

1 Ted O. Lympus, District Judge  
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6 IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT OF  
THE STATE OF MONTANA, IN AND FOR THE COUNTY OF FLATHEAD

7 \* \* \* \* \*

8 REBECCA E. MATTSON, SLITERS, )  
NORTH FLATHEAD LAKE YACHT CLUB, ) Cause No. DV-99-548 (A)  
9 J. MICHAEL DOCKSTADER, RAY J. HABEL, )  
GREG R. HABEL, WILLIAM G. BOWD, ) ORDER AND RATIONALE  
PAUL & MARY SULLIVAN, RANDA J. MCALPIN ) ON PLAINTIFFS' MOTION  
10 NEIL R. MCALPIN, PETE C. WOLL, ) FOR PARTIAL SUMMARY  
LOYD FOSTER, G.W. INGHAM II, ) JUDGMENT AND ON MOTION  
11 BENJAMIN W. LOUDEN, L. HARRY WOLL, ) FOR SUMMARY JUDGMENT BY  
KENNETH D. LOUDEN, MICHAEL O. ) PPL MONTANA, LLC,  
12 SPECKERT, STEVEN SPECKERT, SUSIE )  
SPECKERT, HECTOR SPECKERT, JOHN )  
13 DOES 1-500, JANE DOES 1-500, )  
ABC CORPORATIONS 1-500, )  
14 XYZ PARTNERSHIPS 1-500, DEF )  
LIMITED LIABILITY COMPANIES 1-500, and )  
15 all other parties similarly situated, )  
et al., )  
16 )  
Plaintiffs, )  
17 -vs- )  
18 MONTANA POWER COMPANY, a Montana )  
Corporation, and PPL MONTANA, LLC, a )  
19 Delaware Limited Liability Company, )  
TOUCH AMERICA HOLDINGS, INC., a Delaware )  
20 Corporation, MONTANA POWER, LLC a/k/a )  
NORTHWESTERN ENERGY, a South Dakota )  
21 Limited Liability Company, and )  
NORTHWESTERN CORPORATION, a South Dakota )  
22 Corporation, )  
23 Defendants. )  
\* \* \* \* \*

COPY

24  
25 This matter is before the Court on Plaintiffs' Motion for Partial  
26 Summary Judgment, to dismiss the defense raised by PPL Montana, LLC,  
27 that the action is barred due to easements held by the various  
28 defendants, and PPL Montana's Motion for Summary Judgment on that same  
issue. The matters are fully briefed and the Court held argument on  
the motions on August 27, 2003. At the hearing, Plaintiffs were  
represented by Calvin T. Christian, Edward Janecek, III, Larry M.

1 Elison, Thomas R. Meites, Michael M. Mulder, and Jamie Franklin.  
2 Northwestern Energy, Northwestern Corporation, and Montana Power  
3 Company ("MPC") were represented by Terry MacDonald. PPL Montana, LLC  
4 ("PPLM") was represented by Martin King and Sean Morris. The matters  
5 are now ready for ruling. The Court, having reviewed all prior  
6 pleadings and orders entered herein, together with the present motions,  
7 supporting and opposing briefs, affidavits, and documentation, and  
8 supplemental argument and affidavits, and thereby being advised in the  
9 premises, now enters the following:

10  
11 ORDER

- 12 1. PPL Montana's Motion for Summary Judgment is Granted.
- 13 2. Plaintiffs' Motion for Partial Summary Judgment is Denied.
- 14 3. Based on the Court's ruling herein, PPL Montana's Motion for  
15 Partial Summary Judgment for Successor Liability is rendered moot.
- 16 4. As Plaintiffs' claims against the other Defendants is  
17 predicated on the same theories as Plaintiffs' claims against PPL  
18 Montana, the Court grants summary judgment to all Defendants.

19  
20 RATIONALE

21 I. FACTUAL BACKGROUND

22 Plaintiffs filed the present suit on November 8, 1999. On March  
23 26, 2001, the Court granted Plaintiffs' motion to certify the class as  
24 to MPC. On July 9, 2003, the Court granted Plaintiffs' motion to  
25 certify the class against PPL Montana, (hereinafter PPLM), and on  
26 August 27, 2003, the Court granted Plaintiffs' motion to certify the  
27 class against the remaining Defendants. The Plaintiff Class consists  
28 of landowners who own riparian property on Flathead Lake or the  
Flathead River in Flathead County.

In their Second Amended Complaint, Plaintiffs allege Defendants  
damaged their riparian properties through the operation of Kerr Dam.  
The Plaintiffs contend that Defendants, by their operation of Kerr Dam,  
have caused and continue to cause erosion damages to their land by  
causing the lake level to remain higher, than if no dam were in place,  
for a longer period of the year. Plaintiffs argue that essentially, by  
virtue of the higher lake level, the storms occurring in the Fall cause  
more wave action to affect a larger amount of riparian land than if no  
dam existed.

