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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

Cause No. 372979

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

Appellant,

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,

Respondents

APPELLANTS' REPLY BRIEF

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Reply to OOCR Brief

I. Legal Analysis

A. Summary Judgment Standards.

Pursuant to CR 56(c) a summary judgment is available only where “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” In *Morris v. McNicol*, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974), the court considered the criteria for granting summary judgment, and determined that

[a] "material fact" is a fact upon which the outcome of the litigation depends, in whole or in part. Moreover, the burden is on the party moving for summary judgment to demonstrate that there is no genuine dispute as to any material fact and all reasonable inferences from the evidence must be resolved against him.
(citations omitted)

A summary judgment motion should be granted only if, from all the evidence, reasonable men could reach but one conclusion. CR 56(c); *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 421 P.2d 674 (1966).

An appellate court is required, as is the trial court, to review material submitted for and against a motion for summary judgment in the light most favorable to the party against whom the motion is made. *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wn.2d 528, 503 P.2d 108 (1972); *Robert Wise Plumbing & Heating, Inc., v. Alpine Dev. Co.*, 72 Wn.2d 172, 432 P.2d 547 (1967).

B. This Court has Subject Matter Jurisdiction.

Respondent Okanogan Open Roads Coalition (hereinafter “Respondent” or “Coalition”) claims that after Appellants filed a petition to vacate the road in 2009, and the Board of County Commissioners (“BOCC”) denied the petition, Appellants only remedy was to challenge the denial by Writ of Certiorari (Coalition Brief at 15). The fatal flaw in the Coalition claim is the fact the BOCC formally reversed its denial on December 8, 2009 (CP 69-70), and notified the public of its intent to reverse the denial before the statutory appeal period had run. The Coalition also assert, 11 years after the fact, that BOCC Resolution 443-2009 was procedurally improper, yet at no time did the Coalition file a Writ of Certiorari objecting to this alleged improper procedure, and thus have waived the right to assert a procedural defect, in addition to being time barred. A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. See *Estate of Dempsey v. Hospital Co.*, 1 Wn. App. 2d 628, 637, 406 P.3d 1162 (2017).

1. Appellants knew the BOCC was reversing its decision before the Appeal deadline. The Land Use Petition Act (RCW Ch. 36.70C) does not apply to road vacation decisions. See RCW 36.70C.020(2)(a). Instead, when an inferior board exercises judicial

functions, an application for a Writ of Certiorari under RCW Ch. 7.16 is the proper procedure. The statute governing certiorari does not spell out when a writ must be filed. See *Federal Way v. King County*, 62 Wn. App. 530, 536 (1991). The Okanogan County Code (Chapter 12.90) contains no filing deadlines. Washington courts require that the Writ of Certiorari be applied for within a “reasonable time”. *Id.*

Washington courts have held that a reasonable time is controlled by the rules governing appeals. See *Pierce v. King County*, 62 Wn.2d 324, 333 (1963); State ex rel. *L. L. Buchanan & Co., v. Washington Public Service Com’n*, 39 Wash.2d 706 (1957); *Vance v. City of Seattle*, 18 Wn. App. 418 (1977).

In the present case, on November 16, 2009, the BOCC initially denied Appellant’s request to vacate plaintiffs’ three mile private access road. The Coalition asserts that Appellants had either 20 or 21 days to appeal the November 16, 2009 decision, and because the resolution reversing the decision was not actually filed until December 8, 2009 (22 days later), Appellants missed their window to appeal and the denial became final. (Coalition Brief at 20).

The practical problem with this argument is that the BOCC met in regular public session on November 24, 2009, only eight (8) days after the November 16, 2009 resolution, and issued written minutes wherein the

BOCC discussed whether or not to reverse its decision (CP 377). On December 1, 2009, fifteen (15) days after the original decision, the BOCC again met in regular session and directed the county attorney to draft a resolution reversing its November 16th decision regarding the disputed roadway. (CP 378).

Appellants and their attorneys were well aware of the December 1, 2009 BOCC decision.¹ Given Appellants' knowledge that the BOCC voted to reverse its decision on December 1, 2009, there was no reason for Appellants to appeal. On the other hand, if the Coalition believed that the December 8, 2009 resolution was procedurally improper, they had an available remedy (a Writ of Certiorari) to contest the "improper" resolution. They chose not to pursue that remedy. Instead, three months after the resolution was signed by the BOCC, one of the Respondents (Lorah Super) addressed the Commissioners, and threatened to take the issue to court. (CP 1008-1009; 1739-1740).

2. The Coalition's sole authority is a Montana decision.

The Coalition's subject matter jurisdiction argument is based solely on a recent Montana Supreme Court case, *Bugli v. Ravalli County*, 396 Mont. 271, 444 P.3d 399 (2019). A ruling by an out of state tribunal is

¹ One of Appellant's attorney, Jay Johnson, is prominently mentioned in the November 24, 2009 minutes.

nonbinding and not controlling upon a Washington Court. See e.g., *York v. Wahkiakum School District*, 163 Wn. 2d 297, 331, 178 P.3d 995 (2008); *State ex rel. Todd v. Yell*, Wn.2d 443,451 (1941). The Coalition fails to cite any Washington case law that supports its subject matter jurisdiction argument.

In *Bugli*, landowners filed a petition with the Board of Commissioners to abandon a road. The Board denied the petition. Months later, the landowners filed a complaint for declaratory and injunctive relief. The Montana Supreme Court concluded that if the landowners disagreed with a Board's decision, the petitioners must seek a writ of review (i.e. certiorari), and not relitigate the issues by way of a complaint for declaratory relief.

