IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 12-0312

PUBLIC LANDS ACCESS ASSOCIATION, INC.,

Petitioner and Appellant

v.

THE BOARD OF COUNTY COMMISSIONERS OF MADISON COUNTY, STATE OF MONTANA, and TED C. COFFMAN, FRANK G. NELSON, and DAVID SCHULTZ, constituting members of the Commission; and ROBERT R. ZENKER, in his capacity as the County Attorney for Madison County, State of Montana,

Respondents/Appellees.

JAMES C. KENNEDY,
Respondent-Intervenor/Appellee/Cross-Appellant.

On Appeal from Montana's Fifth Judicial District Court,
Madison County – Cause No. DV-29-0443
Hon. Loren Tucker, District Judge

PETITION FOR REHEARING OF APPELLEE AND CROSS-APPELLANT JAMES C. KENNEDY

Appellee and Cross-Appellant James C. Kennedy, by and through his attorneys of record, respectfully petitions this Court, pursuant to Rule 20 of the Montana Rules of Appellate Procedure, for a rehearing and reconsideration of its Opinion entered in this case on January 16, 2014, because that decision overlooks the judicial taking it has effected by retroactively changing state prescriptive

easement law. By abandoning property law principles that had been settled for a century, the Court has converted Kennedy's private property to public land, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and in conflict with decisions of the United States Supreme Court.

INTRODUCTION

The central issue in this appeal is whether the public may access the Ruby River at Seyler Lane by crossing Kennedy's private land—land that the public has never before had a right to traverse. This Court granted the public that right of access only by retroactively changing the State's property law. Until now, the size and scope of a prescriptive public easement had always depended on the public's *actual* use during the prescriptive period. Likewise, this Court had long held that the public does *not* have a right to cross private lands to access public waters. The decision in this case abandons both of those settled principles. The Court took what had previously been only an incidental county right to use adjacent land as needed to maintain the road, and expanded it into a new easement connecting the road to the river below, all based on the notion that it was "reasonably foreseeable" that the public might desire to use Kennedy's property to access the river below. That conclusion is difficult enough to square with this Court's past admonition that the public has no right to access non-navigable rivers *at all*. *See, e.g.*, *Herrin v. Sutherland*, 241 P. 328, 331 (Mont. 1925). But it is impossible to reconcile with

this Court's repeated holdings that a public prescriptive easement is defined by its *actual* historical use.

By retroactively altering settled principles of state property law, this Court has effected a textbook judicial taking. *See, e.g., Stop the Beach Renourishment, Inc. v. Fla. Dep't of Environ. Protection*, 130 S. Ct. 2592 (2010); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980). Until the decision in this case, the public's right of way was no wider than Seyler Lane's paved roadway; now, the public has a permanent right to leave the pavement and use Kennedy's private property to access the Ruby River. It is bad enough that this Court previously converted private waters and riverbanks to public use without just compensation. *See, e.g., Montana Coalition for Stream Access v. Hildreth*, 684 P.2d 1088 (Mont. 1984). The decision here not only reaffirms, but compounds that takings problem. Because this Court's uncompensated conversion of private property into a public easement violates the United States Constitution and conflicts with established Supreme Court precedents, its decision warrants rehearing.

ARGUMENT

The United States Constitution prohibits the taking of private property "for public use, without just compensation." U.S. Const. amend. V. That principle applies not just when a legislature converts private property into a public easement, but also when a state's courts retroactively alter settled property law principles to

"recharacterize as public property what was previously private property." *Stop the Beach Renourishment*, 130 S. Ct. at 2601 (plurality opinion); *see also id.* at 2614 (Kennedy, J., concurring in part and concurring in the judgment) ("If a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law."); *Webb's Fabulous Pharmacies*, 449 U.S. at 452 ("[n]either the Florida Legislature by statute, nor the Florida courts by judicial decree, may .... transform private property into public property without compensation"). Likewise, it applies not just when a property owner is deprived of title, but also "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed." *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 832 (1987). That is precisely what happened here.[1]

The takings problem began with the Court's conversion of all private waters and riverbeds in Montana to public property. Since shortly after statehood, Montana law established that a riparian owner along a river that is not navigable owns the beds and banks of the river. *See* M.C.A. § 70-16-201. For much of its history, this Court applied the same rule to determine the public's right of access to private rivers. *See, e.g., Herrin*, 241 P. at 331. But in *Montana Coalition for*

[1] Kennedy has asserted this argument previously. Pre-Trial Order at p. 22, ¶25; Brief of Appellee and Cross-Appellant James C. Kennedy, at p. 35-36, 44 n.13.