All parties agree that Flathead Lake's water elevation is mandated  
by Kerr Dam's Federal Energy Regulatory Commission ("FERC") License  
("the License"). The License, which incorporates a Memorandum of  
Understanding with the United States Corps of Engineers, requires that  
the level of the Lake reach certain water elevations at certain

1 specific times of the year. Conditions permitting, the Lake will  
2 annually be drawn down to elevation 2883 feet above sea level (fasl),  
3 the minimum level under the license, by April 15th and will be raised  
4 to elevation 2890 fasl by Memorial Day and to elevation 2893 fasl, (the  
5 maximum level under license) by June 15th. Further, at certain times  
6 and under certain conditions, the outflow of Kerr Dam is regulated by  
7 the Department of Interior. Defendants have operated Kerr Dam in  
8 substantially this method since 1937 and under the specific terms of  
9 the Memorandum of Understanding since 1962.

10 In the Second Amended Complaint, Plaintiffs allege four causes of  
11 action: (1) trespass, (2) nuisance, (3) inverse condemnation, and (4)  
12 breach of the flood easements. Based on these causes of action,  
13 Plaintiffs have claimed damages due to "irreparable wave, flooding,  
14 sub-irrigation, and other action eroding and otherwise damaging,  
15 destroying and taking this property."

16 All Defendants in this action have asserted an affirmative defense  
17 that Plaintiffs' claims for damages to their properties as a result of  
18 the Defendants' respective operations of Kerr Dam are precluded by  
19 easements obtained by Defendants and their predecessors ("the Flood  
20 Easements"). The parties agree that these easements come in a variety  
21 of forms including reservations in deeds, specific easement grants,  
22 state forms, and the like. However, all of the forms have the same  
23 general grant of flood right allowing Defendants:

24 the perpetual right and easement for flooding, sub-irrigating,  
25 draining or otherwise affecting with the waters of Flathead Lake  
26 and its tributaries. . . all or any part of the herein-above  
27 described land. . . .

28 At oral argument, Plaintiffs agreed that the Flood Easements were  
properly created prior to the purchase of their respective properties,  
and, where necessary, the easements were recorded, that the Flood  
Easements burden their respective properties, and that the benefits of  
the Flood Easements run with Kerr Dam. Kerr Dam was formerly owned by  
MPC and, since 1999, is owned by PPLM. Moreover, significant to ruling  
on the cross-motions for summary judgment, Plaintiffs do not contend  
that the Flood Easements are ambiguous.

The parties also agree that the Flood Easements were obtained by  
PPLM's predecessors in title, Rocky Mountain Power Company ("RMPC") and  
MPC. RMPC and MPC obtained the Flood Easements from 1936 through 1955  
as a result of either voluntary conveyance or condemnation actions.  
There is unrefuted evidence that RMPC and MPC paid significant amounts  
of money to the respective previous landowners when condemning or  
obtaining the properties. Defendants sold those various parcels  
subject to the flood easements. PPLM notes that Kerr Dam began  
operating in 1938, i.e., before the majority of Flood Easements were  
conveyed. In fact, all of the named Plaintiffs' easements were  
obtained after the dam began operating. Thus, at the time the majority  
of the Flood Easements were executed, the dam had been operating and  
allegedly causing damage to properties on Flathead Lake and the  
Flathead River.

1 II. SUMMARY JUDGMENT

2 Pursuant to Rule 56, M.R.Civ.P., summary judgment is proper if  
3 there are no issues of material fact and the party requesting summary  
4 judgment is entitled to judgment as a matter of law. *Groschelle v.*  
5 *Reid* (1995), 270 Mont. 443, 893 P.2d 314. With the exception of  
6 Plaintiffs' reliance on extrinsic evidence, the parties do not contend  
7 there are any disputes of fact. In addition, the scope of an easement  
8 is a question of law. *Mularoni v. Bing*, 2001 MT 215, ¶ 32, 306 Mont.  
9 405, 34 P.3d 497. As an issue of law, it is proper to decide these  
10 issues at summary judgment.

11 III. SERVITUDES AND THE FLOOD EASEMENTS

12 It is well settled law in Montana that servitudes attach to the  
13 land. Section 70-17-101, M.C.A. A servitude or burden that attaches  
14 to other land as an incident or appurtenance is called an easement.  
15 *Id.* Montana, by statute, specifically recognizes and authorizes  
16 easements granting the right to flood the lands of another. Section  
17 70-17-101(10), M.C.A. In Montana, an easement is a nonpossessory  
18 interest in land imposing a burden upon the land which grants one  
19 person the right to use the land of another for a specific purpose,  
20 such as flooding. *Ruana v. Grigonis* (1996), 275 Mont. 441, 913 P.2d  
21 124.

