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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 SUPEWR, CRAIG OLDON, and KEVIN
CREAGER; and STATE OF WASHINGTON ex Relatione LORAH
SUPER, CRAIG OLSON, and KEVIN CREAGER,

Respondents

APPELLANTS' BRIEF

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II. ASSIGNMENT OF ERROR

1. The trial court erred in ruling on summary judgment that the “Methow Valley Road” was properly opened in 1889.
2. The trial court erred in not finding that the “Methow Valley Road” was abandoned.
3. The trial court erred in not applying the Non-User statute.
4. The trial court erred in considering the “expert” report of Richard Hart over objection.

III. STATEMENT OF THE CASE

A. Statement of facts.

Gamble Land & Timber, Ltd., a Washington Limited Partnership (“GLT”), owns land in Okanogan County. (See CP 1435). Cascade Holdings Group, LP, a Nevada Limited Partnership (“GHG”) also owns land in Okanogan County (see CP 1436). GLT and GHG are collectively referred to as “Appellants”.

The Appellants’ properties, acquired in 1993 and 1994 (CP 400), are located generally northwest of Methow, Washington, in a mountainous region in Okanogan County. The properties are vacant, but fenced and used for grazing purposes and timber production (CP 1415, 1418-19). The land

between Appellants' properties is owned by the State Department of Natural Resources ("DNR"). (CP 1437). On the map at CP 1437, highlighted in red are Appellants' properties, and highlighted in blue is DNR land. (CP 1415). Traversing across both Appellants' property and the DNR land is a narrow (10 feet +/-) winding dirt road ("Private Access Road") used and solely maintained by Appellants for their cattle and logging operations (CP 401; 1391, 1394-96). The Private Access Road at issue is approximately three (3) miles long (CP 41). At both the north and south ends of the Private Access Road are gates. (CP 408-09; 453; 1380; 1391-94; 1410-11; 1412-13).

To the south, the Private Access Road begins at a historic gate, known as the "O'Toole Gate", near the current homesite of the Weddle family (CP 453; 1360; 1390-91; 1395). The O'Toole Gate has been in existence for over 60 years. (CP 1395; 1410-11; 1412-13), and was locked no later than 1974. (CP 453; 1446). At some point, Okanogan County also installed an "End of County Road" sign at the south end (CP 1484).

The north end of the Private Access Road terminates at another locked gate, commonly referred to as the "Judd Gate." (CP 453; 1359; 1392-94). The Judd Gate has also been in place for over 60 years. (CP 40, 453). Okanogan County also installed an "End of County Road" sign at the north end (CP 1370).

In 1971, the O'Toole's, predecessor in interest to the Weddles and surrounding property owners, granted DNR an easement over the private access road so DNR could access its land, with the O'Tooles reserving the right to maintain, close, and lock gates on the Private Access Road (CP 1378). After Appellants acquired title to their properties, Appellants also granted DNR an easement so it could access its trust land. (CP 1502-1513). This easement spelled out, between Appellant and the DNR, who was responsible to perform maintenance on the Road (CP 1503), and specified that gates must be "kept locked at all times." (CP 1511).

In 2009, Okanogan County concluded by Resolution that it had no claim or interest in the Private Access Road. (CP 1348-49; 1364-66). Okanogan County's position that the three (3) mile stretch was private didn't change until October 25, 2019, when Respondents moved a second time for summary judgment, based on an 1889 Petition to establish Methow Valley Road as a County Road. (CP 617).

Respondents assert the Private Access Road is part of the Methow Valley Road, which they claim was opened by Okanogan County in 1889. (CP 430-34). The first private land patents in the region were not issued until 1905, 18 years after the Petition to create the Methow Valley Road was submitted (CP 433). Thus, there were no landowners to contest whether the road was properly opened or not.

B. Procedural History

As a result of repeated trespasses on Appellants' property, admitted to on deposition by some of Respondents' members and supporters (CP 1361-62), on March 3, 2017 Appellants filed a complaint to quiet title to the three (3) mile private access road. (CP 21-34).

On June 19, 2017, Appellants filed a motion for summary judgment asking the trial court to quiet title to the road and bar any claims by the public (CP 1438-39). On June 27, 2017, Respondents filed a counter motion for summary judgment, asking that the access road be declared a public road. (CP 1440-41).

Both of these motions were heard on March 20, 2018. The trial court granted, in part, Appellants' motion for summary judgment, holding:

Okanogan County has never established the disputed roadway as a County Road by dedication, petition, or condemnation.

The trial court denied Respondent's counter motion for summary judgment, holding:

... that a material issue of fact exists whether the public's use of the disputed road satisfied the legal definition of prescriptive use.

(CP 1563-69).

On July 1, 2019, Respondents filed a second motion for summary judgment (CP 444-445) requesting the trial court declare the Private Access Road a county road based on discovery of the 1889 petition. The trial court granted, in part, Respondents' motion on December 18, 2019 (CP 35-37). Appellants filed a Notice of Appeal on January 6, 2020 (CP 446-451).

IV. LEGAL ARGUMENT

A. Standard of Review.

When reviewing a trial court's ruling on a motion for summary judgment, an Appellate court reviews the record de novo. *Babcock v. Mason County Fire District*, 101 Wn. App. 677 5 P.3d 750 (2000). The meaning of a statute is also a question of law reviewed de novo. *State v. Breazeale*, 144 Wn.2d 829, 837, 31 P. 3d 1155 (2001).

B. The Methow Valley Road was not properly opened per Washington Territorial Law.

For purposes of this appeal, Appellants do not dispute that the three (3) mile Private Access Road is located in the same vicinity as a portion of what Respondents refer to as the old Methow Valley Road (now known by other names, including French Creek Road and Texas Creek Road).

In their second motion for summary judgment, Respondents made the following assertions:

“Washington State law has long held that R.S. 2477 grants public rights-of-ways across federal lands at any time when

underlying state law for establishing roads is complied with.”
(emphasis ours)

(CP 430)

“The new evidence provided by Okanogan County ... conclusively established that – even before Washington became a State – today’s French Creek Road was established as portion of the Methow Valley Road, which was properly petitioned for and opened under the laws of the Territory of Washington then in effect.”

