

Number DV-12-16
Filed 24th
Day of August, 20 16
Donna Morris
Clerk of District Court

MONTANA FOURTEENTH JUDICIAL DISTRICT COURT

MEAGHER COUNTY

STATE OF MONTANA,)	
)	Cause No. DV-12-16
Plaintiff,)	
)	
v.)	
)	
HOWARD ZEHNTNER and ZEHNTNER)	
BROTHERS, LLC ,)	
)	
Defendants.)	

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

A hearing on the parties' cross-motions for summary judgment was held on July 25, 2014. Both parties presented argument and provided demonstrative exhibits. Assistant Attorney General J. Stuart Segrest, of the Montana Attorney General's office represented Plaintiff, State of Montana. Hertha L. Lund, Bjorn E. Boyer, and Susan B. Swimley represented Defendants Howard Zehntner and Zehntner Brothers, LLC. The Court has now reviewed the briefs, pleadings, and attached declarations and exhibits, and, having also considered the evidence submitted at the prior preliminary injunction hearing held on November 14, 2012, enters the following Findings of Fact, Conclusions of Law, and Order.

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BACKGROUND

1. On October 12, 2012, the Attorney General filed a Complaint for Declaratory and Injunctive Relief on behalf of the citizens of the State of Montana seeking to have a road, referred to by Plaintiff as “Tenderfoot Road”, declared a petitioned county road. The declaration of Robert Dennee, Lands and Realty Officer for the Forest Service, and a number of historic documents, maps, photographs, and other exhibits were attached to the Plaintiff’s Complaint. The Complaint seeks to have the referenced road declared as a petitioned county road. The Complaint and accompanying Application for Preliminary Injunction also seek to enjoin the Defendants from erecting or maintaining any encroachments that would prohibit the public from using the referenced road.

2. Defendant Zehntner Brothers, LLC, is a limited liability corporation registered to do business in the State of Montana. Howard Zehntner is the registered agent of Zehntner Brothers, LLC, and resides in Meagher County, Montana.

3. On August 12, 2013, this Court granted a preliminary injunction, ordering Defendants to unlock the gates on the subject road, refrain from building and locking any other gates, and take down any signs restricting public access, until a final ruling was issued.

FINDINGS OF FACT

1. The road which is the subject of Plaintiff’s Complaint and which Plaintiffs refer to as “Tenderfoot Road” is located in Meagher County, northwest of White Sulphur

Springs, Montana. The Road runs from Eagle Creek in a northwesterly direction over the “Divide,” down a series of switchbacks, then along the South Fork of Tenderfoot Creek before crossing the South Fork and continuing in a northerly direction along the South Fork until reaching the main branch of Tenderfoot Creek. Just after crossing the South Fork, the road runs partly through Homestead Entry Survey (HES) 160 (Chambers Homestead), currently owned by the State of Montana. (Ex. 3 to Doc. 1.) It is here (i.e. where the road reaches the north boundary of Section 31 which is also the south boundary of Section 30, T14N, R5E) that the parties’ dispute arises.

Plaintiff contends that after leaving HES 160, but prior to reaching the main branch of Tenderfoot Creek, the road, which they contend is the petitioned county road, traverses HES 668 (referred to as the Mongar Homestead), currently owned by Defendants, to the main branch of Tenderfoot Creek. (See Ex. 2 to Doc. 56, red line indicating the current road as plotted with GPS coordinates).

Defendants, on the other hand, contend that the road crossing their property is, and always has been, private; that the petitioned location of the county road is to the east of their property; and that the portion of the petitioned county road from Defendants’ southern boundary to the main branch of Tenderfoot Creek was never actually constructed by the County.

2. Tenderfoot Road provides the only vehicular access to Defendants’ property, and the only vehicular access to public lands owned by the State of Montana (HES 160) and by the federal government beyond.

3. The current and former Bair Ranch Foundation lands surrounding the Tenderfoot

Road are the subject of the “Tenderfoot Project” or “Tenderfoot Acquisition,” whereby the United States Forest Service, in partnership with the Rocky Mountain Elk Foundation and the Tenderfoot Trust, has purchased and is continuing to purchase Bair Ranch lands. These groups seek to consolidate those lands into public ownership, to conserve important wildlife and fish habitat, and to ensure future recreational access. The entire proposed acquisition area encompasses 8,220 acres. The Bair Ranch lands, once acquired, combined with the adjacent federal landholdings, will create a large contiguous block of public land.

