Brenda R. Gilbert
Presiding District Court Judge
414 East Callender
Livingston, Montana 59047
(406) 222-4130



MONTANA TENTH JUDICIAL DISTRICT COURT,
FERGUS COUNTY

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| PUBLIC LAND/WATER ACCESS ASSOCIATION, INC.,<br><br>Plaintiff,<br><br>-vs-<br><br>MARK. L. ROBBINS AND DEANNA M. ROBBINS; ROBERT "ROBIN" E. Fink (a/k/a) ROBERT "ROBIN" ELI FINK) AND KATHIE FINK; DAVID D. MURRAY; CLEO BOYCE, MARY D. BOYCE, DAN BOYCE AND LAURA BOYCE, JOANN OWENS PIERCE AND THE MARABETH OWENS OSTWALD REVOCABLE TRUST DATED NOVEMBER 12, 2012,<br><br>and<br><br>THE STATE OF MONTANA, and FERGUS COUNTY, MONTANA,<br><br>Defendant. | Cause No. DV14-2012-0085K<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW AND INTERIM ORDER** |

This case came before the Court for trial from September 10 through September 14, 2018, sitting without a jury, the Hon. Brenda Gilbert presiding. The Plaintiff, Public Land/Water Access Association, Inc., was represented by Paul Grigsby, J. Troy Redmon, and Keeley McKay. The Defendants, Mark L. Robbins, Deanna M. Robbins, Robert "Robin" E. Fink, Kathie Fink, David D. Murray, Cleo Boyce, Mary D. Boyce, Dan Boyce, and Laura



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Boyce were represented by Colleen Dowdall. Fergus County Attorney Kent Sipe represented Defendant, Fergus County. Ada C. Montague and Danna R. Jackson represented the State of Montana.

Over the course of five days, the Court received the parties' testimony and evidence, including the testimony of 27 fact witnesses and two expert witnesses. In addition to considering the substance of witnesses' testimony, the Court carefully observed the witnesses' demeanor while they testified. The Court has considered the evidence, including over 80 exhibits.

The Court conducted a site visit with the parties and their counsel, observing the Mabee Road built by Fergus County, the two-track trail disputed by the parties, the Knox Ridge Road and surrounding areas. The Court ascertained the "lay of the land" subject to this dispute, property boundaries, and other relevant features referenced by witnesses and exhibits. In addition, the Court observed the site where Delos was previously located, a U.S. Post Office having operated there from about 1903 to 1905.

Having considered the testimony and evidence presented, the Court now makes the following:

## FINDINGS OF FACT

### The Parties and Property Ownership

1. Plaintiff, Public Land/Water Access Association, Inc., (hereinafter PLWA) is a nonprofit corporation headquartered in Billings, Montana. Its relevant mission is to promote public access to public land.

2. Three ranching families are Defendants owning interests in private land in Fergus County, Montana, and subject to this litigation. Individual ownership changed somewhat

between the time PLWA filed its original complaint and the time of trial, which is noted below.

3. At the time of trial, Mark L. Robbins and Deanna M. Robbins ("Robbins Family") owned the following interests in real property pertinent to this cause of action:

a. **Township 20 North, Range 22 East, M.P.M**

| | | |
|---|---|---|
| i. | **Fee title** | **Section 2: S 1/2** |
| ii. | **Fee title** | **Section 11: N/2, S/2 S/2, N/2S/2** |
| iii. | **Fee title** | **Section 14: N/2, N/2S/2** |

b. **Township 21 North, Range 22 East, M.P.M**

| | | |
|---|---|---|
| i. | **Leasehold** | **Section 35: S ½** |
| ii. | **Fee title** | **Section 35: N ½** |
| iii. | **Fee title** | **Section 25: S ½** |

c. **Township 21 North, Range 23 East, M.P.M.**

i. **Fee title Section 18: SE/4NE/4, N/2SE/4, LOTS 7, 8, 9, 12, SW/4SE/4**

4. Defendant David D. Murray is the grandson of the late Russell Murray and Beatrice "Bea" Murray. Until her death in 2003, Bea Murray owned and controlled the following land pertinent to this cause of action:

d. **Township 20 North, Range 22 East, M.P.M**

| | | |
|---|---|---|
| i. | **Fee title** | **Section 2: S 1/2** |
| ii. | **Fee title** | **Sections 11: N/2, S/2 S/2, N/2S/2** |
| iii. | **Fee Title** | **Section 14: N/2, N/2S/2** |

e. **Township 21 North, Range 22 East, M.P.M**

i. **Fee title** **Section 25: S ½**

f. **Township 21 North, Range 23 East, M.P.M.**

i. **Fee titleSection 18: SE/4NE/4, N/2SE/4, LOTS 7, 8, 9, 12, SW/4SE/4**

5. Upon Bea Murray's death in 2003, the real property identified in the preceding paragraph was transferred to David L. Murray, who owned and operated the ranch until he sold and transferred his interest to the Defendant Robbins Family in 2016. (See description of Defendant Robbins Family's land ownership above).

6. At the time of trial, Defendant David L. Murray owned no real property pertinent to this cause of action.

7. Kathie Fink and her step-son Robert "Robin" Fink, ("Defendant Fink Family") own the following interests in real property pertinent to this cause of action:

g. **Township 20 North, Range 22 East, M.P.M.**

i. **Fee title** **Section 14: S 1/4**

ii. **Fee title** **Section 15: all**

iii. **Fee title** **Section 23: all**

h. **Township 21, North, Range 22 East, M.P.M.**

i. **Fee title** **Section 35: S 1/2 (leased to Robbins Family)**

Robert E. "Bob" Fink, Kathie's late husband and Robin's father, owned and operated the Defendant Fink Family's foregoing described land prior to his death in August 2013.

8. Cleo Boyce, Mary D. Boyce, Dan Boyce and Laura Boyce ("Defendant Boyce Family") own the following pertinent interest in real property.

i. **Township 21 North, Range 22 East M.P.M**

i. **Fee title** **Section 11: SE ¼**

9. Defendants Joanne Owens Pierce and the Marabeth Owens Ostwald Revocable Trust, dated November 27, 2012, ("Owens Family Defendants) own the following interest in real property pertinent to this cause of action:

j. **Township 21 North, Range 22 East M.P.M.**

i. **Section 2: NE 1/4**

10. The Owens Family Defendants were duly served with process but failed to appear or defend in this cause of action. They did not attend or participate in the trial.

11. Defendant State of Montana owns public school trust Section 36, Township 21 North, Range 22 East, M.P.M. PLWA seeks a declaration that a portion of the disputed trail situated on the State Section is part of the Mabee Road, or alternatively, that it is part of a public road extending from Mabee Road to Knox Ridge Road.

12. Defendant Fergus County is a political subdivision of the State of Montana. It acquired the public right-of-way, dedicated and approved construction of the Mabee Road.

13. For purposes of this proceeding, the trail or road that is in dispute will be referred to as the "disputed trail". The disputed trail is a two-track trail through pasture land and sage brush, with grass and sage brush growing between the tracks. The disputed trail is not graveled, nor regularly maintained in any other way.

14. PLWA seeks a declaration that the disputed trail at issue in this cause of action is an extension of Mabee Road, or in the alternative, a public road by some other lawful means. PLWA seeks an injunction mandating Fergus County to assume jurisdiction of the disputed trail.

