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MONTANA FOURTEENTH JUDICIAL DISTRICT COURT
MEAGHER COUNTY

| | | |
|------------------------------|---|--------------------------|
| STATE OF MONTANA, |) | |
| |) | Cause No. _____ |
| Plaintiff, |) | |
| vs. |) | COMPLAINT FOR |
| |) | DECLARATORY AND |
| HOWARD ZEHNTNER and ZEHNTNER |) | INJUNCTIVE RELIEF |
| BROTHERS, LLC , |) | |
| |) | |
| Defendants. |) | |

INTRODUCTION

This action is brought by Attorney General Steve Bullock on behalf of the citizens of the State of Montana under his authority granted in Mont. Code Ann. § 2-15-501(6). The purpose of this action is to declare the status of Tenderfoot Road (County Road No. 13) as a petitioned county road, and to recognize the corresponding right of the public to use Tenderfoot Road to access thousands of acres of public land. Defendants are physically blocking the roadway with a locked gate and have refused to open or

remove the gate. Defendants' actions are in violation of state law and pose immediate harm to Montana's citizens who seek to hunt, fish, and recreate on public lands in the Tenderfoot drainage. The Attorney General brings this action to vindicate the public's right of access, to require removal of the encroachment, and to enjoin Defendants from blocking or otherwise interfering with lawful public use of the roadway in the future.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to Article VII, section 4 of the Montana Constitution and Mont. Code Ann. § 3-5-302.
2. Venue is proper in Meagher County under Mont. Code Ann. § 25-2-118.

PARTIES

3. This suit is brought by Attorney General Steve Bullock on behalf of the citizens of the State of Montana under the authority of Mont. Code Ann. § 2-15-501(6). Montana Code Annotated § 2-15-501(6), authorizes the Attorney General, "when required by the public service," to "prosecute or defend appropriate cases in which the state or any officer of the state in the officer's official capacity is a party or in which the state has an interest[.]"

4. 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.

5. The road that is the subject of this suit lies in Meagher County, northwest

of White Sulphur Springs, Montana, and is referred to as the “Tenderfoot Road.” The road crosses private land owned by Howard Zehntner and Zehntner Brothers, LLC. The road also crosses public land owned by the State of Montana and the United States government.

FACTUAL ALLEGATIONS

6. The Tenderfoot Road (County Road No. 13) is located in Meagher County, Montana. It is accessed from Highway 360, approximately 12 miles northwest of White Sulphur Springs. From Highway 360, the road travels in a northern direction for approximately 28 miles to its ending point at Tenderfoot Creek. In those 28 miles, the Tenderfoot Road crosses federal, state and private land.

7. Tenderfoot Creek originates in the Little Belt Mountains and flows west into the Smith River. There are trails along Tenderfoot Creek that provide both motorized and non-motorized access to thousands of acres of public land. From the point at which the road ends at Tenderfoot Creek, a person may walk along Tenderfoot Creek to a point overlooking the Smith River canyon, a distance of approximately ten miles. From the same location, a person may also access two popular National Forest System trails – Tenderfoot Creek Trail No. 342 and Bald Hills Trail No. 345.

8. The Tenderfoot Road has been used to access public and private lands for over 100 years.

9. The portion of Tenderfoot Road from Eagle Creek Park to Tenderfoot Creek is a petitioned county road. The Tenderfoot Road is the only legally-established

road that provides vehicle access to the intermingled private, state and federal lands in the Tenderfoot Creek drainage. *See* Declaration of R. Dennee attached as Ex. 1, ¶ 4.

10. On December 15, 1899, a petition was filed with the Board of County Commissioners in Meagher County, Montana, to establish a county road “[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.” The petition is signed by eleven residents and taxpayers of the vicinity. *See* 12/5/99 Petition attached as Ex. 2.