4. This dispute arose because Defendants had blocked public access on Tenderfoot Road where it enters their private land in section 30, Township (T.) 14 North (N.), Range (R.) 5 East (E.). Since this Court’s preliminary injunction, however, the road has remained open to the public. The Plaintiff maintains that Tenderfoot Road is a county road and that Defendants have no right to control public access. Defendants argue that the road they have gated is not the county road.

5. The parties agree that Tenderfoot Road was properly petitioned in 1899 and declared a county road in 1900. They also agree as to the location of roughly 80% of the county road that was actually constructed, from Eagle Creek through sections 11, 10, 3, 4 and 5 in T. 13 N., R. 5 E., and through sections 32 and 31 in T. 14 N., R. 5 E. The parties do not agree, however, to the location (or even existence) of the petitioned road as it approaches Defendants’ property and beyond.

A. Petitions, Declaration, and County Surveys

1. Certified County records submitted by the Plaintiff, and also attached to

briefs by Defendants, show that two petitions to establish a county road in the Tenderfoot area were filed in 1899, one typed and one handwritten, and that the Meagher County Commissioners accepted the petitions and declared the road a county road in 1900. (Exs. 2 and 3 to Doc. 1.)

2. The petitions describe a road that goes all the way to the main branch of Tenderfoot Creek, to a point above the mouth of the South Fork of Tenderfoot Creek.

3. The typed petition, dated December 15, 1899, describes the road as “[c]ommencing at the South East corner of Section 1, Township 12 North of Range 4 East, and running thence 2 miles North to the North East Corner of Section 36, Township 13 North, Range 4 East, thence in a Northeasterly direction past the Shannon Post Office to the District School House, thence following the main travelled road across Bridge Gulch, through the Park and over the pass to Tenderfoot Creek.” (Ex. 2 to Doc. 1.)

4. The handwritten petition contains a similar description of the road location “to the Divide thence down the south fork of Tenderfoot to a point on Tenderfoot above the mouth of the South Fork.” (Ex. 3 to Doc. 1.)

5. The 1900 report accepting the petitioned county road describes it as a road “from Eagle Creek to Tenderfoot Creek by the way of Shannons.” (Ex. 2 to Doc. 1.)

6. What appears to be a handwritten viewer’s report was also filed in 1900, providing a description of a “Road from Eagle Creek to Tenderfoot.” (Ex. F to Doc. 51.) The report places the road “through Eagle Park to Tenderfoot divide. Thence along said road to the South fork of Tenderfoot-Destination.”

7. Sometime after the road was declared, a metes and bounds survey was

undertaken of “Tenderfoot Road, Number-Thirteen.” (Ex. 1 to Doc. 55.) This survey contains both a written description and plat map. The written description ends at a location “which point is the Sec. Cor. Common to Secs. 29-30-31-32, T.14N. R.5E. and is also the end of the Road” The plat map also shows the road ending at this section corner¹. As shown in the map attached as exhibit 2 to Doc. 56, which depicts a yellow line indicating the metes and bounds platted location and a red line indicating the current road as plotted with GPS coordinates, the current location of the road varies somewhat from the road as located on the metes and bounds survey, in places by a significant amount.

B. Mongar Homestead Application

8. In September of 1912, George Mongar filed his homestead application. (Ex. B to Doc. 51). The application includes a hand drawn map showing a road entering the southeast corner of the proposed homestead.

9. A couple of months after George Mongar entered his homestead application, a Forest Service “Assistant Ranger/Surveyor” completed a report on the application. (Ex. I to Doc. 51). The report, at paragraph 5, states “A wagon road crosses this tract but the county road will probably be extended down the South Fork of Tenderfoot in the near future.” A colored map attached to the report (1912 Map) depicts a road, labeled “Wagon Road,” running through the proposed homestead, entering at the southeast corner and exiting near the northeast corner. The “wagon road” is shown

¹ The section lines have since been redrawn, so that the metes and bounds survey now ends at a point in the southeast corner of section 30. *See* Ex. 2 to Doc. 56 (yellow line).

continuing to the north and south of the homestead area. Plaintiff contends and to this Court it appears that the “wagon road” is in the same general location as the road Plaintiff contends is the petitioned county road.

