

NO. DA 07-0353
IN THE SUPREME COURT
OF THE STATE OF MONTANA

REBECCA E. MATTSON, et al.,

Plaintiffs and Appellants,

v.

**MONTANA POWER COMPANY,
PPL MONTANA, LLC,
TOUCH AMERICA HOLDINGS, INC.,
MONTANA POWER, LLC, a/k/a
NORTHWESTERN ENERGY, and
NORTHWESTERN CORPORATION,**

Defendants and Respondents/Cross-Appellants.

APPELLANTS' BRIEF

ON APPEAL FROM A JUDGMENT OF THE
MONTANA ELEVENTH JUDICIAL DISTRICT, FLATHEAD COUNTY
CAUSE NO. DV-99-548(A)
THE HONORABLE TED O. LYMPUS, DISTRICT JUDGE

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INTRODUCTION

This appeal will significantly affect the future of one of the most beautiful and valuable natural resources in Montana: Flathead Lake, the largest freshwater lake east of the Mississippi and the site of a National Wildlife Refuge, the University of Montana's Biological Station, state parks, farms, recreational facilities, and private homes. The District Court's decision below to grant summary judgment to defendant PPL Montana, LLC has enormous consequences for the future of the lake and its shores, because it gives the defendant power company the unrestrained right to take, damage and degrade every inch of lakefront property, without liability. This result is diametrically opposed to Montana's public policy, the law of easements, and common sense. It should be reversed.

ISSUES PRESENTED FOR REVIEW

1. Did the District Court impermissibly expand the specific grant of the easements by disregarding the language restricting PPLM's use of the servient tenement to 2893 feet above sea level?
2. Did the District Court erroneously disregard plaintiffs' evidence that PPLM caused unreasonable damage to and unreasonably interfered with their enjoyment of their property?
3. Did the District Court misconstrue the specific grant of the easements by reading in an additional right to erode the shoreline?

STATEMENT OF THE CASE

I. NATURE OF THE CASE

The plaintiffs are a group of landowners with property on the shores of Flathead Lake or the southern banks of the Flathead River. They filed this action on behalf of themselves and a class of similarly-situated landowners against the Montana Power Company (“MPC”) on November 8, 1999 in the District Court of the Eleventh Judicial District in Flathead County. Docket No. 1. The plaintiffs alleged that MPC owned, operated and managed Kerr Dam, a hydroelectric dam located on the south shore of Flathead Lake near Polson, MT, in a manner that resulted in continuous erosion, property damage, and loss of shoreline on their lakefront and riverfront properties. *Id.*

In December 1999, a month after the plaintiffs filed this lawsuit, MPC sold its interest in Kerr Dam to PP&L Global, Inc., which assigned its interest to its subsidiary PPL Montana, LLC (“PPLM”), and on March 26, 2001, the District Court gave plaintiffs permission to add PPLM as an additional defendant in this case. Docket No. 15. MPC then underwent a series of corporate changes, and, as a result, the plaintiffs filed their Second Amended Complaint (Docket No. 67 and App. 23) naming three additional defendants: Touch America Holdings, Inc. (“Touch America”), Montana Power LLC, a/k/a NorthWestern Energy LLC, and NorthWestern Corporation (“NorthWestern”). Since then, both Touch America

and NorthWestern have filed for bankruptcy protection in the United States Bankruptcy Court for the District of Delaware. Docket Nos. 103, 118.¹

On March 26, 2001 and July 9, 2003, the District Court certified this case to proceed as a class action under Montana law and the Montana Rules of Civil Procedure as to all defendants. Docket Nos. 15, 99. The class consists of

All persons and entities (other than defendants and the Confederated Salish and Kootenai Tribe of the Flathead Reservation, Montana) that own real property with lake frontage on the shoreline of Flathead Lake in Flathead County and Lake County, Montana, and/or real property which contains a bank of the Flathead River located in Flathead County, Montana.

Id. No notice has yet been issued to the class.

In May and June 2003, in an effort to narrow the issues in the case, plaintiffs and filed a motion for summary judgment on the legal effect of easements that were obtained by the power company in the early years of the dam's operation. PPLM filed a cross-motion on the same issue shortly thereafter. Docket Nos. 86

¹ The plaintiffs have filed claims on behalf of the class in both the Touch America and NorthWestern bankruptcies. The trustee has objected to plaintiffs' claim in the Touch America bankruptcy based, in part, on the District Court's grant of summary judgment to all defendants in this matter. As such, the outcome of this appeal will, in part, determine the course of the Touch America claim. As for the NorthWestern claim, the plaintiffs reached a settlement agreement with the trustee in 2006 and the District Court granted preliminary approval of the settlement on July 17, 2006 (Docket No. 154), but it granted summary judgment to all defendants and thus extinguished the class' claim before the settlement could be finally approved. The outcome of this appeal will thus determine whether the NorthWestern settlement goes forward. Should this Court reverse and remand, neither bankruptcy proceeding will prevent plaintiffs' claims against PPLM from going forward.

and 90. The District Court heard oral argument on the easement issue on August 27, 2003 and took the matter under advisement. Fact discovery had not been completed at this time, and the parties had not yet submitted their final expert reports.

On February 19, 2004, the District Court allowed plaintiffs to submit additional evidence of damage that was continuously occurring on their properties (Docket Nos. 122-124). On August 11, 2005, the plaintiffs, concerned with the rapid pace at which their properties were eroding, filed a motion for a preliminary injunction, presenting both preexisting and new scientific evidence confirming that lowering the lake level earlier in the fall could substantially reduce or even halt the worst of the damage. Docket Nos. 130-134. Included in this evidence was an affidavit of their consultant, Dr. Mark Lorang, setting out his new findings regarding the lake level and shoreline erosion. Docket No. 133. The District Court denied plaintiffs' preliminary injunction motion on December 14, 2005. Docket No. 146.

On April 25, 2007, the District Court rendered its decision on the cross-motions for summary judgment, denying plaintiffs' motion and granting PPLM's motion. Docket No. 155 and App. 9 (Order). Finding that PPLM was permitted by the easements to take and damage plaintiffs' property and that there was no limit on its right to erode the lake shore, the District Court entered summary

judgment against the plaintiffs as to all defendants and rendered moot both plaintiffs' motion and another pending motion by PPLM regarding successor liability. *Id.* Plaintiffs now appeal the District Court's grant of summary judgment to PPLM and the other defendants.

