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FILED
 PAIGE TRAUTWEIN, CLERK

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 DEPUTY

MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT, RAVALLI COUNTY

ZACKARY JAY BUGLI¹ and TRACY)
 BUGLI; WADE COX and CHARLENE)
 COX; and VIOLET COX, as Trustee of the)
 Cox Family Trust,)

Plaintiffs,)

-vs-)

RAVALLI COUNTY, a political)
 subdivision of the State of Montana,)

Defendant.)

Cause No. DV-17-137 / 14

Department No. 1

OPINION & ORDER

This matter comes before the Court upon three motions: (1) Plaintiffs' *Motion for Partial Summary Judgment*; (2) Defendant's *Rule 12 Motions to Dismiss for Lack of Subject Matter Jurisdiction and for Count IV for Failure to State a Claim*; and (3) Defendant's *Motion to Strike Plaintiffs' "Reply."*

¹ In Plaintiffs' filings, the first named plaintiff is "Zackary Jay Bugli." In Defendant's filings, the first named plaintiff is "Zachary Jay Bugli." The Court will use Plaintiffs' spelling of the first named plaintiff.

Plaintiffs are represented by Martin S. King and Jesse C. Kodadek of WORDEN THANE P.C.

Defendant Ravalli County (“the County”) is represented by Ravalli County Attorney Bill Fulbright and Deputy Ravalli County Attorney Daniel Browder.

BACKGROUND

On April 10, 2017, Plaintiffs filed their *Complaint for Declaratory and Injunctive Relief* in this matter. Plaintiffs summarize their complaint in its “Introduction” section:

- Part of Hughes Creek Road is a statutorily-created county road established around 1900.
- This case concerns a dispute as to where the county road ends and private property begins.
- Since the late 1970s, Hughes Creek Road has been gated approximately nine miles up Hughes Creek Road.
- In the 1980s, Ravalli County sued to have the gate removed.
- The parties eventually stipulated to have the case dismissed with prejudice.
- The gate has remained in place ever since.
- Last year, the issue came up again, and Ravalli County has directed Plaintiffs and their neighbors to remove the gate by June 1, 2017.

Plaintiffs assert four claims. In Count 1, Plaintiffs seek declaratory judgment that the County’s act of directing Plaintiffs to remove the gate and allow public access is barred by the doctrine of claim preclusion. In Count II, they seek declaratory judgment that Hughes Creek Road ends as depicted on a 1965 map, which would be at or near the gate. In Count III, they seek declaratory judgment regarding the correct construction and application of § 7-14-2615(3), MCA. In “Count IV (contingent claim) - Unconstitutional Taking,” they seek a determination that if

prior to adjudication of this case, the County orders the gate to be removed and the Court later determines the property beyond the gate is private, then the County's actions will constitute a taking and Plaintiffs are entitled to just compensation and damages, plus attorney fees.

On the same day they filed their complaint, Plaintiffs filed a *Motion for Partial Summary Judgment* on Count I (claim preclusion).

On April 13, 2017, service was made upon County Commissioner Greg Chilcott.

On May 4, 2017, the County filed an unopposed motion to extend time to May 11, 2017, to answer Plaintiffs' complaint and to respond to Plaintiffs' motion for partial summary judgment.

On May 8, 2017, the Court granted the County's motion and extended the deadline for the County to file its answer and its response to Plaintiffs' motion for summary judgment to May 11, 2017.

On May 11, 2017, the County filed *Defendant's Rule 12 Motions to Dismiss for Lack of Subject Matter Jurisdiction and for Count IV for Failure to State a Claim*.

On May 26, 2017, Plaintiffs filed *Plaintiffs' Response to Defendant's Rule 12 Motions to Dismiss and Reply in Support of Plaintiffs' Motion for Partial Summary Judgment*.

On June 1, 2017, the County filed *Defendant's Motion to Strike Plaintiffs' "Reply"* in support of its motion for summary judgment on the ground that a reply is only allowed after a responsive brief, which the County has not yet filed.

OPINION

After review of the entire record, the Court determines the issue of whether it has subject matter jurisdiction over this case is a threshold issue that must be decided first. Therefore, it

begins its discussion with the County's Rule 12 motions to dismiss, which are fully briefed and ripe for ruling.

