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BEFORE THE SUPERIOR COURT FOR OKANOGAN COUNTY  
STATE OF WASHINGTON

GAMBLE LAND & TIMBER, LTD., )  
a Washington limited partnership; and )  
CASCADE HOLDINGS GROUP, LP, a )  
Nevada limited partnership, )  
Plaintiffs, )  
vs. )  
OKANOGAN COUNTY, a Washington )  
Municipal Corporation; and all other persons )  
or parties unknown claiming right, title, )  
estate, lien, or interest in the real estate )  
described in the Complaint herein, )  
Defendants, )  
and )  
OKANOGAN OPEN ROADS )  
COALITION, and individual taxpayer )  
members thereof LORAH SUPER, )  
CRAIG OLSON, and KEVIN CREAGER; )  
and STATE OF WASHINGTON, )  
*ex Relatione* LORAH SUPER, )  
CRAIG OLSON, and KEVIN CREAGER )  
Defendants and Cross Plaintiffs. )

NO. 17 - 00086-0  
MEMORANDUM IN SUPPORT OF  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT

INTRODUCTION/ Summary of argument:

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1 Plaintiffs Gamble Land and Timber, Ltd. (“Gamble”), and Cascade Holdings Group LP  
2 (“Cascade”), have sued to quiet title to the road commonly known as French Creek Road OCR  
3 1545, as is further described in their complaint. The gravamen of their complaint is that the  
4 road, which has been on the formal county road roster since 1955, was improperly placed there  
5 and its establishment was void, and as such it has never been a county road. Thus, their  
6 argument goes, full title should be quieted in them, as the real property owner of all lands over  
7 which the road passes.

8 Summary judgment is appropriate on an issue of law when no genuine issue of material  
9 fact exists and when the moving party is entitled to judgment as a matter of law. CR 56(c). The  
10 court considers the facts in the light most favorable to the nonmoving party, granting summary  
11 judgment if reasonable persons could only reach one conclusion. *Simpson Tacoma Kraft Co.*  
12 *v. Department of Ecology*, 119 Wash. 2d 640, 646, 835 P.2d 1030 (1992).

13 The incontrovertible facts and well-established principles of law in this motion and  
14 memorandum should put to rest all Plaintiffs’ assertions of any non-public character to the  
15 road. The character of French Creek Road (OCR 1545) as a county road has been redundantly  
16 established so many times in so many ways and documented so thoroughly in contemporaneous  
17 maps, in the public record, and by incontrovertible sworn statements of use, and even by  
18 binding Washington Supreme Court precedent established in Okanogan County cases, that this  
19 court should have no difficulty ruling at this time on the character of the road.

20 It has become necessary for my clients to intervene to bring the facts and the law to the  
21 court’s attention because the County Commissioners, with the advice of a deputy prosecutor,  
22 have in the past raised official doubts of the road’s status, and may even have disclaimed title.  
23 The public has the right to ensure its crucial interest in keeping this road open is fairly  
24 represented. See, *Nelson v. Pacific County*, 36 Wash. App. 17, 671 P.2d 785 (1983).

25  
26 A FACTUAL BACKGROUND:

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1 Here are some of the basic facts and relevant legal points that will be explored herein:

2 In 1888 a man named Risley claimed to have taken the first wagon from French Creek  
3 over Bald Knob<sup>1</sup> to the Methow Valley, with the help of a French Creek homesteader named  
4 Cheval. (Exhibit 50. See also reference to Cheval homestead on French Creek in Exhibit 48.)

5 In 1892 the Colwell family moved their household from Wenatchee to the Methow  
6 Valley, where Mr. Colwell eventually became the first postmaster of the pioneer town of Silver  
7 (which then existed near the mouth of Beaver Creek on the Methow between present day Twisp  
8 and Carlton). Young Cecile Colwell remembered the journey well and recounted how they  
9 traveled up the Watson Draw from Pateros (then called Ives Landing) up to French Creek and  
10 from there over Bald Knob to the Methow at a point south of Silver. In the years before the  
11 Methow Valley Highway was built, the Watson Draw, French Creek, and Texas Creek Road  
12 was the only road connection between Pateros and the north half of the Methow Valley. Exhibit  
13 48.