II. STATEMENT OF FACTS

A. Flathead Lake and Kerr Dam

Flathead Lake, which covers 190 square miles, is the largest lake in Montana. It is 28 miles long and 15 miles wide. Docket No. 88, Ex. 5 at PPLM 33339-52. The lake is the site of Kerr Dam and its powerhouse, which are located on the lower Flathead River, approximately five miles south of Polson, MT. Docket No. 88, Ex. 7 at PPLM 30801-9.

Kerr Dam regulates the water level of Flathead Lake, which is fed by both snowmelt and releases from the Hungry Horse Dam located north of the lake. Docket No. 88, Ex. 6 at PPLM 59257-73; Ex. 7 at PPLM 30801-9. Prior to the dam's existence, Flathead Lake usually rose several feet from mid-April to early June due to runoff from the spring snowmelt. After reaching its height in June, the lake level would drop steadily during the summer to a base level where it would remain until the following spring. Docket No. 88, Ex. 9 at PPLM 51383-408.

Kerr Dam altered this natural process. Under current Kerr Dam operations, the lake level is allowed to rise throughout the spring and summer to an average

peak elevation some 3 to 4 feet above the natural high elevation. The high lake level is then maintained through early October. The level is lowered gradually over the winter to a point 2 to 3 feet above the pre-dam base level, when spring runoff begins the cycle anew. *Id.*

Until 1999, MPC owned the generators, transmission systems, and distribution systems at Kerr Dam. It provided electrical power for residents of the western two-thirds of Montana and portions of Wyoming. Docket No. 88, Ex. 10 at PPLM 00028-66. On December 17, 1999, shortly after this case was filed, MPC sold most of its hydroelectric generation assets, including its interest in Kerr Dam, to defendant PPLM. Docket No. 88, Ex. 11 at PPLM 62914-16.

B. Kerr Dam's Licensing History

In 1920, the Federal Power Commission (“FPC”) was authorized to grant power plant licenses on the Flathead Indian reservation in northwestern Montana. That year, the Rocky Mountain Power Company (“RMPC”), a MPC subsidiary, filed for a license to construct a dam on Flathead Lake. Docket No. 88, Ex. 12 at PPLM 00014-17. On May 23, 1930, the FPC issued a 50-year license to RMPC for the construction and operation of Kerr Dam. Docket No. 88, Ex. 13 at PPLM 12421-40 (FPC License). In 1932, the dam’s license was transferred to MPC. Docket No. 88, Ex. 8 at PPLM 30801-9. Construction of Kerr Dam began in 1930 and was completed in 1938 after an interruption due to the Depression. Docket No.

88, Ex. 12 at PPLM 00014-17. Kerr Dam began operating in 1939. Docket No. 88, Ex. 7 at PPLM 30801-9.

In 1980, Kerr Dam's initial 50-year license expired. MPC and the Confederated Salish and Kootenai Tribes ("Tribes") who live on the Flathead Indian reservation had applied for competing licenses in 1976, and the Federal Energy Regulatory Commission ("FERC"), which succeeded the FPC in 1977, set the matter for hearing in July 1983, granting successive one-year licenses to MPC in the interim. MPC and the Tribes then reached a settlement agreement in which they agreed to share the license: MPC would own and operate the dam for the first 30 years of the license, and the Tribes would have the option to transfer the project to themselves in the year 2015, for the last 20 years of the license. The FERC approved the settlement and a 50-year joint license was granted on July 17, 1985. Docket No. 88, Ex. 7 at PPLM 30801-9; Ex. 17 at PF 03414-35 (License). This is the license under which the dam is operated today. *Id.*

In 1999, MPC sold its interest in Kerr Dam to PPLM and the FERC transferred the Kerr Dam license from MPC to PP&L. PPLM has operated the dam continuously since that date. Docket No 88, Ex. 18 at PPLM 61340-470 (Asset Purchase Agreement); Docket No. 88, Ex. 11 at PPLM 62914-16 (License transfer order).

C. The Easements

The dam's license required the dam's operator to acquire easements on all lands impacted by the dam. Docket No. 88, Ex. 16 at PF 03400-12 (an update to all FERC licenses, including the Kerr Dam license, codifying the requirement that “[t]he Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands ... necessary or appropriate for the construction, maintenance, and operation of the project”).

In the early years of the dam's operation, MPC (or its predecessor, RMPC) undertook to secure flood easements on all properties affected by Kerr Dam. The power company purchased many of these easements from the landowners for the sum of \$1.00. Docket No. 88, Ex. 19 at PPLM 61678-79; Docket No. 88, Ex. 20 at PPLM 62468. On January 20, 1943, MPC affirmed that it had acquired the necessary easements to operate the dam by filing a “Revised Kerr Project License Exhibit F,” which listed all the easements acquired to date, and stated:

The Montana Power Company has acquired and is now the owner of those certain easements for flooding, sub-irrigating, draining or otherwise affecting with the waters of Flathead Lake and its tributaries, all or any part of the lands described therein which will or may be affected by the regulation or control of Flathead Lake by the construction, maintenance and operation of a dam and said hydroelectric power development in the Flathead River below said lake designed to control and regulate the said waters at varying elevations at said dam, not exceeding 2893 feet U.S.G.S. datum

Docket No. 88, Ex. 14 at PPLM 62167-99. When PP&L purchased MPC's interest in the dam in 1999, it bought all of MPC's real property, easements, and other rights in real property in Flathead and Lake Counties, MT. Docket No. 88, Ex. 23 at PPLM 15501-26.

There are two basic types of easements encumbering the plaintiffs' properties. The first, referred to by the parties as "Type A," was purchased by the power company from the landowners. Although there are variations in the language, the Type A easement grants the power company substantially as follows:

... the perpetual right and easement for flooding, subirrigating, draining, or otherwise affecting with the waters of Flathead Lake, and its tributaries, all or any part of the hereinafter described lands which will or may be affected by the regulation and control of the waters of Flathead Lake by the construction, maintenance and operation of a dam and hydroelectric power development in the Flathead River below said Lake designed to control and regulate the said waters at varying elevations at said dam, not exceeding 2893 feet, U.S.G.S. datum

Docket No. 88, Exs. 24-27.

The second basic type of easement, referred to by the parties as "Type B," was reserved by the power company when it sold its own shoreline property. The Type B easement granted the power company substantially as follows:

(a) the perpetual right and easement for flooding, subirrigating, draining, or otherwise affecting with the waters of Flathead Lake and its tributaries, all or any part of the herein-above described lands which [are,] will or may be affected by the regulation and control of the waters of Flathead Lake by the construction, maintenance and operation of a dam and hydroelectric power development in the

Flathead River below said Lake, which dam is designed to control and regulate the waters of Flathead Lake at varying elevations, not exceeding a maximum controlled water level of 2893 feet, U.S.G.S. datum, at said dam.

