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January 7, 2021

**VIA EMAIL/FASCIMILE AS INDICATED
FOLLOWED BY U.S. MAIL**

Governor Greg Gianforte (Fax: 406-444-5529)
Office of the Governor
P.O. Box 200801
Helena, MT 59620-0801

Attorney General Austin Knudsen (Email: contactdoj@mt.gov)
Office of the Attorney General
Justice Building, Third Floor
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*Re: Request for Removal of Illegal Encroachment/Gate on Hughes Creek Road
Ravalli County, Montana*

Dear Governor Gianforte and Attorney General Knudsen:

My firm represents the Ravalli County Fish & Wildlife Association and Public Land/Water Access Association (“PLWA”). I am writing to inform you that Ravalli County has abandoned its statutory duty to remove a gate obstructing public access along the Hughes Creek Road—a county road—as well as the public lands and waters that are accessed solely by that road. The gate is unlawfully encroaching on a Montana public highway. Because the County refuses to comply with Montana law mandating this gate be “immediately” removed, §§ 7-14-2133 and 7-14-2134, MCA, we respectfully request the State step in, remove the unlawful gate, and ensure safe public access on Hughes Creek Road and the public lands and waters beyond it.

I. Background of Hughes Creek Road Dispute.

Hughes Creek Road (“Road”) is a county road built in 1900. It begins at its junction with West Fork Road near the confluence of Hughes Creek and the West Fork of the Bitterroot River. *Bugli v. Ravalli Cty.*, 2019 MT 154, ¶ 3, 396 Mont. 271, 444 P.3d 399 (“*Bugli IP*”).

In the late 1970's, a locked gate was placed across the Road. *Bugli II*, ¶ 7. In 1982, prior landowners abutting the Road took additional steps to block public access over the Road and the public lands and waters accessed by it: they petitioned the Ravalli County Board of County Commissioners ("Board") to abandon the Road beyond the gate as a county road. *See id.* Significantly, a county may not abandon a county road used for access to public land or waters, unless another public road provides substantially the same access. *Bugli II*, ¶ 27 (citing § 7-14-2615(3), MCA). In obvious recognition of this law and finding that the Road provided access to a USFS trailhead and federally managed public lands, the Board denied the abandonment petition and ordered removal of the gate. *See Bugli II*, ¶ 7.

In 1984, the Board filed suit to remove this gate (as well as another gate) across the Road. That case, however, was later dismissed without the gates being removed.

Now, despite decades having passed, and the Montana Supreme Court's rejection of multiple legal challenges by certain landowners along the Road, the obstructing gate still exists today. *Id.*; *see also Bugli v. Ravalli Cty.*, 2018 MT 177, ¶¶ 4, 12, 392 Mont. 131, 422 P.3d 131 ("*Bugli I*").

In July 2016, in another attempt to avoid removing the gate, landowners Zackary and Tracy Bugli, along with members of the Cox family, petitioned the Board to abandon the county road segment of the Road beyond the gate. *Bugli II*, ¶ 10; *see also Bugli I*, ¶¶ 1, 5. Once again, in January 2017, following a public hearing and consideration of an extensive historical record, the Board denied the abandonment petition. In their denial, the Board expressly recognized that the Road is an approximately 12-mile long county road that provides public "access to public lands or waters" that would be entirely cut off if abandoned. The Board further found that the locked gate unlawfully encroached on the Road and **ordered the gate's removal by June 1, 2017**. *Bugli II*, ¶ 11.

Litigation¹ by the landowners delayed the gate's removal by this deadline. But ultimately, in July 2019, at Ravalli County's request and its taxpayers' expense, the Montana Supreme Court expressly rejected the landowners' contentions, removing any uncertainty over Ravalli County's mandate to the landowners to remove the gate. *Bugli II*, ¶¶ 32-33.

As such, per the binding precedent of *Bugli II*, it has now been undisputed for well over a year that:

¹ The landowners initiated the first lawsuit on April 10, 2017, when they filed a complaint for declaratory and injunctive relief, seeking relief, in part, from having to remove the gate and allow public access over Hughes Creek Road. *Bugli I*, ¶ 6. While the appeal of the first lawsuit was pending in the Montana Supreme Court, the landowners filed the second lawsuit on July 31, 2017, seeking review of the Board's denial of their abandonment petition. *Bugli II*, ¶¶ 15-18.

- Hughes Creek Road is a legally established county road/public highway that is being illegally blocked by the locked gate; and
- The locked gate is blocking the public’s right to access public lands and waters beyond the gate.

II. Montana Law Requires Immediate Removal of the Gate Obstructing Public Access.

Montana law clearly and unequivocally mandates the gate— which is an obstruction and encroachment— “shall” be “immediately” removed. §§ 7-14-2133 and -2134, MCA. Sections 7-14-2133 and -2134, MCA, which govern obstructions and encroachments on county roads and public highways, state in pertinent part:

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

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

7-14-2134. Removal of highway encroachment

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

§§ 7-14-2133(1), 7-14-2134(1)-(3), MCA (emphasis added).

