IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No.: DA 23-0720

STEPHEN D. BEHLMER,
Petitioner and Appellant,

v.

CRUM REAL PROPERTIES, LLC, ET AL.,
Defendants and Appellees.

APPELLEES' RESPONSE BRIEF

On Appeal from Montana First Judicial District Court
Lewis and Clark County Cause No. BDV-2023-141
Hon. Mike Menahan, District Court Judge, Presiding

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STATEMENT OF THE ISSUES

As discussed below, some contentions in Appellant Stephen D. Behlmer's ("Behlmer")[1] Statement of the Issues were waived because he failed to raise the issues with the District Court. As a result, the issue for the Court to decide is whether the District Court abused its discretion when it found that under Rule 19, M. R. Civ. P., the United States was a required party and then dismissed the action because the United States could not be joined based on sovereign immunity, and in equity and good conscience the action could not proceed among the existing Defendants.

STATEMENT OF THE CASE

On February 27, 2023, Behlmer sued over two dozen neighbors seeking to establish that a road running through the Defendants'[2] properties is a public road

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[1] As noted in Behlmer's Opening Brief, the case was originally brought by a Trust known as "Associated Dermatology and Skin Cancer Clinic of Helena, P.C. Profit Sharing Plan and Trust for the Benefit of Stephen D. Behlmer, M.D." Behlmer was subsequently substituted as the Petitioner in place of the Trust. In the interest of clarity, this Brief refers to Stephen Behlmer and the Trust jointly as Behlmer.

[2] This Brief is filed on behalf of Defendants/Appellees Tamara G. Jones, Margie O. Jones, Brian Robert Meyers and Debra Joyce Meyers, Trustees of The Brian & Debra Meyers Trust, Dennis L. Grisamore, Deborah Grisamore, Tonya McCormack, Wanda D. McCallum, Kent B. Whiting, Tannia M. Stebbins, Michael R. Stebbins, Sean F. Melton, Jenet A. Melton, Kevin M. Heit, and Lori A. Heit

or, in the alternative, a private road that provides access to a series of mining claims he owns. Dkt. # 1.[3] On April 10, 2023, the Landowners filed a Motion to Dismiss pursuant Rule 12(b)(7) in which they argued that under Rule 19, the United States was a required party that could not be joined.[4] Dkt. # 25. In response, on April 21, 2023, Behlmer filed an Amended Petition explaining that he "does not seek a declaration that any portion of any road across BLM property is a public road." Dkt. # 30 at 2. The Landowners filed a Renewed Motion to Dismiss the Amended Petition. Dkt. # 33. On November 9, 2023, District Court Judge Menahan granted the Landowners' Motion to Dismiss. Dkt. # 57 ("Order," Tab 001 to Appellant's Appendix). On December 14, 2023, Behlmer filed a timely Notice of Appeal with this Court.

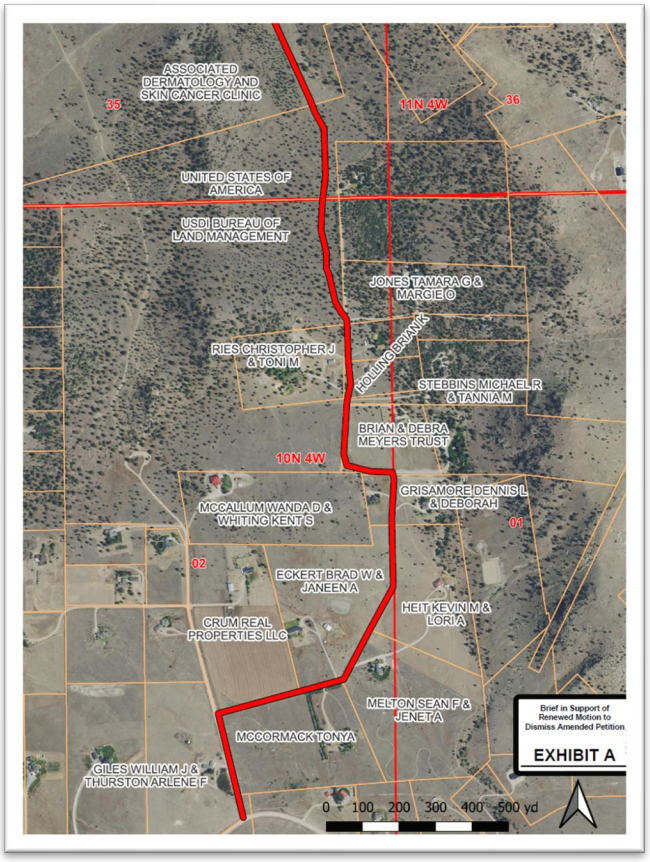
(collectively, the "Landowners"). Some of the other named Defendants named in the Petition and Amended Petition were served, but never made an appearance. The remainder of the Defendants were never served.

[3] Documents filed with the District Court are referenced as "Dkt. # __" according to the filing number on the Register of Actions filed with this Court on December 15, 2023.

[4] As part of the 2011 amendments to the Montana Rules of Civil Procedure, the term "necessary party" in Rule 19 was replaced with the term "required party" based on the changed to the Federal Rules. However, the change was stylistic and not substantive. *See* Committee Comments to M. R. Civ. P. 19 (Mont. AF 07-0157, April 26, 2011).

STATEMENT OF THE FACTS

The District Court laid out most of the material facts in its Order. In short, a road sometimes called Treasure Canyon Drive crosses the Defendants' properties in the Treasure Canyon Estates subdivision, before entering land owned by the United States administered by the Department of the Interior, Bureau of Land Management ("BLM"). Order at 2. Behlmer owns a series of mining claims known as the "Behlmer Property," which is located at the end of the road after it passes through the federal land. *Id.* Behlmer seeks to use the road to establish access to his property. The relevant properties and the road are depicted in Exhibit A to Dkt. # 33, which is excerpted below.



In 1994, Behlmer acquired Tract D in the Treasure Canyon Estates subdivision. Order at 2. He then executed a Road Maintenance Agreement that referred to the road as a "private road." Order at 2-3; Exhibit B to Dkt. # 33. Around the same time, Behlmer, through a trust he controlled, acquired the mining claims known as the Behlmer Property. Order at 3. In 1997, Behlmer negotiated with BLM for a "right-of-way" on federal land that connected a portion of Treasure Canyon Drive to the Behlmer Property. Order at 3; Exhibit D to Dkt. # 33. This right-of-way terminated in 2017. *Id.* ("This instrument shall terminate on 20 years from its effective date . . .").