Even if this Court finds the Montana Court's decision compelling, there is a distinguishing fact which makes the case inapplicable to this appeal. Specifically, after the petition to vacate ("abandon") the road was denied, the Board in *Bugli* never reversed its denial. In the present case, after the petition to vacate was initially denied (on November 16, 2009), the Okanogan BOCC on December 1, 2009 approved a motion reversing its decision, concluding plaintiffs' three mile private access road was not a County road. The formal resolution, No. 443-2009, states in pertinent part:

BE IT FURTHER RESOLVED; that with regards to the remaining portion of the road, including the gated portion, ... The records and documents held by the County do not support that that portion of the road is a county road or public right of way and, therefore, does not claim any interest or jurisdiction over that portion of the Road. Therefore, there was no interest to vacate, or not vacate, and that portion of the decision is rendered null and void. Furthermore, as the gated portion of the road lies outside the County's jurisdiction, any order to remove or open the gate is rendered null and void. (CP 1364-1365).

Since Okanogan County disclaimed jurisdiction over the three (3) mile stretch of road, Appellant had no reason to pursue a Writ of Review.

Further, Appellants' quiet title action is not an attempt to relitigate the 2009 petition to vacate. It was filed on March 3, 2017, eight (8) years later, to address trespasses that had damaged the gates and used the road to access Appellants' surrounding land. (CP 1361)

C. Prescriptive Easement Claim/Opinions of E. Richard Hart.

1. **Procedural History.** On June 23, 2017, the Coalition filed a cross motion for summary judgment, asserting (in part) that the disputed area between the two gates was a public road by prescription. On May 7, 2018, the trial court denied Respondent's cross motion, finding "that a material issue of fact exists whether the public's use of the disputed road satisfied the legal definition of prescriptive use." (CP 1563-1567).

Respondent later renewed their motion based on the declaration of a historian, E. Richard Hart. (CP 433-435; 444-445).

In the trial court's order dated December 18, 2019, the court made no findings on Respondent's prescription claim, nor was the claim addressed in the court's ruling. (CP 35-37). Where a trial court does not make a finding on a factual issue, we "must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue. See *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). Despite this, the Coalition's counsel incorrectly asserts that the trial court "properly entered summary judgment for OORC because the Methow Valley Road in 1903 became a public road by prescriptive use...." (Coalition Brief at 29-30).

2. **The Hart report at most raises a question of fact.** While a declaration containing an expert opinion may create a genuine issue of fact precluding summary judgment (see *Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 553 P.2d 107 (1976)), in this case the Hart report at most adds another layer to the factual dispute identified by the trial court. (CP 1563-1567).

While the Coalition asserts that Mr. Hart "is eminently qualified as an expert historian" (Coalition Brief at 22), a review of his C.V. and the report itself establish that he has no knowledge of the road in question, has

never researched or published on the topic of roads created per the Territorial Laws of Washington, and has never testified as an expert on the subject of Territorial Roads. (CP 1258-1276). Further, his C.V. confirms that his only background regarding roads involves a preliminary paper/report he wrote back in 2002 on R.S. 2477 Rights of Way in Utah that he submitted to the Utah Attorney General. (CP 1268).

When looking at Mr. Hart's report, what really stands out is the lack of any facts/evidence substantiating his opinions. He generally talks about the importance of roads in the U.S. (CP 1705-06), does an overview of Federal/State relations regarding highways (CP 1707-1715), and then he discusses passage of RS 2477, relating to right of ways for the construction of highways across public lands. (CP 1716-17).

Mr. Hart then claims, without citation to any authority, the following:

Soon after Okanogan County was first formed action was taken to establish roads. The importance of the Methow Valley/Bald Knob/French Creek Road was apparent given the speed in which Okanogan County worked to improve the road and declare it open.

(CP. 1717). Next, Mr. Hart refers to the 1889 Petition that sought to create the Methow Valley Road, and simply quotes from statements in the Petition itself as "facts" that somehow substantiate his opinions of later use of the "road". (CP. 1718)

The 1889 Petition itself indicates that no road was then in existence (“... Almost all prominent citizens in the Methow Valley petitioned to have a road established between the Columbia River and the fork of the Methow ...”) (“... over hundred people in the Upper Methow ... were said to be ‘virtually shut out from all communication with the outside world’...”)(“other routes for the road had been discarded as impracticable.”) (CP 1718).

Despite the foregoing, Mr. Hart claims that starting in 1889, the Methow Valley Road was the primary route into the Methow Valley (CP 1719), without citation to any historical materials indicating when the road was built, whether it was built in sections, and when the portion of the road between the two gates was constructed. Appellants do not dispute that a road was constructed at some point in time, but Mr. Hart fails to cite to anything supporting his opinion that the entire road was constructed and opened in 1889, let alone between 1889 and 1894.

As an example, Mr. Hart cites to Okanogan County’s answers to written discovery to support his claim that the road was improved by the use of state funds (CP 1719), yet the County’s interrogatory answers do not mention road improvements or state funding. (CP 280-282). He also relies on a transcript of a newspaper article (prepared by one of the Defendant’s supporters), describing a wagon road route. Said transcript does not identify

the date the route was first used, or when the route was created. In fact, no date is ever mentioned in the article. (CP 1719; 2020).

Mr. Hart also states “a school accessible by the Methow Valley Road was opened following the 1903 survey and was in operation at least until 1910” (CP 1724). His sole basis for this assertion is a single photo (not produced) that he claims shows students at the school from 1908 to 1910 (CP 1754 – footnote 76). He does not reference any photos taken between 1903 and 1907, nor does he mention any photos of students actually using the road. Further, he does not identify in what township the school was located or what students it served. The school referenced by Hart was actually in Township 32, Section 22 just outside of Carlton, nowhere near the “Methow Valley Road” and in a completely different township from the gated area in dispute (CP 83-84). The route students took to get to the school is pure speculation by Mr. Hart.

Next, Mr. Hart references in his report the ranch of Silas Cheval (CP 1718) as part of the route proposed by the 1889 petition to establish the Methow Valley Road. Evidence submitted by the Coalition included a 1904 newspaper article recounting a wagon trip over the Cheval ranch (which later became the O’Toole ranch) that was permissive, in that it was a guided trip by the then owner to get a wagon over Bald Knob. (CP 81-84; Index 62, PP. 5-6 of Memorandum Opposing Summary Judgment). There is no

evidence that later trips across the Cheval ranch were also anything other than permissive, further contradicting the Coalition's assertion of prescriptive use.

