IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 23-0720

STEPHEN D. BEHLMER,

Petitioner and Appellant,

v.

CRUM REAL PROPERTIES, LLC, TONYA MCCORMACK, BRAD W. AND JANEEN A. ECKERT, SEAN F. AND JENET A MELTON, KEVIN M. & LORI A. HEIT, WANDA D. MCCALLUM & KENT B. WHITING, DENNIS L. & DEBORAH GRISAMORE, BRIAN ROBERT MEYERS & DEBRA JOYCE MEYERS, TRUSTEES OF THE BRIAN & DEBRA MEYERS TRUST, CHRISTOPHER J. & TONI M. RIES, MICHAEL R. & TANNIA M. STEBBINS, BRIAN KYLE HOLLING a/k/a BRIAN K. HOLLING, TAMARA G. & MARGIE O. JONES, BRETT KYLE HOLLING, WILLIAM J. GILES & ARLENE F. THURSTON, and JOHN AND JANE DOES 1-20,

Respondents and Appellees.

OPENING BRIEF OF APPELLANT, STEPHEN D. BEHLMER

On Appeal from the Montana First Judicial District Court, Lewis & Clark County,
Cause No. ADV-2023-141
the Honorable Mike Menahan Presiding

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STATEMENT OF THE ISSUES

1. Whether the United States is a Required Party under Rule 19 of the Montana Rules of Civil Procedure in litigation concerning the legal status of a road located entirely on private, non-federal land.

2. Assuming the United States to be a Required Party under Rule 19, whether, in equity and good conscience, the action should proceed among the existing parties, where the existing parties are the only ones potentially affected by the relief requested, and where dismissal would leave the Petitioner/Appellant Behlmer with no remedy.

3. Whether the district court erred in holding the United States to be a Required Party in litigation of a prescriptive easement claim over a road located entirely on private, non-federal land.

STATEMENT OF THE CASE

Dr. Stephen Behlmer[1] ("Behlmer") brought a claim under the Uniform Declaratory Judgments Act, Mont. Code Ann. § 27-8-101, *et. seq.*, seeking a declaration from the district court that a road crossing Respondents and Appellees' ("Landowners") real properties is a public road, or in the alternative, a private road

[1] The case was originally brought by Associated Dermatology and Skin Cancer Clinic of Helena, P.C. Profit Sharing Plan and Trust for the Benefit of Stephen D. Behlmer, M.D. Dr. Behlmer individually was subsequently substituted as the Petitioner, in place of the Trust. In the interest of clarity, this Brief refers to the Petitioner/Appellant as Dr. Behlmer.

appurtenant to the real property owned by Behlmer. Landowners moved to dismiss, contending that the United States is a Required Party under Rule 19 of the Montana Rules of Civil Procedure.

Before Landowners' motion to dismiss was fully briefed, Behlmer filed a timely Amended Petition for Declaratory Judgment, clarifying that the Behlmer Trust does not seek a declaration that any portion of any road across BLM property is a public road.

Landowners renewed their motion to dismiss the Amended Petition under Rule 19, arguing that dismissal is necessary because the United States is a Required Party, but sovereign immunity precludes its joinder.

The district court concluded that the United States is a Required Party under Rule 19, the "equity and good conscience" provision of the Rule does not apply, and that sovereign immunity precludes the district court from joining the United States as a party. Accordingly, the district court granted Landowners' motion to dismiss.

This appeal followed.

STATEMENT OF THE FACTS

Treasure Canyon Drive is located in the Scratchgravel Hills northwest of Helena, in Lewis and Clark County, Montana. It runs through Landowners' properties in its entirety, roughly east from Tumbleweed Drive, then north, and

terminates at the boundary of federal land administered by the U.S. Bureau of Land Management (the "BLM Land"). *See generally*, Amend. Pet. for Decl. J. 7, ¶ 16; Answer Br. Opp. Resp'ts' Mot. to Dismiss 3 n.2. No portion of Treasure Canyon Drive crosses BLM Land or any other public land. *Id*.

In 1994, Petitioner/Appellant Behlmer acquired thirteen adjacent mining claims collectively containing approximately 224 acres of real property generally located in Section 35, Township 11 North, Range 4 West, M.P.M., Lewis and Clark County, Montana (the "Behlmer Property"). Amend. Pet. for Decl. J. 3, ¶ 2. The Behlmer Property is currently surrounded by BLM Land restricted to non-motorized recreational opportunities only under the BLM's Scratchgravel Hills Recreational Management Plan. *Id*. at 2, n.1. Thus, to access the Behlmer Property, one must travel north on Treasure Canyon Drive, and then cross BLM Land.

