

# Road Law Handbook

## **Road Creation and Vacation/Abandonment Law in Idaho**

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## I. PUBLIC ROAD CREATION

Road validation cases are different from many other legal determinations in that it is based on application of laws no longer in effect to historical events. They often turn on events that occurred many decades ago where there is little or no direct evidence and the facts cannot be determined with certainty.

### A. Overview

#### 1. Methods of public road creation

Under Idaho law, roads may be created as public roads in any of the following ways:<sup>1</sup>

- (1) Formal declaration and recording by the county or highway district (1864 to present).<sup>2</sup>
- (2) Blanket legislative declaration (any public use prior to 2/1/1881).<sup>3</sup>
- (3) Five years of public use (prior to 2/2/1893).<sup>4</sup>
- (4) Five years of public use and maintenance (2/2/1893 to present).<sup>5</sup>

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<sup>1</sup> Public road creation is in contrast to the establishment of private rights-of-way by prescriptive use or other means.

<sup>2</sup> Idaho's first road creation statute was enacted in 1864. Laws of the Territory of Idaho, at p. 578, § 1 (1864). In 1887, the Territorial Legislature enacted the first "modern" road creation statute (containing both formal declaration and public use road creation methods). Rev. Stat. of Idaho Terr. §§ 850, 851 (1887) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)). The 1887 statute has been amended many times over the years. Each amendment, however, recognizes road creation based on either official act of the county (formal dedication) or prescriptive use for a number of years. The statute in effect in 1909 (at the time Foster Road was created) was enacted in 1893. 1893 Idaho Sess. Laws at p. 12, § 1 (then codified at Rev. Stat. of Idaho Terr. §§ 851, 851; recodified on various occasions, and codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)). The 1887 statute was the applicable statute in *Galli v. Idaho County*, 146 Idaho 155, 191 P.3d 233 (2008) (W. Jones, J.; J. Jones, J., concurring).

<sup>3</sup> Laws of the Territory of Idaho, at p. 578, § 1 (1864); Compiled and Revised Laws of the Territory of Idaho, § 1, pp. 677-78 (approved 1/12/1875); Gen. Laws of the Territory of Idaho, § 1, pp. 277-78 (approved 2/1/1881). Section 46 of the 1881 statute makes it effective as of the date of enactment. Gen. Laws of the Territory of Idaho, § 18, p. 292 (approved 2/1/1881).

The 1881 statute was the applicable statute in *Sopatyk v. Lemhi County*, 151 Idaho 809, 814, 264 P.3d 916, 921 (2011) (W. Jones, J.). The Court applied both the 1881 statute and the 1887 statute in *Kirk v. Schultz*, 63 Idaho 278, 119 P.2d 266 (1941) (Budge, J.).

Arguably the Legislature enacted another blanket recognition of public roads in 1885. This statute recognized as county roads "all roads and highways heretofore declared to be such by legislative enactment, and that are now open and used as such by the public." Gen. Laws of the Territory of Idaho § 1, p. 162 (approved 2/5/1885). A strict reading of the language, however, suggests that the requirement of current public use is a limitation on previously recognized public roads rather than a new recognition and creation of public roads created after 1881.

<sup>4</sup> Road creation by public use has been recognized since 1887, in which the Territorial Legislature provided for public road creation based on five years of public use. Rev. Stat. of Idaho Terr. §§ 850, 851 (1887) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)). However, the five years of public use could have occurred at any time before or after the date of enactment in 1887.

- (5) Common law dedication, including dedication by the federal government via land patents.<sup>6</sup>
- (6) In addition to the above, R.S. 2477 roads (1866 to 1976) may be created by “some positive act or acts on the part of the proper public authorities.”<sup>7</sup>
- (7) Dedication through the platting process.<sup>8</sup>
- (8) Conveyance (sale, gift, or bequest by landowner).
- (9) Condemnation.

Some of the road creation methods mentioned above are based on Idaho statutes. Others are based on state common law (the body of judicial decisions handed down by appellate courts). R.S. 2477 reflects a mix of federal and state statutory and common law.

### Method 1

Since 1887, Idaho’s road creation statute has provided two ways to create public roads.<sup>9</sup> First, they may be created by official declaration of a public body (method 2 above). This is referred to as “formal” road creation. See discussion in section I.D.2 at page 18.

### Method 2

The first method listed above is based on territorial statutes enacted in 1864, 1875, and 1881 declaring all then-existing roads to be public roads. See discussion in section I.C at page 15.

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<sup>5</sup> 1893 Idaho Sess. Laws at p. 12, § 1 (approved 2/2/1893) (then codified at Rev. Stat. of Idaho Terr. § 851; codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).

<sup>6</sup> The doctrine of “common law dedication” in Idaho dates back to 1908. *Boise City v. Hon*, 14 Idaho 272, 94 P. 167 (1908) (Sullivan, J). It provides that where a landowner makes an offer of a road to the public (typically, but not necessarily, by filing a plat showing the road as public), and members of the public accept (by purchasing lots or accepting patents from the government), a public dedication occurs. In *Farrell v. Bd. of County Comm’rs of Lemhi County*, 138 Idaho 378, 385, 64 P.3d 304, 311 (2002), the Idaho Supreme Court ruled that the doctrine applies equally to the patenting of homesteads on the public land by the federal government.

<sup>7</sup> R.S. 2477 is section 8 of the Mining Act of 1866. R.S. 2477 refers to the Act’s original codification as section 2477 of the Revised Statutes. The full citation is a mouthful: An Act Granting the Right-of-way to Ditch and Canal Owners Over the Public Lands and for Other Purposes, *also known as* the Mining Act of 1866, also known as Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253 (1866), section 8 initially was codified at Revised Statutes 2477 (1873) (“R.S. 2477”), section 8 was re-codified at 43 U.S.C. § 932 (1938), repealed by Federal Land Policy Management Act of 1976 (“FLPMA”) § 706(a), Pub. L. No. 94-579, 90 Stat. 2743, 2793 (1976).

<sup>8</sup> Idaho Code §§ 50-1301 to 50-1334 (plats and vacations); Idaho Code § 40-109(5) (definition of highways includes those dedicated or abandoned to the public); Idaho Code § 40-117(9) (rights-of-way may be acquired by “deed of purchase, fee simple title, authorized easement, eminent domain, by plat, prescriptive use, or abandonment of a highway pursuant to section 40-203”).

<sup>9</sup> Idaho’s current road creation statute is codified at Idaho Code §§ 40-106, 40-109(5), 40-202(3).



### Methods 3 and 4

The second statutory method of road creation statute is “passive road creation” (methods 2 and 3 above). Even when no official action is taken, roads may become public roads simply through public use and maintenance over time. See discussion in section I.D.3 at page 19. We refer to this method as “passive,” “public use,” or “prescriptive” road creation—which are interchangeable terms.

### Method 5

Where a dedication fails to comply with platting requirements for some reason, a “common law dedication” nonetheless may be found to have occurred (method 5 above). See discussion in section I.F at page 40. The courts have ruled that a common law dedication occurs where an offer to create a public road is extended by the owner of a property in connection with its sale or conveyance and that offer is accepted by those acquiring the property. A notable aspect of common law dedication is that roads created in this way are not subject to passive abandonment (except pursuant to a narrow exception adopted in 2013). Indeed, roads dedicated to the public by recorded plat may not even be constructed for decades, but nonetheless remain valid public roads. See discussion in section I.F at page 40 and section III.D at page 96.

Common law dedication may occur in the context of R.S. 2477 roads where a federal survey (or survey notes) depicts or describes a public road, and patents are issued pursuant to that survey.

### Method 6

A federal statute known as R.S. 2477 authorized the creation of public roads on unreserved federal land until its repeal in 1976 (method 6 above). See discussion in section I.H at page 50. Although the statute was repealed in 1976, all roads created prior to that date remain valid. Although R.S. 2477 is a federal statute, it looks to state law for the rules of road creation.

The required “acceptance” of an R.S. 2477 may be satisfied by meeting any of the road creation methods described above or by a separate and more relaxed standard for creation for R.S. 2477 roads recognized by the Idaho Supreme Court (“some positive act” by local officials). Thus, the law for creating a road under R.S. 2477 is exactly the same as creating any other public road, except that, in addition, they may be created under the more relaxed standard for formal declaration.

R.S. 2477 roads are not subject to any special treatment or exemption from the rules of abandonment, at least until 1993. See discussion of 1993 legislation in I.H.7 at page 69. See also discussion of special treatment of roads on public lands in the 2013 legislation.

The Legislature also has addressed the R.S. 2477 standard in a 1993 Act, calling for liberal recognition of these roads. 1993 Idaho Sess. Laws, ch. 142 (H.B. 388) (codified at Idaho Code §§ 40-107(5), 40-204A).<sup>10</sup> However, the 1993 Act does not apply retroactively and therefore is of limited practical effect. See discussion in section I.H.7 at page 69.

There is a body of federal law, regulation, and guidance addressing R.S. 2477 roads. However, most courts, including Idaho’s Supreme Court and a 2005 Tenth Circuit decision, have ruled that the creation and abandonment of R.S. 2477 roads is primarily a matter of state law. Consequently, regulatory

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<sup>10</sup> This was one of two important pieces of road legislation adopted in 1993. The other was 1993 Idaho Sess. Laws, ch. 412, § 1 (S.B. 1108) (codified at Idaho Code § 40-106(3)). See discussion in section I.H.7 at page 69.

pronouncements by federal agencies that purport to define how the federal grant R.S. 2477 roads may be accepted by states and local governments are of doubtful authority.

### Methods 7 and 8

In addition, public roads may be conveyed by private parties to the public dedication through the platting process (method 7 above)<sup>11</sup> or by formal conveyance (method 8 above). This is the standard process for road dedication when new subdivisions are created.

### Method 9

Finally, of course, roads may be acquired by condemnation (method 9 above). This subject is not treated in this Handbook.

These methods of public road creation are summarized in the chart below.

Public road creation method		Time frame when this method is available
1.	Formal declaration by county commission or highway district	1864-present
2.	Blanket legislative recognition (based on “one day” of public use)	Road in public use on or before 2/1/1881
3.	5 years of public use	Through 2/2/1893
4.	5 years of public use and public maintenance	1893-present
5.	Common law dedication	Any time
6.	R.S. 2477 roads: any state law method mentioned above or “some positive act or acts on the part of the proper public authorities”	1866-1976
7.	Platting	Any time
8.	Conveyance, bequest, statutory dedication (platting), or condemnation	Any time
9.	Condemnation	Any time

Key legislative events addressing both road creation and abandonment are summarized chronologically in the table below.

Year	Event
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<sup>11</sup> Idaho Code §§ 50-1301 to 50-1334 (plats and vacations); Idaho Code § 40-109(5) (definition of highways includes those dedicated or abandoned to the public); Idaho Code § 40-117(9) (rights-of-way may be acquired by “deed of purchase, fee simple title, authorized easement, eminent domain, by plat, prescriptive use, or abandonment of a highway pursuant to section 40-203”).

1864	First road creation statute (blanket declaration as to existing roads; formal declaration going forward)
1866	R.S. 2477 enacted
1881	Last of three blanket declaration statutes (1864, 1875, and 1881)
1887	First “modern” road creation statute enacted (formal declaration or five years public use) <sup>12</sup> First “modern” passive abandonment statute enacted. <sup>13</sup>
1890	Statehood
1893	Road creation statute amended to add five years public maintenance <sup>14</sup>
1963	Eliminated passive abandonment for roads accessing public lands; limited passive abandonment to roads created by prescription (public use)
1976	Repeal of R.S. 2477 (by FLPMA)
1986	Detailed new abandonment/vacation and validation provisions enacted; roads included on official highway maps protected from passive abandonment.
1993	Enactment of Idaho’s pro-R.S. 2477 statute; repeal of passive abandonment <sup>15</sup>
2006	Prescriptive period for private roads by adverse possession changed from five to 20 years
2013	Public Access Amendments of 2013 (addressing a variety of issues including a new abandonment law, judicial review and quiet title, road width, etc.) <sup>16</sup>
2014	Road Funding and Detachment Act of 2014 (technical amendments establishing mechanism for detachment of a road from a highway district) <sup>17</sup>

<sup>12</sup> Rev. Stat. of Idaho Terr. §§ 850, 851 (1887) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).

<sup>13</sup> Rev. Stat. of Idaho Terr. § 852 (1887) (later codified at Idaho Code § 40-203(4) (repealed by S.B. 1108 in 1993)).

<sup>14</sup> 1893 Idaho Sess. Laws at p. 12, § 1 (then codified at Rev. Stat. of Idaho Terr. § 851; codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).

<sup>15</sup> 1993 Idaho Sess. Laws, ch. 412, § 4 (S.B. 1108) (codified at Idaho Code § 40-203(4)).

<sup>16</sup> 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified at Idaho Code §§ 40 114, 40 202, 40 203, 40 208, 40 2312).

<sup>17</sup> Highway Funding and Detachment Amendments of 2014, 2014 Idaho Sess. Laws, ch. 214 (H.B. 619a) (codified at Idaho Code §§ 40 709, 40 709A).

## 2. Terminology — roads, highways, and rights-of-way; abandonment and vacation

Various authorities have drawn distinctions among the terms “roads,” “highways,” and “rights-of-way.” *E.g.*, 39 Am. Jur. 2d. *Highways, Streets, and Bridges* § 1 (1999). For example, the term “highway” is often understood to imply public use and ownership. *Id.* The term “right-of-way” (a type of easement) is often employed to emphasize that the holder owns only an easement (a right to use land owned by another), not fee title. *Id.* § 2.

However, title 40 (Highways and Bridges) defines “public highway” and “public right-of-way” in ways that do not conform to common usage of those terms. One might think that the difference between the two would be that a highway includes fee ownership while a public right-of-way reflects only public ownership of an easement. But that is not how they are defined.

The Idaho Legislature employs the term “public highway” to describe public roads that are maintained by the state, county, highway district, city, or other governmental entity.<sup>18</sup>

In contrast, “public rights-of-way” describe rights-of-way that are public but are not required to be maintained by the government.<sup>19</sup> This is a peculiar use of the term “right-of-way,” which, in common usage, is not defined in terms of a maintenance obligation (or lack thereof).

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<sup>18</sup> “‘Public highways’ means all highways open to public use in the state, whether maintained by the state or by any county, highway district, city, or other political subdivision. (See also ‘Highways,’ section 40-109, Idaho Code).” Idaho Code § 40-117(7).

“‘Highways’ mean roads, streets, alleys and bridges laid out or established for the public or dedicated or abandoned to the public. Highways shall include necessary culverts, sluices, drains, ditches, waterways, embankments, retaining walls, bridges, tunnels, grade separation structures, roadside improvements, adjacent lands or interests lawfully acquired, pedestrian facilities, and any other structures, works or fixtures incidental to the preservation or improvement of the highways. Roads laid out and recorded as highways, by order of a board of commissioners, and all roads used as such for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of a board of commissioners, are highways.” Idaho Code § 40-109(5). Highways, as described in Idaho Code § 40-109(5), may or may not be publicly maintained.

<sup>19</sup> “‘Public right-of way’ means a right-of-way open to the public and under the jurisdiction of a public highway agency, where the public highway agency has no obligation to construct or maintain, but may expend funds for the maintenance of, said public right-of-way or post traffic signs for vehicular traffic on said public right-of-way. In addition, a public right-of-way includes a right-of-way which was originally intended for development as a highway and was accepted on behalf of the public by deed of purchase, fee simple title, authorized easement, eminent domain, by plat, prescriptive use, or abandonment of a highway pursuant to section 40-203, Idaho Code, but shall not include federal land rights-of-way, as provided in section 40-204A, Idaho Code, that resulted from the creation of a facility for the transmission of water. Public rights-of-way shall not be considered improved highways for the apportionment of funds from the highway distribution account.” Idaho Code § 40-117(9). This definition of “public right-of-way” was added in 1993 at the same time as the term “federal land right-of-way” was added at Idaho Code § 40-107(5).

The code does not define the term “right-of-way” (it would appear at Idaho Code § 40-119). However, it defines the term “federal land rights-of-way” to describe R.S. 2477 roads located “on federal land.” Idaho Code § 40-107(5); see also Idaho Code § 40-204A. The reference to being “on federal land” may be read to limit the definition to those located on federal land today (excluding R.S. 2477 roads across land that is now in private

See discussion in section IV.A.7 at page 113 for a discussion of reclassifying public highways to public rights-of-way.

As noted in footnotes 18 and 19, the definition of “public highway” keys into the definition of “highway,” which, in turn, provides the statutory basis for public road creation (formal declaration or prescriptive use). In contrast, the definition of “public right-of-way” does not key into any other definition.

The Legislature employs the term “federal land rights-of-way” to describe R.S. 2477 roads that are on federal land today. Idaho Code §§ 40-107(5), 40-117(9), 40-204A. This definition does not include R.S. 2477 roads now located on non-federal land.

In this Handbook, the author generally employs the generic term “public road” to encompass all types publicly owned road including public highways, public rights-of-way, and federal land rights-of-way. Idaho courts also tend to employ the term “roads” as a catch-all to encompass all of the above.

In any event, these terms and distinctions are not employed consistently, and the reader is cautioned against reading too much into such labels.<sup>20</sup>

The term “county highway system” is defined to include all public highways within the county except those under the jurisdiction of the State, a city, a highway district, or the federal government. Idaho Code § 40-104(6).

For no apparent reason, the Idaho Code speaks in terms of “abandonment and vacation” of roads. These are two words for the same thing. They are used interchangeably here, except that the term “vacation” (or the verb “vacate”) applies only to formal abandonment proceedings, not to passive abandonment. Likewise, references in this Handbook to “validation/vacation proceedings” refer to combined proceedings under both Idaho Code § 40-203 (abandonment and vacation) and Idaho Code § 40-203A (validation).

### **3. Roads may be administered by cities, counties, or highway districts.**

Note: State highways are administered by the Idaho Department of Transportation, and federal highways are administered by the Federal Highway Administration. This Handbook does not address state and federal highways.

With the exception of “single county-wide highway districts,” cities with functioning street departments have responsibility for streets within their city limits even if some or all of the city is overlapped by a highway district. Where a highway district overlaps a city without a functioning street department, the highway district has jurisdiction and control over those streets. This topic is addressed in section V at page 160.

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ownership). Alternatively, the definition might be understood to refer to roads located on federal land when they were created. The only places where the term appears substantively in the code (Idaho Code §§ 40-203(i) and 40-204A) do not read as if they were intended to be limited to R.S. 2477 roads still on federal lands.

<sup>20</sup> A federal court described the semantic line a party tried to draw between a “statutory right-of-way” and a “public road” as a “distinction without a difference.” *Fairhurst Family Ass’n, LLC v. U.S. Forest Service*, 172 F. Supp. 2d 1328, 1332 (D. Colo. 2001).

Outside of city streets controlled by cities, all public roads in Idaho (other than state or federal highways) are administered either by the county government or by specially created highway districts.<sup>21</sup> This includes both the responsibility for maintenance and jurisdiction over road acceptance and vacation.

#### 4. Confusion over the label “commissioners.”

Idaho statutes addressing public road issues (title 40) contain numerous references to “commissioners,” some of which apply to both county and highway district commissioners and some of which apply only to one or the other. Figuring out which is which can be tricky. The confusion is exacerbated by the definition of “commissioners” in Idaho Code § 40-104(4), which defines the term solely in terms of county commissioners.

Elsewhere in the code, there are express references to the “board of county or highway district commissioners.” *E.g.*, Idaho Code § 20-202(1)(a) (requiring preparation of an official road map); Idaho Code § 40-203 (abandonment and vacation); 40-203A (validation); Idaho Code § 40-208 (judicial review). Then later in the same section, there are references simply to “commissioners.” It seems fair to conclude that such reference to commissioners should be read in context and not driven by the more limited formal definition of “commissioners” in Idaho Code § 40-104(4).

In other cases, there are stand-alone references to “commissioners” that, in context, are plainly intended to apply only to county commissioners (*e.g.*, multiple references in chapter 6 of title 40, such as Idaho Code 40-604 (powers and duties)) or only to highway district commissioners.

In yet other places, however, there are references to the “board of commissioners” without any indication in the same area of the code as to whether it also includes highway districts. *E.g.*, Idaho Code § 40-109(5) (dealing with road creation) refers to roads laid out “by order of a board of commissioners.”

It does not appear that the definition in section 40-104(4) was intended to override explicit references to commissioners of counties and highway districts found elsewhere in title 40. The definition was enacted in 1985 as part of a comprehensive recodification of the road statutes. 1985 Idaho Sess. Laws, ch. 253, § 2. Prior to 1985, there was no general definition section. The definition of commissioner has not been touched by the Legislature since adopted in 1985. Nor has this definition ever been mentioned in any Idaho appellate decision.<sup>22</sup> Its narrow reference only to county commissioner appears to have been appropriate at the time.<sup>23</sup>

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<sup>21</sup> “It has long been the law in Idaho that ‘county commissioners have exclusive jurisdiction over the [construction of] highways within their county outside of highway districts’ and that highway districts have exclusive jurisdiction over the construction of highways in highway districts.” *Schneider v. Howe*, 142 Idaho 767, 771, 133 P.3d 1232, 1266 (2006) (Burdick, J.) (quoting *Baker v. Gooding Cnty.*, 125 Idaho 506, 514, 138 P. 342, 345 (1914)). See Idaho Code §§ 40-601 to 40-619 and 50-1330 respecting the establishment and authority of highway districts.

<sup>22</sup> Note that from 1932 to until 1985, Idaho Code § 40-104 was not a definition section but was the provision dealing with passive abandonment (which was recodified in 1985 to section 40-203 and ultimately repealed). Accordingly, numerous references in Idaho cases to section 40-104 have nothing to do with the current codification of definitions.

<sup>23</sup> For example, in 1985, there were still separate portions of the code dealing with the authority of counties and highway districts to abandon roads. Idaho Code §§ 40-604(4) (1985) and 40-1310(5) (1985). Moreover,

The best rule of thumb, it would seem, is to read the reference to commissioners in the context of the section. In the great majority of instances, it is clear whether the reference is to county commissioners, highway district commissioners, or both. To put it differently, the definition of commissioners should be read as if it said “‘Commissioners’ means the board of county commissioners of a county of this state, unless the context makes clear that it refers to both county and highway district commissioners or to highway district commissioners alone.”

In any event, any doubt about the authority of highway districts to engage in validation and vacation proceedings is resolved by other statutory provisions expressly addressing this subject.<sup>24</sup>

## **B. Private easements**

The focus of this Handbook is the law of public roads and rights-of-way. The law of private easements is a separate subject beyond the scope of this Handbook. Nevertheless, a cursory overview of the subject of private easements is included below.

An easement is a non-possessory interest in real estate that permits its holder to make a specific use of the property owned by another (or to prevent a use from being made). In other words, it allows the easement holder to use or control property he or she does not own.

The landowner who is receiving the benefit from the easement is called the dominant party and the land is called the dominant estate (aka dominant tenement). The landowner burdened by the easement is called the servient party and the land is the servient estate (aka servient tenement).

Most easements are created by an express grant, typically a deed. However, easements also can be created without a signed writing, including easements by implication, easements by necessity, easement by prescription, and easement by estoppel.

### **1. Express easements**

Express easements are created by written documents, typically deeds. For example, a deed conveying property to another might reserve an easement allowing the grantor to continue to make some use of the conveyed property. Alternatively, an easement may be conveyed in a stand-alone conveyance or as part of some other agreement.

Express easements may be affirmative or negative. Affirmative easements give the easement holder the right to access or make a particular use of another property. A negative easement restricts what the servient landowner may do on the servient estate (for example, preventing construction of a building that

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the current sections dealing with road validation and vacation did not exist in 1985. When they added in 1986 (1986 Idaho Sess. Laws, ch. 206), it appears the Legislature did not bother to amend the definition of commissioners in section 40-104(4). It probably did not seem necessary, because the new sections on validation and vacation (Idaho Code §§ 40-203A and 40-203) expressly provided that they applied to both counties and highway districts.

<sup>24</sup> Idaho Code § 40-1310(5) provides, in part: “The highway district has the power to receive highway petitions and lay out, alter, create and abandon and vacate public highways and public rights-of-way within their respective districts under the provisions of sections 40-202, 40-203 and 40-203A, Idaho Code.” (See discussion *Halvorson v. North Latah County Highway Dist.*, 151 Idaho 196, 200 254 P.3d 497, 501 (2010) (Horton, J.) referencing these sections).

would block the view enjoyed by the dominant estate). A conservation easement is an example of a negative easement.

Express easements are either “easements appurtenant” or “easements in gross.” Easements appurtenant benefit another specific parcel of land (the dominant estate). Easements in gross do not benefit any particular parcel; hence there is no dominant estate. An example of an easement in gross is the grant of hunting or fishing rights to a particular person. Easements appurtenant run with the land, meaning that they are enforceable by and against the successors-in-interest to the dominant and servient parties. Easements in gross are personal to the easement holder.

## **2. Implied easements**

“An easement may be express or implied. *See Shultz v. Atkins*, 97 Idaho 770, 773, 554 P.2d 948, 951 (1976).” *Aizpitarte v. Minear*, 170 Idaho 186, 193, 508 P.3d 1260, 1267 (2022) (Bevan, C.J.).

Implied easements arise from the division of property (meaning that, at the time the implied easement was created, there must have been “unity of title” between the servient and dominant estates).

Implied easements come in two forms: Implied easements by necessity and implied easements by prior existing use. Sometimes the nomenclature varies. Some commentators have referred to these as “easements by necessity” vs. “easements by implication.” This terminology is unhelpful, because both are based on implication but they are created in different ways.

The main difference between easements based on prior use versus easements of necessity is the former requires proof that the parties intended to make the easement as reflected in an existing prior established use, while an easement of necessity needs no proof of the actual existence of the road at the time—it simply arises from the compelling and apparent need to obtain access based on the physical circumstances.

### **a. Implied easement by necessity**

The Idaho Supreme Court provided the following thumbnail summary of the law of easements by necessity:

To show an implied easement by necessity, the claimant “must prove  
‘(1) unity of title and subsequent separation of the dominant and servient estates;  
(2) necessity of the easement at the time of severance; and (3) great present  
necessity for the easement.’” *Backman v. Lawrence*, 147 Idaho 390, 394, 210  
P.3d 75, 79 (2009) (quoting *Bear Island*, 125 Idaho at 725, 874 P.2d at 536).

*Aizpitarte v. Minear*, 170 Idaho 186, 201, 508 P.3d 1260, 1275 (2022) (Bevan, C.J.).

### **b. Implied easement by prior use**

The Idaho Supreme Court offered this summary of the law of easements by prior existing use:

To establish an implied easement by prior use, a party must prove three elements:

(1) unity of title or ownership and a subsequent separation by grant of the dominant estate; (2) apparent continuous use long enough before separation of the dominant estate to show that



the use was intended to be permanent; and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate.

*Spectra Site Commc'ns, Inc. v. Lawrence*, 160 Idaho 570, 574, 377 P.3d 75, 79 (2016) (citing *Bird v. Bidwell*, 147 Idaho 350, 352, 209 P.3d 647, 649 (2009)). The owner of the dominant estate has the burden of proof “to show the existence of facts necessary to create by implication an easement” pertinent to their estate. *Davis v. Gowen*, 83 Idaho 204, 212, 360 P.2d 403, 408 (1961). This doctrine presumes that if an access was in use at the time of severance, such use was meant to continue. *Capstar Radio Operating Co. v. Lawrence*, 160 Idaho 452, 459, 375 P.3d 282, 289 (2016).

*Aizpitarte v. Minear*, 170 Idaho 186, 193, 508 P.3d 1260, 1267 (2022) (Bevan, C.J.).

### **c. Implied grant or implied reservation**

Easements by implication may be created by grant or reservation, depending on which parcel is landlocked.<sup>25</sup> If the parcel conveyed by the original division of the common property is landlocked, the easement is created by grant from the original owner to the grantee of the divided parcel. But, if the parcel retained by the original owner is the one that is landlocked, the common law may recognize the reservation of an easement by implication.

### **d. Unity of title may not be based on original federal ownership**

Implied easements require the person claiming the easement to show unity of title. In contrast, unity of title is not a criterion in the establishment of a private easement by prescriptive use.

The common ownership must be shown at the time the implied easement was created. Some have sought to trace this common ownership back to the time when the federal government owned all the land. But the courts have consistently ruled that prior federal ownership does not satisfy the unity of ownership criterion.

This evidence, however, fails to establish the requisite common grantor or unity of ownership prior to the division of the land. Roberts has established only that the land was at one time originally under public ownership. Original ownership by the public or state is not sufficient to constitute the necessary unity of ownership.

*Roberts v. Swim*, 117 Idaho 9, 15, 784 P.2d 339, 345 (Ct. App. 1989) (Swanstrom, J.).

In *Backman v. Lawrence*, 147 Idaho 390, 394, 210 P.3d 75, 79 (2009) (Burdick, J.), the Idaho Supreme Court confirmed the cursory holding in *Roberts* with a broader explanation:

It would be ruinous to establish the precedent contended for, since by it every grantee from the earliest history of the State, and those who succeed to his

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<sup>25</sup> *Murphy v. Burch*, 205 P.3d 289, 292 (Cal. 2009) (“Generally, an easement by necessity arises from an implied grant or implied reservation in certain circumstances when a property owner (the grantor) conveys to another (the grantee) one out of two or more adjoining parcels of the grantor’s property.”).

title, would have an implied right of way over all surrounding and adjacent lands held under junior grants, even to the utmost limits of the State.

*Backman*, 147 Idaho at 395, 210 P.3d at 80 (quoting *Guess v. Azar*, 57 So.2d 443, 444-45 (Fla. 1952).

The *Backman* Court also quoted this federal decision:

It is, in my judgment, very doubtful whether the doctrine of implied ways of necessity has any application to grants from the general government, under the public land laws. If it exists at all, it can be invoked against the government and its grantees as well as in their favor. Hence every grantee of a portion of the public domain from the time the land laws were extended over the same and those succeeding to his title would have an implied right of way over the surrounding and adjacent public lands, and a junior grant thereof if necessary to reach his own land, and a junior grantee and his successors in interest would have such a way over a prior grant under similar circumstances simply because they derive title from a common source . . . . By public statute Congress has granted rights of way for the construction of highways over public lands not reserved for public use. Beyond this and the full protection of the title which it confers, it would seem that the government owes no duty or obligation and reserves to itself or its subsequent grantees no interest in the land granted except such as may appear on the face of the grant, or the law under which it was made, or be declared by a general statute in force at the time the interest of the grantee was acquired.

*Backman*, 147 Idaho at 395, 210 P.3d at 80 (quoting *United States v. Rindge*, 208 F. 611, 619 (S.D. Cal. 1913).

It would seem that the rule against basing unity of title on prior common ownership by the federal government should be limited to situations when the common ownership by the government was some time prior to the division of property giving rise to the easement. However, the California Supreme Court rejected this seemingly logical argument. In this case, the federal government conveyed land by patent without expressly reserving access on the remaining federal property across the patented property. The remaining landlocked property was conveyed later to the predecessor of the plaintiff. The Court rejected her argument for an easement by necessity over the earlier patented property.

In this case, the federal government was that common owner, and it first conveyed the defendants' property without expressly reserving a right of access to the plaintiff's property, which it retained. The question is whether a right of access nonetheless arose by implication based on the circumstances surrounding that conveyance, including whether or not a strict necessity for access resulted and the inferences reasonably drawn regarding the parties' intent.

Given the distinctive nature and history of federal land grants and the government's power of eminent domain, we hold that extreme caution must be exercised in determining whether an access easement arises by implication when common ownership is traced back to a federal grant made without an express reservation for access.

*Murphy v. Burch*, 205 P.3d 289 (Cal. 2009).

### 3. Private prescriptive use rights based on adverse possession

The term “prescription” (or “prescriptive use”) is often employed to refer to roads created by public use under the road creation statute (method 3 above).<sup>26</sup> Indeed, the 1963 amendment to the public road creation statute uses this term (see discussion in section III.C.8 at page 96).<sup>27</sup> This use of the term “prescription” in the public road context should not be confused with the law of prescription applicable to private parties based on adverse possession. *E.g.*, *Backman v. Lawrence*, 147 Idaho 390, 210 P.3d 75 (2009) (Burdick, J.).

The “prescriptive” or “public use” method under the public road creation statute is based on a concept analogous to adverse possession or prescriptive use in real property law—coupled with a public maintenance requirement. The basic idea is that if the public acts like it owns it long enough, it does own it.

In the private context, this is called “adverse possession” in the case of land and “prescriptive use” in the case of rights-of-way and other easements. Adverse possession and prescriptive use are based on Idaho’s statute of limitation on actions to recover realty. Idaho Code § 5-203. In short, if the original property owner suffers the use of the property by others without challenge for more than the statutory period, then the statute of limitation bars the original owner from litigating the matter thereafter. Although the statutory foundation is the statute of limitations, the courts have interpreted this as more than a restriction on that person’s right to sue; the passage of time under the proper circumstances actually shifts title (for a right-of-way) to the new owner.

Note that in 2006, the Idaho Legislature changed the prescriptive period from five to 20 years. 2006 Idaho Sess. Laws, ch. 158 (codified at Idaho Code § 5-203). However, the change does not apply retroactively.<sup>28</sup> Thus, any right-of-way that already had vested by satisfying the five-year test as of 2006 would be unaffected by the amendment to the statute, while that any road that had experienced less than five years of adverse use as of 2006 would become subject to the 20-year requirement (with the years of adverse use prior to 2006 counting toward the twenty).<sup>29</sup>

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<sup>26</sup> For example, *Total Success Investments, LLC v. Ada County Highway Dist.*, (“*Total Success II*”), 148 Idaho 688, 691, 227 P.3d 942, 945 (Ct. App. 2010) (Perry, J. pro tem.), referring to a road created by public use and public maintenance as a “prescriptive easement.” In *State v. Nesbitt*, 79 Idaho 1, 6, 310 P.2d 787, 790 (Idaho 1957) (Keeton, C.J.), the Court said: “Where the public uses a highway or road for the statutory period of five years and it is worked and kept up at public expense, a highway is established by prescription.” See also, *Tomchak v. Walker*, 108 Idaho 446, 447-48, 700 P.2d 68, 69-70 (1985).

<sup>27</sup> 1963 Idaho Sess. Laws, ch. 267, § 1 (S.B. 242) (then codified at Idaho Code § 40-104, later codified at Idaho Code § 40-203(4), repealed by S.B. 1108 in 1993).

<sup>28</sup> *Capstar Radio Operating Co. v. Lawrence*, 153 Idaho 411, 420 n.2, 283 P.3d 728, 737 n.2 (2012) (“However, the twenty year time period does not apply to an easement by prescription acquired prior to the amendment.”) (quoted in *Machado v. Ryan*, 153 Idaho 212, 222, 280 P.3d 715, 725 (2012)).

<sup>29</sup> The Utah Supreme Court dealt with the inverse situation in *Stichting Mayflower Mtn. Fonds v. United Park City Mines Co.*, 2017 WL 1091162 (Utah 2017) (switching from 20 years to five years in the context of public road creation). The Utah court found that the Utah statute was not retroactive. Hence, nine years of public use as of the date of the statutory change was insufficient.

The law of prescription in the private, real property context is summarized in this Idaho Court of Appeals decision:

A claimant, in order to acquire a prescriptive easement in Idaho, must present reasonably clear and convincing evidence of open, notorious, continuous, uninterrupted use, under a claim of right, with the knowledge, actual or imputed, of the owner of the estate for the prescriptive period. The use of the land must also constitute some actual invasion or infringement of the right of the landowner. A prescriptive right cannot be obtained if use of the servient estate is by permission of the landowner. . . .

The prescriptive period in Idaho is five [now 20] years. I.C. § 5-203. To establish a prescriptive easement, [the claimant is] required to prove continuous, uninterrupted use of the roads for the prescriptive period.

*Roberts v. Swim*, 117 Idaho 9, 12-13, 784 P.2d 339, 342-43 (Ct. App. 1989) (Swanstrom, J.) (citations omitted). See also *Weaver v. Stafford*, 134 Idaho 691, 698, 8 P.3d 1234, 1241 (2000) (Trout, J.) (saying much the same as *Roberts*, but in the context of an irrigation ditch easement) (*Weaver* also addresses the abandonment of a prescriptive right. Abandonment requires more than mere non-use. But the filling in of the irrigation ditch by the other landowner effected an abandonment.).

Satisfying the requirement of adversity is not so easy when it comes to roads. Absent evidence showing otherwise, the use likely will be presumed to be permissive. “However, when one claims an easement by prescription over wild or unenclosed lands of another, mere use of the way for the required time is not generally sufficient to give rise to a presumption that the use is adverse.” *Cox v. Cox*, 84 Idaho 513, 522, 373 P.2d 929, 934 (1962).

The claimant for a private prescriptive right must establish the requisite facts by “clear and convincing evidence.” *Roberts*, 117 Idaho at 12, 784 P.2d at 342. This contrasts with the less rigorous “preponderance of the evidence” test applicable to public road creation by public use. *East Side Highway Dist. v. Delavan*, 2019 WL 6724484 at \*13 (Idaho Dec. 11, 2019) (Stegner, J.); *Floyd v. Bd. of Comm’rs of Bonneville Cnty.* (“*Floyd II*”), 137 Idaho 718, 724, 52 P.3d 863, 869 (2002) (Walters, J.).

The law of prescriptive use (or prescription) is applicable in contests among private parties and, if successful, creates private rights. Although bearing some similarity in concept to public road creation through public use, prescriptive use is a distinct legal theory (based on Idaho Code § 5-203) that is not applicable to the creation of public roads (under Idaho Code § 40-202(3)). Nevertheless, the labels “prescriptive” or “prescription” are sometimes employed to refer to roads created by the public use method under the road creation statute. There, it has a different meaning. The reader should be cautious not to confuse the law of prescription in the context of public and private road creation.

The distinction between public road creation by public use and private easement creation by adverse possession is well illustrated in the case of *Kirk v. Schultz*, 63 Idaho 278, 119 P.2d 266 (1941) (Budge, J.). In this case the Court held that no public road was created, but private parties acquired a personal easement for use of the road. Accordingly, the owners of the land crossed by the road could maintain a padlock on the gate, so long as the easement holders were given access.

The Idaho Supreme Court has ruled that easements based prescriptive use under Idaho Code § 5-203 can only be acquired by private parties for themselves and such use does not give rise to easements or other interests in the public at large. *State v. Fox*, 100 Idaho 140, 594 P.2d 1093 (1979) (dealing with

beach access to Lake Coeur d'Alene; citing *Kirk v. Schultz*, 63 Idaho 278, 119 P.2d 266 (1941) (Budge, J.)). In *Fox*, the Court noted that the public road creation statute is an exception to this general rule. “The one situation where the legislature has allowed such public prescriptive rights is in public highways.” *Fox*, 100 Idaho at 146, 594 P.2d at 1099 (citing the road creation statute, Idaho Code § 40-103, now 40-202).

Note that “[a]dverse possession cannot be initiated . . . before issuance of patent when such possession is asserted in defense of a claim of title adverse to that of the government.” *Hemphill v. Moy*, 31 Idaho 66, 169 P. 288, 289 (1917). On the other hand, “[o]ne claiming an easement or a private road by adverse possession for the statutory period as against all persons except the United States may assert such adverse possession against any person in occupancy, while conceding the superior title of the United States.” *Kirk v. Schultz*, 63 Idaho 278, 283, 119 P.2d 266, 269 (1941) (Budge, J.).<sup>30</sup>

### C. Blanket legislative declaration (aka legislative fiat) (pre-1881 roads)

In 1864, 1875, and again in 1881 the Territorial Legislature issued blanket declarations that all roads then in public use were public roads. Laws of the Territory of Idaho, at p. 578, § 1 (1864); Compiled and Revised Laws of the Territory of Idaho, § 1, pp. 677-78 (approved 1/12/1875); Gen. Laws of the Territory of Idaho, § 1, pp. 277-78 (approved 2/1/1881).<sup>31</sup>

Since each of these statutes sweep in all roads in public use as of the date of enactment, the only date that matters is 2/1/1881.<sup>32</sup> Thus, if a road can be shown to be in existence and used by the public as of 2/1/1881, then it automatically became a public road as of that date.

Most importantly, there is no requirement of public maintenance and no minimum number of years that the road be in public use. Thus, if the road was in public use for one day before enactment of the legislation, it was established as a public road.

These territorial-era laws are no longer in effect, but their subsequent repeal and replacement by other road creation statutes does not affect the validity of public roads created while the statutes were in effect.

Presumably, roads created in this fashion are subject to the laws of abandonment in the same manner as any other road.

In *Sopatyk v. Lemhi Cnty.*, 151 Idaho 809, 814, 264 P.3d 916, 921 (2011) (W. Jones, J.), the Court applied the standard for the quantum of use established in *Kirk v. Schultz*, 63 Idaho 278, 282-84, 119 P.2d 266, 268-69 (1941) (Budge, J.) to the 1881 blanket legislative declaration (Gen. Laws of the Territory of Idaho § 1, pp. 277-78 (approved 2/1/1881)). “To satisfy the 1881 law, the use must be regular, not casual

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<sup>30</sup> The *Kirk* case also limited application of the rule of “implied dedication.” The Court declined to follow California precedent, ruling instead that “a party claiming a right by dedication bears the burden of proof on every material issue.” *Kirk*, 100 Idaho at 147, 594 P.2d at 1100. The Court also restricted application of two other common law principles, public rights acquired by “custom” and rights secured by the “public trust.” *Kirk*, 100 Idaho at 148-49, 594 P.2d at 1101-02.

<sup>31</sup> In addition, an 1885 statute recognized the prior blanket declarations. However, it did not contain another such declaration. Gen. Laws of the Territory of Idaho, at p. 162, § 1 (1885).

<sup>32</sup> The 1881 statute was enacted on 2/1/1881. Section 46 of the statute makes it effective as of the date of enactment. Gen. Laws of the Territory of Idaho, at p. 292, § 18 (approved 2/1/1881).

or desultory.” *Sopatyk*, 151 Idaho at 814, 264 P.3d at 921. By applying this standard, the Court implicitly treated the “blanket declaration statutes” as a form of road creation by prescriptive use—the key difference being that there is no need to show public use for any particular duration of time.

The *Sopatyk* Court found that there was substantial evidence from which the county could “infer” public use of the road in 1881:

A photograph dating to 1878 depicts two roads lined with structures intersecting in the center of Gibbonsville, one of which was undoubtedly ACR. Published historical accounts included in the record note that most of the mineral deposits around Gibbonsville had been found by the end of 1877, including a number of claims upstream from town along Anderson Creek. A deed specifically indicates that by 1881 at least four mining claims were located adjacent to or very near ACR along its whole length. It was reasonable for the Board to validate ACR because it was open and commonly used by the public in 1881.

*Sopatyk*, 151 Idaho at 815, 264 P.3d at 922.

#### **D. Idaho’s public road creation statute (formal declaration and prescription)**

##### **1. Overview**

As noted, Idaho’s first road creation statute was enacted in 1864. Laws of the Territory of Idaho § 1, p. 578 (1864). In addition to its blanket declaration based on public use, it also allowed roads to be created in the future based on official action.

In 1887, the Territorial Legislature enacted the first “modern” road creation statute (containing both formal declaration and public use road creation methods). It provided:

*Section 850.* Highways are roads, streets or alleys, and bridges, laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the public.

*Sec. 851.* Roads laid out and recorded as highways, by order of the Board of Commissioners, and all roads used as such for a period of five years, are highways. Whenever any corporation owning a toll bridge or a turnpike, plank or common wagon road is dissolved, or discontinues the road or bridge, or has expired by limitation, the bridge or road becomes a highway.

Rev. Stat. of Idaho Terr. §§ 850, 851 (1887) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).

The 1887 road creation statute has been amended on occasions over the years. Each amendment, however, recognizes road creation based on either official act of the county (formal dedication) or prescriptive use for a number of years.

The task of determining which version applies is simplified by the fact that there have been relatively few changes to Idaho’s road creation statute over the last century. Although there have been amendments and re-codifications from time to time, the substance of the statute is largely unchanged since 1893, when the road maintenance requirement was added. (This is in contrast to Idaho’s road abandonment

statutes, discussed below, which have been modified extensively over the years.) A detailed summary of these statutes is set out in Appendix A: Index to Idaho Road Creation and Abandonment Statutes.”

The 1893 statute provided:

*Section 850.* Highways are roads, streets or alleys, and bridges, laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the public.

*Section 851.* Roads laid out and recorded as highways, by order of the board of commissioners, and all roads used as such for a period of five years, provided the latter shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways. . . .

1893 Idaho Sess. Laws § 1, p. 12 (originally codified at Rev. Stat. of Idaho Terr. §§ 851, 851; codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).

Most Idaho road litigation is based on the statute as it read in 1893, because roads predating 1893 are relatively rare. The statute is only cosmetically different today.<sup>33</sup> Section 850 is now codified in the definition section, Idaho Code § 40-109. Section 851, the operative provision, is now codified at Idaho Code § 40-202(3).

Today’s version reads as follows:

(5) “Highways” mean roads, streets, alleys and bridges laid out or established for the public or dedicated or abandoned to the public. Highways shall include necessary culverts, sluices, drains, ditches, waterways, embankments, retaining walls, bridges, tunnels, grade separation structures, roadside improvements, adjacent lands or interests lawfully acquired, pedestrian facilities, and any other structures, works or fixtures incidental to the preservation or improvement of the highways. Roads laid out and recorded as highways, by order of a board of commissioners, and all roads used as such for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of a board of commissioners, are highways.

Idaho Code § 40-109(5) (corresponding to section 850 quoted above).

(3) Highways laid out, recorded and opened as described in subsection (2) of this section, by order of a board of commissioners, and all highways used for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of a board of commissioners, are highways. . . .

Idaho Code § 40-202(3) (corresponding to section 851 quoted above).

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<sup>33</sup> A minor substantive amendment was made in 1992. It is discussed in section I.D.2 at page 18.

The two methods of road creation contemplated by Idaho's road creation statute (formal declaration and public use) are discussed in turn below.

## **2. Roads created by formal declaration**

Since 1864, statutes have provided that roads may be created by official, recorded declaration of the county commissioners.<sup>34</sup>

At the outset, it is worth noting that a formal declaration recognizing a public road must have some legal basis. The commissioners cannot simply declare, by fiat, that a strip of land is now a public road, thereby depriving the owner of his or her property without compensation. Rather, the declaration should confirm some lawful basis for road creation, such as (1) gift or dedication of the road by the property owner, (2) creation of an R.S. 2477 road on federal land, or (3) condemnation (or its predecessor involving road viewers and damages). Curiously, the case law never seems to speak to this basic point.

Today's formal road creation statute can be traced to territorial legislation adopted in 1887, which provided "Roads laid out and recorded as highways by order of a board of commissioners ... are highways." Rev. Stat. of Idaho Terr. §§ 850, 851 (1887) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)). The 1887 statute was amended in 1893 (to add a road maintenance requirement) to read essentially as it does today.<sup>35</sup>

Roads laid out and recorded as highways, by order of a board of commissioners, and all roads used as such for a period of five years, provided the latter shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways.

1893 Idaho Sess. Laws § 1, p. 12 (emphasis supplied) (then codified at Rev. Stat. of Idaho Terr. § 851; codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).

The underlined portion of the statute provides for road creation by formal dedication. The key requirements are that the road be declared public "by order" and that the order be "recorded." In other words, there must be some formal, recorded action by the county commission declaring or recognizing that the road is part of the public road system.

As noted, the statute requires that the declaration must be recorded. No particular form of recording is required. In the early days, most counties maintained separate "road books" where such recordings were entered.

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<sup>34</sup> Laws of the Territory of Idaho, at p. 578, § 1 (1864) (containing a blanket declaration as to existing roads and allowing new roads to be created by official action); Compiled and Revised Laws of the Territory of Idaho, § 1, at 677-78 (approved 1/12/1875) (the second blanket legislative declaration); Gen. Laws of the Territory of Idaho, § 1, pp. 277-78 (approved 2/1/1881) (third blanket legislative declaration); Gen. Laws of the Territory of Idaho, § 1, p. 162 (1885) (recognizing prior blanket declarations as well as declaration by official act of county, but requiring that such roads be opened within four years).

<sup>35</sup> The discussion is based on the 1893 version of the statute because it is applicable to older roads where controversies are more likely and because this is version upon which the current statute is based.



The reference to roads being “laid out” appears to relate, conceptually, the idea of mapping (laying out) the location of a proposed road.<sup>36</sup> In particular, it appears to refer to the practice of the day in which persons within a road district could petition the district to lay out a new road. This is described in some detail in a territorial statute. Rev. Stat. of Idaho Terr. §§ 920 to 937 (1887). The commissioners of the district would then appoint disinterested “viewers” who would evaluate the proposed location of a road, determine the most practicable route, and assess what damages (that is, compensation) must be paid to landowners across whose property the road will pass. Rev. Stat. of Idaho Terr. § 924 (1887). This operated, in practical effect, as a form of condemnation.

In 1992 the Legislature amended the road creation statute, adding a requirement that the road be “opened.” 1992 Idaho Sess. Laws, ch. 55, § 1 (H.B. 627) (codified at Idaho Code § 40-202(3)).<sup>37</sup> In addition, the Legislature added a proviso to subsection (2) to clarify that counties “may hold title to an interest in real property for public right-of-way purposes without incurring an obligation to construct or maintain a highway with the right of way until the district determines that the necessities of public travel justify opening a highway within the right of way. The lack of an opening shall not constitute an abandonment, and mere use by the public shall not constitute an opening of the right of way.” 1992 Idaho Sess. Laws, ch. 55, § 1 (codified at Idaho Code § 40-202(2)). Note that common law dedications (discussed in section I.F at page 40) also allow roads to be dedicated to public use today, even if they are not constructed for many years.

### **3. Roads created by prescription (public use and maintenance)**

#### **a. Overview of statutory requirements**

Road creation by public use has been recognized since 1887, in which year the Territorial Legislature provided for public road creation based on five years of public use. Rev. Stat. of Idaho Terr. §§ 850, 851 (1887) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)). In this discussion, we will focus on the 1893 statute (which added the maintenance requirement). The same 1893 statute quoted above contains a provision for creation of public roads by prescription, that is, by public use and maintenance:

Roads laid out and recorded as highways, by order of a board of commissioners, and all roads used as such for a period of five years, provided the latter shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways.

1893 Idaho Sess. Laws § 1, p. 12 (emphasis supplied) (then codified at Rev. Stat. of Idaho Terr. § 851; codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)). Note that the proviso (the maintenance requirement) was added in 1893.

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<sup>36</sup> For example, in *Worley Highway Dist. v. Yacht Club of Coeur d’Alene, Ltd.*, 116 Idaho 219, 221, 775 P.2d 111, 113 (1989) (Bengtson, J. Pro Tem.), these surveyor’s notes are quoted: “I lay out a 60 ft. road extending from the Bridge along S.S. bdy. of Lots 5 and 6, in sec. 14 by setting stakes 60 ft. N of corners established on S. bdy. of reservation.”

<sup>37</sup> The 1992 Act neglected to make a corresponding change to the definition of “highways” in Idaho Code § 40-109(5).

This method does not require any official government declaration that the road is public. Indeed, it requires no public action at all. Instead, it is sufficient that the road be used by the public and (after 1893) “worked or kept up at the expense of the public” for a period of five years. This happens automatically by operation of law. “Under this statute, the use of a highway for a period of five years brought the road into existence as a highway without more; it was founded on user and the lapse of time and passed at once under the control of the public authorities designated by law.” *Kosanke v. Kopp*, 74 Idaho 302, 305, 261 P.2d 815, 816-17 (1953) (Thomas, J.).<sup>38</sup>

In a common fact setting, a road might have been built by private parties but, over time, came to be traveled by the public and the county took over road maintenance. The statute recognizes longstanding public use and maintenance as sufficient to create a public road—without any condemnation, gift, dedication, or other conveyance.

This discussion focuses on the words of the proviso requiring public maintenance (“provided the latter shall have been worked and kept up at the expense of the public”). But there is another component of the proviso: “or located and recorded by order of the board of commissioners.” To understand this odd provision, we need to back up in time.

As noted above, from 1887 until 1893, the statute provided two methods of road creation—formal and passive. Passive road creation required simply five years of public use. There was no requirement for public maintenance.<sup>39</sup> At that time the statute read:

Roads laid out and recorded as highways, by order of the Board of Commissioners, and all roads used as such for a period of five years, are highways. Whenever any corporation owning a toll bridge or a turnpike, plank or common wagon road is dissolved, or discontinues the road or bridge, or has expired by limitation, the bridge or road becomes a highway.

Rev. Stat. of Idaho Terr. §§ 850, 851 (1887) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).

The method of road creation based on public use enacted in 1887 is not limited to roads created after the date of enactment. Thus, the statute provides a “bridge” connecting the last blanket legislative declaration in 1881 (requiring only public use as of that date) to the 1893 amendment that added the maintenance requirement. Thus, prior to 1881, there was no particular duration of public use required.

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<sup>38</sup> The *Kosanke* case involved two roads. One, Blind Springs Road, was found to be a public road on the basis of written easements provided by the landowner to the local highway district. The Court also noted that, subsequent to the easements, there was public use and public maintenance. But that would seem to be belt and suspenders. The other, Sunbeam Road, was found to be a public road on the basis of public use alone pursuant to public use prior to the 1887 statute recognizing roads based on five years of public use alone. Here, the road was in use beginning in 1882. The Court noted that there had also been some public maintenance of Sunbeam Road (based on a “poll tax”), but the Court does not appear to have based its decision on this. The case contains a nice summary of the effect of the 1893 amendment adding the public maintenance requirement. This appears to have been included simply to show that prior to 1893, there was no public maintenance requirement.

<sup>39</sup> This reading of the statute is confirmed in *Cox v. Cox*, 84 Idaho 513, 519, 373 P.2d 929, 932 (1962) (prior to 1893 there were “no requirements it be worked or kept up at public expense”).

Between 1881 and 1893, the requirement was five years of public use. After 1893, the requirement was five years of public use and five years of public maintenance.

In 1893, the statute was amended to add the requirement for public maintenance, as shown in the following redline:

Roads laid out and recorded as highways, by order of the ~~B~~oard of  
~~C~~ommissioners, and all roads used as such for a period of five years,  
provided the latter shall have been worked and kept up at the expense of the  
public or located and recorded by order of the board of commissioners, are  
highways. Whenever any corporation owning a toll-bridge, or a turnpike,  
plank, or common wagon road is dissolved, or discontinues the road or  
bridge, or has expired by limitation, the bridge or road becomes a highway.

1893 Idaho Sess. Laws at § 1, p. 12 (then codified at Rev. Stat. of Idaho Terr. § 851; codified today as amended at Idaho Code §§ 40 109(5) and 40 202(3)) (redlining supplied to show 1893 amendment).

The addition of the 1893 amendment makes the statute difficult to parse. The first part (“provided the latter [all roads used for five years] shall have been worked and kept up at the expense of the public”) is simple enough. But the second part (“or located and recorded by order of the board of commissioners”) is confusing.

The “located and recorded” provision appears to be an alternative to the original formal recognition for roads “laid out and recorded.” This makes sense if the provision for roads “laid out and recorded” is understood to apply to the process road construction by the local government involving viewers and the payment of damages (compensation) as described above in section I.D.2 at page 18. In other words, roads “laid out” describes a condemnation-type method of road creation for roads not yet in place, while the 1893 amendment’s reference to roads “located and recorded by order of the board of commissioners” may be understood to allow the board to formally recognize as public existing roads that have been used for five years—without public maintenance and without payment of compensation. If this is the correct reading, then formal declaration of existing roads is allowed only if they have been publicly used for five years.

It bears emphasis that no Idaho appellate court has delved so deeply into this statute. Rather, the courts have read the statute far more simply, saying that there are two kinds of road creation: (1) formal declaration and (2) passive creation which, since 1893, requires both public use and public maintenance.

In any event, it is safe to say that if the 1893 amendment ever allowed for recognition of public roads based solely on public use, that authority ended with the adoption of modern validation proceeding statutes in 1986 (Idaho Code § 30-203A). In other words, there is no longer any mechanism for a County to simply “locate and record” a road. Thus, if a road is being validated (or if title is being judicially determined) for the first time today based on passive road creation after 1893, both public use and public maintenance must be shown.

Note that the necessity or importance of a road to the public is not a relevant consideration under the road creation statute. “The necessity of public access is not germane to the determination of public road status under I.C. § 40-202.” *Roberts v. Swim*, 117 Idaho 9, 16, 784 P.2d 339, 346 (Ct. App. 1989) (Swanstrom, J.). However, once it is determined that a public road has been created, necessity and importance are critical factors to be considered under the public interest evaluation mandated for road validation. See discussion in section IV.A.3 at page 108.

**b. The public use requirement for road creation**

Note that however much public use is required to establish road creation, even less is required to fend off a claim of abandonment. See discussion in section III.C.3 at page 92.

**(i) Use need not be hostile; permissive use qualifies as public use.**

In *East Side Highway Dist. v. Delavan*, 2019 WL 6724484 (Idaho Dec. 11, 2019) (Stegner, J.), the Idaho Supreme Court ruled that there is no requirement for “hostility” under Idaho’s statute for public road creation (Idaho Code § 40-202(3)).

The hostility requirement derives from the law of adverse possession, which is the basis for private prescriptive rights. In other words, permissive use by a third party does not create a private prescriptive right in that third party. *Chen v. Conway*, 121 Idaho 1000, 1005, 829 P.2d 1349, 1354 (1992); *Simmons v. Perkins*, 63 Idaho 136, 144, 118 P.2d 740, 744 (1941)).

In so ruling, the *East Side* Court expressly overruled dictum to the contrary in *Lattin v. Adams Cnty.*, 149 Idaho 497, 502, 236 P.3d 1257, 1262 (2010) (W. Jones, J.).

“The statute does not contain a requirement for hostile or adverse use by the public.” *East Side* at \*13. “To the extent *Lattin* can be read to identify a ‘hostility’ requirement in Idaho Code section 40-202(3) it was unnecessary to the decision in *Lattin* and we disavow that portion of the decision.” *East Side* at \*14. Thus, even use that is permissive can satisfy the public use requirement and give rise to a public road.

**(ii) What quantum of public use is required?**

In a seminal and oft-quoted case, the Idaho Supreme Court said that it is insufficient to show that the road was used “only casually and desultorily and not regularly.”<sup>40</sup> *Kirk v. Schultz*, 63 Idaho 278, 284, 119 P.2d 266, 268 (1941) (Budge, J.). The Court applied this rule both to the passive road creation statute of 1887 and to the blanket territorial declaration of 1881.

In summarizing the evidence considered by the trial court, the Idaho Supreme Court noted that “the witnesses generally agree that it was well-marked, used as a stock trail, and by miners, hunters, fishermen, and persons on horseback casually and desultorily to 1890 or 1891, when certain users of the trail or road proceeded to widen it into a wagon road over the land which respondents now occupy, and which was public domain at that time.” *Kirk*, 63 Idaho at 282, 119 P.2d at 268. Then, without further discussion or explanation, the Court concluded:

Evidence upon these points is conflicting. To quote the evidence would unnecessarily extend this opinion. “But, where the testimony in such a case is conflicting, and from it reasonable men might draw different conclusions, since there is evidence to support both theories of the case, the judgment of the trial court will not be disturbed.” *Jones v. Vanausdeln*, 28 Idaho 743, 750, 156 P. 615, 617; to same effect see *Bussell v. Barry*, 61 Idaho 350, 354, 102 P.2d 280, and cases cited therein.

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<sup>40</sup> The word “desultory,” by the way, means “marked by lack of definite plan, regularity, or purpose.” The word derives from the Latin term for a circus rider who jumps from horse to horse. Merriam-Webster Unabridged Dictionary (2013). A Roman circus rider refers to a chariot rider.

We have therefore concluded, after a most careful examination of the record, that there is sufficient substantial evidence to support the Court's findings and judgment as to appellants' first cause of action."

*Kirk*, 63 Idaho at 284, 119 P.2d at 268-69.

Thus, we know nothing of the facts that lead the Court to conclude that this use was not regular but only casual and desultory. Instead, the case was decided on the basis of deference to the trial court's factual findings, which go wholly unexplained. At the end of the day, the *Kirk* case articulates a standard, but offers no meaningful factual precedent for how that standard should be applied.

More recently, the Court elaborated on how much use is enough: "This Court has repeatedly found that casual or sporadic use is not enough—the use must be regular and continuous." *Lattin v. Adams Cnty.*, 149 Idaho 497, 502, 236 P.3d 1257, 1262 (2010) (W. Jones, J.). In *Lattin*, the Court found insufficient three affidavits describing occasional recreational use:

The County provided affidavits from three Adams County residents attesting to the fact that, for at least twenty years, local residents used Burch Lane to access the Payette National Forest for recreational or personal purposes such as hunting, berry picking, and wood gathering. There is also evidence of individual incidents when construction equipment traversed the road, such as an occasion when Idaho Power used it to build power lines in the area. Even so, nothing in the record indicates whether this activity occurred frequently or with any consistency, especially over a five-year span.

*Lattin*, 149 Idaho at 502-03, 236 P.3d at 1262-63.<sup>41</sup> This suggests that use by the public for such things as hunting, berry picking, and wood gathering may be sufficient to show public use, but only if the evidence shows they occurred frequently and consistently.

That conclusion is consistent, by the way, with the ruling in *Floyd v. Bd. of Comm'rs of Bonneville Cnty.* ("*Floyd II*"), 137 Idaho 718, 724, 52 P.3d 863, 869 (2002) (Walters, J.), which upheld public road status for Antelope Creek Road based on evidence that "the road was regularly and continuously used by the public for fishing, hunting, camping, and other recreational activities."

The *Lattin* Court was also influenced by the circumstances of this road. The road was first built in the 1920s when a prior owner of what was then a single tract of land allowed a local logger to construct a temporary access road on their property. The land was subdivided in 1974. By the time the land was platted, the road was overgrown with trees and difficult to use. Thereafter, some of the residents of the subdivision improved the road which they used to access their lots. Over the decades, the road had at least some use by members of the public to access forest lands. At some point, however, the subdivision residents installed signs declaring the road private. The Court keyed in to the law of private prescriptive rights, noting that the use by the public did not appear to be hostile.

Furthermore, the record does not suggest that any public access was hostile to Respondents' ownership. "[W]here the owner of real property constructs a

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<sup>41</sup> The *Lattin* case, by the way, was a quiet title action brought by the private landowners against the county. It was premised on dedication (either statutory or common law) and prescription. No R.S. 2477 issue was raised.

way over it for his use and convenience, the mere use thereof by others which in no way interferes with his use will be presumed to be by way of license or permission.” Respondents apparently never did anything to keep the public off the road prior to putting up the signs that triggered this lawsuit, nor does the County suggest that occasional traffic into the national forest interfered with Respondents’ ownership of the road. Respondents very well could have permitted such access to the forest. In short, there is simply not enough evidence to create a fact issue as to public use.

*Lattin*, 149 Idaho at 503, 236 P.3d at 1263 (citing *Chen v. Conway*, 121 Idaho 1000, 1005, 829 P.2d 1349, 1354 (1992) (quoting *Simmons v. Perkins*, 63 Idaho 136, 144, 118 P.2d 740, 744 (1941) (a case dealing with prescription by both by public and private use, finding neither occurred because the use was permissive)).

The *Lattin* Court’s reference to the hostility requirement for private easements was rejected and overruled in *East Side Highway Dist. v. Delavan*, 2019 WL 6724484 (Idaho Dec. 11, 2019) (Stegner, J.).

In *Ada Cnty. Highway Dist. v. Total Success Investments, LLC* (“*Total Success I*”), 145 Idaho 360, 179 P.3d 323 (2008) (Burdick, J.), the Idaho Supreme Court found that a public road had been created based on public use. In so ruling, the Court offered this summary of the law:

Public status of the roadway can be established by proof of regular maintenance and extensive public use. [*Floyd v. Bd. of Comm’rs of Bonneville Cnty.* (“*Floyd II*”), 137 Idaho 718, 724, 52 P.3d 863, 869 (2002).] There is no intent requirement to create a public road pursuant to I.C. § 40-202(3). *Id.* at 727, 52 P.3d at 872. “[T]he primary factual questions are the frequency, nature and quality of the public’s use and maintenance.” *Id.* The public must use the road regularly, and the use must be more than only casual or desultory. *Burrap*, 114 Idaho at 53, 753 P.2d at 264.

Maintenance need only be work and repairs that are reasonably necessary; it is not necessary maintenance be performed in each of the five consecutive years or through the entire length of the road. *Floyd*, 137 Idaho at 724, 52 P.3d at 869 (citing *Roberts v. Swim*, 117 Idaho 9, 16, 784 P.2d 339, 346 (Ct. App. 1989); *State v. Nesbitt*, 79 Idaho 1, 6, 310 P.2d 787, 790 (1957), overruled on other grounds by *French v. Sorensen*, 113 Idaho 950, 751 P.2d 98 (1988)).

*Total Success I*, 145 Idaho at 365, 179 P.3d at 328 (referencing *Burrap v. Stanger*, 114 Idaho 50, 753 P.2d 261 (Ct. App. 1988) (Swanstrom, J.), *aff’d*, 115 Idaho 114, 765 P.2d 139 (1988)). The Court found this test was met based on evidence of “extensive public use.” *Total Success I*, 145 Idaho at 368, 179 P.3d at 331. In *Total Success I*, the Court found that use of an alley by business customers, delivery trucks, and garbage trucks easily passed this test.

In *Sopatyk v. Lemhi Cnty.*, 151 Idaho 809, 814, 264 P.3d 916, 921 (2011) (W. Jones, J.), the Court found that there was substantial evidence from which the county could “infer” public use of the road by 1881:<sup>42</sup>

Further, there is also substantial evidence from which the Board could infer that the public commonly used ACR [Anderson Creek Road] in 1881. A photograph dating to 1878 depicts two roads lined with structures intersecting in the center of Gibbonsville, one of which was undoubtedly ACR. Published historical accounts included in the record note that most of the mineral deposits around Gibbonsville had been found by the end of 1877, including a number of claims upstream from town along Anderson Creek. A deed specifically indicates that by 1881 at least four mining claims were located adjacent to or very near ACR along its whole length. It was reasonable for the Board to validate ACR because it was open and commonly used by the public in 1881.

*Sopatyk*, 151 Idaho at 815, 264 P.3d at 922.

See discussion of *Cnty. of Shoshone v. United States*, 589 Fed. Appx. 834 (9th Cir. 2014) below in section I.D.3.b(iv) at page 27 (no inference of five years of public use based on a one-year mining boom).

**(iii) Idaho law does not require that a road be a major thoroughfare to become a public road.**

Under Idaho law, any road, even a rough trail, may become a public road if it meets the test for five years of regular public use.

For example, in *State v. Nesbitt*, 79 Idaho 1, 9, 310 P.2d 787, 792 (1957) (Keeton, J.), the majority found sufficient public use despite the dissent’s observation that the testimony showed it was “merely a trail that you could get over with a wagon” and the only evidence of use was a 75-year old witness recalling that when she was 11 she “rode horseback” on the trail.

In *Kirk v. Schultz*, 63 Idaho 278, 119 P.2d 266 (1941), the Court repeatedly used the terms “trail or road” together, drawing no distinction between them in stating the legal test for a public road: “The question therefore arises, Was there such regular use of the trail or road by the public for such a period of time and under such conditions as to establish a public highway under the laws of this State?”

In a 1972 case, the Court said that, in the early days at least, a mere path or trail is sufficient for road creation:

To appreciate the statutory pattern and legislative purpose one must first consider the conditions prevailing in the territory of Idaho at the time of the enactment of the progenitor of I.C. § 40-104 and the various platting statutes. The state was sparsely populated, roads as we know them today were few, the number of actual villages, towns and cities were few, and the streets in such

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<sup>42</sup> Although the *Sopatyk* Court was addressing to the 1881 Territorial Declaration, the “regular public use” standard it applied is the same as that applied under subsequent passive road creation cases in *Kirk*, *Galli*, and all the other cases.

settlements somewhat primitive. In 1887 when I.C. § 40-104 was first enacted the situation was but little changed. Highways, as defined, were originally in many instances merely paths or trails that by use had been expanded to the point where they could be recognized as roads.

*Boise City v. Fails*, 94 Idaho 840, 844, 499 P.2d 326, 330 (1972) (McFadden, J.) (emphasis supplied).<sup>43</sup>

In *S. Utah Wilderness Alliance v. BLM* (“SUWA”), 425 F.3d 735 (10<sup>th</sup> Cir. 2005), the Tenth Circuit offered this observation:

R.S. 2477 grants “the right of way for the construction of highways over public lands, not reserved for public uses.” At common law the term “highway” was a broad term encompassing all sorts of rights of way for public travel. In his magisterial *Commentaries on American Law*, Chancellor James Kent wrote that “Every thoroughfare which is used by the public, and is, in the language of the English books, ‘common to all the king’s subjects,’ is a highway, whether it be a carriage-way, a horse-way, a foot-way, or a navigable river.” James Kent, 3 *Commentaries on American Law* 572-73, (10<sup>th</sup> ed. 1860). Accord, Isaac Grant Thompson, *A Practical Treatise on the Law of Highways* 1 (1868) (“A highway is a way over which the public at large have a right of passage, whether it be a carriage way, a horse way, a foot way, or a navigable river”); Joseph K. Angell & Thomas Durfee, *A Treatise on the Law of Highways* 3-4 (2d ed. 1868) (“Highways are of various kinds, according to the state of civilization and wealth of the country through which they are constructed, and according to the nature and extent of the traffic to be carried on upon them,—from the rude paths of the aboriginal people, carried in direct lines over the natural surface of the country, passable only by passengers or pack-horses, to the comparatively perfect modern thoroughfare.”).

*SUWA* at 782.<sup>44</sup>

In the same decision, the Tenth Circuit rejected any requirement of mechanical construction, holding that mere use of the road is sufficient.

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<sup>43</sup> The *Boise City* case, by the way, dealt with road abandonment. The reference to section 40-104 is to the road abandonment statute, later recodified to Idaho Code § 40-203 and repealed altogether in 1993. 1993 Idaho Sess. Laws, ch. 412, § 4 (S.B. 1108) (codified at Idaho Code § 40-203(4)).

<sup>44</sup> The long and hard fought *SUWA* litigation ultimately ended, on remand, in a dismissal on jurisdictional grounds for want of an actual case or controversy, when the construction of the roads ceased and the BLM dismissed its claims. The court then had no basis to rule on the issue of title to the alleged R.S. 2477 roads. “For its part, SUWA pleaded no ownership interest in the land subject to the asserted rights-of-way and the United States is no longer a party to this case. Cf. *San Juan County v. United States*, 420 F.3d 1197, 1209–10 (10<sup>th</sup> Cir. 2005) (noting ‘that SUWA could not itself initiate or defend a federal quiet title action’).” *S. Utah Wilderness Alliance v. BLM*, 2006 WL 2572116 (D. Utah 2006).



No judicial or administrative interpretation of the statute, prior to its repeal, ever treated “mechanical construction” as a pre-requisite to acceptance of the grant of an R.S. 2477 right of way. The standard has no support in the common law, which, as we have noted, formed the statutory backdrop for R.S. 2477.

...

Consistent with our conclusion that acceptance of the grant of R.S. 2477 rights of way is governed by long-standing principles of state law and common law, we cannot accept the argument that mechanical construction is necessary to an R.S. 2477 claim. Adoption of the “mechanical construction” criterion would alter over a century of judicial and administrative interpretation.

*SUWA*, 425 F.3d at 776-78 (footnote omitted).

The case of *Galli v. Idaho Cnty.*, 146 Idaho 155, 191 P.3d 233 (2008) (W. Jones, J.; J. Jones, J., concurring), which is discussed more fully below, is not to the contrary. While insufficient public use was found there, that was not because the road was a mere trail. Rather, it was because the trail was incomplete and there was no evidence of five years of public use before the land left the public domain.

**(iv) Inferences of public use may be based on circumstantial evidence.**

The obvious difficulty in applying the use and maintenance requirement is that commissions and courts may be called upon to figure out what happened in remote parts of the State over a century ago. Evidence is often limited to old maps and surveys, historic newspaper articles, the occasional public record, and the childhood memories (often hearsay) of octogenarians. And that’s the good case. This challenging situation was presented in *Galli v. Idaho Cnty.*, 146 Idaho 155, 191 P.3d 233 (2008) (W. Jones, J.; J. Jones, J., concurring).

Although the *Galli* case dealt with an alleged R.S. 2477 road,<sup>45</sup> I discuss it here because its holding applies equally to all prescriptive road creation situations. In *Galli*, there was no evidence of “some positive act” (the R.S. 2477 analog to formal creation—see discussion in section I.H.5 at page 63). Instead, the R.S. 2477 road creation theory in *Galli* relied on compliance with the Idaho road creation statute in

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<sup>45</sup> At the time of their alleged creation, the Race Creek and Kessler Creek roads were located on unreserved public land. Accordingly, the *Galli* case was litigated on the basis of R.S. 2477. The detailed description of the roads in the district court decision shows that, at the time of the litigation, all of Race Creek Road and about half of Kessler Creek road were located on private land owned by Mr. Galli. Only the last portion of Kessler Creek Road enters what is now the Nez Perce National Forest and leads to the unpatented Spotted Horse Mine claim owned by Mr. Jutte. No one raised a question about why there was no federal quiet title action as to the portion on federal land. Perhaps this was because, according to the district court decision, the federal government supported this public access and had even considered condemning the right-of-way to create access. By the way, it would seem that the proponent of the roads could have presented other road creation theories—at least as to the portions of the roads on private lands—but failed to do so. For instance, the roads probably could have been justified as a common law dedication, based on the patents issued in 1905 which, presumably, were issued with reference to plats showing the roads in question. Likewise, it would seem that the roads might have been justified on the basis of more recent prescriptive use and public maintenance.

existence in 1887 which required a showing of five years of public use.<sup>46</sup> Since this was an R.S. 2477 case, the five years of use had to occur prior to 1904, the year the land was removed from the public domain.<sup>47</sup> Thus, there needed to be evidence of public use beginning in 1899.

Alas, the *Galli* case got off on the wrong foot. The county commissioners incorrectly relied on the “act of first construction and first use” standard set out in Idaho Code § 40-204A(1). Thus, they thought that they did not have to show five years of public use and public maintenance (because the road was alleged to be created after 1893). The commissioners believed, incorrectly, that they only needed to show that the road existed prior to the underlying land leaving public land status. Accordingly, the record upon which they relied was poorly developed. Note also that they could have attempted to show that there was five years of public use and maintenance after the date on which the road left the public domain (1904), but, again, they did not understand the need to provide this evidence.

As a consequence, the Idaho Supreme Court had little in the record to work with. What it had was a federal survey in 1902 showing all of Race Creek Road and portions of Kessler Creek Road along with “a few cabins, some landmarks and residences and a few fences.” *Galli*, 146 Idaho at 157, 191 P.3d at 235.

On appeal to the district court, the Board defended its decision saying that it was reasonable to infer that these cabins and fences had not sprung up overnight, thus suggesting that the road was in existence and used by the public by 1899. The district court rejected this conclusion because it was a mere inference, saying that only “direct evidence” could be relied on. The Idaho Supreme Court ruled that direct evidence is not required and that circumstantial evidence may suffice.

The district court incorrectly stated that a party must prove the existence of the road by direct evidence. Although direct evidence is not required, there must be sufficient circumstantial evidence to support any inferences.

*Galli*, 146 Idaho at 160, 191 P.3d at 238.

In this case, however, the Court found the circumstantial evidence insufficient. In other words, some reasonable inference might be allowed, but reaching three years back when there was only evidence of some “cabins and fences” along a portion of the road was not enough:

Here, there was no documentary evidence which showed use prior to the 1902 survey. The Board merely inferred the use would have had to pre-date the 1902 survey. However, use would have had to pre-date the survey by three years in order to meet the statutory requirement of five years. Jutte [the proponent of the road] was required to provide evidence, direct or circumstantial, which showed the existence and regular use of the Roads dating back to 1899. It is noted that no evidence, other than the existence of cabins and fences, spoke towards the amount of use. The only

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<sup>46</sup> The *Galli* decision, however, did not address the applicability of the maintenance requirement. This may be because it mistakenly applied the 1887 statute (which has no maintenance requirement). See discussion in section I.D.3.c(viii) at page 35.

<sup>47</sup> Land in the area was temporarily withdrawn on February 1, 1904 to form the Seven Devils Mountains Forest Reserve. Some homestead entries were made in the same year, and were patented as early as 1905. Record before the Idaho Supreme Court at 51.

documentation was the survey map and notes, which is not adequate to show regular public use for five years. The district court incorrectly stated that a party must prove the existence of the road by direct evidence. Although direct evidence is not required, there must be sufficient circumstantial evidence to support any inferences. It cannot be said that existence of the roads in a 1902 survey supports a finding by substantial and competent evidence to infer regular use by the public from 1899 to 1904.

*Galli*, 146 Idaho at 160, 191 P.3d at 238.

It bears emphasis that the issue in *Galli* (at least as to Race Creek Road) was not the extent of public use, but the duration of public use. While the *Galli* Court (except for Justice Jim Jones) was unwilling to infer public use for three years prior to the date of the survey, it had no quarrel with the conclusion that there was public use 1902 forward. Thus a survey showing the existence of a road along with a few cabins and fences was plenty to establish public use from 1902 on. The problem for the road proponents was that this was only two years of public use before the reservation.

One would think that evidence of cabins, fences, and irrigation ditches<sup>48</sup> would be pretty strong circumstantial evidence. The majority did not explain why this was insufficient. The concurrence by Justice Jim Jones, however, explains that there the existence of “a number of cabins, fences and irrigation ditches” should have been sufficient evidence to support an inference that Race Creek Road existed at least three years prior to 1902, but that there was no such evidence to support the existence of Kessler Creek Road. Therefore, “any remand would be fruitless.” *Galli*, 146 Idaho at 162, 191 P.3d at 240. In other words, there were really two roads involved, and both were necessary to the public road proponent. So whatever inferences might be drawn regarding one of the roads did not suffice. No inferences of public use prior to 1902 could be drawn regarding the other road.

In sum, proving use (or maintenance) of a road a hundred years ago is a difficult task. However, the Court will allow some inferences to be drawn based on circumstantial evidence so long as the evidence is “sufficient to support any inferences.” *Galli*, 146 Idaho at 160, 191 P.3d at 238.

In *Sopatyk v. Lemhi Cnty.*, 151 Idaho 809, 264 P.3d 916 (2011) (W. Jones, J.), the Court had occasion to apply the *Galli* rule allowing inferences of public use to be drawn. It did so in the context of the 1881 blanket legislative declaration (see discussion in section I.C at page 15), but the standard is the same for prescriptive use. Although there was no direct evidence of public use, the Court found ample evidence of public use based on inferences drawn from documentation of active mining activity in the vicinity of the road.

In *Cnty. of Shoshone v. United States*, 589 Fed. Appx. 834 (9th Cir. 2014) (memorandum decision), the Ninth Circuit applied the *Kirk*, *Galli*, and *Sopatyk* precedents to a boom and bust scenario. At issue was whether there had been five years of public use of a road known as Eagle Creek Road, which accessed a mining town known as Eagle City.<sup>49</sup> The facts showed a boom and bust cycle that lasted barely a year,

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<sup>48</sup> The concurrence mentioned the irrigation ditches, too. The majority only mentioned the cabins and fences.

<sup>49</sup> Eagle Creek Road is located within the Coeur d’Alene National Forest. The district court and appellate decisions refer instead to the Payette National Forest(s), which is a collection of national forests including the Coeur d’Alene.

after which there was scant evidence of use. “The district court concluded that, after the frenzy, ‘the great stampede to Eagle Creek collapsed upon itself like the banks of snow dissolving into the spring freshet.’” *County of Shoshone*, 589 Fed. Appx. at 837. Applying a “clear error” standard, the Ninth Circuit declined to overrule the district court’s conclusion that the facts were closer to those of *Galli* than to *Sopatyk*. The district court’s conclusion that there was insufficient public use to meet the *Kirk* test was not “illogical, implausible, or without support in inferences that may be drawn from the record.” *County of Shoshone*, 589 Fed. Appx. at 837.

**(v) Use by adjacent landowners qualifies as “public” use.**

Occasionally opponents of public roads will contend that use by the landowners served by the road does not constitute “public” use for purposes of road creation by prescription. The Idaho Supreme Court has rejected this argument, holding that use of a road by adjacent landowners qualifies as public use. *Ada Cnty. Highway Dist. v. Total Success Investments, LLC* (“*Total Success I*”), 145 Idaho 360, 367-68, 179 P.3d 323, 330-31 (2008) (Burdick, J.) (“TSI argues ACHD has failed to establish an acquisition because ACHD relied on testimony by individuals that do not qualify as members of the public. . . . The evidence reveals that the strip in question was used frequently by adjacent landowners and individuals accessing the businesses of the adjacent landowners and, therefore, supports a conclusion of extensive public use.”); *Marshall v. Blair*, 130 Idaho 675, 680, 946 P.2d 975, 980 (1997) (“[U]se of a roadway by adjoining landowners’ invitees and guests . . . indeed must be considered general public use.”).

**(vi) Placement of gates across a road is inconsistent with public nature of use.**

Of course, the public use requirement requires that the road be open to the public. What if the road is sometimes open to the public and sometimes not? That is probably not sufficient.

In a 1924 case the Idaho Supreme Court rejected a claim of public road creation by prescription where the road had been gated by the owners. In *Ross v. Swearingen*, the Court said:

The evidence was sufficient to justify the court in concluding that the road was not a public road, but that it was one over which people had traveled at will, but on which landowners through whose lands it extended had felt at liberty for many years to maintain and had maintained gates.

*Ross v. Swearingen*, 39 Idaho 35, 39, 225 P. 1021, 1022 (1924) (Lee, J).

This conclusion was reiterated in 1962. In *Cox v. Cox*, the Court said the existence gates across a road—even if unlocked—is strong evidence against recognition of the road as public:

Witnesses for both parties concurred that gates had been maintained across the road in question for many years, the only area of dispute being the time when the gates were first erected. Where gates are in existence across a road barring the passage and making it necessary to open them in order to use the road, the existence of such gates is considered as strong evidence that the road was not a public road.