11. That same day (December 5, 1899) a handwritten petition was submitted to the Meagher County Commissioners to establish a county road in essentially the same location as the typed petition referred to above, with a more detailed description:

Petition to the Honorable Board of County Commissioners in the County of Meagher State of Montana. The undersigned legal voters who own real estate or who occupy real estate under the homestead laws of United States or under contract from the State of Montana hereby Petition you to lay out a new road beginning at the South East ____ of sec “1” one township twelve north Range ‘4’ four East then North to main travelled road thence across Eagle Creek and up the Eagle Creek Hills to the South East corner of John Moor’s fence thence in a north westerly direction to a point on town line between section one and sec six thence north on town line to the north east corner of section one thence East about 600 ft on correction line to the south East corner of section thirty six township 13 North Range 4 East thence North on town line one mile and a quarter, thence east to the west end of ____ which crosses J.C. Shannon’s Ranch, thence east through _____ to east and thence in a north easterly direction to road thence east along said raod to a point one hundred and fifty feet north of Eagle Creek School House thence east on main road to Bridge Creek thence on said road to Abel Burglund Ranch and thence on east side of said ranch through Eagle Creek Park to the Divide thence

down the south fork of Tenderfoot to a point on Tenderfoot above the mouth of the South Fork.

See 12/5/99 Handwritten Petition attached as Ex. 3. This petition is signed by 17 landowners.

12. The Reports of County Officers, Journal 6, page 522, dated March 7, 1900, states: “The report of A.J. Holland and Thomas Berkin, who viewed a road from Eagle Creek to Tenderfoot Creek by the way of Shannons was read considered and the same declared a County Road as viewed, and their report ordered filed.” See Journal 6, p. 522, Reports of county officers (Ex. 2).

13. Attached to the Report is a description and partial map of the road location. The description mirrors the language in the typewritten petition, except that the Township/Range was corrected to read “Township 13 North, Range 5 East,” instead of Township 13 North, Range 4 East. *See* Map attached to Journal 6, p. 522 (Ex. 2). The map that would depict the remainder of the road as it travels into Township 14 North, Section 5 East is missing from the public records. Ex. 1, ¶ 9.

14. In the early 1900’s, Government Land Office (GLO) surveyors prepared plat maps of the Tenderfoot area. The GLO map for Township 14 North, Range 5 East of the Principal Meridian, Montana, was surveyed in 1913 and approved by the Surveyor General in September 1916. *See* GLO Map attached as Ex. 4.¹ The plat map clearly identifies a roadway within sections 30, 31, and 32 of Township 14 North, Range 5 East, Meagher County, Montana. Ex. 1, ¶ 12.

¹ A certified copy will be filed with the Court when it is received from the federal government.

15. The Homestead Entry Survey No. 668 was surveyed in 1916 and approved by the United States Surveyor General in 1917. The map depicts a homestead area of 159.19 acres in section 30, Township 14 North, Range 5 East. The survey states that the plat “is strictly conformed to the field notes thereof on file in this office, which have been examined and approved.” *See* Homestead Entry Survey No. 668. Ex. 5.²

16. The notes accompanying Homestead Entry Survey No. 668 indicate the presence of a road across the homestead. Ex. 5. The homestead map contains two hash marks near corners 3 and 4 of the plat, which corresponds to the written description accompanying the survey and referring to a road entering and existing near the points along the HES boundary represented by the two hash marks. Ex. 1, ¶ 11. The entry and exit points depicted on the HES No. 668 correspond to the current location of the Tenderfoot Road. Ex. 1, ¶ 11.

17. In 1919, the land described in Homestead Entry Survey No. 668 was patented by the United States government to George Mongar under the Homestead Act of 1882 (the Mongar Homestead). *See* Patent 685948. Ex. 6.³ Defendants acquired the original Mongar Homestead in 1959.

18. The Homestead Entry Survey No. 160 was surveyed in 1913 and approved by the United States Surveyor General in 1914. This homestead consisted of 157.40 acres in section 30 and 32 T14N, R5E, Meagher County. The map clearly shows a road

² A certified copy will be filed with the Court when it is received from the federal government.

³ A certified copy will be filed with the Court when it is received from the federal government.

through the homestead along the South Fork of Tenderfoot Creek. *See* Homestead Entry Survey No. 160. Ex. 7.⁴ The road corresponds to the written description (field notes) accompanying the survey and referring to a road entering and crossing HES 160. Ex. 1, ¶ 10.

19. The homestead described in Homestead Entry Survey No. 160 was acquired by the State of Montana and is held in trust for the people of the State of Montana pursuant to Article X, section 11 of the Montana Constitution. Currently it is managed by the Montana Department of Natural Resources and Conservation and is leased to Zehntner Brothers, LLC for grazing. The Tenderfoot Road provides the only public road access to this state trust land. Ex. 1, ¶ 4.