14 In 1903 the federal Government Land Office published a survey map of Township 31  
15 N, Range 23 E containing the approximate position of Watson Draw-French Creek Texas Creek  
16 Road, based on surveys done between 1891 and 1902, showing most of road was in essentially  
17 the same location as it is today. Exhibit 47. However, a government topographic map published  
18 just prior in 1902, Exhibit 42, shows the road in nearly precisely the same location as it is today.  
19 The 1903 survey map is important because at that time homesteads conferred no title on the  
20 homesteader. Title remained in the United States until the surveys were complete. Only then  
21 could homesteaders apply for fee patented land. Homestead Act of 1862, 12 Stat. 392 (1862)

---

23 1  
24 There is some confusion with designation of Bald Knob and the Bald Knob Road in the  
25 early accounts, because there were (and are) two mountains known as Bald Knob in the same  
26 general area, one northwest of Brewster south of Rat Lake (see Exhibit 42) and the other just  
27 west of the French Creek in sections 17 and 18 of Twp 31 N. R 23 E. See section 18, 1903  
28 GLO Map, Exhibit 47.

1 A Congressional Act of 1866, (Sec. 2477, Revised Statutes of the United States) ceded  
2 the roads on federal lands to the counties in which they are located, and in 1903, a resolution  
3 and order by the County Commissioners formally accepted this federal cession of the roads, as  
4 had been established by use, which included the French Creek road at the time. Multiple  
5 decisions of the Washington Supreme Court hold and then reaffirm that the cession of a wagon  
6 road in public use for more than ten years, along with the County's 1903 resolution and order  
7 creates a county road, which cannot thereafter be gated. *Stofferan v. Okanogan County*, 76  
8 Wash. 265, 268-269 136 Pac. 484 (1913); *Okanogan County v. Johnson*, 156 Wash.515, 287  
9 P.15 (1930).

10 Through the decades thereafter, up to and including the present day, every published  
11 roadmap showed French Creek Road as a public road. Exhibits 38 - 47. Declarations covering  
12 the last 80 years overwhelmingly confirm continuous public use. (Exhibits 52-89.)

13 In particular there is the declaration of former County Commissioner Dave Schulz that  
14 he and his friends regularly used French Creek road in the years both before and after 1955, and  
15 in 1948 the Methow Valley highway was knocked out by flood and the Watson Draw-French  
16 Creek-Texas Creek road became the primary link to the Methow Valley until the highway and  
17 bridges in the lower valley could be restored. Exhibit 89.

18 In 1955 the County, by resolution, officially placed what was then called Texas Creek  
19 Road on the county roster as a maintained (i.e., "graded") public road. (Exhibit 2) The  
20 significance of this fact is not that it created the county road, which had been created under law  
21 by ten years' public use as early as 1898 (Rem. & Bal. Code, SS 5657 (P.C. 441 SS 91),  
22 Washington Session Laws-1937- Ch 187. Sec 11; RCW 36.75.070-080), but that prior to its  
23 inclusion on the roster, the county had no duty to maintain it. See, RCW 36.75.080 and prior  
24 codes, *supra*.

25 Aside from the history and mapping set forth above, we know for a fact that French  
26 Creek Road had been considered an open county road for many year prior to 1955, because a

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1 few days before the adoption of the 1955 roster (Exhibit 2), a petition was received by Charley  
2 Judd to vacate it, which was turned down. Exhibit 1, page 2.

3 In 1980 the Legislature created the category of primitive roads which the county had no  
4 duty to maintain and the lack of maintenance created no liability. RCW 36.75.300. French Creek  
5 Road was designated as a primitive county road in 2008. Exhibit 13.

6 We can infer that the road was maintained at some level by the county at least after the  
7 1948 flood when it became a vital link (Exhibit 89), but there is documentary evidence of  
8 maintenance thereafter (Exhibit 2, p.2 (1955 roster indicating grading of road) and exhibit 5),  
9 and the County had until 2009 been scrupulously enforcing against attempts to gate it through  
10 the years. (Exhibits 7,8,9,10,and 11; and see Exhibit 49, Brewster Herald 1911, reporting  
11 commissioner resolution of enforcement against gating public roads through homestead land).

12 In 2003, the County separated out the different sections of the Texas Creek Road which  
13 had included the French Creek Road at issue here, and the French Creek Road was designated  
14 OCR 1545. (Exhibit 7 ).

15 As far as we are aware, at no time in its hundred twenty year history has anyone legally  
16 challenged the county's title to the road nor the public's right to use it.

17 In 2009, plaintiffs formally petitioned to vacate French Creek Road and took their  
18 petition to hearing, which of course carries with it the presumption that Plaintiffs here, at the  
19 time, believed that it was a public road. Exhibit 14. The Staff report produced for the hearing  
20 showed that the average daily use was about 45 in hunting season. (Exhibit 18, p.2) Ultimately  
21 the commissioner felt compelled to deny the petition after both the public outcry and the firm  
22 opposition of DNR, (Exhibit 20-21), the Sheriff (Exhibit 23), and fire officials (Exhibit 22).

