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Via Email Only
Bernie Lea
Public Lands & Water Access Association
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Re: Senate Bill No. 354

Dear Mr. Lea,

The PLWA has asked that I provide input on Senate Bill No. 354, which proposes to modify Montana's existing laws regarding prescriptive easements.

First, I find this measure very confusing, and not particularly clear in its purpose. It is tacked on to existing § 23-2-322, MCA, which is a measure dealing only with recreational use of waters and the fact that prescriptive easements cannot be obtained through such use of waters. However, the new subsection (3) appears to apply to **all** prescriptive easements, and that carries the possibility of tremendous mischief. Before tinkering with years of common law, this issue should be given much more careful consideration.

Moreover, the measure is very confusing because it seems to conflate easements **by grant** with **prescriptive** easements. A prescriptive easement "is a right to use the property of another that is acquired by open, exclusive, notorious, hostile, adverse, continuous, and uninterrupted use for a period of five years." I get this definition from the very law in question, § 23-2-322(1). In other words, prescriptive easements are established by continuous **use**, not by "grant." Why, then, does the measure talk about "grants" and easements "reduced to writing," i.e., granted easements? Again, this adds more confusion than clarity to Montana's real property common law.

As best I can tell, this is an attempt to limit the ability of organizations such as the PLWA to gain access to public lands and claim easements on behalf of the public. If that is its purpose, in my view, this is inimical to the public's interest in attaining access to public lands—lands owned by all of us.

In particular, it appears that under the new § 23-2-322(3)(a), a prescriptive easement may be obtained only by a governmental entity or by an individual. This runs counter to longstanding precedents which confer organizational standing on behalf of organizations such as PLWA, which

represent individual members.

More concerning, that same section provides that prescriptive easements that have "not been reduced to writing" or that have been established as "the result of a court order" must be registered with the Department of Natural Resources and Conservation. Why? What possible purpose could this serve?

For example, I presently represent a client in Park County whose property is subject to a court-established prescriptive easement which was declared by the local district court and affirmed by the Montana Supreme Court many years ago. Does this law require that the dominant tenement's lawyer now advise his/her client to register? What if the client does not do that? Does this mean the prescriptive easement is less valid?

Moreover, all such filings must be made with the Department by December 31, 2022. Again, why? And, does this mean that an inchoate prescriptive easement is lost if not registered by that date? Does this allow me to sue on behalf of my client, the servient tenement, to void the prescriptive easement, and, if so, how long do I have to do that? The measure is silent on the consequences of not registering.

In sum, this imposes a new burden on lawyers advising clients, and Montana landowners and easement holders, and just results in red tape.

Further, the bill purports to amend § 70-17-106, MCA, to add several subsections. I cannot even begin to characterize subsection (2), so I will simply quote it to show its internal contradiction:

> (2) A servitude granted, either by the terms of the grant or by **the nature of the enjoyment**, to a local, state, or federal government body for administrative purposes does not create a right to use the servitude for any other purposes **unless specifically provided for in writing in the grant.**

(Bold emphasis added). On the one hand, this seems to suggest that a prescriptive easement may be established by "the nature of the enjoyment" (in addition to a specific grant), but contradictorily restricts the enjoyment to those purposes "specifically provided for in writing in the grant." Again, why does the bill even talk about easements "by grant"—which have nothing to do with prescriptive easements?

This kind of contradiction simply leads to mischief and invites endless litigation.

In sum, I see no defined reason to amend Montana's longstanding prescriptive easement statutes, as well as its common law. If there were such a need, it should be more carefully articulated and the measure should be much more carefully drafted.

Sincerely,

James H. Goetz