22 It is equally well settled law that the dominant estate enjoys the  
23 rights and privileges granted by an easement and the servient estate  
24 permits the exercise of those rights and privileges. Section  
25 70-17-103, M.C.A., *Burleson v. Kinsey-Cartwright*, 2000 MT 278, ¶ 16,  
26 302 Mont. 141, 13 P.3d 384. The owner of the dominant estate has the  
27 right to use the servient estate pursuant to the scope of the easement  
28 grant.

In determining what rights were conveyed by the easement, the  
Court looks to the terms of the grant. Section 70-17-106, M.C.A., *Van*  
*Hook v. Jennings*, 1999 MT 198, 295 Mont. 409, 983 P.2d 995. "Where an  
easement is specific in nature, the breadth and scope of the easement  
are strictly determined by the actual terms of the grant." *Mason v.*  
*Garrison*, 2000 MT 78, 299 Mont. 142, 998 P.2d 531.

In the present case, while in varying forms, each Flood Easement  
grants broad rights to Defendants to "flood, sub-irrigate, drain or  
otherwise affect with the waters of Flathead Lake" "all or any part" of  
the Plaintiffs' properties. The specific pertinent language of the  
grant of easement is:

the perpetual right and easement for flooding, sub-  
irrigating, draining, or otherwise affecting with the waters  
of Flathead Lake and its tributaries, all or any part of the  
herein-above described land 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

1 regulate the waters of Flathead Lake at varying elevations,  
2 not exceeding a maximum controlled water level of 2893 feet,  
U.S.G.S. datum, at said dam.

3 At oral argument, Plaintiffs agreed that, by purchasing property  
4 encumbered by these easements, they purchased their properties subject  
5 to the terms of the Flood Easements. Section 70-20-308, M.C.A., *Ludwig*  
*v. Spoklie* (1996), 280 Mont. 315, 930 P.2d 56.

#### 6 IV. EFFECT OF THE FLOOD EASEMENTS

7 While Plaintiffs agree that the alleged damage to their properties  
8 was a result of the operation of Kerr Dam and the water of Flathead  
9 Lake, Plaintiffs present four arguments as to why the Flood Easements  
10 do not preclude their claims. First, the Plaintiffs argue that the  
11 submersion and erosion occurring on their respective properties by  
12 virtue of the water of Flathead Lake exceeds the scope of the easement,  
13 burdening their land beyond that which the parties anticipated at the  
14 time the easements were drafted. Second, the Plaintiffs argue that the  
15 absence of damage waivers in the easements (in contrast to the  
16 easements which allow the Defendants to construct and repair dikes on  
17 certain properties) result in liability on the part of the Defendants  
18 for any damage to the Plaintiffs' land. Third, the Plaintiffs argue  
19 generally that the Defendants, as holders of the easements, have the  
20 duty not to damage the servient estate. Thus, contend Plaintiffs, the  
21 Defendants are liable for any damage to the land. Fourth, the  
22 Plaintiffs argue that since the easements specifically refer to 2893  
23 feet above sea level as the farthest reach of the easement, that damage  
24 to land above the 2893 feet point is outside the easement and therefore  
25 compensable. For the reasons set forth below, the Court determines  
26 that no material facts are in issue, and that Defendants are entitled  
27 to judgment as a matter of law.

#### 28 A. THE SCOPE OF THE FLOOD EASEMENTS

19 Plaintiffs contend that Defendants have acted outside the scope of  
20 the Flood Easements by submerging and eroding their respective  
21 properties. Thus, the salient question is whether the Flood Easements  
22 allow Defendants to submerge and/or erode the servient tenement. As  
23 noted before, the Flood Easements grant Defendants the "perpetual right  
24 ...for flooding, sub-irrigating, draining, or otherwise affecting with  
25 the waters of Flathead Lake and its tributaries all or any part..." of  
26 the land of the various Plaintiffs. The easement is to facilitate  
27 "...the regulation and control of the waters of Flathead Lake by the  
28 operation of the Kerr Dam." The terms of the easement itself set 2893  
feet as the maximum level of the lake.

25 Plaintiffs do not dispute that the Flood Easements grant  
26 Defendants at least the right to engage in the "three specified  
27 activities - flooding, sub-irrigating, and draining. . . ." However,  
28 Plaintiffs contend that the actions permitted by the terms of the  
easement are limited to only things similar to flooding, sub-  
irrigating, and draining, such as the movement of water onto, under,  
and off the land. Plaintiffs maintain that damage from erosion (such

1 as permanently undercutting a bank, removing shoreline or otherwise  
2 damaging or permanently taking the property) is not within the ambit of  
"the transportation of water on and off (and under) land."

3 Webster's 3rd New International Dictionary defines "flood" as  
4 "[t]o cover or overwhelm with a flood, inundate, deluge; to cover or  
cause to be covered with water." Similarly, "submerge" is defined as  
5 "[t]o cover or overflow with water: inundate." These definitions are  
6 substantially similar, and thus the Court determines that the easement  
allowing MPC to flood the Plaintiffs' land also allows submersion of  
that same land.