In 1997, the BLM granted Behlmer a right-of-way over and across the BLM Land between the north end of Treasure Canyon Drive and the Behlmer Property. *See* Br. in Support of Renewed Mot. to Dismiss, Exh. D.

Behlmer currently seeks to sell his Scratchgravel Hills property to the BLM, thus providing Landowners and the public additional non-motorized recreational opportunities in the Scratchgravel Hills and precluding future residential development of the Behlmer Property and corresponding increase in usage and impacts to Treasure Canyon Drive. Answer Br. Opp. Mot. to Dismiss 2-3.

R.S. 2477

In 1866, the United States created a standing offer of a free right of-way over the public domain by passing the Mining Act of 1866, Ch. 262, § 8, 14 Stat. 251, 253, codified at R.S. 2477, recodified at 43 U.S.C. § 932, repealed by 8 Federal Land Policy Management Act of 1976 (FLPMA), Pub. L. No. 94-579 § 706(a), 90 Stat. 2743 ("R.S. 2477"). Acceptance of the R.S. 2477 offer was through application of the laws of the particular state in which the land was located. Once a R.S. 2477 right-of-way over the public domain was established, the right-of-way became a public road, and remains so, unless and until it is abandoned in accordance with Montana law.

It is not uncommon for state courts to adjudicate actions by landowners claiming R.S. 2477 rights-of-way to access their own land. *See Mills v. United States*, 742 F.3d 400, 408 (9th Cir. 2014) (citing *Fitzgerald v. Puddicombe*, 918 P.2d 1017, 1021-22 (Alaska 1996) (permitting holders of mining claims to access their property by means of an R.S. 2477 right-of-way over private property); *Anderson v. Richards*, 96 Nev. 318, 321-22, 608 P.2d 1096 (1980) (allowing private landowner to access his own land by means of an R.S. 2477 right-of-way over his neighbors' property); and *Ball v. Stephens*, 68 Cal. App. 2d 843, 158 P.2d 207 (1945) (holding that the private defendant could not bar the plaintiff from accessing his mining claim over an R.S. 2477 right-of-way)).

Behlmer likewise claims a R.S. 2477 right-of-way over private lands in the case below; however, this appeal does not involve the merits of Behlmer's R.S. 2477 claim. Rather, this appeal involves only the threshold issue of the district court's dismissal under the Required Party provisions of Rule 19.

STANDARD OF REVIEW

A motion to dismiss in the Rule 12(b)(7) context is construed in a light most favorable to the non-moving party and should not be granted unless it appears beyond a doubt that the non-moving party can prove no set of facts in support of its claim which would entitle it to relief. *Stenstrom v. Child Support Enf't Div.*, 280 Mont. 321, 325, 930 P.2d 650, 652-53 (1996). Correspondingly, the complaint itself must also be construed in the light most favorable to the non-moving party and all allegations of fact contained therein are taken as true. *Id*. Dismissal under Rule 12(b)(7) (failure to join a party under F. R. Civ. P. 19) is subject to de novo review. *McLaughlin v. Int'l Ass'n. of Machinists & Aerospace Workers*, 847 F.2d 620, 621 (9th Cir. 1988).

SUMMARY OF THE ARGUMENT

Behlmer's argument can be summarized simply: The district court committed reversible error in concluding the United States to be a Required Party under Rule 19 because Behlmer's claims are expressly limited to a road over

private, non-federal lands. Behlmer does not seek a right-of-way over any land owned by the United States. He already has one.

The district court improperly attempted to expand the scope of relief Behlmer requests, as if the court could compel Behlmer to assert an access claim over BLM Land, which neither requested, nor needed. If the district court's ruling is not reversed, Behlmer would have no remaining legal recourse.

