In the Supreme Court of the State of Montana

DA 17–0426

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

Appeal from
Montana Twenty-First Judicial District Court
Ravalli County
Hon. Jeffrey Langton, DV–17–137

APPELLANTS' OPENING BRIEF

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II. Did the District Court err by deciding that it lacked subject matter jurisdiction to declare the legal terminus of a county road based on County records spanning from 1900 to the present day when convincing evidence shows it ends at the gate?

III. Did the District Court err by failing to grant the Plaintiffs' motion for summary judgment on their claim that any County action seeking to compel removal of the gate was barred by claim preclusion when there are no disputed facts on that issue?

STATEMENT OF THE CASE

Act I: The Political Process[1]

County: Hey, some people want us to make you take down that gate.

Landowners: The gate in in front of our house? The one that has been there since *at least* the 1970s?

County: Yes, that one. Some people say a county road continues beyond it.

Landowners: Didn't you sue us in 1984 to try to get the very same gate removed?

County: Yes.

Landowners: And didn't Judge Wheelis find there was "no evidence" that a county road continued beyond the gate.

County: That is true.

Landowners: And didn't the County then prepare and have all attorneys in that case—including two for the County—file a signed stipulation to dismiss the case *with prejudice*?

County: Also true.

[1] This is not a verbatim transcript.

Landowners: What about all of the evidence showing that the county road ends right near the gate, including a 1965 map signed by all of the County Commissioners stating the end of the county road was at the gate? Also, look at all of this historical evidence from the time the road was established—especially based on ownership of the mining claims. It supports our position that the county road always ended at the gate.

County: But some people want us to open it up.

Landowners: OK, we get that you are facing political pressure. We think this is barred by claim preclusion and anyways, the county road never went beyond the gate.

But maybe we can avoid a costly legal dispute in favor of a political solution. How about you abandon the county road beyond the gate, assuming it even exists in the first place, and even though we don't think the evidence supports that idea? Here's our petition to abandon—but we are expressly reserving our legal claims.

County: We don't actually want the road, and we'd like to abandon it. But according to our survey, a tiny portion of the road's right-of-way *might* provide access to public lands or waters, so we think our hands are statutorily tied. Petition denied. Please remove the gate.

Landowners: Thanks for your consideration. I guess we'll do what we always said we'd do.

Act II: At the Courthouse

Landowners: Judge, please declare that the County's actions are barred by claim preclusion, or alternatively, that the county road created in 1900 never went beyond the gate. Here are a whole bunch of reasons we can prove each of those claims.

Also, there are no disputed facts on the claim preclusion issue, and we're entitled to summary judgment.

County: The Landowners are asking the Court to order the abandonment of the road. The Court can't do that. It does not have subject matter jurisdiction to entertain this declaratory judgment action. If the Landowners want the Court to review the Commissioners' actions, they must file a petition for a writ of review.

Landowners: What? No. We aren't asking the Court to review the Commissioners' decision. We are asserting the legal arguments we identified before that political process and expressly reserved. We could have brought these claims prior to or instead of the abandonment petition.

Parties seeking a political remedy before a legal solution should not be turned away at the courthouse doors if the political remedy fails.

And what about the claim preclusion issue? The County doesn't dispute that it dismissed this same case with prejudice almost 25 years ago.

THE COURT: The Court agrees with the County. The Landowners are asking the Court to direct the Commissioners to abandon the road. The Court can't do that unless the Landowners file a petition for a writ of review. The Court lacks subject matter jurisdiction. Case dismissed.[2]

Landowners: Looks like we'll have to appeal.[3]

[2] The District Court issued its Opinion and Order dismissing the case for lack of subject matter jurisdiction on June 30, 2017. (App001–019.)

[3] Plaintiffs/Appellants timely filed their Notice of Appeal on July 18, 2017.

STATEMENT OF FACTS

A. Parties and background

Hughes Creek Road is located in a remote corner of Ravalli County, off the West Fork of the Bitterroot River above the Painted Rocks Reservoir. (App021.) Part of the road is a statutorily-created county road established at the very beginning of the twentieth century. (*Id.*) But there is a dispute about where the road ends—a dispute that began in the early 1980s. (*Id.*) A gate approximately 9 miles up the road, as measured from the West Fork Road, prevents public access beyond it. (*Id.*) The gate has been in place since sometime in the 1970s. (*Id.)*

Plaintiffs/Appellants Jay and Tracy Bugli, Wade and Charlene Cox, and Violet Cox[4] all own property accessed via Hughes Creek Road, and it is all beyond the gate. (App021–22, ¶¶ 1–6.) One of the properties owned by Charlene was part of what was originally known as Mineral Survey ("MS") 5883, or the "Jim Placer." The Jim Placer was located by the Wood Placer Mining Company in 1897. (App021, ¶¶ 2–3.)

B. Dedication of Hughes Creek Road in 1900

Between 1898 and mid-1900, Ravalli County received at least three petitions seeking to establish a county road on Hughes Creek. (App022, ¶ 7.) The first was filed in 1898 by the Wood Placer Mining Company. That road would have ended "near the mouth of Alder

[4] As Trustee of the Cox Family Trust.

Gulch." Alder Gulch is *downstream* of the location of the gate. There is no evidence this petition was granted. (App022, ¶¶ 8–10.)

In 1899, residents filed another petition seeking the creation of a county road. That petition sought a road of indeterminate length, going "to the seat of placer operations on said Hughes Creek." There is no evidence this petition was granted. (App022, ¶¶ 11–12.)

