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Division III
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Case No. 372979

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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,

Respondents, and

OKANOGN 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 CRAEGER

Respondents

RESPONDENT OKANOGAN COUNTY'S BRIEF

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II. STATEMENT OF THE CASE

Appellants Gamble Land and Timber, LTD., and Cascade Holdings Group, LP. (collectively “GLT”) brought this quiet title action asserting that a three mile section of French Creek Road is their private access road, and not a county road. CP 21-34. The disputed section is a mountain road near the towns of Methow and Carlton in Okanogan County. CP 565, Ex A (map showing the proximity of the disputed section to nearby towns and roads). Private gates block the road at both ends of the three mile section. CP 545, 408, 453; 1413. There is some private land near each gate, but most of the land surrounding the three mile section of road between the gates is public land owned by the State Department of Natural Resources (“DNR”). CP 649, Ex B (map showing gates and state land in red).

GLT has owned land abutting the road near the lower gate since 1993. CP 459, 400. Before that, the land was owned by the Weddle’s who bought it from O’Toole in 1973. *Id.* The lower gate (also known as the Weddle gate, or O’Toole gate) had both a private lock and a DNR lock on it for several decades (although recently unlocked pending the outcome of this action). CP 468; 460; 464-467; 453; 1446. The upper gate, also

known as the Judd gate, is located at the point where French Creek Road becomes Texas Creek Road. CP 545; CP 565.

Private landowners have filed petitions to vacate the road at least three times (1955, 1965, and 2009). 1955 (CP 1003); 1965 (CP 136-138; 1004); 2009 (CP 499-501, 1007). The Okanogan County Board of County Commissioners' ("BOCC") denied all three petitions to vacate, and found the road useful to the public. *Id.* The commissioners, less than a month after denying the 2009 petition to vacate, passed Resolution 443-2009. CP 1364-1366. The resolution expressed the commissioners' belief, at the time, that the available records did not show the disputed section had been established as a county road. CP 1364-1366.

The county, during this litigation, continued searching for evidence regarding the origins and ownership of the disputed section. CP 131-133. In 2019, the County Engineer stumbled upon a petition to establish a county road called Methow Valley Road. CP 131-133, CP 224-228, CP 213. The County Engineer also found corresponding survey field notes, BOCC minutes, and other records indicating the Methow Valley Road was established as a county road by petition on August 9, 1889. CP 131-133 (Josh Thomson Declaration); CP 224-228, CP 213 (Petition to establish Methow Valley Road); CP 218-221, CP 503 (Report of Road Viewers, Surveyor's Return and Certificate); CP 504, CP 166-183, 334-359 (Survey

Field Notes); CP 509-510 (Aug. 9, 1889 BOCC minutes: “Report of Viewers and Surveyor and Remonstrance against the acceptance of the Methow valley road Read 2nd time Moved that Road be declared open as a County Road and be named the Methow Valley road.”); CP 511 (last page of survey field notes in Road Book: “I certify the foregoing to be a true and correct copy of the field-notes of the survey of the Methow County Road, as shown by Plat. Henry Carr [Surveyor] Filed 1st day of June, 1889, Road opened Aug 9 1889 F.M. Baum Auditor.”) Underlines added.

The county believed the Methow Valley Road (or Methow County Road) may have included the disputed section of French Creek Road. The county hired surveyor Gary Erickson to survey the disputed section, and determine whether the disputed section was part of Methow Valley Road. CP 639-642. Mr. Erickson concluded French Creek Road, including the disputed section, is the same road as proposed, built, and opened in 1889 as described in the Road Book (or “Road Record A-1”) and called the Methow County Road. CP 644.

The county, based on the newly discovered evidence, filed briefs on October 25, 2019 (CP 616), and November 25, 2019 (CP 472) arguing the disputed section is a county road, and asking the court to dismiss the case, quiet title in the county, and order the private gates removed. On

Dec. 18, 2019, the Superior Court granted the motions for summary judgment, and dismissed the case. CP 35-37. GLT appeals.

III. ARGUMENT

A. Standard of Review

The Court of Appeals reviews an order on summary judgment de novo. *Farmer v. Davis*, 161 Wash.App. 420 (2011). Where reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment should be granted. *LaMon v. Butler*, 112 Wn.2d 193, 199 (1989).

B. Summary

The Court of Appeals should affirm the Superior Court's grant of summary judgment, and hold the disputed section of French Creek Road was established as a county road by petition on August 9, 1889. It is undisputed the survey field notes were recorded, and as argued below, that meets the survey recording requirement. It is disputed whether the plat was recorded, but even if it was not, the nonperformance of that ministerial duty cannot invalidate the commissioners' discretionary decision to grant the petition and establish the road. Moreover, GLT's argument that the road was never established by petition due to procedural defects, is untimely because the 20-day limitation period for appealing the commissioner's decisions has passed. Alternatively, the missing plat is an

informality that does not invalidate establishment of the road. RCW 36.75.100.

The 1890 nonuse statute does not apply because 1) the argument is barred by laches, 2) it is undisputed the Road Book and BOCC minutes described the road as opened, not just authorized, on Aug. 9, 1889, and 3) It is well established GLT cannot overcome the burden of proving the road was not timely opened by pointing to a lack of evidence that it was.