(b) the perpetual right and easement for the perpetual existence and maintenance of any dikes now upon said premises, designed or useful to protect said lands or other lands against flood waters and overflow, together with the perpetual right and easement in the Grantor, its successors and assigns, but without any obligation on its part so to do, and free from any claim of damages, to enter in and upon said premises at any and all times for the purpose of maintaining and improving any of such dikes, and constructing and maintaining thereon such other or additional dikes as the Grantor, its successors and assigns, may from time to time deem reasonably necessary to protect other lands in said vicinity against overflow, flood waters or seepage. The Grantee[s], their [his] heirs, successors and assigns, shall not injure, molest, destroy, or interfere with said dikes or the continued existence and maintenance thereof, but shall have the right at their [his] option and at their [his] own expense to keep and maintain said dikes in good condition and repair.

Docket No. 88, Ex 28. Each property at issue in this case is encumbered by an easement substantially similar to one of these types. Docket No. 88, Ex. 4.

Defendants produced 303 easements in discovery in this case. Docket No. 88, Ex. 4. Of these, 288 are Type A easements, 2 are Type B easements, and 13 are illegible or other forms of easements. Of the easements encumbering the named plaintiffs' properties, 15 are Type A easements and 9 are Type B easements.² *Id.* As of October 8, 1996, MPC possessed easements, deeds, or other

²One named plaintiff has a third type of easement stating "[a]nd there is also reserved an easement in, to and over all lands adjacent to or bordering on Flathead Lake, which lie below an

agreements regarding flood rights for at least 827 properties around Flathead Lake and the Flathead River. Docket No. 88, Ex. 22 at PPLM 55538-67.

D. The Lake Level

Under the terms of the license, Kerr Dam is to be operated in a manner that Flathead Lake does not exceed a maximum water level of 2893 feet above sea level. The original license placed no restrictions on the power company's ability to regulate the lake level as long as it did not exceed 2893 feet. Docket No. 88, Ex. 13 at Art. 23 (FPC License).

In May 1962, MPC entered into a Memorandum of Understanding with the U.S. Army Corps of Engineers regarding seasonal fluctuations of the lake level, and on February 24, 1966, the FERC entered an order approving the agreement (as amended in October 1965). The agreement and amendment provided, *inter alia*:

[C]onditions permitting, the lake will be drawn down to elevation 2883 feet, the minimum level under the license, by April 15th and will be raised to elevation 2890 feet by Memorial Day (May 30th) and to elevation 2893 feet, the maximum level under license, by June 15th.

Docket No. 88, Ex. 15 at PPLM 32613-19. There is no provision in the Memorandum (or any other part of the dam's license) prescribing how long the

elevation of nine feet above the high-water mark of said lake of the year nineteen hundred and nine, for uses and purposes connected with storage for irrigation or development of water power." Docket No. 88, Ex. 29.

lake must be kept at its maximum level of 2893 feet. *Id.*; Docket No. 88, Ex. 13 at Art. 23 (FPC License).

The power companies have historically maintained the lake level at full pool far into the fall storm season. Docket No. 112 and App. 41 (Affidavit of Dr. Paul Komar), ¶ 2. Although the license requires PPLM to maintain the lake level at or below 2893 feet (Docket No. 88, Ex. 17), Flathead Lake regularly exceeds 2893 feet at multiple locations around the lake even when the USGS gauge says that it is 2893 feet or lower. Docket No. 112 and App. 41 (Affidavit of Dr. Paul Komar), ¶ 4. The reasons for this discrepancy include the effects of wind and waves, which can create large differences in lake levels at various points around the lake. *Id.*

E. Erosion and Damage to Plaintiffs' Property

1. Plaintiffs' properties are being continuously eroded and damaged by the operation of Kerr Dam.

The shoreline of Flathead Lake and the Flathead River are continuously being eroded and damaged by the operation of Kerr Dam, a fact that the power companies themselves have known for many years. *See, e.g.*, Docket No. 134, Ex. 3 at PPLM 000028-66 (“Environmental Assessment”), a report prepared by the FERC on August 23, 1984 noting that “high level is a major causative factor in the gradual wasting away of the delta and nearby islands” and that “continued losses of the lake-held delta and islands would be unavoidable under continued current project operation.” *Id.* at PPLM 000043. *See also* Docket No. 88, Ex. 5 (“Flathead

Lake Shoreline Erosion Demonstration Project Final Evaluation Report”) at PPLM 33339, a 1993 report prepared by MPC itself as part of its obligations under the license noting that “[o]peration of Kerr Dam causes artificially high water levels to be maintained throughout the summer months. The shoreline is retreating at several locations Without intervention, wildlife habitats and developed lands such as the Eagle Bend golf course could be inundated within a few decades.” *Id.*

One of plaintiffs’ consultants in this case, Dr. Mark Lorang, a professor at the University of Montana’s Flathead Lake Biological Station, has been studying the rate of erosion on Flathead Lake and the Flathead River for over twenty years, and he has established longstanding study sites at various locations around the lake. Docket No. 124, ¶ 3. In a 1996 study prepared for Montana Power Company as part of their duties under the license, Dr. Lorang found that “severe end effects have accelerated shoreline erosion,” and that approximately one and a half acres of privately-owned land had eroded away in the area of his study in less than two years. Docket No. 125, Ex. A at PF 01916. In some areas, 40 feet of shoreline were lost in a single storm season. *Id.*

2. The continuing damage to plaintiffs’ properties is caused by PPLM’s decision to hold the lake level high into the fall storm season.

Research done as early as the 1980s showed that erosion around the lake is not simply due to the presence of the dam, but the way in which the dam is

operated to regulate lake levels. Docket No. 112 and App. 41 (Affidavit of Dr. Paul Komar), ¶ 2. By the mid 1990s, Dr. Mark Lorang and his colleagues at the University of Montana's Flathead Lake Biological Station had concluded that erosion and land loss were substantially caused by the power company's practice of keeping the lake level high during the fall storm season. *Id.*; *see also* Docket No. 126, Ex. A at PF 01916.

PPLM is under no obligation, whether regulatory or contractual, to hold the lake level high into the fall. Docket No. 88, Ex. 15 at PPLM 32613-19. Yet PPLM regularly maintains the lake at an artificially high level late into the fall, when the natural lake level would have been much lower. Docket No. 112 and App. 41 (Affidavit of Dr. Paul Komar), ¶ 2. Storms are stronger and cause more damage in the fall, and erosion is more severe during storms. *Id.* As a result, most of the damage to plaintiffs' property takes place in the fall when the lake is artificially held at or near 2893 feet. *Id.* (“[i]t is this combination of artificially high lake levels caused by the operation of Kerr Dam and the presence of higher waves during that season that has produced shoreline erosion and property damage”).

