

Hearing to be Noted for
Special Set before Judge Rawson

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
OKANOGAN COUNTY

GAMBLE LAND & TIMBER LTD.,
Washington limited partnership; and
CASCADE HOLDINGS GROUP, LP, a
Nevada limited partnership,

Plaintiffs

vs.

OKANOGAN COUNTY, WASHINGTON
a Washington Municipal Corporation; and
all other persons or parties unknown claiming
any right, title, estate, lien or interest in the real
estate described in the Complaint herein

Defendants,

and

OKANOGAN OPEN ROADS COALITION,
and individual taxpayer members thereof
LORAH SUPER, CRAIG OLSON, and
KEVIN CREAGER, and STATE OF
WASHINGTON, *ex relatione* LORAH SUPER,
CRAIG OLSON, and KEVIN CREAGER

Defendants and Cross-Plaintiffs.

Case No. 17-2-00086-0

MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO
DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION OR, IN
THE ALTERNATIVE, FOR
SUMMARY JUDGMENT, AND
FOR AN AWARD OF FEES



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I. INTRODUCTION

Based on recent persuasive authority from Montana’s Supreme Court, OORC moves for an order dismissing this case for lack of subject matter jurisdiction. In the alternative, based on new evidence, OORC renews its motion for summary judgment declaring the French Creek Road to be a county road held in trust for the public. OORC is filing this motion now to avoid any further delay as another fire season is imminent and the continued closure of the road to traffic creates significant risks to public safety. Defendant Okanogan County, moreover, despite its production of historic documents proving that French Creek Road was established by petition and opened by the County in 1889, has not itself taken any steps to protect the public’s interest in this action.

OORC, therefore, also moves the Court for an award from Defendant Okanogan County of attorney’s fees and costs incurred by OORC in pursuing the public’s rights. OORC is entitled to recover these costs and fees because it has had to intervene in and defend this action, while Okanogan County has disregarded its fiduciary duty to protect the public’s access to French Creek Road (the “Road”). Okanogan County failed to act despite the fact that it at all times had in its possession evidence establishing that the Road has been a public road for over 128 years. Okanogan County did not conduct a reasonable review of its records to locate this evidence until OORC’s issuance of renewed discovery requests and repeated insistence on a more complete search of Okanogan County’s records. Moreover, even now – after discovery of these records, repeated requests by OORC, and as a new fire season approaches – Okanogan County has failed to correct the record before this Court, relying instead on OORC to do so.

II. QUESTIONS PRESENTED

1. Whether this Court lacks subject matter jurisdiction over this action because



1 Plaintiffs and their predecessors in interest previously subjected themselves to the exclusive
2 jurisdiction of the Okanogan County Board of County Commissioners by submitting a series of
3 petitions to vacate the French Creek Road, each of which was denied.

4 2. Whether newly produced evidence that the Road was surveyed and opened by
5 Okanogan County following a public petition in 1889, and used as a primary access route to the
6 valley in the ensuing decades, establishes that the road became a county road by petition as well as
7 public use when Okanogan County in 1903 accepted the federal grant of public rights-of-way under
8 R.S. 2477 (Sect. 2477, Rev. Statutes of the United States, 1866), thereby barring Plaintiffs' claims
9 to ownership of any portion of the Road.

10 3. Whether OORC is entitled to recover attorneys' fees and costs incurred in pursuing
11 this action from Okanogan County, who holds French Creek Road in trust for the public, at all times
12 had access to and control over the newly produced evidence, and failed to exercise its fiduciary
13 duty of protecting the public's interest in French Creek Road, thereby forcing OORC to intervene
14 in this action to ensure the fair representation of the public's interest in the Road.

15 III. FACTUAL BACKGROUND

16 The relevant facts in this case reach back far in our nation's history and begin in 1862.
17 That year, the U.S. Congress passed the Homestead Act, 12 Stat. 392 (1862). Under that Act,
18 private land patents for federal lands could only be granted if claimants established that (i) they
19 had improved the lands; (ii) they had paid for the lands; and (iii) the lands had been opened for
20 settlement and officially surveyed. *Id.* at iii; Homestead Act of June 2, 1862. The Methow Valley,
21 which fully encompasses the French Creek Road, was one of the last areas in the lower forty-eight
22 states opened for settlement. Hart Report at 12. The Methow Valley had been designated as the



1 Moses Columbia Indian Reservation in 1879, and was only returned to the public domain in 1886,
2 when the President of the United States signed an executive order “Restoring a Portion of the
3 Columbia Reservation to the Public Domain”. Id. at 12-13. Even then, however, private
4 landownership was not possible because the lands at issue had not been surveyed. Id.; see also
5 Homestead Act of June 2, 1862.

6 The same year the Methow Valley was removed from the Indian reservation, Congress
7 also passed the Mining Act of 1866, a federal statute that came to be known as R.S. 2477. See
8 Expert Report of E. Richard Hart, June 29, 2019 (the “Hart Report”), pp. 11-12. This act allowed
9 states to obtain firm and permanent public rights-of-way through federal lands in an effort to
10 encourage settlement of the western states. Id. By late February 1889, Congress passed a law
11 granting statehood for Washington, Montana and the Dakotas. Washington’s statehood was
12 declared official on November 11, 1889.

13 On May 6, 1889, while Washington was still a Territory, the Okanogan County
14 Commission received a petition, bond and affidavit requesting the establishment of the “Methow
15 Valley Road” as a public road. Hart Report at 14. The petition requested “the location of a County
16 road, described as follows: ‘Commencing at a point on the Columbia River about two miles above
17 the mouth of the Methow River and Running on the most practical route to the ranch of Alex
18 Watson from thence to the ranch of Silas M. Cheval on French Creek from thence to the summit of
19 the mountain west thence down a creek called Texas Creek to the ranch of Mr. Sumpter thence
20 up the East side of the Methow River to a place known as the forks of the Methow.’” Hart
21 Report at 14. This road encompasses what today is known as the French Creek Road. See
22 Declaration of William Tackman, dated June 21, 2019 (the “Tackman Decl.”), and Exhibits A-C.