7 The second question is whether the Flood Easements grant  
8 Defendants the right to erode Plaintiffs' properties. Webster's 3rd  
9 International Dictionary defines "erosion" as "land desecration and  
10 simultaneous removal of particles (as of soil) by running water, waves  
and currents, moving ice or wind." While erosion is not specifically  
11 listed in the Flood Easement, PPLM argues that erosion is a consequence  
of the listed activities and that easements do not and could not list  
every consequence of approved activities.

12 An easement creates an interest in property that authorizes the  
13 dominant tenement to use the servient tenement property. Therefore,  
the easement grant is defined in terms of actions allowed by the  
14 dominant tenement, and not the impact to the servient tenement. "Where  
an easement is specific in nature, the breadth and scope of the  
15 easement are strictly determined by the actual terms of the grant."  
*Mason, supra*, cases omitted. In *Laden v. Atkeson* (1941), 112 Mont.  
16 302, 116 P.2d 881, a case involving ditch easements, the Montana  
Supreme Court reiterated basic maxims of property law, "that when the  
17 use of a thing is granted, everything is granted by which the grantees  
may reasonably enjoy such use, that is, rights that are incident to  
something else granted..."

18 It is apparent that the Flood Easements do not need to  
19 specifically mention every type of damage that may occur to Plaintiffs'  
properties; it would be impossible to list all of the specific  
20 consequences resulting from use of the easement. The dominant tenement  
cannot be liable for the consequences of actions permitted by the  
21 Easement. Plaintiffs do not dispute that erosion is a consequence of  
the listed activities. As Plaintiffs purchased their properties  
22 subject to Defendants' rights in the Flood Easement, Plaintiffs cannot  
now claim damage to their properties for consequences of the activities  
permitted by the Flood Easements.

23 The Court finds additional support for its conclusion in the  
24 holdings of *Carvin v. Arkansas Power and Light Company*, 14 F.3d 399  
(8th Cir. 1993), and *Jeffers v. Montana Power Co.* (1923), 68 Mont. 114,  
25 217 Pac. 652. Both of these cases concerned landowner's claims of  
damages as a result of flooding from dams and the power companies'  
26 corresponding defenses. In *Carvin*, the Eighth Circuit held that the  
flood easements absolved the power company of liability for "massive  
27 damage to the landowners' real estate" as a result of flooding from a  
dam. 14 F.3d at 402. The Eighth Circuit did not make any detailed

1 analysis of the affects of the flooding. Instead, the Eighth Circuit  
2 reviewed whether the actions taken were within the scope of the flood  
3 easement. The Court noted that the right which the company purchased  
4 was the capacity to store excess water in an emergency. The Court  
5 noted that right "...inevitably means flooding the land surrounding the  
6 lake, and doing so under emergency conditions--that is, suddenly." The  
7 Court opined that the kind of flooding which occasioned the lawsuit was  
8 "...not an unnecessary collateral result of the privilege granted by the  
9 easement, but was instead the very privilege granted by the easement."  
10 Having determined that the power company was within the scope of the  
11 easement, the Eighth Circuit granted the power company summary  
12 judgment.

13 In *Jeffers* the Montana Supreme Court affirmed a directed verdict  
14 for the power company when water released from Hebgen Dam allegedly  
15 caused fluctuations in the flow downriver, and flooded over the banks  
16 onto the plaintiff's land, due to ice dams having formed, also  
17 allegedly as a result of the fluctuations in the water flow as a result  
18 of the dam. The Court held that "...persons impounding waters are not  
19 insurers against damage caused thereby, but are held only to the  
20 exercise of ordinary care in the ...operation of their plants." The  
21 Court reiterated long standing law that such dam operators are liable  
22 only for negligent operations, and not for damages occasioned by the  
23 ordinary operation of the dam. Further, "...an easement holder does not  
24 commit negligence in doing exactly what the easement permits. Some  
25 additional negligence must be shown..." *Carvin*, citing *Griffeth v.*  
26 *Utah Power & Light Co.*, 226 F.2d 661, (9th Cir. 1955), *Satterwhite v.*  
27 *West Central Texas Mun. Water Dist.*, 737 S.W. 2d 98. (Tex. Ct. App.  
28 1987).

1 The Flood Easements at issue herein allow for "flooding, sub-  
2 irrigating, draining, or otherwise affecting with the waters of  
3 Flathead Lake. . . ." The additional language "otherwise affecting,"  
4 contemplates all the "effects" of flooding, sub-irrigating, or  
5 draining, including erosion. It is not disputed that one of the main  
6 "effects" of flooding property and subsequently draining the property  
7 is erosion.