*Cox v. Cox*, 84 Idaho 513, 521, 373 P.2d 929, 933 (1962).

Thus, the mere presence of an unlocked gate—requiring members of the public to get out of their vehicles and open the gate—undercuts the argument that the road is public. This conclusion is reinforced where, as in *Cox*, the gate is locked “at times.” *Cox*, 84 Idaho at 519, 373 P.2d at 932. In any event, a showing that public access was sometimes available (when the gate was unlocked) was insufficient to satisfy the public use requirement.<sup>50</sup>

See also *State v. Nesbitt*, 79 Idaho 1, 310 P.2d 787 (1957), including a lengthy discussion of the subject in the dissent.

**(vii) Payment of taxes**

Another factor that has been mentioned by the Court is in determining whether there was “public use” is whether the land over which the road traverses is exempted from assessment for property tax purposes. This was mentioned by the Court in *Cox v. Cox*, 84 Idaho at 520, 373 P.2d at 933, though it is presumably not a determinative factor. Indeed, placing too much emphasis on this factor would seem inconsistent with the Court’s conclusion that inclusion or exclusion of a road from official maps is not determinative.

**c. The public maintenance prong**

**(i) There was no maintenance requirement prior to 2/2/1893.**

As noted above, the road maintenance requirement was not added to the road statute until 2/2/1893.<sup>51</sup> If public use of the road can be demonstrated for five years prior to 1893, that is all that is required.

**(ii) Proof of maintenance**

Since 1893 it has been necessary to show public maintenance as well as public use. (See discussion above in section I.D.3.a at page 19.) Of the two, public use is usually easier to document. Public use may be proved through a variety of means, including personal recollections or even hearsay reports of family members. In contrast, public maintenance is difficult to prove where records of maintenance are sketchy at best and sometimes entirely unavailable.

The proponent of the road may seek to prove public maintenance by implication—for instance showing that the road was within a road district for which funding was available.<sup>52</sup> The courts have not had an occasion to articulate a clear standard of proof on this issue.

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<sup>50</sup> This conclusion is reinforced by the Court’s decision in *French v. Sorensen*, in which a claim of road creation by prescriptive use was rejected. In that case, “[t]he Forest Service considers the road to be necessarily open for public use, but dependent upon Forest Service permission, including the right to close. . . . As is disclosed, the use by the public of a Forest Service road is at the will of the Forest Service.” *French v. Sorensen*, 113 Idaho 950, 954, 956, 751 P.2d 98, 102, 105 (1988) (Bistline, J.).

<sup>51</sup> The statute in effect prior to 1893 was Rev. Stat. of Idaho Terr. §§ 850, 851 (1887) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)). The road maintenance requirement was added by 1893 Idaho Sess. Laws at p. 12, § 1 (then codified at Rev. Stat. of Idaho Terr. § 851; codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).

**(iii) How many years of maintenance are required?**

Technically speaking, the statute appears to require public use for five years and public maintenance for no particular period of time. However, in *Roberts v. Swim*, the Court stated that five years of public maintenance is also required.<sup>53</sup> The Court said so again in *Ada Cnty. Highway Dist. v. Total Success Investments, LLC* (“*Total Success P*”), 145 Idaho 360, 366, 179 P.3d 323, 329 (2008) (Burdick, J.): “Maintenance need only be work and repairs that are reasonably necessary; it is not necessary maintenance be performed in each of the five consecutive years or through the entire length of the road.” In *Lattin v. Adams Cnty.*, 149 Idaho 497, 236 P.3d 1257 (2010) (W. Jones, J.), the Court again made it clear that five years of maintenance is required: “There is also no issue of material fact to support the County’s claim that it has maintained the road for any five-year span of time.” *Lattin*, 149 Idaho at 503, 236 P.3d at 1263.

This quotation from *Lattin* (“any five-year span of time”) suggests that the five years of public use need not correspond with the five years of public maintenance. But in next breath, the Court implies that they must occur at the same time: “Even if such evidence existed, nothing in the record suggests that the county maintained the road at the same time the public was using it.” *Lattin*, 149 Idaho at 503, 236 P.3d at 1263. In any event, even if the maintenance and public use must occur during the same five years, that may occur at any time. Thus a road could be declared public today based on evidence that it was publicly maintained during, say, the 1920s, even if it is no longer publicly maintained.

**(iv) Maintenance is not required in every year.**

The five-year maintenance requirement (applicable beginning in 1893) does not require that maintenance be shown in each of the five years. Maintenance is required to be performed only to the extent necessary and need not occur over the entire length of the road.

“Such maintenance need only consist of work and repairs that are reasonably necessary . . . .” *Roberts v. Swim*, 117 Idaho 9, 16, 784 P.2d 339, 346 (Ct. App. 1989) (Swanstrom, J.). “It is not necessary for the county to do work upon a road that does not need work to keep it in repair or to put it in condition for the public to travel.” *State v. Berg*, 28 Idaho 724, 724, 155 P. 968, 969 (1916) (finding road creation through five years of public use despite no evidence of public maintenance).

“Maintenance need only be work and repairs that are reasonably necessary; it is not necessary maintenance be performed in each of the five consecutive years or through the entire length of the road.” *Ada Cnty. Highway Dist. v. Total Success Investments, LLC* (“*Total Success P*”), 145 Idaho 360, 366, 179 P.3d 323, 329 (2008) (Burdick, J.).

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<sup>52</sup> This situation was presented in the litigation over Indian Creek Road in Lemhi County (*Farrell v. Bd. of County Comm’rs of Lemhi County*, 138 Idaho 378, 64 P.3d 304 (2002) (Schroeder, J.)) and Anderson Creek Road also in Lemhi County (*Sopatyk v. Lemhi County*, 151 Idaho 809, 264 P.3d 916 (2011) (W. Jones, J.)). However, the Court found it unnecessary to reach the issue in either case, because it found the road met other (easier) tests of road creation.

<sup>53</sup> “The maintenance of the road by a public agency and the use by the public must be for a period of five years.” *Roberts*, 117 Idaho at 16, 784 P.2d at 346. In another case, however, the Court seemed to recognize that the five year rule applies only to the public use component: “Under the statute, a public road may be acquired by prescription: (1) if the public uses the road for a period of five years, and (2) the road is worked and kept up at the expense of the public.” *Floyd II*, 137 Idaho at 725, 52 P.3d at 870.

On the other hand, the maintenance must be something more than occasional or sporadic. “That testimony indicates that while there was some maintenance by the county, it was sporadic in nature. . . . The use and maintenance by a public entity must be something more than occasional or sporadic to change the character of a road from private to public.” *Rice v. Miniver*, 112 Idaho 1069, 1070-71, 739 P.2d 368, 369-70 (1987) (Shepard, C.J.).

**(v) Maintenance is not required of full length.**

It is not necessary that the entire length of the road receive maintenance. The Court noted over a hundred years ago in *Gross v. McNutt*, “Very few roads require work throughout their entire length. Our statute does not require work to be done upon a part of a highway not needing work.” *Gross v. McNutt*, 4 Idaho 286, 289, 38 P. 935, 936 (1894).

In a 1957 case, the Court reiterated: “[N]or does the statute require work to be done throughout the road’s entire length, but only requires that such work as may be needed be done when necessary . . . .” *State v. Nesbitt*, 79 Idaho 1, 6, 310 P.2d 787, 790 (1957) (Keeton, C.J.). On the other hand, in order to count toward the statutory requirement, the work must be performed on a part of the road that is “an integral part of the county road.” *Cox v. Cox*, 84 Idaho 513, 521, 373 P.2d 929, 933 (1962). As the Court said: “To so extend the rule of the *Gross v. McNutt* case (supra) would mean that by public maintenance on any county road, automatically every lane or road that touched or crossed such county road, would become a public one.” *Id.*

**(vi) Gratuitous or quid pro quo maintenance**

In a 1962 case, the Court concluded that a county road grader making a pass over a road was “done merely as a favor,” and therefore did not qualify as public maintenance for road creation purposes. *Cox v. Cox*, 84 Idaho 513, 520, 373 P.2d 929, 932 (1962). The Court noted: “There was a common custom in this area for county road crews to open up ranchers’ roads to their yards, without charge or obligation on the part of the rancher . . . .” *Id.*

Likewise, in *Roberts*, the Court of Appeals stated:

The intention of the county in maintaining the road must not be merely to provide gratuitous aid to the landowner. *Rice v. Miniver*, 112 Idaho 1069, 739 P.2d 368 (1987). Maintenance of a roadway by a public agency under an express contract, which exchanges such maintenance for limited public access while recognizing the private character of the road, creates no public rights in the roadway beyond those granted by the agreement.

*Roberts v. Swim*, 117 Idaho 9, 16, 784 P.2d 339, 346 (Ct. App. 1989) (Swanstrom, J.).

Where the maintenance was performed for other purposes (such a quid pro quo agreement with the landowner), the expenditure does not qualify under the statute:

This Court has held, “... where the public agency expending funds on a roadway expressly recognizes the private character of the road, and does not intend to create or assert any rights greater than those allowed by the owner of the roadway, I.C. § 40-103 does not operate to make the road public.”

*Rice v. Miniver*, 112 Idaho at 1071, 739 P.2d at 370 (quoting *Cordwell v. Smith*, 105 Idaho 71, 76, 665 P.2d 1081, 1086 (Ct. App. 1983)).

In *Burruv v. Stanger*, 114 Idaho 50, 753 P.2d 261 (Ct. App. 1988) (Swanstrom, J.), *aff'd*, 115 Idaho 114, 765 P.2d 139 (1988), the Court noted that there was no evidence that the road had been constructed at county expense. It ruled that occasional blading, snow plowing, and construction of a turn-around by the county was done gratuitously and therefore did not meet the test of being maintained at the expense of the public. The Court found that the county's intent with respect to these maintenance actions mattered and that it was proper to take into account the fact that the relevant portion of the road was displayed as "deleted or abandoned" on state and county road maps.

In *Tomchak v. Walker*, 108 Idaho 446, 448, 700 P.2d 68, 70 (1985), the Court provided this summary of the case law:

It is difficult to articulate a general rule to aid, on remand, the trial court's conclusion because of the extensive variation of circumstances in previous cases. In order to qualify under I.C. § 40-103, the use and maintenance must be something more than "only casually and desultorily and not regularly used" and maintained. *Kirk v. Schultz*, 63 Idaho 278, 284, 119 P.2d 266, 268 (1941). "Regular maintenance and extensive public use [are] sufficient to establish" a public easement by prescription under the statute. *Pugmire v. Johnson*, 102 Idaho 882, 884, 643 P.2d 832, 834 (1982). It need not be for five consecutive years nor through the entire length of the road, *State v. Nesbitt*, 79 Idaho 1, 6, 310 P.2d 787, 790 (1957). We are aware that in some counties it is a "common custom" for county road crews to gratuitously aid or to contract with rural citizens in the maintenance of private roadways. See *Cox v. Cox*, 84 Idaho 513, 520, 373 P.2d 929, 932 (1962); *Cordwell v. Smith*, 105 Idaho 71, 665 P.2d 1081 (1983). Therefore, we agree with the conclusion of the Court of Appeals that: "[W]here the public agency expending funds on a roadway expressly recognizes the private character of the road, and does not intend to create or assert any rights greater than those allowed by the owner of the roadway, I.C. § 40-103 does not operate to make the road public." 105 Idaho at 76, 665 P.2d at 1086.

**(vii) Maintenance by federal government**

Many roads in Idaho are maintained by the U.S. Forest Service through various cooperative arrangements with counties and highway districts. The Supreme Court ruled in 1988 that such federal expenditures do not qualify as public expenses under the road creation statute. *French v. Sorensen*, 113 Idaho 950, 958, 751 P.2d 98, 106 (1988) (Bistline, J.) (the Carole King case).<sup>54</sup>

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<sup>54</sup> There is room to distinguish *French* on the facts from other road contests. First, the Court noted in *French* that the ranch involved there was completely surrounded by Forest Service land. Thus there was no need for the Forest Service to keep the road open, and its doing so was plainly nothing more than a gesture of cooperation. Second, the Court added a strongly worded caution at the end of the case. The Court noted that the road through Carole King's ranch had never been formally dedicated, and had been formally abandoned in 1939. Moreover, the Court emphasized that access to public lands were not at issue in that case. If they were, private landowners would be "acting at their peril." *French*, 113 Idaho at 959, 751 P.2d at 107.



The *French* case involved a road known as Robinson Bar Road.<sup>55</sup> When Ms. King (then Sorensen) acquired the property, she gated the road. The opinion (which was adopted in toto from the district court's decision) is difficult to follow. It appears that Custer County validated the segment crossing the ranch as a public road in 1981. Thereafter, the Frenches and another couple brought a quiet title action seeking to establish title in the County<sup>56</sup> on the basis of five years of public use and public maintenance. The Court rejected the argument on the basis that the public maintenance was performed by the federal government, and such federal expenditures did not qualify under the Idaho statute for public road creation.

The Idaho Legislature quickly responded by writing a new definition of "expense of the public" to clarify that Forest Service funds should count in such cases. "Expense of the public" means the expenditure of funds for roadway maintenance by any governmental agency, including funds expended by any agency of the federal government, so long as the agency allows public access over the roadway on which the funds were expended and such roadway is not located on federal or state-owned land." 1993 Idaho Sess. Laws, ch. 412, § 1 (S.B. 1108) (codified at Idaho Code § 40-106(3)). No court has ruled as to whether S.B. 1108 has retroactive effect. (However, another 1993 statute, H.B. 388 has been found not to have retroactive effect. See discussion in section I.H.7 at page 69.

**(viii) No maintenance requirement for creation of an R.S. 2477 rights-of-way?**

In the *Galli* case, the district court judge, John H. Bradbury, swept aside the maintenance requirement altogether for R.S. 2477 rights-of-way. Relying the statement in *State v. Berg*, that evidence of use alone was sufficient to establish a public road if no maintenance was necessary, he concluded: "I therefore doubt that more than public use for the statutory period was necessary for acceptance of the federal offer of grant." *Galli v. Idaho Cnty.*, Case No. CV 36692, slip op. at 34 (Idaho Dist. Ct., 2<sup>nd</sup> Jud. Dist. June 2, 2006). He buttressed his decision on an early Wyoming decision calling for generous acceptance rules for R.S. 2477 rights-of-way. "Thus, I agree with the Wyoming Supreme Court's reasoning that laws enacted to fix roads which would be maintained at public expense should not easily be found to abrogate the mean of acceptance of the federal offer of grant by use alone." *Id.*, slip op. at 34 (citing *Hatch Bros. Co. v. Black*, 171 P. 267, 268 (Wyo. 1918).

On appeal, the amicus curiae urged that the maintenance requirement should be disposed of altogether for R.S. 2477 roads based on the more "lax" standard described in *Farrell v. Bd. of Cnty.*

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<sup>55</sup> The road is located entirely on U.S. Forest Service (now within the Sawtooth National Recreation Area). An .8-mile segment of the road crosses a private, 128-acre inholding known as Robinson Bar Ranch, immediately south of the Salmon River. Until approximately 2018, the ranch was owned by music legend Carole King (who, at the time of the litigation, went by Carol K. Sorensen). The ranch was once owned by Governor Chase Clark and his wife Jean, whose daughter Bethine Clark married Frank Church at the ranch.

<sup>56</sup> The opinion does not address the standing or right of the private parties to establish title in a third person (Custer County). See discussion in section IV.T.1 at page 153. However, the opinion did note that the United States was not made a party to the suit, and that relief was sought only as to the portion of the road crossing the private ranch. Thus, by clear implication, the parties and the Court recognized that a federal quiet title action would be necessary to establish title to that portion of the road on federal land. As a practical matter, however, there was no need to do so. The Forest Service recognized the rest of the road as part of the forest road system and, pursuant to its discretion, allowed public use thereof.

*Comm'rs of Lemhi Cnty.*, 138 Idaho 378, 384, 64 P.3d 304, 310 (2002) (Schroeder, J.), and the fact that none of the prior R.S. 2477 cases speak of maintenance.

Despite all this, the Idaho Supreme Court said nothing about maintenance. Apparently, the Court felt it did not need to address maintenance because no maintenance is required under the 1887 road creation statute, which it said was applicable. *Galli*, 146 Idaho at 159, 191 P.3d at 237. It is true that no maintenance was required in 1887, but this ignores the fact that the statute was amended in 1893 to require five years of public maintenance. The 1893 statute, it would seem, should have controlled in *Galli* since the key date for beginning road use was 1899.

Thus, we have no definitive guidance on the issue of whether R.S. 2477 roads are exempt from the public maintenance requirement or subject to a more lax standard on public maintenance. The general tenor of the *Galli* decision, however, seems to cut in the other direction. The thrust of the case seems to be that the “lax” standard allows R.S. 2477 roads to be established on the basis of “some positive act,” but that if there is no such official action, the road creation statute must be strictly complied with.

## **E. Statutory platting process (and the acceptance requirement)**

### **1. Current law**

Idaho has long provided a statutory method for dedication of rights-of-way to the public by developers of subdivisions (*e.g.*, Idaho Code §§ 50-1301 to 50-1334 governing dedications by real estate developers creating subdivisions).<sup>57</sup> There are other specialized platting statutes, as well. For example, Idaho Code § 58-317 (dating to 1909) authorizes the Idaho State Land Board to subdivide, plat, and sell at auction State endowment lands.

Key provisions of the current platting statutes are quoted below:

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<sup>57</sup> Chapter 13 (Plats and Vacations) is part of Title 50 (Municipal Corporations), which was enacted in 1967. 1967 Idaho Sess. Laws, ch. 429. Although found within the title on Municipal Corporations, the platting provisions in chapter 13 (Idaho Code §§ 50-1301 to 50-1334) are not limited to platting within a city; they also apply to unincorporated areas throughout the county. This was not always the case. From 1893 until 1967, the platting statute, although difficult to parse, apparently applied only to land that was part of a city or intended to be added to a city. In contrast, the 1967 version applies to all land within every county. This reflects the fact that prior to the 1960s, subdivisions rarely occurred outside of cities.

The predecessor to the 1967 platting statute was enacted in 1893 Idaho Sess. Laws, Act Concerning Cities and Villages, § 93, p. 127 and reenacted in 1899 Idaho Sess. Laws, H.B. 95, § 97, p. 213. “Prior to 1893, we had no statute on the subject of laying out city and village lots and blocks, streets, and alleys, filing plats thereof, and dedicating streets and alleys to public use.” *Boise City v. Hon*, 14 Idaho 272, 94 P. 167 (1908) (Sullivan, J).

The 1893 statute, with relatively minor amendments, was codified and recodified multiple times, most recently as Idaho Code § 50-2505 (1957). It remained in place until it was superseded by a new comprehensive Municipal Code in 1967. 1967 Idaho Sess. Laws, ch. 429.

Note that, despite the early statute’s limitation to cities, a proper statutory dedication may occur with respect to lots platted by the federal government and recorded in General Land Office, thanks to a subsequent statute recognizing as valid other platting laws. *Worley Highway Dist. v. Yacht Club of Coeur d’Alene, Ltd.*, 116 Idaho 219, 223, 775 P.2d 111, 115 (1989) (Bengtson, J. Pro Tem.) (federal platting constituted a valid statutory plat “with the help of the curative predecessor of I.C. § 50-1315”).

1. The owner or owners of the land included in said plat shall make a certificate containing the correct legal description of the land, with the statement as to their intentions to include the same in the plat, and make a dedication of all public streets and rights-of-way shown on said plat, which certificate shall be acknowledged before an officer duly authorized to take acknowledgments and shall be indorsed on the plat. The professional land surveyor making the survey shall certify the correctness of said plat and he shall place his seal, signature and date on the plat.

2. No dedication or transfer of a private road to the public can be made without the specific approval of the appropriate public highway agency accepting such private road.

3. Highway districts shall not have jurisdiction over private roads designated as such on subdivision plats and shall assume no responsibility for the design, inspection, construction, maintenance and/or repair of private roads.

Idaho Code § 50-1309.<sup>58</sup>

The acknowledgment and recording of such plat is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for public streets or other public use, or as is thereon dedicated to charitable, religious or educational purposes; provided, however, that in a county where a highway district exists and is in operation no such plat shall be accepted for recording by the county recorder unless the acceptance of said plat by the commissioners of the highway district is endorsed thereon in writing.

Idaho Code § 50-1312 (emphasis supplied) (previously codified to 49-2205).

The current codification of this statute traces its lineage only to a 1967 recodification. In fact, the “equivalent to a deed in fee simple” key language has been on the books since early statehood (1893 Idaho Sess. Laws sec. 93, as discussed in *Shaw v. Johnston*, 17 676, 682, 107 P. 399, 400 (1910) (Sullivan, C.J.).

Most people (including most title companies) assume this language means what it says (that the dedication conveys a fee interest). Curiously, however, the Idaho Supreme Court has consistently held that this conveys only an easement. According to the Court, the dedication conveys an easement, not the full fee.<sup>59</sup>

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<sup>58</sup> Prior to 1992, Idaho Code § 50-1309(1) called for the dedication of “all public streets and alleys shown on said plat.” 1967 Idaho Sess. Laws, ch. 429. In 1992, this subsection was amended to read as follows: “all public streets and ~~alleys~~ rights-of-way shown on said plat.” 1992 Idaho Sess. Laws, ch. 262. Minor amendments also were made to subsections (2) and (3).

<sup>59</sup> The first case to address the nature of the interest conveyed by a public dedication under the 1893 statute (which is functionally the same as the version in effect today) was *Shaw v. Johnston*, 17 Idaho 676, 682, 107 P. 399, 399-400 (1910) (Sullivan, C.J.). The *Shaw* Court did not actually apply the statute because it was enacted nearly two months after the subject plat was filed. Nevertheless, the Court addressed the 1893 statute and ruled

The easement created by the dedication presumably would be an exclusive right-of-way. This conclusion follows from the Court's explanation that the main difference between a full fee and the "equivalent" to a fee is that the public entity may not convey away its interest for profit.

The Court has held that the dedication to the public must be clear on the face of the plat.<sup>60</sup>

No street or alley or highway hereafter dedicated by the owner to the public shall be deemed a public street, highway or alley, or be under the use or control of said city or highway district unless the dedication shall be accepted and confirmed by the city council or by the commissioners of the highway district. An acceptance imposes no obligation or liability upon the city council or highway district until the street, highway or alley is declared to be open for public travel.

Idaho Code § 50-1313.<sup>61</sup>

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on its meaning (arguably in dictum). *Shaw* held that the same result would occur under the 1893 statute and the common law. Either way, only an easement is conveyed. In reference to the statute, the Court observed:

While the acknowledgment and recording is equivalent to a deed in fee simple, it is not a deed in fee simple, and does not give the public the same right to sell or dispose of the same that a private party has to land for which he holds the title in fee simple. We do not think it would be contended that, if a private owner dedicates a street or a block in a city to public use, the public could convey it to a private party and have the property placed to some other use or purpose than that for which it was originally dedicated.

*Shaw*, 107 P. at 400-01.

See also *Mochel v. Cleveland*, 51 Idaho 468, 5 P.2d 539 (1930) (recording of plat vested only determinable fee for public use to surface of street in city); *Powell v. McKelvey*, 56 Idaho 291, 53 P.2d 626 (1935) (owners of property abutting on street which predecessor in title had dedicated to city or state for use as such, owned fee of land to center of street, while city or state had complete right to use of such land for street purposes).

*Neider v. Shaw*, 138 Idaho 503, 507, 65 P.3d 525, 529 (2003) (Kidwell, J.) involved a statutory dedication (not a common law dedication) in which the plat depicted roads dedicated to the public. Relying on *Shaw*, the *Neider* Court reiterated that the statute providing that a recorded plat dedication is the equivalent of a deed in fee simple (Idaho Code § 50-1312) actually conveys only an easement.

In *Ponderosa Homesite Lot Owners v. Garfield Bay Resort, Inc.* ("*Ponderosa II*"), 143 Idaho 407, 410, 146 P.3d 673, 677 (2006) (Burdick, J.), a case involving a common law dedication, the Court again reiterated that "under Idaho law, a dedication, whether express or common law, creates an easement." The Court cited *Neider* in a footnote. *Ponderosa II*, 143 Idaho 410 n.3, 146 P. 676 n.3. Arguably, this too was dictum because the *Ponderosa II* case dealt with common law dedication not statutory dedication. Nevertheless, the Court has consistently adhered to its conclusion that section 50-1312 (and its 1893 predecessor) conveys an easement, not the full fee.

<sup>60</sup> In *Rowley v. Ada Cnty. Highway Dist.*, 156 Idaho 275, 281, 322 P.3d 1008, 1014 (2014) (Burdick, C.J.), the Court held that a plat depicting a walkway (without labeling other than the words "Walk Way") was insufficient to dedicate it to the public under this statute (or as a common law dedication) without some labeling or words showing it is intended to be set apart for public use. The *Rowley* Court observed that "there is no reason why a statutory dedication in a plat would have to be less clear and unequivocal than a dedication by common law." *Rowley*, 156 Idaho at 282, 322 P.3d at 1015 (quoting *Lattin v. Adams Cnty.*, 149 Idaho 497, 501, 236 P.3d 1257, 1261 (2010) (W. Jones, J.)).

None of the provisions of sections 50-1301 through 50-1325, Idaho Code, shall be construed to require replatting in any case where plats have been made and recorded in pursuance of any law heretofore in force; and all plats heretofore filed for record and not subsequently vacated are hereby declared valid, notwithstanding irregularities and omissions in manner of form of acknowledgment or certificate. Provided, however:

(1) When plats have been accepted and recorded for a period of five (5) years and said plats include public streets that were never laid out and constructed to the standards of the appropriate public highway agency, said public street may be classified as public right of way; and

(2) Public rights of way for vehicular traffic included in plats which would not conform to current highway standards of the appropriate public highway agency regarding alignments and access locations which, if developed, would result in an unsafe traffic condition, shall be modified or reconfigured in order to meet current standards before access permits to the public right of way are issued.

Idaho Code § 50-1315.

By taking or accepting land for a highway, the public acquires the fee simple title to the property. The person or persons having jurisdiction of the highway may take or accept [a] lesser estate as they may deem requisite for their purposes.

Idaho Code § 40-2302(1). This statute, which is codified to the road law title and has been in place since the 1950s, would appear to encompass both statutory and common law dedications.

## **2. Acceptance of the plat has not always been required.**

In *Worley Highway Dist. v. Yacht Club of Coeur d'Alene, Ltd.*, 116 Idaho 219, 224, 775 P.2d 111, 116 (1989) (Bengtson, J. Pro Tem.), the Court noted that the acceptance requirement did not exist until 1905.

Since the statutes existing in 1904 relating to statutory dedications make no reference to requiring acceptance of a plat by a public body, and in 1905 the legislature amended the statutes relating to dedication by adding a requirement that no plat shall be recorded unless it shall have been accepted and approved by a public body, we can only assume that the legislature intended to change the then existing law (here, by adding a requirement of acceptance).

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<sup>61</sup> The provision of the current section 50-1312 requiring acceptance by a highway district is more broadly articulated Idaho Code § 50-1313 (“Dedication must be accepted”) and in Idaho Code § 50-1309(2) (dealing with dedication of private roads to the public).

*Worley*, 116 Idaho at 223, 775 P.2d at 115.<sup>62</sup>

#### **F. Common law dedication**

Dedications of streets, open space, and the like ordinarily are accomplished pursuant to Idaho's platting statutes. Where there is a failure to comply with those statutes or when those statutes do not apply, a dedication may nonetheless be recognized under the common law.

##### **1. When a landowner offers to dedicate a road to the public, and the public accepts, a common law dedication occurs.**

In addition to the statutory method of public road dedication, roads may be made public in Idaho under the common law where, statutory dedication was not available for its formal requirements were not met. (The common law simply refers to judge-made law, that is, the collection of precedents from decisions of the appellate courts.)

Note that the doctrine of common law dedication is not limited to roads. Parks, open space, school lands, and land for public purposes may be dedicated in this way.

The common law provides that where a landowner makes an offer to dedicate property to the public or other private persons (typically by filing a plat showing the road, open space, etc. as public—but can even be oral), and the offer is accepted (typically by purchasing lots, but also by an act of approval of local government), a common law dedication occurs.

Note that a common law dedication does not require compliance with any statutory requirement. Nor does it require any official action. Indeed, the whole point of the doctrine is to judicially recognize the creation of public roads and other assets when statutory formalities are not followed. A common law dedication requires an “offer,” clearly and unequivocally stated, reflected by the totality of circumstances (*e.g.* the recording of a plat) and “acceptance” reflected in sales of lots pursuant thereto.

The doctrine of “common law dedication” is nearly as old as Idaho itself, dating to 1908. *Boise City v. Hon*, 14 Idaho 272, 94 P. 167 (1908) (Sullivan, J). In *Hon*, the platting of Arnold's Addition to the City of Boise occurred in 1878, prior to the first platting and dedication statute in 1893. Accordingly, there

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<sup>62</sup> *Worley* involved a road created by common law dedication by the United States based on a 1904 federal plat filed in in the General Land Office. The plat described a 60-foot wide road that was “laid out” (marked with stakes), but the road was never constructed. The Court found that no acceptance of the 1904 plat by the County was required, because the statutory requirement of acceptance did not go into effect until 1905. *Worley*, 116 Idaho at 223, 775 P.2d at 115. The Court complained that the trial court failed to explain why this was not a valid statutory dedication. However, the Court found that a remand was not necessary because, in any event, there was a valid common law dedication.

As an aside, Idaho platting statutes have long required that plats be filed County recorder's office. In *Worley*, the plat was filed in the General Land Office in Boise, not with the County. The Court affirmed the trial court's conclusion that this defect was corrected pursuant to a “curative” statute providing recognizing as valid all plats that “have been made and recorded in pursuance of any law heretofore in force.” Idaho Code § 50-1315. The Court declined to consider the Yacht Club's argument that the federal plat did not meet the standard of the curative statute, because the Yacht Club failed to file a cross-appeal. *Worley*, 116 Idaho at 223, 775 P.2d at 115.

was no statutory dedication. Nevertheless, the Court found that a dedication occurred based on common law precedent. This principle is now referred to as common law dedication.

*Hon* provides that where a landowner makes an offer of a road to the public (typically, but not necessarily, by filing a plat showing the road as public), and members of the public accept (by purchasing lots or accepting patents from the government), a public dedication occurs.

Note that a common law dedication does not require compliance with any statutory requirement. Nor does it require any official action. Indeed, the whole point of the doctrine is to judicially recognize the creation of public roads when statutory formalities are not followed. “This Court has held that a common law dedication can occur even when statutory dedication, based on statutes in effect at the time of the alleged dedication, fails.” *Paddison Scenic Properties, Family Tr., L.C. v. Idaho Cnty.*, 153 Idaho 1, 3 (2012) (citing *Worley Highway Dist. v. Yacht Club of Coeur d’Alene, Ltd.*, 116 Idaho 219, 224 (1989)).

For instance, in *Pullin v. Victor*, 103 Idaho 879, 655 P.2d 86 (Idaho Ct. App. 1982) (Walters, J.), a developer filed a plat in 1909 dedicating a road, which remained unbuilt until the 1960s. Homeowners challenged the 1909 dedication on the basis that it had never been accepted by the city, as required by the platting statute.<sup>63</sup> The Court held that a common law dedication occurred nonetheless. *Pullin*, 103 Idaho at 881, 655 P.2d at 88.

A common law dedication merely requires an “offer” (reflected in the filing of a plat or otherwise) and “acceptance” reflected in sales of property pursuant thereto.<sup>64</sup> The doctrine has been summarized this way by the Idaho Supreme Court:

When an owner of land plats the land, files the plat for record, and sells lots by reference to the recorded plat, a dedication of public areas indicated by the plat is accomplished. This dedication is irrevocable except by statutory process.

*Smylie v. Persall*, 93 Idaho 188, 191, 457 P.2d 427, 430 (1969) (McQuade, J.); *Boise City v. Hon*, 14 Idaho 272, 94 P. 167 (1908) (Sullivan, J); *see*, Memorandum from Susan Mattos to Idaho Attorney General Larry Echohawk, *Public Access to Public Lands*, State of Idaho Dept. of Fish and Game, at 17 (Sept. 10, 1991).

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<sup>63</sup> The platting statute referenced in *Pullin* was Idaho Revised Code § 2301 (1908). The equivalent provision of the current platting statute enacted in 1967 reads:

No street or alley or highway hereafter dedicated by the owner to the public shall be deemed a public street, highway or alley, or be under the use or control of said city or highway district unless the dedication shall be accepted and confirmed by the city council or by the commissioners of the highway district. An acceptance imposes no obligation or liability upon the city council or highway district until the street, highway or alley is declared to be open for public travel.

Idaho Code § 50-1313. It would seem that if the public entity expressly declined to accept an offer of dedication (rather than simply fail to act, as in *Pullin*), this should be sufficient to prevent a common law dedication from occurring. But *Pullin* is not clear on this point and could be read otherwise.

<sup>64</sup> This sounds a bit like the offer and acceptance provided for under R.S. 2477, discussed in section I.H.2.b at page 54. Indeed, as discussed below, common law dedication is a proper means of “accepting” the federal grant.

The requirements were recently re-stated by the Court, speaking in terms of “offer and acceptance”:

The elements of a common law dedication as established by *Pullin v. Victor* are “(1) an offer by the owner, clearly and unequivocally indicating by his words or acts evidencing his intention to dedicate the land to public use, and (2) an acceptance of the offer by the public.”

*Farrell v. Bd. of Cnty. Comm’rs of Lemhi Cnty.*, 138 Idaho 378, 384, 64 P.3d 304, 310 (2002) (Schroeder, J.) (quoting *Pullin v. Victor*, 103 Idaho 879, 881, 655 P.2d 86, 88 (Ct. App. 1982) (Walters, J.)).<sup>65</sup>

## **2. Common law dedications are irrevocable, except by statutory process.**

Once a common law dedication has been made (that is, once the offer has been accepted), the offer may not be withdrawn. “This dedication is irrevocable except by statutory process.” *Smylie v. Pearsall*, 93 Idaho 188, 191, 457 P.2d 427, 430 (1969) (quoted with approval in *Farrell*, 138 Idaho at 385, 64 P.3d at 311).

Nor are roads created by common law dedication subject to the “passive abandonment” statute. In a significant ruling in 2002, the Idaho Supreme Court confirmed earlier statements that roads created by common law dedication are not subject to passive abandonment. *Farrell v. Bd. of Cnty. Comm’rs of Lemhi Cnty.*, 138 Idaho 378, 386, 64 P.3d 304, 312 (2002) (Schroeder, J.). The Court has said the same in two prior cases involving urban platted streets. However, this was the first case in which this principle was applied in a rural setting. That made no difference, said the Court. *Farrell*, 138 Idaho at 378, 64 P.3d at 304.

Indeed, the road need not even be constructed, but will nonetheless be protected from abandonment in any event if originally created by common law dedication. “Therefore, even if Indian Creek Road were not developed by the County, the passive abandonment statute would not apply where there has been a common law dedication.” *Farrell*, 138 Idaho at 378, 64 P.3d at 304.

Thus, the only way to abandon a road created by common law dedication is by formal declaration of abandonment by the county or plat vacation by the relevant jurisdiction.

## **3. Common law dedications may be “public” or “private.”**

Common law dedications typically involve dedications to the public. The Idaho Supreme Court has also recognized “private” common law dedications. *City of Eagle v. Two Rivers Subdivision Homeowners Assn, Inc.*, 2020 WL 3786217 (July 7, 2020). These private dedications typically dedicate open space to and/or roads to the exclusive use of purchasers of lots within the subdivision. *Ponderosa Home Site Lot*

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<sup>65</sup> Both R.S. 2477 and common law dedication are analyzed in terms of “offer” and “acceptance.” The terms mean different things in each context. In the context of R.S. 2477, the enactment of the statute itself was the “offer.” In common law dedication, the offer is the filing of the plat. However, for purposes of common law dedication, the enactment of R.S. 2477 and its historical context reinforces the conclusion that the inclusion of a road on subsequent federal surveys was intended as a public dedication thereof. *Farrell* did not say this; it did not need to. It simply announced the rather obvious conclusion that the act of filing and recording a plat depicting a road is sufficient “to establish the intent on the part of the owner to make a donation to the public.” *Farrell*, 138 Idaho at 384, 64 P.3d at 310. The case of *Worley Highway Dist. v. Yacht Club of Coeur d’Alene, Ltd.*, 116 Idaho 219, 224, 775 P.2d 111, 116 (1989) (Bengtson, J. Pro Tem.) contains a thorough and helpful explanation of the concept of “acceptance” of the offer of dedication.



*Owners v. Garfield Bay Resort, Inc.* (“*Ponderosa I*”), 139 Idaho 699, 85 P.3d 675 (2004) (Kidwell, J.) (reversing trial court’s determination of a common law dedication to the public, and remanding for a determination of who owned the beach access parcel); *Ponderosa Homesite Lot Owners v. Garfield Bay Resort, Inc.* (“*Ponderosa II*”), 143 Idaho 407, 146 P.3d 673 (2006) (Burdick, J.) (affirming the district court’s decision on remand that the common law dedication created an easement in favor of the lot purchasers and that the original owner retained (and could convey) the underlying fee subject to that easement). See also, *Sun Valley Land & Minerals, Inc. v. Hawkes*, 138 Idaho 543, 548, 66 P.3d 798, 803 (2002) (Trout, C.J.); *Dunham v. Hackney Air Park, Inc.*, 133 Idaho 613, 616, 990 P.2d 1224, 1226 (Ct. App. 1999).

**4. Sale of lots: Although the buyer “accepts” the dedication, the dedication is to the public not to the buyer.**

The acceptance part of the equation simply requires the sale of lots (or conveyance of land patents from the federal government).

Note that the dedication, although “accepted” by the buyer at the time of purchase or patent is not a dedication to the buyer. Rather, the dedicated property (if it is located within the buyer’s land) is essentially a carve-out from the conveyed fee interest and the creation of a new interest held by the public. Thus, acceptance of the dedication may or may not work to the benefit of the buyer. The buyer receives both the benefits and the burdens of the dedication (*e.g.*, access to the property, but also a public road located on the property). By acquiring the property subject to the plat, however, he or she has “accepted” the dedication to the public as a matter of law, and his or her successors-in-interest are bound thereby.

**5. The offer to dedicate must be clear and unequivocal.**

Notwithstanding the flexibility given to common law dedications as compared to their statutory counterparts, the standard for establishing an offer to dedicate property to public use is high: the owner must “clearly and unambiguously” indicate an intention to set aside the property.

Recent decisions by the Idaho Supreme Court suggest that the Court will set a high bar for an offer to dedicate. For example, in *Ponderosa Home Site Lot Owners v. Garfield Bay Resort, Inc.*, 139 Idaho 699, 85 P.3d 675 (2004) (“*Ponderosa I*”) (Kidwell, J.), the Court held that, as a matter of law, the inclusion of the words “lake access” within a platted area adjacent to a platted road were insufficient to offer to dedicate that area to public use.

Similarly, in *Sun Valley Land & Minerals, Inc. v. Hawkes*, 138 Idaho 543, 548, 66 P.3d 798, 803 (2002) (Trout, C.J.), the Court held that no offer to dedicate property had occurred where (1) the text in the plat gave no reference to the common area depicted on the plats and referenced in the homeowners’ deeds and (2) the dedication of the common area anticipated the formation of a homeowner’s association that never occurred.

Finally, in *Dunham v. Hackney Airpark, Inc.*, 133 Idaho 613, 617, 990 P.2d 1224, 1228 (Ct. App. 1999), the Idaho Court of Appeals rejected a claim of private common law dedication of the unrestricted use of an airstrip because the plat did not unambiguously convey such a right.

In *Lattin v. Adams Cnty.*, 149 Idaho 497, 236 P.3d 1257 (2010) (W. Jones, J.), the Idaho Supreme Court emphasized that for both common law and statutory dedications, the offer to dedicate must be clear

and explicit. “The County asserted that Burch Lane had been dedicated to public use, but it has been unclear throughout the course of litigation whether the County is relying on a statutory or common-law theory. Under either theory, however, the claim fails because the Reico Subdivision plat does not unequivocally dedicate Burch Lane to public use.” *Lattin*, 149 Idaho at 500, 236 P.3d at 1260.

The Court noted: “To determine whether there was a dedication, this Court will interpret the plat like a deed, giving effect to the intent of the parties.” *Lattin*, 149 Idaho at 501, 236 P.3d at 1261. In this case, the intent was crystal clear that no dedication was intended—so clear that the Court awarded attorney fees against the county under Rule 11. The county relied on a subdivision plat showing the road in question. The key to the plat stated that public roads are depicted by a dotted line, and this road was not so depicted.

In *City of Eagle v. Two Rivers Subdivision Homeowners Assn, Inc.*, 2020 WL 3786217 (July 7, 2020), the Idaho Supreme Court held that statements by the developer’s representatives at a public hearing combined with a detailed description in a design review application constituted a clear and unequivocal dedication of trailhead public parking, notwithstanding the fact the parking lot did not appear on a subsequently filed and accepted plat.

**6. No express words of dedication are required; even an oral dedication may suffice.**

Common law dedications often occur without words of dedication. As noted above, a dedication may be predicated on “words or acts.” *Farrell*, 138 Idaho at 384, 64 P.3d at 310. Typically, the “act” is the depicting of the road on a plat. “[T]he act of filing and recording a plat or map is sufficient to establish the intent on the part of the owner to make a donation to the public.” *Farrell*, 138 Idaho at 384, 64 P.3d at 310 (quoting *Worley Highway Dist. v. Yacht Club of Coeur d’Alene, Ltd.*, 116 Idaho 219, 224, 775 P.2d 111, 116 (1989) (Bengtson, J. Pro Tem.) and *Boise City v. Hon*, 14 Idaho 272, 279, 94 P. 167, 168-69 (1908) (Sullivan, J)). However, “[in] determining the intent to dedicate, the Court must examine the plat, as well as the surrounding circumstances and conditions of the development and sale of lots.” *Ponderosa Home Site Lot Owners v. Garfield Bay Resort, Inc.*, 139 Idaho 699, 85 P.3d 675 (2004) (“*Ponderosa I*”) (Kidwell, J.) (internal quotations omitted).

In *City of Eagle v. Two Rivers Subdivision Homeowners Assn, Inc.*, 2020 WL 3786217 (July 7, 2020), the Idaho Supreme Court confirmed that a common law dedication may be oral, and that the statute of frauds does not apply.

The plat need not contain words of dedication. “We do not view the absence of a written designation in specific spaces on the plat as always foreclosing the possibility of a public dedication of the areas so represented.” *Smylie v. Persall*, 93 Idaho 188, 191, 457 P.2d 427, 430 (1969). To the contrary, a principal purpose of the doctrine is to supply a presumption of dedication “particularly [as to] access ways.” *Smylie*, 93 Idaho at 192, 457 P.2d at 431. The Court continued, “Though the county records contain no formal dedication, the dedication is presumed from the plat, and no evidence was presented to rebut the presumption.” *Smylie*, 93 Idaho at 190, 457 P.2d at 429 (emphasis supplied).

In the same vein, the Court in *Boise City v. Hon* referred to “[t]he reasonable inference from the existence on a map of description of a tract marked off as a park or other public improvement.” *Boise City v. Hon*, 14 Idaho 272, 280, 94 P. 167, 169 (1908) (emphasis supplied). In other words, unless express words or other compelling circumstances point to a different conclusion, the Court will presume or infer

that sales conducted pursuant to plats showing roads are intended to dedicate those roads to the public. *Boise City v. Hon*, 14 Idaho 272, 280, 94 P. 167, 169 (1908).

Common law dedication often involves the recording of a plat depicting a public road. However, it may also occur on the basis of an oral offer (with no writing or recording). In an often-cited 1914 case, the Court stated:

The doctrine seems well settled in America that an owner of land may, without deed or writing, dedicate it to public uses. No particular form or ceremony is necessary in the dedication; all that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation.

*Thiessen v. City of Lewiston*, 26 Idaho 505, 512, 144 P. 548, 550 (1914) (Truitt, J.) (quoting a Missouri case) (cited with approval in *Pullin v. Victor*, 103 Idaho 879, 881, 655 P.2d 86, 88 (Ct. App. 1982) (Walters, J.)).

#### **7. No metes and bounds description is required for existing roads.**

The depiction of the road on the plat must be clear and certain. *Nesbitt v. Demasters*, 44 Idaho 143, 255 P. 408 (1927). However, where the road is already constructed (and thus, its location known), there is no need for a metes and bounds type of description. *Farrell v. Bd. of Cnty. Comm'rs of Lemhi Cnty.*, 138 Idaho 378, 385, 64 P.3d 304, 311 (2002) (Schroeder, J.).

See *Kosanke v. Kopp*, 74 Idaho 302, 305, 261 P.2d 815, 816-17 (1953) (Thomas, J.) in which no precise location of the road was required to establish its public nature, but the court remanded to the district court with instructions to specify the width and location with sufficient particularity to avoid further litigation.

#### **8. The required “acceptance” is objective, not subjective.**

In cases where the acceptance occurs by way of the sale of lots, it is not necessary to peer into the minds of the buyers to ask whether they believed the road was part of the sale and relied thereon. As the Court has said:

The second element—acceptance of the offer by the public—is not evidenced by the subjective intent of purchasers of property whose instruments of title make specific reference to a plat, but rather by the fact that lots have been sold or otherwise conveyed with specific reference to the opposite plat.”

*Farrell*, 138 Idaho at 384, 64 P.3d at 310.

In so ruling, the *Farrell* Court following its ruling in *Worley Highway Dist. v. Yacht Club of Coeur d’Alene, Ltd.*, 116 Idaho 219, 225, 775 P.2d 111, 117 (1989) (Bengtson, J. Pro Tem.). In rejecting the trial court’s conclusion that it could not “imply” the acceptance of the offer of dedication by the purchasers of lots nearly a century earlier, the *Worley* Court noted that “it would have been nigh onto impossible, if not impossible, to produce evidence as to the subjective intent of Mr. Lewis when he acquired lots 5 and 6 in 1906, unless he is a modern day Methuselah.” *Worley*, 116 Idaho at 209 n.4, 775 P.2d at 117 n.4.

**9. No formality is required; public use is a form of acceptance.**

We have long understood that public acceptance of a road dedication requires no specific formality. *See Thiessen v. City of Lewiston*, 26 Idaho 505, 513, 144 P. 548, 550 (1914). Indeed, the Court has explained that public use of a dedicated easement constitutes acceptance: “User by the public is a sufficient acceptance of a dedication for the purpose of a way to invest a right of way to the public.” *Id.* (citing several cases from other jurisdictions) (internal quotation marks omitted). *Accord Pugmire v. Johnson*, 102 Idaho 882, 884–85, 643 P.2d 832, 834–35 (1982) (citing *Thiessen*). *Thiessen*, though nearly one hundred years old, has not been overruled or even called into question.

*Paddison Scenic Properties, Family Tr., L.C. v. Idaho Cnty.*, 153 Idaho 1, 3 (2012).

**10. Acceptance may occur by other means: e.g., city approval of design review.**

In *City of Eagle v. Two Rivers Subdivision Homeowners Assn, Inc.*, 2020 WL 3786217 (July 7, 2020), acceptance of the developer’s offer of trailhead public parking occurred when the city approved an application for design review—before lots were sold. That acceptance became irrevocable at that time, and was not affected by the subsequent filing and acceptance of a plat that did not depict the public parking.

**11. If acceptance is by public use, the acceptance applies to the full stated width of the dedication, but only to the length that was actually used by the public.**

The [*Thiessen*] Court held that the public had accepted the length of the rights of way it used, and that the width of the public highway was equal to the fifty-foot width of the dedication, whether the public actually used the whole width or not. *Id.* at 514–15, 144 P. at 551. But the Court concluded that the 125-foot length of the dedications that was never used, and which became separated from the publically used portion by a fence and telephone poles, was not accepted. *Id.*

*Paddison Scenic Properties, Family Tr., L.C. v. Idaho Cnty.*, 153 Idaho 1, 3 (2012) (citing *Thiessen v. City of Lewiston*, 26 Idaho 505, 144 P. 548 (1914) (Truitt, J.)).

**12. Common law dedication applies to homesteads and (presumably) other patents.**

The doctrine of common law dedication originated in the context of residential home sales involving platted, urban properties. In *Farrell*, the Court ruled that the doctrine applies equally in a rural context, specifically to the patenting of homesteads on the public land by the federal government. *Farrell*, 138 Idaho at 385, 64 P.3d at 311. Thus, when the federal government issues a homestead patent pursuant to a map or survey notes depicting a road, that road is deemed to have been dedicated to the public by the federal government.

This appears to be a correct result. After all, the theory—based largely on notions of fair play and estoppel—operates equally in both urban and rural contexts. Indeed, there are cases where common law dedications have been

found under circumstances far more informal than the official federally surveyed plats involved in homestead patents. See, e.g., *Monaco v. Bennion*, 99 Idaho 529, 585 P.2d 608 (1978).

To put this in the context of a tradition common law dedication, the United States plays the role of the landowner/developer and makes an offer by making public lands available for homesteading, mining, or other private use. The entryman accepts the offer by acquiring the patent (just as a homeowner buys a lot). As the *Farrell* Court explained:

That the road was clearly marked and labeled on the plat and patent is sufficient to create an offer to dedicate a public road. In a case where the roads are not yet built and the plat is part of a subdivision plan, it makes more sense to require a metes and bounds type of description, but where, as here, there is already a road in existence and labeled and marked on the map, the offer requirement is met.

Furthermore, the grant of homestead patents constitutes a valid acceptance of a common law dedication.

*Farrell*, 138 Idaho at 385, 64 P.3d at 311.

Although *Farrell* dealt with a homestead patent, its logic would apply equally to any other patent issued by the federal government, such as a mineral patent. As the Court said in *Farrell*, “The federal government was the owner of the land, and it filed and recorded a valid plat. That is sufficient under *Worley* to show intent on the part of the owner to dedicate public areas of the plat.” *Farrell*, 138 Idaho at 385, 64 P.3d at 311 (referring to *Worley Highway Dist. v. Yacht Club of Coeur d’Alene, Ltd.*, 116 Idaho 219, 224, 775 P.2d 111, 116 (1989) (Bengtson, J. Pro Tem.)). Nothing in this language suggests a narrow limitation to homestead patents.

As noted above, the dedication may be based on a plat depicting the road without any express words of dedication.<sup>66</sup> If further circumstances are required to reinforce the implication of a dedication, they may be found in R.S. 2477 itself. The homesteading of the West occurred against the backdrop of Congress’s express goal of creating a network of roads in the newly-settled areas. See discussion in section H.1.a at page 50.

### **13. Can an R.S. 2477 road be created by common law dedication?**

In *Farrell*, the Court discussed the two methods of road creation for R.S. 2477 roads (compliance with state statute or some positive act by local authorities) established in *Kirk. Farrell v. Bd. of Cnty. Comm’rs of Lemhi Cnty.*, 138 Idaho 378, 384, 64 P.3d 304, 310 (2002) (Schroeder, J.). The Court found that Indian Creek Road satisfied the second (some positive act). Curiously, the Court went on address common law dedication under a separate heading rather than as part of the R.S. 2477 discussion. “The record also establishes that a road was created by common law dedication.” *Farrell*, 138 Idaho at 384, 64 P.3d at 310.

Does this separate treatment imply that a road created on federal land by common law dedication is not an R.S. 2477 road? The *Farrell* case leaves that unclear, but this seems an unlikely proposition. It

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<sup>66</sup> Indeed, there are cases where common law dedications have been found under circumstances far more informal than the official federally surveyed plats involved in homestead patents. E.g., *Monaco v. Bennion*, 99 Idaho 529, 585 P.2d 608 (1978).

would seem that common law dedication is simply another way (in addition to state statute or some positive act) by which a public road may be created on unreserved federal land prior to the repeal of R.S. 2477 in 1976. Indeed, the author would suggest that very reason that Idaho's common law dedication applies to conveyance of federal property in the first place is that the federal government has allowed it to apply by enacting R.S. 2477. Thus, an acceptance of the common law dedication by the homestead patentee also constitutes the acceptance of the road by the State of Idaho as an R.S. 2477 road. Although not squarely addressed by the Idaho Supreme Court, this conclusion seems to be consistent with the Court's broad language in other cases: "[U]nder R.S. 2477,] a highway may be established across or upon such public lands in any of the ways recognized by the law of the state in which such lands are located." *Sopatyk v. Lemhi Cnty.*, 151 Idaho 809, 814, 264 P.3d 916, 921 (2011) (W. Jones, J.) (bracketed material original). "The procedures for establishing an R.S. 2477 right-of-way are generally governed by the laws of the individual states." *Galli v. Idaho Cnty.*, 146 Idaho 155, 159, 191 P.3d 233, 237 (2008) (W. Jones, J.). In other words, any lawful means of road creation under state law creates an R.S. 2477 road if the road happens to be located on federal land at the time of creation.

At the end of the day, however, the question is academic. Whether you call it an R.S. 2477 road or a not, a road created by common law dedication is a public road. That much is made clear by *Farrell*.

**14. The offer must be by the true owner, not one merely authorized to construct a road on federal land.**

The offer of dedication must come from the owner of the land. In the case of a road located on federal land, that means the offer comes from the federal government (by way of R.S. 2477).

In *Farrell*, the Supreme Court rejected an offer made by miners who had constructed a road on federal land and then quitclaimed it to the county. The Court emphasized that in order to make out a common law dedication, the offer must come from the owner of the land on which the road is located (in this case, the federal government). *Farrell*, 138 Idaho at 384, 64 P.3d at 310. In the *Farrell* case, Indian Creek Road was constructed by miners who, pursuant to R.S. 2477, had authority to build the road on public land. Although their action was lawful under R.S. 2477 (discussed below in section I.H at page 50), that did not make them owners, however. In other words, they were not trespassers on the public land (by virtue of the authority granted under R.S. 2477), but neither were they the owners of the right of way. (Instead, as discussed below, the road was found to be a public road on the basis of common law dedication by the federal government itself at the time of homestead patent.)

**15. Most common law dedications are not subject to passive abandonment (subject to limited exceptions beginning in 2013).**

One of the more significant attributes of a common law dedication is that once the dedication occurs (that is, once the offer has been accepted), the offer cannot be withdrawn. Thus, roads created by common law dedication are not subject to the pre-1993 "passive abandonment" statute. See discussion in section III.F.1 on page 97. Of course, they may still be vacated by formal declaration of the county<sup>67</sup>—with the possible exception of R.S. 2477 roads.<sup>68</sup> A 2013 amendment created a very limited exception. See discussion in section III.B at page 88.

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<sup>67</sup> Current requirements for formal abandonment are discussed below in section III.G.5 beginning on page 102.

<sup>68</sup> Formal abandonment of R.S. 2477 roads is discussed below in section III.J beginning on page 103.

**16. The doctrine of common law dedication remains vital, at least as to older plats.**

The Supreme Court rejected a common law dedication claim in 2000. *Stafford v. Klosterman*, 134 Idaho 205, 998 P.2d 1118 (2000). In dictum, the case went so far as to cast doubt on the continued viability of the doctrine. “Even if the cases related to dedication by the common law method have continuing viability, they do not aid Klosterman.” *Stafford*, 134 Idaho 208, 998 P.2d at 1121. Thus, it may be that the Court will be more cautious in finding common law dedications in the context of recent dedications, where the platting process is clear and predictable and there is less justification for forgiving noncompliance with platting requirements. However, the Court’s application of the common law dedication concept in *Farrell* makes clear that the doctrine continues to be recognized, at least in the context of dedications that occurred a long time ago prior to modern platting requirements.

**G. Implied easements based on oral representations**

On occasion the Courts have recognized something akin to a common law dedication under the rubric of an implied easement.

Implied easements are created by written or spoken representations made by the property owner. Most developers expect that easements can be created only by the express recordation of an easement document in the public record. However, there are circumstances where easements can be implied from a property owner’s words or conduct without any document ever being made of record.

The Idaho Supreme Court held in *Middlekauff v. Lake Cascade, Inc.*, 110 Idaho 909, 913-14, 719 P.2d 1169, 1173-74 (1986), that oral representations by a property owner may be sufficient to create a legally enforceable property interest in lot buyers to enforce open space protections in a piece of property. In *Middlekauff*, the property owner had represented to lot purchasers both orally and in a brochure given to the potential buyers that a parcel in the development would be set aside for use as a common recreation area. The Court upheld the district court’s determination that a writing meeting the requirements of the statute of frauds was not necessary to support the determination that the parcel was subject to an easement for common recreational use.

For many years, the Idaho Supreme Court did not elaborate on the requirements for creating an enforceable property interest through oral representations. Finally, the Court offered some clarification in *Sun Valley Land & Minerals v. Hawkes*, 138 Idaho 543, 66 P.3d 798 (2002) (Trout, C.J.).<sup>69</sup> In rejecting an implied easement claim in *Sun Valley Land*, the Court held that “the right to relief must be based on an independent cause of action, such as misrepresentation or fraud. Further, in order to prove a representation

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<sup>69</sup> *Hawkes* was the second of two cases involving a failed residential development in Blaine County. The developer recorded a plat and CC&Rs on a property that already was subject to a prior recorded mortgage. The plat showed a cluster of 45 small circular lots sprinkled within a larger area, but did not label the surrounding area as a common area. The CC&Rs described the common area, but expressly provided that it would be conveyed to a homeowners association (which never happened). A few lots were sold before the development failed. Thereafter, the bank took possession of the unsold portion of the property. The issue was whether the common areas were properly dedicated such that the lot owners had an interest in them, or whether the bank now owned them. The Court held that the lot owners’ express easement and common law dedication theories both failed for the same reason: “Because this homeowners’ association was never formed and no property rights were ever conveyed, the Lot Owners’ rights in the property at issue were never created.” *Hawkes*, 138 Idaho at 546, 66 P.3d at 802.

in fact occurred, the Court must make a factual inquiry into the circumstances surrounding the interaction between buyer and seller.” *Sun Valley Land*, 138 Idaho at 549, 66 P.3d at 804.

Notwithstanding this significant limitation on the potential implications of *Middlekauff*, the property owner or developer should be very careful what he or she says to potential buyers. Particular care should be given to documenting what real estate agents are authorized to say to potential buyers and to assuring that purchase forms disclaim that the buyer has relied on any oral representations. *See Middlekauff*, 110 Idaho at 914, 719 P. 2d 1169, 1174 (holding owner liable for representations made by real estate agents).

## **H. R.S. 2477 rights-of-way**

### **1. Overview**

#### **a. The enactment and historical context of R.S. 2477**

One of the most interesting—and controversial—areas of road access law deals with the creation of rights-of-way under a federal statute, section 8 of the Mining Act of 1866, commonly referred to as R.S. 2477.<sup>70</sup> In this Reconstruction-era legislation, the United States government encouraged the creation of a road network over its vast western estate, forever granting to local authorities ownership of these rights-of-way. As a result, western states now exercise considerable control over roads located on federal lands. Many of these roads, however, are now located on private lands (the underlying federal land having been patented long ago).<sup>71</sup> This legacy has given rise to intense modern controversies regarding public access across both private and federal lands.

It all began with a single sentence, described by the Tenth Circuit as “short, sweet, and enigmatic.” *S. Utah Wilderness Alliance v. BLM* (“SUWA”), 425 F.3d 735, 761 (10<sup>th</sup> Cir. 2005). R.S. 2477 provides in full:

*And be it further enacted*, That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

The effect of this statute was to create a free-standing offer to the public to construct roads across the public domain, and to convey title to such rights-of-way to the local entity in accordance with local law.

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<sup>70</sup> The term “R.S. 2477” refers to the former codification of this federal statute as Revised Statute 2477. R.S. 2477 is section 8 of the Mining Act of 1866. The full citation is: An Act Granting the Right-of-way to Ditch and Canal Owners Over the Public Lands and for Other Purposes, *also known as* the Mining Act of 1866, also known as Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253 (1866). Section 8 initially was codified at Revised Statutes 2477 (1873) (“R.S. 2477”). It was re-codified at 43 U.S.C. § 932 (1938). It was repealed by Federal Land Policy Management Act of 1976 (“FLPMA”) § 706(a), Pub. L. No. 94-579, 90 Stat. 2743, 2793 (1976), but the repeal did not affect previously created R.S. 2477 roads.

<sup>71</sup> All R.S. 2477 roads were located on non-reserved federal land at the time of their creation. Some remain on non-reserved land, managed today by the U.S. Bureau of Reclamation. In other cases, the underlying land subsequently has been reserved (typically for national forests). In yet other cases, the underlying land has been patented and is now in private ownership. These subsequent changes in land ownership have no effect on the road’s status as an R.S. 2477 road. Other subsequent events do matter. Like all roads, R.S. 2477 roads may be abandoned or vacated.



These words generate passions today that, in some quarters, are unsurpassed by any other public policy issue. As one author said, “Despite its deceptively simple language, it invokes the imbroglio between state and federal supremacy which has plagued American federalism since the founding of the Republic.” Harry R. Bader, *Potential Legal Standards for Resolving the R.S. 2477 Right of Way Crisis*, 11 Pace Envtl. L. Rev. 485, 486 (1994).

Its supporters have described the statute as a godsend, expressing the simple genius of early lawmakers. Others have been less flattering. The Clinton Administration’s Department of the Interior described the statute this way: “R.S. 2477 was a cryptic, nineteenth century westward expansion statute. . . . R.S. 2477 is a historical hangover; arcane and not well understood.” Statement of John D. Leshy, Solicitor, U.S. Department of the Interior, *Rights-of-Way Disposals Federal Lands*, Hearings Before the House Resources Subcommittee on Nat’l Parks, Forests and Lands, 104<sup>th</sup> Cong. (Mar. 16, 1995), 1995 WL 113237.

To understand the statute, one must understand its historical context. Here is a neat capsule:

The quest for understanding the R.S. 2477 grant and for developing a workable rule to govern its progeny must start with the story of the American West. America’s undeveloped frontier was disappearing as settlers spread westward from the Missouri River and eastward from the Pacific coast. The Federal Government, knowing that its vast western holdings contained untold riches, and knowing equally it could not adequately administer those holdings, turned to a series of “self-help” remedies, of which R.S. 2477 is only one.

While the federal government was preoccupied with the issues of slavery and secession in the years preceding the mining laws, homesteaders and miners were left to their own devices in developing access to claims and farms. Not until after the Civil War did Congress once again turn its attention to the nation’s internal economic development. Recognizing path and road developments that had already evolved in the remote territories, Congress decided to formalize and solidify these access routes, thereby validating the frontier policy of self-help development.

Harry R. Bader, *Potential Legal Standards for Resolving the R.S. 2477 Right of Way Crisis*, 11 Pace Envtl. L. Rev. 485, 489 (1994).

In this way the simple words of R.S. 2477, enacted at the close of the Civil War, changed the face of the West. As one author said, “The West grew up around these roads.” Mitchell R. Olson, Note, *The R.S. 2477 Right of Way Dispute: Constructing a Solution*, 27 Envtl. L. 289, 293 (1997).

Judge Matsch of the Tenth Circuit put it this way:

These roads, in the fullest sense of the words, were necessary aids to the development and disposition of the public lands. They facilitated communication between settlements already made, and encouraged the making of new ones; increased the demand for additional lands, and enhanced their value. Governmental concurrence in and assent to the establishment of these roads are so apparent, and their maintenance so clearly in furtherance of the general policies of the United States, that the moral

obligation to protect them against destruction or impairment as a result of subsequent grants follows as rational consequence.

*Wilkenson v. Dept. of the Interior of the U.S.*, 634 F. Supp. 1265, 1275 (D. Colo. 1986) (internal citations omitted) (Judge Matsch was the judge in the Oklahoma bomber trials).

This continues to be recognized by highway officials in Idaho:

Under the authority of R.S. 2477, thousands of miles of highways were established across the public domain. It was a primary authority under which many existing state and county highways were constructed and operated over federal lands in the Western United States.

A Manual for the Development of a Highway System Map Including Validation, Vacation and Abandonment Procedures, Local Highway Technical Assistance Council, at 6 (June 1999) (available at [www.lhtac.org](http://www.lhtac.org)).

#### **b. The repeal and survival of R.S. 2477**

After 110 years, Congress repealed R.S. 2477 in 1976 as part of its comprehensive overhaul of the federal land statutes. Federal Land Policy Management Act of 1976 (“FLPMA”), § 706(a), Pub. L. No. 94-579, 90 Stat. 2743, 2793 (1976). That hardly put the issue to rest. “It is curious that R.S. 2477 should stimulate such intense controversy nearly two decades after its repeal, when it created hardly a ripple during its long life.” Thomas E. Meacham, *Public Roads over Public Lands: The Unresolved Legacy of R.S. 2477*, 40 Rocky Mtn. Min. L. Inst. § 2.01 at 2-4 (1994).

The simple reason is that FLPMA contained an express savings clause for then-existing R.S. 2477 rights-of-way.<sup>72</sup> Consequently, although no new R.S. 2477 rights-of-way can be created since 1976, the thousands in existence on that date (whether or not recognized at that time) are unaffected by the repeal of R.S. 2477. As the Utah Supreme Court said. “R.S. 2477 is no longer on the books. . . . Yet R.S. 2477 still rules us from its grave.” *Stichting Mayflower Mtn. Fonds v. United Park City Mines Co.*, 2017 WL 1091162 at \*4 (Utah 2017).

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<sup>72</sup> “Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act.” FLPMA § 701(a), Pub. L. No. 94-579, 90 Stat. 2743, 2786-87 (1976) (codified at 43 U.S.C. § 1701 note). See, *S. Utah Wilderness Alliance v. BLM* (“SUWA”), 425 F.3d 735, 741 (10<sup>th</sup> Cir. 2005) (citing and discussing this provision of FLPMA).

Another savings clause is found in FLPMA § 509, Pub. L. No. 94-579, 90 Stat. 2743, 2781, (1976) (codified at 43 U.S.C. § 1769). This provision was designed to ensure that FLPMA’s new right-of-way procedures are not construed to invalidate prior established rights-of-way. The savings clause does not relate to the repeal of R.S. 2477, but certainly reinforces the congressional policy of protecting prior rights-of-way. Some authors (and even some courts) mistakenly cite the latter provision as the controlling savings clause for R.S. 2477. E.g., Mitchell R. Olson, Note, *The R.S. 2477 Right of Way Dispute: Constructing a Solution*, 27 Env’tl L. 289, 294 n.42 (1997); *Fairhurst Family Ass’n, LLC v. U.S. Forest Service*, 172 F. Supp. 2d 1328, 1331 (D. Colo. 2001); *County of Shoshone v. United States*, 912 F. Supp. 2d 912, 915 (D. Idaho 2012), *aff’d*, 589 Fed. Appx. 834 (9<sup>th</sup> Cir. 2014) (memorandum decision).

### c. The peculiar political lineup

R.S. 2477 rights-of-way generate fierce political passions. However, the controversy does not divide along predictable political lines. Instead, the policy conflicts are multi-dimensional. Indeed, they seem to operate in a sort-of “fourth dimension” of politics in which conservative and liberal positions sometimes appear to be reversed. This is reflected in the strange bedfellows that make up both the pro- and anti-R.S. 2477 camps.

For example, environmental groups are split when it comes to R.S. 2477 rights-of-way. More traditional, hunting and fishing oriented conservation groups often support recognition of R.S. 2477 roads because they provide critical access to public lands. Curiously, this conservation-based pro-R.S. 2477 constituency finds itself allied with fiercely conservative activists who support R.S. 2477 right-of-way for very different reasons. In supporting R.S. 2477 roads on federal lands, these conservatives often tout explicit anti-wilderness, anti-federal government goals. This conservative constituency is particularly prevalent in places like Utah where most R.S. 2477 battles are on federal lands.

For the same reason that some conservatives like R.S. 2477 roads, many environmental groups oppose them, seeing R.S. 2477 rights-of-way as a threat to wilderness designation (which may occur only in roadless areas) and as an invitation to the “wrong” kind of public use—*e.g.*, by off-roaders and miners.<sup>73</sup> Yet another anti-R.S. 2477 constituency is composed of politically conservative private property activists. Private property is a non-issue when the R.S. 2477 road is on federal land. But not all R.S. 2477 roads are on federal lands. Where they cross private lands, R.S. 2477 are seen by private property activists as a threat to property rights.<sup>74</sup>

In sum, the pro-R.S. 2477 side is composed of left-of-center traditional conservationists and right-of-center anti-federal government sagebrush rebels—a peculiar combination. Meanwhile, the anti-R.S. 2477 camp is composed of left-of-center environmental protection advocates as well as right-of-center advocates of private property rights, and equally unusual coalition. Where the battle is on federal land, liberals are more likely to be on the anti-R.S. 2477 side with conservatives supporting R.S. 2477 roads. Where the battle is over public roads crossing private lands, these positions may be reversed.

These curious alignments led to an odd confrontation in the 2001 Idaho Legislature. One of the most conservative members of the Idaho House (Rep. JoAn Wood) joined with a liberal Democrat (Rep. Lin Whitworth) in sponsoring pro-R.S. 2477 legislation only to see it defeated at the last moment when none other than former U.S. Representative Helen Chenoweth-Hage (an arch conservative and close friend of the conservative proponent of the legislation) testified at the state legislature on behalf of anti-R.S. 2477 forces. Western politics do not get much stranger than this.

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<sup>73</sup> “Conservationists and federal land managers worry that vehicle use in inappropriate locations can permanently scar the land, destroy solitude, impair wilderness, endanger archeological and natural features, and generally make it difficult or impossible for land managers to carry out their statutory duties to protect the lands from ‘unnecessary or undue degradation.’ They argue that too loose an interpretation of R.S. 2477 will conjure into existence rights of way where none existed before, turning every path, vehicle track, or dry wash in southern Utah into a potential route for cars, jeeps, or off-road vehicles.” *S. Utah Wilderness Alliance v. BLM* (“SUWA”), 425 F.3d 735 (10<sup>th</sup> Cir. 2005) (citation to FLPMA omitted).

<sup>74</sup> As the Tenth Circuit noted in a Utah case: “[P]rivate landowners express the fear that expansive R.S. 2477 definitions will undermine their private property rights by allowing strangers to drive vehicles across their ranches and homesteads.” *S. Utah Wilderness Alliance* (“SUWA”), 425 F.3d 735, 741-42 (10<sup>th</sup> Cir. 2005).

## 2. The effect and operation of R.S. 2477

### a. The Act itself provides little guidance.

Congress provided only one sentence of instruction: “[T]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.” Unlike modern legislation, there is no legislative history to explain the statute’s intent or operation. All that can be said for certain is what the statute itself says: that Congress hereby grants rights of way for the construction of highways over unreserved public lands.

The Act is breathtaking in its simplicity. A federal court summed it up this way:

Unlike any other federal land statute of which we are aware, the establishment of R.S. 2477 rights of way required no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested. As the Supreme Court of Utah noted 75 years ago, R.S. 2477 ““was a standing offer of a free right of way over the public domain,”” and the grant may be accepted “without formal action by public authorities.” *Lindsay Land & Live Stock Co. v. Churnos*, 75 Utah 384, 285 P. 646, 648 (Utah 1929) (quoting *Streeter v. Stalnaker*, 61 Neb. 205, 85 N.W. 47, 48 (Neb. 1901)). In its *Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands* 1 (June 1993), the Department of the Interior explained that R.S. 2477 highways “were constructed without any approval from the federal government and with no documentation of the public land records, so there are few official records documenting the right-of-way or indicating that a highway was constructed on federal land under this authority.”

*S. Utah Wilderness Alliance v. BLM* (“SUWA”), 425 F.3d 735, 741 (10<sup>th</sup> Cir. 2005).

In short, the Act says nothing about how the grant may be accepted, who may accept it, what law controls the right-of-way once it is created, and what special attributes, if any, such rights-of-way have. Over time, however, each of these questions has been answered (to some extent at least) by various court decisions and legislative pronouncements. But the upshot is that, as to any given road, even one a dilapidated and currently impassable one, the question might be asked, “Is this a public right of way under R.S. 2477?” Unless the road has gone through the process described below, the answer has to be, “We don’t know yet.”

### b. The basic mechanics of R.S. 2477: A federal “offer” that must be “accepted” by the State

The statute is generally understood to operate as a self-executing<sup>75</sup> offer (or grant) from the federal government to the individual states and territories.<sup>76</sup> As the Alaska Supreme Court nicely put it, “Case law

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<sup>75</sup> By “self-executing,” it is meant that no further implementing legislation or other federal action is required to make the grant effective.

has made it clear that § 932 [R.S. 2477] is one-half of a grant—an offer to dedicate.” *Dillingham Commercial Co., Inc. v. City of Dillingham*, 705 P.2d 410, 413 (Alaska 1985).

It also is generally agreed that, to be effective, the offer must be accepted by the state or territory, or some entity or person acting on its behalf. The Idaho Supreme Court recently said: “To be valid it must be shown that the local government accepted the road from the federal government.” *Farrell v. Bd. of Cnty. Comm’rs of Lemhi Cnty.*, 138 Idaho 378, 384, 64 P.3d 304, 310 (2002) (Schroeder, J.).

One author summed up the statute’s operation this way:

In 1866 Congress passed R.S. 2477 as a self-executing grant of rights of way over unreserved public lands to promote the construction of highways. When a claimant of an R.S. 2477 right of way, usually a government or private individual, constructed a highway meeting the statute’s plain language criteria, that right of way vested in the claimant.

Mitchell R. Olson, Note, *The R.S. 2477 Right of Way Dispute: Constructing a Solution*, 27 *Envtl. L.* 289, 290 (1997) (footnotes omitted).

The statute says nothing about how this offer may be accepted, and sets up no federal process for overseeing these grants. Thus, no claim need be filed with the federal government, nor confirmed thereby. Instead, these roads have simply come into existence through the combined operation of local actions and state law.

All that is required . . . are acts on the part of the grantee sufficient to manifest an intent to accept the congressional offer. In fact, because there were no notice or filing requirements of any kind, R.S. 2477 rights of way may have been established—and legal title may have passed—without the BLM ever being aware of it. Thus, R.S. 2477 creates no executive role for the BLM to play.

*S. Utah Wilderness Alliance v. BLM* (“SUWA”), 425 F.3d 735, 754 (10<sup>th</sup> Cir. 2005).

As one author noted:

Because settlement was universally regarded to be a good thing in 1866, the R.S. 2477 grant was generous and the level of federal involvement was nil. No claim or paperwork was required. Anyone desiring access simply needed to satisfy state requirements for establishing a public highway.

Stephen Urquhart, *Protecting Access to Federal Lands: The Roads Less and Less Traveled*, 15 *Nat. Resources and Env’t* (2001).

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<sup>76</sup> “The grant language of the R.S. 2477 right-of-way has consistently been construed by the federal courts as an offer to the public of a right-of-way across public lands not reserved for public uses.” Harry R. Bader, *Potential Legal Standards for Resolving the R.S. 2477 Right of Way Crisis*, 11 *Pace Env’tl. L. Rev.* 485, 490 (1994) (citing *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988) (the “Burr Trail” case), *appeal following remand*, *Sierra Club v. Lujan*, 949 F.2d 362 (1991), *overruled on other grounds by Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992)).

Because the federal statute did not dictate how the offer might be accepted, it is up to the states to answer that question. Consequently, the law of R.S. 2477 rights-of-way necessarily varies from state to state.

**c. R.S. 2477 provided an ongoing offer, not a one-time confirmation.**

The offer served to legitimize access routes carved by miners, loggers and homesteaders across federal domain—both before and after enactment of the statute. Although there is some authority to the contrary, it is generally accepted that the R.S. 2477 grant was not merely retroactive approval of trespasses as of the date of enactment, but established a mechanism going forward for the recognition of such roads.<sup>77</sup>

**d. Why does being an R.S. 2477 road matter?**

As will be shown below, state law governs the acceptance of the federal offer to create an R.S. 2477 road. Thus, to create an R.S. 2477 road, one must show compliance with state law, which is the same for R.S. 2477 roads as it is for all others with the single exception of the more “lax” standard for creation by “some positive act” rather than full compliance with the recorded order requirement for formal declaration under the road creation statute.

One might well ask, why all the fuss about whether a road is an R.S. 2477? For instance, if the road satisfies one of the traditional state law road creation tests, what difference does it make that it is an R.S. 2477 road? Here is the answer.

First, the federal statute overcomes any federal objection to the creation of the road on public land. Absent R.S. 2477, the federal government might contend, quite reasonably, that a state road creation law cannot deprive the federal government of title to federal property.

Second, Idaho law allows roads that have been established as R.S. 2477 roads to remain as public roads without any ongoing maintenance obligation by the local government. 40 Idaho Code § 40-204A(4).

Third, Idaho’s 1993 legislation addressing R.S. 2477 roads (Idaho Code §§ 40-204A(2)) may be read to prohibit, prospectively, the abandonment or vacation of R.S. 2477 roads except by eminent domain. See discussion in section III.J at page 103.

These three reasons do not add up to as much as one might expect. The fact is that the lore of R.S. 2477 is probably greater than its current significance, particularly in Idaho where conflicts over roads with the federal government are less common than in other states such as Utah.

At the end of the day, R.S. 2477 is simply the “permission” given by the federal government to create a public, non-federal road on federal land. Once an R.S. 2477 road is created, it is a public road just like a public road originally created on private land.

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<sup>77</sup> See Pamela Baldwin, *Highway Rights of Way: The Controversy Over Claims Under R.S. 2477*, C.R.S. Report for Congress, at 37 (Jan. 15, 1993, updated Apr. 28, 1993).

**3. R.S. 2477 rights-of-way may be created only “over public lands, not reserved for public uses.”**

**a. What is unreserved land?**

By its own terms, R.S. 2477 applies to roads constructed “over public lands, not reserved for public uses.” Thus, the threshold question in every R.S. 2477 claim is, was the land over which the road lies unreserved public land at the time of its construction? If the land upon which the road is located already was reserved for a federal purpose prior to the road’s construction, then R.S. 2477 does not apply, and any road would be owned and controlled by the federal government, the owner of the reserved land.

Public land can mean different things in different contexts.<sup>78</sup> In the context of R.S. 2477, however, the meaning is clear: “The crucial language of Section 932 [R.S. 2477] for this case is the phrase ‘public lands.’ Such lands are those subject to sale or other disposal under general laws, excluding those to which any claims or rights of others have attached.”<sup>79</sup>

When first acquired by purchase or conquest, most federal lands were “non-reserved.” That is, they were declared open for mineral development and settlement under the mining, homestead, desert land entry, and other laws—these would be the “public lands” to which R.S. 2477 applies. In contrast, when a particular parcel was set aside for a particular federal purpose, it is deemed “reserved.” Such reservations include Indian reservations,<sup>80</sup> national parks, national forests, national wildlife refuges, national monuments, and military reservations.

The national policy of land disposal ended in 1976 with the enactment of FLPMA.<sup>81</sup> Today, non-reserved lands are held for public use and managed by the U.S. Bureau of Land Management (“BLM”) for multiple purposes.

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<sup>78</sup> “Initially, the ‘public domain’ label was applied to all federally-owned lands that were acquired by treaty from other nations, including Native Americans, or ceded to the federal government by the thirteen original states. A secondary meaning, however, was that the ‘public domain’ or ‘public lands’ encompassed lands ‘subject to sale or other disposal under general laws.’” Marla E. Mansfield, *A Primer on Public Land Law*, 68 Washington L. Rev. 801, 822 (1993) (footnote omitted).

<sup>79</sup> *Humboldt County v. United States*, 684 F.2d 1276, 1281 (9<sup>th</sup> Cir. 1982); *Columbia Basin Land Protection Ass’n v. Schlesinger*, 643 F.2d 585, 602 (9<sup>th</sup> Cir. 1981) (citations omitted) (“The United States Supreme Court has consistently held that ‘public lands’ means lands which are subject ‘to sale or other disposal under general laws,’ and does not include ‘(a)ll land, to which any claims or rights of others have attached.’”).

<sup>80</sup> “It has been long established that Indian reservation land is not public land.” *United States v. Schwarz*, 460 F.2d 1365, 1372 (7<sup>th</sup> Cir.1972). “As a general rule, Indian lands are not included in the term ‘public lands’ which are subject to sale or disposal under general laws.” *Bennett County, S.D. v. United States*, 395 F.2d 8, 11 (8<sup>th</sup> Cir. 1968) (Matthes, J.). See, *Missouri, Kansas & Texas Railway Co. v. United States*, 235 U.S. 37 (1914) (Holmes, J.) (holding in another context that land held for Indians was not “part of the public domain in the ordinary sense.”).

<sup>81</sup> Federal Land Policy Management Act of 1976 (“FLPMA”), § 706(a), Pub. L. No. 94-579, 90 Stat. 2743, 2793 (1976). FLPMA § 103(e) defines “public lands,” in pertinent part, as “any land and interest in land owned by the United States within the several states and administered by the Secretary of the Interior through the Bureau of Land management....”

There are three ways that federal lands may be removed from the public domain—that is, removed from the operation of what traditionally were termed the public land “disposal” laws, such as the homestead and mining laws. First, as noted, they may “reserved” for a designated federal use. Second, lands may be “withdrawn” from settlement, sale, location, or entry under these public land laws, but not reserved for any specified use (although often a withdrawal is coupled with, or serves as, a reservation).<sup>82</sup> Third, land may be removed from the public domain by action of private parties under the public land disposal laws, resulting ultimately in the issuance of a patent (*e.g.*, a homestead or mining patent).

It does not affect the validity of an R.S. 2477 right-of-way that the surrounding and underlying land is subsequently patented to private parties or reserved to specific federal uses. All that matters is that the road was on unreserved public lands at the time of its construction. Consequently, R.S. 2477 rights-of-way are found today throughout rural Idaho—in national forests and BLM lands as well as on private farms and ranches.

#### **b. A public road may “invade” federal land.**

It would seem to go without saying that public roads may be created on federal land pursuant to R.S. 2477. After all, that is the whole point of R.S. 2477. However, this point was litigated in 2011. “Sopatyk next argues that the Board lacks the authority to validate ACR [Anderson Creek Road] because in some places it drifts onto land owned by the U.S. Forest Service. As described above, however, R.S. 2477 expressly permitted states to establish rights-of-way on federal land so long as the property is in the public domain.” *Sopatyk v. Lemhi Cnty.*, 151 Idaho 809, 817, 264 P.3d 916, 924 (2011) (W. Jones, J.).