In 1900, a P.B. Bennett and others filed a third petition requesting a county road "commencing at Alta postoffice…then running East along Hughes Creek to the Wood Placer Mining Co claims, a distance of about twelve miles." (App022, ¶ 13.)

By the time the Bennett Petition was filed, the Wood Placer Mining Company had located numerous claims on Hughes Creek. (App023, ¶ 15.) The entire area was unsurveyed, and the claims were "upwards of forty-five miles, over a mountain road, from the nearest surveyed public land." *Wood Placer Mining Company (On Review)*, 32 Pub. Lands Dec. 263, 366 (1903).[5]

The Wood Placer Mining Company's claims in Hughes Creek canyon totaled over 316 acres, and "embrace[d] substantially the area between and practically follow[ed] the base lines of the enclosing cliffs or walls." *Wood Placer Mining Company (On Review)*, 32 Pub. Lands Dec. 401 (1904).[6]

[5] 1903 WL 963 at *3.
[6] 1904 WL 888.

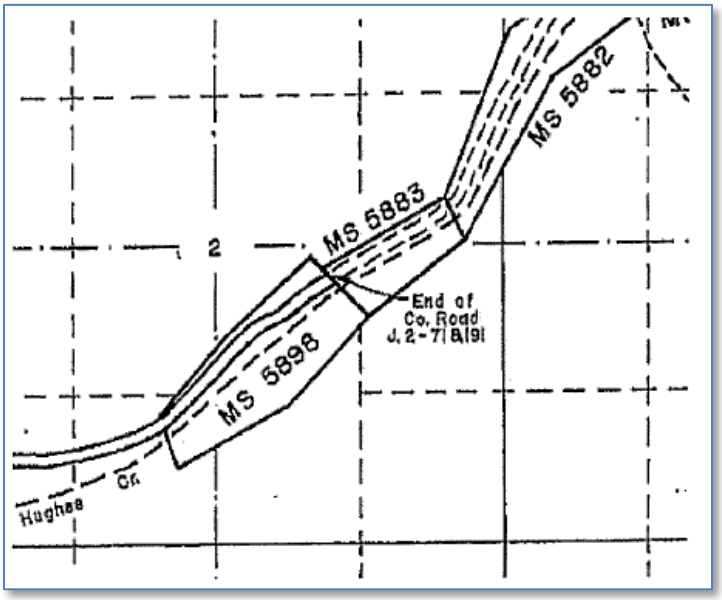
In June of 1900, the County granted the Bennett Petition, creating Hughes Creek road:

> ***The road petition for by P.B. Bennett et al. on Hughes Creek commencing at Alta Post Office and running east along Hughes Creek to Wood Placer Mining Co. Claims about twelve miles was declared a public highway.

(App023, ¶ 14.)

C. The 1965 County Road Map and 1967 Resolution

A 1965 map signed by all three County Commissioners shows "Co. Rd. No. 96D." This map of the Hughes Creek area has an arrow pointing to the Jim Placer's western edge, with a notation that says "End of Co. Rd." The map is signed by all three Commissioners:



(App024, ¶ 20.) The "end of the county road" as shown on this map is at the precise point where the Wood Placer Mining Company claims began

at the time the road was dedicated via language expressly creating a road "*to*" those same placer claims.

In 1967, the United States Forest Service requested a "realignment and reconstruction" of the road. The Forest Service asked the County to rebuild the road beginning at the West Fork junction and ending "at the west boundary of MS 5883"—again, the same location where the 1965 map shows the road ending. (App024, ¶ 21.) In response, the Commissioners ordered that the "road requested by the Forest Service be accepted as the official Ravalli County Road No. 96D, and such parts of the old road as are no longer needed for use by the public be vacated by Ravalli County and allowed to revert to the ownership of the adjoining land." (App025, ¶ 22.)

D. The earlier abandonment proceedings and litigation

In the early 1980s, the property owners learned that the County was going to try to force them to remove the gate. They decided to seek a political solution, and petitioned the County to abandon the road. At the same time, they reserved their argument that no county road continued beyond the gate. (*See e.g.* Doc. 7 at 4.) The County denied the petition. (App026, ¶ 33.)

Following the denial of that petition, the County sued the property owners beyond the gate, including current plaintiff Violet Cox, alleging that the gate "encroached" on the roadway, and requesting a court order

directing its removal. *Jay Unrue, Road Supervisor for Ravalli County v. Royal Teton Ltd., et al.*, DV-84-248. (App025, ¶ 23.)

The Court held a hearing on the County's application for a TRO or preliminary injunction. At the close of the hearing, Judge Wheelis denied the County's application, concluding "[t]here is no evidence that I can see credibly that establishes that the public road was ever enacted past the fences." (App025, ¶ 25.) The case then languished for almost a decade. Eventually, in 1993, Judge Langton issued an order directing the parties to show cause why the case should not be dismissed. (App025, ¶ 26.)

In November 1993, the Ravalli County Attorney's office drafted a stipulation, where the parties "do hereby stipulate that this cause be dismissed with prejudice." It was signed by the County Attorney, another attorney for the County, and Violet Cox's attorney and then filed with the district court. (App025–26, ¶¶ 27–28.)[7]

Since the earlier litigation, the gate has remained closed and generally locked to the present day. (App026, ¶ 29.)