The legislature’s use of the word “shall” is mandatory, meaning removal of the encroachment is required. *See Gaustad v. City of Columbus*, 265 Mont. 379, 381-82, 877 P.2d 470, 471 (1994) (“[s]hall” is understood to be compelling or mandatory). To abide by Montana law, the government has no choice but to immediately remove the gate.

PLWA tried to work cooperatively with the Board and the Ravalli County Attorney’s Office to

reach an amicable solution to this problem, to no avail. Seeking a resolution short of litigation, PLWA sent the Board a letter on October 9, 2020, urging them to act on its mandate and require the gate's removal. PLWA further informed the Board that if it is forced to initiate legal action to compel the Board to enforce the law, that PLWA is prepared to file a mandamus action to do so and will seek its attorneys' fees under the mandamus statute as well as the private attorney general doctrine. *See* §§ 27-26-102 and -402, MCA; *see also Common Cause of Mont. v. Argenbright*, 276 Mont. 382, 390, 917 P.2d 425, 429-430 (1996) (a writ of mandamus is available "when the party requesting it is entitled to the performance of a clear legal duty"); *Kadillak v. Mont. Dep't of State Lands*, 198 Mont. 70, 74, 643 P.2d 1178, 1181 (1982) (reasonable attorney fees are damages with the meaning of § 27-26-402, MCA); *Montanans for Responsible Use of Sch. Trust v. State ex rel. Bd. of Land Com'rs*, 1999 MT 263, ¶ 64, 296 Mont. 402, 989 P.2d 800 (attorney fees may be recovered under the private attorney general doctrine where "the government, for some reason, fails to properly enforce interests which are significant to its citizens"). Finally, PLWA pointed out the Board's legal responsibility for failing to take action to remove obstructions on county roads. § 7-14-2133, MCA.

With full knowledge of the Board's statutory duties, and in complete dereliction thereof, the Board is refusing to take any steps whatsoever to remove the gate. In November 2020, the Ravalli County Attorney's Office, unwilling to put a response in writing, informed this firm in a phone call:

- The Board is not going to respond to this firm's October 9, 2020 letter;
- The Board is not going to take any steps to remove the illegal gate across the Road despite successfully defending its prior mandate twice at the Montana Supreme Court; and
- Instead, Ravalli County is now planning to defend against a mandamus lawsuit on the basis that removing the gate is a threat to public health and safety, as a result of the landowners' threats of violence toward anyone who attempts to remove the gate.

Furthermore, the Ravalli County Sheriff's Office has indicated it will require a court order before it will lend peace-keeping assistance to those who perform work to remove the gate.

In short, Ravalli County acknowledges it has a clear legal duty to remove the gate that is blocking public access to public land and waters. Nonetheless, the County refuses to act.² Instead, the County is surrendering to the vigilantism of a few menacing landowners along the Road who flout Montana law and threaten harm to anyone trying to remove the gate or access the Road. That lawlessness must not be condoned.

² Indeed, the Ravalli County attorney is charged with prosecuting an action for violating the law as provided in Title 7, chapter 14, parts 21. § 7-14-2138, MCA.

III. The State Must Take Action to Protect Public Access to Public Land and Waters and Restore Law and Order in Ravalli County.

Ravalli County's refusal to enforce the public's right to access public lands and waters is a matter of great public importance that must not be ignored. It is undisputed that:

1. **Hughes Creek Road is a public road open to everyone.** The Road is not just reserved for the few rogue landowners who currently control this county road and surrounding public land by threatening violence to anyone—including law enforcement—who dares to take down their gate.
2. **The Road accesses public water and public land, which belong to the public.** In fact, the "Road provides legal access to thousands of acres of USFS land" and "is the *only* county road within the Hughes Creek drainage." *Bugli II*, ¶ 36 (emphasis original).

The Montana Supreme Court recently recognized:

...the Board...could not legally abandon the county portion of Hughes Creek Road because it provided the only legal means for public access to the public lands and waters beyond the Landowners' locked gate. **Montana law prevents private land owners from blocking public access to public lands and waters** through Montana's statutory process for abandoning county roads.... **Montana's public lands belong to the public** and cannot be enjoyed or properly managed where counties have abandoned legal access points in favor of private ownership."

Bugli II, ¶ 36 (citing § 7-14-2615(3), MCA) (emphasis added).

3. **Hughes Creek Road is gated and illegally blocked by neighboring landowners.** This is evident from Montana Supreme Court's holdings in *Bugli I* and *Bugli II*, *supra*.
4. **Ravalli County is refusing to perform its legislatively mandated job of removing the gate or taking action to rectify the encroachment over this county Road.** The County is abdicating its legislative mandate and custodial duty to control and manage the Road. *See* §§ 7-14-2133 and -2134, MCA; *Bugli I*, ¶ 15 (citing §§ 7-5-2101 and 7-14-2101(1)(a)(i), MCA). By refusing to remove the gate and maintain public access over the Road, the County is violating the "high degree of trust" the legislature placed in the Commissioners' hands to protect county roads. *See* § 60-1-102(1)-(2), MCA.