I. THE COUNTY'S RULE 12 MOTIONS TO DISMISS

When presented with a M.R.Civ.P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, if the plaintiff's complaint does not state facts that, if true, would vest the court with subject matter jurisdiction, a court may dismiss on the basis of the complaint alone. *Harrington v. Energy West Inc.*, 2015 MT 233, ¶ 9, 380 Mont. 298, 356 P.3d 441. A court also has discretion to receive evidence of facts bearing on the Rule 12(b)(1) motion and determine that it lacks subject matter jurisdiction based on that evidence. *Id.*; *Marriage of Sampley*, 2015 MT 121, ¶ 9, 379 Mont. 131, 347 P.3d 1281.

The Court has discretion to decide whether to hold an evidentiary hearing. *Harrington*, ¶ 11; *Marriage of Sampley*, ¶ 13.

Neither party has requested an evidentiary hearing. In light of the absence of any disputed material facts, the Court determines an evidentiary hearing is unnecessary. *Harrington*, ¶ 11. Plaintiffs have requested oral argument; however, the Court determines oral argument is unnecessary in view of the parties' extensive briefing of the issues and the law.

When evaluating a motion made under Rule 12(b)(6), a district court must examine only whether a claim has been adequately set forth in the complaint. *Meagher v. Butte-Silver Bow City-County*, 2007 MT 129, ¶ 15, 337 Mont. 339, 160 P.3d 552.

As a result, the court is limited to an examination of the contents of the complaint in making its determination of adequacy. Additionally, the effect of a Rule 12(b)(6) motion to dismiss is that all the well-pleaded allegations in the complaint are admitted as true; therefore, it should not be dismissed "unless it appears beyond reasonable doubt that the plaintiff can prove no set of facts which would entitle him to relief."

Id. (Citation omitted.)

A. Parties' Arguments

The County seeks dismissal of each of Plaintiffs' four counts for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1). The County seeks dismissal of Count IV, alternatively, for failure to state a claim, pursuant to Rule 12(b)(6). The County asks the Court to dismiss Counts I and IV with prejudice, and to dismiss Counts II and III without prejudice.

The County contends this action, which Plaintiffs filed after the Board of Ravalli County Commissioners ("Commissioners") denied a petition to abandon a portion of Hughes Creek Road on January 25, 2017, is essentially a lawsuit seeking to have the Court review the Commissioners' denial of the petition for abandonment.² The County argues that because the statutory procedure for seeking the abandonment of a county road requires petitioning the Commissioners for abandonment, the Commissioners have original jurisdiction; and the exclusive method for a district court to obtain jurisdiction over a road abandonment proceeding is through a writ of review, pursuant to § 27-25-102, MCA. The County relies on *Board of County Commissioners v. District Court*, 203 Mont. 44, 659 P.2d 266 (1983); and *Lee v. Musselshell County*, 2004 MT 64, 320 Mont. 294, 87 P.3d 423, as legal authorities for its argument.

Plaintiffs counter that the County "misframes the entire issue." Plaintiffs argue they are not "in any way" asking the Court to order or direct the abandonment of a county road, nor are they asking the Court to review the Commissioners' denial of the petition for abandonment. They argue a writ of review has no application to the facts of this case or the remedy they seek;

² It appears Plaintiffs were among a group of landowners who signed the petition for abandonment, but not all of the landowners who signed the petition are plaintiffs in this lawsuit.

Plaintiffs point out they do not allege the Commissioners acted outside of or exceeded their jurisdiction, which is a prerequisite for a writ of review. Plaintiffs further contend the fact that they first sought a “political remedy” does not bar them from now seeking a “judicial remedy.”

In its reply, the County contends Plaintiffs’ choice to petition the Commissioners to abandon and exclude the public from a portion of Hughes Creek Road requires them to utilize a petition for writ of review as their sole remedy, and they should be prohibited from trying to circumvent that procedure.