10. The 1912 Map also depicts a “Proposed County Road” running parallel to the South Fork of Tenderfoot Creek, just outside the proposed boundary of the homestead. The current road, as it traverses the Mongar Homestead, is within a quarter mile of the “Proposed County Road” depicted on the 1912 Map. The parties agree that a road was never built in the location indicated as “Proposed County Road” on the 1912 Map.

C. HES 668

11. Following George Mongar’s homestead application, and the subsequent Forest Service report, a homestead entry survey was performed by Fred E. Thieme, a surveyor with the Forest Service. (Ex. 5 to Doc. 1.) Titled HES 668, the proposed homestead was surveyed in 1916, approved in 1917, and the patent issued to George Mongar in 1919. The survey map depicts a homestead area of approximately 160 acres. The documents in HES 668 identify a road across the homestead. The two hash marks on the homestead map near corners 3 and 4 correspond to the written description in the field notes stating “Road bears N. and W.”, and indicate that a road entered the homestead near corner 4 (the southeast corner) and exited the homestead near corner 3 (the northeast corner). The hash marks indicated on the 1916 map generally correspond to the location of the road as it exists today.

D. HES 160

12. Homestead Entry Survey No. 160 is the entry survey for the Chambers Homestead. (Ex. 7 to Doc. 1.) Like HES 668, HES 160 was performed by Fred E. Thieme. HES 160 was surveyed in 1913 and approved in 1914. This homestead consists of 157.40 acres and is currently owned by the State of Montana.

13. The survey map within HES 160 identifies a road through the homestead along the west side of the South Fork of Tenderfoot Creek. The road corresponds to the written description in the field notes accompanying the survey that refers to a road entering and crossing HES 160. The written description refers to the road as “county road.”

14. The Chambers’ homestead application was submitted in 1909. The subsequent Forest Service report is attached as Ex. H to Doc. 51, and consists of a handwritten and typed report, prepared by a “Deputy Forest Ranger,” followed by a map sheet.

15. Paragraph 10 to the typed report to the Chambers’ homestead application, titled “Economic possibilities,” states “Transportation by wagon road fair.” The map sheet following the typewritten report depicts a “County Road” running parallel to, and entirely outside of, the western boundary of the property, and shows the South Fork of Tenderfoot running parallel to, but just inside, the western property boundary. The current road, in contrast, crosses into and out of HES 160 and runs immediately adjacent to the South Fork in the upper northwest corner of HES 160. (*Compare to Ex. 2 to Doc. 56, red line depicting current road location.*)

E. Maps and Surveys of the General Tenderfoot Area

16. In 1913 the Government Land Office (GLO) surveyed the Tenderfoot area. (Ex. 4 to Doc. 1.) This GLO map was approved in 1916. It is a hand-drawn map depicting section lines and geographic features including creeks and roads. The GLO map depicts a road in the general location of the current road, following the South Fork of Tenderfoot Creek, but stopping short of the Mongar Homestead and Tenderfoot Creek.

17. The record includes three Meagher County maps that include the Tenderfoot area, dated 1917, 1936, and 1958. (Exs. Q, N, and R to Doc. 51.) The maps depict a road in the general location of the current road, following the South Fork of Tenderfoot Creek, but stopping short of the Mongar Homestead and Tenderfoot Creek.

18. The record also includes three Forest Service maps that include the Tenderfoot area, dated 1939, 1954 and 1971. (Exs. 3, 4, and 5 to Doc. 56.) Like the County maps and the GLO map, each Forest Service map shows a road generally following the path of the current road, but the Forest Service maps show the road continuing through HES 668 (the Mongar Homestead) all the way to Tenderfoot Creek. The road depicted in the Forest Service maps forks within HES 668, branching to the north and west, the northern branch leading to Tenderfoot Creek along the path of the current road. (Ex. 2 to Doc. 66.)

19. In 1965 the County and Forest Service entered into a road maintenance agreement, including a portion of Tenderfoot Road. (Ex. 11 to Doc. 1.) A map attached to the agreement (labeled "Attachment to Schedule 'A'") divides road maintenance responsibilities on Tenderfoot Road between the Forest Service and the County in an alternating pattern. The area demarcated for maintenance ends as the road crosses from

section 32 into section 31, just short of the location of the Defendants' gate within HES 160, as is shown in exhibit 2 to Doc. 56 (GPS location of road and gates). The map shows the road continuing past the endpoint of the maintenance agreement, in a northwesterly direction through section 31 and into section 30.

