

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 24-0231

DAVID L. MURPHY PROPERTIES, LLC, and JOHN SCHAFFER,

Plaintiff and Appellant,

v.

PAINTED ROCKS CLIFF, LLC,

Defendant and Appellee.

AMENDED NOTICE OF APPEAL

On Appeal from the Montana Twentieth Judicial District Court, Lake County,
Cause No. DV-2022-143
the Honorable John Larson Presiding

APPEARANCES:

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NOTICE IS GIVEN that David L. Murphy Properties, LLC and John Schaffer, the above-named Appellants who are the Plaintiffs in that cause of action filed in the Montana Twentieth Judicial District, in and for the County of Lake, as Cause No. DV-22-143, hereby jointly appeal to the Supreme Court of the State of Montana from the *Order Granting Defendants' Lake County and Lake County Board of Commissions Motion for Rule 12(b)(6)* dated May 9, 2023, and the final

Order Granting Defendant's Motion for Summary Judgment dated March 12, 2023,
(both of which are attached).

THE APPELLANTS FURTHER CERTIFY:

1. This appeal is subject to the mediation process required by M. R. App. P. 7. because Appellants have sought monetary damages greater than \$5,000.
2. This appeal is not an appeal from an order certified as final under M. R. Civ. P. 54(b).
3. All available transcripts of proceedings in this cause have been ordered contemporaneous with the filing of this notice of appeal.
4. Included herewith is the filing fee prescribed by statute.
5. That a copy of the notice of appeal has been contemporaneously filed in the office of the Clerk of the District Court.

DATED this 9th day of April, 2024.

JACKSON, MURDO & GRANT P.C.

By: 

Michael P. Talia ,
Counsel for Appellants

1 John W. Larson, District Judge
2 Fourth Judicial District, Dept. 3
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MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

DAVID L. MURPHY PROPERTIES,
LLC, AND JOHN SCHAFFER,

Plaintiffs,

vs.

PAINTED ROCKS CLIFF, LLC,
AND LAKE COUNTY, a political
subdivision of the State of Montana,
by and through the LAKE COUNTY
BOARD OF COMMISSIONERS:
BILL BARRON, GALE DECKER,
AND STEVEN STANLEY,

Defendants.

Cause No. DV-22-143

**ORDER GRANTING
DEFENDANTS' LAKE COUNTY
AND LAKE COUNTY BOARD OF
COMMISSIONS MOTION FOR
RULE 12(b)(6)**

Before the Court is Defendants Lake County and Lake County Board of Commissioners: Bill Barron, Gale Decker, Steve Stanley ("BOCC") Motion for Rule 12(b)(6). The matter is fully briefed, the parties waived argument, and the matter is ready for decision.

BACKGROUND

The Court finds the facts as alleged in the Complaint as the following. Plaintiff David L. Murphy Properties (Murphy Properties) owns a tract of land with Flathead Lake frontage in a cove. Compl. & Demand for Jury Trial, ¶ 1. Plaintiff John Schaffer owns Murphy Properties. *Id.* at ¶ 2. Plaintiff's neighbor is Painted Rocks Cliff, LLC. *Id.* at ¶ 3. Painted Rocks bought its property

1 around 2020 and applied to Lake County for a permit to build a boat dock in
2 January 2022, which was approved by the Lake County Commissioners in
3 March 2022, as a final action on the permit. *Id.* at ¶¶ 10-11 & 25. Plaintiff
4 Schaffer contends he uses the cove to launch and recover his ski boat. *Id.* at
5 ¶ 8. Plaintiff alleges he communicated to Painted Rocks and Lake County that
6 the dock might block him from accessing the lake from his cove and Mr.
7 Schaffer was ignored. *Id.* at ¶¶ 14-16. Plaintiff contends he has attempted to
8 navigate his boat from the Murphy Parcel cove into Flathead Lake and he has
9 not been able to do so because of the requirement for a sharp angled turn that
10 Painted Rocks dock requires. Complaint, ¶ 20.