(CP 245-257; 431)

That all “statutory procedure [were] followed here ... The BOCC appointed a surveyor to survey the route of the road and three independent citizens as viewers. ..., the viewers and surveyor signed a report and certificate attesting to the location of the road and providing detailed field notes of the road’s exact location. ... Immediately following these public readings, the commissioners formally declared the road to be opened... Accordingly, under Washington law at the time, from thenceforth said road shall be considered a public highway sixty feet in width.” 1878 Road Laws Secs. 5 and 10.

(CP 432-433)

What Respondents failed to mention was Okanogan County failed to comply with several mandatory conditions before a road could be “opened” under the 1879 Territorial Law. Section 5 of the Territorial Law (relating to roads) provides in relevant part:

“... The surveyor shall also make out and deliver to one of the viewers, without delay, a certified return of the survey of the said road, and a plat of the same, and the viewers or majority of them shall make out and sign a report in writing, stating their

opinion in favor of or against the establishment or alteration of such road, and set forth the reasons of the same, which report, together with the plat and survey of said road, or alteration, shall be delivered to the county auditor by one of the viewers, on or before the first day of the term of said board then next ensuing, ... and 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.)

(CP 245-246).

In *Yorkston v. Whatcom County*, 11 Wn. App. 2d 815, 461 P.3d 392 (2020), involving the width of a county right-of-way created in 1884, the court commented on the procedure prescribed by the territorial code by which county roads were to be created, stating in relevant part:

If the county commission concluded that the road would be of “public utility,” then the viewer’s report, and any survey and plat, were to be recorded, and the road “shall be considered a public highway, and the commissioners shall issue an order directing said road to be opened.” Laws of 1869, §5, at 269. (emphasis ours.)

In the present case, no survey of the Methow Valley Road was ever recorded, nor was any plat ever recorded. By statute, a condition precedent to the opening of a public highway is the recording of the survey and the plat. Because these condition precedents were never satisfied, by law the “Methow Valley Road” never opened.

1. The Statutory procedure for opening a County road by petition was established in Sections 2 through 5 of the 1879 Territorial Law.

The 1879 Territorial Law (see CP 245-257), Chapter 1 (which relates to roads), set out the detailed process required to establish county roads. A petition had to be submitted to the county commissioners, including at least 12 signatures from households in the county. (See 1879 Territorial Law, Section 2). Prior to presenting the petition, notice and publication that a meeting regarding the petition would occur was required. (See 1879 Territorial Law, Section 3). Upon presentation of the petition and proof of notice regarding the meeting, the commissioners were then required to appoint three disinterested households to act as viewers, and to appoint a surveyor. (See 1879 Territorial Law, Section 4). After appointment of the viewers and surveyor, Section 5 of the Territorial Law required the following steps be completed:

...The surveyor shall also make out and deliver to one of the viewers, without delay, a certified return of the survey of the said road, and a plat of the same, and the viewers or majority of them shall make out and sign a report in writing, stating their opinion in favor of or against the establishment or alteration of such road, and set forth the reasons of the same, which report, together with the plat and survey of said road, or alteration, shall be delivered to the county auditor by one of the viewers, on or before the first day of the term of said board then next ensuing, ... and 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).

As previously discussed, no survey or plat was ever recorded, and thus the Methow Valley Road could never have been opened pursuant to the 1879 Territorial Law.

(a) Rules of Statutory Construction.

Given the fact no survey and no plat were ever recorded, Appellants rely on the language in Section 35 and 36 of the 1879 Territorial Law to provide an exemption to the recording requirements. Section 35 states:

SEC. 35. That when the board of county commissioners of any county have, upon petition, appointed viewers who have viewed and located any public highway or county road, and the same has been surveyed and the minutes of such survey have been recorded in the office of the auditor of the county in which such survey was made, the said public highways or county roads so surveyed, as aforesaid, be, and the same are hereby, declared to be lawful public highways and county roads, to all intents and purposes, regardless of any defect or omission in posting notices or defect in the appointment of such viewers, or in their returns or reports of such view, survey and location: Provided, that the minutes of any such survey and location have been recorded as herein specified. (emphasis ours.)

(See CP 430 (footnote), CP 256).

So if there were defects or omissions in the posting of notices, appointment of viewers, or the return of viewers' reports, the 1879 Territorial Law provided an exception whereby a road may be declared a

county road without having to meet all of the aforementioned requirements, so long as the survey minutes were recorded with the county's auditor.

In Washington, statutory exemptions are to be interpreted narrowly, and additional exemptions should not be inserted where a clear list of permitted exemptions has been given. See *Washington State Republican Party v. Washington State Public Disclosure Com'n*, 141 Wn.2d 245, 280, 4 P.3d 808 (2000) (“Where a statute specifically lists the things upon which it operates, there is a presumption that the legislating body intended all omissions, i.e., the rule of *expressio unius est exclusio alterius* applies.”). Here, the statute provides only that omissions in posting notices, defects in the appointment of viewers or their reports fall under this exemption. There is no mention of omissions or defects in the recording of the survey or plat. As such, Section 35 did not exempt the commissioner's required step of recording the survey and plat.

Section 36 of the 1879 Territorial Laws provides an additional “catchall” exemption which states:

That in any cause wherein the legality of any county road or public highway shall be contested, the introduction of the record, or a certified copy thereof, showing that the minutes of 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 or roads. (emphasis ours)

(CP 256-57).

Section 36 would appear to provide a sweeping exemption whereby a county road may be proven simply by producing recorded minutes of the survey. Such a broad, sweeping exemption is puzzling because it would seem to contradict the procedural requirements to establish and open a county road in Sections 2 through 5, and make superfluous the limited exemption in Section 35.

A court's objective in construing a statute is to determine the legislature's intent in enacting the statute. See, e.g., *Dep't of Ecology v. Campbell v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id.* at 9-10. Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *Id.* at 9-12. If the statutory language is ambiguous, then a court may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001). If alternate interpretations are possible, the Court should adopt the one that best advances the legislative purpose overall. See *Weyerhaeuser v. Department of Ecology*, 86 Wn.2d 310, 321, 545 P.2d 5 (1976).

Sections 5, 35, and 36 are subject to statutory construction because of obvious ambiguity/inconsistency.

i. Section 35 and 36.