20. A map of Meagher County prepared by Meagher County Surveyor, J.V. Potter, in 1936 shows a road that corresponds to the road description in the 1899 petitions (Exs. 2, 3) and the Record and Declaration of the Meagher County Commissioners (Ex. 2) as running past the Shannon Post Office to the District School House, and following the main travelled road across Bridge Gulch, and over the pass to a point on the South Fork of Tenderfoot Creek. *See* Map of Meagher County, Montana. Ex. 8.

21. The existing county road corresponds with the roadway description in the 1899 petitions, the entry in the Meagher County Commissioners' Journal, the Homestead Entry No. 160, and the Homestead Entry No. 668. Ex. 1, ¶ 13.

22. The Meagher County Commissioners have taken no formal action to

⁴ A certified copy will be filed with the Court when it is received from the federal government.

abandon the petitioned county road.

23. In 1998, former Meagher County Commissioner Errol Galt sent a letter to the United States Forest Service stating, "Meagher County records disclose that a petition to establish a County Road beginning at Eagle Creek to a point on Tenderfoot Creek above the mouth of the South Fork was viewed, a report was made and declared a County Road by Order of the County Commissioners March 7, 1900 as disclosed in Commissioner Journal #6, page 522. No search has been made for any petitions for abandonment or changes of the aforementioned road." Ex. 9.

24. At a meeting of the Meagher County Commissioners on May 17, 2011, the commissioners acknowledged the Galt letter and that the Commission had never denied that Tenderfoot Road was a county road. *See* 5/17/11 Minutes. Ex. 10.

25. In 1965, the Meagher County Commissioners and the U.S. Forest Service entered into written agreement to provide for cooperative maintenance of certain existing roads in Meagher County. The first road listed in the 1965 agreement is Tenderfoot Road (county designation) or South Fork Tenderfoot Road #6424 (forest service designation). Ex. 11. In 1987, the agreement was revised. The 1987 agreement contains a map showing the road extending down to Tenderfoot Creek in section 30, and showing cooperative maintenance ending near the ranch buildings in section 32, Township 14 North, Range 5 East. Ex. 11.

26. Defendants own three separate parcels of land in the Tenderfoot area. The other landowners in the area include the United States Forest Service and the Bair Ranch Foundation. The Tenderfoot Road provides the only public road access to these lands in

the Tenderfoot drainage. *See* Map attached as App. A to Ex. 1.

27. The Bair Ranch Foundation relies on the Tenderfoot Road to access its private lands in the Tenderfoot drainage. The Bair Ranch Foundation uses the Tenderfoot Road for commercial, educational, scientific, philanthropic and other management purposes.

28. The USDA Forest Service, the Rocky Mountain Elk Foundation, and the Tenderfoot Trust, a grassroots volunteer group, are working to acquire lands owned by the Bair Ranch Foundation to consolidate ownership of lands in the Tenderfoot Creek area, which are currently in a checkerboard pattern of ownership (“the Tenderfoot Acquisition”). The entire project area encompasses 8,220 acres. Ex. 12. To date, 3,400 acres have been acquired. The remaining 4,820 acres will be acquired over the next few years, with funding from private sources as well as federal funds. Ex. 1, ¶ 17.

29. The Tenderfoot Acquisition will provide high quality habitat for fish and wildlife, and extraordinary recreational opportunities for hiking, fishing, camping, hunting, and other forms of outdoor recreation. Ex. 12; Ex. 1, ¶ 18. The Tenderfoot Acquisition is supported by many state and local sportsmen’s groups, as well as the Meagher County Commissioners. In April 2012, the Commissioners passed a resolution supporting the land purchase in the Tenderfoot area and wrote letters supporting the same. Ex. 13.

30. The petitioned county road provides the only motorized public access to thousands of acres of land within the Tenderfoot Acquisition, the only motorized access route to the thousands of acres of state and federal lands in the drainage, as well as the

only motorized access route to the private lands in the drainage. Ex. 1, ¶ 4.