1 The petition was signed by many prominent early Methow Valley settlers, including
2 “householders residing in the vicinity of said road,” and the accompanying affidavit of petitioners
3 confirmed that “notices of petition were posted within the time and in the manner prescribed by
4 law.” Id. The day after having received the petition, the Okanogan County Commissioners
5 appointed a surveyor to survey the route of the road. Id. The importance of the road to Okanogan
6 County could hardly be overstated: The records of the Commission include reference to over one
7 hundred people in the upper Methow who, without a good road, were said to be “virtually shut out
8 from all communication with the outside world rough ranges of mountains attaining high altitude
9 and thickly studded with timber intervening between them and the Columbia River...”. Hart Report
10 at 14. By June 1, 1889, the survey of the Methow Valley Road was completed and field notes
11 describing the exact location of the route had been certified. Hart Report at 15. On August 9,
12 1889, the road was formally “declared open.” Id.

13 Despite having been previously requested, none of Okanogan County’s records relating to
14 the French Creek Road from 1889 through 1903 were produced to OORC until March 25 through
15 May 1st of this year. Declaration of Natalie N. Kuehler, dated June 29, 2019 (the “Kuehler
16 Decl.”), ¶¶ 3-8. A contemporary analysis of these newly produced 1889 certified survey notes
17 shows that the road encompassed the portion of French Creek Road that is at issue in this case.
18 Hart Report pp. 14-15; Tackman Decl. Exs. A-C, E, F. The Methow Valley Road became the
19 primary route into the Methow Valley and provided the only route for stagecoaches and settlers to
20 take wagons and horses into the upper Methow Valley. Hart Report p. 15.

21 Like the 1889 road survey notes, the first federal surveys of the area, conducted by the
22 Government Land Office (“GLO”) between 1891 and 1902 and by the U.S. Geological Survey



1 between 1897 and 1903, not only identify the road but locate it in the same place as the French
2 Creek Road exists today. Hart Report p. 15; Tackman Decl. ¶¶ 6-8 Exs. A-C, E, F. The GLO
3 survey completed in 1902, a map of which was published in 1903, is not only considered the most
4 accurate historical survey, but also was the first survey that complied with the requirements of the
5 Homestead Act and provided a basis for private land claims to be filed. Hart Report p. 15;
6 Tackman Decl. ¶¶ 6-7. The GLO survey followed the strict federal surveying guidelines and
7 “clearly shows the existence of the roads and marks all land within [the surveyed area] as Public
8 Land.” Hart Report at 15-16, 20-21. The Methow Valley Road, including the portion of today’s
9 French Creek Road at issue in this case, is prominently depicted on this survey. *Id.* at 21.

10 The following year, and still years before the first private land patents were issued in the
11 area in 1905, Washington State passed a statute formally authorizing Counties to accept the public
12 rights-of-way through federal lands granted to states under R.S. 2477. Hart Report at 16. These
13 rights-of-way were to “not be less than thirty feet in width nor more than sixty feet in width” and,
14 upon ratification or confirmation by the counties, were “deemed duly laid out county roads.” *Id.*
15 Okanogan County acted without delay and, by resolution dated August 11, 1903, officially
16 adopted the public rights-of-way granted by R.S. 2477. *Id.* On that date, nearly sixteen years to
17 the day after it was first opened, French Creek Road formally became a county road under R.S.
18 2477. It has never since been vacated and remains a public road to this day. Hart Report p. 17.

19 IV. PROCEDURAL BACKGROUND

20 a. Prior Unsuccessful Petitions to Vacate French Creek Road

21 On at least three occasions during the twentieth century, in 1955, 1965, and 2009, the
22 Okanogan County Board of Commissioners received petitions to vacate portions of the French



1 Creek Road. Hart Report p. 30. The Commission denied all three attempts to vacate the road as
2 contrary to the public interest. Id. At least one of these petitions to vacate, in 2009, was filed by
3 Plaintiffs and encompasses the same sections of the French Creek Road that are at issue here.
4 None of the denials were appealed.

5 Indeed, for much of the twentieth century, French Creek Road was a well-known county
6 road. Hart Report at 30. As far back as 1917, in the official county road map, French Creek Road
7 was identified by county road number and designated as a “Primary Road.” Id. Historic aerial
8 photographs from 1943 also clearly show the sections of the French Creek Road at issue in this
9 case in the same location as is shown on the 1903 USGS survey. Id.

10 The first attempt to vacate French Creek Road in 1955 was denied by resolution of the
11 County Commissioners, who rejected the petition “after due consideration” “on the grounds that it
12 would not be in the best interest of the public to vacate any portion of the road at this time.” Id. at
13 31. A second attempt to vacate French Creek Road was made by petition dated 1965. Id. at 31.
14 The County Commissioners held a hearing on the proposed vacation on May 24, 1965, by which
15 time more than one hundred and fifty people had signed petitions opposing the vacation. Id. at 31.
16 Many of these individuals reported using the road for hunting purposes. Id. The District
17 Supervisor for the Washington State Department of Natural Resources also submitted a report
18 opposing the proposed vacation for three reasons: “1. There is a need for hauling supplies. 2. For
19 fire control. 3. Public hunting and fishing.” Id. The County Engineer, moreover, investigated the
20 road and in his written report confirmed that the road was “easily traveled by passenger car”
21 providing access to several tracts of state land, and that despite being “extensively used during
22 hunting season” “three gates are presently in place illegally across the road.” Id. On June 15,



1 1965, the County Commissioners visited the location of the road and “unanimously agreed that
2 ‘vacating would have to be denied in the public interest.’” Id. pp. 31-32.

3 Despite having been previously requested, none of Okanogan County’s records relating to
4 the failed 1965 attempt to vacate the French Creek Road were produced to OORC until February
5 1st of this year. Kuehler Decl. ¶ 4.

6 Over the following few years, private landowners continued to illegally maintain barriers
7 preventing public access to the French Creek Road. Id. p. 32. On July 7, 1969, a number of
8 individuals met with the Okanogan County Commissioners on this issue, and a resolution passed
9 requiring the removal of these barriers and the grading of the road by July 16th. Id. at 32.