15. Ross Butcher, Sandy Youngbauer and Carl Seilstad are duly elected County Commissioners for Fergus County. By Order dated March 2, 2016, the PLWA's claims against the individual Commissioners were dismissed, on the merits. Accordingly, the Commissioners were not parties at the time of trial, though their names remain on the Court caption.

16. Defendant Thomas Meisner was the County Attorney of Fergus County at the time PLWA filed the original complaint. In the March 2, 2016 order referenced above, the Court

also dismissed the PLWA's claims against Mr. Meisner, on the merits. He was no longer a party to this cause of action by the time of trial, though his name remains on the Court caption.

17. Public land that is managed by the U.S. Bureau of Land Management, and public land managed by the U.S. Fish and Wildlife Service within the Charles M. Russell National Wildlife Refuge, (CMR) is impacted by the disputed trail. These federal entities have not been named as parties in this case and have received no service of process.

**Mabee Road**

18. The parties presented voluminous evidence regarding the history of Mabee Road. Based on substantial credible evidence, it is clear to the Court that Fergus County lawfully acquired a right-of-way, which was dedicated and accepted, and built the Mabee Road, which extends about 13 miles north from Montana Highway 191 near the community of Roy, Montana.

19. Fergus County constructed Mabee Road. The overwhelming weight of the evidence before the Court demonstrates that Mabee Road abruptly ends where Fergus County stopped building it.

20. This occurs at a readily identifiable endpoint. The actual road built by Fergus County is physically obvious and it abruptly ends exactly at the point where the County stopped building it, on land owned by the Defendant Fink Family in the S ¼ of Section 14, on or near the common section line with Section 15, both in Township 20 North, Range 22 East, M.P.M.

21. Although not relevant to the trail that PLWA disputes in this cause of action, it is also clear and not subject to legitimate question that the Fergus County right-of-way for Mabee Road likewise terminates at a defined endpoint.

22. The evidence shows that Fergus County owns a short stretch of right-of-way to continue construction of Mabee Road, which extends north approximately 440 yards from the

endpoint of the physical road – the spot the county stopped building the road – to the common quarter corner on the common section line between Section 14 and 15, Township 20 North, Range 22 East, M.P.M.

23. It is also clear to the Court that this additional stretch of right-of-way is not pertinent to the PLWA's claims, because no part of the trail PLWA disputes in this cause of action lies upon the short stretch of undeveloped right-of-way. The Court will discuss the evidence relating to the physical transition from the end of the Mabee Road to the trail in dispute in more detail below.

24. The history of Mabee Road is readily ascertainable from Fergus County records, and the findings regarding the Mabee Road are supported in large part by Petition 842, filed in 1919; Petition 2041, filed in 1949, and County Resolution 29-2003 filed in 2003.

25. With respect to where the road ends, the Court notes the following from the records. The road's namesake, Fred Mabee, was a longtime resident of the Zuley community north of Roy. In 1949, Fred Mabee, Russell R. Murray (grandfather of Defendant David Murray, husband to Beatrice Murray, and all predecessors in title to Defendant Robbins Family), and other area residents filed Petition No. 2041 for what are now the last seven miles of the Mabee Road, before it terminates.

26. The minutes of a December 28, 1949 Fergus County Board of County Commissioners' meeting duly record the acceptance of the Petition and declaration of the road. "Petition No. 2041: All petitions having been filed and right-of-way secured on the road known as the Fred Mabee Road, in Twn 19 & 20, Rg 22, on motion of Comr. Donisthorpe, seconded by Commissioner Kottas, and unanimously carried, the above-mentioned road is hereby declared to be a county road."

27. The 2003 resolution adopted by the Board of County Commissioners also confirms that the Mabee Road comes to a definite end in this readily defined location. Ex. 53.

28. In stark contrast to the overwhelming weight of evidence relating to the history of Mabee Road, there is no evidence that predecessors in title to the defendant ranch families named herein, or other residents in the area, ever filed petitions seeking a county road over the property and purported route where PLWA claims a public trail now exists.

29. Sharpening that contrast, PLWA presented no evidence that Fergus County acted on such a petition: it presented no evidence of a viewers' report, nor notice of a Board of County Commissioners' meeting to consider such a petition, or minutes of such meeting where a petition was accepted or rejected. The physical characteristics of the PLWA's purported trail demonstrate it was not built by Fergus County. Finally, there is no evidence that the landowners were ever paid for having a public right-of-way across their land.

30. In addition, Fergus County records show that area residents unsuccessfully petitioned for a new county road that would have extended a mile east and two and half miles north from the present end point of Mabee Road.

31. In 1965, the namesake of Mabee Road – Fred Mabee - and other area residents signed the unnumbered Petition for a new county road. Ex 38. Also of note, Russell Murray, husband to Beatrice Murray and grandfather to Defendant David Murray – all predecessors in title to the Defendants Robbins Family with respect to Section 14, Township 20 North, Range 22 East, M.P.M., appears to have notarized the Petition for New Road.

32. Curiously, the 1965 petition does not even mention, let alone identify, the disputed trail that PLWA now claims is a public road.

33. Instead, the petitioners sought to extend the new road one mile east of where

Fergus County stopped construction of Mabee Road, and then two and half miles north to the public land now managed by BLM in the N ½ of Section 2, Township 21 North, Range 22 East, M.P.M.

34. The new proposed road would have extended east of the endpoint of Mabee Road, following the boundary line between what at all pertinent times has been the Defendant Fink Family's land in the S1/4S1/2 of Section 14, T. 20 North, Range 22 East, M.P.M., and at the time of trial was the Defendant Robbins Family's land in the N1/4S1/2 of Section 14, Township 20, North, Range 22 East, M.P.M., for a distance of one mile. At the southeast corner of Section 14, Township 20 North, Range 22 East, M.P.M., the proposed road would have been built due north for two and a quarter miles along the common section lines between Section 14 and 13 and Sections 11 and 12, all in Township 20 North, Range 22 East, M.P.M., to the common quarter corner on the section line between Sections 1 and 2, Township 21 North, Range 22 East, M.P.M., providing access to the public land now managed by the BLM in the N ½ of Section 2, Township 21, North, Range 22 East, M.PM.

35. The Board of County Commissioners denied the petition during a public meeting on September 25, 1968.

36. The Commissioners' meeting minutes state: "Petition to Establish Road Denied: A petition to establish a county road beginning at the NW Corner of SW1/4SW1/4, Section 14, T 20 N, R 22 E thence 1 mile to section lines between Sections 14 and 13, thence north 2 ¼ miles has been denied by the Board. Reasons for denial being insufficient use and cost too great. This road would only be used in summer and by hunters. Ex. 39.

37. Neither the Petition nor the minutes regarding the Board's action rejecting it identify the purported trail that PLWA disputes today. If the Murrays, Fred Mabee or others

thought there was a public trail or road through the interior of Murray's Sections 14, 11, and 2, Township 20 North, Range 22 East, M.P.M. and through the Defendant Fink Family's Section14, Township 20 North, Range 22 East, M.P.M., it is reasonable to infer that the Petition would have identified it.

38. In addition, if the petitioners were seeking to merely move an existing public road from a location in the interior of the sections involved to the section lines, it is reasonable to assume that the Petition would have stated as much and identified the old location and the new location. That is not what the petition stated. The Petition sought to establish a new public road.