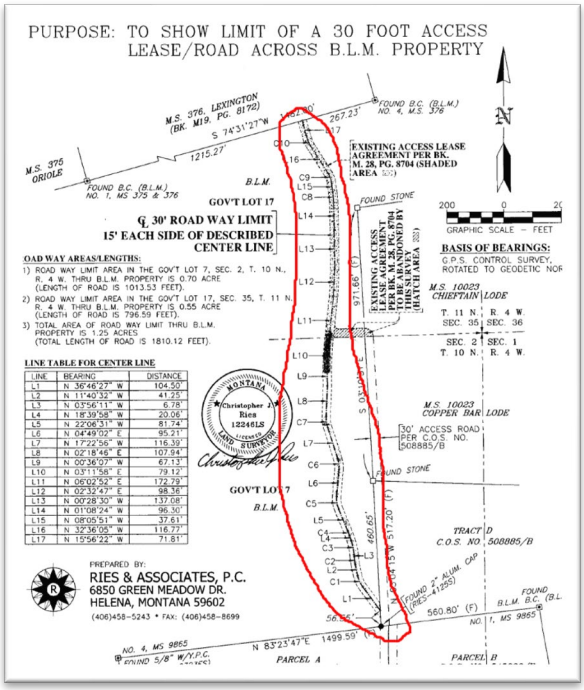
In 2002, Behlmer sold his lot in Treasure Canyon Estates, but he retained the Behlmer Property. Order at 3; Exhibit C to Dkt. # 33. As part of that transaction, Behlmer signed a document stating he "[was] desirous of an easement through the property being sold in order to access [the Behlmer Property]." Exhibit C to Dkt. # 33.

At some point around 2004, Behlmer began pursuing a plan to develop the Behlmer Property for a residential development. Order at 3. Between 2004 and 2009, Behlmer met with Treasure Canyon Estates homeowners seeking an agreement that would allow him to use the road for access to the Behlmer Property. *Id.* At that time, Behlmer offered to limit the development to 14 home sites in exchange for the homeowners agreeing that Behlmer and the purchasers of the parcels could use the road for access. Exhibit G to Dkt. # 33 ("The Treasure Canyon road access easements will apply to me and to purchasers of home sites,"

"I will limit the number of home sites to a maximum of 14 home sites."). The meetings did not result in an agreement. Order at 3. In 2013, Behlmer, through counsel, sent letters to the Treasure Canyon Estates homeowners claiming that Treasure Canyon Drive permitted access to the Behlmer Property. *Id.* The Landowners did not believe Behlmer had provided sufficient evidence to support his easement claim. *Id.*

According to a letter from Behlmer, a homeowner in Treasure Canyon Estates "prevented me from accessing [the right-of-way issued by BLM in 1997]. I considered my options, and decided to request and [sic] extension of the right of way instead of litigating." Exhibit E to Dkt. # 33. Thus, rather than pursue litigation to establish Treasure Canyon Drive as a public road, in 2011 Behlmer acquired a longer right-of-way from BLM that bypassed the objecting homeowner's property. Exhibit F to Dkt. # 33. Like the first BLM right-of-way, the 2011 agreement is temporary, terminating on December 31, 2037 (unless renewed); it is limited to 30 feet in width; Behlmer must make rental payments to the United States; and Behlmer is subject to 39 terms and conditions. *Id.* None of these conditions or requirements would apply if the road was a public road.

Exhibit A to the 2011 right-of-way (excerpted below) depicts the 1,810-foot-long segment of the road located on federal land.



In 2013, BLM placed a sign in the middle of the road located on federal property stating, "ROUTE CLOSURE" and "No Motorized Travel Yearlong." Exhibit H to Dkt. # 33 (excerpt below).

In 2021, Behlmer filed an almost identical lawsuit seeking to establish public access to his mining claims. Order at 3; Exhibit I to Dkt. # 33 (First Judicial District Court, Lewis and Clark County, Cause No. ADV 2021-1202, "First Lawsuit"). The most significant difference between the First Lawsuit and the current lawsuit is that Behlmer named BLM as a defendant in the First Lawsuit. Exhibit I to Dkt. # 33 at ¶¶ 25-26, page 9. Behlmer never served any of the defendants in the First Lawsuit, and he voluntarily dismissed it before filing the current lawsuit. Exhibit J to Dkt. # 33.

In December 2022, Behlmer's counsel sent another letter to the homeowners in Treasure Canyon Estates asking them to sign a "Private Access Agreement" that would establish legal access to the Behlmer Property via Treasure Canyon Drive. Order at 3; Exhibit K to Dkt. # 33. The letter threatened, "If all Owners do not join in the Private Access Agreement" Behlmer would sue them to establish a public access easement and Behlmer would then punish the Landowners by pursuing "residential development/private sale of the property" instead of a sale to BLM.[5] *Id.* Most homeowners disagreed with Behlmer's assertions and declined to sign the Private Access Agreement. Order at 3.

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[5] The letter and Behlmer's briefing mention a speculative sale to BLM. However, the lack of a public access does not prevent Behlmer from selling his property to BLM, it only reduces the amount of money that he may receive since BLM is limited to paying fair market value for the property and the lack of public access would decrease the market value. Thus, this dispute, at its heart, concerns the size of a potential profit to Behlmer, and not establishing public access.

When the Landowners were served with the Petition and Summonses for this lawsuit, a letter from Behlmer's counsel was attached. Exhibit L to Dkt. # 33. The letter explained that Behlmer was not particularly interested in establishing that the road was open to the public; instead he was using the threat of the road being declared a public road by the District Court, which meant it could be used as "the primary access route for construction contractors and new private residents, dramatically increasing commercial and residential traffic on Treasure Canyon Drive" to pressure the Landowners to sign a private access agreement. *Id*. at 2.

A secondary factual issue raised in Behlmer's Brief is his assertion that "[i]t is undisputed that Behlmer's Amended Petition includes all potentially affected Landowners as parties." Opening Brief at 9, n. 2. This fact has not been established and even Behlmer's Amended Petition named additional "Doe Respondents" as "additional currently unknown individuals and/or other legal entities who may claim interests affected by this case, and who are currently unknown to the Petitioner despite best efforts to identify them." Dkt. # 30, ¶ 17. Behlmer's Brief also asserts that "to access the Behlmer Property, one must travel north on Treasure Canyon Drive, and then cross BLM Land." Opening Brief at 3. Behlmer cites no evidence in the record to support this assertion. In fact, in his First Lawsuit, Behlmer stated there were multiple "***roads*** accessing the [Behlmer Property] cross real property owned by the United States of America and administered by the United States" Exhibit I to Dkt. # 33 at ¶ 26 (emphasis added). He also alleged "[t]he ***roads*** that provide access to the [Behlmer Property] became

public roads when the R.S. 2477[6] offer was accepted in accordance with applicable Montana law." *Id.* at ¶ 31. While it is not material to the current dispute, Behlmer's First Lawsuit correctly noted there are multiple paths or routes that could provide access to the Behlmer Property, and one does not have to use Treasure Canyon Drive to access the Behlmer Property.

