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IN THE SUPREME COURT OF THE STATE OF MONTANA
CAUSE NO: DA 24-0492

ROBERT SAYERS,
Plaintiff and Appellant,

vs.

CHOUTEAU COUNTY,
Defendant and Appellee.

BRIEF OF APPELLANT

On Appeal from the Montana Twelfth Judicial District Court,
Chouteau County, the Honorable Kaydee Snipes Ruiz, Presiding

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APPELLANT**

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I. Introduction

In this case, Plaintiff/Appellant Robert Sayers (“Sayers”), a landowner in Chouteau County, filed a declaratory action requesting the Montana Twelfth Judicial District Court (“District Court”) review Defendant/Appellee Chouteau County’s (“County”) records and declare that a road providing access to his land was made a county road in the early 1900s. The District Court converted the action to a writ of review and, sua sponte, dismissed it as time barred. It additionally determined that the Chouteau County Board of County Commissioners (“Board”) had never opened the road and had also abandoned it by petition. Sayers’ appeal asks this Court to declare the road a county road or in the alternative reverse and remand for additional proceedings as a declaratory action.

II. Statement of Issues

1. Did the District Court err when it sua sponte dismissed the writ of review as time barred?
2. Did the District Court err when it misapplied the appropriate standard of review for a writ review on the Board’s jurisdiction to abandon Lippard Road and misapprehend the evidence?
3. Did the District Court err by reviewing this case as a writ of review under Mont. Code Ann. § 27-25-101, et seq., instead of as a declaratory action pursuant to the Uniform Declaratory Judgments Act (“UDJA”)?

III. Statement of the Case

This case involves a dispute over the status of a road in Chouteau County (“Lippard Road”)¹. This Court has previously adjudicated the status of a connecting road to the southeast (“Lippard Road South”), which is not in dispute, in *Sayers v. Chouteau Cnty.*, 2013 MT 45. Lippard Road also has a connecting road to the north (“Lippard Road North”), the status of which is not in dispute.

Sayers initiated this case as a declaratory action, requesting a declaration that Lippard Road had been established as a county road in the early 1900s by both petition and by historical use of the public. Compl., ¶¶ 1 & 3.

The County answered by denying Lippard Road was a county road and affirmatively alleging abandonment. Chouteau County Answer to Compl. , ¶¶ 3 & 4 (“Answer”). The County alleged as its fourth affirmative defense that the matter should be determined as a writ of review. Answer, p. 1, ¶ 1 and p. 7.

The parties stipulated to the relevant public records (hereafter collectively “Records”²), with one exception. Notice of Filing R. on Appeal, pp. 1-2. Sayers objected to a map that had been filed with the Chouteau County Clerk and Recorder (“Clerk and Recorder”) in 1919 (“1919 Map”), two years after the Board had

¹ Lippard Road is depicted on a demonstrative exhibit included in the appendix.

² The Records were filed with the District Court and marked as docket numbers 15-21. Each contains historical records marked with a bates stamp that is prefixed with “CC”. Contained in the appendix is all of the Records arranged in sequential order by bates stamp. Pinpoint references are presented herein as Doc. ## at CC ##.

concluded its deliberations on Lippard Road. Notice of Filing R. on Appeal, p. 1 at footnote 1.

While the case was still pending as a declaratory action, Sayers filed a motion in limine to exclude the 1919 Map. Pl.’s Mot. in Lim. and Br. in Supp., p. 1. The District Court denied Sayers’ motion “in an exercise of judicial discretion,” ruling that the 1919 Map is relevant and further stating that “[u]ltimate admissibility at trial or weight given to the evidence remain to be seen.” Order³, p. 2. In the same order the District Court ordered the parties to present arguments on whether the case should be tried under the UDJA or as a writ of review. Order, p. 3. The District Court subsequently determined that a writ of review was appropriate and ordered the parties to brief and argue the case accordingly. Order for Writ of Rev., pp. 1-2.

The parties did just that. See generally Def.’s Br. - Writ of Rev. & Pl.’s Br. in Opp’n to Def.’s Writ of Rev. on Abandonment. The County argued both that Lippard Road was a county road and that it had been abandoned. Def.’s Br. - Writ of Rev., pp. 3, 5, & 6. The County relied on the Record, as well as the contested 1919 Map. Def.’s Br. - Writ of Rev., pp. 3. Sayers argued that the Record could not establish abandonment by petition because the Board lost its jurisdiction to abandon

³ See “Order” issued October 12, 2023 (Doc. 60).

when it failed to substantially comply with the applicable statutes. Sayers also argued that the Board outright rejected the petition to abandon. Pl.'s Br. in Opp'n to Def.'s Writ of Rev. on Abandonment, pp. 3-5 & 15. 5, & 6.

The Court then relied on evidence outside of the Record, such as the absence of construction and the contested 1919 Map, and ruled in favor of the County. It found that the Record supported the County's assertion that the Board had not lost jurisdiction to abandon, and had, in fact, abandoned Lippard Road. Order Following Writ of Rev., p. 15.

Shockingly, without notice to either party, the District Court, sua sponte, also dismissed the case as untimely:

This Court finds that this writ of review of the 1916 decision of the Chouteau Board of County Commissioners to abandon the relevant section of Lippard Road is untimely and time-barred under any version of Montana's Civil and appellate procedural rules, and therefore, is dismissed.

Order Following Writ of Rev., p. 10.

Final judgment was entered on June 25, 2024, notice of entry of judgment was served on Sayers on June 26, 2024, and Sayers timely filed Notice of Appeal on August 19, 2024. See generally J. in Favor of Def. Chouteau County and Notice of Entry of J.

IV. Statement of the Facts

1. The Initial Petition to Establish Lippard Road as a County Road and the Viewers' Recommendation to Also Establish Lippard Road North as a County Road.

On July 1, 1913, a valid petition ("Petition") was filed to establish Lippard Road as a county road along the following route:

[B]eginning at a point in the Marias and Big Sandy county road near the N[orth] W[est] cor[ner] of Sec[tion] 29, T[ownship] 26, N[orth], R[ange] 10 E[ast], running thence east, on section lines as nearly as practicable, about 2 3/4 miles, thence southeasterly following the present traveled road between two coulees about one mile to the section line between Sec[tions] 26 and 27.

Doc. 18 at CC 4-6.

The Petition was sufficiently executed; it identified residents along Lippard Road, and it described Lippard Road. Doc. 18 at CC 5-6. The Petition represented Lippard Road to be necessary for the convenience of public travel because it had been in use for twenty-five years and that construction costs would not exceed one dollar. Doc. 18 at CC 5-6. Later, affidavits were timely filed averring Lippard Road had been in use since 1892. Doc. 18 at CC 24-26; Doc. 19 at CC34; and Doc. 21 at CC 37.