39. The Board was careful enough to memorialize the cost benefit analysis it performed. It found insufficient public use to justify the requested new road. It would be used in the summers and by hunters. It did not believe that Fergus County taxpayers should shoulder the costs of such a road providing such limited public benefit. Again, given the Board's analysis, if the Board thought a nearby public road already provided access to the BLM parcel, it is reasonable to infer that it would have mentioned it and factored it into its analysis. That did not occur.

40. At the time of trial, Fergus County Commissioner Carl Seilstad testified that Mabee Road exists to the point where construction stopped, with the caveat that the county also owns an undeveloped right-of-way over which it could extend the road north another 440 yards along the Fink-Robbins property boundary on the common section lines between Sections 14 and 15, Township 20 North, Range 22 East, M.P.M.

41. Seilstad testified that the Commissioners discussed the PLWA's contentions and have concluded that the disputed trail is not a county road. He testified that the County still believes that insufficient public use exists to justify the cost to Fergus County taxpayers that

would be involved in acquiring a county right-of- way over private land where the PLWA claims the disputed trail now exists.

42. In sum, weighing the evidence before the Court, PLWA did not prove that the disputed trail is a county road or part of the Mabee Road.

**The Disputed Trail**

43. The physical characteristics of the trail that PLWA alleges is a public road readily distinguish the disputed trail from the physical characteristics of Mabee Road.

44. The disputed trail in large part literally amounts to two tire ruts that meander across prairie gumbo soil, which can be notoriously treacherous to travelers in wet weather. Near the Armells Creek Crossing, in some spots the sage brush between the ruts is approximately two-feet tall.

45. The Court's site visitation of the disputed two-track trail was accomplished with all-terrain vehicles. The testimony showed that the disputed trail would be impossible to navigate in a passenger car and difficult to navigate in some places with a truck. The Armells Creek crossing is particularly steep and best negotiated in an ATV.

46. School buses, passenger cars, big brown delivery service trucks, semi-trucks and trailers hauling freight, fire and ambulance vehicles, and a multitude of other vehicles commonly found on county roads would have great difficulty using portions of the two-track trail, even in the best of weather. Common weather events during Montana's four seasons surely would further hamper travel and increase risk and safety concerns for travelers. In fall, winter and spring, the trail is likely impassable a good bit of the time.

47. PLWA presented no evidence that the trail has ever been utilized by such vehicles for such public purposes. Rather, as discussed in more detail below, PLWA's testimony of

public use consists almost entirely of use for seasonal recreation purposes, namely hunters who testified that they used the disputed trail.

48. PLWA's evidence demonstrates clearly that the physical nature and characteristics of the disputed trail, as well as the disputed trail's limited public use, readily distinguish it from the character and public uses of the Mabee Road and the Knox Ridge Road.

49. The Mabee Road is improved and maintained for year-round travel by most any vehicle one would expect to find on county roads in Montana. For example, witnesses demonstrated that school buses used Mabee Road to the point where construction ends. No such similar testimony or evidence exists with respect to public use of the disputed trail.

50. At point where the Mabee Road ends lies at the boundary line between the Defendant Fink Family's land in the South ¼ of the South ½ of Section 14, Township 20 North, Range 22 East, M.P.M., and the beginning of the Defendant Robbins Family's land in the N ¼ of the S 1/2 of Section 14, Township 20 North, Range 22 East, M.P.M.

51. The point where the Mabee Road ends is physically obvious, as is the beginning of the disputed trail. A fence line and gate cross the disputed trail near where it begins at the south boundary of Defendant Robbins Family's land in Section 14 described above.

52. The route of the purported trail proceeds northeasterly (away from the county's short stretch of undeveloped right-of-way related to Mabee Road) through the interior of Section 14 and into Section 11 (both in Township 20 North, Range 22 East, M.P.M.) There is a fence line between the N ½ and S ½ of Section 11 referenced above, with a gate over the disputed trail. The fence and gate are used for purposes of controlling livestock movement. The Defendant Robbins own both Sections 14 and 11 described in this paragraph.

53. PLWA contends that the disputed trail meanders north through the east half of the

Defendant Robbins Family's Section 11, Township 20 North, Range 22 East, M.P.M., and into their private land in the South ½ of Section 2, Township 20 North, Range 22 East, M.P.M. There is a fence line between Sections 11 and 2 referenced above, with a gate over the disputed trail. The fence and gate are used for purposes of controlling livestock movement.

54. PLWA contends that the disputed trail extends north across the Defendant Robbins Family's private land in the S ½ of Section 2 and into public land situated in the north half of Section 2, Township 20 North, Range 22 East, M.P.M., managed by the Bureau of Land Management.

55. A fence line exists on the boundary line between the private land in the S ½ and the public land in the N ½ of Section 2, Township 20 North, Range 22 East, M.P.M. A gate is maintained across the disputed trail for purposes of controlling livestock movement.

56. The disputed trail alleged by the PLWA extends north across the BLM managed public land in the N ½ of Section 2, Township 20 North, Range 22 East, M.P.M. As noted above, BLM is not a party to this action.

57. PLWA claims that the disputed trail extends north through the BLM's northeast quarter of Section 2 described above, crossing into private land owned by Joanne Owens Pierce and the Marabeth Owens Ostwald Revocable Trust dated November 27, 2012, (the Defendant Owens Pierce Family).

58. PLWA contends that the disputed trail crosses over the private land owned by Defendants Owens Pierce and into private land in the south half of Section 35, Township 21 North, Range 22 East, M.P.M., which is owned by the Defendant Fink Family and leased to the Defendant Robbins Family. At that point, the alleged and disputed trail crosses through another fence line separating the Defendant Fink Family's Property from the Defendant Owens Pierce

Family, and a gate is maintained across the trail for the purpose of controlling livestock movement. The Defendant Robbins Family leases Fink's S ½ of Section 35 described above.

59. PLWA alleges that the disputed trail extends northeasterly through the south half of Section 35 into the north half of Section 35, Township 21 North, Range 22 East, M.P.M., which is owned by the Defendant Robbins Family. There is a fence line between the S ½ of and N ½ of Section 35. A gate is maintained across the trail for the purpose of controlling livestock movement.

60. PLWA alleges that the disputed trail crosses northeasterly through the Defendant Robbins Family's land in the SE ¼ NE ¼ of Section 35, Township 21 North, Range 22 East, M.P.M. and into the NW1/4 of Section 36, Township 21 North, Range 22 East, M.P.M., which is public school trust property managed by the State of Montana. There is a private fence line owned by the Defendant Robbins Family on the boundary between their land and the state school section. The disputed trail claimed by PLWA crosses through a gate maintained by the Defendant Robbins Family for purposes of controlling livestock movement.

61. PLWA contends that the disputed trail extends northeasterly across the NW1/4 of Section 36, Township 21 North, Range 22 East, M.P.M., and into private land owned by the Defendant Robbins Family in the south half of Section 25, Township 21 North, Range 22 East, M.P.M.

62. PLWA contends that the disputed trail extends northeasterly across the Defendant Robbins Family's land in the south half of Section 25, Township 21 North, Range 22 East, M.P.M., and crosses into public land managed by the BLM in the NW 1/4 of Section 30, Township 21 North, Range 23 East, M.P.M.

63. PLWA contends that the disputed trail extends north across the BLM's NW1/4,

NW1/4 of Section 30, Township 21 North, Range 23 East, M.P.M., into public land in Section 19, Township 21 North, Range 23 East, M.P.M., managed by BLM.