[7] For unknown reasons, the parties left a place for the judge to sign this stipulated dismissal, and under Judge Langton's signature dated December 10, it was dismissed "without prejudice." (Doc. 1, ¶ 28.) As will be shown below, every single court to have considered this question agrees that a Rule 41 stipulation is self-executing when filed, and the order was therefore pure surplusage that has no legal effect.

E. The 2016–2017 abandonment proceedings

In 2016, the Plaintiffs/Appellants became concerned that the County was going to once again try to force them to open the gate. Seeking a political solution, all of the landowners beyond the gate petitioned the County to abandon the road behind the gate—assuming such a road ever existed in the first place. (App026, ¶ 30.) Along with their petition, the landowners sent a letter to the County expressly reserving their argument that any attempt by the County to prove the road existed beyond the gate (1) was barred by claim preclusion, and (2) would fail because the evidence shows the road, as dedicated in 1900, never continued beyond the location of the gate anyways. (App026, ¶ 30; *see also* Doc. 7 at Ex. B.)

The Commissioners appointed viewers who recommended the petition be granted. (App026, ¶ 31.) The Commissioners then held a hearing, and all five suggested that they wanted to grant the petition. (App026, ¶ 32.) Three of the five, however, voted no, reasoning that because the road beyond the gate may provide access to public land or public waters, abandonment was foreclosed by § 7–14–2615(3), Mont. Code Ann. (2017).[8] (App026, ¶ 33.)

[8] "The board may not abandon a county road or right-of-way used to provide existing legal access to public land or waters, including access for public recreational use as defined in 23-2-301 and as permitted in 23-2-302, unless another public road or right-of-way provides substantially the same access."

The Commissioners then directed the landowners to remove the gate. (App027, ¶ 34.)

F. The decision below

The Plaintiffs/Appellants sought a declaratory judgment that: (1) any attempt to open the gate was barred by claim preclusion because a stipulation for dismissal with prejudice ends the case on the merits; and (2) the dedicated road never continued beyond the western edge of MS 5883 or the Jim Placer, which—among many other facts—is within a few hundred feet of the gate, the precise location where the 1965 County map signed by all Commissioners shows the road ending. It is also exactly where the Wood Placer Mining Company claims began at the time a road "to" those claims was created.[9]

At the same time they filed their Complaint, the Plaintiffs also filed a motion for partial summary judgment on their claim preclusion argument, pointing out that because a stipulation for dismissal with prejudice is a final judgment on the merits for claim preclusion purposes, the County could not attempt to relitigate the exact same issues again. (Doc. 2.)

The County then filed an "Unopposed Motion to Extend Time to Answer Complaint and Respond to Plaintiffs' Motion for Summary

[9] Plaintiffs also brought two other counts, neither of which they are currently appealing. The third count sought a declaratory judgment regarding the scope and application of § 7–14–2315(3), and the fourth was a takings claim because based on the County's position, the Plaintiffs believed the County might attempt to open the gate by force during the pendency of the case.

Judgment," which was granted. (Docs. 4–5.) But the County never answered or responded to the substance of the motion for summary judgment. Instead, it filed a Rule 12 motion to dismiss counts I and II for lack of subject matter jurisdiction. (Doc. 6.)

The County did not seriously address the allegations that the County's attempts to compel the removal of the gate were barred by claim preclusion; nor did it address the Plaintiffs' argument about the historical terminus of the road.

Rather, the County's entire argument centered on its belief that the Plaintiffs were asking the Court "to do what the [County Commissioners] already determined was not in the public interest: Close the road and allow the landowners to maintain the gate across the road to keep the public out." (Doc. 6 at 2.) Addressing the Plaintiffs' claim preclusion argument, the County asserted that, in the earlier litigation, "the District Court did not have jurisdiction to issue an order that would have the effect of abandoning a County road." (Doc. 6 at 3.) The County therefore argued that the Plaintiffs' only remedy was via a writ of review under § 27–25–102, Mont. Code Ann. (2017).

The District Court agreed with the County, ruling that "regardless" of how the earlier case "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." (App014.) The District Court also agreed with the County's argument regarding the terminus of the road, concluding that Plaintiffs are "asking the Court to: (1) ignore the findings of two separate boards of commissioners [that the road continues beyond 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." (App016.)

Ultimately, The District Court seemed to believe that the Plaintiffs were asking it to "abandon a road," but that a district court could only obtain jurisdiction to do that via a petition for a writ of review. (App016.) It therefore dismissed the case claims for lack of subject matter jurisdiction.

STANDARD OF REVIEW

This Court reviews de novo a district court's decision regarding its subject matter jurisdiction. *Comm'r of Political Practices for State ex rel. Motl v. Bannan*, 2015 MT 220, ¶ 7, 380 Mont. 194, 354 P.3d 601 ("*Motl*").

This Court also reviews de novo a district court's ruling on motions for summary judgment, applying the same standards as the district court under Rule 56, M.R.Civ.P. *Davis v. State DPHHS*, 2015 MT 264, ¶ 7, 381 Mont. 59, 357 P.3d 320. Summary judgment is appropriate when the "pleadings, the discovery and disclosure materials on file, and any affidavits show there is no genuine issue of material

fact" and the moving party is entitled to judgment as a matter of law. *Davis*, ¶ 7.

SUMMARY OF THE ARGUMENT

The Plaintiff/Appellant Landowners were not asking the District Court and are not asking this Court to review the County Commissioners' decision to deny the abandonment petition. Instead, they seek a declaratory judgment about issues that were ripe and specifically reserved prior to any of the abandonment proceedings.