STANDARD OF REVIEW

Citing a 1988 decision from the Ninth Circuit, Behlmer argues that "Dismissal under Rule 12(b)(7) . . . is subject to de novo review." Opening Brief at 5 (citing *McLaughlin v. Int'l Ass'n. of Machinists & Aerospace Workers*, 847 F.2d 620, 621 (9th Cir. 1988)). This Court, however, has long held that a district court has discretion to grant or deny a motion to dismiss for failure to join a required party, and that this court will review the district court's decision for an abuse of discretion.

> When considering a motion to dismiss based on the assertion that an indispensible [sic] party is absent, the [district] court is given discretion to determine whether the action will proceed or must be dismissed. We review such discretionary rulings for an abuse of discretion.

Williams v. Bd. of Cty. Comm'rs of Missoula Cty., 2013 MT 243, ¶ 21, 371 Mont. 356, 308 P.3d 88 (citations omitted); *John Alexander Ethen Trust Agreement v.*

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[6] Section 2477 of the Revised Statutes of the United States, repealed by Federal Land Policy Management Act of 1976 (FLPMA) ("R.S. 2477").

River Res. Outfitters, 2011 MT 143, ¶ 49, 361 Mont. 57, 256 P.3d 913;[7] *see also* the Court's Standard of Review Handbook ("Joinder/indispensable party[,] The district court's ruling on a motion to dismiss due to the absence of an indispensable party is reviewed for an abuse of discretion.").[8]

"The test for an abuse of discretion is whether the trial court acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice." *In re A.S.*, 2006 MT 281, ¶ 24, 334 Mont. 280, 146 P.3d 778 (quotation omitted).

SUMMARY OF THE ARGUMENT

Only in the rare case does Rule 19, M. R. Civ. P. require dismissal of a lawsuit because a necessary party may not be joined as a defendant. Yet the sovereign immunity of the federal government is one such circumstance warranting dismissal. Given that the United States is the owner of the property where the longest section of the disputed road is located, even if the District Court did not adjudicate the status of that segment of the federal property, as a practical matter, the United States' interests would be directly and substantially affected by a declaratory judgment establishing that a portion of the road is open to the public.

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[7] On page 13 of his Opening Brief, Behlmer cites *John Alexander Ethen Trust Agreement*, but he does not acknowledge the standard of review the Court applied in that decision.

[8] Available at https://courts.mt.gov/external/SOR/civil/II-49.htm

The District Court properly found the United States was a required party under Rule 19(a). It then correctly balanced the four factors in Rule 19(b) to find that, in equity and good conscience, the action should be dismissed. The District Court did not abuse its discretion in making these determinations and the Order dismissing Behlmer's Amended Petition should be affirmed.

ARGUMENT

I. The District Court correctly found that one quarter of the disputed road is located on federal land.

A key dispute between Behlmer and the District Court is how to describe the disputed road. The District Court found that "[a]pproximately one quarter of the disputed road is located on federal land." Order at 5. Behlmer argues "[t]his is categorically false," and he claims, "Treasure Canyon Drive terminates at the boundary of the federal land . . ." Opening Brief at 10. Behlmer argues, "The district court's failure to take Belmer's allegations [concerning where Treasure Canyon Drive terminates] as true is, in itself, reversible error." *Id.* Yet this "fact"/allegation, was never mentioned in Behlmer's Petition; it is an *argument* that Behlmer first made in his response to the Landowners' Renewed Motion to Dismiss.

Behlmer's Brief cites *Brown v. Yellowstone Club Operations*, 2011 MT 155, 361 Mont. 124, 255 P.3d 205, as authority supposedly establishing the District Court committed reversible error. Opening Brief at 10. *Brown* addressed a motion

dismiss for failure to state a claim under Rule 12(b)(6), M. R. Civ. P., and it is well established the Rule 12(b)(6) standard does not apply to a motion to dismiss for failure to join a required party under Rule 12(b)(7). 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1359 (3d ed. 2007) (in considering a Rule 12(b)(7) motion to dismiss, a district court "is not limited to the pleadings"); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Products Liab. Litig.*, 826 F.Supp.2d 1180, 1197-98 (C.D. Cal. 2011) ("Plaintiffs' argument that the Court must 'accept all the factual allegations in the complaint as true', is not well taken because that standard applies to motions to dismiss under Rule 12(b)(6), not motions to dismiss for failure to join under Rule 12(b)(7)" (citation omitted)). "It is well settled that courts may look to extrinsic evidence on motions for failure to join." *In re Toyota Motor Corp.*, 826 F.Supp.2d at 1197.

Belmer implicitly agrees that the District Court was not limited to considering the facts in his Amended Petition as he cites documents and relies upon documents in his briefing filed with the District Court and on appeal that are not mentioned in the Amended Petition. This includes the 1997 right-of-way issued by BLM, Lewis and Clark County Resolution 1994-54, and BLM's Scratchgravel Hills Recreational Management Plan. *See* Opening Brief at 2, 3, 11.

Further, even under the Rule 12(b)(6) standard, a court only has to accept "well-pled, 'non-conclusory' factual assertions" contained in a pleading as true. *Hamlin Constr. & Dev. Co. Inc. v. Montana Dep't of Transp.*, 2022 MT 190, ¶ 29,

410 Mont. 187, 521 P.3d 9. And a court need not accept "bare conclusory assertions" or "label[s]" used in a pleading. *Id.* at ¶ 31. Belmer's Amended Petition never asserted that Treasure Canyon Drive terminates at the boundary of the federal land. This is an argument, unsupported by any evidence in the record, that Belmer made in his brief opposing the Renewed Motion to Dismiss. Since it is an argument made in a brief and not a well plead factual assertion in a pleading,[9] the District Court properly disregarded Behlmer's unsupported assertion that Treasure Canyon Drive terminates at the boundary of the federal land.