64. PLWA contends that the trail extends north across the BLM land, from the SW ¼ to the NW ¼ of Section 19, Township 21 North, Range 23 East, M.P.M.

65. From there, PLWA contends that the disputed trail extends north into federal public land in SW ¼ of Section 18, Township 21 North, Range 23 East, M.P.M., which is part of the Charles M. Russell National Wildlife Refuge (CMR), and managed by the USFWS. Those federal agencies are not named as defendants in this cause of action and they did not appear or testify at the time of trial.

66. PLWA contends that the disputed trail extends northeasterly into private land owned by the Defendant Robbins Family in Section 18, Township 21 North, Range 23 East, M.P.M. On the Defendant Robbins Family's land described in this paragraph, the terrain is particularly steep and rugged. The disputed trail is primitive at best, and it would not be too much of a stretch to believe it would be suitable only for all-terrain vehicles, motorcycles, horses and foot travel. The disputed trail crosses Fargo Creek and the Armells Creek Crossing.

67. The Boyce Family's property that is the subject of this litigation is located in SE ¼ of Section 11, Township 21 North, Range 22 East M.P.M.

68. This parcel is dissected by Knox Ridge Road. Boyces donated a public road easement to BLM for the purpose of creating Knox Ridge Road. Boyces' public road easement does not include the disputed trail now claimed by PLWA for access from Knox Ridge Road to nearby BLM land.

69. Boyces testified that they traditionally have allowed permissive public use of the disputed trail by hunters.

70. The disputed trail is marked by a sign that expressly states that public access across it is granted by permission of the private landowners.

71. In addition, Boyces' land along Knox Ridge Road, including their land around the disputed trail, is enrolled in the State's Block Management Program. Thus, the public's use of Boyces' land, including the trail, is clearly permissive.

72. Though PLWA presented testimony from witnesses who say they used the Boyce property, the Court finds that PLWA failed to provide clear and convincing evidence that such use was open, notorious, adverse and hostile to Boyces. In addition, the evidence of seasonal recreational use presented by PLWA also fails to demonstrate that alleged public use was continuous and uninterrupted.

**The School Section**

73. In 2015, many years after Fergus County was made a defendant in this lawsuit, it paid $1,500 and submitted an official application to the State Department of Natural Resources and Conservation, indicating that Fergus County sought a historic right-of-way over the PLWA's disputed trail in the State's school trust section, Section 36, Township 21 North, Range 22 East, M.P.M.

74. The application was part of a bundle of such applications made by Fergus County, given that there are more than 300 State trust land sections in Fergus County. The County paid about $80,000 for all of these historic right-of-ways through State trust land sections and the applications were submitted in two large bundles, per the testimony of Carl Seilstad.

75. At the trial, county officials disavowed the application, the information set forth in it and confirmed that Fergus County does not claim a county road right-of-way in the State section at issue. The circumstances around this application and payment are curious.

76. Commissioner Ken Ronish appeared to have caused the application and payment to have been submitted to DNRC; and Clive Rooney is the DNRC official in Lewistown who reviewed it. It appears from the testimony and evidence at trial that both officials favor the PLWA's position in this case. Clive Rooney also testified that he used the disputed trail over the Defendants' lands because he considered it to be a public road. In addition, it is reasonable to infer that both officials knew that the application could become evidence in this pending litigation and that such evidence could impact the outcome.

77. Thomas Meisner, then the County Attorney of Fergus County, said in an email when he learned that the application had been submitted, that apparently Ronish went ahead and did it anyway, contrary to the county attorney's advice. Clive Rooney wrote on the application "disputed road."

78. The application that Ronish caused to be submitted did not accurately describe the primitive two-track trail that actually exists on the state school section. Instead, the disputed trail was described incorrectly as a well-maintained and graveled road.

79. At the trial, Commissioner Seilstad testified that he has no memory of requesting that the disputed trail be included in the County's applications for a historic right-of-way. He does not believe that the disputed trail is a county road and does not recall identifying this road as a county road. Commissioner Seilstad testified that he believes including the right-of-way through Section 36 in the applications that the County submitted to apply for Historic Easements was a mistake.

80. Commissioner Seilstad also testified that the Commissioners passed a resolution declaring Mabee Road a County Road from Roy to the gate into what was Bea Murray's property. This was done in 2003. Mr. Seilstad testified that the State Section for which the

County purchased the historic right-of way easement was an easement that is past the point where the County Road ends.

81. Commissioner Ronish testified that he, too, had no memory of this particular application and said it was submitted by "mistake." He said a title company had been hired to complete the application by inserting legal descriptions and describing roads, and that no county employee took part in the inclusion of the disputed trail or the erroneous description of the road provided.

82. The Commissioners testified that they learned of the application only when the State of Montana sent the County a deed for its right-of-way easement in the state school section at issue. The Commissioners testified that it was a mistake for the application to have been submitted.

83. Lisa Axeline, the right-of-way supervisor for DNRC, testified at the trial. Ms. Axeline testified regarding the historic right-of-way statute. Ms. Axeline testified that she had not been notified that the historic right-of-way across Section 26 had been established in error. Ms. Axeline testified that the way to undo the historic right-of-way that the County purchased across Section 26 would be for the County to relinquish the easement. She has not been notified about the County wishing to do so.

**Gas Tax Map**

84. Similarly, the County mistakenly identified the disputed trail as a road that was used by the public and was capable of being driven by passenger cars on its application to the State for reimbursement for gas taxes. The road appeared on the County Gas Tax Map in 2007 and 2008, after the road had been closed to public travel. The PLWA has tried to use the mapping of the road as evidence of public use. The County admits that they were mistaken in

placing the road on the gas tax maps.

85. Commissioner Seilstad testified that they do not go into an in-depth assessment for each individual road every time they do a fuel map review. He further testified regarding Exhibit 31, that this road, i.e. the disputed trail, did not qualify as a fuel tax road, because it was not passable by a two-wheel drive vehicle.

**The Bolles Survey**

86. On April 9 and 10, 1913 Fergus County Commissioners awarded a bid for the survey of un-platted roads in Fergus County.

87. The survey came to be known as the Bolles Survey. PLWA's Exhibit 11, consists of the county survey records of roads for Township 19 North, Range 22 East, otherwise known as the road book or the plat book. It includes the Bolles Survey metes and bounds. It did not include a notation as to the origin of the road.

88. Roads established by approval of a petition are annotated with the petition number and references to where other documents pertaining to the approval of the road are found in the public record.

89. The Bolles Survey enters Section 14, Township 20 North, Range 22 East on the east boundary, approximately halfway up the section line, and ends short of Fargo Coulee and the crossing at Armells Coulee in Section 18, Township 21 North Range 23 East.

90. None of the Bolles Survey drawings intersected with the Mabee Road, that was created by the petition process.

91. Fergus County took no action to make the survey a County road. There are other surveys that were part of the Tilzey contract, including Knox Ridge Road, which are not County roads.

92. The PLWA did not prove by clear and convincing evidence that the road depicted in the Bolles Survey was ever built, laid out or used by the public. The PLWA did not prove by clear and convincing evidence that the road surveyed by Bolles is the disputed trail.