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Clearly, Ravalli County is failing the public and violating Montana law. A government's refusal to uphold the rule of law, for fear of retribution by a few outlaw neighbors, is a dangerous proposition to American democracy and our peaceful way of life in Big Sky Country.

Thankfully, the State of Montana, through your honorable offices, has the authority to step in, remove the gate, and restore law and order in Ravalli County.

By virtue of its status as a county road, the State owns and is ultimately responsible for Hughes Creek Road, pursuant to Montana law:

The state through its legislature primarily has the power to control and regulate the public highways and their use. The power is an exercise of the police power of the state to protect the highways and promote the safety, peace, health, morals and general welfare of the public.

City of Billings v. Herold, 130 Mont. 138, 141-142, 296 P.2d 263, 264 (1956) (citing 40 C.J.S., Highways, § 232, pp. 240, 241). As such, the State has primary authority over public roads, such as Hughes Creek Road, whereas local governments serve as trustees and only have the jurisdiction delegated to them by the legislature. *See State ex rel. Rocky Mountain Bell Telephone Co. v. Mayor, etc., of City of Red Lodge*, 30 Mont. 338, 76 P. 758 (1904) (cities only have the authority granted to them by state legislature, and state does not surrender control over streets to cities); *Dakota Utilities Co. v. City of Billings*, 2003 MT 332, ¶ 28, 318 Mont. 407, 80 P.3d 1247; *Herold*, 130 Mont. at 141-142, 296 P.2d at 264-65 (Through its police powers, the state has the power to regulate and control public highways to promote the public's safety, peace, health, morals and general welfare); *Bidlingmeyer v. City of Deer Lodge*, 128 Mont. 292, 297, 274 P.2d 821, 823 (1954) (Although a municipality's source of police power is delegated from the state, the state may "take away or revoke a part or all of the authority which it has delegated to the cities."); *see also* § 7-14-2109, MCA (state can require counties to transfer county roads to state for highway purposes).

Because Ravalli County and its County Attorney are refusing to preserve public access by taking the necessary steps to remove the gate and prosecute those thwarting the law, the State is responsible to rectify this dire situation. Safe and efficient travel over public roads is of "important interest to all" Montanans and preserves the "public peace, health, and safety[.]" § 60-1-101, MCA. Blocking the public's ability to safely travel over public roads is an "urgent" problem. *See* § 60-1-101(2), MCA. The State has a statutory duty to "assist and cooperate with" the County in this matter and has "broad authority" to take the necessary steps to remove the gate and reopen the Road to the public. *See* § 60-1-102(3)-(4), MCA; *see also*: §§ 60-2-110, -111, -126, -201, -204, -210, -211, MCA and § 7-14-4108, MCA (statutes providing for cooperation between state, counties and cities). This is consistent with the legislature's intent, with respect to the county road statutes, "to provide sufficiently broad authority to enable the highway officials at all levels of government to function adequately and efficiently in all areas of their respective responsibilities, subject to the limitations of the constitution and the legislative mandate

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imposed.” § 60-1-102(4), MCA.

If counties were allowed to completely ignore the mandates of the statutes, they would be of no legal consequence. This could not have been the intent of the legislature.

Madison County v. Elford, 203 Mont. 293, 302, 661 P.2d 1266, 1270 (1983) (County’s eminent domain proceedings did not substantially comply with mandates of Chapter 7, Section 14, MCA).

Mr. Governor and Mr. Attorney General: PLWA urges the State to take immediate action to rectify this injustice. Any failure to act by the State will not only violate the public’s right of access to the public lands and waters accessed by Hughes Creek Road, but it will also constitute a complete abdication of your charge to maintain law and order in Montana.

Neither the State nor Ravalli County should condone these illegal actions. To do so would defy norms essential to maintaining a civil society and would be a tacit endorsement of lawlessness and mayhem. Yesterday’s actions at the U.S. Capitol demonstrate how quickly the mob can seize control when our political leaders fail to enforce the rule of law. Regardless, the public coffers should not have to fund potentially expensive litigation to compel compliance with the law, especially after the taxpayers already paid to establish Ravalli County’s right/obligation to remove the illegal gate. The State must exercise its authority, to the full extent of the law to ensure that those who threaten public safety and are held to account.

Sincerely,



J. Devlan Geddes

cc: Chris Hoffman, Commissioner (choffman@rc.mt.gov)
Greg Chilcott, Commissioner (gchilcott@rc.mt.gov)
Jeff Burrows, Commissioner (jburrows@rc.mt.gov)
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