B. Undisputed Facts

In its motion brief, the County includes salient facts that were omitted from Plaintiffs’ complaint, along with several exhibits of documentation of these facts. Plaintiffs have attached documentation to their response brief and to their motion for partial summary judgment, as well. For purposes of the Rule 12(b)(1) motions, the Court has considered all of this evidence. The following facts are undisputed:

- In 1900, Hughes Creek Road was petitioned for and established as a county road of “about twelve miles” in length.
- In August 1982, landowners on Hughes Creek Road alleged to be Plaintiffs’ predecessors-in-interest petitioned the Board of County Commissioners to abandon Hughes Creek Road at and beyond a gate some nine miles from the junction with West Fork Road.
- After appointing viewers and holding a hearing, in October 1982, the commissioners made findings of fact and issued an order denying the landowners’ petition to abandon. The commissioners determined Hughes Creek Road was 11.8 miles in length and ordered it “shall remain open to public use and all encroachments thereon must be removed forthwith.”
- After the landowners failed to remove the gate, the County’s road supervisor sued the landowners in 1984 in Cause No. DV-84-248, Fourth Judicial District

Court, and sought an order directing removal of the gate and a temporary restraining order.³

- On September 20, 1984, presiding Judge James B. Wheelis orally denied the road supervisor's motion for a temporary restraining order.
- For the next eight to nine years, Cause No. DV-84-248 apparently was inactive.
- In 1993, after the undersigned took judicial office in the newly-created Twenty-first Judicial District, the undersigned issued an order to the parties in Cause No. DV-84-248 to show cause why their case should not be dismissed for failure to prosecute.
- On December 10, 1993, a *Stipulation and Order* was entered wherein the parties stipulated to the dismissal of the case and the Court approved the stipulation and ordered the case dismissed. The *Stipulation and Order* contains conflicting language as to whether the case was dismissed with or without prejudice.
- In 2016, Plaintiffs (allegedly successors-in-interest to the landowners who petitioned for abandonment in 1982) and other landowners petitioned the Commissioners to abandon the same portion of Hughes Creek Road as in the 1982 proceeding.
- After appointing viewers, the Commissioners held a hearing on January 25, 2017, denied the petition, and directed the landowners to remove the gate no later than June 1, 2017. The basis for the petition's denial was that no other public road or right-of-way provides substantially the same access to public land or waters, as required by § 7-14-2615(3), MCA.
- On April 10, 2017, Plaintiffs commenced this lawsuit.

³ Plaintiffs have purportedly attached the complaint in Cause No. DV-84-248 to their motion for partial summary judgment as Exhibit 1. However, only the first and last two pages of the complaint have been included; the middle portion is missing. In the complaint's prayer, the county road supervisor seeks: (1) that said gates be declared a nuisance and be abated, and (2) that defendants be restrained from relocating gates or fences on the roadway or otherwise interfering with the public use of the roadway.

C. Governing Legal Authorities

The board of county commissioners has jurisdiction and power over county property and management of county concerns, as follows:

7-5-2101. General authority of county commissioners. (1) The board of county commissioners has jurisdiction and power, under such limitations and restrictions as are prescribed by law, to represent the county and have the care of the county property and the management of the business and concerns of the county in all cases where no other provision is made by law.

The board of county commissioners has jurisdiction over county roads, as follows:

7-14-2101. General powers of county relating to roads and bridges -- definitions. (1) The board of county commissioners, under the limitations and restrictions that are prescribed by law, may:

* * * * *

(a)(i) lay out, maintain, control, and manage county roads and bridges within the county[.]

The procedure for petitioning to establish, alter, or abandon a county road is set forth in Title 7, Chapter 14, Part 26. The authority to grant or deny a petition to establish, alter, or abandon a county road is vested in the board of county commissioners. Sections 7-14-2601, -2604, MCA.

“All county roads once established must continue to be county roads until abandoned or vacated by: (1) operation of law; (b) judgment of a court of competent jurisdiction; or (3) the order of the board.” Section 7-14-2615(1), MCA. An order to abandon a county road is not valid unless preceded by notice and public hearing. Section 7-14-2615(2), MCA.

A writ of review (or certiorari) may be granted by the district court “when a lower tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of the

tribunal, board, or officer and there is no appeal or, in the judgment of the court, any plain, speedy, and adequate remedy.” Sections 27-25-101 and -102(2), MCA.

The Montana Supreme Court has held and reaffirmed that a district court does not have jurisdiction to abandon a county road; the proper method for abandoning a road is by petition to the board of county commissioners. The Montana Supreme Court has further held and reaffirmed that the remedy for a petitioner who disagrees with a decision of the commissioners regarding a petition for abandonment is to petition the district court for a writ of review.