Mr. Hart cites to no other evidence of use, let alone continuous use, of the road for 10 years. Despite this, the Coalition claims the Hart report conclusively establishes that the road, from 1889 on, was "immediately, consistently and frequently used by the public..." (Coalition Brief at 27).

3. **No evidence of adverse use.** Given the petition filed in 1889, and the BOCC approval of said petition (ignoring for the moment the fact the BOCC failed to record the survey and the plat), a public right of way was authorized. Given that, the Coalition cannot establish the elements of a prescriptive easement, which requires proof that the use was: (1) adverse to the owner of the land, (2) open and notorious, (3) over a uniform route, (4) continuous and uninterrupted for 10 years, and (5) with the knowledge of such owner at a time when he was able in law to assert and enforce his rights. *Kunkel v. Fisher*, 106 Wash.App. 599, 602, 23 P.3d 1128 (2011) (citing *Mountaineers v. Wymer*, 56 Wash.2d 721, 722, 355 P.2d 341 (1960)). The party asserting prescriptive use has the burden of establishing the existence of each element. *Drake v. Smersh*, 122 Wash.App. 147, 151, 89 P.3d 726 (2004).

A claimant's use is adverse when he or she "uses the property as the true owner would, under a claim of right, disregarding the claims of others, and asking no permission for such use." *Kunkel*, 106 Wash.App. at 602, 23 P.3d 1128. Here, since the public right of way was "authorized" in 1889, use by the public could have never been an adverse use.

D. Respondent's assertion of Laches and the Statute of Limitations is without merit.

When Appellants purchased their land in the 1990's, the private access road had already been gated on both ends for 40 years. It was only after Appellants became aware of trespassers damaging the gates that it brought a quiet title action in March 2017.

In all cases cited as authority in support of Respondent's laches defense (Coalition Brief at 30), the party bringing the quiet title action sought relief based on the Non-User statute. See *Real Progress Inc., v. City of Seattle*, 91 Wash. App. 833, 837-38, 963 P.2d 890 (1998); *John Robinett Pension Plan & Trust v. City of Snohomish*, 2 Wash. App.2d 1007 (2018) (unpublished opinion). In this case, Appellant never affirmatively sought relief under the Non-User statute.

In support of their statute of limitations claim (Coalition Brief at 31), the Coalition cite the case of *Yorkston v. Whatcom County*, 11 Wash. App.2d 815, 461 P.3d 392 (2020). In that case, a property owner brought a declaratory judgment and quiet title action contesting the width of a county

right of way, which *Yorkston* asserted was 30 feet. It was undisputed that the road itself was opened in accordance with the Territorial Law (i.e. four roads were resurveyed, and the plat and field notes were recorded per the 1881 Act). Under the 1881 Act, if not specified, the default width was sixty feet. The court in *Yorkston* held if *Yorkston* wanted to challenge the validity of the 1884 county commissioner's decision, appeal would have to have been pursued by his predecessors within 21 days of the 1884 decision.

In the present case, if in 1889 the road was not opened in accordance with the 1879 Territorial Law, meaning the road never became a public right of way, then there was nothing for Appellant's predecessors to appeal. Further, Appellant's lawsuit does not affirmatively assert that the 1889 BOCC decision was invalid. It is only after the Coalition filed its counterclaim, and affirmatively asserted the road was created by petition, did Appellant assert claims as defenses to the counterclaim.

In general, a defense to a claim is not statutorily time barred if the main action in which the defense is raised is not time barred (in other words, statutory time limitations do not run against defenses separately from the main actions in which the defenses are raised). See *Olsen v. Persarik*, 118 Wn. App. 688, 77 P.3d 385 (2003); *Ennis v. Ring*, 56 Wn.2d 465, 471, 353 P.2d 950 (1959); *Allis-Chalmers v. North Bonneville*, 113 Wn.2d 108, 112,

75 P.2d 953 (1989); *Sea-First v. Siebol*, 64 Wn. App. 401, 407, 824 P.2d 1252 (1992).

In both *Keller v. Sixty-01 Associates of Apartment Owners*, 127 Wn. App. 614, 621, 112 P.3d 544 (2005) and *Club Envy v. Ridpath Tower Condo*, 184 Wn. App. 593, 337 P.3d 1731 (2014), the court held that a defense that an amendment was void from its inception because it was not adopted by the HOA was not time barred, despite the one year statute of limitations in RCW 64.34.264(2).

Finally, in *Cashmere Valley Bank v. Brender*, 128 Wn. App. 497, 116 P.3d 421 (2005), the court confirmed that even if an affirmative claim is statutorily time barred, that does not prevent a party from asserting the basis of the claim as a defense.

1. **The only claim barred is Respondent's counterclaim.**

Laches applies when the party asserting the doctrine affirmatively establishes “(1) knowledge by plaintiff of facts constituting a cause of action or a reasonable opportunity to discover such fact; (2) unreasonable delay by plaintiff in commencing as action; and (3) damage to defendant resulting from the delay in bringing the action.” *Davidson v. State*, 116 Wash.2d 13, 25, 802 P.2d 1374 (1991).

Here, the Coalition waited 130 years before first asserting the road was created by petition in 1889. By law, the Coalition and its predecessors

are charged with knowledge of the facts, and waiting 131 years is clear evidence of unreasonable delay. See *Real Progress Inc. v. City of Seattle*, 91 Wn. App. 833, 844, 963 P.2d 890 (1998). As a result of this unreasonable delay, Appellants have been materially prejudiced because it is no longer possible to locate evidence to rebut Respondent's claim that the road was opened by petition and used by the public between 1889 and 1894.

