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.

REPLY 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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INTRODUCTION

The most noteworthy aspect of the Landowners' Response Brief is its primary focus on irrelevant matters, *e.g.*, Behlmer's acquisition of the property, old road maintenance agreements, superseded pleadings (*i.e.*, the original Petition), and attorney correspondence reflecting Behlmer's efforts to negotiate with the Landowners, which violates the spirit, if not the letter of Rule 408 of the Montana Rules of Evidence's bar of Behlmer's offers to compromise his disputed claim of a right-of-way on Treasure Canyon Drive; all for the two-fold purpose of distracting the Court from what's relevant, in an ill-fated and improper attempt to cast Dr. Behlmer and his counsel in a vaguely negative light. *See* Resp. Br. at 3-9.

What *is* relevant are Behlmer's claims to a vested property right of access over and across Landowners' properties – and *only* Landowners' properties – to the exclusion of land owned by the United States. Any matter beyond this sole issue discussed in Landowners' Response Brief has no legal relevance.[1]

[1] One example of the Landowners' extensive irrelevant argument concerns the designation "Treasure Canyon Drive." Landowners' Brief exhaustively argues that the portion of the road over BLM Land is part of Treasure Canyon Drive, but ultimately acknowledges that the label "Treasure Canyon Drive" has no material significance, Resp. Br. at 16, perhaps tacitly recognizing that the legal description of Treasure Canyon Drive in the County Commissioners' Naming Resolution was limited to the road through the private properties of the Landowners, to the exclusion of the BLM Land because no consent was given by the BLM as required under Mont. Code Ann. § 7-14-2101(3)(b).

ARGUMENT

I. The United States cannot be deemed a Required Party under Rule 19 with respect to Behlmer's private right of access claims under prescription and implied easement by pre-existing use.

As established in Behlmer's Opening Brief, the district court erroneously dismissed Behlmer's private right of access claims over Landowners' property, brought as stand-alone claims, separate and apart from Behlmer's right-of-way claim based on R.S. § 2477. In sum, the United States cannot be deemed a Required Party under Rule 19 *with respect to the private right of access claims* for the following reasons.

First, Behlmer's claims of a private right of access, on their face, are expressly limited to the private, non-federal servient estates of the Landowners. Second, prescriptive easement claims cannot be asserted against the United States. *See* Opening Br. at 20-21 (citing *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.")). Third, common law easement claims (i.e. implied easement by pre-existing use), asserted against the United States are preempted by federal statute. *Adams v. United States, 3 F.3d 1254, 1259* (9th Cir. 1993) ("Common law [easement] rules are applicable only when not

preempted by statute. Congress has affirmatively spoken in this area through … the Federal Land Policy and Management Act.")

It inescapably follows that the United States cannot be deemed a Required Party for litigation of the private right of access claims, and it was reversible error for the district court to rule otherwise.

In their Response Brief, the Landowners ignore the above, and fail to address *Hoyt* or *Vasarajs* at all. Instead of responding to the merits of Behlmer's argument, the Landowners argue, in essence, that Behlmer waived its prescriptive and implied easement claims by failing to raise them in response to the Landowners' Motion to Dismiss. Resp. Br. at 36. But in briefing their Motion to Dismiss, the Landowners never argued for dismissal of Behlmer's prescriptive or implied easement claims. Indeed, the Landowners' district court brief failed to even mention the prescriptive or implied easement claims at all, let alone offer any argument for their dismissal. Consequently, no dismissal arguments were made regarding the prescriptive or implied easement claims to which Behlmer could respond. In sum, the Landowners fault Behlmer for failing to refute arguments the Landowners never made.

The Landowners also erroneously argue that Behlmer's prescriptive and implied easement claims in his Amended Petition are too lacking in detail to determine whether the interests of the United States are implicated. Resp. Br. at 37.

Nonsense. The prescriptive and implied easement claims in the Amended Petition are expressly limited to an allegation that "*the portion of the road crossing Respondents' real property* . . . became a private road appurtenant to the Behlmer Property by prescription and as an implied easement by pre-existing use, in accordance with appliable Montana law." Amend. Pet. for Decl. J. at 8, ¶ 24 (emphasis added). Indeed, Behlmer's sole purpose in filing an Amended Petition was to clarify that Behlmer seeks a right-of-way over and across only the private Landowners' servient properties, to the specific and clear exclusion of BLM Land. *Id*. at 1-2.

It is simply not the prerogative of either the Landowners or the district court to re-write and expand the scope of "relief" Behlmer never requested, and then use such involuntary expansion as the basis for dismissing Behlmer's case – yet that is precisely what has occurred.