In *Board of County Commissioners v. District Court*, a board of commissioners was presented with two petitions regarding a dedicated but never opened county road right-of-way: one sought abandonment of the right-of-way, and the other sought removal of road obstructions in the right-of-way. The board decided not to take action on either petition. Subsequently, plaintiffs sued defendants in district court to enjoin defendants from obstructing their use of the dedicated right-of-way. The district court granted summary judgment in favor of defendants, and later issued an order granting the commissioners’ authority to do one of two things: (1) retain the subject land in trust for the public, or (2) return the land to the grantors. (Either would have the effect of abandoning the right-of-way.) The district court further ordered that the commissioners did not have discretion to “open” the land.

Subsequently, the commissioners took up both petitions regarding the dedicated right-of-way: the dedicated roadway was inspected, a report was prepared, the adjoining landowners were given notice, the public was given notice, and a public hearing on the petitions was held. The commissioners entered findings of fact and conclusions of law, denied the petition for

abandonment of the roadway, ordered the removal of encroachments, and ordered that the property shall be held in trust for the public for future development for the benefit of the public.

Defendants moved for a contempt order against the commissioners, and the district court issued an order holding the commissioners in civil contempt for failure to abide by its order. The district court fined the commissioners and ordered them to pay attorney fees, but gave them the opportunity to purge themselves of the contempt citation by revoking their order.

The commissioners filed a petition for writ of review in the Montana Supreme Court. The Montana Supreme Court determined: “The *effect* of the District Court’s order was to abandon the road whereas the initial cause of action was injunction.” *Bd. of Cty. Commr.*, 203 Mont. at 48, 659 P.2d at 268. (Emphasis added.) The court held that pursuant to § 7-14-2601, *et seq.*, it is the board of county commissioners who has jurisdiction over road abandonment petitions; “[t]he District Court does not have original jurisdiction to entertain the petition.” *Id.* The court wrote: “Should petitioners or respondents be unsatisfied with the decision of the commissioners, they could then petition the District Court for a writ of review pursuant to section 27-25-102, MCA[.]” *Id.*, 203 Mont. at 48-49, 659 P.2d at 268-69. The court concluded:

We find [a petition for writ of review] to be the only method for the District Court to obtain jurisdiction to abandon a road. Here, this procedure was not followed. As the proper procedure was not followed, the District Court did not have jurisdiction to order abandonment of the road. The commissioners claim they cannot be held in contempt for violating an order which exceeded the District Court’s jurisdiction. We agree. A party cannot be held in contempt for disobeying an order which the court had no authority to make.

Id.

Two decades later, this issue again came before the Montana Supreme Court. In *Lee v. Musselshell County*, Lee appealed a grant of summary judgment against him in his suit for

trespass. Lee's trespass claim was based on a 1952 quiet title action wherein his predecessor-in-interest had obtained quiet title over parts of his property traversed by a county road that had been created in 1900. Although the county was named and served in the quiet title action, it did not respond. The quiet title decree subsequently entered did not mention any reservation for roads or other easements.

In 1999, Lee unsuccessfully petitioned for abandonment of the county road across his property.

In 2001, a Musselshell County road crew opened a fence Lee had placed across the road, installed culverts, brought in fill, and bladed the county road. These acts formed the basis for Lee's trespass suit, in which Lee argued the 1952 quiet title action was res judicata as to any claim that a county road traverses his property. The Montana Supreme Court disagreed, holding that a county road cannot be abandoned by implication; a county's mere failure to respond to a quiet title action is insufficient indication of an intent to abandon a county road which requires that affirmative steps be taken by county authorities. The court further held the trial court in the 1952 quiet title action was without jurisdiction to abandon the road because the statutory procedure for abandonment had not been followed. The court discussed its earlier case of *Board of County Commissioners v. District Court* and reaffirmed that the only method by which a district court obtains jurisdiction to abandon a road is through a petition for writ of review.

D. Analysis

It is undisputed that prior to filing this lawsuit, Plaintiffs and others unsuccessfully petitioned the Commissioners to abandon the portion of Hughes Creek Road beyond the gate. The County has filed extensive documentation of the history of Hughes Creek Road and the

recent abandonment proceedings before the Commissioners, and Plaintiffs have filed their attorney's correspondence to the Commissioners that accompanied and summarized the grounds for the petition for abandonment.

