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*Attorneys for Plaintiff/Petitioner*

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

PUBLIC LAND/WATER ACCESS  
ASSOCIATION, INC.

Plaintiff/Petitioner,

vs.

RAVALLI COUNTY and BOARD OF  
RAVALLI COUNTY COMMISSIONERS,

Defendants/Respondents.

Cause No. \_\_\_\_\_  
Hon. \_\_\_\_\_

**BRIEF IN SUPPORT OF PETITION  
FOR ALTERNATIVE WRIT OF  
MANDAMUS**

Petitioner Public Land/Water Access Association, Inc. (PLWA) submits this brief in support of its application for an alternative writ of mandamus ordering Respondents Ravalli County and Board of Ravalli County Commissioners (Board) to immediately remove the gate encroachment and felled timber and brush obstructing the public's use of the Hughes Creek Road for its full length. Pursuant to § 27-26-102, MCA, an alternative writ of mandate should issue to compel Ravalli County and the Board to carry out their clear statutory duty to immediately remove the encroachment and obstructions blocking public access to the Hughes Creek Road.

Pursuant to §§ 27-26-202 and 27-26-203, MCA, PLWA requests that the Court set an order to show cause hearing, at the earliest possible time, requiring Respondents to appear and show cause why they should not be ordered to immediately comply with §§ 7-14-2133 and 7-14-2134, MCA and “immediately” remove the encroachment and obstructions blocking public use of the Hughes Creek Road.

### FACTUAL BACKGROUND

PLWA’s Complaint for Declaratory Judgment and Petition for Alternative Writ of Mandamus, and the supporting declaration of Jim Olson, detail the material facts surrounding this case. For the sake of brevity and economy, those facts will not be repeated here. PLWA will instead highlight the undisputed facts pertinent to its application for an alternative writ of mandamus:

1. In June 1900, Ravalli County declared the Hughes Creek Road a county road for a distance of about 12 miles. *See* Compl., ¶¶ 7–8.

2. In February 2017, the Board denied a petition to abandon the Hughes Creek Road beyond a gate located about 8.5 miles up the Hughes Creek Road. In that order, the Board declared that the Hughes Creek Road is a public highway at least 11.8 miles in length, with a 60-foot right-of-way, and provides legal access to public lands and waters. *See* Compl., ¶¶ 14–17.

3. The Montana Supreme Court affirmed that determination, holding that the “historical record substantially supports the Board’s conclusion that Hughes Creek Road is 11.8 miles long.” *Bugli v. Ravalli County*, 2019 MT 154, ¶ 32, 396 Mont. 271, 444 P.3d 399 (*Bugli II*); *see also* Compl., ¶¶ 20–21.

4. In June 2021, the illegal gate was finally removed. *See* Compl., ¶ 23.

5. In July 2021, PLWA member Jim Olson discovered a new gate on another landowner's property about 150 yards further up the road (between the 8.5 and 9.0 mile-marker)—but still on the portion declared to be public by the Board. That new gate includes a menacing sign threatening violence for crossing the gate. Behind the new gate is also some felled timber and brush obstructing use of the road. *See* Compl., ¶ 24; *see also* Dec. Jim Olson, ¶ 6.

6. The new gate is an encroachment, which obstructs and prevents the use of Hughes Creek Road for vehicles beyond the gate. The brush and felled timber are obstructions that if not removed would remain in the road indefinitely. *See* Compl., ¶¶ 26–27; *see also* Dec. Jim Olson, ¶ 8–9.

7. In July 2021, Jim Olson notified Ravalli County of the gate encroachment and other obstructions and asked for their removal. Ravalli County and the Board have not removed the encroachment and obstructions. *See* Compl., ¶¶ 28–29; *see also* Dec. Jim Olson, ¶¶ 10–11.

## DISCUSSION

A writ of mandate should issue when a clear legal duty exists and there is no plain, speedy, and adequate remedy in the ordinary course of law. § 27-26-102, MCA; *see also Common Cause of Mont. v. Argenbright*, 276 Mont. 382, 390, 917 P.2d 425, 429–430 (1996) (a writ of mandamus is available “when the party requesting it is entitled to the performance of a clear legal duty”). The clear legal duty must involve a ministerial act. *Withers v. Cty. of Beaverhead*, 218 Mont. 447, 450, 710 P.2d 1339, 1341 (1985).

A ministerial act is one that an official or agent is required to perform in a prescribed manner without regard to his or her own judgment or opinion. *State ex rel. Swart v. Casne*, 172 Mont. 302, 309, 564 P.2d 983, 987 (1977). A ministerial act leaves nothing to discretion:

[w]here the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial, but where the act to be done involves the exercise of discretion or judgment, it is not to be deemed merely ministerial.