The Board appointed Viewers to investigate Lippard Road and their oaths of office were filed. Doc. 18 at CC 8; Doc. 17 at CC 56-57; and Doc. 18 at CC 8-9.

Importantly, these were the only Viewers appointed by the Board to investigate Lippard Road, Lippard Road South, or Lippard Road North. Viewers were never appointed to investigate the abandonment petition which was filed two years later.

The Viewers investigated Lippard Road (finding it necessary for access to “Lippard”), notified owners of property impacted by it, and ascertained said owners’ consent thereto. Doc. 17 at CC 56-57; and Doc. 18 at CC 12-14. The Viewers drafted and filed the Viewers’ Report (“Report”) with the Clerk and Recorder. Doc. 17 at CC 56-57; and Doc. 18 at CC 11. None of the foregoing ever occurred with respect to the later filed petition to abandon.

The Viewers refined the description of Lippard Road and recommended it be made a county road along the petitioned route, with the amendment that an additional northerly route (Lippard Road North⁴) also be made a county road. Doc. 17 at CC 56-57; and Doc. 18 at CC 12.

The Board scheduled a hearing on the Petition for September 9, 1913 and served notice of the same. Doc. 17 at CC 57. The Board thereafter deferred action on the matter until September 29, 1913 stating its need for additional “investigation”.

⁴ The status of Lippard Road North is not in dispute

Doc. 17 at CC 57. By contrast, there is no evidence that the petition to abandon was subject to additional “investigation”.

The Board also pursued the establishment of Lippard Road by historical use. It requested the Chouteau County Attorney’s legal opinion on whether Lippard Road, being an old and commonly traveled road, could be established as a county road other than via a petition. Doc. 18 at CC 15-16. On November 5th, 1913, the Board was advised that pursuant to what is now referred to as the “curative statute”⁵, if affidavits from two or more people were secured that attested to ten years of continuous use, Lippard Road could be declared a county road by virtue of the public’s use. Doc. 18 at CC 15.

Affidavits conforming to the legal opinion did thereafter appear in the Board’s Records. The affidavits stated as follows:

We, the undersigned citizens and residents of Chouteau County Montana, hereby certify that on or about the first of November 1913, we made affidavit to the effect that there was a road leading from Sayre in a westerly direction and formed a junction with Big Sandy and Ft. Benton road at top of hill about three miles north of Loma. This road had been in use by the undersigned, Charles Lippard and others, since 1892 to our personal knowledge.

Doc. 18 at CC 26; and Doc. 19 at CC 34.

⁵ Section 3. All highways, roads, lanes streets, alleys, courts, places and bridges laid out or erected by the public, or now traveled or used by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such by the partition of real property, are public highways. Section 1339, Revised Codes of Montana (1907) (Amended by ch 72, Ch. I, §, 1913 Mont. Laws 139).

It is important to note that, without any supporting evidence, the District Court determined that the affidavits had been signed on November 1, 1913. Writ of Rev. at p. 6. The correct date is that of the notary public's verification on the affidavits as that is the only evidence of the signature date and it clearly states the signatories had "subscribed and sworn to" the affidavits on October 30, 1915. Doc. 18 at CC 26; and Doc. 19 at CC 34.

2. The Establishment of Lippard Road as a County Road

The Board continued its investigations, deferring action three additional times, until June 5, 1914. Doc. 17 at CC 57. On said date, the Board accepted the Report, declared Lippard Road to be a "public highway"⁶, instructed the road supervisor open it to the public, and directed the County Surveyor to survey and plat it. Doc. 17 at CC 57. By this declaration, Lippard Road became a county road. By contrast to the Board's action on the Petition, viewers were never appointed for the abandonment petition and a viewers' report on abandonment never existed for the Board to accept or reject.

⁶ The terms "county road" and "public road" are used synonymously herein to refer to a "public highway". "Public highways" in The General Highway Act of 1915 are analogous to "county roads" and "public roads" for purposes of this case because the dispute revolves around whether (1) Lippard Road was properly declared a county road and (2) whether it was abandoned. In that context the distinction between a "county road", a "public road" and a "public highway" is immaterial.

Notices were posted in three public places on July 18, 1914 that Lippard Road was to be opened as a county road. Doc. 17 at CC 58; and Doc 18 at CC 18. The route for Lippard Road in the posted notices matches the description in the Report. See Doc. 18 at CC 12 and Doc 18 at CC 18. By comparison, notice of Lippard Road being altered or abandoned was never publicly posted as statutorily required.

3. The Board's Failure to Comply with Statutes on Abandonment

Approximately one year after Lippard Road was declared a county road, on August 4, 1915, the Board received an abandonment petition. Doc. 18 at CC 19-22. The abandonment petition was a handwritten letter, sufficiently executed by "residents and taxpayers". Doc. 18 at CC 21. The road description therein was not identical to the Viewers' description of Lippard Road (compare Doc. 18 at CC 12 and Doc. 18 at CC 21), but it was close enough that the Board considered taking up the matter. Doc. 18 at CC 21 and Doc. 17 at CC 53.

Additionally, Attorney H.S. McGinley offered the Board a typewritten letter of objection dated August 4th, 1915 on behalf of his five clients who were "objecting" to Lippard Road. Doc. 18 at CC 22.

The Board scheduled a hearing on the petition for October 5, 1915. Doc. 18 at CC 19-20. However, without explanation, the Board deferred action. Doc. 18 at CC 20. The Record is devoid of any indication that the Board held the statutorily

required hearings to appoint viewers⁷ on abandonment. The District Court acknowledged the absence of minutes, irrespective of that fact, found that a hearing had been held on October 5. Writ of Rev. at p. 5.

The Records also contain a letter to the Board dated October 5, 1915 from Rollin M.G. Howell, a landowner along Lippard Road who had a proposal (“Howell Letter”). Writ of Rev. at pp. 5-6. Howell proposed the Board abandon Lippard Road in exchange for deeds from him granting easements across Howell’s property. Doc. 18 at CC 27. It is noteworthy that Howell never issued to the County said deeds as he had proposed. See Doc. 18 at CC 27, ¶ V.

Regardless, the Records reflect that the Board never appointed viewers, investigated abandonment, reviewed a viewers’ report, held a hearing on abandonment, nor approved or rejected a viewers’ report. The District Court found a handwritten passage affixed to the Howell Letter (stating “The above proposition is hereby accepted this 7th day of September 1916”), and signed only by the Board chairman, to be evidence of the Board substantially complying with the abandonment statutes. See Doc. 18 at CC 27; and Writ of Rev. at p. 7.

⁷ See Section 1364, 1915 Supplement to Revised Codes of Montana (1907) (hereafter “Rev. Code Mont. § ____ (1915)).

