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**MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT,
RAVALLI COUNTY**

PUBLIC LAND/WATER ACCESS ASSOCIATION, INC, Plaintiff/Petitioner,	Cause No.: DV-41-2021-0000433-WM
- vs -	Dept. No.: Judge Leslie Halligan
RAVALLI COUNTY and BOARD OF RAVALLI COUNTY COMMISSIONERS Defendants.	**DEFENDANTS' REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

On December 30, 2021, Defendants Ravalli County and Board of Ravalli County Commissioners (hereinafter referred to as "County," "County Defendants," or "Defendants") filed *Defendants' Motion to Dismiss and Brief in Support*. Defendants now file this reply brief to *PLWA's Brief in Opposition to Defendant's Motion to Dismiss*.

INTRODUCTION

Defendants have repeatedly complied with Montana law in an appropriate and timely manner. After almost a decade of litigation, including two Supreme Court decisions, Defendants

have removed offending gates and obstructions from Hughes Creek Road now four times (January 13th, June 21st, December 8th, and December 28th) in 2021. All issues presented in Plaintiff's Complaint for removal of the gate (encroachment) and trees and brush (obstructions) do not exist. Plaintiff concedes in its brief that the encroachment and obstructions are not present. There is no meaningful relief that this Court could grant as to any allegations in Plaintiff's Complaint.

In Plaintiff's brief in opposition to the County's Motion to Dismiss, Plaintiff made several inaccurate claims. Plaintiff's claims that the County "forced PLWA to file suit" are wrong. Despite the County having properly carried out its legal duties on four separate occasions in 2021 and having communicated with Plaintiff prior to the filing of this suit, Plaintiff took it upon itself to bring forth this arbitrary and unnecessary suit.

Plaintiff's claims that the County "manipulated the litigation process" and removed the gate from Hughes Creek Road "one week before its answer was due, just before Christmas day" are wrong. The County has been consistent in all communications with Plaintiff that a new road constructed directly beyond the gate, that appeared to start in the County road but thereafter turned out of the County road and crossed onto private property, raised many issues that the County had to address at the time of removal of the gate, trees, and brush to comply with Montana law. *See* Section 60-1-101, MCA ("safe and efficient highway transportation is of important interest to all of the people of the state and declares that inadequate highways, roads, and streets . . . endanger the health and safety of the citizens of the state."). Once those public safety concerns were timely mitigated and intrusion onto private property was prevented, the County removed the encroachment and the obstructions.

To be clear, this suit and subsequent Court deadlines have played no role in when actions have been taken by the County. The County and its officials have not and will not allow this suit to distract it from its duty and commitment to protect the safety of its citizens and members of the public from legitimate risks posed throughout the County. Also, contrary to Plaintiff's claim, the County removed the gate in early December, on December 8th, 2021, before an additional extension to respond was sought and granted by the Court.

Plaintiff's claims that the County has not acknowledged their statutory duty are wrong. Even though Plaintiff withheld from its Complaint material facts, including that the County had removed an offending gate in January 2021, Plaintiff was aware of this, as well as the other occasions in which proper action was taken by the County, when bringing this suit.

Plaintiff's claims seeking to be awarded attorneys fees are baseless. In that the County has not failed to properly enforce any interest and this suit has not changed the way the County has fulfilled its duties and enforced the law, as is evident by the past successful actions of the County, there is no relief that can, nor should, be granted to Plaintiff. A lawsuit, such as this, was not needed for the County's previous removal of encroachments.

