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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, a 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,

Respondent,

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 and Cross-Appellants.

**REPLY BRIEF OF RESPONDENTS AND CROSS-APPELLANTS
OKANOGAN OPEN ROADS COALITION, and individual taxpayer
members thereof,**

NATALIE N. KUEHLER, WSBA No. 50322
RYAN & KUEHLER PLLC
PO Box 3059
Winthrop, WA 98862
Email: nk@ryankuehler.com
Phone: (509) 996-2832
Attorney for Respondents

TABLE OF CONTENTS

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER GAMBLE’S CLAIMS	1
A. Okanogan County’s Denial of Gamble’s Petition to Vacate Became Binding when Gamble Failed to Appeal.....	2
B. Okanogan County’s Attempt to Rescind its Denial of Gamble’s Petition to Vacate is Procedurally and Substantively Improper and Void	4
C. The BOCC’s Denial of Gamble’s Petition to Vacate was Passed Too Late to Excuse Gamble’s Failure to Appeal	9
D. The Montana Supreme Court’s Decisions in <i>Bugli I</i> and <i>Bugli II</i> are Persuasive Because of Washington’s Similar Statutory Scheme	12
E. Longstanding Washington State Policies Support Dismissal of Gamble’s Claims for Lack of Subject Matter Jurisdiction	12
1. Washington Supreme Court Precedent Precludes Gamble from Challenging the French Creek Road’s Status as a Public Road because Gamble Previously Filed a Petition to Vacate.	14
2. Washington Supreme Court Precedent Precludes Gamble from Maintaining a Declaratory Judgment Action because it had an Adequate Alternative Remedy	17
3. Washington’s Policy Supporting Finality in Land Use Decisions Prohibits Gamble from Collaterally Attacking the BOCC’s Denial of its Petition to Vacate	18
4. Asserting Jurisdiction over Gamble’s Declaratory Judgment Action Would Violate Washington’s Policy that Road Easements are Held in Trust and can be Vacated Only through the Statutory Vacation Process	20

5. Washington’s Doctrine of Primary Jurisdiction Supports Dismissal of Gamble’s Declaratory Judgment Action for Lack of Subject Matter Jurisdiction	22
II. CONCLUSION	25

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Broughton Lumber Co. v. BNSF Ry. Co.</i> , 174 Wash. 2d 619, 278 P.3d 173 (2012).....	13
<i>Bugli v. Ravalli Cty. (Bugli I)</i> , 2018 MT 177, 392 Mont. 131, 422 P.3d 131 (MT 2018).....	<i>passim</i>
<i>Bugli v. Ravalli Cty. (Bugli II)</i> , 2019 MT 154, 396 Mont. 271, 444 P.3d 399 (MT 2019).....	<i>passim</i>
<i>Chelan Cty. v. Nykreim</i> , 146 Wash. 2d 904, 52 P.3d 1 (2002).....	19, 21
<i>City of Fed. Way v. King Cty.</i> , 62 Wash. App. 530, 815 P.2d 790 (1991).....	9, 17
<i>City of Longview v. Wallin</i> , 174 Wash. App. 763, 301 P.3d 45 (2013).....	13
<i>City of Seattle v. Mighty Movers, Inc.</i> , 152 Wash. 2d 343, 96 P.3d 979 (2004).....	13
<i>Coal. of Chiliwist v. Okanogan Cty.</i> , 198 Wash. App. 1016 (2017).....	12
<i>Davidson v. State</i> , 116 Wash. 2d 13, 802 P.2d 1374 (1991).....	9
<i>Estate of Dempsey v. Spokane Washington Hosp. Co. LLC</i> , 1 Wash. App. 2d 628, 406 P.3d 1162	9
<i>Hook v. Lincoln Cty. Noxious Weed Control Bd.</i> , 166 Wash. App. 145, 269 P.3d 1056 (2012).....	4
<i>In re Real Estate Brokerage Antitrust Litig.</i> , 95 Wash. 2d 297, 622 P.2d 1185 (1980).....	23

<i>Kiely v. Graves</i> , 173 Wash.2d 926, 271 P.3d 226 (2012).....	21
<i>Kilpatrick v. City of Anacortes</i> , 84 Wash. App. 327, 927 P.2d 1145 (1996).....	3
<i>King's Way Foursquare Church v. Clallam Cty.</i> , 128 Wash. App. 687, 116 P.3d 1060 (2005).....	11
<i>London v. City of Seattle</i> , 93 Wash. 2d 657, 611 P.2d 781 (1980).....	5
<i>Nelson v. Pacific Cty</i> , 36 Wash. App. 17, 671 P.2d 785 (1984).....	5
<i>Northshore Inv'rs, LLC v. City of Tacoma</i> , 174 Wash. App. 678, 301 P.3d 1049 (2013).....	10
<i>Rapp v. Stratton</i> , 41 Wash. 263, 83 P. 182 (1905).....	<i>passim</i>
<i>Resp. Growth *NE Washington v. Pend Oreille Pub. Util. Dist. No. 1</i> , 466 P.3d 1122 (Wash. Ct. App. 2020).....	4
<i>S. Tacoma Way, LLC v. State</i> , 169 Wash. 2d 118, 233 P.3d 871 (2010).....	5
<i>Saldin Sec., Inc. v. Snohomish Cty.</i> , 134 Wash. 2d 288, 949 P.2d 370 (1998).....	18
<i>Schmidt v. Old Union Stockyards Co.</i> , 58 Wash. 2d 478, 364 P.2d 23 (1961).....	22
<i>Skamania Cty. v. Columbia River Gorge Comm'n</i> , 144 Wash. 2d 30, 26 P.3d 241 (2001).....	18
<i>Smith v. Monson</i> , 157 Wash. App. 443, 236 P.3d 991 (2010).....	16
<i>Sorenson v. Pyeatt</i> , 158 Wash. 2d 523, 146 P.3d 1172 (2006).....	17

