DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
FOR MONTANA

Billings, Montana
October 29, 1948

Mr. C. G. Kegel, Deputy
U. S. District Court
Federal Building
Great Falls, Montana

Re: U. S. v. Paul L. Van Cleve, et al.

Dear Keg:

Enclosed please find original complaint and two copies thereof. Please file the original complaint and issue summons, and advise us of the date of filing and the number assigned.

You will also find enclosed an original and two copies of a notice of application for preliminary injunction which should be delivered to the Marshal, asking the Marshal to serve the original summons and the original notice upon each of the defendants by delivering to them, and each of them, a copy of the summons, complaint and order. The post office address of the defendants is Melville, Montana, but I believe that they are still residing upon the Van Cleve ranch situated in the Big Timber Canyon some thirty miles north of Big Timber, Montana.

Service upon the defendant corporation may be made by service upon Helen P. Van Cleve, who is the major stockholder of said corporation and the wife of the defendant Paul L. Van Cleve, Jr., or service may be made upon the defendant corporation by serving Paul L. Van Cleve, Jr., who is the active business manager of the defendant corporation.

This is an action to obtain a declaratory judgment to establish the existence of a public road and trail through and upon the lands owned by the defendants.

It is probable that The Great Falls Tribune would be interested in the filing of this complaint for the reason that the defendant is the president of the Dude Ranchers Association, and for the further reason that all Rod and Gun Clubs in Montana are particularly interested in the filing of this action because of the inability of vacationers and sportsmen to use the road and highway as a means of access to public recreational areas constructed by the Forest Service and as a means of access to fishing and hunting areas in the Crazy Mountains north of Big Timber. We are also advised that there are other land owners in Montana who are contemplating the same action as this defendant if he is successful in appropriating the road and trail.

This office is indebted to the cooperative efforts of Senator James E. Murray and John W. Bonner in furnishing us with the information and assistance necessary in order to properly present this matter to the court.

Sincerely yours,

Franklin A. Lamb

FRANKLIN A. LAMB
Assistant U. S. Attorney

FAL:nm
Enclosures 6

IN THE DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

- - - - - - -

FILED

OCT 30 1948

H. H. WALKER, Clerk

BY C B Kegel Deputy Clerk

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAUL L. VAN CLEVE, JR.; and THE VAN CLEVE COMPANY, INC., a Corporation.,

Defendants.

COMPLAINT

No. 1098

- - - - - - -

COMES NOW the United States of America, by and through John B. Tansil, as United States Attorney, and Franklin A. Lamb, as Assistant United States Attorney, in and for the District of Montana, and for its cause of action, complains and alleges:

I

This is an action brought by the United States of America pursuant to the provisions of Rule 57, Federal Rules of Civil Procedure and Title 28, Section 2201, U.S.C.A., for and on behalf of the general public of the United States and officers and employees of the United States of America because there is an actual controversy now existing in respect of which the plaintiff needs a declaration of rights by this Court.

II

That The Van Cleve Company, Inc., is a corporation duly organized and authorized to do business under the laws of the State of Montana, with its principal place of business at Melville, Montana.

III

That for more than fifty (50) years there has been and now is a public road or highway and trail known as the Big Timber Canyon or Big Timber Creek road and trail extending across the eastern boundary of the Gallatin National Forest on the east line of the

Northeast Quarter of the Northeast Quarter (NE¼NE¼) of Section Twelve (12), Township Three North (3N) Range Twelve East (12E) and continuing in a westerly direction across the North line of the Northeast Quarter of the Northeast Quarter (NE¼NE¼) of said Section Twelve (12) and extending through and across Sections One (1), Two (2), Three (3), Four (4), Five (5) and Six (6) all in Township Three North (3N), Range Twelve East (12E) in Sweet Grass County, Montana, and crossing the Park and Sweet Grass County line and then extending in a north and westerly general direction to a point near the center of Township Four North (4N), Range Eleven East (11E) in Park County, Montana, where it joins the Sweet Grass Creek Trail.

IV

That the defendants own lands in Sections One (1), Two (2), Three (3) and Five (5), in Township Three North (3N), Range Twelve East (12E) in Sweet Grass County, Montana, over which said public road or highway and trail was, at all times herein mentioned and now is, situated, all within the District of Montana and within the jurisdiction of this Court.

V

That since the year 1940, the defendants have attempted to interfere and have interferred with the usage of said road or highway and trail by the officers and employees of the Forest Service of the Department of Agriculture, a Department of the United States of America, in the performance of their official duties as such officers and employees in the administration and protection of the Gallatin National Forest.

VI

That since the year 1940, the defendants have attempted to interfere, restrain, bar and prohibit and have interferred, restrained, barred and prohibited members of the general public from the free and unimpeded usage of said public road or highway and trail as a means of access to recreational areas and camp ground parks and facilities provided by the Forest Service of the United

States and the general usage and enjoyment of that portion of the Gallatin National Forest.

VII

That the defendants have maintained and do now maintain locked gates across said public road or highway and trail and have maintained and do now maintain signs of various kinds and nature claiming and identifying said public road or highway and trail as a private road and prohibiting any trespassing on the lands to the west of said signs and gates; That the defendants have refused and do now refuse to premit members of the general public to pass through said locked gates along said public road or highway and trail and have threatened and continue to threaten to restrain and interfere with the free and unimpeded usage thereof by officers and employees of the Forest Service of the United States.

VIII

That by reason of the conduct and actions of the defendants, an actual controversy exists between the defendants and members of the general public of the United States and officers and employees of the Forest Service, a Department of the United States of America, concerning the free and unimpeded right of usage of said road, highway and trail and concerning the status and character of said public road, highway and trail.

WHEREFORE, plaintiff prays:

1. That an injunction be issued out of this Court directed to the defendants and their employees, attorneys, agents and those acting in concert with them or any of them, restraining and enjoining each of them during the pendency of this action from maintaining gates, locks or chains interferring or tending to interfere or impede the free usage of the road, highway or trail or the gates situated thereon by members of the general public or officers or employees of the Forest Service of the United States of

America, and from maintaining signs of any character importing to convey the meaning or impression that said road is a private road or that travel thereon or usage thereof is in any manner prohibited or restricted.

2. That judgment be entered herein declaring said road or highway and trail to be a public road, highway and trail and as such is a right-of-way upon, over and across the lands owned or controlled by the defendants, and that the defendants, upon the final determination of this action, be permanently restrained and enjoined from doing any act or thing tending to interfere in any manner with the free and unimpeded usage of said road, highway or trail by members of the general public or officers and employees of the Government of the United States of America.

3. That plaintiff have judgment for its costs of suit and for such other and further relief as may be just and proper.

JOHN B. TANSIL
Attorney of the United States, in and for the District of Montana.

Franklin A. Lamb
Assistant Attorney of the United States, in and for the District of Montana.

SUMMONS IN A CIVIL ACTION — D. C. Form No. 15 Rev.

District Court of the United States

FOR THE

DISTRICT OF Montana.

Billings DIVISION

CIVIL ACTION FILE No. 1098

FILED
NOV 3 1948
H. H. WALKER, Clerk
BY C.G. Kegel Deputy Clerk

United States of America,

Plaintiff

v.

Paul L. Van Cleve, Jr.; and
The Van Cleve Company, Inc.,
a corporation,

Defendants.

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon Mr. John B. Tansil, United States District Attorney, or Franklin A. Lamb, Assistant United States District Attorney,

plaintiff's attorneys, whose address is Federal Building, Billings, Montana,

an answer to the complaint which is herewith served upon you, within TWENTY days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

H. H. Walker
Clerk of Court.

By C.G. Kegel
Deputy Clerk.

Date: October 30, 1948.

[Seal of Court]

NOTE.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

No. ____

District Court of the United States

DISTRICT OF ____

v.

SUMMONS IN CIVIL ACTION

Returnable not later than ____ days after service.

Attorney for Plaintiff.

1350-Mont 25-P. 46

U. S. v. Paul L. Van Cleve Jr. et al
Billings Div. No. 1098

Form No. 282

RETURN ON SERVICE OF WRIT

United States of America
} ss:
DISTRICT OF Montana

I hereby certify and return that I served the annexed Summons and Notice

on the therein-named Paul L. Van Cleve Jr.

with copy of complaint attached thereto
by handing to and leaving a true and correct copy thereof with him

personally

at about 38 miles NW of Big Timber said District on the 1st day of

November, 1948

United States Marshal's Fees $4.00

U. S. GOVERNMENT PRINTING OFFICE 16—17777 ..... $19.94

Total $23.94

Geo. A. Wright
U.S. Marshal.

By ____
Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

- - - - - - -

UNITED STATES OF AMERICA,

Plaintiff, :

v. :

PAUL L. VAN CLEVE, JR.; and THE VAN CLEVE COMPANY, INC., a Corporation, :

Defendants.

N O T I C E

No. 1098

- - - - - - -

TO PAUL L. VAN CLEVE, JR., AND THE VAN CLEVE COMPANY, INC., A CORPORATION, MELVILLE, MONTANA:

Please take notice that the undersigned will apply to the above-entitled court in the courtroom, United States Courts and Post Office Building, City of Helena, Montana, on the 18th day of November, 1948, at 10:00 o'clock A. M. of said day, or as soon thereafter as counsel may be heard, for a temporary injunction restraining you, and each of you, your employees, attorneys, agents and those acting in concert with you, or any of you, during the pendency of this action, from maintaining gates, locks or chains interfering or tending to interfere or impede with the free usage of the Big Timber Canyon road and trail, also known as the Big Timber Creek road and trail, by members of the general public or officers or employees of the United States of America, and from maintaining signs of any character importing to convey the meaning or impression that said road or trail is a private road or trail, or that travel thereon or usage thereof is in any manner prohibited or restricted.

JOHN B. TANSIL
Attorney of the United States, in and for the District of Montana

Franklin A. Lamb
Assistant Attorney of the United States, in and for the District of Montana

3

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION
****

UNITED STATES OF AMERICA,
Plaintiff,
-Vs-
PAUL L. VAN CLEVE, JR., and THE VAN CLEVE COMPANY, INC., a Corporation,
Defendants.

M O T I O N

No. 1098

Filed Nov. 18. 1948
H. H. Walker, Clerk

The defendants, and each of them, move the court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendants upon which relief can be granted.

2. To dismiss the action for the reason that plaintiff has entirely failed to join an indispensable party to said action, to-wit: The Board of County Commissioners of Sweetgrass County, Montana, said Sweetgrass County being the county wherein the alleged public highway described in the complaint of plaintiff herein is located.

David L. Fitzgerald
Attorney for Defendants
127 North Main Street
Livingston, Montana

Service of foregoing motion admitted + receipt of true copy of admitted this 18th day of November, 1948 without waiving any rights or time under Rules of Civil Procedure.
Franklin A. Kamb
Asst. U. S. Atty

FITZGERALD AND BODINE
ATTORNEYS AT LAW
LIVINGSTON, MONTANA

5

IN THE DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

- - - - - - -

UNITED STATES OF AMERICA,

Plaintiff, :

v. :

PAUL L. VAN CLEVE, JR.; and :
THE VAN CLEVE COMPANY, INC.,
a Corporation,

Defendants.

ORDER FOR
PRELIMINARY INJUNCTION

No. 1098

- - - - - - -

This cause came on to be heard upon plaintiff's application to this court, notice of said application having heretofore been served on each of the defendants herein, and the court having considered the complaint on file herein, together with all of the other pleadings, records and files in conjunction herewith, and having heard oral evidence in open court, the court makes the following

FINDINGS OF FACT

1. That this court has jurisdiction of this matter in accordance with the provisions of Rule 57, Federal Rules of Civil Procedure, and Title 28, Section 2201, U.S.C.A.

2. That an actual controversy now exists between the plaintiff and defendants.

3. That there has been for many years and now is a road, highway and trail known as the Big Timber Canyon and Big Timber Creek road and trail, extending across the eastern boundary of the Gallatin National Forest and extending generally in a westerly direction through the Big Timber Creek Canyon, and extending through and across certain lands owned and controlled by the defendants herein, as described in the complaint on file.

4. That since the year 1940 the defendants have maintained and is at the present time maintaining locked gates across said Big Timber Creek Canyon road and trail, the maintenance of which has interferred, restrained, barred and prohibited members of the general public from the free and unimpeded usage of said road and trail, and have interferred, barred and prohibited the free and unimpeded usage of said road and trail by officers and employees of the Forest Service of the United States of America, and in addition thereto the defendants have maintained and now are maintaining signs of various kinds and nature importing and conveying the meaning or impression that said road and trail is a private road and trail, and that travel thereon or the usage thereof is prohibited and restricted.

5. That the maintenance of said locked gates and signs has interferred with the free and unimpeded usage of said road and trail by members of the general public and officers and employees of the United States.

On the basis of the foregoing, the court makes the following

CONCLUSIONS OF LAW

1. That this court has jurisdiction of a controversy now existing between the plaintiff and defendants, pursuant to the provisions of Rule 57, Federal Rules of Civil Procedure, and Title 28, Section 2201, U.S.C.A.

2. That the maintenance of locked gates, chains and signs by the defendants has interferred, impeded and barred members of the general public and officers and employees of the United States from the free and unimpeded usage of the Big Timber Canyon road and trail, and that the continued maintenance thereof during the pendency of this action will result in restraining and interfering with the free and unimpeded usage of said road and trail.

ORDER

WHEREFORE, IT IS ORDERED that the defendants, and each of them, their agents, servants, employees, attorneys and all persons acting in concert with them, or any of them, be, and they hereby are, restrained and enjoined pending the determination of this action from maintaining any locked gates or signs of any character which tend to interfere or impede the free usage of the Big Timber Canyon road or trail through, over and upon property owned by the defendants, or either of them, or any signs that import to convey the meaning or impression that said road or trail is a private road and trail and that travel thereon or usage thereof is in any manner prohibited or restricted.

IT IS FURTHER ORDERED that the Clerk of this court issue a preliminary injunction under the seal of this court.

DONE in Open Court this 20th day of November, 1948.

Charles H. Leavy
District Judge

United States Department of Justice

UNITED STATES ATTORNEY
FOR MONTANA

Billings, Montana
November 24, 1948

Mr. C. G. Kegel, Deputy
U. S. District Court
Federal Building
Great Falls, Montana

Re: U. S. v. Paul Van Cleve, Jr.
Billings Civil Number 1098

Dear Keg:

Enclosed please find original stipulation and original proposed order granting the defendants additional time within which to file their brief in support of their motion.

If this meets with the Court's approval will you please notify counsel for both parties of the date of the execution of the order.

Sincerely yours,

Franklin A. Lamb

FRANKLIN A. LAMB
Assistant U. S. Attorney

FAL:nm
Enclosures 2

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IN THE DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

****

UNITED STATES OF AMERICA,

Plaintiff,

-Vs-

PAUL L. VAN CLEVE, JR., and THE VAN CLEVE COMPANY, INC., a Corporation,

Defendants.

STIPULATION

No. 1098 ✓

FILED

NOV 27 1948

H. H. WALKER, Clerk

BY C. S. Kegel Deputy Clerk

IT IS HEREBY STIPULATED AND AGREED, by and between the parties to the above entitled action, acting through their respective counsel herein, that the defendants and each of them, may have to and including the 20th day of December, 1948, to prepare, serve and file their memorandum in support of their motion to dismiss the complaint in said action heretofore made herein.

DATED this 24 day of November, 1948.

John B. Tansil

Franklin A. Lamb

Attorneys for Plaintiff

David P. Fitzgerald

Attorney for Defendant
127 North Main Street
Livingston, Montana

FITZGERALD AND BODINE
ATTORNEYS AT LAW
LIVINGSTON, MONTANA

7

IN THE DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

****

UNITED STATES OF AMERICA,

Plaintiff,

-Vs-

PAUL L. VAN CLEVE, JR., and THE VAN CLEVE COMPANY, INC., a Corporation,

Defendants.

ORDER

No. 1098

Pursuant to stipulation of the parties herein on file, it is hereby ordered that the defendants and each of them, in the above entitled action may have to and including the 20th day of December, 1948, to prepare, serve and file their memorandum in support of their motion to dismiss the complaint in said above entitled action, heretofore made herein.

JUDGE

FILED entered
noted in Civil Docket
NOV 27 1948
E. R. WALKER, Clerk
By Elizabeth C. McKee
Deputy Clerk

FITZGERALD AND BODINE
ATTORNEYS AT LAW
LIVINGSTON, MONTANA

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IN THE DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

- - - - - - -

UNITED STATES OF AMERICA,

Plaintiff, :

v. :

PAUL L. VAN CLEVE, JR.; and THE VAN CLEVE COMPANY, INC., a Corporation, :

Defendants.

PRELIMINARY INJUNCTION

No. 1098

- - - - - - -

This cause came on regularly for hearing before the Court, Honorable Charles N. Pray Judge presiding, on the 18th day of November, 1948, plaintiff being represented by Franklin A. Lamb, Assistant United States Attorney, in and for the District of Montana, and the defendant being present in person and represented by by his counsel David B. Fitzgerald, and oral and documentary evidence having been presented on behalf of the plaintiff, and at the conclusion of the evidence the motion for issuance of a preliminary injunction was orally argued to the court by counsel for the respective parties, and the court after considering all the evidence and the argument of counsel and being fully advised in the premises made its findings of fact and conclusions of law and directed the Clerk of this court to issue a preliminary injunction based upon the Court's findings of fact and conclusions of law, which by reference are incorporated herein and hereof made a part, the Court being of the opinion that it was proper and necessary that a preliminary injunction issue restraining the defendants from the acts complained of in plaintiff's complaint in order that the status quo of the subject matter of the action remain unchanged until the final determination of the action on its merits is had by the Court.

FILED

DEC 1 1948

E. C. McKee

Deputy Clerk

WHEREFORE, IT IS ORDERED, and this does ORDER that you, the defendants, Paul L. Van Cleve, Jr. and The Van Cleve Company, Inc., a corporation, and each of you, your agents, servants, employees, attorneys and all persons acting in concert with you or any of you be, and you hereby are, restrained and enjoined, pending the determination of this action, from maintaining any locked gates or signs of any character which tend to interfere or impede the free usage of Big Timber Canyon road or trail through, over and upon the property owned by you, the said defendants, or either of you, or any signs that import to convey the meaning or impression that said road or trail is a private road and trail, and that travel thereon or usage thereof is in any manner prohibited or restricted.

Given under my hand and the seal of this court this 20th day of November, 1948.

H. Stewart
Clerk of the above-entitled Court.

Form No. 282

RETURN ON SERVICE OF WRIT

United States of America
District of Montana } ss:

I hereby certify and return that I served the annexed Preliminary Injunction

on the therein-named The Van Cleve Co., Inc., a Corp

by handing to and leaving a true and correct copy thereof with Paul L. Van Cleve Jr., President of The Van Cleve Co. Inc., a Corp. personally

at Billings in said District on the 27th day of November, 19 48

Geo. A. Wright
U.S. Marshal.

By J. P. Johnson
Deputy.

U. S. GOVERNMENT PRINTING OFFICE 16—17777

Form No. 282

RETURN ON SERVICE OF WRIT

United States of America
District of Montana } ss:

I hereby certify and return that I served the annexed Preliminary Injunction on the therein-named Paul L. Van Cleve Jr.

by handing to and leaving a true and correct copy thereof with him personally at Billings in said District on the 27th day of November, 1948

Geo. A. Wright
U.S. Marshal.

By J. R. Johnson
Deputy.

United States Marshal's $4.06
U. S. GOVERNMENT PRINTING OFFICE 16—17777
Expenses $
Total $4.06

GIBSON, FITZGERALD & BODINE
LAW OFFICES
127 NORTH MAIN STREET
LIVINGSTON, MONTANA

FRED L. GIBSON
DAVID B. FITZGERALD
RICHARD A. BODINE

TELEPHONE 18

December 18, 1948.

Mr. H. H. Walker, Clerk
United States District Court
Helena, Montana.

Dear Sir:

We are enclosing herewith defendants' brief in support of Motion to Dismiss in the action entitled United States of America, Plaintiff, v. Paul L. Van Cleve, Jr., et. al., Defendants, for filing and delivery to Judge Pray.

A copy of the brief has been served upon the attorneys for plaintiff by mail.

Very truly yours,

Fred L. Gibson

Fred L. Gibson

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IN THE DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

UNITED STATES OF AMERICA,)

Plaintiff,)

-Vs-)

PAUL L. VAN CLEVE, JR., and THE VAN CLEVE COMPANY, INC., a Corporation,)

Defendants.)

DEFENDANTS' BRIEF ON MOTION TO DISMISS

No. 1098

Filed Dec - 20 - 1948

H Hewacker Clerk

This action is brought to obtain a declaratory judgment declaring and determining a certain road and trail in Sweet Grass County, Montana, "to be a public road, highway and trail and as such is a right of way upon, over and across the lands owned or controlled by the defendant".

The action is brought by the United States of America, and the jurisdiction of this court is only because the United States is a party to the controversy. Art. 2 Sec. 3 U. S. Constitution.

The controversy is whether the road is a public road or a private way across the lands of defendants.

The action is brought pursuant to the permission of Section 2201 of Title 28 U. S. C. entitled "Judiciary and Judicial Procedure", being the revision of Section 400 Title 28 formerly titled "Judicial Code and Judiciary". Rule 57 Federal Rules of Procedure governs the procedural aspects of

actions for declaratory judgments.

The declaratory judgment act does not enlarge the jurisdiction of the court. Commercial Casualty Co. v Fowles, 154 Fed. 2nd 884, 165 A L R 1068. Nor does the fact that the United States is plaintiff in any manner enlarge the powers of the court.

