) continuous and uninterrupted, FF, ¶103 ("Based on the evidence in the aggregate, PLWA failed to meet its burden of proof relating to its contention that the public began using the disputed trail in 1903 and has done so continuously since that time"). Thus, the court made more than sufficient findings to uphold its determination.[8]

[8] PLWA also provides a single cursory reference to the curative statute in its fact section but does not explain in its argument how it is purporting to rely on the statute. There is thus no argument in which to respond. At any rate, the statute is unhelpful to PLWA. First, the statute only applies to "cure[] procedural defects which were not jurisdictional if the county had shown obvious efforts on the record to establish a road," *Sheldon*, 218 Mont. at 273, which renders it inapplicable here. Second, PLWA has not argued it has established, much less shown, any of the elements in the curative statute. *McCauley v. Thompson-Nistler*, 2000 MT 215, ¶21(reciting statutory elements to invoke statute).

CONCLUSION

For the forgoing reasons, the Ranch Families request that this Court affirm the District Court.

Respectfully submitted this 9th day of October, 2020.

/s/ Matthew H. Dolphay

William W. Mercer
Matthew H. Dolphay
Holland & Hart LLP
401 North 31st Street, Ste. 1500
Billings, MT 59103-0639
wwmercer@hollandhart.com
mhdolphay@hollandhart.com

Counsel for Appellees Ranch Families Robin Fink, Kathie Fink, Mark Robbins, Deanna Robbins, Cleo Boyce, Mary Boyce, Dan Boyce, Laura Boyce, and David Murray

CERTIFICATE OF COMPLIANCE

The undersigned, Matthew H. Dolphay, certifies that this Brief complies with the requirements of Mont. R. App. P. 11. The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 9,966 words, excluding the caption, certificates of compliance and service, table of contents and authorities, and exhibit index. The undersigned relies on the word count of the word processing system used to prepare this document.

/s/ Matthew H. Dolphay
Matthew H. Dolphay

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CERTIFICATE OF SERVICE

I, Matthew Herman Dolphay, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-09-2020:

Colleen M. Dowdall (Attorney)
120 West Broadway Suite B
Missoula MT 59802
Representing: Cleo Boyce, Dan Boyce, Laura Boyce, Mary D. Boyce, Kathie Fink, Robert E. Fink, David Murray, Deanna M. Robbins, Mark L. Robbins
Service Method: eService

Kent M. Sipe (Prosecutor)
801 W. Broadway
Lewistown MT 59457
Representing: Fergus County
Service Method: eService

James Troy Redmon (Attorney)
1716 W. Main St., Ste. 5
Bozeman MT 59715
Representing: Public Land and Water Access Association, Inc.
Service Method: eService

Paul Grigsby (Attorney)
P.O. Box 6356
Bozeman MT 59771
Representing: Public Land and Water Access Association, Inc.
Service Method: eService

Ada Cordelia Montague Stepleton (Attorney)
1539 Eleventh Ave., P.O. Box 201601
Helena MT 59620-1601
Representing: State of Montana
Service Method: eService

Danna R. Jackson (Attorney)
1539 Eleventh Avenue
Helena MT 59601
Representing: State of Montana
Service Method: eService

William W. Mercer (Attorney)
401 North 31st Street
Suite 1500
PO Box 639
Billings MT 59103-0639
Representing: Cleo Boyce, Dan Boyce, Laura Boyce, Mary D. Boyce, Kathie Fink, Robert E. Fink, David Murray, Deanna M. Robbins, Mark L. Robbins
Service Method: eService

Keeley McKay (Attorney)
Redmon Law Firm, P.C.
1716 W. Main Street, Ste. 5
Bozeman MT 59715
Representing: Public Land and Water Access Association, Inc.
Service Method: E-mail Delivery

Electronically signed by Arlene Forney on behalf of Matthew Herman Dolphay
Dated: 10-09-2020