

James H. Goetz
Robert K. Baldwin
J. Devlan Geddes
Trent M. Gardner
Kyle W. Nelson
Jeffrey J. Tierney
Katherine B. DeLong
Braden S. Murphy

GOETZ, BALDWIN & GEDDES, P. C.
Attorneys at Law
35 North Grand (zip 59715)
P. O. Box 6580
Bozeman, MT 59771-6580

Telephone:
(406) 587-0618
Facsimile:
(406) 587-5144
knelson@goetzlawfirm.com

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RECEIVED

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VIA EMAIL FOLLOWED BY U.S. MAIL

Ravalli County Board of County Commissioners
215 S. 4th Street, Suite A
Hamilton, MT 59840
gwiles@rc.mt.gov

Ravalli County Commissioners

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Re: Request for Removal of Illegal Encroachment/Gate on Hughes Creek Road

Dear Commissioners:

My firm represents the Ravalli County Fish & Wildlife Association and Public Land/Water Access Association. As you know, there is a gate near the 8-mile marker of Hughes Creek Road. That gate is obstructing public access to a county road (and the public lands and waters that the road reaches) beyond the gate and constitutes an unlawful encroachment of a public highway. I write here to respectfully request that the Ravalli County Board of County Commissioners (Board) comply with the mandatory provisions of §§ 7-14-2133 and 7-14-2134, MCA and “immediately” remove the unlawful gate.

Sections 7-14-2133 and 7-14-2134, MCA address obstructions and encroachments on county roads and public highways. Those statutes state, in pertinent part:

7-14-2133. Removal of obstructions on county roads

- (1) When a county road becomes obstructed, the board of county commissioners, or the county surveyor if the surveyor is in charge, **shall remove** the obstruction upon being notified of the obstruction.

7-14-2134. Removal of highway encroachment

- (1) . . . if any highway is encroached upon by fence, building, **or otherwise**, the road supervisor or county surveyor of

the district must give notice, orally or in writing, requiring the encroachment to be removed from the highway.

- (2) If the encroachment obstructs and prevents the use of the highway for vehicles, the road supervisor or county surveyor **shall immediately remove** the encroachment.
- (3) The board of county commissioners may at any time order the road supervisor or county surveyor to immediately remove any encroachment.

§§ 7-14-2133(1), 7-14-2134(1)-(3), MCA (emphasis added).

There is no dispute that Hughes Creek Road was duly established as a county road/public highway by petition and is approximately 12 miles in length. This Board made that very determination in January 2017 when it denied a petition to abandon the road beyond the unlawful gate.

Enclosed as **Exhibit 1** are the minutes of the Board's January 25, 2017 public hearing on that abandonment petition. The Board there unequivocally determined that:

- Hughes Creek Road was legally established as a public highway right of way by petition (Finding of Fact 6);
- Hughes Creek Road is "at least 11.8 to no more than 12 miles" in length (Finding of Fact 1);
- Hughes Creek Road beyond the gate (located at 8.5 miles from West Fork Road) "leaves private lands and enters public lands at various points" (Finding of Fact 3);
- Hughes Creek Road beyond the gate provides "public access to public lands or public waters" (Finding of Fact 4); and
- If Hughes Creek Road were abandoned beyond the gate, substantially similar legal access to public lands or waters "would not be provided" (Finding of Fact 7).

See Ex. 1.

I am aware that several nearby landowners disagree with the Board's 2017 determination and believe that the county portion of the road ends at approximately the 9-mile marker (about a half mile past the gate). Respectfully, the landowners are mistaken. In 2019, the Montana Supreme Court expressly rejected the landowners' contentions and held that the "historical record substantially supports the Board's conclusion that Hughes Creek Road is 11.8 miles long." *Bugli v. Ravalli County*, 2019 MT 154, ¶ 32, 396 Mont. 271, 444 P.3d 399 (*Bugli II*).

More importantly, *Bugli II* recognized that the gate across Hughes Creek Road “illegally block[s] access to an existing county road.” *Bugli II*, ¶ 33. To that end, the language of §§ 7-14-2133 and 7-14-2134, MCA is clear and unequivocal: the obstruction and encroachment “shall” be “immediately” removed.

Of course, none of this is news to the Board. In 2017, the Board determined that the unlawful gate “is an encroachment” of the highway right-of-way and ordered that the gate be removed by **June 1, 2017**. *See Ex. 1*. I appreciate that the opposing landowners’ two lawsuits reasonably delayed that deadline. Those lawsuits, however, were fully resolved by the Montana Supreme Court in July 2019—well over a year ago. As it stands then, Hughes Creek Road is a legally established county road/public highway by petition that is approximately 12 miles in length, and it is currently obstructed by an unlawful encroachment.