ARGUMENT

> *The sole and singular purpose of Behlmer's Amended Petition is to clear up any confusion concerning the relief Behlmer seeks in this case. The Landowners moved to dismiss, based on the erroneous notion that Behlmer requests the Court to declare a road across BLM Land to be a public road, which they argue renders the United States a necessary party.*
>
> *However, Behlmer does **not** seek a declaration that any portion of any road across BLM Land is a public road. On the contrary, Behlmer requests such declaration only with respect to lands owned by the named Landowners. BLM Land will remain unaffected. Consequently, no interest of the United States would be affected by a judicial declaration that a public road exists over the named Landowners' private properties, none of which are owned by the BLM. Nor would the BLM / United States be prejudiced in any way by the declaration Behlmer seeks.*

See Am. Pet. for Decl. J. 1-2 (paraphrased).

I. The United States is not a Required Party under the Uniform Declaratory Judgments Act or Rule 19 in litigation concerning the legal status of Treasure Canyon Drive because the road is located entirely on private, non-federal land.

A. The BLM is not a Necessary Party under the Uniform Declaratory Judgments Act.

Behlmer brought this action under the Uniform Declaratory Judgments Act ("UDJA"), Mont. Code Ann. § 27-8-101, et seq., in Montana's First Judicial District Court as the appropriate mechanism, jurisdiction, venue and forum for a determination regarding Landowners' property and Treasure Canyon Drive's status as a public road pursuant Montana law as applicable under operation of R.S. 2477. *See generally Richter v. Rose*, 1998 MT 165, 289 Mont. 379, 962 P.2d 583; *Parker v. Elder*, 233 Mont. 75, 758 P.2d 292 (1988); and *McCauley v. Thompson-Nistler*, 2000 MT 215, 301 Mont. 81, 10 P.3d 794.

The Necessary Party provision of the UDJA is set forth at Mont. Code. Ann. § 27-8-301: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration." Because the declaration sought in this case applies only to Landowners' properties – not BLM Land – the United States neither has, nor claims, any interest which would be affected by the declaration. Therefore, the United States is not a Necessary Party under the UDJA.

Moreover, Mont. Code. Ann. § 27-8-301 further provides that "no declaration shall prejudice the rights of persons not parties to the proceeding." Consequently, even if the BLM had any interest which would be affected by the declaration, such declaration cannot be construed or applied against the BLM so as to cause any prejudice.

B. The United States is not a Required Party under Rule 19 of the Montana Rules of Civil Procedure.

Because Behlmer seeks only a declaration of a right-of-way across private, non-federal land, the district court erred in concluding that the United States is a Required Party under Rule 19(a)(1) of the Montana Rules of Civil Procedure. The rule provides:

> A person who is subject to service of process must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

M. R. Civ. P. 19(a)(1).

The first part of the Rule 19 analysis here is whether, in the United States' absence, the court can accord complete relief among the existing parties; *i.e.*,

Behlmer and the Landowners. The answer is yes, because the "complete relief" Behlmer seeks in this case is a right of ingress and egress over Treasure Canyon Drive, which is located entirely on private, non-federal land.[2] As Behlmer seeks no relief with respect to any federal land, the United States cannot be deemed a Required Party under Rule 19(a)(1)(A). Because Behlmer seeks relief only with respect to private lands of existing parties, the Court can indeed "accord complete relief among existing parties."

Because Rule 19 sets forth a disjunctive test, the next inquiry under Rule 19(a)(1)(B) is whether the United States claims "an interest relating to the subject of the action." This case involves private land and private parties exclusively; therefore, the United States neither asserts any such claim, nor could it. Nor is the United States so situated that disposing of the action in the United States' absence may "impair or impede" the United States' ability to protect its interests. Nor would the disposition of this action leave any existing party exposed to any additional obligations. The only logical conclusion is that the United States is not a Required Party under Rule 19(a)(1)(B).

This Court need go no further.

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[2] It is undisputed that Behlmer's Amended Petition includes all potentially affected Landowners as parties.

C. The district court's error resulted, in the first instance, in its misunderstanding of the facts as unambiguously alleged in the Amended Petition.

Perhaps the district court's clearest – and most significant – error on the facts was its mistaken understanding that a portion of the disputed road, Treasure Canyon Drive, crosses federal land. *See* Order 5:10-11 ("Approximately one quarter of the disputed road is located on federal land."). This is categorically false. Treasure Canyon Drive terminates at the boundary of the federal land. *See generally*, Amend. Pet. for Decl. J. 7, ¶ 16; Answer Br. Opp. Resp'ts' Mot. to Dismiss 3 n.2. In the context of a motion to dismiss, Behlmer's allegation must be taken as true. *See Brown v. Yellowstone Club Operations*, 2011 MT 155, ¶ 4, 361 Mont. 124, 255 P.3d 205. The district court's failure to take Belmer's allegations as true is, in itself, reversible error.