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13 The Complaint specifically alleges that the Painted Rocks' dock blocks
14 navigation by boat to the cove on the Murphy Parcel. The Complaint alleges
15 the following causes of action: (Count 1) Violation of the Lakeshore Protection
16 Act by interfering with navigation and lawful recreation; (Count 2) Nuisance;
17 (Count 3) Prescriptive Easement declaration to cross Painted Rocks' property.
18
19 The Complaint also seeks punitive damages. Defendants Lake County and
20 Lake County Board of Commissions: Bill Barron, Gale Decker, and Steve
21 Stanley (hereinafter BOCC) request dismissal, asserting the recitals in the
22 Complaint are legal conclusions, no right exists, no facts support a claim for
23 public nuisance, and BOCC is insulated from liability.
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STANDARD

1 “We construe the complaint in the light most favorable to the plaintiffs
2 when reviewing an order dismissing a complaint under Rule 12(b)(6),
3 M.R.Civ.P.” *Plouffe v. State*, 2003 MT 62, ¶ 8, 314 Mont. 413, ¶ 8, 66 P.3d
4 316, ¶ 8. A court should not dismiss a complaint for failure to state a claim
5 unless it appears beyond doubt that the plaintiff can prove no set of facts in
6 support of his claim that would entitle him to relief. *Plouffe*, ¶ 8.
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DISCUSSION