10 Continued public use was confirmed again in 1976, when the Commissioners learned that the
11 road was used as a school bus route and agreed to continue to do more maintenance to improve
12 the roadbed. Id. at 32. Similarly, in 1982, the public works director noted that the road was public
13 and that a new gate that had been erected across it “was probably an illegal obstruction.” Id. at 32.
14 That year, the County also agreed to repair road damage on the French Creek Road. Id. at 32.

15 By 2008, Plaintiffs had erected yet another barrier across the French Creek Road. Again,
16 the Okanogan County Public Works Department, through its Senior Engineer Tech Verlene
17 Hughes, explained that the gate crosses “a public road and is therefore probably an illegal
18 obstruction of the road.” Id. at 33. She went on to explain that the gate had to be removed, and
19 that it was “necessary for the County to keep the road open for public use.” Id. at 33. Ms. Hughes
20 noted that, if Mr. Gebbers felt that there was a need, he should petition the county to vacate the
21 road. Id. at 33. By May of that year, the gate had still not been removed. Id. at 33. At this point,
22 the Department of Natural Resources requested that Okanogan County have the gate removed,



1 and Ms. Hughes prepared a report confirming that the French Creek Road was part of the
2 County’s road system. Id. at 34. In November 2008, the Okanogan County Commissioners voted
3 to require the removal of the gate obstructing public access to French Creek Road. Id. at 34.

4 In 2009, Plaintiffs submitted a further petition to vacate the portion of French Creek Road
5 at issue in this case. Id. at 35. The County Commissioners directed the County Engineer to
6 prepare a report on the road and posted notice of a public hearing. Id. at 35. Over the next few
7 weeks, the public comments poured in. The overwhelming majority of written comments and
8 public testimony affirmed the continued importance of the road to the public. Id. at 35. The
9 public’s response was so extensive, that the hearing was continued from November 3rd to
10 November 16th, when the Commissioners again voted to deny vacation of the French Creek Road.
11 Id. Plaintiffs did not appeal this denial.

12 Instead, on November 24, 2009, the Okanogan County Commissioners received a report
13 that an “attorney for the Gebbers” was “preparing a Quiet Title for the portion of the road that is
14 owned by the county.” Id. at 35-36. Apparently in response to this threat of litigation, and in
15 coordination with individuals acting on behalf of Plaintiffs, the County Commissioners with no
16 public notice, no public hearing, and no review of the road’s extensive historic record, passed a
17 new resolution purporting to disclaim knowledge of whether the portion of French Creek Road at
18 issue in this case was, in fact, a public road. Id. The 2009 petition to vacate, however, was never
19 granted, and no further petition to vacate has ever been filed.

20 **b. This Litigation**

21 Instead of appealing the County’s denial of their 2009 petition to vacate, Plaintiffs filed
22 the instant quiet tile action on March 3, 2017. Although Okanogan County initially filed an



1 Answer protective of the public’s right of access to the French Creek Road, the County filed an
2 amended answer on March 27, 2017, opting instead to take no position on the matters raised in
3 the complaint. After learning of the County’s new position, OORC intervened and filed its own
4 answer and cross-claims. OORC also filed multiple requests for public records seeking the
5 production of all documents relevant to French Creek Road from Okanogan County. After
6 extensive and costly discovery, Plaintiffs and OORC filed cross-motions for summary judgment
7 based on the documents produced to date by Okanogan County, and this Court heard oral
8 argument on March 20, 2018. By Order dated May 7, 2018, and based on the evidence available
9 at the time, the Court determined that “Okanogan County has never established the disputed
10 roadway as a County Road by dedication, petition, or condemnation” and granted Plaintiff’s
11 motion for summary judgment in this regard. The Court further determined that “a material issue
12 of fact exists whether the public’s use of the disputed road satisfied the legal definition of
13 prescriptive use.” The Court scheduled trial to take place in February of 2020.

14 On July 13, 2019, new counsel for OORC appeared in this action. On July 17, 2018, the
15 Supreme Court of the State of Montana issued its opinion in Bugli v. Ravalli County, holding that
16 courts lack subject matter jurisdiction where a plaintiff seeking to quiet title to a county road has
17 previously filed an unsuccessful petition to vacate with the county and failed to appeal that
18 decision. 2018 MT 177, 392 Mont. 131, 136, 422 P.3d 131 (2018) (attached as Ex. A to the
19 Kuehler Decl.). On September 12, 2018, concerned that the County had not produced all records
20 responsive to the previous public records requests, OORC served a request for production of
21 documents and interrogatories on Okanogan County. The County began responding to this
22 document request on October 27, 2018. Kuehler Decl. ¶ 3. Following further correspondence



1 among counsel regarding the completeness of the County’s document production and the
2 thoroughness of its search for responsive records, the County located the key historic documents
3 at issue in this motion. *Id.* Okanogan County’s production of these documents was not completed
4 until May 1, 2019. *Id.*

5 V. LEGAL ARGUMENT

6 This action should be dismissed for lack of subject matter jurisdiction because Plaintiffs
7 previously chose to submit a petition to vacate the portion of French Creek Road at issue in this
8 lawsuit (the “Road”) and thereby “committed their road dispute to the statutory process that arises
9 from the statutory [vacation] process, including necessary fact-finding. [Plaintiffs] are now bound
10 to that process, and cannot relitigate these issues in a separate forum.” Bugli, 392 Mont. at 136;
11 see also City of Fed. Way v. King Cty., 62 Wash. App. 530, 533, 815 P.2d 790 (1991) (judicial
12 review of administrative decision, not declaratory judgment action, is proper way to initiate
13 review of road vacation decision where facial validity of ordinance is not at issue).

14 Alternatively, this Court should grant summary judgment to OORC because the evidence
15 establishes that the Road was created by petition across federal lands and opened in 1889. The
16 Road was formally deemed a county road in 1903 when, after sixteen years of continuous use, the
17 State of Washington and Okanogan County accepted the federal government’s grant of rights-of-
18 way across public lands under R.S. 2477. The Road, which is held in trust for the public by
19 Okanogan County, has never been vacated.