Of course, it is another matter whether title may be established by means other than a federal quiet title action. (See discussion in section VII.A at page 184.) In *Sopatyk*, however, this did not matter, because the federal government supported recognition of the road as a public road.

#### **4. Determining the date of the reservation, withdrawal, or patent**

As noted above, in order to establish an R.S. 2477 road, it is necessary to demonstrate that the road was located on non-reserved public land at the time it became a public road under state law. If the road is no longer located on non-reserved public land (*e.g.*, if it is located on what is today a national forest or private patented land), establishing the date of the reservation, withdrawal, or patent is critical.

For example, if the road creation method for establishing the road is five years of public use and maintenance, and the road is located within a national forest that was created in 1904, then it must be shown that the road began to be publicly used and maintained no later than 1899. If the road creation method is a common law dedication based on the fact that the road is depicted or described on the survey accompanying a homestead or mining claim patent, then it is necessary to show only that the survey predated the entry date. All this is discussed in greater detail below.

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<sup>82</sup> FLPMA defines “withdrawal” as “withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program;...” 43 U.S.C. § 1702(j). Of course, no post-FLPMA withdrawal can affect an R.S. 2477 decision because R.S. 2477 was repealed by FLPMA. But FLPMA’s definitions may be instructive in interpreting Congress’s understanding generally as to withdrawals and reservations.



Determining the date of a reservation or withdrawal (such as for a national forest) is straightforward enough. These involve congressional or executive actions of the federal government with clearly established dates. Figuring out when land passes out of the public domain via patents to private parties is a little trickier, however, because there are multiple steps involved. Examples follow.

Bear in mind that if the land was patented to private ownership before the public road was created, a public road still may be established later by prescription or otherwise—but it would not be an R.S. 2477 road.

#### **a. Homesteads**

In the context of homesteads, the date on which land is segregated from the public domain is the date of “entry.” Entry refers to the date of “application to acquire title to public lands.” Terry S. Maley, *Handbook of Mineral Law* at 693 (1983).

The Colorado Court of Appeals said in 2002: “Accordingly, we conclude that a homesteader’s rights in land patented by him relate back to the time the homestead entry is properly filed with the appropriate government office.” *Lee v. Masner*, 45 P.3d 794, 796 (Colo. Ct. App. 2002). The Alaska Supreme Court had earlier reached the same result. *Hamerly v. Denton*, 359 P.2d 121, 123 (Alaska 1961). In sum, the homesteaded land is deemed withdrawn from the public domain on the date that the homestead entry form is entered, not the subsequent date when the government issues the patent.<sup>83</sup>

The homestead patent may convey the property either by reference to the GLO survey of the relevant township or by a particular survey for that homestead known as a Homestead Entry Survey (“HES”).<sup>84</sup>

#### **b. Mining claims**

Once a mining claim is patented, the land of course is privately held and no longer part of the federal domain. However, there are many events leading up to patent: discovery, location, record, and application for patent (aka entry).<sup>85</sup> A federal court decision noted, “the date of a patent’s issuance is not necessarily the date the land is withdrawn from the public domain; indeed, it may be an earlier date.” *Barker v. Bd. of Cnty. Comm’rs of the Cnty. of La Plata, Colo.*, 24 F. Supp. 2d 1120, 1128 (1998).

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<sup>83</sup> In contrast, mere squatting on public land does not withdraw lands from the public domain, and such lands remain eligible for road creation under R.S. 2477. *Dillingham Commercial Co., Inc. v. City of Dillingham*, 705 P.2d 410, 414 (Alaska 1985).

<sup>84</sup> Homestead Entry Surveys (“HES”) only came into existence after the passage of the Forest Homestead Act of 1906. See Paul W. Gates, U.S. Public Land Law Review Comm’n, *History of Public Land Law Development* at 511-12 (1968). That law was intended to permit the homesteading of properties that maintained agricultural value despite the fact that they had been withdrawn from the public domain, usually for a forest reserve or, after 1905, a national forest. Prospective homeowners almost always had to pay for those HES surveys, which were typically performed in locations that had not already been surveyed by the GLO due to the remote or rugged landscape. In contrast, ordinary homestead patents were not typically issued based on a metes and bounds survey because they were almost always in townships that had been surveyed by the GLO.

<sup>85</sup> R.S. Morrison & Emilio D. De Soto, *Morrison’s Mining Rights* (14<sup>th</sup> Ed.) at 162 (1910).

The Court did not find it necessary to pin down which earlier event was critical. Nor, apparently, has any appellate court addressed the question in the context of R.S. 2477.<sup>86</sup> However, secondary authorities identify the pivotal date for determining when land is segregated and removed from the public domain as the date of entry. Entry is the date on which an application for patent is entered.<sup>87</sup> Entry often occurs years well after the claim is located and after a valid discovery is made, perhaps years before patent is issued. Once a valid entry occurs, equitable title shifts to the entryman.<sup>88</sup>

Professor Bader of the University of Alaska stated in a seminal article on R.S. 2477 rights-of-way:

Public Lands are those owned by the federal government and subject to sale or other disposal under the general land laws, excluding those to which any claims or rights of others have attached. An R.S. 2477 right-of-way cannot be established on public lands subject to any prior valid claim in which the rights of the general public have passed. Thus, the date of entry, not the date of actual patent, removes lands from the public domain for purposes of establishing public highways under the grant.

Harry R. Bader, *Potential Legal Standards for Resolving the R.S. 2477 Right of Way Crisis*, 11 Pace Envtl. L. Rev. 485, 490 (1994) (footnotes omitted) (emphasis supplied).

This conclusion is in accordance with a well-known early treatise on mining law, which notes that land is not segregated from the public domain until the filing of a mineral survey that has been followed by an application for patent.<sup>89</sup>

Segregation from the Public Domain.

. . . The register of the land office, when application for patent is made, is supposed to except all previous surveys as noted in the approved field notes (where such surveys have been followed by application for patent), in his notice for publication, which is the first period at which the officers of the

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<sup>86</sup> Although this case did not deal with R.S. 2477 rights-of-way, a U.S. Supreme Court case frequently cited on the general issue of when title to public lands passes is *Witherspoon v. Duncan*, 71 U.S. 210 (1866). *Witherspoon* arose in Arkansas and dealt with a special type of land entry known as a “donation entry.” These entries were intended to compensate settlers who had been displaced by the ceding of land to the Cherokee Indians; displaced settlers were entitled to claim certain federal lands within the state simply by filing for them. In determining when title passed for tax purposes, the Court said: “In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained.” *Id.* at 217. Consistent with the authorities discussed below, entry is identified as the critical event.

<sup>87</sup> In describing entry as the date of the patent application, this may refer to the date on which the miner files the application with the BLM (previously the General Land Office) or the date on which the government issues a certificate acknowledging the filing and receipt of the purchase money. The distinction is usually academic.

<sup>88</sup> “After entry in the land office, although title is still technically equitable, it amounts practically to the legal or fee simple . . . . The subsequent issue of the patent follows as a mere ministerial act . . . .” Morrison at 160.

<sup>89</sup> The date of entry is sometimes equated with the date of application. Terry S. Maley, *Handbook of Mineral Law* at 693 (1983).

United States recognize the segregation of the claim from the mass of the public domain.

R.S. Morrison & Emilio D. De Soto, *Morrison's Mining Rights* (14<sup>th</sup> Ed.) at 162 (1910) (emphasis original).

The reader should be careful not to confuse the question of when land is segregated and removed from the public domain (which cuts off road creation under R.S. 2477) with the issue of who, between two competing mining claimants, has the more senior claim (which has no bearing on the issue of R.S. 2477 roads).

The latter question is addressed by the “doctrine of relation.” Morrison at 162 (“Where successive steps are essential to perfect title, as discovery, location, record, application for patent, entry and finally patent; and during the progress of the time required to complete the series two hostile parties have taken some or all of these steps towards obtaining title to the same ground—the doctrine of relation may become material to determine between them the question of priority.”). This doctrine provides that under appropriate circumstances, “relation will carry the junior entry back to the date of its senior application.” Morrison at 163. This doctrine, however, relates solely to disputes between the two mining claimants, and does not affect the date on which the land was segregated from the public domain.<sup>90</sup> As Morrison states: “Many loose assertions are found in the cases on this topic of relation, not taking into consideration the conditions above attempted to be pointed out.” *Id.*

Thus, in a contest between two miners, the one with the more senior location may defeat the junior locator (even if the junior is the first to file an application for patent). In contrast, a miner with a valid location who allows or suffers a public road to be constructed across the site may not subsequently defeat the road as an R.S. 2477 right-of-way by relying on the doctrine of relation. This is consistent with the limited rights to which a locator is entitled.<sup>91</sup>

In sum, until an appellate court rules to the contrary, the best rule of thumb appears to be that land subject to a mining claim remains part of the public domain until the date of mineral entry. This conclusion is consistent with the clearly established rule for homestead entries discussed above.

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<sup>90</sup> For instance, the case of *Calhoun Gold Mining Co. v. Ajax Gold Mining Co.*, 182 U.S. 499 (1901), has been cited by litigants seeking to cut off R.S. 2477 rights-of-way as of the date of location, based on the following dictum: “The patents were proof of the discovery and related back to the date of the locations of the claims.” *Id.* at 510. However, the *Calhoun* case deals only with conflicts between competing mining claimants with overlapping locations; it has no bearing on and has never been cited for the proposition that lands are withdrawn from the public domain as of the date of location. Indeed, the very fact that multiple claimants are authorized to file overlapping locations demonstrates the opposite principle: mere location of a mining claim does not bar other members of the public from filing claims on that same land—or even establishing public roads under R.S. 2477. In other words, the land remains part of the public domain until an entry is made with the appropriate federal authority.

<sup>91</sup> “Pedis Possessio – A claimant in actual occupancy of a mining claim, even if he did not have a discovery, could hold against anyone who had no better title, so long as he was diligently engaged in seeking a discovery. The doctrine of pedis possessio was founded to provide such protection. However, these possessory rights are limited to protection against adverse locators or the general public. They are of no value against the United States who holds the superior title.” Terry S. Maley, *Handbook of Mineral Law* at 697-98 (1983).

**c. Lands subject to reserved mineral interest**

Lands granted to private parties with mineral interests retained by the federal government do not constitute public lands for purposes of R.S. 2477. *Columbia Basin*, 643 F.2d at 602. However, this decision was drawn into question by *Sierra Club v. Watt*, 608 F. Supp. 305, 337 (E.D. Cal. 1985).

**d. State endowment lands (school lands, insane asylum lands, etc.)**

See *Idaho Land Use Handbook* for discussion of management of endowment lands.

Idaho's endowment lands can be traced to 1863 when the U.S. Congress created the Territory of Idaho and designated sections numbered 16 and 36 in each township for school purposes. Organic Act of the Territory of Idaho, 12 Stat. 808, 814, § 14 (Mar. 3, 1863). This grant of school lands was confirmed and became effective when the State was admitted to the Union on July 3, 1890. Idaho Admission Act, 26 Stat. 215, 215, § 4 (July 3, 1890).

Section 4 of the admissions act set aside sections numbered 16 and 36 of every township then held by the federal government as "school lands" to be used by the State "for the support of common schools." Section 5(d) of the act declared that these lands are "reserved for school purposes only."

In addition, the Idaho Admission Act granted additional acres for various specific institutions, including 50,000 acres for the "insane-asylum located at Blackfoot." *Id.*, at 217, § 11. See Idaho Code § 66-1101 (Mental Hospital Permanent Endowment Fund).

In some cases, some portions of section 16 and 36 were unavailable (due, for example, to prior federal reservation or patent, or the presence of navigable water bodies). In such cases, the State was given the opportunity to select other federal lands, which are known as "in lieu lands" or "lieu lands." See Idaho Code §§ 58-201 to 58-206.

Given that these are reserved lands, R.S. 2477 rights-of-way may not be created on these lands after the date of admission in 1890 (or the date of selection of in lieu lands). R.S. 2477 roads created before the date of admission would remain valid.

Although the opinion was later withdrawn,<sup>92</sup> the Ninth Circuit provided this useful summary of the law:

Valid pre-existing claims upon the land traversed by an alleged right of way trump any RS 2477 claim. As the *Dillingham* court put it, "[i]t is clear that the public may not, pursuant to § 932 [R.S. 2477] acquire a right of way over lands that have been validly entered." *Dillingham*, 705 P.2d at 414. Homesteading rights clearly are superior to later established RS 2477 claims. Territory validly withdrawn for other purposes also falls within the *Dillingham* rule. Thus, when Congress set aside land for the support of territorial schools, the sections it named from each township no longer were available public lands. Act of March 4, 1915, ch. 181, §§ 1-2, 38 Stat. 1214,

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<sup>92</sup> As noted in the citation, this opinion was withdrawn on rehearing in 1996 when the Court issued a one paragraph opinion reaching the same result without analysis and specifically not reaching the holding dealing with the statute of limitations. The Handbook author nevertheless employs the quotation above because it provides useful guidance.

48 U.S.C. § 353 (repealed by Pub. L. No. 85-508, § 6(k), 73 Stat. 343 (1958)) (withdrawing all township sections numbered 16 and 36 for schools unless “settlement with a view to homestead entry ha[d] been made upon any part of the sections reserved hereby before the survey thereof in the field”). Cf. *Mercer v. Yutan Constr. Co.*, 420 P.2d 323, 324, 325-26 (Alaska 1966) (grazing land “public” because grazing permit subordinate to public right of way).

*Shultz v. Dep’t of Army* (“*Shultz II*”), 10 F.3d 649, 656 (9th Cir. 1993) (emphasis added), *opinion withdrawn*, 96 F.3d 1222 (9<sup>th</sup> Cir. 1996) (“*Shultz III*”). The statute referenced in the quotation is “An Act to reserve lands to the Territory of Alaska for educational uses.” It is a rough counterpart (so far as school lands are concerned) to Idaho’s Admission Bill. The *Dillingham* reference is to *Dillingham Commercial Co., Inc. v. City of Dillingham*, 705 P.2d 410 (Alaska 1985).

## **5. Federal and state role in R.S. 2477 rights-of-way**

### **a. State law generally controls R.S. 2477 rights-of-way.**

Although R.S. 2477 is a federal statute, most courts (including the Idaho Supreme Court) have held that state law governs the acceptance of a right-of-way under the federal R.S. 2477 statute. “State law governs whether a highway has been created under R.S. 2477.” *Galli v. Idaho Cnty.*, 146 Idaho 155, 160, 191 P.3d 233, 238 (2008) (W. Jones, J.) (quoted in *Sopatyk v. Lemhi Cnty.*, 151 Idaho 809, 814, 264 P.3d 916, 921 (2011) (W. Jones, J.) and *Flying “A” Ranch, Inc. v. Cnty. Comm’rs of Fremont Cnty.* (“*Flying A*”), 157 Idaho 937, 942, 342 P.3d 649, 654 (2015) (Horton, J.)). “Since the inception of Revised Statute 2477 (R.S. 2477), state law controlled acceptance of the R.S. 2477 right-of-way grant. . . .” Mitchell R. Olson, Note, *The R.S. 2477 Right of Way Dispute: Constructing a Solution*, 27 Env’tl. L. 289, 296 (1997).

Moreover, state courts, applying state law, developed specific criteria for all five factors.” Mitchell R. Olson, Note, *The R.S. 2477 Right of Way Dispute: Constructing a Solution*, 27 Env’tl. L. 289, 296 (1997). “It follows that the laying out by authority of the state law of the road here in question created rights of continuing user to which the government must be deemed to have assented.” *Cent. Pac. Ry. Co. v. Cnty. of Alameda*, 284 U.S. 463, 473 (1932) (“user” is an arcane term for public use). “In determining whether the criteria for a R.S. 2477 right-of-way were met, local custom and state law controls.” *United States of America v. Boundary Cnty.*, Case No. CV98-253-N-EJL, at 5 (D. Idaho, Memorandum Decision and Order, Aug. 28, 2000) (<http://www.id.uscourts.gov/>).

In 2005, the Tenth Circuit confirmed that state law ultimately governs the issue of road creation for R.S. 2477 rights-of-way:

We therefore conclude that federal law governs the interpretation of R.S. 2477, but that in determining what is required for acceptance of a right of way under the statute, federal law “borrows” from long-established principles of state law, to the extent that state law provides convenient and appropriate principles for effectuating congressional intent.

*S. Utah Wilderness Alliance v. BLM* (“SUWA”), 425 F.3d 735, 768 (10<sup>th</sup> Cir. 2005).<sup>93</sup> This far reaching and scholarly opinion provides a helpful overview of the law governing R.S. 2477 rights-of-way. The quoted statement from the Tenth Circuit was quoted approvingly by the Ninth Circuit in *Cnty. of Shoshone v. United States*, Fed. Appx. 834, 836 (9<sup>th</sup> Cir. 2014) (memorandum decision).

A 1993 Ninth Circuit opinion is in accord, but it was withdrawn. *Shultz v. Dep’t of Army*, 10 F.3d 649, 655 (9<sup>th</sup> Cir. 1993) (“*Shultz II*”) (“Whether [an R.S. 2477] right of way has been established is a question of state law.”), *opinion withdrawn*, 96 F.3d 1222 (9<sup>th</sup> Cir. 1996) (“*Shultz III*”). On rehearing, the same panel substituted a one paragraph decision reaching the same conclusion, but without deciding whether it was on the basis of state or federal law.<sup>94</sup> The author is not aware of any other Ninth Circuit decision addressing the issue.

The Utah Supreme Court summed it up this way:

Thus, R.S. 2477 does not prescribe a specific time period in which a road must be subject to public use in order to become a public highway as a matter of federal law. Instead, the requisite “public use” time period is dictated by state law, such that the time necessary to establish an R.S. 2477 public highway may differ from state to state, and may vary within a state as state law is amended from time to time.

*Stichting Mayflower Mtn. Fonds v. United Park City Mines Co.*, 2017 WL 1091162 at \*5 (Utah 2017). That is a good summary equally applicable in Idaho.

The fact that state law controls does not deprive the federal courts of “federal question” jurisdiction when ownership and control of federal lands are involved. *Wilkenson v. Dept. of the Interior of the U.S.*,

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<sup>93</sup> This litigation was initiated by environmental groups in response to road grading actions undertaken by three counties on purported R.S. 2477 roads on BLM lands in Utah. The environmental groups sued the counties to stop the trespass and BLM for failing to stop the road grading. The district court concluded that it lacked primary jurisdiction to decide the issue, stayed the litigation, and referred the issue to the BLM for an administrative determination of the validity of the claimed R.S. 2477 roads. The BLM concluded that 15 of the 16 alleged R.S. 2477 roads were not valid. The district court proceeded to review the BLM’s decision as an appeal under the APA, ultimately affirming the decision. The Court of Appeals reversed, holding that the BLM had no authority to adjudicate R.S. 2477 claims. It then remanded to the district court for a de novo determination of the legal status of the roads—essentially a quiet title action, although the court did not call it by that name. (Indeed, a subsequent case noted, “In that case, we remanded for the district court to adjudicate the validity of purported R.S. 2477 rights without even mentioning the Quiet Title Act.” *The Wilderness Society v. Kane County*, 581 F.3d 1198, 1219 (10<sup>th</sup> Cir. 2009), *rev’d en banc*, 632 F.3d 1162 (2011) (reversed for lack of standing).

<sup>94</sup> “Paul G. Shultz appeals the district court’s judgment in favor of the government in his quiet title action under 28 U.S.C. § 2409a. Shultz argued that he has a right-of-way across Fort Wainwright to get back and forth between Fairbanks and his property under either R.S. 2477, 43 U.S.C. § 932, or Alaska common law, or both. Because we ultimately agree with the district court that Shultz has not sustained his burden to factually establish a continuous R.S. 2477 route or a right-of-way under Alaska common law, we affirm the district court. We do not reach Shultz’s argument that the district court erred by holding that his action was time-barred by 28 U.S.C. § 2409a(g).” *Shultz v. Dep’t of Army*, 96 F.3d 1222, 1222 (9<sup>th</sup> Cir. 1996).

634 F. Supp. 1265, 1272 (D. Colo. 1986) (allowing removal to federal court on the basis of federal question jurisdiction, while also recognizing that state law controls determination of the acceptance of the grant).

Although state law may govern the creation of roads under R.S. 2477, state law cannot broaden the nature of the federal offer. Thus state statutes purporting to “accept” R.S. 2477 rights-of-way along all section lines in the state have been struck down. *See, S. Utah Wilderness Alliance v. BLM* (“SUWA”), 425 F.3d 735, 766 (10<sup>th</sup> Cir. 2005); Michael J. Wolter, *Revised Statutes 2477 Rights-of-Way Settlement Act: Exorcism or Exercise for the Ghost of Land Use Past?*, 5 Dickinson J. Envtl. L. & Policy 315, 328 (1996), *cf.*, *Bird Bear v McLean Cnty.*, 513 F.2d 190 (8<sup>th</sup> Cir. 1975) (upholding North Dakota statute accepting the grant as to all section lines). This is discussed further in section I.H.5.b at page 65 regarding the limited but continuing authority of the federal government over R.S. 2477 roads on federal lands.

In 2014, the Tenth Circuit reiterated that federal law looks to state law, but added the limitation that state law must not contravene the congressional intent embodied in R.S. 2477.

Federal law governs our interpretation of R.S. 2477. *SUWA*, 425 F.3d at 768. True, R.S. 2477 was enacted “against a backdrop of common law, without any indication of intention to depart from or change common law rules.” *Id.* at 763. Stated another way, state common law has provided “convenient and appropriate principles for [carrying out] congressional intent,” and we have used it in the past to determine how the public can accept an R.S. 2477 right-of-way and to elaborate on the term “highway.” *Id.* at 768; *see id.* at 782 (defining “highway”). However, state law ceases to provide “convenient and appropriate principles” when it contravenes congressional intent. *See id.* at 767–68.

*San Juan Cnty., Utah v. United States*, 754 F.3d 787, 798 (10<sup>th</sup> Cir. 2014) (brackets original).

**b. The federal government retains some measure of control over R.S. 2477 rights-of-way established and recognized on federal land.**

In *S. Utah Wilderness Alliance v. BLM* (“SUWA”), 425 F.3d 735 (10<sup>th</sup> Cir. 2005), the Ten Circuit recognized that while state law generally controls acceptance of R.S. 2477 rights-of-way, there are limits to how far the states may go in issuing blanket acceptances of such roads:

This [does] not mean, and never meant, that state law could override federal requirements or undermine federal land policy. For example, in an early decision, the BLM determined that a state law purporting to accept rights of way along all section lines within the county was beyond the intentions of Congress in enacting R.S. 2477. *Douglas Cnty., Washington*, 26 Pub. Lands Dec. 446 (1898).

*SUWA* at 766. Thus, state law controls, but only so long as it is consistent with the general intent of the federal grant. Given the breadth of the federal grant, however, only the most extreme overreaching by a state would be subject to check in the federal courts.<sup>95</sup>

Once an R.S. 2477 right-of-way is recognized on federal land, what control does the federal government retain over it? Plainly, the federal government does not own R.S. 2477 rights-of-way crossing federal land, and thus cannot unilaterally close such roads.

This has alarmed environmental groups and other supporters of stronger federal control over our public lands, who have raised concern that R.S. 2477 rights-of-way impair protection of environmental resources. However, in some cases the federal government retains some authority to regulate use of a R.S. 2477 right-of-way crossing federal lands so as to protect environmental or other values, at least where the federal agency has a statutory or regulatory duty to preserve those values and the use of the road may impair them.<sup>96</sup> On the other hand, the federal government may not use its regulatory power to impose a toll on R.S. 2477 rights-of-way. *United States v. Maris*, 987 F. Supp. 865 (D. Or. 1997).

An analysis of the competing arguments over the extent of the federal government's authority to control and restrict the use of R.S. 2477 roads on federal property is set out in Matthew L. Squires, Note, *Federal Regulation of R.S. 2477 Rights-of-Way*, 63 N.Y.U. Annual Survey of American Law 547 (2008).

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<sup>95</sup> Two Idaho cases have rejected section line road dedications, but only for technical reasons. In 1980 the Idaho Supreme Court ruled that a 1919 county resolution that purported to “confirm” a prior dedication of all section lines to public roads was insufficient because the document “did not specify when the acceptances referred to may have occurred or where they might be found.” *Roper v. Elkhorn at Sun Valley*, 100 Idaho 790, 793, 605 P.2d at 968, 971 (1980). On the other hand, the case seems to imply that if the original section line dedication had been produced, it would have been effective. In the much earlier case of *Gooding Highway Dist. v. Idaho Irrigation Co.*, 30 Idaho 232, 164 P. 99 (1917), the Court found that a contract provision between Idaho and the federal government recognizing the establishment of section line roads within Carey Act lands to be insufficient because of the county's failure to follow certain procedures of a then existing statute respecting road creation petitions.

<sup>96</sup> *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988) (the “Burr Trail” case), *appeal following remand*, *Sierra Club v. Lujan*, 949 F.2d 362 (1991), *overruled on other grounds by Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992) (BLM had authority, and the duty, to require a widening alternative to an R.S. 2477 road that was less damaging to the wilderness study area through which it passed); *United States v. Vogler*, 859 F.2d 638, 642 (9th Cir. 1988), *cert. denied*, 488 U.S. 1066 (1989) (National Parks Act gives Secretary of Interior authority to regulate the manner of use of an R.S. 2477 road through a national park); *Wilkenson v. Dept. of the Interior of the U.S.*, 634 F. Supp. 1265 (D. Colo. 1986) (Forest Service could not prohibit commercial use of an R.S. 2477 road through a national monument, but dictum in this opinion suggests the agency could regulate commercial vehicle use with regard to weight, hazardous loads, and similar factors). In *Fitzgerald v. United States*, 932 F. Supp. 1195, 1201 (D. Ariz. 1996), no R.S. 2477 road was found, and the court ruled that the Forest Service had authority to impose conditions on forest road use, even where access is guaranteed (such as through the Alaska National Interest Lands Conservation Act (“ANILCA”), P.L. 96-487, § 1323 (codified at 16 U.S.C. § 3210), which ensures access to private inholdings in national forests, subject to rules and regulations).

Note also that the Forest Service often enters into agreements with counties allowing county maintenance of public access over roads within the National Forest System pursuant to the National Forest Road and Trails Act (“FRTA”), 16 U.S.C. § 533.



**6. R.S. 2477 roads may be created on the basis of (1) compliance with state statute or (2) “some positive act” of acceptance.**

Given that acceptance of the federal offer is governed by state law, the question is what does Idaho law require to create an R.S. 2477 right-of-way? The Idaho Supreme Court has long stated that R.S. 2477 rights-of-way may be accepted in either of two ways, by compliance with state statutes for road creation or by some positive act by local officials recognizing the road as public.

Here is an oft-quoted passage:

The general rule would seem to be that in order to constitute an acceptance of the congressional grant of right of way for public highways across public lands [under R.S. 2477], there must be either user by the public for such period of time, and under such conditions as to establish a highway under the laws of this State; or there must be some positive act or acts on the part of the proper public authorities clearly manifesting an intention to accept such a grant with respect to the particular highway in question.

*Kirk v. Schultz*, 63 Idaho 278, 282-83, 119 P.2d 266, 268 (1941) (Budge, J.) (emphasis supplied).<sup>97</sup>

Prior to the *Farrell* decision in 2002, there had been uncertainty as to whether the Court was merely summarizing the two forms of road creation by statute (“formal” and “public use” road creation), or whether it was setting out a separate, more relaxed standard for R.S. 2477 rights-of-way.<sup>98</sup> In *Farrell*, the Idaho Supreme Court resolved this question, ruling that R.S. 2477 rights-of-way need not satisfy the statutory criteria for road creation if they can meet the alternative, more lenient common law standard:

Under R.S. 2477 a public road may be created under the state road creation statute or where there is a positive act of acceptance by the local government. The *Kirk* case is not explicit as to whether the second approach is independent of the state statute or if both of the two requirements for R.S. 2477 roads are reiterations of the requirements as already found in the state statute. The difference is important since the second method requiring any “positive act” is more lax than the requirements set forth in the state road creation statute. Considering the language in *Kirk* it appears that there are two separate methods and that a positive act of acceptance need not be coextensive with the road creation statute.

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<sup>97</sup> Note that the word “user” in the quotation is an arcane term for public use. This passage has been quoted in each of the following cases: *French v. Sorensen*, 113 Idaho 950, 957 n.4, 751 P.2d 98, 105 n.4 (1988) (Bistline, J.); *Roper v. Elkhorn at Sun Valley*, 100 Idaho 790, 793-94, 605 P.2d at 968, 971-72 (1980); *John W. Brown Properties v. Blaine County*, 129 Idaho 740, 743 n.2, 932 P.2d 368, 371 n.2 (Idaho Ct. App. 1997) (“*John Brown I*”), *attorney fees award clarified*, 132 Idaho 60, 966 P.2d 656 (Idaho Ct. App. 1997) (“*John Brown II*”), *appeal after remand*, 2001 WL 215311 (Idaho Ct. App., Mar. 6 2001) (“*John Brown IV*”); *aff’d in part, rev’d in part*, 138 Idaho 171, 59 P.3d 976 (2002) (“*John Brown IV*”).

<sup>98</sup> Meanwhile, the Idaho Legislature has made it very clear that it considers R.S. 2477 rights-of-way to be subject to different standards. 1993 Idaho Sess. Laws, ch. 142 (H.B. 388) (codified at Idaho Code §§ 40-107, 40-204A). See discussion in section III.G.5 at page 102.

*Farrell v. Bd. of Cnty. Comm'rs of Lemhi Cnty.*, 138 Idaho 378, 384, 64 P.3d 304, 310 (2002) (Schroeder, J.).

Idaho law as it stands today is neatly summarized by the Court in *Galli*:

In *Farrell*, this Court found this statement from *Kirk* to contain two methods for establishing an R.S. 2477 public right-of-way. That is, an R.S. 247 right-of-way is either created through a positive act of acceptance by the local government or compliance with the public road creation statutes in existence at the time.

*Galli*, 146 Idaho at 159, 191 P.3d at 237 (citation omitted).<sup>99</sup>

Note that the “public road creation statutes” that may provide the basis for road creation under R.S. 2477 includes territorial statutes enacted prior to statehood. *Galli*, 146 Idaho at 160, 191 P.3d at 238; *Sopatyk v. Lemhi Cnty.*, 151 Idaho 809, 814, 264 P.3d 916, 921 (2011) (W. Jones, J.) (“This includes territorial laws relating to road creation.”)

What, then, does this more “lax” standard allow? In *Farrell*, plaintiff contended that Lemhi County’s decision to accept the road was not properly recorded. The Idaho court brushed aside the statutory requirement for recording. The Court’s more “lax” standard allowed the Court to find that the county’s acceptance of a miners’ petition for the road “pasted in the old leather-bound County book” constituted “a clear manifestation of an intent to accept a road.” *Farrell*, 138 Idaho at 384, 64 P.3d at 310.<sup>100</sup>

The *Farrell* and *Galli* decisions did not offer further guidance on the bounds of this more “lax” standard for the “clear manifestation of an intent to accept the road.” Two examples, however, can be found in earlier cases. In 1961, the Supreme Court found a map and order of county commissioners to be sufficient, in themselves, to qualify as an R.S. 2477 acceptance. *Rich v. Burdick*, 83 Idaho 335, 343, 362 P.2d 1088, 1092-93 (1961) (Taylor, J.). In 1988, the Court gave the example of “a resolution passed by the county commissioners” as being sufficient. *French v. Sorensen*, 113 Idaho 950, 958, n.4, 751 P.2d 98, 106, n.4 (1988).

*Galli* put to rest a question left open by *Farrell* and *Kirk*.<sup>101</sup> The Idaho Association of Counties urged in an amicus brief in *Galli* that the “lax” standard should relax both the formal declaration and the

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<sup>99</sup> The Court did not say so in this part of the opinion, but it may be that R.S. 2477 rights-of-way also may be created by a third method: common law dedication. The *Farrell* court expressly recognized that the Indian Creek Road also passed muster under the theory of common law dedication. It would stand to reason, then, that this would be yet another lawful means of acceptance by the State. However, none of the Court’s articulations of the methods for establishing an R.S. 2477 road has mentioned common law dedication.

<sup>100</sup> The Court found that the road satisfied the more “lax” standard, and did not evaluate whether it would also satisfy the stricter statutory requirement for formal dedication (formal approval and recording). It would seem, however, that the County’s action would satisfy either test. What the Court referred to as “past[ing] in the old leather-bound County book” is how these matters were recorded.

<sup>101</sup> In the passage from *Kirk v. Schultz* quoted above, the Court spoke only of “user by the public for such period of time” without reference to how long that period must be; nor did the Court discuss the public maintenance element.

prescriptive use components of the Idaho road creation statute, urging that R.S. 2477 roads should be recognized based on less than five years of public use and even despite no showing of public maintenance. *Galli* rejected that suggestion and made clear that the “lax” standard applies only to the “some positive act” branch of the test. The fact that an R.S. 2477 road is involved does not otherwise relax the standards for establishing the existence of the road under the road creation statute. Thus, notably, there is no “lax” standard for showing five years of public use and maintenance. *Galli v. Idaho Cnty.*, 146 Idaho 155, 159, 191 P.3d 233, 237 (2008) (W. Jones, J.; J. Jones, J., concurring).<sup>102</sup>

In *Sopatyk v. Lemhi Cnty.*, 151 Idaho 809, 264 P.3d 916 (2011) (W. Jones, J.), a committee of miners seeking to establish a townsite filed a petition accompanied by a plat showing Anderson Creek Road within the local mining district. The Idaho Supreme Court ruled that the miners committee was not a “public authority” sufficient to satisfy the “some positive act” criterion. *Sopatyk*, 151 Idaho at 814, 264 P.3d at 921.

Query: Could placement of a road on a county or highway district map constitute “some positive act” by local officials sufficient to satisfy the “lax” standard under R.S. 2477? The author is not aware of a situation in which such a claim has been asserted.

#### **7. Idaho’s legislative recognition of R.S. 2477 rights-of-way in 1993 (§ 40-204A) had no retroactive effect.**

In 1993, Idaho enacted legislation specifically addressing R.S. 2477 rights-of-way. 1993 Idaho Sess. Laws, ch. 142 (H.B. 388) (codified at Idaho Code §§ 40-107(5), 40-204A). The 1993 statute declares that R.S. 2477 rights-of-way are created automatically upon mere “construction and first use.” Idaho Code § 40-204A(1). The same statute also repealed the provisions authorizing passive abandonment (see discussion in section III.D at page 96) and eliminated the independent formal abandonment statutes for counties and highway districts (see discussion in section III.E at page 96).

This sweeping legislation reflects a vigorous endorsement of positions urged by pro-R.S. 2477 forces on everything from road creation to abandonment. (See the discussion of what section 40-204A says about abandonment of R.S. 2477 roads in section III.J at page 103.)

This minimalist requirement for road creation (construction and first use) is inconsistent with Idaho statutory law (requiring formal declaration or five years of public use and maintenance). The question, then, is, does this statute have retroactive effect allowing recognition of roads created long ago?

The answer is no. As Idaho District Judge John H. Bradbury said in 2006, “[Plaintiffs] offer no explanation as to how a law passed in 1993—seventeen years after a federal law *which preserved rights then extant* under R.S. 2477—can govern the conditions under which a property right was established and became vested more than one hundred years ago.” *Galli v. Idaho Cnty.*, Case No. CV 36692, slip op. at 30 (Idaho Dist. Ct., 2nd Jud. Dist. June 2, 2006) (emphasis original).

The Idaho Supreme Court upheld Judge Bradbury on that point, noting that the statute itself resolved the issue: “I.C. § 40 204A was not intended to have retroactive effect.” *Galli v. Idaho Cnty.*, 146

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<sup>102</sup> For reasons that are unclear, the *Galli* decision applied no maintenance requirement. See discussion in section I.D.3.c(viii) at page 35.

Idaho 155, 159, 191 P.3d 233, 237 (2008) (W. Jones, J.) (citing Idaho Code § 40-205).<sup>103</sup> The Court then concluded: “In this instance, Jutte [the road proponent] was required to prove to the Board that the Roads were used for a period of five years in order to meet his initial burden, and not merely to show an ‘act of construction and first use.’” *Galli*, 146 Idaho at 159, 191 P.3d at 237.

A 2003 decision by the Owyhee County Commissioners reached the same conclusion. The Owyhee County Commissioners’ Upper Reynolds Creek Road decision addressed this question and concluded Idaho Code § 40-204A does not codify pre-existing common law and does not have retroactive effect. The Commissioners concluded that “the case decisions regarding abandonment of RS 2477 roads suggest just the opposite” and that such an “application would diminish . . . vested private property rights . . .” *In the Matter of the Status of the Upper Reynolds Creek Road*, at 8 (Bd. of Owyhee County Comm’rs June 2, 2003).

The federal district court reached the same conclusion in an unreported decision in 1993:

After considering all of the foregoing, the Court concludes that to the extent the 1993 Act does not create new rights or enlarge or destroy vested rights, it is applicable retroactively. However, to the extent that it contradicts the right of way laws existing in Idaho before 1905 and the case law interpreting those laws, the 1993 Act necessarily would create or destroy existing rights. Therefore, the Court concludes that the 1993 Act is not applicable in determining whether a right of way was created prior to 1905.”

*United States v. Mountain Home Highway Dist.*, Case No. CV92-0491-S-LMB, slip op. at 28 (D. Idaho, order dated Oct. 13, 1993) (Boyle, M.J.) (case later resolved by stipulation).

The conclusion that section 40-204A does not apply retroactively is consistent, as well, with *Floyd v. Bd. of Comm’rs of Bonneville Cnty.* (“*Floyd I*”), 131 Idaho 234, 953 P.2d 984 (1998) (Silak, J.), which held that procedural rules governing validation proceedings may be applied retroactively. By implication, then, statutory changes in substantive law do not apply retroactively.<sup>104</sup>

In sum, the 1993 legislation comes too late to change the law of how R.S. 2477 rights-of-way were created in Idaho.

## **8. Other questions about R.S. 2477 roads**

### **a. Can a private party hold title to an R.S. 2477 right-of-way?**

Typically, R.S. 2477 rights-of-way are held by public entities. In some instances, however, private parties have alleged an ownership interest in R.S. 2477 rights-of-way. Mitchell R. Olson, Note, *The R.S.*

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<sup>103</sup> Judge Bradbury’s analysis—based on general principles of the law of retroactivity—is the better explanation for why there is no retroactive effect. The Supreme Court’s reference to Idaho Code § 40-205 is arguably misplaced. That “no retroactive effect” provision was included when the entire Title was replaced in 1985—eight years before Idaho Code § 40-204A was enacted in 1993.

<sup>104</sup> In a footnote to a 2015 decision, the Idaho Supreme Court reached the opposite conclusion. In *Flying “A” Ranch, Inc. v. County Comm’rs of Fremont County* (“*Flying A*”), 157 Idaho 937, 940 N.2, 342 P.3d 649, 652 n.2 (2015) (Horton, J.), the Court held, without explanation, 2013 amendments to standard of review in the very same section 40-208 do not apply retroactively.

*2477 Right of Way Dispute: Constructing a Solution*, 27 Env'tl. L. 289, 290 (1997). The authority for private ownership, however, is not well established. In any event, it appears that the road must be “public in character” even if claimed by private individuals. Thomas E. Meacham, *Public Roads over Public Lands: The Unresolved Legacy of R.S. 2477*, 40 Rocky Mtn. Min. L. Inst. § 2.03[1][b] at 2-32 (1994). As an early federal administrative decision held, “the fact of general public right of user for passage, without individual discrimination, is the essential feature.” *The Pasadena and Mount Wilson Toll Road Co. v. Schneider*, 31 Pub. Lands Dec. 405, 407-08 (1902) (holding that a toll road could be an R.S. 2477 right-of-way).

The Idaho Supreme Court appears to have resolved the issue in favor of recognizing only publicly created R.S. 2477 rights-of-way: “To be valid it must be shown that the local government accepted the road from the federal government.”<sup>105</sup> *Farrell*, 138 Idaho at 384, 64 P.3d at 310. The Idaho Court went on to note that the acceptance might occur by way of public user sufficient to establish a public road under state statute. Thus, private persons acting alone can create an R.S. 2477 right-of-way, but it is nonetheless a publicly held right-of-way, not a private easement.

This is consistent with federal case law:<sup>106</sup>

[T]he real property interest in a public road created by operation of R.S. 2477 and other authority “is vested in the public generally” and “[m]embers of the public as such do not have ‘title’ in public roads. To hold otherwise would signify some degree of ownership as an easement. It is apparent that a member of the public cannot assert such an ownership in a public road.”

*Fairhurst Family Ass’n, LLC v. U.S. Forest Service*, 172 F. Supp. 2d 1328, 1331 (D. Colo. 2001) (citing *Kinscherff v. United States*, 586 F.2d 159, 160 (10<sup>th</sup> Cir. 1978)).

#### **b. Which unit of government holds the R.S. 2477 right-of-way?**

In Idaho, R.S. 2477 rights-of-way are held by the same local entities (typically counties and highway districts) that control other local roads. In other states, such as New Mexico, the legislature has specified that the state itself holds title to R.S. 2477 rights-of-way.

## **II. OTHER ROAD CREATION ISSUES**

### **A. Road width**

#### **1. The 2013 road width amendment**

Most road disputes are over the length and location of roads. In some cases, however, the width of the road is also critical. Where there is no official declaration or survey to the contrary, Idaho law uses a 50-foot width as a default.

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<sup>105</sup> On the other hand, private versus public ownership of the road was not at issue in this litigation, so the Court’s statement could be seen as *dictum*.

<sup>106</sup> Note that this decision is a limitation only on the ability of a private party to bring a quiet title action in federal court to quiet title to an R.S. 2477 right-of-way held by the public. Idaho courts have not doubted the ability of private parties to use state quiet title actions to resolve disputes over R.S. 2477 rights-of-way.

Since territorial times (1887), statutes have set a 50-foot minimum for road width.<sup>107</sup> As of 2012, the statute read as follows:

All highways, except bridges and those located within cities, shall be not less than fifty (50) feet wide, except those of a lesser width presently existing, and may be as wide as required for proper construction and maintenance. Bridges located outside incorporated cities shall be the same width to and across the river, creek, or stream as the highway leading to it.

Idaho Code § 40-2312 (prior to 2013 amendment).<sup>108</sup>

In 2013 the statute was amended extensively in a political compromise in response to two Idaho Supreme Court decisions on the subject of road width (*Sopatyk v. Lemhi Cnty.*, 151 Idaho 809, 264 P.3d 916 (2011) (W. Jones, J.) and *Halvorson v. N. Latah Cnty. Highway Dist.*, 151 Idaho 196, 254 P.3d 497 (2011) (Horton, J.)). 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified in part at Idaho Code § 40-2312). The 2013 amendment codified the holding of those cases establishing a minimum 50-foot road width, but carved out specific and limited exceptions.<sup>109</sup>

The first subsection of the statute now reads:

(1) Where the width of a highway is stated in writing in the plat, dedication, deed, easement, agreement, official road book, determination or other document or by an oral agreement supported by clear and convincing evidence that effectively conveys, creates, recognizes, or modifies the highway or establishes the width, that width shall control.

Idaho Code § 40-2312(1).

This provision clarifies that if a road's width is defined by some legally operative document (or even an oral agreement supported by clear and convincing evidence), that document controls, and the rest of the statute does not apply. Thus, for instance, if there is a plat, validation, viewers' report, prior validation, or quiet title stating that a road is so many feet wide, that is the end of the matter. Note that the document or agreement must be legally operative; it cannot just be any piece of paper. In the words of the statute, it must "effectively" convey, create, recognize or modify the road or otherwise establish the width of the road. Thus, specification of road width in some less formal, non-definitive document (such as the road map required by Idaho Code § 40-202(6)) would not be "effective" in establishing the road width. Similarly, a post-hoc survey undertaken by a landowner or other interested party, recorded without county review and approval, would probably not qualify under the statute to establish road width.

Although the statute speaks only in terms of width, the establishment of width also would determine the location of the outer boundaries of the right-of-way. Thus, it would seem that an approved plat or other

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<sup>107</sup> The predecessor of the current statute was enacted in 1887, prior to statehood. It read, in full: "All highways, except alleys and bridges, must be at least fifty feet wide except those now existing of a less width." 1887 Revised Stat. of Idaho Territory, title VI, ch. II, § 932 (June 1, 1887).

<sup>108</sup> Idaho Code § 40-2312 was first enacted in 1985, 1985 Idaho Sess. Laws, ch. 253, § 2. It was a complete re-codification of prior road statutes.

<sup>109</sup> The retroactive effect of the 2013 amendments is discussed in II.A.3 at page 75.

operative document establishing the location of a boundary of a right-of-way would be definitive (assuming it did not contradict a prior validation, quiet title, or other controlling document).

If road width has not been previously established in such a document, it must be determined by validation or some authorized judicial procedure, and that proceeding will be governed by the balance of Idaho Code § 40-2312.

The second subsection of the statute now reads:

(2) Where no width is established as provided for in subsection (1) of this section and where subsection (3) of this section is not applicable, such highways, except bridges and those located within cities, shall be not less than fifty (50) feet wide.

Idaho Code § 40-2312(2). This provision confirms, that, unless the road falls into one of the exceptions discussed below, its width will be a minimum of 50-feet. This codifies the rule set in *Halvorson* and *Sopatyk*.

The third subsection of the statute sets out one more exception to the 50-foot minimum (dealing with non-maintenance). It reads:

(3) Highways which at the time of a validation or judicial proceeding are not located on land owned by the United States or the State of Idaho or on land entirely surrounded by land owned by the United States or the State of Idaho, and that have not received maintenance at the expense of the public in at least three (3) years during the previous fifteen (15) years, shall be declared to be of such width, and none greater, as is sufficient to accommodate:

- (a) The existing physical road surface;
- (b) Existing uses of the highway;
- (c) Existing features included within the definition of highways in section 40-109(5), Idaho Code;
- (d) Such space for existing utilities as has historically been required for ongoing maintenance, replacement and upgrade of such utilities; and
- (e) Space reasonably required for maintenance, motorist and pedestrian safety, necessary to maintain existing uses of the highway.

Idaho Code § 40-2312(3).

This provision excepts from the default 50-foot minimum those highways that (1) are not located on public lands and (2) have not been publicly maintained three times in the last 15 years. Both requirements must be met to be exempted from the 50-foot minimum. Thus, a public road located on federal land would continue to be subject to the 50-foot minimum even if it had never been publicly maintained.

The 2013 amendment also amended the definition of public maintenance, Idaho Code § 40-114(3), to make it more expansive. It now includes such things as snow plowing (which requires extra width for plowed snow).<sup>110</sup>

For those roads falling with the exception (that is, roads on private lands that have not been recently publicly maintained), their width may be less than 50-feet. Even these roads, however, shall be wide enough to accommodate existing uses. For example, if the road is used to move large agricultural equipment, its width will take that into account. The width must also accommodate existing “features” (such as ditches and roadside improvements) and utilities. Finally, the width must be sufficient to provide for “maintenance [and] motorist and pedestrian safety.” (The “and” was inadvertently dropped during the amendment process.) This would include such things as snow plowing as well as the installation of traffic signs and improvements for pedestrian safety. Note that these do not need to be existing at the time of the width determination.

It should be noted that subsection 40-2312(3) appears to have been drafted with only existing, constructed roads in mind. The statute does not say so explicitly, but this may be divined by the reference to the “existing physical road surface” in subsection 40-2312(3)(a). If this road narrowing exception were deemed applicable to an unconstructed road (*e.g.*, one created by dedication but without a specified width) it is difficult to imagine how it might operate. It simply does not make sense in that context.

## **2. Comparison between 2013 road width provisions and 2013 road abandonment provisions.**

The 2013 amendment did three things: First, as discussed above, it established new exceptions to the 50-foot minimum road width. Second, it established a new form of passive abandonment for certain roads created by common law dedication. Third, it changes procedural and substantive rules regarding judicial review. This discussion compares the 2013 provisions on road width with the 2013 provisions on passive abandonment.

The provisions of the 2013 amendment creating a new type of passive abandonment contain similar exception provisions (applying only to public roads crossing private land that have not been recently maintained). (See discussion in section III.B at page 88.)

The 2013 passive abandonment provisions do not apply to roads that provide public access. In contrast, this public access provision was not incorporated into the road width section of the bill. Thus, roads that provide public access may be found to be less than 50-feet wide (if they meet other tests in the 2013 amendments, *e.g.*, are on private land, have not been recently maintained, and do not have an established width).

Also note that the 2013 passive abandonment provision is limited to roads created by solely by an unrecorded common law dedication. This limitation does not apply to the 2013 road width provisions.

Another difference is that the 2013 passive abandonment provision requires both non-use and non-maintenance. The 2013 road width exception, in contrast, requires only recent non-maintenance. Thus,

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<sup>110</sup> “‘Maintenance’ means to preserve from failure or decline, or repair, refurbish, repaint or otherwise keep an existing highway or public right-of-way in a suitable state for use including, without limitation, snow removal, sweeping, litter control, weed abatement and placement or repair of public safety signage.” Idaho Code § 40-114(3).



roads that are still in use by the public but are not being publically maintained could be subject a width narrowing, but are not subject to passive abandonment.

The 2013 passive abandonment provisions deal with abandonment of the entire road or sections of road (as opposed to abandonment of some “width” of the road). The 2013 road width provisions allow, in essence, for a reduction the width to less than the default 50-feet based on recent non-maintenance. But that width narrowing would not apply if there has been sufficient maintenance of that section of road at all. In other words, maintenance within a narrower width will cause the road to be validated or decreed at the full 50 feet.

Moreover, the road width provision is a one-time determination, not an on-going “width-adjustment” concept. It allows width to be determined at the time of “validation or judicial proceeding” based on recent road maintenance. Once road width has been determined by validation or judicial proceeding, road width is set as a matter of title, i.e., as a permanent legal right. After that, road width could be changed only by conveyance, condemnation, or vacation (formal abandonment).<sup>111</sup>

### **3. Do the 2013 amendments affecting road width have retroactive effect?**

NOTE: If a statute is found to have retroactive effect, that retroactive effect could give rise to a takings claim (to the extent it destroyed vested property rights). In the case of the 2013 amendment, however, takings claims are probably not an issue for two reasons. First, any taking would be a taking by the Legislature, not by a county or highway department applying or operating under the 2013 amendments. Second, nothing was taken from private property owners. If anything, the 2013 amendments constituted a “giving” to private property owners.

No one would contend that the 2013 amendments were intended to alter the width of public roads where the width has been established by prior judicial decree or an unappealed validation/vacation proceeding (both of which have res judicata effect). The question is whether the procedural and substantive provisions of the amendments are intended to apply to subsequent validation/vacation proceedings and judicial proceedings determining the width of roads that were created prior to 2013.

The language of the 2013 amendments directly address this question. The amendments expressly state that the act is intended to apply to all existing as well as to future roads:

It is the intent of the Legislature to address right-of-way issues brought forward during the testimony and discussion before the Senate Transportation Committee in the 2012 legislative session relating to House Bill No. 628, as amended. During the 2012 interim session, the President Pro

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<sup>111</sup> Adverse possession (Idaho Code § 5-203) might seem like another way of reducing road width, but adverse possession generally does not work against a governmental entity. *Rich v. Burdick*, 83 Idaho 335, 362 P.2d 1088 (1961) (Taylor, J.) (possession and use of unused portion of highway by abutting owner is not adverse to public and cannot ripen into right or title by lapse of time no matter how long continued nor does such possession and use, even though by permission of public authority, work an estoppel against public use); *Thiessen v. City of Lewiston*, 26 Idaho 505, 512, 144 P. 548, 550 (1914) (Truitt, J.) (a private individual cannot obtain title to a public highway or street by adverse possession).

Tempore of the Senate and the Speaker of the House of Representatives established an Interim Task Force encompassing members of the Idaho Senate and the House of Representatives to further study these issues. On October 1, 2012, the Right-of-Way Task Force convened and accepted extensive testimony from stakeholders that included representatives of utility companies, counties and highway districts, irrigation districts and canal companies and various members of the public. It is further the intent of the Legislature to protect private property rights and ensure adequate public rights-of-way for transportation, utility and irrigation and other public facilities. It is the intent of the Legislature that this act shall apply to any and all existing and future highways and public rights-of-way and provide for an immediate implementation date due to the year delay in passing needed legislation, as a result of the yearlong task force efforts and the immediate need to provide clarity regarding the status or abandonment of highways and public rights-of-way.

2013 Idaho Sess. Laws, ch. 239 § 1 (H.B. 321) (emphasis supplied). This language, which is part of the statute (though not codified), is reiterated in the bill’s statement of purpose.

This language was not mentioned by the Court in *Flying A*, which applied the pre-2013 version of the road statute. The Court’s discussion of retroactivity is set out in footnote 2 of the decision:

On April 2, 2013, the legislature amended Idaho Code section 40–208(7) by deleting this language in its entirety from subsection seven. However, “a statute is not applied retroactively unless there is ‘clear legislative intent to that effect.’” *Guzman v. Piercy*, 155 Idaho 928, 937–38, 318 P.3d 918, 927–28 (2014) (quoting *Gailey v. Jerome Cnty.*, 113 Idaho 430, 432, 745 P.2d 1051, 1053 (1987)). Here, the Board entered its order on December 27, 2012, prior to the amendments to Idaho Code section 40–208(7). Since there is no indication the amendments were meant to be retroactive, this Court applies Idaho Code section 40–208(7) as it existed at the time of the Board’s decision.

*Flying A*, 157 Idaho at 939, n.2, 342 P.3d at 652, n.2. Had the statement of legislative intent been brought to the Court’s attention, the result, presumably, would have been different.<sup>112</sup>

As the Court said in another case:

“[A] statute should be applied retroactively only if the legislature has clearly expressed that intent or such intent is clearly implied by the language of the statute.” *Kent v. Idaho Pub. Utils. Comm’n*, 93 Idaho 618, 621, 469

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<sup>112</sup> The Court obviously was unaware of the above-quoted section of the 2013 legislation (which was not codified) or the statement of purpose, both of which addressed retroactivity. Otherwise it would not have stated that “there is no indication the amendments were meant to be retroactive.” *Flying A*, 157 Idaho at 939, n.2, 342 P.3d at 652, n.2. It appears that the 2013 amendments were not even brought to the Court’s attention, much less was the issue of retroactivity briefed. Respondent’s Brief, 2014 Westlaw 1673184.

P.2d 745, 748 (1970). The Legislature does not need to “use the words, ‘this statute is to be deemed retroactive,’” however. *Peavy v. McCombs*, 26 Idaho 143, 151, 140 P. 965, 968 (1914).

[I]t is sufficient if the enacting words are such that the intention to make the law retroactive is clear. In other words, if the language clearly refers to the past as well as to the future, then the intent to make the law retroactive is expressly declared within the meaning of [I.C. § 73–101].

*Id.*

*Guzman v. Piercy*, 155 Idaho 928, 938, 318 P.3d 918, 928 (2014) (Schroeder, pro tem.) (brackets original).

A more extensive discussion of retroactive legislation is included in the *Idaho Land Use Handbook*.

#### **4. Even if the 2013 amendments are not retroactive, Idaho’s platting statutes provide an independent mechanism for fixing road width.**

Where a road is dedicated to the public in a recorded plat that is approved and accepted by local officials, the plat defines the width and location of the road. It operates essentially as a conveyance.

Not all public roads depicted on plats, however, constitute dedications (which create the public road for the first time). In some instances, existing public roads may be depicted on a recorded plat. Where the width and/or location of the road has not been previously fixed, the effect of the plat may be to set that width and location.

This would seem to be the case irrespective of the retroactivity of the 2013 amendments. This is because the platting statutes provide an independent statutory basis for determining road width and location.

Idaho’s platting statutes, Idaho Code §§ 50-1301 to 50-1334, mandate the filing of plats for subdivisions for a variety of vital public purposes. They require detailed surveying work, review, and approval by all affected governmental officials. This serves the purpose of putting purchasers of property and the public in general on notice as to all pertinent boundaries. Indeed, identification of roads and easement boundaries—including existing roads—are a stated legislative purpose. Each plat must “particularly and accurately describe and set forth all the streets, easements, . . . and other essential information.” Idaho Code § 50-1302. “The plat shall show: (a) the streets and alleys, with widths and courses clearly shown.” Idaho Code § 50-1304(2).

The city or county does not stand by impassively while plats are filed. “The county shall choose and require an Idaho professional land surveyor to check the plat and computations thereon to determine that the requirements herein are met, and said professional land surveyor shall certify such compliance on the plat.” Idaho Code § 50-1395. “If a subdivision is not within the corporate limits of a city, the plat thereof shall be submitted, accepted and approved by the board of commissioners of the county in which the tract is located in the same manner and as herein provided.” Idaho Code § 50-1308(1).

The author is not aware of any reported decision addressing this, but it would seem that the platting process was not intended as a hollow exercise. Where a city or county signs off on a plat and that plat is recorded, one would think that people would be entitled to rely on it.<sup>113</sup>

## 5. Pre-2013 law on road width

The following discussion is rendered largely academic by the 2013 amendment (assuming it applies retroactively). The following discussion of pre-2013 road width law is retained here nonetheless. For one thing, it demonstrates that the establishment of 50-foot minimum as a default in the 2013 amendment is well-founded on existing law and, therefore, is not subject to a takings challenge.

The predecessor of the current statute was enacted in 1887, prior to statehood. It read, in full: “All highways, except alleys and bridges, must be at least fifty feet wide except those now existing of a less width.” 1887 Revised Stat. of Idaho Territory, title VI, ch. II, § 932 (June 1, 1887).

An even earlier version, enacted in 1885, provided for a 60-foot minimum: “No county road shall be less than sixty feet in width.” 1885 Gen. Laws of the Territory of Idaho § 10, p. 165 (approved 2/5/1885).

A different statute also sets out a 50-foot minimum:

Commissioners may lay out new highways within the county as they determine to be necessary. The right-of-way of any highway shall not be less than fifty (50) feet wide, except in exceptional cases. Commissioners may also change the width or location or straighten lines of any highway under their jurisdiction. If, in the laying out, widening, changing or straightening of any highway it shall become necessary to take private property, the commissioners or their director of highways shall cause an accurate description of the lands required.

Idaho Code § 40-605.<sup>114</sup> This section and the following section go on to describe the negotiation and condemnation process for road widening.

In the case of *Meservey v. Gulliford*, 14 Idaho 133, 93 P. 780 (1908) (Sullivan, J.), the Court discussed the 1887 road width statute, 1887 Revised Stat. of Idaho Territory, title VI, ch. II, § 932 (June 1, 1887), in a case involving a public road created by public use and maintenance under Idaho’s road creation statute. The Idaho Supreme Court held that width of highways established by public use is based on a consideration of circumstances peculiar to each case, but is presumed to be 50 feet, unless facts clearly

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<sup>113</sup> *Halvorson v. N. Latah County Highway Dist.*, 151 Idaho 196, 254 P.3d 497 (2011) (Horton, J.) (which applied the pre-2013 50-foot width statute) is not contrary to this conclusion. *Halvorson* was not decided in the context of a subdivision plat. It was decided in the context of an 1887 road-width statute operating in a remote, rural area. It seems unlikely that the Idaho Supreme Court would say that the ancient road-width statute prevails over the express and detailed requirements of Idaho’s modern platting statutes. Where an approved and recorded plat is filed establishing the width and/or boundary location of an existing road (which is not contrary to some other determination with *res judicata* effect), one would think that the courts would find that the city or county is constrained by their approval of the plat in any future validation proceeding.

<sup>114</sup> The 2013 amendments to Idaho’s primary road width statute, Idaho Code § 40-2312, did not address Idaho Code § 40-605.

indicate otherwise.<sup>115</sup> Referring to the 1887 statute, the Court said, “This statute evidently provides the width of a road that is considered reasonably necessary for the convenience of the public generally.” *Meservey*, 14 Idaho at 146, 93 P. at 784. “Where there is no other evidence of dedication than mere user by the public, the presumption is not necessarily limited to the traveled path, but may be inferred to extend to the ordinary width of highways . . .” *Meservey*, 14 Idaho at 147, 93 P. at 784 (quoting *Angell on the Law of Highways* § 155). Elsewhere, the Court embraced the common law of Utah, which holds that the road created by prescription encompasses the public’s right “to use the whole tract as a highway, by widening the traveled part or otherwise, as the increased travel and the exigencies of the public may require.” 14 Idaho at 147, 93 P. at 784.

A 50-foot width for a road by prescription was also recognized in *State v. Berg*, 28 Idaho 724, 155 P. 968 (1916) (public road found to have been created by five years of public use, for the entire width between two fences, not just the traveled portion).

In *Bentel v. Cnty. of Bannock*, 104 Idaho 130, 133, 656 P.2d 1383, 1386 (1983), the Court acknowledged and reaffirmed *Meservey*’s holding that the 50-foot width was “no more than sufficient for the proper keeping up and repair of roads generally.”

The Court adopted a more conservative approach in *French v. Sorensen*, 113 Idaho 950, 955-56, 751 P.2d 98, 103-04 (1988) (Bistline, J.) (the Carole King case). There the Court distinguished *Meservey*, noting that in *Meservey* there was at least some evidence of a 50-foot wide road, while in *French* there was none.

In *Halvorson v. N. Latah Cnty. Highway Dist.*, 151 Idaho 196, 254 P.3d 497 (2011) (Horton, J.), a landowner built a fence along a public road and sued the highway district on tort, due process, and takings claims when the highway district’s road maintenance activities damaged the fence. The Court first determined that the road was a public road. It then turned to the width of the road. The Court reaffirmed *Meservey* and *Bentel*, and then went a step further. The Court note that “*Meservey* applied a presumption of fifty-foot width to highways preexisting the enactment of the statutory predecessor to I.C. § 40-2312.” *Halvorson*, 151 Idaho at 205, 254 P.3d at 506. The *Halvorson* Court then distinguished *Meservey* and said that a fixed minimum (not a mere presumption) applies to public roads created by prescription after the enactment of the predecessor to Idaho Code § 40-2312:

*Meservey* discussed a road that predated the enactment of the predecessor statute to I.C. § 40-2312, putting the scope of the use at issue in that case. Here, however, the plain language of I.C. § 40-2312 prescribes a fifty-foot width to all highways and makes no distinction between highways established by prescription and highways laid out by the Highway District.

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<sup>115</sup> Elsewhere, the Court used language that, taken alone, might seem to suggest a fixed minimum: “However, it must be borne in mind that the statute fixes the width of highways at not less than 50 feet, and common experience shows that width no more than sufficient for the proper keeping up and repair of roads generally.” *Meservey*, 14 Idaho at 148, 93 P. at 785. But other cases have taken the overall message of the *Meservey* Court as establishing a presumption of 50 feet, not a mandatory minimum. “*Meservey* applied a presumption of fifty-foot width to highways preexisting the enactment of the statutory predecessor to I.C. § 40-2312.” *Halvorson v. N. Latah County Highway Dist.*, 151 Idaho 196, 205, 254 P.3d 497, 506 (2011) (Horton, J.).

*Halvorson*, 151 Idaho at 206, 254 P.3d at 507 (citation omitted). “However, for highways created after the statute’s enactment, the statute establishes a mandatory width.” *Halvorson*, 151 Idaho at 205-06, 254 P.3d at 506-07 (emphasis supplied).

The *Halvorson* Court’s premise that *Meservey* discussed a road that predated 1887 is incorrect.<sup>116</sup> As noted above, the predecessor to section 40-2312 was 1887 Revised Stat. of Idaho Territory, title VI, ch. II, § 932 (reflecting statutes in force in June 1, 1887). The road in *Meservey* was “used and traveled by the public as a road from 1887 to the spring of 1905.” *Meservey*, 14 Idaho at 146, 93 P. at 784. Elsewhere, the Court referred to “evidence tending to show that said road was first traveled in June, 1887.” *Meservey*, 14 Idaho at 149, 93 P. at 785. Thus if the road predated the 1887 statute, it was only for a matter of months, not the five years necessary to create a road by prescription. Moreover, the *Halvorson* Court did not mention that even before 1887, another road width statute was in effect. “No county road shall be less than sixty feet in width.” 1885 Gen. Laws of the Territory of Idaho § 10, p. 165 (approved 2/5/1885). Thus, even if the road in *Meservey* did predate 1887, it would still have been subject to a road width statute, as opposed to mere common law.

Be that as it may, the *Halvorson* Court has declared that roads created by prescription after 1887 are subject to a mandatory 50-foot minimum based on the version of section 40-2013 that was in effect from 1887 to 2013. As discussed below, the statute was modified in 2013 with express language making it retroactive.<sup>117</sup>

In so ruling, the *Halvorson* Court did not examine the effect of the statutory language “except those now existing of a less width” from the 1887 act or its modern counterpart. Perhaps this is because the *Meservey* Court specifically said that language applied only to roads “of a less width at the date of the enactment of said section.” *Meservey*, 14 Idaho at 146, 93 P. at 784. No reported decision has addressed the question of whether the 1985 recodification of this 1887 statute had an effect on that trigger date.

In sum, the *Halvorson* decision appears to establish the rule that a minimum 50-foot is not just a presumption, but is mandatory, as to all post-1887 roads. Although the road involved there was created by prescription, the opinion said the statute applied equally to roads created by prescription and formal declaration. It did not mention common law dedication, but there would seem to be no basis for treating them any differently, at least until the 2013 Amendments.

Perhaps the best-known federal case on the subject of road width is the Burr Trail case in Utah.<sup>118</sup> (As noted above, the Idaho Supreme Court has looked to Utah law on the subject of road width.) This case involved a planned widening and improvement of 28 miles of an R.S. 2477 road in Utah, known as Burr Trail. *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988) (the “Burr Trail” case), *appeal following*

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<sup>116</sup> The *Halvorson* court also does not mention that there was an even earlier statute establishing a 60-foot width.

<sup>117</sup> No appellate decision has addressed the effect of the 2013 amendment on road width. But see discussion below of *Flying “A” Ranch, Inc. v. County Comm’rs of Fremont County* (“*Flying A*”), 157 Idaho 937, 342 P.3d 649 (2015) (Horton, J.), which discusses the issue of retroactivity in the context of another part of the 2013 amendments.

<sup>118</sup> Although the Burr Trail case involved the application of Utah state law, the Idaho Supreme Court has expressly recognized and adopted Utah law governing the width of roads created by prescription. See discussion of *Meservey v. Gulliford*, 14 Idaho 133, 93 P. 780 (1908), below.

*remand, Sierra Club v. Lujan*, 949 F.2d 362 (1991), *overruled on other grounds by Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992). The Sierra Club sued, claiming that the expansion exceeded the county's right-of-way under R.S. 2477. The federal court of appeals squarely rejected the Sierra Club's position. The Court said:

Applying the "reasonable and necessary" standard in light of traditional uses does not mean, however, that the County's right-of-way is limited to the uses to which the Burr Trail was being put when it first became an R.S. 2477 road. R.S. 2477 was an open-ended and self-executing grant.

848 F.2d at 1083.

The Court recognized that there are limits to how much a right-of-way may be widened. "Surely no Utah case would hold that a road which had always been two-lane with marked and established fence lines, could be widened to accommodate eight lanes of traffic . . ." 848 F.2d at 1083. But here the Court found it entirely reasonable for the county to expand Burr Trail "from an essentially one-lane dirt road into a two lane graveled road." 848 F.2d at 1073.

This flexibility is recognized in Idaho law as well. "Absent language in the easement to the contrary, the uses made by the servient and dominant owners, as a rule, may be adjusted consistent with the normal development of their respective lands." *Conley v. Whittlesey*, 133 Idaho 265, 272, 985 P.2d 1127, 1134 (1999).

The case of *Anderson v. Town of East Greenwich*, 460 A.2d 420 (R.I. 1983) is instructive. This case involved a public road created by prescription (public use). The town sought to widen and improve the road beyond its historical width, and an adjoining neighbor brought this action to enjoin the construction. The landowner contended that because the road was created by prescription, "its width was limited to its presently traveled width." 460 A.2d at 422. The Rhode Island Supreme Court rejected this argument, ruling that "even if the entire portion has not been used by the public . . . the width of a public highway cannot be limited to its traveled portion when there are signs that the width has otherwise been established." 460 A.2d at 424. The Court continued: "[T]he width of a road acquired for the public by prescription is not limited to the traveled way. Such width 'must be governed by fences, if near, or if not, the usual distance on road sides in this section of the country . . .'" 460 A.2d at 425 (quoting a federal case). In the case of this rural road, "the road line should be established allowing a 'reasonable width of 50 feet.'" 460 A.2d at 422 (quoting a report in evidence).

The case of *Rich v. Burdick*, 83 Idaho 335, 362 P.2d 1088 (1961) (Taylor, J.) demonstrates that Idaho law is in accord with the notion that the right of way for a public road may be substantially broader than the road surface itself. The Idaho Court declared: "Mere non-user of a portion of the total width of a highway over a period of years does not constitute an abandonment, or estop the public from claiming the title and right to the use thereof." *Rich*, 83 Idaho at 345, 362 P.2d at 1094. In this case, the state of Idaho was authorized in widening and improving a highway even where the effect was to require the removal (without compensation) of a gas station owned by the defendant.

Even more to the point, the Idaho Supreme Court went on to observe that where monuments and fences are not available to fix the width of a road, "the usual width of highways in the locality is the pertinent factor." 83 Idaho at 344, 362 P.2d at 1093. Therefore, the state was entitled to improve and expand the use of the highway to meet increasing traffic demands over time. In so holding, the Idaho

Supreme Court cited cases from numerous other state courts on the general law of road width, thus establishing that these other cases can provide useful guidance in Idaho.

The same statutes and precedents apply to roads created pursuant to R.S. 2477. In *Sopatyk v. Lemhi Cnty.*, 151 Idaho 809, 264 P.3d 916 (2011) (W. Jones, J.), Court addressed both the status and the width of Anderson Creek Road (“ACR”), an old mining road located on what is now private land (patented mineral claims) acquired by Mr. Sopatyk in the 1990s. Sopatyk planned to close the road, which was used by the public to access nearby national forest lands. The County initiated validation proceedings, and validated the road as a 50-foot road. Sopatyk complained that the road was only about ten feet wide at the time of validation. The Court upheld the county’s decision to validate the road as an R.S. 2477 road for a width of 50 feet:

Sopatyk notes that even if the County can validate ACR [Anderson Creek Road], the road’s travelway is presently only about ten feet wide. He asserts that it was beyond the Board’s statutory authority to validate ACR at fifty feet wide. As explained above in Parts V.A and V.B, the Board was correct to hold that ACR became a public road by legislative declaration. From 1887 forward, the Legislature mandated: “All highways, except alleys and bridges, must be at least fifty feet wide except those now existing of a less width.” Rev. Stat. of Idaho § 932 (1887). This 1887 statute is the progenitor of today’s I.C. § 40–2312, which similarly states: “All highways, except bridges and those located within cities, shall be not less than fifty (50) feet wide, except those of a lesser width presently existing.” Therefore, all highways are fifty feet wide unless a lesser width is established. Neither side presented any evidence establishing the road’s width. As discussed in Part V.A, ACR was likely seventy five feet wide in 1881. Therefore, the Board did not exceed its statutory authority to validate Anderson Creek Road at fifty-feet wide.

*Sopatyk*, 151 Idaho at 817, 264 P.3d at 924 (footnote with citation to statute omitted).

Recall that in *Halvorson*, the Court seemed to construe the road width statute as establishing a mandatory 50-foot minimum for roads created after 1887. In *Sopatyk*, the road was created by way of the blanket legislative declaration in 1881. Accordingly, the statute mandating a mandatory 50-foot width did not apply to Anderson Creek Road.<sup>119</sup>

## **B. Utilities in road easement**

The interest held by a governmental entity in a road may be either a fee simple interest or an easement (aka right-of-way). If the owner holds the fee, obviously, it may use the roadway for purposes other than transportation, such as for the utility lines.

However, even if the government owns only an easement, it may use that easement corridor for laying utility lines and similar purposes. “In this sense, it includes not only the entire thickness of the

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<sup>119</sup> It is unclear why the Court said that neither side presented evidence of road width. Elsewhere in the opinion, the Court noted: “In 1878, a miners committee filed a plat depicting a seventy-five-foot-wide road labeled ‘Main Street’ going north, flanked by numbered lots on each side, and intersecting with two other streets running east-west.” *Sopatyk*, 151 Idaho at 814-15, 264 P.3d at 921-22.



pavement and the prepared base on which it rests, but also so much of the depth as may not unfairly be used as streets are used for the laying therein of drainage systems and conduits for sewer, water and other services.” 39 Am. Jur. 2d, *Highways, Streets and Bridges* at 626 (1999).

In 1983, the Idaho Supreme Court ruled that a public right-of-way created by prescription (presumably referring to Idaho Code § 40-202(3)) carries with it the same comprehensive rights to use for utilities as easements created by grant, dedication, or condemnation. *Bentel v. Cnty. of Bannock*, 104 Idaho 130, 133, 656 P.2d 1383, 1386 (1983). “[T]he scope of such easements [are] comprehensive enough to include reasonably foreseeable public uses of such roadways, such as subsurface installations for sewage, runoff, communications and other services necessary to the increased quality of life which generally accompanies the growth of civilization.” *Id.* The Court said this authorizes not only utility lines owned by public utilities, but wastewater pipelines constructed by private industries. *Bentel*, 104 Idaho at 135, 656 P.2d at 1388.

Idaho statutes specifically authorizing and regulating the installation of utility infrastructure in public road easements are found in Idaho Code §§ 62-701 (telephone), 62-705 (power), and 62-1101 (gas).

In a follow up case to *State v. Kelly*, 89 Idaho 139, 403 P.2d 56 (1965) (“*Kelly I*”) (discussed elsewhere), the Idaho Supreme Court ruled that the fee owner has no right to compensation from a utility that installs easements on the public right-of-way. *Mountain States Telephone & Telegraph Co. v. Kelly*, 93 Idaho 226, 459 P.2d 349 (1969) (“*Kelly II*”).

### **C. Right-of-way easement versus fee ownership**

A public road may be held by the government in fee simple or as a mere right-of-way (i.e., an easement). It depends on how the road was acquired or created.<sup>120</sup>

Curiously, most Idaho road law decisions say little if anything about this distinction.

#### **1. Roads created by deed, condemnation, or other transaction**

If the interest in the road was conveyed by deed to the governmental entity (i.e., by purchase, gift, exchange, or condemnation), the deed or other conveyance document will control what type of interest is conveyed.

#### **2. Roads created by statutory dedication**

Contradictory statutes and case law provide ample opportunity for confusion over whether roads created by statutory dedication convey the full fee or a mere easement.

An Idaho statute dating to 1899 and still on the books provides that roads creation by statutory dedication convey a fee simple interest in streets and other things expressly dedicated to the public.

The acknowledgment and recording of such plat is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for public streets or other public use, or as is thereon dedicated to

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<sup>120</sup> Our Legislature has noted that public roads may be acquired by “deed of purchase, fee simple title, authorized easement, eminent domain, by plat, prescriptive use, or abandonment of a highway pursuant to section 40-203.” Idaho Code § 40-117(9) (definition of “public right-of-way”).

charitable, religious or educational purposes; provided, however, that in a county where a highway district exists and is in operation no such plat shall be accepted for recording by the county recorder unless the acceptance of said plat by the commissioners of the highway district is endorsed thereon in writing.

Idaho Code § 50-1312 (emphasis supplied).<sup>121</sup>

In *Worley Highway Dist. v. Yacht Club of Coeur d'Alene, Ltd.*, 116 Idaho 219, 222, 775 P.2d 111, 114 (1989) (Bengtson, J. Pro Tem.), the Court quoted the 1899 version of this statute, concluding that “the dedication to the public would be complete” upon compliance with statutory requirements—thus implying that dedication conveys the full fee.<sup>122</sup> In contrast, *Worley* recognized that the interest conveyed in a common law dedication is an easement.<sup>123</sup> *Worley*, 116 Idaho at 225, 775 P.2d at 117 (quoting *Boise City v. Hon*, 14 Idaho 272, 278, 94 P. 167, 168 (1908) (Sullivan, J.)).

However, more recent Idaho Supreme Court decisions have reached the surprising conclusion that Idaho Code § 50-1312 does not mean what it says. *Neider v. Shaw*, 138 Idaho 503, 65 P.3d 525 (2003) (Kidwell, J.) and *Ponderosa Homesite Lot Owners v. Garfield Bay Resort, Inc.* (“*Ponderosa II*”), 143 Idaho 407, 410, 146 P.3d 673, 677 (2006) (Burdick, J.) each conclude that statutory dedications convey only a right-of-way.

*Neider* involved a statutory dedication (not a common law dedication) in which the plat depicted roads dedicated to the public. The Court concluded that the statute providing that a recorded plat is the equivalent of a deed in fee simple (Idaho Code § 50-1312) means the opposite of what it says. The Court said that instead of conveying the full fee, only an easement is conveyed. *Neider* relied, without justification, on *Shaw v. Johnston*, 17 Idaho 676, 682, 107 P. 399, 399-400 (1910) (Sullivan, C.J.), which made the worthy observation that although “the equivalent of a deed in fee simple” is conveyed, the conveyed interest may carry some baggage. *Shaw* opined that the public entity should not be able to take property

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<sup>121</sup> This provision was included in a 1967 recodification, 1967 Idaho Sess. Laws, ch. 429, but this language may be traced back to 1899. “The acknowledgement and recording of such plat is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for streets or other public use; or as is thereon dedicated to charitable, religious, or educational purposes.” 1899 Idaho Sess. Laws, H.B. 95 § 97, p 213. The 1899 statute applied only to cities and villages. The current statute, enacted in 1967, applies throughout Idaho. The provision of the current section 50-1312 requiring acceptance by a highway district is more broadly articulated Idaho Code § 50-1313 (“Dedication must be accepted”) and in Idaho Code § 50-1309(2) (dealing with dedication of private roads to the public). Note also that a proper statutory dedication may occur with respect to lots platted by the federal government and recorded in General Land Office, thanks to a subsequent statute recognizing as valid other platting laws. *Worley Highway Dist. v. Yacht Club of Coeur d'Alene, Ltd.*, 116 Idaho 219, 223, 775 P.2d 111, 115 (1989) (Bengtson, J. Pro Tem.) (federal platting constituted a valid statutory plat “with the help of the curative predecessor of I.C. § 50-1315”).

<sup>122</sup> “[S]ince 1899 Idaho Sess. Laws, § 97 of H.B. 95 provides: ‘The acknowledgement and recording of such plat is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for streets or other public use; . . .’” *Worley Highway Dist. v. Yacht Club of Coeur d'Alene, Ltd.*, 116 Idaho 219, 222, 775 P.2d 111, 114 (1989) (Bengtson, J. Pro Tem.) (ellipses original).

<sup>123</sup> The Court found it unnecessary to decide (or to remand for a decision) whether there was an effective statutory dedication, because it found there was an effective common law dedication.

dedicated to a street or other public purpose and convey it for profit to some other private use. Even if that is so, it does not convert the fee to an easement.

In *Ponderosa II*, a case involving a common law dedication, the Court reiterated the conclusion that “under Idaho law, a dedication, whether express or common law, creates an easement.” The Court cited *Neider* in a footnote. *Ponderosa II*, 143 Idaho 410 n.3, 146 P. 676 n.3. Why it spoke to statutory dedications is unclear because the *Ponderosa II* case dealt with a common law dedication.

### **3. Roads created by common law dedication**

Idaho Code § 50-1312 discussed above applies only to statutory dedications.

Another statute, this one dating to the 1950s, provides an even broader declaration that any “acceptance” results in conveyance of fee simple:

By taking or accepting land for a highway, the public acquires the fee simple title to the property. The person or persons having jurisdiction of the highway may take or accept [a] lesser estate as they may deem requisite for their purposes.

Idaho Code § 40-2302(1). This statute would appear to encompass both statutory and common law dedications. But, as noted above, *Neider* and *Ponderosa Homes* reached the conclusion that both statutory and common law dedications convey only a right-of-way easement. No Idaho case has discussed section 40-2302(1).

Notwithstanding this statute, the Idaho Supreme Court consistently has recognized that common law dedication conveys only an easement.<sup>124</sup>

### **4. Roads created by prescriptive use.**

In the case of roads created by public use and maintenance (or just public use prior to 1893), the public acquires only an easement across the land. “All the right acquired by the public is an easement in the land consisting of a right to pass over the same and keep the road in repair. The legal title to said lands remains in the owner of the adjoining land or the land over which the road runs.” *Meservey v. Gulliford*, 14 Idaho 133, 142, 93 P. 780, 783 (1908) (Sullivan, J.).

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<sup>124</sup> “[T]he grantor, by making such a conveyance, is estopped, as well in reference to the public as to his grantees, from denying the existence of the easement.” *Boise City v. Hon*, 14 Idaho 272, 278, 94 P. 167, 168 (1908) (Sullivan, J.). The person making the dedication “is estopped . . . from denying the existence of the easement.” *Worley Highway Dist. v. Yacht Club of Coeur d’Alene, Ltd.*, 116 Idaho 219, 225, 775 P.2d 111, 117 (1989) (Bengtson, J. Pro Tem.). “Once common law dedication is accomplished, it has the legal effect of creating an easement in favor of the lot purchasers.” *Ponderosa Homesite Lot Owners v. Garfield Bay Resort, Inc.* (“*Ponderosa II*”), 143 Idaho 407, 409, 146 P.3d 673, 675 (2006) (Burdick, J.). “We hold that the legal effect of illustrating a private road on a filed plat and “dedicating” it is the creation of an easement in favor of the lot purchasers.” *Monoco v. Bennion*, 99 Idaho 529, 533, 585 P.2d 608, 612 (1978) (Bistline, J.). “Common law dedication does not grant ownership of the parcel in another, but a limited right to use the land for a specific purpose.” *Saddlehorn Ranch Landowner’s, Inc. v. Dyer*, 146 Idaho 747, 203 P.3d 677 (2009). See also 23 Am.Jur.2d *Dedications* § 59 (2013).

The author is not aware of any Idaho case addressing the nature of the legal interest acquired in roads created by legislative fiat (i.e., by public use alone prior to 1881). However, it seems most likely that the same interest (an easement only) would be acquired as is the case for road creation based on five years of public use.