Documentation of the extent and cause of erosion around Flathead Lake's shoreline was well-established long before PPLM assumed operation of the dam in 1999. For example, in the 1993 report prepared by the power company to fulfill its license requirements, it acknowledged that the “[o]peration of Kerr Dam causes

artificially high water levels to be maintained throughout the summer months” and that “[t]he shoreline is retreating at several locations at the north end of the lake on both sides of the Flathead River in response to wind-generated waves at higher water surface elevation.” Docket No. 88, Ex. 5 at PPLM 33339.

SUMMARY OF ARGUMENT

First, the District Court erred in misconstruing the specific language of the easements, which restrict PPLM’s use to 2893 feet above sea level. Rather than crediting the actual terms of the grant, the District Court held that the limiting clause was merely descriptive and, as a result, that PPLM’s easement covers the entirety of plaintiffs’ property, not just the portion below 2893 feet. In so holding, the district court incorrectly relied on *Rutledge v. Union Electric Co.*, 280 S.W.2d 670 (Miss. 1955), which is both legally and factually dissimilar. Further, the District Court ignored plaintiffs’ evidence, which created a question of fact regarding the extent to which PPLM exceeded its grant of 2893 feet.

Second, the District Court erred in failing to hold PPLM to its duties to the servient estate under the Restatement (Third) of Property and Montana easement law. It further ignored plaintiffs’ evidence that PPLM caused unreasonable damage to their property and interfered unreasonably with their enjoyment of it. It also erred in holding that PPLM had no discretion to lower the lake level earlier in the fall. Plaintiffs’ evidence showed that PPLM knew when it assumed the license

to operate the dam that erosion was ongoing, yet remediable; that it had the authority to take steps to stop the damage; and that it failed to alter its operation of the dam to reduce the damage. Plaintiffs thus created a question of fact that should have defeated summary judgment.

Third, the District Court erred in misconstruing the specific language of the easements to permit the type of erosion that is taking place on Flathead Lake's shores. It erroneously read into the easements the right to cause any type of damage, and it improperly relied on *Carvin v. Arkansas Power and Light Company*, 14 F.3d 399 (8th Cir. 1993), which is neither controlling nor applicable here. For all these reasons, as explained more fully below, the District Court's decision should be reversed and remanded for further proceedings.

ARGUMENT

I. STANDARD OF REVIEW

This Court's review of a district court's grant of summary judgment is *de novo*, and this Court's evaluation is the same as that of the trial court. *Grimsrud v. Hagel*, 2005 MT 194, ¶ 14, 328 Mont. 142, 146, 119 P.3d 47, 50. Moreover, according to Rule 56, M.R.Civ.P., "[t]he moving party must establish both the absence of a genuine issue of material fact and entitlement to judgment as a matter of law." *Farmers Union Mut. Ins. Co. v. Staples*, 2004 MT 108, ¶ 18, 321 Mont.

99, 104, 90 P.3d 381, 384-385. The construction of an easement is a question of law. *Ophus v. Fritz*, 2000 MT 251, ¶ 19, 301 Mont. 447, 452, 11 P.3d 1192, 1195.

“Summary judgment is an extreme remedy that should never be a substitute for a trial on the merits if a controversy exists over a material fact.” *Anderson v. Stokes*, 2007 MT 166, ¶ 15, 338 Mont. 118, 125, 163 P.3d 1273, 1279. The nonmoving party may defeat a motion for summary judgment by offering facts to prove that a genuine issue of fact does exist. *Staples*, ¶ 18. All evidence must be viewed in the light most favorable to the non-moving party, and all reasonable inferences should be drawn in favor of the party opposing summary judgment. *Anderson*, ¶ 15.

II. INTRODUCTION

The right of “acquiring, possessing and protecting property” is guaranteed to all Montanans by the state’s Constitution. Art. II, § 3. Yet the decision below gave PPLM the perpetual right to remove the shoreline of Flathead Lake, foot by foot, even if, in the end, the plaintiffs’ entire property is gone, eroded away by the operation of Kerr Dam. The easements do not permit this result, and the District Court’s decision should be reversed.

In Part III below, plaintiffs first show that the District Court erred as a matter of law by disregarding the easements’ explicit limitation of a “maximum controlled elevation of 2893 feet.” In Part IV, plaintiffs show that that the District Court

erred by disregarding plaintiffs' evidence that PPLM unreasonably damaged plaintiffs' property and unreasonably interfered with their enjoyment of it. Finally, in Part V, plaintiffs show that the District Court erred as a matter of law by reading into the easements the right to erode plaintiffs' properties.³

III. THE DISTRICT COURT IMPERMISSIBLY EXPANDED THE SPECIFIC GRANT OF THE EASEMENTS BY DISREGARDING THE LANGUAGE RESTRICTING PPLM'S USE OF THE SERVIENT TENEMENT TO 2893 FEET ABOVE SEA LEVEL.

As this Court has stated many times, the breadth and scope of an easement are, as a matter of law, to be determined by the actual terms of the grant. *Anderson v. Stokes*, 2007 MT 166, ¶ 31, 338 Mont. 118, 130, 163 P.3d 1273, 1282. Where, as here, an easement is “specific in nature, the breadth and scope of the easement are strictly determined by its actual terms.” *Mason v. Garrison*, 2000 MT 78, ¶ 21, 299 Mont. 142, 147, 998 P.2d 531, 535; *Titeca v. State By and Through Dept. of Fish* (1981), 194 Mont. 209, 214, 634 P.2d 1156, 1159 (where an easement is “specific in its terms, it is decisive of the limits of the easement”). Montana statutory law requires application of the same principle: “the extent of a servitude

³The District Court opened its opinion with the error that “the parties do not contend that there are any disputes of fact.” Docket No. 155 and App. 9, p. 4. Although the parties cross-moved for summary judgment on the construction of the easements, plaintiffs contended that questions of fact existed regarding whether PPLM violated the terms of the easements (in Sections III and V) and whether it acted unreasonably (in Section IV).

is determined by the terms of the grant or the nature of the enjoyment by which it was acquired.” § 70-17-106, MCA.