Chronologically, in November of 1915 the affidavits of historical use of Lippard Road appear next in the Board's Records. Doc. 18 at CC 26; and Doc. 19 at CC 34. The affidavits attested to the affiants' use of Lippard Road since 1892. Doc. 19 at CC 34. Though the District Court found the affidavits to be meaningless on the basis of incorrectly assessing the date of execution to be November 1, 1913, as was noted above, it is hard to ignore the context and timing of the affidavits being filed. The Board certainly found them meaningful otherwise they would not appear in the Records.

4. The Board Rejects Abandonment

Two months later, on January 5, 1916, the Board convened and its minutes state as follows:

In the matter of the Lippard Road in Twp. 26 N., Rng. 10 E.,

It appearing to the Board that certain parties through whose land this proposed road runs object to opening said road; it also appearing that an old road following approximately the same route was traveled by the public at the time of the adoption of the Montana Codes of 1895 and by virtue of Sec. 2600 thereof has been a public highway since said time, no action toward abandonment ever having been taken by the proper officials, and the county not having lost said right-of-way by adverse possession or other operation of law;

The Board of County Commissioners therefore declared that said old road is still a bona fide public highway and it is hereby ordered that the said road be immediately restored to public travel and to that end the road supervisor of [R]oad District Number 40 is hereby ordered and directed to forthwith remove

any and all fences or other encroachments of whatsoever kind of character now erected or maintained over or upon the said road.

Doc. 21 at CC 37-38.

The above-quoted minutes appear verbatim in the Board's Records a second time in a letter dated January 15, 1916. Doc. 17 at CC 55-56; and Doc. 18 at CC 29-33. The letter authored by the County Clerk was served via certified registered mail on Mr. W.H. Arrasmith of Loma, and instructed him to "take due notice and govern yourself accordingly". Doc. 17 at CC 55-56; and Doc. 18 at CC 29-33.

The District Court found that Lippard Road was the only road subject to the Petition and that Lippard Road North, "[t]he second northerly route[,] was not petitioned to be abandoned..." Writ of Rev. at p. 4. Then in the selfsame Order the District Court contradicts itself by finding that "[t]here is not enough information in the Record to determine that the January 5, 1916, minutes relate to or are a rejection of the 1915 Petition to Abandon" on the basis that the minutes could apply to either Lippard Road or Lippard Road North. Writ of Rev. at pp. 12-13.

5. The Board's Contradictory Reconsiderations

Nine months later, on September 7, 1916, a flurry of activity appears in the Records. Doc. 17 at CC 57-58. As noted above, the Board chairman's signature is affixed to the Howell Letter, along with "The above proposition is hereby accepted this 7th day of September, 1916." Doc. 18 at CC 27. The Viewers' Report is again

accepted and it is again noted that notices of opening Lippard Road were properly posted on July 18, 1914. Doc. 17 at CC 57-58. Abandonment is referenced. Doc. 17 at CC 57. The Records contain two route recapitulations which do not match the description in the Viewers' Report. Doc. 15 at CC 40 and Doc. 17 at 57-58. There is no indication that a hearing was held, nor is there evidence that landowners were provided notice of any impending action on Lippard Road.

The Board's reconsiderations, as they appear in the Board's Proceedings book, are presented in two complicated run-on sentences. The passage's structure is convoluted due to the use of long strings of prepositional phrases and poorly defined clauses. See Doc. 15 at CC 40 and Doc. 17 at 57-58.

The District Court ultimately concluded that "in 1916" the Board abandoned Lippard Road despite the Record demonstrating that the Board only complied with the statutes on abandonment in one respect, receiving a petition to abandon. Writ of Rev. at pp. 12-15.

V. Standards of Review

The applicability of a particular statute of limitations is a question of law. *Gulf Ins. Co. v. Clark*, 2001 MT 45, ¶ 13. This Court reviews for correctness a district court's application of the statute of limitations. *Id.*

A district court's decision to grant or deny a petition for a writ of review is discretionary. *Bugli v. Ravalli Cty.*, 2019 MT 154, ¶ 19 (“Bugli II”); and Mont. Code Ann. § 27-25-102. Both this Court’s review and the district court's review of a decision of a board of county commissioners on a writ of review is limited to determining whether the board exceeded its jurisdiction. *Williams v. Stillwater Bd. of Cnty. Comm'rs*, 2021 MT 159, ¶ 11; and Mont. Code Ann. §§ 27-25-102(2), & 303.

This Court reviews the district court’s adjudication of a writ of review for an abuse of discretion. *Bugli II*, 2019 MT 154, ¶ 19 (citations omitted). A district court’s evidentiary rulings are also reviewed by this Court for an abuse of discretion. *State v. Bonamarte*, 2009 MT 243, ¶ 13 (citations omitted). A district court abuses its discretion when it has acted arbitrarily without conscientious judgment or has exceeded the bounds of reason. *Bugli II*, 2019 MT 154 at ¶ 20 (citations omitted).

Although the district court’s judicial discretion is afforded deference, it must align with legal principles; therefore, this Court’s review is plenary when a discretionary ruling is based on a legal conclusion, requiring this Court to assess whether the law was correctly interpreted. *State v. Price*, 2006 MT 79, ¶ 17 (citations omitted). Conclusions of law are reviewed de novo and this Court is free to reach

its own conclusions based on the record before it. *McCauley v. Thompson-Nistler*, 2000 MT 215, ¶ 18 (citations omitted).

“As a general rule, this Court will not disturb a district court's determination that declaratory relief is not necessary or proper unless the district court abused its discretion.” *Donaldson v. State*, 2012 MT 288, ¶ 7 (citations omitted). This Court “review[s] for correctness a district court's interpretation of law pertaining to a declaratory judgment ruling.” *Newman v. Scottsdale Ins. Co.*, 2013 MT 125 (citations omitted).

VI. Summary of the Argument

1. A Writ of Review on the Board’s Jurisdiction to Abandon is not Subject to the General Five-Year Statute of Limitation.

The District Court erred when it sua sponte dismissed the writ of review as time barred by Mont. Code Ann. § 27-2-231, the general five-year statute of limitation. Had the Board acted in excess of its jurisdiction by abandoning Lippard Road, the District Court’s dismissal would have the effect of retroactively granting the Board original jurisdiction, an act which would be in excess of the District Court’s authority. Additionally, sua sponte dismissal, without notice or the opportunity to argue the issue, violated the parties due process rights.

2. Did the District Court err when it misapplied the appropriate standard of review for writ of review on the Board's jurisdiction to abandon Lippard Road?