20 Finally, OORC is entitled to an award of attorney’s fees and costs from Okanogan County
21 for two separate reasons. First, the County failed to comply with its fiduciary duty as public
22 trustee when it decided not to defend the public’s interest in Road. Second, Okanogan County’s



1 failure to conduct a reasonable review of its records in response to public records requests and
2 discovery requests by Plaintiffs and OORC has caused OORC to expend unnecessary resources in
3 compelling the production of key historic documents and litigating the substance of the issues
4 presented in this case. These costs should be borne by the County, which all along has had a
5 fiduciary duty of loyalty to protect the public’s interest in the road, and a duty under the Civil
6 Rules to ensure the reasonableness of its search for, and production of, responsive documents.
7 Okanogan County’s actions in this case have violated both of these duties.

8 **a. This Court Lacks Subject Matter Jurisdiction Because Plaintiffs Previously**
9 **Submitted the Matter to the Okanogan County Board of Commissioners for Decision**

10 Where, as here, plaintiffs voluntarily brought a petition to vacate a road or portion thereof
11 before the County Commissioners and that petition is denied, their only avenue for redress is an
12 appeal of that denial – and courts such as this one are deprived of subject matter jurisdiction in a
13 later quiet title action. It is axiomatic that a “lack of subject matter jurisdiction renders the
14 superior court powerless to pass on the merits of the controversy brought before it.” Skagit
15 Surveyors & Engineers, LLC v. Friends of Skagit Cty., 135 Wash. 2d 542, 556, 958 P.2d 962,
16 969 (1998) (en banc). Unlike personal jurisdiction, litigants may not waive subject matter
17 jurisdiction. Id. Accordingly, the issue may be raised at any time, and the only action that a court
18 lacking subject matter jurisdiction can take is to dismiss the case. See id.

19 In City of Federal Way, the Court of Appeals explained that if a plaintiff has another
20 completely adequate remedy, he or she is not entitled to relief by way of a declaratory judgment.
21 ... Thus, in a typical land use case. resort to a declaratory judgment procedure is not
22 permitted” because judicial review of the vacation decision provides an adequate remedy. 62
23 Wash. App. at 535; see also Coal. of Chiliwist v. Okanogan Cty., 198 Wash. App. 1016, review
24



1 denied sub nom. Coal. of Chiliwist Residents & Friends v. Okanogan Cty., 188 Wash. 2d 1022,
2 398 P.3d 1138 (2017) (unpublished opinion) (judicial review available for road vacation decisions
3 based on fraud, collusion or interference with a vested right). This is a typical road vacation case,
4 in which Plaintiffs’ means of seeking relief from the County’s decision not to vacate the French
5 Creek Road in 2009 was to initiate judicial review on the basis of fraud, collusion or interference
6 with a vested right. See id. at 4.

7 This precise issue was addressed by the Montana Supreme Court in July of 2018. See
8 Bugli, 2018 MT 177. The facts in Bugli are strikingly similar to the facts at issue in this case.
9 Plaintiffs there, like here, owned private property bisected by a county road created in 1900. Id. at
10 132. In the 1970s, a gate was placed across the road, preventing public access beyond the gate.
11 Id. In 1982, previous landowners abutting the road filed a petition with the Board of County
12 Commissioners (“BOCC”) to vacate – or, as it is referred to in Montana, to abandon¹ – the road
13 beyond the gate. Id. That petition was denied and the gate was ordered removed. Id. In the
14 following years, however, the gate remained in place. Id. at 132–133. In 2016, the landowners
15 filed a new petition to vacate the road. Id. at 133. The BOCC held a hearing and again denied the
16 petition as contrary to the public interest and ordered the landowners to remove the gate. Id.
17 Rather than appeal the denial to vacate, the landowners filed a complaint for declaratory and
18 injunctive relief in Montana district court seeking a declaration that the county road ended at the
19 boundary to their properties and was, thereafter, a private road. Id.

20 The Bugli Court held that “[i]nstead of filing a complaint in the District Court,
21 Landowners should have challenged the BOCC’s denial pursuant to the statutory requirements for

¹ In Montana, “‘abandonment’ [of a county road] means cessation of use of right-of-way (easement) or activity thereon with no intention to reclaim or use again and is sometimes called ‘vacation’”. MCA 7-14-2601.



1 county road abandonment cases.” Id. at 136. The Court explained that the landowners’ district
2 court suit had the effect of arguing that the BOCC had exceeded its jurisdiction when it failed to
3 grant their petition to abandon the road through their properties because any declaratory judgment
4 by the district court regarding the length of the road could conflict with the BOCC’s denial of the
5 petition for abandonment. Id. at 136–37 The Court acknowledged that “[i] has long been the
6 practice in Montana to litigate the existence, location, and conditions of a county road through
7 declaratory or quiet title actions.” Id. However, the Court held that:

8 [b]y submitting their petition to abandon the road, Landowners voluntarily chose,
9 accepted, and submitted to the BOCC’s jurisdiction and committed their road
10 dispute to the statutory process that arises from the statutory abandonment process,
11 including necessary fact-finding. Landowners are now bound to that process, and
12 cannot relitigate these issues in a separate forum.

13
14 Id. at 137.

15 There, as here, the landowners petitioned the BOCC to vacate the road, but “they did not
16 petition the [Superior] Court for a writ of review upon denial of their petition.” Id. Instead, they
17 filed a later court action seeking “[vacation] by implication outside of the [vacation] process.” Id.
18 The Bugli Court explained that, under these facts, the only “proper process is to invoke the
19 jurisdiction of the courts ... through a properly filed petition for writ of review of the BOCC
20 decision.” Id. Plaintiffs failure to do so deprived the court of subject matter jurisdiction. Id.