In the initial inquiry, the Court must examine the actual terms of the grant. *Mary J. Baker Revocable Trust v. Cenex Harvest States, Cooperatives*, 2007 MT 159, ¶ 18, 338 Mont. 41, 164 P.3d 851, 857. The granting language of the easements here, in relevant part, gives PPLM

the perpetual right and easement for flooding, subirrigating, draining, or otherwise affecting with the waters of Flathead Lake and its tributaries, all or any part of the herein-above described lands which [are,] will or may be affected by the regulation and control of the waters of Flathead Lake by the construction, maintenance and operation of a dam and hydroelectric power development in the Flathead River below said Lake, which dam is designed to control and regulate the waters of Flathead Lake at varying elevations, **not exceeding a maximum controlled water level of 2893 feet, U.S.G.S. datum, at said dam.**⁴

Docket No. 88, Exs. 24-28 (emphasis added).

PPLM argued below, and the District Court held, that the phrase “not exceeding a maximum controlled water level of 2893, U.S.G.S. datum” was merely one of description, not limitation. Docket No. 155 and App. 9 (Order), p. 13. This is an error of law, which requires reversal.

⁴All of the easements at issue here, save a handful, contain the phrase “not exceeding a maximum controlled water level of 2893, U.S.G.S. datum,” either in the granting clause or in an earlier “wherefore” clause. See Docket No. 88, Exs. 24-28 and Statement of Facts, § II.C. above.

There is a rich case law on the construction of flood easements, dating back to 19th century cases dealing with mill ponds, holding that “[t]he general rule is that the height of the dam, when in good condition and repair, fixes the extent of the right to the flow.” *Haigh v. Lenfesty*, 239 Ill. 227, 234, 87 N.E. 962 (1909) (citing *Gould on Waters* § 344 (3rd ed.)). See also *Binkley v. Rabon Creek Watershed Conservation Dist.*, 348 S.C. 58, 69, 558 S.E.2d 902, 907 (2002) (“easements for flowage are customarily described in terms of elevation, contour lines, and or acreage”) (cases collected).

Montana law is clear that, as with any contract, *all* the words in an easement are to be acknowledged, and it must be read as a whole to “give effect to every part if reasonably practicable.” *Anderson*, ¶ 33; § 28-3-202, MCA. This Court recently cautioned that in construing an easement, “the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, **not to insert what has been omitted or to omit what has been inserted.**” *Mary J. Baker Revocable Trust*, 2007 ¶ 30 (emphasis added). As such, the explicit reference to the “maximum controlled water level of 2893” cannot be read as mere words of description and not of limitation.

Rutledge v. Union Electric Co., 280 S.W.2d 670 (Miss. 1955), relied on by the court below, is neither on point nor correctly decided. The *Rutledge* court incorrectly held that the language referring to the height of the dam was merely

descriptive because it was in a separate sentence. This result is inapplicable to Montana law, § 28-3-303, MCA, which requires “[t]he whole of a contract ... to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other.” *See Anderson*, ¶ 36 (in interpreting an easement, “the court will not isolate certain phrases ... but will grasp the instrument by its four corners”), *citing Rumph v. Dale Edwards, Inc.* (1979), 83 Mont. 359, 368-69, 600 P.2d 163, 168-69.

Moreover, the easement in *Rutledge* differed significantly from those here.

Its granting language allowed the power company:

To back water over or under, submerge, flood or **otherwise damage** said tracts or parcels of land through backwater or otherwise, whether caused by flooding, erosion, seepage ground water, lack of drainage, obstructed drainage, or in any manner whatever, resulting from the construction, operation and maintenance of the dam Said dam, power house and works appurtenant thereto shall be designed to hold the water level at the dam at **approximately** 660 feet above mean sea level”

Id. at 671 (emphasis added). Thus, the terms of the grant in *Rutledge* placed the water level not in the context of the extent of the easement, but in a description of the dam.

Here, by contrast, the specific language limits the lands covered by the easements to that directly affected by the dam’s regulation of the lake level. The easements incorporate the word “control” three times in the portion describing the extent of the land covered, referring to land “which will or may be affected by the

regulation and *control*” of the Lake’s waters by the operation of the dam and “which dam is designed to *control* and regulate” the Lake’s waters “at varying elevations, not exceeding a maximum *controlled* water level of 2893, U.S.G.S. datum” Docket No. 88, Exs. 24-28 and App. 30 (forms of easements). As such, because the extent of an easement is determined at the time of its grant (*Guthrie v. Hardy*, 2001 MT 122, ¶ 48, 305 Mont. 367, 378, 28 P.3d 467, 475 (“no use may be made of a right-of-way different from the use established at the time of the creation of the easement so as to burden the servient estate to a greater extent than was contemplated at the time the easement was created”)), the easements here extended only to those lands within the 2893-foot area of the dam’s control.

Rutledge also differs from the present case in other significant ways. The easement there had a specific damage waiver granting the power company the right to “otherwise damage” the lands; the easements here do not. The easements here are specific as to the maximum “controlled” height of the dam, or 2893 feet; the *Rutledge* easement contains the general term “approximately 660 feet.” Finally, the *Rutledge* court based its conclusion on the normal level of the lake in question: “[w]e cannot agree with plaintiffs that the second sentence of paragraph (a) should be construed to read that the dam had been designed to hold the lake's water level to a *maximum* elevation of approximately 660 feet. It is our view that the ‘approximately 660 feet’ reference is to *normal* lake level.” *Rutledge*, 280 S.W.2d

at 674. No such assertion can be made here, where Flathead Lake fluctuated widely under natural conditions prior to the construction of Kerr Dam. Docket No. 112 and App. 41 (Affidavit of Dr. Paul Komar), ¶ 2.

The only intelligible way to define the scope of the easements here is by reference to a contour line at 2893 feet. A landowner granting the easement could look at a contour map and by identifying the lands above 2893 feet could determine how much land would be affected by the dam's operations. Above that line, the landowner could be confident that he or she would be safe from invasion. The reading given the easement by the court below results in the landowner granting PPLM an open-ended and unlimited right to a continuous, ever-expanding taking, without limitation, that may far exceed the original 2893-foot contour line that the landowner originally bargained for. This is not permitted under Montana easement law, where “[a] contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting” Section 28-3-301, MCA.

Plaintiffs presented evidence below that the since PPLM acquired the dam, the shoreline of the lake has eroded, and, thus, the lake has expanded, resulting in an impermissible expansion of the easements. Docket No. 112 and App. 41 (Affidavit of Dr. Paul Komar), ¶¶ 2, 4; Docket No. 125, Ex. A at PF 01916. In addition, the record shows that since PPLM's acquisition, the water level at

numerous points on the shoreline is often significantly higher than 2893 feet. Docket No. 112 (Affidavit of Dr. Paul Komar), ¶ 4. Plaintiffs thus created a question of fact as to what damages were caused by lake levels above the 2893-foot contour line. As such, summary judgment must be vacated and the matter remanded for a determination of whether and to what extent the 2893-foot contour line has been exceeded by PPLM's operation of the dam.