<i>State v. Chenoweth</i> , 160 Wash. 2d 454, 158 P.3d 595 (2007).....	13
<i>Unzelman v. City of Snohomish</i> , 40 Wash. 588, 82 P. 911 (1905).....	14, 15, 16
<i>Yorkston v. Whatcom Cty.</i> , 11 Wash. App. 2d 815, 461 P.3d 392 (2020).....	10

Statutes

RCW 36.32.330	10
RCW 9A.72.085	1
RCW 36.70C.040	10
RCW 36.87	3, 7, 8, 13
RCW 36.87.010	5, 19

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER GAMBLE’S CLAIMS.

This court lacks subject matter jurisdiction over Gamble’s quiet title claims because Gamble previously submitted the issue to the jurisdiction of the Okanogan Board of County Commissioners (the “BOCC”). This result is compelled by Washington State’s statutory road vacation scheme, persuasive authority from Montana’s Supreme Court, and long-standing public policy goals. By filing three separate petitions to vacate the French Creek Road with the BOCC, Gamble and its predecessors recognized the status of the French Creek Road as a county road, subject to Washington’s statutory vacation proceedings.

In denying each of the petitions, the BOCC concluded that it was not in the public’s inters to vacate the Road. Gamble cannot now invoke the court’s subject matter jurisdiction to seek a different outcome in a different forum under a different legal standard. Having admitted that the French Creek Road is a county road and voluntarily subjected itself to BOCC jurisdiction in 1955, 1965 and 2009, Gamble’s only relief was to seek a timely writ of certiorari – or to file a new petition to vacate and meet the high statutory burden of establishing that it would be in the public’s interest to vacate the Road.

A. Okanogan County's Denial of Gamble's Petition to Vacate Became Binding when Gamble Failed to Timely Appeal.

Gamble incorrectly argues that the BOCC's denial of the most recent Petition to Vacate French Creek Road, filed by Gamble on October 1, 2009, did not have to be appealed because that decision did not become final before being reversed. As an initial matter, Gamble's argument is irrelevant: Two prior petitions to vacate, in 1955 and 1965, had also been denied. In filing these petitions to vacate, Gamble's predecessors already submitted the issue to the BOCC's jurisdiction. Gamble, therefore, could only invoke the court's equitable jurisdiction now by demonstrating that the French Creek Road was statutorily vacated in the interim. They have not – and cannot – do so.

Rather, the BOCC during its public hearing on Gamble's most recent petition to vacate on November 16, 2009, once more passed a binding motion denying the petition. The official meeting minutes state as follows:

Commissioner Hover respectfully disagrees that the road is of no use to the public as stated by the County Engineer, Bob Breshears. Commissioner Hover also stated the road appears to be very important to the citizens. ... Commissioner Hover moved to deny the vacation of a portion of French Creek Road and ordered all obstructions on the road be removed within the week. Motion was seconded and carried.

Commissioner Peterson thanked all for attending the public hearing.

Meeting adjourned.

(CP 923).

The road vacation statute, RCW 36.87, requires the BOCC to make its decision during a publicly noticed hearing on the matter, and directs that “[i]ts decision shall be entered in the minutes of the hearing.” *Id.* Where, as here, no entry of a written document is required, “[t]he ‘action’ that trigger[s] the appeal period [is] the Board’s vote.” *Kilpatrick v. City of Anacortes*, 84 Wash. App. 327, 927 P.2d 1145, 1146 (1996).

The *Kilpatrick* court explained that “[t]he date of a meeting when the Board takes its final vote is an appropriate trigger because it is ‘easily determined and precisely fixed and because all parties to the public proceeding will ordinarily know of the Board’s public vote at the time it is taken.” *Id.* at 328 (holding that appeal period of denial of variance request begins to run when vote is taken). In *Kilpatrick*, as here,

the Board’s vote denied the [petition]. The Board neither contemplated nor needed further formal action to effectuate that decision. There is no basis in the record for the [Appellant’s] assertion that the way remained open for them to seek another vote ... Nothing in the transcript of that meeting indicates that the Board’s decision was subject to later modification.