21 This Court, too, should dismiss Plaintiffs’ action for lack of subject matter jurisdiction.
22 Montana’s statutory code relating to the vacation of county roads is virtually identical to
23 Washington’s statutory regime. Both states allow BOCCs to vacate county roads upon petition of
24 abutting landowners so long as any order to vacate is preceded by notice and a public hearing and
25 the vacation is not contrary to the public interest. MCA 7-14-2601, 2615, 2617; RCW 36.87.030-



1 060. Both states provide for judicial review as a means of challenging a BOCC's decision on a
2 petition to vacate. MCA 27-25-103; RCW 7.16.040. And in both states, landowners who submit
3 an unsuccessful petition to vacate a county road cannot later circumvent that decision by instead
4 filing a declaratory or quiet title action; their only avenue of redress is to appeal the BOCC's
5 decision. Bugli, 2018 MT 177; see also City of Federal Way, 62 Wash. App. at 535 (right to
6 declaratory relief should be barred when [the] right to coercive relief is barred).²

7 Given that both states have nearly identical statutory frameworks and legal standards, the
8 Montana Supreme Court's decision in Bugli is persuasive. This action, too, should be dismissed
9 for lack of subject matter jurisdiction because here, like in Bugli, the same landowners previously
10 submitted a petition to vacate the same section of road to the BOCC, that petition to vacate was
11 denied, and Plaintiffs failed to appeal the BOCC's decision in the manner provided for by statute.

12 **b. In the Alternative, Summary Judgment Should be Granted to the County Because**
13 **Newly Produced Evidence Establishes that the French Creek Road Became a County**
14 **Road in 1903 and Has Never Been Vacated**
15

16 If this Court concludes that it does have subject matter jurisdiction, it should in the
17 alternative grant OORC and Okanogan County summary judgment because newly produced
18 evidence conclusively establishes that the French Creek Road was both created by petition to the
19 Okanogan BOCC in 1889 and used as primary access route to the Methow Valley for more than a
20 decade thereafter, and therefore formally became a county road in 1903, when the State of
21 Washington and Okanogan County accepted the federal government's grant of public rights-of-
22 way across federal lands under R.S. 2477.

² The importance of adhering to the proper means of review is not merely procedural. Unlike courts in declaratory judgment actions, courts reviewing BOCC decisions on petitions to vacate roads are limited to determining whether the BOCC's decision was based on fraud, collusion, or interference with a vested right. See Coalition of Chiliwist, 198 Wash. App. at 4.



1 Summary judgment is appropriate when no genuine issue of material fact exists and the
2 evidence, viewed in a light most favorable to the non-moving party, can lead to only one
3 reasonable factual determination. CR 56(c); Vallandigham v. Clover Park Sch. Dist. No. 400, 154
4 Wash. 2d 16, 26, 109 P.3d 805 (2005); If the moving party satisfies its burden, the nonmoving
5 party must present evidence demonstrating that material facts are in dispute. Vallandigham, 154
6 Wash. 2d at 26. The nonmoving party, however, must provide more than conclusory allegations,
7 argumentative assertions or speculation, and instead demonstrate specific facts showing the
8 existence of genuine issues of fact. Absher Const. Co. v. Kent Sch. Dist. No. 415, 77 Wash. App.
9 137, 141–42, 890 P.2d 1071 (1995); see also CR 56(e). A motion for summary judgment,
10 moreover, may be renewed at any time prior to entry of a final judgment at trial. Washburn v.
11 Beatt Equip. Co., 120 Wash. 2d 246, 301, 840 P.2d 860, 890 (1992) (partial summary judgment
12 orders that aren't certified are not final judgments and can be modified by the trial court "at any
13 time before entry of final judgment as to all claims and the rights and liabilities of all parties").

14 Washington State law has long held that R.S. 2477 grants public rights-of-ways across
15 federal lands at any time when underlying state law for establishing roads is complied with. In
16 1913 the Stofferan Court explained that in Washington State, "such highways may be established
17 by prescription, dedication, or user as well as by proceedings under the state statute by petition."
18 Stofferan v. Okanogan Cty., 76 Wash. 265, 268–269, 136 P. 484 (1913), quoting Smith v.
19 Mitchell, 21 Wash. 536, 58 P. 667 (1899). Here, newly produce evidence establishes that the
20 Methow Valley Road, including today's French Creek Road, became a county road in 1903,
21 when Okanogan County accepted the federal grant of rights-of-way across public lands.

22 1. French Creek Road was Established by Petition and Opened by the County in 1889

23 Plaintiffs previously claimed that French Creek Road did not become a County Road by



1 operation of Washington State and Okanogan County’s acceptance in 1903 of the public rights-
2 of-way grant across federal lands under R.S. 2477 because the road “was never opened to the
3 public” and “the County never took further action to establish the road[] or open the road[].”
4 Plaintiffs’ Memorandum of Law in Support of Summary Judgment at 17. The new evidence
5 provided by Okanogan County, however, conclusively establishes that – even before Washington
6 became a State – today’s French Creek Road was established as portion of the Methow Valley
7 Road, which was properly petitioned for and opened under the laws of the Territory of
8 Washington then in effect. *See* Laws of Washington Territory 1879, *An Act in Relation to Roads*,
9 Chapter 1 (the “1879 Road Law”); Kuehler Decl. Ex. B.