Construing the allegations in the Complaint as true—as required on a motion to dismiss for lack of subject matter jurisdiction—the district court could have issued a declaratory judgment that would have settled the issues raised in the first two counts: (1) that any attempt by the County to reopen the road beyond the gate was barred by claim preclusion; or (2) that no petitioned-for county road had ever existed beyond the gate because that issue is a mixed question of law and fact that County Commissioners cannot decide.

Neither of these rulings would have implicated the elements of a writ of review—which is only relevant 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." Section 27–25–102(2), Mont. Code Ann. (2017). But the Landowners never argued that the commissioners exceeded their jurisdiction by refusing to abandon

the road. The District Court therefore erred for at least four distinct reasons.

First, the Landowners' claims were fully ripe and could have been adjudicated *before* the petition to abandon was ever submitted. The district court's conclusion therefore punishes the Landowners for first seeking a political decision rather than immediately running to the courts. Yet there is no precedent to foreclose a legal remedy when a political remedy fails. The very idea is repugnant to the constitutional obligations of the judicial branch.

Second, the County's arguments are belied by its own actions. In the 1980s, after the first conditional petition to abandon the road was denied, the County recognized that the Commissioners' actions did not resolve the issue and it therefore brought its own lawsuit seeking to compel the removal of the gate. (App006–07.) The idea behind that lawsuit—that the County was required to seek judicial approval rather than exercising self-help—is inconsistent with its current position that the Landowners cannot turn to the Courts for a declaration that the earlier lawsuit is barred by claim preclusion.

Third, the District Court erred by failing to grant the Landowners' summary judgment on claim preclusion because the case law is unanimous that the County's stipulation to dismiss with prejudice was effective on filing. There is no justification for creating some new and undefined exception to claim preclusion under the facts of this case.

Finally, the question of where a county road ends is a question of mixed law and fact that only a court can answer. County commissioners do not have the authority to adjudicate title to real property, and the District Court therefore erred when it concluded that it lacked subject matter jurisdiction to determine where the county-created road ended in 1900.

ARGUMENT

The District Court erroneously concluded that "regardless" of how the earlier litigation "was dismissed and the effect of its dismissal," it did not have subject matter jurisdiction to declare that the County's actions were barred by claim preclusion. The District Court also erred when it concluded that it did not have subject matter jurisdiction to issue a declaratory judgment concerning the legal terminus of the road.

Both of these conclusions were based on the District Court's reasoning that "the declaration Plaintiffs seek in this Court * * * is substantively a challenge to the Commissioners' denial of their petition for abandonment."

This is wrong for two distinct sets of reasons—and both of them involve the fact that the Landowners did not ask the District Court to direct the Commissioners to do anything. Instead, the Landowners asked the District Court itself to do two things that had nothing at all to do with the Commissioners' decision related to the abandonment.

First, they simply asked the District Court to declare that the County's attempts to compel removal of the gate are barred by claim preclusion because the County had earlier initiated litigation addressing the identical issues and then dismissed that case with prejudice after an adverse order had issued. By holding that it lacked subject matter jurisdiction over this claim, the District Court created a new and unwarranted exception to claim preclusion—an exception that is unsupported by any authority and that is contrary to the policy that encourages a definite end to litigation. This novel exception to claim preclusion would allow local governments to engage in never-ending litigation over just about any topic—including topics that have nothing to do with county roads.

Second, the District Court's reasoning has the unintended effect of vesting county commissioners with the extra-constitutional authority to declare the existence of purported county roads allegedly created over 100 years ago and then insulating those decisions from judicial review. Essentially, the District Court abdicated its authority to the County Commissioners' own "findings of fact" about the existence and location of a long-disputed section of purported county road. But both the statutory road creation and dedication process and the constitutional bar on taking private property without just compensation show that these sorts of decisions must be subject to judicial review.

I. The District Court had subject matter jurisdiction over the Landowners' claim preclusion count and it erred both by dismissing it and by failing to grant the Landowners' motion for summary judgment.

District courts have original jurisdiction over all civil matters. Mont. Const. art VII, § 4. "Subject matter jurisdiction refers simply to a court's power to hear and adjudicate a case." *Ballas v. Missoula City Bd. of Adjustment*, 2007 MT 299, ¶ 12, 340 Mont. 56, 172 P.3d 1232. When considering a motion to dismiss for lack of subject matter jurisdiction, the question is simply whether "the complaint states facts that, if true, would grant the court subject matter jurisdiction." *Motl*, ¶ 7.

The Uniform Declaratory Judgments Act is to be "liberally construed and administered" to "settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." Section 27–8–102, Mont. Code Ann. (2017). A court may refuse to render a declaratory judgment only where the judgment "would not terminate the uncertainty or controversy giving rise to the proceeding." Section 27–8–206, Mont. Code Ann. (2017).

Putting these rules together, the question becomes whether, if the allegations in the Complaint are true, could the district court issue a judgment that would grant the Landowners the relief they request? The answer is yes. And a final decision on either of the Landowners' claims would not—and could not—implicate the Commissioners' actions related to the abandonment petition because both of these claims could have been brought prior to or instead of the abandonment petition.

A. The District Court had subject matter jurisdiction over the Landowners' claim seeking a declaratory judgment that the County's threatened actions were barred by claim preclusion because it is a purely legal issue.