20. While the record thus indicates a lack of County maintenance of the road as it passes through the Mongar Homestead, the record also indicates that the Meagher County Commissioners have never formerly abandoned the petitioned county road, and that a road in a similar location to the current road, running from the divide, down the South Fork of Tenderfoot, through the Mongar Homestead and on to Tenderfoot Creek, existed by 1939.

F. Testimony

21. George Mongar III, the grandson of George Mongar (who established the Mongar Homestead), stated in his declaration, attached to the Plaintiff's Application for Preliminary Injunction, that "[h]is family and other neighbors in the area used the Tenderfoot Road to travel to and from their homesteads to White Sulphur Springs. The road was also used by miners who accessed their mining claims near Tenderfoot Creek." (Ex. A to Doc. 3).

22. Howard Zehntner testified at the November 14, 2012 hearing that his family purchased the Mongar Homestead in 1959. The Zehntners also lease the state trust land in section 31 (HES 160) from the State of Montana for grazing. Mr. Zehntner testified that his family has maintained a gate in HES 160, on State land, for more than 50 years. He testified that he and his brothers granted permission for people to drive through

the gate, but that they locked the gate during hunting season starting in 1960. Defendants were notified by the DNRC in 2010 that the road through State trust land was open to motorized vehicle use under the Rules for Recreational Use of State Lands. (Ex. 16 to Doc. 1.) In 2012, at the request of the Meagher County Commissioners and the State of Montana, Mr. Zehntner opened this gate in HES 160.

23. In August 2012, Defendants erected a new gate across the Tenderfoot Road at the point where the road enters their property on the Mongar Homestead. (Ex. 18 to Doc. 1).

Based on these FINDINGS OF FACT, the Court enters the following:

CONCLUSIONS OF LAW

A. Summary Judgment Standard

1. Summary judgment is appropriate where there is “no genuine issue as to any material fact” and a party “is entitled to judgment as a matter of law.” Mont. R. Civ. P. 56. Only disputes over facts which actually affect the outcome of the case are material--in other words, to be material, a fact must be outcome determinative.

Anderson v. Liberty Lobby, 477 U.S. 242, 250 (1986); *Carter v. Miss. Farm Bureau Cas. Ins.*, 2005 MT 74, ¶ 20, 326 Mont. 350, 109 P.3d 735 (determining that a disputed fact “is not material to the outcome of this case, and is not a material fact for the purposes of summary judgment pursuant to Rule 56, M.R.Civ.P.”).

2. Once a party shows that there are no disputed issues of material fact, the “burden shifts to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue of material fact does exist.” *Dovey v. BNSF Railway*,

2008 MT 350, ¶ 12, 346 Mont. 305, 195 P.3d 1223 (citation omitted). Here, both parties assert that there are no material issues of fact and that summary judgment is appropriate.

B. Record Taken as a Whole Standard

3. The Supreme Court evaluates old roads under the “record taken as a whole” standard first enunciated in *Reid v. Park County*. 192 Mont. 231, 627 P.2d 1210 (1981). In *Reid*, a road that was established in 1905 was determined to be a “public” road, even though all statutory prerequisites could not be definitively proven. *Reid* at 192 236. Specifically, Park County failed to provide a copy of the petition establishing the road or evidence that a record notice was provided to neighboring landowners. *Id.* at 233. Looking past these evidentiary shortcomings, the Court considered “the record taken as a whole” and concluded there was sufficient evidence that a public road was created. *Id.* at 234. The Court noted that to instead require the county to present evidence of each statutory requirement for a road created “so many years ago” would place a “burden on the public [that] may well be unsurmountable [sic].” *Id.* at 236.

4. Under the “record taken as a whole” standard, the burden is on the party opposing the public status of the road to provide conclusive proof that the road is not a county road. *Roe Family v. Lincoln County*, 2008 MT 70, ¶¶ 21-23, 342 Mont. 108, 179 P.3d 514 (determining that the disputed road is a county road where “there was inconclusive proof on either side of the issue.”).