23 Shortly thereafter it appears that attorneys for plaintiffs here approached a deputy  
24 prosecutor with the argument that the county's title to OCR 1545 was defective (Exhibit 27) and  
25 he so advised the commissioners (Exhibit 28) who then passed Res. 443-2009 questioning the  
26 County title and allowing the road to be gated. Exhibit 29.

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1           Because the road had never been vacated, the public has largely ignored the Resolution  
2 and continued to use it. See Exhibits 52-89.

3 B       SUMMARY OF LAW

4           The following well-established legal principles confirm that, given the documented facts  
5 set forth above, OCR1545 is beyond question a public County road.

6           1. County public roads are established by public use continuously for ten years by the  
7 public, and for seven years if the County maintains them in any way *Stofferan v. Okanogan*  
8 *County*, 76 Wash. 265, 136 Pac. 484 (1913); *Seattle v. Smithers*, 37 Wash. 119, 79 Pac. 615  
9 (1905); *Okanogan County v. Cheetham*, 37 Wash. 682, 80 P. 262 (1905); *State v. Horlacher*,  
10 16 Wash. 325, 47 Pac. 748 (1897); Rem. & Bal. Code, SS 5657 (P.C. 441 SS 91), Washington  
11 Session Laws-1937- Ch 187. Sec 11; RCW 36.75.070-080.

12           2. Once established, public rights in them are not lost except by formal vacation  
13 according to statute, *Nelson v. Pacific County*, 36 Wash. App. 17, 23-24, 671 P.2d 785 (1983).  
14 *Seattle v. Hinckley*, 67 Wash. 273, 278-279, 121 Pac. 444 (1912); *Heuston v. Tacoma*, 67 Wash.  
15 92, 120 Pac. 872 (1912).

16           3. There is no requirement that the county maintain primitive county roads in order to  
17 preserve their status, RCW 36.75.300, and no failure to maintain changes the status of *any*  
18 county or other public road, *Goedecke v. Viking Investment Corp.*, 70 Wn.2d 504, 509, 424 P.2d  
19 307 (1967); *Vetter v. K. & K. Timber Co.*, 124 Wash. 151, 213 P. 927 (1923); *Brokaw v. Town*  
20 *of Stanwood*, 79 Wash. 322, 140 P. 358 (1914).

21           4. The status of a county right of way can not be lost through adverse or prescriptive use  
22 or possession. *Goedecke v. Viking Investment Corp.*, 70 Wn.2d 504, 509, 424 P.2d 307 (1967);  
23 *Commercial Waterway Dist. No. 1 of King Cy. v. Permanente Cement Co.*, 61 Wash. 2d 509,  
24 379 P.2d 178 (1963).

25           5. It is immaterial if the precise course of the road has varied over the years. Common  
26 sense and the law expects that the course of rural county roads will meander over the decades,

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1 and no variation from the earlier course of the road affects the character of a rural county road,  
2 unless established by formal survey after court order. RCW 36.75.100 - 110.

3 ARGUMENT:

4 A) **Watson Draw-French Creek-Texas Creek Road Was Established as a Public Road**  
5 **by Prescription Before the Turn of the Last Century; and as a County Road by**  
6 **Resolution and Order in 1903**

7 In May of 1892, young Cecile Colwell traveled with her family from Wenatchee to their  
8 new home in the Methow Valley. The events of the two day journey remained indelibly in her  
9 mind. She traveled from what is now Pateros over the rough wagon road up the Watson Draw  
10 to French Creek and then over Bald Knob to a point south of Silver (a town then located near  
11 the mouth of Beaver Creek on the Methow River a few miles north of present day Carlton). In  
12 1955, she set down her account of the journey, which was published a few years later in  
13 Okanogan County Heritage Magazine. Her own words are clear and compelling:

14 In the month of May of the Spring of 1892, Mother left Wenatchee with brother  
15 Harley and me to join Father. I was then five years old and Harley was three. The trip  
16 was made on the steamboat City of Ellensburg on the Columbia river to Ives Landing,  
17 now Pateros, where we met Father. The only building at this landing place was a small  
18 log cabin with dirt roof, located a short distance north of the present hotel in Pateros.

19 On the following day we were on our way over the Bald Knob road to our new  
20 home in the Methow valley. The road was rough, and at some points we had to get out  
21 of the wagon and walk over the steep, sidling grades. To keep the back end of the  
22 wagon from sliding off, a rope was tied to the rear, then held by Sel Medaris, who also  
23 was walking. Mr. Medaris had made the trip down with Father to help bring us and our  
24 belongings to the Methow.