The district court is correct in stating that one of Behlmer's legal arguments is that "Treasure Canyon Drive became a public road when the federal statute R.S. 2477 offer was accepted in accordance with applicable Montana law." Order 6:1-2. It is also true that a road continues from the north end of Treasure Canyon Drive, across BLM Land, to the Behlmer Property, over which the BLM has granted Behlmer a right-of-way. But the district court then went too far.

In essence, the district court concluded that the United States is a necessary party because Behlmer's R.S. 2477 argument could theoretically apply with equal

force to the road across the BLM Land. But Behlmer has raised no such argument or claim with respect to the road across BLM and has been exceedingly clear that he seeks no declaration affecting BLM Land in any way. He simply has no need for such a declaration because, in 1997, the BLM granted Behlmer a 20-year renewable right-of-way over and across the BLM Land between the north end of Treasure Canyon Drive and the Behlmer Property. *See* Br. in Support of Renewed Mot. to Dismiss, Exh. D.

In substance, the district court has created a sort of new "quasi-res judicata" theory; *i.e.*, that if it rules in favor of Behlmer with respect to his R.S. 2477 argument concerning Treasure Canyon Drive, it would also somehow be an adjudication of the status of the road crossing BLM Land (*see* Order 6:3-7) as well, even though the status of the BLM road is not at issue in the present case, as Behlmer has requested no such adjudication. Again, he already has a BLM right-of-way. Res judicata can only apply in a subsequent case if the "the parties or their privies are the same." *Adams v. Two Rivers Apartments*, 2019 MT 157, ¶ 8, 396 Mont. 315, 444 P.3d 415. An R.S. 2477 ruling with respect to Treasure Canyon would certainly not be res judicata or otherwise binding on the United States because the United States is not a party here. Moreover, the district court has no jurisdiction to issue a ruling binding on the United States, and sovereign immunity

mandates that adjudication concerning federal land against the United States must be filed in federal court. Behlmer seeks no such adjudication.

D. The United States is not a Required Party because the right-of-way at issue lies completely within the perimeter of the lands owned by the Landowners.

The district court continues its Rule 19 Required-Party analysis with the correct and unremarkable observation that, "in an easement dispute, the owners of the purported servient estates are indispensable parties." Order 8:1-2 (cleaned up). The district court then erroneously concludes that the United States "is a necessary or Required Party under Rule 19" because "the United States would be an owner of a servient estate for any easement allowing the public to access the Behlmer Property." *Id*., 8:6-8. Yet again, the district court ignores the relief sought in Behlmer's Petition. He certainly does not request an "easement allowing the public to access the Behlmer Property." Rather, he simply requests a right-of-way only across private land up to the boundary of, *but not across*, the BLM Land. Behlmer's Amended Petition could not be clearer on this point. Consequently, the BLM Land cannot be considered part of the servient estate because Behlmer seeks no easement across it, as the BLM has granted Behlmer a right-of-way.

Moreover, in its Rule 19 required-party analysis, the district court overlooks the controlling legal principle for this entire case, which the Landowners have correctly stated: "When '[t]he easement subject to [an] action lies completely

within the perimeter of the land owned only by [the named defendants],' other property owners who do not own the servient estate, are not necessary parties." Br. in Support of Renewed Mot. to Dismiss 8 (citing and quoting *Strahan v. Bush*, 237 Mont. 265, 269, 773 P.2d 718, 721 (1989)) (alterations in Respondent/Appellees' Brief).

Let us let that sink in, as it is dispositive.

As applied here, the right-of-way sought by Behlmer "lies completely within the perimeter of the land owned only by [the Landowners]. Consequently, "other parties who do not own the servient estate [*e.g.*, the United States] are not necessary parties." *Id*.

The Montana Supreme Court reached a similar result in *John Alexander Ethen Trust Agreement v. River Resource Outfitters*, 2011 MT 143, 361 Mont. 57, 256 P.3d 913. There, the Ethens brought a declaratory judgment action to resolve a boundary dispute with two neighbors, the Outfitters and Fischer (collectively, "Fischer"). Ethens relied on an existing Certificate of Survey showing a meandering boundary along the bank of Flint Creek. *Id*. at ¶ 19. Fischer, on the other hand, commissioned a new survey, which showed a straight-line boundary cutting off Ethens' access to Flint Creek. *Id*.