IV. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO PPLM BY DISREGARDING PLAINTIFFS' EVIDENCE THAT PPLM CAUSED UNREASONABLE DAMAGE TO AND UNREASONABLY INTERFERED WITH THE ENJOYMENT OF THEIR PROPERTY.

Even if the "maximum controlled elevation of 2893 feet" were properly read out of the easement (which it was not), the court below erred as a matter of law when it held that PPLM owed no duty to the plaintiffs to refrain from damaging their property unnecessarily. Docket No. 155 and App. 9, pp. 10-11. Plaintiffs presented evidence below that PPLM's decision to maintain the lake level at maximum height well into the fall storm season caused unreasonable and unnecessary damage to plaintiffs' property. Docket No. 112 (Affidavit of Dr. Paul Komar), ¶ 2 ("Dr. Lorang's research further demonstrated that Kerr Dam's operation could be altered in such a way that the shoreline erosion and property losses would effectively be halted"). Plaintiffs further showed that PPLM knew this from the day it purchased the dam in 1999, yet it nonetheless continued to

operate the dam in the same manner. *See, e.g.*, Docket No. 88, Ex. 5 at PPLM 33339.

Nonetheless, the District Court held that PPLM owed no duty to the plaintiffs to minimize the damage to their properties, and, alternatively, it held that plaintiffs failed to submit any evidence that PPLM acted negligently. *Id.* In both holdings, the District Court is incorrect: the first as a matter of law, and the second as a matter of fact.

A. PPLM had a duty to prevent unreasonable damage to and avoid unreasonable interference with the plaintiffs' property.

The Restatement of Property requires that the owner of an easement preserve the subject property unless the easement explicitly states otherwise:

Unless authorized by the terms of the servitude, the holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.

Restatement (Third) of Property (Servitudes) § 4.10 (2000). The Comments to this section further explain:

[T]he servitude owner is not entitled to cause any greater damage than that contemplated by the parties, or reasonably necessary to accomplish the purposes of the servitude. Unless clearly contemplated by the parties, it is not assumed that the servient owner intends to permit the easement owner to remove existing structures or terminate existing uses of the servient estate.

Id. at Comment g.

Montana law has adopted the Restatement of Property's position on servitudes. *Leichtfuss v. Dabney*, 2005 MT 271, ¶ 30, 329 Mont. 129, 138, 122 P.3d 1220, 1227. *See also Walsh v. U.S.*, 672 F.2d 746, 748 (9th Cir. 1982) (“the law also imposes upon the owner of the easement the duty for the benefit of the owner of the servient tenement to so maintain and repair the easement as to prevent unreasonable interference with the use of the servient tenement”). “This Court disfavors summary disposition of claims governed by a standard of ‘reasonableness’ when the surrounding facts remain in dispute.” *Walters v. Getter* (1988), 232 Mont. 196, 200-01, 755 P.2d 574, 577.

The District Court, rejecting the Restatement and controlling case law, refused to conduct the required inquiry, stating that “extrinsic evidence is irrelevant when the scope of the easement is specifically defined.” Docket No. 155 and App. 9 (Order), p. 11. This is an error of law: the requirement to abstain from unnecessarily damaging the servient estate is not a question of interpreting the scope of the easement – rather, it is an independent requirement that applies to all easement holders. *Walsh*, 672 F.2d at 748; *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1241 (Colo. 1998) (even where grantor erects roadway within express terms of easement, it may still be liable separately for unreasonable use of that easement; extrinsic evidence admissible to prove unreasonableness).

B. The District Court erred in holding that plaintiffs presented no evidence of negligence on the part of PPLM.

Alternatively, the court below erroneously concluded that plaintiffs failed to produce any evidence that PPLM operated the dam negligently. Docket No. 155 and App. 9 (Order), pp. 7, 10.

In fact, plaintiffs presented evidence below showing that PPLM knew, at the time it assumed the license to operate the dam, that erosion was an ongoing, yet remediable, problem. Docket No. 112 and App. 41 (Affidavit of Dr. Paul Komar); Docket No. 88, Ex. 5 at PPLM 33339. PPLM presented no evidence to the contrary below; plaintiffs thus created a triable issue of fact regarding whether PPLM complied with its duties. However, believing it was still in contract-interpretation mode and refusing to consider any “extrinsic evidence,” the District Court merely reiterated its holding that PPLM was acting within the scope of the easements and, as such, “had no duty to repair or maintain the Plaintiffs’ servient property.” Docket No. 155 and App. 9 at p. 11.

Courts routinely examine evidence regarding use of an easement in order to determine whether an easement holder has violated its duty to avoid unreasonable damage to and unreasonable burdens on the servient property. For example, in *Peterson v. Town of Oxford*, 189 Conn. 740, 747, 459 A.2d 100, 103 (Conn. 1983), the court, noting that the question of reasonableness was for the trier of fact, sustained evidence that a town’s use of its drainage easement exceeded its intended scope because increased flow of water was causing erosion to property owners’

land. In affirming an award of damages, the court affirmed the lower court's finding that the increased flow was foreseeable, and that town could easily have prevented the erosion to property owners' land. *Id.* Similarly, in *Anne Arundel Co. v. Litz*, 45 Md. App. 186, 193, 412 A.2d 1256, 1260 (Md. App. 1980), the court held that a grant for use of the waters of a lake did not encompass the damage that occurred to plaintiffs' property: "[t]here are several possible uses of the waters of a lake but dumping silt onto the lake bottom is not one of them. An easement is a right of use and *cannot be construed to permit such destruction of the underlying fee of the servient estate* as is shown by the evidence." *Id.* (Emphasis added.)⁵

The Restatement's Comment h also directs courts to review the "purpose for which the servitude was created and the use of the servient estate made or reasonably contemplated at the time the easement was created." *Id.* Here, plaintiffs presented evidence ignored by the court below showing that the parties never contemplated that their entire properties might be eroded away. Docket No.

⁵*See also Fedder v. Component Structures Corp.*, 23 Md. App. 375, 386, 329 A.2d 56, 63 (Md. App. 1974) (easement owner who was building a roadway on the easement was liable for damage caused by surface water drainage across the servient land because the construction "set in motion the forces of destruction"); *Fradkin v. Northshore Utility Dist.*, 96 Wash. App. 118, 123-26, 977 P.2d 1265, 1268-70 (1999) (even if "easement grant[ed] permission to install the sewer line on" servient estate, utility may be liable for continuing trespass by overburdening estate where project left surface land in "bog-like condition").