While the jurisdiction of the courts of the United States extends "to controversies to which the United States shall be a party", U. S. Const. Art. 3 Sec. 2, when the United States voluntarily becomes a litigant in its own court, it must maintain its contention in the controversy under the same rules of substantive law and evidence binding upon other litigants in like situation, excepting that laches and the statutes of limitation shall not bar its action if otherwise of legal right and merit. United States v Beebe, 127 U. S. 338, 32 L. Ed. 121. But even as to the defense of laches and limitations the United States is subject thereto if it is a litigant in a case where it is a nominal plaintiff, and has allowed its name to be used therein for the sole benefit of private persons. United States v Beebe, supra.

Here the United States appears as would any private litigant. It has no power or authority over the road in controversy.

The establishment, maintenance, control and supervision of public highways is within the state power and authority.

Montana has by statute enacted a "General Highway Law", (Chapter 140, R. C. M. 1935) and in great detail has provided for the creation, maintenance, control and use of the public roads of the state. The State of Montana has imposed the duty of working and maintaining "such highways as are necessary for public convenience" upon the boards of county commissioners of the respective counties. Sec. 1622 R. C. M. 1935, as amended by Chapter 102, Session Laws 1947. The power of establishing certain roads called "state roads", and of maintenance thereof, and of co-operation in the construction of highways under the federal aid road act is conferred by the state upon the "State Highway Commission", Secs. 1790, 1791 R. C. M. 1935, but the road here involved is not in truth, nor is it alleged to be in the complaint, either a state highway or a federal aid highway, within the authority of the State Highway Commission. If a public highway, as plaintiff seeks to have it declared to be, it is within the control and supervision of the board of county commissioners of the county wherein it is located, Sweet Grass County, and it follows that said board is an indispensable party to an action that has for its purpose the determination of its status and character as such public highway. For if it is declared by judgment to be such public highway, the duty is upon said board to work and maintain it, (Sec. 1622 R. C. M. 1935, supra,) and to levy and cause to be collected taxes upon the taxable property of the county for such maintenance. Sec. 1617 R. C. M. 1935, as amended by Chapter 145 Session Laws 1947.

For the purpose of the motion to dismiss it is, of course, true that the allegations of fact are to be taken as true. But is is also true that the entire complaint must be examined to determine the issues presented and that a matter alleged as a fact is not to be taken apart from the context and aside from, and independent of the purpose, scope and object of the action.

Here we have the broad, general allegation that "for more than fifty years there has been and now is a public road or highway and trail * * * extending across the eastern boundary of the Gallatin National Forest * * * and extending through and across sections One (1), Two (2), Three (3), Four (4), Five (5) and Six (6) all in Township Three North, (3 N) Range Twelve East (12 E) in Sweet Grass County, Montana, and crossing the Park and Sweet Grass County line and then extending in a North and Westerly general direction to a point near the center of Township Four North (4 N), Range Eleven East (11E) in Park County, Montana, where it joins the Sweet Grass Creek Trail". Taken alone this might be construed as a statement of fact that the so called "road or highway and trail" was and is a"public road or highway or trail", but it is followed in the complaint by the allegation that "The defendants own lands in Sections One (1), Two (2), Three (3) and Five (5) in Sweet Grass County, Montana, over which said public road or highway and trail was * * * and now is situated". And following the allegation that the so-called "public road or highway and trail" is in part situated on lands of the defendants there are allegations showing the claim and contention of defendants that the "road" is not

a public road but a private road; and the prayer of the complaint, and the purpose of the action as disclosed by the pleading in its entirety is "That judgment be entered herein declaring said road or highway or trail to be a public road, highway and trail and as such is a right of way upon, over and across the lands owned or controlled by the defendants".

Thus it is shown that the "actual controversy" that must exist to give the court jurisdiction to enter a declaratory judgment, is whether the road and trail is a public highway or a private way across defendants lands.

Such being the controversy as defined in the complaint we consider the motion to dismiss.

The motion is made pursuant to Rule 12 Federal Rules of Civil Procedure, as amended, and upon the 6th and 7th grounds of defense which the rule provides may be made by motion.

The first ground of the motion is the 6th ground of defense specified in the rule, that the complaint "fails to state a claim against defendants upon which relief can be granted".

It is settled that private individuals to maintain a suit to enjoin obstruction to a road alleged to be a public highway, must show that they have sustained special damage different not only in degree but in kind from that suffered by the public at large. 29 C. J. 627; 40 C. J. S. 226; State ex. rel. Babcock et al v Heusman, et al, 110 Mont. 51, 99 Pac. 2nd 452. The united States in this action is merely

a private litigant. Its complaint is to be tested by the same rule that is applied to any other private litigant. Tested by the rule announced in the cited text and Montana authority the plaintiff's complaint fails to state a claim against defendants upon which relief can be granted, and the action should be dismissed because thereof. Unless it shows that it has suffered the special damage, differing in kind from that suffered by the general public, it fails to bring itself within the rule that permits a private litigant to enter into a matter that the law has entrusted to the public authorities - the board of county commissioners. And here it is to be noted that in fact the complaint is not framed upon the ground of special damage to the United States but in behalf of the general public. And while the United States has assumed guardianship of large parts of the world, it has thus far left the mountain roads and trails to the states or the individuals interested.

The second ground of the motion for dismissal of the action is the seventh in the list of defenses that may be presented by motion under Rule 12 as amended. It is the failure to join an indispensable party. This is peculiarly and especially a defense in this action where the object is to obtain a judgment declaring and establishing as a status that the road in controversy is a public highway. Admittedly the controversy before the court is exactly this: the plaintiff says the road is a public highway; the defendants say that it is a private way across their lands. This is the "actual controversy" that gives the court jurisdiction under

the declaratory judgment act, and it is the controversy that the complaint submits to the court for its declaratory judgment thereon. It follows that the board of county commissioners of the county in which the road is located is an indispensable party to the action. This board is the body which the State of Montana has clothed with the authority and power over the public highways of the class this one is alleged to be in the county where this road is located. We cite Montana statutes of which this court takes judicial notice as follows:

R. C. M. 4465.3

> Board of County Commissioners has jurisdiction and power - - to lay out, maintain, control and manage public highways within the county.

R. C. M. 1622 - and Ch. 102 L. 1947

> Boards of county commissioners of the several counties of the state have general supervision over the highways within their respective counties, and must work and maintain them.

The county may not be saddled with the burden and expense of maintenance, construction of bridges and repair of a road unless it is in fact and law a public road which it is its duty to maintain. And as the statute reposes the direct obligation of supervision, and the duty of working and maintaining "such highways as are necessary for public convenience" it follows that the board of county commissioners entrusted with the protection of the county interests must be a party to a suit having for its object the establishment by judgment of the status of a road as a public highway to be worked and maintained by the county.

Under the uniform declaratory judgments law adopted by many states it was held in Colorado that an action for declaratory judgment by the Mutual Insurance Company to obtain a construction of laws and charter membership policies, brought against the state commissioner of insurance was not maintainable because all policy holders had an interest in the controversy between the company and insurance commissioner and were indispensable parties. Continental Mutual Ins. Co. v Cochrane, _____ Colo____ 4 Pac. 2nd 308.

An indispensable party is one who has an interest in the controversy of such a nature that a final decree cannot be made without affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity. Shell Dev. Co. v Universal Oil Prd. Co. 157 Fed. 421. Suit will be dismissed where indispensable party not joined. Mine Safety Appliance Co. v. Knox, 326 U. S. 371, 90 L. Ed. 140; Keegan v. Humble Oil & Refin. Co. 155 Fed. 971; Ducher V. Butler 104 Fed. 236;

It is oft repeated in the many cases that have been brought under the Federal Declaratory Judgments Act as well as in the cases under the Uniform Declaratory Judgments Act in the states that have adopted it, that the action is not proper and should be dismissed where it appears that the decision would not terminate the uncertainty or controversy giving rise to the action. Samuel Goldwyn, Inc. v United Artists Corp. 113 Fed 703; Angell v Schram, 109 Fed 2nd 380. And it is also declared by the Supreme Court of the

United States that the declaratory judgment procedure may be resorted to only in the sound discretion of the court and where an adequate and effective judgment may be rendered. Alabama State Federation of Labor v McAdory, 325 U. S. 450, 89 L. Ed. 1725.

Here we have a case where the controversy and uncertainty as to whether the road is a public highway is sought to be settled in an action between two private litigants, neither having any power, authority or control over the road, if it is a public highway. The judgment would not be effective as to the authority or lack thereof of the board of county commissioners over the road, nor as to any member of the public who might seek to compel the board to perform an alleged duty of maintenance of it and constructing and repairing bridges and culverts to make it safe or possible to travel.

IN BRIEF SUMMARY

The case outlined in the complaint fails to entitle the plaintiff to sue for the alleged obstruction of the alleged highway, under the decisions and rules announced in cases hereinabove cited, no special damage to plaintiff permitting it to intrude into the field of action reserved to the authority having control of public highways in Montana being alleged.

The courts say of the declaratory judgments act that an appeal under the procedure therein is addressed to

the sound discretion of the court.

If the road in controversy is a public highway it is under the control of the board of county commissioners of Sweet Grass County, and that board is an indispensable party to the action. If the action here results in a judgment declaring that it is not a public highway does that deprive the board of asserting in other actions that it is a public highway? If it is declared to be a public highway does the judgment saddle Sweet Grass County with the burden of care, maintenance and improvements of the road, if the board denies that it is a public highway? May the road be a public highway as to the United States and the defendants in the action and only a private way as to the rest of the world?

These queries make clear that the suit should be dismissed because of failure to join an indispensable party, and because in the exercise of a sound discretion the suit in its present condition should not be maintained because it will not settle the controversy nor eliminate the uncertainty as to the status of the road.

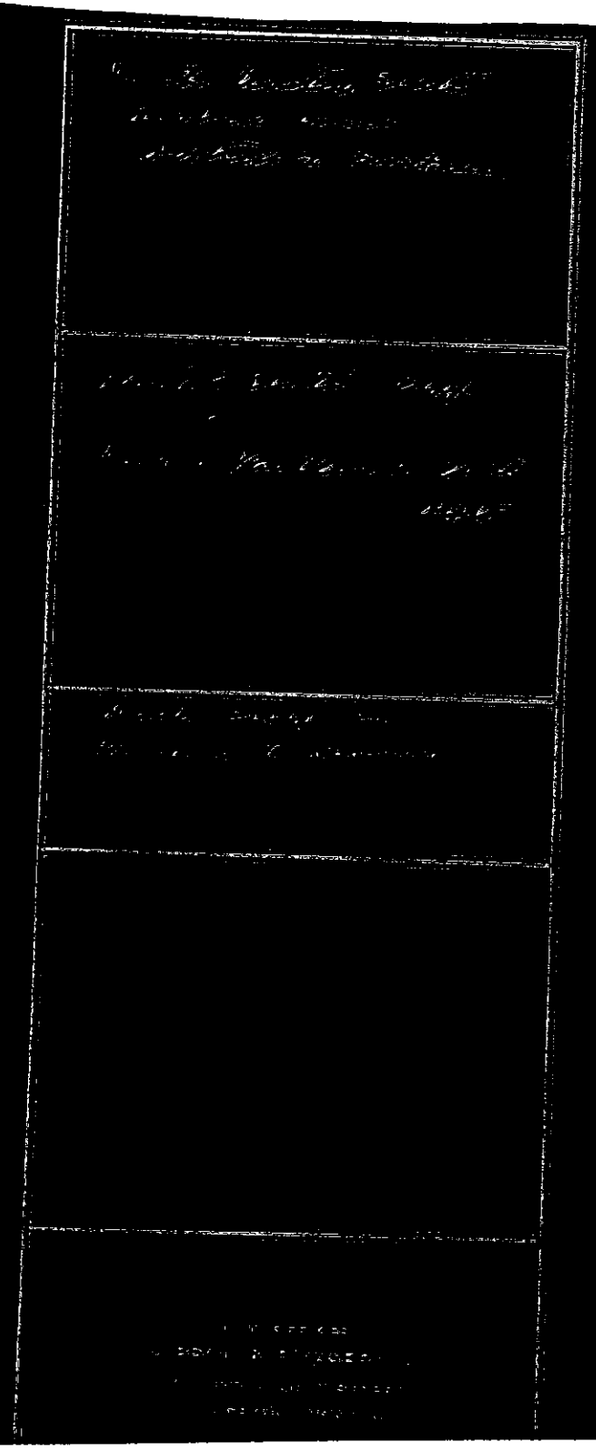
The action should be dismissed.

Respectfully submitted

Fred L. Gibson

David B. Fitzgerald

Attorneys for defendants
Livingston, Montana.



10

IN THE DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

FILED

DEC 23 1948

H. H. [illegible], Clerk

BY C. E. Kegel Deputy Clerk

- - - - - - -

UNITED STATES OF AMERICA, :

Plaintiff, :

v. :

PAUL L. VAN CLEVE, JR., and THE VAN CLEVE COMPANY, INC., a Corporation, :

Defendants. :

- - - - - - -

STIPULATION

No. 1098.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties that the plaintiff, United States of America, may have thirty additional days within which to prepare and file its answer brief.

JOHN B. TANSIL
United States Attorney in and for the District of Montana.

Franklin A. Lamb
Assistant United States Attorney
Attorneys for Plaintiff.

GIBSON, FITZGERALD & BODINE

By David E. Fitzgerald
Attorneys for Defendant.

ORDER

Upon the reading and filing of the above stipulation, the plaintiff, United States of America, is hereby granted thirty additional days within which to prepare and file its answer brief.

DONE this 23rd day of December, 1948.

Charles N. Pray
United States District Judge.

11

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

- - - - - -

Filed Jan 28 - 1949
H H Walker clerk
By C Kegel Deputy

UNITED STATES OF AMERICA,

Plaintiff, :

v. : PLAINTIFF'S BRIEF ON DEFENDANTS' MOTION TO DISMISS

PAUL L. VAN CLEVE, JR., and THE VAN CLEVE COMPANY, INC., a Corporation, : Civil No. 1098 ✓

Defendants.

- - - - - -

The action before the court is pending upon plaintiff's complaint asking for a declaratory judgment that the road or highway and trail is a public road, highway and trail and asking that the defendants be restrained and enjoined from interfering with the free and unimpeded usage of the road, highway and trail by members of the general public and by the officers and employees of the Government of the United States of America. The road, highway and trail are situated entirely within the boundaries of a national forest. The defendants spend four and one-half pages in their brief attempting to analyze the question before the court before discussing their motion upon which their brief is based. Many of the statements contained in their brief are the conclusions of the writer without citation of authority, and for the purpose of this brief we have turned to page 5 of the defendants' brief where the defendants discuss the first ground of their motion.

However, in our brief we will discuss the questions before the court under three topics, i.e., jurisdiction, the complaint states a claim against the defendants upon which relief can be granted, and Sweet Grass County is not an indispensable party.

JURISDICTION

Paragraph I of the complaint on file before the court specifies the provisions under which this action is brought and discloses that the action is brought by the United States both on behalf of the general public and also on behalf of the Government's officials and employees. Because the controversy arises under the laws of the United States, this court clearly has jurisdiction of this cause and the citation of authorities would be pure surplusage.

The defendants in their brief have questioned the authority of the United States to control the road in question, and we wish to again direct the court's attention to the fact that the road in question is situated entirely within the boundaries of a national forest. Section 501, Title 16, U.S.C.A. provides for the budget necessary for the Secretary of Agriculture in the construction and maintenance of roads and trails within the national forests in the States from which such proceeds are derived. It further provides that the Secretary of Agriculture may secure the cooperation or aid of the proper State authorities in the furtherance of any system of highways of which such roads may be made a part.

Section 503, Title 16, U.S.C.A. provides for additional funds which may be expended by the Secretary of Agriculture upon request of the officers of the State within which the national forest is situated for the construction and maintenance of roads and trails.

Section 525, Title 16, U.S.C.A. discloses that the Secretary of Interior may take the necessary steps to secure a right-of-way for roads and highways across any national forest when in his judgment the public interests will not be injuriously affected thereby.

These sections clearly disclose that the Government has retained its control and supervision of the lands within the boundaries of a national forest, and while there may be reciprocal

agreements with the States it is not mandatory that such agreements be entered into, and Section 501 cited above clearly discloses that the Secretary of Agriculture has complete control of the roads and trails within the national forests unless the cooperation or aid of the State is secured by agreement. There is no allegation of any State interest in the road and trail in question in the case at bar.

Clearly, then, the United States having retained control of the construction and maintenance of the road and trail, it may go before its own courts to maintain the right of its employees to free and unimpeded usage of the road and trail in question.

COMPLAINT STATES A CLAIM AGAINST DEFENDANTS UPON WHICH RELIEF CAN BE GRANTED

Section 8651, Revised Codes of Montana for 1935, provides that a private person may maintain an action for a public nuisance if it is specially injurious to himself but not otherwise. The citations are numerous that the obstruction of a highway is a nuisance and that a private individual may sue in his own name to enjoin this public nuisance if it is specially injurious to him. (See Iverson v. Dilno, 44 Mont. 270). We also wish to cite to the court Faucett et al. v. Dewey Lumber Co., et al., 82 Mont. 250, wherein the Supreme Court of Montana upheld the right of a private person to sue for the obstruction of a way preventing the private person from free passage.

Section 8652, Revised Codes of Montana for 1935, provides that a public nuisance may be abated by any public body or officer authorized thereto by law.

The following Code sections of Montana provide the rights of a private person in objecting to the continuance of a public nuisance as the same affects the complainant.

The complaint in question alleges that the defendants have interfered with the usage of the road, highway and trail by the officers and employees of the United States Government in the performance of their official duties in the national forest.

Certainly the United States has the right to go into its own court to protect and enforce the rights of its employees in areas over which it exercises control.

In Williams v. Bluebird Laundry (Cal.) 259 Pac. 484, the court held that if the nuisance invades a distinct private right, a cause of action for injunction is not destroyed by the fact that similar rights of an indefinite number of other people are also infringed in the same manner.

We freely submit the complaint now on file as stating a claim against the defendants upon which this court may grant the plaintiff its desired relief.

SWEET GRASS COUNTY IS NOT AN INDISPENSABLE PARTY

> "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this chapter." Section 9077, Revised Codes of Montana 1935.
>
> "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in...." Section 9090, Revised Codes of Montana 1935.
>
> "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; ..... and when the question is one of a common or general interest, of many persons, or when the parties are numerous, it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." Section 9083, Revised Codes of Montana 1935.

In general the Codes provide that all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs. (Section 9077 R.C.M. 1935) This clearly does not mean that all persons who might join must do do.....Several plaintiffs may properly join in one action where their rights are identical in nature and kind and only differ in extent and quality..... Persons, however, who have separate

interests and suffer separate damage may not join. See Bancroft's Code Pleading, Volume 1, page 257-8.

It is a general rule that all persons who have an interest in the subject and objection of the action are necessary parties plaintiff or defendant..... This general rule is not without exceptions however, one of which is that interested persons are "proper" rather than "necessary" parties when the court may determine the controversy before it without prejudice to, or by saving their rights; that is, where the cause may proceed without them, although their presence would allow a decree or judgment more clearly or effectively to settle the controversy between all interested..... Of course, persons are not necessary parties where nothing is asked of them and they are in no way essential to a determination of the respective rights of the plaintiff and defendant. See Bancroft's Code Practice, Volume 2, pages 1079-80.

Necessary parties must be joined, and proper parties may be joined, for the foregoing Code provisions are not construed as making all persons referred to necessary parties to the rendition of a valid judgment or as making their joinder in all cases obligatory. See Bancroft's Code Practice, Volume 2, page 1106.

A defect of parties plaintiff or defendant results when there is a failure to join necessary as distinguished from proper parties.....

The non-joinder of a party may ordinarily be objected to only by one prejudiced thereby. But such prejudice exists as to a defendant who may be subjected to undue inconvenience or to damage of loss or to future liquidation or to more extensive liability by reason of the defect;..... defendant may not object when he may urge against the plaintiff any defense available against the absent party and satisfaction of the judgment rendered will protect him from future annoyance or loss. Bancroft's Code Practice, Volume 2, pages 1117-18. See also Hoffman v. Gallatin County Commissioners, 18 Mont. 224, 245.

When the action may be disposed of without affecting the rights of others, there is no ground or reason for bringing in any other parties, nor is such procedure required by the codes. See Bancroft's Code Practice, Volume 2, pages 1127-8.

Necessary parties are those having an interest in the subject and object of the action and all persons against whom relief must be obtained to accomplish the object of the suit;

An indispensable party is one who has such an interest in the subject matter of the controversy that a final decree between the parties before the court cannot be made without injuriously affecting his interests or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. "Indispensable" parties are of course "necessary" parties.

A proper party is one without whom the case may proceed but whose presence will allow a decree of judgment more clearly settling the controversy.

A familiar illustration of the distinction between necessary and proper parties is found in the action to foreclose a mortgage; the mortgagor, his heirs, devisees, grantees or assignees are necessary parties; while the mortgagees or lien holders are proper parties. The action may proceed to judgment without the latter, but it will not be binding on their interests. See Bancroft's Code Pleading, Volume 1, pages 228-30.

In the foregoing paragraphs we have discussed the general rules and definitions of the parties to this action. It seems to counsel for the Government that if the road and trail are declared to be public highways, the obligation of Sweet Grass County is neither enlarged nor diminished. The county's obligation and duties are defined by statute and the decision of this court can have no bearing insofar as the county is concerned, and the issues can be determined without the joining of additional parties. We

believe clearly that Sweet Grass County may be a "proper" party but is neither necessary nor indispensable as this court may determine the controversy before it without prejudice to or in any manner affecting the rights or obligations of Sweet Grass County. If the road is declared to be a private way Sweet Grass County is not affected, and if it is declared to be a public highway the county's obligations have already been specified and determined by the statutes of Montana, and no decision of this court can enlarge or decrease the county's obligations as determined by those statutes.