E. The requirements of the 1879 Territorial Laws were not satisfied.

Respondent, by asserting the road was formally opened by petition in 1889, has the initial burden (in moving for summary judgment) to establish the requirements of the Territorial Laws were satisfied.

1. **Evidence not considered by the Trial Court.** The Coalition not only cites to, but attaches as appendices survey instructions from the Bureau of Land Management ("BLM") and the Department of Interior from 1881, 1947 and 1973, as well as a glossary of BLM surveying and mapping terms from 1988 and 2003, to support their argument that "surveys", "minutes of survey" and "field notes" are one and the same. (Coalition Brief at 36- 39 and Appendices A-E)

Per RAP 10.3(a)(6), a respondent's brief should include argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. *Satomi Owners Ass'n v. Satomi LLC*, 167 Wn.2d 781, 807-808, 225 P.3d 213 (2009).

Portions of a brief which contain factual material not submitted to or considered by the trial court should be stricken. *Nelson v. McGoldrick*, 127 Wn.2d 124, 896 P.2d 1258 (1995). In *Nelson v. McGoldrick*, Respondent's supplemental brief contained factual assertions not supported by the record, as well as evidence which was never submitted to nor considered by the trial court in deciding the summary judgment motion. The Supreme Court struck those portions of the brief. *Id.* at 141. Similarly, in *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) the Supreme Court held that if grounds for an argument are not supported by the record, the argument will not be considered. See also *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 252, 850 P.2d 1298 (1993) ("This argument is not supported by evidence in the records. Cases on appeal are decided only on evidence in the record."); *Grobe v. Valley Garbage Serv., Inc.*, 87 Wn.2d 217, 551 P.2d 748 (1976).

In *Casco Co. v. PUD No. 1*, 37 Wn.2d 777, 226 P.2d 235 (1951), an Amicus Curiae brief filed in the Supreme Court attached, as an appendix, a copy of a contract which was not part of the record. The Supreme Court held as follows:

Of course, this court cannot consider the appendix as evidence. This court is a reviewing court, and, on appeal, considers only such evidence as was admitted in the trial court. On appeal of the case to this court, it would be very unfair to the trial judge to consider evidence in this court which was not before him when he entered his decision in the case. ...

Id., at 784-85.

In the present case, Respondent's arguments based on Appendix A-E were never considered by the trial court, and thus cannot be considered by this court. Finally, Appellants are not required to file a motion to strike the appendices. In *Estate of Evans*, 181 Wn. App. 436, 453, 326 P.3d 755 (2014), the court ruled that the brief is the appropriate vehicle for pointing out alleged extraneous materials, not a separate motion to strike.

Moreover, RAP 10.3(a)(8) provides: "An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c)." RAP 10.4(c) provides exceptions for documents such as statutes, rules, and jury instructions, allowing those to be attached as an appendix to a brief. The Coalition's appendices do not fall within the exception granted in RAP 10.4(c) and thus should not be considered by this court.

a. **1881 Instructions to the Surveyors General.** Even if this court decides to allow consideration of Appendix A-E, the 1881 Instructions to the Surveyors General (Appendix A) provides:

"FIELD NOTES.

The deputy surveyor will provide himself with proper blank books for his field notes, or same will be furnished to him by the surveyor general, and in such books he must make a faithful, distinct, and minute record of everything officially done and observed by himself and his assistants, pursuant to instructions, in relation to running, measuring and marking lines, establishing corners, &c.,

and present, as far as possible, a full and complete topographical description of the country surveyed.”

Nowhere do the 1881 instructions state that “field notes” are the same as a “survey” or “minutes of survey”.

b. **1833 General Instructions.** The Coalition also assert that Section 36 of the 1879 Territorial Laws was satisfied, because the term “minutes of survey” is the same thing as “field notes”². Yet nowhere in the Appendices does the BLM refer to “minutes of survey” as “field notes”.

Further, the 1833 General Instructions (Respondent’s Appendix D) confirm that “field notes” are not the drawn “survey” itself (which must be recorded under Section 5 of the 1879 Territorial Law). Appendix D provides in part:

5. The field notes of the surveys furnish primarily, the materials from which the plats and calculations of the public lands are made; and the source from where the description and evidence of the location and boundaries of those surveys are drawn and perfected.
P. 299 (emphasis ours)

In *Selde v. Lincoln County*, 25 Wn. 198 (1901) (cited by the County at P. 12 of its Brief), the Lincoln County BOCC rejected a petition to establish a county road. It was alleged that the board appointed viewers and a surveyor

² The Coalition contends, at P. 37 of its Brief that Appellants define “minutes of survey” to mean the official record of survey which are not field notes. This contention is misplaced as Appellants only defined the term “minutes” using West Encyclopedia of American Law to mean the “written record of an official proceeding. Moreover, clearly stated “survey field notes are not a written record prepared at an official proceeding qualifying as “minutes””. (Appellants’ Brief at 17-18.)

to survey the proposed road (*Id.* at 199), and that the viewers “filed their report and map ...” (emphasis ours). *Id.* at 200. This case confirms that a survey is a map that is drawn, whereby field notes are detailed notes describe township and section lines, corners, monuments, topography, etc. Because surveys and field notes are two different things, the Coalition failed to satisfy their initial burden of proof on summary judgment.

F. Defendants have produced no evidence a plat was ever recorded.

No recorded plat has been produced by the Coalition in accordance with Section 5 of the 1879 Territorial Law. It is not the party opposing the summary judgment’s burden to prove something was not recorded – it is the moving party’s burden to show it was. See *Cox v. Malcolm*, 60 Wn. App. 894, 808 P.2d 758 (1991); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989).