10 Defendants Lake County and Lake County Board of Commissioners
11 (BOCC) assert that not all recitals in the Complaint are facts, but are instead
12 legal conclusions for the Court, not the Plaintiff, to declare. Defendant BOCC
13 takes issue with recitals in the Complaint enumerated at Paragraph’s 28 and
14 29. In Paragraph 28, Plaintiff alleges that the dock “interferes with navigation
15 and lawful recreation, and creates a public nuisance.” At Paragraph 29 of the
16 Complaint, Plaintiff alleges that BOCC’s “failure” or refusal to “enforce” the
17 Lakeshore Protection Act resulted in the dock at issue “interfere(ing) with
18 navigation on the lake and the use and enjoyment of adjacent property.”
19 Defendant BOCC contends that BOCC cannot interfere with a right that does
20 not exist, as there are no Coast Guard navigational standards on Flathead
21 Lake nor navigational standards on Flathead Lake. Defendant BOCC further
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1 argues that the Lakeshore Protection Act offers no guidance on what
2 conditions or situation may or may not constitute an interference with
3 navigation. Defendant BOCC argues that nowhere has Plaintiff alleged that
4 any recreational use are denied Plaintiff much less as a consequence of the
5 BOCC permitting the dock. Defendant BOCC contends that at no point is
6 navigability of dockage specifically addressed in statute or administrative
7 rules, or any “implementing regulations,” either as a thing to itself or as a
8 feature of “recreational use.” Defendant BOCC argues that structures
9 intruding on the surface waters of the state are specifically permitted by law.
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11 See, e.g., Section 75-7-201, MCA. Defendant BOCC argues that
12 “[n]avigability for use is determined by state law.” *Montana Coalition for*
13 *Stream Access v. Curran* (Mont. 1984) 682 P.2d 163. Defendant BOCC
14 assert that the only legal conclusion that can be drawn from all well-pled,
15 actual facts of the Complaint, is that Plaintiff’s recreational rights to the use of
16 the surface waters of the state remain untarnished by the dock permit.
17
18 Defendant BOCC argues that Plaintiff has failed to allege any interference
19 with “recreational use” as that is specifically defined under Montana law,
20 Section 23-2-301, MCA. Defendant BOCCC asserts that the only legal
21 conclusion is that BOCC acted within its own regulations in issuing the
22 relevant dock permit.
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1 Next, Defendant BOCC argues that Plaintiff has also claimed that the
2 BOCC shares blame for a theory of recovery under “public nuisance.”
3 Complaint at Para. 28. Defendant BOCC argues that Montana statutory law
4 offers guidance on what constitutes a public nuisance, defined as “...one
5 which affects, at the same time, an entire community or neighborhood or any
6 considerable number of persons.” Section 27-30-102, MCA. Defendant
7 BOCC argues that Plaintiff has recited no facts that the dock, or its location or
8 permitting, “affects, at the same time, an entire community or neighborhood or
9 any considerable number of persons” and any such conclusory assertion
10 must fail.
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14 Plaintiffs respond that they are entitled under the Lakeshore Protection
15 Act, to judicial review of Lake County’s permitting of Painted Rocks Cliff,
16 LLC’s dock and judicial enforcement of its own permits and regulations, and
17 the Act itself. See Mont. Code Ann. § 75-7-215. Plaintiffs argue that they
18 seek review of Painted Rocks’ permit to show it was arbitrary, capricious, or
19 unlawful so that this Court can enforce the Act. *Community Assn. for N.*
20 *Shore Conservation, Inc. v. Flathead County*, 2019 MT 147, ¶¶ 28, 396 Mont.
21 194, 445 P.3d 1195. Plaintiffs assert that they commonly understood
22 definition of navigation is sufficient. Plaintiffs also contend that the Lake
23 County regulations refer to “...the navigational rights and safety of
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1 neighboring property owners and recreational uses of the lake....” Lake
2 County Lakeshore Protection Regulations, § 5-3(P)(1)(a). Plaintiffs contend
3 that they only need plead they are interested persons who seek review of a
4 final action of Lake County. Plaintiffs further respond that “if nobody can
5 access a part of the lake in a boat, there is public nuisance.” Response, p. 6.
6 Plaintiffs argue that Lake County’s action permits a public nuisance because
7 it affects an entire community of lake users who are now denied the
8 enjoyment of a portion of the lake. Mont. Code Ann. § 27-30-102.
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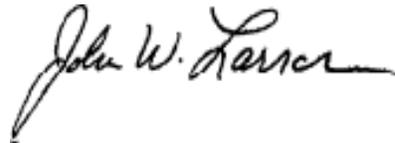
11 Defendant replies that there are no well-pled factual assertions in the
12 Complaint entitling Plaintiff to relief. Defendant asserts that Plaintiff is using
13 legal conclusions serving as “facts” in the Complaint. Defendant BOCC
14 further argues it is shielded from liability to this Plaintiff pursuant to the terms
15 of the permit forming the basis of Plaintiff’s cause.
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18 Here, Plaintiff contends that the dock “interferes with...lawful
19 recreation.” Complaint, p. 5, ¶ 28. Plaintiff concedes that “entry to, and
20 egress from, the cove” requires navigation of submerged rocks. Complaint, at
21 ¶ 9. The permit at issue specifically provides a condition that “[n]either Lake
22 County, the Planning Department, nor their respective members shall be
23 responsible or liable for any portion of the proposed plans that...impact
24 easements or neighboring properties.” Exhibit C-3 to Complaint. The Court
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1 has determined that Plaintiff has failed to adequately establish a right to
2 “navigation” for “recreation use” of the surface waters under the facts as
3 alleged. The Court finds no well-pled factual assertions as to Defendant
4 BOCC. Plaintiff also has failed to sufficiently plead public nuisance under the
5 terms of the permit issued. Accordingly,
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7 IT IS HEREBY ORDERED that Defendants Lake County and Lake
8 County Board of Commissioners’ Rule 12(b)(6) Motion to Dismiss is
9
10 GRANTED.

11 Dated this 9th day of May, 2023.

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15 JOHN W. LARSON, DISTRICT JUDGE
16

17 Copies of the foregoing were sent to:

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FILED BY _____
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4 MONTANA TWENTIETH JUDICIAL DISTRICT COURT
5 LAKE COUNTY

6 DAVID L. MURPHY PROPERTIES,
7 LLC, AND JOHN SCHAFFER,

8 Plaintiffs,

9 vs.