Given the plain and unambiguous language of §§ 7-14-2133 and 7-14-2134, MCA, and the lack of any legitimate reason for further delay, the Ravalli County Fish & Wildlife Association and Public Land/Water Access Association respectfully request that the Board (or the road supervisor or county surveyor, as appropriate) “immediately” remove the unlawful gate obstructing and encroaching upon Hughes Creek Road.

I invite the Board, or the Ravalli County Attorney’s Office, to call me to discuss a potential date this fall for which the Board will require the gate’s removal. The Ravalli County Fish & Wildlife Association and Public Land/Water Access Association strongly prefer to work cooperatively with the Board to reach an amicable solution, but any further extended delay is not acceptable.¹

That said, I understand there may have been some threats of violence if there is an attempt to remove the gate. I also understand that the Ravalli County Sheriff’s Office requires a “court order” before it will lend peace-keeping assistance to those who perform the work to remove the gate. I truly hope both of those understandings are inaccurate and that the Board, the appropriate county employees, and the Sheriff’s Office work together to “immediately” remove the unlawful gate.

Nonetheless, if the Ravalli County Fish & Wildlife Association and Public Land/Water Access Association are forced to initiate a legal action to compel the Board to enforce the mandatory, non-discretionary language of §§ 7-14-2133 and 7-14-2134, MCA, they are prepared to file a mandamus action to do so. *See* § 27-26-102, MCA (a writ of mandamus may be issued “to compel the performance of an act that the law specifically enjoins”); *see also Common Cause of Mont. v. Argenbright*, 276 Mont. 382, 390, 917 P.2d 425, 429–430 (1996) (a

¹ I appreciate that the term “immediately” is not defined by § 7-14-2134, MCA. According to Black’s Law Dictionary, however, the term “immediate” means “[o]ccurring without delay.” *Black’s Law Dictionary* 619 (Bryan A. Garner ed., 8th ed. 2005).

writ of mandamus is available “when the party requesting it is entitled to the performance of a clear legal duty”).

Moreover, if forced to initiate legal action, the Ravalli County Fish & Wildlife Association and Public Land/Water Access Association will seek an award of their costs and attorney fees as damages pursuant to § 27-26-402, MCA and under the private attorney general doctrine. *See Kadillak v. Mont. Dep’t of State Lands*, 198 Mont. 70, 74, 643 P.2d 1178, 1181 (1982) (reasonable attorney fees are damages with the meaning of § 27-26-402, MCA); *Montanans for Responsible Use of Sch. Trust v. State ex rel. Bd. of Land Com’rs*, 1999 MT 263, ¶ 64, 296 Mont. 402, 989 P.2d 800 (noting that attorney fees may be recovered under the private attorney general doctrine where “the government, for some reason, fails to properly enforce interests which are significant to its citizens”). Moreover, pursuant to the plain language of § 7-14-2133, MCA, the Board is “responsible or liable for . . . willful, intentional neglect **or failure to act**” with respect to its legal duty to remove obstructions on county roads. § 7-14-2133(3), MCA (emphasis added).

Again, I truly hope court action is not necessary. The Board is aware of the unlawful obstruction and encroachment on Hughes Creek Road (*i.e.* the unlawful gate) and of its statutory mandate to immediately remove it. The Ravalli County Fish & Wildlife Association and Public Land/Water Access Association respectfully request that the Board comply with that legal duty and remove the unlawful gate across Hughes Creek Road.

Please call (or write) and let me know whether the Board intends to comply with §§ 7-14-2133 and 7-14-2134, MCA and, if so, to discuss the date when it intends to do so.

Sincerely,



Kyle W. Nelson

KWN:km

cc: Chris Hoffman, Commissioner (choffman@rc.mt.gov)
Greg Chilcott, Commissioner (gchilcott@rc.mt.gov)
Jeff Burrows, Commissioner (jburrows@rc.mt.gov)
Stephen Holton, Ravalli County Sheriff (sholton@rc.mt.gov)
Royce McCarty, Ravalli County Attorney's Office (rmccarty@rc.mt.gov)
Ryan Domsalla, U.S. Forest Service (rdomsalla@fs.fed.us)



SPECIAL AND REGULAR MEETINGS
OF THE
RAVALLI COUNTY BOARD OF COUNTY COMMISSIONERS

REGULAR MEETING 9:30 AM (starting with Agenda Item 6)

Wednesday, January 25, 2017

Commissioners' Meeting Room
County Administration Building,
215 S. 4th St, Hamilton, MT 59840.

