

See Note below:

No. 603

PETITIONER:

Frank E. Hallstead et al

Petition filed Jan. 10 1952

Viewers appointed Feb. 8, 1952

Report filed Feb. 9, 1952

Date of hearing Mar. 6 1952

Report approved 191

Order of survey 191

Surveyed 191

Field Book No. Page

Recorded in Roadbook 191

abandoned
Declared County Road Mar. 21, 1952

Aug. 28, 1952 District Judge
W.W. Lessley Ordered that Comms.
Resolution of Mar. 21, 1952 be set

aside - Road to be open
Hearing held in Court July 2, 1952

Approved: See papers inside this file.
Chairman

See Book 29 Commissioners' Proceedings,
311, 341, 342, 343,
pages 370, 384-385.

County Clerk

603
 Received
 JAN 15 1952

PETITION FOR ABANDONING
 A PUBLIC HIGHWAY

Gentlemen:

We, the undersigned, freeholders of Gallatin County, do hereby petition your Honorable Body to abandon as a public highway the following described County Road:

Commencing at a point between the south line of Lots No. 340 and 264 of Rainbow Subdivision of Bozeman Hot Springs Tract, Gallatin County Montana, as now on file and recorded in the Office of the County Clerk and Recorder of Gallatin County, Montana;

Thence running North between Lots No. 264, 263, and 262 to the South line of Lot No. 261 which lie on the west side of the road in question, and Lots No. 340, 341, 342, 343, 344, 345, 346 and that portion of Lot 347, which lie on the East side of said Road to the point on Lot 347 which is due East of the South line of Lot No. 261.

NAMES OF PETITIONERS

- OK Thos. B. Todd ^{OK} Ernest L. Todd
- OK Samuel E. Hallstead ^{OK} Mildred Hallstead ^{WION WILLSON}
- OK Walter Michel - ~~X~~ Ellen Michel - Bozeman R. 1.
- OK J. L. Kullston - ~~X~~ Edith Kullston Bozeman R. 1.
- OK Myron Beatty - ~~X~~ Myron Beatty Bozeman R. 1.
- OK Edwin M. Todd ^{OK} Annie M. Knipper Bozeman Star
- OK Ray J. Smith ~~X~~ Ray J. Smith Bozeman R. 1.
- OK P. D. Davis ^{OK} Esther M. Davis Star Route Bozeman
- OK Lillian Chappert R. 1. Bozeman Mont.
- ~~X~~ Milan Solset R. 1.
- ~~X~~ Wm. B. Barr R. 1. Bozeman R. 1.
- ~~X~~ Trinity Barr R. 1. Bozeman R. 1.
- OK Walter Brown R. 1. Bozeman
- OK Thos. Brown Bozeman
- OK Glen H. Crabbe R. 3 Bozeman Montana
- OK Mrs. Pemberton R. 3 Bozeman Montana

PL. EX. 7
7/2/52

BOZEMAN STAR. R. 1.

GALLATIN COUNTY

MONTANA

J. O. E. NELSON - - COMMISSIONER
GEORGE L. STUCKY - - COMMISSIONER
C. W. CRAMER - - COMMISSIONER
EARL WALTON - CLERK AND RECORDER
C. A. MacKENZIE - - - TREASURER
MRS. GRACE ROSNESS - - AUDITOR
PHIL E. EVANS - - - ASSESSOR

W. W. LESSLEY - - DISTRICT JUDGE
L. E. HAYS - - - CLERK OF COURT
MICHAEL J O'CONNELL - - ATTORNEY
C. E. RICE - - - SHERIFF
MRS. MARTHA HAYNES - SUP'T OF SCHOOLS
WALT DAVIS - - PUBLIC ADMINISTRATOR
DR. CARL W. HAMMER - - HEALTH OFFICER

BOZEMAN, MONTANA

January 24th, 1952

The Board of County Commissioners,
Bozeman, Montana.

We hereby certify that the attached petition
contains the names of seventeen freeholders of
of Gallatin County, State of Montana.

Earl Walton
County Clerk and Recorder

Phil Evans
County Assessor.

PL. EX. 7A
JB 7/2/52

1 IN THE DISTRICT COURT OF THE EIGHTEENTH JUDICIAL DISTRICT OF THE
2 STATE OF MONTANA IN AND FOR THE COUNTY OF GALLATIN

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J. S. FREEMAN,)
Plaintiff,)
vs.)
BOARD OF COUNTY COMMISSIONERS)
OF GALLATIN COUNTY,)
Defendant.)

No. 12285
Aug 28 52
Evelyn Thompson
27 165

10
11

O R D E R

12 The hearing on the Order to Show Cause why a Writ of Review
13 should not be allowed in the above-entitled cause came on regu-
14 larly for hearing before the above-entitled Court on the 2nd day
15 of July, A. D., 1952, J. H. Morrow, Jr., appearing as attorney for
16 the plaintiff and Michael J. O'Connell and Joseph B. Gary, appear-
17 ing as attorneys for the defendant. Evidence was introduced on
18 behalf of both plaintiff and defendant; at which time the matter
19 was deemed submitted to the Court, and by the Court taken under
20 advisement.