8 Plaintiffs contend that wave action at a higher than normal  
9 elevation is the cause of the erosion, and the Court notes that the  
10 affidavit of Plaintiffs' expert, Dr. Paul Komar, acknowledges that the  
11 reason the erosion is at a higher elevation is a consequence of the  
12 level of water at which Kerr Dam is operated. As noted elsewhere, the  
13 operation of Kerr Dam is dictated by federal regulations: the elevation  
14 of Flathead Lake is strictly controlled by the licenses under which  
15 Kerr Dam operates. The level of the lake is not subject to Defendants'  
16 volitional control. The Defendants are "doing exactly what the  
17 easement permits." That is, operating the dam at the lake level  
18 mandated by its licenses. There is no allegation nor evidence that  
19 Defendants are "additional[ly] negligent." *Carvin*, supra. Thus, wave  
20 action erosion is also within the scope of the Flood Easements.

1 B. DAMAGE WAIVERS IN EASEMENTS

2 Plaintiffs next argue that because the Flood Easements do not  
3 contain a damage waiver, Defendants are liable for any damage to the  
4 servient estate. At oral argument, Plaintiffs' counsel noted that  
5 there are two grants of easement contained in the Flood Easements. The  
6 first grant is the one in dispute and grants Defendants the right to  
7 flood, sub-irrigate, drain, or otherwise affect Plaintiffs' properties.  
8 The second conveyance allows Defendants to enter Plaintiffs' properties  
9 to construct dikes. These second grants contains an express waiver of  
10 damages as a result of the construction of dikes. Therefore,  
11 Plaintiffs contend, because the second conveyance contains a damage  
12 waiver, the Flood Easement drafters "knew how to draft damage waivers"  
13 and, since the first easements do not contain a damage waiver, it is  
14 "implied" that the parties did not anticipate any damage from the  
15 flooding. Plaintiffs rely on *Guthrie v. Hardy*, 2001 MT 122, 305 Mont.  
16 367, 28 P.3d 467, and cases preceding *Guthrie* for support.

17 Plaintiffs, in both their briefs and at oral argument, have not  
18 contended that the Flood Easements are ambiguous and, in fact, have  
19 argued that the Flood Easements are specific in the grant of use.  
20 Following that argument, then, and applying the law that "the breadth  
21 and scope of the easement are strictly determined by the actual terms  
22 of the grant", the Court may not go beyond the terms of the easement  
23 and attempt to imply any expectations of the parties. *Mason v.*  
24 *Garrison*, *supra*.

25 The absence of any exculpatory language in the easements is not  
26 fatal to Defendants' defenses. It is well established law in Montana  
27 that a holder of an easement may make full use of that easement, and  
28 land for the full exercise of that easement. For example, in *Laden v.*  
29 *Atkeson*, *supra*, a case involving access for ingress, egress and repair  
30 of a ditch on the land of another, the Montana Supreme Court held,  
31 *inter alia*, that "A person having an easement in a ditch running  
32 through the land of another may go upon the servient land and use as  
33 much thereof on either side of the ditch as may be required to make all  
34 necessary repairs and to clean out the ditch at all reasonable times."  
35 Similarly, in the instant case, the Defendants have the right to flood,  
36 inundate, etc., the Plaintiffs' land. Exercise of such right will  
37 result in permanently flooding land, and, due to wave action of the  
38 lake, cause erosion. It appears that part of Plaintiffs' claim is that  
39 the 'artificial' level of the lake, which is arguably at a higher  
40 elevation than before the dam, causes more damage in the Fall than it  
41 did before the dam was built. As noted above, the level of the lake is  
42 dictated by FERC, not Defendants.

43 The Eighth Circuit in *Carvin* specifically rejected an argument  
44 similar to Plaintiffs' contention in the case at bar. There, a variety  
45 of deed reservations and grants of an easement gave AP&L "the right and  
46 privilege of overflowing said lands with water impounded by said  
47 dam..." The plaintiffs contended that AP&L was negligent in operating  
48 the flood gates on two lakes in a manner which caused the water level  
49 to rise dramatically in a third lake, the banks of which were developed  
50 by the plaintiffs. The Federal District Court entered partial summary

1 judgment for AP&L, holding: "Since the sole purpose for having the  
2 easements was to allow AP&L to flood the property, plaintiffs cannot  
3 complain that the exercise of this right constitutes an illegal  
4 interference with their rights of utilization and enjoyment." The  
5 District Court stated that it had "difficulty accepting plaintiffs'  
6 general assertion that a party can act negligently in using an easement  
7 for the precise purpose for which it is obtained." (Emphasis added.)  
8 The Circuit Court noted that the use of the easement was consistent  
9 with the terms of the easement, and that the sole purpose for having  
10 the easement was to allow AP&L to flood the property.