5. An old road, like the road at issue, is considered a county road, despite discrepancies in the record, where the road generally follows the petitioned route and arrives at the exact point described in the petition. For example, In *Roe Family*, “[t]he

exact location of the entire route of the 1906 Road [was] not known with precision . . . and discrepancies exist[ed] among the descriptions of the route as contained in the Road Petition, the Notice of Road Opening, and various maps for the area.” *Id.*, ¶ 3. More specifically: (a) the road identified in the viewer’s description was located “one quarter mile east of the Roe Road [the specific portion of the 1906 Road in dispute]”; (b) the road had “lengthened” to make the connection with Black Lake Road, which had also migrated; (c) the road did not exactly follow the written description in the petition, running due east at one point instead of in a “southeasterly direction”; and (d) there were remnants in the area of one or more other roads that did travel “in a southeasterly direction.” *Roe Family*, ¶¶ 18-19; *Roe Family Appellant’s* brief at 3-4, 7-8.²

6. Despite the discrepancies in the record in *Roe Family*, namely the differences between the location of the current road and the road as located in the petition and viewer’s report, the Supreme Court, applying the *Reid* standard, determined that the disputed road was an established county road because it was the only road that “connected with the Black Lake Road near the Madden Ranch” as provided in various descriptions of the road. *Roe Family*, ¶¶ 21-23.

7. Similarly, in *Galassi v. Lincoln County Bd. of Comm’rs*, the Supreme Court held that a road was a public road, despite a “vague and ill defined” legal petition, where “the legal description articulates a definite start point and an end point, prescribes a direction of travel . . . and identifies a creek [the South Fork] to which the roadway runs

² Available at <http://searchcourts.mt.gov>.

adjacent.” 2003 MT 319, ¶¶ 9, 13, 318 Mont. 288, 80 P.3d 84.

8. Due to the imprecise nature of the various documents identifying old roads, the Supreme Court has consistently determined that discrepancies or inconsistencies “in the description or location of the road are not sufficient to turn [a] county road into private property.” See e.g., *Garrison v. Lincoln County*, 2003 MT 227, ¶ 21, 317 Mont. 190, 77 P.3d 163.

9. Likewise, the failure of a County to maintain a county road does not lead to abandonment and therefore does not affect the road’s status as public. *Galassi*, Supra at ¶ 15 (“failure to maintain a public county road” does not mean “a road is not public”); *McCauley v. Thompson-Nistler*, 2000 MT 215, ¶ 31, 301 Mont. 81, 10 P.3d 794 (nonuse or lack of maintenance insufficient to show abandonment).

10. And, a delay in constructing the full road does not defeat the status of the road as public. *Ashby v. Maechling*, 2010 MT 80, ¶ 30, 356 Mont. 68, 229 P.3d 1210 (“[in]ere non-use, even for extended periods of time, is generally insufficient alone to indicate an intent to abandon a public way.”) (upholding summary judgment).

C. The Evidence Supports the Status of the Current Tenderfoot Road as a County Road.

11. The parties agree that a county road was petitioned and declared from Eagle Creek to a point on Tenderfoot Creek above the mouth of the South Fork. Like the disputed road in *Roe Family*, the current Tenderfoot Road leads to the exact location specified in the petition, to a point just upstream of where the South Fork enters the main branch of Tenderfoot Creek. (See Ex. 2 to Doc. 56, the red line indicating the location of

the current road as plotted with GPS coordinates.)

12. The current location of Tenderfoot Road also tracks the general description in the petitions, traveling “to the Divide,” “over the pass” and “thence down the south fork of Tenderfoot” *Id.* (“Down the south fork” referring to traveling in the direction of the South Fork of Tenderfoot Creek). Though the road is not immediately adjacent to the South Fork as it traverses Defendants’ property, it does continue to follow the direction of the creek (northwest). This is, from this Court’s perspective, sufficient under the liberal “record taken as a whole” standard to suggest that the petitioned county road and the road traversing the Defendants’ property are one and the same.

13. As with the road at issue in *Galassi*, *Supra*, the current road matches the starting point and endpoint, the general direction of travel, and the creeks referenced in the petitions and declaration.

14. While it is true that the 1912 Map identifies the “proposed county road” outside the Mongar Homestead, the entire county road has, as Plaintiff notes, meandered or migrated to some degree from its original description. (See Ex. 2 to Doc. 56, yellow line indicating metes and bounds platted location and red line indicating the current road). Such a discrepancy “in the description or location of [an old] road [is] not sufficient to turn [Tenderfoot Road] into private property.” *Garrison*, *Supra* at ¶ 21.