Stream Access, Inc. v. Curran, the Court adopted a new rule that "any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes." 682 P.2d 163, 171 (Mont. 1984). And in *Montana Coalition for Stream Access v. Hildreth*, the Court expanded its new rule even further to hold that "[t]he public has the right to use the waters *and the beds and banks* up to the ordinary high water mark." 684 P.2d 1088, 1091 (Mont. 1984).

Still, this Court had never before granted the public an easement to leave a roadway and cross private property to access these newly-minted public waters. On the contrary, both *Curran* and *Hildreth* admonished that they should not be "construed as granting the public the right to enter upon or cross over private property to reach the State-owned waters held available for recreational purposes." *Id.*; *Curran*, 682 P.2d at 172. Combined with settled prescriptive easement law, that limitation was quite meaningful. Prescriptive rights of access to public roadways had always been limited to the extent of the prescriptive use that led to their creation. Indeed, the Montana legislature has codified this limit: "The extent of a servitude is determined by ... the nature of the enjoyment by which it was acquired." Section 70-17-106, MCA. Precisely because non-navigable rivers like the Ruby River had never been public until *Curran* and *Hildreth*, the public of course had no history of using private property to access them without permission.

Thus, under Montana law, the width of a public prescriptive easement like Seyler Lane extended only to the definite course actually traversed by the general public—that is, the paved roadway itself.

In keeping with that settled law, this Court repeatedly and emphatically rejected any contention that the public could impose a prescriptive easement on private land through any method other than actual open, continuous, and adverse public use. In *Montana v. Portmann*, 149 Mont. 91, 95, 423 P.2d 56, 58 (1967) for instance, this Court held that the width of a public road acquired by prescription could not be determined by statute, even a statute providing that "'[t]he width of all public highways ... must be sixty feet'" because that would be "inconsistent with the general rule that the user determines the nature and the extent of the easement...." 149 Mont. 91, 94, 423 P.2d 56 (1967). Instead, the Court—grounding its decision upon "the fullest recognition [of] the traditional requirements of adverse possession"—upheld the trial court's decision that the travelled "width, and not more" set the road's width. *Id.* at 98. The *Portmann* Court did not imply a road easement over any other area incidentally necessary for repair, support or public enjoyment. "[T]he public may obtain title by adverse possession *only* of that which it has occupied," which it defined as "actual use." *Id.* at 95 (emphasis added) (*quoting Descheemaeker v. Anderson*, 131 Mont. 322, 326 (1957)).

This Court's decision in *Portmann* stands in an unbroken line of decades of unwavering Montana case law. More recently, in *McCauley v. Thompson-Nistler*, this Court similarly held that "[t]o establish the existence of a public road by prescription, it must be shown that the public followed a definite course continuously and uninterruptedly for the prescribed statutory period together with an assumption of control adverse to the owner." 301 Mont. 81, 10 P.3d 794 (quoting *Granite County v. Komberec*, 245 Mont. 252, 800 P.2d 166 (1990)).

This principle is nothing new. Over 75 years ago, in *Maynard v. Bara*, this Court held that "to establish a public highway by prescription, ... the testimony must definitely show a use of the identical strip of land over which the right is claimed. ... [T]he public must have pursued a definite, fixed course ... for the [full] statutory period." 96 Mont. 302, 306-07 (1934). The *Maynard* Court specifically emphasized that the location of a public road must be limited to the area historically travelled: "The occupancy or use *by the public* of one portion of the road *does not avail it in its claim to another portion not occupied by it.* In any case the public may obtain title by adverse possession of that *only* which it has occupied during the full statutory period." *Id.* at 307 (emphasis added). "[T]he testimony must definitely show a use of the identical strip of land over which the right is claimed...." Id. This Court thus has consistently *rejected* attempts to assert any

right-of-way beyond the identical strip of land actually used by the public during the prescriptive period.[2]

This Court's decision radically departs from this settled property law. The only thing the public ever acquired through *actual use* at Seyler Lane is a prescriptive right to travel the paved way. The public has never used a definite course on the other side of the longstanding fence locations[3], and the County's additional access rights arise only by implication, for the limited purpose of *maintaining and repairing* the public's easement. Nothing in the State's statutory law or this Court's prior jurisprudence sanctions a public right beyond those defined boundaries. Yet this Court's decision converts the public's previously limited easement to use the paved way to *cross* the river into a right to *access* the

