APPENDIX A

DA 18-0249

IN THE SUPREME COURT
OF THE STATE OF MONTANA

2019 MT 30

LETICA LAND COMPANY, LLC, a Michigan limited liability company, and DON McGEE, an individual,

Plaintiffs and Appellants,

v.

ANACONDA-DEER LODGE COUNTY, a political subdivision of the State of Montana,

Defendant and Appellee.

APPEAL FROM: District Court of the Third Judicial District, In and For the County of Anaconda-Deer Lodge, Cause No. DV-12-24 Honorable Randal I. Spaulding, Presiding Judge

COUNSEL OF RECORD:

For Appellant Letica Land Company, LLC:

Martin S. King; Jesse C. Kodadek, Worden Thane, P.C., Missoula, Montana

For Appellee:

Cynthia L. Walker; Mark A. Thieszen,
Poore, Roth & Robinson, P.C.,
Butte, Montana

Submitted on Briefs: December 5, 2018

Decided: February 5, 2019

Filed:

/s/ Bowen Greenwood
Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Letica Land Company, LLC, (Letica) appeals the judgment of the Third Judicial District Court granting Anaconda-Deer Lodge County's motion for summary judgment. We affirm in part and reverse in part.

¶2 We restate the issues on appeal as follows:

1. Whether the District Court erred in concluding that Anaconda-Deer Lodge County's use of the upper branch of Modesty Creek Road did not amount to a taking under the United States and Montana Constitutions.

2. Whether Letica is constitutionally entitled to litigation expenses under Article II, Section 29 of the Montana Constitution.

3. Whether the District Court correctly ordered Letica to pay the costs previously awarded to Anaconda-Deer Lodge County as the prevailing party at trial.

PROCEDURAL AND FACTUAL BACKGROUND

¶3 This case arises from a dispute over the status of Modesty Creek Road, located near the boundary between Anaconda-Deer Lodge County (County) and Powell County in the Flint Creek Range foothills approximately ten miles north of Anaconda, Montana. Modesty Creek Road consists of two sections, an upper branch and a lower branch, both of which are located on Letica's property.

¶4 In 2012, the Anaconda-Deer Lodge County Commissioners voted to reaffirm Modesty Creek Road as a county road. Immediately after reaffirming the road, the County cut locks on the two gates blocking the lower branch and removed a dirt berm from the upper branch.

¶5 Shortly thereafter, Letica filed a complaint and sought a preliminary injunction barring public use until a judgment established the existence of a public right-of-way over either or both branches. The District Court denied Letica's request for a preliminary injunction, concluding that both branches were likely statutorily created county roads established by petition. The District Court also sua sponte bifurcated Letica's Takings Clause claims from the public right-of-way claims. In 2014, following a five-day bench trial, the District Court held that a county petition established the lower branch of Modesty Creek Road, a public prescriptive easement established the upper branch as a public road, and the prescriptive easement had not been

extinguished by reverse adverse possession. Letica and McGee appealed.[1] This Court affirmed the District Court's conclusion that the lower branch of Modesty Creek Road is a validly existing petitioned county road and confirmed the District Court's determination of the location of the lower road's terminus. However, this Court found that the public's prescriptive easement on the upper branch was extinguished by reverse adverse possession. The case was remanded for further consideration of Letica's outstanding takings claims.[2]

¶6 On remand, the District Court issued an order granting summary judgment in favor of the County and dismissing Letica's takings claims.[3] Letica appeals.

STANDARD OF REVIEW

¶7 We review de novo a district court's decision on a motion for summary judgment, using the same criteria applied by the district court under M. R. Civ. P. 56. *Malpeli v. State*, 2012 MT 181, ¶ 11, 366 Mont. 69, 285 P.3d 509. Rule 56(c)(3) provides: "The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show

---

[1] McGee is not a party to this appeal.

[2] *Letica Land Co., LLC v. Anaconda-Deer Lodge Cnty*., 2015 MT 323, 381 Mont. 389, 362 P.3d 614.

[3] The District Court also dismissed Letica's other claims including substantive due process, violation of civil rights, and spoliation of evidence. Letica only appeals dismissal of the takings claims.

that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." A material fact is one involving the elements of the cause of action or defense at issue to such an extent that it requires resolution of the issue by a trier of fact. *Malpeli*, ¶ 11.

¶8 To overcome a motion for summary judgment, the opposing party must set out specific facts showing a genuine issue for trial. *Malpeli*, ¶ 12. In evaluating a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party and all reasonable inferences must be drawn in favor of the party opposing summary judgment. *Malpeli*, ¶ 12.

DISCUSSION

¶9 *1. Whether the District Court erred in concluding that Anaconda-Deer Lodge County's use of the upper branch of Modesty Creek Road did not amount to a taking under the United States and Montana Constitutions.*

¶10 Letica argues that its fundamental rights under the Montana and United States Constitutions were violated when the County removed the dirt berm from the upper branch and encouraged public use of Letica's property. According to Letica, the County's actions amounted to an unconstitutional taking of property that necessitates compensation. The County contends that the temporary physical invasion was done under

a claim of right and therefore did not amount to a taking of Letica's private property.

¶11 The Takings Clause of the United States Constitution provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Article II, Section 29 of the Montana Constitution similarly provides, "Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into the court for the owner." Despite the facial disparities found in the separate clauses, "[W]e have generally looked to federal case law for guidance when considering a takings claim brought under Article II, Section 29." *Kafka v. Mont. Dep't of Fish, Wildlife & Parks*, 2008 MT 460, ¶ 30, 348 Mont. 80, 201 P.3d 8.

¶12 Significantly, the United States Supreme Court has held that if the government mistakenly asserts the right to use its own property, and the property in fact belongs to another, the true property owner's remedy is in tort and the mistake does not amount to a constitutional taking. *Langford v. United States*, 101 U.S. 341 (1880). In *Langford*, the Court considered whether government occupation of private property under a mistaken claim of right constitutes a taking. The Court noted that if the government takes private property for public use and asserts no claim of title, the use may amount to a taking. *Langford*, 101 U.S. at 343. However, the Court also explained:

> It is a very different matter where the government claims that it is dealing with its own, and recognizes no title superior to its own. In such case the government, or the officers who seize such property, are guilty of a tort, if it be in fact private property.

Langford, 101 U.S. at 344. This holding was relied upon in *In the Matter of Chicago, Milwaukee, St. Paul and Pacific R. Co.*, 799 F.2d 317 (7th Cir. 1986): "[W]hen agents of the United States wrongly believe that the government owns some land, and occupy it under a claim of right, the occupation is a noncompensable tort rather than a taking." *Matter of Chicago*, 799 F.2d at 326. The court further noted, "Mistaken applications of the law are inevitable, but no principle of constitutional law requires compensation for every mistake." *Matter of Chicago*, 799 F.2d at 327.

¶13 Here, the County acted under a claim of right when it removed the dirt berm. Specifically, the County relied on county records, maps, surveys, and other evidence related to historical use of the road before reaffirming the upper branch. Although the County erroneously relied on the initial petition and this Court subsequently concluded that the public prescriptive easement was extinguished by reverse adverse possession, the County's actions were reasonable. The County's conduct was reinforced by the District Court order denying Letica's request for a preliminary injunction, in which the District Court concluded that the County was likely to succeed on the petition regarding the upper branch.

¶14 Pursuant to *Langford*, the County's good faith reliance on the petition, and other evidence supporting its petition, preclude Letica's claim that a taking occurred.

¶15 Letica further argues that it is entitled to compensation pursuant to Article II, Section 29 of the Montana Constitution because the County damaged Letica's property. Letica contends that the County physically damaged the property by sending heavy machinery to remove the berm, and by "allowing, causing, and encouraging an unknown number of people to drive over primitive roads, which caused erosion, loss of established plant life, and the substantial spread of noxious weeds." We agree with the District Court that "the record is devoid of any evidence that the temporary invasion of the upper branch resulted in any significant burden or substantially interfered with Letica's use of the property despite Letica's conclusory claims to the contrary." The County introduced evidence establishing that public use of the road was minimal considering the location and character of the road. Letica failed to present evidence contradicting the County's evidence that the effect on the land was insignificant.

¶16 When viewed in a light most favorable to Letica, the evidence presented establishes no genuine issue of material fact. The District Court did not err when it granted summary judgment in the County's favor. Because a taking did not occur, and the upper branch was not damaged, Letica is not entitled to compensation per the United States or Montana Constitutions.

¶17 *2. Whether Letica is constitutionally entitled to litigation expenses under Article II, Section 29 of the Montana Constitution.*

¶18 Article II, Section 29 of the Montana Constitution provides, "In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails." Mont. Const. art. II, § 29. Here, Letica asserts that it is constitutionally entitled to its necessary expenses of litigation – including attorney's fees – because it prevailed when this Court found the public prescriptive easement on the upper branch was extinguished by reverse adverse possession.

¶19 The question of whether Letica prevailed was litigated before the District Court. In its order on cross motions for award of costs, the District Court held that neither Letica nor the County were prevailing parties under M. R. App. P. 19(3)(a), or § 25-1-711(1), MCA. Consequently, the Court determined that neither party was entitled to their costs on appeal. The District Court's decision rested on this Court's holding that "there is no prevailing party where both parties gain a victory but also suffer a loss." *Parcel v. Myers*, 214 Mont. 220, 224, 697 P.2d 89, 91 (1984). The District Court found neither party prevailed because even though this Court reversed the trial court's conclusion that the public prescriptive easement was not extinguished by reverse adverse possession, the remaining issues were decided in favor of the County.

¶20 Perhaps more significantly, our holding that the County's conduct did not amount to a taking precludes the finding that Letica is a prevailing party pursuant to Article II, Section 29 of the Montana Constitution. Letica is not entitled to necessary litigation costs.

¶21 *3. Whether the District Court correctly ordered Letica to pay the costs previously awarded to Anaconda-Deer Lodge County as the prevailing party at trial.*

¶22 Following the first trial, the District Court ordered Letica and McGee to pay the County's costs, in the amount of $5,048.29. Letica asserts the District Court erred in failing to reconsider the award of costs after the District Court's decision was reversed and remanded. The County challenged Letica's request for reconsideration on the basis that Letica failed to appeal the District Court's November 2014 order on costs. The District Court agreed with the County and held Letica and McGee jointly and severally responsible for the County's costs, as initially calculated. This Court reviews a district court's award of costs to determine whether the district court abused its discretion. *Mularoni v. Bing*, 2001 MT 215, ¶ 22, 306 Mont. 405, 34 P.3d 497.

¶23 Section 25-10-102, MCA, provides that defendants are entitled to costs, as a matter of course, upon a judgment in the defendant's favor. There is no authority which requires an appellant, when challenging on appeal the merits of a trial court's decision, to separately challenge the imposition of trial costs in favor of the prevailing party. Rather, a challenge to trial costs

is implicitly tied to a challenge on the merits. Thus, a party does not waive their right to challenge an order on costs by failure to appeal if the costs were awarded per § 25-10-102, MCA. However, § 25-10-103, MCA, allows for costs in the district court's discretion. In that case, a party should appeal the district court's award to avoid waiver.

¶24 Here, neither Letica nor the County prevailed for the purpose of entitlement to costs. Although Letica prevailed on the status of the upper branch, the County succeeded on the remaining claims. *Letica*, ¶ 50. Accordingly, because "Letica and [the County] have both gained a victory and suffered a defeat" neither can be considered the prevailing party pursuant to M. R. App. P. 19(3)(a), §§ 25-10-101, -102, and -711 (1)(a), MCA, or M. R. Civ. P. 54(d)(1). *H-D Irrigating, Inc. v. Kimble Props., Inc.*, 2000 MT 212, ¶ 60, 301 Mont. 34, 8 P.3d 95 (holding there is no prevailing party where both parties gain a victory but also suffer a loss). As here, when there is no prevailing party, each party shall remain responsible for their own costs. The District Court's order holding Letica accountable for the County's trial costs is reversed.[4]

CONCLUSION

¶25 For the aforementioned reasons, Letica is not entitled to compensation under the Montana or United States Constitutions, nor attorney's fees pursuant to

[4] Because McGee is not a party to this appeal, this Opinion does not address his obligations involving the County's trial costs.

Article II, Section 29 of the Montana Constitution. Both Letica and the County are responsible for their individual trial costs.

¶26 Reversed in part and affirmed in part.

/S/ MIKE McGRATH

We Concur:

/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON
/S/ JIM RICE

APPENDIX B

MONTANA THIRD JUDICIAL DISTRICT COURT

ANACONDA-DEER LODGE COUNTY

LETICA LAND COMPANY, LLC, a Michigan limited liability company, and DON McGEE, an individual, Plaintiffs, -vs- ANACONDA-DEER LODGE COUNTY, a political subdivision of the State of Montana, Defendant	Cause No. DV-12-24 Hon. Randal I. Spaulding **ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT AND ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND** (Filed Apr. 12, 2018)

Pending before this Court are the parties' cross motions for summary judgment. The motions are fully briefed. The Court held a telephonic scheduling conference on April 10, 2017. During the conference, the parties waived oral argument on the cross motions for summary judgment and the Court deemed the motions submitted on briefs. The parties' cross motions for summary judgment are ripe for adjudication, and this Court issues the following ruling.