REPLY ARGUMENT

Article VII, Section 4, of the Montana Constitution limits the judicial power of the courts of Montana to justiciable controversies. *Heringer v. Barnegat Dev. Grp., LLC*, 2021 MT 100, ¶ 13, 404 Mont. 89, 485 P.3d 731 at 736; *see also Greater Missoula Area Fed'n of Early Childhood Educators and Related Pers. v. Child Start, Inc.*, 2009 MT 362, ¶ 22, 353 Mont. 201, 219 P.3d 881. "A matter is moot when, due to an event or happening, the issue has ceased to exist and no longer presents an actual controversy." *Ruckdaschel v. State Farm*, 285 Mont. 395, 396, 948 P.2d 700, 701 (1997); see also *Turner v. Mountain Engineering and Const., Inc.*, 276

Mont. 55, 59, 915 P.2d 799, 803 (1996). Declaratory relief claims are not immune from mootness considerations. *See Kasza v. Browner*, 133 F.3d 1159, 1172 (9th Cir. 1998). The fundamental question to be answered in any review of possible mootness is whether it is possible to grant some form of effective relief to the appellant. *Montanans Against Assisted Suicide (MAAS) v. Bd. of Med. Exam'rs*, 2015 MT 112, ¶ 11, 379 Mont. 11, 347 P.3d 1244 (quoting *Briese v. Mont. Pub. Emps. Ret. Bd.*, 2012 MT 192, ¶ 14, 366 Mont. 148, 285 P.3d 550). If a court lacks jurisdiction, then it may take no action in a case other than to dismiss it. *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 11, 355 Mont. 142, 226 P.3d 567.

Here, Plaintiff's requests in its Complaint are moot. The gate (encroachment) has been removed and the felled timber and brush (obstructions) have been removed out of the County Road. The issues presented in Plaintiff's complaint do not exist. This Court would be unable to grant any meaningful relief as the allegations in the Complaint are not present.

I. THE VOLUNTARY CESSATION EXCEPTION DOES NOT APPLY TO THIS CASE.

In Plaintiff's brief in opposition to the County's Motion to Dismiss, Plaintiff attempts to evade this matter being moot by exploring the voluntary cessation exception to mootness. The voluntary cessation exception to mootness applies in limited circumstances "where the defendant has voluntarily ceased the alleged wrong; where it is "reasonable to expect the 'same wrong' to recur, such that a ruling on the merits would be of ... discernible future benefit to the litigants or the interests of judicial economy"; and where the reasonableness of such recurrence is supported by evidence, rather than speculation or allegation alone." *Montanans Against Assisted Suicide v. Board of Medical Examiners, Montana Dept. of Labor & Industry*, 379 Mont. 11 at 16, 347 P.3d 1244 at 1248 ¶ 15 (quoting *Havre Daily News, LLC, v. City of Havre*, 2006 MT 215 ¶¶ 38-40, 333 Mont. 331, 142 P.3d 864). The voluntary cessation doctrine may apply when a defendant's

challenged conduct "is of indefinite duration, but is voluntarily terminated by the defendant prior to completion of appellate review." *Zunski v. Frenchtown Rural Fire Dept. Bd. Of Trustees*, 371 Mont. 552 at 556, 309 P.3d 21 at 25. *See Havre Daily News*, ¶ 34.

Here, the voluntary cessation exception should not be applied to this matter. First, the only voluntary aspect is that the County did, once again in accordance with the law, remove the gate (encroachment) and trees and brush (obstructions) from Hughes Creek Road. However, as the County articulated in its brief in support of its Motion to Dismiss, the County did not wait for litigation to take action nor did the County do so because of this suit. The County's prior actions where encroachments and obstructions were removed from Hughes Creek Road without the need for the filing of a lawsuit is evidence of how unnecessary this suit is. Additionally, the County's communications with Plaintiff prior to the filing of the suit made clear that the County was in the process of examining, investigating, and addressing this situation. Thus, the County's actions to remove the encroachment and obstructions happened after the lawsuit was filed simply because the lawsuit was filed arbitrarily beforehand.

Second, it is not reasonable to expect the "same wrong" to recur. With the voluntary cessation exception, Courts ask the question of whether "[i]t is [] generally reasonable to expect the "same wrong" to recur, such that a ruling on the merits would be of any discernible future benefit to the litigants or the interests of judicial economy." *Havre Daily News*, 333 Mont. at 348, 142 P.3d at 876. Plaintiff brought forth this unnecessary and arbitrary suit and is unable to show that the County has repeatedly failed to remove encroachments or obstructions. Plaintiff's complaint misrepresented when actions have been taken in the past by the County to remove gates from Hughes Creek Road. Plaintiff withheld from its Complaint the fact that Defendants removed a gate from Hughes Creek Road in January 2021. There is no evidence, beyond pure

speculation, that the County would 'fail' to comply with the encroachment and obstruction statutes in the future.