Common law abandonment does not apply because 1) the legal authorities GLT relies on do not support a finding that common law abandonment ever applies to county roads established by petition, 2) the public has never stopped using or attempting to use the road, as evidenced by GLT's claim of repeated trespass, 3) GLT's gating of road is adverse use, and a private landowner cannot gain public land through adverse possession or prescription, 4) lack of use by the public has not been voluntary, 5) abandonment must be intentional, and there can be no intentional abandonment of a county road without knowing it is a county road, 6) commissioners denial of vacation attempts in 1955, 1965, and 2009 indicate they did not intend to abandon the road when they believed it was a county road, 7) resolution 443-2009 was based on the commissioners' misbelief that the disputed section was not a county road,

and is not evidence of intent to abandon a county road, and 8) the resolution was not a valid method for abandoning a county road.

C. The Methow Valley Road was established by petition August 9, 1889.

1. Recording the field notes of the survey satisfies the requirement of recording the survey.

GLT argues the Methow Valley Road was not established by petition because: "... no survey or plat was ever recorded, and thus the Methow Valley Road could never have been opened pursuant to the 1879 Territorial Law." Appellant's Brief p. 9. GLT acknowledges the survey field notes were recorded, but argues recording survey field notes does not meet the requirement of recording the "survey." Appellant's Brief p. 16; CP 334-359 (recorded survey field notes). The "survey" recording requirement is in the 1879 Session Laws § 5 at 50; and in the Code of 1881 § 2974 at 513. GLT argues the survey can only be recorded by recording the "minutes of the survey" (a term found in the 1879 Law §§ 35, 36 at 60-61), and that "survey field notes" are not "minutes of the survey." Appellant's Brief, pgs. 16-20.

The term "minutes of survey" does not appear anywhere else in the 1879 Law. The term is not used at all in the 1881 Code of Washington, or in the *Supplement to the Code of 1881* (also known as "Bagley's Supplement" and composed of prior legislation that was inadvertently left

out of the Code of 1881). Kelly Kunsch, *Statutory Compilations of Washington*, 12 U. Puget Sound L. Rev. 285, 290 (1989).

The term “field notes” by contrast, is used extensively in the 1881 Code: see e.g. §§ 2761, 2762, and 2765 at 479 (describing the county surveyor’s duty to preserve survey “field notes.” Today the county surveyor is known as the county engineer); § 3041 at 528 (providing that when the “field notes” are lost or destroyed, or the road’s location cannot be determined from the papers on file, or there are defects or omissions in the record, or doubts exist as to the legal establishment of the road, then the commissioners can order a new survey and plat to be created and recorded); § 3042 at 529 (a copy of the “field notes” and plat is to be recorded “as in cases of the original establishment of a county road”); § 3046 at 529 (after final determination that a road is a legal county road the commissioners shall cause the “field notes and plat to be recorded, as in case of the establishment ... of highways, and thereafter such records shall be received by the courts as conclusive proof of the establishment and lawful existence of such county road”). All underlines added.

The current RCW’s also mention “field notes” but not “survey minutes”: see e.g. RCW 36.75.110 (when a road’s true location is uncertain the commissioners shall direct the engineer to investigate and the investigation shall include among other things examining “the original

petition, report, and field notes on the establishment of such road.”); RCW 36.81.010 (regarding establishment of roads, the engineer must file a map of the road surveyed and the field notes); RCW 79.110.310 (regarding irrigation right-of-ways “ ...shall file with the department a map accompanied by the field notes of the survey ...”); RCW 58.28.240, RCW 58.040.030, and many more. All underlines added.

The 1881 Code was the legislature’s response to what had become a constant call for revision, compilation, and printing of the entire territorial code. Kelly Kunsch, *Statutory Compilations of Washington*, 12 U. Puget Sound L. Rev. 285, 290 (1989). For the first time since 1854 all territorial laws of a permanent nature were published in one compilation. *Id.* By its own terms, the Code of 1881 is to be construed as “repealing all prior laws pertaining to the same subject, but the provisions of the Code so far as they are the same as those of prior laws shall be construed as continuations of such laws and not as new enactments.” Code of 1881 § 3319 at 578. The 1881 Code contains a savings clause that says Acts or portions of them that were general in nature and in force prior to the code’s enactment remain in effect unless repugnant to the code. Code of 1881 § 3320 at 578.

Reasonable minds can differ on whether §§ 35 and 36 of the 1879 Law were repealed by the 1881 Code, or whether they were not repugnant

to the Code, and remained in effect. 1879 Session Laws §§ 35, 36 at 60, CP 256-257. However, the complete absence of the term “survey minutes” or anything similar in the 1881 Code, or in any code after 1879, combined with repeated references to recording “field notes” and using field notes to establish location and legality of roads indicates recording field notes meets the requirement of recording the “survey”.

The term “minutes of survey” may have meant the cleaner version of the survey field notes found together with the report of viewers, and the surveyor’s return, in the Road Book. CP 165-183; CP 503-504; CP 511. GLT argues “The only recorded document Respondents have been able to produce are recorded field notes (CP 334-359).” Appellant’s Brief p. 16. Not so, other recorded documents Respondents produced include: the Petition CP 224-228; Remonstrance CP 214-217; Report of Road Viewers CP 218-219; Surveyors Return and Certificate CP 220-221; and the Bond CP 222-223. And the cleaner versions of many of these documents were also recorded in the Road Book (CP 165-183) which seems to have been another acceptable method of recording road documents back then. *Town of Sumner v. Peebles*, 5 Wash. 471, 474, 32 P. 221, 222 (1893)

“... we understand that when in the road book there is entered a petition, the report of viewers, a description of the road, and the adoption of the view, the road is thereby and thenceforth established.” Underline added.