If the legislature intended to provide such a broad exemption in Section 36, the narrower exemption in Section 35 would serve no purpose, as it would be covered in Section 36. Whenever possible courts in Washington interpret sections of the same statute to be in harmony and attempt to give every section meaning. *State v. Thorne*, 129 Wn.2d 736, 761, 921 P.2d 514 (1996) (“Each provision must be viewed in relation to the other provisions and harmonized.”).

If one interprets Sections 35 and 36 to be distinct exemptions, then each section can be given meaning. Section 35 relates to attempts to open roads, and provides that certain omissions or defects in the petition process will not cause the petition to fail, so long as survey minutes are recorded. On the other hand, Section 36 relates to the legality of an established county road, not omission or defects in the petition process to create the road.

ii. Sections 2 through 5 and 36.

If Section 36 provides a sweeping exemption, as Respondents assert, then in turn all requirements under Sections 2 through 5 for establishing a public highway or county road by petition would be superfluous, as there would be no need to follow the precise step by create step process in

Sections 2 through 5, because if it was ever challenged, such a challenge could be overcome by simply showing recorded survey minutes. Such an interpretation would make significant portions of the road statute largely meaningless, which is disfavored in Washington. See *State v. Bash*, 130 Wn.2d 594, 602, 925 P.2d 978 (1996).

Such an outcome could not have been the intent of the legislature when drafting the procedural requirements to establish a public road. Courts favor interpretations of statutes that are consistent with the purpose of the statute over a literal reading, when a literal reading results in unlikely or strained consequences. See e.g., *Premera v. Kreidler*, 133 Wn. App. 23, 37, 131 P.3d 930 (2006).

(b) Statutory Construction – “And”.

Territorial Law required the county commissioners to “...cause said report, survey and plat to be recorded...” (emphasis ours). It is anticipated Respondents will argue the word “and” should be read as an “or”.

When interpreting a statute, the purpose is to discern and implement the intent of the legislature. *City of Olympia v. Drebeck*, 156 Wn.2d 289, 295, 126 P.3d 802 (2006) (quoting *State v. J. P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). Where the meaning of statutory language is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. *City of Olympia v. Drebeck*, 156 Wn.2d at 295. In

discerning the plain meaning of a provision, the court considers the entire statute in which the provision is found as well as related statutes or other provisions in the same act that disclose legislative intent. See *Advanced Silicon Materials, LLC v. Grant County*, 156 Wn.2d 84, 89-90, 124 P.3d 294 (2005); *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 519, 22 P.3d 795 (2001).

In *Ski Acres v. Kittitas County*, 118 Wn.2d 852, 822 P.2d 1000 (1992), a ski area operator sought to prevent a county from imposing an admission tax on ski lift tickets. The applicable statute was RCW 36.38.010, which provided in part:

Any county may by ordinance enacted by its board of county commissioners, levy and fix a tax of not more than one cent on twenty cents or fraction thereof to be paid for county purposes by persons who pay an admission charge to any place ... and require that one who receives any admission charge to any place shall collect and remit the tax to the county treasurer of the county. ...

The statute defined "admission charge" to include:

A charge made for rental or use of equipment or facilities for purpose of recreation or amusement, *and* where the rental of the equipment or facilities is necessary to the enjoyment of a privilege for which a general admission is charged, the combined charges shall be considered as the admission charge. (Italics in original).

Ski Acres argued the word “and” in the definition should be read as conveying a conjunctive meaning, and that two conditions had to exist before a recreational equipment rental could be taxed as an “admission charge”: the rental must be for the purpose of recreation or amusement, and the rental must be necessary for the enjoyment of a privilege for which a general admission fee is charged. Kittitas County argued the word “and” should be read like an “or”, to convey a disjunctive meaning.

The Washington Supreme Court ruled in favor of *Ski Acres*, holding:

The statute contains an “and”, not an “or”. We thus read the “and” as simply being an “and”. The Legislature would have used the word “or” if it had intended to convey a disjunctive meaning. See *State v. Carr*, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982) ... *Childers v. Childers*, 89 Wn.2d 592, 596, 575 P.2d 201 (1978) (the word “and” does not mean “or”).

Id., at 856.

In the present case, Section 5 of the 1879 Territorial Laws states:

The surveyor shall also make out and deliver to one of the viewers, without delay, a certified return of the survey of the said road, **and** a plat of the same, **and** the viewers or a majority of them shall make out and sign a report in writing, stating their opinion in favor of or against the establishment or alteration of such road, and set forth the reasons of the same, which report, together with the plat **and** survey of said road, or alteration, shall be delivered to the county auditor by one of the viewers, on or before the first day of the terms of said board then next ensuing. ... and the commissioners being satisfied that such road will be of public utility, the report of the viewers being favorable thereto, the commissioner 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. (bold print ours).

In two (2) places in Section 5 three (3) separate distinct steps were required to be performed and documented. Given these three (3) distinct steps, it would be nonsensical for the word “and” to have in fact intended to convey a disjunctive meaning. Appellants submit that the Legislature would not have specifically mandated preparation of three (3) separate written documents, and also require that each be delivered to the county for recording, if only one document needed to be recorded.

(c) Respondents have failed to produce any minutes of a survey, let alone recorded minutes.

The only recorded document Respondents have been able to produce are survey field notes (CP 334-359). The only known minutes were the minutes of the Board of County Commissioners, when it approved the petition to open the Methow Valley Road. However, the commissioner minutes were not recorded (see CP 506-511). [As public records commissioner minutes have to be kept and held by the county, but they are not recorded with the county auditor.]

The Territorial Law for roads do not define the terms “records”, “minutes” or “minutes of survey”. In Washington, when a statutory term is undefined, a court will give the term its plain and ordinary meaning

ascertained by a standard dictionary. See *State v. Sullivan*, 143 Wn.2d 162, 19 P.3d 1012 (2001); *Tingey v. Haisch*, 159 Wn.2d 652, 152 P.3d 1020 (2007). However, for technical terms, technical dictionaries may be used. See e.g., *City of Spokane ex rel. Wastewater Management Dep't. v. Washington Dept. of Revenue*, 145 Wn.2d 445, 452, 38 P.3d 1010 (2002).

According to Miriam Webster Dictionary (2019), “record” is defined as:

... (2) Something that records: such as:

...

b: an official document that records the acts of a public body or officer...

c: an authentic official copy of a document deposited with a legally designated officer ...

The term “minutes of survey” may be a technical term used by surveyors. However, there is no definition for such a term located in the Oxford Dictionary of Construction, Surveying and Civil Engineering.