11  
12 In *Carvin*, supra, the Court gave little weight to the damage  
13 waiver in affirming the grant of partial summary judgment to AP&L. The  
14 Court noted that the easements were written to convey a property  
15 interest and to protect AP&L from liability. In rejecting the argument  
16 that the damage waivers were impermissible exculpatory contracts, the  
17 Court noted that the easements were not limited to an exculpatory  
18 purpose, as they conveyed a property interest. Since the easements  
19 were not exculpatory contracts, the Court noted that any deficiency in  
20 the exculpatory language did not invalidate the underlying property  
21 interest.

22  
23 The Circuit Court considered the case pursuant to Arkansas law,  
24 and noted that "the obvious purpose of the flood and flowage rights is  
25 to protect AP&L from liability." In *Carvin*, the Court found no  
26 negligence on the part of AP&L, as under Arkansas law, the easement  
27 holder was entitled to flood or submerge the land of the servient  
28 estate. Under Montana law, persons impounding water, such as in the  
instant case, "... are not insurers against damage caused thereby, but  
are held only to the exercise of ordinary care..." *Jeffers v. Montana  
Power Co., et al.* (1923), 68 Mont. 114, 217 Pac. 652. Montana law  
recognizes the right of an easement holder to use the land as necessary  
for the full exercise of the easement. *Laden, supra.* The Court  
determines that the holding of *Carvin*, although from the Eighth Circuit  
and based on Arkansas law, is applicable to this case, as the premises  
on which *Carvin* was decided are similar to Montana law.

29  
30 The Court notes that the same result can be achieved by reviewing  
31 the effect of the Flood Easement on Plaintiffs' three tort claims: (1)  
32 trespass, (2) nuisance, and (3) inverse condemnation. As explained  
33 below, under Montana law, all three tort claims are invalid against the  
34 holder of an easement.

35  
36 First, Plaintiffs agree that a valid easement precludes their  
37 claim for trespass. This is consistent with Montana law. "Conduct  
38 which otherwise would constitute an intentional trespass is not  
39 unlawful if it is privileged conduct pursuant to an easement."  
40 *Ducham v. Tuma* (1994), 265 Mont. 436, 877 P.2d 1002. "...plaintiff  
41 landowner could not maintain an action for trespass because the  
42 trespass necessarily results from the imposition of the easement. . ."  
43 *Riddock v. City of Helena* (1986), 212 Mont. 390, 687 P.2d 1386.

1 Similarly, a holder of an easement cannot be liable for nuisance.  
2 *George v. Fish Creek Irr. Ditch Co.* (1959), 135 Mont. 490, 342 P.2d  
3 738. (In an action to abate a dam as a nuisance, the Court found that  
4 defendants had an easement for the construction of the dam and, as a  
5 result, no claim for nuisance existed); *Northwestern Improvement Co. v.*  
6 *Lowry* (1937), 104 Mont. 289, 66 P.2d 792 ("An 'affirmative easement' is  
7 one which authorizes the doing of acts which, if no easement existed,  
8 would give rise to a right of action.")

9  
10 Third, the servient tenement has no claim against a dominant  
11 tenement for inverse condemnation. *Riddock v. City of Helena* (1984),  
12 212 Mont. 390, 687 P.2d 1386 ("We hold that plaintiff Riddock may not  
13 maintain an action for inverse condemnation, trespass or injunctive  
14 relief against the City for construction of a water pipeline" for which  
15 the City had obtained a prescriptive easement against the predecessor).  
16 Therefore, the lack of a damage waiver in the Flood Easements has no  
17 effect and cannot create liability on the part of Defendants.

#### 18 C. DUTY OF A DOMINANT TENEMENT TO A SERVIENT TENEMENT

19 Plaintiffs' third argument is that the holder of a dominant  
20 tenement owes a duty to the servient tenement to refrain from damaging  
21 the servient property. Plaintiffs do not allege that Defendants were  
22 negligent in the operation of Kerr Dam, but base their argument on the  
23 Restatement (Third) of Property - Servitudes § 4.13 which, in full,  
24 states:

25 Unless the terms of a servitude determined under § 4.1 provide  
26 otherwise, duties to repair and maintain the servient estate and  
27 the improvements in the enjoyment of a servitude are as follows:

28 (1) The beneficiary of an easement for profit has a duty to  
the holder of the servient estate to repair and maintain the  
portions of the servient estate and the improvements used in  
the enjoyment of the servitude that are under the  
beneficiary's control, to the extent necessary to (a) prevent  
unreasonable interference with the enjoyment of the servient  
estate, or (b) avoid liability of the servient estate owner  
to third-parties.

Plaintiffs maintain that there were other reasonable courses of  
action Defendants could have taken to mitigate the damage to their  
properties and the propriety of these alternative courses of action is  
a question of fact precluding summary judgment. Plaintiffs cite no  
cases interpreting the particular section of the Restatement.