PROCEDURAL BACKGROUND

This case relates to whether there is a public right of way across two sections of road in Deer Lodge County. This matter previously went through a bench trial and appeal to the Montana Supreme Court. Following the trial, the District Court found in favor of Defendants Anaconda-Deer Lodge County (hereinafter ADLC) and against Plaintiffs Letica Land Company, LLC (hereinafter Letica) and Don McGee (hereinafter McGee) regarding both sections of road, and issued extensive Findings of Fact and Conclusions of Law. On appeal, the Supreme Court affirmed in part and reversed in part.

Specifically, the Supreme Court affirmed the District Court's determination that what has been referred to as the lower branch of Modesty Creek Road is a validly existing petitioned county road and further affirmed the District Court's determination of the location of the terminus of the lower road.[1]

Regarding the upper branch, the Supreme Court concluded that the District Court misapplied the law regarding reverse adverse possession.[2] The Court then conducted its own analysis of the reverse adverse possession claim and assumed for the sake of its analysis that the District Court correctly found that a public prescriptive easement had been established for the upper branch. Ultimately, the Court concluded that any

---

[1] *Letica Land Co., LLC v. Anaconda-Deer Lodge Cty.*, 2015 MT 323, ¶ 27, 381 Mont. 389, 362 P.3d 614.

[2] *Id.* at ¶ 49.

public right of way across the upper branch had been lost by reverse adverse possession and reversed the District Court on that issue.[3] The Supreme Court then remanded the case for further consideration of Letica's outstanding bifurcated claim, which it referred to earlier in the opinion as Letica's takings claims.[4]

On remand, the parties filed motions regarding costs from the trial and on appeal, which have been addressed in a separate order and are again addressed herein. The parties also filed motions regarding a scheduling order or scheduling conference, and made arguments regarding what claims are still in the case, whether further discovery is appropriate, and whether further expert disclosures are appropriate. The parties' motions regarding what claims remain at issue and the scope of discovery are moot based on the Court's ruling on the parties' cross motions for summary judgment herein.

PARTIES' SUMMARY JUDGMENT MOTIONS

Letica argues that for over three and a half years ADLC invaded its property and invited the public to do the same by using a road to access the Beaverhead-Deer Lodge National Forest.[5] Letica also argues that ADLC physically invaded, occupied, and damaged its private property without right or justification and

---

[3] *Id.* at ¶¶ 34, 49.

[4] *Id.* at ¶¶ 11, 50.

[5] *Letica Mot. for Part. SJ and Brf. in Supp.* at p. 1 (Sept. 19, 2016).

violated its fundamental rights under the Montana and U.S. Constitutions.[6] Letica further argues that ADLC's actions constituted an unconstitutional taking of its property that requires compensation and attorney fees.

Conversely, ADLC argues that the undisputed facts establish that no unlawful taking of Letica's property by ADLC occurred, no violation of Letica's substantive due process rights, no violation of Letica's civil rights, and no spoliation of evidence by ADLC.

Specifically, ADLC contends that in March of 2012 it cut locks on two gates across a dedicated county road (the lower branch), which it contends it had the legal right to do, and removed a dirt berm from the upper branch which it asserts was done under a claim of right. Consequently, ALDC asserts, ADLC's temporary physical invasion of the upper branch that was done under a claim of right worked no unlawful taking of Letica's private property.

FACTUAL BACKGROUND

The parties set forth disputed and undisputed facts in their briefing. It appears that very few of the facts are material to the cross motions for summary judgment. The trial court judge made extensive findings of fact after observing witnesses, listening to the evidence, and conducting a site view, Since the Montana Supreme Court did not reverse any of the District

[6] *Id.*

Court's findings of fact on appeal, those findings stand and, to the extent that they are germane to the parties' cross motions for summary judgment, will be relied upon by this Court.

LEGAL ANALYSIS

I. Summary Judgment Standard

The purpose of summary judgment is to eliminate the burden and expense of unnecessary trials by disposing of litigation expeditiously when there are no disputed material facts and judgment as a matter of law is proper.[7] Rule 56(c), Mont.R.Civ.P., provides that a motion for summary judgment "shall be rendered forthwith if pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[8]

The party moving for summary judgment bears the initial burden of establishing the absence of genuine issues of material fact and entitlement to judgment as a matter of law. If this burden is met, the burden shifts to the non-moving party to establish with substantial evidence, as opposed to mere denial, speculation, or conclusory assertions, that a genuine issue of

---

[7] *First Security Bank of Bozeman v. Jones (1990)*, 243 Mont. 301, 303, 794 P.2d 679, 681.

[8] *Phelps v. Frampton*, 2007 MT 263, ¶ 15, 339 Mont. 330, 170 P.3d 474.

material fact does exist or that the moving party is not entitled to prevail as a matter of law.[9]

II. Letica's Taking Claim

A. Permanent v. Temporary Taking

ADLC asserts and this Court agrees that the appropriate standard for determining whether a taking has occurred depends upon the nature of the alleged taking including *per se*, regulatory, conditional permit approval, and temporary takings.[10] The case at bar clearly does not involve a regulatory taking or a conditional permit approval.

In *Loretto*[11] the United States Supreme Court established that permanent physical invasions are *per se* takings while temporary physical invasions are subject to a different standard.[12] In the subsequent case of *Arkansas Game & Fish*[13], the Supreme Court concluded that instead of the *per se* rule for permanent physical invasions, "temporary limitations are subject to a more complex balancing process to determine

---

[9] *Phelps*, ¶ 16.

[10] See e.g. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001); *Nollan v. California Coastal Com'n.*, 483 U.S. 825 (1987); *Arkansas Game and Fish Com'n. v. U.S.*, 133 S. Ct. 511 (2012).

[11] *Supra* at footnote 10.

[12] *Loretto*, 458 U.S. at 435, n. 12.

[13] *Supra* at footnote ID.

whether they are a taking."[14] Here, the undisputed facts demonstrate that none of the acts allegedly committed by ADLC worked a physical and permanent occupation of Letica's land. Thus, the *per se* rule from *Loretto* for permanent physical invasions is not applicable to the temporary physical invasion at issue in this case.

In this case, ADLC argues that, at most, a temporary physical invasion occurred. As noted by ADLC, it is undisputed that the public used the road from the early 1900s through the 1980s.[15] Thus, when ADLC cut the locks on gates on the lower branch, the public merely resumed using the upper branch of the road to access their water rights and national forest land. The record is devoid of any evidence presented to this Court that ADLC took any permanent action regarding the upper branch. Rather, it appears that the only action taken by ADLC with respect to the upper branch consisted of removing a dirt berm that posed a safety hazard.

Any physical invasion that resulted from ADLC asserting that the upper branch was a public right of way in this case was limited to the time from when ADLC cut the locks on gates on the lower branch in March 2012, to when the Montana Supreme Court reversed the District Court's ruling in November 2015. Letica does not dispute that this case involves a

---

[14] *Arkansas Game and Fish Com'n.*, at 521 (citing and quoting *Loretto*, 458 U.S. at 435, n. 12).

[15] Docs. 222, 66.

temporary physical invasion. Instead, Letica asserts that case law regarding temporary physical invasions only applies "where there is an actual question about whether the government action effectuated a taking in the first instance."[16] In a conclusory fashion, Letica asserts that there is "simply no question" that a taking occurred in this case, so the temporary takings case law is irrelevant.[17] Despite Letica's statements, the precise issue before this Court is whether a taking occurred.

Letica's argument is contrary to the United States Supreme Court's holding in *Arkansas Fish & Game* that temporary physical invasions involve a different standard than permanent physical invasions.[18] Letica did not address the temporary takings line of cases, and instead relied on standards applicable to permanent takings. For example, Letica relied on *Nathan*[19], which addresses whether a conditional permit approval constitutes a taking, and *Lingle*[20], which involved a regulatory taking. Letica also cited to *Wohl*[21] *and Kaiser*[22], but those cases involved permanent

---

[16] Letica Reply, 7.

[17] Id.

[18] Arkansas Game and Fish Com'n., Supra at footnote 10, at 521.

[19] Supra at footnote 10.

[20] *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074

[21] *Wohl v. City of Missoula*, 2013 MT 46, 369 Mont. 108, 300 P.3d 1119

[22] *Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979)

takings, either permanent physical invasions or easements.

Unlike in *Wohl*, ADLC did not build or pave a road. At most, the undisputed facts establish that ADLC removed a dirt berm from the upper branch for safety reasons. Since Letica's takings claim in this case is premised on a temporary physical invasion, *Arkansas Game & Fish* provides the appropriate standard to be applied.

B. Relevant considerations for determining whether a temporary physical invasion constitutes a taking.

In *Arkansas Game & Fish*, the United States Supreme Court described the relevant factors and considerations for determining when a temporary physical invasion by government constitutes a taking, and remanded the matter to the Federal Circuit Court of Appeals for further proceedings.[23] The Court emphasized that "most takings claims turn on situation-specific factual inquiries," and cases "should be assessed with reference to the particular circumstances of each case."[24] The relevant factors identified include: 1) the

---

[23] *Arkansas Game and Fish Com'n.*, at 522-23.

[24] *Id.* at 518, 522 (quotations and citations omitted). The Court also explained, "We have recognized, however, that no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area." *Id.* at 518.

time or duration of the physical invasion, 2) the degree to which the invasion is intended or is the foreseeable result of authorized government action, 3) the character of the land at issue and the owner's reasonable investment-backed expectations regarding the land's use, and 4) the severity or substantiality of the interference.[25]

In regard to time or duration of the invasion, the Supreme Court explained, "[t]ime is a factor in determining the existence *vel non* of a compensable taking."[26] The Court did not establish bright lines in regard to time, rather, it is reasonable to expect that the duration necessary to constitute a taking depends on the "situation-specific factual inquiries" and the character of the land.[27] On remand in *Arkansas Game & Fish*, the Court ruled that the invasions at issue in that case were long enough to constitute a taking because the length of the invasion so "profoundly disrupted" regions of the area that the landowner "could no longer use those regions for their intended purpose."[28]

The "degree to which the invasion is intended or is the foreseeable result of authorized government action" is also relevant to determining whether a taking

---

[25] *Id.* at 522-23.

[26] *Id.* at 522.

[27] *Id.* at 518.

[28] *Ark. Game & Fish Comm'n v. United States*, 736 F.3d 1364, 1370 (quotations omitted).

occurred.[29] In support of this consideration, the United States Supreme Court cited *In the Matter of Chicago, Milwaukee, St. Paul and Pacific R. Co.*[30] The portion of the *Matter of Chicago* opinion cited by the Court explains that, "when agents of the United States wrongly believe that the government owns some land, and occupy it under a claim of right, the occupation is a non-compensable tort rather than a taking." Further, "Mistaken applications of the law are inevitable, but no principle of constitutional law requires compensation for every mistake."[31]

In *Langford*, the United States Supreme Court addressed whether government occupation of private property under a mistaken claim of title constitutes a taking.[32] The facts of that case were that government officers took possession of buildings on land based on an assertion that their possession was by virtue of the government's own title, which was hostile to that of the claimant.[33] The Court acknowledged that if the government takes property for public use to which it asserts no claim of title, then it could be taking.[34] However, the Court explained:

---

[29] *Arkansas Game and Fish*, 133 S. Ct. at 522.

[30] *In the Matter of Chicago, Milwaukee, St. Paul and Pacific R. Co.*, 799 F.2d 317, 325-26 (7th Cir. 1986).

[31] *Matter of Chicago*, 799 F.2d at 325-27 (citing *Langford v. U.S.*, 101 U.S. 341, 344-45 (1879)).

[32] *Langford*, Supra at footnote 10.

[33] *Id.* at 342.

[34] *Id.* at 343.

> It is a very different matter where the government claims that it is dealing with its own, and recognizes no title superior to its own. In such case the government, or the officers who seize such property, are guilty of a tort, if it be in fact private property.[35]

Thus, where the government is asserting the right to use its own property, mistakenly taking possession of someone else's does not constitute a constitutional taking but is a tort instead.[36]

The "character of the land at issue and the owner's reasonable investment-backed expectations regarding the land's use" are also relevant to the takings inquiry.[37] In *Arkansas Game and Fish*, the Court observed that the "damage [occasioned by the Corps of Engineers repeated temporary flooding] altered the character of the Management Area" which clearly interfered with the landowner's reasonable investment-backed expectations by significantly decreasing its very valuable hardwood timber resource.[38] The invasion also drastically changed the character of the land in that case from hardwood forests managed for recreation and profit to a headwater swamp.[39]

"Severity of the interference figures in the calculus [of whether a temporary invasion constitutes a taking]

---

[35] *Id.* at 344.

[36] *Id; Matter of Chicago*, 799 F.2d at 325-27.

[37] *Arkansas Game and Fish*, 133 S. Ct. at 522.

[38] *Id*. at 517.