Fischer argued that other neighbors were necessary parties because they have an interest in the court's interpretation of the Certificates of Survey. The

District Court determined that the other neighbors were not necessary parties because the sole issue was the boundary between the Ethens and Fischer, and the resolution of the Ethen-Fischer boundary dispute had no effect on the rights of the other adjacent neighbors. This Court affirmed. *Id*. at ¶¶ 52, 58. Similarly, in the present case, resolution of the Behlmer claim that the road over the Landowners' properties will have no effect on the interests of the BLM.

The district court further misunderstood the relief Behlmer seeks, in stating that "an order finding an easement across only the section of road on Respondents' property does not guarantee access to the Behlmer Property." Order 7:23-25. True in the abstract but irrelevant because Behlmer did not bring the suit below to "guarantee access to the Behlmer Property." Rather, Behlmer brought suit seeking a judgment "[d]eclaring that the *portion of the road crossing Respondents' real property* is a public road. The Behlmer Trust seeks no such declaration with respect to any road on BLM property." Amended Pet. 9 (emphasis added). Hence, the United States cannot be deemed a Required Party under Rule 19, and the district court's dismissal should be reversed.

II. Even if the United States were a Required Party – and it is not – in equity and good conscience, the action should proceed among the existing parties .

As conclusively established above, the United States is not a Required Party under Rule 19(a). But even assuming it is for the sake of argument, dismissal was

nonetheless improper. Where, as here, joinder of the United States is not feasible, Rule 19(b) requires the court to determine "whether, in equity and good conscience, the action should proceed among the existing parties." In making such determination, the factors for the court to consider include:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
> (2) the extent to which any prejudice could be lessened or avoided by:
> (A) protective provisions in the judgment;
> (B) shaping the relief; or
> (C) other measures;
> (3) whether a judgment rendered in the person's absence would be adequate; and
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Mont. R. Civ. P. 19(b). Application of the foregoing factors in the present case reveals that the action should, "in equity and good conscience," proceed among the existing parties.

First, as exhaustively demonstrated above, the judgment requested by Behlmer would not prejudice the United States, as the judgment would not involve BLM Land or any other federal land. Remarkably, the district court concluded that it "cannot grant complete relief without addressing the section of road connecting [the Landowners'] property and the Behlmer Property [and] [i]f the Court accepts Petitioner's public road argument, it apparently must also apply that finding to the section of the road crossing federal land." Order 9:3-7.

But why? The district court is wrong, first, because Behlmer already has a right-of-way over the section of road crossing federal land. Second, Behlmer's Amended Petition requests no such relief, and for the district court to extend its ruling beyond the request of Behlmer would constitute judicial overreach. In fact, the district court lacks jurisdiction to "apply that finding to the section of the road crossing federal land."

As for the second factor, "the extent to which any prejudice could be lessened or avoided" does not apply because neither the United States nor the Landowners would be prejudiced by limiting the judgment to private land as requested by Behlmer. Turning to the third factor, a judgment rendered in the United States' absence would be wholly adequate, as it would be limited to private, non-federal land.

The district court's error in its application of the fourth factor, "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder," is most egregious. The district court concluded that "an alternative forum is available" (Order 10:12-22), specifically a claim in federal court under the Federal Quiet Title Act ("QTA"). The QTA provides in relevant part that "[t]he United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property *in which the United States claims an interest*, other than a security interest or water rights." 28 U.S. Code §

2409a(a) (emphasis added). Here, the United States has not claimed – and could not claim – any interest whatsoever in Treasure Canyon Drive because the road does not pass over any federal land.

More to the point, Dr. Behlmer does not seek to quiet title to any federal land or federal property interest of any kind. Moreover, under the facts of this case, a federal court would have no jurisdiction. Where, as here, the United States has not expressly disputed the existence of an R.S. 2477 right-of-way or taken an action that "implicitly disputes" the right-of-way, federal courts do not have jurisdiction to hear a claim against the United States under the QTA. *Mills v. United States*, 742 F.3d 400, 406 (9th Cir. 2014). Here, the United States has neither expressly disputed the existence of an R.S. 2477 right-of-way over the Landowners' private property nor taken an action that "implicitly disputes" its existence.