In West’s Encyclopedia of American Law, Edition 2 (2008), “minutes” is defined as:

The written record of an official proceeding. The notes recounting the transactions occurring at a meeting or official proceeding; a record kept by courts and corporations for future reference.

Land survey field notes contain detailed descriptions of surveying township and section lines as well as setting corner and other survey

monuments. Survey field notes also include descriptive information about topography and natural vegetation. Survey field notes are not a written record prepared at an official proceeding, qualifying as “minutes.” As such, Respondents have produced nothing establishing that survey minutes were recorded with the county auditor, and thus none of the exemptions granted in Sections 35 and 36 of the 1879 Territorial Laws are satisfied.

- (d) The Legislature Distinguished Survey field notes from survey minutes.

On November 16, 1881, two (2) years after the 1879 Territorial Laws at issue were enacted, and eight (8) years before the petition was filed to create the Methow Valley Road, the Legislature approved a new Act regarding county roads. This Act, considered by the trial court as part of the summary judgment motion (See RP 57-58), addressed a limited situation when survey field notes can be recorded along with the plat, instead of the actual survey. (See relevant pages of Act attached hereto as Exhibit “A” and incorporated herein by this reference.)

The 1881 Act provided, in pertinent part as follows:

SEC. 1. ... That where by reason of the loss or destruction of the filed 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.

So only in situations where survey field notes are lost, the survey itself is defective, or the road has been altered so its location cannot be accurately defined, does the Legislature authorize a resurvey, and in this circumstance allows the county to record the survey field notes and the plat.

Application of the 1881 Law is seen in the case of *Yorkston v. Whatcom County*, 11 Wn. App. 2d 815, 461, P.3d 815 (2020). In 1876, 1877, 1883 and 1884 four (4) roads were created, but the roads created in 1883 and 1884 were unsurveyed and unplatted. *Id.* at 823. In January 1884 the county declared its intent to designate the entire route (the four (4) roads) as a county road. The roads were resurveyed, and pursuant to the 1881 Act, the plat and field notes were directed to be recorded.

Finally, it is important to note that the 1881 Legislature recognized a difference/distinction between “survey minutes” (referenced in the 1879 Act) and survey field notes (as described in the 1881 Act).

C. The private access road was abandoned by Okanogan County.

There is evidence in the record, as well as argument made during the summary judgment hearing (without objection) that the “Private Access Road” was abandoned. (See RP 59-63). Both the Respondents and Okanogan County claim that RCW 36.87.060(i), the statutory vacation process, is the exclusive process for ending a public right of way. (CP 594; 473; RP 35). Said claim is contradicted by Washington case law.

The evidence is unrefuted that before and after Appellants purchased their properties, large portions of the Private Access Road between the O’Toole and Judd gates (located in Township 31 N, Range 23, Sections 16, 17, and 21) did not even exist. (CP 400; 408-09; 1443). This fact was confirmed by the DNR. Specifically, in June 1994, a Forest Practice Application was submitted by Cass Gebbers to log areas between the two (2) gates in Section 21. The DNR rejected the application for the following reason:

“Please note: The application is being rejected until legal proof of ownership for Section 22 can be provided and also, the lack of existing roads in Section 21 as indicated on the application.”

(CP 406). To get approval to log from the DNR, it was necessary for Appellants to build entire new sections and rebuild the rest of the Private Access Road. (CP 401).

In *Johnston v. Medina Improvement Club*, 10 Wn.2d. 44, 116 P.2d 272 (1941), Plaintiff deeded to Defendant Medina a tract of land in 1923 so Defendant could build a clubhouse. The clubhouse was never built, and in 1939 Medina deeded the land to King County for public park and recreational purposes. Plaintiff brought an action to recover title to the property, and after King County (joined as a defendant), disclaimed having any right, title or interest in the property (*Id.*, at 56), the Washington Supreme Court held that the County, in effect, abandoned the property:

By the weight of authority, where property dedicated to the public is abandoned or relinquished, the public's rights are terminated and the land by operation of law reverts to the dedicator. In 2 Thompson on Real Property (Perm. ed.), 72, § 495, the rule is stated as follows:

“In case the ownership is in the public, a relinquishment of such use by the authorities terminates the rights of the public, and the land reverts to the original dedicator, or to persons claiming under him.”

An excellent statement of the rule is found in 4 Tiffany, Real Property (3rd ed.), 371 § 1113:

“In case a right of user only is vested in the public, an abandonment of the right has the effect of leaving the land free from the burden thereof in the original dedicator or those claiming under him. 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.)

Id., at 56-57.

In *Campbell v. City of Kansas*, 102 Mo. 326, 13 S.W. 897 (1890), cited as authority by the court in *Johnston v. Medina*, an action was instituted to recover land dedicated to the City as a graveyard, after an ordinance was passed vacating the land as a burial ground. The Missouri court held:

“... When land is donated for a mere public use, such as highways, streets, wharves, parks and landing places, the use of the land reverts to the donor upon discontinuance or abandonment of the particular use for which it was donated.”

Id., at 58-59.

While the road in the present case was allegedly “opened” by petition, rather than dedication, the same rules should equally apply here.

In *Foster v. Bullock*, 184 Wash. 254, 50 P.2d 892 (1935) the roadway in dispute was claimed by Appellant Foster to be his private driveway, and by Respondent Bullock to be a public highway. The roadway, located between Foster and Bullock’s adjoining farms, extended south several hundred feet from a public highway and terminated at a gate next to Respondent Bullock’s land. The roadway crossed a creek over a

small bridge, built and maintained by the county. Appellant Foster sought to restrain Respondent from trespassing upon his private driveway.

The court noted that in the early days, the evidence left no doubt that there existed a road or trail known as the "Pioneer Trail," which followed the course of the road in dispute and extended on to connect with roads leading to Issaquah. The general use of the "Pioneer Trail" was abandoned about 1905, when another route between Fall City and Issaquah was laid out and improved. The Respondent contended that while the Pioneer Trail to the south was abandoned, the portion in controversy (north of the gate) always remained open and had been used continuously by Respondent, his predecessors in interest, as well as by the public.