[39] *Id.* at 523.

as well."[40] In *State ex rel. Dept of Transp. v. Winters*[41], state surveyors "walked and parked vehicles on some portion of defendant's property on a few occasions during the course" of a road construction project. The Court explained, "[t]here was no evidence that the surveyors used any particular portion of the property for any extended period of time or caused any physical damage."[42] The Court held that the trial court correctly denied judgment as a matter of law and the jury was able to, and did, determine that any interference was insubstantial, and the temporary physical invasions did not constitute a taking.[43]

Similarly, Montana cases have explained, lilt is implicit in inverse condemnation that the extent of damage be of such a degree as to amount to a taking of an interest in the property damaged."[44] In *Arkansas Game & Fish*, the Court on remand explained that the trial court had made a factual finding that "a reasonable investigation by the Corps of Engineers prior to implementing the deviations . . . would have revealed" that serious injury would occur.[45] The Court also explained that the government action "effected a

---

[40] *Arkansas Game and Fish*, 133 S. Ct. at 522-23 (citations omitted).

[41] *State ex rel. Dept of Transp. v. Winters,* 10 P.3d 961, 966 (Or. Ct. App. 2000)

[42] *Id.*

[43] *Id.*

[44] *Knight v. City of Missoula (1992)*, 252 Mont. 232, 243, 827 P.2d 1270, 1276-77.

[45] *Arkansas Game and* Fish, 736 F.3d at 1373.

wholesale change in the ability of the Management Area to support timber harvesting and a wildlife preserve of the sort that the Commission had historically maintained."[46] Throughout, the Court emphasized factual findings by the trier of fact.[47] A plain reading of the case makes clear that the extent of damage is not just something a plaintiff needs to establish in order to quantify an amount of damages to be awarded. Rather, a plaintiff must establish that the damage caused by the temporary physical invasion is substantial enough to constitute a taking in the first instance.

III. ADLC's temporary physical invasion of the upper branch does not constitute a taking.

ADLC alleges and Letica has not disputed that ADLC's temporary physical invasion of the upper branch was only a matter of hours while it removed the dirt berm. While the public was allowed to use the upper branch for a period of three years after ADLC cut the locks on gates across the lower branch which was determined by the Supreme Court to be a validly petitioned and dedicated county road, ADLC has alleged that each physical invasion of the upper branch during the short duration while the public traveled across the road to reach national forest Lands was minimal, particularly considering that [sic] the location and character of the road. Indeed, Letica has not alleged or shown otherwise.

---

[46] *Id.*, at 1374.

[47] *Id.*

Letica has not established that the duration of the use was significant in the context of the character of the property or that it rose to the level of a taking considering its temporary nature. More accurately, Letica has not presented evidence contradicting ADLC's evidence that the duration was insignificant based on the case specific nature of the temporary invasion. Indeed, reasonable minds cannot differ that this case is very different from *Arkansas Game & Fish*, where the Court determined that the duration "imposed a severe burden" on the property such that the landowner "could no longer use those regions for their intended purpose."[48] In this case, the record is devoid of any evidence that the temporary invasion of the upper branch resulted in any significant burden or substantially interfered with Letica's use of the property despite Letica's conclusory claims to the contrary.

Regarding the degree to which the invasion is intended or is the foreseeable result of authorized government action, another factor to be considered in the temporary invasion/restriction balancing test, it is true that the public's use of the upper branch was the foreseeable result of ADLC's actions, ADLC does not dispute this. However, ADLC acted under a claim of right. Specifically, ADLC relied on a road petition and public prescriptive easement in re-affirming the upper branch and removing the berm. Although the petition initially relied on for the upper branch was later discovered to be inapplicable and the Montana Supreme

---

[48] *Arkansas Game &* Fish, 736 F.3d at 1370.

Court ultimately held that ADLC was mistaken in its belief that the public prescriptive easement had not been extinguished by reverse adverse possession, ADLC's mistakes were reasonable. The District Court agreed in its order denying Letica's request for a preliminary injunction that ADLC had a likelihood of success on the petition ADLC relied on regarding the upper branch.[49]

It is undisputed that when the Road Record book was discovered that conclusively showed that the upper branch was not a dedicated county road, ADLC immediately withdrew reliance on its theory that the upper branch was a properly petitioned county road. Letica's assertion to the contrary aside, it is also true that ADLC alleged a public prescriptive easement across the upper branch from the beginning of the case, and pursued it as a defense prior to the discovery of the Road Record book.[50] ADLC's claim of right pursuant to a public prescriptive easement was reasonable, as established by the District Court's ruling in ADLC's favor on all issues following a bench trial and site view. Had the Montana Supreme Court affirmed the District Court's conclusion concerning reverse adverse possession of the upper branch, ADLC's actions in removing the berm would have been legal pursuant to a public prescriptive easement.[51] Therefore, pursuant to *In the*

---

[49] Doc. 35.

[50] See e.g. Doc 54; Doc. 253, Exhibit B, at 2.

[51] A public prescriptive easement is not an unconstitutional taking of private property. *McClurg v. Flathead County Commissioners*, 188 Mont. 20, 24-25, 610 P.2d 1153, 1156 (1980).

Matter of Chicago and *Langford*, ADLC's temporary physical invasion on Letica's property was pursuant to a claim of right which would potentially entitle Letica to recover in tort, but not on its constitutional takings claim.[52]

While Letica asserts that *Wohl*[53] establishes that whether ADLC acted under a claim of right is irrelevant, this Court agrees with ADLC that *Wohl* is distinguishable as it involved a permanent as opposed to a temporary taking. As discussed above, temporary and permanent invasions have very different standards and relevant areas of analysis. As noted by ADLC, by the time of trial in *Wohl*, the city had already affected a permanent invasion of the homeowners' properties by expanding a paved road where the landowners' porches, stoops, hedges, trees, fences, sidewalks, driveways and building overhangs had been.[54] Consequently, the Court found that the city commenced physical occupation of, and permanently seized, the land at issue and cited to *Loretto* in support of its conclusion that the city's permanent physical occupation of private property worked a taking of the homeowners' property.[55]

As to the character of the land at issue and the owner's reasonable investment-backed expectations

---

[52] *Langford*, 101 U.S. at 344; *Matter of Chicago*, 799 F.2d at 325-27.

[53] Supra at footnote 21.

[54] *Wohl*, ¶¶ 20, 26.

[55] *Id.* at ¶ 56

regarding the land's use, Letica has not established much less alleged that ADLC's actions defeated Letica's reasonable investment-backed expectations regarding the land's use. Letica has presented no evidence that the use of the upper branch interfered with its use and plans for the property. Nor has Letica asserted that there is any disputed material fact as to this issue. Rather, ADLC has alleged and Letica has not disputed that ADLC's temporary physical invasion of the upper branch did not interfere with Letica's reasonable investment-backed expectations regarding the land's use.

Here, the undisputed facts show that the character of the land remained fundamentally the same with the public merely temporarily resuming its use of a road that had been used as a road for decades. This is considerably different that [sic] the physical invasion that occurred in *Arkansas Game & Fish* which resulted in the permanent loss of valuable harvestable timber and turned the property at issue into a headwater swamp.

Regarding the severity of the interference with Letica's property, ADLC asserts that the public's temporary physical invasion of the upper branch did not cause any significant damage to Letica's property. Letica has not provided any evidence to the contrary. Causation and severity of damages are required to be proven to determine whether a temporary taking occurred, not just in determining the amount of damages if a taking did occur. Again, despite ADLC's claim that Letica has not sustained any significant damages as a result of ADLC's and/or the public's temporary

physical invasion of their property, Letica has not presented any substantial evidence to the contrary.

ADLC "re-affirmed" the upper branch as a public right of way, which the parties agree had no legal effect. Letica filed the present action to block public use of both the lower and upper branches. It was the District Court that denied Letica's requests for preliminary injunctions and determined that the public could use the upper branch during the pendency of the case. Letica is essentially arguing that by opposing its preliminary injunction requests, ADLC effected a taking. ADLC's good faith defenses pursuant to a claim of right against Letica's lawsuit by relying on a petition and public prescriptive easement does not constitute a taking. This is not a case where ADLC claimed an easement and then built or paved a road. Nor is it a case where ADLC physically occupied or seized private property. The lower and upper branches of the road at issue had been in existence for decades.

Letica did not attempt to apply the Arkansas Game and Fish temporary physical invasion balancing test/factors to the facts of this. In its cross motion for summary judgment ADLC, on the other hand, did apply the temporary physical invasion balancing test/factors to what they contend are the undisputed facts of the case to establish that their act of cutting of locks on the lower road and removal of the berm on the upper road did not result in a taking. Having met their burden to establish the absence of genuine issues of material fact and their entitlement to judgment as a matter of law, the burden shifted to Letica to establish

with substantial evidence, as opposed to mere denial, speculation, or conclusory assertions, that a genuine issue of material fact does exist or that ADLC was not entitled to prevail as a matter of law. Letica did neither.

It is worth emphasizing that this conclusion is based on the unique circumstances of this case. Unlike many cases, this case has already been through trial and extensive findings of fact were made by the District Court Judge. The United States Supreme Court directed that "most takings claims turn on situation-specific factual inquiries," and cases "should be assessed with reference to the particular circumstances of each case."[56] *Id.* at 518, 522 (quotations and citations omitted). This Court heeded the Supreme Court's directive and analyzed this case on its very unique facts. Based on the factors from *Arkansas Game & Fish* and the undisputed facts of this case, reasonable minds cannot differ, no taking occurred.

IV. Letica's Other Claims

The Montana Supreme Court remanded this matter to the District Court for consideration of Letica's bifurcated claim, which was described as the takings claim contained in the Second Amended Complaint.

[56] The Court also explained: "We have recognized, however, that no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area." *Id.* at 518.

Letica, ¶¶ 11, 50. Letica acknowledged that it is only pursuing its takings claim, but then argued that its substantive due process and violation of civil rights claims are intertwined with its takings claim. ADLC moved for summary judgment on each of Letica's other claims in the Second Amended Complaint, arguing that Letica did not and cannot establish facts supporting Count III – Substantive Due Process, Count IV – Procedural Due Process, and Count VI – Spoliation. Letica responded that the other counts of the Second Amended Complaint are part of the takings claims and are based on the same facts and legal bases as the takings claim. Letica provided no additional facts or legal authority in support of these claims. To the extent these other claims are simply part of Letica's takings claim, they should be dismissed as described above. To the extent they are standalone claims, they are dismissed because ADLC shifted the summary judgment burden to Letica, and Letica failed to set forth any genuine issue of material fact or legal authority separate from its takings claim necessary to survive summary judgment with respect to these other counts. Accordingly, ADLC's motion for summary judgment in relation to Letica's other claims is deemed well-taken.

ORDER

The undisputed facts establish that ADLC's temporary physical invasion of the upper branch pursuant to a claim of right does not constitute a taking, or a violation of Letica's substantive due process rights, or a violation of Letica's civil rights.

THEREFORE, IT IS HEREBY ORDERED that Defendant ADLC's Cross Motion for Summary Judgment is **GRANTED**, and all remaining claims against ADLC are dismissed with prejudice.

IT IS FURTHER ORDERED that Letica's Cross Motion for Summary Judgment is **DENIED**.

For the reasons noted in Defendant's Response Brief in Opposition to Plaintiff Letica Land Company, LLC's Motion to Alter or Amend the Court's Order on Cross Motions for Award of Costs, **IT IS FURTHER ORDERED** that Letica's Motion to Alter or Amend this Court's Order on Cross Motions for Award of Costs is also **DENIED.**

DATED this day 10th of April, 2018.

/s/ Ronald I. Spaulding
Hon. Ronald I. Spaulding,
District Judge

cc: Martin S. King/Jesse C. Kodadek, Counsel for Letica Land Co., LLC
Mark L. Stermitz, Counsel for Don McGee
Cynthia Walker/Mark Thieszen, Counsel for Defendants

APPENDIX C

DA 14-0780

IN THE SUPREME COURT
OF THE STATE OF MONTANA

2015 MT 323

LETICA LAND COMPANY, LLC, a Michigan limited liability company, and DON McGEE, an individual,

Plaintiffs and Appellants,

v.

ANACONDA-DEER LODGE COUNTY, a political subdivision of the State of Montana,

Defendant and Appellee.

APPEAL FROM: District Court of the Third Judicial District, In and For the County of Anaconda-Deer Lodge, Cause No. DV-12-24 Honorable Kurt Krueger, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Martin S. King (argued), Jesse C. Kodadek, Worden Thane, P.C., Missoula, Montana (for Letica Land Company, LLC)

Mark L. Stermitz (argued); Jeffrey R. Kuchel, Crowley Fleck PLLP, Missoula, Montana (for Don McGee)

For Appellee:

Cynthia L. Walker (argued), Mark A. Thieszen, Poore, Roth & Robinson, P.C., Butte, Montana

---

Argued and Submitted: September 16, 2015
Decided: November 17, 2015

Filed:

/s/ Ed Smith
Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Letica Land Company, LLC, (Letica) and Don McGee appeal the judgment of the Third Judicial District Court that two roads crossing Letica's and McGee's properties in Anaconda-Deer Lodge County are public roads. Letica and McGee raise several issues on appeal that we restate as follows:

1. Whether the District Court erred in concluding that the record, taken as a whole, established that Anaconda-Deer Lodge County statutorily created Modesty Creek Road's lower branch terminating in Section 22, Township 6 North, Range 11 West;

2. Whether the District Court erred in concluding that the public holds a prescriptive easement across Modesty Creek Road's upper branch.