It is not necessary that the United States join other persons injured by the wrongful acts complained of as their rights are different and distinct from those of the United States. See Duester v. Alvin, 145 Pac. 660; also 25 Mont. 379, and Bancroft's Code Pleading, Volume 3, pages 2540-2547.

We have examined numerous authorities and read many cases pertaining to the right of abutting property owners to sue to enjoin the obstruction of a street which prevents the owner's access to his property. We were unable to find any cases wherein any court said that it was necessary to join the city or the county in the action and in each case the property owner was allowed to sue to enjoin the obstructions of the street. See 29 C.J. 629

The United States is in much the same position as the property owners as the obstructions which we complain of prevent the Government's access to areas under its control, i.e., the national forests. See also Gentner v. Kern, 103 Pac. 2d 721.

Without retiring from the position which we have taken we felt it advisable to discuss the effect of non-joinder of an indispensable party for the court's assistance. A defect of parties disclosed by the complaint does not ordinarily amount to failure to state a cause of action..... and even when an objection is properly raised it is not the general practice to dismiss the action but to order the absent parties brought in if their presence is necessary for a determination of the entire controversy.

On appeal the failure of the plaintiff to join necessary parties is not to be considered reversible error. See Bancroft's Code Practice, Volume 2, pages 1122-3.

In summary, therefore, it clearly appears that this court has jurisdiction of the cause as disclosed in the complaint because of the federal statutes giving the United States the control of the maintenance and construction of highways within its national forests. The Government also has the right to protect its servants and employees in the performance of their official duties in the supervision of its national forests.

The complaint clearly states a claim upon which relief can be granted against the defendants, as it is clear that the Government cannot gain ingress or egress to its national forests without the use of the road and trail in question. (State ex rel. Dansie v. Nolan, 58 Mont. 167,171.)

While Sweet Grass County might be a desirable or proper party, the general rules as well as the specific citations disclose that the county is not indispensable as its rights would not be affected by a judgment herein.

However, if the court deems that Sweet Grass County is a necessary party it should not dismiss the action but should order that the necessary party be joined, and grant sufficient time within which to permit such joinder.

Respectfully submitted,

JOHN B. TANSIL
Attorney of the United States, in and for the District of Montana.

Franklin A. Lamb
Assistant Attorney of the United States, in and for the District of Montana

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TELEPHONE 18

February 7, 1949

Mr. H. H. Walker, Clerk
United States District Court
Helena, Montana

Re: United States of America,
Plaintiff, v. Paul L. Van
Cleve, Jr., et. al., Defendants.

Dear Sir:

We are enclosing herewith defendants' reply brief on Motion to Dismiss in the above-entitled case, which you may forward to Judge Pray.

A copy of the brief has been served on the Attorneys for plaintiff by mail.

Very truly yours,

Fred L. Gibson

Fred L. Gibson

FLG:n

12

IN THE DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

UNITED STATES OF AMERICA,)

Plaintiff,)

-Vs-)

PAUL L. VAN CLEVE, JR., and THE VAN CLEVE COMPANY, INC., a corporation,)

Defendants.)

REPLY BRIEF OF DEFENDANTS ON MOTION TO DISMISS

No. 1098

In plaintiff's brief, the issues on the motion to dismiss are discussed under the three heads, "jurisdiction", "the complaint states a claim against defendants upon which relief can be granted", and "Sweet Grass County is not an indispensable party".

The first matter, jurisdiction, is not involved in defendants' motion to dismiss. Admittedly this Court has jurisdiction of the pending cause. We said in our original brief upon the motion to dismiss, "The jurisdiction of this Court is only because the United States is a party to the controversy". Article 3, Section 2, United States Constitution. The plaintiff asserts that "because the controversy arises under the laws of the United States, this Court has jurisdiction of this cause and the citation of authorities would be pure surplusage". So, it is agreed that this Court has jurisdiction of the cause.

Whether, because the United States is a party to the controversy, as we see it, or because the case arises under the laws of the United States, as plaintiff contends, is not material insofar as jurisdiction of the court is concerned. But because

FRED L. GIBSON, DAVID B. FITZGERALD & RICHARD A. BODINE

the argument of plaintiff discloses what appears to us to be a misconception of the case in its broad and general aspect, and because the source of jurisdiction is of importance, in this, that if there is a law of the United States that gives to the United States jurisdiction and control of the road across defendants' lands, then the case is governed by such federal law, and not by the laws of Montana, upon which substantive law the defendants' motion to dismiss is predicated.

The motion itself is, of course, a matter of procedure governed by the federal rules of civil procedure applicable in federal courts without regard to the source of jurisdiction of the cause. So, we will briefly canvass the question of the ground of this court's

JURISDICTION.

Although plaintiff avers that it would be "pure surplusage" to cite authorities to support its contention that jurisdiction here is because the case "arises under the laws of the United States", it might have enlightened the Court, and it certainly would have informed the defendants, had the plaintiff cited any law of the United States that gives the Federal Court jurisdiction of an action for a declaratory judgment fixing the status of a road across private lands as a public highway. If, instead of the United States, Richard Roe, a resident citizen of Montana, had brought this action against defendants, also citizens of Montana, to secure a judgment declaring the road which crosses the lands of defendants, (their private property), to be a public road, what law of the United States or what provision of its Constitution could be cited to give this Court jurisdiction of such cause?

Counsel say the road across defendants' lands is within the boundaries of the Gallatin National Forest. True, but such fact does not place it within federal jurisdiction. The creation of a forest reserve, whether by presidential proclamation or by Act of Congress, does not change the law that governs action and relationship of persons, and property rights in the territory thus set aside as a reserve. The purpose of the creation of the reserve is to preserve the timber that is upon the public domain of the United States from destruction, and the incidental conservation of the water supply by preventing the denuding of the forest lands owned by the United States. It would seem to go without saying that the creation of a forest reserve does not withdraw the territory within its boundaries from the sovereignty of the state in which it is situate. But, probably because Congress realized the tendency of bureaucrats vested with some administrative power, to seek to expand and enlarge it to include legislative and judicial authority as well, it was enacted by Congress that:

> "The jurisdiction, both civil and criminal, over persons within national forests shall not be affected or changed by reason of their existence, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State."
>
> Sec. 480, Title 16, United States Code Annotated.

The statute itself clearly shows that the Congress, by the creation of forest reserves, seeks not to make unconstitutional assault upon state sovereignty. But if more is needed,

a recent decision of the Supreme Court of the United States supplies it. In the case of Wilson v. Cook, 327 U.S. 474, 90 L.Ed. 793, that court held that

> "the state has legislative jurisdiction over the federal forest reserve lands located within it, whether they were originally a part of the public domain of the United States, or were acquired by the United States by purchase."

A forest reserve is not a body politic; it has no legislative power. By its creation, the government reserves from disposal certain forest areas. Even so, it permits entry upon and location of mineral claims therein. As to the lands therein that are owned by private persons, the creation and existence of the reserve affects them not all. And the fact that a road or a section of it is within or traverses a forest reserve gives no jurisdiction over it to the federal government.

An Act of Congress that would purport to take from the state its territorial jurisdiction over private lands or roads crossing the same in a forest reserve, would be in violation of the United States Constitution that prescribes when, how, and for what purpose the United States may obtain exclusive sovereignty and legislative authority over areas within a state. Clause 17 of Section 6 of Article 1, United States Constitution. But we are not called upon to consider this for no law has been cited from which it may be said that this case arises.

It is true that plaintiff refers to Sections 501, 503 and 525 of Title 16, United States Code Annotated, and in brief asserts that these sections "disclose that the government has retained its control and supervision of the lands within the boundaries of a national forest". A reading of these Sections does not disclose any retention of control over private lands that happen to lie within the exterior boundaries of a forest

reserve. The federal government had no control over such lands to retain. Such lands, and indeed the government lands within the forest reserves, if within a state, are under state sovereignty. The two sections first cited merely provide a source of revenue to be used by the government in building roads and trails. Of course the government may build such roads, trails, structures or what not on its own lands as it may desire. It may do so as the proprietor of the lands. And the government, under its power of eminent domain, may take private property for a road, which road, of course, must be for a public use within the purview of federal power. There is here no issue upon the question of what power the Secretary of the Interior has in condemning rights of way for roads. This action is not a condemnation suit. Whatever authority the Secretary of the Interior has to obtain a right of way for roads, it surely does not come from the section of the Code cited by the plaintiff. That Section, 525, Title 16, United States Code Annotated, plaintiff says provides "that the Secretary of the Interior may take the necessary steps to secure a right of way for roads and highways across any national forest when, in his judgment, the public interests will not be injuriously affected thereby". Counsel misconstrue the language of the section if they urge to the court, as they do, that this gives the Secretary of the Interior a right to take steps to get a right of way for the government over private lands for a government road. The statute reads as follows:

> "In the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any national forest when in his judgment the public interests will not be injuriously affected thereby."
>
> Sec. 525, Title 16, United States Code Annotated.

Clearly this means that the Secretary of the Interior may permit the construction of a railroad or highway over and across a forest reserve, if, in his judgment, public interests will not be injuriously affected thereby. The Secretary merely permits the construction and approves surveys and plats of any right of way for the railroad or highway. The right of way over private lands in the reserve is for the builder of the road to obtain.

The Secretary of the Interior does not, under this Section, "take the necessary steps to secure a right of way" as plaintiff says, but it merely grants power to such official to permit the corporation or entity that seeks to build a railroad or road across a forest reserve to do so. The Interior Department, having control of the public domain of the United States, is, by this Section, permitted to grant a right of way across government lands, not authorized by such Section to "secure" a right of way. Certainly the United States statutes cited by plaintiff do not grant to federal courts jurisdiction of a case involving the alleged obstruction of an alleged highway over private lands, wherein the dispute is whether the road involved is a public road or not, and the parties to the controversy are private citizens, resident of the state wherein the highway lies. The federal government could not retain "control and supervision" of private lands within such boundaries under our federal constitutional system, either in a political or proprietary sense, and it could retain only such control over its own lands as is within its capacity as the proprietor of the lands.

After carefully canvassing the question of the legislative power of the states over the areas within the

national forests therein, the Supreme Court of the United States, in the case of Wilson v. Cook, above cited, said, "It follows that the state has retained its legislative jurisdiction, which it acquired by statehood, over public lands within the state, which have been included within the forest reserve". As to the private lands in forest reserve boundaries, we have never before heard of anyone who has intimated that the creation of a forest reserve takes from the state its sovereignty over the area.

If, as we believe is manifest, the jurisdiction of this court in this case is because the United States is a party to the controversy, and not because as plaintiff asserts, it is one that arises under the laws of the United States, we then have for consideration by the court on the defendants' motion to dismiss, the two grounds of our motion specified, outlined and briefly presented in our original brief herein and which here we need not repeat, but to which, for a brief further consideration, we advert as follows; first:

FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

This ground of motion, as stated in our original brief, is the 6th ground of defense, which, under rule 12 Federal Rules of Civil Procedure, may be made by motion.

In answer to our original brief upon this defense, plaintiff for the moment seems to shed the robe of august official power assumed in its discussion of the source of the court's jurisdiction, and appears in the subdued habiliments of a private litigant humbly seeking to enforce the rights of its employees.

But even as it pleads that under the provisions of 8651, Revised Codes of Montana, 1935, a private person may maintain such an action as the one it has here instituted, there appears an upsurge of sublime official power which it could but momentarily repress, when it asserts that it may "enforce the rights of its employees in areas over which it exercises control". Plaintiff's brief, page 4.

Despite the plaintiff's persistent thought that it has the power and authority of "control" over everything within the exterior boundaries of such forest reserves as it sees fit to create within a state, we believe that the holding of the Supreme Court in Wilson v. Cook, supra, is in accordance with the constitutional principles properly applied. And as the States, in establishing and maintaining public highways, are acting in their governmental capacity, State v. District Court, 105 Mont. 44, 69 P. 2d 112, 29 C.J. 671, it follows that the laws of the State of Montana must determine whether the road on defendants' land is a public highway or not. And that is the issue in the case. It is the reason the action was brought. The plaintiff says the road is a public highway. The defendants aver it is not. The plaintiff says that "an actual controversy exists between the defendants and members of the general public of the United States and officers and employees of the Forest Service, a Department of the United States of America, concerning the free and unimpeded right of usage of said road, highway and trail and concerning the status and character of said public road, highway and trail". And it asks for a judgment declaring the road to be a public road. Such is the story of the complaint.

And as was pointed out in defendants' original brief, even though the road was a public road, a private person has no cause of action for its obstruction unless he can plead and prove special damage to him differing in kind and degree from that

occasioned the generality of users of the road.

Because the creation, maintenance and protection of the road is a governmental function, a private person has no voice in its protection unless in the exceptional instances of special and particular damage to him. The complaint fails to state facts so necessary. State ex. rel. Babcock v. Linsman, 110 Mont. 51, 99 Pac. 2d 492. This case was erroneously cited in our original brief as being reported in 99 Pac. 2d 452 instead of 492.

The last cited case follows the rule adopted in Montana in the case of State ex. rel. Dansie v. Nolan, 58 Mont. 167, 191 Pac. 150, and a reading of that case discloses that the complaint herein fails to allege facts that would show plaintiff's position to be different in its nature than that of the general public.

FAILURE TO JOIN AN INDISPENSABLE PARTY.

The 7th defense, that rule 12 of the federal rules provides may be presented by motion, is failure to join an indispensable party. If the road or trail is a public road, it follows that the Board of County Commissioners is entrusted with its protection, repair and maintenance. See cases cited in our original brief.

While counties are not the owners of the public roads established within their boundaries, they act as a trustee for the public and as the agency through which the state acquires the property. The state owns the highway. Not necessarily the fee but the easement for the public highway. State v. District Court, 105 Mont. 44, 69 P. 2d 112, and cases therein cited.

It seems not necessary in this reply to cite cases further than in our original brief to the point that where,

because of the absence of a party having such an interest in the determination of the issue that the judgment cannot fully and finally settle the same, the case should be dismissed because of failure to join such indispensable party.

DECLARATORY JUDGMENT ACTION.

It should at all times be borne in mind that this is merely an action seeking a declaratory judgment to determine whether the road or trail mentioned in the Complaint is a public highway or not.

It is well understood by the courts that jurisdiction of such actions is taken as a matter of discretion. That such a judgment "should be granted only as a matter of judicial discretion, exercised in the public interest". Eccles v. Peoples Bank, U.S. , 92 L.Ed. 592 - Advance Sheet.

The cautious attitude of the federal courts in cases brought for declaratory judgments, is to be noted in many cases, among those in the Supreme Court may be cited: Great Lakes D. & D. Co. v. Huffman, 319 U.S. 293, 87 L.Ed. 1407; Brillhart v. Excess Ins. Co., 316 U.S. 491, 86 L.Ed. 1620.

Certainly here is a case where the court may well proceed with caution. The action is to declare the "highway and trail" to be a public road, highway and trail. The Complaint does not say how wide the road, how wide the trail, what part is road, what part is trail. And as stated in our original brief, if the declaration shall be that the trail is not a public road, does that set the issue at rest so that Sweet Grass County may not in later action claim that it is a public road under its control? Or, if declared to be a public road, does that declaration bind Sweet Grass County to repair and maintain it as a public road under its supervision?

If the declaratory judgment does not bind Sweet Grass County, the action should be dismissed because of the failure to join it as a party, as Rule 12 provides, and for the additional reason that judicial discretion may well be exercised to avoid such an idle determination amounting to no more than an advisory opinion upon the disputed question whether the road is a public road, or whether it is a trail or what not.

Respectfully submitted,

Fred L. Gibson

David B. Fitzgerald

Attorneys for Defendants.
Livingston, Montana

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

- - - - - - -

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAUL L. VAN CLEVE, JR.; and THE VAN CLEVE COMPANY, INC., a corporation,

Defendants.

MOTION TO CITE FOR CONTEMPT AND FOR ENLARGEMENT OF TEMPORARY INJUNCTION

Civil No. 1098

Filed May 25-1949.
H H Walker
Clerk

- - - - - - -

COMES NOW John B. Tansil, United States Attorney, and Franklin A. Lamb, Assistant United States Attorney, in and for the District of Montana, the attorneys for United States of America, and respectfully show to the Court as follows:

I

That on November 19, 1948, a preliminary injunction was issued out of this court directed to the defendants above named enjoining them and each of them during the pendency of this action from maintaining any locked gates or signs of any character which tend to interfere or impede the free usage of the Big Timber Canyon road or trail through, over and upon the property owned by said defendants, or either of them, or any signs that import to convey the meaning or impression that said road or trail is a private road and trail and that travel thereon or usage thereof is in any manner prohibited or restricted; that thereafter said preliminarly injunction was duly and regularly served upon each of said defendants.

II

That continuously since the issuance and service upon said defendants of said preliminary injunction, said

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defendants have continued to maintain locks, chains, signs and gates which continued to interfere and impede the free usage of the Big Timber Canyon road and trail through, over and upon the property owned by said defendants, and that said locks, chains, signs and gates convey the meaning and impression that said road and trail is a private road and trail and that travel thereon and usage thereof is prohibited and restricted.

III

That on May 20, 1949, officers, servants and employees of the Forest Service of the United States of America were engaged in maintenance work upon the Big Timber Canyon road in Section 3, Township 3 North, Range 12 East in Sweet Grass County, Montana, in preparation of said road for the use of the general public of the United States and the officers, servants and employees of the United States Forest Service during the coming summer months, which said maintenance work was necessary for the safe travel of the general public and the officers, servants and employees of the United States Forest Service in the performance of their duties so that the general public might attain access to the recreational area constructed by the United States of America, and the officers, servants and employees of the United States Forest Service might attain access to the Big Timber Canyon trail necessary for fire protection in the National Forest, and upon said date while so engaged, the defendant Paul L. Van Cleve, Jr., violently obstructed and prevented the performance of said duties by the said officers, servants and employees of the United States Forest Service and caused the discontinuance of the necessary work as aforesaid and prohibited and restricted the free usage and travel of said employees, servants and officers of the Forest Service of the

U. S. GOVERNMENT PRINTING OFFICE

United States upon said Big Timber Canyon road and trail.

IV

That on May 20, 1949 and on May 22, 1949, the defendant Paul L. Van Cleve, Jr., violently threatened officers, servants and employees of the Forest Service of the United States and prevented the construction of a cattle guard upon lands owned and controlled by United States of America and immediately adjoining certain lands owned by the defendants, said lands being situated in Section 4, Township 3 North, Range 12 East in Sweet Grass County, Montana, and by reason thereof prevented, restricted and prohibited said officers, servants and employees of the United States of America from the performance of their duties in the improvement and maintenance of property owned by United States of America.

V

That by said conduct as aforesaid the defendant Paul L. Van Cleve, Jr. has abused the dignity of this Court and obstructed the administration of justice in the manner set forth above and has violated the letter, spirit and intent of the order of this Court dated November 19, 1948, and has threatened and continues to threaten to prevent the officers, servants and employees of the United States of America in the free and unimpeded usage of the Big Timber Canyon road or the maintenance thereof, and continues to maintain chains, locks, signs and gates restricting, interfering, impeding and prohibiting the free usage of the Big Timber Canyon road and trail, and by such course of conduct aforesaid continues to violate the order of this Court dated November 19, 1948, and continues in contempt of the dignity of this Court.

WHEREFORE, the plaintiff prays that the defendant Paul L. Van Cleve, Jr. be adjudged in contempt of this Court

STATE OF MONTANA, }
County of Sweet Grass } ss.

I, DICK ARMSTRONG, Clerk and Recorder of Sweet Grass County, Montana, do hereby certify that the attached is a true and correct copy of a

Deed No. 28701E

Filed for record April 1 19 42, at 2:50 o'clock P. M. and recorded in Book 37 of Deeds Page 160 in the records of Sweet Grass County, Montana.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said office.

Done at Big Timber, Sweet Grass County, Montana, this 25th day of May 1949

Dick Armstrong Clerk and Recorder

Deputy

(COPY)

Reception No. 52758

N. P. Ry. Co.
Paul L. Van Cleve Jr.

(A)
DEED No. 28701E
Contract No. 15828 MONTANA DIVISION
NORTHERN PACIFIC RAILWAY COMPANY

THIS DEED, Made the fifth day of May in the year of our Lord one thousand nine hundred and thirty-nine, by the Northern Pacific Railway Company a corporation of the State of Wisconsin, grantor, to Paul L. Van Cleve, Jr. of Big Timber in the County of Sweet Grass and State of Montana grantee, WITNESSETH:

WHEREAS, by a contract in writing entered into on the twenty-fourth day of November A.D. 1923 the grantor contracted to sell and convey the premises hereinafter described for the consideration hereinafter expressed, which contract has been duly performed and the grantee has become entitled to a conveyance of the premises.

THEREFORE, the grantor in consideration of the sum of Two thousand one hundred ninety-nine and 96/100 (2,199.96) Dollars, unto it paid according to said contract, the receipt whereof is acknowledged, grants, bargains, sells and conveys unto the grantee, his heirs and assigns, the following described tract of land situate in the County of Sweet Grass in the state of Montana to-wit:

All of Section No. three (3) in Township three (3) North of Range twelve (12) East of the Montana Principal Meridian, containing, according to the United States Government Survey seven hundred thirty-three and 32/100 (733.32) acres, more or less;
($2.50 Documentary stamps attached and cancelled)

the lands hereby conveyed being subject, however, to an easement in the public for any public roads heretofore laid out or established, and now existing over and across any part of the premises.

Together with the hereditaments and appurtenances thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD, the said lands and appurtenances, unto the grantee his heirs and assigns, forever.