The Court determines it must examine each of the counts in Plaintiffs' complaint to determine whether Plaintiffs' complaint is, in substance, a disagreement with the Commissioners' denial of the petition for abandonment and an attempt to circumvent their sole remedy—a petition for a writ of review—through the filing of a declaratory judgment action. If Plaintiffs' claims seek abandonment of the portion of road in dispute through a declaratory judgment action, dismissal will be warranted because the Court will be without jurisdiction over such claims. The only method for vesting this Court with jurisdiction over a party's disagreement with a decision by a board of county commissioners regarding a petition for abandonment of a county road is through a petition for writ of review.

1. Count I

In Count I, Plaintiffs seek a declaration that the Commissioners' directive that Plaintiffs remove the gate by June 1, 2017, "thereby allowing unfettered public access," is barred by the doctrine of claim preclusion. *Compl.*, ¶ 36. Plaintiffs allege the 1993 order dismissing Cause No. DV-84-248 was a dismissal with prejudice that, under M.R.Civ.P. 41(a)(1), constitutes a final judgment on the merits for the purpose of claim preclusion. *Id.*, ¶ 43. (This count is also the subject of Plaintiffs' motion for partial summary judgment.)

Plaintiffs contend the Court should reach the merits of this claim, and when it does, it should grant this claim which will moot all remaining issues in this case.

The County argues this claim should be dismissed with prejudice on two grounds: (1) the Court lacks jurisdiction over this claim because Plaintiffs have not petitioned for a writ of review of the Commissioners' denial of their petition for abandonment, and (2) in 1993, when it issued the order dismissing Cause No. DV-84-238, the Court lacked jurisdiction to issue an order that would effectively constitute abandonment of a portion of Hughes Creek Road on the same ground. Thus, the County argues Count I suffers from lack of jurisdiction twice over.

The parties dispute whether the two-sentence *Stipulation and Order* dismissing Cause No. DV-84-248 in 1993 constituted a dismissal with or without prejudice. The first sentence says "with prejudice" and the second sentence says "without prejudice." If the dismissal was without prejudice, it would not have the effect of a final judgment. If the dismissal was with prejudice, it would have the effect of a final judgment and purportedly serve to bar the County from seeking a declaration that the gate across the road is a nuisance and that its owners should be restrained from interfering with the public use of the roadway, all of which would imply that the road that was the subject of the unsuccessful 1982 petition for abandonment was now abandoned. However, as the *Lee v. Musselshell County* court pointed out, a county road cannot be abandoned by implication; a county must take affirmative steps to indicate intention to abandon a road. *Lee*, ¶ 19; *see also Letica Land Co.*, ¶ 23; *Glassi v. Lincoln Cty. Bd. of Commr.*, 2003 MT 319, ¶ 15, 318 Mont. 288, 80 P.3d 84; *McCauley v. Thompson-Nistler*, 2000 MT 215, ¶ 31, 301 Mont. 81, 10 P.3d 794; *Baertsch v. Cty. of Lewis & Clark*, 256 Mont. 114, 122, 845 P.2d 106, 111 (1992) (concluding the conduct necessary to demonstrate an intent to abandon "must be some affirmative official act, and not mere implication").

Plaintiffs raised this issue of claim preclusion before the Commissioners. *See Pls. ' Rep. to Def. 's Rule 12 Mots. to Dismiss*, Ex. A and B. In denying their petition for abandonment and directing that the gate be removed by June 1, 2017, the Commissioners implicitly rejected Plaintiffs' claim preclusion argument.

The dispute over the effect of the *Stipulation and Order* does not give rise to an issue of material fact. Regardless of how Cause No. DV-84-248 was dismissed and the legal effect of its dismissal, the declaration Plaintiffs seek in this count—that the County is barred from ordering removal of the gate—is substantively a challenge to the Commissioners' denial of their petition for abandonment. If Plaintiffs were to prevail on this count, such declaration would effectively overrule the Commissioners' denial and declare the road abandoned. In order for the Court to obtain jurisdiction under these facts, Plaintiffs must petition for a writ of review.

The County's argument is well-taken. This count should be dismissed for lack of jurisdiction.