Only if this court elects to consider Respondent’s Appendices, then the 1881 Instructions to the Surveyors General (Appendix A) clearly distinguish field notes from a plat:

With the notes of the survey of principal lines forming a tract of 24 miles square the deputy will submit a plat of the lines run, on a scale of one-half inch to the mile, and with the notes of survey of the exterior lines of townships, a plat of the lines run, on the scale of two inches to the mile, on which are to be noted all the objects of topography on line necessary to illustrate the notes,
(emphasis ours)

Since the Coalition is unable to produce a copy of the recorded plat, they instead take the position that the mere reference to the term “plat” in the viewer’s report and the surveyor’s return is somehow sufficient proof of recording. (Coalition Brief at 39-40). Without proof the plat was actually recorded, by law the road never was formally established. At a minimum, there is a genuine issue of material fact whether the plat was recorded.

G. The Stretch of Road in dispute was Abandoned.³

In the early days, county roads could be created by two distinct methods. County commissioners could create roads upon the petition of freeholders (Bal. Code § 3772 et seq.) or a landowner could create roads by filing a plat with the county auditor. *Murphy v. King County*, 45 Wash. 587, 589, 593, 88 Pac. 1115 (1907). As originally enacted, roads created under either method were vacated if they were not opened to the public within five years. *Leonard v. Pierce County*, 116 Wash.App. 60, 65, 65 P.3d 28 (2003); *Murphy v. King County*, 45 Wash. at 593; LAWS OF 1889-1890, ch. XIX, § 25. In response to the *Murphy* decision, the Legislature promptly amended the statute to exempt privately platted roads from the automatic vacation process. Roads created by petition were still vacated if unopened

³ The claim of abandonment only is applicable if this court finds that the Methow Valley Road was in fact properly established by the County in 1889.

after five years. See LAWS OF 1909, ch. 90, § 1 (now codified in RCW 36.87.090).

In the present case, if this court finds that the Methow Valley Road was established in accordance with the 1879 Territorial Laws, the Coalition takes the position the road cannot be abandoned without first following RCW 36.68.010. (Coalition Brief at 45)⁴. They also cite as authority *Nelson v. Pacific County*, 36 Wn. App. 17, 671 P. 2d 785 (1983). In *Nelson*, land shown on a plat map was dedicated to public use as a public highway, but was outside of the platted area. The court held that the county could not abandon the property, because the road in question abutted a body of water, and RCW 36.87.130 prohibits vacation or abandonment of roads abutting bodies of water. The Methow Valley Road does not abut any body of water.

Appellants do not dispute that RCW 36.87.020 et seq. sets out a procedure to vacate county roads. However, case law in Washington (cited at PP. 20-25 of Appellant's Brief) and cases in other parts of the United States have also found common law abandonment where the use becomes impossible or is inconsistent with the public use. While Appellant recognizes cases from other jurisdictions are not binding, they do indicate that abandonment can occur under the common law and not solely by statute.

⁴ RCW 36.68.010 only applies to disposition of surplus park property.

In *Kelsoe v. Mayor and Town Council of Oglethorpe*, 120 Ga. 951, 48 S.E. 366 (1904), Kelsoe sued to enjoin the town from opening and improving streets over land Kelsoe had title to. Kelsoe's predecessor had dedicated to the town streets shown on a map for use by the public, but certain streets were not used by the public. Evidence presented that the public had not used the streets on Kelsoe's property for at least 40 years. The court concluded that the town abandoned the right to maintain said streets, stating:

A street over which a municipality has once exercised control may, by vacation or abandonment, cease to be a public thoroughfare.

Id., at 367. The court went on to hold that abandonment can be shown by nonuse. *Id.*, at 368.

In *City of Carlinville v. Castle*, 177 Ill. 105, 52 N.E. 383 (1898), the city brought an ejectment action against Castle to recover a portion of a public alley. As early as 1856 defendant took possession of the strip of land in dispute, occupied it and held it adversely to the city for a period of 40 years. The court held the city's claim was barred by abandonment.

Similarly, in *The Village of Auburn v. Goodwin*, 128 Ill. 57, 21 N.E. 212 (1889), an action of ejectment was brought by the village to recover possession of certain alleys in a certain block. One of the defenses was abandonment. The court held that since the alleys had been fenced for 20

years, and no effort had been made by the village authorities to remove the obstruction, the village's ejectment claim was dismissed.

In *City of Peoria v. Johnston*, 56 Ill. 45, 1870 WL 6476 (1870), the Supreme Court of Illinois held that where land (upon which a highway was laid out) had been in the open and exclusive adverse possession of the owner of the land for 20 years, and a complete nonuse by the public during that time, extinguishment will be presumed.

Finally, in *Kelroy v. Clear Lake*, 232 Iowa 161, 5 N.W.2d 12 (1942), owners of lots sought to enjoin the city from opening a street between their lots and the lake. The court, in part, set out the general rule as follows:

It is well settled that while mere non-user will not of itself defeat the public title to a street, yet where there has been such non-user for more than ten years, accompanied by actual and notorious possession of the land by an individual as private property under a claim of right, an abandonment will be presumed and the public right in the street will be extinguished. . . . Furthermore, the occupancy by the individual of the land platted for a street must be inconsistent with its future use for such purpose and exist for such length of time as shows acquiescence by the municipality in the permanent appropriation of the ground for private purposes. (citations omitted)

Id., at 168.

What constitutes abandonment is generally a question of fact. See 11A McQuillin Municipal Corp § 33.75, at 545 (3d. ed.), citing *Horton v. Okanogan County*, 98 Wash. 626, 634, 168 P. 479 (1917). In the present case, not only has the road been gated since the 1950's at both ends, and

later locked, it is also undisputed that the road ceased to exist sometime prior to 1993.

Reply to Okanogan County's Brief

I. Legal Analysis

A. The Methow Valley Road was not established on August 9, 1889.

1. **The terms “survey field notes,” “minutes of survey,” and “survey” are not equivalent or interchangeable.** The County argues that because the term “minutes of survey” (mentioned in both Sections 35 and 36 of the Territorial Laws of 1879) is not mentioned in the 1881 Act, and because the term “field notes” is used in the 1881 Act, that the recording of field notes meets the requirement of recording a survey under the 1879 laws (Okanogan County's Brief at 9). The County cites to no legal authority supporting this argument, but rather makes conclusory statements based on its own opinion why the term “minutes of survey” is not included in later statutes. The use of the term “minutes of survey” (referenced in the 1879 Act) and “survey field notes” (as described in the 1881 Act), indicates that the Legislature recognized a difference between the two terms, not that the two terms are interchangeable or synonymous with the term “survey.”