As the Ninth Circuit has explained, "[f]or a title to be disputed for purposes of the QTA, the United States must have adopted a position in conflict with a third party regarding that title." *Mills v. United States*, 742 F.3d 400, 405 (9th Cir. 2014). Where title is not disputed, the waiver of sovereign immunity provided by the QTA does not apply. *Id*.

Accordingly, where the United States has not expressly disputed the existence of an R.S. 2477 right-of-way or taken an action that "implicitly disputes" the right-of-way, federal courts do not have jurisdiction to hear a claim against the

United States under the QTA. *Id*. at 406. The QTA does not, however, preclude *State* courts from validating rights-of-way under R.S. 2477, as Behlmer requests, because the QTA only allows a federal court to conduct its own validation analysis where federal title is disputed. *Nemeth v. Shoshone Cnty.*, 165 Idaho 851, 856, 453 P.3d 844, 849 (2019).

Thus, contrary to the district court's conclusion, Behlmer has no remedy under the federal QTA, and would have no adequate remedy if the district court's dismissal for non-joinder were affirmed.

III. It is not the prerogative of the district court to expand the scope of relief in Behlmer's Amended Petition.

The relief requested in Behlmer's Amended Petition is crystal clear: "[T]he Behlmer Trust requests judgment in its favor . . . [d]eclaring that the portion of the road crossing Respondents' real property and used to access real property owned by the Behlmer Trust is a public road. *The Behlmer Trust seeks no such declaration with respect to any road on BLM property*." Amend. Pet. 9, ¶ 1 (emphasis added). Not only did the district court re-define the scope of the relief requested, it did so in a manner that would divest the court of jurisdiction and leave Behlmer with no remedy.

Specifically, the district court improperly expanded the scope of relief by erroneously reasoning that it "cannot grant complete relief without addressing the section of road connecting Respondents' property and the Behlmer Property."

Order 9:3-5. Not only did Behlmer not request such relief, his Amended Petition also expressly disclaims such relief. The district court thereby violated one of the "paramount policies embodied in the well-pleaded complaint rule -- that the plaintiff is the master of the complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-99 (1987). Under this principle, it is the prerogative of a Petitioner to delineate the specific relief sought, and to waive or forgo particular claims in order to litigate in state court, rather than federal court. In fact, the Supreme Court in *Caterpillar v. Williams* recognized this approach as entirely proper. *Id*.

Correspondingly, the Court in *Caterpillar v. Williams* condemned precisely the approach the district court took here: attempting to re-write and expand the scope of the relief Behlmer requested, resulting in the divestiture of the Montana First Judicial District Court's jurisdiction and leaving Behlmer with no remedy. *See id*; *see also Ultramar Am. Ltd. v. Dwelle*, 900 F.2d 1412, 1414 (9th Cir. 1990) ("The plaintiff is the 'master' of his complaint; where he may pursue state and federal law claims, he is free to pursue either or both, so long as fraud is not involved."); and *Elam v. Kan. City S. Ry.*, 635 F.3d 796, 803 (5th Cir. 2011) ("A plaintiff is the master of his complaint and may allege only state law causes of action, even when federal remedies might also exist."). Or more precisely here, "Petitioner is the master of his pleading and the Court will respect his choice."

Gonzalez-Longoria v. Wong, 2018 U.S. Dist. LEXIS 38385, at *3 (E.D. Cal. Mar. 7, 2018) (citing *Bogovich v. Sandoval*, 189 F.3d 999, 1001 (9th Cir. 1999)).

In the case below, the district court failed in its duty to respect the choice of Behlmer regarding the scope of relief requested.

IV. The district court erred in holding the United States to be a Required Party with respect to Behlmer's claims establishing Treasure Canyon Drive as a private road under prescription and as an implied easement by pre-existing use.

In his Amended Petition, Behlmer alleged, in the alternative, that "the portion of the road crossing Respondents' real property road and provides access to the Behlmer Property became a private road appurtenant to the Behlmer Property by prescription and as an implied easement by pre-existing use, in accordance with applicable Montana law." Amend. Pet. 8, ¶ 24. Behlmer further alleged that "[Landowners'] ownership of their properties is subject to the existence of the private road accessing and appurtenant to the Behlmer Property." Id., ¶ 25.