21 Subsequently, on the 4th day of August, A. D., 1952, the above-
22 entitled Court issued an Order granting the Writ of Review to the
23 plaintiff as requested, and ordering the defendant to make a return
24 under the Writ of Review on or about the 20th day of August, A. D.,
25 1952. On said day the defendant made a return presenting to the
26 Court certain exhibits of both plaintiff and defendant, together
27 with other documents and certain minute entries in Commissioners'
28 Journal, Vol. 29.

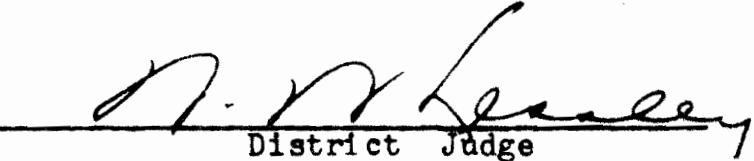
29 The undersigned Judge of the above-entitled Court has now
30 carefully read all of the exhibits in the case, together with other
31 exhibits and Commissioners' Journal presented to the Court, under
32 the return to the Writ of Review. The Court now being fully advised

1 in the premises and the law;

2 IT IS ORDERED, ADJUDGED AND DECREED that the Board of County
3 Commissioners in the instant matter were acting in excess of their
4 jurisdiction.

5 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the certain
6 Resolution adopted by the Board of County Commissioners of the
7 County of Gallatin, State of Montana, on the 21st day of March,
8 A. D., 1952, and appearing on the Commissioners' Journal at pages
9 384 and 385, and containing an Order of said Board of County Com-
10 missioners that the road herein involved be closed, vacated and
11 abandoned, is hereby set aside, vacated and held at naught.

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13 Dated this 28 day of August, A. D., 1952.

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18 District Judge

19 Copies to:

20 J. H. Morrow, Jr.
21 Michael J. O'Connell &
22 Joseph B. Gary
23 Board of County Commissioners
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1 IN THE DISTRICT COURT OF THE EIGHTEENTH JUDICIAL DISTRICT OF THE
2 STATE OF MONTANA IN AND FOR THE COUNTY OF GALLATIN

3
4 J. S. FREEMAN,

5 Plaintiff,

6 vs.

7 BOARD OF COUNTY COMMISSIONERS
8 OF GALLATIN COUNTY, *Petition No 603*

9 Defendant.

No. 12285

Aug 28 52

Evelyn Thompson

10 MEMORANDUM ACCOMPANYING ORDER

11
12 The Court has, pursuant to the Writ of Review heretofore
13 granted in this matter, signed an Order annulling, setting aside
14 and vacating a certain Resolution and Order of the Board of County
15 Commissioners bearing date March 21, 1952; wherein said Board
16 ordered closed, vacated and abandoned a certain road situated and
17 located in the Rainbow Subdivision of the County of Gallatin,
18 State of Montana. In order that the Board of County Commissioners
19 and its legal adviser, the County Attorney, and all other persons
20 interested, might know the basis of the Court's Order, I am filing
21 herewith, and requesting the Clerk of the Court to serve upon the
22 attorneys of record and the Board of County Commissioners, this
23 Memorandum.

24 It is well to remember that the Court here is concerned not
25 with the merits of the case; not with the reasonableness of the
26 Board; not with the correctness of the Board's action; nor even
27 with the practicality of the Board's action, but is concerned with
28 only one question, and that question is the jurisdiction of the
29 Board to act in the instant case.

30 In simple language, jurisdiction is the power to hear and
31 determine a particular matter. The Board of County Commissioners
32 is a creature of the law; whatever power, whatever right to act it

1 may have, must be found expressed or implied in the laws of this
2 State. The law here is not clear and it is not too surprising
3 that the County Attorney and the Board of County Commissioners
4 have erred. It is obvious that before the Board of County Com-
5 missioners may make an Order, as they did on the 21st day of March,
6 A. D., 1952, closing, vacating and abandoning a road, the require-
7 ments of the law must be observed.

8 Two possible avenues of approach were open to the Board of
9 County Commissioners: First, they could proceed on the theory
10 that this was a platted subdivision, and hold therefore, that a
11 road, street or alleyway in said subdivision so platted, could be
12 vacated under Section 11-2803, RCM 1947. There is considerable
13 merit in such an approach in that the plat itself in its dedication
14 clause states, and I quote: "...and that said survey and plat are
15 made in accordance with the provisions of Chapter 6, Title 3, Part
16 4, of the Political Code of the State of Montana...", and the sur-
17 veyor so subscribed to said dedication attached to the plat, and
18 further stated that, and I again quote: "That iron monuments have
19 been placed at the intersections of the center lines of the streets
20 and avenues, and as indicated by a cross (X) on said plat." An
21 examination of the plat shows these crosses, indicating the lo-
22 cation of iron monuments, in the very road under consideration.
23 If, and the Court does not so decide here, this could be held to
24 be a subdivision of an abandoned townsite or village or vineyard
25 tract or acreage tract or suburban tract or community tract, then,
26 it seems clear that in order for the Board of County Commissioners
27 to so act as they did, or at least to acquire jurisdiction, a
28 petition to so abandon should be signed by all the owners of the
29 land in such platted area.

