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 C. TED COFFMAN, FRANK G. NELSON and DAVID SCHULTZ, constituting members of said Commission; and ROBERT R. ZENKER, in his capacity as the County Attorney of Madison County, State of Montana,

Respondents and Appellees.

JAMES C. KENNEDY, MONTANA STOCKGROWERS ASSOCIATION and HAMILTON RANCHES, INC.,

Defendant Intervenors.

On Appeal from Montana Fifth Judicial District Court,
Madison County - Cause No. DV-29-04-43
Hon. Loren Tucker, District Judge

APPELLANT'S OBJECTION TO PETITION FOR REHEARING OF APPELLEE AND CROSS-APPELLANT JAMES C. KENNEDY

Appellant Public Lands Access Association, Inc. ("PLAAI"), by and through its attorney of record, respectfully objects, pursuant to Rule 20(2)(b), M.R.App.P., to the *Petition for Rehearing of Appellee and Cross-Appellant James C. Kennedy* (Jan. 30, 2014) (the "*Petition*"). The Court should deny Mr. Kennedy's *Petition* because it fails to satisfy any of the criteria upon which a rehearing may be granted under Rule 20(1)(a), M.R.App.P.

ARGUMENT

The Rules of Appellate Procedure provide three very limited circumstances upon which this Court will even consider a petition for rehearing:

> (a) The supreme court will consider a petition for rehearing presented only upon the following grounds:
>
> (i) That it overlooked some fact material to the decision;
>
> (ii) That it overlooked some question presented by counsel that would have proven decisive to the court; or
>
> (iii) That its decision conflicts with a statute or controlling decision not addressed by the supreme court.

Rule 20(1)(a), M.R.App.P.

Mr. Kennedy fails to identify which provision of Rule 20(1) he relies upon for his *Petition*.[1] That is likely because Mr. Kennedy's *Petition* is not a petition for

[1] The only ground for rehearing that is even remotely close to supporting Mr. Kennedy's request for rehearing is subsection (ii) — that the Court overlooked some question presented by Mr. Kennedy that would have proven decisive to the Court.

rehearing at all — it is a motion for reconsideration that should rejected. *See Collins v. Metro. Life Ins. Co.*, 32 Mont. 329, 348, 80 P. 1092, 1093 (1905) ("The court should not be asked to reconsider matters which have been already considered and determined, especially where counsel concede that the view of the court is supported by authority.").

The sole basis for Mr. Kennedy's *Petition* is the mistaken proposition that the Court "retroactively" changed Montana's property law regarding public prescriptive easements and, therefore, the Court's *Opinion* affected a judicial taking. PLAAI assumes Mr. Kennedy is attempting to apply Rule 20(1)(a)(ii). Thus, the Court must decide first, whether it "overlooked" this question, and, second, whether the question, if considered, would have proven decisive to the Court.

Answering the first question, the Court did not overlook Mr. Kennedy's question. Mr. Kennedy did not adequately raise the issue below and, nonetheless, the Court considered and rejected Mr. Kennedy's argument.

First, it is doubtful whether Mr. Kennedy raised this argument below. A review of the appeal record demonstrates Mr. Kennedy half-heartedly attempted to raise his "judicial taking" argument in his opening appeal brief, by stating in a footnote:

> The District Court did not apply its "overlapping rights-of-way" approach to Seyler Lane because PLAA failed to prove that the

> general public had taken a right-of-way by prescription intersecting with the River. Were this Court to find otherwise, it would face the same constitutional issue at Seyler Lane as at Lewis Lane, as well as a judicial taking by changing the settled law on prescription.

Brief of Appellee and Cross-Appellant James C. Kennedy, p. 44 n. 13 (cited in the *Petition* at p. 4 n. 1). It is hard to see how this passing comment in a footnote sufficiently raised this issue on appeal to permit a rehearing. *See In re Tuohy's Estate*, 33 Mont. 230, 250, 83 P. 486, 492 (1905) (failing to consider and decide questions not raised in the appellate brief is not grounds for rehearing).

Next, when addressing Mr. Kennedy's arguments regarding Lewis Lane, the majority opinion (¶¶ 61-70) and the dissent (¶¶ 116-120) both considered and rejected Mr. Kennedy's argument that permitting the public to walk within a public road right-of-way to access the Ruby River constituted a judicial taking. *See also*, e.g., *Opinion*, ¶¶ 24, 31, 43, 45; *id.*, ¶¶ 77-78, 80-82 (Baker, J., concurring).