Moreover, this is a newly found position for Behlmer, and is inconsistent with his prior statements. In 2013, Behlmer sent a letter stating, "The road now known as Treasure Canyon Drive has been used for various recreational, residential and mining activities for well over 100 years. I bought the 224 acre parcel [i.e., the Behlmer Property] from Mitchell Mike Lovely and several other sellers in 1994. Mr Lovely had recorded an affidavit of continued use of that same road for at least 20 years prior." Exhibit E to Dkt. # 33.[10] In 2022, Behlmer's counsel sent the Landowners a letter stating, "The Behlmer property . . . has been accessed since the 1870s by the road now named Treasure Canyon Drive." Exhibit K to Dkt. # 33. In 2023, Behlmer's counsel sent a second letter stating, "Behlmer

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[9] Rule 7, M. R. Civ. P., defines the classes of "pleadings" allowed and the list does not include a brief filed in response to a motion to dismiss.

[10] The veracity of Behlmer's claims concerning the historical use of the road is disputed.

would like to sell his 224-acre property ***at the north end of Treasure Canyon Drive*** . . . " Exhibit L to Dkt. # 33 (emphasis added). The same counsel who wrote that the Behlmer Property is "at the north end of Treasure Canyon Drive," now argues "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." Opening Brief at 10.

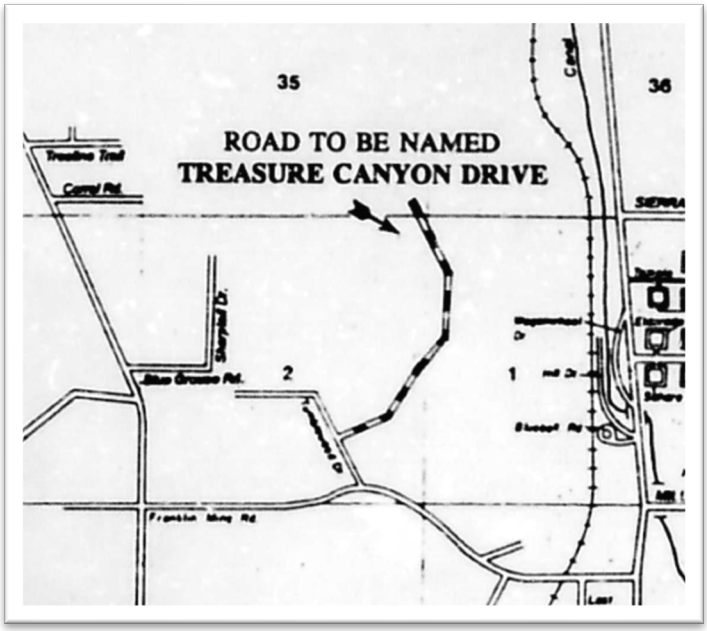
The only portion of the record that Behlmer cites to support his claim that "Treasure Canyon Drive terminates at the boundary of the federal land," is Paragraph 16 of his Amended Petition and footnote 2 in his Answer Brief to the Landowners' Renewed Motion to Dismiss. Opening Brief at 10 ("*See generally*, Amend. Pet. for Decl. J. 7, ¶ 16; Answer Br. Opp. Resp'ts' Mot. To Dismiss 3 n.2."). Paragraph 16 of the Amended Petition simply states, "Starting at Franklin Mine Road, the road accessing the Behlmer Property includes a portion of the road generally referred to as Tumbleweed Drive, and the road generally referred to as Treasure Canyon Drive." This does not establish where Treasure Canyon Drive terminates. Footnote 2 in Behlmer's Answer Brief addressed the topic by stating:

> Treasure Canyon Drive, as named and defined in Lewis and Clark County, Montana's Resolution 1994-54 Naming a Road in the Scratchgravel Hills Area as Treasure Canyon Drive and in the Amended Petition, terminates at the BLM property boundary neither crossing nor traversing any portion of BLM land.

Dkt. # 53, at 3, n. 2.

As noted in the Landowners' Reply Brief in Support of their Motion to Dismiss, Lewis and Clark County Resolution 1994-54 states that a portion of

Treasure Canyon Drive is "located in the E 1/2 of Section 2 . . . T10N, R4W," which includes the portion of the road located on federal property. Exhibit 1 to Dkt. # 54.[11] The map attached to Resolution 1994-54 (excerpt below) depicts Treasure Canyon Drive extending onto the federal property, including the portion in Section 35, Township 11 North, Range 4 West, which adjoins the Behlmer Property. *Id.*



The larger and more important point is that Treasure Canyon Drive is just a label, and there is no dispute that a significant portion of the disputed road accessing the Behlmer Property is located on federal property. The District Court

[11] Despite representing that Resolution 1994-54 states Treasure Canyon Drive "terminates at the BLM property boundary neither crossing nor traversing any portion of BLM land," Behlmer did not attach a copy of the Resolution to his Answer Brief.

correctly found "Petitioner cannot access the Behlmer Property via Treasure Canyon Drive without crossing federal land." Order at 7. In his Opening Brief, Behlmer agrees that "to access the Behlmer Property, one must travel north on Treasure Canyon Drive, and then cross BLM Land." Opening Brief at 3. While there may be a dispute as to where Treasure Canyon Drive "terminates" and whether the label "Treasure Canyon Drive" represents all, or just a portion, of the road mentioned in the Amended Petition, the material issue is the status of the road (i.e. whether it is a public road under R.S. 2477), and the District Court correctly found that "[a]pproximately one quarter of the disputed road is located on federal land." Order at 5.

II. The District Court did not abuse its discretion when it found the United States was a required party.

Rule 19 requires a court to conduct a three-part inquiry when determining whether an action should be dismissed for failure to join a necessary or required party. First, a court must determine whether the absent person's presence is "required." Rule 19(a), M. R. Civ. P. An absent person's presence is "required" in two instances: (1) when complete relief cannot be accorded among the existing parties because of the absent person; and (2) when the absent person has an interest in the subject of the action such that disposing of the action would either impair or impede that person's ability to protect their interest as a practical matter, or would leave an existing party in substantial risk of incurring double, multiple, or

otherwise inconsistent obligations because of the absent person's interest. Rule 19(a)(1)(A), (B), M. R. Civ. P.

Second, if the presence of an absent person is "required," the court must order that the person be joined if feasible. Rule 19(a)(2), M. R. Civ. P.

Third, if the required party cannot be joined, the court must determine "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Rule 19(b), M. R. Civ. P.

This Court has said "[t]here is no precise formula for determining whether a particular non-party is necessary to an action, consequently the determination is heavily influenced by the facts and circumstances of each case." *Mohl v. Johnson*, 275 Mont. 167, 171, 911 P.2d 217, 220 (1996). This Court has also said that because Montana's Rule 19 is modeled on the Federal Rule 19, interpretation of the federal rule is instructive. *Id*. Based on the facts and circumstances of this case, the United States is a required party.

A. The United States is a required party to accord complete relief when approximately one quarter of the disputed road is located on federal land.