Id. at 331-32. The BOCC’s denial of Gamble’s 2009 petition to vacate, therefore, became final when the BOCC entered its decision in the minutes of its public hearing on November 16, 2009, and could thereafter no longer be altered except by a timely appeal or the filing of a new petition.

B. Okanogan County’s Attempt to Rescind its Denial of Gamble’s Petition to Vacate is Procedurally and Substantively Improper and Void.

Gamble argues that the BOCC’s December 8, 2009, resolution purporting to rescind the denial of Gamble’s petition to vacate excuses Gamble’s failure to timely appeal and bars OORC’s claims in this action. That resolution, however, substantively exceeded the BOCC’s authority and procedurally failed to comply with the road vacation statute’s notice requirements. As a result, it is void and subject to attack at any time, and cannot serve to rescind the BOCC’s properly adopted denial of Gamble’s petition to vacate.

As this court recently explained:

A municipal corporation’s powers are limited to those necessarily or fairly implied in or incident to powers expressly granted by statute, and to those essential to the declared objects and purposes of the corporation. If a municipal corporation acts in excess of its statutory authority, a complainant may challenge its actions as ultra vires. An ultra vires act is void on the basis that no power to act existed, even when the government followed proper procedural requirements.

*Responsible Growth *NE Washington v. Pend Oreille Pub. Util. Dist. No. 1*, 466 P.3d 1122, 1130 (Wash. Ct. App. 2020) (internal quotations omitted). “[L]egislation unlawfully adopted and void may be attacked at any time.” *Hook v. Lincoln Cty. Noxious Weed Control Bd.*, 166 Wash. App. 145, 269 P.3d 1056, 1060 (2012). Ultra vires acts are therefore “void on the basis that

no power to act existed” and “cannot be validated by later ratification or events.” *S. Tacoma Way, LLC v. State*, 169 Wash. 2d 118, 233 P.3d 871, 874 (2010).

In Washington, the state has “plenary power over public streets and may vacate the public easement therein. The state may invest municipal corporations with this authority and it has done so by statute.” *London v. City of Seattle*, 93 Wash. 2d 657, 611 P.2d 781, 786 (1980). The relevant statutory scheme sets forth in detail how a county road may be vacated, and requires public notice, a report or survey of the road at issue, a public hearing, and a determination by the BOCC that the vacation of the road is in the public’s interest. RCW 36.87.010 *et seq.*

Under this law, once the French Creek Road was established as a public road it could only be vacated by following the statutory process. *See id.* The State has not imbued the County with the authority to simply disclaim the public’s interest in county roads, much less to do so without giving public notice. *See id.* The Washington Supreme Court addressed this issue in *Rapp v. Stratton*, 41 Wash. 263, 261, 83 P. 182 (1905). In that case, the plaintiff had filed a petition to vacate, which was accepted and “granted” by the city’s committee on streets and alleys. *Id.* at 183. No notice of the committee’s proceedings or decision, however, was given to the public. *Id.* The Court held that the committee’s action was merely “preliminary”, and

that “the court is not authorized in presuming that the prescribed notice was given, or that an ordinance was passed finally vacating the alley. Streets and alleys are of too much importance to the public to be obliterated by a showing of this kind.” *Id.* at 265.

The record here shows that the French Creek Road has been a public road for well over a century. The Road was first petitioned for, surveyed and declared opened in 1889, when all affected lands remained under federal ownership, and became a R.S. 2477 public right-of-way at the time. (CP 291-92; CP 1334). This decision was not appealed. The Road is mapped on the very first official federal surveys of the relevant area published in 1901 and 1902, is visible on all available aerial images from 1943 on and remains in the same place it was originally constructed today. (CP 291-93). Over time, the public also acquired an easement in the Road by public use. (CP 1334). The Road’s public status was reaffirmed in 1955, when the BOCC passed a resolution adopting it as an Official County Road. (CP 902). This resolution, too, was not appealed.

In 1968, the County’s road numbering system changed, and the Road was assigned a new County road number, OCR 1543. *Id.* In 2003, the County split the road into two sections, which were named OCR 1543, Texas Creek Road and OCR 1545 French Creek Road, respectively. *Id.* The County sent letters to the landowners requesting removal of gates placed

across the French Creek Road in 1969, 1979, 2007 and 2008. *Id.* Three separate, unsuccessful petitions to vacate the French Creek Road were filed, in 1955, 1965, and again in 2009. (CP 795, 839-42, 905-14). Each of the petitions were denied, and none of these denials were appealed. In filing the petitions, Gamble and its predecessors each time affirmed the status of the Road as a county road. *See id.*

Most recently, in their 2009 petition to vacate, Gamble specifically attested to the French Creek Road's status as a public road. Gamble affirmed that it was "petition[ing] that the following described *County Road* be vacated: French Creek Road OCR 1545." (CP 905) (emphasis added).