Here, the plat is missing, but the field notes and other documents were recorded both in the Road Book (CP 165-183, CP 504, 511), and separate versions were recorded with the auditor's seal. CP 334-359, CP 214-228.

2. The missing plat, and missing highway plat book, do not prevent the Court from concluding the road was established by petition in 1889.

References to the plat indicate the plat existed and was located "herewith" the records in the Road Book. See e.g. CP 503-504 (Surveyor's Return, from the Road Book, the last few words on the page are: "and that herewith is a correct plat of said road, according to said survey.") underline added; CP 358 ("I certify the forgoing to be a true and correct copy of the field notes of the survey of the Methow County Road as shown by plat.") underline added.

Even if the county never locates the plat, the Court should find the road was established by petition because the commissioner's discretionary decision to establish the road cannot be invalidated by failure of another to perform a ministerial duty such as recording or preserving the plat, and because informalities are not fatal.

a. Failure to record a plat cannot frustrate the commissioner's discretionary decision to establish a county road because recording is a ministerial duty.

GLT acknowledges the county commissioners "approved the petition to open the Methow Valley Road." Appellant's Brief, pg. 16. The evidence in the record supports this. CP 510 (Commissioner minutes Aug. 9, 1889, second line: "Moved that Road be declared opened as a County Road and be named Methow Valley Road"; CP 511 "Road Opened Aug 9 1889." Failure to record a plat cannot frustrate the commissioner's discretionary decision to establish a county road because recording is a ministerial duty. *City of Bothell v. Gutschmidt*, 78 Wash. App. 654, 663 (1995):

"If the nonperformance of required duties (ministerial acts) can invalidate the exercise of discretionary power there is no discretionary power. A legislative decision would be susceptible of invalidation by mere nonperformance of the duty."

In *Gutschmidt*, the plaintiff argued the city's DWI ordinance was invalid because recording certain documents was a condition precedent to adopting a valid ordinance, and the city clerk had not recorded them. The Court held the clerk's statutory duty to record was not discretionary, and was therefore ministerial. The Court held the ordinance was valid because the Clerk's failure to perform a ministerial duty could not invalidate the commissioner's discretionary decision to adopt an ordinance. *Id.*

The commissioners' decisions on whether a petitioned for road will be of public utility, whether it will be worth the expense, and whether it should be established as a county road is discretionary. Selde v. Lincoln Cty., 25 Wash. 198, 205 (1901). In Selde, the commissioners denied a petition to establish a county road. Petitioner appealed to Superior Court. A jury found the road would be of public utility. The trial court reversed the BOCC's order denying the petition, and ordered the BOCC to establish the road. The Supreme Court reversed the trial court, holding:

“The matter of establishing the road is left wholly to the discretion of the board of county commissioners, and necessarily so, for the board of commissioners is charged by the law with the duty of ‘managing the county funds and business.’”

Similarly, mandamus actions brought against municipalities to repair roads are usually not successful. Burg v. City of Seattle, 32 Wash. App. 286, 296 (1982) (“Further, the decision whether to repair the street in question, how to repair it or not to repair it at all is a discretionary decision not subject to judicial invasion of legislative power by the issuance of mandamus.”)

By contrast, the duty to record the survey and plat is non-discretionary, and therefore ministerial. Code of 1881 § 2974, at 514, last sentence of § 2974: “the commissioners shall cause said report survey and plat to be recorded”. The requirement to “cause” the plat to be recorded

does not mean the commissioners had to personally record it. The auditor, and the clerk of the BOCC, were the same person back then: Code of 1881 § 2668 at 464 (“The auditor of the county shall be the clerk of the board of county commissioners, and attend their meetings and keep a record of their proceedings.”)

Thus presumably the auditor/clerk would have recorded the necessary documents once the commissioners decided to grant the petition to establish the road. And an auditor/clerk’s nonperformance of that ministerial duty would not invalidate the commissioners’ discretionary decision to open the road. *City of Wenatchee v. Owens*, 145 Wash. App. 196, 210 (2008) (“To hold otherwise would vest powers in the clerk that are not provided for by statute.”)

As mentioned above, there is circumstantial evidence the plat existed (e.g. references to the plat being “herewith” the other necessary documents that were recorded in the Road Book). Under the circumstances the court should presume the correct procedures were followed and the plat was recorded, even if the original plat is missing 131 years later. *City of Wenatchee v. Owens*, 145 Wash. App. 196, 203 (2008) (“In the absence of an affirmative showing to the contrary, it is presumed that the mandatory provisions of the law were duly observed, in substance at least, in the ordinance’s enactment.”). Alternatively, the Court should

find the commissioners' intent to establish the road cannot be frustrated by a clerk's failure to record the plat. *City of Wenatchee v. Owens*, 145 Wash. App. 196, 210 (2008); *Yorkston v. Whatcom County*, 11 Wash. App2d 815, 829 (2020): ("The trial court misapprehended a procedural rule as creating a substantive bar to the Commission's authority to create roads.)

b. A missing plat from 1889 is an informality that does not prevent the Court from concluding the road was established by petition.