Further, the County erroneously claims that the Appellants' asserted that a survey can only be recorded by recording the “minutes of the survey”. (Okanogan County's Brief at 6). (Appellants did not argue that recording

minutes of the survey satisfied the requirement to record the survey.) Rather, Appellants have argued the terms “survey field notes,” “minutes of survey,” and “survey” are not equivalent or interchangeable, and recording one does not satisfy the requirement to record the other.

Section 5 of the 1879 Territorial Law, Chapter 1 (related to roads), required, among other documents, a survey and a plat to be recorded prior to the establishment of a public road. Given the fact no survey and no plat were ever recorded, Section 5 was not complied with. As a fall back argument, Respondents assert that Sections 35 and 36 were satisfied, both of which require “minutes of survey” be recorded. However, no minutes of survey were ever recorded (Appellants’ Brief at 16-20). Moreover, given rules of statutory construction, Sections 35 and 36 of the Territorial Law does not eliminate the condition precedent that the survey and plat be recorded before a public road can be established. (Appellants’ Brief at 9-13).

The only sections of the 1881 Act that apply to roads (Sections 1 and 2) address a very limited situation where a resurvey is necessary because the original survey is defective, or survey field notes are lost. In only that limited situation, a surveyor’s field notes can be recorded along with the plat, instead of the actual survey. The 1881 Act states:

SEC 1, ... That where by reason of the loss or destruction of the field notes of the original survey, or in case of defective survey,

or record, in case of such numerous alterations of any county road, since the original location and survey, that its location cannot be accurately defined by the papers on file in the property county auditor's office, or where through some omission or defect, doubts may exist as to the legal establishment of evidence of establishment of any county road or highway, the board of county commissioners ... may ... order... any part of a county road used and traveled by the public to be re-surveyed, platted and recorded as hereinafter provided.

SEC. 2. A copy of the field notes, together with a plat of any highway or county road, surveyed under the provisions of the preceding section, shall be filed in the office of the county auditor, and thereupon he shall designate a day at a regular term of the board of county commissioners, not less than twenty days from the publication of said notice, upon which said board will, unless good cause be shown against so doing, approve of such survey or plat, and order them to be recorded as in case of the original establishment of a county road.

Section 1 confirms that a survey and field notes are two separate and distinct documents. Given the very limited application of Sections 1 and 2, the County's argument that the 1881 Act repealed Sections 35 and 36 of the 1879 Act is misplaced.

The County next claims that "minutes of survey" could mean a:

cleaner version of the survey field notes found ... in the Road Book. . . . which seems to have been another acceptable method of recording road documents back then.

(Okanagan County's Brief at 9). This assertion at best is pure speculation.

The County cites as authority *Town of Sumner v. Peebles*, 5 Wn. 471, 32 P. 221 (1893). The public road at issue in *Peebles* was established in 1860 under the 1859 Territorial Laws, which required county commissioners to

record in the Road Book all records concerning the road. *Peebles*, 5 Wn. at 473-474. The court in *Peebles* stated that nothing in the 1959 Act definitely declares what shall constitute the establishment or opening of a county road. *Id.*, at 474. Since the 1879 Territorial Laws specifically spell out each step that must be satisfied for a road to be established, including the recording of the plat and survey, *Peebles* does not support the County's argument.

2. **The BOCC failed to record the plat or the survey of Methow Valley Road.** The County relies on two cases, *City of Bothell v. Gutschmidt*, 78 Wn. App. 654 (1995) involving a DWI ordinance, and *City of Wenatchee v. Owens*, 145 Wn. App. 196 (2008), involving a gambling tax ordinance, to argue that the failure of the BOCC to record the plat and survey cannot frustrate the decision to establish a public road, because recording is a ministerial duty.

The *Owens* case dealt with the validity of a city ordinance wherein the city clerk failed to sign the ordinance. The ordinance had been signed by the mayor, two city commissioners, the city attorney, and recorded with the Chelan County Auditor. *Id.*, at 199-200. Owens, charged with failure to pay gambling taxes, asserted the ordinance was invalid, because the city clerk had not signed it per RCW 35A.12.130 (ordinances "shall be signed by the mayor and attested by the clerk."). The Court of Appeals concluded that attestation was a ministerial duty of the city clerk, and that nothing in

RCW 35A.12.130 suggested that a failure to attest renders the ordinance void. *Id.* at 209.

In *Bothell v. Gutschmidt*, a city ordinance adopted portions of the Washington Model Traffic Ordinance (“MTO”) by reference. However, the city clerk allegedly failed to authenticate, record and file copies of the MTO with the ordinance. Ordinances were “recorded” by placing them in Bothell’s Ordinance book. While it is undisputed that the city clerk filed the MTO separately from the book containing the adopted ordinance, Everett Gutschmidt could cite to no authority requiring attachment of the adopted statutes to the authenticated ordinance as a condition precedent. *Id.*, at 661. In addition, there was no evidence showing that a copy of the adopted statute⁵ was not authenticated by the signature of the clerk and recorded. *Id.*, at 661-662. The Court of Appeals concluded that the statute (RCW 35A.12.140) imposed ministerial duties on the clerk, and said duties were not a condition precedent to adoption of a valid ordinance.