In Plaintiff's opposition to the County's Motion to Dismiss, Plaintiff attempted to cite past instances as "evidence," through declarations of Drewry Hanes, but in each of these instances, contrary to the allegations and declarations made, the County properly, timely, and safely removed gates and obstructions. Plaintiffs' opinions of the County's past failures is actually evidence of the County's past successes. Plaintiff cannot and does not point to Defendants failing to take action to remove an encroachment or obstruction.

Plaintiff additionally alleged that there is a new obstruction now blocking Hughes Creek Road and that the County is not taking action to immediately remove it. To clarify, there is no "new obstruction." However, there was a new encroachment (excavator parked in the roadway). Once again, when notified of this encroachment, the County followed Montana law by immediately sending written notice to the landowner to remove the encroachment. *See* Section 7-14-2135, MCA ("Notice to remove the encroachment immediately, specifying the breadth of the highway and the place and extent of the encroachment, must be given to the occupant or owner of the land or the person owning or causing the encroachment"). Thereafter, on January 24, 2022, the County sent a road grader and a snow plow truck up Hughes Creek Road to prepare the road to a point that would allow for the necessary equipment to be taken up the road for the immediate removal of the excavator. On January 26, 2022, County personnel traveled up to Hughes Creek Road and discovered that the landowners had removed the excavator from the County road. Thus, there is no excavator (encroachment) blocking Hughes Creek Road. Plaintiff's claims of inaction by the County are untrue and purely speculative.

II. INVOKING THE VOLUNTARY CESSATION EXCEPTION TO MOOTNESS TO THIS MATTER WOULD BE INAPPROPRIATE CONSIDERING THE CIRCUMSTANCES OF THIS CASE.

Courts look to the circumstances of a case when deciding whether the voluntary cessation exception is appropriate. "Whether there has been only a single instance of a party ceasing an alleged wrongful act may not carry great weight or be dispositive in every case. Rather, the relevance of such an inquiry depends on the circumstances of the case." *Heringer*, 404 Mont. 89, 485 P.3d at 737. Looking at the circumstances of this case, Plaintiff withheld material facts from its complaint. Plaintiff withheld that there was a new road constructed beyond the gate that started in the County road and crossed onto private property. Plaintiffs withheld the fact that the County first removed the gate in January 2021. Additionally, Plaintiff (and Drewry Hayes) incorrectly declared that the County waited to remove the gate until late December.

Courts have addressed the voluntary cessation exception and have found its application to be inappropriate in a number of cases. In *Heringer*, owners of condominium units sued a developer after the developer unilaterally amended a condominium declaration to create a new homeowner's association. *Id.* at 733. A suit was filed and the developer revoked the amendment before answering the complaint. *Id.* The developer made further assurances on appeal that it would not repeat the conduct to avoid the voluntary cessation exception. The *Heringer* Court affirmed the district court, holding that the voluntary cessation doctrine did not apply to the moot action as the developer rescinded the amendment. *Id.* at 738. The Court noted that "[w]hether there has been only a single instance of a party ceasing an alleged wrongful act may not carry great weight or be dispositive in every case. Rather, the relevance of such an inquiry depends on the circumstances of the case." *Id.* at 737.

Here, the County and its officials have complied with the law in the past, and will continue to do so in the future. Similar to *Heringer*, where the developer made assurances that it would not repeat the conduct, the County has consistently communicated, by its conduct and its words, that it does and will remove encroachments and obstructions from County roads in accordance with Montana law. Contrary to Plaintiff's claim that the County has never said that it would cease its practice of "failing" to remove illegal gates and obstructions, the County will continue to address each situation, such as this one, in accordance with the law to insure that the rights of the public as well as the rights of the landowners are respected, all while minimizing any dangers to public safety.