The trial court in *Foster* found in pertinent part that:

- Sometime along about 1902 or 1905, the use of that portion of the road south of the gate was abandoned by the public;
- Travel on the part north had fallen off, and for the last several years it has been used principally by the tenants of the Bullock and Foster properties and by the public having business with said tenants;
- To establish an abandonment of a public road it is necessary to show nonuse by the public for a period of at least five (5) years. If it is used at all by the public, then there is no abandonment;

- That the road had been improved by King County, by building a bridge over Canyon Creek and in laying timbers along the slope leading up the hill toward the gate; and

- The bridge was repaired at least two (2) times by a county road employee at Appellant Foster's request.

Id., at 257-58.

Based on the foregoing evidence, the Supreme Court affirmed the trial court's dismissal of Appellant Foster's complaint, the court finding that despite the road being surrounded by fences, it had always been open to public use, and that the bridge over the creek was built and had been maintained by the county. *Id.*, at 258.

In the present case, not only were both ends of the private access road gated, the gates were locked, precluding public use of the road for decades. (CP1391-93; 1410-11; 1412-13; 1445-46; 1448). Further, Okanogan County never maintained the private access road. (CP 39-41; 401-402; 407-408; 453; 1446-48; 1574-75). In fact, Okanogan County officials have admitted on multiple occasions that the road is closed and not maintained by the county. For example, in a letter dated April 8, 1980, the Okanogan County engineer wrote in a letter:

“As a result of that research it is obvious that you are referring to a portion of Texas Creek Road that is not considered a county road. Aside from the State gate that you refer to on Texas Creek Road it is in fact a private gate and marks the end of County Jurisdiction. There is a section of the Texas Creek Road between the gate and a similar gate on the other end of the Road that is considered a private road and therefore is not maintained by the county...”

(CP 66-67).

And, on December 16, 2009, Okanogan County Prosecuting Attorney Stephen Bozarth sent an email (regarding the Private Access Road) to the Okanogan County Department of Public Works and stated in pertinent part: “Also, we are not closing it, it has been closed for 40 years.” (CP 71).

As further evidence of abandonment, the County acquired from the Weddle’s a right of way deed in 1984 for access over this same road located just south of the O’Toole gate (CP 1450; 1514), and similarly in 1940 (Easement NO. CR 1702) Okanogan County applied for and obtained a permanent right of way permit from the DNR over DNR land just north of the Judd gate (CP 1443-44; 1449; 1493). If the road was a County Road, and was in existence at the time, why is Okanogan County purchasing right of ways? (CP 1449).

Respondents produced no evidence contradicting the fact portions of the private access road ceased to exist over time due to washouts and

other natural events. Appellants would submit that nothing establishes abandonment more than the fact that portions of a roadway no longer exist.

D. Defendants have presented no evidence the “Methow Valley Road” was built in the first five (5) years after it was “opened”.

Respondents claim that the “Methow Valley Road” was established by petition and “declared open” by Okanogan County on August 9, 1889, and is now known as French Creek/Texas Creek Road. (CP 431). Yet there is no evidence that a 60-foot-wide road (per Sec. 10 of the Territorial Laws) was constructed and used in the first five years after it was “opened” by the County Commissioners. (CP 250). There is also no evidence of road maintenance or financial records of maintenance. (CP 401; CP 39-41; 401), because Okanogan County has not maintained the Private Access Road. (CP 67-68; CP 453). The DNR quit maintaining the road around 1990. (CP 408-09; 1394-96).

1. Nonuser Statute.

Even assuming, for the sake of argument, that the Methow Valley Road was properly established under the 1879 Territorial Law, roads are automatically vacated if there is no evidence of the road’s use within five (5) years. On March 7, 1890, the State of Washington first adopted the Nonuser Statute, which stated:

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, and the authority for building the same barred by lapse of time. (emphasis ours)

(CP 465 - Session Law, 1889-90 Chapter XIX - Road Laws)

As interpreted by Washington Courts, the non-user statute ‘vacates’ a county road not opened for public use within five (5) years of the order or authority for opening it.” *Leonard v. Pierce County*, 116 Wn. App. 60, 64, 65 P.3d 28 (2003). For the road to be “opened”, the County must “perform the condition of the grant” within five (5) years. *Wells v. Miller*, 42 Wn. App. 94, 97, 708 P.2d 1223 (1985). “If the purpose of the grant was not accomplished within five (5) years, ‘a reversion of the authority to construct a road would result.’” *Id.*, citing *Miller v. King Co.*, 59 Wn.2d 601, 605, 369 P.2d 304 (1962).

The Nonuser Statute is applicable here. Though enacted in 1890, the statute makes clear that it is retroactive, applying to county roads that have “heretofore” been authorized. (“Heretofore” is defined as “up to this time”. See *Real Progress, Inc., v. City of Seattle*, 91 Wn. App. 833, 841-884, 963 P.2d 890 (1998)). Okanogan County agrees the statute is retroactive. (CP 625). Applying common sense, the reason this legislation was enacted was not only to address future roads, but also roads already “opened” prior to

1890 that had not been used. If that was not the case, then there would have been no reason to include the “heretofore” language.

2. Burden of Proof.

Okanogan County has cited several cases for the proposition that the burden of proof is on Appellants to show the Methow Valley Road was not opened in the first five (5) years. See *Adams v. Skagit County*, 18 Wn. App. 146, 566 P.2d 982 (1997). The practical problem is that the type of evidence available today (aerial photos, videos), did not exist in 1890. There is also no eye-witnesses testimony, as any witness would have passed away at least three (3) decades ago. Appellants made multiple public records requests to Okanogan County and its various departments (CP 1442-43), seeking proof of public improvements, such as grading, earth movement or blasting, road signage records, as well as any maintenance records for the Methow Valley Road. The fact no such public records exist is, at a minimum, circumstantial evidence of non-use, because the county is required by law to maintain such public records.

In addition, under Chapter I of the Territorial Laws of 1879, at Section 18, 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). In accordance with Section 19 of the 1879 Territorial Laws, the supervisor

of each road district was also required to annually have a meeting to elect a new road supervisor, and

“The meeting shall also elect a secretary who shall record the proceedings of the meeting, and all persons in the district, who are required to labor on the roads or who have road taxes to pay, may vote at such election, and the person receiving the highest number of votes shall be considered elected supervisor for that year, ...”

(CP 53-54).