15. Even taking the inconsistencies raised by Defendants into account, because Tenderfoot Road has never been abandoned, and because the current road is the only road in existence, now or ever, that connects to the endpoint laid out in the petition(s) (a point on Tenderfoot Creek above the mouth of the South Fork), there is sufficient evidence to

conclude, and this Court does conclude, that the final segment of Tenderfoot Road within section 30, including the portion traversing Defendants' property, is a county road.

(Similarly, see *Roe Family*, Supra at ¶ 23.

D. Defendants Have Failed to Present Conclusive Evidence to the Contrary.

16. Defendants' arguments and evidence to the contrary fall into five main points: (1) the 1912 Map conclusively establishes that the county road was intended to closely parallel the South Fork in a location outside the Mongar Homestead; (2) the 1912 Map conclusively establishes that the road traversing through Defendants' property is private; (3) the county maps and GLO survey map show the road ending short of the Mongar Homestead; (4) the road through Defendants' property does not run "down the South Fork"; and (5) a road cannot "migrate" if it is not built in the original petitioned location. These arguments are insufficient to defeat the public status of Tenderfoot Road.

17. Regarding the "proposed county road" located on the 1912 Map, this Court agrees with the Plaintiff that the speculation or assumption of the Forest Service employee that the county road would "probably" be built in the location depicted is insufficient to defeat the road's public status. This Court concludes that the 1912 Map is no more conclusive than the viewer's report in *Roe Family* that placed the disputed road in that case a quarter mile from the road as viewed. Here the current road through Defendants' property is within a quarter mile of the "proposed county road" on the 1912 Map. In this regard, it is noteworthy that the map within the Chambers' homestead application also placed the "county road" outside the homestead boundary while the

current road actually runs through HES 160. (Ex. H to Doc. 51.) These old surveys, not surprisingly, were not perfect. Moreover, contradictory evidence offered by the Plaintiffs suggests that the road traversing Defendants' property is where the petitioned county road was ultimately located. Defendants' contradictory (inconclusive) evidence is insufficient, from this Court's perspective, to defeat the public status of the roadway at issue.

18. Similarly, the 1912 Map's labeling of the road through the Mongar Homestead as a "wagon road" fails to conclusively show the road is private. The "wagon road" is in the same general location as the current road, and is shown on the 1912 Map extending beyond the boundaries of the homestead to both the north and the southeast, suggesting that it was a public thoroughfare, providing access, to the north, to Tenderfoot Creek and the mining claims beyond it, and to the south to White Sulphur Springs. Notably, the typed report in the Chambers homestead application also refers to the road as a "wagon road," denoting a road used by the public and suitable for wagons. (Ex. H to Doc. 51.) Moreover, as Plaintiff notes, that portion of the road traversing Defendants' property is not, contrary to Defendants' assertions, considered private under federal law, because it was constructed prior to the entry of George Mongar's homestead application. Ownership rights under a patent do not relate back to activity that occurred prior to the filing of the original homestead application. See *Knapp v. Alexander-Edgar Lumber*, 237 U.S. 162, 164, 166-67 (1915).

19. Regarding the County and GLO maps showing Tenderfoot Road ending short of the Mongar Homestead, these maps present, at most, inconsistencies in the record insufficient to defeat the road's status. It is not clear why, for example, the 1958

County map shows the road stopping short of Mongar Homestead, while the 1939, 1954, and 1971 Forest Service maps show the road continuing through Defendants' property to Tenderfoot Creek. It may be that the County was only documenting the portion of the road that was maintained. But, as noted above, the failure of a County to maintain a county road does not lead to abandonment and therefore does not affect the road's status as public. *Galassi*, Supra at ¶ 15; *McCauley*, Supra at ¶ 31.

20. Regarding whether the road runs “down the South Fork” as it crosses Defendants' property, Defendants' rendering of this phrase to require the road to be immediately adjacent to the creek is too narrow under the “record taken as a whole” standard. As previously noted, descriptions of old roads are often vague. *See, e.g., Galassi*, ¶ 9. Under a broader construction, “down the South Fork” is fairly interpreted as meaning near to and/or in the direction of the South Fork. The current road meets this more general description as it follows the direction of the South Fork (northwest) while traversing Defendants' property, before running into the main branch of the Tenderfoot above the mouth of the South Fork, the exact point laid out in the petition. (Ex. 2 to Doc. 56, the red line indicating the location of the current road as plotted with GPS coordinates).