100, Ex. B (Testimony of Frank Kerr); Docket No. 112 and App. 41 (Affidavit of Dr. Paul Komar), ¶ 3.

As such, plaintiffs, at a minimum, created a question of fact as to whether PPLM's conduct was unreasonable, thus subjecting it to liability, and the District Court's grant of summary judgment to PPLM should be reversed. *Staples*, ¶ 18.

C. The District Court erred in finding that PPLM had no control over the lake level.

The District Court also erroneously found that PPLM could not have been negligent because “the level of the lake is not subject to Defendants’ volitional control.” Docket No. 155 and App. 9 (Order), p. 7. On the contrary, the record is clear that PPLM had discretion to lower the lake earlier in the fall storm season. Its only restriction is found in the Memorandum of Understanding from May 1962, which requires the lake to be drawn down to 2883 feet by April 15, raised to 2890 feet by May 30, raised to 2893 feet, the maximum level under license, by June 15 of each year. Docket No. 88, Ex. 15 at PPLM 32613-19. There is no provision in the Memorandum (or any other part of the dam’s license) prescribing how long the lake must be kept at full pool of 2893 feet. *Id.*

In sum, the District Court erred in holding that PPLM need not operate the dam as to avoid unreasonable damage to or unreasonable interference with the enjoyment of plaintiffs’ property. It also ignored the evidence offered by plaintiffs as “extrinsic” and erroneously held that PPLM had no authority to alter the lake

level to reduce the damage to plaintiffs' property. Questions of fact abound regarding whether PPLM violated its duty to the plaintiffs, and, as such, the decision below should be reversed and remanded for further proceedings. *Lazy Dog Ranch*, 965 P.2d at 1241.

V. THE DISTRICT COURT MISCONSTRUED THE SPECIFIC GRANT OF THE EASEMENTS BY READING IN AN ADDITIONAL RIGHT TO ERODE THE SHORELINE.

Finally, even if the District Court were correct in disregarding the limitation of 2893 feet, and in failing to evaluate plaintiffs' evidence of PPLM's unreasonable damage and interference with their enjoyment of their property, the instant easement does not cover the erosion that has occurred and continues to occur here.

A. The District Court erroneously construed the easements to permit PPLM to cause any type of damage.

As noted in Part III above, the Court's first inquiry when evaluating an easement is to examine the actual terms of the grant. *Mary J. Baker Revocable Trust*, ¶ 18. The granting language of the easements here, in relevant part, gives PPLM "the perpetual right and easement for flooding, subirrigating, draining, or otherwise affecting" the land subject to the easement. Docket No. 88, Exs. 24-28 and App. 30 (forms of easements). The word "erosion" does not appear in the terms of the grant.

In construing an easement, a court cannot “insert what has been omitted or to omit what has been inserted.” *Mary J. Baker Revocable Trust*, ¶ 30. The power company could have granted itself the right to erode and take plaintiffs’ property – other dam operators during the same time period did. For example, in *Rutledge*, 280 S.W.2d at 671, the flood easement specifically granted the right to erode and damage the servient property, stating that the power company could “submerge, flood or **otherwise damage** said ... land ... whether caused by flooding, erosion, seepage ground water” (Emphasis added.) *See also San Diego County v. California Water & Tel Co.*, 30 Cal.2d 817, 819, 186 P.2d 124, 127 (1947) (1938 flood easement exculpated power company from “any and all damages of any kind ... connected with inundation of the property”); *Conlon v. City of Dickinson*, 72 N.D. 190, 196, 5 N.W.2d 411, 413 (1942) (1934 flood easement waived “any right of action” against municipality for its use of the easement); *Bistline v. U.S.*, 640 F.2d 1270, 1272-73 (9th Cir. 1981) (1952 easement for dam flooding released the U.S. “from all claims for damages”).

And the power company clearly knew how to draft a prospective damage waiver, since such a waiver is *actually found* in another section of the easements regarding the maintenance of dikes, granting

the perpetual right and easement for the perpetual existence and maintenance of any dikes now upon said premises, designed or useful to protect said lands or other lands against flood waters and overflow, together with the perpetual right and easement in the Grantor, its

successors and assigns, but without any obligation on its part so to do, and **free from any claim of damages**

Docket No. 88, Exs. 24-28 (emphasis added).

It is against this background that the court below erroneously held that the easements permitted every kind of damage to the property. It reasoned that that PPLM is entitled to cause any type and quantity of damage to the shores of Flathead Lake following from its operation of the dam, since “the Flood Easements do not need to specifically mention every type of damage that may occur to Plaintiffs’ properties.” Docket No. 155 and App. 9 (Order), p. 6. Citing *Laden v. Atekson* (1941), 112 Mont. 302, 116 P.2d 881, the District Court observed that along with the rights explicitly granted by an easement go those rights “incident” to them. In this, the District Court then made what appears to be a finding of fact that the damage to plaintiffs’ properties is a consequence of flooding, and that, as a result, PPLM was acting with the scope of its grant by taking and eroding plaintiffs’ properties. Docket No. 155 and App. 9 (Order), p. 7.

PPLM itself had, in the proceedings below, invoked the United States Geological Survey’s definition of “flood erosion” as “the process by which flood waters lower the ground surface in an area by removing upper layers of soil.” Docket No. 105, Att. G and App. 34 (USGS definitions). But the same USGS definitions distinguish “flood erosion” from “bank erosion” and “beach erosion.” The USGS defines “bank erosion” as the “[d]estruction of land areas bordering

rivers or water bodies by the cutting or wearing *action of waves* or flowing water” (emphasis added), and “beach erosion” as “[t]he retrogression of the shore line of large lakes and coastal waters caused by wave action, shore currents, or natural causes other than subsidence.” *Id.*

Plaintiffs introduced evidence below that *bank and beach erosion* damaged their properties, not flood erosion. Docket No. 112 and App. 41 (Affidavit of Dr. Paul Komar), ¶¶ 2-4. Plaintiffs’ evidence showed that under pre-dam conditions, the lake receded long before the fall storms, but under PPLM’s operation of the dam, the lake level remains at or near full pool in the fall when the storms begin. The resulting increase in wave action causes the continuing erosion that is eating away plaintiffs’ properties, as wind and waves from the storms combine with the unnaturally-high lake to result in permanent and continuing disappearance of shore frontage. Docket No. 112 and App. 41 (Affidavit of Dr. Paul Komar), ¶ 2.