In order to have jurisdiction to abandon Lippard Road, the Board was required to substantially comply with the statutory procedures on abandonment. Those procedures required receiving a petition to abandon, appointment of viewers to investigate the proposed abandonment, identifying and notifying consenting and non-consenting parties affected by the proposal, and holding a hearing on abandonment for the purpose of accepting and considering evidence. The District Court found that the Board accepting a petition to abandon was sufficient statutory compliance to abandon Lippard Road. The District Court erred as a matter of law because substantial compliance with the statute requires compliance with the statutory mandates promulgated by the legislature.

The District Court also misapprehended the evidentiary Record and issued arbitrary findings. Where the District Court found no record of a hearing on abandonment, it interpreted that evidence as implying a meeting. Where the District Court found minutes of a Board meeting convened to reject the abandonment petition on Lippard Road, the District Court found that the minutes were impossible to decipher. The District Court also misapprehended the evidence when it implied

from the signature of the Board Chairman on a proposal letter advocating for abandonment that Lippard Road had been abandoned.

Interpretations of the Record that lead to absurd results are arbitrary and capricious. In addition to abandonment being an act in excess of jurisdiction, the County failed to offer substantial evidence of a clear intent to abandon and an act of abandonment. The District Court's interpretation of the evidence of Record justifies this Court's reversal.

3. Did the District Court err by reviewing this case as a writ of review under Mont. Code Ann. § 27-25-101, et seq., instead of a declaratory action pursuant to the Uniform Declaratory Judgments Act ?

Either Lippard Road was a county road and abandonment is the primary issue in this case, or Lippard Road's status as a county road is the issue presented. The District Court conflated the review standards for the UDJA and a writ of review by failing to address the underlying issue presented.

Sayers claims, as supported by the Record, and the County denies, in spite of the Record, that all of the necessary legal steps were taken to create Lippard Road as a county road. The County additionally argued Lippard Road was abandoned by petition. The District Court ruled that Lippard Road was never opened as a county

road and that it was abandoned by petition. A declaratory action is appropriate if the creation of a county road is at issue. A writ of review is the exclusive remedy for reviewing an abandonment proceeding.

In the first alternative, the District Court erred when it denied Sayers' motion to dismiss the County's fourth affirmative defense alleging that the action should be tried as a writ of review. This Court should reverse the District Court's application of the writ of review standard and remand for proceedings under the UDJA for the purpose of determining whether the Record indicates Lippard Road was made a county road.

Alternately, if the Court determines that Lippard Road was declared a county road, the Court should reverse the District Court's abandonment finding. The scope of the District Court's review went well beyond that which is permitted on a writ of review by including post-September 7, 1916 evidence, which could not have been considered by the Board. This Court should either reverse and remand with instructions that the District Court permit both the County and Sayers to offer evidence not considered by the Board, or this Court should review the Board's pre-September 7, 1916 Records and simply reverse the District Court's abandonment decision as unsupported by the Record and remand with instructions to have the road surveyed and to determine damages.

VII. Arguments

1. The District Court Erred when It Applied a Statute of Limitations to the Board's Jurisdictional Authority.

a. The District Court Improperly Granted the Board Original Jurisdiction by Application of the Statute of Limitations.

The District Court erred when it sua sponte dismissed the writ of review as time barred by a five-year statute of limitations. A writ of review contemplates the jurisdictional validity of an act for which there is no other appeal. Mont. Code Ann. § 27-25-102(2). An act of abandonment made without jurisdiction is void, and a district court reviewing such an act cannot belatedly grant jurisdiction to abandon through the application of a statute of limitations. *Heinle v. Fourth Judicial Dist. Court*, 260 Mont. 489, 494-95 (1993) (with respect to a judgment that was void for lack of jurisdiction, the district court could not compel a party to employ the rules of procedure to challenge the district court's invalid ruling).

The District Court employed the statute of limitations to dismiss Sayers' case as untimely without considering jurisdiction by relying on this Court's holding in *Jones v. Mont. Nineteenth Judicial Dist. Court*, 2001 MT 276. Writ of Rev. at pp. 8-10. *Jones* "establish[ed] the time frame within which petitions for review of contempt orders must be filed...." *Jones*, 2001 MT 276 at ¶ 6 (emphasis added). In

Jones, this Court imposed a 30-day deadline under Rule 5, M.R.App.P., for filing a timely notice of appeal to petitions for writ of review challenging contempt orders. *Id.* at ¶ 22. This Court explained its holding by distinguishing contempt actions from other types of writs: "[t]o set such indefinite time frames for [petitions for writs of review] ... would discourage judicial economy and would erode the inherent contempt power of the courts, where the proceedings requiring review are straightforward, definite, and final." *Id.* at ¶ 14.

The District Court held that determining whether a board of county commissioners complied with the law to obtain jurisdiction to abandon a county road is analogous to this Court's review of a district court's contempt ruling. Writ of Rev. at p. 9. The District Court disregarded the deliberately restricted scope of *Jones*: "our holding here only applies to petitions for writs of certiorari to review contempt proceedings...." *Jones*, 2001 MT 276 at ¶ 23.

The District Court's expansive interpretation of *Jones* is at the direct expense of a more fundamental issue, jurisdiction. The District Court effectively employed the statute of limitations to grant jurisdiction to the board of county commissioners.

An indispensable requirement for granting a writ of review is an act in excess of jurisdiction. Mont. Code Ann. § 27-25-102(2). Jurisdiction is a condition precedent to the legal authority to act and is so fundamental that it cannot be waived

and may be raised at any time during the proceeding or after. *Kahl v. Polkow*, 2024 MT 248, ¶ 18; see also Mont. Code Ann. § 1-3-230 (“Time does not confirm a void act.”).

A void act is but “a dead limb upon the judicial tree, which may be lopped off at any time”. *Lowery*, 122 Mont. 571, 584 (1949) (quoting *Lind v. Stubblefield*, 1929 OK 143, ¶ 16, 138 Okla. 280, 282, 282 P. 365, 367). Even “‘a curative statute cannot breathe life and validity into . . . void . . .’” acts. *McWilliams v. Clem*, 228 Mont. 297, 308 (1987) (quotations omitted). “It is elementary that when the judgment roll upon its face shows that the court was without jurisdiction to render the particular judgment, its pronouncement is in fact no judgment. It cannot be enforced. No right can be derived from it. *All proceedings founded upon it are invalid and ineffective for any purpose.*” *Ciotti v. Hoover*, 237 Mont. 462, 466 (1989) (emphasis original) (quotation omitted).

The rules of procedure cannot be used to cure an act that originally suffered from an absence of jurisdiction because the act itself is void, as if it never occurred. *Heinle*, 260 Mont. 489, 494-495 (1993). Likewise, “[s]tatutes of limitations do not apply to actions that are void ab initio. *Fasbender v. Lewis*, 2007 Mont. Dist. LEXIS 509 at ¶ 17, *aff’d*, *Fasbender v. Lewis & Clark County Bd. Of County Comm’rs*, 2009 MT 323.

b. The District Court's Dismissal Was Improper Because the County Did not Allege the Statute of Limitations as an Affirmative Defense and the District Court Deprived the Parties of their Respective Due Process Rights.