In considering the circumstances of the case, invoking the voluntary cessation exception would be inappropriate. The Plaintiff overlooks and misrepresents the circumstances of this matter. The circumstances are unique, and Plaintiff knew that was the case before filing this suit. Plaintiff knew that a new road was constructed raising both legal and public safety concerns; Plaintiff knew that the County has previously removed encroachments; Plaintiff knew that landowners had threatened violence; and Plaintiff knew that the County was in the process of examining and addressing this situation. The County did address this situation, as was acknowledged by Plaintiff in its brief, and the issues in the complaint are moot.

III. THE COUNTY DID NOT MANIPULATE THE LITIGATION PROCESS AND DOES MEET ITS BURDEN.

Plaintiff claims that the County manipulated the litigation process in an effort to create the heavy burden of persuading the court that the challenged conduct cannot reasonably reoccur. *Havre Daily News*, ¶ 34. However, the County has not manipulated the litigation process in any way and should not bear that heavy burden. As explained above, the County had to do its due

diligence on this unique situation before proceeding with the removal of the gate, trees, and brush.

In *Havre*, a newspaper company (Havre Daily News) sued the City of Havre seeking dissemination of an incident report. *Havre Daily News*, 333 Mont. at 334, 142 P.3d at 867. The City eventually provided the newspaper with the report. *Id.* The district court there ruled that the case was moot and non-justiciable, but that ruling was appealed to the Supreme Court. *Id.* The Supreme Court there declined the application of the voluntary cessation in stating "[t]o the extent that this case once presented a justiciable controversy, that dispute has been rendered moot by Havre's providing the Havre Daily News with a complete copy of the Reports." *Havre Daily News*, 333 Mont. at 349-350, 142 P.3d at 877. In coming this this conclusion, the Court explained that the identical wrong was incapable of recurrence and the Newspaper pointed to no concrete evidence suggesting that Havre will perpetrate a substantially similar wrong. *Havre Daily News*, 333 Mont. at 349, 142 P.3d at 877. Further, the Court there also pointed out that the Newspaper did not point out any inevitable future violations. *Havre Daily News*, 333 Mont. at 350, 142 P.3d at 877.

Here, like the newspaper in *Havre*, Plaintiff does not point to any "inevitable future violation . . . in anything other than conjectural, conclusory fashion" and provided no concrete evidence suggesting that the County has or will fail to timely remove gate, trees, or brush. Any comments, opinion, or declarations of instances that the County failed to remove encroachments and obstructions in the past are actually instances of the County properly and successfully removing encroachments and obstructions. Additional violations are purely speculative. In fact, Plaintiff tried to mention a new "obstruction" which does not exist. A new encroachment

(excavator) was in the roadway, but has been removed as a result of the Defendant's prompt notification to the landowners.

Additionally, Plaintiff cannot assert a legitimate reasonable expectation that the challenged practice will resume after this lawsuit is dismissed. While Defendants cannot always control the actions of private parties, Defendants have and will continue to comply with the law. Just as in *Havre*, no real dispute exists over which the Court may exercise judicial authority. This case is moot as the gate (encroachment) and trees and brush (obstructions) have already been removed as was sought by Plaintiff in this litigation. The Court cannot provide relief for that requested by Plaintiff. No actual controversy remains; instead only a hypothetical future controversy remains. Thus, this case should be dismissed.

IV. THIS CASE IS NOT AMENABLE TO CONSIDERATION UNDER THE "CAPABLE OF REPETITION YET EVADING REVIEW" EXCEPTION TO MOOTNESS.

Plaintiff's brief also seeks to get around this action being moot by examining the "capable of repetition yet evading review" exception to mootness. This exception is similar to the voluntary cessation exception discussed above. However, with this exception to mootness, the Plaintiff bears the burden. "Under the exception to mootness for wrongs "capable of repetition, yet evading review," the party invoking the exception—generally the plaintiff—bears the burden of showing that the challenged conduct inherently is of limited duration, so as to evade review, and that there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Havre Daily News*, 333 Mont. at 346, 142 P.3d at 875. *See also Skinner v. Lewis and Clark*, 1999 MT 106, ¶ 18, 294 Mont. 310, ¶ 18, 980 P.2d 1049, ¶ 18 (imposing the burden on the party invoking the exception to mootness).