"No informalities in the records in laying out, establishing, or altering any public highways existing on file in the offices of the various county auditors of this state or in the records of the department or the transportation commission, may be construed to invalidate or vacate the public highways." RCW 36.75.100

There are no published opinions interpreting the word "informalities" in this statute, and the word is not defined in the definitions section. RCW 36.75.010. An interpretation that includes missing or improperly recorded records is consistent with other laws preventing public roads from easily losing their public character through errors or mishaps.

For example, the 1881 Law provided that if the survey notes are lost, stolen or destroyed, or if because of some omission there is uncertainty about the legal establishment of the road, the county could resurvey the road, and record new field notes. Code of 1881 § 3041 at

528; and 1881 Session Laws § 2, at 11. The road would not lose its public character simply because the missing field notes made it impossible to prove the survey was recorded. The same should be true when there is a missing plat.

Other examples of laws that prevent public roads from easily losing their public character include: the state cannot lose a road through prescription. *Williams Place v. State ex rel. DOT*, 187 Wash. App. 67, 98 (2015). Or by adverse possession. *Goedecke v. Viking Inv. Corp.*, 70 Wn.2d 504, 508-509 (1967). Or by not maintaining the road. *Id.* And statutory vacation procedures prevent accidental vacation of roads. RCW 36.87.010-140. The statutory vacation procedures even prevent intentional abandonment of public roads when the statutory vacation procedures are not followed. *Nelson v. Pacific County*, 36 Wash.App. 17, 23-24 (1983). Applying RCW 36.75.010 here is consistent with the general theme that public roads cannot easily be lost, in this case by losing the plat. And see *Yorkston v. Whatcom County*, 11 Wash.App. 2d 815, 827 (2020) (“Moreover, ‘[w]e presume that municipal ordinances were validly enacted.’”). The same should be true of establishment of roads.

3. The existence of DNR easements is not evidence the road was not established by petition in 1889.

GLT asks why, if the road is a county road, the county obtained easements from the DNR for a section of the road that lies north of the disputed section. Appellant's Brief pg. 25. The answer is the county moved that particular section of road from the south side of Texas Creek, to the north side of the Texas Creek, where DNR owned the land. CP 491, CP 576-581 (maps and photos showing the path of the old road and the path of the new road in Section 35). Note, the disputed section does not even run through Section 35, only through Sections 21, 17, and 16. CP 565. Neither the State, nor the DNR existed when the county established the road on Aug 9, 1889, it was still federal land. Therefore the county did not need DNR easements to establish the original road containing the disputed section. CP 653 (Email from DNR employee Jeff Wolf to county dated Jun. 13, 2019):

“... the start date for State Trust Land ownership holdings T31 R23E Section 16 is April 28, 1904 ... (My understanding is that no easement consideration would apply if the county can show they acquired rights prior to DNR ownership)”.

4. Even if there were evidence DNR owns the road, DNR's repeated position against vacation would indicate common law dedication of the road to the county.

DNR has consistently opposed petitions to vacate French Creek Road as a county road. CP 500 (BOCC minutes from 2009 vacation

hearing: “Kevin Roberts, representing DNR, reiterated that DNR’s lock on the gate in question will be removed. He submitted a letter from DNR in opposition of vacation of French Creek Road.”); CP 136 (BOCC minutes from 1965 vacation hearing: Walt Smith on behalf of DNR “The State opposes the closing for three reasons. 1. There is a need for hauling supplies. 2. For fire control. 3. Public hunting and fishing.”).

Thus, even if there was evidence DNR owned the disputed section, DNR’s repeated position that the county should not vacate the road, should be viewed as a common law dedication to the county for use as a county road. *Roundtree v. Hutchison*, 57 Wash. 414, 417 (1920) (an intention on the part of the owner to dedicate to a public use, followed by some act or acts clearly evincing such intention and an acceptance by the public, constitute a valid common law dedication). Although, the existence of a DNR lock on the lower gate for many years is inconsistent with DNR’s position at vacation hearings. And, if there was evidence DNR owned the disputed section, they would need be joined as a party.

5. GLT’s argument that Methow Valley Road was not properly established by petition per Territorial Law is barred by the Statute of Limitations.

As mentioned by GLT, the court in *Yorkston* referenced a 20-day limitation period to challenge the decision of county commissioners, *Yorkston v. Whatcom County*, 11 Wash. App2d 815, 826-827, 829 (2020)

citing Code of 1881, ch. 209, § 2695, at 467 . In *Yorkston*, no objection or appeal was made to the commissioners' 1884 decision to establish a county road, therefore the commissioners' decision to establish the road was beyond challenge:

“In addition the trial court did not consider the absence of any objection to the Commission’s 1884 decision. It did not consider that any challenge to the commission’s action – based on the absence of a petition request – was required to be brought in court within 20 days of the commission action (not 130 years later). ... Whatever the County did, it was valid.”

GLT argues the 20-day limitation period does not apply because there were no private landowners in the area to object to, or appeal, the commissioners' decision on Aug. 9 1889. Appellant's Brief p. 32. However, the 1881 Code allowed settlers living in the relevant road district to participate by signing the petition, or by objecting before the commissioners made their decision. Code of 1881, § 2974 at 514. Here, some settlers signed the petition to establish the road. CP 224-225. And other settlers signed the remonstrance against the road. CP 214-217 (Remonstrance, dated Apr. 7, 1889, asking commissioners to disallow establishment of Methow Valley Road); CP 203-204 (Aug. 9, 1889 BOCC minutes: “Report of Viewers and Surveyor and Remonstrance against acceptance of the Methow Valley road Read 2nd time Moved that Road be declared opened as a County Road and be named the Methow

Valley road.”). Any of these people could have appealed within 20 days after the commissioners made their decision. Code of 1881 § 2695 at 467:

“Any person may appeal from the decision of the board of county commissioners to the next term of the district court of the proper district. Such appeal shall be taken within twenty days after such decision, and the party appealing shall notify the county commissioners that the appeal is taken, at least ten days before the first day of the next term of the court appealed to, ...”