The District Court's sua sponte dismissal of Sayers' claim as time barred by the statute of limitations was improper because the parties were not permitted to present their arguments before the dismissal. It is an error for a trial court to sua sponte dismiss claims based on the statute of limitations where it has not been raised as an affirmative defense as required by Rule 8(c), M.R.Civ.P. *Estabrook v. Baden*, 284 Mont. 419, 423 (1997).

“The plain language of M. R. Civ. P. 8(c) requires a party affirmatively to set forth the statute of limitations defense by answer.” *Meadow Lake Estates Homeowners Ass'n v. Shoemaker*, 2008 MT 41, ¶ 28. It is fundamental to Rule 8(c), M.R.Civ.P. that affirmative defenses be timely pleaded so as to provide opposing parties fair notice that while the cause of action may be otherwise be justified, some statute permits avoidance of liability. *Bitterroot Int'l Sys. v. W. Star Trucks, Inc.*, 2007 MT 48, ¶ 49 (citations omitted). Circumvention of the rule has been consistently discouraged by this Court. A party's failure to timely plead an affirmative defense necessarily results in waiver thereof. *Meadow Lake Estates*,

2008 MT 41, ¶ 29 (affirmative defense deemed waived when first asserted after summary judgment ruling) (citations omitted).

The County never pleaded the statute of limitations. The parties did not have an opportunity to argue the issue. Writ of Rev. at p. 8. The District Court instead relied on the County having affirmatively pleaded laches in its answer, reasoning that laches is a “a doctrine that exists where there has been an unexplainable delay of such duration or character as to render the enforcement of an asserted right inequitable”. Writ of Rev. at p. 8.

If principles of fairness and notice are implicated by a party’s failure to affirmatively plead the statute of limitations, the same must be implicated when a district court does the same on a party’s behalf. In *Estabrook*, this Court reversed a district court that, sua sponte, suspended a party’s Rule 8(c), M.R.Civ.P. waiver:

We conclude that under Rule 8(c), M.R.Civ.P., a "party" must raise the affirmative defense of the statute of limitations. If the party fails to appear or, having appeared, fails to raise the statute as a defense, the defense is waived and may not thereafter be raised by the court, sua sponte, on the party's behalf. *Estabrook v. Baden*, 284 Mont. 419, 423. (1997)

Unlike this case, when a procedural time limitation is applicable (as opposed to substantive), it behooves a court to consider the due process implications of dismissing a claim on its own initiative:

When a court is inclined to make such a dispositive ruling on an issue not raised by the parties, the court must first "afford the parties fair notice and an opportunity to present their positions before acting on its own initiative to dismiss a petition as untimely.

Spencer v. Beck, 2010 MT 256, ¶ 16 (quotations omitted).

The District Court erred in dismissing Sayers' claims as untimely. The County failed to affirmatively plead statute of limitations, thus waiving the defense. The District Court erred in suspending the waiver by effectively affirmatively alleging the statute of limitations on the County's behalf.

**2. The Board Did Not have Jurisdiction to Abandon Lippard Road;
the Board Actually Rejected Abandonment.**

***a. The Board's Act of Abandonment Did Not Substantially Comply with
the General Highway Law and Was Therefore Invalid for Want of
Jurisdiction.***

A writ of review invalidating the Board's act of abandonment must be granted if the Board's act of abandonment was made in excess of its statutorily granted jurisdiction. Mont. Code Ann. §§ 27-25-102 & 303; *Bryant Dev. Ass. v. Dager v. Rector's Garage*, 166 Mont. 252, 256 (1975).

Jurisdiction is the power to hear and determine a particular action. *Mailey v. Bd. of Cnty. Comm'rs*, 142 Mont. 505, 522 (1963) (citations omitted). Properly

invoking jurisdiction is the only method by which the Board can assume authority to act. See *Miller*, 135 Mont. 409 (1959) (ordering a county commission vacate its jurisdictionally void abandonment of a street). Jurisdiction, once invoked, may still be lost and any act or declaration thereafter is necessarily void. *Chennault v. Sager*, 187 Mont. 455, 462-463 (1980). Abandonment, supported by clear and convincing evidence, is void without jurisdiction. *State v. Fisher*, 2003 MT 207, ¶¶ 9-10 (citations omitted); see also *DeVoe v. State*, 281 Mont. 356, 368 (1997) (holding the adoption of a formal resolution to abandon, made at a regularly scheduled meeting of the board of county commissioners, would be insufficient, in itself, to constitute an official act of abandonment).

In 1915 the legislature passed the General Highway Law (Rev. Code Mont. §§ 1337-1404 (1915)), the exclusive procedure by which the Board could invoke jurisdiction to abandon Lippard Road. *Chennault*, 187 Mont. 455, 459 & 463 (1980) (citations omitted); see also *Lee v. Lee*, 2000 MT 67, ¶ 20 (citations omitted); see also *Smith v. Russell*, 2003 MT 326, ¶ 11. It provided that “[a]ll public highways once established must continue to be public highways until abandoned by order of the board of county commissioners.” Rev. Code Mont. § 1341 (1915).

The Board’s jurisdiction to abandon is conditioned by statute on (1) establishing that abandonment was necessary for the public, (2) providing notice to

affected members of the public, and (3) preceding the abandonment by a public hearing. Rev. Code Mont. §§ 1341, 1349(4), and 1367 (1915). To satisfy said conditions, the Legislature required the Board do the following:

- Receive an abandonment petition signed by ten freeholders that details the road proposed for abandonment. Rev. Code Mont. §§ 1362 and 1363 (1915).
- Appoint Viewers who, who under oath, discharge the following duties:
 - Identify and provide notice to landowners potentially affected by the abandonment;
 - Ascertain by signature landowners consent;
 - Assess each landowners damage claims;
 - Identify any additional costs associated with the proposed abandonment;
 - Produce a report to the Board containing the Viewers' recommendation and (1) describing the proposal and its estimated cost, (2) naming all non-consenting landowners, (3) estimating damages per landowners, (4) naming all non-resident landowners did not received notice of the proposal, (5) describing feasibility/desirability/cost of alternatives to the proposed abandonment, and (6) stating whether the Viewers believe the proposed abandonment would be necessary for the public's convenience.

Rev. Code Mont. § 1366 (1915).