## **5. R.S. 2477 roads**

It is well established in other jurisdictions that the grant of a “right-of-way” under R.S. 2477 conveys only an easement (not the full fee).<sup>125</sup>

That seems a logical conclusion, given that the R.S. 2477 itself employs the term right-of-way: “the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”

The Idaho Legislature has described R.S. 2477 roads as “federal land rights of way.” Idaho Code §§ 40-107(5), 40-117(9), 40-204A. Whether that relatively recent language changes the nature of the interest previously acquired, however, seems doubtful.

In any event, it is largely a moot point, because most R.S. 2477 roads are created either by prescriptive use or by common law dedication, both of which create only a right-of-way easement.

### **D. Ownership of bridges and other structures**

Where the public owns a road fee, bridges and other structures located on the fee land is obviously part of the fee (absent some special arrangement providing otherwise). Where the public owns only an easement (as opposed to a fee interest), bridges or other structures located in that right-of-way are owned by whoever built them, unless that interest was conveyed or otherwise altered by agreement among the relevant parties.<sup>126</sup> This is equally true of the bridges on rights-of-way crossing federal and private land. Thus, for example, if the Forest Service builds a bridge on an R.S. 2477 road within the forest, it owns the bridge and could remove it if it chooses to do so—even though it does not have authority to close the road.

### **E. Access to public lands**

Access to public lands is often a major concern of those concerned with public roads. However, the fact that a road does, or does not, access public lands is not itself a factor in the law of public road creation. Public land access is a factor only in the following contexts.

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<sup>125</sup> *Dillingham Commercial Co., Inc. v. City of Dillingham*, 705 P.2d 410, 415 (Alaska 1985); *Fairhurst Family Ass’n, LLC v. U.S. Forest Service*, 172 F. Supp. 2d 1328, 1332 (D. Colo. 2001); *Sierra Club v. Hodel*, 848 F.2d 1068, 1083 (10th Cir. 1988) (the “Burr Trail” case), *appeal following remand*, *Sierra Club v. Lujan*, 949 F.2d 362 (1991), *overruled on other grounds by* *Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

<sup>126</sup> As in the case of any building or structure built upon a limited estate, the ownership interest in the structure is limited by the duration of the estate. Upon abandonment of the right-of-way, ownership of any bridges or other structures within it presumably would revert to the owner of the underlying fee, along with the road itself.

Although not a requirement for any road creation method,<sup>127</sup> access to public lands nevertheless could be a significant factor in the public interest evaluation undertaken by a county or highway district in a validation or vacation/abandonment proceeding. This, however, is a matter of discretion and judgment on the part of public officials, rather than a legal criterion.

The existence of a road on unreserved federal public lands at the time of creation is, of course, a requirement for recognition of a road as an R.S. 2477 road. However, once created, an R.S. 2477 road continues to be a public road when the lands are patented. Thus, many R.S. 2477 roads today are located far from public lands and provide no access to them.

Although access to public lands is not a factor in public road creation, it was a factor in passive road abandonment from 1963 until 1993. As discussed in section III.F.3, since 1963, roads accessing public lands or waters may not be abandoned “passively” through non-use and non-maintenance. They still may be vacated, but only by way of formal vacation procedures. Passive abandonment was eliminated altogether in 1993.

The Legislature’s recognition of the importance of public access is reflected in Idaho Code § 40-203(5)(b) (exempting from passive abandonment roads providing public access). This provision, added in 2013, replaced earlier special treatment enacted in 1963 that protected roads accessing public land from passive abandonment. 1963 Idaho Sess. Laws, ch. 267, § 1 (S.B. 242) (then codified at Idaho Code § 40-104; later codified at Idaho Code § 40-203(4); repealed by S.B. 1108 in 1993). See discussion in section III.B at page 88.

### **III. ABANDONMENT AND VACATION**

#### **A. Overview of the passive and formal abandonment statutes**

Public roads may be abandoned either by formal action or “passively” through non-use and non-maintenance. Both are governed by statutes. There is no common law abandonment.

In showing abandonment, it is essential to apply the abandonment statute that was in effect at the time abandonment is believed to have occurred. Determining which statute applies can be tricky. The statutes are codified in various locations and have been amended a good deal over the years. For decades, separate statutes governed formal abandonment by counties and highway districts (*e.g.*, Idaho Code §§ 40-501 (1948), 40-133(d) (1961), 40-604(4) (1985), and 40-1310(5) (1985)). From 1986 to 1993, they operated redundantly with a new formal abandonment statute (Idaho Code § 40-203). Consequently, one must pay particular attention to the history of these statutes. An outline of these statutes as they have changed over time is set out in the Appendix A: Index to Idaho Road Creation and Abandonment Statutes appended hereto. This is important both for selecting the proper one to apply to a particular road abandonment fact setting, and for understanding the various judicial precedents (which often fail to clearly identify which statute they are interpreting).

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<sup>127</sup> Note that the necessity or importance of a road to the public is not a relevant consideration under the road creation statute. “The necessity of public access is not germane to the determination of public road status under I.C. § 40-202.” *Roberts v. Swim*, 117 Idaho 9, 16, 784 P.2d 339, 346 (Ct. App. 1989). However, once it is determined that a public road has been created, necessity and importance are critical factors to be considered under the public interest evaluation mandated for road validation. See discussion in section IV.A.3 at page 108.

When first enacted in 1887, the road creation statute contained companion provisions governing “passive” and “formal” abandonment.<sup>128</sup> The passive abandonment statute has been restricted and narrowed over the years, and was finally repealed in 1993. However, a very limited form of passive abandonment was created by the Legislature in 2013 as part of legislation dealing with road width. 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified at Idaho Code §§ 40-114, 40-202, 40-203, 40-208, 40-2312).

Note that from 1932 to until 1985, the passive abandonment statute (now codified at Idaho Code § 40-203) was codified to Idaho Code § 40-104. Accordingly, many appellate decisions cite to the prior codification.

In 1963, the passive abandonment statute was amended to require formal abandonment for roads providing public access.<sup>129</sup> The same statute also limited passive abandonment to roads created by prescription (public use).

In 1985, the Legislature repealed all of title 40 and enacted a completely new codification of the road creation statute. 1985 Idaho Sess. Laws, ch. 253 (H.B. 265). In the following year, the Legislature substantially amended section 40-203 to create a new, detailed set of formal abandonment procedures applicable to public roads. 1986 Idaho Sess. Laws, ch. 206 (H.B. 556). However, the older, separate abandonment provisions for counties and highway districts (Idaho Code §§ 40-604(4) and 40-1310(5)) continued to operate independently—and cause confusion. This was resolved in 1993 when the Legislature adopted amendments to those sections linking them back to section 40-203(1). *Floyd II* suggests that these disparate provisions should be read “harmoniously,” even before they were linked in 1993. *Floyd II*, 137 Idaho at 727, 52 P.3d at 872.

The 1993 legislation also eliminated passive abandonment altogether. From 1993 until 2013, the only way to abandon a road is by formal action of the county or highway district.

The road width legislation enacted in 2013, 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified at Idaho Code §§ 40-114, 40-202, 40-203, 40-208, 40-2312), also contained a provision authorized passive abandonment under very limited circumstances.

#### **B. Passive abandonment under the 2013 amendment (limited to certain roads created by common law dedication)**

In 2013, the Legislature enacted a statute dealing primarily with road width. 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified at Idaho Code §§ 40-114, 40-202, 40-203, 40-208, 40-2312). (See discussion in section II.A.1 at page 71.) This statute also addressed abandonment, however, creating a narrow class of roads that may be passively abandoned after 2013.

The new abandonment provision reads:

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<sup>128</sup> The 1887 statute is Rev. Stat. of Idaho Terr. §§ 850 to 852 (1887). See the attached outline to track changes to the statute over the years.

<sup>129</sup> 1963 Idaho Sess. Laws, ch. 267, § 1 (S.B. 242) (then codified at Idaho Code § 40-104; later codified at Idaho Code § 40-203(4), repealed by S.B. 1108 in 1993) (containing proviso requiring formal abandonment for roads providing public access).

(5) In any proceeding under this section [40-203] or section 40-203A, Idaho Code, or in any judicial proceeding determining the public status or width of a highway or public right-of-way, a highway or public right-of-way shall be deemed abandoned if the evidence shows:

(a) That said highway or public right-of-way was created solely by a particular type of common law dedication, to wit, a dedication based upon a plat or other document that was not recorded in the official records of an Idaho county;

(b) That said highway or public right-of-way is not located on land owned by the United States or the state of Idaho nor on land entirely surrounded by land owned by the United States or the state of Idaho nor does it provide the only means of access to such public lands; and

(c)(i) That said highway or public right-of-way has not been used by the public and has not been maintained at the expense of the public in at least three (3) years during the previous fifteen (15) years; or

(ii) Said highway or right-of-way was never constructed and at least twenty (20) years have elapsed since the common law dedication.

All other highways or public rights-of-way may be abandoned and vacated only upon a formal determination by the commissioners pursuant to this section that retaining the highway or public right-of-way for use by the public is not in the public interest, and such other highways or public rights-of-way may be validated or judicially determined at any time notwithstanding any other provision of law. Provided that any abandonment under this subsection shall be subject to and limited by the provisions of subsections (2) and (3) of this section.

Idaho Code § 40-203(5).

This abandonment provision has very limited applicability. It is designed to apply to what was described during the legislative process as roads that are only “squiggles on a map.” This was a reference to roads that happen to be displayed on an old plat (such as a General Land Office survey) (thereby creating a common law dedication) but which have not been publically used or maintained for many years.

First, it bears emphasis that this new form of passive abandonment applies only to roads that were created solely by common law dedication. Idaho Code § 40-203(5)(a). That is, if the road was created by common law dedication and by some other form of road creation (or just by some other form of road creation) such as public use or formal action, then it would not be subject to passive abandonment under this or any other provision.

Second, this form of passive abandonment does not apply to roads currently located on state or federal land. Idaho Code § 40-203(5)(b).

Third, this form of abandonment does not apply to roads that “provide the only means of access to such public lands.” Idaho Code § 40-203(5)(b)..

Fourth, this form of abandonment applies only if, in addition to the other tests, the road “has not been used by the public and has not been maintained at the expense of the public in at least three (3) years

during the previous fifteen (15) years.” Idaho Code § 40-203(5)(c)(i). First, note that this focuses on the most recent 15-year period—not just any 15 years. The idea is to evaluate what’s going on now, not ancient history. Second, note that there must be both non-use and insufficient maintenance to trigger abandonment. Both conditions must apply. For instance, if the road had some public use at some time during the last 15 years, but no public maintenance, it would not face abandonment (because only one of the abandonment conditions was met). Likewise, if there is evidence that the road was publicly maintained on three occasions during the last 15 years, there is no need to also produce evidence of public use in order to defeat a claim of abandonment. As for what constitutes public maintenance, note that this ties into the new definition of maintenance in Idaho Code § 40-114(3), which is quite broad.

If this seems like a rigorous standard for abandonment, keep in mind the legislative purpose. It was aimed at protecting private ranches from “squiggles on a map” that do not reflect actual use. The legislation was aimed at protecting private landowners from pro-public-access advocates who “just dig up an old plat showing a road” and claim a common law dedication. If the road has not been used in recent years (or was never even built), the two-pronged test should be easy for the rancher to meet and thereby demonstrate abandonment. But pretty much any evidence of either modern public use or public maintenance is sufficient to overcome the rancher’s assertion of abandonment.

Subsection 40-205(5)(c)(i) does not address what constitutes “used by the public.” Arguably, this would key into the law governing what public use is sufficient to create a public road in the first place. (See discussion in section I.D.3.b at page 22.) Thus, for instance, if a road has been gated for over 15 years and use allowed only by permission, this may defeat a showing of public use. Again, at the risk of undue repetition, this section applies only to a road now on private land, which does not provide the sole access to public lands, and which was created solely by common law dedication.

In the unusual situation where the road was created by common law dedication, but was never actually built, the statute provides that, assuming the other tests are met, it will be passively abandoned if 20 years have lapsed since the dedication. Idaho Code § 40-203(5)(c)(ii). Obviously, if the road was never built, public use and maintenance would not come into play.

## **C. The pre-1993 passive abandonment statute**

### **1. Overview**

This section explores Idaho’s previous “passive abandonment” statute—which was repealed in 1993.<sup>130</sup> 1993 Idaho Sess. Laws, ch. 412, § 4 (S.B. 1108) (codified at Idaho Code § 40-203(4)). Although it has been repealed, it remains relevant because roads that were abandoned prior to 1993 cannot be validated today.

By passive abandonment, we refer to abandonment based on a lack of use and maintenance, as opposed to affirmative official action. Some courts and commentators refer to this as “informal abandonment” or “abandonment by implication.” *E.g., Floyd II*, 137 Idaho at 728, 52 P.3d at 873.

Idaho’s first abandonment statute was adopted in 1887. That statute provided in full: “A road not worked or used for the period of five years ceases to be a highway for any purpose whatever.” Rev. Stat. of

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<sup>130</sup> A 2013 amendment created a limited exception allowing passive abandonment under specific circumstances. 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified at Idaho Code §§ 40-114, 40-202, 40-203, 40-208, 40-2312).



Idaho Terr. § 852 (1887) (later codified at Idaho Code § 40-203(4), repealed by 1993 Idaho Sess. Laws, ch. 412, § 1 (S.B. 1108)). Throughout its life, the core of the abandonment requirement has been a showing that the road has been subject to both non-use and non-maintenance for a five-year period.

This language remained intact until 1963, when the Legislature made it applicable only to roads created by public use (as opposed to formal road creation).<sup>131</sup> In the same year, the Legislature amended the statute again to make it inapplicable to roads accessing public lands. In 1986, roads listed on official highway maps were immunized from passive abandonment. It was finally repealed in 1993. These amendments are discussed further below.

In sum, the following exceptions exist to the passive abandonment statute:

- Passive abandonment does not apply to roads created by common law dedication.
- Passive abandonment only applies to roads created by prescription. (This was codified in 1963; it is unclear whether the rule applied prior to 1963.)
- Since 1963, passive abandonment does not apply to roads accessing public lands.
- Since 1986, passive abandonment does not apply to roads included on official highway maps.
- The passive abandonment statute was repealed in 1993 and thus applies to no roads after that date.

## **2. Both non-use and non-maintenance must be shown.**

One asserting abandonment must “prove the negative” with regard to both the “use” and “maintenance” elements.

Further, the position of the highway district ignores the dual requirement that a road not be worked or used. Here the evidence, albeit controverted, indicates continued usage of the road to the present time, and hence the requirement of the then statute was not met, and the decision of the district court is supported by the evidence.

*Taggart v. Highway Bd.*, 115 Idaho 816, 817, 771 P.2d 37, 38 (1989) (Shepard, C.J.).

“Therefore, there is a dual requirement of both non-maintenance and non-use for a five-year period for abandonment.” *Farrell v. Bd. of Cnty. Comm’rs of Lemhi Cnty.*, 138 Idaho 378, 385, 64 P.3d 304, 311 (2002) (Schroeder, J.).

“This Court has previously considered and rejected the argument that a right-of-way must be both used and publicly maintained to avoid abandonment under § 40-104.” *Galvin v. Canyon Highway Dist. No. 4*, 134 Idaho 576, 580, 6 P.3d 826, 830 (2000) (Walters, J.).

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<sup>131</sup> 1963 Idaho Sess. Laws, ch. 267, § 1 (S.B. 242) (then codified at Idaho Code § 40-104; later codified at Idaho Code § 40-203(4), repealed by S.B. 1108 in 1993) (limiting passive abandonment statute to roads created by “prescription”).

Conversely, one arguing against abandonment need only establish public “work” or “use” to defeat the abandonment claim.

### 3. **Virtually any public use is sufficient to defeat an abandonment claim.**

The quantum of use required to avoid abandonment is very low. In *Galvin v. Canyon Highway Dist. No. 4*, 134 Idaho 576, 6 P.3d 826 (2000) (Walters, J.), the plaintiff contended that there was no longer public use of an old road after a new road was created and only the local residents continued to use the old road. The Court rejected this argument, saying that use by residents is sufficient to ward off abandonment.

In *Taggart*, this Court also rejected the argument that some arbitrarily high level of public use is necessary to prevent abandonment. The Court stated that “any continuous use no matter how slight, by the public, is sufficient to prevent a finding of abandonment.” *Taggart* at 818, 771 P.2d at 39. The situation that the Court was presented with in *Taggart* is nearly identical to the situation presented by this case. In *Taggart*, the road was established in 1904 and constituted the main route between Princeton and Moscow until the 1930s when a more direct route was constructed. Since the new road was constructed, the old road was used primarily to access local residences. The Galvins argue that *Taggart* should be distinguished from the present case because *Taggart*’s road was formally established whereas Old Middleton Road is prescriptive. Based upon this distinction, the Galvins argue that only “full public use” as set forth in *Burruv v. Stanger* can prevent the abandonment of a prescriptive road. The first thing to note is that only prescriptive rights-of-way can be abandoned under § 40-104. *Taggart* could possibly have been decided by simply stating that a formally established road cannot be abandoned under § 40-104. However, we reiterate the rule stated in *Taggart* and believe that it is applicable to a road established by prescription. Indeed, *Sellentin v. Terkildsen*, 216 Neb. 284, 343 N.W.2d 895 (1984), which was relied upon in *Taggart*, involved a prescriptive right-of-way. *Sellentin*, in turn, relied upon *Smith v. Bixby*, 196 Neb. 235, 242 N.W.2d 115 (1976), where the court stated

The defendant contends that even though the public may have used the road for the requisite period of time to establish a prescriptive right, nevertheless, it had been abandoned as a public road for more than 10 years because the regular users of the road are now reduced to the plaintiff and Loudon and their families, and irregularly by persons interested in traveling to and from their ranches. The defendant cites no authority, nor do we find any, to support the contention that when only a few members of the public use a road regularly, the road may be deemed abandoned. Neither is there any authority to support the proposition that public rights acquired by prescription are lost or abandoned because of a substantial reduction in the number of members of

the public who continue to make use of the rights previously acquired.

*Id.* at 118. Likewise, we can see no reason why the normal residential use of an established public right-of-way should be insufficient to prevent its abandonment.

*Galvin*, 134 Idaho at 580, 6 P.3d at 830 (citing *Taggart v. Highway Bd.*, 115 Idaho 816, 818, 771 P.2d 37, 39 (1989) and *Burruv v. Stanger*, 114 Idaho 50, 753 P.2d 261 (Ct. App. 1988) (Swanstrom, J.), *aff'd*, 115 Idaho 114, 765 P.2d 139 (1988)).

It said so again in 2011: “As to the level of use required to prevent a finding of abandonment, a showing of ‘any continuous use no matter how slight, by the public, is sufficient.’” *Sopatyk v. Lemhi Cnty.*, 151 Idaho 809, 815, 264 P.3d 916, 922 (2011) (W. Jones, J.) (quoting *Farrell v. Bd. of Cnty. Comm’rs of Lemhi Cnty.*, 138 Idaho 378, 385, 64 P.3d 304, 311 (2002) (Schroeder, J.) and *Taggart v. Highway Bd.*, 115 Idaho 816, 818, 771 P.2d 37, 39 (1989) (Shepard, C.J.)).

In the *Farrell* case, a Forest Service report showed that the road was “washed out, rutted, sliding, has broken bridges and high centers. However, it is passable to automobiles.” *Farrell*, 138 Idaho at 385, 64 P.3d at 311. The report also noted that, despite its condition, the road accommodated an estimated two automobile trips a year and five tons of freight per season. That was sufficient to satisfy the public use requirement.

The *Farrell* case is consistent with prior cases showing that one need not show “some arbitrarily high level of public use” to prevent abandonment. *Galvin v. Canyon Highway Dist. No. 4*, 134 Idaho 576, 580, 6 P.3d 826, 830 (2000) (Walters, J.) (quoting *Taggart v. Highway Bd.*, 115 Idaho 816, 817, 771 P.2d 37, 38 (1989)).

If a picture is worth a thousand words, the photograph in Figure 1 below says it all. In an unusual action, this picture was published as part of the Court’s decision in *Taggart*. Despite the fact that grass is visibly growing throughout the single lane roadbed, the Court found sufficient public use to avoid abandonment.



Figure 1: Photograph of “Public Road 460” published as part of the Court’s decision in *Taggart v. Highway Bd. for N. Latah Cnty.*, 115 Idaho 816, 820, 771 P.2d 37, 41 (1988) (Shepard, C.J.). It is difficult to see in this reproduction, but there is grass growing in this roadway.

#### 4. Road realignment along the same path does not constitute non-use for purposes of abandonment.

Does a change in alignment of a road constitute abandonment of the old road?<sup>132</sup> The quick answer is that is a question of degree. If the current road follows the same basic path as the historic road, the change does not constitute an abandonment of the historic road. On the other hand, if the change is so fundamental that the new road “is no longer in the same location as [the] historical road” then an abandonment may occur. *Adams v. United States*, 3 F.3d 1254 (9<sup>th</sup> Cir. 1993).

In *Farrell v. Bd. of Cnty. Comm’rs of Lemhi Cnty.*, 138 Idaho 378, 64 P.3d 304 (2002) (Schroeder, J.), opponents of a public road sought to prove non-use based on the fact that the road had been largely re-aligned along a creek bed, with substantial stretches jumping from one side of the creek to the other. The Supreme Court squarely rejected this theory:

After 1955, the Ranch Owners allege that the road was not used because it was relocated by the Forest Service. The parties are at odds as to the extent of realignment, but they both concede there was at least some realignment and that the road has always had the same termini and followed

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<sup>132</sup> Note that Idaho Code § 55-313 (adopted in 1985) authorizes the holder of the servient estate to relocate a right-of-way across his/her property in a manner that does not injure the holder of the easement. The statute is somewhat oddly worded in that it applies to “access which is less than a public dedication . . . constructed across private lands.” This appears to limit the application of the statute to private rights-of-way. This conclusion is reinforced by statutory history that saying that the intent of the phrase was to exclude roads that are part of the public highway system.

the same creek. The Ranch Owners based the majority of their non-use abandonment claim on the non-use of the portions of the road abandoned because of realignment. Abandonment of the old portions of a realigned road, however, is not evidence of non-use or abandonment of the realigned new road unless the changes actually change the identity of the road originally laid out. *See Central Pac. Ry. Co. v. Alameda County*, 284 U.S. 463, 467, 52 S. Ct. 225, 226, 76 L. Ed. 402, 404-05 (1932). That did not happen in this case.

*Farrell*, 138 Idaho at 386, 64 P.3d at 312.

This ruling reflects the practical reality in Idaho that mountain roads are routinely re-aligned in response to washouts and other natural conditions. Indeed, the fact of realignment may serve as evidence that the road was being maintained.

Note the standard articulated in the quotation: The realigned road must have the same “identity” as the road originally laid out. In so ruling, the *Farrell* Court noted, “the road has always had the same termini.” *Farrell*, 138 Idaho at 386, 64 P.3d at 312.

This is consistent with a 1932 decision by the U.S. Supreme Court:

[I]n such cases, the line of travel is subject to occasional deviations owing to changes brought about by storms, temporary obstructions, and other causes. But, so far as the specific parcels of land here in dispute are concerned, we find nothing in the record to compel the conclusion that any departure from the line of the original highway was of such extent as to destroy the identity of the road as originally laid out and used.

*Central Pac. Ry. Co. v. Alameda Cnty.*, 284 U.S. 463, 467 (1932). The federal district court in Idaho also cited this case as controlling authority on this point. *United States of America v. Boundary Cnty.*, Case No. CV98-253-N-EJL, at 5 (D. Idaho, Memorandum Decision and Order, Aug. 28, 2000); *accord*, *Sheridan Cnty. v. Spiro*, 697 P.2d 290, 296 (Wyo. 1985); *Schultz v. Dept. of the Army, U.S.*, 10 F.3d 649, 655 (9<sup>th</sup> Cir. 1993).

#### **5. It is not clear whether maintenance need be shown if none was required.**

Recall that under the public use road creation statute, maintenance is required only to the extent needed. *State v. Nesbitt*, 79 Idaho 1, 6, 310 P.2d 787, 790 (1957) (Keeton, C.J.) (see discussion in section I.D.3 at page 19). It is not clear whether the same standard is applicable in road abandonment cases. The Court raised the question, but ducked answering it 2002. *John W. Brown IV*, 138 Idaho at 176, 59 P.3d at 981.

#### **6. Gratuitous maintenance by the county does not forestall abandonment.**

Although the Court has never said just how much maintenance is required, it has declared what maintenance will not work to avoid abandonment. Infrequent “gratuitous” maintenance provided solely to “aid the local landowners” will not preclude a finding of abandonment. *John W. Brown IV*, 138 Idaho at 176, 59 P.3d at 981. See also the various cases on gratuitous maintenance in the context of road creation (discussed in section I.D.3.c(vi) at page 33).

**7. Maintenance by the federal government may or may not count.**

The abandonment statute only requires that a road be “worked” to avoid abandonment. In contrast to the creation statute, it does not state that the work must be “at the expense of the public.” Thus, the non-recognition of federal maintenance expenses for road creation in *French v. Sorenson* (1988) may not apply to abandonment. In other words, work performed by the federal government might be enough to overcome an assertion of abandonment.

**8. The passive abandonment statute is self-executing.**

It appears that the abandonment statute is self-executing. That is, it operates automatically, without any action or official confirmation, to establish abandonment as a matter of law as soon as the requisite lack of maintenance and public use occur. The Court said *John W. Brown IV*:

As previously noted, I.C. § 40-104 and I.C. § 40-203 provide a self-executing mechanism under which a public roadway that had been established by prescription could be abandoned, in the event that there was neither public maintenance nor public use for the required five-year period.

*John W. Brown IV*, 138 Idaho at 177, 59 P.3d at 982 (2002). See also, *Elder v. Northwest Timber Co.*, 101 Idaho 356, 358, 613 P.2d 367, 369 (1980).

**D. The passive abandonment statute was repealed in 1993.**

In 1993, the Legislature repealed what was left of the passive abandonment statutes. 1993 Idaho Sess. Laws, ch. 412, § 4 (S.B. 1108) (amending Idaho Code § 40-203(4) to remove abandonment provisions). Subsequent to that date, roads may be abandoned only by formal action (except for minor exceptions introduced in the 2013 amendments discussed elsewhere).

In *Sopatky v. Lemhi Cnty.*, 151 Idaho 809, 264 P.3d 916 (2011) (W. Jones, J.), the Court mentioned in a footnote: “In 1986, the Legislature repealed the passive-abandonment statute altogether, replacing it with a formalized process for vacating public highways. Act of April 3, 1986, ch. 206, § 3, 1986 Idaho Sess. Laws 512, 513–14 (amending I.C. § 40–203, the provision that previously provided for passive abandonment).” *Sopatky*, at n.6. This statement is inaccurate. The 1986 act did not repeal the passive abandonment provision, but amended it to create another exception (for roads included on an official map). It was the 1993 act that repealed the provision.

**E. The independent abandonment statutes were ended in 1993.**

The section 40-203(1) procedures adopted in 1986 existed alongside the longstanding county and highway district abandonment provisions for over a decade. This created some confusion. *Floyd II* suggests that these disparate provisions should be read “harmoniously.” *Floyd II*, 137 Idaho at 727, 52 P.3d at 872 (2002).

In any event, this disconnect was resolved in 1993 when the Legislature adopted amendments to those sections linking them back to section 40-203(1). 1993 Idaho Sess. Laws, ch. 412, §§ 7, 8 (S.B. 1108) (codified at Idaho Code §§ 40-604(4), 40-1310(5)). Sections 40-604(4) and 40-1310(5) remain on the books, but they no longer set out independent abandonment authority. Instead they simply refer back to the procedures set out in section 40-203.

**F. Certain roads are immune from passive abandonment under the pre-1993 statute.**

**1. Roads created by common law dedication were not subject to passive abandonment (subject to a limited exception added in 2013).**

One of the more significant attributes of a common law dedication is that once the dedication occurs, (that is, once the offer has been accepted), the offer cannot be withdrawn. Thus, roads created by common law dedication are not subject to the pre-1993 “passive abandonment” statute. And after 1993, no roads are subject to passive abandonment, with the narrow exception of the 2013 amendment discussed in section III.B on page 88. Of course, all roads may be vacated by formal declaration of the county or highway district<sup>133</sup>—with the possible exception of R.S. 2477 roads.<sup>134</sup>

The non-applicability of passive abandonment to roads created by common law dedication was first recognized in *Smylie v. Pearsall*, 93 Idaho 188, 457 P.2d 427 (1969) (McQuade, J.):

When an owner of land plats the land, files the plat for record, and sells lots by reference to the recorded plat, a dedication of public areas indicated by the plat is accomplished. This dedication is irrevocable except by statutory process.

*Smylie v. Persall*, 93 Idaho 188, 191, 457 P.2d 427, 430 (1969) (McQuade, J.) (emphasis supplied).

In *Worley Highway Dist. v. Yacht Club of Coeur d’Alene, Ltd.*, 116 Idaho 219, 775 P.2d 111 (1989) (Bengtson, J. Pro Tem.), the Court confirmed the non-applicability of passive abandonment to roads created by common law dedication:

We have above concluded that there was a valid common law dedication of the sixty-foot strip of land in question, and we further hold the fact that such road had not been worked or used for a period of five years does not constitute an abandonment thereof merely by virtue of former I.C. § 40–104.

*Worley*, 116 Idaho at 227, 775 P.2d at 119.

In 2002, the Court quoted from *Smylie* and confirmed once again that the same rule applies outside of urban, platted areas:

The holding in *Worley* affirms that roads not designated as streets in an urban city plan are also not subject to the passive abandonment statute if they are properly dedicated. The Court also noted that the “irrevocable character of a common law dedication is not affected by the fact that the property is not at once subjected to the use as designed. The public exigency requiring the use of the property may not arise for years.” [*Worley*] at 227, 775 P.2d at 119 (citations omitted). Therefore, even if the Indian Creek Road

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<sup>133</sup> Current requirements for formal abandonment are discussed below in section III.G.5 beginning on page 102.

<sup>134</sup> Formal abandonment of R.S. 2477 roads is discussed below in section III.J beginning on page 103.

were not developed by the County, the passive abandonment statute would not apply where there has been a common law dedication.

*Farrell*, 138 Idaho at 387, 64 P.3d at 313.

Thus, until an amendment in 2013, the only way to abandon a road created by common law dedication is by formal declaration of abandonment by the county. The 2013 amendment created a new, limited form of passive abandonment that applies only to one particular type of common law dedication. See discussion in section III.B at page 88. All other forms of common law dedication remain immune from passive abandonment.

## **2. Passive abandonment applies only to roads created by prescription (at least since 1963, perhaps before).**

In 1963 the passive abandonment statute was amended to make it applicable only to roads created by “prescription,” that is, roads created under Method 2 of the Road Creation Statute.<sup>135</sup> Thus, as of 1963, only roads created by “use” could be lost by “non-use.”

It appears that this may have merely codified existing law. This conclusion is supported by *Taggart v. Highway Bd. for N. Latah Cnty.*, 115 Idaho 816, 771 P.2d 37 (1989) (Shepard, C.J.). In *Taggart*, the usual roles were reversed: A private landowner brought an action seeking to establish a road to and across his property as a public road. The highway district took the position that the road had been abandoned because, although once a primary route between Princeton and Moscow, it had not been maintained by the district for decades and was used by very few (“primarily for access to several residences, and used by farmers as a farm-to-market route, by loggers, hunters, and recreational users”). *Taggart*, 115 Idaho at 817, 771 P.2d at 38. The Court sided with *Taggart*. First, it declared that the passive abandonment statute does not apply to a road that had been created by formal action. “Here the road was not established by prescription but rather by formal action of the then governing entity.” *Taggart*, 115 Idaho at 817, 771 P.2d at 38. (It went on, however, to hold that, in any event, passive abandonment was not established because the minimal continuing use was sufficient to prevent abandonment.) In ruling that passive abandonment only applies to road created by prescription, the Court did not mention the 1963 statute. Moreover, the alleged abandonment occurred before 1963. Thus, the Court’s holding must be understood to be that passive abandonment is inapplicable to roads created by formal action both before and after 1963.

This conclusion (that the limitation applied prior to 1963) is also implicitly confirmed by the Court’s holding in *Galvin v. Canyon Highway Dist. No. 4*, 134 Idaho 576, 580, 6 P.3d 826, 830 (2000) (Walters, J.): “The first thing to note is that only prescriptive rights-of-way can be abandoned under § 40-104. *Taggart* could possibly have been decided by simply stating that a formally established road cannot be abandoned under § 40-104.” The *Galvin* Court did not say that this principle applies only after 1963.

However, the conclusion (that abandonment has always been limited to roads created by prescription) is undercut slightly by the decision in *Sopatyk v. Lemhi Cnty.*, 151 Idaho 809, 264 P.3d 916 (2011) (W. Jones, J.) at least as to roads created by legislative declaration. The Court discussed abandonment prior to 1963 in the context of a case involving road creation by legislative declaration. The Court found no evidence of abandonment, and the issue was not addressed further. Thus, it was not

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<sup>135</sup> There is an argument that the 1963 amendment merely codified existing law. After all, it makes some intuitive sense that the Legislature would have intended that abandonment by non-use apply only to roads created by use. See discussion in section III.G.5 at page 102.



necessary for the Court to determine whether the passive abandonment statute applies to roads created by legislative declaration prior to 1963, but the implication would seem to be that it does.

**3. In 1963, roads accessing public lands or waters were protected from passive abandonment.**

In a separate 1963 amendment to the passive abandonment statute, the Legislature established mandatory formal procedures for the abandonment of roads created by prescriptive use when access to public lands or waters is involved.<sup>136</sup> The establishment of these procedures had the effect of making these roads also immune from the passive abandonment statute (regardless of whether they were created by public use or formal declaration). *French v. Sorensen*, 113 Idaho 950, 958-59, 751 P.2d 98, 106-07 (1988) (Bistline, J.) (the Carole King case); *Floyd II*, 137 Idaho at 728, 52 P.3d at 873.

The 1963 amendment added the following procedures (subsequently repealed) applicable to roads accessing state or federal public lands or waters:

40-104. A road established by prescription not worked or used for the period of five years ceases to be a highway for any purpose whatever; provided, however, that in the case of roads furnishing public access to public lands, state or federal, and/or public waters, no person may encroach upon the same and thereby restrict public use without first petitioning for the abandonment of the road to the county commissioners of the county in which the road is located or if the road be located in a highway district then to the board of commissioners of the highway district in which the same is located, and until such time as abandonment is authorized by the commissioners having jurisdiction thereof, public use of the roadway may not be restricted or impeded by encroachment or installation of any obstruction restricting public use or by the installation of signs or notices that might tend to restrict or prohibit public use.

Idaho Code § 40-104 (1963, recodified to section 40-203, repealed in 1993) (emphasis supplied).

In sum, before obstructing such a road, a party was required to petition the county commissioners or highway district and obtain a formal determination of abandonment. No particular procedures or standards were set out.

This special treatment of roads accessing public lands is no longer part of Idaho's road statutes, since the passive abandonment statute was repealed altogether in 1993. In 1993, the entire passive abandonment statute was repealed, thus expanding the scope of the requirement that roads be abandoned by formal validation only. 1993 Idaho Sess. Laws, ch. 412, § 4 (S.B. 1108) (codified at Idaho Code § 40-203(4)). The 1963 statute may still be important, however, because it may provide a defense to an allegation of abandonment prior to 1993. Note that the special treatment of roads accessing public lands

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<sup>136</sup> 1963 Idaho Sess. Laws, ch. 267, § 1 (S.B. 242) (then codified at Idaho Code § 40-104; later codified at Idaho Code § 40-203(4); repealed by S.B. 1108 in 1993). This requirement is stated in a "proviso" attached to the rule limiting passive abandonment to roads created by prescriptive use. One could make the argument that, because of this structure, the requirement for formal abandonment of roads accessing public lands or waters only applies to such roads if they were created by prescription. However, the proviso is not so limited on its face, and the Courts have not spoken of it as being so limited. *Floyd II*, 137 Idaho at 728, 52 P.3d at 873.

was included in the 2013 law reinstating a limited form of passive abandonment. Idaho Code § 40-203(5)(b).

**4. In 1986 the Legislature protected roads included on official highway maps from passive abandonment.**

The abandonment statute was amended in 1986 to exempt from passive abandonment roads “designated as part of a county or highway district system by inclusion on the official map.” 1986 Idaho Sess. Laws, ch. 206, § 3 (H.B. 556) (codified at Idaho Code § 40-203(4), repealed by S.B. 1108 in 1993 when all passive abandonment was eliminated).

**G. Formal vacation/abandonment statutes**

**1. Sources of statutory authority**

Since territorial times, counties and highway districts have had authority to abandon roads by official declaration of abandonment.<sup>137</sup> For years, separate provisions set out the general authority of county commissions (now section 40-604(4)) and highway districts (now section 40-1310(5)) to abandon roads.

In 1963, the Legislature limited the passive abandonment statute, making it inapplicable to roads that access public lands. In the same session, the Legislature amended that statute a second time, adding specific procedures to be followed for formal abandonment of such roads (then codified at section 40-104). These provisions were repeated in the separate road abandonment provisions applicable to highway districts (then section 40-1614, now section 40-1310(5)). However, the Legislature neglected to amend the separate abandonment provisions applicable to counties (then section 40-133, now section 40-604(4)). This created some confusion of whether a county could choose one set of road abandonment provisions or the other.

In 1986, the Legislature set out detailed abandonment procedures for all roads, applicable to both counties and highway districts. Idaho Code § 40-203(1). However, the separate county and highway district abandonment authorities remained intact, again, creating some confusion. In 1993, the Legislature amended the separate county and highway district abandonment authorities (sections 40-604(4) and 40-1310(5)) so that they referenced back to section 40-203(1), thus ending the confusion over which procedures to follow.

There remains some uncertainty as to whether these procedures must be followed (or whether a party may instead bring a quiet title action) where there is doubt about the existence of a public road.

**2. Early abandonment statutes provided little guidance.**

Originally, two abandonment statutes contained broad grants of authority with little guidance as to either procedure or standards. For instance, from 1887 until 1951, the county statute, now section 40-604(4), authorized formal abandonment of roads “as necessary.” Meanwhile, the statute applicable to highway districts (now section 40-1310(5)) simply declared they “shall have power” to abandon roads, without offering any guidance as to how that power should be exercised.

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<sup>137</sup> The statute speaks in terms of “abandonment” and “vacation.” For all practical purposes, the terms are interchangeable.

From 1951 until 1993 when it was amended, the county abandonment statute required a determination that the abandonment be in the “public interest.” However, it provided no guidance on how to make that determination. Nor is there any appellate decision interpreting what constitutes a valid public interest finding under that provision.

### **3. When is a formal determination, with findings, is required?**

The pre-1986 abandonment statutes set out no particular procedure to be followed and contain no express requirement for finding and conclusions. However, in 1968 the Court construed the county statute (then Idaho Code § 40-501<sup>138</sup>) to require a finding that the road is no longer necessary. *Nicolaus v. Bodine*, 92 Idaho 639, 642, 448 P.2d 645, 648 (1968) (Spear, J.).

In *Farrell v. Bd. of Cnty. Comm’rs of Lemhi Cnty.*, 138 Idaho 378, 387, 64 P.3d 304, 313 (2002) (Schroeder, J.), the Court reiterated: “To constitute formal abandonment under *Nicolaus*, however, there must be a finding by the board that the road is unnecessary—or, under the subsequent statute, that it is in the public interest—which is nowhere alleged by either party.”

In *Sopatyk v. Lemhi Cnty.*, 151 Idaho 809, 816, 264 P.3d 916, 923 (2011) (W. Jones, J.), the Court provided a more detailed analysis of when a finding is required. It concluded that, in the absence of an express statutory requirement for a finding, the Court’s role “is simply to determine whether it was clear error for the Board to determine that validating ACR [the road in question] was in the public interest.” This decision did not mention *Nicholas*.

The *Sopatyk* Court noted that the vacation/abandonment statute (Idaho Code § 40-203(1)(h)) requires findings and conclusions but that the validation statute (Idaho Code § 40-203A(3)) does not. *Sopatyk*, 151 Idaho at 816, 264 P.3d at 923. Likewise, the Court contrasted the validation statute with the requirement under the Idaho Administrative Procedure Act requiring a reasoned explanation of the decision, Idaho Code § 67-5248(1)(a). *Id.* Be that as it may, the better practice is to provide a clearly articulated basis for the decision in any decision.

When acting under either the abandonment/vacation or validation statute, commissioners should be careful to distinguish between their legal and discretionary functions. Their findings and conclusions should reflect an understanding of the difference between determining, as a matter of law, whether a public road or right-of-way exists, and, as a matter of public policy (that is, the public interest), whether it should be validated or abandoned.

### **4. Formal vacation/abandonment requires more than updating official maps.**

Public officials are obligated under various (and frequently changing) statutes to maintain maps of public roads. Sometimes they do a better job of that than at other times. Often there are discrepancies between the maps and official action. Litigants often seize such discrepancies as proof that an abandonment occurred or did not occur. The courts have not been enthusiastic about such claims.

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<sup>138</sup> *Nicholas* recited that the abandonment statute then in effect (1968) was Idaho Code § 40-501, which was enacted in 1948. In fact, it had been replaced in 1950 and again in 1951 by a statute that was finally codified in 1961 as Idaho Code § 40-133(d). Section 40-133(d) was repealed and replaced by section 40-604(4) in the 1985 revision of Title 40.

The Idaho Supreme Court has made clear that omission of a road from an official road map (even coupled with a prosecutor's "opinion" that the road was abandoned) does not rise to the requisite level of formality to qualify as a formal abandonment:

Indian Creek Road was not color-coded as a County road on any of these subsequent County road inventory maps. Apparently there is also a prosecutor's opinion that is referenced in County board minutes reflecting the opinion that the road was abandoned. To constitute formal abandonment under *Nicolaus*, however, there must be a finding by the board that the road is unnecessary—or under the subsequent statute, that it is in the public interest—which is nowhere alleged by either party.

*Farrell v. Bd. of Cnty. Comm'rs of Lemhi Cnty.*, 138 Idaho 378, 387, 64 P.3d 304, 313 (2002) (Schroeder, J.).

Nor does the absence or presence of a road estop (that is bar) the county from subsequently asserting the existence or abandonment of the road. In *John W. Brown IV*, the Court ruled that to make out such a claim for equitable estoppel, one must demonstrate that the county intended for its map to be relied upon for this purpose and that the person did in fact rely on the map to their detriment. *John W. Brown Properties*, 138 Idaho 171, 176-77, 59 P.3d 976, 981-82 (2002) ("*John W. Brown IV*"). That will be impossible to show in most instances.

#### **5. Detailed formal vacation/abandonment procedures for all roads were adopted in 1986.**

In 1986 the Legislature undertook a thorough revision of the road creation and vacation/abandonment statutes. The Legislature included a new section 40-203(1) setting out comprehensive procedures for road abandonment and vacation. Various technical amendments have occurred since then. The statute reads in full today as set out in the Appendix A: Index to Idaho Road Creation and Abandonment Statutes appended hereto. These abandonment procedures are discussed in section IV.A.3 at page 108.

#### **6. A road may not be vacated if doing so will leave real property without access.**

The formal vacation/abandonment statute provides "No highway or public right-of-way or parts thereof shall be abandoned and vacated so as to leave any real property adjoining the highway or public right-of-way without access to an established highway or public right-of-way. The burden of proof shall be on the impacted property owner to establish this fact." Idaho Code § 40-203(2).

#### **H. Who gets the property after a road is vacated?**

When a city, county, or highway district vacates a road that it holds merely as a right-of-way easement, the underlying fee ownership is not changed by the vacation. The vacation simply removes the easement, and whoever owned the fee before still owns it.

In contrast, when a city, county, or highway district vacates a road that it holds in fee simple, the fee typically is transferred to adjoining landowners.

If a road held in fee crosses through the middle of a property (i.e., the same owner owns the land on both sides of the road), the fee to the road property is conveyed to that owner. If the vacated road divides two properties that have an identical relationship to the road, the government's interest in the road is divided equally between the two owners (down the centerline of the road).

However, a special circumstance arises where the road, when it was created, was carved entirely out of the land of a landowner or landowners on one side of the road, without any contribution from the landowner(s) on the other side of the road.

In the case of cities, a statute specifically addresses this issue, providing for a default 50/50 split but giving the city the flexibility to allocate the property in another fashion as appropriate.<sup>139</sup>

#### **I. Vacation of platted easements other than roads.**

A provision of the platting statutes (chapter 13 of title 50) provides: "Easements shall be vacated in the same manner as streets" Idaho Code § 50-1325. The statute apparently applies to all manner of easements, not just road easements. (But no published decision has construed the statute.)

Because this section is included in the chapter dealing with plats, it presumably applies only to easements dedicated by plat.

The reference to "the same manner as streets" presumably incorporates the full body of law governing who has jurisdiction and what procedures should be followed. Thus, cities with functioning street departments would have jurisdiction over vacations of easements within city limits (Idaho Code §§ 50-331 and 50-1330), while counties or highway districts would have jurisdiction over everything else (Idaho Code § 40-203(4)(a)). (See discussion in section V at page 160.)

#### **J. R.S. 2477 rights-of-way may be abandoned like any other road.**

##### **1. As a general principal, R.S. 2477 roads are subject to abandonment and vacation.**

There is a common misperception that R.S. 2477 rights-of-way are inherently unique and, unlike other roads, are not subject to abandonment. These statements, however, overlook the fact that state law

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<sup>139</sup> "Cities are empowered to: create, open, widen or extend any street, avenue, alley or lane, annul, vacate or discontinue the same whenever deemed expedient for the public good; to take private property for such purposes when deemed necessary, or for the purpose of giving right of way or other privileges to railroad companies, or for the purpose of erecting malls or commons; provided, however, that in all cases the city shall make adequate compensation therefor to the person or persons whose property shall be taken or injured thereby. The taking of property shall be as provided in title 7, chapter 7, Idaho Code. The amount of damages resulting from the vacation of any street, avenue, alley or lane shall be determined, under such terms and conditions as may be provided by the city council. Provided further that whenever any street, avenue, alley or lane shall be vacated, the same shall revert to the owner of the adjacent real estate, one-half ( ½ ) on each side thereof, or as the city council deems in the best interests of the adjoining properties, but the right of way, easements and franchise rights of any lot owner or public utility shall not be impaired thereby. In cities of fifty thousand (50,000) population or more in which a dedicated alley has not been used as an alley for a period of fifty (50) years [such alley] shall revert to the owner of the adjacent real estate, one-half ( ½ ) on each side thereof, by operation of the law, but the existing rights of way, easements and franchise rights of any lot owner or public utility shall not be impaired thereby." Idaho Code § 50-311 (emphasis supplied).

controls the acceptance and subsequent management of R.S. 2477 rights-of-way. See discussion in section I.H.5.a at page 63. In short, if they are unique, it is up to Idaho lawmakers to say so.

In *Farrell*, proponents of the public road urged the Court to declare that R.S. 2477 rights-of-way are subject to their own, distinct common law and are immune from the passive abandonment statute (if not from the provisions on abandonment by public declaration). Opening Brief of Madill Family and Lemhi County at 32-33 (Jan. 22, 2002). In sum, the proponents of the public road urged the Court to view the 1993 act as an affirmation and codification of existing common law. The Court declined the invitation. Indeed, without any reference to either the 1993 act, the Court proceeded to apply the passive abandonment statute to the facts of the case, ultimately determining that the burden of proof of abandonment had not been met by the ranch owner. *Farrell*, 138 Idaho at 385-86, 64 P.3d at 311-12. Thus, although it did not say so expressly, the Court's action appears to confirm that R.S. 2477 rights-of-way are subject to the same abandonment rules as any other public road in Idaho, at least with regard to actions affecting the road prior to 1993.

## **2. The effect of Idaho's 1993 legislation (section 40-204A(1)) on abandonment of R.S. 2477 roads**

In 1993 the Idaho Legislature enacted a bill dealing specifically with R.S. 2477 rights-of-way. (See discussion in section I.H.7 at page 69.) The measure contains the following confusing provisions regarding abandonment of R.S. 2477 roads:

- (1) The state recognizes that . . . the [R.S. 2477] grant shall be for the perpetual term granted by the congress of the United States.
- (2) . . . Neither the passage of time nor the frequency of use shall be considered a justification for considering these rights-of-way to have been abandoned.

Idaho Code §§ 40-204A(1) and (2).<sup>140</sup>

The first section (stating that the grant is perpetual) could mean many things. Perhaps it means that when title to the road shifted from the federal government to the state of Idaho, the federal government cannot unilaterally reclaim title to the road. That would be a statement of the obvious. Perhaps it means that if the road is ever abandoned, it does not revert back to the United States. That would make sense for roads now located on private (patented) ground. It makes no sense, frankly, for roads located on federal land.

The second section seems to say that infrequent use will not cause abandonment. If so, that would be redundant because passive abandonment was repealed across-the-board in 1993. (See discussion in section III.D at page 96.) In any event, it is overridden by the 2013 amendment.

One might read these statements as prohibiting local governments from formally abandoning R.S. 2477 roads. However, that interpretation is not credible because vacation of R.S. 2477 roads was recognized in a 2000 amendment to section 40-203(i). (See discussion in section III.J.4.c at page 106.) It

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<sup>140</sup> This measure was enacted as 1993 Idaho Sess. Laws, ch. 143, § 1 (H.B. 388) (codified at Idaho Code §§ 40-107(5), 40-204A). Despite its sweeping language and broad implications, this legislation was a sleeper—adopted with little fanfare at a time before R.S. 2477 legislation was a red flag for controversy.

is also difficult to reconcile with section 40-204A(2) (mandating use of eminent domain for abandonment), discussed below. To date, courts have largely ignored these provisions, which may not be a bad thing.<sup>141</sup>

Whatever these provisions mean, they apply prospectively only. See section I.H.7 at page 69.

### **3. Effect of the 1993 legislation dealing with eminent domain (section 40-204A(2))**

The same 1993 legislation contained this peculiar provision saying that R.S. 2477 roads may only be abandoned via eminent domain proceedings:

(2) The only method for the abandonment of these rights-of-way shall be that of eminent domain proceedings in which the taking of the public's right to access shall be justly compensated. . . .

Idaho Code §§ 40-204A(2).

This is a profoundly nonsensical provision. Eminent domain is a process by which private property is taken from private parties for public use, with compensation therefore to the private party. It is unclear how eminent domain would be employed to compensate the public for the “loss” of a public resource. What is the government to do: tax its citizens and then return that money to them?

Eminent domain does not contemplate taking money from private citizens (*e.g.*, the person who owns the land upon which the road is located) to compensate the public. However, another section does just this. Idaho Code § 40-203(1)(i) provides a mechanism applicable in certain circumstances for the landowner to pay a charge corresponding to the fair market value of the abandoned road. (See discussion below.)

### **4. Charge imposed on landowner for vacation (section 40-203(1)(i))**

#### **a. Overview of statute**

A seldom (if ever) used provision of the vacation statute, Idaho Code § 40-203(1)(i), contemplates that the county or district may, if it chooses, charge the underlying landowner for the value of the vacated road “as a condition of the abandonment or vacation.” In other words, this may occur only if the landowner affirmatively seeks the vacation. In any event, it is permissive, not mandatory. Moreover, the charge may be made only if the value of vacation is \$2,500 or more. There is a proviso that “no such charge shall be imposed on the landowner who originally dedicated the such parcel.” Perhaps this may be construed to include the successor of the original landowner.

#### **b. The statute should be narrowly read.**

This peculiar statute, if broadly applied, would raise troubling questions about the role of commissioners in vacation proceedings. The thought that they might be able to extract payment for making a ruling in favor of vacation is fundamentally at odds with their quasi-judicial (judge-like) role.

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<sup>141</sup> The fact that the 1993 was enacted as a stand-alone piece of legislation, rather than as amendments to existing road statutes, has made it easier for the Courts to ignore. In other words, if the Legislature really intended a profound change in road law, why did they not amend other statutory provisions making contrary statements?

Accordingly, the power to negotiate payment for a vacation determination, if it can stand at all, must be limited to the vacation of roads that actually are in use and which the underlying landowner seeks to acquire. Accordingly, the statute should be construed with attention to the future tense employed in the phrase “parcel to be abandoned.” In other words, if any charge is to be imposed, it must occur after a road is validated as a public road and then vacated as a matter of public policy. If, instead, the commission is simply called upon to determine, based on historical facts, that a road was previously abandoned, it would be gravely improper to impose a charge on the underlying landowner.

**c. Effect of 2000 amendment (section 40-203(1)(i))**

Someday courts may also be called upon to decipher the strange language adopted in 2000 providing “that if the highway or public right-of-way was originally a federal land right-of-way [R.S. 2477 right-of-way], said highway or public right-of-way shall revert to a federal land right-of-way.” Idaho Code § 40-203(1)(i).<sup>142</sup> Apparently the Legislature envisioned by this that a road might lose its character as a county or highway district road, but nonetheless retain its character as an R.S. 2477 right-of-way. Just what that remnant character is, is difficult to grasp.

In sum, all indications are that the Idaho Supreme Court views the abandonment statutes (both passive and formal declaration abandonment) to be applicable to R.S. 2477 rights-of-way. So far, no one seems to have tangled with the question of whether the 1993 act impedes the ability of counties and highway districts to manage (and vacate) R.S. 2477 rights-of-way within their road networks today.

**K. The BFP defense may not be used to defeat a public road**

The case of *Trunnell v. Fergel*, 153 Idaho 68, 278 P.3d 938 (2012) (Burdick, C.J.) involved a road dispute between neighbors. The plaintiff contended that the road was public and that the neighbor was illegally preventing access to the road (which crossed the defendants’ property and led to plaintiff’s property).

The road was established by formal declaration of Bonner County in 1908, and the action was recorded in Bonner County’s “Road Book.” *Trunnell*, 153 Idaho at 70, 278 P.3d at 940. Thus, there was little doubt that it was a public road and, indeed, that issue was not appealed. The defendants contended, however, that when they bought their property in 1991 they were without actual or constructive knowledge of the public status of the road and were therefore “bona fide purchasers” (or BFPs) and, as such, were entitled to take the property not subject to any public easement.

The trial court agreed, but the Idaho Supreme Court reversed. “Because I.C. § 40–203 establishes the only avenues through which a validly created public road may be abandoned, the bona fide purchaser defense is not available to Fergel.” *Trunnell*, 153 Idaho at 72, 278 P.3d at 942. Thus, the Idaho Supreme Court established the principle that the BFP defense applies only to private easements.

The Court did not explain why the BFP defense would apply at all, given that the formal declaration creating the road was recorded in the county’s road book. The implication seems to be that a recording in a

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<sup>142</sup> This provision was adopted as part of 2000 Idaho Sess. Laws, ch. 251. The statement of purpose includes this remark: “Clarifies the status of Federal land right of way used as a highway or public rights-of-way and under the jurisdiction of a county and highway district. If the highway or public rights-of-way is abandoned according to 40-203, that abandonment would not destroy the legal status of the Federal land right of way.”



road book is a lesser status, and that one may become a BFP so long as the public status of the road is not reflected in the chain of title in the recorder's office. In any event, this decision makes clear that the BFP defense is not viable in the context of public roads, though it would continue to be a defense in the context of a private easement.

#### **IV. MECHANISMS FOR RESOLVING ACCESS DISPUTES**

##### **A. Road validation and abandonment/vacation statutes**

##### **1. Various means of resolving road disputes**

Landowners wishing to raise concerns over the status or management of an individual public right-of-way may take any of the following actions:

- First, a landowner may file a petition with the county commission requesting the initiation of proceedings for validation and/or vacation under Idaho Code §§ 40-203A(1) and 40-203(1)(b).
- Where the county or highway district fails to act on a petition for validation/vacation, a landowner may initiate a quiet title action. Idaho Code § 40-208(7).
- If a highway district wishes to resolve a dispute over road status or width, its only option is to initiate proceedings for validation and/or vacation. Idaho Code § 40-208(7). However, a highway district is under no particular obligation to do so. It may wait until a time of its choosing to initiate such proceedings.
- Prior to 2013, a landowner could petition the county or highway district commission to modify the official road map to add or delete a proposed right-of-way segment, as was done in *Homestead Farms, Inc. v. Bd. of Comm'rs of Teton Cnty.*, 141 Idaho 855, 859, 119 P.3d 630, 634 (2005) (Trout, J.) and *Flying "A" Ranch, Inc. v. Cnty. Comm'rs of Fremont Cnty.* ("Flying A"), 157 Idaho 937, 342 P.3d 649 (2015) (Horton, J.). In 2013, the Legislature directed that challenges to such maps be made by way of validation and/or vacation proceedings on individual roads. Idaho Code § 40-202(8).
- Rather than pursue a formal challenge to title, a landowner may employ a more informal approach, seeking the county or highway district commission to impose for use restrictions on such public rights-of-way. (This is done under the general authority of the commission to regulate roads and rights-of-way within its jurisdiction.)
- The public status or width of a road title may become an issue in an encroachment action under Idaho Code § 40-2319. Arguably, the 2013 amendments require that such disputes be resolved through validation/vacation proceedings. Idaho Code § 40-208(7). But no appellate court has addressed this issue.
- The 2013 amendments expressly provide that the legal status or width of public roads may be determined in the context of eminent domain proceedings. Idaho Code § 40-208(7).
- On occasion, courts are called upon to resolve the legal status or width of a public road in the context of other judicial proceedings, such as tort or trespass claims. See, e.g., *Halvorson v. N. Latah Cnty. Highway Dist.*, 151 Idaho 196, 254 P.3d 497 (2011) (Horton,

J.) (tort, due process, and taking claims brought by the owner of fence damaged by road maintenance activities; court first determined whether it was a public road and how wide); *Schneider v. Howe*, 142 Idaho 767, 133 P.3d 1232 (2006) (Burdick, J.) (private landowner sought declaratory judgment that road within its subdivision was a public road; presumably it was framed in this fashion to avoid argument that landowner had no authority to bring quiet title action to establish title in a third person).

- Idaho Code § 40-204A(6) provides a mechanism for seeking “acknowledgment” of R.S. 2477 roads. This is a pointless exercise with no legal effect.

These approaches are explored in greater detail below.

## **2. Separate validation and vacation/abandonment statutes**

Since 1986, Idaho’s statutes have contained two statutory mechanisms for resolving road disputes.<sup>143</sup> 1986 Idaho Sess. Laws, ch. 206 (H.B. 556) (codified in pertinent part at Idaho Code §§ 40-203A and 40-203(1)).

- Idaho Code § 40-203 lays out detailed hearing procedures for road abandonment and vacation. Abandonment and vacation in the context of this statute are seemingly redundant words describing the same action of eliminating public road status by formal action.
- Idaho Code § 40-203A sets out procedures for road validation. Those procedures reference and tie into section 40-203.

It is not readily apparent why the Legislature set out separate mechanisms for validation and abandonment/vacation. Both sections were part of the same bill enacted in 1986. 1986 Idaho Sess. Laws, ch. 206, §§ 3 & 4 (H.B. 556) (codified at Idaho Code §§ 40-203(1) and 40-203A).

Presumably the idea is that validation proceedings were intended where there is doubt as to the legal status of an alleged public road, while vacation proceedings are appropriate where this is no uncertainty whatsoever that the road is currently a public road and the only issue is whether or not it should be vacated in the public interest. Nevertheless, it is unclear why the Legislature did not provide a single proceeding, subject to the same procedural requirements, where all issues could be addressed to the extent appropriate.

When a private party initiates a proceeding, it often chooses one or the other (validation or abandonment/vacation) depending on what relief they are seeking (i.e., whether they are “pro-road” or “anti-road”). Regardless of how the petition is framed, however, the county or highway district is well advised to initiate proceedings under both statutes, in order to provide maximum flexibility. The same is true of the county or district initiates proceedings on its own motion.

## **3. The validation statute (§ 40-203A)**

A validation proceeding may be initiated by either a private party or by the county Commission or highway district. Idaho Code § 40-203A(1).

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<sup>143</sup> This handbook addresses statutes governing counties and highway districts. Other statutes govern streets within cities. See discussion in section V at page 160.

The statute identifies three particular circumstances under which these proceedings may be initiated:

- (a) If, through omission or defect, doubt exists as to the legal establishment or evidence of establishment of a highway or public right-of-way;
- (b) If the location of the highway or public right-of-way cannot be accurately determined due to numerous alterations of the highway or public right-of-way, a defective survey of the highway, public right-of-way or adjacent property, or loss or destruction of the original survey of the highways or public rights-of-way; or
- (c) If the highway or public right-of-way as traveled and used does not generally conform to the location of a highway or public right-of-way described on the official highway system map or in the public records.

Idaho Code § 40-203A(1).

Although fairly broad, this list is hardly comprehensive. One would hope that the Courts will view the list as illustrative, not intended to establish a barrier to road validation in other circumstances.

The validation statute also provides for judicial review via Section 40-208. Idaho Code § 40-203A(4).

Although the validation of a road inherently involves questions of law (whether the road was lawfully created or abandoned), the statute also incorporates a public interest analysis. “Upon completion of the proceedings, the commissioners shall determine whether validation of the highway or public right-of-way is in the public interest . . .” Idaho Code § 40-203A(3). Although the statute does not lay this out, presumably, the commissioners should engage in a two-step process in which they first consider the legal issues of road validity and then, if they determine that the road satisfies legal requirements, whether it is in the public interest to validate it.

In *Galvin v. Canyon Highway Dist. No. 4*, 134 Idaho 576, 579, 6 P.3d 826, 829 (2000) (Walters, J.), the highway district validated a road as a public road, and a landowner appealed. On further appeal to the Idaho Supreme Court, the Court said:

Section 40-203A may only be used to validate an existing highway or public right-of-way about which there is some kind of doubt. It does not allow for the creation of new public rights.

In order to validate a public right-of-way under § 40-203A, the Board must first find that a right-of-way exists although there is some doubt about its current status. In this case, if a public right-of-way existed over Old Middleton Road prior to the construction of New Middleton Road and the right-of-way was not abandoned, a validation could be proper. Conversely, if all of Old Middleton Road, including the portion at issue in this case, was abandoned with the construction of New Middleton Road, a validation proceeding could not be used to create a new public right-of-way where the abandoned one was located.

*Galvin*, 134 Idaho at 579, 6 P.3d at 829.

This statement in *Galvin* is simply a recognition that the validation process may not be used to create new roads. Rather, its purpose is to determine whether there both is (1) a legal basis to recognize a road as a public road and (2) a public policy basis to continue to recognize it as a public road. This point was made again in *Halvorson v. North Latah Cnty. Highway Dist.*, 151 Idaho 196, 254 P.3d 497 (2011) (Horton, J.):

Ordinarily, a validation proceeding as described in I.C. § 40-203A is the appropriate method to “validate an existing highway or public right-of-way about which there is some kind of doubt,” although “[i]t does not allow for the creation of new public rights.” *Galvin*, 134 Idaho at 579, 6 P.3d at 829.

*Halvorson*, 151 Idaho at 203, 254 P.3d at 504.

#### **4. The abandonment/vacation statute (§ 40-203)**

As in the case of validation, abandonment/vacation proceedings may be initiated by the county or highway district. Idaho Code § 40-203(1)(a). Private parties may also petition the appropriate governing body to initiate procedures under this section. Idaho Code § 40-203(1)(b).

The abandonment statute seems to assume the existence of a road, and provides procedures for the commission to determine, as a matter of public policy, whether it should be abandoned. Indeed, the analysis is framed solely in reference to the discretionary, public interest component of the analysis: “After completion of the proceedings and consideration of all related information, the commissioners shall decide whether the abandonment and vacation of the highway or public right-of-way is in the public interest of the highway jurisdiction affected by the abandonment or vacation.” Idaho Code § 40-203(1)(h).

#### **5. Public notice and other procedural requirements**

The vacation/abandonment statute, Idaho Code § 40-203(1), sets out the specific public notice and other requirements that must be met in advance of the evidentiary hearing. These are adopted by reference in the validation statute, Idaho Code §§ 40-203A(2) and 40-203A(2)(d). They include the following:

- ◆ Adoption of a resolution initiating proceedings to abandon, vacate, or reclassify the road, Idaho Code § 40-203(1)(a), and/or to validate the road either as a public highway or as a public right-of-way, Idaho Code § 40-230A(1).<sup>144</sup>
- ◆ Order a survey of the road, if deemed necessary (applicable only in validation proceedings). Idaho Code § 40-203A(2)(a).
- ◆ Preparation of a report providing information about the road (applicable only in validation proceedings). Idaho Code § 40-203A(2)(b).

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<sup>144</sup> In the case of vacation, the statute recites that the commissioners shall adopt a resolution declaring their intention to abandon, vacate, or reclassify the road. Idaho Code § 40-203(1)(a). This is peculiar, because it suggests that the commissioners should have a predisposition toward this outcome prior to the hearing, which, obviously, would be improper. The author suggests that it would be more appropriate to adopt a resolution declaring an intent to consider abandonment, vacation, or reclassification. There is no comparable requirement to declare an intention in the case of validation. Idaho Code § 40-203A(1).

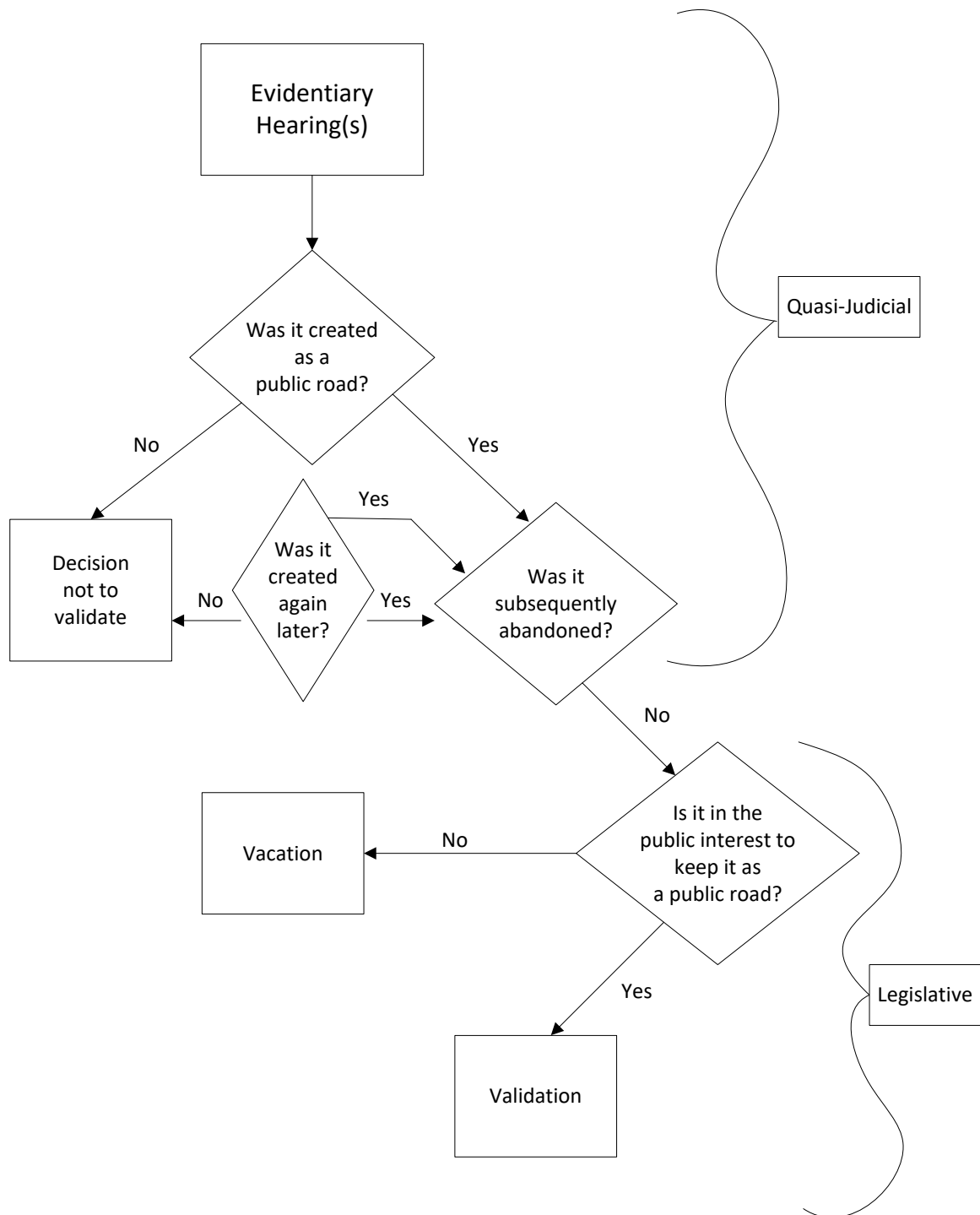
- ◆ Establish a date for the public hearing. Idaho Code §§ 40-203(1)(c), 40-203A(2)(c).
- ◆ Issue public notice at least 30 days in advance of the hearing. Idaho Code §§ 40-203(1)(d), 40-203A(2)(d).
- ◆ Publication in local newspapers two times (if weekly paper) and three times (if daily paper), the last notice to be published at least five but not more than 21 days prior to the hearing. Idaho Code § 40-203(1)(f).
- ◆ 30-day notice, by U.S. mail, to owners of record (per county assessor's tax rolls) of land abutting the subject road. Idaho Code § 40-203(1)(f).
- ◆ 30-day notice, by U.S. mail, to known owners and operators of any underground facility (as defined in Idaho Code § 55-2202) within the right-of-way. Idaho Code § 40-203(1)(e).
- ◆ Notice, by U.S. mail, to any persons requesting such notice within three working days of receiving the request (or as soon as the notice is issued, if requested prior to notice). Idaho Code § 40-203(1)(d).
- ◆ Although not required by statute, it is good practice to make the public notice and as much of the record as possible available on the county or district's website.
- ◆ At the hearing, the commissioners shall consider all information in the record and shall accept testimony from all persons or entities having an interest in the proposed validation. Idaho Code §§ 40-203A(2)(e) and 40-203(1)(g). This appears to mean that the commissioners may encourage, but may not require, that interested persons submit written comments and/or evidence in advance of the hearing.
- ◆ The commissioners will cause any order or other resolution of the validation proceeding to be recorded in the County records. Idaho Code § 40-203(1)(j).
- ◆ The commissioners will cause the official map of the County highway system to be amended as required to reflect any order or other resolution of the validation proceeding, in accordance with Idaho Code § 40-203(1)(j).

Note that the statute requires notice by ordinary U.S. mail, not by certified mail.

## **6. Combined validation/vacation proceedings**

Where there is doubt about whether a road is a public road in the first instance, it is a good policy for a commission to undertake a combined validation and abandonment/vacation proceeding (referred to in this Handbook as a validation/vacation proceeding) in which the commission first determines whether the road is a public road and, if so, then determines whether to retain it as a public road or abandon it.

The decision-making process for a road validation/vacation proceeding is summarized visually in this following flow chart:



**7. The duty to maintain a public road: Classification as a public highway versus public right-of-way (§§ 40-117(7), 40-117(9))**

The very first substantive section of the road law title sets out a duty to maintain public highways, but only “within the limits of the funds available.”

There shall be a system of state highways in the state, a system of county highways in each county, a system of highways in each highway district, and a system of highways in each city, except as otherwise provided. The improvement of highways and highway systems is hereby declared to be the established and permanent policy of the state of Idaho, and the duty is hereby imposed upon the state, and all counties, cities, and highway districts in the state, to improve and maintain the highways within their respective jurisdiction as hereinafter defined, within the limits of the funds available.

Idaho Code § 40-201 (emphasis provided).

The term “highway” is defined at Idaho Code § 40-109(5) to include roads, streets, etc.<sup>145</sup> This includes both “public highways” (which are open and publicly maintained)<sup>146</sup> and “public rights-of-way” (which are not)<sup>147</sup>. These separate definitions appear to recognize that the county or highway district has discretion, based on funds available, to determine that some roads, though public, will not be publicly maintained.

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<sup>145</sup> “‘Highways’ mean roads, streets, alleys and bridges laid out or established for the public or dedicated or abandoned to the public. Highways shall include necessary culverts, sluices, drains, ditches, waterways, embankments, retaining walls, bridges, tunnels, grade separation structures, roadside improvements, adjacent lands or interests lawfully acquired, pedestrian facilities, and any other structures, works or fixtures incidental to the preservation or improvement of the highways. Roads laid out and recorded as highways, by order of a board of commissioners, and all roads used as such for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of a board of commissioners, are highways.” Idaho Code § 40-109(5). Highways, as described in Idaho Code § 40-109(5), may or may not be publicly maintained.

<sup>146</sup> “‘Public highways’ means all highways open to public use in the state, whether maintained by the state or by any county, highway district, city, or other political subdivision. (See also ‘Highways,’ section 40-109, Idaho Code).” Idaho Code § 40-117(7).

<sup>147</sup> “‘Public right-of way’ means a right-of-way open to the public and under the jurisdiction of a public highway agency, where the public highway agency has no obligation to construct or maintain, but may expend funds for the maintenance of, said public right-of-way or post traffic signs for vehicular traffic on said public right-of-way. In addition, a public right-of-way includes a right-of-way which was originally intended for development as a highway and was accepted on behalf of the public by deed of purchase, fee simple title, authorized easement, eminent domain, by plat, prescriptive use, or abandonment of a highway pursuant to section 40-203, Idaho Code, but shall not include federal land rights-of-way, as provided in section 40-204A, Idaho Code, that resulted from the creation of a facility for the transmission of water. Public rights-of-way shall not be considered improved highways for the apportionment of funds from the highway distribution account.” Idaho Code § 40-117(9). The code does not define the term “right-of-way” (it would appear at Idaho Code § 40-119).

A county or highway district is authorized to vacate a road as a public highway (which carries a public maintenance obligation) and reclassify it as a public right-of-way (which has no obligation to maintain). Idaho Code §§ 40-117(9),<sup>148</sup> 40-203(1)(a).<sup>149</sup> Such a reclassification is a matter of discretion subject to the same public interest evaluation applicable to vacations and validations. Idaho Code § 40-203(1)(a).

Similarly, when validated, a public road may be validated as either a public highway (which must be publicly maintained) or as a public right-of-way (which does not carry such a requirement). Idaho Code § 40-203A(1).

The definition of “public right-of-way” was added in 1993 at the same time as the term “federal land right-of-way” was added at Idaho Code § 40-107(5). The term “federal land rights-of-way” applies to R.S. 2477 roads located on federal land. Idaho Code § 40-107(5); see also Idaho Code § 40-204A. The 1993 legislation expressly provided that local governments are not required to maintain R.S. 2477 rights-of-way located on federal land. “These rights-of-way shall not require maintenance for the purpose of vehicular traffic, nor shall any liability be incurred for injury or damage through a failure to maintain access or to maintain any highway sign. These rights-of-way may be traveled at the risk of the user and may be maintained by the public through usage by the public.” 40 Idaho Code § 40-204A(4).<sup>150</sup>

## **8. Rules of evidence**

One difference between a validation proceeding and a quiet title action is that the strict rules of evidence do not apply in the more relaxed administrative-type setting of a validation or vacation/abandonment proceeding. *Wheeler v. Idaho Transportation Dep’t*, 148 Idaho 378, 383, 223 P.3d 761, 766 (Idaho Ct. App. 2010) (a hearing officer is not bound by the Idaho Rules of Evidence and may consider hearsay statements so long as they are of a type commonly relied upon by prudent persons in the conduct of their affairs); *Eastern Idaho Regional Medical Center v. Ada Cnty. Bd. of Cnty. Comm’rs*, 139 Idaho 882, 885, 88 P.3d 701, 704 (2004) (“Ada County is analogous to ‘a fact-finding, administrative agency and, as such, is not bound by the strict rules of evidence governing courts of law.’”). This is consistent with Idaho Code § 40-203A(2)(e), which provides that the District “shall consider all information relating to the proceeding and shall accept testimony from persons having an interest in the proposed validation.” (See also Idaho Code § 40-203(g).)

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<sup>148</sup> In 2011, Idaho Code § 40-117(6) was re-codified to section 40-117(9). There was no change in the wording.

<sup>149</sup> The reclassification provision was formerly codified at Idaho Code § 40-203(4). In 2013, this section was repealed and the language was inserted instead into Idaho Code § 40-203(1)(a). The change was basically cosmetic. The author’s contemporaneous notes to the legislative draft stated: “This replaces former section 40-203(4). This clarifies that only a valid existing highway may be downgraded to a public right-of-way. There was concern that 40-203(4) might be read to allow a county or highway district to revive an abandoned highway as a public right-of-way.”

<sup>150</sup> Other provisions providing exemption from maintenance requirements are: 40 Idaho Code § 40-117(9) (public rights-of-way), 40-202(3) (unopened roads); 40-202(4) (public rights-of-way).



## 9. The public interest

Both the validation statute (Idaho Code § 40-203A) and the abandonment and vacation statute (Idaho Code § 40-203) require the commissioners to make a determination as to whether validation or vacation is in the public interest.<sup>151</sup>

### a. Vacation (section 40-203)

The abandonment/vacation statute contemplates that proceedings may be initiated either by petition of a private party or public entity or by resolution of the county or highway district. If the proceeding is initiated by resolution, the resolution should note that vacation may occur “where doing so is in the public interest.” Idaho Code § 40-203(1)(a). This ambiguously phrased requirement does not mean that the commissioners are to announce at the outset (prior to hearing the evidence) that the vacation is in the public interest. Doing so in a quasi-judicial proceeding would be entirely inappropriate. Rather, this provision should be understood as saying that the resolution should note that the vacation will be approved only if found to be in the public interest. Where the commissioners initiate vacation proceedings by acting on a petition by another person, the statute contains no provision calling for a statement about the public interest when initiating the proceedings. Idaho Code § 40-203(1)(b).

In any event, once the vacation proceeding is completed, the commissioners are obligated to decide whether the vacation is in the public interest and issue written findings and conclusions. Idaho Code § 40-203(1)(h). This requirement is repeated in Idaho Code § 40-203(5).

### b. Validation (section 40-203A)

Like the vacation statute, the provision for validation of public roads may be initiated either by a petition by a private party or public entity, or by resolution of the county or highway district itself.

Unlike the vacation statute, the validation statute does not mention the public interest in connection with a resolution establishing the proceeding.

The validation statute requires that, after a public hearing, the commissioners must determine whether keeping the road as a public road is in the public interest. Idaho Code § 40-203A(3).

In *Sopatyk v. Lemhi Cnty.*, 151 Idaho 809, 816, 264 P.3d 916, 923 (2011) (W. Jones, J.), the Court noted that the vacation/abandonment statute (Idaho Code § 40-203(1)(h)) requires findings and conclusions but that the validation statute (Idaho Code § 40-203A(3)) does not. *Sopatyk*, 151 Idaho at 816, 264 P.3d at 923. Likewise, the Court contrasted the validation statute with the requirement under the Idaho Administrative Procedure Act requiring a reasoned explanation of the decision, Idaho Code § 67-5248(1)(a). *Id.* Be that as it may, the better practice is to provide a clearly articulated basis for the decision in any decision affecting the legal status of a road.

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<sup>151</sup> The terms “abandonment” and “vacation” are synonymous and redundant in this context. There are not separate proceedings for abandonment versus vacation. Validation proceedings are distinct from abandonment and vacation proceedings, but the two may, and probably should, be combined into a single proceeding allowing the commissioners to resolve the matter either by validating or vacating the subject road (or parts thereof).

**c. Official highway map**

In addition, Idaho Code § 40-202(1)(b) requires a public interest determination before adopting the official county or highway district road map.

**B. Judicial review of validation and abandonment/vacation (§ 40-208)**

Note: See *Idaho Land Use Handbook* for a broader discussion of the nature of judicial review in Idaho.

Both the abandonment/vacation statute (Idaho Code § 40-203(1)(k)) and the validation statute (Idaho Code § 40-203A(4)) provide for judicial review of any final decision by the county or highway district pursuant to Idaho Code § 40-208. Section 40-208 is a sort of “mini” Administrative Procedure Act specifically set up for road decisions.<sup>152</sup>

The statute governing judicial review of road validation actions, Idaho Code § 40-208 was enacted in 1993. 1993 Idaho Sess. Laws, ch. 412 § 6. Prior to 1993, the appeal deadline, at least as to counties, was governed by a statute generically applicable to all appeals from county decisions. That statute simply linked to the judicial review provisions of the Idaho Administrative Procedure Act (“IAPA”), thus embracing the IAPA’s 28-day deadline. Idaho Code § 31-1506. Prior to 1995, that statute had been codified to Idaho Code 31-1509. 1995 Idaho Sess. Laws, ch. 61 § 11. Prior to 1993, the statute did not link to the IAPA, but instead set its own 20-day deadline. 1993 Idaho Sess. Laws, ch. 103 § 2. This latter statute, by the way, is the one quoted by the Court in *Floyd v. Bd. of Comm’rs of Bonneville Cnty.* (“*Floyd II*”), 137 Idaho 718, 723 52 P.3d 863, 868 (2002).

In *Cobbley v. City of Challis*, 143 Idaho 130, 133-34, 139 P.3d 732, 735-36 (2006), the Idaho Supreme Court held that a petition for judicial review pursuant to Idaho Code § 40-208 is the exclusive means to challenge a county’s decision concerning the validation of a road. Citing *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984), the Court reiterated that, when provided, statutory judicial review proceedings are exclusive remedies.

Until 1993, judicial review of road validations and abandonment decisions was governed by Idaho Code § 31-1512 (which provided for judicial review of decisions by counties) and Idaho Code § 40-1614 (which made those judicial review provisions applicably to highway districts). Under these statutes, judicial review was de novo, meaning that the district court could accept new evidence and would consider the matter anew (without deference to the administrative decision-maker).<sup>153</sup>

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<sup>152</sup> The Idaho Administrative Procedure Act (“IAPA”), Idaho Code §§ 67-5201 to 67-5292, governs procedures and judicial review of state agencies. It does not apply to local governments such as counties and highway districts (unless some other statute so provides). *Petersen v. Franklin County*, 130 Idaho 176, 182, 938 P.2d 1214, 1220 (1997); *Allen v. Blaine County*, 131 Idaho 138, 140, 953 P.2d at 578, 580 (1998); *Arthur v. Shoshone County*, 133 Idaho 854, 859, 993 P.2d 617, 622 (Ct. App. 2000).