The current version of this law is RCW 36.32.330. GLT also argues the territorial law for establishing county roads by petition was not complied with, so the road never opened, and there was no need to appeal. It is undisputed the commissioners granted the petition to establish the road, and declared the road open on Aug 9, 1889. If anyone believed procedural defects invalidated the commissioners’ action they had 20 days to appeal the decision.

Note, the Court in *Stofferan* indicated the statute of limitations for quiet title actions is 10 years. *Stofferan v. Okanogan Cty.*, 76 Wash. 265, 273, 136 P. 484, 487 (1913) (“... or, where not so kept up at the public expense, simply by continued use by the public for a period coextensive with the period of limitation for quieting title to land, which is, in this state, 10 years.”). Underline added. And see, RCW 4.16.010(1). Other cases say there is no statute of limitations period for quiet title actions. *Petersen v. Schafer*, 42 Wash. App. 281, 284 (Div. 1, 1985). In any event,

the 20-day limitations period for appeals from the commission's decisions applies here. *Yorkston v. Whatcom County*, 11 Wash. App2d 815, 826-827, 829 (2020)

D. Common law abandonment does not apply.

- 1. There can be no common law abandonment because the public never stopped using the road, and because a private landowner who excludes the public with locked gates cannot claim non-use as evidence of abandonment.**

As pointed out by GLT, and by the Court in *Foster v. Bullock*, if a road is used "at all" by the public then there is no common law abandonment. 184 Wash. 254, 257 (1935), Appellant's Brief, pg. 23.

Here, GLT argues there was no use at all by the public because: "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."

Appellant's Brief pg. 24. Precluding the public's use with locked gates is not voluntary non-use by the public. It is adverse use by the private landowner, and a private landowner cannot gain public land through adverse possession. *Goedecke v. Viking Inv. Corp.*, 70 Wash.2d 504, 508-509, 424 P.2d 307 (1967).

Injuries caused by lack of maintenance on county roads can cause tort liability when there is a duty to maintain the road, but lack of maintenance does not cause the road to no longer be a public road. *Id.*

There is also no duty to maintain primitive roads, RCW 36.75.300(3), and

French Creek road was declared a primitive road in 1980 (CP 517).

Although, the county does perform maintenance on many primitive roads including French Creek road leading up to the lower gate, and Texas Creek Road leading down to the upper gate. CP 523-524 (Deposition Mark Dawson Road Maintenance Supervisor); CP 538-542 (Deposition Dallas Darwood Road Maintenance Supervisor).

GLT acknowledges the public continues to use the road, and that these “repeated trespasses” are why GLT filed this quiet title action.

Appellant’s Brief pg. 4. Before the gates were locked, the public used the road more often. CP 136-137 (BOCC minutes from 1965 unsuccessful petition to vacate French Creek-Texas Creek Road):

CP 136 top of page, Petitioner Judd: “This road is used by four of us and we are trying to cooperate with the fencing. The commissioner’s can’t give a legal right to fence off the road with gates. We can’t afford cattle guards and we can’t fence the road because of water.” Underline added.

CP 136 “Leonard Therault said this is an old road and not used very much. It is one of the finest hunting areas. To close one part of it, we of the Sportsman’s Association are opposed.” Underline added.

CP 136 “Walt Smith of the Department of Natural Resources: We had no problems in the past. The State opposes the closing for three reasons. 1. There is a need for hauling supplies. 2. For fire control. 3. Public hunting and fishing.” Underline added.

CP 137 Ted Weber, County Engineer: “On April 30, [1965] I made an investigation of the Texas-French Creek Road No. 51 and hereby report on the condition of said road; the road is of generally

low standard, but easily traveled by passenger car. Three gates are presently in place illegally across the road. Access to several tracts of state land is provided by the road. It carries little traffic at most times, but is extensively used during hunting season.” Underline added.

CP 137 Jim Reeder asked Ted Weber “how long since the county maintained the road?” answer: “several years.”

And see *Kelly v. Tonda*, 198 wash App 303 (2017):

“The mere fact that the right-of-way is used almost exclusively by the residents who live alongside it does not mean that the county’s interest has been extinguished ... Indeed the county concluded as recently as 2009 (by denying the vacation request) that the right-of-way has value as part of the county road system.”

If a private individual can buy a small piece of land with a public road going through it, and gate the road, and drive three miles down the road and buy another piece of private land, and gate the road there, and then wait five years and claim abandonment via non-use, that is adverse possession of public land, not abandonment. GLT describes the road as a “private access road,” as if similar to a long driveway that provides exclusive access to private property. In fact, the disputed section is right in the middle of, and part of, a much longer public road that continues before and after the gates. There is some private land surrounding each gate, but the three mile stretch of road between the gates is surrounded almost entirely by public land. CP 649, Ex B (map of disputed area showing the private gates and the state land in red). Thus if the disputed

section is deemed a private road it will provide GLT almost exclusive private access to a large amount of public land.