¶2 We affirm on Issue 1, reverse on Issue 2, and remand for further proceedings.

PROCEDURAL AND FACTUAL BACKGROUND

¶3 The disputed portions of Modesty Creek Road[1] pass through properties owned by Letica and McGee. The road includes an upper and lower branch and is located near the boundary between Anaconda-Deer Lodge County (County) and Powell County in the Flint Creek Range foothills approximately ten miles north of Anaconda, Montana.

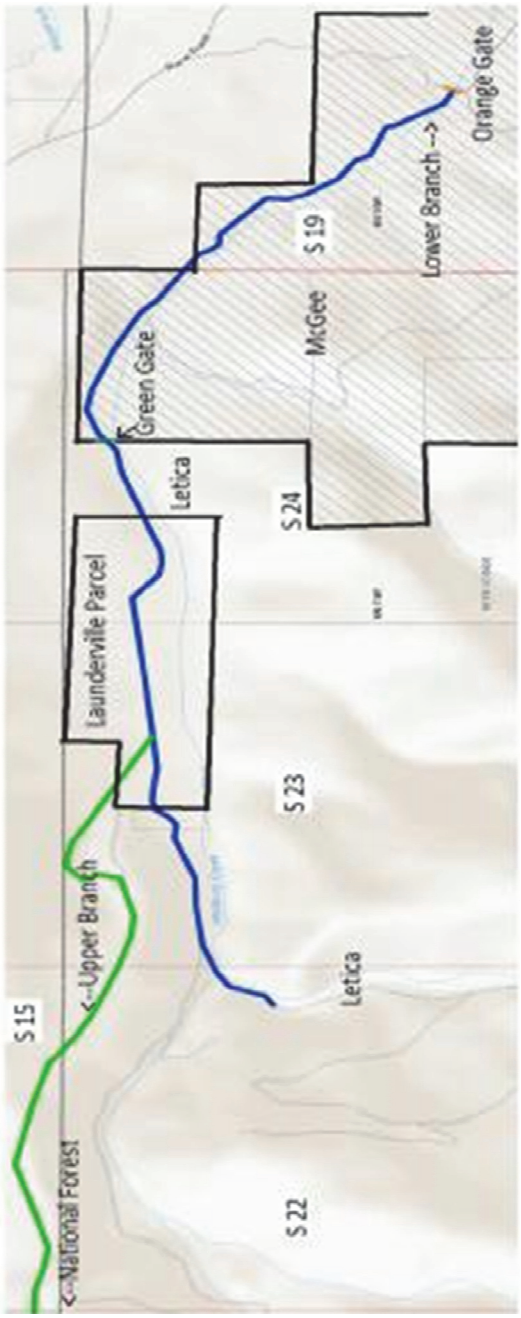
¶4 Modesty Creek Road's lower branch begins at an intersection with Spring Gulch Road—an undisputed county road—in Section 19, Township 6 North, Range 10 West. There is an orange gate on the lower branch at that branch's intersection with Spring Gulch Road. The road travels northwest through McGee's property along Modesty Creek's north side and exits the property in Section 24, Township 6 North, Range 11 West. There is a green gate where the road exits McGee's property and enters Letica's property. The road passes a short distance over Letica's property before entering what the parties refer to as the Launderville parcel—an inholding surrounded entirely by Letica's property and now owned by nonparties Thomas and Patricia Donich. The District Court concluded that the lower

[1] There is dispute regarding the road's name and whether it is even a road in places; however, both parties refer to the road as "Modesty Creek Road" in their briefing and we will do the same.

branch reenters Letica's property in Section 23, Township 6 North, Range 11 West, and continues west before ending in the eastern portion of Section 22, Township 6 North, Range 11 West.

¶5 The upper branch splits from the lower branch near the western Launderville/Letica property boundary in Section 23, Township 6 North, Range 11 West. The upper branch travels west/northwest across Letica's property through Sections 23, 22, and 15, Township 6 North, Range 11 West. The road enters Powell County in Section 15. It continues into the Beaverhead-Deerlodge National Forest where it becomes a United States Forest Service road that accesses a number of lakes.[2]

[2] The map shown is not included in the record, but it represents an approximate location of the two disputed branches of Modesty Creek Road as they pass through the various properties according to maps and exhibits contained in the record.


S 15
<--National Forest
<--Upper Branch
S 22
Letica
S 23
Launderville Parcel
Letica
S 24
Green Gate
McGee
S 19
Lower Branch -->
Orange Gate

¶6 In March 1889, the Deer Lodge County Commission[3] considered a petition to establish Modesty Creek Road as a county road. The minutes from the meeting describe the petition as follows:

> Upon the petition of John N. Nelson, et al. and proof of the posting of notices as required by law having been filed with the Clerk, Frank Stephens, Geo Jacques and Joseph Marshall were appointed viewers to meet April 11, 1889 to view out, locate and report upon the following road to wit.
>
> Beginning at the S.E. Cor[ner] of Sec[tion] 22, T9NR10W,[4] Deer Lodge Co. MT and running thence due west two miles along the section lines. Thence up Modesty Creek along the old road as near as practicable to the mouth of Dry Gulch.

Deer Lodge County Commissioners Records, *Deer Lodge County Commission Meeting Minutes, March 21, 1889*, Book 6, 373. The Commission met again in June 1889 and the minutes from that meeting contain the following declaration regarding Modesty Creek Road:

> Report of Frank Stephens, Joseph Marshall, and Geo Jacques—viewers appointed on March 21st and 1889 to view out, locate and report upon a road petitioned for by John N. Nelson, et al. met and accepted and the same is hereby

---

[3] Anaconda-Deer Lodge County was formerly known as Deer Lodge County.

[4] At trial, the parties agreed that "T**9**NR10W" was a scrivener's error and should read "T**6**NR10W."

> accepted declared a public highway with the provision that all parties interested or benefited by said road bear all expense connected with the opening and building of the same.

Deer Lodge County Commissioners Records, *Deer Lodge County Commission Meeting Minutes, June 3, 1889*, Book 6, 396. An 1896 County road map shows Modesty Creek Road's lower branch generally following the route described above and ending near a gulch labeled "Dry Gulch" in an "unsurveyed" portion of Township 6 North, Range 11 West.

¶7 The road traversed only federal public land until the federal government conveyed the land to the Anaconda Company in 1937. During the Anaconda Company's ownership, testimony at trial indicated that the public regularly accessed both branches of Modesty Creek Road. In 1965, the Anaconda Company sold the land. A number of private interests have owned various parcels ever since. Testimony at trial indicated that the public continued to regularly access both branches until the early 1980s. Ilija Letica purchased the property in 1989 and transferred the property to Letica in 1997. McGee also purchased his property in 1997.

¶8 In the mid-1960s, the Launderville parcel's prior owner, Joe Launderville, fenced the parcel and placed a gate across the upper branch. Launderville testified at trial that he locked the gate sporadically in the early 1980s. At around the same time, Letica's and McGee's predecessors in interest installed and locked the orange and green gates across the lower branch. In

the mid-1980s, Shawn DeMers, an area landowner, removed a culvert at the orange gate at Launderville's request. The culvert allowed road users to cross Modesty Creek. The locked gates on the lower branch and the culvert's removal restricted public use of both branches. As such, both Letica and McGee maintain that they were unaware of any claim of public right of access over either branch of Modesty Creek Road at the time they purchased their respective properties.

¶9 Following a confrontation with Ilija Letica, DeMers and another County resident asked the County Commission in early 2012 to reaffirm both branches of Modesty Creek Road as county roads and reopen them to the public. The County Commission retained an attorney to research the road's history and, on March 6, 2012, voted to reaffirm both branches as county roads based in part on her opinion and supporting documentation. Two days later, Letica filed a complaint for declaratory and injunctive relief. Following a hearing, the District Court issued an order in July 2012 denying Letica's request for a preliminary injunction to close Modesty Creek Road.[5] McGee joined as a plaintiff in an amended complaint.

---

[5] The court found it unnecessary to address whether a public prescriptive easement was created on Modesty Creek Road in its July 2012 order denying a preliminary junction. The court, however, did observe that "the public's acquiescence of locked gates placed across Modesty Creek Road for more than 30 years likely extinguished any public prescriptive easement, if one ever existed." In a December 2013 order, the court held that sufficient facts remained at issue for the County's prescriptive easement claim to proceed to trial.

¶10 Prior to trial, the County initially contended that both branches of Modesty Creek Road were statutorily created. After discovery closed, however, the County located a road record book that established that the upper branch was not in fact a statutorily created road. The County thereafter asserted that a public prescriptive easement established the upper branch as a public road.

¶11 In a December 2013 order, the District Court denied the parties' motions for partial summary judgment. The court also denied Letica's and McGee's motion to alter or amend the July 2012 order to allow gates to be placed on the upper branch based on the newly-discovered evidence that the upper branch was not a statutorily created road. The court did, however, allow Letica and McGee to amend their complaint to add a constitutional takings claim based on the same evidence regarding the upper branch. The court then bifurcated the takings claims from the public right-of-way claims *sua sponte*.

¶12 The court commenced a five-day bench trial on May 12, 2014. The parties presented extensive evidence regarding whether the County created the lower branch by petition and whether there is a public prescriptive easement on the upper branch. The evidence included: the 1889 Commission meeting minutes quoted above; 1896 Commission meeting minutes; various maps that either show or do not show Modesty Creek Road; lay witness testimony concerning the County's level of exercise of jurisdiction over the road; lay witness testimony regarding the road's use

by the public; testimony from Letica's and McGee's expert, Ken Jenkins, a licensed surveyor; historical documents relating to mining activity in the area; and a site visit with the court, counsel, and representatives for each party. Following the trial, the District Court issued a thorough 74-page findings of fact, conclusions of law, and order in October 2014.[6] The court concluded that Modesty Creek Road's lower branch was a statutorily created road ending along the eastern edge of Section 22, Township 6 North, Range 11 West. The court also concluded that a public prescriptive easement established Modesty Creek Road's upper branch as a public road and that the prescriptive easement had not been extinguished by reverse adverse possession. The court entered its order as a final judgment; in mid-November 2014, the court issued an order awarding costs and finding that "the takings issue is not ripe for ruling or further hearing until after the appeal is heard." Letica and McGee appeal.

STANDARD OF REVIEW

¶13 We review a district court's findings of fact to determine if they are clearly erroneous. M. R. Civ. P. 52(a)(6); *Galassi v. Lincoln Cnty. Bd. of Comm'rs*, 2003 MT 319, ¶ 7, 318 Mont. 288, 80 P.3d 84 (citation omitted). A finding is clearly erroneous if it is not supported by substantial evidence, if the district court misapprehended the effect of the evidence, or if our

[6] We would like to acknowledge that the District Court's order meticulously cited to the record.

review of the record convinces us that the district court made a mistake. *Galassi*, ¶ 7 (citations omitted). We review a district court's conclusions of law to determine if they are correct. *Galassi*, ¶ 7 (citation omitted).

DISCUSSION

¶14 *1. Whether the District Court erred in concluding that the record, taken as a whole, established that the County statutorily created Modesty Creek Road's lower branch terminating in Section 22, Township 6 North, Range 11 West.*

¶15 In 1889, the statutory procedures for establishing a county road required, in part: residents to submit a petition regarding the proposed road to the board of county commissioners; the posting of public notice of the petition; the board to appoint road viewers to mark out the road and report back to the board; and the board to approve or reject the road viewers' report and provide notice of the road's opening. Compiled Statutes of Mont., 5th Div. Gen. Laws §§ 1809-1818 (1887); *Oates v. Knutson*, 182 Mont. 195, 199, 595 P.2d 1181, 1183 (1979) (summarizing the 1887 statutory procedures for establishing a county road). The standard for determining the existence of a public road, however, is not proof of strict adherence to these statutory procedures; rather, it is whether "the record taken as a whole shows that a public road was created." *Reid v. Park Cnty.*, 192 Mont. 231, 236, 627 P.2d 1210, 1213 (1981). We adopted the "record taken as a whole" standard in *Reid* because "strict compliance with the

jurisdictional requirements to establish a road by petition would pose an unjustifiable burden on the public to prove a public road created nearly 100 years earlier." *Sayers v. Chouteau Cnty.*, 2013 MT 45, ¶ 26, 369 Mont. 98, 297 P.3d 312 (citing *Reid*, 192 Mont. at 234, 627 P.2d at 1212).

¶16 As an initial matter, Letica and McGee contend that "[u]nder the circumstances of this case . . . the 'finding' that a county road exists is actually the declaration of a significant legal right that implicates [Letica's and McGee's] fundamental and constitutionally protected property interests." Accordingly, they assert that the determination whether Modesty Creek Road is a public road is a conclusion of law that must be reviewed for correctness. Although we have not addressed this issue directly, we have concluded that under the "record taken as a whole" standard, there must be "substantial credible evidence" to support a district court's determination that a road is public. *Jefferson Cnty. v. McCauley Ranches, Ltd. Liab. P'ship*, 1999 MT 333, ¶ 35, 297 Mont. 392, 994 P.2d 11 (holding that "substantial credible evidence supported the District Court's determination that McCarty Creek Road is a county road"); *Galassi*, ¶ 16 (concluding "that there was substantial evidence presented to the District Court to support its finding that RP 81 is a public roadway"). As stated above, the "record taken as a whole" standard allows for less than strict compliance with the statutory requirements for establishing a public road. *Reid*, 192 Mont. at 235-36, 627 P.2d at 1213. Consequently, the determination whether a road

was created by petition requires a district court to make factual findings—that we review for clear error—and then apply the "record taken as a whole" legal standard to those findings—a conclusion of law that we review for correctness.