II. The "disputed road" is the section of road over and across Landowners' private servient properties.

Behlmer's Amended Petition could not be clearer: "[T]he Behlmer Trust does not seek a declaration that any portion of any road across BLM property is a public road. On the contrary, the Behlmer Trust requests such declaration only with respect to lands owned by the named [Landowner] Respondents." Amend. Pet. at 2. Landowners' Response Brief concedes that "[o]n February 27, 2023, Behlmer sued over two dozen neighbors seeking to establish that a road *running through the*

Defendants' properties is a public road or, in the alternative, a private road that provides access to a series of mining claims he owns." Resp. Br. at 1-2 (emphasis added). Thus, the "disputed road" consists solely of the road passing through the private Landowners' servient properties – to the exclusion of lands owned by the United States.

Ignoring the plain language of the Amended Petition, the Landowners' Response Brief misrepresents the meaning of "the disputed road" approximately 16 times, improperly attempting to transmogrify its meaning to improperly include the road over BLM Land as part of the "disputed road." More specifically, the Respondents' Brief falsely claims seven times that "one quarter of the disputed road" is located on federal land. The Respondents' *ad nauseum* repetition of this false premise does not make it true.

On the contrary, there is nothing "disputed" about the portion of the road over the BLM Land. It is owned by the United States. The only interest claimed by Behlmer is his *un*disputed right of access pursuant to an agreement with the BLM. *See* Resp. Br. at 18; Order at 7. Behlmer asserts no other claim with respect to the BLM portion of the road, either under a prescriptive easement theory, implied easement by pre-existing use theory, under R.S. § 2477, or otherwise. Indeed, the only "dispute" with respect to the BLM portion is the one Respondents have fabricated out of thin air in their transparent attempt to make the United States a

necessary party under Rule 19 when it isn't one. The Court should summarily reject such a tactic.

III. Adjudication of the status of the road on private, non-federal land would not "impair or impede" the interests of the United States because Behlmer does not – and cannot – seek an easement over BLM Land.

All parties and the district court agree on one principle: In an easement dispute, the owner of the servient estate is a Required Party under Rule 19. The Landowners' and the district court's application of this principle, however, is flawed as applied to the facts of this case, insofar as they erroneously conclude that the United States is a Required Party because the BLM Land is part of the servient estate. *See* Resp. Br. at 20; Order at 8. This conclusion is a legal impossibility.

The easement theories involved in this case are Behlmer's alternative claims for a prescriptive and implied easement over Landowners' private properties. Amend. Pet. at 8-9. The only land over which Behlmer seeks a declaration of a servitude is the Landowners' property. *See* Amend. Pet. at 8 (seeking prescriptive and implied easement over only "the portion of the road crossing Respondents' real property"). Moreover, as noted above, prescriptive and implied easement claims can't be brought against the United States as owner of the servient estate because the law preempts and prohibits prescriptive and implied easement claims over federal land. *Hoyt*, 813 F.3d at 353; *Vasarajs*, 908 F.2d at 447; *Adams,* 3 F.3d at 1259. It logically follows that in the present case, the BLM Land is not, and can

never be, included in the servient estate here; therefore, the BLM cannot be deemed a Required Party as a servient owner under Rule 19.

Citing Rule 19(a)(1)(B) and quoting the district court, Respondents argue that as a practical matter, any order expanding the use of Treasure Canyon Drive has the potential to unfairly prejudice the interests of both the federal government and Respondents." Resp. Br. at 19. Not true. The district court and Respondents' position is based on their fundamental misunderstanding of the relief Behlmer seeks.

Specifically, the district court reasoned that the interests of the United States would be adversely affected "[b]ecause the Behlmer Property is inaccessible via Treasure Canyon Drive without crossing the federal land." Order at 8. But the district court and the Respondents miss this critical point: Behlmer did not bring this case to obtain access all the way to his property. Rather, he brought suit to confirm his access from Tumbleweed Drive, through the Landowners' properties, only to the south boundary of the BLM Land. Behlmer already has access over and across the BLM Land pursuant to an access agreement with the BLM. This is why Behlmer limited the scope of relief he seeks to establish his access right over Respondents' private land to the exclusion of the BLM Land.

The district court also stated that "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 (emphasis added). Again, Behlmer does not request the district court to grant an easement "allowing the *public* to access the Behlmer Property." The district court's misunderstanding led it to erroneously conclude that the federal land is somehow "a servient estate."

The Respondents make a similar error with respect to Behlmer's R.S. § 2477 claim. The Respondents argue that "[s]ince Behlmer is claiming a public access easement created pursuant to R.S. § 2477 for a road that is currently located on both federal and private property," the easement does not lie completely within the perimeter of the land owned by the named Respondents. Resp. Br. at 21. Wrong. Behlmer's R.S. § 2477 claim is expressly limited to the road located on Respondents' private servient property. Behlmer makes no such claim with respect to the road across federal land. Again, Respondents expand and distort the relief Behlmer seeks in order to justify dismissal.

IV. A finding that the United States' interests would be "impaired or impeded" by recognition of a right-of way across Respondents' servient property would lead to an absurd result.