Section 20 imposed a duty on the county auditor to furnish the supervisor of each road district a list of petitioners for county roads, residing in their respective districts, and it shall be the duty of the supervisors to cause said petitioners to perform two days' labor each in opening said road. (CP 54). In addition, Section 21 required the county auditor to furnish the road supervisors in his county with their respective road lists, and containing directions when to return same to the auditor. (CP 54)

The Territorial Law also imposed a duty on the Board of County Commissioners to levy and assess a road tax on every male liable to perform labor on the public roads. See Section 22 of the Territorial Laws. (CP 54). Finally, Section 32 required every supervisor to “keep an account of the days' work performed on the roads, in payment of road tax, and by whom performed, and also an account of all moneys collected or received by him for road tax, and such supervisor shall each year return his account to the Board of County Commissioners for examination and settlement, at the

February term thereof, and must pay over any moneys in his possession to his successor in office.” (CP 57)

Again, no public records exist to substantiate that any of these statutory requirements were complied with in the five (5) years after the Methow Valley Road “opened”, which is also circumstantial evidence of non-use.

3. Laches does not apply.

Appellants filed this action to stop trespasses on its properties, and to eliminate potential adverse possession or prescriptive easement claims by said trespassers. Respondents and the County have argued Appellants claim should be barred by laches because Appellants, and the predecessors, had knowledge that the Methow Valley Road was a county road as far back as 1889. This argument raises several problems. First, there was no private property ownership in 1889 – the first private land patents were not issued in the area until 1905. (CP 449). Second, other than asserting a prescriptive easement over the road between the two (2) gates, Respondents had no knowledge the Methow Valley Road potentially existed until Respondents located the 1889 petition in late 2019. Third, during Appellants’ ownership of the property, Okanogan County had repeatedly disclaimed any interest in the stretch of road between the two (2) gates. (CP 1443).

Laches is an equitable defense based on estoppel and applies when the defendant 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 an action; (3) damage to defendant resulting from the delay in bringing the action.” *Davidson v. State*, 116 Wn.2d 13, 25, 802 P.2d 1374 (1991).

The county has asserted Appellants had knowledge this was a county road because in 1955 the county adopted a resolution declaring every road in the county as a county road. (CP 629). Yet, on May 7, 2018, the trial court ruled that Okanogan County had never established the road in dispute as a county road, either by dedication, petition, or condemnation, and thus the 1955 resolution did not provide any notice.

Further, there is zero evidence Respondents or the County were damaged by any delay. In fact, but for the “delay”, Respondents last-minute discovery of the 1889 petition would have never occurred.

4. The Statute of Limitations does not apply.

In *Yorkston*, the court referenced the 20-day limitation period to challenge the decision of County Commissioners, citing to the 1881 Territorial Code, and that no objection or appeal was made to the Commissioner’s 1884 decision. As such, the court commented that the

validity of the 1884 decision is beyond challenge. *Yorkston v. Whatcom County*, 11 Wn. App. 2d at 826.

The *Yorkston* case is distinguishable from the present action. First, in the present case there was no private property ownership in 1889; no land patents were even issued until 1905, so there was no property owner who could object or appeal. Second, in *Yorkston* the evidence established that the county complied with the 1881 Act by recording the survey field notes and plat. Here, the Act was not complied with and thus the road never opened in the first place. So there was no need for someone to object or appeal.

5. Tackman Declaration.

Appellants' surveyor, William Tackman, asserts that the "Methow Valley Road" location was confirmed by the general land office's ("GLO") survey published in 1903 (based on surveys conducted between 1891 and 1902), as well as separate survey notes on the combined 1901 and 1905 quad maps. (CP 433). What these surveys do not disclose is when the Private Access Road portion was surveyed. All a survey tells someone is that at some point in time a road was in existence and visible to the surveyor. Because there is no evidence when the Private Access Road was actually surveyed, these surveys do not establish that the three (3) mile Private Access Road was constructed in the first five (5) years.

6. Hart Declaration.

There is also no evidence that the public generally used, traveled, or accessed the entire length of the “Methow Valley Road” (let alone the three (3) mile Private Access Road) in the five (5) years following the 1889 petition. In an effort to establish the road was actually “opened,” Respondent relies on the Declaration/report of a historian, Richard Hart, retained by Respondents. (CP 969-1302).

(a) The trial court should have excluded the Hart Report.

Courts may only consider admissible evidence in a motion for summary judgment. See CR 56(e); *King County Fire Protection Dist. No. 16 v. Housing Auth.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994). Should a party’s materials present inadmissible evidence, the opposing party may register objections that specify the deficiencies. See e.g., *Smith v. Showalter*, 47 Wn. App. 245, 248, 734 P.2d 928 (1987).

In Washington, once a declaration is filed, it is improper to file a motion to strike when admissibility of the declaration is at issue. In *Cameron v. Murray*, 151 Wn. App. 646, 658, 214 P.3d 150 (2009), the court stated:

“The trial court granted the defendants’ motion to strike these materials from the record. Cameron assigns error to this ruling. Her objection is well taken. To begin with, materials submitted to the trial court in connection with a motion for summary judgment cannot actually be stricken from consideration as is true of evidence that is removed

from consideration by a jury; they remain in the records to be considered on appeal. Thus, it is misleading to denominate as a “motion to strike” what is actually an objection to the admissibility of evidence that could have been preserved in a reply brief rather than by a separate motion.”

Here, Appellants properly and timely objected to the admissibility of historian Richard Hart’s “expert” report. (CP 1321-1324).

Evidence Rule (ER) 702 permits the Court to admit opinions regarding “scientific, technical, or other specialized knowledge” if it “will assist the tier of fact to understand the evidence or to determine a fact in issue...” The Washington Supreme Court has established a two-step inquiry to determine the admissibility of opinion testimony under ER 702: 1) does the witness qualify as an expert; and 2) will the opinion be helpful to the tier of fact. See *Reese v. Stroh*, 128 Wn.2d 300, 306, 907 P.2d 282 (1995). The Hart Report meets neither requirement for admissibility under ER 702.

(b) Mr. Hart is not qualified as an expert witness.