2. Count II

In Count II, Plaintiffs seek a declaration that Hughes Creek Road has never extended past the approximate location of the gate. *Id.*, ¶ 45. Plaintiffs also seek associated injunctive relief barring public or county access beyond that point. *Id.*, ¶ 53. Plaintiffs acknowledge the roadway that was declared a public highway in 1900 was "about twelve miles." *Id.*, ¶ 14. Plaintiffs allege it is unlikely the roadway was accurately surveyed in 1900. *Id.*, ¶ 51. Plaintiffs allege the roadway has been rerouted and straightened over time and now measures approximately nine miles. *Id.*, ¶ 50.

In their response brief, Plaintiffs acknowledge “a board of county commissioners clearly has authority to create, modify, and abandon county roads provided all legal requirements are met”; however, in reliance on *Letica Land Co., LLC v. Anaconda-Deer Lodge Cty.*, 2015 MT 323, 381 Mont. 389, 362 P.3d 614, Plaintiffs contend the Commissioners’ “present-day ‘findings of fact’ regarding the location and terminus of a road created nearly 120 years ago have no legal relevance.” *Pls.’ Resp. to Def.’s Mot. to Dismiss and Reply in Support of Pls.’ Mot. for P.S.J.*, 5. Plaintiffs argue: “*Letica* thus stands for the rule that county commissions cannot create county roads or make binding legal decisions about them based merely on political votes.” *Id.*, 6. The Court finds nothing in *Letica* that even remotely describes such a rule. The relevant issue in *Letica* was whether a public prescriptive easement over a private road could be extinguished by reverse adverse possession. The Montana Supreme Court held that it could; however, the court also pointed out that a private individual may not obtain title to a public statutorily created road by adverse possession. *Letica*, ¶¶ 35-36; 46-50.

Plaintiffs do not dispute that Hughes Creek Road is a public statutorily created road, nor do they dispute that at the time of its creation, it was described as “about twelve miles” in length. County historical records submitted in support of the County’s motion provide evidence that at several times throughout the twentieth century, Hughes Creek Road was described in records and by users as being approximately 12 miles long, with a U.S. Forest Service trailhead located 11.8 miles up the road. The commissioners who denied the 1982 petition for abandonment found Hughes Creek Road to be 11.8 miles in length. The Commissioners who recently denied Plaintiffs’ petition found the road to be at least 11.8 miles and no more than 12 miles in length.

By asking the Court to declare that Hughes Creek Road never existed beyond the gate and is approximately nine miles long, and to grant injunctive relief barring public access beyond the gate, Plaintiffs are effectively asking the Court to: (1) ignore the findings of two separate boards of commissioners that the county road extends some three miles past the gate, (2) override the Commissioners' recent quasi-judicial decision to deny the petition for abandonment, and (3) abandon the road by enjoining public access. The only method by which a district court obtains jurisdiction to abandon a road is through a petition for writ of review. For the same reason stated in the section above, this count should be dismissed for lack of jurisdiction.

3. Count III

In Count III, Plaintiffs seek a declaration “providing guidance” on the construction and application of § 7-14-2615(3), MCA, and a remand to the Commissioners for reconsideration of the petition for abandonment in light of such guidance. *Id.*, ¶¶ 55, 60. Plaintiffs allege this subsection was the Commissioners' sole justification for denying the petition. *Id.*, ¶ 56. Plaintiffs allege the Commissioners misinterpreted this statute to mean “they had no discretion to decide that the public land immediately before the gate does not provide ‘substantially the same’ access as the extremely marginal and disputed public access beyond the gate.” *Id.*, ¶ 59.

In this count, Plaintiffs are challenging the basis for the Commissioners' denial of Plaintiffs' petition—no other public road or right-of-way will provide substantially the same access to public land or waters, and they are asking the Court to “correctly” interpret § 7-14-2615(3) and remand for the Commissioners' reconsideration. Plaintiffs clearly disagree with the Commissioners' decision and seek a different outcome. “Should petitioners or respondents be unsatisfied with the decision of the commissioners, they could then petition the District Court for

a writ of review[.]” *Bd. of Cty. Commr.*, 203 Mont. at 48-49, 659 P.2d at 268-69. A writ of review is the only method by which the Court can obtain jurisdiction to abandon a road. *Id.* Plaintiffs have not filed such a petition; therefore, the Court does not have jurisdiction. This count should be dismissed.