Havre looked to the analysis of federal courts when considering this exception to mootness. *Havre Daily News*, 333 Mont. at 345, 142 P.3d at 874. As its implementation by the federal courts made clear, "the exception to mootness for wrongs capable of repetition, yet evading review is properly confined to situations where the challenged conduct invariably ceases before courts can fully adjudicate the matter." *See Spencer v. Kemna*, 523 U.S. 1, 18, 118 S.Ct. 978, 988, 140 L.Ed.2d 43 (1998) (declining to apply the exception because "[petitioner] has not shown ... that the time between [the challenged wrong] and [the occurrence rendering the case moot] is always so short as to evade review"); see also, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (nine-month term of pregnancy effectively precludes full appellate review of restrictions on abortion prior to the completion of any individual plaintiff's pregnancy). The Court in *Havre* stated, "[g]enerally, like the federal courts, this Court has limited application of this exception to situations where the challenged conduct is of inherently limited duration." *Havre Daily News*, 333 Mont. at 347, 142 P.3d at 875.

Here, the alleged wrongful conduct of the County is not of inherently limited duration. The challenged conduct is of indefinite duration. While the challenged conduct would persist until the encroachment and obstructions were removed, as explained above, it was not this unnecessary lawsuit that brought about the removal. Plaintiff's bizarre claim that the encroachments and obstructions would still be on Hughes Creek Road if it was not for this lawsuit baselessly disregards the past actions of the County as it pertains to this road and disregards its prior communication with the County. As in *Havre*, in that the County's conduct is not of inherently limited duration, this case is not amenable to consideration under the exception to mootness for wrongs "capable of repetition, yet evading review." This exception is not appropriate to this matter.

V. PLAINTIFF IS NOT ENTITLED TO ATTORNEYS FEES OR COSTS.

None of the bases on which Plaintiff seeks attorneys' fees and costs are appropriate. Plaintiff's claim that "PLWA was forced to file this lawsuit to obtain 'immediate' removal of the gate and obstructions" is bizarre. Plaintiff voluntarily brought forth this suit even while knowing that the County was taking action to address this situation. This suit has not changed the way that the County has fulfilled its duties and enforced the law, for the many reasons stated above and in the County's brief in support of its motion to dismiss. Defendants have upheld their legal duties now four separate times in 2021, all without the need of this unnecessary lawsuit.

Plaintiff claims in its brief that, even if Court I and II of its Complaint are moot, it is still the prevailing party. "A determination of the prevailing party requires consideration of all the facts and circumstance of the case." *Gibson v. Paramount Homes*, LLC, 2011 MT 112, 360 Mont. 421, 253 P.3d 903. Here, considering the circumstances of this case (as discussed above), the County acted appropriately and timely in conducting its due diligence by first examining and investigating the new situation to determine the exact location of the new gate, and the newly constructed road, relative to the County Road and the adjoining private property. By mitigating or alleviating threats to public safety and potential dangers presented by the new gate location and road at the time of removal, the County was complying with its concurrent duty to ensure the health and safety of the citizens of the state travelling over public roads. Section 60-1-101, MCA. Once the County was able to mitigate the real and foreseeable threats to public safety and potential dangers, in accordance with Section 7-14-2134, MCA, the County removed the encroachment and in accordance with Section 7-14-2133, the County removed the obstructions. Any analysis of these facts and circumstances, in conjunction with the County's communications with Plaintiff prior to the filing of this suit, makes clear that the timing of this suit had nothing to

do with when actions were taken by the County, and that the Plaintiff should not be considered a "prevailing party" for simply bringing an unnecessary and arbitrary suit.