21. Lastly, Defendants misconstrue the term “migrate” by arguing the road must be built in the original petitioned location before it legally can migrate. While “migrate” most certainly includes the movement of a road from its original petitioned location, as used by the Supreme Court, it appears it may also refer to an inconsistency with one of the early road documents, not necessarily the physical meandering of a road

bed. For example, in *Roe Family* the viewer's report located the proposed road a quarter mile from the current road in dispute. While there were remnants of a road in the general location described in the viewer's report, there was no evidence that the road had physically meandered to its new location a quarter mile away. Instead the road had been built in the new location, and lengthened, in order to maintain contact with the Black Lake Road as called for in the petition. *Roe Family*, ¶ 22. Here, the current road is admittedly in a slightly different location than that shown as the route of the "proposed county road" in the 1912 Map, an inconsistency on par with that in *Roe Family*.

22. Viewing the record as a whole, as the parties agree this Court must, the inconsistencies presented by Defendants at most amount to "inconclusive proof on either side of the issue," and are insufficient to defeat the public status of the road traversing their property, a road with a terminus at the precise location provided for in the petition(s). *Roe Family*, ¶ 21. Stated differently, there is substantial evidence in the record as a whole to conclude that the road traversing Defendants' property is the same road included in the petitions to establish Tenderfoot Road, Defendant's inconsistent and inconclusive evidence notwithstanding.

23. Defendants also briefly argue that the declaration of Dale Schaeffer-- wherein he discusses a metes and bounds survey he claims located the county road along the path of the "proposed county road" on the 1912 Map--presents a genuine issue of material fact sufficient to defeat the Plaintiff's summary judgment motion (but interestingly not Defendants' motion). Putting aside the evidentiary problems regarding the admissibility of this hearsay testimony, this Court concludes that even if Mr.

Schaeffer's testimony were taken as true, it is not outcome determinative. Like the road at issue in *Roe Family*, a discrepancy between the location of a county road in an old county document and its current location does not lead to abandonment or otherwise "turn a county road into private property." *Garrison* ¶ 21; *Roe Family*, ¶¶ 21-23.

24. Finally, there is no evidence in the record, nor do Defendants claim, that the County Commissioners have abandoned the county road, or that there has been any formal action taken to disavow its county road status. As a matter of law, Tenderfoot Road cannot be abandoned by the Commissioners because it provides existing legal access to public land and there is no other public road or right-of-way that provides substantially the same access. Mont. Code Ann. § 7-14-2615(3).

25. There being no material issues of fact and for the reasons noted, the Plaintiff is entitled to judgment as a matter of law.

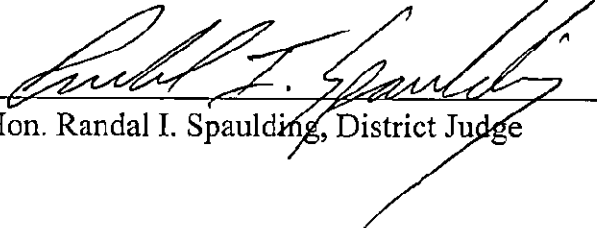
Based upon the forgoing, the Court hereby enters its:

ORDER

1. Defendants' Motion for Summary Judgment is DENIED.
2. Plaintiff's Motion for Summary Judgment is GRANTED.
3. The Tenderfoot Road, in its current location, is DECLARED a county road from Eagle Creek to the main branch of Tenderfoot Creek, including that portion traversing through Defendants' property (also referred to as the Mongar Homestead or HES 668). (*See* Ex. 2 to Doc. 56, the red line indicating the location of the county road as plotted with GPS coordinates.)

4. Defendants are PERMANENTLY ENJOINED from locking a gate across Tenderfoot Road, including the portion of the road that traverses Defendants' property, or otherwise impeding the public's access to the road in any manner, though Defendants or a government entity such as Meagher County or the United States Forest Service may place signs next to the road directing the public to stay on the road as it crosses private property.

DATED this 22nd day of August, 2016.



Hon. Randal I. Spaulding, District Judge

cc: J. Stuart Segrest, Counsel for Plaintiff
Hertha L. Lund, Counsel for Defendants
Susan B. Swimley, Counsel for Defendants