A stipulation for dismissal "is the same as a judgment on the merits; accordingly, a dismissal is res judicata as to every issue raised in the action." *Tisher v. Norwest Capital Mgmt. & Trust Co.*, 260 Mont. 143, 152, 859 P.2d 984, 989-90 (1993). Claim preclusion, or res judicata, bars a party from "relitigating claims that were or could have been raised" in a previous action in which a final judgment was reached. *Asarco LLC v. Atl. Richfield Co.*, 2016 MT 90, ¶ 15, 383 Mont. 174, 369 P.3d 1019. The doctrine embodies the policy "that favors a definite end to litigation." *Id.*

Claim preclusion applies to claims by government in the same way it does to any other litigant. *See e.g. McDaniel v. State*, 2009 MT 159, ¶ 46, 350 Mont. 422, 208 P.3d 817; *Baertsch v. Cty. of Lewis & Clark*, 256 Mont. 114, 124–25, 845 P.2d 106, 112–13 (1992). It applies if five elements are satisfied:

> (1) The parties or their privies are the same in the first and second actions;
>
> (2) The subject matter of the actions is the same;
>
> (3) The issues are the same in both actions, or are ones that could have been raised in the first action, and they relate to the same subject matter;

> (4) The capacities of the parties are the same in reference to the subject matter and the issues between them; and
>
> (5) A valid final judgment has been entered on the merits in the first action by a court of competent jurisdiction.

Asarco, ¶ 15.

As alleged in the Complaint—and entirely undisputed by the County below—each of these elements is satisfied. First, in the earlier litigation, some of the parties were the same and some current parties are privies. Indeed, Plaintiff/Appellant Violet Cox herself was a defendant when the County sued her seeking removal of the gate in 1984. The positions of the parties now are merely reversed.

Second, the subject matter is the same—whether the property owners beyond the gate have a right to exclude the public—and this question turned on whether the county road continued beyond the gate.

Third, the issues are identical. In both cases, the primary issues are: (a) where the county road ends, and (b) whether the County can compel the Landowners to remove the gate.

Fourth, the capacities of the parties are the same—the County seeks removal of the gate, believing the county road continues beyond it; and the Landowners want the gate to stay, believing that the county road has always ended at the gate.

Finally, a voluntary dismissal with prejudice is a final judgment on the merits for claim preclusion purposes. *Touris v. Flathead County*, 2011 MT 165, ¶ 15, 361 Mont. 172, 258 P.3d 1.

None of these elements have anything to do with the abandonment proceedings. The Landowners' request for a declaratory judgment on this issue was was ripe and could have been fully resolved long before the property owners beyond the gate conditionally asked the County to abandon a portion of road that the Landowners never conceded was a county road in the first place. Granting this relief would not require the District Court or this Court to in any way overrule the Commissioners' refusal to deny the abandonment petition. Nor would such a ruling have the "effect" of abandoning the road, as the District Court apparently feared.

Yet the District Court never even analyzed this issue, reasoning that "regardless" of how the earlier case "was dismissed and the legal effect of its dismissal," it could do nothing. This is a dangerous abrogation of jurisdiction and it ignores both the law and policy objectives served by claim preclusion's "concept of finality," because "litigation must, at some point, come to an end." *Touris*, ¶ 12.

The District Court's conclusion, if affirmed, would create a brand new exception to claim preclusion for local governments, but that exception is unsupported by both law and policy. First, as a matter of law, nowhere did the District Court or the County identify any basis for

the idea that a local government is somehow exempt from the mandates of claim preclusion. Taken to the logical end, if the District Court was correct, some governmental entities could never be bound by a district court's order because they could just keep trying until they achieve the result they want. This is, of course, ridiculous.

Second, this Court has already held that a county's right-of-way can be extinguished or modified in a quiet title action. *Lee v. Musselshell Cty.*, 2004 MT 64, ¶ 21, 320 Mont. 294, 87 P.3d 423. And those rulings are res judicata against actions by a county that would disturb the rulings, assuming all of the required elements are met. *Baertsch*, 256 Mont. at 124–25, 845 P.2d at 112–13. The County has not attempted to explain why this case is unique. It is not.

Third, as a matter of policy, litigants should not be barred at the courthouse doors if they first seek a political solution and are unsuccessful. Rather, litigants should be *encouraged* to seek political solutions before engaging in expensive and protracted litigation.

Ultimately, the novel and unsupported exception to claim preclusion as adopted by the District Court would be contrary to the purposes and policy of the doctrine, and would lead to a lack of certainty for everyone who has ever litigated, is litigating, or will litigate against a local government. At bottom, if the County's actions here are not barred by claim preclusion, what government actions are?

B. A writ of review has no application to the facts of this case because the Commissioners were exercising a political rather than legal function.

A writ of review, by its own statutory terms, has no application to the facts of this case. The writ applies 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." Section 27–25–102(2) Mont. Code Ann. (2017). Here, the point of the Landowners' Complaint is not that the Commissioners exceeded their legal jurisdiction as related to the abandonment proceedings—it is that the County must be bound by its own decision to dismiss with prejudice its earlier case.