25 After climbing seven miles uphill from Ives Landing through the Watson Draw  
26 and down Arkansas hill before starting the long, steep pull up over Bald Knob  
27 mountain, we stayed one night at the old Chevall place located at the base of the  
28 mountain between upper and lower French creek. During the following day we arrived  
in the Valley near the old Metcalf place on the Methow river just below the town of  
Silver. Going on up the valley we crossed the Methow at a point approximately where  
the box mill is now located at Twisp.

“I Remember When Twisp was Platted” (Account of Cecile Colwell Magee) *Okanogan County Heritage*, Vol 1 Number 2, p. 21 (Okanogan County Historical Society, Sept., 1963) at page 22. Exhibit 48.

This vivid account tells the story of this case in three short paragraphs: The way to the Methow, from well before the turn of the last century, was the wagon road up the Watson Draw

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1 from Pateros to French Creek, and thence over Bald Knob to the area near present day Carlton.  
2 Although we now have the Methow Valley Highway, the original route has stayed the same for  
3 125 years, and the old road along it is still a vital link for those who live along its course.  
4

5 **1. The Controlling Law for French Creek Road Was Established by 1913 and Then**  
6 **Reaffirmed in 1930**

7 Much of the controlling law in this case was established in the first quarter of the 20<sup>th</sup>  
8 century by our State Supreme Court. Not surprisingly, because of the size and history of  
9 Okanogan County, much of that law was established here.

10 In the 1880's, title to most of Okanogan County was held by the United States, but was  
11 open for homesteading. As Mrs. Magee confirmed in her account quoted above, homesteads  
12 were in fact established along different parts of the route of the road between present day  
13 Pateros, and a point north of present day Carlton by 1892; i.e. the Watson Draw-French Creek-  
14 Texas Creek Road. At some point after the land was surveyed, the homesteader could apply for,  
15 and if the claim was perfected, receive, a patent in fee for the homesteaded land. See generally  
16 Homestead Act of 1862, 12 Stat. 392 (1862).

17 In 1866, Congress dealt with the issue of title and use of the roads established across  
18 these federal homestead lands. In Sec. 2477, Revised Statutes of the United States, the federal  
19 government granted rights of way to local government for the construction public highways  
20 upon the roads running through the unpatented federal homestead lands, unless the roadway was  
21 reserved for some federal purpose. In 1905, our supreme court explained the how and why of  
22 the federal Act:

23 In the settlement of the public lands in a young state, it is necessary, frequently, that  
24 highways be laid out across the public domain; and it was in recognition of this  
25 necessity that Congress enacted § 2477. The very nature of conditions in an unsettled,  
26 or sparsely settled, locality is such that roadways must be frequently laid out by the early  
27 settlers without much regard to section lines, or to the location of future homesteads or  
28 other claims. When these roadways become used generally by the public as highways,  
it would be unreasonable and inconsistent to hold that any action should be required of  
the authorities in order to constitute an acceptance of the grant of Congress made as



1 aforesaid.

2 *Okanogan County v. Cheetham* 37 Wash. 682, 692, 80 P. 262 (1905); reversed in part on other  
grounds, *McAllister v. Okanogan County*, 51 Wash. 647, 100 Pac. 146 (1909). See also,  
3 *Stofferan v. Okanogan County*, 76 Wash. 265, 136 Pac. 484 (1913); *Okanogan County v.*  
4 *Johnson*, 156 Wn.515, 287 P.15 (1930)

5 In 1903, the Commissioners of Okanogan County accepted the federal grant of  
6 established wagon roads, in a resolution and order quoted in its entirety in *Stofferan v.*  
7 *Okanogan County*, supra.

8 "On motion of Commissioner Rosenfelt, seconded by Commissioner Wehe, the  
following order is unanimously adopted:

9 Be it remembered, That on the 11th day of August, A.D. 1903, at a regular  
10 meeting of the board of county commissioners in and for Okanogan county, state  
of Washington, said meeting being duly held and all members of said board  
11 being present, on motion it was ordered and resolved, that the right-of-way for  
the construction of highways over public lands as granted by act of Congress  
(Sec. 2477, Revised Statutes of the United States) be, and the same is hereby  
12 accepted, as far as said grant relates to said Okanogan County, state of  
Washington, that is to say, to the extent of thirty feet on each side of the center  
13 line of all wagon roads which now exist or which have heretofore existed upon  
or across or over lands that are now public lands of the United States, not  
14 reserved for public uses in said Okanogan county, Washington;"

15 *Stofferan v. Okanogan County*, 76 Wash. 265, 268-269 136 P. 484 (1913).