*State v. Cooney*, 102 Mont. 521, 529, 59 P.2d 48, 53 (1936).

A writ of mandamus is appropriate here because Ravalli County and the Board's duty under §§ 7-14-2133 and 7-14-2134, MCA are clear, ministerial legal duties and there is no plain, speedy, and adequate remedy available to PLWA in the ordinary course of law to remedy the Board's failure to perform its clear legal duty.

**I. Sections 7-14-2133 and 7-14-2134, MCA impose clear legal duties involving ministerial acts.**

Sections 7-14-2133 and 7-14-2134, MCA address obstructions and encroachments on county road and public highways and impose a clear legal duty, involving purely ministerial acts, on Ravalli County and the Board. Those statutes state, in pertinent part:

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

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

**7-14-2134. Removal of highway encroachment.**

- (1) . . . if any highway is encroached upon by fence, building, **or otherwise**, the road supervisor or county surveyor of the district must give notice, orally or in writing, requiring the encroachment to be removed from the highway.
- (2) If the encroachment obstructs and prevents use of the highway for vehicles, the road supervisor or county surveyor **shall immediately remove** the encroachment.

- (3) The board of county commissioners may at any time order the road supervisor or county surveyor to immediately remove any encroachment.

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

The term “immediately” is not defined by §§ 7-14-2133 or 7-14-2134, MCA, but, according to Black’s Law Dictionary, the term “immediate” means “[o]ccurring without delay.” *Black’s Law Dictionary* 619 (Bryan A. Garner ed., 8th ed. 2005). Moreover, Merriam-Webster’s defines the term “immediate” to mean “occurring, acting, or accomplished without loss or interval of time.” *Merriam-Webster’s New Collegiate Dictionary* 601 (9th ed. 1987).

There is no dispute that Hughes Creek Road was duly established as a county road/public highway and is approximately 12 miles in length (11.8 miles). The gate encroachment and felled timber and brush obstructing the Hughes Creek Road are approximately located between the 8.5 and 9.0 mile-marker.

Ravalli County and the Board’s legal duty in these circumstances is clear: the encroachment and obstructions must be “immediately” removed. §§ 7-14-2133, 7-14-2134, MCA. Ravalli County and the Board, however, are aware of the gate encroachment and the felled timber and brush obstructing the road beyond the gate but have not removed them— “immediately” or otherwise.

**II. There is no other plain, speedy, and adequate remedy available in the ordinary course of law.**

Generally, “a writ of mandate is to be issued only when there is no plain, speedy and adequate remedy in the ordinary course of law.” *State ex rel. Burkhartsmeyer Bros. v. McCormick*, 162 Mont. 234, 237, 510 P.2d 266, 267 (1973). The mere existence of another remedy, however, “will not bar the issuance of a writ of mandate.” *Id.*, 510 P.2d at 268. Rather, “the alternative

must be one that itself enforces the performance of the particular duty that the applicant for a writ of mandamus seeks.” *Victor Fed. of Teachers Local 3494, MEA-MFT v. Victor Sch. Dist. No. 7, Ravalli Cty.*, 2018 MT 72, ¶ 23, 391 Mont. 139, 414 P.3d 1284.


A declaratory judgment action, however, “is not an adequate remedy, because it does not enforce the performance of the particular duty” sought in the writ of mandamus application. *Id.* at ¶ 27. Instead, a declaratory judgment action “simply pronounces the duty to be performed.” Mandamus, in contrast, “commands performance.” *Id.* PLWA therefore has no plain, speedy, or adequate remedy available in the ordinary course of law.

### CONCLUSION

Based on the foregoing, the Court should issue an immediate show cause order to Ravalli County and the Board directing them to show cause why the Court should not issue a writ of mandamus compelling performance of their clear legal duty, pursuant to §§ 7-14-2133 and 7-14-2134, MCA, to remove the gate encroachment and other obstructions blocking the public’s use of the Hughes Creek Road.

DATED this 22<sup>nd</sup> day of October, 2021.

GOETZ, BALDWIN & GEDDES, P.C.

By:   
\_\_\_\_\_  
J. Devlan Geddes  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing document was served upon the following, by the means designated below, this 22<sup>nd</sup> day of October, 2021.

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| <ul style="list-style-type: none"><li><input checked="" type="checkbox"/> U.S. Mail</li><li><input type="checkbox"/> Federal Express</li><li><input type="checkbox"/> Hand-Delivery</li><li><input type="checkbox"/> Via Fax:</li><li><input checked="" type="checkbox"/> E-mail: <a href="mailto:bfulbright@rc.mt.gov">bfulbright@rc.mt.gov</a></li></ul> | Bill Fulbright<br>Ravalli County Attorney<br>205 Bedford Street, Ste. C<br>Hamilton, MT 58840 |
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