<sup>153</sup> What became section 40-1614 (and was repealed in 1985) may be traced back to 1911 Idaho Sess. L. ch. 55, § 18, which provided that appeals of decisions by highway districts are subject to judicial review in the same manner in which appeals are taken to district court from the board of county commissioners. “Prior to the enactment of I.C. § 40-208, I.C. § 31-1512 applied to judicial review of Commissioners’ decisions. I.C. § 31-1512 required that upon appeal, the matter be heard anew.” *Floyd v. Bd. of Comm’rs of Bonneville County* (“*Floyd I*”), 131 Idaho 234, 237, 953 P.2d 984, 987 (1998). “I.C. § 40-1614 itself recognizes this principle by

In 1993 the Legislature repealed the prior judicial review provisions and added a separate judicial review section (Idaho Code § 40-208) to the road statute for the first time. 1993 Idaho Sess. Laws, ch. 412 (enacting Idaho Code § 40-208); 1994 Idaho Sess. L. ch. 35 (repealing Idaho Code § 31-1512). From 1993 until 2013, section 40-208 provided a deferential standard of review—essentially setting out a mini-administrative procedures act not unlike that provided in the Idaho Administrative Procedure Act (“IAPA”), Idaho Code § 67-5279(3).<sup>154</sup>

In 2013, the Legislature amended section 40-208. 2013 Idaho Sess. Laws, ch. 239 (H.B. 321). It retained a deferential standard and record-based review for challenges to the administrative body’s determination of the public interest. Idaho Code § 40-208(6). But it returned to something approaching a de novo standard of review for everything else (that is, issues involving whether a road was lawfully created or was previously abandoned, as well as its width). This differs slightly from true de novo review in that the court does not begin with a blank slate. Rather, the court “shall consider the record before the board.” Idaho Code § 40-208(6). However, “the court may accept new evidence and testimony supplemental to the record” and “shall consider those issues anew.” Idaho Code § 40-208(6). Thus, to some extent, the administrative hearing is a dry run. The statute does seem to contemplate allowing parties to undertake more research and homework after the administrative hearing. On the other hand, the statute does not require the court to accept the new evidence. It says the court “may” accept new evidence, while every other verb in this subsection is “shall.” Moreover, subsection 40-208(7) makes the administrative process at the county or highway district a mandatory first step. It would seem, then, that the Legislature did not intend for that county or highway district ruling to be a pointless preliminary exercise. Thus, if it appeared that, for strategic reasons, a party waited out the administrative hearing and then sought to spring new evidence only during the trial, an argument could be made that the court should not entertain the new evidence. The statute does not lay out a standard for how a court is to determine when to accept new evidence. But some sort of good faith test would seem appropriate.

The statute is silent as to whether discovery may be obtained.

In addition, the Legislature amended subsection 40-208(5) in 2013 to allow parties to present additional material evidence to the court. This provision, seemingly redundant with subsection 40-208(6), is aimed at a different purpose than de novo review. It provides:

In such case, the court may order that the additional information be presented to the commissioners upon conditions determined by the court. The commissioners may modify their findings and decisions by reason of the

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providing for judicial review. . . . [A]ppeals are lodged as provided for in I.C. § 40-1614, supra, incorporating by reference I.C. § 31-1509 through I.C. § 31-1512, the provisions for appeals from action of the county commissioners. . . . I.C. § 31-1512 provides for de novo review.” *Nicholas v. Bodine*, 92 Idaho 639, 642-43, 448 P.2d 645, 648-49 (1968) (Spear, J.).

<sup>154</sup> The standards in the IAPA (Idaho Code § 67-5279(3)) and former section 40-208(7) were essentially identical. The only difference was that section 40-208(7)(e) provided a “clearly erroneous” rule for review of fact-finding, in contrast to the “substantial evidence” test set out in the IAPA, Idaho Code § 67-5279(3)(d). However, this is a difference without a distinction; the two tests are identical. *Galli v. Idaho County*, 146 Idaho 155, 158, 191 P.3d 233, 236 (2008) (W. Jones, J.) (“A decision is clearly erroneous when it is not supported by substantial and competent evidence.”). *Evans v. Teton County*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003) (“factual findings are not clearly erroneous so long as they are supported by substantial . . . evidence”).

additional information and shall file that information and any modifications, new findings, or decisions with the reviewing court.

Idaho Code § 40-208(5). Thus, the purpose of the additional evidence under this subsection is to allow a remand and a second chance for the commissioners to evaluate the evidence.

### **C. Deadlines for reconsideration and judicial review**

The petition for judicial review must be filed within 28 days of the agency's final action and the exhaustion of all administrative remedies. Idaho Code §§ 40-203(1)(k), 40-203A(4), and 40-208(2). Sections 40-203(1)(k) and 40-203A(4) refer to this as an "appeal." Section 40-208(2) refers to it as judicial review. They are the same thing.

Litigants must pay careful attention to this deadline. Our Supreme Court has described the deadline as jurisdictional:

Requirements for timely filing and service of a petition for review are jurisdictional. Absent compliance with this statutory requirement, a district court has no jurisdiction to review a final determination of the district board. *Lindstrom v. Dist. Board of Health Panhandle Dist. I*, 109 Idaho 956, 712 P.2d 657 (Ct. App. 1985). *See also Freeman v. Sunshine Mining Co.*, 75 Idaho 292, 271 P.2d 1022 (1954) (requirements of statutes relative to perfecting an appeal in workmen's compensation cases are mandatory and jurisdictional, and failure to comply therewith deprives the court of jurisdiction); *State v. James*, 112 Idaho 239, 731 P.2d 234 (Ct. App. 1986) (requirement of perfecting an appeal within the forty-two day time period is jurisdictional, and appeals taken after expiration of the filing period must be dismissed). The filing of a petition for review of a board's decision within the time prescribed by statute is a jurisdictional matter that cannot be waived by the parties. *Stout v. Cunningham*, 29 Idaho 809, 162 P. 928 (1917).

*Floyd v. Bd. of Comm'rs of Bonneville Cnty.* ("Floyd II"), 137 Idaho 718, 723, 723 52 P.3d 863, 868 (2002) (Walters, J.) (emphasis supplied). This case arose under the predecessor to the current judicial review provision.<sup>155</sup> There is no reason to think, however, that the same jurisdictional limitation would not apply to Idaho Code § 40-208.

Section 40-208 states that the clock begins to run upon "filing of the final decision of the commissioners." Idaho Code § 40-208(2). Presumably this means the date when the commission files its

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<sup>155</sup> The current statute governing judicial review of road validation actions, Idaho Code § 40-208 was enacted in 1993. 1993 Idaho Sess. Laws, ch. 412 § 6. Prior to 1993, the appeal deadline, at least as to counties, was governed by a statute generically applicable to all appeals from county decisions. That statute simply linked to the judicial review provisions of the Idaho Administrative Procedure Act ("IDPA"), thus embracing the IAPA's 28-day deadline. Idaho Code § 31-1506. Prior to 1995, that statute had been codified to Idaho Code 31-1509. 1995 Idaho Sess. Laws, ch. 61 § 11. Prior to 1993, the statute did not link to the IAPA, but instead set its own 20-day deadline. 1993 Idaho Sess. Laws, ch. 103 § 2. This latter statute is the one quoted by the court in *Floyd II*.

findings and conclusion, not the date of the decision. The Idaho Supreme Court has so held in the context of the Local Land Use Planning Act (“LLUPA”).<sup>156</sup>

The statute also authorizes motions for rehearing (the same thing as reconsideration). Idaho Code § 40-208(2).<sup>157</sup> The Supreme Court has ruled, albeit in *dictum*, that filing a motion for rehearing will stay the appeal clock. *Floyd II*, 137 Idaho at 724 n. 1, 52 P.3d at 869 n.1. The *Floyd II* Court had to struggle with the issue of whether a motion for reconsideration stayed the appeal deadline because it was decided on the basis of an appeal statute that pre-dated section 40-208, and on a prior Supreme Court decision, which the Court expressly overruled in *Floyd II*. However, the Court noted in *Floyd II* that the adoption of section 40-208 in 1993 “specifically allows rehearing, thus resolving the issue for the future.” *Floyd II*, 137 Idaho at 724 n. 1, 52 P.3d at 869 n.1.

Presumably the statute’s provision authorizing petitions for rehearing is self-executing, meaning that no implementing ordinance is required. The Court’s statement in *Floyd II* (discussed above) seems to assume so. But it could be read merely to authorize commissions to allow petitions for rehearing by ordinance. Accordingly, one should check to determine whether the local ordinance is contemplates petitions for reconsideration.

However, even if the local ordinance does not provide for rehearing (or reconsideration), arguably the statute mandates such a mechanism. Accordingly, the county or highway district would be well advised to act on the request for rehearing, rather than just run the clock on the appeal.

In addition to section 40-208, judicial review is governed by procedures set out in Idaho Rule of Civil Procedure 84 (“I.R.C.P. 84”). This rule governs judicial review of all actions by state agencies and local governments, unless otherwise provided by statute. Thus, I.R.C.P. 84 applies despite the fact that road validation appeals are not conducted pursuant to the IAPA. I.R.C.P. 84 sets out ten pages of detailed procedures including deadlines that are operative unless “a different time or procedure is prescribed by a statute.” I.R.C.P. 84(b)(1).

The filing of a petition for judicial review does not, in itself, stay the effectiveness of the Commission’s decision. Idaho Code § 40-208(3). However, the district court may issue a stay if it deems appropriate. *Id.*

#### **D. Venue**

“An action against a county may be commenced and tried in such county unless such action is brought by a county, in which case it may be commenced and tried in any county, not a party thereto.” Idaho Code § 5-403. Presumably, this applies to civil actions, not to judicial review.

“Proceedings for [judicial] review are instituted by filing a petition in the district court of the county in which the commissioners have jurisdiction over the highway or public right-of-way within twenty-eight

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<sup>156</sup> See discussion of judicial review in Allen, Meyer, et al, *Idaho Land Use Handbook: The Law of Planning, Zoning, and Property Rights in Idaho* (2007).

<sup>157</sup> The rehearing provision applicable to road validations/vacations corresponds (roughly) to the provision for reconsideration in the Idaho Administrative Procedure Act (“IAPA”), (Idaho Code §§ 67-5246(4) and (5)). This is in contrast to local land use planning decisions. The Local Land Use Planning Act (“LLUPA”), Idaho Code §§ 67-6501 to 67-6538, incorporates some IAPA provisions, but not those dealing with reconsideration. *Arthur v. Shoshone County*, 133 Idaho 854, 858-59, 993 P.2d 617, 621-22 (Ct. App. 2000) (Lansing, J.).

(28) days after the filing of the final decision of the commissioners, or, if a rehearing is requested, within twenty-eight (28) days after the decision thereon.” Idaho Code § 40-208(2).

One final note: One should make certain that the petition for judicial review is properly filed in the proper court proceeding. In *Cobbley v. City of Challis*, 143 Idaho 130, 139 P.3d 732 (2006), litigants seeking to judicial review of a road validation had their case thrown out when they filed their “petition” with the court in the course of a remand of another tort case against the city, rather than as a new lawsuit.

### **E. Res judicata effect of unappealed decision**

A county or highway district’s validation or vacation/abandonment determination has the equivalent of res judicata effect once the decision becomes final.<sup>158</sup> Any affected person may seek judicial review. If that occurs, the court’s decision, obviously, has res judicata effect. Similarly, if no appeal is taken, the administrative decision to validate or abandon becomes final, with identical res judicata effect. This is illustrated by the case of *Cobbley v. City of Challis* (“*Cobbley I*”), 143 Idaho 130, 139 P.3d 732 (2006) (J. Jones, J.).<sup>159</sup>

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<sup>158</sup> “In the absence of fraud or collusion, the courts cannot, in an action of this character, revise the discretion of the board touching matters within their jurisdiction. . . . Administrative discretion must be lodged somewhere, and after a board of county commissioners has in good faith acted upon a matter within its jurisdiction, though carelessly and improvidently, and no appeal is taken, the order becomes final, and is not subject to collateral attack.” *Dexter Horton Trust & Sav. Bank v. Clearwater County*, 235 F. 743, 747 (D. Idaho 1916). See also discussion in *Sagewillow, Inc. v. IDWR* (“*Sagewillow II*”), 138 Idaho 831, 844, 70 P.3d 669, 682 (2003) (Eismann, J.) (“The doctrine of res judicata applies to administrative proceedings.”).

<sup>159</sup> In that case, the Cobbleys failed to appeal a validation of Antelope Road by Custer County. Instead, they filed papers that sought to overturn the validation in a separate civil lawsuit against the City of Challis. “The City moved to dismiss and the district court ruled that the County’s validation of the road precluded the Cobbleys from asserting that the City owned it.” *Cobbley II*, 143 Idaho at 131, 139 P.3d at 733. The Idaho Supreme Court affirmed the district court:

The Cobbleys argued to the district court, and argue to us, that they did not need to file a separate petition for judicial review of the County’s validation decision.

...

The district court’s ruling is correct: a petition for judicial review of a road-validation decision of a local governing board is a distinct form of proceeding and cannot be brought as a pleading or motion within an underlying civil lawsuit. A board of county commissioners’ authority over highways derives from the Legislature’s delegation of its authority over roads and highways. See I.C. § 40–201. The Legislature has provided the method by which certain persons, or the board having jurisdiction over the particular highway system, may initiate proceedings to validate a road. I.C. § 40–203A. “Judicial review” is defined by our Rules of Civil Procedure as “the district court’s review pursuant to statute of actions of agencies . . . .” Idaho R. Civ. P. 84(a)(2)(C). Judicial review of an administrative decision is wholly statutory; there is no right of judicial review absent the statutory grant. Idaho R. Civ. P. 84(a)(1); *Gibson v. Ada County Sheriff’s Dep’t.*, 139 Idaho 5, 8, 72 P.3d 845, 848 (2003); see also *Sellers v. Employment Sec. Commn. of Wyoming*, 760 P.2d 394, 395 (Wyo.1988). Thus, a party’s failure to physically file a petition for judicial review with the district court within the time limits prescribed by statute

**F. May a county or highway district settle or resolve a road dispute outside of the validation process?**

It frequently occurs that a county or highway district will disagree with a private landowner about the existence, location, or width of a public right-of-way across the landowner's property. As discussed in the sections above, the landowner is obligated to petition for validation/vacation of the road, and may proceed with a quiet title action only if the county or highway district does not initiate the proceeding within 30 days. Idaho Code § 40-208. The county or highway district is similarly obligated to initiate a validation proceeding rather than initiating a quiet title action. If a validation/vacation proceeding is initiated, "those proceedings and any appeal or remand therefrom shall provide the exclusive basis for determining the status and width of the highway . . . ." Idaho Code § 40-208. This would seem to suggest that, once validation/vacation proceedings have been initiated, the parties do not have the authority to terminate the proceedings and settle the matter via stipulation, other contract, easement, quitclaim deed, or otherwise.

Even if no validation/vacation proceedings have been initiated, a stipulation, settlement, quitclaim deed, or similar arrangement might be seen as improper short-circuiting of the public's interest in the resolution of such matters.

In *Infanger v. City of Salmon*, 137 Idaho 45, 44 P.3d 1100 (2002) (Eismann, J.), the Idaho Supreme Court set aside as void an "exchange" between the city and a landowner to facilitate relocation of a public right-of-way to a different location. The Court explained:

There is a clear distinction between a city vacating a city street and a city exchanging a portion of a city street for other property. The vacation of a city street is governed by Idaho Code § 50-311 and, if the street is part of a plat or subdivided tract, by Idaho Code § 50-1321. The exchange of city real property for other property is governed by Idaho Code § 50-1403. Idaho Code § 50-1403 does not apply to the vacation of a city street. The Ordinance was drafted as an exchange of real property under Idaho Code § 50-1403 rather than as a vacation of a city street under Idaho Code §§ 50-311 and 50-1321.

*Infanger*, 137 Idaho at 49, 44 P.3d at 1104 (footnote omitted).

Under Idaho law, however, a city has no authority to convey a portion of a city street. In Idaho, city streets from side to side and end to end belong to the public and are held by the municipality in trust for the use of the public. *Kleiber v. City of Idaho Falls*, 110 Idaho 501, 716 P.2d 1273 (1986); *Keyser*

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and the Rules of Civil Procedure is jurisdictional and results in a dismissal of the appeal. Idaho R. Civ. P. 84(n).

*Cobbley II*, 143 Idaho at 133, 139 P.3d at 735 (emphasis supplied).

The finality of the validation decision is reinforced by the 2013 amendments to the judicial review provisions, which provide that if a validation or abandonment proceeding is initiated, the proceeding "shall provide the exclusive basis for determining the status and width of the highway, and no court shall have jurisdiction to determine the status or width of said highway except by way of judicial review." Idaho Code § 40-208(7).

*v. City of Boise*, 30 Idaho 440, 165 P. 1121 (1917). In the absence of a statute expressly permitting it to do so, a city may not make a valid contract permanently alienating a part of a city street or permitting a permanent encroachment and obstruction thereon limiting the use of the street by the public. *Barton v. State*, 104 Idaho 338, 659 P.2d 92 (1983); *State v. Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596 (1959); *Boise City v. Sinsel*, 72 Idaho 329, 241 P.2d 173 (1952).

*Infanger*, 137 Idaho at 49, 44 P.3d at 1104.

Although this decision dealt with city streets rather than streets owned by a county or highway district, the same logic would seem to apply.

Arguably, if a title dispute were properly before a court (either through judicial review or a quiet title action), the parties, with court approval, would have the power to resolve issues of title, width, and location via a stipulated settlement. Arguably, doing so would not deprive the public of its interest in the tight-of-way given that (1) anyone could have sought to intervene in the litigation and (2) the court would be obligated not to approve a stipulation that did not comport with the law and facts. But this is an open question.

The safest way to “settle” a dispute over the existence, location, or width of an alleged public right-of-way is through validation/vacation proceedings. Prior to completion of the validation proceeding, the interested parties and the governmental entity could enter into a contingent settlement agreement. The agreement should expressly provide that it does not bind or in any way restrict the decision-making process and that the commissioners will go into the validation/vacation hearing with an open mind. If, after hearing public testimony and all the evidence offered, the commissioners adopt findings and conclusions that are consistent with the settlement terms (and appeals have run), the settlement would go into effect.

## **G. Official road maps (§§ 40-202(1), 40-202(6), 40-1310(9), and 40-604(13))**

### **1. Terminology**

First, a word on terminology. Title 40 (the road statutes) defines “public highway” and “public right-of-way” in ways that do not conform to common usage of those terms. One might imagine that a highway includes fee ownership while a public right-of-way reflects ownership of an easement only. But that is not how they are defined. The Idaho Legislature employs the term “public highway” to describe public roads that are maintained by the state, county, highway district, city, or other governmental entity.<sup>160</sup> In contrast, “public rights-of-way” describe rights-of-way that are public but are not required to be maintained by the government.<sup>161</sup> This Handbook uses the term “road” to include both highways and public rights-of-way.

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<sup>160</sup> “‘Public highways’ means all highways open to public use in the state, whether maintained by the state or by any county, highway district, city, or other political subdivision.” Idaho Code § 40-117(7). See also a separate definition of “highways” provides, which does not specify that they must be publicly maintained. Idaho Code § 40-109(5).

<sup>161</sup> “‘Public right-of way’ means a right-of-way open to the public and under the jurisdiction of a public highway agency, where the public highway agency has no obligation to construct or maintain, but may expend



## 2. Overlapping statutes

Five largely redundant but different Idaho statutes require counties and highway districts to adopt an official map of all public highways and public rights-of-way.

- Idaho Code § 40-202(1) provides for the “initial selection” of roads in the county or highway district system.<sup>162</sup>
- Idaho Code § 40-202(2) provides that for newly acquired roads (i.e., after the “initial selection”) the commissioners shall either record the relevant order, deed, etc. or update the official road map.<sup>163</sup>
- Idaho Code § 40-202(6) requires that an official road map be updated every five years.<sup>164</sup>
- Idaho Code §§ 40-604(13) repeats the language in section 40-202(6), but applies only to counties.<sup>165</sup>

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funds for the maintenance of, said public right-of-way or post traffic signs for vehicular traffic on said public right-of-way. In addition, a public right-of-way includes a right-of-way which was originally intended for development as a highway and was accepted on behalf of the public by deed of purchase, fee simple title, authorized easement, eminent domain, by plat, prescriptive use, or abandonment of a highway pursuant to section 40-203, Idaho Code, but shall not include federal land rights-of-way, as provided in section 40-204A, Idaho Code, that resulted from the creation of a facility for the transmission of water. Public rights-of-way shall not be considered improved highways for the apportionment of funds from the highway distribution account.” Idaho Code § 40-117(9). This definition of “public right-of-way” was added in 1993 at the same time as the term “federal land right-of-way” was added at Idaho Code § 40-107(5). The code does not define the term “right-of-way” (it would appear at Idaho Code § 40-119). However, it defines the term “federal land rights-of-way” to describe R.S. 2477 roads located “on federal land.” Idaho Code § 40-107(5); see also Idaho Code § 40-204A. The reference to being “on federal land” may be read to limit the definition to those located on federal land today (excluding R.S. 2477 roads across land that is now in private ownership). Alternatively, the definition might be understood to refer to roads located on federal land when they were created. The only places where the term appears substantively in the code (Idaho Code §§ 40-203(i) and 40-204A) do not read as if they were intended to be limited to R.S. 2477 roads still on federal lands.

<sup>162</sup> Section 40-202(1) was enacted in 1986. 1986 Idaho Sess. Laws, ch. 206, § 2 (H.B. 556). It was amended in 1993 to make it applicable also to public rights-of-way. 1993 Idaho Sess. Laws, ch. 412, § 3 (S.B. 1108).

<sup>163</sup> Section 40-202(2) was enacted in 1986. 1986 Idaho Sess. Laws, ch. 206, § 2 (H.B. 556). The 1986 Act required both recording and the amendment of the map. It was amended in 1992, to require either recording or amendment of the map. 1992 Idaho Sess. Laws, ch. 55, § 1 (H.B. 627). It was amended again in 1993 to make it applicable also to public rights-of-way. 1993 Idaho Sess. Laws, ch. 412, § 3 (S.B. 1108).

<sup>164</sup> Section 40-202(6) was enacted in 1998. 1998 Idaho Sess. Laws, ch. 184, § 1 (S.B. 1367). In 2000, the compliance deadline was advanced from 2000 to 2005. 2000 Idaho Sess. Laws, ch. 251 (S.B. 1407). It was amended again in 2013 to make it applicable also to highways. 2013 Idaho Sess. Laws, ch. 239 § 3 (H.B. 321).

- Idaho Code § 40-1310(9) repeats the language in section 40-202(6), but applies only to highway districts.<sup>166</sup>

To understand how these five statutes interact it is helpful to step through the legislative history.

In 1986, the Legislature enacted the first statute requiring the adoption of official road maps. 1986 Idaho Sess. Laws, ch. 206, § 2 (H.B. 556) (codified at Idaho Code § 40-202(1)). It provides for the “initial selection of the county highway system and highway district system.” It applied only to public highways (i.e., publicly maintained highways). The same 1986 Act added section 40-202(2) providing that if additional roads are added after the initial selection, they must be recorded and the official map must be modified.

In 1992, the Legislature amended section 40-202(2) changing the “and” to “or” so that documents regarding acquired roads could be recorded or the official road map could be updated. 1992 Idaho Sess. Laws, ch. 55, § 1 (H.B. 627).<sup>167</sup>

In 1993, the Legislature amended sections 40-202(1) and (2) to add “public rights-of-way” (which are not publicly maintained). 1993 Idaho Sess. Laws, ch. 412, § 3 (S.B. 1108).

In 1998, the Legislature enacted Idaho Code § 40-202(6), also requiring an official road map, providing that it be updated at five years.<sup>168</sup> 1998 Idaho Sess. Laws, ch. 184, § 1 (S.B. 1367). When enacted in 1998, this provision applied only to “public rights-of-way.” Since 1993, section 40-202(1) applied to both highways and public rights-of-way. So why a separate provision (section 40-202(6)) would be added in 1998 calling for a road map of only public rights-of-way is unclear. In any event, section 40-202(6) was amended again in 2013 to make it applicable to both highways and public-rights-of-way. Thus the two are seemingly redundant.

Adding to the confusion, when section 40-202(6) was added in 1998, the operative language was repeated verbatim, for no apparent reason, in two other newly created subsections: Idaho Code §§ 40-604(13), which applies to counties and Idaho Code § 40-1310(9), which applies to highway districts. 1998 Idaho Sess. Laws, ch. 184, §§ 2 and 3 (S.B. 1367).

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<sup>165</sup> Subsection 40-604(13) was added in 1998. 1998 Idaho Sess. Laws, ch. 184, § 2 (S.B. 1367). It was enacted as subsection 40-604(14). The codification corrected this to subsection “13,” which was made necessary by the deletion of another subsection of section 40-604 by a different Senate bill in the same year.

<sup>166</sup> Subsection 40-1310(9) also was added in 1998. 1998 Idaho Sess. Laws, ch. 184, § 3 (S.B. 1367).

<sup>167</sup> The legislative history of the 1992 amendment offers this explanation: “Mr. Dave Wyncoop [should be Wynkoop], an attorney with the Ada County Highway District, told the committee ACHD is very much in favor of the legislation, but they would ask to change line 30, the word ‘and’ to ‘or’ because it refers to official maps and makes the legislation applicable and acceptable to counties who may not have adopted official maps.” *Idaho House Local Gov’t Committee Minutes* (Feb. 12, 1992). In other words, the Legislation makes clear that may comply with the requirement of section 40-202(2) even if it has not yet adopted an official road map so long as it records the relevant order, deed, or other document.

<sup>168</sup> Section 40-202(1) refers to an “official” map, while section 40-202(6) refers only to a “map.” This distinction appears to be inconsequential, since both are formally adopted and thus “official.”

In 2013, the Legislature amended section 40-202(6) to make it applicable to both “highways and public rights of way.” 2013 Idaho Sess. Laws, ch. 239, § 3 (H.B. 321). However, the 2013 Act failed to include similar corrections to the carbon copies of the provisions in Idaho Code § 40-604(13) and § 40-1310(9). Indeed, the 2013 Act also made other changes to the mapping requirement (adding new sections 40-202(7) and 40-202(8)), which changes were not incorporated into Idaho Code § 40-604(13) and § 40-1310(9).

To recap, subsection 40-202(1) began as limited to publicly maintained highways, while subsection 40-3202(6) began as limited non-publicly maintained public rights-of-way. They have since been amended (in 1993 and 2013, respectively) to make them each applicable to both highways and public rights-of-way. Accordingly, the two statutes are now largely redundant, while more detailed provisions are set out in subsections 40-202(7) and 40-202(8). Subsections 40-604(13) and 40-1310(9) remain limited to public rights-of-way, but add nothing to the substantive or procedural requirements of subsections 40-202(6), (7), and (8). As they stand today, the difference between subsection 40-202(1) and subsection 40-202(6) is that the former applies to the “initial selection” of the road system, while the latter applies to the map updates that come out every five years. Thus, for entities that already have an official road map, the only relevant provisions are subsections 40-202(2), (6), (7), and (8).

As amended, these subsections read as follows:

(2) If a county or highway district acquires an interest in real property for highway or public right-of-way purposes, the respective commissioners shall:

(a) Cause any order or resolution enacted, and deed or other document establishing an interest in the property for their highway system purposes to be recorded in the county records; or

(b) Cause the official map of the county or highway district system to be amended as affected by the acceptance of the highway or public right-of-way.

...

...

(6) By July 1, 2005, and at least every five (5) years thereafter, the board of county or highway district commissioners shall publish in map form and make readily available a map showing the general location of all highways and public rights-of-way under its jurisdiction. Any board of county or highway district commissioners may be granted an extension of time with approval of the legislature by adoption of a concurrent resolution.

(7) Prior to designating a new highway or public right-of-way on the official map, the board of county or highway district commissioners shall confirm that no legal abandonment has occurred on the new highway or right-of-way to be added to the official map. In addition, the board of county or highway district commissioners shall have some basis indicating dedication, purchase, prescriptive use or other means for the creation of a highway and public right-of-way with evidentiary support.

(8) The board of county or highway district commissioners shall give advance notice of hearing, by U.S. mail, to any landowner upon or within whose land the highway or public right-of-way is located whenever a

highway or public right-of-way is proposed for inclusion on such map and the public status of such highway or public right-of-way is not already a matter of public record. The purpose of this official map is to put the public on notice of those highways and public rights-of-way that the board of county or highway district commissioners considers to be public. The inclusion or exclusion of a highway or public right-of-way from such a map does not, in itself, constitute a legal determination of the public status of such highway or public right-of-way. Any person may challenge, at any time, the inclusion or exclusion of a highway or public right-of-way from such map by initiating proceedings as described in section 40-208(7), Idaho Code.

Idaho Code §§ 40-202(2), (6), (7), and (8).

The key points are:

- Counties and highway districts must update and re-publish their official road maps at least every five years.
- The map should include all roads open to the public, regardless of whether they are publicly maintained.
- The map need not include roads that have not yet been constructed and opened to the public.<sup>169</sup> Presumably, however, there is no reason that such roads could not be included in the map, if desired.
- The county or highway district is neither required nor expected to undertake a formal validation proceeding for every road within its system. However, the 2013 amendments emphasize that the highway district must have some credible basis for including a road on the official road map. Idaho Code § 40-202(7). This is a codification of the decision in *Homestead Farms, Inc. v. Bd. of Comm'rs of Teton Cnty.*, 141 Idaho 855, 861, 119 P.3d 630, 636 (2005) (Trout, J.)
- Before any new road is added to the map for the first time, the county or highway district must give advance notice by U.S. mail to any landowner whose land the road crosses, unless the status of the road already has been made a matter of public record. Idaho Code § 40-202(8).
- This dovetails with the requirement in Idaho Code § 40-202(2) that new roads either be recorded or the map amended. Thus, the best practice is to record the roads as they are acquired by the county or highway district. They should, of course, still be included on the

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<sup>169</sup> The definitions of public highways and public rights-of-way are both limited to those that have been opened to the public. Idaho Code §§ 40-117(7) and (9). However, counties and highway districts sometimes hold title to roads that have been dedicated or otherwise created that have never been constructed and opened. Idaho Code §§ 40-202(2) and (3). Note also that common law dedications allow roads to be dedicated to public use today, even if they are not constructed for many years.

official road map when it is next routinely amended, but no individual notice to landowners will be required.

- This individual notice by mail requirement only applies if the road is “upon or within” the land of the landowner. Thus, notice by mail is not required as to adjacent landowners, so long as no part of the road overlies any portion of land owned in fee by the landowner. To be safe, the county or highway district should give notice to adjacent landowners as well, unless the county or highway district knows with certainty the landowner’s property boundary does not overlap the road or its right-of-way.
- The notice by mail requirement applies only when a road “is proposed for inclusion on such map.” The author reads this to mean that notice by mail is required only when a road is included on the map for the first time. Any ambiguity in this regard is resolved by the provision that notice is not required if the road’s public status is “already a matter of public record.” Obviously, the prior official road map would have accomplished that.
- It bears emphasis that all of these individual notice by mail issues are mooted if the road has been recorded.
- Subsection 40-202(6) does not set out any other specific procedural requirements. In contrast, subsection 40-202(1) (applicable to the “initial selection” of roads) requires that “the commissioners shall cause notice to be given of intention to adopt the map as the official map of that system, and shall specify the time and place at which all interested persons may be heard.” Though not technically applicable to adoption of the five-year update map, it is a good practice for counties and highway districts to provide at least that minimal level of public involvement.
- The county or highway district should also follow whatever public notice and other procedural requirements are applicable for all public hearings.

### **3. Post-2013 procedural requirements for adoption of map.**

The 2013 amendment added new procedural requirements for the adoption of road maps:

(8) The board of county or highway district commissioners shall give advance notice of hearing, by U.S. mail, to any landowner upon or within whose land the highway or public right-of-way is located whenever a highway or public right-of-way is proposed for inclusion on such map and the public status of such highway or public right-of-way is not already a matter of public record. The purpose of this official map is to put the public on notice of those highways and public rights-of-way that the board of county or highway district commissioners considers to be public. . . .

Idaho Code § 40-202(8).

The first sentence of section 40-202(8) is procedural; it requires the commissioners to notify landowners in advance of a hearing on the inclusion of a road on the road map for the first time. This individual notice requirement applies only to roads that are not already designated as public as a matter of

public record. Thus, individual notice is not required for roads that are designated as public in deeds, formal dedications, or prior road inventory maps, validations, or quiet title actions.

Idaho Code § 40-202 does not describe the hearing process for adopting the official road map. Accordingly, the road map (or update thereto) should be approved at a public hearing, pursuant to whatever procedural requirements are ordinarily applicable to such hearings (in addition to the individual notice requirement for landowners).

#### **4. Official road maps do not establish title.**

The presence or absence of a road on an official road map may have some inferential evidentiary value. However, it is not determinative of the legal status of a road.<sup>170</sup>

In *Homestead Farms, Inc. v. Bd. of Comm'rs of Teton Cnty.*, 141 Idaho 855, 119 P.3d 630 (2005) (Trout, J.), the Court made clear that the adoption of an official road map is not a vehicle for validating or creating public roads:

When fulfilling their duty under I.C. § 40-202(6) to update and publish their official highway map, county commissioners should only adopt a map of already existing and accepted public highways; it is not a tool, in and of itself, to create those public highways. Certainly, if a road is not properly created as a public highway, its inclusion on an official county highway system map does not make it so, nor does it impose any requirement on a property owner to vacate what has never been established as a public roadway.

*Homestead Farms*, 141 Idaho 860, 119 P.3d at 635 (emphasis supplied).

The process by which a county selects a highway system or creates an official highway map does not also serve to adjudicate the public status of any roads within the county or create new public highways or rights-of-way.

*Homestead Farms*, 141 Idaho 859-60, 119 P.3d at 634-35 (emphasis supplied).

In *Halvorson v. N. Latah Cnty. Highway Dist.*, 151 Idaho 196, 254 P.3d 497 (2011) (Horton, J.), the Court reiterated that the inclusion or exclusion of a road from the official map has no bearing on whether a road is a public road.

The Halvorsens dispute the district court's reliance on the 1986 Highway District map, citing *Homestead Farms, Inc. v. Board of Commissioners of Teton Cnty.*, 141 Idaho 855, 862, 119 P.3d 630, 637 (2005) (Eismann, J. concurring). The Halvorsens are correct in this regard. "[I]f a road is not properly created as a public highway, its inclusion on an official county

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<sup>170</sup> From 1986 to 1993, the inclusion of a road on an official public road map precluded passive abandonment. The abandonment statute was amended in 1986 to exempt from passive abandonment roads "designated as part of a county or highway district system by inclusion on the official map." 1986 Idaho Sess. Laws, ch. 206, § 3 (H.B. 556) (codified at Idaho Code § 40-203(4), repealed by S.B. 1108 in 1993 when all passive abandonment was eliminated).

highway system map does not make it so, nor does it impose any requirement on a property owner to vacate what has never been established as a public roadway.” *Id.* at 860, 119 P.3d at 635.

*Halvorson*, 151 Idaho at 202, 254 P.3d at 503.

These holdings were codified in 2013. 2013 Idaho Sess. Laws, ch. 239, § 3 (H.B. 321) (codified in part at Idaho Code § 40-202(8)). The final three sentences of section 40-202(8) confirms that the official road map does not, in and of itself, determine road status.

The purpose of this official map is to put the public on notice of those highways and public rights-of-way that the board of county or highway district commissioners considers to be public. The inclusion or exclusion of a highway or public right-of-way from such a map does not, in itself, constitute a legal determination of the public status of such highway or public right-of-way. Any person may challenge, at any time, the inclusion or exclusion of a highway or public right-of-way from such map by initiating proceedings [for validation/vacation or quiet title] as described in section 40-208(7), Idaho Code.

Idaho Code § 40-202(8).

In sum, the idea behind public road map requirement (both before and after the 2013 amendment) is that the county or highway district must evaluate all roads within its jurisdiction and put the public on notice as to which roads it believes are public. But that does not make them public. In other words, the action does not affect title to land. Rather, the inclusion of such a public road on the map has the singular effect of putting the public on notice that credible evidence has been presented to the commission suggesting that the road appears to qualify as a public road. In this way, the map serves a valuable public notice purpose, but has no other legal effect (except, as noted above, to preclude passive abandonment between 1986 and 1993, when passive abandonment was eliminated).

Because the inclusion or exclusion of a road under Idaho Code § 40-202(6) has no dispositive legal effect with respect to title, the inclusion or exclusion of a road does not slander title. This conclusion is consistent with the Court’s observation that the mapping process “does not also serve to adjudicate the public status of any roads.”<sup>171</sup> *Homestead Farms*, 141 Idaho at 859, 119 P.3d at 634. In any event, counties and highway districts are well advised to make it clear through express disclaimers when they adopt their official public road map that their action does not constitute validation or abandonment of any road.

Although the road inventory requirement is stated in terms of a map, counties and highway districts may wish to consider providing textual material supplementing the map that identifies individual roads and the basis for their inclusion. This may be helpful in showing compliance with Idaho Code § 40-202(7) and avoiding *Homestead Farms*-type litigation (discussed below).

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<sup>171</sup> The proper legal mechanism for resolving disputes as to individual road or right-of-way segments is through the procedures established by the Legislature for road abandonment and vacation (Idaho Code § 40-203) and/or road validation (Idaho Code § 40-203A), or through a quiet title action. The availability of state quiet title actions, however, has been sharply limited by the 2013 amendment to Idaho Code § 40-208(7).

Query: Could placement of a road on a county or highway district map constitute “some positive act” by local officials sufficient to satisfy the “lax” standard under R.S. 2477? The author is not aware of a situation in which such a claim has been asserted. As a practical matter, this issue does not frequently present itself, because there were not many official public road maps at the time relevant for road creation under R.S. 2477.

**5. There must be a sound basis for inclusion of a road on the public road map.**

Although the official road map does not determine title, these maps still matter. People are likely to rely on them in ways that may affect property values, for instance. And the inclusion or exclusion of a road may make it necessary for affected parties to initiate costly validation or abandonment proceedings. The Idaho Supreme Court noted this point in *Homestead Farms*: “The Commissioners erred in placing these three disputed roads on the purported official map and requiring [landowners] to initiate proceedings to vacate them . . . .” *Homestead Farms*, 141 Idaho 860, 119 P.3d at 635. Accordingly, the Court said, commissioners must not include a road on the official map “absent clear evidence these roads were established existing public highways.” *Id.* The Court continued:

The decision to place roads on the county highway system map should be made only after a determination that a particular roadway occupies the status, in fact, of a public highway or right-of-way. Further, the decision of whether or not a road should be considered to be a public highway should be dependent upon that roadway having some basis through dedication, purchase, prescriptive use or some other accepted means of creating a public highway so there is some evidentiary support for the Commissioners’ determination to designate a road on the map. Only at that point should the Commissioners adopt an official map of the County’s highway system, reflecting all of those roads known to be, at that time, public highways.

*Homestead Farms*, 141 Idaho 861, 119 P.3d at 636.

The Court’s guidance quoted above was codified by the Legislature in 2013:

(7) Prior to designating a highway or public right-of way on the official map, the board of county or highway district commissioners shall confirm that no legal abandonment has occurred on the new highway or right-of-way to be added to the official map. In addition, the board of county or highway district commissioners shall have some basis through indicating dedication, purchase, prescriptive use or other means for the creation of a highway and public right-of-way with evidentiary support.

Idaho Code § 40-202(7).

**6. Judicial review of official road maps prior to 2013.**

Until the relevant statutes were amended in 2013 (2013 Idaho Sess. Laws, ch. 239 (H.B. 321)), a person dissatisfied with an official road map was not limited to the option of petitioning for validation, but could instead seek judicial review of the adoption of the map (subject to a 28-day deadline). In two cases, the Idaho Supreme Court ruled that section 40-208 governs decisions by counties and highway



commissions taken under section 40-202 in adopting road maps. *Homestead Farms, Inc. v. Bd. of Comm'rs of Teton Cnty.*, 141 Idaho 855, 858, 119 P.3d 630, 633 (2005) (Trout, J.); *Flying "A" Ranch, Inc. v. Cnty. Comm'rs of Fremont Cnty.* ("Flying A"), 157 Idaho 937, 342 P.3d 649 (2015) (Horton, J.).

Curiously, in those cases, the Court did not address on the fact that the judicial review statute only applies to persons aggrieved by a decision "in an abandonment and vacation or validation proceeding." Idaho Code § 40-208(1). In *Homestead Farms*, the Court simply noted that it is "logical" that review should be available and controlled by the same provisions:

Although there is no applicable standard of review previously articulated by the Court for such a situation, since I.C. § 40-202 is contained in the section of the Code relating to general provisions for the establishment and maintenance of the state and county highway system, including procedures required for abandonment, vacation or validation of highways, it is logical that the statutorily mandated standard of review under § 40-208 should apply to § 40-202 decisions. Therefore, the following standard will be applied in evaluating this appeal.

*Homestead Farms*, 141 Idaho 858, 119 P.3d at 633.

This was reiterated in *Flying A*, again, without explanation of how there can be judicial review at all:

*Homestead Farms* was clear in one important aspect: the standard of review imposed by Idaho Code section 40–208 applies to decisions to include roads on the highway system map under Idaho Code section 40–202.

*Flying A*, 157 Idaho 653-54, 342 P.3d at 941-42.

In *Flying A*, the Court clarified a reference to "some evidence" in *Homestead Farms*, making clear that it takes more than some evidence to justify inclusion of a road on the official map. Rather, the decision to include the road is judged under the clearly erroneous standard, meaning that it must be supported by "substantial and competent evidence." *Flying A*, 157 Idaho 654, 342 P.3d at 942. The Court further noted that a preponderance of evidence is sufficient, and the "clear and convincing evidence" standard does not apply. *Flying A*, 157 Idaho 654 n.4, 342 P.3d at 942 n.4.

The Court then addressed the shifting burden of proof in the context of the practical burden imposed on landowners when roads are inappropriately included on the map:

Thus, we continue to adhere to the view that the County bears the burden to produce substantial and competent evidence to support the necessary factual findings needed for the legal determination that a road has public status. In reaching this decision, we note the manifest unfairness of placing the burden of initiating proceedings on property owners to challenge the designation of a road as public in the absence of substantial and competent evidence that the road is, in fact, public.

*Flying A*, 157 Idaho 654, 342 P.3d at 942 (footnote omitted).

**7. As of 2013, public road status and road width may be determined only via validation and/or abandonment/vacation proceedings (with limited exceptions).**

The 2013 amendments not only eliminated judicial review of official road maps. Those amendments reversed the result in *Halvorson v. N. Latah Cnty. Highway Dist.*, 151 Idaho 196, 254 P.3d 497 (2011) (Horton, J.) (which allowed courts to determine the public road status of roads in the context of other civil actions). See discussion in section IV.S at page 149.

**H. Burden of proof and standard of proof**

**1. Semantics**

The following terms come into play in the evaluation of evidence:

1. The burden of proof
  - (a) The burden of production
  - (b) The burden of persuasion
2. The standard of proof

The burden of proof is composed of two burdens (production and persuasion).<sup>172</sup> The party with the burden of production has the initial duty to present some evidence on the matter. Only then does the other party have a duty to provide countervailing evidence. Once all the evidence is presented, the party with the burden of persuasion is the one with the duty to satisfy whichever “standard of proof” is applicable.

Thus, the burden of proof deals with which party has either the burden of production or the burden of persuasion. The standard of proof addresses how heavy that burden is.

The most common standards of proof (listed in order of strictness) are:

1. Proof beyond a reasonable doubt (in criminal cases)
2. Clear and convincing evidence (in private road prescription cases)
3. Preponderance of the evidence (in road validation and abandonment proceedings)
4. Substantial and competent evidence (required to justify inclusion of a road on the official map)<sup>173</sup>

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<sup>172</sup> “‘Burden of proof’ encompasses both the burden of production and the burden of persuasion.” *Cowan v. Bd. of Cnty. Comm’rs of Freemont Cnty.*, 143 Idaho 501, 148 P.3d 1247 (2006) (Burdick, J.) (a land use case).

<sup>173</sup> “The Board’s factual determinations are binding on this Court even where there is conflicting evidence before the Board, so long as the determinations are supported by substantial and competent evidence. Substantial and competent evidence is less than a preponderance of the evidence, but more than a mere scintilla. Substantial and competent evidence need not be uncontradicted, nor must it necessarily lead to a certain conclusion; it need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusion as the fact finder.” *Spencer v. Kootenai Cnty.*, 145 Idaho 448, 456, 180 P.3d 487, 495 (2008) (J. Jones, J.) (citing *Cowan v. Bd. of Cnty. Comm’rs of Freemont Cnty.*, 143 Idaho 501, 517, 148 P.3d 1247, 1263 (2006) (Burdick, J.)).

Closely related to the standard of proof is the standard of review employed by courts in judicial review of administrative action. Three are commonly employed:

1. De novo review (as of 2013, a modified form of de novo review is applicable in judicial review of road creation and abandonment decisions, but is not applicable to judicial review of the public interest determination)
2. Clearly erroneous / substantial and competent evidence (applicable to judicial review of validation and vacation proceedings prior to 2013; also applicable to appellate review of a trial court's decision on the facts<sup>174</sup>)
3. Substantial evidence on the record as a whole (applicable to judicial review under the IAPA)

## **2. The standard of proof**

The standard of proof for public road creation is “preponderance of the evidence,”<sup>175</sup> *Floyd v. Bd. of Comm’rs of Bonneville Cnty.* (“*Floyd II*”), 137 Idaho 718, 724, 52 P.3d 863, 869 (2002) (Walters, J.); *Lattin v. Adams Cnty.*, 149 Idaho 497, 502, 236 P.3d 1257, 1262 (2010) (W. Jones, J.); *Flying “A” Ranch, Inc. v. Cnty. Comm’rs of Fremont Cnty.* (“*Flying A*”), 157 Idaho 937, 942 n.4, 342 P.3d 649, 654 n.4 (2015) (Horton, J.)), not the more demanding “clear and convincing evidence” standard applicable in private prescription cases, *Roberts v. Swim*, 117 Idaho 9, 12, 784 P.2d 339, 342 (Ct. App. 1989) (Swanstrom, J.). (On the other hand, the preponderance of the evidence standard is more rigorous than the substantial evidence standard that applies to judicial review of the agency’s determination.<sup>176</sup>)

When a validation or abandonment proceeding is appealed to district court, review is governed by the standards of review set out in Idaho Code § 40-208(6).

## **3. Burden of proof in establishing road creation**

Where a party initiates a quiet title action, the Idaho Supreme Court consistently has placed the burden of proof on the party initiating the proceeding. However, they have yet to articulate a clear rule on the subject, particularly in the context of validation and abandonment proceedings.<sup>177</sup>

In *Ross v. Swearingen*, 39 Idaho 35, 225 P. 1021, 1022 (1924) (Lee, J.), the Court held: “Appellants had the burden of establishing the existence of the public road described in the petition.” That case involved a dispute between two private parties. The Appellant (Ross) filed a petition with Washington County which sought an order compelling the neighbor (Swearington) to remove gates on a road. When the County denied the petition, Ross appealed. As the case’s headnote states: “The burden of establishing the existence of public road is on party who alleges it.” The headnote is clearer than the case itself, but it

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<sup>174</sup> *East Side Highway Dist. v. Delavan*, 2019 WL 6724484 at \*11, \*14 (Idaho Dec. 11, 2019) (Stegner, J.).

<sup>175</sup> “A ‘preponderance of the evidence’ is evidence that, when weighed with that opposed to it, has more convincing force and from which results a greater probability of truth.” *Harris v. Electrical Wholesale*, 141 Idaho 1, 3, 105 P.3d 267, 269 (2004) (quoting *Cook v. W. Field Seeds, Inc.*, 91 Idaho 675, 681, 429 P.2d 407, 413 (1967)).

<sup>176</sup> “Substantial and competent evidence is less than a preponderance of the evidence, but more than a mere scintilla.” *Spencer v. Kootenai County*, 145 Idaho 448, 456, 180 P.3d 487, 495 (2008).

<sup>177</sup> In any event, the cases have noted consistently that the burden of proof shifts to the opponent of the road on the issue of abandonment. These are discussed in the following section.

makes sense. The burden is on the appellant because it was the party making the allegation. That is plainly consistent with well-established common law principles.<sup>178</sup>

The same rule was applied in *Roberts v. Swim*, 117 Idaho 9, 784 P.2d 339 (Ct. App. 1989) (Swanstrom, J.), a quiet title action between two parties. In *Roberts*, however, the case turned on the existence of a private prescriptive easement, not a public road. The *Roberts* Court remanded because it found that the district court failed to appreciate that “Roberts [the plaintiff] had the burden of presenting ‘reasonably clear and convincing evidence’ establishing the requisite elements for an easement.” *Roberts*, 117 Idaho at 15, 784 P.2d at 345. Again, the Court did not provide further explanation, but the ruling would appear to simply apply the common law principle that he or she who presents a claim or raises an affirmative defense has the burden of proving it. (See prior footnote,)

*Ross* and *Roberts* were cases initiated as judicial actions (as opposed to judicial review). It appears that the first occasion in which the Idaho Supreme Court addressed the burden of proof issue in the context of a validation proceeding was *Floyd v. Bd. of Comm’rs of Bonneville Cnty.* (“*Floyd I*”), 137 Idaho 718, 724, 52 P.3d 863, 869 (2002) (Walters, J.). There, the Court said simply: “The burden rests on the County [the entity that initiated the validation proceeding] to prove by a preponderance of the evidence that public rights were established in the disputed segment of the road . . . .” *Floyd v. Bd. of Comm’rs of Bonneville Cnty.* (“*Floyd I*”), 137 Idaho 718, 724, 52 P.3d 863, 869 (2002) (Walters, J.). (The Court went on to say that the burden shifts to the party urging abandonment once road creation has been established. *Floyd II*, 137 Idaho at 728, 52 P.3d at 873.) The Court did not explain why the burden initially rests on the county; instead, it simply cited to *Roberts v. Swim*, 117 Idaho 9, 784 P.2d 339 (Ct. App. 1989) (Swanstrom, J.). Could it be that the burden is always on the party urging public road status? That seems unlikely. Such a rule would be at odds with common law principles, which seem to be the basis for *Roberts v. Swim*. It

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<sup>178</sup> *Corpus Juris Secundum* provides the black letter rule:

The burden of proof or persuasion as to a fact or issue generally rests on the party asserting or pleading it, or having the affirmative of the issue as determined by the pleadings, and remains on that party throughout the trial.

. . .

A party is not relieved of the burden of proof by the difficulty or inconvenience of satisfying it.

31A C.J.S. *Evidence* § 191 (2014).

If the party on whom the burden of proof rests fails to establish a prima facie case, the opposing party is not required to present any countervailing evidence. In other words, the party not having the burden of proof on an issue need not offer any evidence concerning it.

31A C.J.S. *Evidence* § 193 (2014).

In most cases, the party who has the burden of pleading a fact will have the burdens of producing evidence and of persuading the jury of its existence as well.

2 McCormick on Evidence § 337 (7<sup>th</sup> ed. 2014).

The Idaho Supreme Court said this applies in administrative hearings, too:

The customary common law rule that the moving party has the burden of proof—including not only the burden of going forward but also the burden of persuasion—is generally observed in administrative hearings.

*Intermountain Health Care, Inc. v. Bd. of County Comm’rs of Blaine County, Idaho*, 107 Idaho 248, 251, 688 P.2d 260, 263 (1984) (Walters, C.J.) (ellipses original) (quoting E. Cleary, *McCormick on Evidence* § 357 (3d ed. 1984)).

seems more likely that the party initiating the proceeding and advocating a particular position bears the burden of proof on that issue, which in that case happened to be the party urging public road status.

This conclusion is reinforced by *Ada Cnty. Highway Dist. v. Total Success Investments, LLC* (“*Total Success I*”), 145 Idaho 360, 365, 179 P.3d 323, 328 (2008) (Burdick, J.). In that case, the Court quoted *Floyd II* for the proposition that “[t]he highway district has the burden of proving by a preponderance of the evidence that public rights were established.” *Total Success I*, like *Roberts*, was a quiet title case initiated by the highway district. Thus, although the Court does not explain its reasoning, it appears that the reason the highway district bears the burden of proof is because it was the plaintiff.

On the other hand, all of the cases discussed above arose where the proponent of the public road initiated the administrative or judicial proceeding. The only case (of which the author is aware) in which the persons opposing the public road initiated the litigation is *Lattin v. Adams Cnty.*, 149 Idaho 497, 236 P.3d 1257 (2010) (W. Jones, J.). This was a quiet title action initiated by landowners who claimed the road was private. Nevertheless, the Court explicitly placed the burden on the county to prove road maintenance (and, by implication, other requirements of prescriptive use). At one point, the Court explained this burden in the context of summary judgment: “Even so, the County can point to nothing in the record suggesting that the road did not need maintenance over a period of any length prior to this lawsuit. A nonmoving party cannot resist a motion for summary judgment by resting on ‘mere allegations or denials of his pleadings.’” *Lattin*, 149 Idaho at 503, 236 P.3d at 1263. Elsewhere, however, the Court said, without explanation, that the County would have the burden of proof at trial: “Since the County has the burden at trial to prove that it would have maintained the road if such work was needed, there is no issue of material fact in support of this element.” *Lattin*, 149 Idaho at 503, 236 P.3d at 1263 (citing *Total Success I*, 145 Idaho at 365, 179 P.3d at 328). The Court’s unexplained reliance on *Total Success I* (a case in which the public road advocate initiated the litigation) could be read to support the proposition that the burden of proof is not a function of who raises the claim but is fixed as a matter of law on the advocate for the public road. The fact is, the Court has never explained its reasoning or articulated a clear rule.

In any event, the burden of proof is a concept that works best in an adversarial proceeding between competing parties presided over by a neutral decision-maker. It works in the courtroom. For example, the allocation of the burden of proof makes sense in the context of a quiet title action, such as *Farrell*, in which the county played the role of party-advocate against a private landowner.<sup>179</sup>

Burden of proof concepts also make sense in the context of controlling the county’s decision-making in a validation or vacation proceeding initiated by a private party. It makes less sense in a validation or vacation proceeding initiated by the county or highway district. However, no appellate decision has drawn this distinction. Indeed, in *Floyd II*, the Court said that the county—which initiated the validation proceeding—bore the burden of proof.

We would never say that the judge has the burden of proof. How can it be, then, that the county or highway district has the burden of proof in a proceeding that it initiates and decides? The governmental entity should not be seen as an advocate for (or opponent) public road status. That would be inconsistent with its role as quasi-judicial decision-maker. In the author’s view, the courts have not yet really grappled with this. Until they do, the author suggests that in validation proceedings, the decision maker should rule on questions of road creation and road abandonment based on a preponderance of the evidence approach.

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<sup>179</sup> *Farrell* addressed burden of proof only in the context of it switching to the opponent of the road when it came to proving abandonment.

#### **4. The burden of proof rests on the person claiming the road was abandoned.**

The person asserting abandonment carries the burden to prove abandonment, by a preponderance of the evidence:

Upon establishment of a public road by prescription, the burden shifts to the opponents of the public road to show a subsequent abandonment or extinguishment of those rights.

*Floyd v. Bd. of Comm'rs of Bonneville Cnty.* (“*Floyd II*”), 137 Idaho 718, 728, 52 P.3d 863, 873 (2002) (Walters, J.) (the Antelope Creek Road case).

[T]he defendants bore the burden on summary judgment to demonstrate that Grove Road had not received either public use or public maintenance for a period of at least five years, thus resulting in the road “ceas[ing] to be a highway for any purpose whatever.”

*John W. Brown Properties*, 138 Idaho 171, 175, 59 P.3d 976, 980 (2002) (“*John W. Brown IV*”).

The Court reinforced the point in another case decided the same year: “Once a public road has been established, the burden shifts to the one claiming that the road was abandoned to prove such abandonment.” *Farrell v. Bd. of Cnty. Comm'rs of Lemhi Cnty.*, 138 Idaho 378, 386, 64 P.3d 304, 312 (2002) (Schroeder, J.) (citing *Floyd*). “However, once a right of way or public road is proven the burden of showing abandonment of that road by non-use and non-maintenance is on the party asserting abandonment.” *Farrell*, 138 Idaho at 386, 64 P.3d at 312.

Likewise, in *Sopatyk v. Lemhi Cnty.*, 151 Idaho 809, 264 P.3d 916 (2011) (W. Jones, J.), the Court found that the burden of proof as to abandonment rested on a private landowner who opposed validation of a road. “The County had substantial evidence on which to find that Sopatyk could not meet the burden of showing that the road went unused for any five year period. Sopatyk gives no affirmative evidence that the public ceased using the road for any five year span before 1963.” *Sopatyk*, 151 Idaho at 816, 264 P.3d at 923.

#### **5. The burden of proof where abandonment will result in lack of access**

Idaho Code § 40-203(2) prohibits abandonment or vacation where the result is “to leave any real property adjoining the highway or public right-of-way without access to an established highway or public right-of-way.” In 2013, the Legislature added a provision placing the burden of proof to establish such land-locking on the landowner. 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified at Idaho Code §§ 40-114, 40-202, 40-203, 40-208, 40-2312).

#### **6. Burden on appeal from district court**

“On appeal the appellant carries the burden of showing that the district court committed error. Error will not be presumed but must be affirmatively shown on the record by appellant.” *Farrell*, 138 Idaho at 390, 64 P.3d at 316 (quoting *Western Community Ins. Co. v. Kickers Inc.*, 137 Idaho 305, 306, 48 P.3d 634, 635 (2002)).

## **7. Review of intertwined facts and law**

An appellate court freely applies the law to the facts:

We are faced with reviewing entwined questions of law and fact. As to narrative facts found by the trial court, we will defer to those that are supported by substantial, competent evidence. I.R.C.P. 52(a). However, we freely review whether the facts found are sufficient to satisfy the legal requirements for a public highway through public use and maintenance under I.C. § 40-202. *See Standards of Appellate Review in State and Federal Courts*, § 3.2.2 IDAHO APPELLATE HANDBOOK (Idaho Law Foundation, Inc. 1985).

*Burruv v. Stanger*, 114 Idaho 50, 52, 753 P.2d 261, 263 (Ct. App. 1988) (Swanstrom, J.), *aff'd*, 115 Idaho 114, 765 P.2d 139 (1988)).

### **I. Acknowledgement of R.S. 2477 rights-of-way (Idaho Code § 40-204A(6))**

A provision in the 1993 act addressing R.S. 2477 rights-of-way provides:

Persons seeking acknowledgment of federal land rights-of-way shall file with the county recorder the request for acknowledgment and for any supporting documentation. The county recorder shall record acknowledgments, including supporting documentation, and maintain an appropriate index of same.

Idaho Code § 40-204A(6).

Another section in the same act expressly provides that section 40-203A is the proper procedure for validation of R.S. 2477 rights-of-way. Idaho Code § 40-203A(5). Thus, the purpose of subsection 6 quoted above is a mystery. It authorizes any person to file such a request. It does not say what or on what basis the county is expected to respond. Nor does it say what effect, if any, such an acknowledgment would have. Instead, it simply says that an acknowledgment, if issued, should be recorded.

It is also unclear why the statute calls for these acknowledgments being filed only with the county, rather than with the appropriate highway district.

As a practical matter, this acknowledgment process appears to be little more than a “feel good” strategy for backers of R.S. 2477 rights-of-way. Those interested in actually resolving legal questions affecting a purported R.S. 2477 road should initiate a proper validation proceeding or quiet title action.

### **J. The encroachment statute (§ 40-2319)**

#### **1. Overview**

Counties and highway districts have express authority under Idaho Code § 40-2319 to take actions to remove or require others to remove encroachments on public roads in Idaho.<sup>180</sup> The statute applies to

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<sup>180</sup> The current statute dates to 1985, when the road laws were re-codified. Predecessor statutes date at least to the 1960s. *See State v. Kelly*, 89 Idaho 139, 403 P.2d 56 (1965) (“*Kelly I*”).

situations in which a person blocks or impairs public access by placing “gates, fences, buildings, or otherwise” within a public highway or right-of-way.

It bears emphasis that this obligation to address encroachments applies to both highways and public rights-of-way. As discussed in section IV.A.7 at page 113, counties and highway districts have a duty to maintain public highways, but not public rights-of-way. But they are obligated to keep both clear of encroachments.

A 2013 amendment, 2013 Idaho Sess. Laws, ch. 264 (H.B. 171), substantially clarified the operation of the statute and the situations in which a county or highway district can be held liable for failing to address an encroachment.<sup>181</sup> As discussed below, however, a few uncertainties remain.

As amended in 2013, the statute provides in full:

40-2319. Encroachments - Removal - Notice - Penalty for failure to remove - Removal by county or highway district - Abatement.

(1) If any highway or public right-of-way under the jurisdiction of a county or highway district is encroached upon by gates, fences, buildings, or otherwise, the appropriate county or highway district may require the encroachment to be removed.

(2) If the county or highway district has actual notice of an encroachment that is of a nature as to effectually obstruct and prevent the use of an open highway for vehicles or is unsafe for pedestrian or motorist use of an open highway, the county or highway district shall immediately cause the encroachment to be removed without notice.

(3) If the county or highway district elects to remove an encroachment as provided for in subsection (1) of this section, notice shall be given to the occupant or owner of the land, or person causing or owning the encroachment, or left at his place of residence if he resides in the highway jurisdiction. If not, it shall be posted on the encroachment, specifying the place and extent of the encroachment, and requiring him to remove the encroachment within ten (10) days.

(a) If the encroachment is not removed, or commenced to be removed, prior to the expiration of ten (10) days from the service or posting the notice, the person who caused, owns or controls the encroachment shall forfeit up to one hundred fifty dollars (\$150) for each day the encroachment continues unremoved;

(b) If the owner, occupant, or person controlling the encroachment, refuses either to remove it or to permit its removal, the county or highway district shall commence in the proper court an action to abate the

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<sup>181</sup> The amendment was prompted by the death of a motorist in Ada County killed by another driver who ran a stop sign. The stop sign was obscured by the branch of a tree. Six days earlier, the owner of the property with the tree had received notice from the Ada County Highway District (“ACHD”) to abate the obstruction. Under the statute at the time, ACHD did not believe it had the authority to remove the tree branch until the ten-day notice period had expired. The amendments made clear that a county or highway district may act in such situations without delay. New subsection (4) also limits the liability of counties and highway districts in such situations.



encroachment. If the county or highway district recovers judgment, it may, in addition to having the encroachment abated, recover up to one hundred fifty dollars (\$150) for every day the encroachment remained after notice, as well as costs of the legal action and removal; or

(c) If the owner, occupant or person controlling the encroachment fails to respond to the notice within five (5) days after the notice is complete, the county or highway district may remove it at the expense of the owner, occupant, or person controlling the encroachment, and the county or highway district may recover costs and expenses, as well as the sum of up to one hundred fifty dollars (\$150) for each day the encroachment remained after notice was complete.

(4) The duties referenced in the provisions of this section, whether statutory or common law, require reasonable care only and shall not be construed to impose strict liability or to otherwise enlarge the liability of the county or highway district. The county or highway district, while responsible for their own acts or omissions, shall not be liable for any injury or damage caused by or arising from the encroachment or the failure to remove or abate the encroachment as provided for in subsection (1) of this section. The provision of this section shall not be construed to impair any defense that the county or highway district may assert in a civil action.

(5) Nothing in this chapter shall be construed to limit, abrogate or supersede the provisions of this title governing the power, authority or jurisdiction of a county or highway district, including the authority to regulate the use of highways or public rights-of-way for pedestrian and motorist safety.

Idaho Code § 2319.

## **2. Right to abate**

Subsection (1) sets out the basic principle that counties and highway districts are entitled to require that encroachments be removed. The prohibition against encroachments is broadly stated to apply to all manner of encroachments: “gates, fences, buildings, or otherwise.” Idaho Code § 40-2319(1).

The provision applies both to highways (broadly defined by Idaho Code 40-109(5) as including “roads, streets, alleys and bridges) and to public rights-of-way (which are not required to be publically maintained, Idaho Code § 40-117(7)). For some reason, the statute references “highways” rather than “public highways,” but this appears to be inconsequential.

This section ambiguously speaks in terms of requiring the encroachment to be removed, without saying by whom. Read in context with the rest of the encroachment statute, it appears that this subsection is intended to encompass both removal by the county or highway district and a demand by the county or highway district that the landowner (or other person responsible for the encroachment) remove the encroachment.

Frankly, subsection 2319(1) seems unnecessary. It serves only as an introductory sentence to the statute. The actual mechanisms for abatement are provided in subsections 2319(2) and (3).

### **3. Immediate self-help—without notice and without penalties**

Subsection (2) authorizes counties and highway districts to act immediately to remove an obstruction that is preventing vehicular use or creating a safety hazard on an open highway. No notice to the affected landowner is required.

Note that subsection (2) applies only to “open highways.” Thus, it does not apply to obstructions in roads that have been dedicated to the public but never opened.

This self-help provision imposes a mandatory duty to act immediately. However, it is only applicable to “an encroachment that is of a nature as to effectually obstruct and prevent the use of an open highway for vehicles or is unsafe for pedestrian or motorist use of an open highway.” Where an encroachment unlawfully intrudes upon the public right-of-way (*e.g.*, with a fence or sign) but in a way that does not actually impair use of the road or create a safety hazard, this section does not apply. In some instances, the responsibility to act may be clear; in others, it is less so. Although the statute is written in mandatory terms, the governmental entity must exercise judgment in determining what constitutes a safety concern or physical obstruction.<sup>182</sup>

Subsection (2) contains no provision for penalties, damages, or attorney fees. Presumably, after removing the obstruction, the county or highway district could bring a civil action seeking reimbursement for its expense, and for attorney fees if successful, based on other principles of law (*e.g.*, trespass damages and Idaho Code § 12-117 for attorney fees). The statute, however, is silent on this.

### **4. Obstructions not requiring immediate action—notice required, penalties accrue**

Subsection 2319(3) addresses encroachments where there is no immediate need for self-help—that is, obstructions not falling under subsection 2319(2).

This section requires notice to “the occupant or owner of the land, or person causing or owning the encroachment.” If that cannot be readily determined (such as where it is unknown who placed the obstruction or where the ownership status is unclear), notice may be “posted on the encroachment.” Idaho Code § 40-2319(3).

#### **a. When the responsible party voluntarily removes the encroachment after notice.**

Subsection 2319(3)(a) provides that if the responsible party removes the encroachment within ten days of the notice, that is the end of the matter. If the responsible party voluntarily removes the

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<sup>182</sup> The question of how much obstruction is required to mandate removal under this section is addressed by *Total Success Investments, LLC v. Ada County Highway Dist.*, (“*Total Success II*”), 148 Idaho 688, 692, 227 P.3d 942, 946 (Ct. App. 2010) (Perry, J. pro tem.) discussed below. The holding in that case (that obstruction requires more than inconvenience) strongly suggests that unlocked gates do not mandate immediate removal without notice by the county or highway district, at least where the gate is in a remote, rural area and does not impair traffic flow. Indeed, some counties and highway districts have ordinances expressly authorizing certain unlocked gates on public roads pursuant to a permit process.

encroachment, but not until sometime after ten days, the party is responsible for a penalty of up to \$150 per day<sup>183</sup> beginning on the 11<sup>th</sup> day after notice.<sup>184</sup>

This subsection does not speak to the procedure for collecting this penalty. Presumably, it simply ties into subsection 2319(3)(b) and/or subsection 2319(3)(c). Frankly, it is unclear what purpose subsection 2319(3)(a) serves. It appears to be redundant with the penalty provisions in the subsections 2319(3)(b) and (c).

#### **b. Abatement action (district court)**

Subsection 2319(3)(b) provides that if the responsible party refuses to remove or allow removal of the encroachment after notice is provided, the county or highway district may initiate an abatement action in district court. Such an action could seek either an injunction affirmatively requiring the responsible party to remove the obstruction, a declaration authorizing the governmental entity to remove it at the responsible party's expense, or some combination.

If the county "recovers judgment" (i.e., prevails), it is also entitled to recover penalties of \$150 per day for each day after notice was provided. It also authorizes an award of "costs of the legal action and removal."

It is unclear whether "costs of the legal action" includes attorney fees. Typically, the terms "costs" and "attorney fees" are distinct terms of art, and costs includes only a limited and specific set of costs including such things as filing fees. On the other hand, the reference to a legal action might be read more broadly to encompass attorney fees. In any event, attorney fees are recoverable by the prevailing party under Idaho Code §§ 12-117, 12-120(1), 12-121, 12-123, Rule 11 and other attorney fee provisions.<sup>185</sup>

#### **c. Removal by the county or highway district**

Subsection 2319(3)(c) provides another "self-help" option to the county or highway district. It provides that if the responsible party ignores the notice (specifically, where the person "fails to respond to the notice within five (5) days after the notice is complete" (i.e., 15 days (after the notice))), the county or highway district may remove it at the expense of the responsible person. Just as in subsection 2319(3)(b), this provision allows the county or highway district to recover up to \$150 per day per encroachment for each day the encroachment(s) remained after notice was complete (i.e., after ten days). It also provides that the removal shall be "at the expense of the owner, occupant, or person controlling the encroachment."

Subsection 2319(3)(c) does not speak to how the \$150/day penalty is enforced. Presumably, the county or highway district would first remove the obstruction and then bring a civil action to recover the

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<sup>183</sup> The encroachment statute provides in three places for penalties of "up to" \$150/day, but does not address how the precise penalty is to be set. Presumably, this is left to the discretion of the district court.

<sup>184</sup> The statute is unclear as to when the penalties begin to accrue. It says the penalty accrues "for each day the encroachment continues unremoved." Idaho Code § 40-2319(3)(a). Does this mean that the penalties begin to accrue when the encroachment continues after the notice is provided, or after 10 days expire? The former would be consistent with the seemingly redundant penalty provision in subsection 2319(3)(b).

<sup>185</sup> Attorney fees and expert fees were denied in *Total Success II*, but that case did not arise under section 40-2319. Instead, ACHD and other parties defended a mandamus action brought by a private party, and the Court found that *Total Success'* position was not frivolous.

penalties and costs of removal, if the party refused to pay them. Likewise, it does not speak to recovery of attorney fees. Presumably, they could be obtained under Idaho Code §§ 12-117, 12-120(1), 12-121, 12-123, Rule 11 and other attorney fee provisions, as in any other civil action.

In sum, subsection 2319(3)(b) and 2319(3)(c) achieve much the same result—both resulting in penalties of up to \$150/day. The difference is that under subsection 2319(3)(b), the county or highway district goes to court first. Under subsection 2319(3)(c), it removes the encroachment first and then goes to court (if necessary to recovery the penalties).

Subsection 2319(3)(c) differs from the self-help provision in subsection 2319(2) in the following ways. Subsection 2319(3)(c) requires notice and provides for recovery of penalties. Subsection 2319(2) is for emergency situations, allowing for immediate “self-help” abatement by the local government without notice and with no provision for penalties.

#### **5. Resolving disputes over road status, location, or width in the context of an encroachment action.**

The encroachment statute is written as if the Legislature never imagined there might be a dispute over the public status, location or width of a road on which an encroachment has been placed. This is a peculiar oversight. As often as not, the reason there is an encroachment is because the landowner disputes that the road is a public road and/or disputes how wide it is or its location. The statute provides no express mechanism more the resolution of such questions.

Under subsections 40-2319(2) and 40-2319 (3)(c), the county or highway district simply removes the obstruction. Thus, any assertion by the landowner that the “encroachment” is not within the right-of-way would be presented after-the-fact, presumably in an action initiated by the landowner. Such an action would subject the county or highway district to the risk of a judgment that it acted without authority and in trespass.

Subsection 40-2319(3)(b) requires the county or highway district to “commence in the proper court an action to abate the encroachment.”

It is unclear how this squares with other amendments in 2013, 2013 Idaho Sess. Laws, ch. 239 (H.B. 321). See footnote 198 regarding a possible drafting oversight. This amendment to the judicial review provision of the road statutes provides that “where a board of county or highway district commissioners wishes to determine the legal status or width of a highway or public right-of-way, the commissioners shall initiate validation or abandonment proceedings, or both, as provided for in sections 40-203 and 40-203A, Idaho Code, rather than initiating an action for quiet title.” Idaho Code § 40-208(7). Does this mean that the county or highway district has a duty to validate the road first, before initiating the abatement action? If an abatement action is initiated without a prior validation and the landowner (or other responsible party) denies that the road is public, should the court stay the action so that the county or highway district may conduct a validation/vacation proceeding? Or should the court find that it has independent authority under section 40-2319(3)(b) to make the road status determination itself?

In order to avoid these uncertainties, at least in situations where there is a known dispute as to the public status of the road and there is no immediate public necessity to act, a county or highway district may be well advised to resolve the public road issue first in a validation/vacation proceeding, and then bring proceedings under section 40-2319. On the other hand, this more cautious approach could subject the county or highway district to liability if there is a clear duty to act “immediately” under section 40-2319(2).

## 6. Case law

There is very little case law applying section 40-2319. The only reported appellate case addressing the statute is *Total Success Investments, LLC v. Ada Cnty. Highway Dist.*, (“*Total Success II*”), 148 Idaho 688, 227 P.3d 942 (Ct. App. 2010) (Perry, J. pro tem.).

In a prior round of litigation, *Ada Cnty. Highway Dist. v. Total Success Investments, LLC* (“*Total Success I*”), 145 Idaho 360, 179 P.3d 323 (2008) (Burdick, J.), the Ada County Highway District (“ACHD”) brought suit to quiet title to an alley that was encroached upon by a cell tower and enclosing fence installed by Total Success. ACHD prevailed. The plaintiff then brought a mandamus action demanding that ACHD be required to abate other encroachments (power poles and landscaping) placed in the alley by other persons. To put it in the vernacular, the second case was in the nature of: “If I have to take my stuff out of the alley, then everyone else should, too.”

Because the case was framed as a mandamus action, the Idaho Court of Appeals addressed the question of whether ACHD had a mandatory duty to remove encroachments.<sup>186</sup> That depends, said the Court, on whether the encroachments obstruct the use of the highway to the extent that it cannot be used:

This statute provides that a party act in two circumstances. The sentence using “may,” the discretionary sentence, allows highway districts to seek removal of any encroachment. The sentence using “shall,” the mandatory sentence, imposes a duty upon the highway district to remove encroachments that “effectually obstruct and prevent use of the highway.”

*Total Success II*, 148 Idaho at 692, 227 P.3d at 946. The Court of Appeals then affirmed the trial court’s determination that an obstruction to an alley that caused only some inconvenience in parking did not rise to the level of mandating that ACHD abate the encroachment under section 40-2319. *Total Success II*, 148 Idaho 693, 227 P.3d 947.

The take home point is that all encroachments of public roads are illegal and subject to an abatement action, but there is a mandatory duty on the governmental entity to abate only those that interfere with public access.

This conclusion follows directly from the statute itself, which provides: “If any highway or public right-of-way under the jurisdiction of a county or highway district is encroached upon by gates, fences, buildings, or otherwise, the appropriate county or highway district may require the encroachment to be removed.” Idaho Code § 40-2319(1) (emphasis supplied). Notably, encroachments are not limited to locked gates and other absolute barriers to traffic. Thus, unlocked gates (even open gates) constitute encroachments.<sup>187</sup>

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<sup>186</sup> The court in *Total Success II* applied the version of Idaho Code § 40-2319(1) in effect prior to the 2013 amendment, 662013 Idaho Sess. Laws, ch. 264 (H.B. 171). That provision was amended and recodified to Idaho Code §§ 40-2019(1) & (2). However, the mandatory versus discretionary analysis in *Total Success II* remains applicable as to the part of the statute dealing with encroachments that impair “use an open highway.”

<sup>187</sup> The idea of unlocked gates constituting an encroachment is consistent with *Ross v. Swearingen*, 39 Idaho 35, 39, 225 P. 1021, 1022 (1924) (Lee, J). *Ross* did not deal with encroachments on an established public road; it dealt with whether the mere existence of apparently unlocked gates on a private road could defeat a claim of public road creation through prescription. The Court found that it did. “The evidence was sufficient to

This conclusion is reinforced by a 1965 case arising under a prior version of the encroachment statute.<sup>188</sup> In *State v. Kelly*, 89 Idaho 139, 403 P.2d 56 (1965) (“*Kelly I*”), the Idaho Supreme Court upheld the right of the State to force the removal of a sign placed within the easement of a state highway, but some 55 feet away from the center line. Thus, the state has the right to prohibit other uses of the easement by the owner of the underlying fee, even if the uses are off the roadway itself and do not physically interfere with the use of the road. The Court rejected the plaintiff’s argument that the portion of the easement not used for road purposes is forfeited to the owner of the fee. Although this case involved a state highway created under federal law (the Federal Aid Highway Act), that should make no difference when it comes to the abatement of encroachments.

Another such case is *Rich v. Burdick*, 83 Idaho 335, 343, 362 P.2d 1088, 1092-93 (1961). In *Rich*, the Idaho Supreme Court affirmed the district court’s order that a property owner remove part of a gasoline service station (pumps, concrete island, canopy and signs) that encroached onto the 99-foot width of a public right-of-way. This result obtained despite the fact that the gas station had been located next to road surface for 30 years. This case predated Idaho Code § 40-2319, and the result simply followed from general provisions of road law (including common law). The point, however, is that section 40-2319 was enacted against the backdrop of many decades of understanding that anything in the right-of-way constitutes an encroachment.

## **K. Criminal enforcement actions**

### **1. Criminal obstruction of highways (§ 18-3907)**

Idaho’s criminal code makes obstruction of a road or highway a misdemeanor:

Any person who obstructs, injures or damages any public road, street or highway, either by placing obstruction therein or by digging in, deepening

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justify the court in concluding that the road was not a public road, but that it was one over which people had traveled at will, but on which landowners through whose lands it extended had felt at liberty for many years to maintain and had maintained gates.” *Ross*, 39 Idaho at 39, 225 P. at 1022.

This conclusion was reiterated in 1962. In *Cox v. Cox*, the Court said the existence gates across a road—even if unlocked—is strong evidence against recognition of the road as public:

Witnesses for both parties concurred that gates had been maintained across the road in question for many years, the only area of dispute being the time when the gates were first erected. Where gates are in existence across a road barring the passage and making it necessary to open them in order to use the road, the existence of such gates is considered as strong evidence that the road was not a public road.

*Cox v. Cox*, 84 Idaho 513, 521, 373 P.2d 929, 933 (1962).

While it is readily apparent that an unlocked gate forces a member of the traveling public to get out of the vehicle and open the gate, even an open gate can be a hindrance to public use. One encountering such a gate may be deterred from proceeding further for fear of discovering the gate closed and locked upon return. In any event, the fact that even signs, buildings, or fences located within the easement but away from the road surface constitute *per se* encroachments reinforces the conclusion that all gates (open, closed, or locked) are encroachments.

<sup>188</sup> 1957 Idaho Sess. Laws, ch. 227 (then codified at Idaho Code § 40-120(18)) authorized highway districts to remove “unauthorized signs, billboards or structures on the right-of-way.”

or deviating the water of any stream, or by placing any obstruction in any ditch or stream within or along any public road, street or highway, or by placing or constructing any obstruction, ditch or embankments upon his own or other lands, so as to make or cause any water to flow upon or impair any public road, street or highway, or rides or drives upon and along the sidewalk of any road, street or highway, whenever such sidewalk has been graded or graveled, located or designated by any order of the board of commissioners or city council, or prepared in any other manner dedicating and designating the same for and to that particular use and purpose, either by the property owner or by the public, or in any other manner injures or obstructs any public road, street or highway, is guilty of a misdemeanor.

Idaho Code § 18-3907. The leading case on this is *State v. Nesbitt*, 79 Idaho 1, 310 P.2d 787 (1957) (Keeton, C.J.).

## **2. Criminal nuisance (§§ 18-5901 to 5903)**

Idaho's criminal code defines criminal nuisance to include obstruction of roads:

Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, stream, canal or basin, or any public park, square, street, or highway, is a public nuisance.

Idaho Code § 18-5901. Such a nuisance is punishable as a misdemeanor. Idaho Code § 5903.

## **3. Criminal penalties under the road statute**

In 1985, the Legislature enacted Idaho Code § 40-207 which provides that anyone who “shall violate or aid in the violation of any of the provisions of this title . . . shall be guilty of a misdemeanor, and upon conviction thereof be punished by a fine of not more than five hundred dollars (\$500), or imprisonment for a period to exceed ninety (90) days . . . .”

*French v. Sorensen* suggests, in strongly worded dictum, that the penalties could apply to private landowners who illegally block public access to a public road. *French*, 113 Idaho at 958, 751 P.2d at 106. The statute, however, does not say explicitly what violations it is referring to. There are no other reported cases dealing with the statute.

Section 40-207 is cross-referenced in Idaho Code § 40-708 (dealing with misuse of highway revenues).

### **L. Standing**

The law of “standing” addresses the question of who is a proper party to initiate a legal or administrative proceeding.

The related question of who is a proper party to bring an action under the federal Quiet Title Act is discussed in section VII.A at page 184.

The statutes establishing procedures for road abandonment/vacation and validation state that a petition for such a proceeding may be filed by “[a]ny resident, or property holder, within a county or highway district system . . .” Idaho Code §§ 40-203(1)(b), 40-203A (the later code section omits the commas). This broad statement does not take into account the constitutional and common law limitations on standing articulated by the Courts.

The Idaho Supreme has established a standard for standing to initiate judicial review whose underlying principle is that only those with a concrete stake in the matter should be allowed to initiate a legal action. Mere bystanders, no matter how emotionally involved or concerned with the principles at stake, are not proper parties. *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989) (quoting *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 72 (1978) (subsequently quoted in *Doe v. Roe*, 134 Idaho 760, 764, 9 P.3d 1226, 1230 (2000)).

In order to satisfy the requirements of standing, the petitioners must ‘allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury.’ Standing may be predicated upon threatened harm as well as a past injury.

*Schneider v. Howe*, 142 Idaho 767, 772, 133 P.3d 1233, 1266 (2006) (Burdick, J.) (citations omitted). Standing may even be based on alleged harm involving a road that has not yet been constructed. *Id.*

A separate body of law governs the right of associations or organizations to litigate, either on behalf of their members or in their own right. *Glengary-Gamlin Protective Assn., Inc. v. Bird*, 106 Idaho 84, 675 P.2d 344 (1983). “An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Friends of the Earth, Inc. v. Laidlaw Env’tl. Services (TOC), Inc.*, 528 U.S. 167, 181 (2000).