Plaintiff is also not entitled to fees and costs pursuant to the private attorney general doctrine. As Plaintiff mentioned, "[a]bsent a specific contractual or statutory provision, a prevailing party in a civil case is generally not entitled to attorney fees." *Burns v. County of Musselshell*, 2019 MT 291, 398 Mont. 140, 146, 454 P.3d 685,689. The private attorney general doctrine, an equitable exception to this general rule, applies "when the government, for some reason, fails to properly enforce interests which are significant to its citizens" and private citizens must take up litigation to vindicate those interests." *See Id.* (quoting *In re Dearborn Drainage Area*, 240 Mont. 39, 43, 782 P.2d 898, 900 (1989)). Here, the County has not failed to properly enforce interests of the citizens of Ravalli County. Instead, the County has successfully enforced and protected the interests of the citizens of Ravalli County as demonstrated through the County's past actions of removing a gate from Hughes Creek Road now four times. Thus, invoking the private attorney general doctrine would be inappropriate.

Plaintiff is not entitled to an award of fees and costs under Section 27-26-402, MCA. Section 27-26-402, MCA states "[i]f judgment is given for the applicant: the applicant may recover the damages that the applicant has sustained, as found by the jury or as determined by the court or referees, if a reference was ordered, together with costs; . . ." Here, Plaintiff should not be a successful applicant for a writ of mandate. The County has complied with its legal duty under the law in repeatedly and diligently removing the gate and obstructions from Hughes Creek Road. Plaintiff has incurred legal fees and other expenses by its own choosing.

Plaintiff is not entitled to an award of fees and costs pursuant to Section 27-8-313, MCA as supplemental relief. The County has carried out its legal duty removing encroachments and obstructions blocking County roads. Any relief to Plaintiff would be inappropriate in this matter.

Overall, Plaintiff is not entitled to fees or expenses in bringing forth this arbitrary suit. Plaintiff's repeated attempts to set arbitrary deadlines on the Defendants completing their due diligence in order to mitigate public safety risks while preventing intrusion onto private property rights have been meaningless in the end, given Defendants' diligent, repeated response to the evolving situation on Hughes Creek Road.

CONCLUSION

Based on the forgoing and Defendants' brief in support of their Motion to Dismiss, Plaintiff's complaint and alternate writ of mandamus should be dismissed.

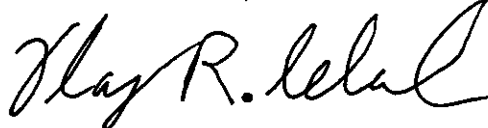
1. This matter is moot. All issues presented in Plaintiff's Complaint for removal of the gate (encroachment) and trees and brush (obstructions) do not exist. Plaintiff concedes that the encroachment and obstructions are not present. No real dispute exists over which the Court may exercise judicial authority. Thus, there is no meaningful relief that this Court could grant as to any allegations in Plaintiff's Complaint.
2. Invoking the voluntary cessation exception to mootness would be inappropriate to this matter. Looking at the circumstances of this case, the County ensured public safety concerns were timely mitigated and intrusion onto private property was prevented before diligently removing the encroachment and the obstructions. The County has consistently communicated, by its conduct and its words, that it does and will remove encroachments and obstructions from County roads in accordance with Montana law. It is not reasonable to expect the "same wrong" to recur. Plaintiff has brought forth no evidence, beyond pure

speculation, that the County would fail to comply with the encroachment and obstruction statutes in the future.

3. This case is not amenable to consideration under the "capable of repetition yet evading review" exception to mootness. There is no reasonable expectation that the challenged conduct will resume upon dismissal of this suit.
4. Plaintiff is not entitled to attorneys fees or costs. There is no claim upon which relief can be granted. This suit has not changed the way the County has fulfilled its duties and enforced the law, as is evident by past actions of the County.
5. Counts I and II of Plaintiff's Complaint should be dismissed on the basis that the action requested is moot and could also be dismissed for failure to state a claim upon which relief can be granted. Count III of Plaintiff's Complaint should be dismissed for failure to state a claim which relief can be granted.

DATED this 27th day of January 2022.

BILL FULBRIGHT, COUNTY ATTORNEY



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CERTIFICATE OF SERVICE

I, Clay Richard Leland, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 01-27-2022:

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