The district court completely overlooked these alternative claims for relief that Treasure Canyon Drive is a private road appurtenant to the Behlmer Property by prescription and as an implied easement by pre-existing use. The United States obviously cannot be deemed a Required Party with respect to the claims for two reasons. First, as with the R.S. 2477 claim, the Amended Petition expressly limited the private road claims to non-federal, private lands.

Thus, even if the district court were correct that the United States is a Required Party with respect to Dr. Behlmer's claim of a R.S. 2477 right-of-way, the United States simply could not be deemed a Required Party with respect to the private road claims based on an implied easement by pre-existing use theory.

Second, the federal Quiet Title Act affirmatively precludes prescriptive easement claims against the United States. It states that "[n]othing in this section shall be construed to permit suits against the United States based upon adverse possession." 28 U.S.C. § 2409a(n). Courts interpret this provision as a prohibition of claims of easements by prescription over federal lands because prescriptive easements are created by "adverse" use. *Hoyt v. Benham*, 813 F.3d 349, 353 (7th Cir. 2016) ("[E]asements (called 'prescriptive') can't be acquired over federal land."); *United States v. Vasarajs*, 908 F.2d 443, 447 (9th Cir. 1990) ("[P]rescriptive rights cannot be obtained against the federal government.").

Therefore, in the present case, the United States cannot be deemed a Required Party under Rule 19 because Behlmer's alternative claims of a private road by prescriptive easement and as an implied easement by pre-existing use (a) are limited to private, non-federal land, and (b) prescriptive easement claims cannot be asserted against the United States in any event.

///

CONCLUSION

For the foregoing reasons, Petitioner/Appellant Dr. Stephen Behlmer requests that the district court's Order granting Landowners' Motion to Dismiss be reversed and the case remanded for further proceedings.

DATED this 14th day of March, 2024.

JACKSON, MURDO & GRANT, P.C.

By: */s/ Rob Cameron*
Rob Cameron
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedures, I certify that Appellant's Opening Bried is printed with proportionally spaced Times New Roman typeface of 14 points; is doubled spaced, and the word count calculated by Microsoft Word is 5,042 words excluding the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service.

JACKSON, MURDO & GRANT, P.C.

By: */s/ Rob Cameron*
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CERTIFICATE OF SERVICE

I, Robert Cameron, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-14-2024:

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Representing: Deborah Grisamore, Dennis L. Grisamore, Kevin M. Heit, Lori A. Heit, Margie O. Jones, Tamara G. Jones, Wanda D. McCallum, Tonya McCormack, Jenet A. Melton, Sean F. Melton, Michael R. Stebbins, Tannia M. Stebbins, Trustees of The Brian & Debra Meyers Trust, Kent B. Whiting
Service Method: eService

Jack Connors (Attorney)
P.O. Box 1185
Helena MT 59624
Representing: Deborah Grisamore, Dennis L. Grisamore, Kevin M. Heit, Lori A. Heit, Margie O. Jones, Tamara G. Jones, Wanda D. McCallum, Tonya McCormack, Jenet A. Melton, Sean F. Melton, Michael R. Stebbins, Tannia M. Stebbins, Trustees of The Brian & Debra Meyers Trust, Kent B. Whiting
Service Method: eService

Crum Real Properties, LLC (Appellee)
P.O. Box 212
Elliston MT 59728
Service Method: Conventional

Brad W. Eckert (Appellee)
5370 Treasure Canyon Dr
Helena MT 59602
Service Method: Conventional

Janeen A. Eckert (Appellee)

5370 Treasure Canyon Dr
Helena MT 59602
Service Method: Conventional

William J. Giles (Appellee)
5150 Tumbleweed Dr.
Helena MT 59602
Service Method: Conventional

Brett K. Holling (Appellee)
5545 Treasure Canyon Dr.
Helena MT 59602
Service Method: Conventional

Brian K. Holling (Appellee)
5533 Treasure Canyon Dr.
Helena MT 59602
Service Method: Conventional

Christopher J. Ries (Appellee)
6580 Green Meadow Dr.
Helena MT 59602
Service Method: Conventional

Toni M. Ries (Appellee)
6580 Green Meadow Dr.
Helena MT 59602
Service Method: Conventional

Arlene F. Thurston (Appellee)
5150 Tumbleweed Dr.
Helena MT 59602
Service Method: Conventional

Electronically signed by Kenzie Heimbach on behalf of Robert Cameron
Dated: 03-14-2024