The facts here are distinguishable from both *Gutschmidt* and *Owens*. The 1879 Territorial Laws did not vest any legislative power with the clerk. Instead, the law required the commissioners themselves record the plat and

⁵ ... but the adopting ordinance shall be so published and a copy of any such adopted statute, ordinance, or code, ... in the form in which it was adopted, shall be authenticated and recorded by the clerk along with the adoption ordinance. Note less than one copy of such statute, code, or compilation ... in the form in which it was adopted, shall be filed in the office of the city clerk for use and examination by the public. RCW 35A.12.140 (now found in RCW 35A.12.150).

survey as a condition precedent before a road could be established. Section 5 of the 1879 Territorial Law provides in relevant part:

the commissioners being satisfied that such road will be of public utility, the report of the viewers being favorable thereto, **the commissioners shall cause said report, survey and plat to be recorded, and from thenceforth** said road shall be considered a public highway, and the commissioners shall issue an order directing said road to be opened. (emphasis ours).

The fact the clerk of the BOCC and the auditor may have been the same person in 1889 is irrelevant, as the statute did not impose any duty on the clerk. The County's argument (Okanogan County's Brief at 12-13) that the statutory requirement that "the commissioners shall cause said report, survey and plat to be recorded" doesn't actually mean the commissioners have to record the documents is an attempt to read an ambiguity into a statute where one does not exist, and would create an issue of improper vesting of legislative powers. Under the 1879 Territorial Laws, after being satisfied that a road will be of public utility and if the report of the viewers was favorable thereto, the BOCC was tasked with recording the survey and plat.

The documents required to be recorded under Section 5 of 1879 Territorial Laws serve a purpose of identifying the proposed road location and how the road will be a public benefit. Appellants submit that the Legislature would not have specifically mandated the preparation of three separate written documents, and also required that each document be

recorded, if in reality recording is a “ministerial” duty and nothing actually needed to be recorded.

3. **The BOCC’s failure to record the plat and the survey is not an “informality”**. The County next relies on RCW 36.75.100 (enacted 58 years after Section 5 of the 1879 Territorial Laws) to claim that the BOCC’s failure to record the plat and survey is a mere informality, and not fatal to the attempt to establish the Methow Valley Road as a public road. RCW 36.75.100 provides:

No informalities in the records in laying out, establishing, or altering any public highways existing on file in the offices of the various county auditors of this state or in the records of the department or the transportation commission, may be construed to invalidate or vacate the public highways.

There is no published case law interpreting this statute, let alone the phrase “informalities in the records.” The County wants RCW 36.75.100 to be interpreted as creating a new exception to the requirements for establishing a public road back in 1889.

The failure of the BOCC to record the plat as well as the survey is not an informality, but rather a failure to comply with a condition precedent in the statutory procedures to establish a public road. The survey and plat, as required by statute, serve a purpose and are not merely a formality; they are necessary to identify the actual location of the proposed road. A statutory interpretation that makes significant portions of a statute largely

meaningless is disfavored in Washington. See *State v. Bash*, 130 Wn.2d 594, 602, 925 P.2d 978 (1996). Appellants would submit that the Legislature did not intend to create exceptions to the very detailed steps required to establish a public road under Section 5, because that would make such requirements superfluous.

Moreover, if the legislature intended to amend or repeal prior laws pertaining to the creation of public roads, RCW 36.75.100 would have so stated.

4. **The Existence of a later Right of Way Deed is evidence the road was not established, or was abandoned.** While the County tries to explain why the DNR granted the County an easement over the “Methow Valley Road” (Okanogan County’s Brief at 16), it fails to provide any explanation why the County in 1984 acquired a right of way deed over a portion of the “Methow Valley Road” just south of the O’Toole gate (CP 1514; Appellants’ Brief at 25). This fact at a minimum raises an issue of fact whether the Methow Valley Road ever became a public road, or alternatively was considered abandoned by the County.

5. **The DNR did not dedicate French Creek Road to the County.** The County argues that if the DNR owns any portion of what is now known as French Creek Road, its opposition to Appellants’ 2009 petition to vacate indicates that the DNR has dedicated the road to the

County via common law dedication. (Okanagan County's Brief at 16). Said argument is clearly misplaced, because in order to establish a common law dedication there must first be an intention on the part of the owner to dedicate the land to a public use, followed by acts that clearly evidence such an intention. See *Roundtree v. Hutchinson*, 57 Wn. 414, 417 (1920).

The County admits that "the existence of a DNR lock on the lower gate for many years is inconsistent with DNR's position at vacation hearings." (Okanagan County's Brief at 17). Not only is a DNR lock on the gate inconsistent with its opposition, it is also inconsistent with the County's argument that DNR intended to dedicate the road to the County for public use, since the lock remained on the gate until 2020.⁶

6. The statute of limitations does not apply. The County argues that Appellants' position is barred by the statute of limitations is addressed at PP. 11-13 of this Reply Brief.

B. Even if the Methow Valley Road was properly established, there is evidence of common law abandonment.

The County argues that because Appellants gated the disputed section of the Road, the road cannot be said to be abandoned because any nonuse of the road was not voluntary. (Okanagan County's Brief at 20). First, Appellants did not gate the road. The road was gated for 40+ years

⁶ The gate was opened in 2020 to comply with the trial Court ruling. (CP 35-37).

before Appellants acquired ownership. Second, there is no requirement under common law abandonment that the nonuse be “voluntary,” and the County cites to no case law supporting such a contention.

The facts here also show evidence of an intent to abandon. The BOCC on December 8, 2009 passed Resolution No. 443-2009, concluding the disputed section of Methow Valley Road was not a County road or a public right of way and the County had no jurisdiction over that section of the road. (CP 1364-1365). And, the County cites no legal authority for its proposition that the County first had to believe Methow Valley Road was a County road before the County could abandon it. (Okanogan County’s Brief at 23). Further, if it was not abandoned, why did Okanogan County install “End of County Road” signs at both ends leading to the gates. (CP 1482, 1492).