Gamble further explained that

[c]irca 1949 the old county maps show this road having three different numbers. The Okanogan County Commissioners passed a resolution in 1955 adopting the Official County Road System. The road in question is identified by the ordinance as French Creek-Texas Creek, No. 51, as well as Watson Draw-French Creek, No. 91, while the third number is unknown. Texas Creek Road and French Creek Road were merged together as one road in 1968, when the county changed the road numbering system to four digits and re-logged all County Roads. The new log identified the road as OCR. No. 1543.

Id. The County staff report on Gamble's 2009 Petition, in turn, explained that the issue was the "Resolution for Vacation of *County Road*" under "RCW 36.87 Road Vacation". (CP 877) (emphasis added).

The staff report correctly noted that, having accepted the petition, the only two options for the BOCC were to “#1: Approve” or “#2: Deny” it. *Id.* In accordance with the statutory road vacation process, the BOCC requested a report from the County engineer and held two well-attended public hearings. (CP 878, 904, 916-23). At the conclusion of the public hearings, Commissioner Hover summarized that “the road appears to be very important to the citizens,” and motioned to deny the petition to vacate. (CP 923). This motion was seconded and carried, and entered into the official minutes of the BOCC’s November 16, 2009, proceedings. *Id.*

Faced with this overwhelming evidence of the French Creek Road’s status as a county road, the BOCC’s later effort to circumvent the statutory road vacation process and “void” its denial of Gamble’s petition without further public notice or a hearing was procedurally and substantively improper. The County’s conclusion – under threat of litigation from Gamble and misrepresentation of the underlying facts – that “[t]he records and documents held by the County do not support that the [Road] is a county right or public right of way” was baseless. (CP 934-35). The County’s attempt to then disclaim “any interest or jurisdiction over that portion of the Road” was ultra vires and exceeds the authority granted to the County by the State under RCW 36.87. (CP 934-35).

Washington law has long held that all persons are “charged with

knowledge of the provisions of statutes and must take notice thereof” – indeed, it is a “duty of property owners to take notice of public laws affecting the control or disposition of their property”. *Davidson v. State*, 116 Wash. 2d 13, 26, 802 P.2d 1374, 1474 (1991) (*en banc*). Gamble, therefore, is charged with knowledge that the December 8, 2009, resolution was void, and that its only means of attacking the BOCC’s denial of their 2009 petition to vacate was by seeking a writ of certiorari. As Gamble correctly points out in its reply memorandum on appeal, by failing to do so Gamble intentionally and voluntarily relinquished a known right and is now bound by that decision. Gamble Reply Mem. of Law at 2, citing *Estate of Dempsey by & through Smith v. Spokane Washington Hosp. Co. LLC*, 1 Wash. App. 2d 628, 637, 406 P.3d 1162.

C. The BOCC’s Denial of Gamble’s Petition to Vacate Was Passed Too Late to Excuse Gamble’s Failure to Appeal.

Even if the 2009 Resolution were not void, it could still not excuse Gamble’s failure to timely appeal because it was not passed until December 8, 2009, after Gamble’s appeals period had already expired. As discussed in OORC’s response memorandum of law, because the writ of certiorari statute contains no filing deadlines, courts instead apply a comparable limitations period. *See City of Fed. Way v. King Cty.*, 62 Wash. App. 530, 537–38, 815 P.2d 790 (1991). Here, that period is either 20 or 21 days. *See*

Yorkston v. Whatcom Cty., 11 Wash. App. 2d 815, 461 P.3d 392 (2020) (applying “the 20-day limitation period set forth in RCW 36.32.330” to declaratory judgment actions) or, alternatively, Land Use Petition Act, RCW 36.70C.040 (21-day limitation period for land use appeals). Limitations periods are strictly enforced and, if not met, deprive the court of subject matter jurisdiction. *See Northshore Inv'rs, LLC v. City of Tacoma*, 174 Wash. App. 678, 301 P.3d 1049 (2013) (dismissing one day late LUPA appeal for lack of subject matter jurisdiction).

Gamble was required to bring a declaratory judgment action within 20 days of the opening of French Creek Road in 1889. *See Yorkston*, 11 Wash. App. 2d at 826 (applying 20-day limitations period to bar declaratory judgment action based on road created in 1884). Alternatively, Gamble could have filed a writ of certiorari within 20 or 21 days of the BOCC’s denial of its 2009 petition to vacate – by December 7, 2009, at the latest. Because Gamble failed to do so, and the BOCC’s resolution purporting to modify its denial of Gamble’s petition to vacate was not entered until December 8, 2009, this action must be dismissed.

Gamble next argues that its failure to appeal should nonetheless be excused because the BOCC, within the limitations period, indicated that the resolution would be adopted. *See Gamble Reply Memorandum of Law at 2* (alleging that the BOCC “notified the public of its intent to reverse the

denial before the statutory appeal period had run”). This is not correct. The December 1, 2009, BOCC minutes simply reflect a motion by the BOCC to have a resolution prepared, not the intent to adopt it:

Motion – Direction to Steve Bozarth to Draft Resolution

Commissioner Hover moved to direct Steve Bozarth to prepare a resolution narrowing the decision to deny a vacation of French Creek Road to the portion owned by the county and rescinding the order to open the gate. Motion was seconded and carried.