The grantor will forever Warrant and Defend the title to the premises, except as against liens, charges and incumbrances originating after the date of the aforesaid contract of sale.

IN WITNESS WHEREOF, The grantor has caused these presents to be sealed with its corporate seal, and signed by its Vice President, the day and year first above

written.

(Corporate Seal)

Signed, Sealed and Delivered in the Presence of C. B. Theits - Anna B. Tibbs

Northern Pacific Railway Company
By B. W. Scandrett Vice President. JMH
Attest: G. W. Gottschald Assistant Secretary

STATE OF MINNESOTA)
COUNTY OF RAMSEY) SS.

On this 11th day of December, in the year 1939, before me. S. A. Bertelsen a Notary Public, personally appeared B. W. Scandrett to me known to be the Vice President of the Northern Pacific Railway Company, the corporation which executed the foregoing instrument, and who being duly sworn, did say, that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said B. W. Scandrett acknowledged said instrument to be the free act and deed of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the City of St. Paul, the day and year last aforesaid.

(Notarial Seal)

S. A. Bertelsen
Notary Public, Ramsey County, Minnesota
S. A. Bertelsen
Notary Public, Ramsey County, Minn.
My commission expires March 23, 1940.

Filed for Record April 1, 1942 @ 2:50 P.M.
E. R. Patterson, Clerk & Recorder
By Paul Snyder, Deputy
Fees: $1.50
Return to Paul Van Cleve Jr. Melville, Montana
(Clerk & Recorder Seal)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

FILED

JUN 6 - 1949

H. H. WALKER, Clerk
BY C. G. Kegel
Deputy Clerk

- - - - - - -

UNITED STATES OF AMERICA,

Plaintiff, :

v. :

PAUL L. VAN CLEVE, JR.; and THE VAN CLEVE COMPANY, INC., a corporation, :

Defendants.

O R D E R

Civil No. 1098

- - - - - - -

Upon the reading and filing of the Motion of the attorneys for the plaintiff herein, and upon being fully advised in the premises, and for good cause shown,

IT IS HEREBY ORDERED that the defendant Paul L. Van Cleve, Jr. show cause if any he has at the court room, United States Courts and Post Office Building, City of Great Falls, Montana, on the 6th day of June, 1949, at 2:00 o'clock P. M. of said day, or as soon thereafter as counsel may be heard, why he should not be adjudged in contempt of this Court and the order of this Court dated November 19, 1948, and be punished accordingly, and why the preliminary injunction of this Court dated November 19, 1948, should not be enlarged to restrain him from maintaining any gates, locks, chains, signs or engaging in any conduct during the pendency of this action which might interfere or tend to interfere or impede with the free usage or maintenance of the Big Timber Canyon road and trail by the general public or the officers, employees or servants of the United States of America.

IT IS FURTHER ORDERED that a copy of this Order together with a copy of the Motion of the plaintiff be served upon the defendant at least three days before the

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time herein set for showing cause.

Dated May 25, 1949

James M. Carter
United States District Judge

Entered and noted in Civil Docket
May 25, 1949.

H. Hweek Clerk.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

FILED

JUN 6 - 1949

H. H. WALKER, Clerk

BY C. Kegel Deputy Clerk

- - - - - - -

UNITED STATES OF AMERICA,

Plaintiff, :

v. :

PAUL L. VAN CLEVE, JR.; and :
THE VAN CLEVE COMPANY, INC.,
a corporation,

Defendants.

- - - - - - -

N O T I C E

Civil No. 1098

TO PAUL L. VAN CLEVE, JR., AND THE VAN CLEVE COMPANY, INC., A CORPORATION, MELVILLE, MONTANA:

Please take notice that the undersigned will bring on its Motion for an order adjuding Paul L. Van Cleve, Jr. as being in contempt of the above-entitled Court, and its Motion for an order enlarging the terms of the preliminary injunction heretofore issued out of said Court on the 19th day of November, 1948, in the court room, United States Courts and Post Office Building, City of Great Falls, Montana, on the 6th day of June, 1949, at 2:00 o'clock P. M. of said day, or as soon thereafter as counsel may be heard.

JOHN B. TANSIL
United States Attorney

Franklin A. Lamb
Assistant United States Attorney

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U. S. GOVERNMENT PRINTING OFFICE

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
vs	)	Civil Action No. 1098
PAUL L. VAN CLEVE, JR., and THE VAN CLEVE COMPANY, INC., a Corporation, Defendants.	)	

The defendant in the above cause was cited to appear and show cause why he should not be held in contempt for the alleged disobedience of the restraining order theretofore issued by the court.

The proof shows that the gate across the highway in question at the lower boundary of the Van Cleve property has never been locked since the restraining order was issued, and that all signs indicating a private road which had formerly been posted at the gate had been removed by defendant following the issuance of the restraining order. Although the above facts were clearly established at the hearing, counsel for the plaintiff has indicated that a species of deception was practiced by the defendant to deceive travelers on approaching the gate where they would be confronted by a "Positively No Trespassing" sign, and could see a chain over the gate with a padlock attached, and who, meeting such conditions, would be likely to turn back, gaining the impression from the appearance of the sign, chain and lock that passing the gate was prohibited. There appeared on the no trespassing sign written words to the effect that the traveler would be expected to keep to the road and not trespass on either side thereof.

The defendant was questioned as to whether one driving up to the gate could read the writing on the no trespassing sign, and he was not explicit in his answer but said that one on opening the gate could not help but see the written part and

be able to read it. No question is raised as to the right of the defendant to post no trespass signs on his property, in fact he stated that all of his property was so posted.

From the foregoing recitation of facts the proof appears to be insufficient to enable the court to state in positive terms that it has been clearly and convincingly established that the defendant has violated the restraining order. It is possible that the defendant may have created a condition there that might have been misleading to a stranger driving that way, but the evidence shows that men in the forestry service and others, so far as the proof goes, passed through the gate and over the road without interference by the defendant or any of his employees, and none of them ever found the gate locked after the restraining order was issued.

While it appears that considerable ill feeling exists on the part of the members of the forestry service and the defendant it does not seem to be necessary to go into the quarrel over the attempt at road repairing on the part of the forestry crew or the abusive conduct on the part of the defendant for which he later apologized; he did not object to work done on the forest reserve, but only on his own land, and there might be some question raised as to whether it was proper during the pendency of the restraining order and the action to undertake extensive alterations in the condition of the road. It is evident that the forestry crew with their road machinery gained entrance over the road in question through the premises of defendant without obstruction. The court does not believe that this unfortunate incident should be accepted as proof of a violation of the restraining order which required the defendant to keep the road open for ingress and egress of members of the public generally during the pendency of the action, or until the further order of the court.

From a consideration of all the facts which the court regards as material to the issues raised in this hearing, the court does not believe the proof justifies holding the defendant

in contempt of the restraining order, and such is the order herein, without assessment of costs, each side paying its own costs.

Judge

FILED

JUN 22 1949

C. S. Kegel
County Clerk

STATE OF MONTANA,)
) ss.
County of Sweet Grass.)

DICK ARMSTRONG, being first duly sworn on oath deposes and says:

That he is the duly elected, qualified and acting Clerk and Recorder of Sweet Grass County, Montana, and Ex-Officio Clerk of the Board of County Commissioners of Sweet Grass County, Montana; that on the 20th day of June, 1949, he mailed true copies of the annexed Certificate and Resolution as follows: Mailed one such copy to Franklin D. Lamb, Assistant United States District Attorney inclosed in an envelope addressed to him at Billings, Montana; and mailed one such copy to Fred L. Gibson, attorney for the defendants in the action referred to in such resolution, addressed to him at Livingston, Montana; which envelopes and contents were deposited by affiant in United States Post Office at Big Timber, Montana, on said date with the proper and required postage thereon postpaid.

Dick Armstrong

Subscribed and sworn to before me this 20th day of June, A. D. 1949.

E. O. Overland
Notary Public for the State of Montana
Residing at Big Timber, Montana
My commission expires Nov. 4, 1950

FILED

JUN 22 1949

E. H. Wallace, Clerk
By C. K. Kegel
Deputy Clerk

RESOLUTION.

WHEREAS, in the case of "The United States of America, Plaintiff, versus The Van Cleve Company, a corporation, and Paul L. Van Cleve, Jr., Defendants", now pending in the United States District Court for the District of Montana, an order was duly made or given by and in said Court on the 7th day of June, 1949, requiring that the County of Sweet Grass of the State of Montana, be joined as a party in said action,

And after considering said matter, and being duly advised in the premises,

IT IS HEREBY RESOLVED: That the County of Sweet Grass, of the State of Montana, declines to join in the aforesaid action as a party plaintiff.

- - - - - - - - - - -

STATE OF MONTANA,)
(ss.
County of Sweet Grass.)

We hereby certify that the foregoing is a true and correct copy of a resolution adopted by unanimous vote of the Board of County Commissioners of Sweet Grass County, Montana, at a special meeting regularly called, noticed and held on June 20th, 1949.

Dated: June 20th, 1949.

J. F. Clark

Chairman of the Board of County Commissioners of Sweet Grass County, Montana.

ATTEST:

Clerk of said Board.

United States Department of Justice

UNITED STATES ATTORNEY
FOR MONTANA

Billings, Montana
June 24, 1949

Mr. C. G. Kegel, Deputy
U. S. District Court
Federal Building
Great Falls, Montana

Re: U. S. v. Paul L. Van Cleve, Jr., et al.

Dear Keg:

Enclosed please find original amended complaint as directed to be filed by the Court when the hearing was held in Great Falls on June 7th.

Please advise us of the date of filing.

Also, enclosed please find a copy of the amended complaint, and we ask that you issue summons and deliver the summons and one copy thereof together with one copy of the complaint to the Marshal for service upon the Chairman of the Board of County Commissioners of Sweet Grass County, Montana, who have offices in the courthouse in the City of Big Timber, Montana. Copies of the complaint are being mailed to the attorneys for the other defendants and no new summons need be served upon them.

Very truly yours,

Franklin A. Lamb

FRANKLIN A. LAMB
Assistant U. S. Attorney

FAL:nm
Enclosures 2

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

- - - - - - -

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAUL L. VAN CLEVE, JR.; THE VAN CLEVE COMPANY, INC., a corporation; and SWEET GRASS COUNTY, MONTANA, a quasi-municipal corporation,

Defendants.

- - - - - - -

AMENDED COMPLAINT

No. 1098

Filed June 25-1949
H. H. Walker Clerk
By C. Kegel Deputy

COMES NOW United States of America, by and through John B. Tansil, United States Attorney, and Franklin A. Lamb, Assistant United States Attorney, in and for the District of Montana, and for its first cause of action complains and alleges:

I

That this is an action brought by the United States of America pursuant to the provisions of Rule 57, Federal Rules of Civil Procedure, and Title 28, Section 2201, U.S.C.A., because there is an actual controversy now existing in respect of which the plaintiff needs a declaration of rights by this Court.

II

That the Van Cleve Company, Inc., is a corporation duly organized and authorized to do business under the laws of the State of Montana, with its principal place of business at Melville, Montana.

III

That the defendant Sweet Grass County, Montana, is a quasi-municipal corporation duly created and organized

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U. S. GOVERNMENT PRINTING OFFICE

under and by virtue of the laws of the State of Montana, and by prior order of this Court was declared to be a necessary party to the full and final disposition of the issues in this cause; that the said defendant was requested by the plaintiff, United States of America, to join as a party plaintiff in this cause, and at a special meeting regularly called, noticed and held on June 20, 1949, by a resolution then duly and regularly adopted, the said defendant Sweet Grass County, Montana, refused to join as a party plaintiff herein, and therefore said county is named herein as a party defendant.

IV

That the plaintiff was at all times herein mentioned, and now is, the owner of large areas of public lands situated in Township 2 North, Ranges 11 and 12 East; Townships 3 and 4 North, Ranges 10, 11 and 12 East; Townships 5 and 6 North, Ranges 9, 10, 11 and 12 East; and Township 7 North, Ranges 9 and 10 East, Montana Principal Meridian, in Park, Sweet Grass, Meagher and Wheatland Counties, Montana, constituting the Crazy Mountains Division of what was formerly the Absaroka, now the Gallatin National Forest, established under authority of and pursuant to Acts of Congress.

V

That at all times mentioned herein there has existed and there now exists a public highway, viz., a road and trail in and along the canyon of Big Timber Creek entering said Crazy Mountains Division of said national forest across the east boundary line thereof on the east line of the NE¼ of the NE¼ of Section 12, Township 3 North, Range 12 East, and extending westerly through said NE¼ of the NE¼ of Section 12, and through and across Sections 1, 2, 3, 4, 5 and 6 of said township and range, and thence westerly, then northerly to a point near the center of Township 4 North, Range 11 East

U. S. GOVERNMENT PRINTING OFFICE

where it joins the Sweet Grass Trail situated in the Sweet Grass Canyon in said Crazy Mountains Division of said national forest, which said highway and trail, except for the acts of the defendants hereinafter complained of, has provided and now provides the only means of access to that part of the said Crazy Mountains Division of said national forest within and adjacent to the canyon and drainage basin of Big Timber Creek and the upper drainage of Sweet Grass Creek necessary in the protection, use and administration thereof by the agents and employees of the United States of America, pursuant to the laws of the United States and the regulations of the Secretary of Agriculture relating to the protection, use and administration of the national forests.

VI

That the United States has a special right, title and interest in said highway and trail and all parts thereof, including the parts thereof situated upon lands now owned by the defendants, amounting to an easement and right-of-way for said purposes by reason of the facts that said road and trail were established upon said land when it was in part public land of the United States of America and in part in the ownership of the Northern Pacific Railroad Company, and its successor in interest, the Northern Pacific Railway Company, which said railroad company and railway company dedicated the same as a public highway, which was appropriated by the United States and the general public prior to the issuance of any patents therefor, thereby reserving unto itself and the general public said public highway, road and trail, and by reason of the fact that the United States and its permittees and the public have for more than 50 years used said road and trail for said purposes and the United States has, during said period from time to time, expended upon said road and

U. S. GOVERNMENT PRINTING OFFICE

trail monies appropriated by the Congress, for its construction and maintenance to the end that it might serve said purposes; and the United States in common with the public is entitled to the possession of the right-of-way for said highway and that the same is necessary for the protection, use and administration of the national forest and other property of the United States.

VII

That since the year 1940 and up to and including the present time, the defendants have maintained gates across the said road and trail and have, at will, kept said gates locked, and attempted to exercise dominion and control over the same, and have maintained and do now maintain signs thereon and adjacent thereto claiming and identifying said road and trail as a private road and trail and prohibiting the use thereof, and have threatened and continue to threaten to restrain and interfere with its free usage, thereby restricting and preventing the free and unimpeded use and maintenance of said road and trail by the servants, agents and employees of the United States engaged in the protection, use and administration of the said Crazy Mountains Division of the said national forest as required by law and the regulations of the Secretary of Agriculture, and by reason of said conduct on the part of said defendants, the defendants have restricted and prevented the free and unimpeded use and maintenance of said road and trail as the sole means of access to the property of the United States, to said plaintiff's injury and damage.

VIII

That by reason of the conduct and acts of the defendants, an actual controversy exists between the defendants and the United States of America concerning the free and

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U. S. GOVERNMENT PRINTING OFFICE

unimpeded right of usage and maintenance of said public highway, road and trail and concerning the status and character thereof.

COMES NOW the United States of America and for its second cause of action complains and alleges:

I

That this is an action brought by the United States of America pursuant to the provisions of Rule 57, Federal Rules of Civil Procedure, and Title 28, Section 2201, U.S.C.A., because there is an actual controversy now existing in respect of which the plaintiff needs a declaration of rights by this Court.

II

That The Van Cleve Company, Inc., is a corporation duly organized and authorized to do business under the laws of the State of Montana, with its principal place of business at Melville, Montana.

III

That the defendant Sweet Grass County, Montana, is a quasi-municipal corporation duly created and organized under and by virtue of the laws of the State of Montana, and by prior order of this Court was declared to be a necessary party to the full and final disposition of the issues in this cause; that the said defendant was requested by the plaintiff, United States of America, to join as a party plaintiff in this cause, and at a special meeting regularly called, noticed and held on June 20, 1949, by a resolution then duly and regularly adopted, the said defendant Sweet Grass County, Montana, refused to join as a party plaintiff herein, and therefore said county is named herein as a party defendant.

IV

That the plaintiff was at all times herein mentioned, and now is, the owner of large areas of public lands situated in Township 2 North, Ranges 11 and 12 East, Townships 3 and 4 North, Ranges 10, 11 and 12 East; Townships 5 and 6 North, Ranges 9, 10, 11 and 12 East; and Township 7 North, Ranges 9 and 10 East, Montana Principal Meridian, in Park, Sweet Grass, Meagher and Wheatland Counties, Montana, constituting the Crazy Mountains Division of what was formerly the Absaroka, now the Gallatin National Forest, established under authority of and pursuant to Acts of Congress; that the United States of America, on behalf of the general public of the United States, has constructed, created and developed recreational areas and camp grounds, parks and facilities on and in the immediate vicinity of the above-described public lands for the general usage and enjoyment of that portion of the Gallatin National Forest by the public at large.

V

That at all times mentioned herein, there has existed and there now exists a public highway, viz., a road and trail in and along the canyon of Big Timber Creek entering said Crazy Mountains Division of said national forest across the east boundary line thereof on the east line of the NE¼ of the NE¼ of Section 12, Township 3 North, Range 12 East, and extending westerly through said NE¼ of the NE¼ of Section 12, and through and across Sections 1, 2, 3, 4, 5 and 6 of said township and range, and thence westerly, then northerly to a point near the center of Township 4 North, Range 11 East where it joins the Sweet Grass Trail situated in the Sweet Grass Canyon in said Crazy Mountains Division of said national forest, which said highway, road and trail, except for the acts of the defendants hereinafter complained

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U. S. GOVERNMENT PRINTING OFFICE

of, has provided and now provides the only means of access to that part of the said Crazy Mountains Division of said national forest within and adjacent to the canyon and drainage basin of Big Timber Creek and the upper drainage of Sweet Grass Creek for the use by the general public at large of the recreational areas, camp grounds, parks and facilities of said national forest, and the general usage and enjoyment thereof as provided by the United States of America on behalf of the general public at large pursuant to the laws of the United States and the regulations of the Secretary of Agriculture relating to the protection, use and administration of the national forests.

VI

That the United States, for and on behalf of the public at large, has a special right, title and interest in said highway and trail and all parts thereof, including the parts thereof situated upon lands now owned by the defendants, amounting to an easement and right-of-way for said purposes by reason of the facts that said road and trail were established upon said land when it was in part public land of the United States of America and in part in the ownership of the Northern Pacific Railroad Company, and its successor in interest, the Northern Pacific Railway Company, which said railroad company and railway company dedicated the same as a public highway, which was appropriated by the United States and the general public prior to the issuance of any patents therefor, thereby reserving unto itself and the general public said public highway, road and trail, and by reason of the fact that the United States and its permittees and the public have for more than 50 years used said road and trail for said purposes and the United States has, during said period from time to time, on behalf of itself and the general public,

expended upon said road and trail monies appropriated by the Congress, for its construction and maintenance to the end that it might serve said purposes; and the United States in common with the public is entitled to the possession of the right-of-way for said highway, road and trail and that the same is necessary for the protection, use and administration of the national forest and other property of the United States, and as a necessary way of access to the recreational areas, camp grounds, parks and facilities and all areas adjacent thereto in said national forest, by the general public at large.

VII

That since the year 1940 and up to and including the present time, the defendants have maintained gates across the said highway, road and trail and have, at will, kept said gates locked and have refused and do now refuse to permit members of the general public at large to pass through said gates along said highway, road and trail, and have maintained and do now maintain signs thereon and adjacent thereto claiming and identifying said road and trail as a private road and trail and prohibiting the use thereof, and have exercised dominion over the same, thereby restricting and preventing the free and unimpeded use and maintenance of said road and trail by the general public at large as a means of access to the recreational areas, camp grounds, parks, facilities and areas immediately adjacent thereto as provided by the United States of America on behalf of the public at large and itself, then engaged in the protection, use and administration of the said Crazy Mountains Division of the said national forest as required by law and the regulations of the Secretary of Agriculture, and by reason of said conduct on the part of said defendants, the defendants have restricted and prevented the free and unimpeded use of said public highway, road and

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trail as the sole means of access to the above-described property, to the injury and damage of the public at large and the United States of America, and have deprived the United States of America of certain revenue paid by members of the public in the usage of said national forest.

VIII

That by reason of the conduct and acts of the defendants, an actual controversy exists between the defendants and the United States of America on behalf of the general public at large, as well as itself, concerning the free and unimpeded right of usage and maintenance of said public road and trail and concerning the status and character thereof.

WHEREFORE, plaintiff prays:

1. That an injunction be issued out of this court directed to the defendants and their employees, attorneys, agents and those acting in concert with them or any of them, restraining and enjoining each of them, during the pendency of this action, from exercising or attempting to exercise any dominion or control over said highway, road and trail, and from maintaining any form of gates, locks or chains interfering or tending to interfere or impede the free usage of the public road, highway or trail, or the gates situated thereon, by members of the general public or servants, officers, employees or agents of the United States of America, and from maintaining signs of any character importing to convey the meaning or impression that said public road, highway and trail is a private road, highway and trail or that travel thereon or usage thereof is in any manner prohibited or restricted, and that the temporary injunction heretofore issued by the above-entitled Court in this cause be continued in full force and effect during the pendency of this action.