¶17 Letica and McGee generally contend that the court failed to consider adequately the record as a whole in determining that the lower branch of Modesty Creek Road is a public road created by petition. They first argue that the June 1889 Commission declaration contains a "condition precedent" to the road's creation because of its "provision that all parties interested or benefited by said road bear all expense connected with the opening and building of the same." Deer Lodge County Commissioners Records, *Deer Lodge County Commission Meeting Minutes, June 3, 1889*, Book 6, 396. Letica and McGee assert that the court erred by concluding that the lower branch is a county road created by petition without finding that the county satisfied the condition. They next contend that under the "record taken as a whole" standard, "the record" must focus on county records. Therefore, they claim that the District Court failed to consider adequately the whole record because the "county-created evidence" alone is insufficient to show the creation of a county road. Moreover, they contend that the "county-created evidence" shows that the County did not recognize the lower branch as a county road for nearly 100 years. Finally, Letica and McGee assert that even if Modesty Creek Road's lower branch is a county road, the record as a whole establishes that it must end on the

Launderville parcel in the eastern portion of Section 23, Township 6 North, Range 11 West.

¶18 Letica's and McGee's assertion that the court had to find the June 1889 Commission declaration's "condition precedent" satisfied in order to conclude that a county road exists on the lower branch is misplaced. Letica and McGee correctly point out that the road-creation statutes in effect at the time authorized a county to require the payment of "expense and damages" by the road's petitioners. Compiled Statutes of Mont., 5th Div. Gen. Laws § 1819 (1887). Letica's and McGee's argument, however, does not properly apply the standard we set forth in *Reid*.

¶19 *Reid* rejected a standard of strict compliance with statutory procedures where the applicable documentation might be over 100 years old due to the potential burden on the public to produce the jurisdictional record. *Reid*, 192 Mont. at 236, 627 P.2d at 1213. Here, requiring proof of strict compliance with the declaration's claimed "condition precedent" would allow Letica and McGee "to keep the public from going through land because the public's records of a road no longer support a determination that the public had originally acquired jurisdiction to create the road." *Reid*, 192 Mont. at 236, 627 P.2d at 1213. Such a requirement "may well be unsurmountable" and is therefore not required under the "record taken as a whole" standard. *Reid*, 192 Mont. at 236, 627 P.2d at 1213.

¶20 We have considered in prior cases numerous statutory conditions of road creation for which evidence

was lacking, and have not found the failure to satisfy one or more particular conditions to be determinative. *E.g.*, *Reid*, 192 Mont. at 233, 627 P.2d at 1210 (noting that the record undisputedly lacked copies of the petition showing a description of the road, that the petition was signed by ten qualified petitioners, and that the commissioners gave notice to the affected landowners); *Lee v. Musselshell Cnty.*, 2004 MT 64, ¶ 16, 320 Mont. 294, 87 P.3d 423 (no records available, other than corrected survey notes, demonstrating that the statutory procedures necessary to alter a road were followed); *Jefferson Cnty.*, ¶ 29 (county conceded that a road's creation was procedurally deficient). Additionally, but for evidence of the "expense and damages" payment, the record demonstrates that the lower branch was created in substantial compliance with the statutory procedures for establishing a county road. Statutes of Mont., 5th Div. Gen. Laws §§ 1809-1818 (1887). The provision requiring payment of "expense and damages" is not qualitatively different from the conditions lacking in those cases, and we conclude that it too is not determinative. Finally, the lack of proof showing payment of expenses could just as well be evidence that the road declaration did not result in any expenses, particularly because there was evidence that the road already existed.

¶21 Letica's and McGee's contention that the record, taken as a whole, cannot establish the creation of a county road on the lower branch due to the lack of "county-created evidence" is unpersuasive because the "record taken as a whole" is not limited to the "four

corners" of the public record. *Sayers*, ¶¶ 24, 28. In neither *Reid* nor its progeny have we required that a district court consider only county records under the "record taken as whole" standard. *E.g.*, *Galassi*, ¶¶ 10, 19 (relying in part on the testimony of three witnesses regarding the road's location and its use by the public to conclude that the record taken as a whole established a public road); *Jefferson Cnty.*, ¶¶ 34-35 (relying in part on a private deed of sale, a non-county map, and testimony of witnesses to conclude that the record taken as a whole established a public road); *Lee*, ¶¶ 15, 17 (relying in part on non-county maps to conclude that the record taken as a whole established a public road). Moreover, applying Letica's and McGee's "county-created evidence" standard goes directly against our decision in *Reid* because it would "impose[ ] an unrealistic burden on the public to prove *on the face of the record* that its public officials had jurisdiction to create a public road." *Reid*, 192 Mont. at 234, 627 P.2d at 1212 (emphasis added).

¶22 Letica's and McGee's parallel assertion that the court erred by failing to consider that the County did not recognize the lower branch as a county road in county records likewise is unpersuasive. Letica and McGee concede that the County recognized Modesty Creek Road as a county road on the 1896 County road map, but claim that a 1913 County road map showing no county road in the area proves that the County did not recognize Modesty Creek Road as a county road.[7]

---

[7] Letica and McGee argue that the District Court's findings are clearly erroneous because it failed even to address the 1913

Letica and McGee have offered no legal authority suggesting that a county's failure to depict a road as a public road on county road maps means the road is not public. In fact, we rejected a similar argument in *Galassi*. *Galassi*, ¶¶ 9, 19 (concluding that the road in question was a public road even though the road did not appear in the county tract book depicting county roads). Moreover, Letica's and McGee's own expert testified at trial that there could be county roads that are not shown on county maps.

¶23 Additionally, if recognizing a road on county maps was determinative of whether a county established a road by petition, the County's recognition of the lower branch on the 1896 map would end the discussion because "once a road is established as a public roadway . . . a county must take affirmative steps to indicate intention to abandon such road." *Galassi*, ¶ 15 (citing *McCauley v. Thompson-Nistler*, 2000 MT 215, ¶ 31, 301 Mont. 81, 10 P.3d 794). Later county maps that do not depict Modesty Creek Road do not amount to conduct "so decisive and conclusive as to indicate a clear intent to abandon." *Baertsch v. Cnty. of Lewis & Clark*, 256 Mont. 114, 122, 845 P.2d 106, 111 (1992) (citation omitted) (concluding that the conduct necessary to demonstrate an intent to abandon "must be some affirmative official act, and not mere implication").

---

map. But the court's finding # 58 expressly acknowledged the maps in evidence that do not show the road.

¶24 We conclude, after reviewing the record, that the District Court properly considered all of the evidence in determining the make-up of the record as a whole. Therefore, Letica's and McGee's contentions that the court failed to consider adequately the record as a whole are unconvincing.

¶25 After reviewing the record, we further conclude that the District Court appropriately relied on *Reid* and its progeny in determining that the record in this case, taken as a whole, establishes that the County created Modesty Creek Road's lower branch by petition. The March and June 1889 Commission meeting minutes establish that the statutory requirements for creating a road by petition largely were met. The minutes demonstrate that residents submitted a petition to the County Commission; the petitioners posted public notice of the petition; the Commission appointed road viewers to mark out the road; the viewers reported back to the Commission; the Commission accepted the road viewers' report; and the Commission accepted and declared the road as public, thereby providing notice of the road's opening.

¶26 Moreover, the rest of the record contains a wide range of evidence that is sufficient to support the court's determination. The record includes other historical county records such as the 1896 County road map showing the lower branch as a county road, January 1896 Commission meeting minutes approving the map's creation, and an historical undated map found in the County's road record book showing a portion of Modesty Creek Road. The record also includes other

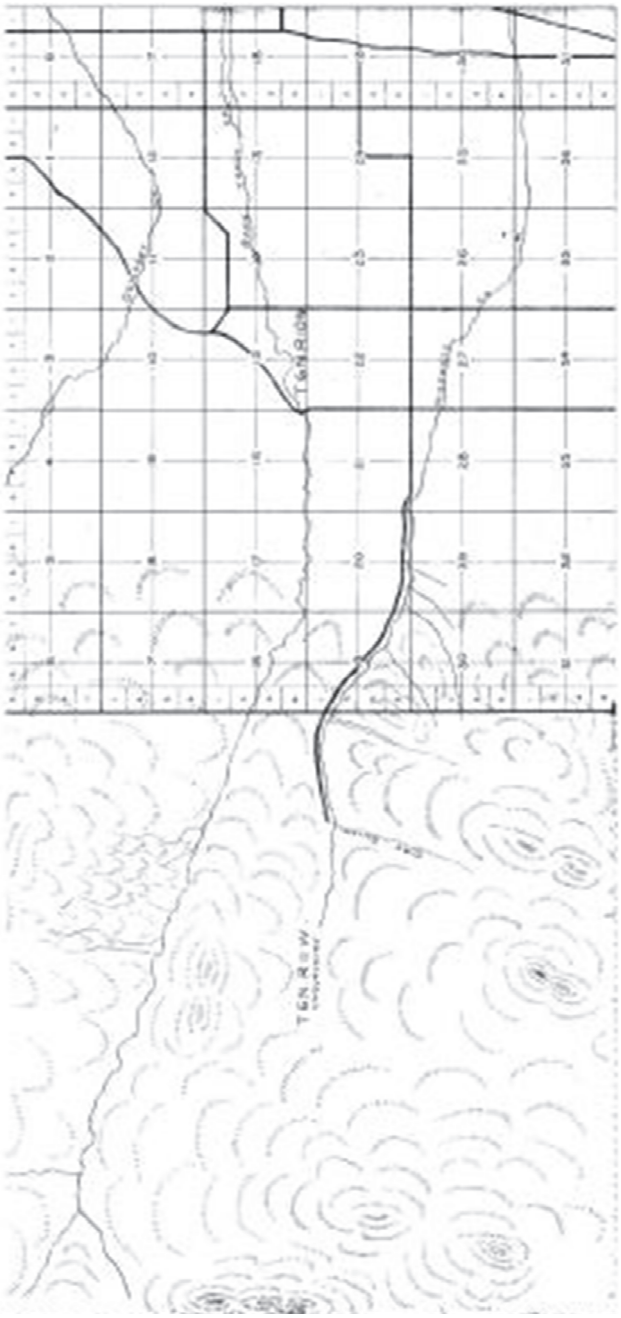
maps and surveys showing Modesty Creek Road, including: mining survey maps, homestead entry maps, U.S. Government Land Office maps, Forest Service maps, and County maps. A number of disinterested witnesses testified concerning the County's exercise of jurisdiction over the lower branch and the public's regular use of the road. Finally, the record contains additional documents describing mining activity in the area that would have necessitated a road running along Modesty Creek.

¶27 Letica's and McGee's assertion that the court did not adequately consider maps that do not depict Modesty Creek Road does not render the findings clearly erroneous because our review of the record indicates that the District Court did not misapprehend the effect of the evidence or make a clear mistake. The court specifically found that Letica's and McGee's own expert "agreed that just because a road is not on a county map does not mean that there is no county road in that location." Moreover, even when there is contradictory evidence, "we will uphold the district court if there is substantial credible evidence to support its findings." *Galassi*, ¶ 16 (citing *Jefferson Cnty.*, ¶ 31). The District Court recounted the evidence in detail, and we hold that there is substantial credible evidence to support its findings. In light of the facts as found by the District Court, the court correctly applied the "record taken as a whole" standard in concluding that Modesty Creek Road's lower branch is a county road created by petition.

¶28 Letica's and McGee's remaining contention is that even if the lower branch is a statutorily created county road, the record as a whole demonstrates that it must terminate in the eastern portion of Section 23, Township 6 North, Range 11 West. Pursuant to the March 1889 Commission meeting minutes, the lower branch ends "as near as practicable to the mouth of Dry Gulch." Deer Lodge County Commissioners Records, *Deer Lodge County Commission Meeting Minutes, March 21, 1889*, Book 6, 373. The parties disagree about Dry Gulch's location.

¶29 Letica and McGee again assert that there is not any "county-created evidence" showing that the lower branch extends beyond the eastern edge of Section 23—relying in particular on the 1896 County road map. Their reliance on the 1896 County road map is misplaced because, as the District Court found, Township 6 North, Range 11 West on the map is "unsurveyed" and therefore does not depict the particular section(s) where Dry Gulch is located.[8]

[8] The map shown is a portion of the 1896 County road map included in the record.


T6N R8W
T6N R9W

¶30 In determining Dry Gulch's location, and consequently the lower branch's terminus, the District Court considered testimony from longtime area residents regarding their understanding of Dry Gulch's location, historical maps depicting Dry Gulch, and historical documents describing Dry Gulch. Moreover, the court conducted a judicial site visit that confirmed historical placer digging in the gulch found by the court to be Dry Gulch in Section 22, Township 6 North, Range 11 West. This historical placer digging evidence corresponds to Dry Gulch's description in the historical documents the court analyzed. The court further found that Ken Jenkins' testimony regarding Dry Gulch's location lacked "reliability and credibility."