The District Court's conclusion that the Landowners should have sought a writ of review was based on two cases, both of which are readily distinguishable. First, the District Court relied heavily on *Board of County Commissioners of Ravalli County v. District Court of Fourth Judicial Dist.*, 203 Mont. 44, 659 P.2d 266 (1983). In that case, competing groups of residents petitioned the Ravalli County Commissioners to either (a) abandon an undisputed county road that had been dedicated but never "opened," or (b) order that a road actually be constructed. The Commissioners declined to act on either petition. *Id.*, 203 Mont. at 46, 659 P.2d at 267. The competing landowners then engaged in litigation, which resulted in the district court ordering the

Commissioners "to do one of two things: retain the subject land in trust for the public, or return the land to the grantors." *Id.* It further ordered that the Commissioners lacked "discretion" to "do any other things, including opening the land." *Id.*

Ignoring the district court, the Commissioners ordered that obstructions be removed and the right-of-way be opened for public use. *Id.* The party who had sought abandonment moved for a contempt order against the Commissioners, which was granted. *Id.* This Court reversed, holding that the district court lacked subject matter jurisdiction "to enter an order which in effect abandoned the roadway," and the only way it could obtain that jurisdiction was if a party petitioned for a writ of review. *Id.*

That case had nothing to do with claim preclusion, nor was there a dispute over the location of the road as originally created. Instead, the district court took the side of one party in a purely political dispute and sanctioned the Commissioners when they did not do as the court ordered. There are no similarities between that case and this one because the relief the Landowners seek does not require directing the Commissioners to do or not do anything.

The other case relied on by the District Court is *Lee*. There, Lee petitioned to abandon a county road that straddled the boundary between Musselshell and Golden Valley Counties. *Id.*, ¶ 8. Musselshell

County denied the petition, and thereafter removed a fence, installed culverts, and bladed the road. Lee sued for trespass. *Id.*, ¶¶ 10–11.

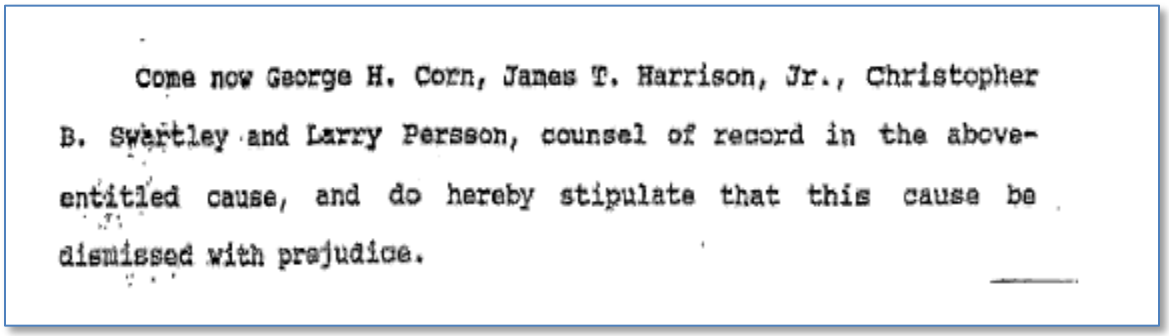
There were a number of issues on appeal, but this Court focused on whether a prior quiet title action caused the road to be abandoned and if so, whether the district court had jurisdiction to do so. The Court held that a county's "mere failure" to respond to a quiet title action is insufficient to indicate an intent to abandon a road. *Id.*, ¶ 26. It further held—in one paragraph that mostly recited the facts and holding of *Board of County Commissioners*—that the district court in 1952 would have lacked jurisdiction to abandon the road anyway. *Id.*, ¶ 27.

These cases stand for the proposition that litigants cannot use courts to direct county commissioners to abandon roads—and nothing more. But that is not what the Landowners seek in this case—they simply asked the District Court for a declaratory judgment that had nothing to do with the abandonment of the road. The issue is instead centered on the County's affirmative act of agreeing to dismiss the earlier litigation with prejudice. There is no basis to shunt that legitimate claim into an obscure writ that, by its own terms, has nothing to do with the facts of this case.

C. Based on the undisputed fact that the County filed a stipulation dismissing the earlier case with prejudice, the District Court erred when it failed to grant the Landowners' motion for summary judgment.

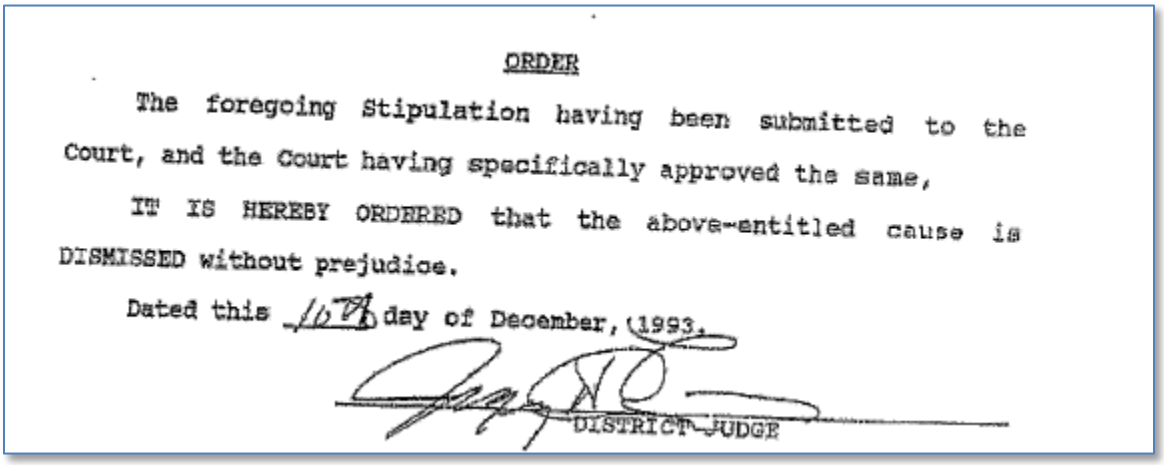
The district court erred when it declined to grant the Landowners summary judgment on their claim preclusion claim. Because this issue will inevitably come up on remand, and because there are no disputed facts, the Court should reach the merits and hold that because the County stipulated to dismiss the earlier case with prejudice, the County's attempts to force removal of the gate are barred by claim preclusion.