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[2] The Montana Attorney General's Office took the same approach with respect to the very land in question. When asked whether the public could access the Ruby River from Seyler Lane and other public roadways, the Attorney General opined that the public may access the rivers from the roads themselves—but only within those roadways' prescriptive bounds. Based on the precedents above, the Attorney General explained "that a road created by prescription is limited—both in size and usage—to the original use during the prescriptive period." 48 Op. Att'y Gen. No. 13, § III(c). Thus, the Attorney General concluded, "for county roads and bridges established by prescription, their use as access to waters is dependent upon their width and use during the prescriptive period." *Id.* Until now, this Court had "never wavered" from this principle. *Id.*

[3] The Court assumed from the encroachment permit in 2004 that the fences were only tied to the bridge then. Op. ¶¶ 8, 31. However, Bob Butler testified that fences extended to the bridge abutments from at least 1981. At the request of Madison County, Butler applied to permit the *existing* fences in 2004. Tr. 375-382.

river across private land. And the Court's decision admittedly does so not based on any *actual* historical use, but rather based on the public's "reasonably foreseeable" desire to use Kennedy's land to access the river for recreational use. Op. ¶ 52. This new standard, which rests on inapposite out-of-state cases on scope, "is contrary to over a century of precedent governing prescriptive easements" and imposes a river-access easement on every Montana landowner whose property contains a roadway crossing public waters. Op. ¶ 100 (McKinnon, J., dissenting in part and specially concurring in part).

That is a judicial taking, plain and simple. There can be no doubt that the new river-access easement deprives Kennedy of rights over his private property. The "right to exclude [is] one of the most essential sticks in the bundle of rights that are commonly characterized as property," and the Supreme Court has long held that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). It is well settled that easements constitute a "permanent physical occupation" under this rule. *See, e.g.*, *Nollan*, 483 U.S. at 832. Thus, because the decision in this case "open[s] private property to public use," it "constitutes a taking." *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Scalia, J., dissenting from denial of certiorari); *Nollan*, 483 U.S. at 831; *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979) ("[T]he

Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking."). What was once private land has been converted to a public right-of-way without just compensation. That is precisely what the Takings Clause prevents.

In short, this is not simply a matter of the Court resolving a property law question of first impression. *Cf. Stop the Beach Renourishment*, 130 S.Ct. at 2611 (majority opinion). State statutes and a long line of decisions from this Court clearly established the rule that a prescriptive easement extends only so far as the public's actual use during the full prescriptive period. And this Court had twice denied any right of the public to cross private lands to access public waters. *See Curran*, 682 P.2d at 172; *Hildreth*, 684 P.2d at 1091. Rather than apply those precedents, the Court rejected them in favor of a new rule that "contravene[s] established property law," *Stop the Beach Renourishment*, 130 S. Ct. at 2613, and grants precisely the sort of river-access easement *Curran* and *Hildreth* disclaimed. Op. ¶ 52. The Court cannot circumvent settled state property law through the simple expedient of declaring heretofore private land public, any more than it could retroactively redefine streambed ownership. *PPL Montana v. Montana*, 132 S.Ct. 1215, 1235 (2012). This Court's decision to do so violates the Fifth and Fourteenth Amendments and conflicts with Supreme Court precedents. *See, e.g.*,

Stop the Beach Renourishment, 130 S. Ct. at 2601, 2614; *Webb's Fabulous Pharmacies*, 449 U.S. at 452. It thus warrants this Court's prompt reconsideration.

CONCLUSION

This Court should grant the petition for rehearing.

Respectfully submitted this 30th day of January, 2014.

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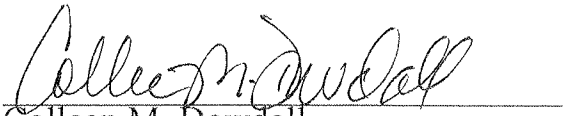
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 20(3) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced, Times New Roman typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2007 is 2,403 words excluding certificate of service and certificate of compliance.

Dated this 30th day of January, 2014.



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I certify that on January 30, 2014 I served a true and correct copy of the preceding document by prepaid mail on the following:

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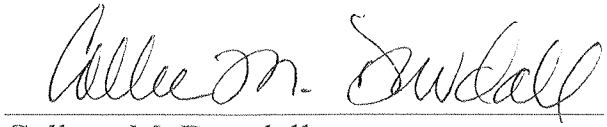

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