The District Court correctly held that under Rule 19(a)(1)(A):

> The Court cannot grant complete relief without addressing the section of road connecting Respondents' property and the Behlmer Property. If the Court accepts Petitioner's public road argument, it apparently must also apply that finding to the section of the road crossing federal land. Even if such a finding merely called into question the status of

> that section, the United States would be deprived of the opportunity to defend its interest in the same proceeding.

Order at 9.

Behlmer, however, argues the District Court erred 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." Opening Brief at 9.

First, this is factually incorrect as Behlmer cannot establish "a right of ingress and egress" to his property without addressing the portion of the disputed road on federal property. Currently Behlmer has a license to cross the federal property, but he does not have "a right of ingress and egress" in the form of a permanent easement to do so. As the District Court held, if Behlmer "lose[s] permission to cross the federal land for any reason, Respondents' land becomes burdened with an easement to nowhere." Order at 9. To obtain complete relief establishing "a right of ingress and egress" to the Behlmer Property, instead of "an easement to nowhere," the United States is a required party.

Second, even if Behlmer is satisfied with the relief the District Court could afford, he overlooks the fact that the Landowners cannot obtain complete relief in the absence of the United States as a party. Rule 19(a)(1)(A) requires a court to be able to "accord complete relief among existing parties," and not just complete relief to the plaintiff. As noted in the Landowners' briefing, the Landowners might defeat Behlmer's claims in the litigation or reach a settlement agreement that

would establish a private easement. In any event, the outcome would not be binding on the United States, and the federal government, or special interest groups seeking to establish public access to federal property, could still sue the Landowners asserting that the road provides public access. Thus, while Behlmer may be able to obtain the relief he is seeking, the District Court could not accord complete relief to the Landowners without joining the United States as a party. The United States, therefore, is a required party under Rule 19(a)(1)(A).

B. As a practical matter, addressing the status of the portion of Treasure Canyon Drive located on the Landowners' property would impair or impede the United States' interests.

Likewise, in applying Rule 19(a)(1)(B), the District Court correctly held that "[a]s a practical matter . . . any order expanding use of Treasure Canyon Drive has the potential to unfairly prejudice the interests of both the federal government and Respondents." Order at 9. This mirrors the U.S. Supreme Court's interpretation of Rule 19:

> Since the outsider is not before the court, he cannot be bound by the judgment rendered. This means, however, only that a judgment is not *res judicata* as to, or legally enforceable against, a nonparty. It obviously does not mean either (a) that a court may never issue a judgment that, in practice, affects a nonparty or (b) that (to the contrary) a court may always proceed without considering the potential effect on nonparties simply because they are not "bound" in the technical sense. Instead, as Rule 19(a) expresses it, the court must consider the extent to which the judgment may as a practical matter impair or impede his ability to "protect" his interest in the subject matter.

Provident Tradesmens Bank & Tr. Co. v. Patterson, 390 U.S. 102, 110 (1968).

This Court has likewise held that in an action where the existence of an easement is disputed, "the owners of the purported servient estates . . . [are] indispensable parties" under Rule 19. *Van Ettinger v. Pappin*, 180 Mont. 1, 12, 588 P.2d 988, 995 (1978), *distinguished on other grounds in Cechovic v. Hardin & Assocs., Inc.,* 273 Mont. 104, 902 P.2d 520 (1995). Based on *Van Ettinger*, the District Court correctly held "Because the Behlmer Property is inaccessible via Treasure Canyon Drive without crossing the federal land, the United States would be an owner of a servient estate for any easement allowing the public to access the Behlmer Property using the road." Order at 8. On appeal, Behlmer does not mention *Van Ettinger* or attempt to explain why the holding in that case is not applicable to the facts of this case.

On the other hand, this Court has held that 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 required parties. *Strahan v. Bush*, 237 Mont. 265, 269, 773 P.2d 718, 721 (1989). Behlmer's Brief cites *Strahan* and he argues the decision is "dispositive." Opening Brief at 13. The easement in *Strahan* was created in a single deed that established a private easement to cross the defendant's property for access to the plaintiff's residence. *Strahan*, 773 P.2d at 719. Since the access route subject to the easement was located "completely within the perimeter of the land owned only by [the named parties]," the Court held that other property owners who did not own

the land benefited or burdened by the easement were not necessary parties under Rule 19. *Strahan*, 773 P.2d at 721.

Behlmer argues that because he only seeks an easement for the segment of the disputed road located on the Landowners' property, under *Strahan* the United States is not a required party. This takes the phrase "the easement subject to this action" out of context, however. As defined by the primary legal argument in Behlmer's Amended Petition, "the easement subject to this action" is the alleged public road easement created in the nineteenth century "when the R.S. 2477 offer was accepted in accordance with applicable Montana law." Dkt. # 30 at ¶ 21. Even Behlmer admits that his "R.S. 2477 argument could theoretically apply with equal force to the road across the BLM Land." Opening Brief at 10-11. He also conceded that it was "theoretically true" to state "[t]he legal theory supporting the Behlmer Trust's claim for a public road would apply equally to the entire length of the road." Dkt. # 53 at 10. Since Behlmer is claiming a public access easement created pursuant R.S. 2477 for a road that is currently located on both federal and private property, the claimed easement does *not* "lie[] completely within the perimeter of the land owned" by the named Defendants. *Strahan*, 237 Mont. at 269, 773 P.2d at 721. Based on the facts and legal claim pled by Behlmer, *Strahan* is distinguishable, and the United States is a required party.

Addressing a similar issue, another Montana District Court held that when a plaintiff asserts that a road is open to the public, the owners of each property traversed by the road — starting at an established public road — are required

parties under Rule 19. *McCauley Fam. Ranch, LLC v. Gardner*, Mont. Fifth Jud. District Court, Jefferson County, Cause No. DV-201-104, Order at 8 (April 16, 2018) attached as Exhibit M to Dkt. # 33 (granting a Rule 19 motion because "[the absent landowner] presently maintains the portion of Rocky Road crossing her property as a private road, and any determination on the issue of whether a public easement would certainly impact [the absent landowner's] interest."). The District Court's decision here adheres to the holding in *McCauley*.

The only other decision cited by Behlmer on this topic is the Court's decision in *John Alexander Ethen Trust Agreement v. River Resource Outfitters, LLC*, 2011 MT 143, 361 Mont. 57, 256 P.3d 913. That decision involved a boundary dispute between adjoining landowners and the Court found that even though the disputed surveys depicted other parcels, the owners of the other parcels were not required parties under Rule 19 because the plaintiff did not dispute the location of the property boundaries with the other landowners. *Alexander Ethen Trust Agreement*, ¶ 52 ("the only boundary in dispute in this action, however, lies between [the named parties]"). Behlmer is not disputing the location of his property boundaries; he is seeking to establish that a road that crosses both private and federal land is a public road, and *Alexander Ethen Trust Agreement* is readily distinguishable.