A more detailed discussion of the law of standing is contained in the *Idaho Land Use Handbook*.

The author is not aware of any precedent applying the judicial standard for standing to road validation proceedings before a county or highway district. However, the Idaho Supreme Court has said: “[T]he legislature cannot, by statute, relieve a party from meeting the fundamental constitutional requirements for standing.” *Evans v. Teton Cnty.*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003). Thus, the Idaho courts treat the issue of standing as one of constitutional law. Whether this governs proceedings prior to the initiation of judicial review is an open question. It would appear prudent, however, for local governments to apply standards derived from the judicial law of standing to limit the ability of persons to initiate road validation actions who have no actual interest in the outcome.

The author is not aware of any challenge to the provision in cited statutes limiting the filing of petitions to residents and property holders of the county or district. This provision would prohibit, for instance, hunters from filing a petition to validate a road in a county different from the one they live in. This provision is more restrictive than can be justified by constitutional standing principles. Whether the Legislature may impose these additional hurdles is an open question.

## **M. Bias**

Persons appearing before a county or highway district have certain due process rights when the governmental entity is acting in a court-like capacity. “[D]ue process demands impartiality on the part of



those who function in judicial or quasi-judicial capacities.” *Eacret v. Bonner Cnty.*, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004) (citing *Schweiker v. McClure*, 456 U.S. 188, 195 (1982)). In contrast, these requirements do not apply when the governmental entity is sitting in a legislative capacity—for instance, when it enacts an ordinance.

The Idaho Supreme Court has applied due process principles to the review of road validation actions by county commissions. *Floyd v. Board of Comm’rs of Bonneville Cnty.* (“*Floyd II*”), 137 Idaho 718, 725, 52 P.3d 863, 870 (2002) (Walters, J.) (A county commissioner’s pre-hearing public statements indicating “predetermination” on an issue demonstrate “actual bias,” rendering his or her participation in the hearing “constitutionally unacceptable.”) (The bias was harmless error, however, because his was not a tie-breaking vote.). In making this ruling, the Court did not address whether a road validation action is legislative or quasi-judicial. Apparently, the Court assumed that it was quasi-judicial. In any event, it is now established that the due process rights do attach to such proceedings.<sup>189</sup>

Plainly, as in *Floyd II*, where a decision maker announces that he or she has made up his or her mind prior to the hearing, that is actual bias, and that decision maker must be disqualified from participating. On the other hand, not every comment on a road policy issue constitutes evidence of bias: “A decision maker is not disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that the decision maker is “not capable of judging a particular controversy fairly on the basis of its own circumstances.” *Eacret v. Bonner Cnty.*, 139 Idaho 780, 785, 86 P.3d 494, 499 (2004) (quoting *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Education Ass’n*, 426 U.S. 482, 493 (1941)).

See the *Idaho Land Use Handbook* for a more complete discussion of the law of bias in administrative proceedings.

#### N. ***Ex parte* contacts**

*Ex parte* contacts refers to communications regarding the merits of a pending matter between an interested party and a decision maker out of the presence of other interested parties. *Ex parte* contacts are not unlawful. However, certain *ex parte* communications (those made in quasi-judicial proceedings) must be fully disclosed at or before the hearing in order to allow other parties a meaningful opportunity to rebut any information provided to the decision maker.

Given the Court’s decision in *Floyd v. Board of Comm’rs of Bonneville Cnty.* (“*Floyd II*”), 137 Idaho 718, 725, 52 P.3d 863, 870 (2002) (Walters, J.) (applying due process protections against bias), it follows that the law governing *ex parte* communications in quasi-judicial proceedings applies to county road validation proceedings. However, the author is not aware of any precedent to this effect.

See the *Idaho Land Use Handbook* for a more complete discussion of the law of *ex parte* communications.

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<sup>189</sup> In *Galli v. Idaho County*, 146 Idaho 155, 191 P.3d 233 (2008) (W. Jones, J.), the Court mentioned that a road validation was quasi-judicial in the context of an attorney fee issue. This is the only case, of which the author is aware, in which the Court has commented expressly on the quasi-judicial nature of a validation proceeding.

### **O. Attorney fees**

It appears that attorney fees may be awarded to prevailing parties where the action of the county or highway commission is challenged. In *Homestead Farms, Inc. v. Bd. of Comm'rs of Teton Cnty.*, 141 Idaho 855, 861-62, 119 P.3d 630, 636-37 (2005) (Trout, J.), the Court declined to award attorney fees under the circumstances, but suggests that attorney fees could have been awarded under Idaho Code §§ 12-117 and 12-121 as well as I.A.R. 41. Note that Idaho Code § 12-117 authorizes fee awards to reach back to the administrative proceedings. See the *Idaho Land Use Handbook* for a more complete discussion of attorney fee recovery provisions.

### **P. Unconstitutional takings**

In *Ada Cnty. Highway Dist. v. Total Success Investments, LLC* (“*Total Success P*”), 145 Idaho 360, 179 P.3d 323 (2008) (Burdick, J.), a property owner argued that acquisition of a roadway by ACHD pursuant to Idaho Code § 40-202(3), the road creation statute authorizing public road creation through prescription, is an unconstitutional taking of property. The Idaho Supreme Court rejected argument out of hand, stating conclusively that statute not unconstitutional “on its face.” The Court said that any claim that application of the statute constitutes a taking “as applied” must be brought within four years, per Idaho Code § 5-224. *Ada County*, 145 Idaho at 369, 179 P.3d at 332.

In *Sopatyk v. Lemhi Cnty.*, 151 Idaho 809, 264 P.3d 916 (2011) (W. Jones, J.), the Court rejected the landowner’s contention that the validation of Anderson Creek Road constituted a taking of property. The Court noted that the road was created as a public road by legislative declaration in the year 1881 years before the land was patented into private ownership. The Court did not explain why this mattered. Obviously, creation of a road on private land by means of prescription does not give rise to an uncompensated taking. After all, transfer of property without compensation is the whole premise of prescriptive rights. *Sopatyk*, however, did not involve a road created by prescription (at least in the sense of five years of public use). Rather, *Sopatyk* involved a road made public by the 1881 legislative declaration. Thus, perhaps, there is an implication that the legislative declaration could give rise to a taking if it converted a road on private land to public status. Again, however, the Court did not address this point.

An excellent explanation of the taking issue (and how road creation through prescription is not a taking) is found in *Evers v. Cnty. of Custer*, 745 F.2d 1196, 1200 (1984) (citing *Texaco, Inc. v. Short*, 454 U.S. 516 (1982)).<sup>190</sup>

### **Q. Regulatory takings analysis**

In 1994 the Idaho legislature enacted the Idaho Regulatory Takings Act. Idaho Code §§ 67-8001 to 67-8004. The law was enacted in response to concerns that state and local agencies were not acting consistently and correctly in evaluating their regulatory actions in light of constitutional takings law. According to the statute, the purpose of the Act is “to establish an orderly, consistent review process that better enables state agencies and local governments to evaluate whether proposed regulatory or administrative actions may result in a taking of private property without due process of law.” Idaho Code § 67-8001.

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<sup>190</sup> This case was the precursor to *French v. Sorensen*, 113 Idaho 950, 751 P.2d 98 (1988) (Bistline, J.), dealing with a road through Robinson Bar Ranch. Carol K. Evers (in the first case) and Carol K. Sorensen (in the second case) is better known as Carol King.

The Act requires the Attorney General to prepare an “orderly, consistent process, including a checklist,” designed to better enable state agencies and local governments to evaluate proposed regulatory or administrative actions, “to assure that such actions do not result in an unconstitutional taking of private property.” Idaho Code § 67-8003(1). The Attorney General complied with this legislative directive by issuing the Attorney General’s *Idaho Regulatory Takings Act Guidelines* released in December 2003.

In 2003, the Legislature amended the Act to give an affected property owner the right to request a regulatory takings analysis from the state agency or local government. The property owner must submit a written request within 28 days after the final decision concerning the matter at issue is made. Idaho Code § 67-8003(2). See the *Idaho Land Use Handbook* for a more thorough analysis of the Act and the Attorney General’s guidelines.

From time to time, persons contesting the actions of counties or highway districts in road validation proceedings demand a regulatory takings analysis. In the author’s view, such requests are misplaced. The regulatory takings statute applies in a zoning context in which a piece of private property is subjected to governmental control. Road validation actions are not in the nature of zoning actions, but rather are in the nature of quiet title actions. That is, the local government is not “taking” someone one’s property, it is determining to whom the property belongs.

If the commission determines that the road is not a public road, then, obviously, there is no taking. But even if the commission determines that a particular road is a public road, nothing is “taken” in the constitutional sense. It simply turns out that the underlying landowner does not own the easement. There is no more reason to compensate this owner in this situation than there would be to compensate an owner of land who lost his property to adverse possession. Thus, either way, a road validation decision cannot give rise to a regulatory taking. Accordingly, going through a takings analysis makes no sense.

#### **R. Jury trial**

Section 40-208 provides that review shall be on the record (which, to some extent, may be supplemented) without a jury.

In *Ada Cnty. Highway Dist. v. Total Success Investments, LLC* (“*Total Success I*”), 145 Idaho 360, 369, 179 P.3d 323, 332 (2008) (Burdick, J.), the Court ruled that there is no right to trial by jury in a quiet title or ejectment case involving a public road.

#### **S. Since 2013, the validation/vacation process (and judicial review thereof) is the exclusive means of determining the legal status or width of a public road; quiet title is no longer available unless the commission fails to initiate proceedings.**

Legislation enacted in 2013 established that abandonment/vacation and validation proceedings under Idaho Code §§ 40-203 and 40-203A are the exclusive means of determining the legal status or width of an alleged public highway or right-of-way. 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified at Idaho Code §§ 40-114, 40-202, 40-203, 40-208, 40-2312). This is reflected in the bill’s amendments to Idaho Code §§ 40-202(7) and 40-208(8), as well as Idaho Code § 40-208(1) which was not amended.

Since 1986, Idaho statutes have provided a statutory mechanism for formal validation and/or abandonment/vacation of roads by counties and highway districts.<sup>191</sup> However, until 2013, these proceedings were not the exclusive means for resolving disputes over the public status of a road.

For example, prior to H.B. 321, parties had the option of bypassing the local government and initiating quiet title actions in district court to determine whether a road or right-of-way is public or private.<sup>192</sup> Indeed, the status of public roads has even been decided in the context of tort actions.<sup>193</sup> Prior to 2013, parties could also challenge the inclusion or exclusion of a road from a county or highway district road map by seeking judicial review of that decision.<sup>194</sup>

In enacting H.B. 321, the Idaho Legislature expressed its view that these “end runs” around the validation and abandonment/vacation process will no longer be allowed.<sup>195</sup>

Section 40-208(7) unambiguously provides that validation and/or vacation (aka abandonment) proceedings are the exclusive means of determining the legal status or width of a public road:

Any person other than a board of county or highway district commissioners seeking a determination of the legal status or the width of a highway or public right-of-way shall first petition for the initiation of validation or abandonment proceedings, or both, as provided for in sections 40-203(1)(b) and 40-203A(1), Idaho Code. If the commissioners having jurisdiction over the highway system do not initiate a proceeding in response

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<sup>191</sup> In 1986, the Legislature enacted two mechanisms for resolving road disputes. 1986 Idaho Sess. Laws, ch. 206 (H.B. 556) (codified in pertinent part at Idaho Code §§ 40-203A and 40-203(1)). Section 40-203A sets out procedures for road validation that tie into section 40-203. Idaho Code § 40-203 lays out detailed hearing procedures for road abandonment and vacation.

<sup>192</sup> *Farrell v. Bd. of County Comm’rs of Lemhi County*, 138 Idaho 378, 384, 64 P.3d 304, 310 (2002) (Schroeder, J.) and *Ada County Highway Dist. v. Total Success Investments, LLC* (“*Total Success I*”), 145 Idaho 360, 179 P.3d 323 (2008) (Burdick, J.) were both quiet title actions.

<sup>193</sup> In *Halvorson v. North Latah County Highway Dist.*, 151 Idaho 196, 254 P.3d 497 (2011) (Horton, J.), the Halvorsons brought tort claims against the highway district alleging that the district’s road maintenance, road widening, and grant of a driveway permit harmed their property. The Halvorsons also asked the highway district to initiate a validation proceeding on the road, but they refused to pay the \$750 filing fee and the highway district declined to initiate the proceeding.

<sup>194</sup> In *Homestead Farms, Inc. v. Bd. of Comm’rs of Teton County*, 141 Idaho 855, 858, 119 P.3d 630, 633 (2005) (Trout, J.), the Idaho Supreme Court ruled that Idaho Code § 40-208 allows judicial review not only of validation and abandonment proceedings, but also governs decisions by counties and highway commissions taken under 40-202 in adopting road maps. The same result obtained in *Flying “A” Ranch, Inc. v. County Comm’rs of Fremont County* (“*Flying A*”), 157 Idaho 937, 342 P.3d 649 (2015) (Horton, J.).

<sup>195</sup> The 2013 statute did preserve one other mechanism for determining the public status of a road. Idaho Code § 40-208(7) contains this proviso: “Provided that nothing in this subsection shall preclude determination of the legal status or width of a public road in the course of an eminent domain proceeding, as provided for in chapter 7, title 7, Idaho Code.”

to such a petition within thirty (30) days, the person may seek a determination by quiet title or other available judicial means. When the legal status or width of a highway or public right-of-way is disputed and where a board of county or highway district commissioners wishes to determine the legal status or width of a highway or public right-of-way, the commissioners shall initiate validation or abandonment proceedings, or both, as provided for in sections 40-203 and 40-203A, Idaho Code, rather than initiating an action for quiet title. If proceedings pursuant to the provisions of section 40-203 or 40-203A, Idaho Code, are initiated, those proceedings and any appeal or remand therefrom shall provide the exclusive basis for determining the status and width of the highway, and no court shall have jurisdiction to determine the status or width of said highway except by way of judicial review provided for in this section. Provided that nothing in this subsection shall preclude determination of the legal status or width of a public road in the course of an eminent domain proceeding, as provided for in chapter 7, title 7, Idaho Code.

Idaho Code § 40-208(7) (emphasis added).

First, the 2013 legislation established that any person “seeking a determination of the legal status or the width of a highway or public right-of-way shall first petition for the initiation of validation or abandonment proceedings, or both, as provided for in sections 40-203(1)(b) and 40-203A(1), Idaho Code.” Idaho Code § 40-208(7). If a county or highway district seeks such a determination, its only option is to initiate such proceedings. If another person or entity seeks such a determination, it is required to petition the county or highway district to initiate such proceedings. Only if the county or highway district fails to initiate such proceedings within 30 days may a person proceed with a quiet title action. Idaho Code § 40-208(7).<sup>196</sup>

Second, the 2013 legislation amended sections 40-202(1) and 40-202(6), which call on counties and highway districts to issue public road maps. This amendment recognized the substantive holding in *Homestead Farms, Inc. v. Bd. of Comm’rs of Teton Cnty.*, 141 Idaho 855, 858, 119 P.3d 630, 633 (2005) (Trout, J.), but established a different procedure. Specifically, the legislation adopted the Court’s holding that roads must not be included on a public road map unless there is “some basis” for doing so. In *Homestead Farms*, the Court found that relying on an ordinary commercial map fell short of that standard.

Section 40-208(7), in turn, is referenced by section 40-202(8). Section 40-202(8) directs that anyone wishing to challenge the inclusion or exclusion of a road from the road map may use the procedures discussed in section 40-208(7), i.e., validation or abandonment, with quiet title allowed only as a fallback.

The language in these sections, read together, makes it clear that if someone disagrees with the roads on a road map, the proper remedy is not to seek judicial review of the map decision, but rather to initiate a validation and/or abandonment proceeding addressing the particular road of concern. Then,

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<sup>196</sup> The statute, as amended in 2013, was applied in *Palmer v. East Side Highway Dist.*, 167 Idaho 813, 815 n.7, 477 P.3d 248, 250 n.7 (2020) (“Idaho Code section 40-208(7) established validation and abandonment proceedings as the proper means of resolving disputes about the status /or width of highways (as opposed to resolving disputes through quiet title actions)”) and *Munden v. Bannock County*, 169 Idaho 818, 504 P.3d 354 (2022) (Stegner, J.) (holding that landowners could not bring a declaratory judgment action respecting the legal status of an allegedly private road without first petitioning for abandonment).

judicial review may be sought of the validation/vacation decision. A quiet title action is allowed only if the local government fails to initiate proceedings with 30 days.

This makes sense. The whole idea is to allow counties and highway districts to engage in the process of issuing and updating public road maps without immediately landing in court. As the legislation makes clear, the map itself has no operative legal effect as to public road status. If a landowner or other interested party objects to the inclusion or exclusion of a particular road, that person should initiate validation and/or abandonment proceedings with the county or highway district. Only if the governmental entity fails to initiate the requested proceeding may that person proceed with a quiet title action.

The *Flying A* decision is not counter to this conclusion. The *Flying A* Court expressly noted that the pre-2013 statutes were applicable in that case. *Flying A*, 157 Idaho at 938, n.1, 939, n.2, 940, n.3, 342 P.3d at 650, n.1, 652, n.2, 653, n.3. (Doing so may have been incorrect. See discussion in section II.A.3 at page 75.)

The 2013 legislation takes the time pressure off the interested parties to challenge the map. The last sentence of section 40-202(8) makes clear that the validation/vacation proceedings may be brought at any time. In other words, a homeowner or road user who disagrees with the official map is not obligated to bring a challenge within 28 days or even 10 years under the statute of limitations. Rather, the matter may sit until there is a pressing need to resolve the road status. This provision, combined with similar language in section 40-203(5), codifies the holding in *Bonneville Cnty. v. Hawkins* that the statute of limitations does not apply to limit when a validation proceeding or state court proceeding may be initiated. See discussion in section IV.U at page 157 (state statute of limitations). On the other hand, this state statute cannot override federal law. Accordingly, it is possible that the federal statute of limitations would be triggered, for purposes of a federal quiet title suit, by the inclusion or exclusion of a road from the road inventory may. See section VII.A.11 at page 197 (federal statute of limitations).

The 2013 amendment also addressed the issue of road width. The amendments do not call for counties and highway districts to address road width in their road inventories. Of course, they may wish to do so nonetheless, if they wish. Doing so would have the advantage of putting the public on notice as to the commissioners' understanding as to the width of individual roads. However, specify road width in the context of the road inventory will not, in and of itself, constitute a legal determination of road width.<sup>197</sup> That, too, must be established by formal validation (or a proper judicial proceeding).

The 2013 amendment leaves no doubt that, as between validation/vacation and state quiet title, the party must first petition for validation/vacation (and may peruse other remedies only if the government declines to initiate validation/vacation proceedings). In the case of a county or highway district, the government must proceed by way of validation/vacation, not quiet title.

No appellate court has yet addressed whether the 2013 amendments to Idaho Code § 40-208(7) also preclude other means of resolving title (e.g., declaratory judgment, encroachment actions, etc.) However, the broad language of amended Idaho Code § 40-208(7) might be read to so hold. By requiring that a

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<sup>197</sup> Inclusion of road width in the road inventory does not constitute a “document” that establishes road width under Idaho Code § 40-2312(1) (as amended in 2013). Road width may only be established by a document that “effectively conveys, creates, recognizes or modified the highway or establishes the width.” *Id.* Only a formal validation (or other legally effective specification or determination of width) can “effectively” establish road width.

person “seeking a determination of the legal status or the width” of a road must first petition for validation/vacation, it would appear that the relief sought in cases like *Halvorson v. N. Latah Cnty. Highway Dist.*, 151 Idaho 196, 254 P.3d 497 (2011) (Horton, J.) and *Schneider v. Howe*, 142 Idaho 767, 133 P.3d 1232 (2006) (Burdick, J.) is no longer available, unless the county or highway district declines to initiate validation/vacation proceedings. On the other hand, the statute speaks in terms of validation/vacation versus quiet title. Arguably, then, it only makes petitioning for validation/vacation a prerequisite to quiet title and similar actions seeking declaratory relief as to road status or width, but does not preclude other express statutory vehicles for road matters such as encroachment actions. Curiously, the statute expressly says that it does not apply to eminent domain proceedings, but fails to address interaction with the encroachment statute.<sup>198</sup>

## **T. State quiet title, declaratory judgment, or other civil action**

### **1. State quiet title action**

The alternative to an appeal of a validation or vacation proceeding is ordinarily a quiet title action under Idaho Code §§ 6-401 to 6-418. A handful of other mechanisms are available as well, as discussed below.

A typical quiet title action is brought by the owner of land across which a road passes. The owner seeks to quiet title in himself or herself against a county or highway district.

In the context of a federal quiet title action, the law is clear that only a person asserting an ownership interest may bring suit. Whether the same limitation applies to a state quiet title action is not as clear. There is law to suggest that an action to quiet title must be brought by a person asserting title in his or her own right. *Bowles v. Pro Indivso, Inc.*, 132 Idaho 371, 973 P.2d 142 (1999) (Silak, J.); *Hanley v. Molko*, 123 Idaho 132, 844 P.2d 1382 (1992). *But see, French v. Sorensen*, 113 Idaho 950, 958, 751 P.2d 98, 106 (1988) (Bistline, J.) (the Carole King case), in which the Court entertained what appears to be a quiet title action case brought by private parties seeking to establish title to a road they asserted was owned by Custer County. The *French* Court does not mention how these parties had standing to bring such a case. It may be that for a state quiet title action, it is sufficient to establish standing in the constitutional sense, meaning that a person who uses a road may have standing to quiet title in the county or other entity.

### **2. Declaratory judgment**

Yet another option is to bring a complaint for declaratory judgment, which has the same result as a quiet title but is binding only on the named parties.<sup>199</sup>

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<sup>198</sup> The author, who played a role in drafting the 2013 amendment, can state that it was probably an oversight that the statute did not also exempt encroachment actions.

<sup>199</sup> The Uniform Declaratory Judgment Act, Idaho Code §§ 10-1201 to 10-1217, authorizes persons to seek declaratory relief. *Tomchak v. Walker*, 108 Idaho 446, 447, 700 P.2d 68, 69 (1985), for example, was a declaratory judgment action in which the Court noted that the road in question crossed property owned by a person who was not a party to the action. The Court ruled that a declaratory action was a proper means of resolving a road claim for public prescriptive use. *Tomchak*, 108 Idaho at 448-49, 700 P.2d at 70-71 (citing *Pugmire v. Johnson*, 102 Idaho 882, 643 P.2d 832 (1982)). The *Tomchak* court noted that all property owners of record to the road should be joined as indispensable parties, but that if this is not done, defendants must raise the issue as an affirmative defense. Another instances of the Court resolving public road status through

In *Schneider v. Howe*, 142 Idaho 767, 133 P.3d 1232 (2006) (Burdick, J.), Schneider (the owner of a property to the south of a platted subdivision) brought an action seeking declaratory and injunctive relief with respect to a road easement in the subdivision. The road had never been constructed, but if it were constructed, it would provide access to Schneider's property, which his trust hoped to subdivide and develop. Schneider asked the court to declare the dedication in the plat created a public road easement. The owner of the road easement, Jefferson County, was not a litigant (though, apparently, it had denied a request to vacate the road and, apparently, supported Schneider's position). Instead, Schneider sued the Howe, who owned a lot in the subdivision and had constructed a garage across the road easement.<sup>200</sup> The Idaho Supreme Court held that Schneider had standing to bring the suit, and affirmed the district court's ruling that a public road easement existed. It declined to issue injunctive relief for removal of the garage, since the County had not yet opened the road. The decision does not discuss quiet title. We may guess, however, that the case was framed as a declaratory judgment action in order to avoid an argument over whether Schneider would be a proper party to bring a quiet title action seeking to establish title in a third party (the county).

### 3. Other remedies

Likewise, determination of public road status could be addressed in the context of other civil litigation, such as a tort action, e.g., *Halvorson v. N. Latah Cnty. Highway Dist.*, 151 Idaho 196, 254 P.3d 497 (2011) (Horton, J.) (tort, due process, and taking claims).<sup>201</sup>

In addition, prior to 2013, parties could challenge the issuance of a county or highway district's public road map by judicial review. *Homestead Farms, Inc. v. Bd. of Comm'rs of Teton Cnty.*, 141 Idaho 855, 858, 119 P.3d 630, 633 (2005) (Trout, J.); *Flying "A" Ranch, Inc. v. Cnty. Comm'rs of Fremont Cnty. ("Flying A")*, 157 Idaho 937, 342 P.3d 649 (2015) (Horton, J.).

Finally, a county or highway district could litigate the public road status of a disputed road in the context of an encroachment action under Idaho Code § 40-2319.

The 2013 amendments expressly provide that the legal status or width of public roads may be determined in the context of eminent domain proceedings. Idaho Code § 40-208(7).

Idaho Code § 40-204A(6) provides a mechanism for seeking "acknowledgment" of R.S. 2477 roads. This is a pointless exercise with no legal effect.

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declaratory relief are *Schneider v. Howe*, 142 Idaho 767, 133 P.3d 1232 (2006) (Burdick, J.) and *Halvorson v. N. Latah Cnty. Highway Dist.*, 151 Idaho 196, 254 P.3d 497 (2011) (Horton, J.).

<sup>200</sup> Schneider also sued neighbors who had planted trees in the easement. But default judgment was entered against those neighbors, and they did not participate in the appeal.

<sup>201</sup> The 2013 amendment establishing an "exhaustion" requirement was aimed primarily at avoiding dueling litigation and a race to courthouse (the judge versus the commissioners) in which one party sought validation or vacation and the opposing party initiated a quiet title action. However, the amendment arguably also took away the authority of courts in situations like the *Halvorson* litigation to resolve road title issues that are germane to the litigation. Note, however, that any such restriction on the court's jurisdiction is limited to roads under the jurisdiction of counties and highway districts. Nothing in the 2013 amendment deprives a court of deciding title with respect to streets in cities with functioning street departments.



#### 4. Choosing among causes of action: The law prior to the 2013 amendment

Until 2013, a litigant could choose freely among validation/vacation, quiet title, declaratory judgment, and other causes of action. This sometimes created a race to the courthouse as a county or highway district conducted a validation or vacation proceeding while another party initiated a quiet title or other civil action.

In other words, in lieu of initiating a validation proceeding under Idaho Code § 40-203A or an abandonment/vacation proceeding under Idaho Code § 40-203, a party seeking a determination of the status of a road could choose to bypass the county commission or highway district altogether by bringing a quiet title or other appropriate action in state or federal court.<sup>202</sup> For example, *Farrell v. Bd. of Cnty. Comm'rs of Lemhi Cnty.*, 138 Idaho 378, 384, 64 P.3d 304, 310 (2002) (Schroeder, J.) was initiated as a quiet title action.

A quiet title suit or other civil action might be seen as an end-run about the statutory validation process. However, the Court in *Farrell* held that this is a valid approach. In other words, the statutory provisions on road abandonment and validation are not exclusive, nor do they constitute procedures that must be exhausted before initiating judicial review. Likewise, a quiet title action was allowed (without discussion of validation) in *Ada Cnty. Highway Dist. v. Total Success Investments, LLC* (“*Total Success I*”), 145 Idaho 360, 179 P.3d 323 (2008) (Burdick, J.).

This conclusion was reinforced by *Halvorson v. North Latah Cnty. Highway Dist.*, 151 Idaho 196, 254 P.3d 497 (2011) (Horton, J.). In this case, Halvorsens brought tort claims against the highway district alleging that the district’s road maintenance, road widening, and grant of a driveway permit harmed their property. The Halvorsens also asked the highway district to initiate a validation proceeding on the road, but they refused to pay the \$750 filing fee and the highway district declined to initiate the proceeding. In ruling on the tort claims, the district court determined that the road was public and had a 50-foot width. The Halvorsens appealed. The Idaho Supreme Court rejected the Halvorsens’ argument that the public status of the road could not be determined outside of a road validation proceeding.

The Halvorsens argue that it is not the province of the district court to establish the public nature of Camps Canyon Road. They cite *Galvin v. Canyon Cnty Highway District No. 4*, for the proposition that the Highway District is not permitted to validate public rights on its own initiative except under certain circumstances. 134 Idaho 576, 579, 6 P.3d 826, 829 (2000). In effect, the Halvorsens argue that it is only through a validation proceeding initiated by an affected land-owner that the public nature of Camps Canyon Road can be determined and that courts may not make such a determination.

This conclusion is incorrect. First, the statutory scheme provides not one but two routes for the establishment of a public highway. One route involves a hearing by the county commissioners. Because I.C. § 40-202(3) provides for establishment of a public highway as “located and recorded by

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<sup>202</sup> State quiet title actions are authorized by Idaho Code § 6-401. However, under the terms of the statute, a state quiet title action may only be “brought by any person against another who claims an estate or interest in real or personal property adverse to him . . . .”

A similar requirement (that only a person claiming an ownership interest may bring a quiet title action) applies in the context of the federal Quiet Title Act.

order of a board of commissioners,” that method of establishing a highway obviously requires action of the county commissioners. However, no such requirement accompanies the process for the establishment of a highway by prescription. In the latter circumstance, a public highway exists where it is “used for a period of five (5) years, provided [it] shall have been worked and kept up at the expense of the public . . . .” I.C. § 40-202(3). “When construing a statute, the words used must be given their plain, usual, and ordinary meaning, and the statute must be construed as a whole.” *Athay v. Stacey*, 142 Idaho 360, 365, 128 P.3d 897, 902 (2005) (citing *Waters Garbage v. Shoshone Cnty.*, 138 Idaho 648, 651, 67 P.3d 1260, 1263 (2003)). Here, the plain, usual and ordinary meaning of the text is that the use and upkeep of a highway by the public is sufficient to establish a highway without any additional hearings or action undertaken by the Highway District.

Ordinarily, a validation proceeding as described in I.C. § 40–203A is the appropriate method to “validate an existing highway or public right-of-way about which there is some kind of doubt,” although “[i]t does not allow for the creation of new public rights.” *Galvin*, 134 Idaho at 579, 6 P.3d at 829. However, there is nothing within I.C. § 40–203A that precludes a finding by a court determining that Camps Canyon Road is a public highway when a cause of action implicates that question. The Halvorsons cite I.C. § 40–1310, which states that the “commissioners of a highway district have exclusive general supervision and jurisdiction over all highways and public rights-of-way within their highway system . . . .” I.C. § 40-1310(1). That statute also states that “[t]he highway district has the power to receive highway petitions and lay out, alter, create and abandon and vacate public highways and public rights-of-way within their respective districts under the provisions of sections 40–202, 40–203 and 40–203A, Idaho Code.” I.C. § 40-1310(5). Neither of these passages suggests that a court lacks the power to determine whether a highway district had established a public highway when faced with a cause of action that squarely presents that issue. We conclude that no validation proceeding was necessary in order for the district court to conclude that Camps Canyon Road was a public highway.

*Halvorson*, 151 Idaho at 203, 254 P.3d at 504.

In sum, until 2013, public road status might be determined via validation/vacation, quiet title, declaratory judgment, and encroachment action, or any civil action that puts the status of the road into question. There may be differences, however, as to who is bound by the decision. Quiet title actions and validation actions are *in rem* proceedings binding on the world.<sup>203</sup> The *Halvorson* Court did not address the

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<sup>203</sup> The *in rem* effect of validation/vacation proceedings is evident in the following statutory provisions. First, public notice is mandated. Idaho Code §§ 40-203(1) & 40-203A(2). Second, the county or highway district is obligated to make a final determination as to validation or vacation/abandonment. Idaho Code §§ 203(1)(h) & 203A(3). Third, the decision must be recorded. Idaho Code §§ 203(1)(j) & 203A(5). Fourth, judicial review is available to “any resident or property holder within the county or highway district system.” Idaho Code §§ 203(1)(k) & 203A(4). Fifth, persons “seeking a determination of the legal status or width of a

issue of who would be bound by its decision (in an action between a private landowner and the county). See section IV.S on page 149 for a discussion of post-2013 law on this subject.

## **U. State quiet title – statute of limitations**

### **1. Case law prior to 2013 amendment**

As noted above in section I.B.3 at page 13, private road prescription arises by way of the statute of limitations on actions to recover realty. Idaho Code § 5-203.

The public road creation statute, 40 Idaho Code § 40-203(3), is in some ways analogous to a statute of limitations, but, as discussed below, it is not a statute of limitations.

This raises the question how the road creation statute interacts with another statute of limitations governing government actions on real estate, Idaho Code § 5-202. This statute applies only to state governmental agencies (“people of this state” in the words of the statute) and requires the government to bring an action with respect to real estate within 10 years of the accrual of the cause of action. In other words, is a county or highway district subject to this 10-year statute of limitation in initiating a quiet title action?

In *Ada Cnty. Highway Dist. v. Total Success Investments, LLC* (“*Total Success P*”), 145 Idaho 360, 179 P.3d 323 (2008) (Burdick, J.), ACHD brought a quiet title action to establish a public road through prescription (Idaho Code § 40-202(3)). The defendant landowner raised the defense of the statute of limitations under Idaho Code 5-202. The Court recognized that a plain reading of the statute would prevent a county or highway district from establishing title to public roads unless they brought their actions promptly after the prescriptive period was satisfied. The Court recognized that this would lead to an absurd result.

In this case, interpreting I.C. § 5-202 according to its plain meaning leads to an absurd result. It would prevent the State from enforcing the right of the public to use a roadway that has been used and maintained by the public for a number of years even if the public’s use of that road had never been contested or impeded. According to TSI’s reading of the statute, even if the State acted in a timely manner upon the interference with the public’s right to use the roadway, as ACHD did in this case, it would be prevented from enforcing a previously uncontested public right to use a roadway. TSI’s interpretation would mean the State would have to bring a lawsuit under I.C. § 5-202 every ten years for every highway, street, or alley it believes to be public thoroughfare. The district court’s interpretation was a fair reading of the statute: the ten year statute of limitations begins to run upon conduct interfering with the State’s claim of right. We hold that because ACHD

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highway or public right-of-way shall first petition for the initiation of validation or abandonment proceedings.” Idaho Code § 40-208(7). Sixth, if a validation or abandonment proceeding is initiated, the proceeding “shall provide the exclusive basis for determining the status and width of the highway, and no court shall have jurisdiction to determine the status or width of said highway except by way of judicial review.” Idaho Code § 40-208(7).

brought the action within ten years of the encroachment, the suit is not barred by I.C. § 5-202.

*Total Success I*, 145 Idaho at 368, 179 P.3d at 331. In sum, the statute does not run from the time the right accrues but from the time that someone interferes with the public's use of the road.

## **2. A 2013 amendment made Idaho's statute of limitation no longer applicable to road validations and quiet title suits.**

The question of whether quiet title actions, or validation proceedings for that matter, whether brought by a state governmental entity or by a private landowner, was resolved and mooted amendments to the road statutes enacted in 2013, 2013 Idaho Sess. Laws, ch. 239 (H.B. 321).

That 2013 law added a new subsection, Idaho Code § 40-203(5), which provided that certain roads meeting three narrow criteria may be passively abandoned. It then concluded, as to all other roads:

All other highways or public rights-of-way may be abandoned and vacated only upon a formal determination by the commissioners pursuant to this section that retaining the highway or public right-of-way for use by the public is not in the public interest, and such other highways or public rights-of-way may be validated or judicially determined at any time notwithstanding any other provision of law. Provided that any abandonment under this subsection shall be subject to and limited by the provisions of subsections (2) and (3) of this section.

Idaho Code § 40-203(5) (emphasis supplied).

“Any other provision of law” (in the underlined section) includes the 10-year statute of limitations applicable to state governmental entities (Idaho Code § 5-202) and the 5-year statute of limitations applicable to private parties (Idaho Code § 5-203). It is, thus, no longer applicable to road validations and quiet title actions. Instead, they may be “determined at any time.”

This was reiterated in another section of the 2013 legislation:

Any person may challenge, at any time, the inclusion or exclusion of a highway or public right-of-way from such map by initiating proceedings [for validation/vacation or quiet title] as described in section 40-208(7), Idaho Code.

Idaho Code § 40-202(8) (emphasis supplied).

Of course, this only affects Idaho's statute of limitations. Under the Supremacy Clause of the federal Constitution, the Idaho Legislature has no power to restrict the federal statute of limitations that would come into play in federal quiet title actions.

## **3. Judicial review and quiet title may not be combined in a single proceeding.**

In *Euclid Avenue Trust v. City of Boise*, 146 Idaho 306, 193 P.3d 853 (2008) (J. Jones, J.), the Idaho Supreme Court declared that it is improper for a litigant to combine a judicial review with a civil action for declaratory and/or monetary relief in a single complaint. Although this case arose in the context of a land

use decision, the Court made clear that the same result would apply in other contexts. Indeed, it quoted from a prior case, *Cobbley v. City of Challis*, 143 Idaho 130, 139 P.3d 732 (2006) (J. Jones, J.), dealing with road validation:

The district court's ruling is correct: a petition for judicial review of a road-validation decision of a local governing board is a distinct form of proceeding and cannot be brought as a pleading or motion within an underlying civil lawsuit. A board of county commissioners' authority over highways derives from the Legislature's delegation of its authority over roads and highways. See I.C. § 40–201. The Legislature has provided the method by which certain persons, or the board having jurisdiction over the particular highway system, may initiate proceedings to validate a road. I.C. § 40–203A. “Judicial review” is defined by our Rules of Civil Procedure as “the district court’s review pursuant to statute of actions of agencies....” Idaho R. Civ. P. 84(a)(2)(C). Judicial review of an administrative decision is wholly statutory; there is no right of judicial review absent the statutory grant.

*Cobbley*, 143 Idaho at 133, P.3d at 735.

The *Euclid Avenue* Court noted, however, that Rule 84(a)(1) of the Idaho Rules of Civil Procedure does allow petitions for judicial review to be combined with petitions for writs of mandate, prohibition, quo warranto, certiorari, or other common law or equitable writs. *Euclid Avenue*, 146 Idaho at 309, 193 P.3d 856.

## V. JURISDICTION OVER CITY STREETS

### A. Table of relevant statutes

The discussion in this section is largely statute-driven. For ease of reference, the table below summarizes the key provisions from titles 40 and 50 that bear on the jurisdiction and authority of cities vis-à-vis highway districts. A more detailed discussion of the statutes and case law follows.

TITLE 40 STATUTES ADDRESSING ROAD JURISDICTION AND AUTHORITY OF CITIES, COUNTIES, AND HIGHWAY DISTRICTS		
Citation	Quotation and/or summary of provision	Comment
Idaho Code § 40-104(1)	“‘City system’ means all public highways within the corporate limits of a city, <u>with a functioning street department</u> , <u>except</u> those highways which are under federal control, a part of the state highway system, <u>part of a highway district system</u> or an extension of a rural major collector route as specified in section 40-607, Idaho Code.” <sup>204</sup>	This definition states that a city’s street system (“city system”) includes all streets within a city with a functioning street department with four exceptions. One is the exception for streets that are “part of a highway district system.” That should be understood to exclude streets that fall under the jurisdiction of a highway district (e.g., the city does not have a functioning street department or lies within a single county-wide highway district created under chapter 14 of title 40. The definition of “functioning street department” is found in Idaho Code § 50-1301. See discussion in section V.B.4 on page 176 regarding dictum in <i>Sandpoint III</i> addressing the interaction of section 40-104(1) and sections 40-109, 40-1310, 40-1333, and 50-1330.
Idaho Code § 40-109(1)	“‘Highway district system’ means all public highways within each highway district, except those included within the state highway system, those under another state agency, those included within city highway systems of incorporated cities with a functioning street department, and those under federal control.”	Defines “highway district system” to exclude roads within cities with functioning street departments. This definition ties into Idaho Code §§ 40-203, 40-1310(1). The definition of “functioning street department” is found in Idaho Code § 50-1301. See discussion in section V.B.4 on page 176 regarding dictum in <i>Sandpoint III</i> addressing the interaction of section 40-104(1) and sections 40-109, 40-1310, 40-1333, and 50-1330.

<sup>204</sup> The only substantive place anything similar to the term “city system” appears in Title 40 is Idaho Code § 40-1333. There is a cross reference in Idaho Code § 40-120(10) and a passing reference in Idaho Code 40-708. Even section 40-1333 does not use the term “city system.” It refers to “Cities, with city highway systems.” Perhaps this is intended to key into the definition of city system. More likely and more logically, it is another way of describing cities with functioning street departments. This point was overlooked by the Court in *Sandpoint III*.

Idaho Code § 40-201	Broadly recognizes that there are separate road systems under the jurisdiction of the state, counties, highway districts, and cities. It is the duty of each “to improve and maintain the highways within their respective jurisdiction.”	In <i>Sandpoint IV</i> , 161 Idaho at 124, 384 P.3d at 371, the Court seized on this innocuous statement to suggest (incorrectly and arguably in dictum) that highway districts have maintenance responsibilities within cities that they overlap. In any event, this section does not address or assign jurisdiction to the various entities.
Idaho Code § 40-203	This section authorizes counties and highway districts to vacate roads within their jurisdiction. For highway districts, it applies to the “highway district system” which is defined in Idaho Code § 40-109(1) to exclude streets within cities with a functioning street department.	This is consistent with other statutory provisions stating that highway districts do not have authority to vacate streets in cities with functioning street departments.
Idaho Code § 40-203(4)(a)	“When a county or highway district is to consider the abandonment or vacation of any highway, public street or public right-of-way that was accepted as part of a recorded platted subdivision, such abandonment shall be accomplished pursuant to the provisions of this section.”	When streets that were accepted as part of a recorded plat fall within the jurisdiction of a county or highway district, they must be vacated by the county or highway district pursuant to section 40-203. This clarification is needed because another statute provides that even cities without functioning street departments have authority to accept new streets through the plat approval process. <sup>205</sup> In addition, there are a number of town sites that have been platted in Idaho that never became municipalities at all. <sup>206</sup>
Idaho Code § 40-203A	This section authorizes counties and highway districts to validate roads within their jurisdiction. For highway districts, it applies to the “highway district system” which is defined in Idaho Code § 40-109(1) to exclude streets within cities with a functioning street department.	This is consistent with other statutory provisions stating that highway districts do not have authority to validate streets in cities with functioning street departments.
Idaho Code § 40-203A(7)	Where a street is accepted pursuant to a platted subdivision within a city, the platting process controls the acceptance of that road irrespective of whether the city has a functioning street department.	Even cities without a functioning street department have authority to accept city streets through the platting process.

<sup>205</sup> Where a new street is dedicated and accepted pursuant to a platted subdivision within a city, the platting process controls the acceptance of that road irrespective of whether the city has a functioning street department: “This section [validation] does not apply to the validation of any highway, public street or public right-of-way which is to be accepted as part of a platted subdivision pursuant to chapter 13, title 50, Idaho Code.” Idaho Code § 40-203A(7). Thus, the new road is created by the city’s platting process, not through validation undertaken by the county or a highway district. But it may be vacated by a highway district with jurisdiction over that road.

<sup>206</sup> *E.g.*, the town sites of Bowmont and Hammett were never incorporated. Only a portion of the townsite of Hagerman was incorporated.

Idaho Code § 40-204A	This section deals with validation of “federal land rights-of-way” (a term defined in Idaho Code § 40-107(5) as an R.S. 2477 road). It provides in part: “Persons seeking to have a federal land right-of-way, including those which furnish public access to state and federal public lands and waters, validated as a highway or public right-of-way <u>as part of a county or highway official highway system</u> , shall follow the procedure outlined in section 40-203A, Idaho Code.” Idaho Code § 40-204A(5).	This section does not address how R.S. 2477 roads under city jurisdiction are to be validated or otherwise confirmed. However, by limiting the requirement to proceed under 40-203A to roads under county or highway district jurisdiction, it appears that the validation or judicial confirmation of R.S. 2477 roads that are under the jurisdiction of a city are <u>not</u> subject the validation procedures (and the exhaustion requirements) of sections 40-203A and 40-208(7)).
Idaho Code § 40-208	Idaho Code § 40-208 contains the judicial review provisions for challenging a decision of a county or highway district in a validation or vacation proceeding. A 2013 amendment to section 40-208(7) mandates that parties must first seek validation or vacation prior to initiating quiet title or other action aimed at determining the status of the road.	These provisions (including the requirement to first seek validation or vacation) do not apply to the cities with functioning street departments. Thus, by implication, a party could seek validation or vacation by the city or proceed directly to district court in an independent action.
Idaho Code § 40-604(4)	This section states that highway district commissioners have “authority to abandon and vacate any highway or public right-of-way <u>within their highway system</u> under the provisions of section 40-203, Idaho Code.”	This authority is limited to roads “within their highway system.” Keying in to the definition of “highway district system” in section 40-109(1), this section does not provide authority over streets in cities with functioning highway departments (except in single county-wide highway districts created under chapter 14 of title 40).
Idaho Code § 40-801(1)(a)	Tax revenue raised by highway districts on property within a city are split 50/50 with the city (irrespective of whether it has a functioning street department).	This retention of funds by the highway district was the driving factor in the <i>Sandpoint</i> cases.
Idaho Code § 40-1310(1)	Highway districts “have exclusive general supervision and jurisdiction over all highways and public rights-of-way within their highway system.” A separate definition (Idaho Code 40-109(1)) defines “highway district system” to exclude roads in cities with functioning street departments. Read together, these sections provide that highway districts have exclusive authority over all roads within their highway systems, except for roads within cities with functioning street departments.	This provision from title 40 dovetails with the key provision from title 50 (Idaho Code § 50-1330). See discussion in section V.B.4 on page 176 regarding dictum in <i>Sandpoint III</i> addressing the interaction of section 40-104(1) and sections 40-109, 40-1310, 40-1333, and 50-1330.



Idaho Code § 40-1310(5)	<p>“The highway district has the power to receive highway petitions and lay out, alter, create and abandon and vacate public highways and public rights-of-way <u>within their respective districts</u> under the provisions of sections 40-202, 40-203 and 40-203A, Idaho Code. Provided however, when a public highway, public street and/or public right-of-way is part of a platted subdivision which lies within an established county/city impact area or within one (1) mile of a city if a county/city impact area has not been established, consent of the city council of the affected city, when the city has a functioning street department with jurisdiction over the city streets, shall be necessary prior to the granting of acceptance or vacation of said public street or public right-of-way by the highway district board of commissioners.”</p>	<p>This broad grant of authority to highway districts is limited to roads “within their respective districts” which ties into the definition in Idaho Code § 40-109(1). Thus, the highway districts’ jurisdiction does not extend to streets within cities with functioning highway districts (except for single county-wide highway districts created under chapter 14 of title 40). The fact that the proviso restricts the highway district’s jurisdiction outside of cities confirms that the Legislature understood that highway districts have no jurisdiction to vacate or validate streets in cities with functioning street departments.</p>
Idaho Code § 40-1310(8)	<p>“The highway district board of commissioners shall have the exclusive general supervisory authority over all public highways, public streets and public rights-of-way under their jurisdiction . . . .”</p>	<p>Likewise, this highway district authority is limited to roads within its jurisdiction, thus excluding cities with functioning street departments (except for single county-wide highway districts created under chapter 14 of title 40).</p>
Idaho Code § 40-1323(1)	<p>Highway districts whose boundaries overlap cities have the power to tax property within the overlapped portion of the city.          “The city council of each incorporated city within the territory of a highway district, so far as relates to their city, shall have the powers and duties as provided by this chapter and as provided in chapter 3, title 50, Idaho Code, in such case.”</p>	<p>This taxing authority applies irrespective of whether the city has a functioning street department. It works in conjunction with Idaho Code § 40-801(1)(a), providing a 50/50 split of revenues raised. This section also contains the clearest statement in title 40 that cities overlapped by highway districts retain control over roads provided under chapter 13 of title 40 (which includes the power to create, abandon and vacate streets under section 40-1310(5)) and under chapter 3 of title 50 (which includes the power to open or vacate streets under section 50-311).</p>
Idaho Code § 40-1324	<p>Deals with creation of highway districts.          “Nothing in this chapter shall be construed as affecting any power of any incorporated city, or portion of it, lying within the limits of a highway district, to issue bonds as empowered by law and to levy, collect or apply the necessary taxes for them.”</p>	<p>Proviso deals only with bonds issued by city, not validation or vacation.</p>
Idaho Code § 40-1333	<p>“Cities, with city highway systems, shall be responsible for construction, reconstruction, and maintenance of highways in their respective city systems.”          This section also authorizes agreements for highway districts and others to perform street work within a city.</p>	<p>This provision confirms that cities with city highway systems (i.e., functioning street departments) have responsibility for the construction and upkeep of city streets. See discussion in section V.B.4 on page 176 regarding dictum in <i>Sandpoint III</i> addressing the interaction of section 40-104(1) and sections 40-109, 40-1310, 40-1333, and 50-1330.</p>

Idaho Code §§ 40-1401 to 40-1418	Chapter 14 addresses the establishment of a single county-wide highway district with jurisdiction over all roads within the county, including those lying within cities. .	The only such highway district in Idaho is the Ada County Highway District (“ACHD”).
Idaho Code § 40-1406	“ . . . No city included within a county-wide highway district shall maintain or supervise any city highways, or levy any ad valorem taxes for the construction, repair or maintenance of city highways. . . .”	A single county-wide highway district under chapter 14 of title 40 has complete jurisdiction and control over all roads within the county.
Idaho Code §§ 40-1501 to 40-1519	Chapter 15 contains the consolidation provisions whereby two adjacent highway districts may be consolidated into one district.	
Idaho Code §§ 40-1601 to 40-1611	These are the detachment provisions whereby a portion of the territory of a highway district may be detached from the highway district. Detachment is initiated by petition to the county. Section 40-1610 provides that after detachment “the property within the detached portion shall be subject to taxation by the county for highway and other purposes to the same extent precisely as if it had never been included in the highway district.”	The <i>Sandpoint III</i> Court did not comment on the fact that the dissolution and detachment statutes speak in terms of allocation of financial assets and debts between highway districts and counties. The Court did not explain whether or how these statutes apply to cities with functioning street departments that are overlapped by highway districts.
Idaho Code §§ 40-1614 to 40-1630	These are the annexation provisions whereby an existing highway district may annex additional territory.	
Idaho Code § 40-1713(2)	This section sets out three options for the administration of a county’s secondary highways: (a) a countywide highway system (administered by the county, not a highway district), (b) a single countywide highway district, or (c) up to four highway districts within the county. For each of these three options, the entity’s jurisdiction expressly excludes “highways and streets within cities with functioning street departments.”	The second option (for a single county-wide highway district) is an alternative to the single county-wide highway district described in Idaho Code §§ 40-1406, 40-1406A, and 40-1407. The version in section 40-1713(2)(b) excludes city streets (in cities with functioning street departments) from highway district jurisdiction. This is the provision relied on by Justice Eismann in <i>Sandpoint III</i> to support the Court’s conclusion that, except for single county-wide highway districts under Idaho Code 40-1406, the Legislature intended that highway districts should not overlap cities with functioning street departments.
Idaho Code §§ 40-1801 to 40-1821	Chapter 18 contains the dissolution provisions whereby an existing highway district may be dissolved.	The <i>Sandpoint III</i> Court did not comment on the fact that the dissolution and detachment statutes speak in terms of allocation of financial assets and debts between highway districts and counties. The Court did not explain whether or how these statutes apply to cities with functioning street departments that are overlapped by highway districts.

Idaho Code § 40-1811(2)	"No city whose incorporated limits lie wholly or partially within the boundaries of a dissolved highway district shall be entitled to receive any share of the moneys of the dissolved highway district."	In <i>Sandpoint II</i> , the Court relied on this provision in holding that the city could not "inherit" funds of the highway district if it were dissolved.
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<b>TITLE 50 STATUTES</b> <b>ADDRESSING ROAD JURISDICTION AND AUTHORITY OF CITIES, COUNTIES, AND HIGHWAY DISTRICTS</b>		
<b>Citation</b>	<b>Quotation and/or summary of provision</b>	<b>Comment</b>
Idaho Code § 50-301	"Cities governed by this act . . . may . . . exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho."	This broad grant of authority implicitly includes the right to validate and vacate roads falling under the control and jurisdiction of cities.
Idaho Code § 50-311	"Cities are empowered to: create, open, widen or extend any street, avenue, alley or lane, annul, vacate or discontinue the same whenever deemed expedient for the public good . . . ." It further provides that upon vacation, the vacated street "shall revert to the owner of the adjacent real estate, one-half (½) on each side thereof." It also provides that any alley in a city of over 50,000 that is not used for 50 years shall also revert to the adjacent landowners.	This expressly authorizes cities to create, open, annul, and vacate streets. The authority is validate implicitly included within the right to open and create. Although section 50-311 is not expressly limited to cities with functioning street departments, the limitation to that effect in sections 40-1333 and 50-1330 should be read to limit the authority granted here.
Idaho Code § 50-313	"The city councils of cities shall have the care, supervision, and control of all public highways and bridges within the corporate limits, and shall cause them to be kept open and in repair and free from nuisances. . . ."	The broad grant of authority to cities for the "care, supervision, and control" over their streets reinforces and includes the right to validate and vacate city streets. Although section 50-313 is not expressly limited to cities with functioning street departments, the limitation to that effect in sections 40-1333 and 50-1330 should be read to limit the authority granted here.
Idaho Code § 50-1301	Defines "functioning street department" for a city in terms of upkeep, construction, repair, etc. and eligibility for highway funds.	Technically applicable only in sections 50-1302 through 50-1334, but this term is used throughout title 40.
Idaho Code § 50-1306A(1)	"Any person, persons, firm, association, corporation or other legally recognized form of business desiring to vacate a plat or any part thereof must petition the city council if it is located within the boundaries of a city, or the county commissioners if it is located within the unincorporated area of the county. Such petition shall set forth particular circumstances of the requests to vacate; contain a legal description of the platted area or property to be vacated; the names of the persons affected thereby, and said petition shall be filed with the city clerk."	Section 50-1306A(1) provides that persons desiring to vacate a plat must petition the city, if the land is located within a city, and otherwise petition the county.

Idaho Code § 50-1306A(6)	“When public streets or public rights-of-way are located within the boundary of a highway district, the highway district commissioners shall assume the authority to vacate said public streets and public rights-of-way as provided in section 40-203, Idaho Code.”	Subsection (6) should be read in context with the rest of section 50-1306A. Subsection (6) is simply a clarification that if the plat is on unincorporated land that includes streets or rights-of-way within a highway district, the highway district (not the county) has jurisdiction over the road vacation.
Idaho Code § 50-1317	Idaho Code § 50-1317 provides that in a city that is not exercising its corporate functions, persons may petition the county or highway district to vacate “property” (presumably including a dedication of a road contained within a plat). The section includes this proviso: “Provided however, when a public street or public right-of-way is located within the boundary of a highway district or is under the jurisdiction of a county, the respective commissioners of the highway district or board of county commissioners shall assume the authority to vacate said public street or public right-of-way pursuant to section 40-203, Idaho Code.”	The proviso, standing alone, might appear to grant highway districts broad authority to vacate public streets. But the proviso applies only in the context of section 50-1317, which is limited to incorporated cities that are not exercising their corporate functions. By the way, the title to this section says that it also applies in unincorporated areas, but nothing in the statute speaks to this.
Idaho Code § 50-1321	Roads created by dedication in recorded plats may not be vacated without the consent of adjoining landowners, unless the road was never opened or has not been used by the public for five years.	Although contained in title 50, this provision appears to be applicable also to any roads on plats outside of cities.
Idaho Code § 50-1325	“Easements shall be vacated in the same manner as streets.”	The statute apparently applies to all easements, not just road easements. Because this section is included in the chapter dealing with plats, it presumably refers to easements dedicated by plat.
Idaho Code § 50-1330	Highway districts have “exclusive general supervisory authority” over roads within their jurisdictions (including the power to accept and vacate) <u>except</u> for streets within cities with functioning street departments.	This is the clearest legislative statement in title 50 of the principle highway districts do <u>not</u> have jurisdiction over streets within cities with functioning street departments. It dovetails with its counterpart in title 40 (Idaho Code § 40-1323(1) and is further reinforced by § 40-1310(1) and 40-109(1). See discussion in section V.B.4 on page 176 regarding dictum in <i>Sandpoint III</i> addressing the interaction of section 40-104(1) and sections 40-109, 40-1310, 40-1333, and 50-1330.

## **B. Jurisdiction and control over city streets in areas overlapped by a highway district**

### **1. Overview**

With the exception of “single county-wide highway districts” created under chapter 14 of title 40, highway districts have no jurisdiction over cities with functioning street departments.<sup>207</sup> Thus, cities with functioning street departments<sup>208</sup> have the responsibility for maintenance and jurisdiction over validation, and vacation. In contrast, where a highway district overlaps a city without a functioning street department, the highway district has jurisdiction and control over those streets, including the authority to validate and vacate.

As discussed in section V.B.4 on page 176, *City of Sandpoint v. Sandpoint Independent Highway Dist.* (“*Sandpoint III*”), 139 Idaho 65, 72 P.3d 905 (2003) (Eismann, J.) contains language to the effect that a city overlapped by a highway district cannot obtain authority over its streets simply by establishing a functioning highway district; instead, it must undertake formal detachment, dissolution, or other procedures that resolve its financial relationship with the highway district. The *Sandpoint III* decision should be understood in the financial context in which it arose. The city sought injunctive relief aimed at taking ownership and control of the highway district’s finances based solely on the fact that the city had established a functioning street department. The Court held that a highway district’s bank accounts, loans, and other financial instruments may be conveyed to the city only via detachment, dissolution, or other formal proceedings. The Court’s holding should be understood as limited to the financial question presented in the case. The city’s right to validate or vacate streets was not an issue in *Sandpoint III*. Any broader dictum in the decision should not be read as overturning the extensive and explicit statutory authority establishing that cities with functioning street departments have jurisdiction over their streets, including the right to maintain and repair them and the authority to vacate and validate them.

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<sup>207</sup> Idaho Code § 40-1713(2) provides three options for the administration of a county’s secondary highways: (a) a countywide highway system (administered by the county, not a highway district), (b) a single countywide highway district, or (c) up to four highway districts within the county. For each of these three options, the entity’s jurisdiction expressly excludes “highways and streets within cities with functioning street departments.”

The second of these options (a single county-wide highway district) stands in contrast to single county-wide highway districts created under chapter 14. Idaho Code §§ 40-1401 to 40-1418 authorizes the creation single county-wide highway districts that have complete jurisdiction over all roads within the county, including city streets. The only one that has been created in Idaho is the Ada County Highway District (“ACHD”). “No city included within a county-wide highway district shall maintain or supervise any city highways, or levy any ad valorem taxes for the construction, repair or maintenance of city highways.” Idaho Code § 40-1406. “If a county adopts a single county-wide highway district, the county commissioners are directed by statute to dissolve all existing city highway systems, highway districts, and county highway systems within the county, IDAHO CODE § 40-1407 (2002).” *City of Sandpoint v. Sandpoint Independent Highway Dist.* (“*Sandpoint III*”), 139 Idaho 65, 70, 72 P.3d 905, 910 (2003) (Eismann, J.).

<sup>208</sup> The term functioning street department is defined by statute. “A city department responsible for the maintenance, construction, repair, snow removal, sanding and traffic control of a public highway or public street system which qualifies such department to receive funds from the highway distribution account to local units of government pursuant to section 40-709, Idaho Code . . . .” Idaho Code § 50-1301.

Where a highway district's territory overlaps a city's boundaries, the highway district has authority to impose ad valorem taxes on property within that overlapped portion of the city. This is true irrespective of whether the city has a functioning street department. Idaho Code § 40-1323(1). Revenues raised by the highway district's taxes on property within the city are divided 50/50 between the city and the highway district (with some exceptions).<sup>209</sup> The highway district retains 100 percent of taxes it raises on property in unincorporated areas. Idaho Code § 40-801(1)(a). The 50 percent split received by the city is in addition to other funding sources available to the city: (1) cities receive a share of state funding through the highway distribution account (Idaho Code § 40-701), (2) cities may impose their own ad valorem taxes (Idaho Code §§ 40-1323(1), 40-1324), (3) cities may impose revenue bonds to support infrastructure, and (4) cities often receive grant funding for street improvements.<sup>210</sup>

If a city does not have a functioning street department, it will still receive a 50/50 split from the highway district. It will likely enter into an agreement with a highway district or the county to maintain its streets.<sup>211</sup>

In *Sandpoint III*, the Court opined that the Legislature must have intended that when highway district boundaries are drawn, they should not include cities with functioning street departments. This is incorrect.<sup>212</sup> The fact is, many Idaho cities with functioning street departments are overlapped by highway

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<sup>209</sup> A highway district may impose a "general levy" of up to 0.2 percent of market value for construction and maintenance of highways and bridges within its territory. The general levy is shared with the overlapping city 50/50. In addition, highway districts are authorized to impose a smaller special levy (of up to 0.084 percent of market value) for five listed purposes including bridge maintenance and construction. The revenues from the special levy are not shared with the overlapping city. Idaho Code § 40-801(1)(b).

<sup>210</sup> One might ask why cities do not receive 100 percent of the money raised by highway districts on property within the city limits. Advocates for highway districts contend that the reasoning of the Legislature is that city residents drive not only on city streets but in surrounding rural areas. A half century ago, the split was 70/30 with highway districts getting the greater share. The rough justice reflected in the 50/50 split does not take into account the growth of cities that are completely or nearly completely overlapped by highway districts. Over time, more and more lane miles are concentrated within the city. Yet, as the urban population rises, 50 percent of the revenues continue to flow out of the city to support the proportionately smaller rural road network.

<sup>211</sup> Cities are authorized to enter into agreements under which a highway district or the county undertakes maintenance of city streets. "Cities may make agreements with a county, highway district or the state for their highway work, or a portion of it, but they shall compensate the county, district or state fairly for any work performed." Idaho Code § 40-1333. "The highway district has the power . . . to construct or repair, with the consent of the corporate authorities of any city within the district, any highway within a city, upon the division of the cost as may be agreed upon . . ." Idaho Code § 40-1310(4). Likewise Idaho Code § 40-607 authorizes counties and highway districts to enter into mutual maintenance agreements. Idaho Code § 40-604 authorizes counties to enter agreements with cities, highway districts and others to perform highway maintenance. Idaho Code § 67-2332 allows public agencies to perform governmental services that the contracting parties are authorized to perform. Idaho Code § 67-2328 allows governmental entities with joint responsibilities to enter into joint powers agreements. As a practical matter, however, only smaller cities find such agreements practical in the context of street maintenance.

<sup>212</sup> The Court reasoned: "Rather, it appears that the legislature's intent was to prevent cities with functioning street departments from being included within a highway district, with the exception of a single county-wide highway district created under Chapter 14, Title 40, Idaho Code." *Sandpoint III*, 139 Idaho at 70,

districts. This may result from the development of a street department subsequent to highway district creation or annexation into highway district territory. When that happens, highway district boundaries are rarely adjusted to exclude the city.<sup>213</sup>

Idaho statutes addressing the subject (see table on page 160) are consistent and, read together, point to the following conclusion: If the city has a functioning street department, it has control and jurisdiction of roads within the city limits, even if overlapped by a highway district.

**2. Statutes establishing that cities with functioning street departments retain control of streets (except for single county-wide highway districts).**

**a. Sections 40-203 and 40-203A**

Sections 40-203 and 40-203A authorize counties and highway districts to vacate and validate roads within their jurisdiction. For highway districts, these sections expressly apply to the “highway district system” which is defined in Idaho Code § 40-109(1) to exclude streets within cities with a functioning street department. Thus, it is evident that highway districts do not have authority to vacate or validate streets located within a city with a functioning street department.

This ties into Idaho Code § 40-1310(5) (discussed below) which reiterates that highway districts have power to “lay out, alter, create and abandon and vacate public highways and public rights-of-way within their respective districts under the provisions of sections 40-202, 40-203 and 40-203A, Idaho Code.” Idaho Code § 40-1310(5) (emphasis added).

**b. Section 50-1330**

Idaho Code § 50-1330 states that highway districts have authority over roads within their jurisdictions except for streets within cities with functioning street departments:

In a county with highway districts, the highway district board of commissioners in such district shall have exclusive general supervisory authority over all public streets and public rights of way under their jurisdiction within their district, excluding public streets and public rights of way located inside of an incorporated city that has a functioning street department, with full power to establish design standards, establish use standards and regulations in accordance with the provisions of title 49, Idaho Code, accept, create, open, widen, extend, relocate, realign, control access to

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72 P.3d at 910. The Court based this conclusion on Idaho Code § 40-1713(2), which describes mechanisms for the administering a county’s secondary highways. This reflects the Court’s flawed understanding of these provisions. The title 17 provisions give authority to highway districts over the secondary highways of a county “exclusive of those highways and streets within cities with functioning street departments.” Idaho Code §§ 40-1713(2)(a), (b) & (c). The Court apparently read this as saying that the boundaries of districts should be drawn to exclude such cities. In fact, the statute contemplates that cities may be overlapped by the district’s boundaries, and when that happens the cities shall retain jurisdiction over their roads. This is evident from the fact that the districts are obligated to share road revenues with the cities they overlap.

<sup>213</sup> There are mechanisms for adjusting highway district boundaries, combining highway districts, and dissolution of highway districts. These are cumbersome processes that involve a public hearing, action by the county, and approval of voters. Idaho Code §§ 40-1501 to 40-1630, 40-1801 to 40-1821.

or vacate said public streets and public rights of way. Provided, however, when said public street or public right of way lies within one (1) mile of a city, or the established county/city impact area or adjacent to a platted area within one (1) mile of a city or the established county/city impact area, consent of the city council of the affected city shall be necessary prior to the granting of acceptance or vacation of said public street or public right of way by the highway district board of commissioners.

Idaho Code § 50-1330 (emphasis supplied).<sup>214</sup> By necessary implication, cities with functioning street departments have jurisdiction over their city streets.

Section 50-1330 dovetails with three provisions in title 40 (dealing with highways) that also preclude highway district jurisdiction over streets in cities with functioning street departments: Idaho Code §§ 40-203, 40-203A, 40-1323(1), 40-1310(1), and 40-109(1).

This straightforward reading of Section 50-1330 was confirmed by the Court in *City of Sandpoint v. Sandpoint Independent Highway Dist.* (“*Sandpoint I*”), 126 Idaho 145, 879 P.2d 1078 (1994) (Trout, J.). “The district court was correct, however, in its initial pronouncement that under I.C. § 50-1330 the Highway District has exclusive power to vacate streets within its boundaries where the City does not have a functioning street department.” *Sandpoint I*, 126 Idaho at 151, 879 P.2d at 1084.

See discussion in section V.B.4 on page 176 regarding dictum in *Sandpoint III* addressing the interaction of section 40-104(1) and sections 40-109, 40-1310, 40-1333, and 50-1330.

#### **c. Section 50-301**

Section 50-301 is a broad grant of authority to Idaho cities to “perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho.” This wide-ranging authority implicitly includes the right to validate and vacate roads falling under the control and jurisdiction of cities.

#### **d. Section 50-311**

Another provision of title 50 assigns broad power to cities over the creation and vacation of city streets:

Cities are empowered to: create, open, widen or extend any street, avenue, alley or lane, annul, vacate or discontinue the same whenever deemed expedient for the public good . . . .

Idaho Code § 50-311.<sup>215</sup> In order to exercise these broad powers, however, other statutes require that the city have a functioning street department. The power to validate, though not specifically named, is

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<sup>214</sup> This provision was added in 1983, 1983 Idaho Sess. Laws, ch. 233, § 1 (with an amendment in 1992, 1992 Idaho Sess. Laws, ch. 263 § 10). Note, by the way, that the proviso in Idaho Code § 50-1330 requiring consent for roads outside of a city does not conform to the similar proviso in Idaho Code § 40-1310(5). For example, the proviso in Idaho Code § 50-1330 is not limited to cities having functioning street departments. (The Idaho Supreme Court mentioned this disconnect in *Sandpoint I*, 126 Idaho at 151 n.2, 879 P.2d at 1084 n.2.) There is no apparent reason for this anomaly. The two provisos, by the way, were not created at the same time.



implicitly included within the broad authority to open and create streets. This conclusion is underscored by the broad grant of authority in section 50-301 discussed above.

**e. Section 40-1323(1)**

Idaho Code § 40-1323(1) does two things. First, it authorizes highway districts that overlap cities to levy ad valorem taxes on property within the overlapped portion of the city. Second, and more importantly here, the language underlined in the quotation below provides that cities overlapped by highway districts have authority to exercise the authorities over streets granted to them under chapter 13 of title 40 (which includes the power to create, abandon and vacate streets under section 40-1310(5)) and under chapter 3 of title 50 (which includes the power perform all functions of local self-government under section 50-301 and the power to open or vacate streets under section 50-311).

Section 40-1323(1) reads:

If any highway district shall include within its boundaries any incorporated city, or any portion of a city, the power of taxation on the part of the highway district as to ad valorem taxes, and in general all power of taxation or assessment, shall extend to and include the persons and property within the territory of the included city. The residents of the included territory shall be deemed for all purposes residents of the highway district, and entitled to vote at highway district elections to the same extent as other residents of the highway district. Nothing in this title shall be construed as affecting or impairing any power of taxation or assessment for local city highway purposes on the part of the authorities of the city of any included territory. Each incorporated city, or portion of it, within a highway district, shall constitute a separate division of the district. The city council of each incorporated city within the territory of a highway district, so far as relates to their city, shall have the powers and duties as provided by this chapter [chapter 13 of title 40] and as provided in chapter 3, title 50, Idaho Code, in such case.

Idaho Code § 40-1323(1) (emphasis supplied).

Note that this provision applies to all cities, not just those with functioning highway districts. This is presumably because it deals primarily with the highway district's authority to levy taxes.

The Court in *Sandpoint I* offered this summary of the effect of section 40-1323:

I.C. § 40-1323 allows the city council of an incorporated city, which is included in the territory of a highway district, to exercise the powers and

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<sup>215</sup> In a 2002 case, the Idaho Supreme Court referenced this provision (and another dealing with landowner consent) in broad terms. “The vacation of a city street is governed by Idaho Code § 50-311 and, if the street is part of a plat or subdivided tract, by Idaho Code § 50-1321.” *Infanger v. City of Salmon*, 137 Idaho 45, 49, 44 P.3d 1100, 1104 (2002) (Eismann, J.). That case (discussed elsewhere) dealt with an exchange of property and did not involve a city with an overlapping highway district. Accordingly, not too much should be read into the Court's sweeping language about jurisdiction (which did not mention that jurisdiction is limited to cities with functioning street departments).

duties of the commissioners of the highway district with respect to the streets within the city limits.

*Sandpoint I*, 126 Idaho at 150, 879 P.2d at 1083.

**f. Sections 40-1310 and 40-109(1)**

The conclusion that cities with functioning street departments have authority over their streets is further reinforced by Idaho Code §§ 40-1310 and 40-109(1). The three relevant subsections of section 40-1310 are discussed in turn below.

See discussion in section V.B.4 on page 176 regarding dictum in *Sandpoint III* addressing the interaction of section 40-104(1) and sections 40-109, 40-1310, 40-1333, and 50-1330.

**(i) Section 40-1310(1)**

Idaho Code § 1310(1) vests in highway districts exclusive jurisdictional authority over all roads “within their highway system.” The definition of “Highway district system” expressly excludes roads “included within city highway systems of incorporated cities with a functioning street department.” Idaho Code § 40-109(1).<sup>216</sup> Thus, read together, these statutes confirm that highway districts have exclusive jurisdiction over roads within their territory except where they overlap cities with functioning street departments.

In *Sandpoint I*, the Court reached the same conclusion by reading together sections 40-1310(1) and 50-1330. *Sandpoint I*, 126 Idaho at 150, 879 P.2d at 1083. This more convoluted path was necessary because recently amended Idaho Code § 40-109(1) was not in effect at the time of the litigation. *Sandpoint I*, 126 Idaho at 150, n.1, 879 P.2d at 1083, n.1.

**(ii) Section 40-1310(5)**

Section 40-1310(5) reads:

The highway district has the power to receive highway petitions and lay out, alter, create and abandon and vacate public highways and public rights-of-way within their respective districts under the provisions of sections 40-202, 40-203 and 40-203A, Idaho Code. Provided however, when a public highway, public street and/or public right-of-way is part of a platted subdivision which lies within an established county/city impact area or within one (1) mile of a city if a county/city impact area has not been established, consent of the city council of the affected city, when the city has a functioning street department with jurisdiction over the city streets, shall be necessary prior to the granting of acceptance or vacation of said public street or public right-of-way by the highway district board of commissioners.

Idaho Code § 1310(5) (emphasis supplied).

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<sup>216</sup> The reference to “functioning street department” was added in 1994. 1994 Idaho Sess. Laws, ch. 324, § 2.

The first sentence in Idaho Code § 40-1310(5) is a broad grant of authority to highway districts to create and vacate roads. However, it is limited to roads “within their respective districts” which ties into the definition of “highway district system” in Idaho Code § 40-109(1). Thus, the power does not extend to streets within cities with functioning street departments (except for single county-wide highway districts created under chapter 14 of title 40).

This conclusion is confirmed by the second sentence of this subsection. It lays out a consent requirement giving cities with functioning street departments veto power over any road acceptance or vacation in platted areas within the area of city impact (or a one-mile buffer zone around the city). The fact that the Legislature gave a veto power to cities for roads outside of the city reflects the fact that cities with functioning street departments have complete control of the streets within their city limits (except in the case of a single county-wide highway district created under chapter 14 of title 40).

### (iii) Section 40-1310(8)

Section 40-1310(8) reads: “The highway district board of commissioners shall have the exclusive general supervisory authority over all public highways, public streets and public rights-of-way under their jurisdiction . . . .”

This provision further reinforces the conclusion that references throughout section 40-1310 to roads “within” the highway district means roads under the jurisdiction of the highway district. In other words, it excludes streets in cities with functioning street departments (except for single county-wide highway districts created under chapter 14 of title 40).

### g. Sections 40-1333

Section 40-1333 is a substantive provision reiterating that cities with functioning street departments have broad authority over their streets:

Cities, with city highway systems, shall be responsible for the construction, reconstruction and maintenance of highways in their respective city systems, except as provided in section 40-607, Idaho Code. Cities may make agreements with a county, highway district or the state for their highway work, or a portion of it, but they shall compensate the county, district or state fairly for any work performed.

Idaho Code § 40-1333 (emphasis supplied).<sup>217</sup>

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<sup>217</sup> Referenced section 40-607 is an exception limited to certain rural major collector roads within a city with a population under 5,000. “The costs of constructing, reconstructing, maintaining and acquiring rights-of-way for highways in a county highway system and a highway district highway system shall be borne by the responsible highway jurisdiction. This section shall not be construed as preventing counties and highway districts from contracting with the state for engineering or other services provided just compensation is paid. If planning or engineering studies show the existence of a need, a county or highway district may purchase, condemn or otherwise acquire new or additional rights-of-way for a new alignment of or improvement of an existing alignment of an extension of a county or highway district rural major collector highway through cities with populations of less than five thousand (5,000), provided the extension does not eliminate access to adjacent property owners. A county or highway district shall have jurisdiction, with the full authority to construct, maintain and control, over an extension of a rural major collector highway eligible for federal highway funds

This section dovetails with the pronouncements elsewhere in titles 40 and 50 to the effect that cities overlapped by highway districts retain control and jurisdiction over city streets. It also dovetails with the reference in the definition of “city system” (Idaho Code § 40-104(1)) limiting such systems to those of cities with functioning street departments.

See discussion in section V.B.4 on page 176 regarding dictum in *Sandpoint III* addressing the interaction of section 40-104(1) and sections 40-109, 40-1310, 40-1333, and 50-1330.<sup>218</sup>

#### **h. Section 40-204A**

Idaho Code § 40-204A deals with “federal land rights-of-way” (a term defined in Idaho Code § 40-107(5) as an R.S. 2477 road). It provides in part:

Persons seeking to have a federal land right-of-way, including those which furnish public access to state and federal public lands and waters, validated as a highway or public right-of-way as part of a county or highway official highway system, shall follow the procedure outlined in section 40-203A, Idaho Code.

Idaho Code § 40-204A(5) (emphasis added).

The underlined portion of the quotation above shows that the provision applies only to roads under county or highway district jurisdiction. This section does not address how R.S. 2477 roads under city jurisdiction are to be validated or otherwise confirmed. However, by limiting the requirement to proceed under 40-203A to roads under county or highway district jurisdiction, this statute is consistent with other statutes providing that streets under the jurisdiction of a city are not subject the validation procedures (and the exhaustion requirements) of sections 40-203A and 40-208(7)).

#### **i. Section 40-604(4)**

Section 40-604 sets out the basic authorities of highway district commissioners. It says they have “authority to abandon and vacate any highway or public right-of-way within their highway system under the provisions of section 40-203, Idaho Code.” Idaho Code § 40-604(4) (emphasis added).

Keying in to the definition of “highway district system” in section 40-109(1), this section confirms that highway districts do not have authority over streets in cities with functioning highway departments (except in single county-wide highway districts created under chapter 14 of title 40).

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within a city, when the city population is less than five thousand (5,000). Counties and highway districts may enter into any mutual agreement for the transfer of maintenance and control of the rural major collector highway extension to the city. A county or highway district may contract with an adjoining county or highway district for the construction and/or maintenance of any part of its highway system.” Idaho Code § 40-607.

<sup>218</sup> In any event, section 40-1333 addresses only the authority of cities over “the construction, reconstruction and maintenance of highways.” Notably and specifically, it does not deal with a city’s authority to accept, validate, or vacate streets. Thus, even if the exception in the definition of “city system” (which may not even apply, see footnote 204 on page 160) were given a broader reading, it would not limit the authority of cities with functioning street departments to validate and vacate streets within their city limits.

**3. Other statutes that interact with the statutes giving jurisdiction to cities with functioning street departments**

**a. Section 50-1317**

Idaho Code § 50-1317 provides that in the case of a city that is not exercising its corporate functions, persons may petition the county or highway district to vacate “property” (presumably including a dedication of a road contained within a plat). The section concludes with the following proviso:

Provided however, when a public street or public right-of-way is located within the boundary of a highway district or is under the jurisdiction of a county, the respective commissioners of the highway district or board of county commissioners shall assume the authority to vacate said public street or public right-of-way pursuant to section 40-203, Idaho Code.

Idaho Code § 50-1317.

This proviso, standing alone, might appear to grant highway districts broad authority to vacate public streets. But the proviso applies only in the context of section 50-1317, which is limited to incorporated cities that are not exercising their corporate functions. By the way, the title to this section says that it also applies in unincorporated areas, but nothing in the statute speaks to this.

**b. Section 50-1321**

Idaho Code § 50-1321 requires the consent of adjoining landowners in order to vacate a public street or public right-of-way.

**a. Section 50-1306A(6)**

One statute that requires some explanation is Idaho Code § 50-1306A(6). It reads:

When public streets or public rights-of-way are located within the boundary of a highway district, the highway district commissioners shall assume the authority to vacate said public streets and public rights-of-way as provided in section 40-203, Idaho Code.

Idaho Code § 50-1306A(6).

If read alone (out of context), this subsection could be understood to apply to incorporated areas. That would contradict all the other statutory provisions that assign to cities with functioning street departments (except for cities within county-wide highway districts created under chapter 14 of title 40) the right to vacate streets, even if overlapped by highway districts.

That conflict may be avoided by reading subsection (6) in context with the rest of section 50-1306A.

Section 50-1306A(1) provides that persons desiring to vacate a plat must petition the city if the land is located within a city, and must petition the county if the land is located in the unincorporated area of the county. Subsection (6) should be read as addressing the situation where a petition is directed to the county. In that context, it serves to clarify and confirm that if the plat lies within unincorporated land that is also within the boundaries of a highway district, the highway district (not the county) has jurisdiction over road

vacation. This dovetails with and reinforces the point made in Idaho Code § 40-203(4)(a) that counties and highway districts are to employ the road vacation procedures in title 40, not plat vacation procedures in title 50, to vacate roads.

In any event, the application of the statute is narrow—it is restricted to plat vacations. One would not know that from reading the subsection quoted above (which sounds like it applies to all road vacations within the physical boundaries of a highway district). But this subsection is within a statute limited to vacations of plats. (The section heading reads “Vacation of plats—Procedure.”) Thus, whatever section 50-1306A(6) does, it applies only in the limited circumstance of when a plat is vacated.

#### a. Section 40-208

Idaho Code § 40-208 authorizes judicial review of validation and vacation decisions by counties and highway districts. In 2013, it was amended to mandate that parties must first seek validation or vacation by the local entity pursuant to Idaho Code §§ 40-203 and 203A. Idaho Code § 40-208(7) (2013 Idaho Sess. Laws, ch. 239 (H.B. 321)). This was intended to preclude parties from seeking judicial determinations via quiet title actions or during the course of other proceedings.

The procedural and exhaustion requirements in Idaho Code § 40-208 are not applicable to the validation or judicial determination of the legal status of streets in cities with functioning street departments (except for those in single county-wide highway districts created under chapter 14 of title 40). See discussion in section V.D on page 180.

#### 4. The *Sandpoint* decisions

The Idaho Supreme Court has issued four decisions over 22 years involving the City of Sandpoint and a highway district (whose name has changed over the years) whose territory overlaps the city.<sup>219</sup> The first, *City of Sandpoint v. Sandpoint Independent Highway Dist.* (“*Sandpoint I*”), 126 Idaho 145, 879 P.2d 1078 (1994) (Trout, J.), involved consolidated appeals from two lawsuits. One was initiated by a city resident who sued both governmental entities seeking a declaration that one or the other must maintain the streets within a newly annexed subdivision. Ironically, neither governmental entity wanted jurisdiction at that time. Both entities contended that the other was responsible for maintaining streets within the city. The Idaho Supreme Court found that the highway district had jurisdiction because the city had no functioning street department. “Thus, reading the above statutes [Idaho Code §§ 40-1323 and 50-1330] together, we hold that the Highway District has exclusive general supervisory authority to maintain the streets within the Highway District absent a showing by the City that it has a functioning street department.” *Sandpoint I*, 126 Idaho at 150-51, 879 P.2d at 1083-84. The other appeal was from the highway district’s lawsuit seeking a declaration that it had the authority to vacate streets within the city. The Court ruled, based on Idaho Code § 50-1330, that “the Highway District has exclusive power to vacate streets within its boundaries where the City does not have a functioning street department.” *Sandpoint I*, 126 Idaho at 151, 879 P.2d at 1084.