10 PAINTED ROCKS CLIFF, LLC,

11 Defendant.

Cause No. DV-22-143

12 **ORDER GRANTING**
13 **DEFENDANT'S MOTION FOR**
14 **SUMMARY JUDGMENT**

15 Before the Court is Defendant's Painted Rocks Cliff Motion for
16 Summary Judgment. The matter is fully briefed, the Court heard oral
17 argument on January 12, 2024, and the matter is ready for decision.

18 **BACKGROUND**

19 The Court finds the facts as alleged in the Complaint and the procedural
20 posture of the case as the following. Plaintiff David L. Murphy Properties owns
21 a tract of land with Flathead Lake frontage in a cove. Compl. & Demand for
22 Jury Trial, ¶ 1. Plaintiff John Schaffer owns Murphy Properties. *Id.* at ¶ 2.
23 Plaintiff's neighbor is Painted Rocks Cliff, LLC. *Id.* at ¶ 3.

24 Plaintiffs David Murphy Properties installed its dock in the cove in its
25 current location on the western boundary of its property just over four years
26 before Plaintiffs filed this suit, in May or June 2018. Before that, David

1 Murphy's dock was in the cove on Tract D as allowed by Painted Rocks'
2 predecessors, which permission was withdrawn in October 2017.

3 Painted Rocks bought its property around 2020 and applied to Lake County
4 for a permit to build a boat dock in January 2022, which was approved by the
5 Lake County Commissioners in March 2022, as a final action on the permit.

6 *Id.* at ¶¶ 10-11 & 25.
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8 Plaintiff Schaffer contends he uses the cove to launch and recover his
9 ski boat. *Id.* at ¶ 8. Plaintiff contends he has attempted to navigate his boat
10 from the Murphy Parcel cove into Flathead Lake and he has not been able to
11 do so because of the requirement for a sharp angled turn that Painted Rocks
12 dock requires. Complaint, ¶ 20.
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14
15 On August 10, 2022, Plaintiffs David Murphy Properties and Schaffer
16 sued Lake County and Painted Rocks based on the issuance of the permit
17 and the existence of Painted Rocks' docks. Plaintiffs allege three causes of
18 action: Count I, violation of the Lakeshore Protection Act by interfering with
19 navigation and lawful recreation; Count II, Nuisance; and Count III, seeking
20 a declaration of a prescriptive easement over Painted Rocks' property. All
21 three counts are alleged against Painted Rocks; only Count I was alleged
22 against Lake County. The Complaint also seeks punitive damages.
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24 Specifically, in Count I, Plaintiffs allege Painted Rocks' dock "negatively
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1 impacts the [Murphy Property], interferes with navigation and lawful
2 recreation, and creates a public nuisance because it blocks ingress and
3 egress from the cove on the [Murphy Property].” Compl., ¶¶ 28, 29.

4 Defendants Lake County and Lake County Board of Commissions: Bill
5 Barron, Gale Decker, and Steve Stanley requested dismissal, asserting the
6 recitals in the Complaint are legal conclusions, no right exists, no facts support
7 a claim for public nuisance, and they are insulated from liability. The Court
8 granted Defendants Lake County and Lake County Board of Commissioners:
9 Bill Barron, Gale Decker, Steve Stanley Motion for Rule 12(b)(6), determining
10 Plaintiff failed to adequately establish a right to “navigation” for “recreation
11 use” of the surface waters under the facts as alleged. The Court further found
12 Plaintiff failed to sufficiently plead public nuisance. Defendant Painted Rocks
13 now seeks summary judgment on all of Plaintiffs’ claims.
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17 STANDARD

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19 A party moving for summary judgment bears the burden to establish
20 the absence of genuine issues of material fact, and that the party is entitled to
21 judgment as a matter of law. *O’Keefe v. Mustang Ranches HOA*, 2019 MT
22 179, ¶ 14, 396 Mont.
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25 DISCUSSION