In the earlier litigation, the County Attorney's office drafted and then signed this stipulation to dismiss with prejudice:



Come now George H. Corn, James T. Harrison, Jr., Christopher B. Swartley and Larry Persson, counsel of record in the above-entitled cause, and do hereby stipulate that this cause be dismissed with prejudice.

(App039–40.) The stipulation was signed by all parties in December of 1993 and then filed with the Clerk of the 21st Judicial District. Judge Langton then signed an order that had been appended to the stipulation:



ORDER

The foregoing Stipulation having been submitted to the Court, and the Court having specifically approved the same,

IT IS HEREBY ORDERED that the above-entitled cause is DISMISSED without prejudice.

Dated this 16th day of December, 1993.

DISTRICT JUDGE

(App040.)

This order is surplusage—it has no legal effect. Rule 41 of the Montana Rules of Civil Procedure governs dismissals, and it addresses two categories of dismissals: those that require a court order and those that do not.

Dismissals that do not require a court order are controlled by Rule 41(a)(1) and its subparts. Under that Rule, all that is required for a voluntary dismissal "[w]ithout a Court Order" is a "stipulation of dismissal signed by all parties who have appeared." Rule 41(a)(1)(A)(ii), Mont.R.Civ.P. That is exactly what happened in the earlier litigation.

A voluntary stipulation to dismiss under Rule 41(a)(1) "automatically terminates the action upon the filing" with the clerk of

court. *U.S. Fid. & Guar. Co. v. Rodgers*, 267 Mont. 178, 184, 882 P.2d 1037, 1040–41 (1994). As explained there, dismissals that do not require court approval are an entirely different animal as compared to Rule 41(a)(2) dismissals that *do* require a court order. *Id*., 267 Mont. at 185, 882 P.2d at 1041).

The Federal Rule 41(a)(1) is substantively identical to the Montana rule, and every federal court that has considered the issue has held that all types of Rule 41(a)(1) dismissals have one trait in common: they are effective upon filing and do not require or allow the district court to take any further action. Because a Rule 41(a)(1) dismissal automatically ends the case, district courts are divested of jurisdiction to take any further action after the stipulation is filed. For example, the Tenth Circuit recently held that because Rule 41(a)(1)(A)(ii) dismissals are "self-executing," the "district court's order granting [a party's] motion to dismiss on the merits was void because it was issued after the stipulation was filed and therefore in the absence of jurisdiction." *De Leon v. Marcos*, 659 F.3d 1276, 1283–84 (10th Cir. 2011).

"[N]o order is needed to effect a voluntary dismissal." *Jenkins v. Village of Maywood*, 506 F.3d 622, 623 (7th Cir. 2007). Instead, the dismissal is effective upon filing, and after that, "the action on the merits is at an end" and any further action by the district court "has no force or effect." *State Nat'l Ins. Co. v. Cty. of Camden*, 824 F.3d 399, 406 (3d Cir. 2016).

This is not a discretionary rule—it is a categorical jurisdictional bar, because a "voluntary dismissal by stipulation under Rule 41(a)(1)(ii)[10] is of right, cannot be conditioned by the court, and does not call for the exercise of any discretion on the part of the court." *Smith v. Phillips*, 881 F.2d 902, 904 (10th Cir. 1989). The rule is universally applied, and as recently as 2016, the Third Circuit concluded that "[e]very court to have considered the nature of a voluntary stipulation under Rule 41(a)(1)(A)(ii) has come to the conclusion that it is immediately self-executing" and that "[n]o separate entry or order is required to effectuate the dismissal." *State Nat'l Ins. Co.*, 824 F.3d at 406–07 (collecting cases).

Based on the plain language of Rule 41(a)(1) and its treatment by this Court and every other appellate court the Landowners are aware of, the order purporting to dismiss the case *without* prejudice cannot change the fact that the parties had already filed a stipulation to dismiss the case *with prejudice*. Judge Langton's order was therefore surplusage, void, and without any legal effect. The Court should therefore direct the District Court to enter judgment that the County's attempts to try and prove the county road continues beyond the gate and compel removal of the gate are barred by claim preclusion.

[10] Fed.R.Civ.P. 41 was amended in 2007. Prior to the amendment, the language contained in Rule 41(a)(1)(A)(ii) was located in Rule 41(a)(1)(ii). The Montana Rule was amended to conform to the federal version in 2011. The amendments were not substantive.

II. The District Court had subject matter jurisdiction over the Landowners' request for a declaratory judgment related to the legal end of the road because it was a mixed question of law and fact rather than a political decision.

The Landowners' second count sought a declaratory judgment that no petitioned-for county road had ever existed beyond the gate. This too is an issue wholly unrelated to the abandonment petition and it has nothing to do with whether or not the Commissioners exceeded their authority by declining to abandon the road.