4. Count IV

In Count IV, which Plaintiffs describe in parentheses as a contingent claim, Plaintiffs allege the following:

If, prior to the adjudication of these issues, the County orders, directs, or allows the removal of the existing gate and encourages or allows unfettered public access beyond the gate’s current location, and the Court later determines the property beyond is private, then the County’s actions will constitute a taking under the Fifth Amendment to the U.S. Constitution and Article II, § 29 of the Montana Constitution.

Id., ¶ 62. “If that occurs,” Plaintiffs seek just compensation and damages, plus attorney fees. *Id.*, ¶ 63.

The County correctly points out that this cause of action will come into existence only if: (1) the County orders, directs, or allows the removal of the existing gate and encourages or allows unfettered public access beyond the gate’s current location; and (2) the Court later determines the property beyond is private.

Plaintiffs concede that as a standalone claim, this “‘contingent’ takings claim” would likely be subject to dismissal as a non-justiciable controversy.

In view of its determination that Plaintiffs’ other counts must be dismissed for lack of jurisdiction, there will be *no* adjudication of these issues in this declaratory judgment action. Because Count IV is contingent upon the County taking certain action before the Court rules in a certain way on Counts I or II, and because Counts I and II must be dismissed for lack of

jurisdiction, this contingent count cannot stand. Because it does not state a justiciable controversy, the Court lacks jurisdiction over it.

Moreover, taking all of the allegations in the complaint as true, and considering nothing outside of the complaint for purposes of this count, the Court determines Plaintiffs can prove no set of facts that would entitle them to relief on this count in the absence of a favorable ruling on at least one of their prior counts over which the Court lacks jurisdiction. Thus, this count should also be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

E. Conclusion

Plaintiffs' argument that they do not seek abandonment of a portion of Hughes Creek Road or review of the Commissioners' denial of the petition for abandonment is not only unpersuasive but disingenuous. Plaintiffs' first two counts seek declaratory relief that would, if granted, effectively abandon the portion of Hughes Creek Road that was the subject of the unsuccessful petition for abandonment. Plaintiffs' third count seeks an order remanding the petition for abandonment to the Commissioners for reconsideration in light of the Court's interpretation of the construction and application of § 7-14-2615, MCA. Plaintiffs' fourth claim is contingent upon a favorable ruling on Count I or Count II. Plaintiffs' complaint appears to be an attempt to make an end run around the remedy to which they are entitled in order to broaden the scope of judicial review.

The County has moved for dismissal of Counts I and IV with prejudice. The Court has determined the complaint must be dismissed for lack of subject matter jurisdiction. A dismissal with prejudice constitutes a final judgment on the merits. It is unclear to the Court how it can

dismiss these counts with prejudice if it lacks subject matter jurisdiction over them. The County has not persuaded the Court that dismissal of either of these claims with prejudice is appropriate or within the law.

II. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND THE COUNTY'S MOTION TO STRIKE PLAINTIFFS' "REPLY"

Because the Court has determined that Plaintiffs' complaint should be dismissed pursuant to Rule 12(b), Plaintiffs' motion for partial summary judgment and the County's motion to strike Plaintiffs' "reply" are moot.

ORDER

IT IS HEREBY ORDERED that *Defendant's Rule 12 Motions to Dismiss for Lack of Subject Matter Jurisdiction and for Count IV for Failure to State a Claim* are **GRANTED**. Plaintiffs' complaint is hereby **DISMISSED**.

IT IS FURTHER ORDERED that Plaintiffs' *Motion for Partial Summary Judgment* and *Defendant's Motion to Strike Plaintiffs' "Reply"* are **MOOT**.

IT IS FURTHER ORDERED that this case is **CLOSED**.

DATED this 29th day of June, 2017.

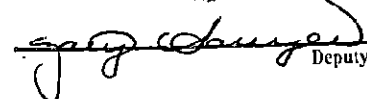

HON. JEFFREY H. LANGTON, District Judge

cc: counsel of record

I certify that I forwarded copies of this instrument to counsel of record

by email
June 30, 2017
Paige Frautwein, Clerk

OPINION & ORDER


Deputy