- Set a hearing, posting notice thereof and mailing the same to non-consenting landowners, to consider the Report. Rev. Code Mont. § 1367 (1915).
- Hold the hearing, at which time the Board must (1) accept evidence from any interested party, (2) ascertain and declare damages due based on the benefits and damages accruing to each person, and (3) then officially act by declaring the Report either approved or rejected. Rev. Code Mont. §§ 1367 and 1368(a) (1915).

However, the Board may only approve a Report proposing abandonment if the Board determines that the road proposed to be abandoned is “not necessary for the public convenience.” Rev. Code Mont. § 1349(4) (1915).

The District Court correctly determined that the Board only complied with the statutory procedure by receiving a petition to abandon. Writ of Rev. at p. 11-12. The District Court also found, in the absence of evidence thereof, that the Board held a hearing on abandonment on October 5, 1915. Writ of Rev. at p.5. No evidence is presented that the Board appointed Viewers, or ever set, noticed and held a hearing on the merits of the petition to abandon.

The Board need not strictly comply with the statutes to maintain jurisdiction. However, “[i]f counties were allowed to completely ignore the mandates of the statutes, they would be of no legal consequence... and [t]his could not have been the

intent of the legislature.” *Madison County v. Elford*, 203 Mont. 293, 302 (1983). Instead, the Board must *substantially comply* with the abandonment statutes in order to invoke and maintain jurisdiction to abandon a county road. *Id.* See also *Chennault v. Sager*, 187 Mont. 455 (1980) (holding that there must be substantial compliance with statutory procedures before the public’s interest in any public land may be abandoned).

This case does not involve claims that the Board's analysis was insufficiently thorough to abandon Lippard Road. Even a minimal analysis on record can sometimes show substantial statutory compliance. By contrast, there is almost no evidence of compliance with the statute in this case. The District Court interpreted the scant evidence as implying abandonment, aggregating it into an act of abandonment. Multiple actions, none of which individually constitute abandonment, cannot be combined to imply abandonment. *Fisher*, 2003 MT 207 at ¶ 12.

A petition to abandon, appointment of Viewers, Viewers’ investigation and production of a Report, and a properly noticed hearing are all statutory mandates determined to be conditions precedent to a board’s jurisdiction to abandon. *Bugli II*, 2019 MT 154 at ¶ 28. The Board entirely failed to comply with every statutory mandate except receipt of the petition, therefore there was no substantial compliance

with the statute. The District Court incorrectly concluded that the Board had jurisdiction to abandon Lippard Road.

b. Moreover, the Board Actually Rejected Abandonment

The District Court reviewed and interpreted the Records as if it had original jurisdiction. Where the District Court found no record, it inferred that the Board acted. Where the District Court found the Records to be irreconcilable with its own conclusions, it deemed the Records indecipherable while simultaneously discerning meaning therein. The District Court's arbitrary misapprehension of the evidence defies reason. Sayers requests this Court review the Board's Records and reverse the District Court's conclusion that substantial evidence supports abandonment.

The Board only has power to act when that power is specified by statute and is duly exercised by the Board. The Board could only abandon Lippard Road by an affirmative official act. *McCauley*, 2000 MT 215 at ¶ 30. It is the duty of the "board of county commissioners" of each county to supervise the county roads in their county. Rev. Code of Mont. §§ 2870-2871 (1907)⁸.

Since "[t]he statutes do not vest the power of the county in three commissioners acting individually, but in them as a single board; and the board can

⁸ Hereafter Rev. Code Mont. § ____ (1907).

act only when legally convened.” *Williams v. Bd. of Comm'rs*, 28 Mont. 360, 365 (1903) (citations omitted). The chairman of the board’s signature affixed on the Howell letter of proposal (Doc. 18 at CC 27) cannot in itself constitute an official act of abandonment by the Board. Nor can it constitute abandonment by implication. *McCauley*, 2000 MT 215 at ¶ 30 (citations omitted).

The absence of records cannot, by implication, demonstrate intent to abandon. Where the legislature has specially directed the Board as to how and when to record certain acts, the making of the record becomes a prerequisite to the legality of the action itself. *State ex rel. Rankin v. Madison State Bank*, 77 Mont. 498, 502 (1926). Minutes of all of the Board’s proceedings must be made and maintained in a “Minute Book”. Rev. Code Mont. §§ 2888-2890 (1907). The legislature unambiguously directed the Board to maintain records of proceedings and orders related to county roads in a “Road Book”. Rev. Code Mont. § 1348 (1915). The District Court misapprehended the absence of evidence when it improperly inferred from that absence that the Board held a hearing on abandonment on October 5, 1915. (Writ of Rev. at p.5.)

The District Court’s interpretation of the Board’s January 5th, 1916 minutes was also a clear misapprehension. The minutes should “give true and correct information to all inquiring concerning county affairs.” *Williams*, 28 Mont. 360,

365 (1903). Interpretations of the actions of political bodies which would lead to absurd results should be avoided whenever any reasonable explanation can be given consistent with the political body's purpose. *Montanans Securing Reprod. Rights v. Knudsen*, 2024 MT 67, ¶15 (citations omitted).

The District Court misinterpreted the Board's minutes pertaining to rejection of the petition for abandonment, resulting in the absurd conclusion that the plain meaning of the minutes has no meaning. The District Court's misinterpretation rendered the Board's rejection of clearly stated abandonment and reaffirmation of the status of Lippard as a county road an idle act. "The law neither does nor requires idle acts." Mont. Code Ann. § 1-3-223. This Court should presume that the Board does not issue meaningless minutes and adopt a rational interpretation that does not lead to absurdities. See Mont. Code Ann §§ 1-3-233 and *Mont. Health Network, Inc. v. Great Falls Orthopedic Assocs.*, 2015 MT 186, ¶21 (favoring reasonable interpretation that avoids absurd results).

This Court should reverse the District Court's misapprehension of the evidence and find that the Board 1) never appointed Viewers, ergo, Viewers could therefore never have fulfilled their statutory duties, 2) never held a duly noticed hearing on the petition to abandon, and 3) clearly rejected the petition to abandon on January 5, 1916. This Court should also find that the Board chairman's signature

affixed to the Howell letter of proposal is insufficient to constitute an official act effectively abandoning Lippard Road.

3. Did the District Court Err in Determining that the Case Should Be Determined Pursuant to the Rules of Procedure for a Writ of Review Instead of the Rules Applicable to a Declaratory Action?

Sayers initiated this case as a declaratory action, requesting the District Court declare Lippard Road a county road. Compl., ¶¶ 1 & 3. The County pleaded as its fourth affirmative defense that the case should be tried as a writ of review. Answer, p. 1, ¶ 1 and p. 7. The District Court erred by making mutually exclusive determinations: failing to conclude, as a matter of law, that Lippard Road was a county road, while also concluding that case be adjudicated by writ of review. See Doc. 65 at p. 2. If Lippard Road was not made a county road by the Board, the UDJA applies. If Lippard Road was a county road, abandonment is subject to a writ of review (in which case the District Court erred by admitting and then relying on evidence as if the case were adjudicated via the UDJA).

a. A Declaratory Action Is the Procedure by Which a Court May Declare a Road to Have Been a Properly Petitioned County Road.