**Snow Plow Maps**

93. The County has published school bus routes for purposes of prioritizing snow removal from County roads. The map for Mabee Road ends at its terminus in Section 14, by Fink's house. The disputed trail is depicted on the map but it is not shown or described as a snow plow route or as a public or county road.

**Postal Route**

94. PLWA introduced a map produced by the Postal Service in 1903 that encompassed three states, showing numerous postal routes in Montana, Wyoming, and Idaho. PLWA's expert witness, Bernard Hallin, testified about the line on the map between Delos and Roy and his opinion that this created a federal right-of-way.

95. The Postal Service map does not answer the question of how the mail was conveyed between Roy and Delos, how frequently the route was used, or any other evidence of public use that might have preceded the opening of the post office. There was speculation that this was the same route as the disputed trail across Defendants' property.

96. The route was shown differently than other routes in northern Fergus County that followed actual roads.

97. The route shown to Delos from Roy was drawn as an arc with a dashed line in the same manner that airline routes are shown, as the crow flies. That line on the postal map did not indicate a particular road but a short-lived postal route between Roy and Delos. The evidence indicates that the Delos postal site terminated in 1905.

## Evidence of Public Use

### Early History

98. PLWA contends that the public used the disputed trail from 1903 until August 2012, when it filed its lawsuit. PLWA introduced no competent evidence that tends to demonstrate that members of the public actually utilized the disputed trail in 1903 or in subsequent decades prior to the 1980's.

99. PLWA relies heavily upon surveys and maps depicting various trails and roads and expert opinion from surveyor Bernard Hallin, who opined that a correlation exists between the routes depicted on the old surveys and maps and the route of the disputed trail at issue now.

100. Defendants' expert witness, surveyor Ken Jenkins, undertook a physical survey of the disputed trail and surrounding land. He also analyzed the early maps, surveys and records relied upon by Mr. Hallin. In addition, Mr. Jenkins conducted his own independent analysis of Fergus County road records. Based upon all of Jenkins' work, Jenkins opined that the disputed trail at issue today is not the same trail or road identified or referenced in the early surveys, maps and other records relied upon by PLWA.

101. In weighing the testimony of both expert witnesses, the Court is cognizant of the fact that lines on a map or survey are not evidence of physical use of the routes they depict. Lines representing old roads on old surveys and old maps are not substitutes for competent evidence of actual public use.

102. Based on the evidence in the aggregate, PLWA failed to meet its burden of proof relating to its contention that the public began using the disputed trail in 1903 and has done so continuously since that time.

103. In addition, the Court finds insufficient evidence of public use of the disputed trail

in 1903 or the subsequent decades until the mid-1980's.

**Seasonal Use by Sportsmen**

104. PLWA's witnesses testified to driving on the disputed trail for seasonal recreational purposes. Most of the witnesses only used the road in the fall to hunt big game. This seasonal use occurred in a range of years from 1985 -2010.

105. In addition, PLWA's witnesses also acknowledged having expressly obtained landowners' permission to hunt on the private land now owned by the Defendants Fink Family and the Defendants Robbins Family (much of whose land was previously owned by Defendant David Murray and his grandparents, Beatrice Murray and her late husband, Russell Murray).

106. PLWA's witness testimony at times was inconsistent and also in conflict with prior testimony, with particular witnesses providing different answers under oath to the same question or providing different versions of facts relating to particular issues. A common illustration is testimony by PLWA's witness Russell Offerdahl, who testified that he first used the disputed trail in 1985 and also that he first used it in 1989. In addition, Offerdahl executed an affidavit stating that the year he first used the disputed trail, he accessed it from the north, across land owned by the Defendant Boyce Family. At trial, however, Offerdahl testified under oath that he accessed the disputed trail from the south, using Mabee Road crossing Beatrice Murray's land (transferred to Defendant David Murray and to Defendant Robbins Family.)

107. At the time of the Court's site visit, seven fences with gates crossed the disputed trail from the point it begins in Section 14, Township 20 North, Range 22 East, M.P.M. to the point where it enters the State school trust, Section 36, Township 21 North, Range 22 East, M.P.M. Substantial credible evidence demonstrates that these fences existed at all times pertinent to the issues before the Court, and that landowners built the fences and gates to control

their livestock.

108. PLWA's witnesses testified inconsistently with respect to the existence of fences and gates, essentially denying having seen most of them, though at times acknowledging some of them.

109. Joining witness Offerdahl on occasion was Richard Hjort, from Libby, Montana. In addition, Hjort's brothers, James and Stephen, from Wisconsin, also testified to utilizing the disputed trail to hunt in the area. These witnesses all admitted that they'd been given permission to hunt the private land owned by Bob Fink, (now owned by the Defendant Fink Family), and Beatrice Murray's land, (also owned after Beatrice's death by Defendant David Murray until 2016 when he sold the land to the Defendant Robbins Family.)

110. Offerdahl testified that he and Bob Fink were friends, and that Bob Fink often recommended where Offerdahl might hunt and camp. A frequent camp site for Offerdahl was on the BLM land in the North ½ of Section 2, Township 20 North, and Range 22 East, M.P.M.

111. The Defendant Fink Family owns the S1/2 of Section 35, Township 21 North, Range 22 East, M.P.M. Bob Fink used to also own the N1/2 of Section 35, and he leased that to Defendant Mark Robbins for hunting purposes.

112. The evidence fails to clearly and convincingly demonstrate that the seasonal recreational use of the disputed trail constitutes sufficient adversity to the landowners.

113. For example, Offerdahl testified that he and Bob Fink were friends, and also admitted to having Bob Fink's permission to use Bob Fink's private land.

114. In addition, Offerdahl testified that the first time he used the disputed trail he'd approached it from the south on Mabee Road. (In his affidavit Offerdahl stated that the first time he used the road he came from the north instead of over Bob Fink's property.) Offerdahl had

discussed with Bob Fink where to camp, and Offerdahl intended to enter the disputed trail and cross the private land two and half miles to the north to reach the BLM in the North ½ of Section2.

115. Offerdahl vividly testified to his surprise and uncertainty when he saw the gate across the disputed trail. (For clarity, this point is the entry to Defendant Robbins Family's land in Section 14, Township 20 North, Range 22 East, M.P.M., formerly owned by Defendant David Murray and, of course, his grandparents Beatrice and her husband Russell, all referenced above.) In addition, because several witnesses testified to this gate, the Court will now adopt a common moniker given it by witnesses during trial, "Bea's Gate."

116. Offerdahl's first impression of Bea's Gate is exactly consistent with what a reasonable person's impression would be today -- any reasonable person seeing Bea's Gate for the first time would realize that it marked her private land.

117. Offerdahl testified that he did not want to proceed beyond Bea's Gate for fear that he would be trespassing. Offerdahl turned around and drove back to Bob Fink's home to ask if Offerdahl had permission to use the private land behind the gate.

118. Offerdahl testified that he asked Bob Fink for permission to travel beyond Bea's Gate. Offerdahl testified that in reply, Bob Fink said something to the effect that Bob Fink could not grant such permission to Offerdahl because the disputed trail is a public road. Offerdahl testified that Bob Fink said Offerdahl could use the disputed trail because it was a public road.

119. Offerdahl testified that from that point forward until the time of trial, he believed that the disputed trail is in fact a public road.

120. Bob Fink was not alive at the time of trial. He passed away in August 2013, about a year after the PLWA filed suit. PLWA did not obtain a deposition of Bob Fink to

preserve his testimony, under oath, and present it in Court.