The question of whether a county road exists in a specific location is a mixed question of law and fact that *only* a court can decide. *See e.g. Letica Land Co., LLC v. Anaconda-Deer Lodge Cty.*, 2015 MT 323, ¶ 16, 381 Mont. 389, 362 P.3d 614 ("the determination whether a road was created by petition requires a district court to make factual findings—that we review for clear error—and then apply the 'record taken as a whole' legal standard to those findings—a conclusion of law that we review for correctness").

In this context, the County's arguments and the District Court's conclusion that the Landowners should have sought a writ of review make no sense. County commissioners clearly have the authority to *abandon* a road by following a specific statutory process—a process that involves political questions and is generally untethered from any constitutional limitation.

County commissioners also have the authority to *create* county roads via a specific statutory process. But this authority is cabined by

constitutional boundaries because the creation of a road could involve a taking of private property for which just compensation is required under both the United States and Montana Constitutions. The entire road dedication process recognizes this requirement. *See e.g.* § 7–14–2602(4)–(5), Mont. Code Ann. (2017) (petition to create county road must identify private property owners and if they do not consent, must further note "the probable cost of the right-of-way"); § 7–14–2607 through –2610 Mont. Code Ann. (2017) (procedures for calculation and payment of condemnation damages).

Because these constitutional limitations circumscribe the entire process of county road dedication, county commissioners do not have the ability to simply make a "finding of fact" about where a county road that was created by petition in 1900 ends and declare the issue resolved, because "[c]ounty [c]ommissioners ha[ve] no authority to adjudicate title." *Baertsch v. Lewis & Clark Cty.*, 223 Mont. 206, 211, 727 P.2d 504, 506–07 (1986). And to be sure, the Landowners sought no such "finding" from the Commissioners.

Nevertheless, the District Court held that it lacked subject matter jurisdiction because it believed that issuing a declaratory judgment regarding the location of the end of the road would have required it to "ignore the findings of two separate boards of commissioners." (App016.) This, however, ignores the fact that after declining to abandon the road in the 1980s, the County itself went to the courts to seek relief and try

to force the removal of the gate. If, as the County now asserts, the Commissioners are vested with the super-authority to make decisions unreviewable by the courts, then why did the County itself not think so over thirty years ago?

Contrary to the District Court's view, it would not have had to "override the Commissioners' * * * quasi-judicial decision to deny the petition for abandonment" in order to render appropriate relief. (App016.) First, the Landowners were not seeking "quasi-judicial" relief with the abandonment petition, they were simply asking for a *political* remedy. And once again, if the Landowners had brought this action instead of asking the County to abandon the road, the District Court's conclusion would make no sense. So by treating the Landowners' petition as creating a bar to judicial review, the District Court has created a new exception to its own subject matter jurisdiction and handed some novel and poorly defined power to the County Commissioners.

To be sure, there are disputed facts about where the road originally ended. The County, for its part, relies exclusively on the idea that because the Bennett Petition suggested the road began at the "Alta postoffice," and continued "to the Wood Placer Mining Co claims, a distance of about twelve miles," that they can begin at the currently-recognized location of the Alta Post Office and simply drive twelve miles up the road, as measured by GPS.

This is problematic for a host of reasons. As alleged in the Complaint, the location of the Alta Post Office is different than it used to be. The Landowners have maps showing it downstream of the confluence between the West Fork of the Bitterroot and Hughes Creek, though it is currently located on Hughes Creek itself. (App029, ¶ 52.) It is also undisputed that in 1967, the Commissioners consented to the Forest Service's request to "realign" the road, ending at the Jim Placer. (App024, ¶ 21.) This was just two years after they had all signed a map expressly depicting the end of the county road at the precise point the Landowners have identified as the historical end of the road.

Additionally, by its own terms, the petitioned-for road ended *at* the Wood Placer Mining Company claims, which is the approximate location of the disputed gate and the same exact location as shown in the 1965 county map. It would make little sense for the mining company to request a road through its property rather than just to it, especially because (a) the Company had two years earlier requested a road that would have ended even further downstream and (b) because the Company controlled the entire width of the canyon beyond that point. (App028, ¶ 49.)

Beyond these issues, there is a real question about how the drafters of the Bennett Petition would have calculated mileage over a rough mountain road that was over forty-five miles from the nearest surveyed public land. (App023, ¶ 16.)

Of course, none of these issues require resolution at this stage. Instead, this count requires discovery, testimony, and actual findings of fact by the District Court properly exercising its subject matter jurisdiction, except that this claim is moot if the Court directs the entry of summary judgment on claim preclusion.

CONCLUSION

The District Court had subject matter jurisdiction to declare that the County's attempts to compel removal of the gate are barred by claim preclusion. It also had subject matter jurisdiction to determine the location of the end of the county road. The Court should reverse and remand with instructions for the District Court to enter judgment on the issue of claim preclusion, or alternatively, reverse and remand with directions to properly exercise subject matter jurisdiction over the Landowners' claims.

October 12, 2017.

WORDEN THANE P.C.
Attorneys for Landowners

By: /s/ Jesse Kodadek
Jesse C. Kodadek

CERTIFICATE OF COMPLIANCE

I certify that this brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double spaced; and the word count as calculated by Microsoft Word is 7,609 words, excluding the caption, tables of contents, table of authorities, certificate of compliance, and certificate of service.

By: /s/ Jesse Kodadek
Jesse C. Kodadek

CERTIFICATE OF SERVICE

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