¶31 After reviewing the record, we conclude that the court's findings establishing Dry Gulch's location along the eastern portion of Section 22, Township 6 North, Range 11 West, are supported by substantial credible evidence. The court therefore correctly applied the "record taken as a whole" standard in concluding that the lower branch terminates along the eastern edge of Section 22, Township 6 North, Range 11 West.

¶32 Accordingly, we affirm the District Court's conclusions as to Modesty Creek Road's lower branch.

¶33 *2. Whether the District Court erred in concluding that the public holds a prescriptive easement across Modesty Creek Road's upper branch.*

¶34 The District Court determined that there is a public prescriptive easement on Modesty Creek Road's upper branch. Letica and McGee argue that this

holding was in error and that, even if the County proved a prescriptive easement on the upper branch, it was extinguished by reverse adverse possession. Because we find the latter argument dispositive, we assume for purposes of analysis that the District Court correctly found that a public prescriptive easement had been established.

¶35 Reverse adverse possession may extinguish a public prescriptive easement on a private road. *Pub. Lands Access Ass'n, Inc. v. Boone & Crockett Club Found., Inc.*, 259 Mont. 279, 856 P.2d 525 (1993) (hereafter *Boone & Crockett*); *Dome Mt. Ranch, LLC, v. Park Cnty.*, 2001 MT 289, 307 Mont. 420, 37 P.3d 710. Under § 70-17-111(1)(c), MCA, a servitude may be extinguished "by the performance of any act upon either tenement by the owner of the servitude or with the owner's assent that is incompatible with its nature or exercise." Based upon that statutory language, we have held that "if a prescriptive easement exists, subsequent acts inconsistent with the claim by prescription[] support the conclusion that the prescriptive easement has been extinguished." *Boone & Crockett*, 259 Mont. at 290, 856 P.2d at 532 (citations omitted) (construing § 70-17-111(3), MCA (amended and codified at § 70-17-111(1)(c), MCA; 2007 Mont. Laws 352)). Acts that are inconsistent with the public's claim by prescription are assertions of hostile rights that "must be brought to the attention of the owner [the public] and the use must continue for the full prescriptive period." *Boone & Crockett*, 259 Mont. at 290, 856 P.2d at

531 (citation omitted). The prescriptive period is five years. Sections 70-19-404, to -405, MCA.

¶36 In considering whether reverse adverse possession extinguished the public prescriptive easement on the upper branch, the District Court correctly observed that "a private individual may not obtain title to a public statutorily created road by adverse possession." *McCauley*, ¶ 33 (citation omitted) (stating that "Montana has followed the general rule that title to public roads may not be obtained by adverse possession"). Based on the lower branch's status as a statutorily created road, the court determined that it would be against public policy to allow Letica and McGee to extinguish the public prescriptive easement on the upper branch by blocking the lower branch. Applying our precedent to the historic record of Modesty Creek Road, we conclude that the status of the lower branch is not relevant to the analysis of whether reverse adverse possession extinguished the public prescriptive easement on the upper branch and we therefore disagree.

¶37 In *Boone & Crockett*, a landowner closed the road in question to through traffic by installing locked gates. *Boone & Crockett*, 259 Mont. at 288, 856 P.2d at 530. The landowner subsequently created a walk-in program allowing public access to public land beyond his property. *Boone & Crockett*, 259 Mont. at 289-90, 856 P.2d at 530-31. Anyone who wanted to drive the road beyond the walk-in point had to get landowner permission. *Boone & Crockett*, 259 Mont. at 288-89, 856 P.2d at 530-31. We concluded that these actions

"evidenced a 'distinct and positive assertion of a hostile right'" to the public's claimed prescriptive easement. *Boone & Crockett*, 259 Mont. at 290, 856 P.2d at 531 (quoting *Taylor v Petranek*, 173 Mont. 433, 438, 568 P.2d 120, 123 (1977)). The landowner, we reasoned, "established reverse adverse possession because the state and local government, as well as the public[,] cooperated and adhered to the walk-in policy which had been in existence for approximately 17 years." *Boone & Crockett*, 259 Mont. at 290, 856 P.2d at 532. We held that such compliance with the road access restrictions "was inconsistent with the claim of a public prescriptive easement. Accordingly, any prescriptive easement the public may have acquired in the road was lost." *Boone & Crockett*, 259 Mont. at 291, 856 P.2d at 532.

¶38 In *Dome Mountain Ranch*, the Park County Commissioners declared the subject road a public road for the first time in 1994 after the public requested that the road be opened as a county road. *Dome Mt. Ranch, LLC*, ¶ 8. A previous landowner, however, had placed gates across the road in 1965 that often were locked. *Dome Mt. Ranch, LLC*, ¶ 6. The locked gates remained until 1998. *Dome Mt. Ranch, LLC*, ¶ 24. The record further established that "although members of the public occasionally used the road . . . after gates and no trespassing signs were erected, such use was for recreational purposes." *Dome Mt. Ranch, LLC*, ¶ 24. We concluded that "Park County and the public's acquiescence of locked gates being place[d] thereon for approximately 30 years extinguished Park County's public

prescriptive easement, if one existed, on the subject road." *Dome Mt. Ranch, LLC*, ¶ 25.

¶39 Here, similar to *Boone & Crockett* and *Dome Mountain Ranch*, the record includes substantial evidence that locked gates on the lower branch blocked public access to the upper branch from 1980 until 2012. At trial, Letica's predecessor in interest, Cal Christian, testified that he installed and locked the green gate on the lower branch in 1980 after witnessing a number of vehicles on the property during hunting season. He also testified that the orange gate was installed and locked in the early 1980s. Cal's son Clayton Christian, who worked at the property, testified that the family placed ads in the paper to let the public know that they were restricting access to the property. Moreover, Cal Christian testified that the County never complained to him about the gates' placement and that the gates remained locked when he sold the property to Letica in 1989.

¶40 Launderville, whom Letica employed from 1994 to approximately 2004, testified that the orange and green gates were installed and locked in the early 1980s and remained locked during the time he worked for Letica. He also testified that in the early to mid-1980s, DeMers removed a culvert at the orange gate, further hindering road access because the culvert allowed road users to cross Modesty Creek. The culvert was not replaced until 2002. Launderville testified that during those approximately twenty years he was unaware of anyone traveling that route beyond the orange gate. Ilija Letica testified that both the orange

and green gates were locked continuously from the time he bought his property in 1989 until 2012 when the County declared both branches of Modesty Creek Road county roads. He further testified that no one, including the County, requested that the locks on the gates be removed during his ownership of the property.

¶41 Additionally, the vast majority of testimony concerning the public accessing the upper branch came from witnesses who traveled the road prior to the gates' installation in the 1980s. Jim Heaphy, a longtime area resident, testified that he traveled the upper branch to access the lakes on the National Forest beginning in the late 1950s but that he stopped using the road once the gates were locked on the lower branch because he considered it trespassing. Other members of the Heaphy family similarly testified to not traveling the upper branch once the gates were installed but said that they accessed the lakes by Forest Service trails instead. Charles Fudge, a district ranger for the Deer Lodge Ranger District, testified to using the upper branch to inspect dams on the lakes until 1976. Thomas Radonich, a longtime area resident, testified to traveling the upper branch to access the lakes in the 1940s and 1950s.

¶42 Connie Ternes-Daniels, a County Commissioner from 1987 to 1990, testified that she traveled the upper branch in the late 1960s and did not travel up there again until the gates' removal. She further testified that she knew about the gates on the lower branch during her tenure as Commissioner. John Thomson, the County Road Department foreman from 1971 to 1989,

testified that he knew about the locked gates but did not take any action to open them. He testified that the issue of the locked gates was "turned over" to the County Commission and that, as far as he knew, no action was taken. He further testified that the gates remained locked when he retired in 1989. Larry Sturm, the County Road Shop supervisor from 1993 to 2014, testified that he knew of the locked gates on Modesty Creek Road but did not take any action to remove them until the County reaffirmed the road as a county road in 2012. In contrast, he testified that he cut a lock off of a cable that McGee put across Spring Gulch Road—an undisputed county road—"as soon as we found out about it."[9] He further testified that he promptly cut locks off of a gate installed by DeMers on Spring Gulch Road when he was "made aware of it."

¶43 Modesty Creek Road's lower branch provides access to the upper branch. Therefore, the installation and locking of the green and orange gates on the lower branch, plus the culvert's removal, restricted public access to the upper branch. Such acts by the various landowners evidence a "distinct and positive assertion of a hostile right" to the public's claimed prescriptive easement on the upper branch. *Boone & Crockett*, 259 Mont. at 290, 856 P.2d at 531. Additionally, the testimony of the various witnesses demonstrates that the County and the public "acquiesce[ed to] locked gates

[9] Sturm testified that McGee put the cable across the road in the springtime when the road was "very, very muddy" in order to keep people from tearing up the road. Sturm removed the cable but did allow McGee to put up signs stating, "road closed due to muddy conditions or something."

being place[d] thereon for approximately 30 years." *Dome Mt. Ranch, LLC*, ¶ 25.

¶44 Like in *Boone & Crockett*, the public had to get permission to access the upper branch once the landowners installed the gates. At trial, Cal Christian testified that as far as he was aware, the public never came through the green gate without his permission during his ownership of the property. Ilija Letica testified that during his ownership the public did not travel either branch of Modesty Creek Road and that the Forest Service asked for permission to travel the upper branch onto the National Forest. Other witness testimony evidences permissive use of the upper branch by the public following the gates' installation in the 1980s. Dave Beck, whose family had water rights in a lake accessed by the upper branch, testified that his family had a key to the gates in the 1980s to access their water rights. Dan Kelley, who leased the Launderville parcel for grazing, testified that he had a key to the gates and had permission to go through the gates. Gerald Wendt, a former County employee, testified that he got permission from Cal Christian to access the area for trapping and had keys to the gates. Leo Nicholes, a longtime area resident who also had water rights in the lakes, testified that he had a key to the gates in order to access his water rights by way of the upper branch.[10] The record demonstrates that for the most part, "the public cooperated and adhered" to the

[10] Many water rights holders testified that they received permission to access their water rights via the upper branch. Ilija Letica testified that water rights holders would continue to have permissive access to the lakes via the upper branch.

permissive use policy following the gates' installation. *Boone & Crockett*, 259 Mont. at 290, 856 P.2d at 532. The public's asking for permission to use the upper branch and not regularly traveling beyond the locked gates to the upper branch without landowner permission is "inconsistent with the claim of a public prescriptive easement" over the upper branch. *Boone & Crockett*, 259 Mont. at 291, 856 P.2d at 532.

¶45 Although Launderville testified that people sometimes cut fences in order to access the upper branch, occasional public use is not sufficient to conclude that reverse adverse possession did not extinguish the claimed prescriptive easement. *Dome Mt. Ranch*, ¶¶ 24-25. Moreover, on cross-examination, Launderville testified that when he worked for Letica he made an effort to prevent people from getting around the gates and accessing the upper branch. He further testified that a few specific individuals—DeMers and Rich Bowbent—were the principal offenders and that they traveled a route different from the upper branch after cutting the fence in order to access their pasture land on a neighboring section.

¶46 The District Court is correct that a person may not obtain title to a statutorily created road by adverse possession. But Letica's and McGee's claim to Modesty Creek Road's lower branch—which now has been determined to be a statutory road—does not determine as a matter of law the status of the upper branch—which is not a statutory road—on the basis of the record in this case. The District Court premised its conclusion that the prescriptive easement "was not

extinguished by reverse adverse possession" on an erroneous determination that "access to the road was never restricted in an adverse way to the public for the statutory period." Installing locked gates that blocked access to the upper branch well in excess of the statutory period, removing the culvert at the orange gate, and requiring permission to access the road beyond the gates all are acts that are incompatible with the nature or exercise of the public's claimed prescriptive easement over the upper branch. Although it ultimately turns out that the gates on the lower branch were blocking a public road, the record demonstrates that for thirty years everyone acquiesced in the understanding that these were private roads, and the owners of the subsequently claimed public prescriptive easement—the public—assented to these assertions of hostile rights by the landowners.

¶47 By declaring the upper branch a county road for the first time in 2012, the County recognized that the landowners had asserted hostile rights for the previous thirty years. In this case, such a declaration "30 years after the . . . gates . . . were in place" is irreconcilable with the County's public prescriptive easement claim. *Dome Mt. Ranch, LLC*, ¶ 25 (noting that the public did not request, and the county did not declare, that the road be opened as a public road until approximately thirty years after gates and "no trespassing" signs were in place). The evidence illustrates that, given the historic understanding of the road's ownership since the Anaconda Company days, this case is not about a landowner intentionally and illegally blocking

a public road and then trying to gain reverse adverse possession.[11] Accordingly, it is not dispositive that the gates were installed on the lower branch. The public policy concern to which the District Court and the Dissent refer is not "at stake in the present case," Dissent ¶ 55, because the Modesty Creek gates were "known to[] and acquiesced in by" the County. *Boone & Crockett*, 259 Mont. at 283, 856 P.2d at 527.