121. The statement that Offerdahl attributed to his late friend was not made in the presence of the Court, not subject to cross examination, and the Court was deprived of the opportunity to observe the witness' demeanor.

122. Offerdahl testified that he asked for and was given permission by Bea Murray's hired man to hunt on her land (now owned by Defendant Robbins Family). Indeed, Offerdahl testified that he hunted extensively on the Murray's property.

123. However, Offerdahl did not disclose to any of the private landowners that he believed that the trail was public. When he asked for permission, there is no evidence that Offerdahl said anything that put the private landowners or their agents on notice that Offerdahl harbored the view that the disputed trail is a public road and that the landowners' permission to use the disputed trail was unnecessary. There was no evidence that Offerdahl and the other hunters and the few other recreationists who testified ever made a distinct and positive assertion of a right hostile to the private landowners or their agents until 2007 when Offerdahl had a confrontation with Defendant Mark Robbins.

124. Prescription can never be obtained by stealth, by secret conduct concealed from the impacted landowner. Adversity requires open, notorious and adverse conduct such that landowners are put on notice of the exercise of rights hostile and adverse to the landowners' interests.

**West Indian Butte Grazing District**

125. The private land owned by Fink and Robbins Families is part of a 17,000 contiguous acre grazing district known as the West Indian Butte Grazing District. The Grazing District comprises private, state and federal land. By voluntary consent, mutual cooperation, and

mutual agreement, members participating in the grazing district travel across private lands and private roads in connection with managing their livestock.

126. Defendants presented substantial credible evidence that a practice and custom existed under which landowners granted permissive use of their land and the disputed trail for seasonal hunting.

127. The Defendant Boyce Family's land is currently enrolled in Montana's Block Management program, providing permissive public use to public hunters.

128. In addition, substantial credible evidence exists for the Court to find that the Boyce Family Defendants historically provided seasonal public use of their land for hunting.

129. Insufficient evidence exists for the Court to determine that Boyces were placed on notice of distinct and positive assertions of rights hostile to their private property rights. Such was never brought to Boyces' attention. In the aggregate, PLWA's testimony focused more on use of other landowners' property.

130. In addition, Defendants presented substantial credible evidence of providing permissive use to area neighbors as part of a custom of neighborly accommodation.

131. The Court finds that PLWA presented no proof that the seasonal hunting prior to 2007 constituted nonpermissive public use of the disputed trail to put the Defendant ranchers on notice of a hostile and adverse use by the hunters, let alone the privately harbored intentions reflected by PLWA's claims.

132. Things changed in 2007. Defendant Robbins Family purchased the N ½ of Section 35, Township 21 North, Range 22 East, M.P.M., and obtained new lease terms with respect to Bob Fink's land in the S ½ of Section 35.

133. Defendant Mark Robbins testified that in September 2007 he saw Offerdahl and

Richard Hjort camped on the BLM in the adjoining BLM parcel (North ½ of Section 2, Township 20 North, Range 22 East, M.P.M.), and that he recognized them from years past.

134. Indeed, Robbins testified that he had come across Offerdahl in 2006, hunting the private land that Robbins leased from Bob Fink. Offerdahl said he had Fink's permission to hunt there, and Robbins discussed with Bob Fink the contradiction between leasing hunting rights to Robbins for consideration, and then purporting to have hunting rights to provide permission for Offerdahl to hunt.

135. During the 2007 confrontation, Robbins informed Offerdahl that the private land in Section 35 was closed to access, essentially revoking any prior permission Offerdahl believed he had to use the private land.

136. Mark Robbins testified that in 2007 he bought the N ½ of Section 35 from Bob Fink. In addition, Robbins testified that he and Fink modified the terms of Robbins' lease of the land Fink owned in the S ½ of Section 35, clarifying that Robbins controlled access to that private land, including the trail now disputed by the PLWA. Based on the purchase and the lease, Robbins said he posted the gate between Section 2 and Section 35 with a sign that said "No Trespassing" and included Robbins' name and telephone number.

137. Robbins testified that thereafter he observed Offerdahl and Richard Hjort driving across the disputed trail in Section 35. Robbins stopped by Offerdahl's camp on the public BLM land in Section 2. He had a conversation with Offerdahl and Hjort. Robbins said he had witnessed the men drive past the "No Trespassing" sign at the gate into Section 35. He told Offerdahl and Hjort that ownership and lease terms had changed and that things were going to be different from previous years. He informed them that he had the right to post the property because of his ownership in the N ½ and the terms of the new lease in the S ½.

138. In response to this information, Offerdahl replied that the disputed trail is a public road.

139. Robbins stated in response that he controlled Section 35, that the gates are posted against trespass and he warned Offerdahl and Hjort that Robbins would file a criminal complaint for trespass if they entered Section 35.

140. Offerdahl and Hjort ignored the "No Trespassing" sign and the verbal warning they received. The next day they entered Section 35 on the disputed trail, and Robbins reported the incident to law enforcement as a trespass upon his private land.

141. In contrast to Offerdahl's relationship's with Bob Fink and Bea Murray, this episode represents the first time in the record that Offerdahl put one of the landowners on notice of an adverse and hostile intention.

142. If seasonal recreational use by a hunter can rise to the level necessary to prove adversity, the only such instance in the record is this one occurring in September 2007, specifically relating to Section 35.

143. Less than five years elapsed between the time of this event in 2007 and the time PLWA filed its original complaint in this action in August 2012.

144. PLWA introduced little evidence of public use across Section 35 after the incident in 2007 and the time the Complaint was filed. For about 12 years, little public use of the disputed trail occurred on Defendants' private land, absent landowner permission.

145. Any conclusions of law stated in the foregoing Findings of Fact are hereby incorporated within the Conclusions of Law set forth below.

From the proposed findings of fact, the Court enters the following:

## CONCLUSIONS OF LAW

A. Any findings of fact set forth in these Conclusions of Law are hereby incorporated within the Findings of Fact set forth above.

B. This Court has jurisdiction over the parties to this proceeding and the subject matter raised by the pleadings.

### Mabee Road

C. Fergus County built the Mabee Road pursuant to a lawful petition process.

D. Mabee Road extends a distance of about 13 miles north of Montana Highway 191 near Roy, Montana, to a point where road construction ceased, in the S1/4S1/4 of Section 14, Township 20 North, Range 22 East, M.P.M.

E. The endpoint of Mabee Road is surrounded by private land, owned by the Defendant Fink Family in the S1/4S/14 of said Section 14, and the Defendant Robbins Family in the N1/4S1/4 of said Section 14.

F. In creating the Mabee Road, Fergus County duly complied with all requirements imposed by Montana statutes at all pertinent times. Petitions 842 and 2041 were signed by freeholders and duly filed. County records contain the viewers' reports, and reports to the board of County Commissioners prior to its decisions approving these Petitions. The minutes kept in the regular course of business reflect the Board's action granting the Petitions and dedicating the county road. In addition, the minutes reflect that rights-of-way were required. Anyone "affected" by the Petition who objected, was paid for the land taken for the roadway. Mont. Code Ann. § 7-14-2601 through § 7-14-2614.

G. These Petitions do not identify, reference, or otherwise have any bearing on the

PLWA's disputed trail.