16 *Stofferan* established a number of the basic principles that control this case. In  
17 *Stofferan*, the appellant landowner, in July of 1910, had fenced and gated a road across his land  
18 in the former north half of the Colville Indian Reservation. His land had only been opened for  
19 settlement in October of 1900. *Stofferan* at 275-76. Before that, the area was federal land for  
20 use of Native American federal wards, which is a federal purpose, and so not subject to transfer  
21 under § 2744. Thus it was not legally open for use by the general public until late 1900. *id* at  
22 276.

23 The *Stofferan* court held that,

24 1) The federal grant passes title to the public at any time that state law for establishing roads  
25 was complied with, including by public use:

26 [U]nder U.S. Rev. Stats, SS 2477, above quoted, the establishment of highways over

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1 public lands may be made in any of the ways recognized by the law of the state in which  
2 such lands are located, and that in this state such highways may be established by  
3 prescription, dedication, or user as well as by proceedings under the state statute by  
4 petition. The net result of our decisions, therefore, is that the United States statute takes  
5 effect as a grant only when the res comes into being, that is, when the road has been  
6 established on petition as prescribed by our statute, or by use for the period required for  
7 prescription prior to the attaching of any adverse rights upon the public lands over which  
8 it passes.

9 *Stofferan* at 274, quoting *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667.

10  
11 2) Establishment of a road for purposes of the federal grant under Section 2744 occurs by when  
12 a road is used by public for travel for ten years, or less by statute:

13 In this state, however, we have repeatedly held that roads may be established by  
14 prescription by the use by the public for a period of not less than seven years, where the  
15 same have been worked and kept up at the expense of the public, as provided in Rem.  
16 & Bal. Code, SS 5657 (P.C. 441 SS 91); or, where not so kept up at the public expense,  
17 simply by continued use by the public for a period co-extensive with the period of  
18 limitation for quieting title to land, which is, in this state, ten years. *Seattle v. Smithers*,  
19 37 Wash. 119, 79 Pac. 615; *Okanogan County v. Cheetham*, supra; *State v. Horlacher*,  
20 16 Wash. 325, 47 Pac. 748; *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St.  
21 858.

22 *Id.* at 273-274, and see successor codes: Washington Session Laws-1937- Ch 187. Sec 11;  
23 RCW 36.75.070-080.

24 3) The 1903 commissioner resolution quoted above did not by its own force establish a county  
25 road, it just took title (to a width of 60 feet) to those roads once they were established by some  
26 other means such as 10 years' public use. Because the road in question in *Stofferan* had been  
27 used by the public for less than the full ten years before it was gated, the public acquired no  
28 rights. *Id.* at 276-277.

These principles were reaffirmed in *Okanogan County v. Johnson*, 156 Wn.515, 287  
P.15 (1930), where the county succeeded in removing a gate placed across an old wagon road:

That being so, and it appearing that a prescriptive right in the public had accrued while  
the land affected was all a part of the public domain, and that the county, by a proper  
and sufficient resolution adopted by its board of county commissioners in 1903 (being  
the resolution set out in *Stofferan v. Okanogan County*, 76 Wash. 265, 136 P. 484), had  
accepted the Federal grant of all such prescriptive highways on public domain within  
the county, it is apparent that every phase of the law which might be deemed applicable  
has been thoroughly settled by our former decisions and we therefore consider it  
unnecessary to enter into any discussion of them here.

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1 156 Wn.515, at 516-517.

2

3 **2. The Facts in this Case Fall Squarely Within the Cases Establishing Prescriptive**  
4 **Use by the Public While its course Was Still Public Federal Land**

4

5 Between 1891 and 1902 federal contractors surveyed Township 31 N, Range 23 E in  
6 Okanogan County containing all of the French Creek and Watson Draw portions of what  
7 became OCR 1545. The survey was published in 1903 and you will note that in most relevant  
8 portions, the road follows the general course road that exists today. Exhibit 47.

9 Below find a side by side comparison of the intersection sections 16, 17, 20 and 21 of  
10 the 1903 survey (Exhibit 47) and Plaintiffs' Exhibit C to their Complaint being where they  
11 claim the road is today.

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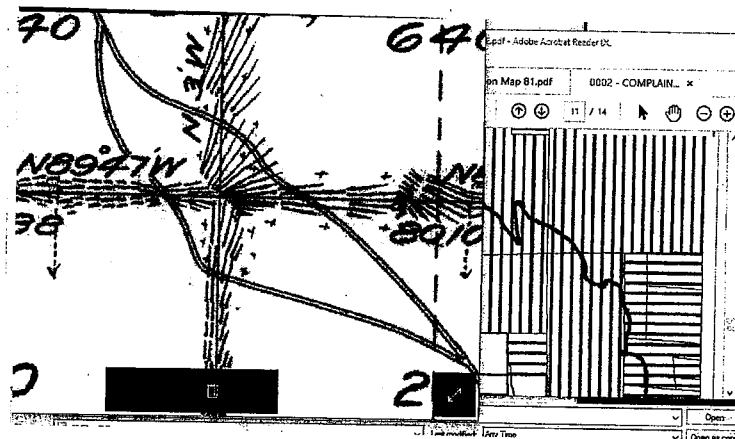
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We point to the following:

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a) The upper road mapped in 1903 crosses the section lines (the natural survey points) in  
24 precisely the same places as they now do according to Plaintiffs' own map. (i.e. the between  
25 setion 21 and section 16, and again between section 16 and section 17.)