2. County Resolution 443-2009 is not evidence of common law abandonment.

GLT, shortly after the commissioners denied the 2009 petition to vacate, questioned the county's ownership of the disputed section. The county questioned whether it would prevail in a quiet title action based on the evidence it located regarding the road. The county did not know the disputed section was part of an approximately 38 mile road formerly known as Methow Valley Road, and established by petition in 1889. Thus, the county passed Resolution 443-2009 which stated: "The records and documents held by the County do not support that that portion of the road is a county road or public right of way and, therefore, does not claim any interest or jurisdiction over that portion of the road." CP 1364-1366.

There can be no common law abandonment without an intent to abandon the road. *Heg v. Alldredge*, 157 Wash.2d 154, 161 (2006) (Nonuse must be combined with intent to abandon; summary dismissal affirmed because no evidence of intent to abandon). And there can be no intent to abandon a county road without a belief that it is a county road. When the county thought the disputed section was a county road, less than a month before the resolution, the county found the road useful and denied

the petition to vacate. CP 499-501, 1007. The resolution was based on the county's misapprehension that the disputed section was not a county road, and is not evidence of an intent to abandon a county road.

Nor did the resolution claim to vacate the disputed section (in fact it said the section was not the county's to vacate or not vacate). CP 1364-1366. The road vacation statutes do not provide the option of vacating without finding the road is not useful (and that never happened here). RCW 36.87.060(1); *Nelson v. Pacific County*, 36 Wash.App. 17, 23-24 (1983). The right-of-way in dispute in *Nelson* was unconditionally dedicated to the public by way of a plat, and the issue was whether the county's prior stipulation that it had no interest in the right-of-way constituted an abandonment of the right-of-way. The court concluded it did not, and that the county could not abandon a right of way held in trust for the public in such a manner. The Court in *Nelson* found inapplicable another abandonment case GLT relies on:

“Johnston v. Medina Improvement Club, Inc., 10 Wash.2d 44, 116 P.2d 272 (1941), upon which the Nelsons rely, does not hold otherwise. The issue of abandonment there was minor and secondary to the principal issues presented which involved standing. The propriety of the abandonment was not questioned.” *Nelson v. Pac. Cty.*, 36 Wn. App. 17, 24, 671 P.2d 785, 790 (1983)

In fact none of the abandonment cases GLT relies on are sufficiently similar to apply here. Those cases do not involve roads

formally established by petition as county roads, or that had been blocked with private gates, or that the public still repeatedly tries to use, or that have been the subject of multiple unsuccessful vacation attempts. Rather, most of those cases involved land that could no longer be used for the donated purpose (a school could no longer be built because a noisy railroad depot was built right next to it, or a new zoning ordinance prohibited cemeteries where a plat was donated to be used as a cemetery). Not forced discontinuance via locked private gates, of a county road that was established by petition, and that the public and other abutting landowners still use.

3. Letters sent by county officials did not result in common law abandonment.

Different county officials have expressed different opinions over the years about whether the disputed section is a county road. CP 66-67. (1980 letter from the County Engineer stating the section between the gates is not a county road); CP 1005 (1969 Assistant Prosecuting Attorney Dick Price informed the BOCC the O'Toole gate was an illegal obstruction, and BOCC instructed Mr. Price to write a letter to Mr. O'Toole demanding removal of the gate); CP 1006 (2009 letter from Public Works Senior Engineer Technician Verlene Hughes telling the Weddles to remove their private gate as it crosses a county road).

GLT and their predecessors have asked the county to vacate the road on at least three occasions (1955, 1965, 2009) indicating both the county and the petitioners thought it was a county road (since the county cannot vacate a private road). 1955 (CP 1003); 1965 (CP 136-138; 1004); 2009 (CP 499-501, 1007).

Individual Commissioners, County Engineers, Public Works Employees, DNR employees, and Assistant Prosecutors do not have authority to change the legal status of a road by writing a letter, or making new notations on a road log. Their opinions do not change the public character of the road.

E. The road was not automatically vacated under the 1890 Nonuse Statute.

In a recent but unpublished opinion, the plaintiff argued “the County would have had to take some kind of affirmative action to open the right of way and that the absence of such evidence in the file supports an inference that the right of way remained unopened after its dedication” *Robinett Pension Plan & Trust v. City of Snohomish*, 2 Wash.App.2d 1007, 76214-1-I, 2018 WL 418907, at 4 (Wash. Ct. App. Jan. 16, 2018) (Unpublished, GR 14.1). The Court disagreed: “But the Trust cites no relevant authority to support its conclusory assertion. Moreover, it has long been the rule that the complete absence of evidence does not satisfy a

proponent's burden under the nonuse statute." *Id.* citing *Brokaw v. Town of Stanwood*, 79 Wash. 322, 325-326 (1914).

The Court in *Robinett* did not remand the matter for trial on whether the road was timely opened for public use, or on whether the road, if automatically vacated, was established by prescription during the over 100 years between the alleged vacation and the filing of the quiet title action. Rather, the Court granted the City's summary judgment motion, held the road was a city road, held the plaintiff's claim was barred by laches, and dismissed the plaintiff's claim. Here the appellant makes the same argument, and the facts are sufficiently similar to resolve the case the same way.