10 The 1879 Road Law provided that “[a]ll applications for laying out ... county roads shall
11 be by petition to the board of county commissioners of the proper county, signed by at least
12 twelve householders of the county, residing in the vicinity where said road is to be laid out.” *Id.*
13 Sec. 2. The petition was required to “specify the place of beginning, the intermediate points, if
14 any, and the place of termination of said road.” *Id.* At the time of presentation to the BOCC, it had
15 to be accompanied by an affidavit attesting that proper notice had been given to the public. *Id.*
16 Sec. 3. At that point, the BOCC could “appoint three disinterested householders of the county as
17 viewers of said road, and a surveyor, to survey the same.” *Id.* Sec. 4. The viewers and surveyor
18 were required to lay out the road in detail and issue a written report, adopted by a majority of the
19 viewers, supporting the opening of the road in the surveyed location. *Id.* Sec. 5.³ The BOCC was

³ The 1878 Road Law also required a “plat” to be prepared by the surveyor. 1878 Road Law Sec. 35. The field notes prepared by the surveyor of the Methow Valley Road demonstrate compliance with this requirement, by certifying the notes as “a true and correct copy of the field notes of the survey of the Methow County Road, as shown by Plat.” Thomson Decl. Ex. B at 77. The 1878 Road Law, moreover, specifically provided that, so long as the road “has been surveyed and the minutes of such survey have been recorded,” the road lawful despite other procedural “defect[s] or omission[s].” 1878 Road Law Sec. 35. The 1878 Road Law further provided that “in any case wherein the legality of any county road or public highway shall be contested, the introduction of the record, or a certified copy



1 then required to publicly read the report twice whereupon, “the commissioners being satisfied that
2 such road will be of public utility, ... from thenceforth said road shall be considered a public
3 highway, and the commissioners shall issue an order directing said road to be opened.” Id.

4 That statutory procedure was followed here. The petition to have the Methow Valley Road
5 established was signed by “almost all prominent citizens in the Methow Valley” at the time. Hart
6 Report at 13-14. It was received by the Okanogan BOCC on May 6, 1889, together with a bond
7 and affidavit attesting that the required public notice had been provided on March 27, 1889.
8 Declaration of Josh Thomson, June 18, 2019 (the “Thomson Decl.”) Exhibit D. The very next
9 day, the BOCC appointed a surveyor to survey the route of the road and three independent
10 citizens as viewers. Hart Report at 14; Thomson Decl. Ex. C. On May 12, 1889, the viewers
11 attested that their “opinions are in favor of the establishment of said road, for the following
12 reasons: that it is the only road that can be constructed with the resources at hand.” Thomson
13 Decl. Ex. C. On June 1, 1889, the viewers and surveyor signed a report and certificate attesting to
14 the location of the road and providing detailed field notes of the road’s exact location. Thomson
15 Decl. Ex. E. The attestation of the three viewers and report of the viewers and surveyor were read
16 by the BOCC twice, on August 8 and August 9, 1889. Hart Report at 14; Thomson Decl. Ex. C.
17 Immediately following these public readings, the commissioners formally declared the road to be
18 opened. Id. Accordingly, under Washington law at the time, “from thenceforth said road shall be
19 considered a public highway” “sixty feet in width.” 1878 Road Law Secs. 5 and 10.⁴

therefor, showing that the minutes of the survey of any such road have been recorded as specified in section thirty-five of this act, the same shall be sufficient proof of location, survey and legality of such road.” Id. Sec. 36.

⁴ The newly produced documents and Hart Report demonstrate that the Methow Valley Road was either already in use when it was formally petitioned for and declared open in 1889, or was constructed immediately thereafter. In addition, OORC previously introduced evidence establishing that the road at issue was traveled by the public as early as 1888, when a man named Risely claimed to have been the first to travel it by wagon, and 1892, when Cecile Colwell Magee and her family used the road to travel from Wentachee to their new home in the Methow



1 The Methow Valley Road encompassed a large area, extending both far to the north and to
2 the south from the section of road at issue in this law suit. A comparison of today’s French Creek
3 Road and the Methow Valley Road as surveyed in 1889 shows a remarkable consistency in the
4 road’s location over the past 128 years. *See* Tackman Decl. Exs. A-B. The Road’s location was
5 later confirmed by the U.S. government’s first official survey of the area conducted by the
6 General Land Office (“GLO”) between 1891 and 1902, whose surveys are considered to be the
7 most accurate surveys at the time and formed the basis for later land patent applications. Tackman
8 Decl. ¶6. The GLO survey notes locate the Road in exactly the same location as it crosses section
9 lines where the Road remains today. *Id.* Ex. C. In addition, separate surveys conducted by the
10 U.S. Geologic Survey between 1897 and 1903, maps of which were published in 1901 and 1905,
11 also confirm the existence of the Road as a public road at the time. Tackman Decl. Ex. F.

12 Having been established by petition, the Methow Valley Road became a proper county
13 road under Stofferan in 1903, when the State of Washington and Okanogan County accepted R.S.
14 2477’s grant of public rights-of-way across federal lands. *See* Stofferan, 76 Wash. at 274
15 (recognizing that roads established by petition became county roads following the acceptance
16 of the grant of public rights-of-way under R.S. 2477); Hart Report at 16. At this point, no
17 private landholdings existed yet in the area because the federal survey required under the
18 Homestead Act had not yet been completed. *Id.* at 16–17. The first private patent in the vicinity of
19 today’s French Creek Road was granted in 1905, eighteen years after the road was first petitioned
20 or and opened and two years after it became a county road by operation of R.S. 2477. *Id.* at 17.
21 Any patents issued for lands crossed by the Methow Valley Road, therefore, were burdened from

Valley. Court Docket Exhibits 50 and 48, “I Remember When Twisp was Platte” (Account of Cecile Colwell Magee) *Okanogan County Heritage*, Vol 1 Number 2, p.21.



1 inception with a county right-of-way. *See Nelson v. Pac. Cty.*, 36 Wash. App. 17, 23–24, 671
2 P.2d 785 (1983) (once established, public rights-of-way cannot be lost except by formal vacation
3 according to statute). Accordingly, from then on, French Creek Road has always been a
4 county road and can only be vacated by petition. Since all such petitions have been denied,
5 this Court should grant summary judgment to OORC and Okanogan County.

6 2. French Creek Road Was Continuously Used by the Public from 1889 On

7 Alternatively, additional historic evidence gathered and the documents newly produced by
8 Okanogan County also establishes that the road was used extensively for more than ten years after
9 it was first constructed, thereby establishing a public easement by use that formed an independent
10 basis to establish a county road when Okanogan County accepted the federal grant of public
11 rights-of-ways under R.S. 2477 in 1903. Indeed, the road was critical means of transportation for
12 Methow Valley residents following its construction in 1889. Expert historian E. Richard Hart
13 concluded that the road was of great importance at the time, and provided the sole access to over
14 one hundred people in the upper Methow who previously were said to be “virtually shut out from
15 all communication with the outside world.” Hart Report at 13-14. The road was the primary route
16 into the Methow Valley, allowed settlers to take wagons and horses into the upper Methow
17 Valley, and was the first stagecoach route into the Methow Valley. *Id.* at 15.

