

IN THE CIRCUIT COURT OF OREGON COUNTY, MISSOURI  
CIRCUIT DIVISION I

VAN MCGIBNEY, et al.,	)		
	)		
Plaintiffs,	)		
vs.	)	Case No.	17AM-CC00021
	)		
MISSOURI DEPARTMENT OF	)		
NATURAL RESOURCES,	)		
	)		
Defendant.	)		

**JUDGMENT**

On the 4<sup>th</sup> day of August, 2020, the Court called this matter for trial. Plaintiffs Van and Elizabeth McGibney and James Conner, Trustee, appeared in person and with their counsel Devin Kirby and Derrick Kirby. Defendant appeared by counsel Cheryl Schuetze and Robert Schmidt. Evidence was heard and the parties were given seven days to file any proposed suggestions. Now, being fully advised in the premises, the Court hereby Finds, Orders and enters Judgment.

**Background**

Plaintiffs bring this action seeking a declaratory judgment that the Missouri Department of Natural Resources (DNR) lacks authority to purchase lands for a public park which lands are located within the boundaries of the Federal Wild and Scenic Easement. The easement lies along the Eleven Point River between Thomasville, Mo. and the State Route 142 bridge in Oregon County, Mo. The easement extends back from the river's edge, on both banks, for

approximately one quarter mile. The subject property lies along the west bank of the river and consists of approximately 625 acres of DNR's total purchase of 4,197 acres. Plaintiffs allege that the restrictive provisions of the Scenic Easement prohibiting public use of the lands encumbered thereunder prevent the expenditure of public funds for the purchase and maintenance of the real property as a public park. Plaintiffs say because it can't be used by the public, public funds cannot be used to purchase or maintain it.

Defendant contends in response that it may purchase and maintain the property as a park without being in conflict with the restrictive covenants of the easement. Further, Defendant says, it may at some future point in time seek modification of the easement to allow public use.

### Standing

Defendants previously, by motion and affirmative defense, alleged that Plaintiffs do not have standing to proceed with this action for a declaratory judgment.

"Where, as here, a question is raised about a party's standing, Courts have a duty to determine the question of their jurisdiction before reaching substantive issues, for if a party lacks standing, the Court must dismiss the case because it does not have jurisdiction of the substantive issues presented." *Columbia Sussex Corp. v. Missouri Gaming Commission*, 197 S.W.3d 137 (Mo. App., W.D. 2006) citing *Farmer v. Kinder*, 89 S.W.3d 447, 451 (Mo. banc 2002).

The Court finds that Plaintiffs have standing under two separate bases. The first grants standing when the action of a state agency involves expenditure of public funds. The second grants standing to those who are subject to the same conservation easement as the lands

purchased by DNR. Plaintiffs and Defendant are both landowners within the boundaries of the scenic easement corridor and are subject to the same restrictions.

Under the first basis "The right of a taxpayer on behalf of himself and other taxpayers, similarly situated, to bring an action to enjoin the illegal expenditure of public funds cannot be questioned." *E. Mo. Laborers Dist. Council v. St. Louis County*, 781 S.W.2d 43, 46 (Mo. banc 1989). "To have standing a taxpayer must be able to demonstrate a direct expenditure of funds generated through taxation . . ." *Id.*

To establish such a basis regarding a claim that a challenged action involves the expenditure of public monies the taxpayer "must establish that one of three conditions exist: (1) a direct expenditure of funds generated through taxation . . ." *Id.* at 47. Plaintiffs in this action allege tax monies were directly expended upon the lands purchased by Defendants. The evidence at trial established this to be so.

As a second basis for standing Plaintiffs, as owners of real property also burdened by the same easement which includes a portion of the real property purchased by DNR, have standing to bring this action pursuant to RSMo. 442.014.4(1). It provides that "an action affecting a conservation easement may be brought by an owner of real property burdened by the easement; ... ." The definition of a "conservation easement" found in RSMo. 442.014.2(1) includes the federal easement existing on the subject lands.

The Court finds that Plaintiffs have standing to bring this action under either basis.

#### *Trial Proceedings*

At trial the evidence established that DNR purchased some 4,167 acres of land in two tracts. The first being known as the "Frederick Creek Ranch" and the second as the "Buildings for Babies" property. Both were originally part of a larger tract known as the "Pigman Ranch". The properties both lie on the west side of the Eleven Point River in Oregon County, Mo. Approximately 625 acres of the two tracts are encumbered by the scenic easement.<sup>1</sup> The easement was created by an act of Congress titled the Wild and Scenic Rivers Act of 1968.<sup>2</sup> The Act is a federal law enacted by Congress which created, among others, a Scenic Easement Corridor on the Eleven Point River from Thomasville, Mo. downstream to the State Route 142 bridge. The act, by its express terms precludes public access to the river, public use of the easement, boat launching, camping, motorized vehicles, roads, trails, improvements and public entry upon any of the lands encumbered by the scenic easement.

The evidence established that approximately 625 acres of the 4,197 purchased by Defendant are subject to the easement. Defendant's predecessor in interest, Reed Pigman, Jr., conveyed the easement rights to the United States Department of Agriculture well prior to Defendant's purchase. Ken McCarty, the Director of Natural Resources Management Programs for DNR was called as a witness by Plaintiffs. He testified that DNR had been looking at purchasing land in this area for several years. He testified that the river is the significant purpose of the proposed park. That any further use would be dependent upon an agreement by the United States Forest Service granting a modification of the restrictive

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<sup>1</sup> Plaintiffs' Exhibit I; Defendant's Exhibit 1.