The plaintiff in *Real Progress* was able to prove the road was automatically vacated by operation of the 1890 nonuse statute, five years after the road was authorized, because old aerial photos of the area in question showed that no street, roads or "even a footpaths" were present at all. *Real Progress, Inc. v. City of Seattle*, 91 Wn.App. 833, 844 (1998). Other evidence indicated physical characteristics, such as a 20 foot embankment, made the area totally impassable. *Id.* GLT has not produced any evidence like that. The closest thing to it is Cass Gebbers' claim that he needed to rebuild sections of the road when he purchased his

land in 1993, and that “presently” (Oct. 28, 2019) the road was not passable. CP 399-402.

Even if that were true, it would not create an inference the road was not opened in 1889 or within five years thereafter. We know the road “was easily traveled by passenger car” and “extensively used during the hunting season” in 1965. CP 137. The road was already behind private locked gates when Mr. Gebbers purchased his land, indicating less access for county maintenance by then. Mountain roads often become impassable in winter because of snow, and may occasionally be damaged by water, or blocked by fallen trees. Thus the condition of the road when Mr. Gebbers bought his land in 1993 does not create an inference the road was not opened over 100 years ago.

GLT argues “there is no evidence a 60-foot-wide road was constructed and used in the first five years after it was ‘opened’ by the commissioners.” Appellant’s Brief p. 26. But “It is a matter of common knowledge that the traveled portion of few county roads are 60 feet in width. The legislative intent is plain that the right-of-way shall be greater in width than the actual road.” *Shotwell v. Transamerica Title Ins. Co.*, 91 Wn.2d 161, 171–72, 588 P.2d 208, 214 (1978) (Wright C.J., dissenting).¹

¹ The issue in *Shotwell* was contract interpretation rather than road establishment. The Court acknowledged the existence of the right-of-way and sought to determine only if it was excluded from the title insurance policy.

It is undisputed the commissioners declared the road open on Aug. 9, 1889. GLT argues the 1890 nonuse statute required the road to be “used” within five years of being opened. GLT’s Brief pgs. 27-28 (“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.”).

The reason the “heretofore” language was included was to vacate roads previously authorized but not opened for public use within five years. Not to vacate roads that were opened for public use, but not used within five years of being opened:

“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.” CP 465 – Session Law, 1889-90 Chapter XIX – Road Laws.
Underline added.

In other words, even though the statute is referred to as the “nonuse” statute, it does not require use, only that the road be open “for public use.” Here, the fact the road was declared “open” as a county road Aug. 9, 2019 appears to mean it was already able to be used by the public. But even if the commissioners used the word “open” to mean authorized,

there was not a requirement of use within the next five years. Only that it be “opened for use” by then, and GLT has not overcome its burden of showing it was not.

F. GLT’s quiet title action is barred by laches.

Laches is an equitable defense based on estoppel that applies when a defendant 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; and (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).

All three elements are present here. The knowledge element is met because the county’s demands to remove the gates over the years, the appearance of French Creek Road on maps and county road logs, and repeated denials of petitions to vacate, informed plaintiffs and their predecessors of facts constituting a cause of action for a quiet title case. The filing of a petition to vacate implies plaintiffs and their predecessors believed the disputed section was a county road that the county could vacate. This belief is reflected in petitioner Judd’s comments during the 1965 vacation proceedings “The commissioners can’t give a legal right to fence off the road with gates.” CP 136. GLT’s Complaint cites as the basis of the quiet title action, the 1955 Okanogan County Resolution

identifying French Creek road as part of the County road system. CP 23. The 1955 Resolution is indeed another example of notice that the county claimed an interest in the road.

GLT had actual knowledge, and is also charged with its predecessors' knowledge, of facts constituting a cause of action. Real Progress, Inc. v. City of Seattle, 91 Wn. App. 833, 844, 963 P.2d 890, 895 (1998) (“First, it is clear that Real Progress or its predecessors in interest are charged with knowledge of the facts constituting nonuse”). The knowledge requirement does not require plaintiff to have knowledge that the road is in fact a county road, or that the road was formerly called Methow Valley Road and established by petition in 1889, or knowledge of recorded documents. Rather, the knowledge requirement only requires knowledge of “facts constituting a cause of action” which in this case means knowledge that the county believed the road was a county road.

Thus, the Superior Court’s initial finding, on May 7, 2018, that the road had not been established by dedication, petition, or condemnation, is not relevant to the knowledge element of laches. Note, the new evidence discovered in 2019 regarding the establishment of the road by petition had not yet been presented to the Court on May 7, 2018.

Regarding unreasonable delay: waiting over 120 years to bring a quiet title action can easily be considered unreasonable because much

shorter periods have been considered unreasonable. *Real Progress, Inc. v. City of Seattle*, 91 Wn. App. 833, 844 (1998) (“waiting over 100 years to file” was sufficient to satisfy burden of demonstrating unreasonable delay for purposes of laches). Plaintiffs may argue they did not unreasonably delay because they have only owned the property since 1993. But the clock for laches started in 1889 when the road was established. *Robinett v. City of Snohomish*, 2 Wash.App. 2d 1007, 2018 WL 418907, at 5 (Wash. Ct. App. Jan. 16, 2018) (unpublished) (plaintiff only owned the property since 2006, but delay of 110 years to file quiet title action was unreasonable).