To admit expert testimony under ER 702, the court must determine that the witness qualifies as an expert and will be helpful. *State v. Cauthron*, 120 Wn.2d 879, 892, 846 P.2d 502 (1993). Unreliable testimony is not considered helpful and should be excluded. See *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 918, 296 P.3d 860 (2013). Mr. Hart’s

Curriculum Vitae details the experience Mr. Hart has in working with Indian tribes, Indian history, and tribal litigation. He has also written about the future of agriculture, land management, and water policy. (CP 1254-1276). His only reported experience with historical roads is a 2002 paper he wrote about Federal Right-of-Ways in Utah and the History of Highways in the U.S. (CP 1265, 1268).

Mr. Hart has never testified as an expert on the subject of territorial roads. Instead, his expert testimony relates to fishing, water, and mineral rights. (CP 1331-1335). In his report, Mr. Hart discusses, generally, roads in the U.S. (CP 982-990). He then simply repeats statements made by the applicants of the 1889 Road Petition:

- Over one hundred people in the upper Methow are “virtually shut out from all communication...”
- Other routes for the road have been discarded.
- Many people would benefit, and a good road can be secured at a not unreasonable expense.

(CP 988).

The road petition itself does not establish use; it only indicates why the applicants wanted the road to be built. But based on these alleged “facts,” Mr. Hart then gave the following opinions:

“Soon after Okanogan County was first formed action was taken to establish public 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 988).

“From its formal opening of August 19, 1889, on, the stretch of the Methow Valley Road at issue in this case was immediately, consistently, and frequently used by the public well into the 20th Century.” (CP 1334).

Mr. Hart’s opinions about the Methow Valley Road are not only beyond his area of expertise, but are nothing more than assumptions and speculation, unsupported by any evidence.

(c) The Hart Report is a summary of otherwise inadmissible evidence.

Appellants concede that ER 703 allows an expert to rely on facts or data which need not be admissible. It permits an expert to base an opinion on facts or data reasonably relied upon by experts in the field. The fact that such material may be inadmissible hearsay does not affect the admissibility of the expert’s opinion to the Court. See e.g., *LeVang v. Dep’t of Labor & Indus.*, 18 Wn. App. 13, 16, 566 P.2d 573 (1977); *Thorton v. Annest*, 19 Wn. App. 174, 181, 574 P.2d 1199 (1978). However, ER 703 does not allow an expert to simply summarize all manner of inadmissible evidence. Se e.g., *State v. DeVries*, 149 Wn.2d 842, 72 P.3d 748 (2003); *Deep Water Brewing, LLC v. Fairway Resources, Ltd.*, 152 Wn. App. 229, 215 P.3d 990 (2009).

In *Deep Water Brewing, LLC*, Deep Water's expert witness relied on past appraisal reports, which were inadmissible hearsay, to form his own expert opinion. See *Deep Water Brewing*, 152 Wn. App. At 275. Key Development Corp. argued that the opinion of Deep Water's expert witness was improperly admitted in evidence and should have been excluded because ER 703 was not designed to allow a witness to "summarize and reiterate all manner of inadmissible evidence." *Id.* (quoting *State v. Martinez*, 78 Wn. App. 870, 880, 899 P.2d 1302 (1995)). The Court of Appeals agreed, stating that an expert has to follow standard procedures to independently verify the data before relying on it. *Id.*

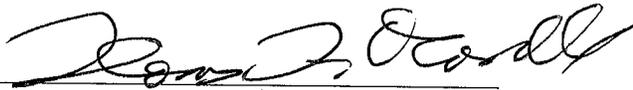
In the present case, Mr. Hart does nothing more than summarize and reiterate various inadmissible hearsay documents prepared by other individuals (the very action ER 703 does not permit), and did nothing to independently verify the "data." Instead, he simply took information at face value and summarized it.

V. CONCLUSION

The Court of Appeals should rule as a matter of law that the Methow Valley Road never opened because the County failed to comply with Territorial Law. Alternatively, the Court should find a question of applicable fact exists on whether the road was abandoned.

Respectfully Submitted this 13th day of June, 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 1st day of June, 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
<input type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Certified Mail, Return Receipt Requested <input type="checkbox"/> Email pursuant to agreement <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Filing JIS/ACCORDS	Court of Appeals Division III 500 N. Cedar Street Spokane, WA 99201-1905


 Patty Gillin

SEC. 3. The costs of a change of venue shall abide the result of the suit, and shall not be demanded in advance.

SEC. 4. This act shall take effect and be in force from and after its passage.

Approved November 5, 1881.

AN ACT

TO AMEND AN ACT ENTITLED "AN ACT IN RELATION TO ROADS, FERRIES, BRIDGES, AND TRAVEL ON PUBLIC HIGHWAYS," APPROVED DECEMBER 1ST, 1881.

SECTION 1. *Be it enacted by the Legislative Assembly of the Territory of Washington,* That section 19 of an act entitled "An act in relation to roads, ferries, bridges and travel on public highways," approved December 1st, 1881, be made to read as follows: "Sec. — The supervisor of each road district in this Territory shall, at least ten days before the first Monday in April of each year, cause three notices to be posted up in three conspicuous places in his road district, giving notice that there will be an election held in such district on the first Monday in April, at two o'clock in the afternoon, at some convenient place in said district to be specified in said notice, for the purpose of electing a road supervisor for the next succeeding year, at which election the old supervisor shall act as chairman, if present; if not present, a chairman shall be elected by the voters present. The meeting shall also elect a secretary who shall record the proceedings of the meeting, and all male persons in the district, who are required to labor on the roads or who have road taxes to pay, may vote at such election, and the person receiving the highest number of votes shall be considered elected supervisor for that year, who shall, within ten days, and before entering upon the duties of said office, take an oath to faithfully discharge the duties of his office, and, if required by the county commissioners, shall enter into bond to the county, with one or more sureties, in any sum not exceeding one thousand dollars, to be approved by the county commissioners, to the effect that he will faithfully account for all money coming into his hands by virtue of his office: *Provided, however,* If from any cause there is no election on the first Monday in April, the supervisor or any qualified elector who is