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2. That judgment be entered herein declaring said road, highway and trail to be a public road, highway and trail, and as such a right-of-way upon, over and across the lands owned or controlled by the defendants, and that the defendants upon the final determination of this action be permanently restrained and enjoined from doing any act or thing tending to interfere in any manner with the free and unimpeded usage of said road, highway and trail by members of the general public at large, and officers, servants and employees of the United States of America, or from maintaining any gates thereon or signs upon said public highway, road and trail or anywhere in the vicinity thereof importing to convey the meaning or impression that said highway, road and trail is a private highway, road and trail or that travel thereon or usage thereof is in any manner prevented or restricted, and from exercising or attempting to exercise any dominion or control over said public highway, road and trail.

3. That plaintiff have judgment for its costs of suit and for such other and further relief and orders as may be just and proper.

JOHN B. TANSIL
United States Attorney

Franklin A. Lamb
Assistant United States Attorney

7—1404

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

- - - - - - -

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAUL L. VAN CLEVE, JR., and THE VAN CLEVE COMPANY, INC., a corporation,

Defendants.

GOVERNMENT MEMORANDUM IN SUPPORT OF MOTION FOR CONTEMPT

Civil No. 1098 ✓

- - - - - - -

This matter came on for hearing before the Court at Great Falls, Montana, on June 6, 1949, upon the plaintiff's motion to find the defendant Paul L. Van Cleve, Jr. and The Van Cleve Company, Inc., a corporation, guilty of contempt of this court by reason of certain conduct in violation of the preliminary injunction issued herein on the 18th day of November, 1948, and upon the Government's motion to enlarge the terms of the preliminary injunction by reason of certain conduct of the defendants which directly interfered with the efforts of Government officials in the conduct of their official duties.

In November 1948, the Government witnesses testified to the physical conditions found which restricted and interfered with the use of the Big Timber Canyon road and trail by members of the public, and incidentally interfering with its use by officials of the Government. The Court thereupon, at the conclusion of the hearing, issued its preliminary injunction, the restraining part of which is as follows:

> "You hereby are restrained and enjoined pending the determination of this action from maintaining any locked gates

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> or signs of any character which tend to interfere or impede the free usage of Big Timber Canyon road or trail through, over and upon the property owned by you, the said defendants, or either of you, or any signs that import to convey the meaning or impression that said road or trail is a private road and trail and that travel thereon or usage thereof is in any manner prohibited or restricted."

For the purpose of this Memorandum, we will discuss the Government's motions separately, although this may result in some repetition of facts proven.

MOTION FOR CONTEMPT

Prior to the issuance of the injunction on November 18, 1948, a chain was maintained by the defendants held together by a lock which, according to the testimony of Government witnesses, was looped over the pole of the portal gate in such a manner that the same could be readily lifted from the gate but which, the witnesses testified, definitely conveyed the impression that the same was locked. In addition thereto, the defendants maintained three or four signs nailed on the posts of the portal gate and upon the wooden sign over the portal, which signs contained printed words of "No Trespassing" and penciled writing of the defendants advising them to stay on the road to Half Moon Park and stating that it was a private road.

The condition found at that time is clearly shown in Government Exhibits Nos. 1, 2 and 3 introduced on November 18, 1948 (T. 58). The defendant states (T. 99) that the gate was locked on November 18, 1948, at the time the injunction was issued but no evidence to that effect was introduced by the Government at that time.

After the service of the Writ of Injunction upon the defendants, the defendant states (T. 91, 93-95) that he

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unlocked the gate replacing the lock in the chain and looping it over the gate as shown in Exhibits Nos. 1, 2 and 3 of November 1948 and Government Exhibit No. 1 of June 6, 1949, and removed from the gate the signs containing the penciled words "Private Road" and replaced the same with a printed sign "Positively No Trespassing", on which the defendant wrote "Positively No Trespassing on Either Side of the Road From Here to Half Moon Park" (T. 93). In addition thereto, the defendant placed a no trespassing sign a few yards inside the portal gate and a sign on posts adjoining the gate at the Van Cleve buildings "No Trespassing" (T. 37). This condition existed until June 2, 1949, when the defendant removed the portal sign after the acts of conduct concerning which the Government complains (T. 92-93).

It will be recalled that the Court, at the conclusion of the injunction hearing November 18, 1948, stated that it was clear that the existence of the chain and lock as it was looped over the gate, definitely conveyed the impression to any member of the public approaching the gate, when considered in connection with the "No Trespassing" signs, that travel on the road through the gate was prohibited.

The evidence of the Government clearly discloses that the condition of the chain and lock has remained exactly the same as it was prior to the issuance of the injunction at all times up to the present hearing, and particularly in November 1948, January 7, 1949, and April 21, 1949 (T. 38, 58-59).

As far as the signs are concerned, the only change was a removal of three signs that existed in November 1948 which contained the printed words "No Trespassing " and the replacement of a sign containing the printed words "Positively No Trespassing". On the signs found in November 1948 and in

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January, April and May, 1949, the defendant had written in pencil words of caution to the public which, at all times, were substantially the same except the omission of the words "Private Road". It is clear from examination of Government's Exhibits Nos. 1, 2 and 3 of November 1948, and Government's Exhibits Nos. 2 and 5 of June 1949, that any person approaching the portal gate in an automobile could not read the penciled notations of the defendant, and in fact would be confronted with exactly the same situation and appearance of the gate in June 1949 that he would have found in November 1948. An examination of Government's Exhibit No. 5 of June 1949 clearly shows the difficulty and the improbability of any member of the traveling public determining the penciled writing and it is very improbable that they would, in fact, alight from the car and attempt to travel upon the road through the portal gate.

It is very apparent that the defendant has attempted to "split hairs" in the wording of the preliminary injunction and by a carefully conceived plan of operation has attempted to technically avoid the restrictive terms of the injunction and yet for all practical purposes accomplish the same purpose and create exactly the same impression to the traveling public which the Court was attempting to aid by the issuance of the preliminary injunction.

This, in the mind of counsel for the Government, is more contemptuous of the order of this Court than an outright intentional violation of the injunction, and we feel sincerely that the defendant should not be permitted to continue this course of conduct and that he should be punished for his actions in the past.

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ENLARGEMENT OF TERMS OF INJUNCTION

It will be recalled that Government witnesses in November 1948 testified that there had not been an extensive obstruction by the defendant preventing the Government officials in the performance of their duties. However, on May 20, 1949, a Government road maintenance crew entered the Gallatin National Forest through the portal gate for the purpose of necessary repair of the road in order to make travel thereon possible by members of the public, Government officials and fire control crews. After working a portion of the road from the portal gate through the gate at the Van Cleve buildings and into Section 3, the operator of the road grader was stopped by the defendant Paul L. Van Cleve, Jr. in a very abusive and obscene manner. This conduct on the part of the defendant is clearly set forth on pages 12-16 of the transcript. In addition thereto, the defendant threatened to obtain his gun and keep the road maintenance crew off the road (T. 16, 53-54). At the time of his conversation with the grader operator, who was the foreman of the road crew, the defendant picked up a large rock and threatened the operator of the crew with the same. Thereafter and on May 22, 1949, the defendant again appeared on the road carrying an unsheathed high-powered rifle which it was very apparent was in furtherance of the threats conveyed to the road crew two days previous (T. 38-39, 61).

After abusively and obscenely obstructing and threatening the operator of the road grader, the defendant then drove to the upper gate located on Government-owned land (T. 32-35) and ordered the Government crew to leave their work and remove the Government truck from the area as he was going to lock the gate even if such action would be deemed in contempt of this court, and that if the road crew did not leave

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they would have to walk out from the area (T. 18-22). In fact, as shown on Government's Exhibit No. 3, the upper gate is thirty feet from property owned by the defendant and the truck at the time the defendant ordered its removal was located entirely upon Government property and the maintenance crew was engaged in work entirely on Government property (T. 22, 33-35).

Thereafter, the defendant abusively and contemptuously telephoned the supervisor of the Gallatin National Forest and advised that the road crew had been run out of the area and that if they went back someone might be hurt (T. 53-54).

All of the Government witnesses testified concerning the necessity for the maintenance work which was being performed when prevented by the defendant, as the road was in such condition that passenger vehicles could not safely travel over the road and that the same was deemed necessary in the fire control and prevention work in that area of the Gallatin National Forest (T. 51-53, 41-42, 59, 65).

The maintenance crew at the upper gate were in the act of cutting timber for the purpose of constructing a cattle guard to be situated entirely upon Government land (T. 18, 63). It was shown that the defendant had been ruining Half Moon Park by permitting his livestock to trespass thereon and that the Government officials deemed it necessary for the protection of said camp grounds that a cattle guard be constructed to prevent the livestock of the defendant from destroying the enjoyable usage of this area by the public (T. 64).

Although it was not directly material to the motions then before the Court, evidence was introduced concerning the maintenance of the road, both inside and outside

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the boundaries of the Gallatin National Forest. It was shown briefly that repair work had been conducted by the Government on the public road within the boundaries of the Gallatin National Forest from at least 1925 to 1940 when the defendant locked the gates preventing further maintenance work (T. 66-67). In addition thereto, witnesses testified that they had examined the records of Sweet Grass County, Montana, showing that county funds had been expended from about 1913 to 1923 upon the Big Timber Canyon road (T. 68). The county maintains the road to the boundary and the Government maintains the road inside the National Forest (T. 46-47, 75-76), as is customary in most national forests where the Government normally maintains the roads within the forest boundaries and the state or county maintains the roads to the boundary.

In addition thereto, the Government offered as supporting evidence Exhibit No. 4 which was a deed from the Northern Pacific Railway Company to the defendants clearly disclosing an easement to the public for the public roads existing at that time over and across all of Section 3, Township 3 North, Range 12 East. This is the section on which the road grader was working at the time the defendant ordered its removal and was the location of the most dangerous part of the road definitely needing repair work in order to enable any normal form of traffic to Half Moon Park (T. 79, 41, 59-61).

SUMMARY

On the Government's motion for contempt the transcript clearly shows that for all intents and purposes the signs, gates, locks and chains were primarily the same at all times after the injunction was issued, and that the defendant cunningly and adroitly attempted to avoid the intent and

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purposes of the order of this Court and by such conduct is definitely in contempt of the order of this Court dated November 18, 1948, and should be punished accordingly.

Because of the defendant's conduct on May 20 and 22, 1949, when the defendant obscenely and abusively prevented the operator of the road grader from continuing the work as ordered by the Government and by his threats of physical violence to the operator of the road grader, as well as to the crew at the upper gate then attempting to construct a necessary cattle guard, the function of the United States Government in its duties in the Gallatin National Forest have been restricted, prohibited and obstructed by the defendant thereby preventing the maintenance work deemed necessary and tending to increase the difficulty of fire control and fire prevention steps in the Gallatin National Forest. The defendant's threats of physical violence were demonstrated by his seizing a large rock and holding the same in a threatening manner, and his later appearance at the scene of the work with an unsheathed rifle which he had previously threatened to use. In addition thereto, he threatened to lock the gate even if it was in contempt of this Court.

This conduct on the part of the defendant makes it necessary to enlarge the terms of the injunction in order to enable the Government officials to carry out the work deemed necessary and essential in this particular area.

WHEREFORE, the Government renews its motions to find the defendant guilty of contempt of this Court and requesting that the terms of the preliminary injunction heretofore issued be enlarged requiring the defendant to remove the chains and locks from the gates and all signs therefrom and to refrain from any interference with the maintenance of the road from the boundary of the Gallatin National Forest to

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Half Moon Park, and the construction of the cattle guards, culverts and other things deemed necessary in the performance of Government functions.

Respectfully submitted,

JOHN B. TANSIL
United States Attorney

Franklin A. Lumb
Assistant United States Attorney

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U. S. GOVERNMENT PRINTING OFFICE

#1098

[redacted]

#1098
U. S
vs
Paul L. Van Cleve et. al

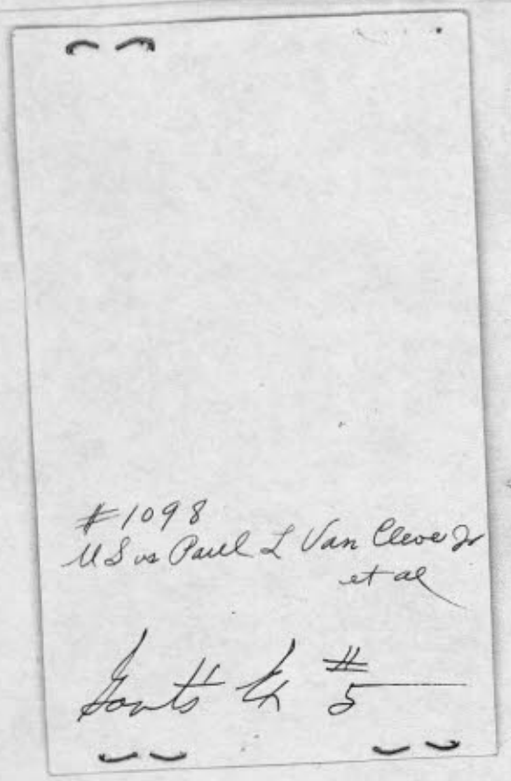
Exhibits introduced
at hearing on Motion for Contempt

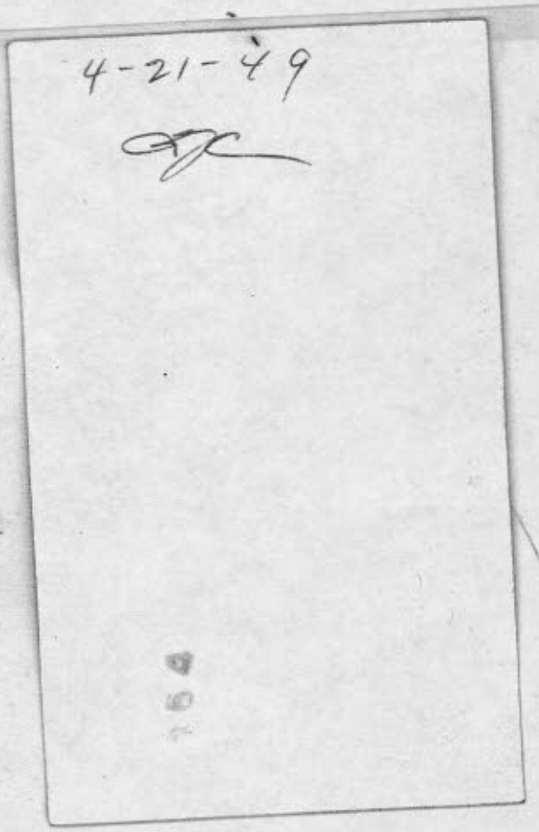
[redacted]

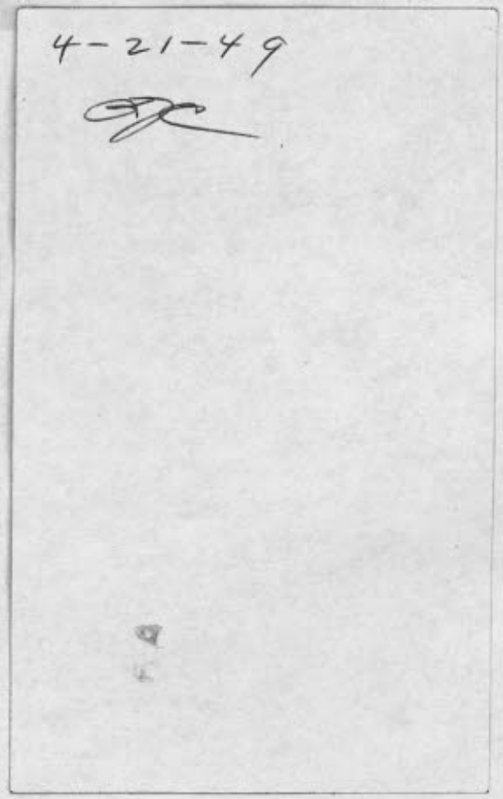
Introduced on June 6 - 1949

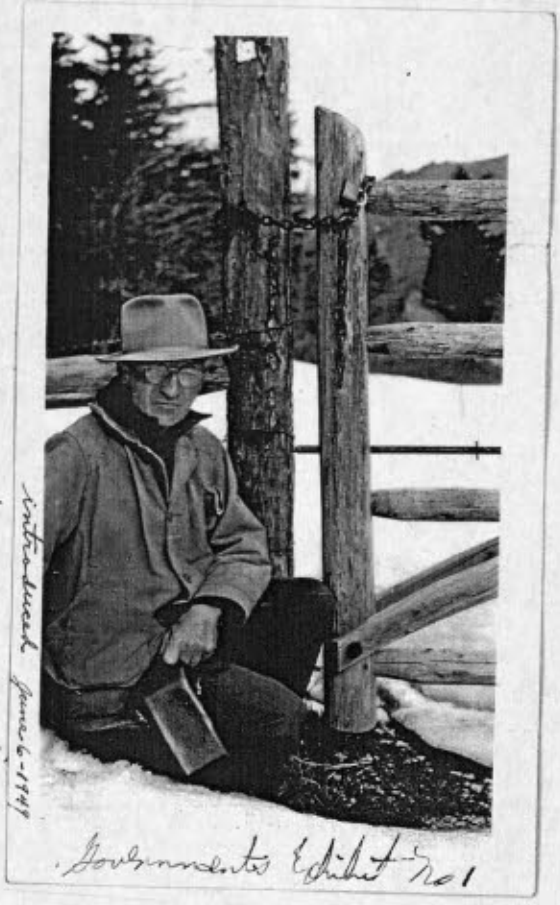
Government Exhibit No 2

Government Exhibit No 5









Case # 1098
U.S. vs
Paul L Van Cleve Jr. et al

Govts Ex # 4

4-21-49

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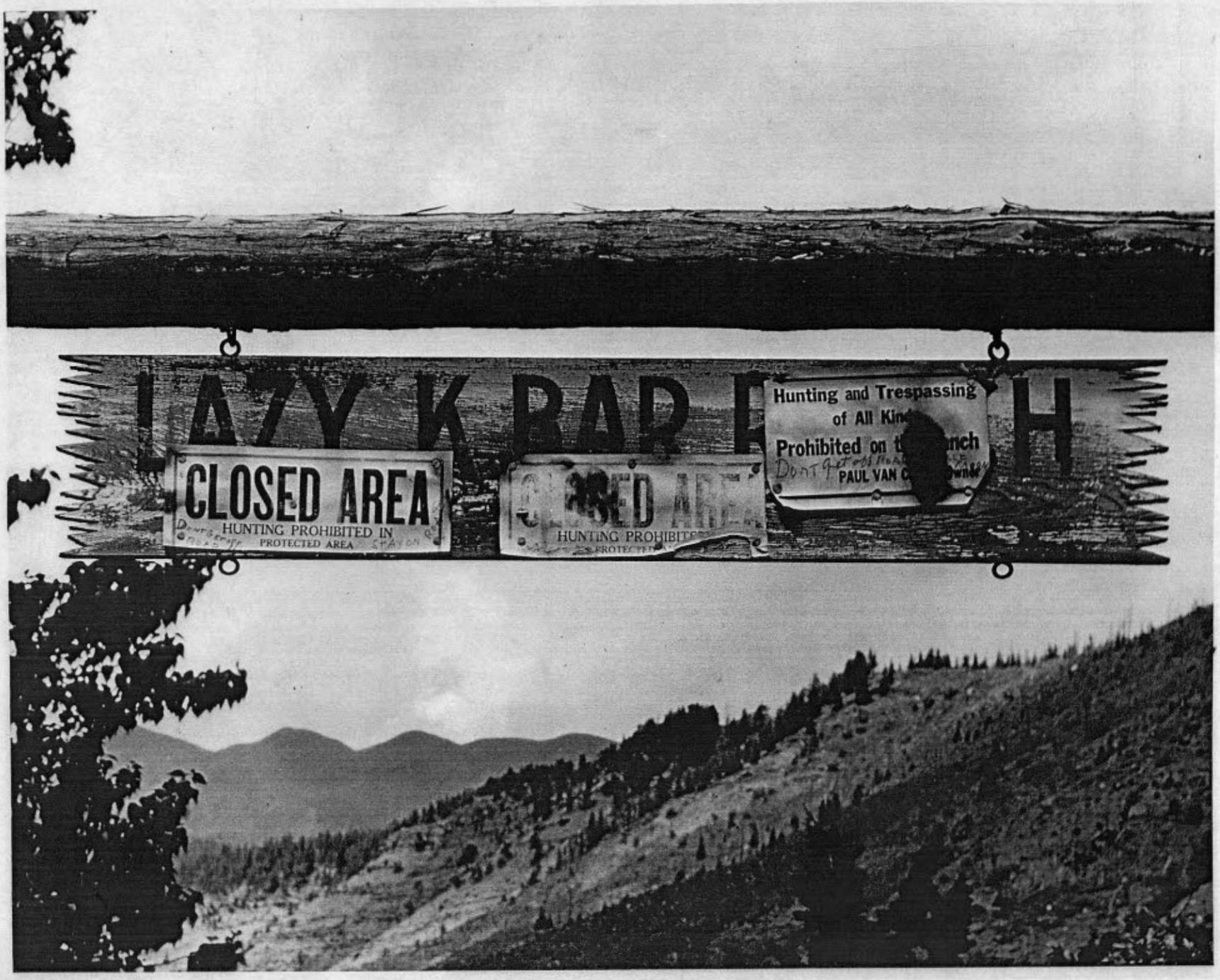
Case #1098 U.S. vs. Paul L. Van Cleve, et. al.