26

b) Where there were two parallel roads in 1903 there is only one shown today, but if we draw

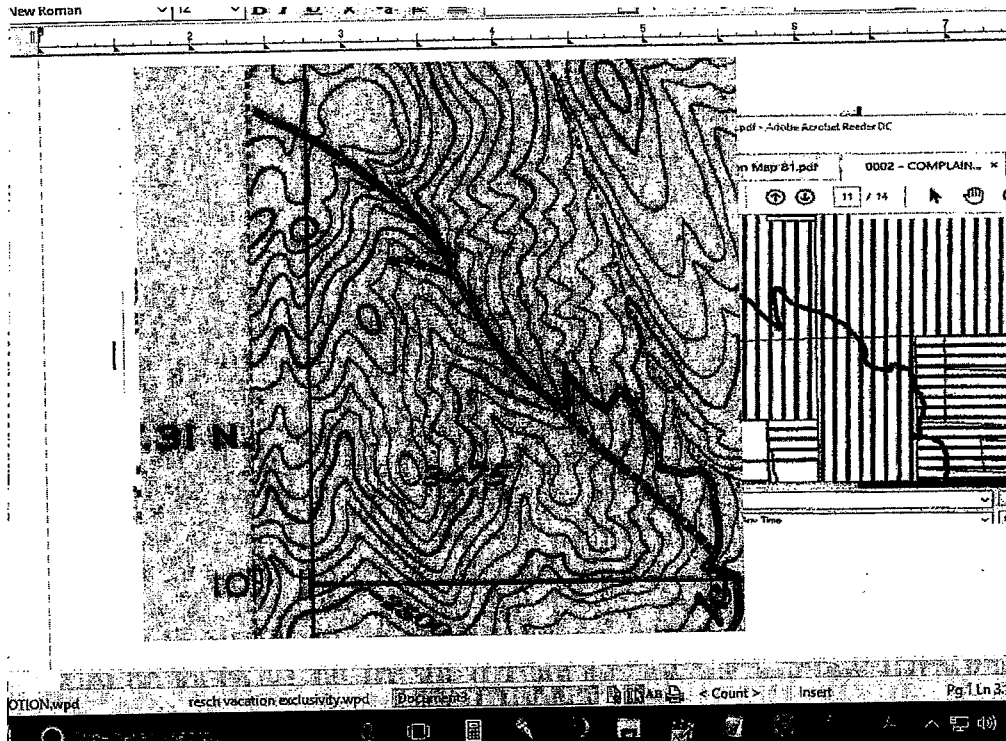
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1 a line connecting the two roads at the point of the jog in section 17 in the 2017 map, the two  
2 graphs match very closely.

3 A more accurate turn of the century survey of the French Creek Road at that location is  
4 found in the 1902 topographical map obtained from the USGS. Exhibit 42. That side by side  
5 comparison is striking:



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20 The maps through the following decades are remarkably consistent on the location of  
21 the road. Exhibits 38-45. We invite the court to review the maps set forth in these exhibits and  
22 compare for itself.

23  
24 3. **Even If the OCR 1545 Had Not Been Established by Prescription During the**  
25 **Period of Federal Jurisdiction under § 2477 and Adopted by the County's 1903**  
26 **Resolution and Order, the Consistent Use as Evidence by the Declarations Filed**  
27 **Herewith for Periods of Greater than Ten Years Would Create That Status Now**  
28 **under RCW 36.75.070-080**

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1 If the consistent map exhibits were not abundantly sufficient to establish French Creek  
2 Road as a county road, the 36 sworn declarations (Exhibits 58-89) filed herewith clearly  
3 establish that it has been in continuing use for about 80 years up to and including today.

4 The establishment of roads by prescription with use for ten years (or seven with county  
5 maintenance) is not an anachronistic relic of the 19<sup>th</sup> century. It persists in our law today as  
6 RCW 36.75.070-080.