¶48 Moreover, Montana statute provides that a prescriptive easement may be extinguished "by disuse of the servitude by the owner of the servitude for the period prescribed for acquiring title by enjoyment." Section 70-17-111(1)(d), MCA. The period prescribed for acquiring title by enjoyment is five years. Section 70-19-404, MCA. The record establishes that the general public essentially abandoned the upper branch for thirty years by not using it.

¶49 We conclude that the District Court erred in its application of the law regarding reverse adverse possession to the facts existing on the upper branch. The court's conclusions of law therefore are incorrect. Accordingly, we reverse the District Court as to Modesty Creek Road's upper branch.

---

[11] Nor is this case about blocking access to public land. It is undisputed that the same National Forest land accessible from the upper branch is also accessed by a public road leading to a developed campground nearby.

CONCLUSION

¶50 We affirm the District Court's conclusion that Modesty Creek Road's lower branch is a statutorily created public road. We also affirm the court's findings as to the lower branch's terminus. We reverse its conclusion that the public prescriptive easement it found on Modesty Creek Road's upper branch was not extinguished by reverse adverse possession. The case is remanded for entry of an amended judgment consistent with this Opinion and for further consideration of Letica's outstanding bifurcated claim.

/S/ BETH BAKER

We Concur:

/S/ LAURIE McKINNON
/S/ PATRICIA COTTER
/S/ JAMES JEREMIAH SHEA
/S/ JIM RICE

Chief Justice McGrath, dissenting.

¶51 I concur in the majority's resolution of Issue 1, that the lower branch of Modesty Creek Road was established as a county road by Anaconda-Deer Lodge County (or its predecessor) according to the requirements of Montana Law.

¶52 I dissent from the majority's resolution of Issue 2 and would uphold the District Court's determination that the public holds a prescriptive easement to travel the upper branch of Modesty Creek Road.

¶53 The District Court determined that there was "compelling evidence" that the lower branch of Modesty Creek Road was a public road, established by Anaconda-Deer Lodge County in 1889. Because it was a county road, the landowners were not able to establish prescriptive rights over the road as a matter of law. *McCauley v. Thompson-Nistler*, 2000 MT 215, ¶ 33, 301 Mont. 81, 10 P.3d 794. The District Court further determined that there was no evidence that the landowners in this case "took any legal steps before locking the orange gate and blocking access" to the lower branch road and had no legal right to do so.

¶54 Under these circumstances the District Court determined that it would violate public policy to allow Letica to extinguish a public prescriptive easement over the upper branch road by illegally closing the lower branch road. As the District Court stated:

> Thus, it would be improper for this Court to adopt a policy that allows an individual to illegally block a public statutorily created road (the lower branch road) and claim that the public prescriptive easement (over the upper branch road that branches off the lower branch road nearly a mile down from the orange gate) is extinguished by reverse adverse possession. Such a holding would be against public policy.

¶55 The majority disagrees with the District Court, citing *Boone and Crockett* and *Dome Mountain Ranch*. Those cases hold that a public prescriptive right to travel a road (as opposed to a road established and

owned by a public entity) may be taken by reverse adverse possession. However, neither case considers the public policy issue at stake in the present case.

¶56 The majority concludes that "the status of the lower branch is not relevant to the analysis of whether reverse adverse possession extinguished the public prescriptive easement on the upper branch. . . ." Opinion, ¶ 36. To the contrary, but for the illegal gates installed across the county road on the lower branch, there was no barrier or impediment to public use of its prescriptive easement on the upper branch road. This case would not exist but for the unlawful closure of the lower branch road.

¶57 I would uphold the District Court and conclude that a person may not illegally block a road created by action of a public governmental entity, and then use that blockage as evidence to support a claim of reverse adverse possession that extinguishes the public's prescriptive right to any other property or interest in property.

¶58 I dissent.

/S/ MIKE McGRATH

Justice Michael E Wheat joins the Dissent of Chief Justice Mike McGrath.

/S/ MICHAEL E WHEAT

APPENDIX D

IN THE SUPREME COURT OF THE
STATE OF MONTANA

DA 18-0249

LETICA LAND COMPANY, LLC, a Michigan limited liability company, and DON McGEE, an individual,

Plaintiffs and Appellants,

v.

ANACONDA-DEER LODGE COUNTY, a political subdivision of the State of Montana,

Defendant and Appellee,

ORDER

(Filed Mar. 12, 2019)

On February 22, 2019, Appellant Letica Land Company, LLC, filed a petition for rehearing in the above-entitled matter citing to M. R. App. P. 20(1)(a)(ii), (iii). Appellee objected to the petition and filed a response.

This Court generally will grant rehearing on appeal only if our initial decision overlooked some fact material to the decision, overlooked a question presented that would have proven decisive to the case, or if the decision conflicts with a statute or controlling

decision not addressed by the Court. M. R. App. P. 20(1)(a).

Upon review, we note that the Court did not overlook a question presented by counsel that would have proven decisive to the case nor does the decision conflict with a statute or controlling decision not addressed.

Therefore, having considered the petition and response from Appellee, IT IS ORDERED that the petition for rehearing is DENIED.

The Clerk is directed to provide a copy of this Order to all counsel of record.

DATED this 12th day of March, 2019.

/s/ Mike McGrath
Chief Justice

/s/ Ingrid Gustafson

/s/ Laurie McKinnon

/s/ Dirk M. Sandefur

/s/ Jim Rice
Justices

APPENDIX E

Martin S. King, Esq.
Colleen M. Dowdall, Esq.
WORDEN THANE P.C.
111 N. Higgins Ave., Ste. 600
P.O. Box 4747
Missoula, Montana 59806
Telephone: (406) 721-3400
Facsimile: (406) 721-6985
E-mail: mking@wordenthane.com
cdowdall@wordenthane.com

Mark L. Stermitz, Esq.
CROWLEY FLECK PLLP
305 S. 4th Street East, Suite 100
P.O. Box 7099
Missoula, MT 59807-7099
Telephone: (406) 523-3600
Fax: (406) 523-3636

Attorneys for Plaintiffs

MONTANA THIRD JUDICIAL DISTRICT COURT,
ANACONDA-DEER LODGE COUNTY

LETICA LAND COMPANY, LLC, a Michigan limited liability company, and DON McGEE, an individual, Plaintiffs, -vs-	Dept. No. Cause No. DV-12-24 **SECOND AMENDED COMPLAINT**

ANACONDA-DEER LODGE COUNTY, a political subdivision of the State of Montana, Defendants.	

For their claim against Defendant, Plaintiffs state and allege as follows:

NATURE OF THE CLAIMS

1. On or about March 6, 2012, the Anaconda Deer Lodge Board of County Commissioners ("Defendants" or "County") adopted a resolution claiming that one or more county road rights-of-way run into and/or through Plaintiffs' property and into United States Forest Service land to the north and west of Plaintiffs' property. Despite the fact that for more than thirty years, without interruption, locks had been placed by Plaintiffs and their predecessors on gates bordering their property, on or about March 7, 2012 the Defendants organized a public display of cutting the locks on gates bordering Plaintiffs' property, and invited the public to enter Plaintiffs' property unobstructed. Thereafter, on or about May 5, 2012, the County sent heavy equipment onto Plaintiffs' property and used it to remove obstacles and "improve" an alleged county road right-of-way. The County intentionally chose not to inform Plaintiffs before cutting the locks on their gates, entering their property, and using heavy equipment to change the landscape on Letica Land Company property.

2. Plaintiffs seek a declaratory judgment pursuant to § 27-8-202, Mont. Code Ann., declaring that (a) no county road rights-of-way run into and/or through Plaintiffs' property, (b) that the County does not have a prescriptive easement over Plaintiffs' property or if any County road rights-of-way were ever established into and/or through Plaintiffs' property, then those rights-of-way have been eliminated by reverse prescription; (c) injunctive relief enjoining the County and public from illegally travelling over Plaintiffs' properties; and (d) damages caused by the actions of the Defendants, including costs and attorney fees, who disregarded the law and the constitutional rights of the Plaintiffs, by invading, taking and using the Plaintiffs' Property without due process and without just compensation.

PARTIES

3. Letica Land Company, LLC ("Letica") is a Michigan limited liability company that is in good standing under the laws of the State of Montana. Letica owns real property located in Sections 21, 22, 23, and 24, T6N, R11W in Anaconda-Deer Lodge County in addition to owning adjoining land located in the south halves of Sections 13, 14, and 15, T6N, R11W in Powell County.

4. Don McGee ("McGee") is an individual who owns property in Anaconda Deer Lodge County that is situated immediately to the east of Letica property in

Section 24, T6N, R11W, and in portions of Section 19, T6N, R10W.

5. Anaconda-Deer Lodge County ("County" or "Defendant") is a political subdivision of the State of Montana.

VENUE

6. Venue is proper in Anaconda Deer Lodge County because the Defendants' actions occurred here, and the Plaintiffs' own property here.

FACTUAL BACKGROUND

7. Letica Land Company acquired its property, known as the Big Horn Ranch, in 1989. Don McGee acquired his property in 1997. Until January 2012, during the time Plaintiffs have owned their property, the County never indicated to Plaintiffs that there is a county road or roads, located on, or running through their property. The County never asserted the existence of a county road right of way to Calvin Christian, who preceded the ownership of the Letica Land property. No title report associated with the Plaintiffs' properties has shown a county road across their land.

8. The County alleges that a county road right of way was created by petition in 1889. The County does not have a copy of the petition or most of the other documents that were legally necessary in 1889 to create a county road. The road claimed by the County leads only to Dry Gulch, providing no access to any public

land. The evidence is insufficient to establish that a county road was created in 1889.

9. The County also claimed that, based on the minutes of a 1902 Commission meeting, and a petition by David Scott ("Scott Petition") a county road was created across Plaintiffs' property, running across and beyond their property to U.S. Forest Service property. This is referred to as the "upper branch road" or "Upper Branch of Modesty Creek Road." Prior to August 19, 2013, the County did not have a copy of a road petition, or the other documents that were legally necessary in 1902 to create a county road. Minutes of the 1902 county commission, upon which the County relied for its right of way claim when it opened the road in March, 2012, contain neither a beginning point nor an end point of the alleged county road. Overall, the evidence was insufficient to establish that a county road was created in 1902, let alone that its location was across Plaintiffs' property.

10. On August 19, 2013, after this litigation had been ongoing for 16 months, the County produced for the first time the rest of the Scott road records, which had been in the County's possession since 1902, disclosing for the first time that the Scott Petition did not affect the Plaintiffs property and that consequently the County did not have a legal right to use the "upper branch" road, contrary to the County's earlier claims and representations.

11. The County and the public invaded and used the Plaintiffs' private property without legal authority

and without compensation from the date the locks were removed, March 7, 2012. They continue to do so as of the date of Plaintiffs' Second Amended Complaint and despite the discovery of the new records, have refused to prohibit the public from using Letica's private land.

12. The County also now claims that there is a public prescriptive right to the road or roads in question. There is insufficient evidence to establish a prescriptive easement for various reasons, including but not limited to: (a) there is no evidence of adverse use for the statutory period; (b) prescriptive rights cannot be based exclusively on recreational use; (c) Montana law prohibited the creation of prescriptive easements from 1895 to 1913; (d) the property across which the County claims a public road easement was under the ownership of the U.S. Forest Service from 1907 until 1937 and a prescriptive easement could not have been established during that time period, and (e) there has been no public use of any roads on Plaintiffs' property for at least 30 years because the gates have been locked, so any prescriptive easement has been extinguished by reverse prescription.

13. Further, the County has failed to describe a definite prescriptive period, and has no evidence of continuous and uninterrupted use, in an adverse manner, by members of the public, over a fixed and definite course, for the statutory period. Proof of these matters by clear and convincing evidence is required in Montana to establish a right of way by prescription.

14. Ignoring glaring omissions in the facts necessary to establish a county road either by petition or by prescription, the County engaged in a rudimentary and result-oriented investigation at the behest of a vocal group of "sportsmen" clamoring to open a road through Plaintiffs' property. In their rush to conclude that a county road exists, the County either failed to discover, or knew and intentionally disregarded, the evidence that there was NOT a county road over the "upper branch" road.

15. Relying on (variously) thin, vague, and irrelevant evidence – or none at all – the County has described the "road" in question (which the County calls the "Modesty Creek Road") thusly:

> A rough description of the lower path of the Modesty Creek Road would be beginning at the SE corner of Section 22, T6N, R10W, running west through sections 21, 20, 19 and then continuing west into T6N, R11W through sections 24, 23, and into section 22 as far as the existing road goes, as guided by the original 1926 survey. The upper path of the Modesty Creek Road is roughly described as branching off in a northwesterly direction from the lower Modesty Creek Road in section 23, T6N, R11W through section 23 and the northeast corner of section 22 and then into section 15 until the road reaches the forest service boundary.

16. The County could only provide a "rough" description of the alleged county road because it could not find an official legal description anywhere for the

road they wanted. The foregoing legal description was created from whole cloth by the County's legal counsel, based merely on counsel's inference from Forest Service maps and other information that was unconnected with the alleged creation of any county road, or with whether there is a discernible road in existence on the Plaintiffs' property.