H. Fergus County denied a 1965 road petition to build a new road from the end of Mabee Road one mile east and two and a half miles north to a parcel of federal public land in the N ½ of Section 2, Township 20 N., Range 22 East, M.P.M.

I. This is the same parcel of federal public land that PLWA's disputed trail reaches from a different route (situated to the west of the petitioned route) and entirely within property owned by Defendant Robbins Family in Sections 14 and 11, Township 20, Range 22 East, M.P.M., and the S ½ of Section 2 of the same township and range.

J. Minutes of the meeting indicate that the Board of County Commissioners denied the road Petition because of insufficient public use, stating the new road would be used only in the summer and by hunters. The Board determined that the costs of the new road were not justified by the little benefit from such use.

K. The 1965 petition did not identify the PLWA's disputed route as existing at the time it was filed, or that the disputed trail is a public road.

L. The disputed trail is not a county road created pursuant to petition process nor built by Fergus County. It is a separate trail, distinct from Mabee Road.

**Historic Use**

M. PLWA contends the disputed trail has been a public road since 1903. The postal map showing the route to Delos is depicted on a map that covers three states. The route is drawn with a dashed line, meaning, according to the testimony of Mr. Jenkins, that there was a delivery connection between the two places.

N. In any event, the postal route to Delos was discontinued in September of 1905, per the Daily Bulletin introduced as Exhibit Z-34. The evidence did not prove that the postal

route to Delos was over the disputed trail. Mr. Hallin testified that the road to Delos is still probably a federal right-of-way. There is nothing in the record that would indicate that the federal government has taken jurisdiction over the disputed trail at issue in this case.

O. The appearance of the disputed trail on various maps does not carry great weight, in terms of establishing it as a public road. According to the testimony of Ken Jenkins, once there is a feature on a map, it keeps getting repeated on successive maps, with the addition of the new information on the new map. Moreover, a road appearing on a map is not proof of use.

**RS 2477**

P. Revised Statute 2477 was enacted by the 1866 Congress to provide "that the right-of-way for the construction of highways over public lands, not reserved for public uses be granted." *S. Utah Wilderness All. v. Bureau of Land Mgmt.*, 147 F. Supp. 2d 1130, 1138 (D. Utah 2001). This statute is but an invitation to accept a public road by one of the lawful means available to create a public road: by petition, by public use, or by dedication. *Our Lady of the Rockies v. Peterson*, 2008 MT 110, ¶ 38, 342 Mont. 363, 181 P.3d 631.

Q. PLWA failed to prove that the disputed road is a public road created by petition. There was no evidence as to any record in Fergus County, pertaining to the disputed trail, of a petition to create a road, minutes of a commissioners' meeting, notice to the public, a viewers' report or the appearance of the road in the surveyor's road book.

R. In *Reid v. Park County*, 192 Mont. 231, 637 P.2d 1210 (1981), the Supreme Court upheld the County's position that a public road was created where the record, taken as a whole, showed that a public road was created. Plaintiff relies heavily upon *Reid* in support of its position, but the facts in this case put the *Reid* standard out of reach when compared to the facts before the Court. In *Reid,* the evidence showed that a Petition was received, three individuals

were appointed to view the road and were required to report back to the Commission. Minutes from other meetings showed that the Commissioners took further steps toward establishing a road. The Commission ordered the road opened on a particular day, and the minutes stated that the Commission "ordered the road opened as petitioned for." *Reid* at 192 Mont. 231, 235.

S. The Court in *Reid* used the "record taken as a whole" standard only because the County could not prove that the required number of petitioners signed the Petition and that each of them were freeholders. Under these facts the Court stated that the, "record taken as a whole standard" was sufficient and that otherwise, "the burden on the public in a particular case to prove a public road was created so many years ago may well be insurmountable." *Reid* at 192 Mont. 231, 236. Unlike the facts in *Reid,* here there is no petition to create a road, no minutes of a commissioners' meeting regarding such road, no notice to the public, no viewers appointed, no viewers report, and certainly no Order by the Commission directing that the road be opened. This Court concludes that the standard in *Reid,* as applied to the facts of this case, fails to support PLWA's position.

T. The records introduced by the Plaintiff regarding claims for grading the Mabee Road, for example, Exhibits 25, 26, 28, and 57, do not represent proof of road work or road grading beyond the undisputed Mabee Road extending from Roy to the point where the County stopped building it. (At the Fink family's property in the S ¼ of Section 14 on or near the common section line with Section 15, both in Township 20 North, Range 22 East, M.P.M.)

U. PLWA also failed to prove that the disputed trail is a public road by dedication.

V. PLWA superficially claims the public used the disputed trail as early as 1903, but introduced no evidence of public use circa 1903 or decades prior or after.

W. Between 1895 and 1913, Montana law did not allow public roads to be created by

prescription. The GLO survey was signed in 1915 and the federal government began patenting land to private landowners. Accordingly, PLWA was obligated to demonstrate public use of the disputed trail occurring before 1895 and for the prescribed period (which was 10 years), or after 1913 when prescription became available and for the prescribed period of 10 years. 1913 Mont. Laws 139, 161. Private landowners entered on the land at various times after the federal government signed the GLO survey in 1915, likely foreclosing PLWA's ability to introduce sufficient evidence relating to prescription before Defendants' land was entered by their successors in title.

X. In any event, PLWA presented no competent evidence that public use of the disputed trail occurred in early years, circa 1903.

Y. PLWA failed to meet is burden of proof to establish that the disputed trail is a public road pursuant to RS 2477, or to otherwise prove that the disputed trail was a public road by some lawful means as early as 1903, or the decades prior to or subsequent to that year.

**Use by Hunters in 1980s through 2012**

Z. Montana law consistently recognizes that seasonal recreational use of a route is generally insufficient to establish public prescriptive use.

AA. In addition, permissive use is incompetent to prove public roads by prescription, because it is the antithesis of adverse use.

BB. Many of PLWA's witnesses admitted that they had permission to hunt private land owned by Bob Fink. This permissive use extended to all land owned by Bob Fink, and the land now owned by the Defendant Fink Family.

CC. In addition, many of PLWA's witnesses admitted having requested permission to hunt private land owned by Beatrice Murray. This permissive use extended to all land owned by

Beatrice Murray and includes the land transferred after her death to Defendant David Murray, her grandson, as well as his transfer of the land in 2016 to the Defendant Robbins Family.

DD. Substantial credible evidence exists that both Bob Fink and Beatrice Murray provided permissive public use of their private land for hunting, including use of the disputed trail by hunters.

EE. One of PLWA's witnesses, Russell Offerdahl, testified to a statement purportedly made out of court by Bob Fink, who died while this matter was pending.

FF. The statement was to the effect that Bob Fink believed the disputed trail was a public road and that Bob Fink therefore could not grant permission to Russell Offerdahl to use it, as the public already had a right to use the disputed trail. Offerdahl relied on Bob Fink's purported statement to contend that the disputed trail is a public road.

GG. The statement was made outside the presence of the Court, was not under oath, not subject to cross examination, and the Court was denied an opportunity to observe Mr. Fink's demeanor. The Court was also deprived of an opportunity to hear Mr. Fink explain the following conflicting evidence presented by many witnesses.

HH. For example, Bob Fink's wife and son, Defendants Kathie and Robin Fink, testified that they never heard Bob Fink say anything like the statement Offerdahl attributed to Bob Fink. They said that Bob Fink always believed that he owned and controlled the disputed trail as part of the Finks' private land. Kathie and Robin testified that they have always considered the disputed trail private and part of their private land.