(CP 929) (emphasis in original). Moreover, even if the BOCC had in fact orally indicated its intent to “pass” the resolution being drafted, that decision would still not have become final until entry of the written resolution itself. *King's Way Foursquare Church v. Clallam Cty.*, 128 Wash. App. 687, 116 P.3d 1060, 1062 (2005) (holding that the Board “passe[s]” a resolution not “when it orally indicate[s] its intent to do so” but “when it enter[s] the written resolution itself”). By the time the BOCC’s written resolution was entered, Gamble’s time to appeal the BOCC’s denial of its petition to vacate had already passed. The resolution, therefore, had no impact on Gamble’s duty to file a timely appeal. And, even if it could excuse Gamble’s failure to timely appeal, Gamble’s instant declaratory judgment action would still be barred. Instead, Gamble could now only file writ of certiorari, which would require Gamble to prove that the BOCC’s 2009 denial of its petition to vacate was the result of fraud, collusion, or

interference with a vested. *Coal. of Chiliwist v. Okanogan Cty.*, 198 Wash. App. 1016, 4 (2017) (Div. 3, 2017 (unpublished)).

D. The Montana Supreme Court's Decisions in *Bugli I* and *Bugli II* are Persuasive Because of Washington's Similar Statutory Scheme.

Gamble next argues that this Court should decline to follow the Montana Supreme Court's persuasive reasoning in *Bugli I* and *Bugli II* and affirm subject matter jurisdiction despite Gamble's prior petitions to vacate. In *Bugli I* and *Bugli II*, the Montana Supreme Court held that courts lack subject matter jurisdiction over landowners' later quiet title actions when those landowners previously submitted petitions to vacate the road at issue to the county commissioners. *See Bugli v. Ravalli Cty.*, 2018 MT 177, 392 Mont. 131, 422 P.3d 131 (MT 2018) (*Bugli I*) and *Bugli v. Ravalli Cty.*, 2019 MT 154, 396 Mont. 271, 444 P.3d 399 (MT 2019) (*Bugli II*).

There is no dispute that the precise issue of whether Gamble deprived the court of subject matter jurisdiction over their quiet title action by previously filing a petition to vacate the French Creek Road is a question of first impression in Washington State. There is also no dispute the Montana Supreme Court, in addressing this very issue in *Bugli I* and *Bugli II*, concluded that the filing of a petition to vacate deprives courts of subject matter jurisdiction over a later quiet title action. Finally, Gamble has not disputed that the statutory road vacation procedures in Montana and

Washington are substantively similar in all material respects. *Cf* RCW 36.87 with MCA §7-14-2601-02, 2613, and 2615.

In Washington, “[i]n resolving a question of first impression ..., [courts] may consider well-reasoned precedents from federal courts and sister jurisdictions. ... Although not binding on [Washington] court[s], such precedents may provide persuasive authority.” *State v. Chenoweth*, 160 Wash. 2d 454, 158 P.3d 595 (2007) (citing *City of Seattle v. Mighty Movers, Inc.*, 152 Wash. 2d 343, 356, 96 P.3d 979 (2004)). The Washington Supreme Court has explained that, where the sister state’s statute is substantially different from Washington’s, the Court “need not adopt the construction placed on a [that] statute in another state.” *Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wash. 2d 619, 639, 278 P.3d 173 (2012).

However, when another jurisdiction instead has a similar statute, that state’s caselaw interpreting the statute is given substantial weight. *See City of Longview v. Wallin*, 174 Wash. App. 763, 301 P.3d 45 (2013), FN11 (adopting reasoning from California caselaw because “California has a similar statute, [so] California cases are persuasive authorities for interpreting the Washington statute”). This court, similarly, should treat the Montana Supreme Court’s decisions in *Bugli I* and *Bugli II* as persuasive authority and dismiss Gamble’s claims for lack of subject matter jurisdiction.

E. Longstanding Washington State Policies Support Dismissal of Gamble’s Claims for Lack of Subject Matter Jurisdiction.

Gamble further argues that OORC has presented no Washington case law supporting dismissal of their claims for lack of subject matter jurisdiction. To the contrary, however, important and long-standing policies in Washington support adoption of the analysis in *Bugli I* and *Bugli II*.

1. Washington Supreme Court Precedent Precludes Gamble from Challenging French Creek Road’s Status as a Public Road because Gamble Previously Filed a Petition to Vacate.

First, permitting Gamble to ignore the statutory vacation process after having already admitted to the French Creek Road’s status as a county road would contravene Washington Supreme Court precedent. As early as 1905, the Court in *Unzelman* held that, when a party has filed a petition to vacate the road at issue, the party thereby recognizes the public’s claim to the road and can’t later argue otherwise. *See Unzelman*, 40 Wash. at 590.