<sup>2</sup> Defendant's Exhibit 2.

easement. That no such negotiations have taken place to date. He acknowledged that DNR had no plan for what to do with the property and that the Forest Service "is the manager of the property" as a result of the scenic easement. He acknowledged that public funds have and are being expended for the maintenance of the land, and that the funds used to purchase the property came from monies recovered as a result of settlements from damages to public lands elsewhere in the state. He further testified that planning for use of the property is on hold and that the federal easement has not been modified in any way.

Plaintiffs Conner and McGibney both testified. They testified they were opposed to the use of the property as a state park and pointed out that if the easement were modified to allow public use of the property acquired by DNR it would destroy the wild and scenic nature of the easement. Further, should such a modification occur, their property would be left subject to the easement restrictions while DNR would be allowed to make uses of its property which they could not.

Defendant called as a witness Amy Salvatore, the Public Services Staff Officer for the United States Forest Service for this district. She testified that her office enforces violations of the covenants of the Scenic Easement and that the Forest Service would enforce those regulations against DNR the same as it would any other landowner. She further testified that she was not aware of any request by DNR to modify or terminate any provision of the Scenic Easement.

### Authority

In their petition Plaintiffs challenge the action of the DNR in purchasing a tract of land for use as a state park, a portion of which is encumbered by a federal scenic easement which precludes virtually all public use of the lands. This action is considered a “non-contested case” under the Missouri Administrative Procedure Act, RSMo. 536.050. See *Ard v. Shannon County Commission*, 424 S.W.3d 468 (Mo. App., S.D. 2014). As a non-contested case the Court hears evidence, determines facts, and adjudges the validity of the agency decisions. *Id.* at 472. The Court must determine if the agency’s (DNR) decision is unconstitutional, unlawful, unreasonable, arbitrary, capricious or otherwise involves an abuse of discretion.” *Id.* at 473.

RSMo. 253.040 defines the authority of DNR to acquire real property for “park or parkway purposes . . . where such action would promote the park program and the general welfare.” This authority is not unlimited. “For expenditures of public funds to have a public purpose, it must be for support of the government or for some of the recognized objects of government , or directly to promote the welfare of the community, and in order for public purpose to be found on the ground that there flowed from the expenditure some benefit or convenience to the public, the benefit or convenience must be direct and immediate, and not collateral, remote or consequential.” *State ex rel Wagner v. St. Louis County Port Authority*, 604 S.W.2d 592 (Mo. banc 1982).

### Discussion

DNR suggests that the remaining property may still be used as a public park. However DNR acknowledged in testimony at trial from Ken McCarty that the purpose of the park,

which bears the name Eleven Point River Park, was for access, use, and enjoyment of the Eleven Point River, presumably by the public whose funds are or were expended in the acquisition and maintenance of the property. The two uses seem to be in direct opposition. The federal act prohibits public use and the state park enabling statute provides lands may be acquired by the State for "use by the public".

DNR suggests that certain state parks are denominated "restricted access" or "wilderness areas". However DNR is unable to cite any state park which has the restrictions found in the act. Those restrictions include no public entry; no camping; no river access to or from the scenic easement; no boat launching; etc. The Court is unable to find any use by the public allowed under the provisions of the Act, nor does the Court believe any such use is intended to be allowed under the Act. The Act seeks to retain the areas within its boundaries as wild and scenic. The provisions of the Act make it clear that the land is not to be developed or its character changed in any way from that of a wild and scenic river.

By contrast the deeds from the respective grantors to DNR both provide that the real property is specifically conveyed subject to the following:

"The property is hereby dedicated to public use and conveyed to the Missouri Department of Natural Resources only for the following purposes and none other: for public use as a state park and for natural resource restoration and preservation."<sup>3</sup>

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<sup>3</sup> Plaintiffs' Exhibits D and E; Defendant's Exhibits 9 and 12.

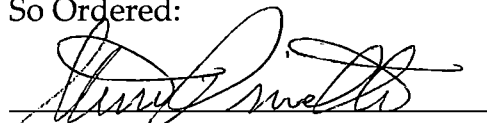
The Court can not find a public use for real property upon which there exists such a restrictive easement as herein specifically excluding use by the public. The Scenic Easement Deed prohibits, by way of example only and not a complete listing, the following:

- Uses (for) campsites.
- Construction of roads or buildings.
- Launching of watercraft.
- Utility right of way.
- Use of the easement to access the river.
- Public entry.
- Public vehicle access.<sup>4</sup>

As presented to the Court at trial DNR has acquired as a state park lands which cannot under any reasonable interpretation be used by the public as a park. As such its actions are arbitrary and capricious.

Having found the action of DNR unlawful, arbitrary, and capricious, Defendant Department of Natural Resources is hereby directed to divest itself of ownership of those lands located within the bounds of the Wild and Scenic Easement.

So Ordered:

A handwritten signature in black ink, appearing to read "Steven Privette", written over a horizontal line.

Honorable Steven Privette  
Circuit Judge, 37<sup>th</sup> Judicial Circuit

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<sup>4</sup> Plaintiff's Exhibit I; Defendants' Exhibit 1 Eleven Point River Natural Scenic River Scenic Easement Deeds.