Finally, the fact that Mr. Kennedy quotes Justice McKinnon's dissenting opinion conclusively establishes the Court considered and rejected Mr. Kennedy's argument the first time around. *See Petition for Rehearing*, p. 9 (citing *Opinion*, ¶ 100 (McKinnon, J., dissent). Mr. Kennedy's attempt to re-package the Dissent as an "overlooked question" of law in unavailing.

Answering the second question, the issue presented by Mr. Kennedy is not decisive because the Court did not alter settled prescriptive easement law. As the Court noted, *State v. Portmann* and the other cases cited by Mr. Kennedy did not

limit the traveling public to the traveled roadway. *Opinion*, ¶¶ 28, 45. To the contrary, Montana has long held that the width of a public prescriptive easement is "determined as a question of fact by the character and extent of its use and may be more or less than the width of highways established by statute." *Id.*, ¶ 28 (citations omitted). Further, it is logical that the "extent of uses" by the public necessarily includes uses outside the traveled way, including areas necessary for maintenance and support and other ancillary uses. *Id.*, ¶¶ 29-38.

CONCLUSION

Mr. Kennedy's *Petition for Rehearing* should be denied because he cannot establish any of the criteria required under Rule 20(a)(1), M.R.App.P.

Respectfully submitted this 13th day of February, 2014.

GOETZ, BALDWIN & GEDDES, P.C.

By: _____

J. Devlan Geddes
Goetz, Baldwin & Geddes, P.C.
P.O. Box 6580
35 N. Grand Ave.
Bozeman, MT 59771

Attorney for Appellant Public Lands Access Association, Inc.

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 text typeface of 14 points; is double spaced; and that the word count calculated by Microsoft Word is 783 words, excluding the Certificate of Service and Certificate of Compliance.

DATED this 13th day of February, 2014.

GOETZ, GALLIK & BALDWIN, P.C.

By: _____
J. Devlan Geddes

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that the foregoing document with the appendix was served upon the following counsel by the means designated below on this 13th day of February, 2014.

☑ U. S. Mail ☐ Federal Express ☐ Hand-delivery ☐ Via Fax: (406) 586-3130 ☐ E-mail: swimley@swimleylaw.com	Susan B. Swimley Attorney and Counselor at Law 1807 West Dickerson, Suite B Bozeman, MT 59715 **Attorneys for Respondents/Appellees**

☑ U. S. Mail ☐ Federal Express ☐ Hand-delivery ☐ Via Fax: (406) 222-7865 ☐ E-mail: attorney@riverworks.net	Tara DePuy Attorney at Law, PLLC P.O. Box 222 Livingston, MT 59047 **Attorneys for Respondents/Appellees**

☑ U. S. Mail ☐ Federal Express ☐ Hand-delivery ☐ Via Fax: (406) 721-6985 ☐ E-mail: cdowdall@wthlaw.net pdayton@wthlaw.net	Colleen M. Dowdall, Esq. Peter S. Dayton, Esq. WORDEN THANE P.C. 111 N. Higgins Ave., Ste. 600 P.O. Box 4747 Missoula, MT 59806 **Attorneys for James C. Kennedy**

☑ U. S. Mail ☐ Federal Express ☐ Hand-delivery ☐ Via Fax: ☐ E-mail: lgaither@dowlohnes.com	Leslie N. Gaither Matthew T. Parrish DOW LOHNES PLLP Six Concourse Parkway, Suite 1800 Atlanta, GA 30328 **Attorneys for James C. Kennedy *pro hac vice***

☑ U. S. Mail ☐ Federal Express ☐ Hand-delivery ☐ Via Fax: ☐ E-mail:	Matthew Clifford Attorney at Law 6280 Canning Street #1 Oakland, CA 94609 **Amicus Curiae Attorney – Montana Trout Unlimited**

☑ U. S. Mail ☐ Federal Express ☐ Hand-delivery ☐ Via Fax: ☐ E-mail: Rebecca.swandal@gmail.com	Rebecca R. Swandal Swandal, Douglass & Gilbert, P.C. 119 South 3rd Street Livingston, MT 59047-2607 **Amicus Curiae Attorney – Property and Environment Research Center**

☑ U. S. Mail ☐ Federal Express ☐ Hand-delivery ☐ Via Fax: ☐ E-mail: barg@law-advisor.com	Margot Barg Ogburn Wittich Law Firm, P.C. 602 Ferguson Avenue, Ste. 5 Bozeman, MT 59718 **Amicus Curiae Attorney – United Property Owners of Montana**

☑ U. S. Mail ☐ Federal Express ☐ Hand-delivery ☐ Via Fax: ☐ E-mail:	Tim Fox Montana Attorney General Matthew Cochenour Montana Assistant Attorney General P.O. Box 201401 Helena, MT 59620-1401 **Attorney for the State of Montana**

J. Devlan Geddes