In *Unzelman*, the plaintiffs first filed a petition to vacate certain streets, which “after a hearing, was denied.” *Id.* at 590. They then filed a declaratory judgment action, seeking to quiet title in themselves. *Id.* at 588. The trial court instead quieted title in the city, and held that “inasmuch as appellants ... petitioned the city for the vacation of the streets..., they thereby recognized that the city did claim rights in the streets, and that it was asserting dominion over them.” *Id.* at 591. The Montana Supreme Court

in *Bugli II* similarly held that “[b]y filing [an earlier] petition to abandon, Landowners necessarily agreed that the gate encroached on a county road.” *Bugli*, 396 Mont. at 279. In the case at hand, Gamble and its predecessors on three separate occasions recognized the French Creek Road as a public road that is subject to the BOCC’s “dominion.” *See Unzelman*, 40 Wash. at 591. Gamble cannot now maintain a declaratory judgment action claiming otherwise. *See id.*, *Bugli*, 396 Mont. at 279.

Gamble argues that it should nonetheless be allowed to bring this quiet title action because the County later ‘disclaimed’ any interest in the Road, and because Gamble and its predecessors maintained barriers across the Road that prevented its use by the public. As noted *supra*, however, the County could not lawfully disclaim the public’s interest in the French Creek Road, and the December 8, 2009, resolution Gamble relies on was both untimely and is void. Gamble’s illegal maintenance of gates across French Creek Road, moreover, does not deprive the Road of its public character. This argument, too, was addressed by the Court in *Unzelman*.

In *Unzelman*, after having filed an unsuccessful petition to vacate and thereby “recognized that the city did claim rights in the streets”, the plaintiffs “proceeded to erect in the streets improvements of a permanent nature.” The Court explained that this put plaintiffs

in the position of wrongdoers, who have knowingly and willfully undertaken to obstruct the streets. ... [T]he private use of the public way was wrong in the beginning and wrong each day of its continuance, and it is a strange perversion of principle to declare that one who bases his claim on an original and continued wrong may successfully appeal to equity to sanction and establish such a claim.

Id. at 591-92 (quoting Elliott on Roads and Streets (2d Ed.) § 844). Here, similarly, Gamble and its predecessors already “recognized” the BOCC’s jurisdiction over the French Creek Road by filing unsuccessful petitions to vacate, thereafter “knowingly and willfully” obstructed the Road, and it would be a “strange perversion of principle” to now allow Gamble to “appeal to equity” by maintaining a quiet title action. *See id.*; *see also Smith*, 157 Wash. App. 443, at 448–49 (suit to quiet title is “an action in equity”).

This principle was reiterated by the Washington Supreme Court in *Rapp v. Stratton*. In that case, too, “[s]ome time before the commencement of this action, the [appellant] petitioned the city council for the vacation of this alley, which petition, upon consideration by the city council, was rejected.” *Rapp*, 41 Wash. at 265. The Court held that by filing the prior petition to vacate, “the appellant would be estopped from now claiming that the street had been vacated at a prior time.” *Id.* at 265-66. This is precisely the reasoning applied by the Montana Supreme Court in *Bugli I*. The court in that case held that a declaratory judgment action is precluded when a landowner “voluntarily chose, accepted, and submitted to the BOCC’s

jurisdiction and committed the[] road dispute to the statutory abandonment process, including the necessary fact-finding. Landowners are now bound to that process, and cannot relitigate these issues in a separate forum.” *Id.* In other words, to now invoke this court’s subject matter jurisdiction, Gamble would have to show that the BOCC at some point after denying its petition to vacate on November 16, 2009, successfully vacated the French Creek Road. Gamble cannot make this showing because the BOCC took no such action.

2. Washington Supreme Court Precedent Precludes Gamble from Maintaining a Declaratory Judgment Action because it had an Adequate Alternative Remedy.

Second, in Washington a party is not entitled to maintain a declaratory judgment actions, such as Gamble’s quiet title case, if there is an adequate alternative remedy available. *City of Federal Way*, 62 Wash. App. at 534; *Sorenson v. Pyeatt*, 158 Wash. 2d 523, 531, 146 P.3d 1172 (2006) (equitable relief is “extraordinary” and granted only if “the remedy at law is inadequate”). Here, Gamble could have challenged the BOCC’s unfavorable decision denying its petition to vacate by filing a writ of certiorari. Indeed, courts have held that writs of certiorari are “properly employed to determine whether a land use decision is arbitrary, capricious, contrary to law, or unsupported by the evidence.” *City of Federal Way*, 62 Wash. App. at 534. Gamble could have appealed the BOCC’s decision and

argued that, in denying its petition, the BOCC had acted beyond its jurisdiction because the French Creek Road was not a public road. This is because “[t]he fundamental purpose of the constitutional writ of certiorari is to enable a court of review to determine whether the proceedings below were within the lower tribunal’s jurisdiction and authority.” *Saldin Sec., Inc. v. Snohomish Cty.*, 134 Wash. 2d 288, 292, 949 P.2d 370 (1998).