30 Second, they could proceed on the theory that this is a road
31 within a road district, as so considered under Section 32-401,
32 RCM 1947. This they have done. But even then they must follow

1 the words of the statute concerned: That ten or a majority of
2 the freeholders of the road district must petition. This was not
3 done. It is clear that the entire County of Gallatin is a road
4 district, therefore, the entire seventeen appearing on the peti-
5 tion for the abandoning of a public highway, and referred to in
6 the cause as Plaintiff's Exhibit 7, would not be a majority of
7 the freeholders of the County. Seventeen names of freeholders
8 appear on Plaintiff's Exhibit 7, and apparently are checked as
9 being "O.K."; nine of the same seventeen are found on another
10 petition presented by Mr. Freeman to the Board of County Commis-
11 sioners at the time of the public hearing on the matter on March
12 6, 1952. Now, it is true that the petition presented by Mr. Free-
13 man does not have the legal clarity that is found on the petition
14 presented by Mr. Hallstead to the Board of County Commissioners,
15 but the Chairman of the Board of County Commissioners, Mr. J. O. E.
16 Nelsen, testified in court that he read both petitions, and that
17 there was no question as to the validity of the signatures, but
18 nevertheless the Board of County Commissioners summarily dismissed
19 the petition of Mr. Freeman and concerned themselves only with
20 the petition of Mr. Hallstead. It is the opinion of this Court
21 that the same force and effect should have been given to the
22 Freeman petition (Plaintiff's Exhibit 6) as was given to the
23 Hallstead petition (Plaintiff's Exhibit 7). The minimum require-
24 ments of the statute were not met. The Board's subsequent actions
25 in this matter were therefore in excess of jurisdiction. The
26 Board's right to act further did not exist.

27 This Court has concerned itself, not with the merits of the
28 present controversy, but only as to whether or not the Board of
29 County Commissioners exceeded its jurisdiction. This jurisdiction
30 is a limited one, and it is well that it is, because the vacation
31 and abandonment of roads is a serious matter and all of the require-
32 ments of the statute must be fully met, and there should be no

1 question of those requirements before the Board begins to act.
2 In other words, the Court has decided here, not that the Board
3 of County Commissioners cannot abandon and vacate a road within
4 the County, but rather, that in the instant case they have ex-
5 ceeded the jurisdiction given to them by the statutes, because
6 the preliminary requirements which must exist before they can even
7 acquire jurisdiction, did not exist.

8 The return on the Writ of Review included a certain easement
9 wherein Frank Hallstead and his wife, Mildred, conveyed to the
10 County of Gallatin a certain easement in consideration for the
11 Board discontinuing and vacating the road in question and providing
12 that in the event that the road in question was reopened, by any
13 means whatsoever, then, the easement granted would be terminated
14 and at an end. The Board of County Commissioners acting as trustees
15 for all the people of Gallatin County does not agree with private
16 individuals, and for a consideration, to do that which they are
17 bound to do, if they have the legal right so to do.

18 The Court has written this Memorandum fully realizing the
19 difficulties involved in the procedure of closing a road, but
20 well aware of the necessity for the Board of County Commissioners
21 to act under the law and in accordance with it.

22

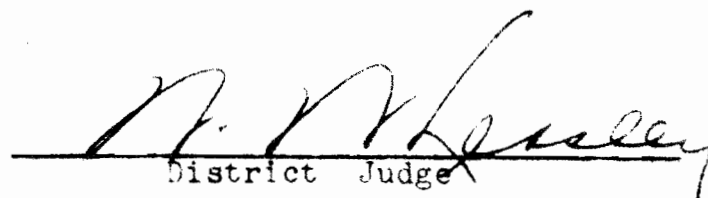
23 Dated this 28 day of August, A. D., 1952.

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District Judge

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Copies to: J. H. Morrow, Jr.
Michael J. O'Connell &
Joseph E. Gary
Board of County Commissioners

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FEBRUARY 26th 1952

TO BOARD OF COUNTY COMMISSIONERS
GALLATIN COUNTY STATE OF MONTANA

WE THE SIGNERS OF PETITION NO. 603
WISH IT TO BE KNOWN THAT WE DO NOT LIVE
ON OR OWN LAND ON ROAD DESCRIBED
IN PETITION NO. 603. THAT WE DO NOT
HAVE ANY INTEREST IN SAID ROAD
WHATSOEVER. AT THE TIME OF SIGNING
PETITION WE WERE NOT TOLD THAT THIS
ROAD HAD BEEN CLOSED THEN OPEN AGAIN.
THEREFOR WE ASK THAT THE ROAD
DESCRIBED IN PETITION 603 REMAIN
OPEN TO THE USE OF THE GENERAL
PUBLIC.

Myron W. Beatty

H. Lullator

Lillian Cheffert

Edwin M. Knipper

Annie M. Knipper

Walter E. Jones

Thos. B. Todd

Erna S. Todd

Ellen Michel

Walter Michel

PL. EX. 6
JB 7/2/52