7  
8 B) **Once Established, a Public County Road Retains its Character Unless and Until**  
9 **Vacated by Statutory Process Set Forth in RCW 36.87.020-060**

10 1. **A County Road, Including One Established by Prescription or Federal Grant**  
11 **under §2744, Does Not Lose That Status by Adverse or Prescriptive Use by an**  
12 **Abutting Landowner**

13 The Plaintiffs appear to assert in their complaint that their gating with county  
14 acquiescence and a county resolution, short of vacation, questioning title, have served as  
15 abandonment or adverse occupation of the road in such a way that the county lost rights to it.

16 Repeatedly the courts have rejected this and similar arguments. *Goedecke v. Viking*  
17 *Investment Corp.*, 70 Wn. 2d 504, 424 P.2d 307 (1967), is one such case that rejects a number  
18 of Plaintiffs' claims. In that case the County's title to an unmaintained mostly unused vestige  
19 of a road surveyed and opened by King County in 1880 became the focus in a private land  
20 transaction gone awry.

21 In the course of reversing the trial court on a number of issues, the Supreme Court beat  
22 back a challenge to the county road status on the basis that the abutting properties had reclaimed  
23 most or all of the traveled lane of McAllister Road such that, where it existed it was  
24 unmaintained and often barely one car width across. The right of way as opened in 1880 was  
25 declared to be 60 feet in width. As such, the Respondent asserted, the County had lost its right  
26 of way for placement of a sewer by Appellant, which was the focus of the litigation. The  
27 Supreme Court rejected that contention:

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1 An abutting property owner does not acquire by adverse possession any part of a right  
2 of way to which a municipal corporation has title.

3 70 Wn.2d at 509, citing *Commercial Waterway Dist. No. 1 of King Cy. v. Permanente Cement*  
4 *Co.*, 61 Wn.2d 509, 379 P.2d 178 (1963).

5 **2. Failure to Maintain a County Road Has No Effect on Title**

6 For some reason, Plaintiffs here seem to hold the idea that the County's failure of  
7 consistent maintenance of French Creek Road is evidence of abandonment or loss of title. In  
8 fact the Road has been maintained over the years at a level appropriate to its character and use  
9 Exhibit 5. But even if the county had entirely failed to maintain the road at all in the memory  
10 of the entire county staff, that would have no effect on the County's title.

11 In *Geodecke*, supra, that precise argument was made. The supreme court rejected it:

12 [T]he respondent's witness, Mr. Gonnason, assistant county engineer for King County,  
13 testified that the King County engineer's file on McCallister Road did not contain a copy  
14 of the order establishing the road nor did the file indicate that the county had expended  
15 any sums to maintain the road. . . .

16 . . . A public road does not lose its character as a public road because no public funds  
17 are expended for its maintenance and upkeep. *Vetter v. K. & K. Timber Co.*, 124 Wash.  
18 151, 213 P. 927 (1923); *Brokaw v. Town of Stanwood*, 79 Wash. 322, 140 P. 358  
19 (1914).

20 70 Wn.2d at 509

21 Furthermore, the County had no duty to maintain the French Creek Road until it was  
22 officially put on the roster in 1955 (RCW 36.75.080). Thereafter the Commissioners, in 2003  
23 disclaimed any duty to maintain it when declaring it a primitive road (Exhibit 13). See RCW  
24 36.75.300.

25 **3. Public Acts, Including Even Formal Legal Agreements, Short of Statutory Vacation**  
26 **Do Not Operate to Vacate Public Right to Roads. *Nelson v. Pacific County*, 36**  
27 **Wash. App. 17, 671 P.2d 785 (1983) Is Dispositive on this Point and Binding on this**  
28 **Court.**

Plaintiffs appear to claim that the County's Resolution 443-2009 (Exhibit 29) permitting  
the gating of the road and declaring its title to the road uncertain constitutes abandonment of  
title. Such assertions have been made in a number of contexts in the past and uniformly failed.  
The courts have always reaffirmed that municipal title to rights of way are only lost through

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1 formal vacation and no legislative or administrative act short of that will do.

2 As early as *Seattle v. Hinkley*, 67 Wash. 273, 121 P. 444 (1912), the supreme court  
3 turned back an effort to deny public title to a right of way based on the inference of official acts  
4 other than vacation. In that case the City had condemned and made payment for a portion of  
5 the right of way to which it thereafter asserted pre-condemnation title. The appellant claimed  
6 that condemnation was an acknowledgment that title had been lost or abandoned and asserted  
7 estoppel. The court made explicit that municipal actions short of statutory vacation could not  
8 ever deprive a municipality of title:

9 They have, by reason of these condemnations, in no wise altered their position for the  
10 worse. Moreover, it was not within the power of the city officials to thus vacate a public  
highway however acquired.