26 Defendant frames the question for the Court to consider as whether

1 Painted Rocks' dock interferes with a right of Plaintiffs Murphy Properties' right
2 to use and enjoy its own property. Defendant contends the parties appear to
3 agree that the public can use up to the high-water mark even though the
4 adjacent landowner owns to, at least, the low water mark. Defendant
5 contends the remaining question is whether the public has a right to
6 recreationally use the water of Flathead Lake and underlying land up to the
7 high-water mark, even though the fee title to the area between the high and
8 low-water marks is owned by the littoral landowner. Defendant argues that
9 Plaintiffs' request for summary judgment on Plaintiffs' claim alleging an
10 appurtenant prescriptive easement must fail as Plaintiffs cannot establish the
11 requisite adverse use, nor can seasonal and recreational use satisfy adverse
12 use. Defendant further alleges that Plaintiffs' claimed use is not for the entire
13 five-year prescriptive period. Next, Defendant argues Plaintiff's nuisance and
14 Lakeshore Protection Act claims fail, as Plaintiffs' use of the area between the
15 high and low water marks of Flathead Lake is made pursuant to Montana's
16 limited public trust easement. *Ash v. Meriette*, 2017 MT 305, ¶ 10, 389 Mont.
17 486, 407 P.3d 304. Defendant further contends the nuisance claim fails
18 because the right to recreate on the water, including getting into the cove
19 remains, and statutory authority authorized the dock. See § 27-30-101(2),
20 MCA.
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1 Plaintiffs frame the issue in this case as whether a prescriptive
2 easement can be obtained over the portion the property of a private landowner
3 which lies between the high and low water mark of a lake. Plaintiffs contend it
4 has a prescriptive right to access the cove without Mr. Schaffer having to get
5 out of his boat and drag it on a line. Plaintiffs contend that Defendant violates
6 the Lakeshore Protection Act and causes a private nuisance by interfering with
7 that right. Plaintiffs Murphy Properties contends it has a prescriptive
8 easement, contending that the holding in *Ash* shows that the property between
9 the low and high-water marks is privately owned, thus it is subject to claims for
10 prescriptive easements. Plaintiffs seek its own summary judgment for a
11 prescriptive easement to cross Defendant's property which is necessary to
12 access the cove in a ski boat, without having to get out of the boat and drag it
13 on a line, consistent with historical use. Plaintiffs contend that one person's
14 use of property should not foreclose a neighbor from its own lawful use.
15 Plaintiffs contend that the issue of whether access is impeded by Defendant's
16 dock is an issue for trial.

21 Defendant replies that the public has a right to use the water of Flathead
22 Lake and underlying land for recreation to the high-water mark, even though
23 Painted Rocks holds title to the area between the high and low water marks.
24 Defendant argues that Article IX, Section 3(3) of the Montana Constitution, the
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1 Public Trust, and the cases addressing them, apply equally to Flathead Lake
2 and streams and rivers. Defendant argues that the Montana Supreme Court
3 has not held that the use of the public's resources, the water, is limited in lakes
4 to the area between the low water marks. Defendant argues that because all
5 of Plaintiffs' disclosed use of Flathead Lake has been based on their rights to
6 use the public trust easement, their prescriptive easement claim fails.
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8 Defendant further argues that where the owner cannot exclude the proponent
9 of a prescriptive easement because of an existing use right, no prescriptive
10 easement can be found. *See, e.g. Burcalow Fam., LLC v. Corral Bar, Inc.*,
11 2013 MT 345, ¶¶ 22, 25, 372 Mont. 498, 313 P.3d 182. Defendant argues
12 that Plaintiffs' nuisance and Lakeshore Protection Act claims depend on the
13 viability of the prescriptive easement claim and without a prescriptive
14 easement, those claims fail.
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17 Here, Plaintiffs David Murphy Properties and Defendant Painted Rocks
18 Cliff own adjacent properties on Flathead Lake. The dock at issue in this
19 case is constructed on the shoreline of Painted Rocks' property. Painted
20 Rocks obtained a permit to build a dock and built the dock in accordance
21 thereto, including constructing it in the permitted location. Painted Rocks'
22 expert Jenkins, opined that the dock at issue is 201 feet from the Plaintiffs'
23 property, and Plaintiffs concede the dock was built in the location where
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1 Painted Rocks applied and Lake County authorized the dock to be located.
2 Def Brief (Ex. 8). Painted Rocks' dock was permitted, signifying compliance
3 with the Lakeshore Protection Act and the Regulations.