18 It soon formed a connection to other roads into the Methow Valley. For example, a
19 surveyor’s report dated May 25, 1890, relating to the “Loop Loop road” noted that this road
20 continued “down Beaver Creek on the east side to the intersection with the Methow Valley
21 County Road the point of termination.” Thomson Decl. Ex. E.

22 The section of the Methow Valley Road that includes today’s French Creek Road was also
23 improved through the use of state funds and recognized as a public road in both the GLO survey



1 of the area from 1891 to 1902 that served as basis for the issuance of private land patents under
2 the Homestead Act, and the USGS surveys conducted between 1897 and 1903. Id. at 15-16;
3 Tackman Decl. ¶¶6-8. These surveys were prepared under strict federal surveying standards in
4 place at the time which required that the “survey clearly shows the existence of the roads and
5 marks all land within as Public Land.” Id. at 4, 15-16. Inclusion of the Methow Valley Road in
6 these surveys, therefore, is conclusive evidence that the federal government documented the
7 continued use and existence of the entire road, including the French Creek Road, across public
8 land through 1903 – sixteen years after the road was formally opened by the Okanogan BOCC.

9 Having been established by use by the public for a period of sixteen by the time Okanogan
10 County accepted R.S. 2477’s grant of public rights-of-way in 1903, the Methow Valley Road at
11 that time became a proper county road under Stofferan. The Washington Supreme Court in
12 Stofferan explained that;

13 [W]e have repeatedly held that roads may be established by prescription by
14 the use by the public for a period of not less than seven years, where the same
15 have been worked and kept up at the expense of the public, as provided in
16 Rem. & Bal. Code, SS 5657 (P.C. 441 SS 91); or, where not so kept up at the
17 public expense, simply by continued use by the public for a period co-
18 extensive with the period of limitation for quieting title to land, which is, in
19 this state, ten years. Seattle v. Smithers, 37 Wash. 119, 79 Pac. 615;
20 Okanogan County v. Cheetham, supra; State v. Horlacher, 16 Wash. 325, 47
21 Pac. 748; Smith v. Mitchell, 21 Wash. 536, 58 Pac. 667, 75 Am. St. 858.

22
23 Stofferan, 76 Wash. at 273–74; see also Okanogan County v. Johnson, 156 Wn.515, 287 P.15
24 (1930) (“it has been thoroughly settled by our former decisions” that roads became county
25 roads upon the 1903 acceptance of the federal grant of rights-of way where “it appear[ed] that
26 a prescriptive right in the public had accrued while the land affected was all or part of the public
27 domain”). Accordingly, this Court should grant summary judgment to OORC and Okanogan
28 County because the French Creek Road alternatively became a county road upon the



1 County’s acceptance of the federal grant of rights-of-way in 1903 by having by that time
2 been continuously used by the public for more than ten years.

3 3. No Petition to Vacate the County Road has Been Granted

4 The status of the French Creek Road as a county road, moreover, has not been unknown to
5 Plaintiffs and their predecessors in interest over the decades. A total of three petitions to vacate
6 the Road were brought, and none of those petitions was granted. Instead, the Road’s public status
7 was repeatedly confirmed, and illegal gates were regularly ordered removed. *See Hart Report at*
8 *30*. The first petition to vacate was filed in 1955 and rejected by the BOCC as contrary to the
9 public interest “after due consideration” and public notice and hearing. *Id.* at 31. Newly produced
10 records maintained by Okanogan County establish that a second petition to vacate was filed in
11 1965, and was similarly “denied in the public interest” when, after public notice and hearing,
12 more than one hundred and fifty people and the Washington Department of Natural Resources
13 signed petitions opposing the vacation of the Road. *Id.* at 31–32. The private landowners were
14 ordered to remove illegal gates placed across the road and a county grader was ordered to grade
15 the road to improve the travelling surface. *Id.* at 32.

16 These issues were then revisited with some frequency until 2009, when the last petition to
17 vacate was filed by Plaintiffs in this action. *Id.* at 33–34. That petition, too, was denied following
18 public notice and hearing. *Id.* at 35. None of these denials were appealed. *Id.* The Road, therefore,
19 remains a public road, and summary judgment should be granted to OORC. *See Nelson*, 36 Wash.
20 App. at 23–24; *City of Seattle v. Hinckley*, 67 Wash. 273, 278–279, 121 P. 444 (1912); *Heuston*
21 *v. City of Tacoma*, 67 Wash. 92, 120 P. 872 (1912).



1 4. The Doctrine of Laches Bars Plaintiffs from Litigating the Long-Recognized
2 Status of French Creek Road as a County Road
3

4 In fact, the extensive history showing repeated attempts to vacate the Road also
5 demonstrates long-standing knowledge by Plaintiffs and their predecessors in interest that the
6 Road is, in fact, a county road. Under circumstances such as these, courts have used the
7 doctrine of laches to bar plaintiffs from raising historical arguments in an effort to quiet title
8 to a road in themselves. *See John Robinett Pension Plan & Trust v. City of Snohomish*, 2
9 Wash.App.3d 107 (Wash. App. 2d 2018) (unpublished). The equitable doctrine of laches
10 applies when there is “(1) knowledge by plaintiff of facts constituting a cause of action or a
11 reasonable opportunity to discover such fact; (2) unreasonable delay by plaintiff in commencing
12 an action; and (3) damage to defendant resulting from the delay in bringing the action.” Davidson
13 v. State, 116 Wash. 2d 13, 25, 802 P.2d 1374 (1991). The Robinett court concluded that abutting
14 landowners are charged with knowledge of the use of a road, that the passage of more than 110
15 years before filing suit to quiet title to the road was an unreasonable delay, and that the long delay
16 in bringing suit “resulted in the inevitable loss of witnesses who could have provided first-hand
17 evidence about the use and physical characteristics of the [road] from 1890 to 1895.” Id.