31. Defendants erected a gate across Tenderfoot Road in section 31, Township 14 North, Range 5 East, Meagher County, Montana, where the road passes through state trust land managed by the Montana Department of Natural Resources and Conservation (MDNRC). The gate was posted with a sign stating: "ROAD CLOSED." Ex. 14.

Another sign purported to authorize use of the road only with Defendants' permission. Ex. 15.

32. MDNRC has designated the Tenderfoot Road on state lands in Township 14 North, Range 5 East, open for motorized vehicle use under the Rules for Recreational Use of State Lands. This means anyone legally accessing the state lands in Section 30 and 32 may use motorized vehicles on the Tenderfoot Road for recreational purposes. Ex. 16.

33. In May 2012, at the urging of State officials, Meagher County requested that Defendants remove or open the gate. Defendants complied with the request by opening the gate. Nonetheless, the State has received information that the gate has been locked on occasion since that time. *See* Declaration of Sheriff J. Lopp attached as Ex. 17.

34. In August 2012, Defendants erected a new gate across the Tenderfoot Road. The new gate is located within the Mongar homestead, section 30, Township 14 North, Range 5 East, Meagher County, Montana, and is secured with a padlock and/or combination lock. Ex. 18.

35. On August 30, 2012, Defendants posted the following announcement in the Meagher County News: GATE LOCKED, ZEHNTNER BROTHERS LAND,

TENDERFOOT ACCESS TO TENDERFOOT CREEK OR FALLS WALK-IN ONLY.

Ex. 19.

36. As a result of Defendants' actions, the people of the State of Montana have no motorized access to public and private lands in the Tenderfoot Creek drainage.

37. As a result of Defendants' actions, the ability of MDNRC to access state trust land for management purposes is compromised.

CLAIMS FOR RELIEF

Plaintiff alleges as follows:

COUNT I

DECLARATORY RELIEF

Mont. Code Ann. §§ 27-8-101 to -313

38. Plaintiff incorporates by reference the allegations in paragraphs 1 to 37 of this Complaint.

39. This claim is brought under the Uniform Declaratory Judgments Act to settle the dispute with respect to the status of the road known as Tenderfoot Road.

40. The State is entitled to a declaration that the road known as Tenderfoot Road, from Eagle Creek Park to the point at which it ends at Tenderfoot Creek, is a petitioned county road that has not been legally abandoned by the Meagher County Commissioners.

COUNT II

INJUNCTIVE RELIEF

Mont. Code Ann. §§ 27-19-101 to -105

41. Plaintiff incorporates by reference the allegations in paragraphs 1 through 37 of this Complaint.

42. Montana law authorizes the grant of an injunction to prevent the breach of an obligation existing in favor of the applicant. Mont. Code Ann. § 27-19-102.

43. If this Court rules that Tenderfoot Road is a public roadway that has been illegally blocked, adequate relief will not be afforded unless Defendants are precluded from engaging in any future activity that prevents, threatens, or intimidates the public in their lawful use of the road.

44. The court should enjoin the Defendants from interfering with public access at any point on the publicly declared portion of Tenderfoot Road, including posting of any signs without permission.

REQUEST FOR RELIEF

Wherefore, the State of Montana as Plaintiff requests the following relief:

1. The Court should declare the portion of Tenderfoot Road, from Eagle Creek Park to the point at which it ends at Tenderfoot Creek, to be a petitioned county road that has not been legally abandoned by the Meagher County Commissioners.

2. The Court should order Defendants to remove the gate in section 30, Township 14 North, Range 5 East, Meagher County, Montana.

3. The Court should order Defendants to remove the gate in section 31, Township 14 North, Range 5 East, Meagher County, Montana.

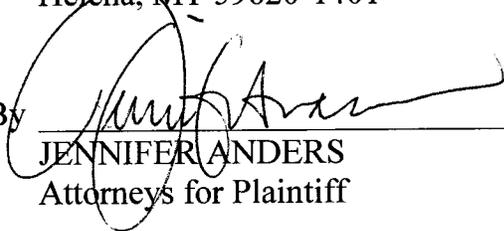
4. The Court should permanently enjoin Defendants from erecting or maintaining an encroachment or otherwise interfering with public access at any point on the publicly declared portion of Tenderfoot Road.

5. Any other relief deemed appropriate.

DATED this 11th day of October, 2012.

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