11 "It is, also, contended by respondents that inasmuch as the city included within  
12 the ordinance of August 6, 1864, and the proceedings to condemn had  
13 thereunder, the property before dedicated, that the city is now estopped from  
14 asserting a claim under the prior dedication, and this too, though the property  
has at all times since 1859 been treated by all parties as a part of the wharf. Such  
15 results, we think, do not follow. We do not see how it is within the power of the  
city officials to thus vacate a public highway." *Moses v. St. Louis Sectional  
Dock Co.*, [80 Mo. 242 (1884)] *supra*.

16 *Seattle v. Hinkley*, 67 Wash. 273, 278-79, 121 P. 444 (1912).

17 In more recent times the Court of Appeals, Division III, reaffirmed the *Hinkley* principle  
18 that public acts short of statutory vacation can not deprive the public of title in a case involving  
19 a county road.

20 The facts in *Nelson v. Pacific County*, 36 Wash. App. 17, 671 P.2d 785 (1983) parallel  
21 this case closely enough that it constitutes binding precedent and leaves Plaintiffs little room  
22 for argument.

23 Nelson sued Pacific County to quiet title to a road across his property on the grounds  
24 that the original dedication of the road was defective. The County answered *disclaiming* title,  
25 but the neighbors objected and intervened. Thereafter the County "settled" with Nelson  
26 agreeing to exchange its interest in the road for an alternative 60 foot right of way.

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1 The neighbors remained in the case to try title to the right of way asserting their own  
2 interest in having access to the open county road. Nelson defended on the basis that the  
3 County's original answer to the complaint and subsequent settlement agreement constituted  
4 abandonment of the right of way.

5 The court opined that the county did not manifest sufficient intent to abandon, but even  
6 if it did, that would be insufficient to pass title to a public road. Only statutory vacation can do  
7 that. Here is the holding:

8 [W]e conclude that the County may not abandon dedicated property in this manner.  
9 Unquestionably the County may compromise claims arising out of subject matter  
10 concerning which it has the general power to contract. *Warburton v. Tacoma Sch. Dist.*  
11 *10*, 55 Wash. 2d 746, 350 P.2d 161 (1960). The Nelsons' position is flawed, however,  
12 because the alienation of dedicated public property cannot be accomplished by contract.  
13 Property once acquired and devoted to public use is held in trust for the public and  
14 cannot be alienated without legislative authority, either express or implied. *Commercial*  
15 *Waterway Dist. 1 v. Permanente Cement Co.*, 61 Wash. 2d 509, 379 P.2d 178 (1963).  
16 The Legislature has expressly provided for the disposition of lands held by the County  
17 in its governmental capacity. Numerous sections in RCW Title 36 deal with this subject.

18 Under RCW 36.34, county property cannot be sold or disposed of without notice  
19 (36.34.020-.030) and a public hearing (36.34.040), with certain exceptions not relevant  
20 here. More specific provisions apply to parks and county roads. . . . RCW  
21 36.87.020-.060 provide that before a county can abandon a road or any part thereof, it  
22 must require a study and report by the county engineer and hold a public hearing on the  
23 proposed vacation. . . . The provisions are comprehensive and demonstrate a strong  
24 legislative intent that property held for the public use and benefit not be summarily  
25 disposed of without giving the public affected a significant opportunity to participate.

26 *Nelson v. Pacific County*, 36 Wn.App. 17, 23-24, 671 P.2d 785 (1983). See also, *Greater*  
27 *Harbor 2000 v. City of Seattle*, 937 P.2d 1082, 132 Wn.2d 267 (1997) *Heuston v. Tacoma*, 67  
28 Wash. 92, 120 Pac. 872 (1912).

29 CONCLUSION:

30 The law of this case has been settled for a century and the material facts have not been  
31 up for serious debate. County title to the French Creek Road was established beyond question  
32 by 1903, its course has remained largely unchanged in over 100 years, and been consistently  
33 mapped as such by every map source. Since that time it has been in continuous use.

34 Such roads cannot be lost to the public absent formal vacation under Chapter 36.87

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1 RCW, which has been tried repeatedly and not succeeded.

2 This case is ripe for summary judgment and this court should grant it.

3

4 Respectfully submitted,

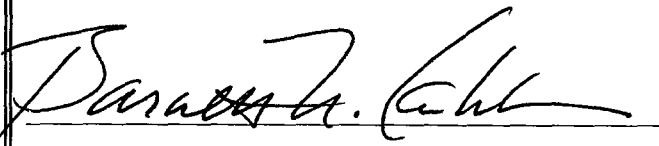
5 June 23, 2017

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11 Barnett N. Kalkow, WSBA #16907  
12 Attorney for Okanogan Open Roads Coalition, and  
individual cross/counter claimants.

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