18 Here, similarly, the doctrine of laches applies to bar Plaintiffs from litigating the public’s
19 historic use of the Road. Plaintiffs were well aware of the continuous use of the Road by the
20 public over the years not only because of their status as abutting landowners, but also because
21 they erected gates to bar continued public use over the years, and were repeatedly advised that
22 those gates unlawfully obstructed a county road. Plaintiffs and their predecessors in interest also
23 attempted to vacate the Road three times between 1955 and 2009, all unsuccessfully. Plaintiffs,
24 therefore, have long had knowledge of facts constituting their cause of action.



1 Plaintiffs and their predecessors in interest also unreasonably delayed bringing this action
2 by waiting more than 128 years after the road was first established to bring suit. Waiting 100
3 years or more is undue delay sufficient for purposes of application of the doctrine of laches. See
4 Robinett at *5; see also Real Progress, Inc. v. City of Seattle, 91 Wash. App. 833, 844, 963 P.2d
5 890 (1998) (“waiting over 100 years” to file an action sufficient to satisfy defendant’s burden to
6 demonstrate an unreasonable delay for applying laches). Moreover, as in Robinett, Plaintiffs’
7 undue delay in bringing this action has caused important witnesses to die and historic records to
8 be increasingly hard to locate, creating material prejudice. See Davidson, 116 Wash. 2d at 26–27
9 (doctrine of laches “commonly recognizes the unavoidable loss of defense evidence as
10 establishing material prejudice”). In this case, too, the doctrine of laches therefore bars Plaintiffs
11 long belated attempt to quiet title to one of the oldest public roads in the Methow Valley.

12 **c. The Court Should Award OORC Attorney’s Fees and Costs from Okanogan County**

13 This Court can award attorney’s fees and costs upon motion by any party. CR 54. Here,
14 the public interest strongly supports an award of attorney’s fees and costs from Okanogan County
15 to Defendant OORC. Even in 1889, when the Road was first established, the laws of the Territory
16 of Washington recognized the public’s preeminent interest in county roads. 1879 Territorial Code,
17 Road Law, Chapter 1. From then on, no county road could be vacated except by authority of the
18 BOCC following submission of a petition, posting of a bond, public notice, a public hearing, and
19 a determination by three disinterested viewers that the vacation was in the public interest. Id.
20 Sects. 1, 3, 11, 12. Today’s RCWs impose the same requirements. RCW 36.87.010-080.

21 The Washington Supreme Court, too, has long recognized that the interest held by
22 counties in streets and highways “is one that is held in trust for the public.” State ex rel. York v.



1 Bd. of Comm'rs of Walla Walla Cty., 28 Wash. 2d 891, 898, 184 P.2d 577 (1947); Kiely v.
2 Graves, 173 Wash. 2d 926, 937, 271 P.3d 226 (2012); see also Cunningham v. Weedin, 81 Wash.
3 96, 98, 142 P. 453 (1914) (“A county holds an easement in its highways in trust for the public”)
4 citing Town of Sumner v. Peebles, 5 Wash. 471, 32 P. 221 (1893); Town of W. Seattle v. W.
5 Seattle Land & Improvement Co., 38 Wash. 359, 80 P. 549 (1905); Rapp v. Stratton, 41 Wash.
6 263, 83 P. 182 (1905). Every time the County has confronted the question of whether the Road is
7 in the public’s interest - in 1955, 1965 and most recently in 2009 - the County concluded that it is.
8 Nonetheless, the County has failed to defend the public’s admitted interest in the Road in this
9 lawsuit, relying instead on a small organization and a handful of taxpayers to bear the burden and
10 cost of doing so. This is a violation of the County’s fiduciary duty as trustee to protect the
11 public’s interest in county roads.

12 In 2009, moreover, the County in response to - or even coordination with - the threat of
13 litigation from Plaintiffs’ counsel to initiate a quiet title action, claimed not to have sufficient
14 information to establish that the French Creek Road is a county road. Even at the time, there was
15 clear evidence of over a century of public use and the County had repeatedly asserted it’s interest
16 in the Road. The County failed to undertake a comprehensive records search first in 2009, before
17 improperly claiming a lack of information sufficient to continue to recognize the Road’s status a
18 county road, then again in 2017, when this lawsuit was filed and the County was called upon to
19 take a position, and finally in the first two years of this litigation in response to the Parties’
20 document requests. Indeed, it took OORC’s repeated requests for more comprehensive searches
21 of the County’s records and a fortuitous visit from the county Road Administration Board for the
22 County to finally locate pivotal documents from 1889 and 1965 – over two years after the lawsuit



1 was filed, and nearly a year after the parties' initial motions for summary judgment. The critical
2 records were located in County's Public Works Department all along. See Thomson Decl. The
3 County's actions, therefore, violated not only its trustee duty to the public in defending its interest
4 in the Road, but also its discovery obligations under the Civil Rules. Because of these violations
5 and the County's decision to rely on OORC to represent the public's interest, the County should
6 now be required to pay OORC's attorney's fees and costs in connection with this action.

7 VI. CONCLUSION

8 OORC respectfully requests that this Court dismiss this case for lack of subject matter
9 jurisdiction or, in the alternative, enter an order granting OORC and Okanogan County summary
10 judgment because French Creek Road (i) was established by petition and opened by Okanogan
11 County in 1889, (ii) became a County Road after sixteen years of continuous public use by
12 operation of the acceptance of the federal grants of rights-of-way in 1903 prior to any private land
13 grants in the area; and (iii) has never been vacated. OORC further requests that this Court enter a
14 permanent injunction against Plaintiffs, and all persons claiming under them, from maintaining or
15 erecting any barriers across French Creek Road, and that the Court order Okanogan County to pay
16 OORC's reasonably incurred costs and fees in defending this action.

17
18 DATED this 1st day of July, 2019.

19 /s/ Natalie N. Kuehler

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