Unfortunately, decisions in subsequent litigation involving the same parties have muddled the guidance to some extent. Statements in those cases that are at odds with the directives of the statutes should be viewed either as dictum or as holdings limited to the facts of those cases.

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<sup>219</sup> “The Highway District was formed in 1930, and its boundaries are nearly coterminous with those of the City.” *City of Sandpoint v. Sandpoint Independent Highway Dist.* (“*Sandpoint III*”), 139 Idaho 65, 66, 72 P.3d 905, 906 (2003) (Eismann, J.).

Two more cases, which proceeded simultaneously, were decided in 2003 (*Sandpoint II* and *Sandpoint III*). In *Sandpoint Independent Highway Dist. v. Bd. Of Cnty. Comm'rs of Bonner Cnty.*, 138 Idaho 887, 71 P.3d 1034 (2003) (“*Sandpoint II*”) (Schroeder, J.), local citizens petitioned the county to dissolve the highway district pursuant to Idaho Code §§ 40-1801 to 40-1822, and shift its assets and responsibilities to the city. The county ruled that dissolution was in the best interests of the highway district, and ordered an election to approve the dissolution and designate the city as the succeeding operational unit to the highway district. The highway district appealed and the district court stayed the election. The Idaho Supreme Court upheld the county’s determination that dissolution was in the best interest of the district, but it overruled the county on the successorship issue, holding that the city was not eligible to receive the financial assets of the highway district, which would instead probably go to the county. The election was never held. Instead, a month after *Sandpoint III*, the parties entered into a joint powers agreement, which was later litigated in *Sandpoint VI* discussed below.

At about the same time in 2000 that the city filed its dissolution petition that was the subject of judicial review in *Sandpoint II*, the city created a functioning street department and sought a declaratory judgment and injunctive relief giving it control over both the streets and the highway district’s revenues. Specifically, the city sought to “impound monies raised by the Highway District . . . to require the Highway District to pay certain funds to the City and to enjoin it from making any levy . . .” *City of Sandpoint v. Sandpoint Independent Highway Dist.* (“*Sandpoint III*”), 139 Idaho 65, 67, 72 P.3d 905, 907 (2003) (Eismann, J.). The decision in *Sandpoint III* came down two weeks after *Sandpoint II*. The two cases appear to reflect a belt-and-suspenders strategy by the city. Success in either would have secured city control over highway district revenues. Instead, the Court delivered a one-two punch to the city’s effort to acquire the highway district’s funds.

The *Sandpoint III* Court ruled that simply establishing a functioning street department is not sufficient to gain control over the highway district’s funds. To accomplish that, the city must first complete statutory dissolution or other formal proceedings. That, of course, is exactly what the city did in *Sandpoint II*. But the *Sandpoint II* Court ruled that the city was ineligible to “inherit” the highway district’s money. Then, in *Sandpoint III*, the Court blocked the city’s end-run around the very dissolution procedures the city initiated. Unable to use dissolution to obtain the highway district funds, the city was not allowed to accomplish the same thing through a separate civil action avoiding the dissolution proceedings and based solely on the fact that it has finally established a functioning street department. Both cases were about the money, and the Court’s rulings should be understood in that context.

The *Sandpoint III* Court began its analysis with the statutes that formed the basis of *Sandpoint I* (Idaho Code §§ 50-1330 and 40-109).<sup>220</sup> *Sandpoint III* also referenced Idaho Code §§ 40-1310 and 40-1333. *Sandpoint III*, 139 Idaho at 67-69, 72 P.3d at 907-09. The Court acknowledged that these statutes “provide that a city with a functioning street department has jurisdiction over all public highways within its corporate limits.” *Sandpoint III*, 139 Idaho at 68, 72 P.3d at 908.

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<sup>220</sup> *Sandpoint I* relied on Idaho Code § 50-1330. The *Sandpoint I* Court mentioned Idaho Code § 40-109 only to note that the 1994 amendment adding the reference to “functioning street department” to the definition Highway District System was not in effect at the time of the litigation.

But it then pivoted to an “ambiguity” it perceived in how Idaho Code § 40-104(1) interacts with Idaho Code §§ 40-109, 40-1310, 40-1333, and 50-1330. *Sandpoint III*, 139 Idaho at 69, 72 P.3d at 909.<sup>221</sup> The Court’s conclusion that section 40-104(1) is at odds with all the other statutes is not compelling.

First, it is not clear that section 40-104(1) is even applicable. None of these statutes refer to “city system.” See footnote 204 on page 160. Even if the definition of “city system” is applicable, the Court’s reading of that definition is strained and at odds with the rest of titles 40 and 50.

Section 40-104(1) is the definition of “city system” which excludes roads that are “part of a highway district system.”<sup>222</sup> The *Sandpoint III* Court apparently read “part of a highway district system” as including any road physically within the territory of a highway district. That conclusion is in direct conflict with the definition of “highway district system” (Idaho Code § 40-109(1)<sup>223</sup>) which excludes from highway district systems streets within cities with functioning street departments. And it would lead to the absurd result that streets within such overlapped areas would be excluded from both the city system and the highway district system. The simple answer, which eluded the *Sandpoint III* Court, is that the exclusion from the “city system” of roads that are “part of a highway district system” should be understood to apply to roads that are legally part of a highway district system. Thus, streets in a city located within a single, county-wide highway district created under chapter 14 of title 40 are not part of the city system. But streets in any other city with a functioning street department that is overlapped by a highway district are part of the city system.<sup>224</sup>

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<sup>221</sup> The Court said: “With respect to the issue involved in this case, there is ambiguity. Idaho Code §§ 40-109 and 50-1330 could be construed as indicating that a highway district has no jurisdiction over streets within a city once it has a functioning street department. Idaho Code § 40-104(1), however, indicates that in a city with a functioning street department, a highway district can have jurisdiction over some of the city streets. It excludes from the “city system” of a city with a functioning street department any public highways that are part of a highway district system.” *Sandpoint III*, 139 Idaho at 69, 72 P.3d at 909. (The quotation references only Idaho Code §§ 40-109 and 50-1330, but the Court had earlier discussed Idaho Code §§ 40-1310 and 40-1333. Presumably it believed that section 40-104(1) also was at odds with the plain meaning of those statutes.)

<sup>222</sup> The definition provides: “‘City system’ means all public highways within the corporate limits of a city, with a functioning street department, except those highways which are under federal control, a part of the state highway system, part of a highway district system or an extension of a rural major collector route as specified in section 40-607, Idaho Code.” Idaho Code § 40-104(1) (emphasis supplied).

<sup>223</sup> The definition provides: “‘Highway district system’ means all public highways within each highway district, except those included within the state highway system, those under another state agency, those included within city highway systems of incorporated cities with a functioning street department, and those under federal control.” Idaho Code § 40-109(1).

<sup>224</sup> Until 1994, that is how the definition in section 40-104(1) worked. At the time of the enactment of section 40-1333 in 1985 (1985 Idaho Sess. Laws, ch. 253, §2), the corresponding definition of “city system” in section 40-104(1) did not reference functioning street departments. More significantly, it did not exclude roads within highway districts. Rather, it excluded roads within a single county-wide highway district—which makes sense.

In 1994, the Legislature amended both definitions (“city system” and “highway district system”) to add the reference to functioning street department. 1994 Idaho Sess. Laws, ch. 324, §§ 1 & 2. Those edits were not the thrust of the 1994 amendment, which dealt with a hodgepodge of issues including record-keeping. As often



The *Sandpoint III* Court also was troubled that “[t]he applicable statutes do not address how to effect the transition when a city that is within the boundaries of a highway district creates a functioning street department. They do not address the division of assets or debt.” *Sandpoint III*, 139 Idaho at 69, 72 P.3d at 909. This led the Court to address the various statutes for modifying or eliminating highway districts (detachment, dissolution, etc.) set out in chapters 14 through 18 of title 40. The Court expounded at length on how these statutes allocate debt, distribute assets, and address other financial issues in making such changes to highway district boundaries.<sup>225</sup>

As noted above, the city did employ the dissolution proceedings in *Sandpoint II*, but that strategy failed because the dissolution statute prohibits cities from obtaining the funds of a dissolved highway district.<sup>226</sup> In *Sandpoint III*, the Court was not about to let the city skirt this prohibition by avoiding dissolution and simply seeking injunctive relief to obtain the funds.

Unfortunately, the *Sandpoint III* decision left in its wake some broad language—broader than it should have been. For instance, the Court concludes: “There is no indication that the legislature intended that a city included within an existing highway district could exclude its streets from the highway district simply by creating a city street department capable of assuming the maintenance, construction, repair, snow removal, sanding and traffic control of the city streets.” *Sandpoint III*, 139 Idaho at 70, 72 P.3d at 910. This statement, however, should be read in light of the amended complaint, in which the City of Sandpoint “sought to impound monies raised by the Highway District pursuant to a special levy instituted in January 2000, to require the Highway District to pay certain funds to the City, and to enjoin it from making any levy upon real property within the City.” *Sandpoint III*, 139 Idaho at 67, 72 P.3d at 907. Those revenue authorities are controlled by other statutes (e.g., Idaho 40-801(1)(a)). And plainly, just because a city with a functioning street department has control over its streets does not mean that the highway district loses its authority to levying taxes on property within the part of its territory that overlaps the city. Plainly, the only way to accomplish that is to dissolve or detach from the highway district. The Court’s ruling should be understood to be that the establishment of a city street department does not, in itself, change a highway district’s boundaries or limit its authority to levy taxes. A broader reading of the Court’s ruling cannot be reconciled with clear statutory directives and, frankly, is inconsistent with how every city and highway district operates today in Idaho.

*City of Sandpoint v. Independent Highway Dist.* (“*Sandpoint IV*”), 161 Idaho 121, 384 P.3d 368 (2016) (J. Jones, J.) also contains some unfortunate language. The parties litigated the case focused on a constitutional challenge to the joint powers agreement. The Court did not want to go there and instead

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happens in legislative drafting, the drafters do a little “clean up” while they are making other edits to a section without understanding of the confusion the “clean-up” may cause to other sections.

<sup>225</sup> The *Sandpoint III* Court did not comment on the fact that the dissolution and detachment statutes speak in terms of allocation of financial assets and debts between highway districts and counties. Perhaps they implicitly apply to cities as well, when the highway districts overlap cities.

<sup>226</sup> “No city whose incorporated limits lie wholly or partially within the boundaries of a dissolved highway district shall be entitled to receive any share of the moneys of the dissolved highway district.” Idaho Code § 40-1811.

decided the case based on the failure of the joint powers agreement to conform to statutory procedures.<sup>227</sup> Elsewhere, however, the Court cites Idaho Code § 40-201 to support the conclusion that “both IHD [the highway district] and the City have the duty to maintain and improve the streets within the city limits.” *Sandpoint IV*, 161 Idaho at 124, 384 P.3d at 371. For all the reasons discussed above, that is simply not true. It was true, however, when *Sandpoint I* was decided (when the city had no functioning street department), and the statement should be understood in that context. In any event, the language appears to be dictum, in that the joint powers agreement was invalidated for failure to follow statutory provisions regarding its structure.

**C. What procedures apply to vacation or validation of streets by a city with a functioning street department?**

As discussed in the preceding section, cities with functioning street departments (except those located in a single county-wide highway district created under chapter 14 of title 40) have control and jurisdiction over their city streets.

The Legislature has set out detailed statutory guidance for how counties and highway districts go about validating or vacating roads, and how courts should review such decisions. Idaho Code § 40-203 and 40-203A. However, there is no counterpart to these statutes applicable to cities.

However, Idaho Code § 50-311 assigns broad power to cities over the creation and vacation of city streets, Idaho Code § 50-313 grants to cities “control of all public highways and bridges within the corporate limits,” and chapter 13 of title 50 addresses the vacation of plats or portions thereof.

In that absence of statutorily authorized procedures specific to validation or vacation of streets by cities, cities should proceed in compliance with all general statutes and ordinances governing public hearings and the like.

**D. Because section 40-208(7) is not applicable, exhaustion is not required and parties may proceed directly to district court to quiet title or otherwise resolve the legal status of streets in cities with functioning street departments.**

Idaho Code § 40-208 contains the judicial review provisions for challenging a decision of a county or highway district in a validation or vacation proceeding. A 2013 amendment to section 40-208(7) (2013 Idaho Sess. Laws, ch. 239 (H.B. 321)) mandates that parties must first seek validation or vacation prior to initiating quiet title or other action aimed at determining the status of the road. Essentially, this creates an “exhaustion” requirement.

This exhaustion requirement was aimed primarily at avoiding dueling litigation and a race to courthouse (the judge versus the commissioners) in which one party sought validation or vacation and the opposing party initiated a quiet title action. Thus, plainly, a party may no longer file a quiet title action without first seeking validation or vacation from the county or highway district.

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<sup>227</sup> “The JPA [joint powers agreement] does not establish an entity designed to conduct the joint or cooperative undertaking between IHD [the highway district] and the City.” *Sandpoint IV*, 161 Idaho at 124, 384 P.3d at 371.

However, arguably, the amendment also took away the authority of courts in situations like the *Halvorson v. N. Latah Cnty. Highway Dist.*, 151 Idaho 196, 254 P.3d 497 (2011) (Horton, J.) litigation to resolve road title issues that are germane to the litigation.

Note, however, that any such restriction on the court's jurisdiction is limited to roads under the jurisdiction of counties and highway districts. Nothing in the 2013 amendment deprives a court of deciding title with respect to streets in cities with functioning street departments.

Specifically, the title 40 judicial review provisions apply only to an appeal from a "final decision of a board of county or highway district commissioners in an abandonment and vacation or validation proceeding." Idaho Code § 40-208(1). Accordingly, they do not apply to the cities with functioning street departments. Thus, the pre-2013 status quo is preserved for determination of title to streets within cities with functioning highway departments. In a city context, a party may continue to choose its forum. It may seek validation or vacation by the city. It may file a quiet title action. Or it may litigate other issues which present call upon the court resolve the title issue as part of the litigation.

One reason that litigants may prefer to proceed directly to district court, rather than initiating validation/vacation proceedings before the city, is that it is not evident how one would appeal the city validation/vacation decision. These decisions are not LLUPA matters, nor are they subject to appeal under the IAPA (which applies only to state agencies). Hence, there is no obvious path to judicial review, leaving a disappointed party with the task of undertaking a collateral attack via declaratory action or other means, with the attendant procedural uncertainty.

#### **E. Landowner consent requirement for vacation of city streets**

Vacation of platted public streets and public rights-of-way requires the consent of the adjoining landowners, unless the road has not been opened or has not been used for five years and other access is available:

No vacation of a public street, public right-of-way or any part thereof having been duly accepted and recorded as part of a plat or subdivided tract shall take place unless the consent of the adjoining owners be obtained in writing and delivered to the public highway agency having jurisdiction over said public street or public right-of-way. Such public street or public right-of-way may, nevertheless, be vacated without such consent of the owners of the property abutting upon such public street or public right of way when such public street or public right-of-way has not been opened or used by the public for a period of five (5) years and when such nonconsenting owner or owners have access to the property from some other public street, public right-of-way or private road. However, before such order of vacation can be entered, it must appear to the satisfaction of the public highway agency that the owner or owners of the property abutting said public street or public right-of-way have been served with notice of the proposed abandonment in the same manner and for the same time as is now or may hereafter be provided for the service of the summons in an action at law. Any vacation of lands within one (1) mile of a city shall require written notification to the city by regular mail at least thirty (30) days prior to the vacation.

Idaho Code § 50-1321 (emphasis supplied).

This provision is codified to title 50, dealing with municipalities. However, it is directed to all public streets and public rights-of-way, not just those within cities. Those terms are defined differently, and more broadly, in title 50 than the definitions contained in title 40 (dealing with public highways). “Public street” is defined to include any road under the jurisdiction of a public highway agency. Idaho Code § 50-1301(13). “Public highway agency,” in turn, is defined very broadly to include, among other things, cities, counties, highway districts, and the state transportation department. Thus, the consent would be provided to whichever entity has jurisdiction over the street or public right-of-way.

#### **F. Allocation of vacated property interest to adjacent properties**

Title 50, dealing with municipalities, provides direction on the disposition of the interest in a vacated street. If the vacated street divides two properties, the interest in the vacated street ordinarily is divided 50/50 (down the centerline) between the adjacent landowners. However, the city council, in its discretion, may award a different disposition as it determines in is the best interests of the adjoining landowners. There is an exception under the statute: Larger cities have no discretion how they divide the vacated interest in long unused alleys. The statute reads:

Cities are empowered to: create, open, widen or extend any street, avenue, alley or lane, annul, vacate or discontinue the same whenever deemed expedient for the public good; to take private property for such purposes when deemed necessary, or for the purpose of giving right of way or other privileges to railroad companies, or for the purpose of erecting malls or commons; provided, however, that in all cases the city shall make adequate compensation therefor to the person or persons whose property shall be taken or injured thereby. The taking of property shall be as provided in title 7, chapter 7, Idaho Code. The amount of damages resulting from the vacation of any street, avenue, alley or lane shall be determined, under such terms and conditions as may be provided by the city council. Provided further that whenever any street, avenue, alley or lane shall be vacated, the same shall revert to the owner of the adjacent real estate, one-half (½) on each side thereof, or as the city council deems in the best interests of the adjoining properties, but the right of way, easements and franchise rights of any lot owner or public utility shall not be impaired thereby. In cities of fifty thousand (50,000) population or more in which a dedicated alley has not been used as an alley for a period of fifty (50) years [such alley] shall revert to the owner of the adjacent real estate, one-half (½) on each side thereof, by operation of the law, but the existing rights of way, easements and franchise rights of any lot owner or public utility shall not be impaired thereby.

Idaho Code § 50-311 (emphasis supplied) (brackets included in codification).

This statute does not speak to whether the interest to be vacated is a fee simple interest or merely a right-of-way easement. One would think that if the city held merely a right-of-way interest, the vacation of that interest would have no impact on the underlying fee ownership. In other words, there would be nothing to divide. The vacation would simply remove the burden on whomever owned the underlying fee.

The default 50/50 allocation makes sense particularly when the street is held in fee by the governmental entity and was created by plat in which the street divided properties on both sides. In that

case, the fair assumption is that the street was carved out of the lots on either side. The 50/50 split would not be proper, however, if the plat dedicated a street at the edge of the plat (along the plat boundary). In that case, the assumption should be street was carved entirely out of the adjacent lots on the side of the street inside the plat. It would be unfair and improper, if the street were later vacated, to allocate some of the land under the street to “foreign” landowners outside of the plat who contributed no land to the creation of the street. “A statute entitling each abutting owner to take title to the center line of an abandoned street or alley does not change the common law rule that the landowner’s reversionary interest extends to the entire highway if the landowner contributed land on both sides of it.” 39 Am. Jur. 2d, *Highways, Streets, and Bridges* § 218.

See also Idaho Code § 55-309, which provides: “An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown.” (This statute may be traced back to 1887.)

### **G. Exchanges involving city streets**

An Idaho statute authorizes cities to enter into certain property exchanges. Idaho Code § 50-1403. Another statute provides that section “shall not apply to the vacation or discontinuance of streets, highways, avenues, alleys or lanes annulled, vacated or discontinued.” Idaho Code § 50-1409. In *Infanger v. City of Salmon*, 137 Idaho 45, 50, 44 P.3d 1100, 1105 (2002) (Eismann, J.), the Court applied that exception to invalidate an exchange involving a city street in Salmon (“The Ordinance enacted by the City was void because it was an attempt to convey a portion of a city street.”)

### **H. Right-of-way versus fee interest**

A public road, like any road, may be held in fee simple or as a right-of-way (easement). It depends on how the road was acquired and what was acquired. Our Legislature has noted that public roads may be acquired by “deed of purchase, fee simple title, authorized easement, eminent domain, by plat, prescriptive use, or abandonment of a highway pursuant to section 40-203.” Idaho Code § 40-117(9) (definition of “public right-of-way”). If the public entity acquired the fee by purchase, grant, formal dedication, or condemnation, then it probably owns whatever interest (typically the entire fee) that the acquisition documents state. If the public acquired the road otherwise (e.g., by common law dedication or by prescriptive use), the public owns only a right-of-way—a form of easement.

Road creation by statutory dedication conveys a fee simple interest in streets and other things expressly dedicated to the public. Idaho Code § 50-1312. Common law dedication conveys only an easement, not the fee. “Common law dedication does not grant ownership of the parcel in another, but a limited right to use the land for a specific purpose.” *Saddlehorn Ranch Landowner’s, Inc. v. Dyer*, 146 Idaho 747, 203 P.3d 677 (2009). This case dealt with dedication of common areas, not roads. But the same principle would apply to roads.

Likewise, as to roads created by public use and maintenance, the public acquires only an easement across the land. “All the right acquired by the public is an easement in the land consisting of a right to pass over the same and keep the road in repair. The legal title to said lands remains in the owner of the adjoining land or the land over which the road runs.” *Meservey v. Gulliford*, 14 Idaho 133, 142, 93 P. 780, 783 (1908) (Sullivan, J.).

It is well established in other jurisdictions that the grant of a “right-of-way” under R.S. 2477 statute conveys only an easement (not the full fee). *Dillingham Commercial Co., Inc. v. City of Dillingham*, 705

P.2d 410, 415 (Alaska 1985); *Fairhurst Family Ass’n, LLC v. U.S. Forest Service*, 172 F. Supp. 2d 1328, 1332 (D. Colo. 2001); *Sierra Club v. Hodel*, 848 F.2d 1068, 1083 (10th Cir. 1988) (the “Burr Trail” case), *appeal following remand*, *Sierra Club v. Lujan*, 949 F.2d 362 (1991), *overruled on other grounds by Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992). There is little doubt that this is the rule in Idaho as well. The limited nature of the interest is reflected in the language employed by the Legislature in describing R.S. 2477 rights-of-way as “federal land rights of way.” Idaho Code §§ 40-107(5), 40-117(9), 40-204A.

## **VI. TITLE CLAIMS AGAINST THE STATE ARE NOT BARRED BY SOVEREIGN IMMUNITY**

As discussed in the sections below, there is a substantial and complex body of law governing the extent to which the federal government has waived claims for title against the government.

In contrast, when it comes to title claims against the State of Idaho, it is a simple matter. Title claims are not viewed as claims against the sovereignty itself and, hence, are allowed. There is case law to this effect specifically with respect to state quiet title claims. Presumably, the same is true with respect to claims for public road validation under the validation statutes.

A suit to quiet title to land allegedly owned by appellants and to which the Board of Education of the State of Idaho allegedly asserts a claim, is not a claim against the Board of Education, or the State, to which it can interpose sovereign immunity as a defense. *Roddy v. State*, 65 Idaho 137, 139 P.2d 1005, and authorities cited therein; *State ex rel. Black v. State Board of Education*, 33 Idaho 415, 196 P. 201; 59 C.J. 282, Sec. 429; 81 C.J.S., *States*, § 194, p. 1260; Section 33-3802, subd. (b), I.C.

The appellants by the proceeding are asserting no claim against the sovereignty, but are attempting to retain what they allegedly own.

Hence the contention that such proceeding deprives the State, its officials or boards, of sovereign rights of immunity, is without merit.

*Lyon v. State*, 76 Idaho 374, 283 P.2d 1105, 1106 (1955) (Keeton, J.).

Frankly, it is difficult to understand why the rule is not the same in the state and federal context. Evidently, the federal government perceives that a claim for title is “a claim against the sovereignty” and will be allowed only to the extent sovereign immunity is waived. Yet the State (based on *Lyon*) perceives that a title claim is not “against the sovereignty” but is merely an attempt by people “to retain what they allegedly own.” It would seem that the better explanation of why title claims against the State are allowed is that Idaho has waived them by enacting the State Quiet Title Act, Idaho Code §§ 6-401 to 6-418, and the state road validation statutes. However you get there, the rule is clear that the State is not immune from actions to determine title, including ownership of roads on State lands.

## **VII. FEDERAL CONTROL OVER ROADS ON FEDERAL LANDS**

### **A. Federal Quiet Title Act**

#### **1. The federal QTA waives sovereign immunity**

We begin from the premise that federal sovereign immunity insulates the United States from suit “in the absence of an express waiver of this immunity by Congress.” *Block v. North Dakota*, 461 U.S. 273,

280 (1983) (White, J.). “It has been settled since at least the mid-nineteenth century that the United States may not be sued without its consent. . . . The Constitution does not refer to sovereign immunity, and the rules pertaining to the defense are judge made.” 14 Fed. Prac. & Proc. Juris. § 3654 (2016).

One might contend that the concept of sovereign immunity is not well suited to the American democracy, which does not have a king. But it is settled law nonetheless.

The concept of sovereign immunity originates in the English common law principle that the English courts were created by, and therefore had no jurisdiction over, the King: “The King can do no wrong.” This legal doctrine was known to lawyers in colonial America. How it came to be applied in the United States is a mystery, given that government in America existed at the pleasure of the people.

Sean Gray, Note, *Declaratory Relief and Sovereign Immunity in Oregon: Can Someone Tell Me If I Turned Square Corners?*, 40 Willamette L. Rev. 563, 568 (2004) (footnotes omitted).

With the enactment of the federal Quiet Title Act (“QTA”) in 1972, the United States waived its sovereign immunity for purposes of certain quiet title actions.<sup>228</sup> A federal quiet title action may be brought by anyone claiming an interest in real property that is also claimed by the United States.<sup>229</sup>

Prior to the enactment of the QTA, the methods by which a non-federal party could obtain relief in a land title dispute involving the United States were quite limited:

- A person might persuade the United States to initiate title litigation against the person.
- A person could petition for congressional action in the form of a private bill.
- Private parties could frame their litigation as an “officer’s suit.”<sup>230</sup>

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<sup>228</sup> The federal Quiet Title Act is primarily codified to U.S.C. § 2409a. U.S.C. §§ 1346(f) and 1402(d) deal with jurisdiction and venue. The full citation is Act of Oct. 25, 1972, Pub. L. No. 92-562, 86 Stat. 1176, codified as amended at 28 U.S.C. §§ 2409a, 1346(f), 1402(d).

<sup>229</sup> The federal Administrative Procedure Act (which authorizes judicial review of agency action) also contains a waiver of sovereign immunity. 5 U.S.C. § 702. However, that section makes the waiver inapplicable if another statute limits jurisdiction. The interaction of the waiver in the APA and the waiver in the QTA (and its limitation as to tribal lands) is discussed in *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, 567 U.S. 209 (2012) (Kagan, J.).

<sup>230</sup> “An “officer’s suit” was a means for obtaining relief in a title dispute with the federal government before Congress passed the Quiet Title Act. . . . In the typical officer’s suit involving a title dispute, the claimant would proceed against the federal officials charged with supervision of the disputed area, rather than against the United States. The suit would be in ejectment or, as here, for an injunction or a writ of mandamus forbidding the defendant officials from interfering with the claimant’s property rights.” *Northern New Mexicans Protecting Land Water and Rights v. United States*, 2016 WL 546375 at \*13 n.4 (D. N.M. 2016). Since the enactment of the QTA, this approach is precluded. “If we were to allow claimants to try the Federal Government’s title to land under an officer’s-suit theory, the Indian land exception to the QTA would be rendered nugatory.” *Block v. North Dakota*, 461 U.S. 273, 285 (1983) (White, J.).

- In some circumstances, relief could be obtained via executive action.
- Finally, where appropriate, one might be able to bring litigation under another statute such as the Administrative Procedure Act or the Tucker Act.<sup>231</sup>

Note that the statute providing federal question jurisdiction, 28 U.S.C. § 1331, does not waive sovereign immunity. *Holloman v. Watt*, 708 F.2d 1399, 1401 (9<sup>th</sup> Cir. 1983).

## 2. Federal courts have exclusive jurisdiction under the federal QTA.

One cannot bring a federal quiet title action in state court.

Exclusive jurisdiction in quiet title actions against the United States is vested in federal courts. 28 U.S.C. § 1346(f). A state court does not have jurisdiction to decide quiet title actions against the United States.

*McClellan v. Kimball*, 623 F.2d 83, 86 (9<sup>th</sup> Cir. 1980).

This court has repeatedly held that both disputes over the right to an easement and suits seeking a declaration as to the scope of an easement fall within the purview of the QTA. *See, e.g., Skranak v. Castenada*, 425 F.3d 1213, 1218 (9<sup>th</sup> Cir. 2005) (dispute over plaintiff's right to an easement over national forest); *McFarland v. Norton*, 425 F.3d 724, 726-27 (9<sup>th</sup> Cir. 2005) (dispute over plaintiff's right to access a route through a national park); *Michel v. United States*, 65 F.3d 130, 131-33 (9<sup>th</sup> Cir. 1995) (per curiam) (dispute regarding the scope of easement over national wildlife refuge); *Narramore v. United States*, 852 F.2d 485, 490-92 (9<sup>th</sup> Cir. 1988) (dispute over whether flooding exceeded the scope of an easement).

*Robinson v. United States*, 586 F.3d 683, 686 (9<sup>th</sup> Cir. 2009).

In *S. Utah Wilderness Alliance v. BLM* ("SUWA"), 425 F.3d 735 (10<sup>th</sup> Cir. 2005), the Tenth Circuit impliedly allowed (on remand) a determination of title to federal property outside of a federal quiet title

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<sup>231</sup> "Without an express congressional waiver, the states and all other entities are barred from suing the United States by federal sovereign immunity. Prior to the passage of the QTA in 1972, the United States retained sovereign immunity with respect to suits involving title to land. The result of sovereign immunity was that any party seeking to assert title to land already claimed by the United States was left with limited means of enforcing their right; claimants could attempt to induce the United States to file a quiet title action against them, or, they could petition Congress or the Executive for discretionary relief. Claimants also attempted a third means of asserting their right: by initiating suits against federal officers as a method of obtaining relief in a title dispute with the federal government." Bethany Henneman, *Artful Pleading Defeats Historic Commitment to American Indians*, Comment, 14 U. Md. L.J. Race, Religion & Class 142 (2014) (footnotes omitted). The options involving petitioning Congress and the Tucker Act are discussed in See Letter from Ralph E. Erickson, Deputy Attorney General, to the Subcommittee Chair (Sept. 9, 1972), included in the committee report approving amendment to the proposed legislation, H.R. Rep. 92-1559, 1972 U.S.C.C.A.N. 4547, 1972 WL 12541; letter from the Attorney General to the Speaker (Oct. 6, 1971), included in the committee report approving amendment to the proposed legislation, H.R. Rep. 92-1559, 1972 U.S.C.C.A.N. 4547, 1972 WL 12541.



action.<sup>232</sup> Four years later, the Tenth Circuit politely repudiated this approach, reaffirming that the federal QTA is exclusive:

As a limited waiver of sovereign immunity, the Quiet Title Act is the sole avenue by which Kane County can seek to prove the existence of its R.S. 2477 rights in court. *See Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983) (holding that the Quiet Title Act is “the exclusive means by which adverse claimants [may] challenge the United States’ title to real property.” (footnote omitted)); *Sw. Four Wheel Drive Ass’n v. BLM*, 363 F.3d 1069, 1071 (10th Cir. 2004) (citing *Block* for the proposition that the Quiet Title Act provides the sole avenue for proving R.S. 2477 rights). Although Kane County does not directly challenge the district court’s ruling regarding the Quiet Title Act, read rather generously, its brief does suggest that the district court’s conclusion contravenes *SUWA v. BLM*. In that case, we remanded for the district court to adjudicate the validity of purported R.S. 2477 rights without even mentioning the Quiet Title Act. 425 F.3d at 788. Given the clear holding in *Block*, we decline to read *SUWA v. BLM* as establishing a contrary rule by implication. Because a Quiet Title Act claim was not filed in this case, the validity of purported R.S. 2477 rights of way over federal land could not have been adjudicated. Rejecting Kane County’s sole argument to the contrary, we affirm the district court’s ruling that the United States is not a necessary party.

*The Wilderness Society v. Kane Cnty.*, 581 F.3d 1198, 1219 (10<sup>th</sup> Cir. 2009) (parentheticals and brackets original, but footnotes omitted), *rev’d en banc*, 632 F.3d 1162 (2011) (reversed for lack of standing).

### **3. Other waivers of federal waiver of sovereign immunity do not allow end-runs around the QTA.**

The federal QTA is probably the broadest waiver of sovereign immunity, but it is not the only one. Prior to the QTA, other federal statutes also waived sovereign immunity in specific contexts, and these are preserved under the federal QTA.<sup>233</sup>

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<sup>232</sup> Curiously, until the final remand, neither the district court nor the court of appeals mentioned the federal Quiet Title Act (“QTA”), which is generally considered to provide the exclusive jurisdictional basis for resolving title. The Tenth Circuit made clear that determining title “is a judicial, not an executive, function,” *SUWA* at 752, but it did not address how that could be done outside of the QTA. (*SUWA* could not plead the QTA, as it was not the property owner; the counties filed counterclaims under the QTA, but they were dismissed as inadequately pled. Brief of United States at \*11-12, 2004 WL 2085030.) Instead, without discussing the matter, both courts appear to have assumed that they had jurisdiction to determine road status outside of the QTA in order to resolve claims of trespass and the like. In any event, only on remand, when counties sought to moot the case by ceasing construction activities and the BLM dropped its claims, did the district court note that it had nothing left to do, because the environmental group did not have standing to pursue a QTA claim.

<sup>233</sup> “It is relevant to note that to a limited degree, the United States has consented to be sued in specific instances in addition to the jurisdiction provided the courts as contemplated under this bill. Specific actions of

However, end runs around the QTA are not allowed. For example, the federal Administrative Procedure Act (which authorizes judicial review of agency action) also waives sovereign immunity. “The Administrative Procedure Act, 5 U.S.C. § 702, waives immunity only for claims alleging that an official’s actions “were unconstitutional or beyond statutory authority.” *Hou Hawaiians v. Cayetano*, 183 F.3d 945, 947 (9<sup>th</sup> Cir. 1999) (citing *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996)).

Suits against the United States are barred absent a waiver of sovereign immunity. *Block v. N.D.*, 461 U.S. 273, 280, 103 S. Ct. 1811, 75 L.Ed.2d 840 (1983). Where claims “challenge the United States’ title to real property,” the United States has provided a narrow waiver, consenting only to those suits that may be brought under the Quiet Title Act (“QTA”), 28 U.S.C. § 2409a. *Block*, 461 U.S. at 286; see also *Leisnoi, Inc. v. United States*, 170 F.3d 1188, 1191 (9<sup>th</sup> Cir. 1999). If an adverse claim to title to real property cannot be brought under the QTA, it cannot be brought at all. Where a claim involves a title dispute, a plaintiff cannot circumvent this bar by, for example, posturing the claim as one against a federal official or as a claim that a government agency action was ultra vires.

*Public Lands for the People, Inc. v. USDA* (“*Public Lands I*”), 733 F. Supp. 2d 1172, 1191 (E.D. Cal. 2010) (citing *Alaska v. Babbitt*, 75 F.3d 449, 453 (9<sup>th</sup> Cir. 1996) (“*Alaska II*”).

This bar against end-runs was recently reinforced by the United States Supreme Court in a ruling that confirmed that the APA’s waiver of sovereign immunity is inapplicable if another statute limits jurisdiction. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012) (Kagan, J.). This case dealt with the interaction of the waiver in the APA and the waiver in the QTA (and its limitation as to tribal lands). However, that case established that suits that raise genuine APA issues not employed as a subterfuge to establish title are not end-runs.

#### **4. The federal QTA is exclusive means for resolving title disputes involving the United States.**

A number of cases have held that the federal QTA is the exclusive means by which to sue the federal government to establish title to property in which the United States claims an interest.<sup>234</sup> These have arisen in a variety of contexts.

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this type are referred to in subsection (a) of new section 2409a. It is there provided that the new section does not apply to actions which may be or could be brought under sections 1346, 1347, 1491 or 2410 of this title, sections 7424, 7425 or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425 and 7426) or section 208 of the Act of July 10, 1952 (43 U.S.C. 666). Title 28, United States Code, section 2410, allows suits to be maintained when the Government’s claim is in the nature of a security interest only. Provision for suits to partition property in which the United States is a joint tenant or a tenant in common is made in 28 U.S.C. sec. 1347. And the Tucker Act, 28 U.S.C. sec. 1346(a)(2), grants the consent of the United States to be sued where the plaintiff alleges that his property has been taken in violation of the Constitution.” H.R. Rep. 92-1559, 1972 U.S.C.C.A.N. 4547, 1972 WL 12541.

<sup>234</sup> Bret C. Birdsong, *Road Rage and R.S. 2477: Judicial and Administrative Responsibility for Resolving Road Claims on Public Lands*, 56 Hastings L.J. 523 (2005).

The basic principle of exclusivity has been established in contexts other than R.S. 2477 roads. The most notable is the U.S. Supreme Court's ruling in *Block v. North Dakota*, 461 U.S. 273 (1983) (White, J.).

Professor Birdsong summed up the case:

In *Block v. North Dakota*, the Supreme Court held that the QTA provides the exclusive means for adverse claimants to challenge the United States' title to property. North Dakota claimed ownership of lands submerged by the Missouri River under the equal footing doctrine, which holds that federal title to the beds of navigable waterways passed to the states by operation of law upon their admission to the federal union. Framing its case as an "officer's suit," North Dakota brought suit under the APA to enjoin the federal officials from leasing the submerged lands for oil and gas development and to obtain a judicial declaration that the Little Missouri River was navigable, a factual question on which title depends. The Court held that the APA claim could not proceed because the QTA provided the exclusive means to adjudicate North Dakota's claim, which was barred by the QTA's twelve-year statute of limitations. The court reasoned that allowing an "officer's suit" under the APA would subvert Congress's narrow waiver of sovereign immunity in the QTA, which was intended to protect the United States from stale claims.

Bret C. Birdsong, *Road Rage and R.S. 2477: Judicial and Administrative Responsibility for Resolving Road Claims on Public Lands*, 56 Hastings L.J. 523 (2005).

### **5. Only those asserting title may bring suit.**

Occasionally private parties have sought to initiate federal quiet title suits to resolve title to public roads. Consistently, they have been tossed on the basis that private parties are not proper plaintiffs because they lack a legal ownership interest in the contested public right-of-way.

In the case of an alleged R.S. 2477 road, the proper plaintiff to bring the suit is the local "government entity that owns the right-of-way and road created by operation of R.S. 2477." *Fairhurst Family Ass'n, LLC v. U.S. Forest Service*, 172 F. Supp. 2d 1328, 1332 n.5 (D. Colo. 2001). In *Fairhurst* an entity owning mining properties sought to quiet title in the public to an alleged R.S. 2477 road that the entity used to access its mines. The district court, following precedent in other areas, found that the miner's asserted interest in the road fell short of the property interest necessary to initiate a federal quiet title action. The court noted that the property interest in an R.S. 2477 road is "vested in the public generally" and "[m]embers of the public as such do not have 'title' in public roads." *Fairhurst* at 1331 (quoting *Kinscherff v. United States*, 586 F.2d 159, 160 (10th Cir. 1978)).

"Therefore, even though both non-governmental Plaintiffs claim an interest (albeit not a real property interest) in the use of Eagle Creek Road, the United States has not waived its sovereign immunity in a way that permits these Plaintiffs to seek to vindicate such interests. Without the necessary property interest in Eagle Creek Road, Plaintiffs George E. Stephenson and the New Jersey Mining Company have no standing to bring a quiet title suit against the United States. Defendants' Motion for Summary Judgment is granted in this respect." *Cnty. of Shoshone v. United States*, 912 F. Supp. 2d 912, 923 (D. Idaho 2012) (Bush, M.J.), *aff'd*, 589 Fed. Appx. 834 (9th Cir. 2014) (memorandum decision) (the Eagle Creek Road cases).

Another Tenth Circuit decision reaching the same conclusion is *Southwest Four Wheel Drive Assn. v. BLM*, 363 F.3d 1069 (10<sup>th</sup> Cir. 2004).

“Thus, a suit seeking to assert an R.S. 2477 right must be brought by the governmental entity that owns the easement.” *Public Lands for the People, Inc. v. USDA* (“*Public Lands I*”), 733 F. Supp. 2d 1172, 1193 (E.D. Cal. 2010).

Relying on other federal precedent, the federal district court in Oregon held that private plaintiffs not claiming an property interest in a disputed road may not bring a QTA case:

The court finds that plaintiffs “interest” as members of the public in using the routes, is insufficient to bring an action to have the roads declared R.S. 2477 roads under the Quiet Title Act. *Kinscherff*, 586 F.2d at 160-161; *See Southwest Four Wheel Drive Ass’n. v. Bureau of Land Management*, 363 F.3d 1069, 1071 (10<sup>th</sup> Cir. 2004) (members of the public do not have title in public roads and therefore, cannot maintain a quiet title action); *See also Long v. Area Manager, Bureau of Reclamation*, 236 F.3d 910, 915 (8<sup>th</sup> Cir. 2001) (right of an individual to use public road is not a right or interest in property for the purpose of the Quiet Title Act); *See also Fairhurst Family Ass’n, LLC v. U.S. Forest Service, Dept. of Agriculture*, 172 F. Supp. 2d 1328, 1330-1333 (D. Colo. 2001) (plaintiff’s interest as a member of the public in using an R.S. 2477 right-of-way is an insufficient interest to state a claim under the Quiet Title Act).

*Alleman v. United States*, 372 F. Supp. 2d 1212, 1226 (D. Or. 2005) (citing *Kinscherff v. United States*, 586 F.2d 159, 160-61 (10<sup>th</sup> Cir. 1978)).

The long and hard fought litigation in *S. Utah Wilderness Alliance v. BLM* (“*SUWA*”), 425 F.3d 735, 782 (10<sup>th</sup> Cir. 2005), ultimately ended, on remand, in a dismissal on jurisdictional grounds for want of an actual case or controversy, when the construction of the roads ceased and the BLM dismissed its claims. The court then had no basis to rule on the issue of title to the alleged R.S. 2477 roads. “For its part, SUWA pleaded no ownership interest in the land subject to the asserted rights-of-way and the United States is no longer a party to this case. *Cf. San Juan Cnty. v. United States*, 420 F.3d 1197, 1209–10 (10<sup>th</sup> Cir. 2005) (noting ‘that SUWA could not itself initiate or defend a federal quiet title action’).” *S. Utah Wilderness Alliance v. BLM*, 2006 WL 2572116 (D. Utah 2006). See discussion of this litigation in footnote 254 at page 214.

Other Tenth Circuit case reaching the same conclusion (that private parties not claiming ownership of the road may not initiate a quiet title suit) is *San Juan Cnty., Utah v. United States*, 420 F.3d 1197 (10<sup>th</sup> Cir. 2005).

Another decision out of the Ninth Circuit reaching the same conclusion is *Friends of Panamint Valley v. Kempthorne*, 499 F. Supp. 2d 1165 (E.D. Calif. 2007).

The Eighth Circuit has taken the same position. “The proper plaintiff to challenge the condemnation of a public road is the governmental entity that owns the easement.” *Long v. Area Manager, Bureau of Reclamation*, 236 F.3d 910, 915 (8<sup>th</sup> Cir. 2001).

One outlier is *Shultz v. Dep’t of Army* (“*Shultz II*”), 10 F.3d 649 (9<sup>th</sup> Cir. 1993), *opinion withdrawn*, 96 F.3d 1222 (9<sup>th</sup> Cir. 1996) (“*Shultz III*”). This case, and its predecessor, *Shultz v. Dep’t of Army* (“*Shultz*

I”), 886 F.2d 1157 (9th Cir. 1989), allowed a private party to pursue a federal quiet title action over an alleged R.S. 2477 road. As noted, the opinion was withdrawn in 1996. The court substituted a three-sentence opinion which denied the claim on the merits, thus implicitly affirming that the private plaintiff had a right to pursue the matter.<sup>235</sup>

If a private party lacks the right to initiate the litigation, may that person intervene in a case initiated by others? In *Kane Cnty. v. United States* (“*Kane County II*”), 597 F.3d 1129 (10<sup>th</sup> Cir. 2010),<sup>236</sup> the Court of appeals upheld the district court’s denial of intervention (both by right and permissive) to environmental groups who sought to intervene in a federal quiet title action brought by Kane County.<sup>237</sup> The court noted that the United States was defending the action vigorously and that the environmental groups had produced no evidence the government would not continue to do so. The environmental groups described “the history of adversarial relations between itself and the Bureau of Land Management.” But that was not enough, said the Court, to justify intervention.

## **6. What if the federal government wishes to quiet title?**

A non-federal entity (such as a county or highway district) wishing to establish ownership and control of a road on federal land to which the federal government asserts an interest must bring suit in federal court under the federal QTA (which provides for suits against the United States as a defendant, 28 U.S.C. § 2409a). When the federal government sues to quiet title, it does not do so under the QTA. It does not need to, because there is no need to waive sovereign immunity when it is the plaintiff. It simply brings an ordinary common law or statutory quiet title action in federal court.

## **7. Travel management plans**

Another context for litigation involves actions by counties challenging federal “travel management plans” via an administrative appeal, rather than a quiet title action. In these cases, the plaintiffs have disclaimed the objective of actually determining title and thereby have avoided conflict with the QTA. But they have failed nonetheless because the federal government is under no obligation to resolve title to R.S. 2477 roads.

In *Kane Cnty. v. Salazar* (“*Kane County I*”), 562 F.3d 1077 (10<sup>th</sup> Cir. 2009), the plaintiffs conceded that the federal QTA was the exclusive means of resolving title, but insisted that they were only seeking an order directing the BLM to “consider” R.S. 2477 roads for planning purposes. *Kane County I*, 562 F.3d at 1087. The court said that BLM was under no such obligation.

Similarly, in *Williams v. Bankert*, 2007 WL 3053293 (D. Utah 2007), the court ruled, “Neither FLPMA nor any other statute imposes a duty on the BLM to determine the validity of R.S. 2477 right-of-way claims as part of the process of preparing the Travel Plan.” *Williams*, 2007 WL 3053293 at \*6. In so

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<sup>235</sup> In addition, there are a few cases in which private plaintiffs have undertaken federal quiet title actions on R.S. 2477 roads and, apparently, no one raised the issue of their right to do so. *E.g.*, *Michel v. United States*, 65 F.3d 130 (9th Cir.1995) (per curiam).

<sup>236</sup> The intervention issue is discussed further by a divided court, sitting *en banc*, in *San Juan County v. United States*, 503 F.3d 1163 (10<sup>th</sup> Cir. 2007).

<sup>237</sup> Because intervention was denied, the court found it unnecessary to decide whether the Supremacy Clause of the Constitution provides a direct cause of action absent a statute authorizing such suits. *Wilderness Society*, 632 F.3d at 1169.

ruling, the court referenced the holding in *Kane County I* that “the appropriate method for asserting those rights would be by means of an action under the Quiet Title Act, not a challenge to the BLM’s management plan.” *Williams*, 2007 WL 3053293 at \*7.

## 8. Environmental suits against counties

In one case, an environmental group succeeded (until an *en banc* rehearing ruling denied them standing) in obtaining injunctive relief against a county which was asserting ownership and management control over alleged, but unadjudicated, R.S. 2477 roads on federal lands.

In *The Wilderness Society v. Kane Cnty.*, 581 F.3d 1198, 1219 (10<sup>th</sup> Cir. 2009), *rev’d en banc*, 632 F.3d 1162 (2011) (reversed for lack of standing), environmental groups sought to enjoin Kane County from posting signs declaring roads to be open and otherwise exercising management authority over roads on federal lands. Kane County took these actions on the basis that the roads were R.S. 2477 roads, but acknowledged that most of the subject roads had not been adjudicated or otherwise federally recognized as valid. Kane County contended that the United States and Utah were necessary and indispensable parties. The court of appeals affirmed the district court’s rejection of this argument because, it “*clearly and repeatedly* noted that it was *not* passing on the validity of any R.S. 2477 rights.” *The Wilderness Society*, 581 at 1218 (emphasis original).

Apparently, Kane County “loudly and repeatedly sought an opportunity to prove its claims in district court, but was rebuffed.” *The Wilderness Society*, 581 at 1219 n.15. The majority found that this effort was properly rebuffed:

As a limited waiver of sovereign immunity, the Quiet Title Act is the sole avenue by which Kane County can seek to prove the existence of its R.S. 2477 rights in court. *See Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983) (holding that the Quiet Title Act is “the exclusive means by which adverse claimants [may] challenge the United States’ title to real property.” (footnote omitted)); *Sw. Four Wheel Drive Ass’n v. BLM*, 363 F.3d 1069, 1071 (10<sup>th</sup> Cir. 2004) (citing *Block* for the proposition that the Quiet Title Act provides the sole avenue for proving R.S. 2477 rights). . . . Because a Quiet Title Act claim was not filed in this case, the validity of purported R.S. 2477 rights of way over federal land could not have been adjudicated.

*Wilderness Society*, 581 F.3d at 1219 (parentheticals and brackets original, but footnote omitted).

In so ruling, the *Wilderness Society* court distanced itself (essentially repudiating) language in *S. Utah Wilderness Alliance v. BLM* (“*SUWA*”), 425 F.3d 735, 788 (10<sup>th</sup> Cir. 2005) in which it remanded with an instruction to the district court to determine the validity of alleged R.S. 2477 roads:

Although Kane County does not directly challenge the district court’s ruling regarding the Quiet Title Act, read rather generously, its brief does suggest that the district court’s conclusion contravenes *SUWA v. BLM*. In that case, we remanded for the district court to adjudicate the validity of purported R.S. 2477 rights without even mentioning the Quiet Title Act. 425 F.3d at 788. Given the clear holding in *Block*, we decline to read *SUWA v. BLM* as establishing a contrary rule by implication.

*Wilderness Society*, 581 F.3d at 1219.

## **9. Indian land exception under the QTA.**

Although the QTA is a broad waiver of sovereign immunity, it contains an exclusion from the waiver of sovereignty for Indian lands. The exclusion reads:

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425 and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

28 U.S.C. § 2409a (emphasis supplied).

This .<sup>238</sup>

Accordingly, litigation respecting an allegedly public road on Indian land may be brought only under the federal exception to the waiver that was carved out in recognition of the special relationship the United States has with Indian tribes under the Administrative Procedure Act (which is tricky) (see section VII.B on page 203) or as a Tucker Act taking claim (for recovery of damages only) (see section VII.C on page 204).

## **10. Is there any role left for state proceedings?**

Given the exclusive nature of the federal QTA, it would appear that neither a road validation under Idaho Code 40-203A nor a state quiet title action to which the United States is not a party will have any effect in quieting title against the United States.<sup>239</sup> Thus, the only effective way finally to resolve a dispute to a road on federal land is through an action brought under the federal QTA.

This, however, leaves open the question of what effect a state validation should have in a federal quiet title action. In other words, if a county or highway district were to validate a road on federal land and if it thereafter were to initiate a federal quiet title suit, should the federal court give effect to the state validation?

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<sup>238</sup> “The exception of Indian lands from the QTA’s waiver provision was included due to the government’s important policy interest in honoring its obligations and agreements with Indian tribes regarding lands for reservations. *United States v. Mottaz*, 476 U.S. 834, 847, 106 S. Ct. 2224, 90 L.Ed.2d 841 (1986) (quoting *Block*, 461 U.S. at 284–85, 103 S. Ct. 1811).” *Mannatt v. United States*, 48 Fed. Cl. 148, 153 (2000).

<sup>239</sup> While a validation by a county or highway district or the adjudication of title to an R.S. 2477 road by Idaho courts is not binding on the federal government, such a determination may have some value. The federal agencies may find it persuasive and agree to follow it. In any event, it provides an opportunity to collect and evaluate the evidence—even if this proves to be only a dry run. Moreover, if the local officials determine that the road is not an R.S. 2477 road, they will have saved the expense of litigating the matter in federal court.

This very question was presented in *Cnty. of Shoshone v. United States*, 912 F. Supp. 2d 912 (D. Idaho 2012) (Bush, M.J.), *aff'd*, 589 Fed. Appx. 834 (9th Cir. 2014) (memorandum decision). The district court gave short shrift to the county validation of Eagle Creek Road in 2009, ruling it had no effect as to the United States and describing it as an “end-run” around the QTA:

According to Plaintiffs, there was no challenge to the 2009 validation efforts surrounding Eagle Creek Road and, therefore, Defendants are now precluded from challenging the validity of the subsequently deemed right-of-way. . . . The Court disagrees.

“As a limited waiver of sovereign immunity, the Quiet Title Act is the sole avenue by which [Shoshone County] can seek to prove the existence of its R.S. 2477 rights in court.” *The Wilderness Soc’y v. Kane County*, 581 F.3d 1198, 1219 (10th Cir. 2009); *see also Modern, Inc. v. Florida, Dept. of Transp.*, 381 F. Supp. 2d 1331, 1351 (M.D. Fla. 2004) (“The Quiet Title Act waives sovereign immunity to suits that seek ‘to adjudicate a disputed title to real property in which the United States claims an interest . . .’ This statute provides the only means by which to challenge federal ownership of real property.”) (quoting 28 U.S.C. § 2409a(a)). Adopting Plaintiffs’ arguments—in essence, pointing to the Shoshone County Board of Commissioners’ recent validation (notwithstanding the United States’ alleged failure to object to same)—would amount to an end-run around the Quiet Title Act. Simply put, the Court cannot ignore the Quiet Title Act in favor of state law when such state law arguably conflicts with the federal law mandates.

*County of Shoshone*, 912 F. Supp. 2d at 943 (emphasis supplied).<sup>240</sup>

The district court provided no analysis of this point, other than the quotation above. Frankly, simply saying that the federal QTA is “exclusive” does not answer the question. After all, the county was not avoiding the QTA; it brought a QTA suit. The various cases declaring the “exclusive” nature of the QTA arise in various contexts discussed above. None of them address the question presented in *County of*

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<sup>240</sup> Here is the procedural background of the Eagle Creek Road cases. The County first validated Eagle Creek Road as a public road. The road is located on both private and Forest Service land. There was no appeal of the validation, and no one contested that the validation was final and effective with respect to the (relatively small) portion of the road on private land. The Forest Service paid no mind to the County’s validation, and proceeded with its plan to close the road. The County then initiated a federal quiet title action against the Forest Service seeking to establish that it owned the portions of Eagle Creek Road located on federal land. At the district court level, the County maintained that the federal court was bound by the County’s validation. The district court correctly rejected that argument, and went on to rule against the County on the basis of its own determination of the merits. *County of Shoshone*, 912 F. Supp. 2d at 943. The County appealed that decision on the merits, but did not appeal the district court’s conclusion that the County’s validation decision was legally of no effect. The Ninth Circuit affirmed on the merits (also ruling that the case was not barred by the 12-year statute of limitations).

Here is another wrinkle: At the district court, the County was joined by two private landowners (mining interests) as plaintiffs. The district court tossed them out, correctly ruling that private parties do not have standing to be plaintiffs in a federal QTA case. The private parties did not appeal.



*Shoshone*: if a plaintiff with standing brings a QTA suit, must the federal court give effect (or at least deference) to a properly conducted state validation proceeding?

In the author's view, the district court's decision in *County of Shoshone* was probably right, notwithstanding the court's failure to meaningfully analyze the issue. Here is why.

The purpose of the QTA is to waive sovereign immunity in a very limited way, notably by placing the decision-making process in federal court and subjecting it to certain statutory constraints.

This is documented in the legislative history: "Since we believe it is the better policy to litigate questions of the Government's title in the Federal courts, the draft bill provides for exclusive jurisdiction of suits under the statute in the United States District Courts." Letter from the Attorney General to the Speaker (Oct. 6, 1971), included in the committee report approving amendment to the proposed legislation, H. Rep. No. 92-1559, 1972 U.S.C.C.A.N. 4547, 1972 WL 12541.

Thus, it would appear that Congress had in mind that the federal court—and not a county or highway district—would be the decision-maker as to title. It seems unlikely that Congress intended to waive sovereign immunity and insist on federal court jurisdiction simply to allow the federal courts to rubber stamp a decision made by a county commission or highway district.

Even if one concedes that the federal court has authority to probe the state validation decision to ensure that it followed proper procedures and was based on a record that supported the decision, giving any recognition to a validation would mean that the federal court would not have the authority to substitute its assessment of the law and facts for that of the state officials. Given the long line of cases emphasizing the limited nature of the waiver and the strictness with which the QTA's restrictions will be applied, this limited, appellate-type role for the federal court seems unlikely to have been Congress's intent.

Moreover, the legislative history shows that Congress determined not to put the United States on the same footing as others:

One approach to a statute waiving immunity in this area would have been to adopt state law in its entirety, thereby placing the United States on the same footing as any private litigant. However, the wide differences in State statutory and decisional law on this subject make this an impractical alternative. Along with the merger of law and equity, many States have enacted legislation to abolish some of the traditional prerequisites for the institution of suits to quiet title. The requirement of possession has occasionally been dropped (see Cal. CCP sec. 738; Neb. R.R.S. 1943 Sec. 25-21, 112; and Code Va. Sec. 55-153), and the statutory procedure in some States appears virtually to supersede the common law (see Vernon's Ann. Civ. St. Art. 7364, et seq., and 47 Tex. Jur. 2d Quieting Title Sec. 1). Several States allow the plaintiff to obtain a judicial determination of rights acquired by adverse possession in this type of suit, and there is an immense variation with respect to the period of limitation on bringing suits. It is our belief that uniformity at least as to the plaintiff's qualifications for instituting suit is desirable, and the draft bill sets forth such qualifications. Possession in the plaintiff is not required. The State law of real property would of course apply to decide all questions not covered by Federal law.

Letter from the Attorney General to the Speaker (Oct. 6, 1971), included in the committee report approving amendment to the proposed legislation, H.R. Rep. 92-1559, 1972 U.S.C.C.A.N. 4547, 1972 WL 12541 (emphasis supplied).

Indeed, one of the examples offered in the letter quoted above is that sovereign immunity is not waived as to adjudications initiated by the parties that do not have an ownership interest. In *County of Shoshone*, the validation proceeding was initiated by a private party who would not have been eligible to bring a federal quiet title action. Thus, one can see how the district court felt that the county's approach was an end-run around the QTA. In sum, it appears that the district court was correct to base its decision on its own evaluation of the historical facts rather than on the basis of the 2009 validation.

But what about a validation that pre-dated the QTA (which was adopted in 1972)? The author would suggest that the answer would be the same, to the extent that the validation decision involved a judicial or quasi-judicial determination of the status of the road. In other words, the QTA did not create restrictions on adjudication of title to property claimed by the United States; it relaxed them. Those restrictions have always been there in the form of sovereign immunity. Thus, prior to 1972, R.S. 2477 roads could be created by state actions and, one would hope, recognized by federal authorities. But there was no way to resolve title other than by administrative recognition of the federal authorities, by litigation initiated by the United States, by congressional act, or by a Tucker Act claim for damages. As a practical matter, it appears that there were very few such actual such disputes; this simply did not come up on federal land very often before 1972.

The plaintiffs in *County of Shoshone* argued that R.S. 2477, although a federal statute, borrows from state law, and that state law in Idaho includes the right to validate. While this is a plausible argument, the author suggests that the state laws that are “borrowed” by R.S. 2477 are not the quasi-judicial or judicial mechanisms for determining title, but rather the substantive and procedural mechanisms that actually create the roads in the first instance. Bear in mind that a validation does not “create” a public road. It only determines (in a judicial sense) that a road was created at some time in the past.

In the case of R.S. 2477 roads in Idaho, the “creation” mechanisms are (1) public use/maintenance satisfying the statutory requirements of the relevant time period or (2) some “positive act” of local authorities. *Kirk v. Schultz*, 63 Idaho 278, 282-83, 119 P.2d 266, 268 (1941) (Budge, J.). In the author's view, those positive acts do not include quasi-judicial determinations of title based on past events. Rather, “positive act” refers to an action that itself effected a change in title, such as the acceptance of a dedication or approval of a petition for designation of a road on unreserved federal land.<sup>241</sup> Thus, the “positive act” must occur at the time that the land remained unreserved (and certainly before the repeal of R.S. 2477 in 1976<sup>242</sup>).

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<sup>241</sup> R.S. 2477 only grants rights-of-way on unreserved federal lands. State authorities cannot create a road on federal land once it is reserved as a national forest or other purpose.

<sup>242</sup> Shoshone County's argument that a “positive act” includes a 2009 validation is particularly difficult with respect to a validation that occurred after 1976 (when Congress repealed R.S. 2477 by enacting FLPMA). While it is true that Congress preserved existing rights-of-way (FLPMA § 701(a), Pub. L. No. 94-579, 90 Stat. 2743, 2786-87 (1976) (codified at 43 U.S.C. § 1701 note)), it seems a stretch to suggest that it also intended to preserve state-law-based quasi-judicial procedures for determining title to such right-of-way. If R.S. “borrowed” these validation procedures in 1866, it seems likely that the “borrowing” stopped in 1976.

I am not aware of any published decision addressing this issue. However, the conclusion urged here is consistent with an unreported decision (ultimately resolved by settlement) in Idaho federal court:

For the reasons stated below, the Court has concluded that pursuant to Section 932 [R.S. 2477], the public could have established a right of way at any time prior to May 29, 1905 [when the Sawtooth Forest Reserve was created]. Events happening after May 29, 1905 could not affect the establishment of a Section 932 grant over the Middle Fork Road.

...

... A public right of way will be established if the road was declared by the board of commissioners before May 29, 1905, but constructed within a reasonable time thereafter.

*United States v. Mountain Home Highway Dist.*, Case No. CV92-0491-S-LMB, slip op. at 16, 29 (D. Idaho, order dated Oct. 13, 1993) (Boyle, M.J.) (case later resolved by stipulation).

## **11. Federal QTA – statute of limitations**

### **a. 180-day notice requirement**

Under the federal QTA, the plaintiff must provide advance notice of the intent to file suit to the head of the federal agency with jurisdiction over the lands in question at least 180 days before filing suit. The notice must include an explanation of the basis of the suit and a description of the lands subject to the suit. 28 U.S.C. § 2409a(m). The practical effect of this requirement is to reduce the statute of limitations from 12 years to 11 and a half years.

### **b. Actions brought by entities other than a State**

The federal QTA contains its own statute of limitations requiring that suit be filed within 12 years of “the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.” 28 U.S.C. § 2409a(g). The statute provides:

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

28 U.S.C. § 2409a(g).<sup>243</sup>

In a harsh application of this statute, the Fifth Circuit ruled that the 12-year limitation applies retroactively. *Crooks v. Placid Oil Co.*, 166 F. Supp. 2d 1104, 1108 (2001 W.D. La.), *aff’d without opinion*, 48 Fed. Appx. 916 (5<sup>th</sup> Cir. 2002). Thus, the court held, if the injury was apparent for more than 12 years before the enactment of the QTA in 1972, the suit is barred despite the fact that it was impossible to bring suit prior to 1972. *Accord, Grosz v. Andrus*, 556 F.2d 972 (9th Cir. 1977) (citing *Hatter v. United States*, 402 F. Supp. 1192, 1194 (E.D. Cal. 1975)).

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<sup>243</sup> The exception for States was added in 1986. Pub. L. No. 99-598, 100 Stat. 3351 (1986). The 1986 amendments also redesignated the subsection from 2409a(f) to 2409(g).

Harsh as this result is, it appears to be consistent with congressional intent. Letter from Ralph E. Erickson, Deputy Attorney General (Sept. 9, 1972), which is included in the committee report on the proposed legislation, H.R. Rep. 92-1559, 1972 U.S.C.C.A.N. 4547, 1972 WL 12541.

Compliance with the statute of limitations is a condition of waiver of sovereign immunity:

The waiver of sovereign immunity contained in the Quiet Title Act is not unconditional; suits must be brought within the twelve year statute of limitations. 28 U.S.C. § 2409a(g). When legislation waiving sovereign immunity contains a statute of limitations, the statute of limitations constitutes a condition on the waiver of sovereign immunity. *Block v. North Dakota*, 461 U.S. 273, 287, 103 S. Ct. 1811, 75 L.Ed.2d 840 (1983). The Quiet Title Act statute of limitations is jurisdictional. *Park Cnty.*, 626 F.2d at 720. Because the statute of limitations is a condition of the waiver of sovereign immunity, it is construed strictly in favor of the government. *Bank One Texas v. U.S.*, 157 F.3d 397, 402 (5th Cir. 1998).

*Alleman v. United States*, 372 F. Supp. 2d 1212, 1226 (D. Or. 2005).

In 2013, however, the Ninth Circuit overturned a long line of cases holding that the statute of limitations is jurisdictional. *Kwau Fun Wong v. Beebe*, 732 F.3d 1030 (9<sup>th</sup> Cir. 2013) (overruling *Marley v. United States*, 567 F.3d 1030 (9<sup>th</sup> Cir. 2008)). *Kwau Fun Wong* was compelled by the Supreme Court's ruling in *Sebelius v. Auburn Regional Medical Center*, 133 S. Ct. 817 (2013).

This provision would bar counties and highway districts from establishing R.S. 2477 roads on federal land where they fail to initiate their action within the prescribed time.

The *Alleman* court applied the statute of limitations to bar a suit to establish an R.S. 2477 road.<sup>244</sup> It held that gating of the road by the federal government put the plaintiffs on notice and triggered the statute of limitations:

The undisputed evidence shows that plaintiffs' predecessors in interest had notice that the Emilly Route was not a public road when the road was gated in the 1960s. The gating of the road by the Forest Service was sufficient to put them on notice that the road was not a public road and that the government claimed ownership of the road. See *Park County*, 626 F.2d at 720-721 (the placing of a sign and rock barrier on the purported public right-of-way was sufficient to alter the public that the government claimed an ownership interest in the right-of-way).

*Alleman v. United States*, 372 F. Supp. 2d 1212, 1227 (D. Or. 2005) (citing *Park Cnty.*, *Montana v. United States*, 626 F.2d 718 (9<sup>th</sup> Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981)).

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<sup>244</sup> As noted in the discussion above, the *Alleman* court also ruled that the private plaintiffs, as members of the public, did not have an "interest" in the road sufficient to bring a quiet title action. Thus, the court's discussion of the application of the statute of limitations to a quiet title action appears to be dictum. But that did not stop the court from offering a definitive discussion of the subject.

It also held that requiring the plaintiffs to obtain a plan of operations put them on notice and triggered the statute of limitations:

The undisputed evidence shows that the plaintiffs' predecessors in interest had notice that the government claimed an ownership interest in the Emilly and Chetco Routes when the government required a mineral survey to allow access to the Alleman property. This action was sufficient notice that the government claimed an ownership interest in the routes that provided access to the Alleman property and that such routes were not public roads. The undisputed evidence shows that plaintiffs had notice of the government claimed an ownership interest in the property when the government required Mr. Alleman to file a plan of operations for the mining claims on the Alleman property as a condition to access the property.

*Alleman v. United States*, 372 F. Supp. 2d 1212, 1227 (D. Or. 2005).

Finally, it held that the enactment of the Wilderness Act put them on notice and triggered the statute of limitations:

The undisputed evidence shows that plaintiffs' predecessors in interest had notice that there were no public roads, including the Emilly and Chetco Routes, in the Kalmiopsis Wilderness Area when the area in question was designated as a wilderness area. The Wilderness Act and its supporting regulations clearly established that the government did not recognize roads or motorized access within the wilderness area. *See Southwest Four Wheel Drive Ass'n v. Bureau of Land Management*, 271 F. Supp. 2d 1308, 1311 (2003), *affirmed*, 363 F.3d 1069 (10th Cir. 2004) (plaintiffs knew or should have known when the wilderness study area was designated that there were no public roads within the wilderness study area).

*Alleman v. United States*, 372 F. Supp. 2d 1212, 1227 (D. Or. 2005).

In other cases, not involving assertions of R.S. 2477 roads, the Ninth Circuit has interpreted the statute such that the clock does not begin to run until such time as the federal government actually denies public access to the road in question. Thus, the rule is similar to that applied under Idaho's statute of limitations in *Ada Cnty. Highway Dist. v. Total Success Investments, LLC* ("*Total Success I*"), 145 Idaho 360, 179 P.3d 323 (2008) (Burdick, J.), as discussed in section IV.U at page 157.

The cases discussed below are not public road cases. Indeed, the *Alleman* court distinguished the *Michel* case on that basis. Rather, they involve the assertion of private easements on federal land by private parties.

In *Michel v. United States*, 65 F.3d 130 (9th Cir. 1995), the plaintiffs had ongoing disputes with the federal government over access to an inholding within a national wildlife refuge dating back to the 1940s. In 1992 they filed suit to quiet title. The Ninth Circuit ruled that the statute of limitations had not run because claims for easements are different than claims to fee title:

The government argues the Michels' action is barred because they have known since the early 1940's that the government claimed title to the land.

However, the Michels' knowledge of the government's claim of title was not itself sufficient to trigger the running of the limitations period on their claim of a right to use roads and trails across the refuge. To start the limitations period, the government's claim must be adverse to the claim asserted by the Michels. See *Fadem v. United States*, 52 F.3d 202, 207 (9th Cir. 1995) (citing *Knapp v. United States*, 636 F.2d 279, 283 (10th Cir. 1980)). If a claimant asserts fee title to disputed property, notice of a government claim that creates even a cloud on that title may be sufficient to trigger the limitations period. See *California v. Yuba Goldfields*, 752 F.2d 393, 394-97 (9th Cir. 1985). But when the plaintiff claims a non-possessory interest such as an easement, knowledge of a government claim of ownership may be entirely consistent with a plaintiff's claim. A plaintiff's cause of action for an easement across government land only accrues when the government, "adversely to the interests of plaintiffs, denie[s] or limit[s] the use of the roadway for access to plaintiffs' property." *Werner v. United States*, 9 F.3d 1514, 1516 (11th Cir. 1993) (finding that limitations period on plaintiffs' claim of an easement over government land had not run even though plaintiffs knew of the government's title for more than twelve years).

*Michel*, 65 F.3d at 131-32 (emphasis supplied).

In *McFarland v. Norton*, 425 F.3d 724 (9<sup>th</sup> Cir. 2005), *second appeal, on a different issue*, *McFarland v. Kempthorne*, 545 F.3d 1106 (9<sup>th</sup> Cir. 2009), *cert. denied*, *McFarland v. Salazar*, 129 S. Ct. 1582 (2009), a property owner brought a quiet title action asserting a private easement to access his inholding within Glacier National Park in Montana. The question posed was whether the federal government's regulations and limitations on the public's use of the road (e.g., a seasonal snowmobile ban) triggered the statute of limitations. The court said it did not. "To avoid forcing landowners and the government into 'premature, and often unnecessary, suits,' *Michel*, 65 F.3d at 132, we should not lightly assume that regulatory or supervisory actions, as opposed to those that deny the easement's existence, will trigger the statute of limitations. Were it not so, any regulation of a property interest would challenge ownership of the interest itself." *McFarland*, 425 F.3d at 727. The Ninth Circuit ruled that the statute of limitations did not begin to run until the plaintiff "knew or should have known the government claimed the exclusive right to deny their historic access." *McFarland*, 425 F.3d at 726 (quoting *Michel v. United States*, 65 F.3d 130, 132 (9<sup>th</sup> Cir. 1995)). The court concluded: "Because *McFarland* was not denied year-round access when he desired it until 1999, he did not know nor should he have known that the government disputed his claim to an easement." *McFarland*, 425 F.3d at 728. Because this case dealt with a private easement, it may be distinguishable from the assertion of a public road. Actions such as gating a road while providing a lock to the gate to certain persons may not be notice of an adverse claim to the holder of a private easement, but they may be sufficient notice of the government's claim that the road is not public.

In *Skranak v. Castenada*, 425 F.3d 1213 (9<sup>th</sup> Cir. 2005), the Ninth Circuit applied the cases cited above to a fact setting involving easements claimed by holders of patented mining claims. At the outset, the court noted that the statute of limitations is a jurisdictional limitation that may not be waived by the parties. *Skranak*, 425 F.3d at 1216. The court ruled that the Skranaks' claim was barred by the statute of limitations because the road over which they claimed an easement had been converted to a hiking trail by the Forest Service in the 1940s. "Although merely barring the public's vehicular access would not have necessarily been inconsistent with the Skranaks' predecessors-in-interest's easement, affirmatively

converting the road to a trail barred not only the public's vehicular access but the owner's use of the alleged easement as well. Because converting the road to a trail barred access in a way that was neither temporary nor obviously overcome by the securing of a permit or special permission, the Skranaks' predecessors-in-interest should then have been put on notice." *Skranak*, 425 F.3d at 1217 (footnote omitted). On the other hand, the Court determined that it was not clear whether the statute ran against mining claims by other plaintiffs in the case. "In Harpole's case, what evidence there is tends to suggest that previous restrictions on his access were consensually negotiated, or at least were consistent with the Forest Service acting in a regulatory capacity (i.e., requiring a permit for further use), instead of in the capacity of a landowner claiming exclusive rights." *Id.* Accordingly, that claim was remanded.

In *Bradley v. Schafer*, 2010 WL 5105049 (D. Mont. 2010),<sup>245</sup> ranchers brought a quiet title action asserting an easement for the operation and maintenance of a reservoir located on national forest land in Montana. The irrigation reservoir had been built in 1912 under a special use permit. The reservoir was accessed and operated under a series of special use permits until 2007 when the federal government informed the ranchers that they would have to accept a different type of easement or seek a new special use permit. Instead of doing so, they sued to quiet title. The district court determined that the statute of limitations began to run when the federal government issued the first special use permit in 1916 because it contained termination and non-transferability conditions fundamentally inconsistent with plaintiffs' claim that they were entitled to a permanent easement under the Irrigation or General Right of Way Act of March 3, 1891. (The same was true as to abandonment and termination conditions in a 1973 special use permit.) The district court stepped through the case law recited above and concluded that the permit language was enough to show that the ranchers "knew or should have known the government claimed the exclusive right to deny their historic access." *Bradley* at \*4 (citing *McFarland v. Norton*, 425 F.3d 724, 727 (9<sup>th</sup> Cir. 2005)).

In *Cnty. of Shoshone v. United States*, 589 Fed. Appx. 834, 835 (9<sup>th</sup> Cir. 2014) (memorandum decision), the court held that the statute of limitations does not begin to run until it is evident that "the government's claim [is] clearly adverse to the claimant's interest." Consequently, the court found that an environmental assessment under the National Environmental Policy Act discussing anticipated road closure did not trigger the statute of limitations. The statute only began to run when a final decision as to road closure was announced.

### **c. Actions brought by a State**

By its terms, the 12-year statute of limitations in 28 U.S.C. § 2409a(g) does not apply to "an action brought by a State." Instead, a separate statute of limitations applies to such actions. It provides:

- (i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

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<sup>245</sup> This case has not been published as of May 7, 2011.

28 U.S.C. § 2409a(i) (emphasis supplied).

Thus, a state is barred under the statute only if it received “notice” more than 12 years before filing suit. “Notice,” in turn, is defined as follows:

- (k) Notice for the purposes of accrual of an action brought by a State under this section shall be --
  - (1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or
  - (2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

28 U.S.C. 2409a(k).

In *Kane Cnty., Utah v. United States* (“*Kane County IIP*”), \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 1180387 at \*15 (Mar. 20, 2013), the Tenth Circuit noted that the 12-year statute of limitations does not apply to states. This decision also contains an extensive discussion of how the statute applies to non-state plaintiffs.

#### **d. Actions brought by the federal government**

Arguably, if the action is initiated by the federal government, the statute of limitations does not apply, even to a counter-claim asserting title adverse to the United States. The argument for this point is set out in the following excerpt from a brief in a case that apparently never resulted in a published decision:

In *Block v. North Dakota ex rel. Bd. of University and School Lands*, 461 U.S. 273, 291 (1983), North Dakota challenged, inter alia, the constitutionality of the limitations provision of the QTA, “insofar as it purports to bar claims to lands constitutionally vested in the State.” The Supreme Court agreed that “Congress could not, without making provision for payment of compensation, pass a law depriving a State of land vested in it by the Constitution.” *Id.* However, the Supreme Court held that “Section 2409a(f) [of the QTA] does not purport to strip any State, or anyone else for that matter, of any property rights.” *Id.* Although the statute limits the time in which a quiet title suit against the United States may be filed, “Section 2409a(f) does not purport to effectuate a transfer of title.” *Id.* In other words, if a claimant has title to disputed lands, he retains that title even if his suit to quiet title is time-barred under the QTA. *Id.* Accordingly, dismissal of an action to quiet title as time-barred does not quiet title to the property in the United States. *Id.* “The title dispute remains unresolved.” *Id.* However, “[n]othing prevents the claimant from continuing to assert his title, in hope of inducing the United States to file its own quiet title suit, in which the matter would finally be put to rest on the merits.” *Id.* at 291-92. Thus, even if a claimant’s action to quiet title against the United States is dismissed as time-barred, a court may resolve the dispute when the United States brings a quiet title suit against the claimant.

Brief of Boundary County in *United States of America v. Boundary Cnty.*, No. CV 98-0253-N-EJL, 2002 WL 32987417 (May 16, 2002).



## B. Federal APA suits

The federal Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706 contains its own waiver of sovereign immunity.<sup>246</sup> On occasion, litigants have been successful in avoiding the Indian lands exception to the QTA by recasting the litigation under the APA.

To do so, however, one must navigate a carve-out contained in the APA itself. The grant of sovereign immunity provides that the waiver is inapplicable “if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.” 5 U.S.C. § 702. “That provision prevents plaintiffs from exploiting the APA’s waiver to evade limitations on suit contained in other statutes.” *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012) (Kagan, J.).

In *Match-E-Be-Nash-She-Wish* a neighboring landowner brought an action under the APA challenging the decision of the BIA’s acquisition of property on behalf of the Indian band. (He alleged that the Secretary of Interior lacked authority to acquire property for the Band because it was not a federally recognized tribe when the statute authorizing such purchases was enacted in 1934.) Here, the U.S. Supreme Court found that the carve-out was inapplicable and allowed the action under the APA. This was because the landowner was not seeking to establish title in his own name and therefore could not have framed the action under the QTA.

One commentator summed up the holding this way:

According to the majority, the QTA speaks only to quiet title actions, which are “universally understood to refer to suits in which a plaintiff not only challenges someone else’s claim, but also asserts his own right to disputed property.” The Court ruled that the Indian Lands Exception did not apply because Patchak was not asserting his own claim to the land, and thus his suit was distinguishable from a quiet title action. In reaching its decision, the Court differentiated Patchak’s case from two prior cases where the QTA was used to address suits in which the plaintiff asserted an ownership interest in property held by the government. The court concluded that Patchak’s suit was a “garden variety” APA claim and that the APA’s general waiver of sovereign immunity applied.

Bethany Henneman, Comment, *Artful Pleading Defeats Historic Commitment to American Indians*, 14 U. Md. L.J. Race, Religion & Class 142, 153 (2014) (footnotes omitted).

In order to mount a viable APA suit, it is necessary to seek relief that is different from quieting title to an existing road. For example, one might seek review of a denial of a request to the Bureau of Indian

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<sup>246</sup> “The Administrative Procedure Act, 5 U.S.C. § 702, waives immunity only for claims alleging that an official’s actions “were unconstitutional or beyond statutory authority.” *Hou Hawaiians v. Cayetano*, 183 F.3d 945, 947 (9<sup>th</sup> Cir. 1999) (citing *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir.1996)). “The APA generally waives the Federal Government’s immunity from a suit ‘seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority.’” *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012) (Kagan, J.).

Affairs (“BIA”) for a renewed right-of-way. Likewise, the BIA’s failure to create a public road under 25 U.S.C. § 311 and/or the Nez Perce treaties might be subject to an APA challenge.

In any event, the petition must establish that he or she is “adversely affected or aggrieved by agency action within the meaning of a relevant statute.” 5 U.S.C. § 702. That is the petitioner must identify with specificity the final agency action that is being challenged. “No special incantations or magic words are required to create a final agency order, and a relatively informal letter may constitute a final order.” 2 Am. Jur. 2d, *Administrative Law* § 438 at 399-400 (2014).

### C. Tucker Act

If other avenues of litigation are cut off (e.g., by the Indian land exception to the federal QTA), another approach is to seek damages for the taking of a road under the Tucker Act, 28 U.S.C. § 1491. Long before the United States waived sovereign immunity under the QTA for title actions and under the APA for administrative challenges, Congress provided another waiver of sovereign immunity under the Tucker Act of 1887.

The Tucker Act, 28 U.S.C. § 1491 and the Little Tucker Act, 28 U.S.C. § 1346(a)(2), authorize suits against the federal government for money damages. In contrast to the APA claim, the Tucker Act does not allow the court to establish title or provide injunctive relief. The only relief that may be obtained is monetary damages for a taking claim. Those damages could be quite substantial, given that the value of the property would be severely impacted (if not destroyed) by the loss of access.

These acts waive sovereign immunity and grant jurisdiction (with respect to certain money claims against the United States), but do not create a cause of action. The Tucker Act places jurisdiction in the U.S. Court of Federal Claims; the Little Tucker Act (for claims up to \$10,000) allows money claims to be brought in federal district court.

The availability of the Tucker Act as an alternative to the QTA was acknowledged in the legislative history of the QTA. “And the Tucker Act, 28 U.S.C. sec. § 1346(a)(2), grants the consent of the United States to be sued where the plaintiff alleges that his property has been taken in violation of the Constitution.” H.R. Rep. 92-1559, 1972 U.S.C.C.A.N. 4547, 1972 WL 12541.

The fact that the claim involves issues of title does not deprive the court of jurisdiction over the taking claim:

This court is not denied jurisdiction now, simply because there is a quiet title issue involved in determining entitlement to just compensation vel non. . . .

If plaintiff had brought suit to be restored possession of her land, perhaps the issue would be different and 28 U.S.C. 2409a might require this suit be brought in the district court. But this is not a suit for possession. It is a just compensation action and thereby within the historical jurisdiction of the court. To hold otherwise would allow defendant in its answer to determine the situs of an action by alleging governmental ownership. This we decline to do.

*Bourgeois v. United States*, 545 F.2d 727, 729, n.1, 212 Ct. Cl. 32, 35 n.1 (Ct. Cl. 1976) (Kunzig, J.)

Unlike the QTA, the Tucker Act contains no exception for Indian lands. Moreover, courts have ruled that, unlike the APA (which defers to the limitation in the QTA), there is no such deference to the QTA exception under the Tucker Act:

Although the QTA is the only avenue to a quiet title action against the United States, the QTA does not apply to and will not affect “actions which may be or could have been brought under the Tucker Act, 28 U.S.C. § 1491 ....”  
28 U.S.C. § 2409a(a).