4 The Complaint specifically alleges that the Painted Rocks' dock blocks
5 navigation by boat to the cove on the Murphy Parcel. Plaintiff contends that
6 the dock "interferes with...lawful recreation." Complaint, p. 5, ¶ 28. Plaintiff
7 concedes that "entry to, and egress from, the cove" requires navigation of
8 submerged rocks. Complaint, at ¶ 9.

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11 Plaintiffs do not dispute that Flathead Lake is a navigable body of water
12 on which the public has a right to recreate; that the State of Montana owns the
13 waters of Flathead Lake and the fee title to the land below the low water mark;
14 or that Painted Rocks owns fee title to the land underneath the water to the
15 low water point (i.e. between the high and low water marks). Article IX,
16 Section 3(3) of the Montana Constitution declares all waters within the State
17 property of the State "for the use of its people"—applies to rives, streams, and
18 lakes equally. The State also owns "all land below the water of a navigable
19 lake or stream," (§ 70-1-202(1), MCA), and the adjacent landowner owns to
20 the low water mark on a navigable water, (§ 70-16-201, MCA). *Galt v. State*
21 *by & through Dep't of Fish, Wildlife & Parks*, 225 Mont. 142, 144, 731 P.2d
22 912, 913 (1987). The *Galt* Court acknowledged "...we further held that the
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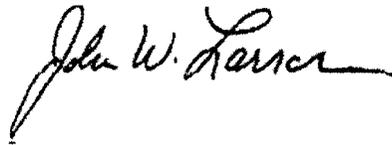
1 public's right to use the waters includes the right of use of the bed and banks
2 up to the high water mark even though the fee title in the land resides with the
3 adjoining landowners." 225 Mont. at 147, 731 P.2d at 915. The Montana
4 Supreme Court has found "the Constitution and public trust 'do not permit a
5 private party to interfere with the public's right to recreational use of the
6 surface of the State's water.'" *Montana Trout Unlimited v. Beaverhead Water*
7 *Co.*, 2011 MT 151, ¶ 29, 361 Mont. 77, 255 P.3d 179. The Montana Supreme
8 Court has made clear that the right to use that public resource does not have
9 an "attendant right that such use be as convenient, productive, and
10 comfortable as possible." *Galt v. State by & through Dep't of Fish, Wildlife &*
11 *Parks*, 225 Mont. 142, 147, 731 P.2d 912, 915 (1987).

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15 The Court finds no genuine issue of material fact that Plaintiffs cannot
16 establish the adverse use element of prescriptive easement necessary to
17 establish Plaintiffs' prescriptive easement, nuisance, and Lakeshore
18 Protection Act claims. Painted Rocks cannot exclude Plaintiffs, the proponent
19 of the alleged prescriptive easement, because of an existing use right and no
20 prescriptive easement can be found. *See Cummings v. Canton*, 244 Mont.
21 132, 136, 796 P.2d 574, 576 (1990). Plaintiffs' use of Flathead Lake is based
22 on their rights to use the public trust easement, and Painted Rocks cannot
23 exclude the same. As there is no genuine issue of material fact, Defendant
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1 Painted Rocks is entitled to summary judgment as a matter of law on each of
2 Plaintiffs' claims. Accordingly,

3 IT IS HEREBY ORDERED that Defendant Painted Rocks' Motion for
4 Summary Judgment is GRANTED.

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6 DATED this 12TH day of March, 2024.

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9
10 JOHN W. LARSON, DISTRICT JUDGE
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14 Copies of the foregoing were sent to:

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25
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CERTIFICATE OF SERVICE

I, Michael Peter Talia, hereby certify that I have served true and accurate copies of the foregoing Notice - Amended Notice of Appeal Filed to the following on 04-09-2024:

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Service Method: eService

Electronically signed by Emma Allyn Watkins on behalf of Michael Peter Talia
Dated: 04-09-2024