a taxpayer of the district may call a special election by giving notice as provided in this section, which election shall be held on the third Monday of the same month. It shall be the duty of the chairman and secretary of such meeting to notify the county auditor in writing before the next regular meeting of the board of county commissioners that the district has elected a supervisor, and give his name in full; but in case any road district shall fail to notify the county auditor in writing that they have elected a supervisor, it shall be the duty of the county auditor to report what districts have failed to elect to the county commissioners, at their regular May meeting, and they shall appoint supervisors to fill all vacancies in such road districts." That section 23 of the same act be made to read as follows: "Whenever the supervisor shall from any cause have neglected or omitted to place on his list the name of any person or property within the time required by law, he may at any time afterwards place the name of any person or property, on the list; and assess the road tax due, which assessment shall in all respects be valid as if made in due form. It shall be the duty of the county commissioners of the several counties to levy and assess a road tax of four dollars on every male person liable to perform labor on the public roads, between the ages of twenty-one and fifty years, except persons that are a public charge, or too infirm to perform labor, idiotic and insane persons and an active fireman who has been a member of any fire company in this Territory for a period of one year preceding the assessment of taxes; also to assess not less than one nor more than five mills on every dollar's worth of property as returned by the county assessment, which tax shall be paid in money or in labor at the rate of two dollars per day: *Provided*, That the county commissioners may in addition levy a special tax of two mills on every dollar's worth of property as returned by the assessor, which tax shall be paid in money at the time and in the manner provided for the payment of county and Territorial taxes; and the money arising from said tax shall be known and designated as the "road and bridge fund," and may in the discretion of the county commissioners be applied to build or repair public bridges or roads: *Provided, further*, That in the county of Lewis, the above two mills shall be used for the purpose of building bridges only.

SEC. 2. The secretary of the Territory and the person or persons authorized to index the Code shall substitute the above sections in lieu of the sections hereby repealed.

SEC. 3. This act shall take effect and be in force from and after its passage.

Approved, December 7th, 1881.

AN ACT

~~TO LEGALIZE COUNTY ROADS.~~

SECTION 1. *Be it enacted by the Legislative Assembly of the Territory of Washington,* 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 proper 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 of the proper county may, if they deem it necessary, order such highway or 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.

SEC. 3. At least twenty days before the day fixed by the auditor as above provided, a notice in which shall be inserted the name of each resident owner or occupier of said land lying on the portion of road sought to be legalized or abutting on the line of survey, shall be published four successive weeks in some newspaper published in the county, if any such there be, or by posting the same in five public places in the vicinity of said survey, which notice may be in following form:
, residents on that portion of the county road, used and traveled as such for . . . years, commencing at, in . . . county, running thence (name distance, and in general terms points of location) and terminating at . . . , has been re-surveyed and the board of county commissioners will at their next term hear and determine whether the road herein described and included in said survey shall be ordained as a lawful county road and public highway, and objections thereto or claims for damages must be filed in the auditor's office on or before the first day of the . . . term, A. D. 18.., or the road herein above de-

scribed will be declared a county road and public highway.
A. B., county auditor.

SEC. 4. If no objections or claims for damages are filed on or before the first day of the term fixed for hearing the same, the board of county commissioners shall proceed to declare that such road included in said survey is a lawful county road. If objections are made to the establishment of the highway or claims for damages are filed, three disinterested freeholders shall be appointed to appraise the damages, the report of whom shall be made to the next term of the county commissioners' court.

SEC. 5. No claim for damages will be allowed to any person who did upon the original location of said road receive damages, or who, or whose grantor applied for, or assented to such road, passing over said land, or who, when making settlement upon the tract by him occupied, found the said road in public use and travel. The appraisers will report any and all acts of the owners of said land or their grantors which show compensation, dedication or assent, to such land being used as a public highway. The board may increase, diminish, or refuse to allow any damages, from which order the parties may appeal within three months.

SEC. 6. In case objection shall be made in writing by any person claiming to be injured by the survey made, the board of county commissioners shall have full power to hear and determine upon the matter, and may, if deemed advisable, order a change to be made in the survey. Upon the final determination of the board, or in case no objection be made at the time named in the notice of the survey, they shall approve of the same, and cause the field notes and plat of the county road to be recorded as in case of the establishment and alteration of highways, and thereafter such records shall be received by courts as conclusive proof of the establishment and lawful existence of such county road and public highway according to such survey and plat.

SEC. 7. If the same, or what is equivalent thereto, has not heretofore been done, the county auditor shall, within six months after this act takes effect, cause every public road in his county, the legal existence of which is shown by the records and files of his office, to be platted in a book, to be obtained and kept for that purpose, and to be called the "Highway Plat Book." Each township shall be platted separately on a scale of not less than four inches to the mile, and such auditor shall have all changes in, or addition to, the highways legally established, immediately entered upon said plat book, with appropriate references to the files in which the papers relating to the same may be found.

SEC. 8. The expenses incurred by the provisions of this act shall be paid out of the county funds, not otherwise appropriated.

Sec. 9. This act to take effect and be in force from and after its passage and approval by the governor.

Approved November 16th, 1881

AN ACT

TO AMEND AN ACT ENTITLED "AN ACT TO DECLARE CERTAIN PERSONS HABITUAL DRUNKARDS, AND TO PROTECT THEM AND OTHERS IN PERSON AND PROPERTY," APPROVED NOVEMBER 14TH, 1879.

SECTION 1. *Be it enacted by the Legislative Assembly of the Territory of Washington,* That section two (2) of an act entitled "An act to declare certain persons habitual drunkards, and to protect them and others in person and property," approved November 14th, 1879, be and the same is hereby amended so as to read: "Any person may make complaint of any person addicted to the excessive use of intoxicating liquors, to the probate judge in the county wherein such person so addicted resides, that the person complained of is a habitual drunkard, and that in consequence thereof such person is squandering his or her earnings or property, or that he or she neglects his or her business, or that such person abuses or maltreats his or her family, which complaint must be verified by the oath of the complainant to the effect that the same is true."

SEC. 2. That section three (3) of said act be and the same is hereby amended so as to read: "Upon filing of the complaint duly verified, the probate judge shall cause a copy thereof to be served upon the accused forthwith, and shall summon him or her to appear and answer, giving such accused at least ten days' notice; and if, upon the hearing of the evidence, the allegations of the complaint are sustained, such judge shall, in open court, declare the accused to be a habitual drunkard, and shall cause the proceedings to be entered in full upon the record of his court."

SEC. 3. That section four (4) of said act be and the same is hereby amended so as to read as follows: "The same fees shall be allowed to the probate judge and sheriff or constable in all proceedings under the foregoing section of this act, as allowed by law for like processes and services, and like fees for witnesses as in civil cases before justices of the peace; and if the

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