The County denied that Lippard Road was established as a county road, and the District Court adopted this position by failing to conclude as a matter of law that

it was. In Montana, disputes over whether the necessary legal steps were taken to establish a county road are typically litigated through a declaratory action. *Bugli v. Ravalli Cnty.*, 2018 MT 177, ¶ 20 (citations omitted).

Unlike a writ of review, a declaratory judgment action is governed by civil procedure rules, allowing discovery of any non-privileged, relevant information reasonably calculated to lead to admissible evidence. See Rules 26 and 57, M.R.Civ.P. Declaratory actions, liberally construed, are well-suited for disputes over county road creation because they align with the intentionally low standard for proving a county road's existence—whether the record as a whole demonstrates its creation⁹. *Flying T Ranch, Ltd. Liab. Co. v. Catlin Ranch, Ltd. P'ship*, 2022 MT 162, ¶ 25 (quotations omitted).

Sayers has consistently asserted that the Record clearly demonstrates Lippard Road was properly established. Compl., ¶¶ 1 & 3. (Doc. 1, ¶ 3; and Doc. 2, ¶ 3). Throughout the entirety of this action the County presented arguments appropriate to a declaratory action on the *creation* of Lippard Road by denying that Lippard Road was opened as a county road:

⁹ As opposed to the heightened standard of substantial compliance for determining whether abandonment occurred.

Ms. Swimley¹⁰: As you are aware, this is a writ of review regarding the County's 1916 abandonment of a petitioned County road as the same was approved along the head of the breaks, or at least discussed to be approved along the head of the breaks beginning at the Fort Benton-Big Sandy Road and extending easterly... .

Writ of Rev. Hr'g Tr. 4:4-10 (March 19, 2024).

Ms. Swimley: So they have a petition pending. They have a viewers report. They have a recommendation. They had some advice from their county attorney and then they have contrary information, and then they come back and they get a petition to abandon. Don't -- and it is a petition to abandon but the record isn't clear it ever had been created yet.

Writ of Rev. Hr'g Tr. 10:4-10 (March 19, 2024).

Ms. Swimley: Now, the County Commissioners used the term reconsider. So I don't -- reconsider would imply that there had been a decision already made. I don't think you're going to find that decision in the record. I think they mean that they're going to -- in the way that you would table a motion and then you would remove the motion from the table. They're going to bring back up the question of whether they're going to create Lippard Road, the existing Lippard Road that's on the north of 20, 21, 22. Writ of Rev. Hr'g Tr. 10:23 - 11:7 (March 19, 2024)..

Ms. Swimley: There's it's an abandoned County road. I think there's good arguments to show that the County Commission indeed took every action to abandon it. I'm not sure we ever got it actually established as a County road... . Writ of Rev. Hr'g Tr. 12:15-19 (March 19, 2024).

Ms. Swimley: In the 1895 law there are four ways to create public roads. The first is the act of a proper authority as provided by statute. Well, you don't have any record that says that the

¹⁰ Susan Swimley is one of Chouteau County's attorneys.

county created that by statute. Writ of Rev. Hr'g Tr. 12:21-25 (March 19, 2024).

Ms. Swimley: But, your Honor, the record here is very clear that... the County did not never open this road, they intended it to be opened, and they abandoned it when they made the decision to close the gap and actually have the northerly route that goes to the south, have all of its pieces in place and have all of the easements granted. Writ of Rev. Hr'g Tr. 31:3-10 (March 19, 2024).

The County denied Lippard Road's status as a county road in its proposed order:

Starting in 1913 they considered the opening of [Lippard Road] and took steps to view [Lippard Road], accept the viewer's report and post notice of opening of the [Lippard Road] in 1914. Then in 1915 with a Petition to Abandon [Lippard Road that] they had not yet constructed or opened... .

Chouteau County's Proposed Order on Writ of Review, p. 12, April 3, 2024.

The County proceeded with the opening of the portion of Lippard Road along the head of the Missouri River breaks up to the point that it directed the County Surveyor to notice the opening of the route.

Chouteau County's Proposed Order on Writ of Review, p. 11, April 3, 2024.

The District Court erred in adopting the County's reasoning. The issue on writ of review is whether a properly petitioned and opened county road was abandoned. The District Court decided contradictorily that Lippard Road was both never opened as a county road and that it was somehow also a properly abandoned county road:

It is apparent that some of the adjacent landowners did not agree with the opening of the portion of Lippard Road along the head of the Missouri River

breaks, filed an objection or Petition to Abandon that ***proposed*** road, and made counterproposals as to what they believed would be a better route to reach Lippard Station.

Order Following Writ of Rev., p. 13 (emphasis added).

From the time the Board of County Commissioners started their deliberation as to whether to construct and open a county road along the head of the Missouri River breaks they moved in a slow and deliberate pace. Starting in 1913 they considered the opening of [Lippard Road] and took steps to view [Lippard Road], accept the viewer's report and post notice of opening of [Lippard Road] in 1914. ***Then in 1915 with a Petition to Abandon [Lippard Road that] they had not yet constructed or opened***, along with letters from adjoining landowners and an offer of a different route, the Board of County Commissioners took their time in considering the Petition to Abandon, ultimately deciding to abandon the route along the head of the Missouri River breaks and accept and open the alternative route suggested by the viewers in the original Petition to open a county road and filling in the "gap" in that route by accepting Mr. Howell's proposal to provide a right-of-way for the "gap". That is the route that was constructed, exists, and is used today.

Order Following Writ of Rev., p. 14-15 (emphasis added).

Where the creation of a county road is at issue, a writ of review is the wrong method of judicial review. *Williams*, 2021 MT 159 at ¶ 10 (refusing to consider abandonment under the UDJA). A declaratory action under the UDJA has been a remedy affirmed repeatedly by this Court. The District Court concluded that Lippard Road was not a county road. Thus, the District Court erred when it denied Sayers' motion to dismiss the County's fourth affirmative defense. This Court should reverse the District Court's application of the writ of review standard and remand for proceedings under the UDJA to determine whether the Record indicates Lippard Road was a county road.

b. Alternatively, if a Writ of Review Was Proper, the District Court Erred when It Considered Evidence that Was not Available to the Board During the Time Period the Board Was Considering Lippard Road.