Applying the factual considerations of the United States having an interest in the road that may be impaired or impeded by this action. First, Behlmer knows the United States has an interest in the status of the road and that is why he named

BLM as a defendant in the First Lawsuit. Exhibit I to Dkt. # 33. In that lawsuit, Behlmer claimed the "roads accessing the [the Behlmer Property] cross real property owned by the United States of America and administered by the United States." *Id.* at ¶ 26 (emphasis added). And he alleged "[t]he ***roads*** that provide access to the [Behlmer Property] became public roads when the R.S. 2477 offer was accepted in accordance with applicable Montana law." *Id.* at ¶ 31. For the same reason that Behlmer named BLM as a defendant in the First Lawsuit, the United States is a required party in this lawsuit as well.[12]

Second, any declaration from the District Court establishing that the disputed road is a public road would have a significant impact on the federal property. In March 2023, Behlmer's counsel sent a letter stating that if Treasure Canyon Drive is "judicially declared [a] public road" the Behlmer Property would likely "be privately sold to a developer" and the road would become the "primary access route for construction contractors and new private residents, dramatically increasing commercial and residential traffic on Treasure Canyon Drive." Exhibit L to Dkt. # 33 at 2. While the point of the letter was to pressure the Landowners into signing a private access agreement, there is no escaping the conclusion that the same "dramatic[] increase [in] commercial and residential traffic" would occur on

[12] According to 28 U.S.C. § 2409a(a), the United States, not BLM, would be the proper defendant. *See*, *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286 (1983).

the federal property because it is undisputed that "to access the Behlmer Property, one must . . . cross BLM Land." Opening Brief at 3. The secondary effects on the federal land from a potential order establishing that Treasure Canyon Drive is a public access road (even if the order only addresses the portion of the road on the Landowners' properties) is precisely the type of practical impairment of an absent third party's interests that Rule 19(a) is designed to prevent.

Third, Behlmer cites the right-of-way agreement with BLM as evidence that the United States' interests will not be impacted by a potential order declaring that Treasure Canyon Drive is a public access, yet the agreement supports the opposite conclusion. There would be no need for the right-of-way agreement between BLM and Behlmer if Treasure Canyon Drive is a public road, and the United States has an interest in receiving rental payments and in limiting Behlmer's use of the road through the conditions stated in the document. Unlike the public road easement Behlmer is claiming, which would be a permanent easement, the BLM right-of-way "shall terminate on December 31, 2037," unless BLM decides to renew the agreement. Exhibit F to Dkt. # 33 at 2. Behlmer must make rental payments to BLM, that would not be required with a public road. *Id.* The BLM right-of-way is limited to 30 feet in width, while a public road established under R.S. 2477 may be up to 60 feet in width according to Montana law. *See* Mont. Code Ann. § 7-14-2112(1). Behlmer has significant obligations under the right-of-way agreement with BLM, including grading the road and installing water diversion structures to prevent erosion, etc., that he would not have to honor if the road were public. BLM

has the right to not renew or terminate the right-of-way, which BLM could not do if the road was a declared public road.

Moreover, based on a favorable ruling in this litigation, Behlmer could decide to terminate the right-of-way agreement with BLM and assert the right to use the portion of the road on federal property without paying the United States or complying with the conditions in the agreement. As a result, the United States would be forced to sue Behlmer to protect its interests. It is also possible that based on a favorable ruling, Behlmer would decide to sue the United States to establish that the entire road is a public road. Either way, "pragmatism tells us it is unlikely that [a] court would be willing to alter [a prior] interpretation of the [same] easement[] in later lawsuits." *Lamb v. Wyoming Game & Fish Comm'n*, 985 P.2d 433, 440 (Wyo. 1999).

Finally, the United States has an interest in limiting and controlling where the public access federal property. Even if the District Court limited a judgment to stating that only the of the road located on the Landowners' property is a public access easement, such a ruling would allow the public to drive up the road, park on the road, and then access the federal property where the road enters federal property. This newly created public access, in a location that BLM has not approved, is likely to result in increased vandalism, illegal parties, poaching, and other criminal activity on federal property that BLM would have to address. It is also safe to assume that some members of the public would not respect the "Route Closure" sign posted by BLM where the road enters federal property (Exhibit H to

Dkt. # 33) and would continue driving up the road and potentially damaging federal property as a result.

In sum, the United States has significant interests in limiting and conditioning the use of federal property for access to the Behlmer Property, which are reflected in the right-of-way agreement. While these interests may not be *directly* impacted by a judgment to which the United States is not a party, as a *practical* matter, a judgment establishing that a portion of the road is a public road under R.S. 2477 would undermine the United States' interests in the remaining portion of the road that is currently protected in the right-of-way agreement. Behlmer correctly recognized that the United States has an interest in the status of the road when it named BLM as a defendant in his First Lawsuit, but he made a strategic decision not to name the United States as a defendant in this litigation. That does not change the fact that the federal government has an interest in the status of the road and its interest may be impaired, as a practical matter, even if the District Court did not directly adjudicate whether the portion of the road on federal land is a public road.

As the District Court noted "Rule 19 does not require proof of impairment; instead, the rule requires that the absent party has an interest that 'may' be impaired or impeded as a practical matter." Order at 5. Therefore, the District Court did not abuse its discretion in finding that the United States is a required party under Rule 19(a).

III. The District Court properly applied the factors under Rule 19(b) and dismissed the lawsuit.

If a court finds that a person is a required party under Rule 19, it is required to join that person as a party if possible. Rule 19(a), M. R. Civ. P. ("A person who is subject to service of process must be joined as a party"). Behlmer does not dispute that if the United States is a required party, the United States may not be joined as a defendant based on sovereign immunity. *See* Opening Brief at 14 ("joinder of the United States is not feasible").

"If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Rule 19(b), M. R. Civ. P. Therefore, the final question for the Court to consider is whether the District Court abused its discretion in dismissing the lawsuit.

Rule 19(b) lays out four factors a court should consider when determining whether, in equity and good conscience, the action should proceed among the existing parties or be dismissed:

> (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.

Rule 19(b), M. R. Civ. P.