As discussed above, the Landowners seek to re-define and expand the fundamental meaning of "servient estate" to include not only the land over which the easement lies, but also include neighboring properties as well, a concept this Court expressly rejected in *Strahan v. Bush*, in which the Court held that owners of properties adjacent to and outside the boundary of the servient estate are not

necessary parties under Rule 19. 237 Mont. 265, 269, 773 P.2d 718, 721 (1989) ("The easement subject to this action lies completely within the perimeter of the land owned only by the Bushes and the Strahans.").

If it is true, as the district court ruled, that all properties that might be affected by an easement, no matter how slight the effect, are considered part of the servient estate, then we should not stop with the BLM Land north of Landowners' properties. Rather, under the district court's reasoning, we should also go further and lump in as necessary parties all the landowners, and governmental entities (i.e. Lewis & Clark County) owning servient property subject to or regulating all the access roads *to* Treasure Canyon Drive: Tumbleweed Drive, Franklin Mine Road, and even Green Meadow Drive. After all, recognizing Behlmer's easement over Landowners' properties could theoretically result in a negligible occasional extra vehicle or two on those other roads, as well as Treasure Canyon Drive. To avoid such an absurd result, the law limits necessary parties to the servient estate(s) over which right of access is being claimed. Thus, it is necessary to limit the very concept of the servient estates to Treasure Canyon Drive to the exclusion of the road over the BLM Land.

V. *Van Ettinger* and *Strahan*, when read together, establish the controlling rule applicable here: In easement cases, servient estate owners are required parties; whereas, the neighbors of servient estate owners are not.

In his Opening Brief, Behlmer cited to controlling Montana case law establishing that in easement cases, necessary parties under Rule 19 do not include neighboring property owners who own no portion of the servient estate. Opening Br. at 12-13 (citing *Strahan* at 269, 773 P.2d at 721 and *John Alexander Ethen Tr. Agreement v. River Res. Outfitters*, 2011 MT 143, ¶ 52, 361 Mont. 57, 256 P.3d 913). Significantly, Landowners' Response Brief fails to cite a single case from Montana, or any other jurisdiction, in which a court ruled that a person owning property adjacent to the alleged servient estate was a necessary party under Rule 19.

Not a single case.

Application here is simple and straightforward. The servient estate consists of the private properties of the Landowners. The United States is a neighboring property owner who owns no portion of the servient estate. Therefore, the United States cannot, as a matter of law, be deemed a necessary party under Rule 19. It was reversible error for the district court to rule otherwise.

Instead of citing any case in support of their position, Respondents continue to misrepresent Behlmer's claim. For example, once again Respondents ignore the plain language of the Amended Petition and offer the demonstrably false and

misleading assertion that "[s]ince Behlmer is claiming a public access easement created pursuant to 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 land owned' by the named Defendants." Resp. Br. at 21. Behlmer is claiming no such thing. Behlmer claims no public or private access easement over the BLM Land under any legal theory, as the Amended Petition conclusively establishes. Respondents' misrepresentation of Behlmer's claim is, to say the least, improper.

Landowners attempt to fault Behlmer for failing to address the district court's citation to *Van Ettinger v. Pappin,* 180 Mont. 1, 588 P.2d 988 (1978). Specifically, Landowners state: "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." Resp. Br. at 20. Simply put, Landowners misrepresent both the holding in *Van Ettinger* and the district court's reliance on it. The district court merely cited *Van Ettinger* for the unremarkable proposition that in an easement dispute, "'the owners of the purported servient estates . . . [are] indispensable parties.'" Order at 8. We agree with the holding in *Van Ettinger* and it applies here: servient estate owners are obviously indispensable parties in easement cases. Correspondingly, the Amended Petition names "*all* owners of the purported servient estates;" *i.e.*, the Landowners.

Here, the United States is not a purported servient estate owner. Rather, the United States occupies the same status as "the other property owners" in *Strahan v. Bush*, 237 Mont. 265, 773 P.2d 718. There, the Court rejected Bushes' argument that the neighboring property owners were indispensable, because "[t]he easement subject to this action lies completely within the perimeter of the land owned only by the Bushes and the Strahans." *Id*. at 269, 773 P.2d at 721. Similarly, Behlmer's access rights in the current action lie completely within the perimeter of the servient estates owned only by the Landowners, with property owned by the United States being clearly, specifically, prohibitively, and preemptively excluded resulting in the United States not being a Required Party under Rule 19.

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 29th day of May, 2024.

JACKSON, MURDO & GRANT, P.C.

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

Pursuant to the Montana Rules of Appellate Procedures, I certify that Appellant's Reply Brief is printed with proportionally spaced Times New Roman typeface of 14 points; is doubled spaced, and the word count calculated by Microsoft Word is 2,810 words, excluding the Table of Contents, Table of Authorities and Certificate of Compliance.

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