In response, PPLM argues that the issue turns on whether the scope  
of the easement is specifically defined. If the Flood Easements are  
specifically defined, "the breadth and scope of the easement are  
strictly determined by the actual terms of the grant." *Mason*, 2000 MT  
78, ¶ 21. PPLM contends if the easements are to be determined by the  
actual terms of the grant, extrinsic evidence is irrelevant, and it  
appears to the Court that hypothetical, alternative courses of action  
are immaterial. *Id.*; see also *Van Hook v. Jennings*, 1999 MT 198, ¶ 11,

1 295 Mont. 409, 983 P.2d 995.

2 PPLM's position is consistent with Montana law. As discussed  
3 above, Plaintiffs agree that the Flood Easements are specifically  
4 defined. Therefore, Defendants have the right to use the Flood  
5 Easements to the full extent of the grant. Plaintiffs' allegation of  
6 "other reasonable courses of action" constitutes extrinsic evidence.  
7 Pursuant to *Mason, Van Hook*, and established Montana law on the  
8 interpretation of unambiguous easements, extrinsic evidence is  
9 irrelevant when the scope of the easement is specifically defined.  
10 Likewise, inadmissible or irrelevant facts cannot preclude summary  
11 judgment. *State Medical Oxygen and Supply, Inc. v. American Medical  
12 Oxygen Co.* (1994), 267 Mont. 340, 883 P.2d 1241.

13 Second, PPLM contends that the duty under the Restatement only  
14 arises "to the extent necessary to (a) prevent unreasonable  
15 interference with the enjoyment of the servient estate. . . ."  
16 Restatement (Third) of Property - Servitudes § 4.13(1). However, the  
17 Restatement also clearly states that the dominant tenement has the  
18 ability to use the easement. The comments to the Restatement note that  
19 the dominant tenement can cause such damage as is "reasonably necessary  
20 to accomplish the purposes of the servitude." Restatement (Third) of  
21 Property - Servitudes § 4.10, Comment g. Thus, PPLM, relying on  
22 *Carvin*, supra, argues that the duty from the Restatement only concerns  
23 unnecessary damage to the servient tenement unrelated to the use of the  
24 easement.

25 The Court agrees and finds the holding from *Carvin* directly on  
26 point. There, the Eighth Circuit specifically evaluated whether the  
27 flooding and erosion caused by the power company was necessary in the  
28 use of the easement. In making this evaluation, the Eighth Circuit  
found that the dominant tenement had only a duty not to cause  
"unnecessary collateral damage to the servient estate, which did not  
follow inevitably from the purpose for which he procured the easement."  
*Id.* (emphasis in original). Thus, the Eighth Circuit found no  
liability for the power company as a result of "massive damage" from  
flooding because the power company was "exercising rights retained by  
it or granted to it in the documents creating the property interest of  
the landowners." *Supra*.

29 In the instant case, PPLM has been operating Kerr Dam within the  
30 scope of the Flood Easements. Consequently, under the Restatement and  
31 other applicable law, PPLM, and before it MPC, had no duty to repair or  
32 maintain the Plaintiffs' servient property.

33 D. THE FLOOD EASEMENTS' REFERENCE TO 2893 FEET ABOVE SEA LEVEL

34 In their final argument, Plaintiffs contend that PPLM is liable  
35 for damage to Plaintiffs' properties over 2893 feet above sea level,  
36 (fasl). Plaintiffs, citing to a letter stating that MPC decided not to  
37 obtain Flood Easements to 2896 fasl, contend the 2893 fasl designation  
38 is a "contour" line. *Id.* As a result of this letter, Plaintiffs  
contend there are fact issues as to the meaning of the Flood Easements'  
reference to 2893 fasl.

1        However, the extrinsic evidence discussed by Plaintiffs is  
2 irrelevant in determining the scope of the easement. As discussed  
3 above, extrinsic evidence is only relevant if the Flood Easements are  
4 ambiguous. *Van Hook, supra.*

5        The interpretation of an unambiguous easement is a question of  
6 law. *Mularoni, supra.* As such, in order to interpret the Flood  
7 Easements, it is again necessary to review the language of the Flood  
8 Easements focusing on the property affected and the 2893 fasl  
9 designation.

10       There are two types of Flood Easements on Plaintiffs' properties,  
11 and the differences between the two easements are important. The first  
12 easement grants Defendants:

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

23       Plaintiffs' Statement of Material Fact, document # 28 (emphasis  
24 added) (Plaintiffs call this a "Type B easement").