In their briefing, the Landowners argued that all four factors favor dismissal. Dkt. # 33. In his Answer Brief opposing the Landowners' Renewed Motion to Dismiss, Behlmer's entire analysis of Rule 19(b) factors consisted of a single paragraph which stated:

> the action should nonetheless proceed under the Rule 19(b) factors, because (1) any judgment here will not prejudice the BLM (see arguments above, incorporated herein); (2) a judgment in the BLM's absence would be adequate; and (3) if this action were dismissed, the Behlmer Trust would be unfairly prejudiced. Therefore, the action should proceed in this Court.

Dkt. # 53 at 16.

This perfunctory response addressed only two of the four factors and it invented a new factor concerning prejudice to the plaintiff that is not included in the text of Rule 19(b) or the relevant case law.[13] Yet Behlmer now argues that the District Court egregiously abused its discretion in deciding that the Rule 19(b) factors mandated dismissal. For the reasons stated in the District Court's Order and below, all four factors supported dismissal.

[13] On appeal, Behlmer does not renew his argument that Rule 19(b) requires a court to consider the prejudice to the plaintiff.

A. There is a significant potential for prejudice to the United States.

The first factor listed in Rule 19(b) requires a court to consider whether a judgment rendered in the required party's absence would prejudice the person or the other parties. In other words, the interests of the absent party (the United States) must be considered. In cases involving the intersection of sovereign immunity and an absent government entity, Rule 19(b)(1) places a "heavy emphasis" on protecting the governmental interest. 7 Wright & Miller, Federal Practice and Procedure, § 1617 (3d ed. 2001); *Wichita and Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 777 n. 13 (D.C. Cir. 1986). Courts have noted that a sovereign's interest under the first factor outweighs the other Rule 19(b) factors. *Enter. Mgmt. Consultants, Inc. v. United States, ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 548 (2d Cir. 1991) (recognizing the "paramount importance accorded the doctrine of sovereign immunity under Rule 19"); *United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 480-81 (7th Cir. 1996); *EEE Mins., LLC v. North Dakota*, 318 F.R.D. 118, 125 (D. N.D. 2016). "[P]rejudice to the government is obvious" when it is not named a party to an action in which it has an interest. *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 46-47 (8th Cir. 2001), *abrogated on other grounds in Wilkins v. United States*, 143 S. Ct. 870 (2023)).

The U.S. Supreme Court has said that under Rule 19(b), "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of

the absent sovereign." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008). While "[t]here may be cases where the person who is not joined asserts a claim that is frivolous," in which case "a court may have leeway under . . . Rule 19(b) . . . to disregard the frivolous claim," *id.*, this is not such a case.

As addressed above, the United States has an interest in the status of the road that may be impaired, as a practical matter, by a ruling establishing that a portion of the road is a public road under R.S. 2477, even if the ruling is limited to the portion of the road located on the Landowners' properties. Since the United States may not be joined because of sovereign immunity, the first Rule 19(b) factor strongly favors dismissal and outweighs the other Rule 19(b) factors.

The absence of the United States as a defendant would also prejudice the Landowners because it would impair their ability to obtain a final resolution concerning the status of the disputed road in a single proceeding. A final judgment or settlement agreement among the named parties would not be binding on the federal government and it would leave open the possibility that the United States could assert that the road is open to the public in a later lawsuit.

B. The prejudice to the United States and the Landowners cannot be lessened or avoided.

The second factor asks a court to consider "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." Rule 19(b)(2), M. R. Civ. P.

In their briefing, the Landowners pointed out that the prejudice to the United States and the Landowners could not be lessened or avoided because the "court could not possibly craft an effective judgment" if the "government would not be bound by that judgment due to its non-joinder." *Spirit Lake*, 262 F.3d at 746-47. In his briefing to the District Court, Behlmer did not address the second Rule 19(b) factor. On appeal, Behlmer simply states, "[a]s for the second factor, 'the extent to which any prejudice could be lessened or avoided' does not apply . . ." Opening Brief at 16.

Therefore, the Court should accept that there is no option to lessen or avoid the prejudice caused by the inability to join the United States a defendant, and that the second factor supports dismissal.

C. A judgment without the United States as a party would not be adequate.

The third factor asks, "whether a judgment rendered in the person's absence would be adequate." Rule 19(b)(3), M. R. Civ. P.

Behlmer's Brief addresses this factor in a single sentence, "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." Opening Brief at 16. Yet the U.S. Supreme Court has said a judgment is "adequate" under Rule 19 when it furthers the public interest in "settling disputes by wholes." *Republic of Philippines*, 553 U.S. at 870. Without the United States as a party, it is impossible to resolve the status of the road at issue in the Amended Petition in a single

proceeding. Therefore, a judgment without the United States as a party would not be adequate and the third factor supports dismissal.

D. Federal court is a potential alternative forum and Behlmer waived his right to argue otherwise.

The fourth factor asks, "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Rule 19(b)(4), M. R. Civ. P. In their briefing, the Landowners argued that the fourth factor supported dismissal. Dkt. # 33 at 14-15. Behlmer did not respond to that argument, and he did not address Rule 19(b)(4) in his Answer Brief. Dkt. # 53. On appeal, however, Behlmer argues, "The district court's error in its application of the fourth factor . . . ***is most egregious***." Opening Brief at 16 (emphasis added). For the first time on appeal, Behlmer asserts he "has no remedy under the federal QTA, and would have no adequate remedy if the district court's dismissal for non-joinder were affirmed." Opening Brief at 18. This statement is directly contrary to Behlmer's briefing where he told the District Court, "***To be sure, the Behlmer Trust could have opted to bring suit in federal court*** . . . . Instead, the Behlmer Trust opted to bring suit in State court . . . . [T]he Behlmer Trust chose the less complicated, less expensive approach, as was its prerogative" Dkt. # 53 at 10 (emphasis added).

Behlmer waived his opportunity to argue that the fourth factor did not support dismissal because he failed to address the factor in his briefing and affirmatively told the district court that he could have brought suit in federal court. As a result, Behlmer should not be allowed to complain about the District Court's

application of that factor. *Davis v. State*, 2007 MT 207, ¶ 17, 339 Mont. 1, 167 P.3d 892 (it is "fundamentally unfair to fault a district court on an issue it was never given an opportunity to address."); *In re A.A.*, 2005 MT 119, ¶ 26, 327 Mont. 127, 112 P.3d 993 ("We will not put a district court in error for an action to which the appealing party acquiesced").

Substantively, Behlmer argues that he could not file an action under the Federal Quiet Title Act ("QTA") because the United States has not expressly or implicitly disputed the existence of the public access easement under R.S. 2477 for the portion of the road located on federal property. While there is no evidence in the record establishing that the United States has taken an official position on whether the portion of the disputed road located on federal property is a public road under R.S. 2477, it has disputed that the road is open to the public by posting a "Route Closure" sign in the middle of the road, which prohibits the public from driving up the road and on to federal property. The federal government also required Behlmer to sign a right-of-way agreement that limits Behlmer's use of the road. Requiring a private party to sign a right-of-way agreement should be viewed as both BLM and Behlmer representing that the road is *not* a public access easement under R.S. 2477.