The prejudice element is met because “the doctrine of laches commonly recognizes the unavoidable loss of defense evidence as establishing material prejudice.” *Id.* (“the long delay in bringing suit in this case resulted in the inevitable loss of witnesses who could have provided first-hand evidence about the use and physical characteristics of the High Street Right of Way from 1890 to 1895”); and *Davidson*, 116 Wn.2d 13, at 26–27 (62–year delay deprived the State of substantial evidence).

The same is true here, the long delay in bringing suit resulted in the inevitable loss of witnesses who could have provided first-hand evidence about the road establishment procedures that were followed, the location

of the plat, and the use and physical characteristics of the disputed section of French Creek Road when it was opened in 1889, and during the following 5 years. GLT argues the county benefited from the delay because without it the last minute discovery of the 1889 petition would not have occurred. Appellant's Brief p. 31. However, the discovery would not have taken so long but-for the delay, because if the action was brought 120 years ago the relevant facts would have been fresh on people's minds. And if not fresh on their minds, then they would have known where to look for them because the road was still called Methow Valley Road back then.

G. Subject matter jurisdiction.

The Coalition cites a recent Montana Supreme Court case that says a party that files a petition to vacate a road, voluntarily binds itself to the road vacation process. Thus if the petition is denied, the only way the party can seek judicial review is by filing a writ of review (not by filing a separate quiet title or declaratory judgment action which could result in a ruling that conflicts with the legislative decision in the road vacation proceeding). *Bugli v. Ravalli County*, 392 Mont. 131, 137 (2018). CP 591. Here, the Superior Court concluded it had subject matter jurisdiction.

This court could dismiss the case for lack of subject matter jurisdiction based on the reasoning in *Bugli*. In some ways the reasoning

in *Bugli* is more persuasive here because in Washington the writ of review is reserved for judicial review of the BOCC's quasi-judicial actions, and a road vacation is not a quasi-judicial action, it is a legislative function, and is not reviewable at all by the courts unless there is fraud, collusion, or interference with a vested right. *Coalition of Chiliwist v. Okanogan County*, 198 Wash. App. 1016, 4 (Div. 3, 2017) (Unpublished), citing *Capital Hill Methodist Church of Seattle v. City of Seattle*, 52 Wn.2d 359, 368 (1958); *Thayer v. King*, 46 Wn.App. 734, 738 (Div. 1, 1987).

Whether a writ of review is the exclusive way to invoke the court's jurisdiction over the commissioner's decision at a road vacation hearing, seems to be an issue of first impression in Washington. But there are already similar rules in Washington. For example, filing a timely petition for judicial review is the exclusive means of invoking the superior court's jurisdiction after a civil forfeiture proceeding. RCW 35.05.510, RCW 35.05.542(2), RCW 69.50.505(5), *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 555 (1998).

If the court dismisses the case for lack of subject matter jurisdiction, GLT can bring another petition to vacate under RCW 36.87. And if the commissioners question the road's true location they can ask the county engineer to investigate. RCW 36.75.110. After the county engineer investigates, the commissioners must ask the court to make the

final determination, and all affected persons must be made parties. RCW 36.75.120. That outcome would be much more drawn out than a resolution that reaches the merits now. But if the court finds it has no jurisdiction to rule on the subject matter, then it cannot rule on the subject matter.

The county is not aware of authority for county commissioners to settle disputes over road ownership. The commissioners, at vacation hearings, decide whether the road is useful to the public and whether to vacate the road, but do not normally resolve disputes over where the county road stops and becomes a private road. Although, the Court in *Bugli* held the commissioners' previous finding at a vacation hearing, that a county road was 11.8 miles long, not 9 miles long (as alleged by the landowners), could no longer be challenged because the landowners did not file a writ of review of the denial of the petition to vacate. *Bugli*, 392 Mont. 131, 136.

The landowners argued the question whether the road was only 9 miles long, and ended at their gate, was not appropriate for a writ of review because they were not arguing the BOCC exceeded its authority when it denied the petition to vacate. But the Court explained: "However, they essentially are, because they claim that whether a petitioned-for

county road ever existed beyond the gate is a mixed question of law and fact that the BOCC had no authority to decide.” *Id.*

Here, unlike in *Bugli*, the commissioners made no express factual finding at the vacation hearing that the 3 mile section of road between the gates is a county road. The issue was not raised at the hearing, and the commissioners did not expressly rule on it. Thus it is less clear that reaching the merits here would infringe on their authority. Although, the commissioners’ denial of the petition to vacate does indicate the commissioners believed the road is a county road.

H. The Hart Report is admissible.

Okanogan County joins OORC’s argument that E. Richard Hart is qualified to submit expert testimony, and that the Hart Report (CP 969-1302) is admissible. CP 599-603.

IV. CONCLUSION

Respectfully, the County asks the Court to affirm the Superior Court’s grant of summary judgment, and to quiet title in the County.

Dated: Jun. 30, 2020.

OKANOGAN COUNTY PROSECUTING
ATTORNEY’S OFFICE

By: 
David Y. Gecas, WSBA #40424
Chief Civil Deputy Prosecutor
For Respondent Okanogan County

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I am over the age of eighteen (18) years, not a party to the above-entitled action, competent to be a witness, and on the day set forth below, I served the document(s) to which this is attached, in the manner noted on the following person(s):

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Dated this 30th day of June, 2020, at Okanogan, Washington.



Teresia Hargraves, Legal Assistant

OKANOGAN COUNTY PROSECUTING ATTORNEY'S OFFICE

June 30, 2020 - 10:59 AM

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