25       The second easement is similar in language, but does not contain  
26 any description concerning 2893 fasl in the granting language:

27       The undersigned [name] grant, bargain, convey and warrant to Rocky  
28 Mountain Power Company . . . the perpetual right and easement for  
29 flooding, sub-irrigating, draining, or otherwise affecting with  
30 the waters of Flathead Lake, and its tributaries, *all or any part*  
31 *of the hereinafter described lands which will or may be affected*  
32 *by the regulation and control of the waters of Flathead Lake by*  
33 *the construction, maintenance and operation of said dam and*  
34 *hydroelectric power development in the Flathead River below said*  
35 *Lake, which land is located in Lake County, Montana, and*  
36 *particularly described as follows [legal description of parcel].*

37       Plaintiffs' Statement of Material Facts, document # 24 (emphasis added)  
38 (Plaintiffs call this a "Type A easement").

39       The second easement does not contain any description limiting  
40 water level to 2893 fasl, yet has the same language concerning the  
41 scope of the conveyance ("flooding, sub-irrigating, draining, or  
42 otherwise affecting with the waters"). As the conveyance in the second  
43 easement does not contain reference to 2893 fasl, there can be no  
44 argument that the rights are limited to 2893 fasl for these easements.

1 Further, and clearly dispositive of this aspect of Plaintiffs'  
2 argument, the Flood Easement encumbers "all or any part of the herein-  
3 above described land" as may be "affected by regulation and control of  
4 the waters of Flathead Lake." (Emphasis added.) Thus, by the plain  
5 language of the documents, the Flood Easements are not limited to any  
6 contour but cover entire parcels. Similarly, the description of the  
7 specific parcel to be encumbered does not list any contour.

8 Likewise, the only mention of 2893 fasl in the first easement  
9 ("Type B easement") is in connection with the water level which the Dam  
10 will be restricting. The easement states that Defendants have the  
11 right to flood or otherwise affect any part of Plaintiffs' properties  
12 by operation of a dam "which dam is designed to control and regulate  
13 the waters of Flathead Lake at varying elevations, not exceeding a  
14 maximum controlled water level of 2893 feet, U.S.G.S. datum, at said  
15 dam." As the 2893 feet designation refers to a water level "at said  
16 dam," the Court must necessarily reject Plaintiffs' contention that the  
17 designation is a contour line on their properties.

18 Instead, the Court finds that the designation of 2893 feet  
19 describes the design of Kerr Dam. A case interpreting a similar flood  
20 easement provision is *Rutledge v. Union Electric Company*, 280 S.W. 2d  
21 670, 674 (Miss. 1955). In *Rutledge*, the power company obtained a flood  
22 easement to "flood" and "affect[] by said waters" the plaintiffs'  
23 lands. *Id.*, 280 S.W.2d at 671. The easement language included a  
24 description of the dam strikingly similar to the description of Kerr  
25 Dam in this case:

26 Said dam, power house and works appurtenant thereto shall be  
27 designed to hold the water level at the dam at approximately 660  
28 feet above mean sea level.

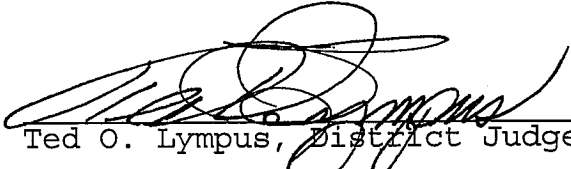
29 *Id.* The *Rutledge* Court rejected plaintiffs' argument that the 660 fasl  
30 designation limited the right to flood to "either the 'approximately'  
31 660 foot contour or to any other contour." 280 S.W.2d at 673. The  
32 *Rutledge* Court held that the "approximately 660 feet" designation was  
33 a description of the dam. *Id.*, 280 S.W.2d at 674. Thus, the Court  
34 found that the power company had the right to submerge all or any part  
35 of the plaintiffs' lands from the operation of the dam. *Id.*

36 Plaintiffs contend that *Rutledge* supports their argument; they  
37 focus on the language in the easement "approximately 660 feet",  
38 compared to the Flood Easements' "maximum controlled water level"  
39 language. However, Plaintiffs ignore the holding from *Rutledge* that  
40 the "approximately 660 feet" designation is irrelevant because it is a  
41 description of the dam. The Court applies such rule to the present  
42 case and determines that the 2893 fasl designation is irrelevant  
43 because it is a description of Kerr Dam, not the amount of land subject  
44 to the Flood Easement.

45 Accordingly, based on the language of the Flood Easements  
46 themselves and the *Rutledge* holding, the Court holds that the 2893 fasl  
47  
48

1 designation in the Flood Easements is a description of water level as  
2 it relates to Kerr Dam and not a contour line. There are no disputed  
3 material facts, Defendants are entitled to judgment as a matter of law,  
4 and, as a result thereof, the Court determines that summary judgment in  
5 favor of Defendants is appropriate.

6 DATED this 25<sup>th</sup> day of April, 2007.

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9  
10   
11 Ted O. Lympus, District Judge

12  
13 c: Calvin Christian, Esq./Larry M. Elison, Esq./Thomas R. Meites,  
14 Esq.  
15 Terry MacDonald, Esq.  
16 Martin King, Esq./Sean Morris, Esq.