Next, the County argues that lack of maintenance does not cause a road to lose its public character. (Okanogan County’s Brief at 20). But what the County fails to address is the undisputed fact that the road ceased to exist sometime prior to 1993 (see DNR denial of Appellant’s Forest Practices Application at CP 406), and but for Appellants expending funds to rebuild the road, it would no longer be in existence presently. In fact, in 1992 the County rejected a request that it maintain the road, given its “condition”. (CP 1481). Evidence that the road was never maintained (CP

137, 517) even before it was declared a primitive road in 1980 is also evidence of abandonment.

While recent damage by trespassers necessitated Appellants filing the quiet title action (CP 1361), the road had already been abandoned long before these trespasses occurred. Common sense tell us that when a road has been abandoned, later attempts by the public to use the road does not somehow reverse the abandonment. Further, while letters from County officials, by themselves, may not result in abandonment (CP 66-67; 71), they are circumstantial evidence on the issue of abandonment and the County's intent to abandon the road.

The County next asserts that the case law on common law abandonment has no relevance because they center around property dedicated rather than petitioned for. (Okanagan County's Brief at 25). That does not make the law of abandonment itself inapplicable, and the facts demonstrate that common law abandonment of the road has occurred. (See Appellants' Brief at 20-26).

As the Washington State Supreme Court eloquently stated in *Johnston v. Medina Improvement Club*, 10 Wn.2d. 44, 116 P.2d 272 (1941):

And even when, under the statute, the ownership is vested in the public, **if the authorities entirely relinquish the use of the land, or the use for which the land was dedicated becomes impossible, the land has been held to revert to the original dedicator, or to persons claiming under him.**" (emphasis ours.)

C. **Methow Valley Road was vacated by operation of law under the Non-User Statute.**

The County argues that the Non-User Statute does not require actual use, only that it be declared open: “Here, the fact the road was declared ‘open’ as a county road Aug. 9, 2019 (sic.) appears to mean it was already able to be used by the public.” (Okanagan County’s Brief at 29). Such an argument is flawed, as the BOOC declaring the road “open” merely meant they were authorizing the opening of the road. The Non-User Statute clearly contemplates that the county will have to go through such a process prior to actually opening the road:

Any county road, or part thereof, which has heretofore been or may hereafter be authorized which remains unopened for public use for the space of five years **after the order is made or authority granted for opening the same**, shall be and the same is hereby vacated. (CP 465 - Session Law, 1889-90 Chapter XIX - Road Laws) (emphasis ours).

In *Real Progress Inc. v. City of Seattle*, the court found:

“casual, intermittent, or inconsequential use of a platted street or alley is insufficient to prevent vacation by operation of the nonuse statute. . . . Rather, the municipal body in charge was required to take some action to open the street.”

Id. Such a finding indicates that actual public use is required upon the opening of a road to overcome the operation of the Non-User Statute.

There is evidence that the road itself was not yet in existence when the BOCC declared it open. The Petition indicates that no road was in existence in 1889 (“... Almost all prominent citizens in the Methow Valley

petitioned to have a road established between the Columbia River and the fork of the Methow. ...”) (“... over hundred people in the Upper Methow ... were said to be “virtually shut out from all communication with the outside world’...”) (“other routes for the road had been discarded as impracticable.”) (CP 1718).

There is also a vast amount of circumstantial evidence that the road was not constructed for public use within five years:

- Despite multiple public records requests, the County failed to produce any construction records, maintenance records, or road signage records. (CP 1442-43)
- At page 15 of his report (CP 988), Mr. Hart made the following assertion:

The road between today’s Brewster (then called Virginia City and later Bruster) and Winthrop was improved through the use of state road funds (administered by the county) and by private parties. That improved road included the section of road now known as French Creek Road...

(footnote omitted).

There are no state road fund records that substantiate this claim.

- Per Section 18 of the Territorial Laws of 1879, after a road was opened, the Board of Commissioners were required to divide their

respective counties into road districts, “and cause a brief description of the same to be entered on the county records”. (CP 53). No such county record exists for the Methow Valley Road between 1889 and 1894.

- Section 32 required every supervisor to keep an account of the work performed (in payment of road tax) and an account of all moneys collected, and required the supervisor to annually account to the Board of County Commissioners. There are no public records that Section 32 was ever complied with for the Methow Valley Road between 1889 and 1894.

Again, Appellants do not contest the fact a road was built at some point in time. However, the County is required by law to maintain public records, and the fact no public records existed between 1889 and 1994 is, at a minimum, circumstantial evidence of non-use.

D. The doctrine of laches does not apply to Appellants’ quiet title action.

The County’s argument that Appellants’ claims are barred by laches is addressed at PP. 11-13 of this Reply Brief.

E. The Hart Report should have been excluded by the trial court.

The County simply cites to and joins the Coalition’s summary judgment argument that Richard Hart is a qualified expert and that the Hart

report is admissible. (Okanagan County's Brief at 36) (CP 599-603). Appellants reaffirm its arguments that the trial court should have excluded the Hart report because Mr. Hart is not qualified (in this case) to give expert opinion testimony, and the Hart report is merely a summary of otherwise inadmissible evidence rather than an expert opinion. (Appellants' Brief at 33-37).

Respectfully submitted this 30th day of July, 2020.

DAVIS, ARNEIL LAW FIRM, LLP

By: 

Thomas F. O'Connell, WSBA# 16539
Attorney for Appellants

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the 30 day of July, 2020, the foregoing was delivered to the following persons in the manner indicated:

<input type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Certified Mail, Return Receipt Requested <input checked="" type="checkbox"/> Email pursuant to agreement nk@ryankuehler.com <input type="checkbox"/> Hand Delivery	Natalie N. Kuehler Ryan & Kuehler PLLC PO Box 3059 Winthrop, WA 98862
<input type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Certified Mail, Return Receipt Requested <input checked="" type="checkbox"/> Email pursuant to agreement dgecas@co.okanogan.wa.us <input type="checkbox"/> Hand Delivery	David Y. Gecas Okanogan County Prosecutor's Office PO Box 1130 Okanogan, WA 98840-1130
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