As noted in Behlmer's Brief, the Ninth Circuit has held that "[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). By requiring Behlmer to sign a right-of-way

agreement, the United States took a position that the road is not open to the public, and that the public, including Behlmer, must obtain the federal government's written permission to use the road.

Based on the federal government's actions in placing a Route Closure" sign in the road and requiring a right-of-way agreement, Behlmer may be able to establish jurisdiction under QTA. *See*, *e.g.*, *Owyhee Cnty. Idaho v. United States*, Case No. 1:21-cv-00070-DKG, 2024 WL 517895, at *5 (D. Idaho Feb. 9, 2024) (the federal government's act of placing signs restricting access would likely create a disputed title under the QTA); *N. Dakota ex rel. Stenehjem v. United States*, 257 F.Supp.3d 1039, 1074 (D. N.D. 2017) ("placing signs limiting access along all section lines, and physically removing individuals from travel along section lines" would create a disputed title under the QTA); *McFarland v. Norton*, 425 F.3d 724, 728 (9th Cir. 2005) (denying a person year-round access across federal property created disputed title under the QTA). However, even if Behlmer is correct that he could not establish jurisdiction under the QTA to sue the United States in federal court, the "lack of an alternative forum does not automatically prevent dismissal of a suit. Sovereign immunity may leave a party with no forum for its claims." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) (citation omitted). Even if the fourth factor did not favor dismissal, that factor must be weighed against the other factors that strongly favor dismissal and would outweigh the fourth factor.

. . . . .

The District Court did not abuse its discretion in weighing the Rule 19(b) factors and its decision to dismiss the Amended Petition should be affirmed.

IV. Even if the well-pleaded complaint rule is adopted in Montana, it would not trump the application of Rule 19.

Behlmer accuses the District Court of violating the "well-pleaded complaint rule." Opening Brief at 19. This Court, however, has never mentioned, addressed, or adopted the well-pleaded complaint rule and Behlmer relies entirely on federal jurisprudence to support his argument.

The U.S. Supreme Court has said that under the well-pleaded complaint rule, a defendant may not remove an action to federal court by asserting a "federal question" in its answer. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-99 (1987). Therefore, the rule from *Caterpillar*, which Behlmer cites in his brief, has no application to this case.

Even accepting that the rule has some relevance to this case, as federal courts have noted, the well-pleaded complaint rule means a plaintiff can decide which claims to assert, but "[t]he benefits of that stewardship are often accompanied by jurisdiction-related pitfalls [that may require dismissal under Rule 19], as is the case here." *Glancy v. Taubman Centers, Inc.*, 373 F.3d 656, 663 (6th. Cir. 2004); *see also* 6 J. Moore et al., *Moore's Federal Practice* § 107.14[2][c], p. 107-67 (3d ed. 2005) ("In general, the plaintiff is the master of the complaint and has the option of naming only those parties the plaintiff chooses to sue, subject only to the rules of joinder [of] necessary parties."). No one disputes that Behlmer

was free to decide which legal claims to assert, but he cannot decide who is considered a required party under Rule 19 based on the claims he asserted. As the District Court held, "While Petitioner argues it has the right to determine the scope of its complaint, this right does not extend to excluding required parties." Order at 5. Therefore, the District Court did not violate the well-pleaded complaint rule.

V. Behlmer's alternative claims for relief were properly dismissed.

As a final matter, Behlmer asserts "[t]he 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." Opening Brief at 20. This is yet another issue that Behlmer raises for the first time on appeal.

In their Renewed Motion to Dismiss, the Landowners argued the "Amended Petition should be dismissed without prejudice . . ." Dkt. # 33 at 15. In his Answer Brief, Behlmer opposed the Motion to Dismiss on the merits, but he never asserted that, even if Rule 19 requires dismissal of his primary claim under R.S. 2477, the District Court should not dismiss his alternative claims for relief as well. Thus, the District Court was presented by the parties with a binary decision of dismissing the entire action or not.

On appeal Behlmer argues "[t]he United States obviously cannot be deemed a Required Party with respect to [his prescriptive easement or an implied easement claim]." Opening Brief at 20. This assertion is not obvious as Behlmer's Amended

Petition does not address the necessary elements to establish a prescriptive easement or an implied easement. Since Behlmer's alternative claims for relief are so lacking in detail, it is impossible to determine whether the United States' interests are implicated or not.

Substantively, Rule 19 requires the dismissal of an "action" and not an individual "claim" if a required party cannot be joined. The terms "action" and a "claim" have different legal meanings. Under Rule 3, M. R. Civ. P., "A civil action is commenced by filing a complaint with the court," whereas a "claim" is used to refer to a particular "demand for money, property, or a legal remedy." Claim, Black's Law Dictionary (11th ed. 2019).

Behlmer could have attempted to avoid dismissal by filing an amended petition that removed the R.S. 2477 claim and only asserted claims for a prescriptive or an implied easement, but he decided to take an all or nothing approach. He must now live with this strategic decision. Since the District Court found the United States was a required party based on Behlmer's R.S. 2477 claim, it did not have to consider Behlmer's alternative claims since Rule 19 required dismissal of the entire action.

CONCLUSION

At the heart of this lawsuit are competing claims for who may use the road located on the Landowners' properties to access the Behlmer Property. While Behlmer desires to establish that the road is open to the public, it is the

Landowners' right to limit who is allowed to enter upon their private property, since it is well established the very idea of property entails "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 W. Blackstone, Commentaries on the Laws of England 2 (1766).

This right to limit and control the use of one's property also applies to the United States. The District Court correctly found that any ruling that the portion of Tressure Canyon Drive located on the Landowners' properties is a public road would impact the United States' interests since 1,810 feet or one quarter of the disputed road is located on federal land. While Behlmer does not want to litigate against the United States, that does not mean the District Court abused its discretion in dismissing the Amended Petition. This Court should affirm the District Court's Order for the reasons above and in the Landowners' prior briefing filed with the District Court.

DATED this 15th day of May, 2024.

DONEY CROWLEY P.C.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(d), I certify that for Defendants/Appellees Response Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count, calculated by Microsoft Word, is 9,087 words, excluding the excluding the caption, Table of Contents, Table of Authorities, and Certificate of Compliance.

DATED this 15th day of May, 2024.

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CERTIFICATE OF SERVICE

I, Jack Connors, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-15-2024:

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