Handwritten initials: JB, R7

6. Public Hearing - Petition to Abandon a Portion of Hughes Creek Road

Present:

Terry Nelson, Planner
Glenda Wiles, BCCAA
Howard Recht, Civil Counsel
Dan Browder, Civil Counsel
Dusty McKern, RCRBD
Sheriff Steve Holton
U.S. Travis McElderry

Also present:

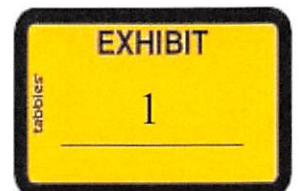
Jesse Kodadek, Attorney
Ryan Domsalla, USFS
Kristen Swindle, USFS
Angus Baker
Marcella Baker
Jim Olson
Jay Bugli
Mike Stephens
Joe Kirschtrn
Wade Cox
Charlene Cox

Kyle Nelson
Lewis Mikolaichik
Suzanne Raski
Kent Miller
Fred Weisbecker
Dave Olson
Karen Phillips
Bill Slomp
Brent Race
Katie Phillips
Jacob Pintok

Julie King
Doug Anderson
Sheila Schroff
John Ormiston
Del Reynolds
Mike Jeffords
Lynn Kleen
Seth Pogue
Kathy Jeffords
Dave Campbell

Public Comment:

Seth Pogue
Jay Bugli, Applicant
Jesse Kodadek, Worden Thane Law
Mike Jeffords
Dave Campbell
Jim Olson
Ryan Domsalla, USFS
Lola Grenfell
Tony Hudson
Kyle Nelson, PLWA Attorney
Mike Stephens



Dave Olson
Lola Grenfell
Jesse Kodadek
Jim Olson
Seth Pogue
Lewis Mikolaichik

Close public comment 11:11 AM

BCC concurrence

Finding of Fact 1:

There is evidence which shows that the road is not more than 12 miles in length, commencing from the Alta Post Office (at least 11.8 to no more than 12 miles). All BCC concur.

Finding of Fact 2:

There is evidence that the original public process and petition for said road was legally followed. All BCC concur.

Public comment:

Lewis Mikolaichik
Dave Campbell
Ryan Domsalla, USFA

Finding of Fact 3:

The existing road beyond the gate (8.5 miles from start (West Fork Road), via GPS) leaves private lands and enters public lands at various points. All BCC concur.

Public comment:

Ryan Domsalla, USFS
Jesse Kodadek

Finding of Fact 4:

There is evidence that this road, located above the gate as the gate sits today, does provide public access to public lands or public waters. All BCC concur.

Finding of Fact 5:

This road does have a 60 foot wide easement. All BCC concur.

Finding of Fact 6:

Within the June 5, 1900 road application, Hughes Creek Road was established as a public highway right of way by legally submitted petition. All BCC concur.

Finding of Fact 7:

If abandonment of Hughes Creek Road for 11.8 to 12 miles from West Fork Road were to occur, substantial access would not be provided, per MCA 7-14-2615 (3). Commissioners Chilcott, Burrows, Schallenberger and Hoffman concur, Commissioner Hawk does not concur.

Public comment:

Ryan Domsalla, USFA
Jesse Kodadek

Lewis Mikolaichik
Dave Campbell

Commissioner Burrows moved to deny the petition to abandon a portion of Hughes Creek Road. Seconded by Commissioner Hoffman. Public comment on motion: none. Discussion: Commissioners Schallenberger, Hawk, Burrows, Hoffman and Chilcott. Commissioner Burrows, Hoffman and Chilcott voted "aye"; Commissioner Hawk and Schallenberger voted "nay", motion passed (3-2).

7. Possible Discussion and Decision on the Gate on Hughes Creek Road

Public comment:

Jim Olsen
Ryan Domsalla, USFS
Jesse Kodadek
Ryan Domsalla, USFS
Jay Bugli

Commissioner Hoffman moved to postpone any decision on this item until the property owners have had a chance to discuss. Motion died for lack of a second.

Finding of Fact 1:

The gate is an encroachment in highway right of way. All BCC Concur.

Public Comment:

Kyle Nelson
Wade Cox

Commissioner Hawk moved to adopt Resolution No. 3495 and approve the order of the gate removal, encroachment located on Hughes Creek Road, and removal of said gate be completed by June 01, 2017. Seconded by Commissioner Hoffman. Public comment on motion: Jim Olson and Kyle Nelson. Discussion: none. All voted "aye" (5-0).

8. Public comment on items not otherwise on the agenda

None.

9. Adjournment

Commissioner Hawk moved to adjourn the meeting. Seconded by Commissioner Burrows. All voted "aye" (5-0).

Glenda Wiles, Administrative Assistant