As the Montana Supreme Court in *Bugli II* explained, a BOCC’s decision to deny a petition to vacate “necessarily” includes a determination that the road at issue is a county road. *See Bugli II*, at 405. This determination, in turn, is subject to review by the courts on a writ of certiorari. *See id.* If the reviewing court concluded that the French Creek Road was a private driveway, as Gamble now alleges, it could have afforded Gamble the relief it now seeks by invalidating the BOCC’s denial of its petition to vacate on grounds that it exceeded the BOCC’s authority. *See Saldin Securities, Inc.*, 134 Wash. 2d at 292. Gamble, however, declined to appeal the BOCC’s decision, and is now “estopped” from claiming that the French Creek Road was not a public road. *See Rapp*, 41 Wash. at 265–66.

3. Washington’s Policy Supporting Finality in Land Use Decisions Prohibits Gamble from Collaterally Attacking the BOCC’s Denial of its Petition to Vacate.

Third, Washington State has a “strong policy supporting administrative finality in land use decisions.” *Skamania Cty. v. Columbia*

River Gorge Comm'n, 144 Wash. 2d 30, 49, 26 P.3d 241 (2001). Allowing a declaratory judgment action now, over 130 years after the French Creek Road was established, 45 years after the BOCC's first denial of a petition to vacate the Road, and seven years after its latest denial of a petition to vacate, "would completely defeat the purpose and policy of the law in making a definite time limit" a requirement for court review. *Chelan Cty. v. Nykreim*, 146 Wash. 2d 904, 931, 52 P.3d 1 (2002) (upholding dismissal of later-filed declaratory judgment action when plaintiff could have filed a LUPA appeal attacking the County's decision).

This reasoning is particularly powerful here, where acceptance by the court of Gamble's declaratory judgment action would effectively allow anybody who unsuccessfully petitioned to vacate to later file a quiet title action on the very same road: if a petitioner failed to succeed because vacating the road was not in the public's interest as required under RCW 36.87.010 *et seq.*, rather than meet the high standard necessary to overturn the BOCC's decision by writ of certiorari, a petitioner could simply change tactics, allege that the road was never public in the first place, and avoid the statutory public interest test altogether. This is precisely what Gamble's declaratory judgment action attempts to do. Allowing a petitioner the opportunity to make such an end-run around the statutory road vacation process – after the public has already established to the BOCC's satisfaction

that vacating the road is not in the public's interest – would violate Washington's policy favoring the finality of land use decisions. It would also, at great cost to the public, encourage forum shopping and repeated litigation by individuals who bring unsuccessful petitions to vacate.

Establishing this precedent would be particularly worrisome in the context of county roads, which are held in trust for the public. Unlike in statutory vacation proceedings, in quiet title actions the BOCC is not required to uphold the public's interest and cannot be compelled to defend the lawsuit. Here, OORC had to be formed, at great costs to private citizens, to intervene in Gamble's lawsuit and defend the public's interest. Indeed, OORC was the only entity doing so for nearly two and a half years, before the County decided to defend the public's interest in the French Creek Road. Had OORC not intervened, judgment would long ago have been entered in Gamble's favor. Public roads, however, "are of too much importance to the public to be obliterated" in this manner. *Rapp*, 41 Wash. at 265.

4. Asserting Jurisdiction over Gamble's Declaratory Judgment Action Would Violate Washington's Policy that Road Easements are Held in Trust and can be Vacated Only through the Statutory Vacation Process.

Fourth, allowing Gamble's quiet title action to proceed would also violate Washington State's strong policy that easements held for public purposes cannot be adversely possessed or otherwise be extinguished

outside the statutory vacation process. As the Supreme Court explained in *Kiely v. Graves*, “[t]here is no question that land held for a street or highway is a public purpose,” and that such land is “held in trust for the public.” 173 Wash. 2d 926, 936, 271 P.3d 226 (2012).

Similarly, the court in *Nelson v. Pacific County* held that a county “may not abandon” a public right-of-way by disclaiming interest in the road, but is instead bound to the statutory vacation process. 63 Wash. App. 17, 23 671 P.2d 785 (1983) (cert denied 1984). The *Nelson* court instead concluded that, once acquired, county roads “cannot be sold or disposed of without notice and a public hearing.” *Id.* The court explained that the road vacation statute’s “provisions are comprehensive and demonstrate a strong legislative intent that property held for the public use and benefit not be summarily disposed of without giving the public affected a significant opportunity to participate.” *Id.* at 23-24.

Contrary to the public’s existing interest in the French Creek Road, Gamble’s underlying fee interest is a “mere future expectanc[y]” that becomes vested only when the road is vacated. *Id.* at 939. Accordingly, “[b]ecause it is not permissible to encroach upon a public easement, it is not permissible to adversely possess the underlying fee interest. ... To decide otherwise would encourage encroachments upon public easements that hinder public uses.” *Id.* at 940 (internal citation omitted).