Exhibit #1

PHOTOGRAPH BY
E. R. AUGUSTIN, JR.
LIVINGSTON, MONTANA



#1098
U.S. on Paul L. Van Cleve Dr; et al

PHOTOGRAPH BY
E. R. AUGUSTIN, JR.
LIVINGSTON, MONTANA

PHOTOGRAPH BY
E. R. AUGUSTIN, JR.
LIVINGSTON, MONTANA

Case #1098

U.S. vs. Paul L. Van Cleve, Jr. et al

Exhibit No. 3

GIBSON, FITZGERALD & BODINE
LAW OFFICES
127 NORTH MAIN STREET
LIVINGSTON, MONTANA

FRED L. GIBSON
DAVID B. FITZGERALD
RICHARD A. BODINE

TELEPHONE 18

July 5, 1949

Clerk of the United States District Court
Great Falls, Montana

Dear Sir:

Enclosed herewith find answer of Paul L. Van Cleve, Jr., and The Van Cleve Company, Inc., to the amended complaint of plaintiff in the case of United States of America, plaintiff, vs. Paul L. Van Cleve, Jr., et al., No. 1098, which please file in the cause.

I am not sure whether the file in this cause is kept at the Great Falls office of the clerk or at Helena, but I assume that the file is in Great Falls.

We are serving copies of the answer upon the United States District Attorney today and he will, no doubt, accept service by letter.

Very truly yours,

GIBSON, FITZGERALD & BODINE

By: Fred L. Gibson

FLG:js
Enc.
Answer of Paul L. Van Cleve, Jr., et al.

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IN THE DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

FILED

JUL 7 - 1949

H. H. WALKER, Clerk

BY C.K. Kegel Deputy Clerk

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

PAUL L. VAN CLEVE, JR., and THE VAN CLEVE COMPANY, INC., a corporation; and SWEET GRASS COUNTY, MONTANA, a quasi-municipal corporation,

Defendants.

ANSWER OF
Paul L. Van Cleve, Jr.,
and
The Van Cleve Company, Inc.,
To Amended Complaint
No. 1098 ✓

Come now Paul L. Van Cleve, Jr., and The Van Cleve Company, Inc., a corporation, two of the defendants in the above entitled action named, and answer plaintiff's amended complaint as follows:

FIRST DEFENSE TO PLAINTIFF'S FIRST CAUSE OF ACTION:

For their first defense to the first cause of action set forth in said amended complaint said answering defendants admit, deny and allege as follows:

I

Admit that this is an action brought by the plaintiff pursuant to the provisions of Rule 57, Federal Rules of Civil Procedure, and Title 28, Section 2201, U. S. C. A.

II

Admit the Van Cleve Company, Inc., one of the answering defendants, is a corporation duly organized and authorized to do business under the laws of the State of Montana, with its principal place of business at Melville, in said state.

III

Aver that Sweet Grass County is a political

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ATTORNEYS AT LAW
LIVINGSTON, MONTANA

division of the state of Montana. Deny that the order of the court referred to in paragraph III of said first cause of action of the amended complaint directed that said county be made a party defendant herein, but aver that said order directed that The Board of County Commissioners of said Sweet Grass County be made defendant herein. Admit that plaintiff requested said county of Sweet Grass to join it as party plaintiff in this action, and that said county, acting by and through its Board of County Commissioners, refused to join in the said action as a party plaintiff.

IV

Admit the allegations of paragraph IV of the first cause of action in said amended complaint contained.

V

Deny the allegations of paragraph V of said first cause of action in said amended complaint contained, and specifically deny that the road referred to in said paragraph is, or ever was, a public highway.

VI

Deny the allegations, and each and every part thereof, of paragraph VI of said first cause of action in said amended complaint contained, and specifically deny that plaintiff has any easement or right of way for said road over or across any of the lands of these answering defendants, or either of them, "in common with the public", or at all, and deny that there is any easement or right of way over any lands of these answering defendants for said road.

VII

Admit that, not only since the year 1940, but at all times since they have owned the lands over which said road crosses, the answering defendants have maintained gates

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LIVINGSTON, MONTANA

across said road upon their said lands, and aver that gates have been and now are, kept and maintained across said road where the same crosses the lands of said defendants, and that such gates have been so maintained by defendants, and their predecessors in interest and title to said lands, at all times since said road has crossed said lands. Admit that prior to the issuance of the temporary injunction herein on November 20, 1948, defendants at certain times, locked one or more of said gates, but deny that at any time, or at all, they have interfered with the use of said road by the plaintiff, or its officers, agents, servants or employees, but aver that at such times as any of said gates were locked the said officers, agents, servants and employees of plaintiff were furnished with keys that opened said locks, or with the combination that opened the same, and that at all times said plaintiff and its said officers, agents, servants and employees have had and do now have the use of said road where the same crosses the lands of defendants all by permission of defendants. Defendants aver that plaintiff itself maintains and has for long maintained a gate across said road where it enters upon lands of plaintiff in Section 12, Township 3 North, Range 12 East of Montana Principal Meridian. Deny that defendants maintain signs on said road or adjacent thereto identifying said road as a private road, but aver that said road is in fact a private road and not a public road, and this defendants assert and maintain.

VIII

Admit that an actual controversy exists between plaintiff and defendants concerning said road; and aver

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LIVINGSTON, MONTANA

that the plaintiff asserts in this action that said road constitutes and is a public highway, and that defendants deny said assertion.

IX

Deny generally each and everyallegation in the plaintiff's first cause of action set forth in its amended complaint not herein specifically admitted or denied.

SECOND DEFENSE TO PLAINTIFF'S FIRST CAUSE OF ACTION:

For their second defense to the first cause of action set forth in said amended complaint said answering defendants aver that the said first cause of action fails to state a claim against said answering defendants, or either of them, upon which relief may be granted.

THIRD DEFENSE TO PLAINTIFF'S FIRST CAUSE OF ACTION:

For their third defense to the first cause of action set forth in said amended complaint said answering defendants aver that the plaintiff has failed to join an indispensable party to said action, to-wit: The board of county commissioners of Sweet Grass County, Montana, which said county is the county wherein the alleged public highway described in said first cause of action is located, and this notwithstanding the order of the court herein that plaintiff in its amended complaint make said board a party defendant herein.

FIRST DEFENSE TO PLAINTIFF'S SECOND CAUSE OF ACTION:

For their first defense to the second cause of action set forth in said amended complaint said answering defendants admit, deny and allege as follows:

I

Admit that this is an action brought by the plaintiff pursuant to the provisions of Rule 57, Federal Rules of Civil Procedure, and Title 28, Section 2201, U. S. C. A.

II

Admit the Van Cleve Company, Inc., one of the answering defendants, is a corporation duly organized and authorized to do business under the laws of the State of Montana, with its principal place of business at Melville, in said state.

III

Aver that Sweet Grass County is a political division of the state of Montana. Deny that the order of the court referred to in paragraph III of said second cause of action of the amended complaint directed that said county be made a party defendant herein, but aver that said order directed that The Board of County Commissioners of said Sweet Grass County be made defendant herein. Admit that plaintiff requested said county of Sweet Grass to join it as party plaintiff in this action, and that said county, acting by and through its Board of County Commissioners, refused to join in the said action as a party plaintiff.

IV

Admit the allegations of paragraph IV of the second cause of action in said amended complaint contained.

V

Deny the allegations of paragraph V of said second cause of action in said amended complaint contained, and specifically deny that the road referred to in said paragraph is, or ever was, a public highway.

VI

Deny the allegations, and each and every part thereof, of paragraph VI of said second cause of action in said amended complaint contained, and specifically deny that plaintiff has any easement or right of way for said road

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LIVINGSTON, MONTANA

over or across any of the lands of these answering defendants, or either of them, "in common with the public", or at all, and deny that there is any easement or right of way over any lands of these answering defendants for said road.

VII

Admit that, not only since the year 1940, but at all times since they have owned the lands over which said road crosses, the answering defendants have maintained gates across said road upon their said lands, and aver that gates have been and now are, kept and maintained across said road where the same crosses the lands of said defendants, and that such gates have been so maintained by defendants, and their predecessors in interest and title to said lands, at all times since said road has crossed said lands, defendants aver that they, and each of them, and their predecessors in title to said lands now owned by them, have ever and do now assert that said road referred to in plaintiff's complaint is a private road or way across defendants' lands, and that no right to the indiscriminate use of or travel upon the same now exists or ever has existed in the plaintiff, or in the general public, or in anyone else, or at all; defendants aver that such travel as has been had over said road has been by the permission of defendants and their predecessors in title, and admit that they have restricted and at times prevented the free and unimpeded use and maintenance of said road by the general public at large; admit that prior to the issuance of the temporary injunction herein on November 20, 1948, defendant at certain times locked the gates maintained by them upon said road, but deny that at any time, or at all, have they interfered with the use of said road by plaintiff, its officers, agents, servants or employees and aver AVER

FITZGERALD AND
BODINE
ATTORNEYS AT LAW
LIVINGSTON, MONTANA

that at such times as any of said gates were locked, the said officers, servants and employees of plaintiff were furnished with keys that opened said locks, or with the combination that opened the same, and that at all times said plaintiff and its said officers, agents, servants and employees have had the use of said road where the same crosses the lands of defendants all by permission of defendants. Defendants aver that plaintiff itself maintains and has for long maintained a gate across said road where it enters upon lands of plaintiff in Section 12, Township 3 North, Range 12 East of Montana Principal Meridian. Deny that defendants maintain signs on said road or adjacent thereto identifying said road as a private road, but aver that said road is in fact a private road and not a public road, and this defendants assert and maintain.

VIII

Admit that an actual controversy exists between plaintiff and defendants concerning said road; and admit that the plaintiff asserts in this action that said road constitutes and is a public highway, and that defendants deny said assertion.

IX

Deny generally each and every allegation in the plaintiff's second cause of action set forth in its amended complaint not herein specifically admitted or denied.

SECOND DEFENSE TO PLAINTIFF'S SECOND CAUSE OF ACTION:

For their second defense to the second cause of action set forth in said amended complaint said answering defendants aver that the said second cause of action fails to state a claim against said answering defendants, or either of them, upon which relief may be granted.

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ATTORNEYS AT LAW
LIVINGSTON, MONTANA

THIRD DEFENSE TO PLAINTIFF'S SECOND CAUSE OF ACTION:

For their third defense to the second cause of action set forth in said amended complaint said answering defendants aver that the plaintiff has failed to join an indispensable party to said action, to-wit: The board of county commissioners of Sweet Grass County, Montana, which said county is the county wherein the alleged public highway described in said second cause of action is located, and this notwithstanding the order of the court herein that plaintiff in its amended complaint make said board a party defendant herein.

WHEREFORE, defendants demand:

1. That plaintiff take nothing by this action.

2. That defendants recover their costs and disbursements herein expended.

3. That defendants have such other and further relief as to the court shall seem proper in the premises.

Fred L. Gibson

David P. Fitzgerald

Attorneys for defendants
127 North Main Street
Livingston, Montana

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United States Marshal - Montana
Dock. No. 3504 Page 328
Criminal _____ Civil 15

SUMMONS IN A CIVIL ACTION

D. C. Form No. 45 Rev.

District Court of the United States

FOR THE

DISTRICT OF Montana

Billings DIVISION

CIVIL ACTION FILE NO. 1098

FILED
JUL 8 - 1949
H. H. WALKER, Clerk
BY C.G. Kegel Deputy Clerk

United States of America,
Plaintiff

v.

Paul L. Van Cleve , Jr.;
The Van Cleve Company, Inc., a corporation;
and
Sweet Grass County, Montana, a
quasi-municipal corporation.

Defendants.

SUMMONS

To the above named Defendant : Sweet Grass County, Montana, a quasi-municipal corporation.

You are hereby summoned and required to serve upon John B. Tansil, United States District Attorney, and Franklin A. Lamb, Assistant United States Attorn

plaintiff's attorneys, whose address is Federal Building, Billings, Montana,

an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

H.H.Walker
Clerk of Court.

By C.G.Kegel
Deputy Clerk.

Date: June 25,1949.

[Seal of Court]

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

U. S. v. Paul L. Van Cleve Jr. et al

Form No. 282

RETURN ON SERVICE OF WRIT

United States of America,
District of Montana } ss:

I hereby certify and return that I served the annexed Summons on the therein-named Sweet Grass County, Montana, a quasi-municiapl corporation

with copy of complaint attached thereto
by handing to and leaving a true and correct copy thereof with J. F. Clark, Chairman of the Board of County Commissioners for Sweet Grass County, Montana personally at Big Timber in said District on the 6th day of July, 1949

United States Marshal's
Fees ..... $ 2.00
Expenses Mileage ..... $ 9.84
Total ... $ 11.84

D. A. Batchoff
U.S. Marshal.

By J. P. Lawrence
Deputy.

U. S. GOVERNMENT PRINTING OFFICE 16—17777

GIBSON, FITZGERALD & BODINE
LAW OFFICES
127 NORTH MAIN STREET
LIVINGSTON, MONTANA

FRED L. GIBSON
DAVID B. FITZGERALD
RICHARD A. BODINE

TELEPHONE 18

July 12, 1949

Clerk of the United States District Court
Great Falls, Montana

Dear Sir:

Enclosed find brief of Paul L. Van Cleve, Jr., and the Van Cleve Company, Inc., in the case of the United States of America, plaintiff vs. Paul L. Van Cleve, et al., defendants, No. 1098, the brief being in opposition to the plaintiff's motions adjudging Mr. Van Cleve guilty of contempt, and for enlargement of the terms of the temporary injunction.

We are serving the same today upon Mr. Franklin A. Lamb, Assistant United States District Attorney at Billings, and he will acknowledge the service.

Very truly yours,

GIBSON, FITZGERALD & BODINE

By: Fred L. Gibson

FLG:js
Enc.
Original brief.

IN THE DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

PAUL L. VAN CLEVE, JR., and THE VAN CLEVE COMPANY, INC., a corporation; and SWEET GRASS COUNTY, MONTANA, a quasi-municipal corporation,

Defendants.

#1098 ✓

MEMORANDA OF PAUL L. VAN CLEVE, JR., AND THE VAN CLEVE COMPANY, INC., CONTRA PLAINTIFF'S MOTION FOR CONTEMPT AND TO ENLARGE INJUNCTION ORDER.

Filed July 14-1949
H. H. Walker Clerk
By C. Kegel Deputy

The matters now before the court are the two motions of plaintiff, first, the motion to adjudge Mr. Van Cleve guilty of contempt for the alleged violation of the temporary injunction of November 20, 1948, and second, the motion to enlarge the terms of said temporary injunction to restrain defendants from preventing plaintiff doing grading and maintenance work on the road upon defendants' lands, and, third, the motion of defendant Van Cleve to dismiss the contempt proceeding because no evidence was received of any violation by defendant of the temporary injunction order.

UPON THE CONTEMPT CHARGE.

The temporary injunction order which plaintiff avers Mr. Van Cleve has violated, provides that it is made "in order that the status quo of the subject matter of the action remain unchanged until the final determination of the action on its merits is had by the Court." By it the defendants "are restrained and enjoined, pending the determina-

tion of this action, from maintaining any locked gates or signs of any character which tend to interfere or impede the free usage of Big Timber Canyon road or trail through, over and upon the property owned by you, the said defendants, or either of you, or any signs that import to convey the meaning or impression that said road or trail is a private road or trail, and that travel thereon or usage thereof is in any manner prohibited or restricted."

The plaintiff alleges that "continuously since the issuance and service x x x of said preliminary injunction, said defendants have continued to maintain locks, chains, signs and gates which continue to interfere and impede the free usage of the Big Timber Canyon road and trail through, over and upon the property owned by said defendants, and that said locks, chains, signs and gates convey the meaning and impression that said road and trail is a private road and trail and that travel thereon and usage thereof is prohibited and restricted." Pltffs. "Motion to Cite for Contempt and for Enlargement of Temporary Injunction", par. 2 pp 1 & 2.

The injunction order is to preserve the "status quo of the subject matter of the action." That plainly is that the road shall be left and used as it was before the hearing. The evidence before the court when the temporary injunction was ordered disclosed without dispute that at all times since the earliest user of the road gates across the road were maintained where it crosses the lands now owned by defendants. And that persons going up to the timber over this road were required to open and close the gates in their use of the road. See testimony of Druckmiller and other witnesses taken at Big Timber, Montana, July 16, 1947, under the

order permitting plaintiff to take depositions to perpetuate testimony for use in its contemplated action to obtain a judgment declaring the road to be a public highway. So, to preserve the status quo we preserve the gates. But no evidence was adduced to show that in those older days the gates were locked and so, the courts injunction order was that defendants should not maintain any "locked gates" to interfere with the use of the road as it was wont to be used.

And consistently with this situation the injunction order as to the maintenance of gates clearly is that defendants shall not maintain "locked gates".

On this the evidence is undisputed that the gates have not been locked since the issuance of the injunction. Mr. Van Cleve testified that he went up to the dude ranch upon his return home from the hearing at Helena when the temporary injunction was granted and unlocked the gate and tore down the two signs that indicated the road was a private road. The forest reserve officials also admitted in their testimony on the contempt hearing that at all times they went up or down the road since the issuance of the injunction the gates were not locked. They passed through at all times without interference. It is undisputed and in fact admitted that the forest officials and employees of plaintiff have not been interfered with or impeded in the use of the road. Then, who, since the injunction order of November 20, 1948, has been prevented from using the road? Not a single, solitary individual of the great mass of men over which plaintiff has herein assumed guardianship, under the name of the "general public" has comeforward to say that he has been prevented from using the road.

As a result of the temporary injunction the gates on defendants lands have since issuance remained at all times unlocked, and the signs that the road was a private road were removed. The forest service officials and employees have not been interfered with in their use of the road. They admit this and testified that they have never found the gates locked.

No one has come forward to say that he has been impeded in his use of the road. No one says he has turned back from contemplated use of the road because of a gate, a chain, a sign, or what not.

It is plain that nothing that had been done or omitted to be done by defendants, from November 20, 1948, the day the temporary injunction was issued, until May 20, 1949, the day Mr. Van Cleve discovered that the plaintiff's officials, employees and servants had four days earlier made clandestine entry upon his lands and were scarifying the soil and grading the road thereon, had caused the plaintiff to conceive that there had been any violation of the injunction order. At such times as plaintiff's officials had gone to the forest reserve they entered and left plaintiff's lands therein situate through unlocked gates, and the two signs that prior to the injunction order stated the road to be a private road had been removed. Only the board over the gate at the entrance to defendants lands with the name "Lazy K Bar Ranch", with a printed "no trespassing" card thereon appeared. And on the printed card "No trespassing" appeared the writing that warned users of the road not to trespass on the Van Cleve lands through which the road passed. Nothing has disturbed the equanimity of the plaintiff or its employees, or any

member of the general public, insofar as the road here involved was concerned, until on May 20, 1949, Mr. Van Cleve found the plaintiff's servants scarifying and grading the road on his lands. He conceived this not to be a preservation of "the status quo of the subject matter" of the case. He stopped further work on the road on his land. Then and not till then was the contempt charge brought charging that he had violated the order at all times from the date of its issuance.

So it is patent that the inspiration of the contempt charge brought against Mr. Van Cleve was his action in preventing the forest service employees from further scarification and grading of the road where it crosses the Van Cleve lands.

But the prevention of the road grading work on defendants' lands was, admittedly, not a violation of the injunction order. It was, in the language of the order itself, "that the status quo of the subject of the subject matter of the action remain unchanged until the final determination of the action on its merits."

Counsel for plaintiff admit that this is not a violation of the order and so stated in his statement of the case to the court upon taking up the plaintiff's motion.

And counsel, besides expressly stating that whatever Mr. Van Cleve did when he stopped the grading work was not in violation of the injunction, also further admits the fact by seeking to enlarge the scope of the order to permit the plaintiff to perform what he terms "maintenance work" on the road.

The evidence as to this trouble between Van Cleve and the forest service employees then upon his land with road

machinery doing road work was to support the plaintiff's motion to enlarge the terms of the injunction to restrain defendants from interfering with such road work, referred to in plaintiff's motion papers as maintenance work on the road.

Of this we may advert briefly in that part of this memoranda devoted to the motion to enlarge the scope of the injunction order. Before proceeding to that subject however, we do feel impelled to say while on the subject of the alleged violation of the injunction order by Mr. Van Cleve, that while he has meticulously observed the order, plaintiff's servants have flouted it. But because plaintiff was not enjoined from trespassing on defendants lands, nor from grading the road, constructing bridges as a part of the road, or what not, the violation of the proprieties by its agents and servants in clandestinely going on defendants premises with road machinery to scarify and grade the road may not be punished as a contempt. Plaintiff's conduct though is termed by the courts "a gross abuse of the process of the court." It is said "where the purpose of the writ (injunction) is to preserve the existing status of property in litigation until a final adjudication may be had, it is a gross abuse of the process of the court for plaintiff to disregard his own injunction after having by means thereof tied the hands of his adversary, and while plaintiff is not liable to punishment as for contempt, the court has ample power otherwise to prevent or redress such abuse, and may do so by ordering plaintiff to restore the property to defendant and to abstain from any further interference with the possession thereof pending suit." 43 C.J.S. p 1014, Pac. 263.

And here it appears that beside the purpose of the

injunction clearly expressed in the injunction order itself, to preserve the status quo, Mr. Van Cleve and the forest supervisor had, at least tentatively, agreed that no work would be done on the road pending the action. See testimony of Mr. Urquhart, Forest Supervisor. And it is significant that for years, not since 1940 according to Urquhart, the forest service had done no work upon this road.

As to the right of defendants to warn against trespass upon their lands we find that the statute of Montana provides that "any person who shall hunt upon any inclosed land or premises where there is posted in a conspicuous place a sign or warning reading, "No hunting allowed on these premises", or a sign or warning reading, "No trespassing allowed on these premises", shall be guilty of a misdemeanor". Sec. 11482 R.C.M. 1935.

Mr. Van Cleve took down the two signs that said road was a private road. He still had the right to post his lands "In a conspicuous place" where prospective hunters, and others should receive warning not to trespass thereon. He has not violated the injunction order and is not guilty of contempt.