17. In fact, the only possibilities for an alleged county road on Plaintiffs' property, based on the "rough" description claimed by the County, are primitive, barely discernible, unmarked, un-surveyed tracks or trails. There is no way to tell on the ground or from descriptions in the record where any purported county road exists.

18. With the August 19, 2013 disclosure of the county road records that show the location of the Scott Petition on Scott's property further to the south, the County has no basis for alleging a road created by petition for the "upper branch" road that forks to the north. The 1902 record of the Scott Petition has nothing to do with the road claimed by the County. Despite this fact the County still allows the public to use the road and refuses to allow the Plaintiffs' [sic] to gate the road.

19. The alleged county roads have not been maintained by the County in at least the last 30 years, and there is no evidence they were ever maintained by the County where they cross Plaintiffs' property.

20. The County does not know the width of any alleged county road because it has never been the subject of official action by the County.

21. On March 6, 2012, the County held a hastily called meeting, to hear and adopt the report of its attorney – which relied in part on information provided by representatives of the "sportsmen" – facilitating Defendant's desire to open public access across Plaintiffs' property. To avoid hearing evidence contradicting its views, the County rejected Letica Land Company's request to postpone the meeting to give it the opportunity to prepare and be present.

22. The next day, Defendant notified news media, "sportsmen," and other members of the public (but not Plaintiffs) to observe Defendant cutting the lock on the gate at Plaintiff Don McGee's property boundary.

23. In the process, Defendant violated the provisions of Mont. Code Ann. § 7-14-2135 (2011), requiring the County to provide notice to a landowner to remove an encroachment, and that the County may only take immediate action to remove an encroachment pursuant to Mont. Code Ann. § 7-14-2134 (2011) if the encroachment "obstructs and prevents the use of the highway for vehicles." The Plaintiffs' gate did not obstruct the use of a highway for vehicles because the County has not identified the location of the road to any degree of certainty and the road has not been open for use by vehicles used by the public in over 30 years.

24. Defendant's actions were motivated at least in part by political aspirations.

COUNT I – DECLARATORY RELIEF

25. Plaintiffs restate and re-allege paragraphs 1-24 as if fully stated herein.

26. The basis for the County's position is set forth in a March 1, 2012 legal opinion of outside counsel (Legal Opinion). The Legal Opinion states: "Actual county records regarding the Modesty Creek Road are limited to an 1889 map and two separate entries in the Commission minutes. Despite diligent efforts, to date no other County documents have been located." Nevertheless, the Legal Opinion ultimately concluded that the so-called Modesty Creek Road runs through Plaintiffs' property, and forks in two directions, one ending at Dry Gulch and the other extending through Powell County onto U.S. Forest Service land.

27. Despite the admitted lack of any petition for the creation of a county road and other obviously missing documents or defective procedures, the Legal Opinion concludes that the County created a public road (in either 1889 or 1902) based on the "curative statute," section 32-103, R.C.M.1947 (repealed 1959):

> All highways, roads, . . . laid out or erected by the public, or now traveled or used by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such by the partition of real property, are public highways.

The Legal Opinion then cites Montana case law construing the "curative statute" and opines that it cures any and all defects in the County's evidence regarding

the establishment of a public road right of way across Plaintiffs' property.

28. The County erroneously relies on the "curative statute," because it does not "cure" a defect in a road proceeding if the County has no jurisdiction in the first place, and if the evidence is insufficient to show the creation and location of the road. The legal standard is whether the record as a whole establishes that the statutory petition process created the road in question. The County has never produced an adequate record showing that it created a legally established road consistent with the County Counsel's legal description.

29. With the disclosure of the remaining records of the 1902 Scott Petition, the location of the road established by the Scott Petition is clearly several miles to the south of where the County claimed it was located. It does not cross Plaintiffs' land. The "upper branch road" is not a County road.

30. The public, including the County, has no legal right to enter and cross Plaintiffs' property in the area described by the County as the "upper branch" road.

31. The County cannot prove that a public road was created by prescription across Plaintiffs' property because of the ownership, legal or evidentiary hurdles described in paragraphs 12 and 13 above, among other reasons.

32. A genuine dispute exists between Plaintiffs and the County on this subject, and the Court's intervention and assistance is needed to resolve it. In

addition to declaring there is not a County road crossing over Plaintiffs' property at Modesty Creek, the Court should award to the Plaintiffs and against the Defendants the Plaintiffs' reasonable costs and attorneys fees.

COUNT II – INJUNCTIVE RELIEF

33. Plaintiffs restate and re-allege paragraphs 1-32 as if fully stated herein.

34. The location, route, and width of the alleged county road is not known by the County or anyone else. Regarding the "upper branch" road, County records discovered on August 15, 2013 demonstrate that it is not a county road. Nevertheless, the County has already taken physical action to remove any obstacles to the public, including but not necessarily limited to cutting locked gates, using heavy equipment to move an earth berm blocking the path the County chose, cutting limbs or trees, and filling and grading a wide spot for parking or turning around. Furthermore, the County has vocally encouraged the public to enter Plaintiffs' property on what the County calls "the Modesty Creek Road" and "Upper Modesty Creek Road."

35. The County's conduct, the "improvements" to the road which include cutting trees that belong to the Plaintiffs, and travel over Plaintiffs' property by the public has caused, and continues to cause, irreparable damage to Plaintiffs.

36. The real and threatened injury to Plaintiffs, invasion and use of their property without legal right or just compensation, destruction of their peaceful ownership of the property, destruction of their land, and the complete disregard for their legal rights generally, outweighs the damage to the County, if any, caused by issuing a preliminary injunction and later a permanent injunction. Jeep trails, tracks and logging roads on Plaintiffs' property have already been rutted, modified, and/or worked on by the County, causing permanent and irreparable damage.

37. Pursuant to Mont. Code Ann. §§ 27-19-201(1),(2) and (3), preliminary injunctive relief is appropriate in these circumstances.

38. The County cannot meet its burden of showing that a county road was created across Plaintiffs' property, and, based on the evidence discovered on August 15, 2013 certainly not over the "upper branch road," the County should be permanently enjoined from taking further action based on its mistaken belief or assumption that a county road exists on Plaintiffs' property. The County should be prohibited from removing locks the Plaintiffs may place on their gates.

COUNT III – SUBSTANTIVE DUE PROCESS

39. Plaintiffs restate and re-allege paragraphs 1-38 as if fully stated herein.

40. Article II, §17 of the Montana Constitution guarantees that "no person shall be deprived of life, liberty, or property without due process of law."

41. This constitutional due process right imposes on the Defendant County standards both of fairness in government action as well as substantive requirements.

42. The essence of substantive due process is that it operates to prevent the government from using its power to take unreasonable, arbitrary, or capricious action against a person.

43. Courts have held that the government violates a person's right to substantive due process when the government's conduct fails to comply with the notion of fundamental fairness, and shocks the universal sense of justice.

44. Even if the County has a legitimate government interest in managing or creating public roads in the County, its conduct exceeds constitutional boundaries to pursue that objective. The County has taken unreasonable, arbitrary, and capricious action against Plaintiffs and their constitutional rights, to a degree that reasonable persons would find shocking and fundamentally unfair.

45. Plaintiffs have suffered actual damage to their property and due process rights through the County's actions.

COUNT IV – VIOLATION OF CIVIL RIGHTS

46. Plaintiffs restate and re-allege paragraphs 1-45 as if fully stated herein. Additional allegations or other factual contentions in this Count are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

47. Plaintiffs bring this Count pursuant to 42 U.S.C. § 1983, to redress Defendant's violations of Plaintiffs' rights secured by the Montana Constitution and the United States Constitution.

48. Anaconda Deer Lodge County is a government entity created and authorized under the laws of the State of Montana. It is authorized by law to take official action through a County Commission.

49. Plaintiffs possess a constitutionally protected right to use and enjoy their property free from unreasonable governmental interference and to receive adequate due process of law based on Mont. Const. Art. II, §§ 3 and 17, and the Fourteenth and Fifth Amendments to the U.S. Constitution.

50. The conduct of Defendant described herein, acting under color of law and without lawful justification, intentionally, maliciously, and/or with a deliberate indifference to or a reckless disregard for the consequences of their acts, violated Plaintiffs' due process rights.

51. The Defendant has unapologetically publicized its acts (among others) of cutting the locks on Plaintiffs' gates and not giving Plaintiffs notice

beforehand when, as it turns out, the County did not have legal authority to take any such action. The Defendant County organized a public media event around forcing their way onto Plaintiffs' land. The County maintains a policy of not seeking judicial authority before taking such action and have, on at least one other occasion, cut a locked gate without notice to the landowner and without seeking judicial approval. The County has flaunted the Court's authority by sending heavy equipment onto Plaintiffs' property while a motion for an injunction was pending in District Court, without notice to anyone and when, as it turns out, the County did not and does not have a County Road over the "upper branch" road. All of these actions were taken pursuant to County policy.

52. The conduct of Defendant caused actual damage to Plaintiffs in the form of (among other things) damage to their real property, damage to fixtures, loss of the free and peaceful enjoyment of their property, and violation of their civil liberties, justifying an award of monetary and punitive damages and costs and attorney fees to the extent allowed by law.

COUNT V – UNCONSITUTIONAL [sic] **TAKING**

53. Plaintiffs restate and re-allege paragraphs 1-52 as if fully stated herein. Additional allegations or other factual contentions in this Count are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

54. The Takings Clause of the Fifth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides that private property shall not "be taken for public use, without just compensation." U.S. Const. Amend. V.

55. The U.S. Supreme Court has held, " . . . that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

56. The Montana Constitution at Article II, Section 29 provides that private property shall not be taken or damaged for public use without just compensation.

57. The actions of the County to open Plaintiffs' land for public use by allowing the public to travel through and across their land, particularly the "upper branch road," without just compensation and without legal authority, is an illegal governmental taking of private property without legal authority, and a violation of the Plaintiffs constitutionally protected rights under the Montana and United States Constitutions. Plaintiffs have suffered damages including but not limited to damages to flora and fauna, remediation costs, diminution in property value, the free use of their land by the public, damage to the land caused by

the unfettered intrusion of their land by members of the public, and the cost and expenses of litigation including attorney fees and other damages to be proven at trial. Plaintiffs are entitled to damages from the County for the County's unconstitutional and illegal taking of Plaintiffs' property without just compensation.

COUNT VI – SPOLIATION OF EVIDENCE

58. Plaintiffs restate and re-allege paragraphs 1-57 as if fully stated herein.

59. While Plaintiffs' motion for a preliminary injunction was under advisement by the District Court, the County sent heavy equipment onto the Big Horn Ranch to change the path or trail the Defendant's claim is a public right of way. The County graded, moved dirt, widened and filled an area to create a parking or turnaround area, cut trees, removed branches and generally attempted to improve or did in fact improve a long-unused, impassable path.

60. When it took the actions described above, the County not only knew there were legal proceedings pending against it, but it also knew the Court had taken under advisement a motion to enjoin the County from engaging in exactly that conduct.

61. In the process of changing the landscape and improving or creating a road, the County destroyed evidence of the pre-existing condition of the land, depriving Plaintiffs of the ability to present such evidence in

support of their case. That evidence will never be recovered, to the prejudice of Plaintiffs. Considered in the light of all the rest of the County's heavy-handed and belligerent actions, the County's destruction of evidence was undertaken in bad faith.

62. Sanctions should be imposed against the County under these circumstances to: (a) deter other parties from engaging in the destruction of evidence; (b) place the risk on the County of an erroneous judgment about the evidence of the condition of any roads on Plaintiffs' land, because the County wrongfully created that risk; and (c) restore Plaintiffs to the same position they would have been in absence of the County's wrongful destruction of evidence. Such sanctions should include, but not necessarily be limited to, excluding any testimony or evidence by the County of the condition of the so-called Modesty Creek Road across any portion of Plaintiffs' property.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray for a Judgment:

1. For a judgment and declaration that there are not County roads over or across the Plaintiffs' property (including specifically the "upper branch") or, alternatively, that any County road under the 1889 petition ends at Dry Gulch;

2. For a judgment and declaration that the County and public do not have a prescriptive easement or right of way over any portion of Plaintiffs' property;

3. For a preliminary injunction, and later permanent injunction, enjoining the County and the public from entering any portion of Plaintiffs' property (including specifically the "upper branch" road), destroying or tampering with any of Plaintiffs' gates, fences, locks or other property, or communicating to the public that it has the right to enter Plaintiffs' property by way of a county road;

4. For a judgment against the County for monetary damages in such amount as will adequately compensate Plaintiffs for the County's illegal violation of the Plaintiffs' rights under the Montana and United States Constitutions including costs and attorney fees as a litigation expense.

5. For appropriate sanctions against the County for the wrongful destruction of evidence;

6. For costs and attorney fees to the full extent permitted by law; and

7. For such other relief as the Court as may deem just and proper or as allowed by law or in equity.

DATED this 18th of September, 2013.

WORDEN THANE P.C.

By /s/ Martin S. King
Martin S. King
Attorneys for Plaintiffs

[Certificate of Service Omitted]