Here, too, finding subject matter jurisdiction over Gamble's claims would merely encourage encroachments upon public roads, such as Gamble's erection of private gates blocking access. It would also result in repeat litigation by parties whose petitions to vacate were previously denied as contrary to the public's interest, even though Washington's legal framework permits the relinquishment of public rights-of-way only through the statutory road vacation process.

5. Washington Doctrine of Primary Jurisdiction Supports Dismissal of Gamble's Declaratory Judgment Action for Lack of Subject Matter Jurisdiction.

Finally, although not directly applicable, the lack of subject matter jurisdiction over this matter is consistent with the doctrine of primary jurisdiction. This doctrine "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body..." *Schmidt v. Old Union Stockyards Co.*, 58 Wash. 2d 478, 484, 364 P.2d 23 (1961). The doctrine requires the administrative agency to have the authority to resolve the issues and special competence over all or some of the controversy, and for the issues to fall "within the scope of a pervasive regulatory scheme so that danger exists that judicial action would conflict

with the regulatory scheme”. *In re Real Estate Brokerage Antitrust Litig.*, 95 Wash. 2d 297, 303, 622 P.2d 1185 (1980).

The BOCC has the authority to decide whether to accept a petition to vacate or decline to do so when the road at issue falls within its jurisdiction. The BOCC further has the right to grant or deny a petition it accepts. To make that finding, the BOCC must review the public’s interest; a review the BOCC is uniquely well positioned to do through the public notice and hearing process. The County, moreover, is the repository of the relevant records: petitions to establish roads; maintenance and expense records; records requiring the removal of barriers across the roads; records relating to prior petition to vacate; and resolutions to adopt roads into the county road network or change names and numbers assigned to such roads.

There is, also, a detailed regulatory scheme that confers jurisdiction over petitions to vacate to the BOCC, and sets out the precise process by which such petitions are to be decided. *See* RW 36.87.010 *et seq.* Finally, as this case demonstrates, the court’s acceptance of jurisdiction over Gamble’s claims creates a danger that judicial action would conflict with the regulatory scheme: the BOCC’s denials of Gamble’s statutory petitions to vacate risk being ignored, the BOCC’s statutorily mandated finding of significant public interest in the French Creek Road risks being irrelevant, and the BOCC’s statutorily required participation in – and authority

conferred over – the road vacation process risks being abandoned. *See Bugli I*, 392 Mont. at 137 (“[a] declaratory judgment by the [trial court] regarding the length of the Road could conflict with the BOCC’s denial of the 2016 petition and undermine its statutory authority over the Road”). All of these factors, therefore, militate in favor of declining to exercise jurisdiction, and requiring Gamble instead to adhere to the statutory vacation process that Gamble itself initially decided to invoke.

These very issues also illustrate the danger to the public of permitting a party who filed an unsuccessful petition to vacate to then forum shop by filing a later declaratory judgment action: defending a quiet title action may be too expensive or burdensome for county government, or simply not in their political interest to pursue. Under such circumstances, the entry of judgment quieting title in the petitioner can only be avoided if dedicated citizens develop and fund a legal defense for the public at large. Imposing this burden on the public – after it already established in petition to vacate proceedings that vacating the road is not in the public’s interest – violates the principles underlying the doctrine of primary jurisdiction.

In short, public policy, Washington State court precedent, and the public’s interest all require adoption of the Montana Supreme Court’s reasoning in *Bugli I* and *Bugli II*: Because Gamble first filed a petition to vacate the French Creek Road and failed to appeal the BOCC’s denial of

their petition, this court lacks subject matter jurisdiction over Gamble’s declaratory judgment claims. Gamble has not identified a single case, policy or doctrine to the contrary. Gamble, like plaintiffs in *Bugli*, thus cannot now invoke this court’s jurisdiction to “run around the denial of their petition to vacate” by seeking a different outcome from a new tribunal. *Bugli I* at 127.

II. CONCLUSION

Gamble’s claims should be dismissed for lack of subject matter jurisdiction, the trial court’s entry of summary judgment for OORC should be upheld, and OORC should be awarded attorney fees and costs from Gamble on appeal.

Respectfully submitted on August 31, 2020.

/s/ Natalie N. Kuehler
NATALIE N. KUEHLER, WSBA No. 50322
Principal
RYAN & KUEHLER PLLC
Attorney for Respondent and Cross-Appellant
OORC

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 August 31, 2020, the foregoing was delivered to the following persons in the manner indicated:

Thomas F. O'Connell, Esq.
Davis, Arneil Law Firm, LLP
Attorney for Appellants and Cross-Respondents
Via email sent to: tom@dadkp.com

David Y. Gecas
Okanogan County Prosecutor's Office
Attorney for Respondent Okanogan County
Via email sent to: dgecas@co.okanogan.wa.us

Court of Appeals
Division III
Via e-filing on JIS/ACCORDS

/s/ Natalie N. Kuehler

Natalie N. Kuehler

RYAN & KUEHLER PLLC

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Sender Name: Natalie Kuehler - Email: nk@ryankuehler.com
Address:
PO BOX 3059
WINTHROP, WA, 98862-3001
Phone: 509-996-2832

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