UPON THE MOTION TO ENLARGE INJUNCTION

The plaintiff and its agents, servants and employees have not been impeded in their use of the road. They have used it without let or hindrance. True they have of necessity been compelled to open and close gates in entering and leaving defendants' lands. But they have been compelled to open and close the plaintiff's gate at the forest reserve entrance before reaching defendants' property. That portion of the public/has been compelled to submit to the same inconvenience. using the road

Now the plaintiff asks that defendants be restrained

"from maintaining any gates, locks, chains, signs or engaging in any conduct x x x which might interfere or tend to interfere or impede with (sic) the free usage or maintenance of the x x x road and trail by the general public or the officers, employees or servants of the United States of America."

It is true that a gate across a road interferes to some extent with the free use of the road. But here we have a road where such gates have been maintained at all times since the first use of the road. The case for a public highway thus far made by the plaintiff is contained in the depositions before the court taken to perpetuate the testimony of the witnesses deposing. The case is an attempt to establish the status of the road as a public road created by prescription. While we contend the case thus far made fails in the attempt, if successful in the end, the prescriptive right could be no greater than the past use gave. It is only the land actually used for the road, for the prescriptive period that may be taken from the owner of the servient property, and only to the extent of such use.
28 C.J.S. p 751, par. 74. Ferguson v. Standley, 89 Mont. 489, 300 Pac. 245; Lowry v. Carrier, 55 Mont. 392, 177 Pac. 756.
The extent of an easement obtained by prescription is governed by the extent of the use for the prescriptive period. Ferguson v. Standley, supra; Lowry v. Carrier, supra.

So, it appears that if the gates must be opened and closed in order to use the road, such necessity is a condition of the alleged easement by alleged prescriptive use.

As to the mere presence of locks or chains upon the gate, there is no evidence before the court that such has interfered with or will hinder the use of the road.

The plaintiff's employees have not been turned back by reason thereof. They fear them not. But the plaintiff is very much concerned about the fishermen. The testimony of A. J. Cramer, the Regional Law Enforcement Officer of plaintiff, discloses that the plaintiff's men were working hard on a Sunday, May 22, 1949, to get the road graded so that fishermen going up the road would not get their cars torn up. "It concerned me quite a little right at that time that a bunch of fishermen didn't get in there and get their cars torn up", said the Regional Law Enforcement Officer.

Of course, if the road is a public road the duty rests upon the board of county commissioners of the county wherein it lies to protect and repair it. It was not the duty of the United States to do so. It did not owe this to the fishermen.

Notwithstanding the fact that the record is devoid of any evidence that any person, either forest reserve employee or anyone else, has been hindered or impeded in using the road through defendants' lands, or that any threat to prevent such use has been made, the plaintiff wants the terms of the injunction enlarged to bring about the elimination of the gates, the use of the chain loop fastened by a lock, the use of any chain, and what not else. Although no prevention of use, or threat thereof is shown, plaintiff intimates, but does not clearly state the absurdity, that mayhap some timid hunter or fisherman may approach the gate and, seeing that the loop by which the gate is fastened consists of a chain held together by a lock, shall deduce that he may enter through the gate only by permission, and not having obtained permission will turn back from his pursuit of game, or abandon

his hopeful intention of taking fish.

May the court prescribe that defendants may not maintain gates as at all times they have been maintained? Not on the record now before the court. If not, may the court forbid the defendants the use as a gate fastener of a chain loop tied by a lock? A lock suggests imprisonment and may possibly scare the timid hunter away. May the court forbid the use of the chain loop absent lock joinder? A chain suggests bondage. Must the new injunction provide that the loop for fastening the gate be a rope? Worse and worse, because there is plainly the suggestion of a hangman's knot. A wire loop might not be so fearful to the hunter and fisherman, but it still suggests possibilities of entanglement. There seems no alternative but to provide that, if defendants are allowed to maintain the gates at all, they shall be fastened with a loop of blue ribbon, probably blue, red is too sanguinary a hue.

The request that the court shall minutely specify the kind of gate fastener that shall be used is so absurd as to demand an answer bearing some relation to the request.

It is admitted that the maintenance of gates across a road "conveys the meaning and impression" that such a road is not a public road. That fact is an important fact that must be considered by the court when the trial of this cause shall be had.

For it is held generally, and specifically by Montana that "the fact that the passage of a road has been for years barred by gates or other obstructions to be opened and closed by the parties passing over the land, has always been considered as strong evidence in support of a mere license to

the public to pass over the designated way." Maynard v. Bara, 96 Mont. 302, 30 Pac. 2d 93.

The evidence before the court upon the motion for temporary injunction in Nov. 1948, consisted principally of the depositions of witnesses taken at Big Timber, Montana, on July 16, 1947, "In the Matter of the Application of the United States of America to Perpetuate the testimony of J. E. Druckemiller" and other witnesses, and the said depositions disclose that gates were at all times maintained across the road on the lands now owned by defendants, which gates people were required to open and close in going up the canyon.

The matter is important here at this time upon the motion to enlarge the terms of the temporary injunction to prevent defendants "from maintaining <u>any gates</u>, locks, chains, signs or engaging in any conduct during the pendency of this action which might interfere or tend to interfere or impede (sic) with the free usage or maintenance of The Big Timber Canyon road."

The injunction order made by the court in November last adequately protected plaintiff and its employees in their use of the road. It likewise protected the public in the use of the road. The order has been obeyed and is obeyed. The court certainly will not make an order that will prevent the defendants from making their defense in this action that the road on their land is their road. They have asserted that defense in their answer herein on file. Must they close their mouths to any utterance outside the court room that the road is theirs? Yet this might be conduct tending to frighten fishermen. When Galileo was enjoined from

asserting his astronomical discovery, it is said that he left the tribunal muttering to himself, "it does move." Unless and until a trial on the merits shall declare the road to be a public highway we shall hear the defendants say "it is not a public road."

IN CLOSING

In closing it seems proper to advert to the general position taken by plaintiff in this case. The purpose of the suit is to declare the road to be a public road. If it is a public highway, the state of Montana owns it and has entrusted its care and supervision to the Board of County Commissioners of the county wherein it lies. The ones who use the road are not required to maintain it. And here the plaintiff is merely one who uses the road. It has no official relation to it. True, the road leads to its property. But so does the road to the post office and the one to the office of the Collector of Internal Revenue, a much traveled one, too, in these days, by the way. Ordinarily a mere user of a public road has no right to enjoin its obstruction, if it be obstructed. It is only when he suffers some damage by reason of the obstruction above and beyond that suffered by the general public that he is permitted to maintain such a suit.

State ex rel. Babcock v. Lensman, 110 Mont. 51, 99 Pac. 2d. 492.

If plaintiff has any standing in this suit it is because of this exception to the rule. Where the private user of a public road is injured above the injury to the public generally by its alleged obstruction, and seeks relief, he acts for himself, not for the general public.

There is not any evidence before the court that it

is necessary to enlarge the injunction order to protect either plaintiff or public in its use of the road as it has been used.

Respectfully submitted,

Fred L. Gibson

David B. Fitzgerald

Attorneys for defendants.
127 North Main Street
Livingston, Montana.

United States Department of Justice

UNITED STATES ATTORNEY
FOR MONTANA

Billings, Montana,
July 15, 1949.

Mr. C. G. Kegel,
Deputy Clerk,
U. S. District Court,
Federal Building,
Great Falls, Montana.

RE: United States of America,
Plaintiff, v. Paul L. Van
Cleve, Jr., and The Van Cleve
Company, Inc., a corporation;
and Sweet Grass County, Montana,
a quasi-municipal corporation,
Defendants.
Billings Division Civil No. 1098.

Dear Mr. Kegel:

Enclosed please find our original Reply Memorandum in the above matter for filing.

Please furnish us with the date of filing and submit the same to the Court for his consideration.

Very sincerely yours,

Franklin A. Lamb

FRANKLIN A. LAMB,
Assistant U. S. Attorney.

FAL:l
1 Encl.

24

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

FILED

JUL 16 1949

H. H. WALKER, Clerk

BY C.K. Kegel Deputy Clerk

UNITED STATES OF AMERICA,

Plaintiff, : REPLY MEMORANDUM OF THE UNITED STATES OF AMERICA

v. :

PAUL L. VAN CLEVE, JR.; and THE VAN CLEVE COMPANY, INC., a Corporation, : Civil Cause No. 1098. ✓

Defendants.

The defendants have quoted one sentence of the preliminary injunction and given the same great weight in their Memorandum. In support of the Government's position herein, we ask the Court to refer to the Order for Preliminary Injunction, particularly, to the Findings of Fact and Conclusions of Law contained therein, which clearly discloses the Court's belief at the conclusion of the hearing in November, 1948, that the general conduct of the defendants in their maintenance of gates, locks, and signs was interfering and impeding the usage of the public road through the property of the defendants.

On Page 3 of Defendants' Memorandum, in the last paragraph thereof, the defendants state "It is undisputed and, in fact, admitted that the forest officials and employees of plaintiff have not been interfered with or impeded in the use of the road." This statement requires considerable limitation as one of the Government officials testified in Helena, in November, 1948, that the gate at the defendants' buildings had been locked and that this condition had caused them to unload their horses from the trucks and proceed from that point up the

canyon on horseback rather than being able to drive to Half Moon Park and there unload their horses. The conduct of the defendants on May 20 and 22, 1949, certainly interfered and impeded the Government officials in the use of the road and in the performance of their duties. This same expression is set forth in the first paragraph on Page 4. The defendants admitted at the time of the issuance of the preliminary injunction that the gate was locked and the Government now merely states that they have not found the gate locked since the issuance of the injunction. (T. 30, L. 19, June 6, 1949).

On Page 7 of Defendants' Memorandum, they state that the defendant Van Cleve, and the Forest Supervisor, had, at least, tentatively agreed that no work would be done on the road pending the action. On Pages 55 and 56, of the Transcript of June 6, 1949, Mr. Urquhart denied that he had told the defendant that there would be no work done on the road until the case was settled so the statement of Defendants' Brief above referred to is contrary to the testimony given.

In the last Paragraph, on Page 7 of Defendants' Memorandum, the defendants state that the plaintiff and its employees have been compelled to open and close the plaintiff's gate at the forest reserve entrance before reaching defendants' property. This is not a fact, as there is no gate at the forest boundary and the testimony given at the various hearings discloses that there never has been and that at the forest boundary adjacent to the Ranger Station many years ago a cattle guard was constructed. Therefore, the defendants, at this point, have again misstated the true facts.

On Page 8 of Defendants' Brief, the defendants state that this cause is an attempt to establish the status of the road as a public road created by prescription. This is a voluntary assumption made by the defendants and evidence of various

types will be offered to the court at the time of the trial, some of which will prove the existence of a right-of-way by easement and not necessarily by prescription. Again, the defendants have made voluntary assumptions that are not necessarily correct.

In the last paragraph, appearing on Page 8 of Defendants' Memorandum, we find another voluntary assumption wherein the defendants state that the presence of locks or chains appearing upon the gate is not evidence before the court that such has interfered with, or will hinder, the use of the road. The Court orally stated at the conclusion of the hearing, in Helena, in November, 1948, that the existence of a chain held together by a lock and looped over the gate, as shown in the exhibits, when considered in conjunction with the signs "No Trespassing" conveyed the definite impression to the public that travel on the road was restricted and prohibited, and we respectfully submit that there is definite evidence before the court of this fact.

On Page 9 of the Brief, the defendants state that the Government's employees have not been turned back by reason of the presence of the signs, locks and chains. We again refer the court to the testimony of Ranger Roemer at the November, 1948, hearing, when he was required to unload his horses at the Van Cleve buildings because of the locked gates found at that point. In the same paragraph, a partial sentence is quoted when referring to the fishermen exhibited in this area on May 22, 1949, which apparently attempts to convey the impression that Mr. Cramer was concerned because the fishermen "didn't get their cars torn up". We ask the Court to refer to Page 60 of the Transcript of June 6, 1949, and for the purpose of erasing this attempt on the part of the defendants to mislead the Court, we quote the sentence in full:

"On that morning, that was Sunday morning and it happened to be the opening day of fishing, which concerned me quite a little right at that time, that a bunch of fishermen didn't get in there and get their cars torn up is the reason we worked all the forenoon to get the road in shape."

In the second paragraph, Page 9, of Defendants' Memorandum, they again assert that if the road is a public road the duty of maintenance rests upon the Board of County Commissioners. We have previously discussed this matter in our Memorandum in opposition to defendants' motion to require the joining of the Board of County Commissioners. Therein, we set forth the various Federal statutes concerning the Government's maintenance of roads within the national forest boundaries, and at various points in the testimony given at the several hearings, the Government officials have also testified that the Government maintains the roads within the forest boundaries. The writer personally knows that this is a fact, as the Forest Service maintains the road leading to the writer's cabin and the County merely maintains the road to the forest boundary.

In the last paragraph, on Page 9, of Defendants' Memorandum, counsel for the defendants claims that it is an absurdity that a hunter or fisherman might approach the gate and, because of the conditions there present, would turn back. We again refer to the Court's remarks at the conclusion of the hearing in Helena, in November, 1948, when the court, as well as counsel for the United States, did not come to the same conclusion and did not feel, as defendants' counsel, that this was an absurdity.

In the first paragraph of Page 10 of Defendants' Memorandum, counsel has attempted to paint a fantasy, which reaches the point of absurdity requiring no reply on behalf of the Government.

In the last paragraph, on Page 10 of Defendants' Memorandum, a general rule of law is quoted. In this connection, we wish to refresh the Court's recollections that the gate in

question was constructed by the defendants on or about the year 1940, when the defendants first acquired title to the South Half ($S\frac{1}{2}$) of Section One (1) and that it was not until that time that any locked gates interferring with the passage of the public were found and it was not until that time that the gate in question was even in existence.

Therefore, in closing, it is clear, as expressed in our original Memorandum, that the defendant has attempted, by subterfuge and indirection, to destroy the effect of the Court's Order and, by such conduct, has been in contempt of Court since the issuance of the prelininary injunction. By his conduct on May 20 and May 22, 1949, he clearly interfered with the performance of the duties of Government employees and clearly expressed tolthem his threat to lock the gate, even if it was contempt of this Court, and it, therefore, is clearly apparent that it is necessary that the order of this Court be enlarged to prohibit any conduct on behalf of the defendant which might, in any way, interfere, or impede with the free usage of the road in question by the general public, or the employees of the Government.

Respectfully submitted,

JOHN B. TANSIL,
United States Attorney,
District of Montana.

Franklin A. Lamb

FRANKLIN A. LAMB,
Assistant U. S. Attorney,
District of Montana.

FRED L. GIBSON
DAVID B. FITZGERALD
RICHARD A. BODINE

GIBSON, FITZGERALD & BODINE
LAW OFFICES
127 NORTH MAIN STREET
LIVINGSTON, MONTANA

TELEPHONE 18

July 18, 1949

Clerk of the U. S. District Court
Great Falls, Montana

In Re: United States of America
vs. Paul L. Van Cleve, Jr., et al.

Dear Sir:

Enclosed herewith find additional brief of defendants upon the motions now pending in the above entitled case, a copy of which we are serving on the district attorney.

Very truly yours,

GIBSON, FITZGERALD & BODINE

By: Fred L Gibson

FLG:js
Enc.

IN THE DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE DISTRICT OF MONTANA,

BILLINGS DIVISION.

FILED

JUL 20 1949

H. H. WALKER, Clerk

By C.K. Kegel Deputy Clerk

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

PAUL L. VAN CLEVE, JR., and THE VAN CLEVE COMPANY, INC., a corporation,

Defendants.

DEFENDANTS' ADDITIONAL BRIEF CONTRA PLAINTIFF'S MOTION FOR CONTEMPT AND TO ENLARGE INJUNCTION ORDER

Civil Action No. 1098 ✓

It seems necessary to file an additional memoranda on behalf of defendants, not to further argue the facts, but to defend the writer of defendants' brief from the charges made in reply brief of plaintiff, on page 2 thereof that "the defendants at this point have again misstated the true facts". This refers to defendants' statement that people traveling up The Big Timber Canyon road must open the gate at the forest boundary as well as the gates on Van Cleve's land. The argument was to press the point that the plaintiff by its action in constructing a gate across the road at the entrance to the forest reserve in effect admit the road is not a public road, as in this action it contends, but a private road of its own, or at least that travel thereon is subject to the inconvenience of impeding gates. The writer has never been to the Van Cleve dude ranch nor to the forest reserve area involved and from the record supposed that the gate that the forest service had maintained on the boundary at the entrance to the reserve was still there. There appears nothing in the

FRED L. GIBSON, DAVID B. FITZGERALD & RICHARD A. BODINE

record to indicate otherwise, at least so far as we have been able to find. But counsel for plaintiff in the reply brief in this matter says on page 2 of his brief that there is no gate there. I assume from this that counsel has been on the ground (I have not,) and so if he says the gate is gone his statement is good. But when he says, as he does at page 2 of the reply brief that "there is no gate at the forest boundary and the testimony given at the various hearings discloses that there never has been" I must refer to the testimony in the record given on that. Mr. Rubottom who says he was in charge as a ranger of the area of the forest reserve here involved from about 1931 to 1944, (Br. p 73) testified on cross-examination: Q. "How many gates were there across the road from the forest boundary to Half Moon Park?" A. "One gate at the forest boundary there at the time. There was a gate on the west line of the homestead, east line, pardon me. And there was a gate maintained at the Van Cleve building, and another one on the present drift fence below Half Moon Park".
Q. "Then there were three gates a traveler has to open or close going up to Half Moon Park besides the entrance gate?"
A. "There was two gates on the Van Cleve property, one on the homestead line and one on the building". (Tr. 76-77).
Again, Q. "I believe you described four gates?" A. "There were four gates in my time." Q. "Of course, the gate where you enter the forest reserve is maintained by the Government?"
A. "Yes." Mr. Rubottom was testifying as to conditions existing, as he says, "in my time." And that apparently was, "from about 1931 to 1944" (Tr. 73) when Mr. Rubottom was "in charge of that area". (Tr. 77).

So the argument the writer sought to make, somewhat clumsily it is true, that the government by putting the barricade of a gate across what it now says is a public road, treated the road, not as a public road, but as its own private road.

The gate which Mr. Rubottom said was at the entrance to the forest in his time evidently has been replaced by a cattle guard, because counsel for the plaintiff says it is not there. He must be mistaken, though when he says, as he does in his reply brief, that there never was a gate there.

If the plaintiff had a gate there it must then have considered the road to be not a public road but private. If some time after the time of which Mr. Rubottom speaks the gate was removed the question arises, does this indicate that the road then became a public road? If so, what grant of easement made it so? Or, did the plaintiff still maintain the thought that the substitution of a cattle guard for a gate, was a sufficient continuance of the inferential claim that it owned the road?

"THE FISHERMEN"

Plaintiff's counsel says defendants' brief "apparently attempts to convey the impression that Mr. Cramer was concerned because the fishermen 'didn't get their cars torn up', and for purpose of erasing this attempt to mislead the court" he says "we quote the sentence (Mr. Cramer's) in full". It was not to "convey the impression that Mr. Cramer was concerned because the fishermen "didn't get their cars torn up", but to convey the impression that the plaintiff was not worried about its own use of the road, but that it was much concerned

about the welfare of the fishermen and was working for their welfare in this regard. If the attempt conveyed this idea to the court it is what was intended. And it did not mislead the court because the statement of Mr. Cramer quoted in both briefs is to the certain effect that he was much concerned for fear that a bunch of fishermen might get their cars torn up on the road, and so the government employees or officials worked all the forenoon on a holiday, Sunday, to get the road in shape so the fishermen would not injure their cars on it. And this too on a road that the government had done no work on for many years--not since 1939 I believe the record shows. (Tr. 75) If this does not display great concern for the fishermen it is hard to conceive what would show it. Q. E. D.

"THE ROAD GRADING"

In his reply brief plaintiff's counsel now states that the action of defendants in preventing further grading of the road "imterfered and impeded the government officials in the use of the road."

This appears to be a mere tentative suggestion hopefully put forward in the absence of evidence that there has been any violation of the injunction order. As stated in defendants' original memoranda herein the dispute about the grading of the road is not within the temporary injunction order. Counsel for plaintiff admitted it at the hearing and the record plainly discloses it.

The record shows that when counsel for plaintiff commenced to put in testimony of the road grading and the altercation following and concerning it counsel for defendant Van Cleve objected to the introduction of the testimony and in

making the objection said: "I object to the testimony regarding the altercation and the stopping of these men from grading up this road because as admitted by counsel it is not a violation of the injunction order and it is immaterial to any issue here; the issue now is, did my client violate the court's order?" Counsel for plaintiff did not question this statement of his position. He said "there are two motions" * * *. "I can go on and show the first matter and get the matter of the contempt out of the way, and then proceed with this" * * *. He did not question that this statement of his admission was not correct. And "then proceed with this" did not refer to the contempt charge. "This" was the altercation between Mr. Van Cleve and Mr. Manry about the road grading. I am sure counsel does not want to mislead the court on this matter. It is adverted to here to keep the record straight. The injunction order may not be distorted from its intent and meaning to make a case of contempt where upon the record and the facts there is no contempt.

Respectfully submitted,

Fred L. Gibson

David B. Fitzgerald

Livingston, Montana
Attorney for Defendants.

26

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs
PAUL L. VAN CLEVE, JR., and THE VAN CLEVE COMPANY, INC., a Corporation,
Defendants.

Civil Action No. 1098

FILED
OCT 15 1949
H. H. WALKER, Clerk
BY C. Kegel
Deputy Clerk

The defendant in the above cause was cited to appear and show cause why he should not be held in contempt for the alleged disobedience of the restraining order theretofore issued by the court.