If the Court finds a writ of review appropriate, it should conclude as a matter of law that Lippard Road was properly established as a county road. Additionally, the Court should reverse the District Court's admission and reliance on evidence unavailable to the Board as of September 7, 1916—the final date for an abandonment decision based on the Record. Alternatively, the Court should remand the case with instructions allowing both Sayers and the County to present evidence outside the Board's Records.

Sayers twice moved the District Court to exclude the 1919 Map (see Docs. 41 and 67 at p. 3) and once with respect to all post-creation evidence (Doc. 67 at 3). Sayers' first motion in limine argued that the 1919 Map was inauthentic, irrelevant, likely to cause confusion of the issues, and unfairly prejudicial. Doc. 41 at 1. Approximately ten years ago, in a previous declaratory action case, the District Court was affirmed by this Court when it found the 1919 Map relevant only to a southern branch of Lippard Road (which is not at issue in this case). *Sayers*, 2013 MT 45 at ¶ 32; see also Order Re: Pl. and Def.'s Cross-motions for Summ. J., Doc. 71 at 8, May 1, 2012, *Sayers v. Chouteau County*, DV-2010-12, Mont. 12th Judicial Dist.

Ct., Chouteau Cty. Sayers also argued in that prior case that the County admitted that the 1919 Map only depicted Lippard Road South (as designated herein). Doc. 41 at 9. Sayers presented deposition testimony by the custodians of the 1919 Map that they had lost custody and control of it. Doc. 41 at 10-13. The custodians lost, and then found, the 1919 Map, on multiple occasions, all while litigation was pending on Lippard Road South, without account for either its disappearance or reappearance, while litigation related to it was pending. Doc. 41 at 10-13. Sayers would have offered testimony that the Board by letter re-affirmed the existence of Lippard Road and that he has been using it for approximately 30 years. Sayers would have asked the District Court to take judicial notice of the fact that in that prior matter the County never disputed Sayers' expert witness affidavit stating that the signature of the county surveyor on the 1919 Map was a forgery. Doc. 41 at 14.

In a declaratory action, those arguments are permissible because they relate to whether or not the record, taken as a whole, indicates a county road was created. *Flying T Ranch*, 2022 MT 162 at ¶ 25 (quotations omitted). Conversely, evidence subject to consideration on writ of review is strictly limited to that which was presented to the board of county commissioners prior to its decision. *Sutey Oil Co. v. Anaconda-Deer Lodge Cnty. Planning Bd.*, 1998 MT 127, ¶ 11.

In *Sutey*, this Court directly addressed the nature and scope of evidence subject to consideration on a writ of review. Sutey Oil Co. had applied for, and been denied, a special use permit through a local planning board. The planning board's denial was appealed to, and affirmed by, the local board of adjustment. Sutey then filed a petition for a writ of review in the district court asking the court to review the boards' denials, and alleging the denials were in excess of jurisdiction. Sutey then appealed to this Court, which held that the scope of review must be limited to the record presented to the lower tribunal unless the legislature has by statute explicitly expanded the scope of review. *Id.* at ¶¶ 7-9 and 11-12 (citations omitted). In Sayers' case, the legislature has never expanded the scope of review. Scope must therefore be limited to the Record reviewed by the Board.

After this case was deemed a writ of review, Sayers moved to strike the 1919 Map, as well as all other references to facts not available to the Board when, between 1913 and September 17, 1916, it considered the creation and abandonment of Lippard Road. Doc. 67 at 3-5. The District Court denied Sayers' motion to strike and permitted the County to offer the irrelevant and prejudicial evidence:

Ms. Swimley: You also are well aware and had an entire hearing on the survey, the 1919 survey which was done at the direction of the County Commission and recorded more than 100 years ago. Writ of Rev. Hr'g Tr. 6:24 – 7:2 (March 19, 2024).

Ms. Swimley: What we are hear [sic] about is the black lined road at the head of the breaks road that has -- we can find no record and you will find no record that shows that it's ever been constructed. Writ of Rev. Hr'g Tr. 7:13-16 (March 19, 2024).

Ms. Swimley: And we don't have any evidence that shows that the head of the breaks was every constructed. Writ of Rev. Hr'g Tr. 13:7-9 (March 19, 2024).

Ms. Swimley: So you can reach a conclusion that there's no record of construction because it didn't happen and we don't have a record of it. Writ of Rev. Hr'g Tr. 30:17-19 (March 19, 2024).

The word "reject" in the petition indicates that the petitioned road may not have yet been built, but again, that is not determinative to the abandonment in this case. The end of the Petition to Abandon states "[t]he foregoing petition is offered as a comprise [sic] on the matter of the so-called Lippard Road". CC 00021.

Chouteau County's Proposed Order on Writ of Review, p. 5, April 3, 2024.

The 1919 Map confirms that the county surveyed and filled in the "gap" that would join with the northerly route accepted by the County. That is the route that was constructed, exists, and is used today.

Chouteau County's Proposed Order on Writ of Review, p. 13, April 3, 2024.

In error, the District Court then took into consideration more impermissible evidence offered by the County:

The parties disagree about whether the road was ever actually constructed or was more of a wagon trail. The distinction is not pivotal to the Court's determination, as the issue is whether the petitioned road along the head of the Missouri River breaks was abandoned; not whether it was or was not constructed.

Order Following Writ of Rev., p. 4.

The word “reject” in the petition indicates that the petitioned road may not have yet been built, but again, that is not determinative to the abandonment in this case. Order Following Writ of Rev., pp. 4-5.

The determination of whether a county road was created should be made under the UDJA. If Lippard Road was a county road, the issue of abandonment must be determined by a writ of review. Evidence permitted on a writ of review is limited to that which was presented to the Board by the time it made a determination on abandonment. The District Court applied the evidentiary rules associated with a declaratory action instead of those of a writ of review. If this Court finds that a writ of review is the proper method, it should remand to the District Court with instructions to disregard all evidence that was not presented to the Board on or before September 17, 1916.

VIII. Conclusion

For the foregoing reasons, this Court must reverse the District Court’s rulings. The District Court erred in adjudicating this case as a writ of review and should remand to the District Court with instructions to try the case under the UDJA. If Lippard Road is a county road, then the Record demonstrates that the Board lacked jurisdiction to abandon Lippard Road and that the Board, in fact, rejected the petition to abandon despite the District Court’s misapprehension of the evidence. Lastly, the District Court erred by dismissing this case via a statute of limitations.

Sayers respectfully requests this Court reverse and remand with instruction

either to try the case as a declaratory action or reverse and remand the writ of review for further proceedings to open Lippard Road to the public, survey Lippard Road, and assess damages.

Dated this 27th day of January, 2025.

/s/Daniel T. Jones

Daniel T. Jones

Attorney for Appellant, Robert Sayers

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,980, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/Daniel T. Jones

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CERTIFICATE OF SERVICE

I, Daniel T Jones, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-27-2025:

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