Plaintiffs’ evidence thus showed that simply flooding the land, which PPLM is granted under the easement, is not the cause of the massive damage to plaintiffs’ properties; at a minimum, plaintiffs have raised a question of fact as to the kind and causes of the erosion damage at issue here. Indeed, after the fall storm season that followed the summary judgment hearing, plaintiffs submitted as additional evidence a video of an October storm on Flathead Lake that documented in dramatic fashion that wave action at full pool – not flooding – was responsible for

the beach and bank erosion at issue. Docket Nos. 123-124. The District Court ignored this evidence as well.

B. *Carvin* does not control the outcome of this case.

The District Court relied heavily, instead, on an Eighth Circuit decision, *Carvin v. Arkansas Power and Light Company*, 14 F.3d 399 (8th Cir. 1993). Docket No. 155 and App. 9 (Order), pp. 6-9. *Carvin* is neither controlling nor persuasive and should not bind the Court here. First, the facts of the two cases are entirely dissimilar. *Carvin* involved heavy rains that caused massive flooding and severe damage to the plaintiffs' property after the power company, which operated three dams in the area, opened one dam to prevent flooding at another. *Id.* at 402. The power company had flood easements on the plaintiffs' property that expressly absolved it from any damages caused by the operation of the dams. *Id.* The landowners sued for negligence. Construing Arkansas law, the Eighth Circuit held that the power company's flood easements allowed it to flood the plaintiffs' properties, and, as such it was not negligent in doing so. *Id.* at 405-406. Here, plaintiffs allege not that PPLM acted within the scope of its flood easement by flooding their property, but that it operated the dam as to cause unnecessary erosion.

Carvin is also inapposite because the easements there contained explicit damage waivers stating that the power company was "not be subject to damages on

account of floods from natural or other causes.” *Id.* at 402. Here, there are no damage waivers; PPLM’s activities are confined to the scope of the grant, which does not cover the taking and damage that are occurring daily.

Finally, *Carvin* is a tentatively-reasoned decision in which the court itself worried about whether it had held correctly: “[w]e have pondered carefully the possibility of a decision contrary to that we now reach ... The issues in this case are extremely close. The loss of property is most substantial and the result seems harsh.” *Id.* at 406. Prior to *Carvin*, Arkansas case law confined easement owners to reasonable use of their easements, as Montana does now. *Bean v. Johnson*, 649 S.W.2d 171, 172 (Ark. 1983) (“[w]hen an easement exists, the rights of both parties are reciprocal, and respective owners must use the easement in a manner that will not interfere with the other’s rights to utilization and enjoyment of the property”). The *Carvin* Court simply dismissed this and other state precedent based on factual dissimilarities rather than a reasoned analysis. For these reasons, *Carvin* has nothing to offer a Montana court construing Montana law in a dissimilar factual setting. It should be disregarded.⁶

⁶The court below also cited *Jeffers v. Montana Power Company* (1923), 68 Mont. 114, 217 P. 652, which did not involve an easement at all, but, rather, a claim by a landowner downstream from a dam that negligent operation of the dam had injured his property. *Jeffers*’ holding sheds no light on the issue of whether erosion is permitted under the easements here – it merely held that the dam operator must exercise ordinary care in the operation of the dam.

C. The phrase “otherwise affecting” does not permit the damage caused by PPLM’s operation of the dam.

The easements also contain the phrase “otherwise affecting,” which the District Court held to provide an additional basis for protecting PPLM from liability. Docket No. 155 and App. 9 (Order), p. 7. However, as explained by this Court in *In re Donovan* (1976), 169 Mont. 278, 282, 546 P.2d 512, 514, the doctrine of construction known as *ejusdem generis* holds that “where an enumeration of specific things is followed by some more general word or phrase, such general phrase is held to refer to things of the same kind as those enumerated.” *See also Circuit City v. Adams*, 532 U.S. 105, 115 (2001) (“the general words are construed to embrace only objects similar in nature”).

Plaintiffs presented evidence, discussed above, showing that the damage here is not caused by flooding, but by wind and waves impacting the shoreline of Flathead Lake during the fall storm season. Docket No. 112 and App. 41 (Affidavit of Dr. Paul Komar), ¶ 2. The District Court ignored this, opting instead to rely on a general definition of “erosion” found in Webster’s 3rd International Dictionary. Docket No. 155 and App. 9 (Order), p. 6. But, as discussed above, specialized sources like the USGS distinguish between different types of erosion with different causes and effects. These distinctions were known in the 1930s when the easements at were written: *Bowyer’s Law Dictionary* defines “erosion” as “the gradual eating away of the soil by the operation of currents or tides.” *Id.* at

361 (Baldwin Ed. 1931). Interestingly, *Bouvier* then goes on to distinguish this from “submergence,” noting that “[t]he one consists of a gradual eating away of the soil by the operation of currents and tides, and the other of its disappearance under the water” *Id.* at 361-62.

In sum, the District Court erred as a matter of law in holding that the specific grant of the easements permits the erosion at issue here, and it further erred in its factual determination that the damage to plaintiffs’ properties was a necessary consequence of flooding. As such, its grant of summary judgment must be reversed.

CONCLUSION

Under the District Court’s decision, PPLM currently has the right to expand its easements indefinitely. As long as PPLM holds the license to operate Kerr Dam, Flathead Lake’s shoreline will continue to erode unchecked, and the plaintiffs will have no recourse in either the specific language of their easements or the protection of Montana law. For all the foregoing reasons, this result must be corrected. The plaintiffs respectfully request that this Court reverse the District Court’s grant of summary judgment to all defendants and order that the case be remanded to the District Court for further proceedings.

Respectfully submitted this 13th day of September, 2007.

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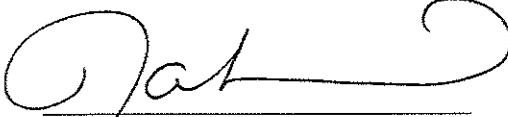
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this brief is printed in proportionally-spaced, 14-point Times New Roman font. This brief is double-spaced except for footnotes and quoted and intended material, and the word count calculated by Microsoft Office Word 2007 is 9,607 words, excluding the Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendix.



Jamie S. Franklin

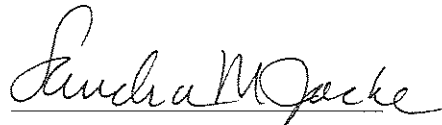
CERTIFICATE OF SERVICE

I, the undersigned, certify that on September 13, 2007, I had a true and correct copy of the foregoing document, **APPELLANTS' BRIEF**, served by U.S. Mail, postage prepaid, on the following:

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