The proof shows that the gate across the highway in question at the lower boundary of the Van Cleve property has never been locked since the restraining order was issued, and that all signs indicating a private road which had formerly been posted at the gate had been removed by defendant following the issuance of the restraining order. Although the above facts were clearly established at the hearing, counsel for the plaintiff has indicated that a species of deception was practiced by the defendant to deceive travelers on approaching the gate where they would be confronted by a "Positively No Trespassing" sign, and could see a chain over the gate with a padlock attached, and who, meeting such conditions, would be likely to turn back, gaining the impression from the appearance of the sign, chain and lock that passing the gate was prohibited. There appeared on the no trespassing sign written words to the effect that the traveler would be expected to keep to the road and not trespass on either side thereof.

The defendant was questioned as to whether one driving up to the gate could read the writing on the no trespassing sign, and he was not explicit in his answer but said that one on opening the gate could not help but see the written part and

be able to read it. No question is raised as to the right of the defendant to post no trespass signs on his property, in fact he stated that all of his property was so posted.

From the foregoing recitation of facts the proof appears to be insufficient to enable the court to state in positive terms that it has been clearly and convincingly established that the defendant has violated the restraining order. It is possible that the defendant may have created a condition there that might have been misleading to a stranger driving that way, but the evidence shows that men in the forestry service and others, so far as the proof goes, passed through the gate and over the road without interference by the defendant or any of his employees, and none of them ever found the gate locked after the restraining order was issued.

While it appears that considerable ill feeling exists on the part of the members of the forestry service and the defendant it does not seem to be necessary to go into the quarrel over the attempt at road repairing on the part of the forestry crew or the abusive conduct on the part of the defendant for which he later apologized; he did not object to work done on the forest reserve, but only on his own land, and there might be some question raised as to whether it was proper during the pendency of the restraining order and the action to undertake extensive alterations in the condition of the road. It is evident that the forestry crew with their road machinery gained entrance over the road in question through the premises of defendant without obstruction. The court does not believe that this unfortunate incident should be accepted as proof of a violation of the restraining order which required the defendant to keep the road open for ingress and egress of members of the public generally during the pendency of the action, or until the further order of the court.

From a consideration of all the facts which the court regards as material to the issues raised in this hearing, the court does not believe the proof justifies holding the defendant

in contempt of the restraining order, and such is the order herein, without assessment of costs, each side paying its own costs.

Judge

FRED L. GIBSON
Attorney and Counselor at Law
Garnier-Miles Bldg.
Livingston, Montana

Livingston, Montana,
October 11th, 1950

Mr. Harlow A. Pease,
Assistant U.S. Dist. Attorney,
Butte, Montana.

Dear Mr. Pease:

This is regarding the case of the United States vs the VanCleve Company, et al, which you indicated was now in your charge since the resignation of Mr. Lamb, who had been in charge of the case.

As you know the case is for a declaratory judgment that a road through the VanCleve lands located in the National forest reserve is a public highway. Mr. Van Cleve has requested me to have the case set for trial but before filing a note of issue I thought to write to you to inquire whether you think the case is one for a jury trial or not. If you do I will file a note of issue and ask to have the case set for trial at the next jury term at Billings. I have been told that Judge Pray expects to have a jury term there soon.

If you think it would be easier and more satisfactory to try the case before the court we should be able to agree upon a date convenient to both of us, subject to the pleasure of the court.

Will you kindly let me know what your thought and desire is in the premises.

Very truly yours,

/s/ Fred L. Gibson

7—1404

U. S. GOVERNMENT PRINTING OFFICE

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UNITED STATES ATTORNEY
FOR MONTANA

JOHN B. TANSIL

Butte, Montana
Oct. 12, 1950

Fred L. Gibson, Esq.
Attorney and Counsellor
Garnier-Miles Building
Livingston, Montana

Re: United States v. Paul L. Van Cleve, Jr.

Dear Judge Gibson:

This will acknowledge your letter of October 11th. It has been my definite understanding that this is an equity case seeking a permanent injunction against the obstruction of the road which is in controversy, and accordingly that the case is triable without a jury. The case is, of course, among Judge Pray's trial aggenda, as you have mentioned.

This office will be compelled to spend about six or ten weeks, commencing October 18th, in the trial of cases at Glasgow, Butte and Missoula before Judge Murray, in all three of which Divisions juries will be in attendance. I am of the impression that Judge Pray is aware of the terms of court I have mentioned and intends to relieve this office of any possible conflict by not setting the Van Cleve case for trial until a time when this office can give its entire attention to it. I, therefore, believe that the observation in your third paragraph will apply to the satisfaction of your office as well as the undersigned.

Sincerely yours,

For the United States Attorney

HARLOW PEASE
Assistant U. S. Attorney

HP:V

7—1404

U. S. GOVERNMENT PRINTING OFFICE

DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
FOR MONTANA

JOHN B. TANSIL

Butte, Montana
October 27, 1950

Honorable Charles M. Pray
United States District Judge
Federal Building
Billings, Montana

Dear Judge Pray:

Enclosed herewith I am handing to you a Motion with supporting Affidavit for the vacating of the setting in the Van Cleve case.

It was impossible to give attention to this matter at Glasgow by reason of our office being engaged in a trial of cases and not having the Van Cleve file available. It was given the utmost priority and deligence immediately upon the return of Mr. Carmichael and myself to Butte. A service copy is being mailed to Mr. Fred L. Gibson of Livingston by this mail.

I am sure that you will appreciate the gravity of the subject matter, not only the conflict with Judge Murray's calendar but also the unexpected fresh development which has necessitated the immediate inquiry into an unknown number of facts which it is believed pertain to the very heart of the controversy.

I am transmitting this Motion to your own desk rather than to the clerk of the court by reason of the urgency of the situation.

With kind personal regards, I remain,

Very truly yours,

For the United States Attorney

HARLOW PEASE
Assistant U. S. Attorney

HP:W

NOTICE OF _____ D. C. Form No. 18

United States District Court

Billings DIVISION, - DISTRICT OF Montana

United States

vs.

Paul L. VanCleve, et al.

No. 1098 - civil

To Messrs. Gibson & Fitzgerald, Livingston, Montana.

TAKE NOTICE that the above-entitled case has been set for TRIAL in said Court at Billings, Montana, on November 15, 1950, at 10:00 A. M.

H. H. WALKER, Clerk

NOTICE OF _____ D. C. Form No. 18

United States District Court

FOR THE

DISTRICT OF MONTANA.

United States of America

vs.

Paul L. Van Cleve, Jr., et al.

No. 1098

To United States Attorney, Butte, Montana.

Messrs. Gibson & Fitzgerald, Attorneys at Law, Livingston, Montana.

TAKE NOTICE that the above-entitled case has been set for TRIAL in said Court at Billings, Montana, on November 16th, 19 53, at 10:00 A. M.

Date Oct. 27, 19 53

H.H.Walker, Clerk US Court

CGK.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

- - - - - - -

UNITED STATES OF AMERICA,

Plaintiff, :

v. : No. 1098✓

PAUL L. VAN CLEVE, JR.; THE VAN CLEVE COMPANY, INC., a corporation; and SWEET GRASS COUNTY, MONTANA, a quasi-municipal corporation, :

Filed Oct-31-1950, H.H. Walker Clerk

Defendants.

- - - - - - -

MOTION TO VACATE SETTING FOR TRIAL

The plaintiff respectfully moves the Court that the setting for trial of this cause for November 15, 1950, be vacated, on the following grounds:

1. That it is impossible for the plaintiff's attorneys to prepare for trial and try this cause on November 15, 1950, by reason of conflicting duties required of them at a trial term of this Court in the Butte Division, which term had been called and cases set previous to the making of the said setting hereby moved to be vacated, and which term commences with a calendar November 7, 1950, and trials commencing November 13, 1950.

2. That recent transactions affecting and involving the merits of this cause have occurred and been brought to the attention of the United States Forest Service, which has put in motion diligently an investigation, to complete, report upon and act upon which cannot be carried out in time to prepare for the presentation thereof at so early a time as November 15, 1950.

7—1404

U. S. GOVERNMENT PRINTING OFFICE

3. That the matters for trial in the Butte Division include a number of cases for jury trial, whereas the instant case is triable to the Court.

This motion is made on the affidavit of Harlow Pease, Esquire, Assistant United States Attorney, and upon the minutes and records of the Butte Division of this Court.

Dated at Butte, Montana, October 27, 1950.

Assistant United States Attorney

Assistant United States Attorney

7—1404

U. S. GOVERNMENT PRINTING OFFICE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

- - - - - - -

UNITED STATES OF AMERICA,

Plaintiff, :

v. : No. 1098

PAUL L. VAN CLEVE, JR.; THE VAN CLEVE COMPANY, INC., a corporation; and SWEET GRASS COUNTY, MONTANA, a quasi-municipal corporation, :

Filed Oct - 31 - 1950.
H. H. Walker, Clerk

Defendants.

- - - - - - -

AFFIDAVIT SUPPORTING MOTION TO VACATE SETTING FOR TRIAL

UNITED STATES OF AMERICA)
)
DISTRICT OF MONTANA)

Harlow Pease, being first duly sworn, on oath says;

This affidavit is made in support of the motion of the plaintiff herein to vacate the setting for trial of this cause, which affiant is informed has been by the Honorable Charles N. Pray, United States District Judge, set for November 15, 1950, at Billings, Montana. Affiant was informed by phone of such setting on October 20th, 1950, at Glasgow, Montana, but no written notice thereof has as yet been received. At the time of receipt of such information this affiant and his associate, Assistant United States Attorney Hugh D. Carmichael, were both at Glasgow, Montana, and were without the file of this case, without which this motion could not be prepared.

1. The said setting for trial is in conflict with engagements in line of official duty of the Assistant

7—1404

U. S. GOVERNMENT PRINTING OFFICE

United States Attorneys in the Butte Office, who are the only attorneys conversant with this case, and who are the attorneys to whom the case has been assigned by the Honorable John B. Tansil, United States District Attorney, to prepare for and try the same, although the case was originally prepared by another Assistant United States Attorney and by him handled up to the month of June, 1950. A trial term of this Court in the Butte Division has been called by the Honorable W. D. Murray, United States District Judge (and was called previous to the order setting this case for November 15, 1950) which includes a criminal and civil calendar at Butte on November 7, 1950, and trial of cases by jury and otherwise commencing with the coming in of a jury at Butte on November 13, 1950. Both this affiant and his associate Hugh D. Carmichael, Esquire, are required to be in attendance upon the United States District Court at Butte at said term of court, in which cases have now been set up to and including December 6, 1950.

It is impossible for the personnel of the Butte office to prepare for trial and try the matters which are included in the said term at Butte, and at the same time prepare for the trial of the above entitled cause at Billings at the time now set.

2. It is further impossible for the attorneys in charge of this case for the plaintiff to go to trial at the time now set by reason of the fact that a recent obstruction of the Big Timber Canyon road in controversy has occurred and been reported to the Forest Service and made known to the affiant and his associate, which required an immediate and thorough investigation to be made, which investigation has been requested (and was requested before it was known that said setting for trial had been

7—1404

U. S. GOVERNMENT PRINTING OFFICE

ordered) and is now in progress, but has not been completed and reported upon. Affiant is informed that a report thereon cannot be made to the attorneys for plaintiff prior to about November 10, 1950, the basis for this statement being an inquiry by long distance telephone to the Regional Forester's office at Missoula on yesterday, October 26th, 1950. The evidence concerning the said recent obstruction will have to be assembled and coordinated after the receipt of the expected report, which cannot be done in time for a trial on November 15th, 1950.

3. Affiant received from Fred L. Gibson, Esquire, the defendant's attorney, a letter dated October 11, 1950, and at once answered the same on October 15th, 1950, copies of which are attached to this affidavit, and in the second of which affiant advised said attorney of the terms of Court already called by the Honorable W. D. Murray, and of the conflict which would be created should the case be set during those terms. By reason of the said exchange of letters, and by reason of said attorney failing to reply to affiant's letter so stating, and also by reason of plaintiff's attorneys' not being notified of the application to have the cause set for trial, the affiant and his associate did not have an opportunity to make any objection thereto more seasonably than the instant application.

Affiant also adverts to the fact that said cause is not triable by jury, being equitable in nature and neither party having requested a jury.

Assistant U. S. Attorney

7—2404

U. S. GOVERNMENT PRINTING OFFICE

Subscribed to and sworn to before me this 27th day of October, 1950.

H. H. WALKER
Clerk, United States District Court

By Helen Haralson
Deputy Clerk

7—1404

U. S. GOVERNMENT PRINTING OFFICE

Billings, Montana
Oct. 31, 1950

Mr. Fred L. Gibson, and
Mr. David B. Fitzgerald,
Attorneys at Law
Livingston, Montana
and
Mr. John B. Tansil
United States Attorney
Billings, Montana.

No. 1098, US vs. Paul L. VanCleve, et al.

Gentlemen:

Plaintiff's motion to vacate setting of case for trial was received in this office and filed October 31, 1950.

Judge Pray has set said motion for hearing at Billings, Montana, on Monday, November 6, 1950, at 10:00 A. M.

Very truly yours,

H. H. Walker, Clerk

PRAECIPE FOR SUBPOENA OTHER THAN ON BEHALF OF UNITED STATES — D. C. Form No. 25

United States District Court

Billings DIVISION, DISTRICT OF Montana.

United States of America
vs.
Paul L. Van Cleve, Jr., et al.

No. 1098

Filed January 17, 1953
H. H. Walker, Clerk.
By C. G. Kegel Deputy.

To the Clerk of said Court:

Please ~~issue Subpoena for~~ withdraw ~~the~~ my name as attorney for the plaintiff in the above entitled cause.

~~Subpoena issued~~ Jan. 17, 1953, ~~1953~~

HARLOW PEASE
Attorney at Law,
Billings, Montana.

~~Attorney for~~

7—1530

Great Falls, Montana.
November 4, 1953.

Messrs. Gibson & Fitsgerald,
Attorneys at Law,
Livingston, Montana.

Dear Sirs:

This is to advise that at the session of Court this day held at Billings, Montana, the Court, on motion of Mr. Krest Cyr, United States District Attorney, ordered that the setting of Civil Action No. 1098, United States vs. Paul L. Van Cleve, Jr., et al, for trial on November 16, 1953, be and is vacated, and that said case will be re-set for trial later in the term.

Notice of new trial date will be given when date is set.

Respectfully yours,

H.H.Walker, Clerk.

By C.G.Kegel
Deputy.

THE BILLINGS GAZETTE
BILLINGS, MONTANA

11 June 1954

Clerk of U. S. District Court
Post Office Building
Great Falls, Montana

RE: U.S. vs Paul Van Cleve
Civil No. 1098

Dear Sir:

Reference is made to the above case heard by the U. S. District Court.

According to a release issued by J. C. Urgurhardt, supervisor of the Gallatin National Forest, last Dec. 13, this case involving a right-of-way was settled out of court with execution of a deed by the Van Cleves to the government.

It was listed again, however, on the docket at the recent term of court held in Billings.

Could you please advise as to whether or not this was a date set before the out-of court settlement was reached -- or whether it came up for approval by the judge -- or just what transpired at this time, if anything?

Sincerely yours,

ADDISON ROSS BRAGG
Reporter
The Billings Gazette

DAILY AND SUNDAY :: ASSOCIATED PRESS :: UNITED PRESS

Great Falls, Montana.
June 12, 1954.

Mr. Addison Ross Bragg,
Reporter,
The Billings Gazette,
Billings, Montana.

Dear Sir:

In reply to your letter of June 11, 1954, re: Case #1098, US vs. Paul Van Cleve, et al, you are advised that the case was on the Trial Calendar of Civil Cases, it being at issue, so faraas the Clerk's Docket shows.

The case was passed for the term, at the request of the United States Attorney, who stated that a settlement of the case has been, or is about to be reached.

We have no record of the actual negotiations for settlement, and do not know just what has transpired in the case.

Respectfully yours,

H. H. Walker, Clerk.

By C. G. KEGEL
Deputy.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA, :

Plaintiff, :

-vs- : CIVIL NO. 1098 ✓

PAUL L. VAN CLEVE, JR.; :
THE VAN CLEVE COMPANY, INC., :
a corporation; and :
SWEET GRASS COUNTY, MONTANA, :
a quasi-municipal corporation, :

Defendants. :

FILED

SEP 10 1954

H. H. WALKER, Clerk
BY Deputy Clerk

MOTION TO DISMISS

Comes now Krest Cyr, United States Attorney for the District of Montana, Attorney for the Plaintiff, and moves the Court to dismiss the above-captioned action, in which the Plaintiff seeks a declaratory judgment establishing the existence of a public road through defendants' lands, and to restrain the interference with the use of said road, for the reason that an easement and road right-of-way over this land was conveyed to the United States of America by the defendants in said action, under deed dated December 10, 1953, which was filed for record on December 11, 1953 and recorded in the office of the County Clerk and Recorder in and for Sweet Grass County, State of Montana, in Book "43" of Deeds, at page 435; and under a deed correcting the description contained in the deed dated December 10, 1953, recorded in Book "43" of Deeds at page 435, aforesaid, said correction deed being dated May 26, 1954, filed for record on May 26, 1954, and recorded in the office of the County Clerk and Recorder in and for Sweet Grass County, State of Montana, in Book "44" of Deeds at page 5; and that the United States Forest Service is now constructing a road on the right-of-way granted by the defendants. This motion is made pursuant to Rule

GPO 16—29995-1

41 (a) (2) Federal Rules of Civil Procedure. Movant further states that no counter-claim has been pleaded by the defendants, or any of them.

United States Attorney for
the District of Montana

Attorney for the Plaintiff.

GPO 16—29995-1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

- - - - - - -

FILED

SEP 10 1954

H. H. WALKER, Clerk

BY C. L. Kegel Deputy Clerk

UNITED STATES OF AMERICA,

Plaintiff, :

v. :

PAUL L. VAN CLEVE, JR.; THE VAN CLEVE COMPANY, INC., A Corporation; and SWEET GRASS COUNTY, MONTANA, a quasi-municipal corporation, :

Defendants.

AFFIDAVIT OF MAILING

Civil No. 1098

- - - - - - -

KREST CYR, first upon his oath being duly sworn, deposes and says: That he is the United States Attorney in and for the District of Montana; that on the 10th day of September, 1954, he deposited franked envelopes addressed to the attorneys for the defendants in the above-entitled case at their last known post office addresses as follows:

Fred L. Gibson, Esq.
Attorney at Law
127 Main Street
Livingston, Montana

David B. Fitzgerald, Esq.
Attorney at Law
127 Main Street
Livingston, Montana

And that said envelopes contained copies of Motion to Dismiss and Notice of Motion To Dismiss, and that the envelopes containing said copies were clearly and plainly addressed to the attorneys above-named.

Krest Cyr

Subscribed and sworn to before me this 10th day of September, 1954.

C. L. Kegel

Deputy Clerk, U. S. District Court,
District of Montana.

16—29995-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA, :

Plaintiff, :

-vs- : CIVIL NO. 1098 ✓

PAUL L. VAN CLEVE, JR.; :
THE VAN CLEVE COMPANY, INC., :
A Corporation; and :
SWEET GRASS COUNTY, MONTANA, :
a quasi-municipal corporation, :

Defendants. :

FILED
SEP 10 1954
H. H. WALKER, Clerk
BY C.G. Kegel Deputy Clerk

NOTICE OF MOTION TO DISMISS

To: Fred L. Gibson, Esq. and David B. Fitzgerald, Esq., Attorneys for Defendants, 127 North Main Street, Livingston, Montana:

PLEASE TAKE NOTICE that the undersigned will bring the annexed Motion to Dismiss on for hearing before this Court at the Court Room, Federal Building, Great Falls, Montana, on the 27th day of September, A. D., 1954, at 10:00 o'clock A. M. of that day, or as soon thereafter as counsel can be heard.

United States Attorney for the
District of Montana,
Federal Building,
Butte, Montana.

Attorney for the Plaintiff.

GPO 16—29095-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

- - - - - -

UNITED STATES OF AMERICA,

Plaintiff, :

v. :

PAUL L. VAN CLEVE, JR.; THE VAN CLEVE COMPANY, INC., A Corporation; and SWEET GRASS COUNTY, MONTANA, a quasi-municipal corporation, :

Defendants, :

ORDER DISMISSING ACTION

Civil No. 1098. ✓

- - - - - -

The Motion of the United States of America, the above-named plaintiff, for an order of this Court to dismiss the above-captioned action, came on regularly for hearing this 27th day of September, 1954, and notice of motion was duly given counsel for the above-named defendants as required by law. Dale F. Galles, Assistant United States Attorney for the District of Montana, one of the attorneys for plaintiff herein appeared in open Court at the time set for the hearing of said motion and counsel for defendants not appearing and the Court being fully advised in the premises,

IT IS ORDERED, and this does order, that the motion of plaintiff to dismiss the above-captioned action is granted and this action is dismissed provided that each of the parties herein shall bear the costs and disbursements expended by them respectively.

Dated and signed in open Court at Great Falls, Montana, this 27th day of September, 1954.

Charles N. Pray
United States District Judge.

Filed, entered & noted in
Civil Docket September 27, 1954.
H.H.Walker, Clerk.
By Elizabeth C McKee Deputy.

16—29965-1

FILED

SEP 27 1954

H. H. WALKER, Clerk
BY C.G. Kegel
Deputy Clerk

United States of America
District of Montana } ss:

I, H.H.Walker, *Clerk of the United States District Court for the District of Montana, do hereby Certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above-entitled action.*

WITNESS my hand and seal of said Court this 27th *day of* September, *19*54.

H.H.Walker *Clerk*

By C.G.Kegel *Deputy*

In hearing Monday
Nov 6 10 am
Notify Counsel