II. The statement attributed to Bob Fink, even if made by him, is not determinative of the outcome of this case, is hearsay, and invades the province of the Court by commenting upon the ultimate issue before the Court for decision.

JJ. In addition, Bob Fink leased and sold land to Defendants Robbins' in Section 35, Township 21 North, Range 22 East, M.P.M. As part of those transactions, Bob Fink acknowledged Robbins' right to control access to Section 35, including use of the disputed trail as it lies in that section. It would be inconsistent for Bob Fink to enter a private lease for consideration with a material term that Robbins' controlled access to Section 35, and at the same time perpetuate an understanding with others, including Offerdahl, that the disputed trail through Section 35 is a public road. The Court will never know how Bob Fink would have reconciled these conflicts in the evidence.

KK. The Offerdahl statement attributed to Bob Fink is not inherently reliable. It is hearsay, and though introduced without objection by the Defendants, the Court is not persuaded by Offerdahl's testimony in light of the conflicting substantial credible evidence that undermines the statement.

LL. In the alternative, the statement Offerdahl attributed to Bob Fink, which was introduced without objection by the Defendants, is irrelevant. *Powell County v. 5 Rockin' MS Angus Ranch, Inc.*, 2004 MT 337, ¶ 47, 324 Mont. 204, 214, 102 P.3d 1210, 1218.

MM. In addition, the statement Offerdahl attributed to Bob Fink provides Offerdahl no legal authorization to cross lands owned by Beatrice Murray (later owned by Defendant David Murray and now owned by Defendant Robbins Family) or land owned by the Defendant Boyce Family. No evidence suggests that Bob Fink acted as an agent of the other Defendants, and no basis exists for that statement to have any bearing those Defendants' land or their right of control relating to the disputed trail.

NN. Offerdahl and others admitted to obtaining permission to hunt on Beatrice Murray's land. Offerdahl and others did not notify Beatrice Murray that they believed the public

had a right to use the disputed trial.

OO. As a matter of law, the hunters and recreational users testifying in this matter did not singularly or collectively demonstrate sufficient adversity of use of the disputed trail where it lies within any of the Defendants' land that would have placed a reasonable landowner on notice of open, notorious, adverse and hostile use of the landowner's property rights. The hunters and other recreational users likewise did not notify the landowners of the hunters' belief that the disputed trail is a public road.

PP. It is doubtful that the private landowners would have granted permission for these hunters to use the landowners' private property for hunting, had the hunters revealed an intention to use the permissive use to later prove a public road across their lands. That, alone, is likely incentive enough for the hunters to keep such opinion secret from the impacted landowners.

QQ. The privilege of public hunting on private land turns in large part on trust, good faith and fair dealing. This privilege could be irreparably damaged if that trust is lost by sharp tactics. In this case, hunters obtained permission to use landowners' property and kept secret their opinion that their use was hostile and adverse to the landowners. After the landowners literally passed away and are not available to testify, the hunters came in to court and revealed their secret understanding that the road is public. They testified that their permissive use did not apply to the disputed road, and that their use of the disputed trail was undertaken in a hostile and adverse manner to the landowners. Testimony under these circumstances fails to allow for a conclusion that the use was open and notorious.

RR. PLWA bears the burden of proving all elements of a public prescriptive road by clear and convincing evidence. *Wareing v. Schreckendgust*, 280 Mont. 196, 203, 930 P.2d 37, 41 (1996).

SS. PLWA must demonstrate that the public's use was open, notorious and adverse to the Defendant, continuous over a fixed and definite path, and continuous and uninterrupted for the prescribed period. *Brumit v. Lewis*, 2002 MT 346, ¶ 15, 313 Mont. 332, 337, 61 P.3d 138, 143. If the Court determines that PLWA met its burden of proof, the burden is deemed to shift to the Defendants to prove by a preponderance of the evidence that the use was excused, for example through permission or a doctrine of neighborly accommodation. *Leisz v. Avista Corp.*, 2007 MT 347, ¶ 17, 340 Mont. 294, 174 P.3d 481.

TT. The Court concludes that PLWA failed to meet its burden of proof to establish a prima facie case that the disputed trail is a public road based on public prescriptive use. The burden of proof did not shift to the Defendants.

UU. The Court specifically concludes that the testimony regarding seasonal recreational use that PLWA introduced is insufficient to constitute adversity. *Keebler v. Harding*, 247 Mont. 518, 523, 807 P.2d 1354, 1358. (1991). The conflicting and disputed evidence also revealed significant use based on express permission of the landowners. *Leisz v. Avista Corp.*, 2007 MT 347, ¶ 17, 340 Mont. 294, 299, 174 P.3d 481, 485; *citing, Boone and Crockett Club,* 259 Mont. at 283–84, 856 P.2d at 527.

VV. The importance of proof of adversity is so that a landowner knows what might be lost by open and adverse use by members of the public. The appearance of a road on a map is similarly unreliable evidence of public use or the validity of a claim for a public road. The PLWA's theory that a road on Government Land Office maps and plats is a public road, has been discussed by the Montana Supreme Court and dismissed in the strongest of terms:

> . . . past, present, and future generations of Montana landowners have the right to be secure in the knowledge that they will not wake up one morning to find that a community or organization has decided to build a 60–foot–wide public highway through their back

> yards based on nothing more than a surveyor's notation of a 6–foot–wide dirt road on a 115–year–old mineral survey and a healthy dose of sophistical prestidigitation.

*Our Lady of the Rockies, Inc. v. Peterson*, 2008 MT 110, ¶¶ 66-67, 342 Mont. 393, 424, 181 P.3d 631, 652.

WW. In addition to the foregoing, the Court notes the physical features relating to the disputed trail. Seven fence lines cross the disputed trail on private property related to the Defendant Robbins Family's land. Gates cross the road at each fence line. The fences and gates were installed by the landowners for purposes of livestock control. Evidence of this nature typically demonstrates permissive use of private property by others utilizing such a path under such circumstances. *Kessinger v. Matulevich*, 278 Mont. 450, 457, 925 P.2d 864, 869 (1996).

XX. In addition, the Court determines that the incident in September 2007 involving Offerdahl marks the first time that any hunter put a landowner on notice that he believed the disputed trail is a public road. *Amerimont, Inc. v. Gannett* (1996), 278 Mont. 314, 323, 924 P.2d 1326, 1333; *Brumit v. Lewis*, 2002 MT 346, ¶ 15, 313 Mont. 332, 337, 61 P.3d 138,

YY. Defendant Mark Robbins notified Offerdahl and Richard Hjort in September 2007 that Robbins now controlled the access to Section 35 for hunting, by virtue of his purchase of the N ½ of the section and his new lease with Bob Fink on the S ½ of the section. Robbins clearly warned Offerdahl and Hjort that if they entered Section 35 again Robbins would contact law enforcement and make a complaint for criminal trespass. Offerdahl then revealed to Robbins Offerdahl's belief that the road was a public road. (Offerdahl didn't mention Bob Fink's purported statement.) Despite Robbins' warning, Offerdahl and Hjort opted to cross Section 35. Robbins contacted law enforcement. As a result, Offerdahl and Hjort were in fact cited for criminal trespass, which charges were later dismissed.