Plaintiffs first brought suit for quiet title in district court in California. The court held that the QTA applied to the claims, and therefore, due to the Indian lands exception, it could not decide on plaintiffs’ claims, as they involved quieting title of Indian lands in private individuals. It may seem that plaintiffs’ suit before this court for inverse condemnation is simply a ploy to circumvent the restrictions contained in the QTA. It is clear, however, from the limitation of the applicability of the QTA residing in its own provisions, that separate courts will encounter the same issues of title in some instances. The fact that plaintiffs have filed in two separate courts does not rid this court of the ability to hear the claims. The Court of Appeals for the Federal Circuit (Federal Circuit) has held that in cases involving takings that include possible unlawful activity by government agency officials, the harm affecting a claimant is best seen as bisected, one harm representing the unlawful agency activity, and the other harm representing the taking of a property interest without compensation. Each harm warrants its own cause of action, each in a different court. This is precisely the reason why the district court saw fit to transfer plaintiffs’ Fifth Amendment claims to this court. On their face, plaintiffs’ claims are properly considered full-fledged takings claims, because they allege property interests which was taken by government agency action, and therefore do not fall under the QTA.

*Mannatt v. United States*, 48 Fed. Cl. 148, 153-54 (2000) (footnote omitted) (numerous citations omitted) (brackets removed).

Accordingly, it appears to me that Rainbow’s End has a second litigation option under the Tucker Act, based on the damage suffered by the uncompensated taking Rainbow’s End’s property.

I note, by the way, that in *Howell v. Nez Perce Tribe*, Case No. 3:11-cv-653-EJL (Feb. 22, 2013), Judge Lodge dismissed claims by private landowners within the Nez Perce reservation (due to the Indian lands exception to the QTA), but noted that they could bring a separate action under the Tucker Act. I have attached a copy of this unpublished decision.

For jurisdictional reasons, the APA and Tucker Act suits would be filed separately. Presumably, in the interest of judicial economy, the Tucker Act claim could be stayed pending resolution of the APA claim.

## **D. Forest Service and BLM road management plans**

### **1. Travel Management Rule**

On November 9, 2005, the U.S. Forest Service promulgated what is known as the Travel Management Rule. *Travel Management; Designated Routes and Areas for Motor Vehicle Use; Final Rule* (“Travel Management Rule”), 70 Fed. Reg. 68264 to 68291 (Nov. 9, 2005), codified at 36 C.F.R. Parts 212, 251, 261, and 295.70. Prior to the promulgation of the Travel Management Rule, it was the practice in most national forests to allow public use of all roads that were not affirmatively declared closed by the Forest Service. The Travel Management Rule replaced the “open unless closed” policy with the opposite—a rule providing that roads are “closed unless open.”

Specifically, the rule requires each national forest to designate a system of “roads, trails, and areas”<sup>247</sup> that are open to motor vehicle use. Roads so designated become National Forest System roads (“NFS roads”). This is accomplished through a travel planning process undertaken for each national forest or other administrative unit. This is a public process subject to NEPA. See 36 C.F.R. § 212.52. The culmination of the travel planning process is the issuance by the National Forest of a motor vehicle use map (“MVUM”) showing each of the NFS roads that are available for public use. See 36 C.F.R. § 212.1 (defining “motor vehicle use map”); 36 C.F.R. § 212.51 (requiring designation of “roads, trails, and areas” which, in turn, are required, pursuant to the definition of “Designated road, trail, or area” at 36 C.F.R. § 212.1, to be displayed on a motor vehicle use map); 36 C.F.R. § 212.56 (requiring designated roads, trails, and areas to be displayed on a motor vehicle use map); 36 C.F.R. § 212.54 (requiring updates to designated roads, trails, and areas to be displayed on a motor vehicle use map).

Once NFS roads are designated for a particular National Forest and displayed on the MVUM, the Travel Management Rule prohibits and criminalizes public use of any road within a National Forest that is not designated an NFS road (with limited exceptions). 36 C.F.R. §§ 212.50(a), 261.13.

### **2. Treatment of R.S. 2477 roads in the Travel Management Rule**

One of the exceptions from the prohibition is for roads that are “authorized by a legally documented right-of-way held by a State, county, or other local public road authority.” C.F.R. § 261.13(i) (exemption from prohibition for legally documented rights of way); 36 C.F.R. § 212.1 (“National Forest System road” and “National Forest System trail” defined to exclude legally documented rights-of-way). The rule does not define “right-of-way held by a State, county, or other local public road authority.” Nor does it reference R.S. 2477. However, it is clear that an R.S. 2477 road located within a national forest would be such a “right-of-way held by a State, county, or other local public road authority.”

The Forest Service has not defined what constitutes a “legally documented” R.S. 2477 road. As a matter of practice, to qualify as “legally documented,” the Forest Service requires a federal quiet title determination or similar formal adjudication. The designation or validation of a road as an R.S. 2477 road by a county or highway district, or even by a state court, does not qualify to make the road “legally documented” in the eyes of the Forest Service.

In sum, public use of a “legally documented” R.S. 2477 road is not prohibited, even if that road is not identified as an NFS road and does not appear on the MVUM. However, if the road is not “legally

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<sup>247</sup> The Travel Management Rule addresses not only roads (used for motor vehicle travel), but trails and off-road areas.

documented” (despite the fact that it meets the legal test for an R.S. 2477 road) and if the road has not been designated a NFS road, then, under the Travel Management Rule, public use of the road is prohibited. Whether the Forest Service has the authority to prohibit use of non-documented R.S. 2477 roads has not been tested.

### **3. Vehicle and time of year limitations on use of “open roads” within national forests**

Note that in addition to declaring roads to be open or closed, the Travel Management Rule contemplates that the Forest Service may establish limits on “the class of vehicle and time of year” that public use is authorized. 36 C.F.R. §§ 212.5(a)(2)(ii); 212.50.

Another section of the rule provides: “The load, weight, length, height, and width limitations of vehicles shall be in accordance with the laws of the States wherein the road is located. Greater or lesser limits may be imposed and these greater or lesser limits shall be established as provided in 36 CFR part 261.” 36 C.F.R. § 212.5(a)(2)(i).

### **4. Commercial hauling**

The Forest Service’s rules governing road use on national forests contain a provision authorizing the Forest Service to require financial or in kind contributions from those engaged in “commercial hauling” on Forest Service roads.<sup>248</sup> Thus, even if a road is listed as “open” on the MVUM, a commercial hauler’s use of that road may be conditioned upon such contribution.

The key provisions relating to commercial hauling are as follows:

(c) Cost recovery on National Forest System roads. The Chief may determine that a share of the cost of acquisition, construction, reconstruction, improvement, or maintenance of a road, or segment thereof, used or to be used for commercial hauling of non-Federal forests products and other non-Federal products, commodities and materials, should be borne by the owners or haulers thereof. The Chief may condition the permission to use a road, or segment thereof, upon payment to the United States of the proportionate share of the cost and bearing proportionate maintenance as determined to be attributable to the owner’s or hauler’s use in accordance with § 212.9. This condition to use roads would apply where the owners or haulers:

(1) Have not shared in the cost of acquisition, construction, reconstruction, or improvements, and

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<sup>248</sup> These provisions are in the codified within the same rules promulgated as part of the Travel Management Rule, but the commercial hauling provisions predate and were not changed by the Travel Management Rule. The commercial hauling provisions first appeared at 30 Fed. Reg. 5,478 (Apr. 16, 1965) (final rule). What is now section 212.5 was then codified at 36 C.F.R. § 212.7; what is now section 212.9 was then codified at 36 C.F.R. § 212.11. There have been a number of amendments to these sections over the years, but the key language has remained untouched since it was promulgated in 1965. The 1965 final rule contained no preamble explaining the rule or the authority for the rule. The final rule contains no citation or other reference to the proposed rule and it is not searchable on Westlaw, so it is not possible to review the proposed rule. The author has reviewed each of the amendments over the subsequent decades, and none sheds any further light on the meaning of commercial hauling or the scope of the rule.

- (2) Have not made contributions to pay their proportionate share of the costs.

36 C.F.R. § 212.5(c).

(a) Road improvement. Use of a road for commercial hauling, except occasional or minor amounts, will be conditioned upon improvement or supplemental construction of the road to safety [sic] and economically serve the contemplated use, unless the Chief determines that the safety and economy of the established and foreseeable use by the United States, its users and cooperators will not be impaired by the use for which application is being made. With the consent of the Chief the applicant may deposit funds in the estimated amount required for the improvements or supplemental construction in lieu of performance. Such funds will be used by the Forest Service to do the planned work. The cost of the improvements or supplemental construction will be taken into account in determining any otherwise required contribution to cover the proportionate share of the cost of road acquisition, construction, reconstruction or improvement attributable to the use.

36 C.F.R. § 212.9(a).

The Travel Management Rule does not define “commercial hauling,” but the rule states that it applies to “commercial hauling of non-Federal forests products and other non-Federal products, commodities and materials.” 36 C.F.R. § 212.5(c). This appears to be a rather broad description.

The Forest Service Manual (the Forest Service’s primary guidance document, which is not a rule and therefore does not have the force and effect of law) defines the term as follows:

Commercial Hauling. For purposes only of cost recovery under FSM 7730, [commercial hauling means] commercial use of NFS roads to transport:

1. Federal or non-federal products from Federal, State, or private lands;
2. Livestock, other than livestock authorized to use NSF lands, feed for livestock authorized to use NSF lands, and livestock from farms and ranches in or adjacent to the NFS; or
3. Goods for, supplies for, or customers of commercial uses or activities on NFS lands pursuant to a special use authorization or other written authorization issued by the Forest Service, other than:
  - a. A Forest Service contract;
  - b. An agreement between the Forest Service and another Federal agency, unless the agreement specifically provides for cost recovery;
  - c. A grazing permit;
  - d. An authorization for a concession involving federally-owned facilities; and
  - e. A special recreation permit issued under the Federal Lands Recreation Enhancement Act (16 U.S.C. 6802(d)(2)).

Commercial Use or Activity. For purposes of this chapter, a use or activity on NFS lands whose primary purpose is the sale of a good or service, regardless of whether the use or activity is intended to produce a profit.

Forest Service Manual § 7730.5 (approved Sept. 23, 2008).

## **5. National Forest “Road Use Permits”**

The Forest Service regulations pertaining to cost recovery for commercial use of forest roads arise primarily from the National Forest Roads and Trails Act of 1964 (“NFRTA”), 16 U.S.C. §§ 532-538. NFRTA is aimed at ensuring that a system of National Forests roads and trails are adequately constructed and maintained “to enable the Secretary of Agriculture . . . to provide for intensive use, protection, development, and management of [National Forest System] lands under principles of multiple use and sustained yield of products and services.” 16 U.S.C. § 532. The statute focuses primarily on the role of forest roads in the development of resources on these lands, and provides the Secretary broad discretion in fashioning ways to finance such roads, including requiring users to help pay for their construction and maintenance. *See, e.g.*, 16 U.S.C. § 535. However, the statute also authorizes the agency to “require the user or users of a road under the control of the Forest Service, including purchasers of Government timber and other products, to maintain such roads in a satisfactory condition commensurate with the particular use requirements of each.” 16 U.S.C. § 537.

The Forest Service uses a “Road Use Permit,” to authorize and condition commercial hauling on forest roads. The Road Use Permit, which is on Forest Service form FS-7700-41—states that it was adopted under authority of NFRTA sections 535 and 537 and 36 CFR Part 212, Subpart A—actually is a contract imposing various conditions on the commercial hauler’s road use.

## **6. Litigation involving travel management plans**

As discussed above, federal land agencies are required to develop travel management plans (sometimes called “travel plans”) that identify roads available for public use on federal lands. The effect of these plans is to make illegal public use of roads not on these maps. Accordingly, pro- and anti-road interests often seek to challenge these plans—complaining that they should include more or fewer roads. These plans do not, in themselves, establish legal title to these roads. Nevertheless, courts have ruled that if counties believe that the management plans do not accurately identify the public roads, their sole remedy is to bring a federal quiet title action.

### **a. *Public Lands III* (Forest Service has authority to require a permit)**

In *Public Lands for the People, Inc. v. USDA* (“*Public Lands III*”), 697 F.3d 1192 (9<sup>th</sup> Cir. 2012) (petition for cert. filed Dec. 12, 2012), a group of miners challenged the travel management plan for the El Dorado National Forest. They complained that, as a result of the closure of some roads that were previously open to the public, they were now compelled to file a Notice of Intent or Plan of Operations under 36 C.F.R. § 228.4(a) in order to obtain access for mineral exploration purposes. This, they said, impaired their “Federal right of access” under various mining and land management statutes. *Public Lands III*, 697 F.3d at 1195. The Ninth Circuit found that they had standing to challenge the travel management plan, but the court rejected their claim on the merits:

We conclude that none of the statutes cited by the Miners cabin the Secretary’s authority with respect to vehicular access. No statutory provision

gives the Miners an unfettered right to access their mining claims via motor vehicles. *See, e.g.*, 30 U.S.C. § 22 (“[A]ll valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration . . . by citizens of the United States . . . *under regulations prescribed by law* . . .”).

. . . But the Secretary of Agriculture has long had the authority to restrict motorized access to specified areas of national forests, including to mining claims. *See Clouser*, 42 F.3d at 1530. Indeed, we recently reaffirmed that even where a miner has a federal mining right, a “prior approval requirement does not ‘endanger or materially interfere with’ [the miner’s] mining operations and is therefore permissible under the statutory scheme.” *United States v. Backlund*, 689 F.3d 986, 996 (9th Cir. 2012) (quoting *Doremus*, 888 F.2d at 633).

*Public Lands*, 697 F.3d at 1198 (emphasis, ellipses, and edits to quotations original; footnote omitted) (referring to *Clouser v. Espy*, 42 F.3d 1522, 1530 (9th Cir. 1994); *United States v. Doremus*, 888 F.2d 630, 633 (9th Cir. 1989).

**b. Kane County I (no obligation to evaluate R.S. 2477 road status)**

In *Kane Cnty. v. Salazar* (“*Kane County I*”), 562 F.3d 1077 (10<sup>th</sup> Cir. 2009), the Bureau of Land Management (“BLM”) issued such a management plan for the Grand Staircase-Escalante National Monument (which was created by President Clinton in 1996). Kane County and other plaintiffs sued the BLM complaining that the plan omitted various R.S. 2477 roads.

The plan included a map showing certain roads open and declaring all others closed. The plan specifically recognized the potential existence of unadjudicated R.S. 2477 roads among the closed roads and included the assurance that road closures were subject to valid existing rights and that, if and when, R.S. 2477 roads were judicially recognized, they would be opened. In the interim, however, the plan called for blocking closed roads with boulders and the like. Plaintiffs said that promising to re-open the roads at some point in the future was not enough; they sought (among other relief) mandamus directing the federal government to “first determine Plaintiffs’ valid existing rights before asserting or taking any action in enforcement . . . .” *Kane County I*, 562 F.3d 1082.

Specifically, the county contended that “the federal defendants have a duty, prior to closing or managing any roads on purported R.S. 2477 rights-of-way, to conduct administrative determinations regarding the validity of those purported rights-of-way.” *Kane County I*, 562 F.3d at 1086. The county conceded that the BLM was not authorized to issue formal administrative determinations, because Congress had taken away that power. *Id.* Instead the county argued that “all they are seeking instead is an order directing the BLM to ‘consider,’ for its own planning purposes, whether or not the county plaintiffs’ purported R.S. 2477 rights-of-way are valid.” *Kane County I*, 562 F.3d at 1087.

The court ruled that the BLM was under no obligation to undertake such a review of potential R.S. 2477 roads before issuing its management plan:

To be sure, we recognized in *S. Utah* that the BLM possessed the authority to “determin[e] the validity of R.S. 2477 rights of way for its own purposes.” 425 F.3d at 757. But, importantly, nothing in federal law requires the BLM to do so. Thus, even though the county plaintiffs might prefer that the BLM informally adjudicate their purported rights-of-way, they may not,



as the district court correctly concluded, “shift their burden as R.S. 2477 claimants or shortcut the existing processes for determining their unresolved R.S. 2477 claims by insisting that the BLM import its [internal and] preliminary road inventory work on unresolved R.S. 2477 claims in 1991 and 1993 [prior to this court’s decision in *S. Utah*] into its planning processes in formulating the 1999 Management Plan.”

*Kane County I*, 562 F.3d at 1087 (footnote omitted; brackets original; reference is to *S. Utah Wilderness Alliance v. BLM* (“*SUWA*”), 425 F.3d 735 (10th Cir. 2005)).

The plaintiffs, by the way, conceded that the federal Quiet Title Act “is the exclusive means for adverse claimants to challenge the federal government’s title to real property.” *Kane County I*, 562 F.3d at 1088. They explained that they were not seeking to establish title. Be that as it may, said the court, the county failed to demonstrate that the BLM had an obligation to informally assess R.S. 2477 roads.

**c.      *The Wilderness Society* (environmental groups lack standing to challenge self-help ordinance)**

The case of *The Wilderness Society v. Kane Cnty.*, 632 F.3d 1162 (10<sup>th</sup> Cir. 2011) (rehearing en banc) also involved alleged R.S. 2477 roads in the Grand Staircase-Escalante National Monument. In this case, however, the county did not bring a lawsuit challenging the BLM’s management plan for the monument. Instead, it engaged in “self-help.” It enacted an ordinance re-opening certain claimed but adjudicated R.S. 2477 roads for off-highway vehicle (“OHV”) use. The county also replaced federal signage along the routes with county signs declaring the roads open.

In response, two environmental groups sued the county. The county raised numerous jurisdictional objections (including that it had mooted the case by repealing the ordinance and fixing the signs, and that plaintiffs had failed to join an indispensable party—the federal government). The district court rejected these and other threshold defenses, and ruled that the county’s actions were preempted by federal law. The Tenth Circuit Court of Appeals affirmed.

On rehearing *en banc*, however, the Tenth Circuit reversed, holding that plaintiff environmental groups lacked prudential standing to bring the case. The court was not speaking of the prudential standing in the “zone of interests” variety of prudential standing arising under *Ass’n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) and its progeny. Rather, the court focused on “third party” prudential standing as articulated in *Warth v. Seldin*, 422 U.S. 490, 499 (1975), *Singleton v. Wulff*, 428 U.S. 106, 113 (1976), and *Allen v. Wright*, 468 U.S. 737, 751 (1984). The court ruled that the environmental groups were not the real party in interest and instead were seeking to assert rights held by the United States (which was not a party to the case). “TWS [The Wilderness Society] has taken sides in what is essentially a property dispute between two landowners, only one of which is represented (Kane County). But TWS lacks any independent property rights of its own.” *Wilderness Society*, 632 F.3d 1162, 1171.

**E. Federal law, regulation, and guidance governing the recognition of rights to use roads on federal land (binding administrative decisions, RDIs, NBDs, and RMAs)**

**1. Overview**

A variety of mechanisms are available to a private party or a governmental entity seeking to obtain or confirm access over roads located on federal land. The most certain, and also the most cumbersome, is through a quiet title action under the federal Quiet Title Act (“QTA”). Indeed, this is the only means of permanently establishing title. The QTA is discussed in a separate chapter of this Handbook.

The federal government also has authority under various statutes to grant temporary rights-of-way (“ROWs”) to private parties and other entities for construction and/or use of roads on federal land. Establishing these private ROWs is likely to trigger the National Environmental Policy Act (“NEPA”), which in some instances can prove to be a burdensome process. These ROWs are independently created rights of use, and are not based on recognition of the road’s status as an R.S. 2477 road.

The Bureau of Land Management allows “casual use” of certain existing roads on BLM land without any explicit authorization.

In the subsections below, the author explores other mechanisms for establishing some measure of authority to use or maintain roads on federal lands: binding administrative determinations (which are now prohibited), recordable disclaims of interest (“RDI”) (which are temporarily unavailable as a matter of agency discretion), non-binding decisions (“NBDs”) (which are available, but seldom employed), and road maintenance agreements (RMAs) (which are more common).

**2. Binding administrative determinations**

Historically, the U.S. Department of the Interior took a hands-off approach in the determination and recognition of R.S. 2477 roads. *S. Utah Wilderness Alliance v. BLM* (“SUWA”), 425 F.3d 735, 754 (10<sup>th</sup> Cir. 2005) (“Until very recently, the BLM staunchly maintained that it lacked authority to make binding decisions on R.S. 2477 rights of way”); *Sierra Club*, 104 IBLA 17, 18 (1988) (“[T]he Department has taken the position that the proper forum for adjudicating R.S. 2477 rights-of-way is the state courts in the state in which the road is located.”).

One of the first movements by the Department toward a more pro-active role on R.S. 2477 roads came on December 7, 1988 when Interior Secretary Donald Hodel approved a policy memorandum endorsing a broad view of R.S. 2477 standards. *Memorandum from Assistant Sec’y for Fish, Wildlife and Parks to Secretary Donald Hodel*, Departmental Policy on Section 8 of the Act of July 26, 1866, Revised Statute 2477 (repealed), Grant of Right of Way for Public Highways (RS-2477) (Dec. 7, 1988) (“*Hodel Policy*”) (available at <http://www.highway-robbery.org/Resources/documents.htm>). As discussed below, the *Hodel Policy* was revoked in 1997 and replaced by *Babbitt Policy*.

The *Hodel Policy* included a widely quoted statement describing the minimal extent of “construction” required to create an R.S. 2477 right-of-way.<sup>249</sup>

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<sup>249</sup> The *Hodel Policy* stated:

Construction is a physical act of readying the highway for use by the public according to the available or intended mode of transportation—foot,

The although purporting to establish federal standards for R.S. 2477 roads,<sup>250</sup> the *Hodel Policy* continued to recognize the limited role of the federal government: “Under RS 2477, the United States had (has) no duty or authority to adjudicate an assertion or application. However, it is necessary in the proper management of Federal lands to be able to recognize with some certainty the existence, or lack thereof, of public highway grants obtained under RS 2477.” *Hodel Policy* at 1 (parenthetical original).

In 1994 the Clinton Administration’s Department of the Interior proposed sweeping new regulations that embraced an aggressive effort to finally determine the status of all alleged R.S. 2477 roads. 59 Fed. Reg. 39,216 (Aug. 1, 1994). Describing R.S. 2477 as a “cryptic, nineteenth century” statute that has resulted in “[c]ontroversy and confusion,”<sup>251</sup> the Department proposed the creation of a federal administrative process for determining the validity of all alleged R.S. 2477 roads on federal, non-Indian lands. The rule would have required all claims to be filed within two years, leading to an “administrative determination” that would be appealable as a final decision under the federal Administrative Procedures Act. Moreover, the proposed rule, if it had been adopted, would have expressly triggered the 12-year statute of limitations period under the federal Quiet Title Act.

Proponents of R.S. 2477 roads feared that the Clinton Administration would use the rules to broadly reject assertions of R.S. 2477 roads, while extinguishing all claims not timely pursued. Following the establishment of a Republican majority in Congress in 1995, Congress imposed a series of moratoria on the proposed regulations. *E.g.*, *National Highway System Designation Act of 1995*, Pub. L. No. 104-59, 109 Stat. 568, 617-18 (1995). This was followed by legislation in 1996 (in the form of an appropriation rider) forbidding the adoption of any new regulations unless approved by Congress.<sup>252</sup> As a result, the Clinton regulations were never adopted.

On January 22, 1997, Secretary Babbitt responded to the legislation by issuing a new policy that revoked the 1988 *Hodel Policy* and, pending congressional approval of final rules, authorized the BLM to

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horse, vehicle, etc. Removing high vegetation, moving large rocks out of the way, or filling low spots, etc., may be sufficient as construction for a particular case.

. . . .

Road maintenance over several years may equal construction.

The passage of vehicles by users over time may equal actual construction.

*Hodel Policy*, Attachment at 2.

<sup>250</sup> This federal articulation of what constitutes R.S. 2477 roads predated more recent judicial guidance establishing that state law—not federal pronouncements—govern the acceptance of R.S. 2477 rights-of-way.

<sup>251</sup> Rights-Of-Way Disposals Federal Lands: Hearings Before the House Resources Subcomm. on Nat’l Parks, Forests and Lands, 104th Cong. (Mar. 16, 1995) 1995 WL 113237 (statement of John D. Leshy, Solicitor, DOI).

<sup>252</sup> “No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 (43 U.S.C. 932) shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act.” Section 108 of the Fiscal Year 1997 Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996). This was the second extension of a prohibition initially adopted in 1995 (Pub. L. 104-59, 109 Stat. 568, 617-18 (1995)). For a full discussion see Mitchell R. Olson, Note, *The R.S. 2477 Right of Way Dispute: Constructing a Solution*, 27 *Env’tl L.* 289, 294-95 (1997).

make binding administrative determinations on R.S. 2477 roads but only where there was a compelling need to do so. *Interim Departmental Policy on Revised Statute 2477 Grant of Right of Way for Public Highways; Revocation of December 7, 1988 Policy* (adopted on January 22, 1997, clarified on February 20, 1997) (“*Babbitt Policy*”).<sup>253</sup> (Available at <http://www.highway-robbery.org/Resources/documents.htm>) (This policy is discussed in *SUWA* at 756 n.11 and Parenteau, *Anything Industry Wants: Environmental Policy under Bush II*, 14 Duke Envtl. L. Pol’y F. 363, 399 (2004).)

### 3. *SUWA* and the end of binding administrative determinations

Though never common, these binding administrative determinations (a process created under the Clinton Administration) continued to be employed under the George W. Bush Administration. All this ended in 2005.

In *S. Utah Wilderness Alliance v. BLM* (“*SUWA*”), 425 F.3d 735, 768 (10<sup>th</sup> Cir. 2005), the Tenth Circuit ruled that the Department had no authority to make binding determinations as to the validity of R.S. roads. The litigation began under the Clinton Administration in 1996 when three Utah counties began grading and improving roads in wilderness study areas. *SUWA* and another environmental group brought suit against the counties and the BLM alleging that the counties’ actions were unlawful under FLPMA and other statutes and that BLM was failing to stop them. The BLM cross-claimed against the counties alleging trespass—essentially agreeing with *SUWA*. The litigation continued for nearly a decade. Early in the litigation, the district court “referred” the matter back to the BLM on the basis that the agency had primary jurisdiction to determine title to R.S. 2477 roads.<sup>254</sup> On appeal, the Tenth Circuit rejected recognition of BLM’s primary jurisdiction, holding that, while the agency may make non-binding determinations for its own purposes, only a court may determine title to R.S. 2477 roads. *SUWA* at 757.

During her last month in office, in response to the *SUWA* decision, Interior Secretary Gale Norton ended the use of binding administrative determinations for resolving R.S. 2477 disputes. *Department of the Interior Memorandum from Secretary to Assistant Secretaries* (Mar. 22, 2006) (“*Norton Policy*”) (reproduced in Appendix C). Specifically, the *Norton Policy* revoked the 1997 *Babbitt Policy* that allowed administrative determinations where a need was demonstrated. The memorandum explained, however, that the agency retained authority to issue non-binding determinations. *Norton Policy* at 3. The *Norton Policy* also terminated the April 9, 2003 Memorandum of Understanding with the State of Utah (which provided a streamlined “acknowledgement process” for recognizing R.S. 2477 roads). *Norton Policy* at 4.

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<sup>253</sup> Following *SUWA*, this guidance was revoked by *Norton Policy*, discussed below.

<sup>254</sup> Curiously, until the final remand, neither the district court nor the court of appeals mentioned the federal Quiet Title Act (“QTA”), which is generally considered to provide the exclusive jurisdictional basis for resolving title. The Tenth Circuit made clear that determining title “is a judicial, not an executive, function,” *SUWA* at 752, but it did not address how that could be done outside of the QTA. (*SUWA* could not plead the QTA, as it was not the property owner; the counties filed counterclaims under the QTA, but they were dismissed as inadequately pled. Brief of United States at \*11-12, 2004 WL 2085030.) Instead, without discussing the matter, both courts appear to have assumed that they had jurisdiction to determine road status outside of the QTA in order to resolve claims of trespass and the like. In any event, only on remand, when counties sought to moot the case by ceasing construction activities and the BLM dropped its claims, did the district court note that it had nothing left to do, because the environmental group did not have standing to pursue a QTA claim.

#### 4. Recordable disclaimers of interest (“RDIs”)

The Federal Land Policy Act (“FLPMA”) authorizes the BLM to issue recordable disclaimers of interest (“RDIs”) to resolve disputes over title between BLM and other parties. These RDIs do not technically convey title. “A disclaimer has the same effect as a quitclaim deed in that it operates to estop the United States from asserting a claim to an interest in or the ownership of lands that are being disclaimed.” 43 C.F.R. § 1864.0-2(b). RDIs are employed in a variety of contexts (such as title to lands subject to moving river boundaries), not just R.S. 2477 roads.

On January 6, 2003, under the George W. Bush Administration, Secretary Gale Norton amended the BLM’s recordable disclaimer of interest (“RDI”) rules aimed at expanding the basis for BLM to disclaim federal interest in R.S. 2477 roads.<sup>255</sup> The Norton amendments to the rules relaxed the 12-year deadline for seeking the disclaimer.<sup>256</sup>

Shortly thereafter, on April 9, 2003, the BLM and the State of Utah entered into a Memorandum of Understanding which established a streamlined “acknowledgement process” for obtaining recordable disclaimers of R.S. 2477 roads in Utah. (Available at <http://www.highway-robbery.org/Resources/documents.htm>.)

As discussed above, in response to *SUWA*, Secretary Norton issued the *Norton Policy* on March 22, 2006 ending the use of binding administrative determination and the terminating the Utah Memorandum of Understanding. However, the *Norton Policy* expressly left intact for purposes of R.S. 2477 roads the RDI

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<sup>255</sup> On February 22, 2002, the Department published a proposed rule to amend existing regulations pertaining to “Conveyances, Disclaimers, and Corrections Documents.” 67 Fed. Reg. 8216 (Feb. 22, 2002). About 18,000 comments were submitted, and a final rule was published on January 6, 2003 amending 43 C.F.R. Subpart 1864. *Conveyances, Disclaimers and Correction Documents*, 68 Fed. Reg. 494-503 (Jan. 6, 2003). The regulations establish a procedure for state and local governments to resolve disputes about ownership of land—but only in one direction, by disclaiming the federal interest. Because the regulations themselves do not expressly reference R.S. 2477 rights-of-way, they escaped the congressional prohibition against new regulations on the subject. The General Accounting Office issued a report in February 2004 concluding that the recordable disclaimer rule is probably valid because it does not reference R.S. 2477 (although the preamble does). GAO Opinion, “Recognition of R.S. 2477 Rights-of-Way under the Department of the Interior’s FLPMA Disclaimer Rules and its Memorandum of Understanding with the State of Utah,” B-300912, at 9-10 (Feb. 6, 2004). The same report, however, concluded that the subsequent Memorandum of Understanding between Interior and the State of Utah implementing the rule violated the prohibition because it expressly deals with R.S. 2477 rights-of-way. The BLM nevertheless implemented the Memorandum of Understanding, until it was revoked by the *Norton Policy* in 2006, as discussed below. On July 14, 2005, BLM’s Deputy Director issued Instruction Memorandum No. 2005-185, which outlined “the procedures to be used for processing disclaimer of interest applications filed to acknowledge valid R.S. 2477 rights-of-way.”

<sup>256</sup> Prior to the Norton amendments, the rule allowed applications for recordable disclaimers only within the 12-year timeframe corresponding to the statute of limitations in the federal Quiet Title Act. 43 C.F.R. § 1864.1-3(a). The Norton amendments exempted states from that deadline, reflecting a similar exemption added to the Quiet Title Act in 1986 (Pub. L. No. 99-598, 100 Stat. 3351 (1986)). However, the Norton amendments defined “state” broadly to also include counties and other local governments. 43 C.F.R. § 1864.0-5(h). This effectively eliminating the deadline altogether, because only states and local governments own R.S. 2477 roads. The Norton amendments also eliminated language limiting applicants to present owners of record (which was problematical because most R.S. 2477 roads are not established by recorded documents).

rules as well as administrative procedures for road maintenance agreements (“RMAs”) and non-binding determinations (“NBDs”):

Department land managers (and right of way claimants) should recognize that there are a number of options available for addressing claimed rights of way that may be preferable to administrative R.S. 2477 determinations. Title V of FLPMA or other right of way authorities, recordable disclaimers, and the Quiet Title Act each may offer more certainty to bureaus and to claimants. Where the land managing bureau and a claimant wish only to maintain the existing status quo, an agreement such as the BLM’s road maintenance agreements (RMAs) or similar tools of other bureaus may be useful. Finally, bureaus in some circumstances may need to make informal, nonbinding administrative validity determinations (NBDs). Bureaus confronted with right of way issues should use this guidance, along with the decision in *SUWA v. BLM*, to decide when and how to use each of these tools.

...

Recordable disclaimers, which are authorized by FLPMA § 315, 43 U.S.C. § 1745, and discussed in detail in 43 CFR § 1864, likewise remain available to settle questions regarding the United States’ interest in rights of way. Such disclaimers have the same effect as a quitclaim deed, estopping the United States from asserting a claim to the interest that is disclaimed.

As the *SUWA v. BLM* court noted, ultimately deciding who holds legal title to an interest in real property, including an R.S. 2477 right of way, “is a judicial, not an executive, function.” 425 F.3d at 752. Thus, if a claimant seeks a definitive, binding determination of its R.S. 2477 rights, it must file a claim under the Quiet Title Act, 28 U.S.C. § 2409a.

Where a county seeks only to preserve the status quo on a road, determining its ownership may not be necessary. Instead, the bureau should consult with the claimant about entering into an agreement that allows for the upkeep of the status quo by routine maintenance. The BLM has used RMAs for this purpose for many years. Other bureaus should consider whether such agreements or a similar tool may offer similar benefits for them. Such agreements would not make any determination regarding the validity of any R.S. 2477 claims, and would not affect the legal right of either party to assert or contest such a claim. A land manager should only agree to include a road in a RMA if preservation of the status quo through routine maintenance is consistent with the land manager’s obligation to protect the surrounding and underlying Federal lands. RMAs should not be finalized until the public has received notice and had an opportunity to comment on the roads to be covered and the maintenance levels to be permitted. In cases where none of these other tools is appropriate, a bureau may need to make an NBD for its own planning purposes or to address proposals for road use. Because NBDs create no binding legal rights, bureaus should keep the process as simple and straightforward as possible. If a bureau must make an NBD, it should seek relevant information from the claimant, internal resources, and the public. If the proposed route crosses or abuts private land or land managed by another

government agency, the bureau should ensure that the private landowner or other agency is notified and has an opportunity to comment. Once a preliminary determination is made, the public should be given notice and an opportunity to comment. Because the relevant legal rules that must be applied may vary from State to State, however, bureaus should work with the Office of the Solicitor to analyze the applicable rules before finalizing any NBDs.

Once it has gathered this information, the bureau should decide “on a preponderance of the evidence standard” if it supports the existence of a right of way under State law in effect prior to the repeal of R.S. 2477. See *SUWA v. BLM* at 750. If a bureau makes a positive NBD that an R.S. 2477 right of way may exist, it should provide the holder with written notice of the NBD and incorporate the NBD in all relevant planning processes and documents. It should also consider entering into an RMA with the holder to cover routine maintenance of the route.

*Norton Policy*, Attachment at 6.

The Department’s view changed again, however, under the Obama Administration. Three months after the Secretary Norton issued the amendments to the RDI rules in 2003, San Bernardino County in California filed an application for an RDI for what it believed was an R.S. 2477 road across public land. That application and associated litigation grinded along for six years before the BLM reversed course on February 20, 2009 and issued a memorandum to BLM State Directors instructing them not to process any claims under the RDI rule for R.S. 23477 roads. This was implemented by Instruction Memorandum No. No. 2010-016 dated November 16, 2009. (See discussion in *Cnty. of San Bernardino*, 181 IBLA 1, 2011 WL 2114988 at \*18, \*\*WL11 (2011)). In accordance with this new policy directive, the BLM issued its decision denying the county’s RDI application. This decision was upheld by the IBLA in the referenced decision.

Accordingly, it appears that, for the time being at least, RDIs are not available to resolve R.S. 2477 disputes on BLM lands.

## **5. Non-binding determinations (“NBDs”)**

*SUWA* ended the use of binding administrative determinations of R.S. 2477 roads. The court noted, however: “This does not mean that the BLM is forbidden from determining the validity of R.S. 2477 rights of way for its own purposes. The BLM has always had this authority.” *SUWA* at 757.

As discussed above, pursuant to this ruling, Secretary Norton issued the *Norton Policy* on March 22, 2006, which formally recognized the role of non-binding determinations (“NBDs”).

In cases where none of these other tools is appropriate, a bureau may need to make an NBD for its own planning purposes or to address proposals for road use. Because NBDs create no binding legal rights, bureaus should keep the process as simple and straightforward as possible. If a bureau must make an NBD, it should seek relevant information from the claimant, internal resources, and the public. If the proposed route crosses or abuts private land or land managed by another government agency, the bureau should ensure that the private landowner or other agency is notified and has an opportunity

to comment. Once a preliminary determination is made, the public should be given notice and an opportunity to comment. Because the relevant legal rules that must be applied may vary from State to State, however, bureaus should work with the Office of the Solicitor to analyze the applicable rules before finalizing any NBDs.

*Norton Policy*, Attachment at 6.

The NBD (non-binding determination) process was then further elucidated in Instruction Memorandum No. 2006-159 issued by the Director of the BLM on May 26, 2006 (reproduced in Appendix C). It authorizes BLM state and field offices to issue NBDs for claimed R.S. 2477 roads “for its own land use planning and management purposes.” Instruction Memorandum No. 2006-159 at 1. The guidance also makes clear, however, that NBDs may be issued at the request of other “claimants” such as a state or county. In such cases, the guidance provides that BLM “offices are encouraged to seek reimbursement of administrative costs for making NBDs by means of contributed funds.” Instruction Memorandum No. 2006-159 at 2. (This tracks the provision in the RDI rule requiring the applicant to reimburse the BLM for its administrative expenses. 43 C.F.R. § 1864.2(a).) The Instruction Memorandum, and an accompanying set of procedures, speak only in terms of states and counties as claimants. They do not address whether private parties may seek NBDs.

Instruction Memorandums generally are temporary guidance documents. This one was issued with an expiration date of September 30, 2007. Apparently it was extended, but has now expired. *Cnty. of San Bernardino*, 181 IBLA 1, 2011 WL 2114988 at \*17, \*\*WL11 (2011) (“This IM expired by its terms on September 30, 2006.”). However, the BLM’s authority to make NBDs does not depend on the Instruction Memorandum.

In any event, NBDs have not been extensively employed. In *Uintah Cnty., Utah*, 182 IBLA 191, 2012 WL 3599285 (2012), the IBLA upheld BLM’s decision not to engage in the NBD process to evaluate an alleged R.S. 2477 road in the context of resource management planning.<sup>257</sup> A similar result was reached in *American Motorcyclist Ass’n.*, 188 IBLA 177, 2016 WL 4536606 (2016). Based on discussions in 2016 with the DOI Field Solicitor’s office in Boise, Idaho, it appears that few if any NBDs have been issued for R.S. 2477 roads in Idaho.

## **6. Road maintenance agreements (“RMAs”)**

As noted above, the 2006 *Norton Policy* also recognized the continuing role of road maintenance agreements (“RMAs”):

Where a county seeks only to preserve the status quo on a road, determining its ownership may not be necessary. Instead, the bureau should consult with the claimant about entering into an agreement that allows for the upkeep of the status quo by routine maintenance. The BLM has used RMAs

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<sup>257</sup> These IBLA decisions do not employ the acronym NBD, which appears to have been created by 2006 *Norton Policy*, but has not been consistently adopted. They simply refer to administrative decisions that are non-binding. “BLM is not authorized to make binding determinations concerning the existence and scope of R.S. 2477 ROWs. However, it may make non-binding R.S. 2477 determinations for its own land-use planning and administration purposes.” *American Motorcyclist Ass’n*, 188 IBLA at 205.



for this purpose for many years. Other bureaus should consider whether such agreements or a similar tool may offer similar benefits for them. Such agreements would not make any determination regarding the validity of any R.S. 2477 claims, and would not affect the legal right of either party to assert or contest such a claim. A land manager should only agree to include a road in a RMA if preservation of the status quo through routine maintenance is consistent with the land manager's obligation to protect the surrounding and underlying Federal lands. RMAs should not be finalized until the public has received notice and had an opportunity to comment on the roads to be covered and the maintenance levels to be permitted.

*Norton Policy*, Attachment at 6.

Thus, an RMA does nothing to establish title (and hence is consistent with *SUWA*), but it may be helpful in documenting that the maintenance activity is authorized and thus not a trespass. An unreported federal district court in Utah described RMA this way:

The practice of using road maintenance agreements (“RMAs” or “MOUs”) predates both the QTA and the repeal of R.S. 2477 by the Federal Land Policy Management Act (“FLPMA”). For years, counties and the BLM have entered into road maintenance agreements to allocate maintenance responsibilities between governments that have intertwined interests.

. . .

As acknowledged by the BLM in an August 8, 2008 instruction memorandum regarding road maintenance agreements, “in instances where a governmental entity, such as a state, county, city, or town, and the BLM are interested in preserving the condition of a road without regard to its legal status, the use of a road maintenance agreement (RMA) may be an appropriate means to accomplish this, and . . . the BLM has used RMAs for such purposes for many years.” Amicus Brief, Ex. 3. Thus, “RMAs do not make any determination regarding the legal status under R.S. 2477.” *Id.* “An RMA simply allocates responsibility between a county and the BLM for maintaining the status quo of the roads covered by the RMA.” *Id.*

*Utah v. United States*, 2012 WL 1584370 at \*3 (D.C. Utah 2012). Because RMAs are not premised on federal ownership of the road, they do not trigger the 12-year deadline under the federal Quiet Title Act. *Id.*

#### **F. Intervention in NEPA cases.**

The National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4370h and the law of intervention are huge topics beyond the scope of this Handbook. However, we mention one recent and notable case dealing with intervention in NEPA cases, which are often the vehicle for litigating road cases.

In *The Wilderness Society v. U.S. Forest Service*, 2011 WL 117627 (9<sup>th</sup> Cir. 2011), the Ninth Circuit, sitting *en banc*, abandoned the “federal defendant” rule which categorically prohibited parties from intervening of right on the merits of claims brought under NEPA. The case involved the Forest Service’s

adoption of a travel management plan designating roads and trails available for motorized use in the Sawtooth National Forest. Two conservation groups sued the Forest Service for NEPA violations.

### **G. Indian lands**

By its own terms, R.S. 2477 applies only to roads constructed “over public lands, not reserved for public uses.”<sup>258</sup> Indian reservations are deemed reserved lands, not public lands, for purposes of R.S. 2477.<sup>259</sup>

Although R.S. 2477 does not apply, another federal statute authorizes the Secretary of the Interior to establish public roads on Indian lands. The statute, enacted in 1901, provides:

The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation.

25 U.S.C. § 311.

In private communications, the Bureau of Indian Affairs (“BIA”) has taken the position that *Bennett County* and other cases require that a party seeking recognition of a public road must establish that the United States “clearly and unequivocally” granted permission for the establishment of a highway. However, those cases are R.S. 2477 cases, not 25 U.S.C. § 311 cases. Moreover, more recent case law has established that the standard may be met without direct evidence, so long as the inference is persuasive. *See, Galli v. Idaho Cnty.*, 146 Idaho 155, 160, 191 P.3d 233, 238 (2008) (W. Jones, J.) (holding that direct evidence is not required, and that circumstantial evidence is sufficient to establish an R.S. 2477 road so long as there is “sufficient circumstantial evidence to support any inferences.”)

In the author’s view, 25 U.S.C. § 311 does not operate like R.S. 2477. Section 311 is not an open-ended offer that may be accepted at will by local governments. Nor is it a delegation of authority to the

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<sup>258</sup> R.S. 2477 is section 8 of the Mining Act of 1866. R.S. 2477 refers to its original codification as section 2477 of the Revised Statutes. The full citation is a mouthful: An Act Granting the Right-of-way to Ditch and Canal Owners Over the Public Lands and for Other Purposes, also known as the Mining Act of 1866, also known as Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253 (1866) (section 8 initially was codified at Revised Statutes 2477 (1873) (“R.S. 2477”)) (section 8 was re-codified at 43 U.S.C. § 932 (1938)) (repealed by Federal Land Policy Management Act of 1976 (“FLPMA”) § 706(a), Pub. L. No. 94-579, 90 Stat. 2743, 2793 (1976)).

<sup>259</sup> “It has been long established that Indian reservation land is not public land.” *United States v. Schwarz*, 460 F.2d 1365, 1372 (7th Cir.1972). “As a general rule, Indian lands are not included in the term ‘public lands’ which are subject to sale or disposal under general laws.” *Bennett County, S.D. v. United States*, 395 F.2d 8, 11 (8th Cir. 1968) (Matthes, J.). *See Missouri, Kansas & Texas Railway Co. v. United States*, 235 U.S. 37 (1914) (Holmes, J.) (holding in another context that land held for Indians was not “part of the public domain in the ordinary sense.”).

states. Rather, it is a statute that delegates authority to the U.S. Department of the Interior (“DOI”) to allow roads to be established, as the Department sees fit, on Indian lands in accordance with state law.

If a road on Indian land is not created pursuant to 25 U.S.C. § 311, DOI has the grant road easements under a 1948 statute. It provides:

The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

25 U.S.C. § 323 (emphasis supplied).

This broad grant of authority to the Secretary of the Interior is limited by the tribal consent requirement in the following section of the code, enacted at the same time:

No grant of a right-of-way over and across any lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984), as amended [25 U.S.C.A. § 461 et seq.]; the Act of May 1, 1936 (49 Stat. 1250) [25 U.S.C.A. §§ 473a, 496]; or the Act of June 26, 1936 (49 Stat. 1967) [25 U.S.C.A. § 501 et seq.], shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

25 U.S.C. § 324 (emphasis supplied).

The reference to the Act of June 18, 1934 is a reference to the Indian Reorganization Act of 1934 (“IRA”), 48 Stat. 984 (codified at 25 U.S.C. § 461 et seq.). The IRA gave Indian Tribes the option of “organizing” under the statute, which provided various benefits and burdens. Thus, section 324 mandates tribal consent only to tribes who elected to organize under the IRA.

Not all tribes elected to organize under the IRA. Indeed, most notably, the Nez Perce Tribe chose not to do so. Accordingly section 324 is not applicable to roads on Nez Perce tribal lands, and the Secretary of the Interior retains full, independent authority and responsibility to determine whether or not to grant a right-of-way across Nez Perce tribal lands.

This view is not shared by the BIA, which takes the position that tribal consent is required in all instances. This conclusion is based on a regulation implementing these statutes which provides a broader tribal consent requirement than does the statute. Until recently, it was codified at 25 C.F.R. § 169.3(a).

The entire rule was re-written in 2015, 80 Fed. Reg. 72,492 et seq. (Nov. 19, 2015), and the consent provision is now found in 25 C.F.R. § 169.107(a). The preamble to the 2015 regulation notes that one commentator suggested that consent should be required only of tribes that have elected to organize under the IRA. The BIA tersely rejected that suggestion. 80 Fed. Reg. at 72,496.

Arguably, the regulation is a violation of 25 U.S.C. § 324, which limits consent to those tribes organized under the IRA. It would be one thing for the regulation to require the Secretary to consult with non-organized tribes and to consider their concerns. But one might argue that 25 U.S.C. § 324 does not authorize the Secretary to simply delegate her decision-making authority to a non-organized tribe. To the author's knowledge, no one has ever challenged the rule, however.

Note also that, aside from the statutes and rule discussed above, the Secretary of the Interior may have independent authority to establish roads or rights of way under applicable treaties. For example, the treaties creating the Nez Perce Reservation appear to grant such authority and do not provide for tribal consent.

Establishing jurisdiction for federal court litigation addressing roads on Indian lands is tricky. See discussion of the Indian lands exception to the federal Quiet Title Act (see section VII.A.9 at page 193), litigation under the federal APA (see section VII.B at page 203), and the litigation under the Tucker Act (see section VII.C at page 204).

## **APPENDIX A: INDEX TO IDAHO ROAD CREATION AND ABANDONMENT STATUTES**

Statutory language shown in quotation marks.

Redlining shows changes made by session law.

Amendments affecting only other parts of statute are omitted here.

Quick Reference to Citations				
Quick Cites	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p><b>Today:</b> I.C. §§ 40-106, 40-109(5), 202(3), 40-204A.</p> <p><b>History:</b> Idaho Territory Laws § 1, p. 578 (1864). Idaho Territory Laws § 1, pp. 677-78 (approved 1/12/1875). — break in history — Idaho Territory Laws § 1, pp. 277-78 (approved 2/1/1881). Idaho Territory Laws § 1, p. 162 (1885). — break in history — Rev. Stat. of Idaho Terr. §§ 850, 851 (1887). Idaho Sess. Laws at p. 12 (1893). I.C. Ann. §§ 1137, 1138 (1901). 1 Idaho Code Ann. §§ 874, 875 (1908). Idaho Sess. Laws, ch. 55 (1911). 1 Compiled Laws §§ 874, 875 (1918). 1 Compiled Stat. §§ 1302, 1304 (1919). 39 I.C. Ann. §§ 39-101, 39-103 (1932). Idaho Code §§ 40-101, 40-103 (1948). Idaho Sess. Laws, ch. 82 (1950). Idaho Sess. Laws, ch. 93 (1951). I.C. §§ 40-103, 40-107 (1961). I.C. §§ 40-109(5), 40-202 (1985). I.C. § 40-202(3) (1986). I.C. §§ 40-109(5), 40-202(3) (1988). I.C. § 40-202(3) (1992). I.C. §§ 40-106, 40-107 (1993). — break in history — I.C. § 40-204A (1993).</p>	<p><b>Today:</b> The operative provisions of I.C. § 40-203(4) were repealed in 1993; I.C. § 40-204A.</p> <p><b>History:</b> Rev. Stat. of Idaho Terr. § 852 (1887). I.C. Ann. § 1139 (1901). 1 Compiled Laws § 876 (1908). 1 Compiled Laws § 876 (1918). 1 Compiled Stat. § 1305 (1919). I.C. Ann. § 39-104 (1932). I.C. § 40-104 (1948). I.C. § 40-104 (1963). I.C. § 40-203 (1985). I.C. § 40-203(4) (1986). I.C. § 40-203(4) (1993). — break in history — I.C. § 40-204A (1993). — break in history — I.C. § 40-203(5)</p>	<p><b>Today:</b> I.C. §§ 40-203(1), 40-604(4), 40-203A.</p> <p><b>History—General Authority:</b> Rev. Stat. of Idaho Terr. § 870 (1887). I.C. Ann. § 1145 (1901). I.C. Ann. § 882 (1908). 1 Compiled Stat. § 1312 (1919). I.C. Ann. § 39-401 (1932). I.C. § 39-401 (1943). I.C. § 40-501(1948). — break in history — Idaho Sess. Laws, ch. 82 (1950). Idaho Sess. Laws, ch. 93 (1951). I.C. § 40-133(d)) (1961). — break in history — I.C. § 40-604(4) (1985). I.C. § 40-604(4) (1993).</p> <p><b>History—Specific Procedures:</b> I.C. § 40-104 (1963). I.C. § 40-203(1) (1986). I.C. § 40-203(1) (1993).</p>	<p><b>Today:</b> I.C. § 40-1310(5).</p> <p><b>History:</b> Idaho Sess. Laws, ch. 55 (1911). 1 Compiled Laws § 62:18 (1918). Idaho Comp. Stat. § 1510 (1919). I.C. Ann. § 39-1524 (1932). I.C. § 40-1614 (1948). I.C. § 40-1614 (1963). I.C. § 40-1310(5) (1985). I.C. § 40-1310(5) (1993).</p>

OVERVIEW				
	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>Despite numerous recodifications and minor changes, the basic principles in the road creation statute have been quite stable from territorial days to the present. The basic statutory format of today's legislation was adopted in the 1887. Codification of territorial laws. It was amended in 1893 to add the maintenance requirement. Its basic provisions have remained unchanged since then (except for a requirement that the road by "opened" added in 1992).</p> <p>The law since 1893 has provided two methods of road creation:</p> <p><b>Method 1 (formal declaration):</b>  <u>"Roads laid out and recorded as highways, by order of a board of commissioners, and all roads used as such for a period of five years, provided the latter shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways."</u></p> <p><b>Method 2 (public use &amp; maintenance):</b>  <u>"Roads laid out and recorded as highways, by order of a board of commissioners, and all roads used as such for a period of five years, provided the latter shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways."</u></p> <p>In the current codification, these provisions are repeated in the definition section (section 40-109(5)) and in the substantive section (section 40-202(3)).</p> <p>In 1993 (H.B. 388) the Legislature</p>	<p>Idaho's first abandonment statute was adopted in 1887 (except for a very limited provision contained in the 1885 legislation pertaining to road that were not opened after four years). It is identified in this outline under the heading "passive abandonment" because abandonment was based on the absence of use and maintenance rather than affirmative official action declaring an abandonment. Some courts and commentators refer to this as "informal abandonment."</p> <p>The passive abandonment statute has been restricted and narrowed repeatedly, and was finally repealed in 1993.</p> <p>In 1963 the statute was amended (H.B. 15) to make it applicable only to roads created by prescription, that is, roads created under Method 2 of the Road Creation Statute. Arguably, this merely codified prior law, see discussion under H.B. 15.</p> <p>In the same year, S.B. 267 established mandatory formal procedures for abandonment of roads providing access to public lands.</p> <p><i>See, Floyd v. Board of Comm'rs of Bonneville Cnty. ("Floyd II"), 137 Idaho 718, 52 P.3d 863 (2002), regarding the interaction between the passive abandonment statute and formal abandonment provisions.</i></p> <p>In 1993 (S.B. 1108) the Legislature repealed the passive abandonment provision altogether.</p>	<p>In this outline, "formal abandonment" refers to mechanisms for abandonment by affirmative, official declaration.</p> <p>Idaho's first formal abandonment statute was enacted in 1887.</p> <p>For years, separate provisions set out the general authority of county commissions (now section 40-604(4)) and highway districts (now section 40-1310(5)). Originally, these statutes provided little guidance as to what sort of formal action was required. For example, until 1961, the statute simply required action "by proper ordinances." From 1951 until 1993, the statute required a public interest finding.</p> <p><i>Nicolaus v. Bodine</i> (1968) construed section 40-501 to require formal findings that the road is no longer necessary.</p> <p>After its amendment in 1963, the passive abandonment statute (then section 40-104) also set out a specific requirement for formal abandonment when the road provided public access. In the same year, an identical requirement was added for highway districts. (Then section 40-1614, now section 1310(5).)</p> <p>In 1986, the Legislature set out detailed abandonment procedures for <u>all</u> roads, applicable to both counties and highway districts. Idaho Code § 40-203(1).</p> <p>For many years, the general provisions existed alongside the specific procedural requirements.</p>	<p>Beginning in 1911, highway districts (like county commissioners) have had general authority to abandon roads by official action. Initially, no particular procedures were set out.</p> <p>In <i>Nicolaus v. Bodine</i> (1968), the Court held that road districts must comply not only with section 40-1614, but also section 40-501 (applicable to county commissioners).</p> <p>In 1963 specific procedures were established for roads accessing public lands. (This paralleled a similar provision in what was then section 40-104; see column to left.)</p> <p>In 1986, the Legislature enacted new formal abandonment provisions for all roads at section 40-203(1) (see column to the left).</p> <p>In 1993, section 40-1310(5) was amended to state that the section 40-203(1) procedures are mandatory for highway districts. That is, the general abandonment authority did not authorize an end run around the section 40-203(1) procedures. Thus, the loop was closed for both county commissions and highway districts.</p> <p>Today, section 40-203(1) sets out the sole statutory mechanism for the abandonment and vacation of public roads and rights-of-way.</p> <p>In 1993, the Legislature amended section 40-1305(5) to incorporate the same procedures for abandonment set out in</p>

OVERVIEW				
	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>adopted a new section 204A which declared that “construction and first use” are sufficient to create R.S. 2477 rights-of-way.</p>	<p>In the same year, H.B. 388 added a new section 204A dealing with R.S. 2477 rights-of-way. Among other things, it states that abandonment principles do not apply to R.S. 2477 rights-of-way. See note to left.</p> <p>A new, limited passive abandonment provision was added in 2013. See 40-203(5) (amended by 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified at Idaho Code §§40-202(6) to 40-203(8)) which is set out under “Other Provisions” below.</p>	<p>In 1993, the Legislature amended section 40-604(4) to incorporate the same procedures for abandonment set out in section 40-203.</p>	<p>section 40-203.</p>



Statutes As They Read Today				
Year = Today	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: Idaho Code § 40-202(3).</p> <p>QUOTE:            “40-202. Designation of highways and public rights-of-way. —            “. . .            “(3) Highways laid out, recorded and opened as described in subsection (2) of this section, by order of a board of commissioners, and all highways used for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of a board of commissioners, are highways. If a highway created in accordance with the provisions of this subsection is not opened as described in subsection (2) of this section, there shall be no duty to maintain that highway, nor shall there be any liability for any injury or damage for failure to maintain it or any highway signs, until the highway is designated as a part of the county or highway district system and opened to public travel as a highway.”</p> <hr/> <p>CITE: Idaho Code § 40-106(3).</p> <p>QUOTE:            “40-106. Definitions – E.            “. . .            “(3) ‘Expense of the public’ means the expenditure of funds for roadway maintenance by any governmental agency, including funds expended by any agency of the federal government, so long</p>	<p>See 40-203(5) (amended by 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified at Idaho Code §§40-202(6) to 40-203(8)) which is set out under “Other Provisions” below.</p>	<p>CITE: Idaho Code § 40-203.</p> <p>QUOTE:            “40-203. Abandonment and vacation of county and highway district system highways or public rights-of-way.            “(1) A board of county or highway district commissioners, whichever shall have jurisdiction of the highway system, shall use the following procedure to abandon and vacate any highway or public right-of-way in the county or highway district system including those which furnish public access to state and federal public lands and waters:            “(a) The commissioners may by resolution declare its intention to abandon and vacate any highway or public right-of-way considered no longer to be in the public interest.            “(b) Any resident, or property owner, within a county or highway district system including the state of Idaho, any of its subdivisions, or any agency of the federal government may petition the respective commissioners for abandonment and vacation of any highway or public right-of-way within their highway system. The petitioner shall pay a reasonable fee as determined by the commissioners to cover the cost of the proceedings.            “(c) The commissioners shall establish a hearing date or dates on the proposed abandonment and vacation.            “(d) The commissioners shall prepare a public notice stating their intention to hold a public hearing to consider the proposed abandonment and vacation of a highway or</p>	<p>CITE: Idaho Code § 40-1310(5).</p> <p>QUOTE:            “40-1310. Powers and duties of highway district commissioners.            “. . .            “(5) The highway district has the power to receive highway petitions and lay out, alter, create and abandon and vacate public highways and public rights-of-way within their respective districts under the provisions of sections 40-202, 40-203 and 40-203A, Idaho Code. Provided however, when a public highway, public street and/or public right-of-way is part of a platted subdivision which lies within an established county/city impact area or within one (1) mile of a city if a county/city impact area has not been established, consent of the city council of the affected city, when the city has a functioning street department with jurisdiction over the city streets, shall be necessary prior to the granting of acceptance or vacation of said public street or public right-of-way by the highway district board of commissioners.”</p>

Statutes As They Read Today				
Year = Today	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>as the agency allows public access over the roadway on which the funds were expended and such roadway is not located on federal or state-owned land."</p> <hr/> <p>CITE: Idaho Code § 40-109(5).</p> <p>QUOTE:            "40-109. Definitions – H.            ". . .            "(5) 'Highways' mean roads, streets, alleys and bridges laid out or established for the public or dedicated or abandoned to the public. Highways shall include necessary culverts, sluices, drains, ditches, waterways, embankments, retaining walls, bridges, tunnels, grade separation structures, roadside improvements, adjacent lands or interests lawfully acquired, pedestrian facilities, and any other structures, works or fixtures incidental to the preservation or improvement of the highways. Roads laid out and recorded as highways, by order of a board of commissioners, and all roads used as such for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of a board of commissioners, are highways."</p> <hr/> <p>CITE: Idaho Code § 40-117(9).</p> <p>QUOTE:            "40-117. Definitions – P.            ". . .            "(9) 'Public right-of-way' means a right-of-</p>		<p>public right-of-way which shall be made available to the public not later than thirty (30) days prior to any hearing and mailed to any person requesting a copy more than three (3) working days after any such request.</p> <p>"(e) At least thirty (30) days prior to any hearing scheduled by the commissioners to consider abandonment and vacation of any highway or public right-of-way, the commissioners shall mail notice by United States mail to known owners and operators of an underground facility, as defined in section 55-2202, Idaho Code, that lies within the highway or public right-of-way.</p> <p>"(f) At least thirty (30) days prior to any hearing scheduled by the commissioners to consider abandonment and vacation of any highway or public right-of-way, the commissioners shall mail notice to owners of record of land abutting the portion of the highway or public right-of-way proposed to be abandoned and vacated at their addresses as shown on the county assessor's tax rolls and shall publish notice of the hearing at least two (2) times if in a weekly newspaper or three (3) times if in a daily newspaper, the last notice to be published at least five (5) days and not more the twenty-one (21) days before the hearing.</p> <p>"(g) At the hearing, the commissioners shall accept all information relating to the proceedings. Any person, including the state of Idaho or any of its subdivisions, or any agency of the federal government, may appear and give testimony for or against abandonment.</p> <p>"(h) After completion of the proceedings and consideration of all related information,</p>	

Statutes As They Read Today				
Year = Today	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>way open to the public and under the jurisdiction of a public highway agency, where the public highway agency has no obligation to construct or maintain, but may expend funds for the maintenance of, said public right-of-way or post traffic signs for vehicular traffic on said public right-of-way. In addition, a public right-of-way includes a right-of-way which was originally intended for development as a highway and was accepted on behalf of the public by deed of purchase, fee simple title, authorized easement, eminent domain, by plat, prescriptive use, or abandonment of a highway pursuant to section 40-203, Idaho Code, but shall not include federal land rights-of-way, as provided in section 40-204A, Idaho Code, that resulted from the creation of a facility for the transmission of water. Public rights-of-way shall not be considered improved highways for the apportionment of funds from the highway distribution account.</p> <hr/> <p>CITE: Idaho Code § 40-204A.</p> <p>QUOTE :</p> <p>"40-204A. Federal land rights-of-way. —</p> <p>"(1) The state recognizes that the act of construction and first use constitute the acceptance of the grant given to the public for federal land rights-of-way, and that once acceptance of the grant has been established, the grant shall be for the perpetual term granted by the congress of the United States.</p> <p>"(2) The only method for the abandonment of these rights-of-way shall</p>		<p>the commissioners shall decide whether the abandonment and vacation of the highway or public right-of-way is in the public interest of the highway jurisdiction affected by the abandonment or vacation. The decision whether or not to abandon and vacate the highway or public right of way shall be written and shall be supported by findings of fact and conclusions of law.</p> <p>"(i) If the commissioners determine that a highway or public right-of-way parcel to be abandoned and vacated in accordance with the provisions of this section has a fair market value of twenty-five hundred dollars (\$2,500) or more, a charge may be imposed upon the acquiring entity, not in excess of the fair market value of the parcel, as a condition of the abandonment and vacation; provided, however, no such charge shall be imposed on the landowner who originally dedicated such parcel to the public for use as a highway or public right-of-way; and provided further, that if the highway or public right-of-way was originally a federal land right-of-way, said highway or public right-of-way shall revert to a federal land right-of-way.</p> <p>"(j) The commissioners shall cause any order or resolution to be recorded in the county records and the official map of the highway system to be amended as affected by the abandonment and vacation.</p> <p>"(k) From any such decision, a resident or property holder within the county or highway district system, including the state of Idaho or any of its subdivisions or any agency of the federal government, may appeal to the district court of the county in which the highway or public right-of-way is located pursuant to section 40-208, Idaho</p>	

Statutes As They Read Today				
Year = Today	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>be that of eminent domain proceedings in which the taking of the public's right to access shall be justly compensated. Neither the mere passage of time nor the frequency of use shall be considered a justification for considering these rights-of-way to have been abandoned.</p> <p>"(3) All of the said rights-of-way shall be shown by some form of documentation to have existed prior to the withdrawal of the federal grant in 1976 or to predate the removal of land through which they transit from the public domain for other public purposes. Documentation may take the form of a map, an affidavit, surveys, books or other historic information.</p> <p>"(4) These rights-of-way shall not require maintenance for the passage of vehicular traffic, nor shall any liability be incurred for injury or damage through a failure to maintain the access or to maintain any highway sign. These rights-of-way shall be traveled at the risk of the user and may be maintained by the public through usage by the public.</p> <p>"(5) Any member of the public, the state of Idaho and any of its political subdivisions, and any agency of the federal government may choose to seek validation of its rights under law to use granted rights-of-way either through a process set forth by the state of Idaho, through processes set forth by any federal agency or by proclamation of user rights granted under the provisions of the original act, Revised Statute 2477.</p> <p>"Persons seeking to have a federal land right-of-way, including those which furnish public access to state and federal public lands and waters, validated as a highway</p>		<p>Code.</p> <p>"(2) No highway or public right-of-way or parts thereof shall be abandoned and vacated so as to leave any real property adjoining the highway or public right-of-way without access to an established highway or public right-of-way.</p> <p>"(3) In the event of abandonment and vacation, rights-of-way or easements may be reserved for the continued use of existing sewer, gas, water, or similar pipelines and appurtenances, or other underground facilities as defined in section 55-2202, Idaho Code, for ditches or canals and appurtenances, and for electric, telephone and similar lines and appurtenances.</p> <p>"(4) A highway abandoned and vacated under the provisions of this section may be reclassified as a public right-of-way.</p> <p>"(5) Until abandonment is authorized by the commissioners, public use of the highway or public right-of-way may not be restricted or impeded by encroachment or installation of any obstruction restricting public use, or by the installation of signs or notices that might tend to restrict or prohibit public use. Any person violating the provisions of this subsection shall be guilty of a misdemeanor.</p> <p>"(6) When a county or highway district desires the abandonment or vacation of any highway, public street or public right-of-way which was accepted as part of a platted subdivision said abandonment or vacation shall be accomplished pursuant to the provisions of chapter 13, title 50, Idaho Code."</p>	

Statutes As They Read Today				
Year = Today	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>or public right-of-way as part of a county or highway official highway system, shall follow the procedure outlined in section 40-203A, Idaho Code.</p> <p>“Neither the granting of the original right-of-way nor any provision in this or any other state act shall be construed as a relinquishment of either federal ownership or management of the surface estate of the property over which the right-of-way passes.</p> <p>“(6) Persons seeking acknowledgement of federal land rights-of-way shall file with the county recorder the request for acknowledgement and for any supporting documentation. The county recorder shall record acknowledgements, including supporting documentation, and maintain an appropriate index of same.”</p>		<p>CITE: Idaho Code § 40-604.</p> <p>QUOTE:  “40-604. DUTIES AND POWERS OF COMMISSIONERS. Commissioners shall:  “ . . .  “(2) Cause to be surveyed, viewed, laid out, recorded, opened and worked, highways or public rights-of-way as are necessary for public convenience under the provisions of sections 40-202 and 40-203A, Idaho Code.  “(3) Cause to be recorded all highways and public rights-of-way within their highway system.  “(4) Have authority to abandon and vacate any highway or public right of way within their highway system under the provisions of section 40-203, Idaho Code.”</p>	
			<p>CITE: Idaho Code § 40-203A.</p> <p>QUOTE:  “40-203A. Validation of county or highway district system highway or public right-of-way.  “(1) Any resident or property holder within a county or highway district system, including the state of Idaho or any of its subdivisions, or any agency of the federal government, may petition the board of county or highway district commissioners, whichever shall have jurisdiction of the highway system, to initiate public proceedings to validate a highway or public right-of-way, including those which furnish public access to state and federal public lands and waters, provided that the petitioner shall pay a reasonable fee as</p>	

Statutes As They Read Today				
Year = Today	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p>determined by the commissioners to cover the cost of the proceedings, or the commissioners may initiate validation proceedings on their own resolution, if any of the following conditions exist:</p> <p>“ (a) If, through omission or defect, doubt exists as to the legal establishment or evidence of establishment of a highway or public right-of-way;</p> <p>“ (b) If the location of the highway or public right-of-way cannot be accurately determined due to numerous alterations of the highway or public right-of-way, a defective survey of the highway, public right-of-way or adjacent property, or loss or destruction of the original survey of the highways or public rights-of-way; or</p> <p>“ (c) If the highway or public right-of-way as traveled and used does not generally conform to the location of a highway or public right-of-way described on the official highway system map or in the public records.</p> <p>“(2) If proceedings for validation of a highway or public right-of-way are initiated, the commissioners shall follow the procedure set forth in section 40-203, Idaho Code, and shall:</p> <p>“ (a) If the commissioners determine it is necessary, cause the highway or public right-of-way to be surveyed;</p> <p>“ (b) Cause a report to be prepared, including consideration of any survey and any other information required by the commissioners;</p> <p>“ (c) Establish a hearing date on the proceedings for validation;</p> <p>“ (d) Cause notice of the proceedings to be provided in the same manner as for abandonment and vacation proceedings;</p>	

Statutes As They Read Today				
Year = Today	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p>and</p> <p>“(e) At the hearing, the commissioners shall consider all information relating to the proceedings and shall accept testimony from persons having an interest in the proposed validation.</p> <p>“(3) Upon completion of the proceedings, the commissioners shall determine whether validation of the highway or public right-of-way is in the public interest and shall enter an order validating the highway or public right-of-way as public or declaring it not to be public.</p> <p>“(4) From any such decision, any resident or property holder within a county or highway district system, including the state of Idaho or any of its subdivisions, or any agency of the federal government, may appeal to the district court of the county in which the highway or public right-of-way is located pursuant to section 40-208, Idaho Code.</p> <p>“(5) When a board of commissioners validates a highway or public right-of-way, it shall cause the order validating the highway or public right-of-way, and if surveyed, cause the survey to be recorded in the county records and shall amend the official highway system map of the respective county or highway district.</p> <p>“(6) The commissioners shall proceed to determine and provide just compensation for the removal of any structure that, prior to creation of the highway or public right-of-way, encroached upon a highway or public right-of-way that is the subject of a validation proceeding, or if such is not practical, the commissioners may acquire property to alter the highway or public right-of-way being validated.</p>	

Statutes As They Read Today				
Year = Today	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			“(7) This section does not apply to the validation of any highway, public street or public right-of-way which is to be accepted as part of a platted subdivision pursuant to chapter 13, title 50, Idaho Code.”	



Historical Statutes and Amendments				
Year = 1864	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: Laws of the Territory of Idaho § 1, p. 578 (1864).</p> <p>QUOTE:  <u>"Section 1. All roads and trails, streets and thoroughfares, shall be considered as public highways, which are, or have been used as such, at any time within the last two years prior to the passage of this act, or which may hereafter be declared as such by the board of county commissioners within their respective counties: Provided, That in case any such public highway is now closed, the same shall not be opened without an order of the board of county commissioners."</u></p> <p>NOTE: This territorial law was Idaho's first road statute. It consisted of a blanket declaration of all roads then in public use, coupled with ongoing authority for counties to create public roads by official act.</p>			

Historical Statutes and Amendments				
Year = 1875	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: Compiled and Revised Laws of the Territory of Idaho § 1, pp. 677-78, (approved 1/12/1875).</p> <p>QUOTE:            "Section 1. All roads and trails, streets and thoroughfares, shall be considered as public highways, which are, or have been used as such, at any time within the last two years prior to the passage of this act, or which may hereafter be declared as such by the board of county commissioners within their respective counties: <del>P</del>rovided, <del>T</del>hat in case any such public highway is now closed, the same shall not be opened without an order of the board of county commissioners. <u>All roads or highways laid out or now traveled in the various counties in the Territory of Idaho are hereby declared public highways; excepting such roads and highways upon which franchises have heretofore been and which franchise may now be in full force and effect."</u></p> <p>NOTE: This was the second blanket declaration. This statute, however, expressly excluded avoided turning toll roads into public roads.</p>			

Historical Statutes and Amendments				
Year = 1881	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: Gen. Laws of the Territory of Idaho § 1, pp. 277-78 (approved 2/1/1881).</p> <p>QUOTE:</p> <p><u>"Section 1. All public highways, roads, streets, and thoroughfares, which are or have been used as such at any time within two years prior to the passage of an act entitled "An Act concerning roads, trails, and public thoroughfares," approved January 12th, 1875, or which may hereafter be declared such by the board of County Commissioners within their respective counties, shall be considered county roads. All roads or highways laid out or now traveled, or which have been commonly used by the public, including such as have been wrongfully closed at any time since January 12, 1873, in the several counties of this Territory, are hereby declared county roads; excepting, however, roads and highways upon which franchises have heretofore been granted, so long as the franchise of any such road shall remain in full force and effect."</u></p> <p>NOTE: This 1881 law restated the blanket declaration of 1875 and then included another blanket declaration, again excluding toll roads.</p>			

Historical Statutes and Amendments				
Year = 1885	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: Gen. Laws of the Territory of Idaho § 1, p. 162 (approved 2/5/1885).</p> <p>QUOTE:  <u>"Section 1. All roads and highways that have been or that may hereafter be declared such by any Board of County Commissioners, and all roads and highways heretofore declared to be such by legislative enactment, and that are now open and used as such by the public, shall be considered county roads; provided, that this section shall not apply to any road heretofore established by any Board of County Commissioners, but which shall not have been opened for four years thereafter as required by law."</u></p> <p>NOTE: This 1885 statute (1) authorized road declaration by official county act, and (2) recognized the prior blanket legislative declarations. However, it excluded roads not opened within 4 years of such county declaration.</p>	<p>NOTE: The proviso at the end of the 1885 legislation declares that roads not opened after four years are no longer public roads. (See statute to left.)</p>		

Historical Statutes and Amendments				
Year = 1887	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: Rev. Stat. of Idaho Terr. §§ 850, 851 (1887) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).</p> <p>QUOTE:  <u>"Section 850. Highways are roads, streets or alleys, and bridges, laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the public.</u>  <u>"Sec. 851. Roads laid out and recorded as highways, by order of the Board of Commissioners, and all roads used as such for a period of five years, are highways. Whenever any corporation owning a toll bridge or a turnpike, plank or common wagon road is dissolved, or discontinues the road or bridge, or has expired by limitation, the bridge or road becomes a highway."</u></p> <p>NOTE: This 1887 codification replaced the earlier territorial road creation statutes and created the basic statutory format which remains in place today in sections 40-109(5) and 40-202(3). Note that as of 1887, there was no requirement for maintenance.</p> <p>The Court explained the interaction of the two sections: "It is clear . . . that § 850 defines what may constitute a highway in the State of Idaho, and that § 851 governs the procedure for the creation of a highway in the State of Idaho." <i>Galli v. Idaho Cnty.</i>, 146 Idaho 155, 160, 191 P.3d 233, 238 (2008).</p>	<p>CITE: Rev. Stat. of Idaho Terr. § 852 (1887) (later codified at Idaho Code § 40-203(4) (repealed by S.B. 1108 in 1993)).</p> <p>QUOTE:  <u>"Sec. 852. A road not worked or used for the period of five years ceases to be a highway for any purpose whatever."</u></p> <p>NOTE: This was Idaho's first road abandonment statute. It was substantially amended (and limited) in 1963. In 1985, all of title 40 was repealed and this section was replaced by what is now section 40-203(4). In 1986, a formal abandonment procedure was adopted in 40-203(1). In 1993 the operative provisions of section 40-203(4) were stricken, making the formal abandonment procedures of section 40-203(1) the sole method of abandonment.</p>	<p>CITE: Rev. Stat. of Idaho Terr. § 870 (1887) (later codified at 1 Idaho Code Ann. § 1145 (1901); Idaho Code Ann. § 882 (1908); 1 Compiled Stat. § 1312 (1919); Idaho Code Ann. § 39-401 (1932); Idaho Code § 39-401 (1943); Idaho Code § 40-501(1948); repealed and replaced by Idaho Code § 40-604(4) in 1985; cross-reference to Idaho Code § 40-203 added in 1993).</p> <p>QUOTE:  <u>"Section 870. The Board of County Commissioners, by proper ordinances, must:</u>  <u>"1. Cause to be surveyed, viewed, laid out, recorded, opened, and worked, such highways as are necessary for public convenience, as in this chapter provided;</u>  <u>"2. Cause to be surveyed, viewed, laid out, recorded, opened, and worked, such highways as are necessary for public convenience, as in this chapter provided;</u>  <u>"3. Cause to be recorded as highways such roads as have become such by usage or abandonment to the public;</u>  <u>"4. Abolish or abandon such as are unnecessary."</u></p> <p>NOTE: In 1985 this statute was repealed (along with parallel provisions in section 40-133(d)) and replaced with Idaho Code § 40-604(4).</p> <p>NOTE: This statute may be traced back to Gen. Laws of the Territory of Idaho § 17, p. 162 (1885), but that earlier version of the statute did not authorize abandonment.</p>	

Historical Statutes and Amendments				
Year = 1890	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: Idaho Admission Bill, 26 Stat. 215 (1890).</p> <p>NOTE: On July 3, 1890, Idaho was admitted to the Union. Idaho's Constitution was adopted in Boise City, in the Territory of Idaho, on August 6, 1889.</p>			

Historical Statutes and Amendments				
Year = 1893	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: 1893 Idaho Sess. Laws § 1, p. 12 (then codified at Rev. Stat. of Idaho Terr. § 851; codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).</p> <p>QUOTE:  <del>"See Section 851. Roads laid out and recorded as highways, by order of the Board of Commissioners, and all roads used as such for a period of five years, provided the latter shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are</del> highways. Whenever any corporation owning a toll_ bridge_ or a turnpike, plank_ or common wagon road is dissolved, or discontinues the road or bridge, or has expired by limitation, the bridge or road becomes a highway."</p> <p>NOTE: The 1893 Amendment contained only a single change to the 1887 Codification. It left section 850 unchanged. The only substantive change was to add the maintenance requirement to section 851.</p> <p>NOTE: Despite numerous minor amendments, the key, operative provisions of sections 850 and 851, as amended in 1893, remain nearly identical today. They are now codified (redundantly) in sections 40-109(5) and 40-202(3).</p>		<p>CITE: 1893 Idaho Sess. Laws § 1, p. 184 (codified at Revised Statutes of Idaho § 870; later codified at 1 Idaho Code Ann. § 1145 (1901); Idaho Code Ann. § 882 (1908); 1 Compiled Stat. § 1312 (1919); Idaho Code Ann. § 39-401 (1932); Idaho Code § 39-401 (1943); Idaho Code § 40-501(1948); repealed and replaced by Idaho Code § 40-604(4) in 1985).</p> <p>QUOTE:  "Section 870. The Board of County Commissioners, by proper ordinances, must:  ". . .  "<u>2. Second. —</u> Cause to be surveyed, viewed, laid out, recorded, opened, and worked, such highways as are necessary for public convenience, as in this chapter provided;_;  "<u>3. Third. —</u> Cause to be recorded as highways such roads as have become such by usage or abandonment to the public;_;  "<u>4. Fourth. —</u> Abolish or abandon such as are unnecessary;_;"</p>	

Historical Statutes and Amendments				
Year = 1901	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: Idaho Code Ann. (Political Code) §§ 1137, 1138 (1901) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).</p> <p>QUOTE:  <del>"Section 850. 1137. What are Highways:</del>            Highways are roads, streets or alleys, and bridges, laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the public.  <del>"Section 854. 1138. Further Enumeration:</del>            Roads laid out and recorded as highways, by order of the board of commissioners, and all roads used as such for a period of five years, provided the latter shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways. Whenever any corporation owning a toll-bridge, or a turnpike, plank, or common wagon road is dissolved or discontinues the road or bridge, or has expired by limitation, the bridge or road becomes a highway."</p>	<p>CITE: Idaho Code Ann. (Political Code) § 1139 (1901) (later codified at Idaho Code § 40-203(4), repealed by S.B. 1108 in 1993).</p> <p>QUOTE:  <del>"Sec. 852 Section 1139. Abandonment of Highway:</del> A road not worked or used for the period of five years ceases to be a highway for any purpose whatever."</p>	<p>CITE: 1901 Idaho Sess. Laws, at page 82 (codified at 1 Idaho Code Ann. § 882 (1901); 1 Compiled Stat. § 1312 (1919); Idaho Code Ann. § 39-401 (1932); Idaho Code § 39-401 (1943); Idaho Code § 40-501 (1948); repealed and replaced by Idaho Code § 40-604(4) in 1985).</p> <p>QUOTE:  <del>"Section 870 1145. Duty of County Commissioners:</del> The Board of County Commissioners, by proper ordinances, must;            "...            "Second. — Cause to be surveyed, viewed, laid out, recorded, opened, and worked; such highways as are necessary for public convenience, as in this chapter provided;            "Third. — Cause to be recorded as highways such roads as have become such by <del>use</del>usage or abandonment to the public;            "Fourth. — Abolish or abandon such as are unnecessary;"</p>	



Historical Statutes and Amendments				
Year = 1908	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: 1 Idaho Code Ann. §§ 874, 875 (1908) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).</p> <p>QUOTE:  <del>"Section 1137 § 874. What are Highways: <u>Highways Defined.</u> Highways are roads, streets or alleys, and bridges, laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the public.</del>  <del>"Section 1138 § 875. Further Enumeration: <u>Recorded and Worked Highways.</u> Roads laid out and recorded as highways, by order of the board of commissioners, and all roads used as such for a period of five years, provided the latter shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways. Whenever any corporation owning a toll-bridge, or a turnpike, plank, or common wagon road is dissolved or discontinues the road or bridge, or has expired by limitation, the bridge or road becomes a highway."</del></p>	<p>CITE: 1 Idaho Code Ann. § 876 (1908) (later codified at Idaho Code § 40-203(4), repealed by S.B. 1108 in 1993).</p> <p>QUOTE:  <del>"Section 1139 § 876. Abandonment of Highways: A road not worked or used for the period of five years ceases to be a highway for any purpose whatever."</del></p>	<p>CITE: 1 Idaho Code Ann. § 882 (1908) (then codified at 1 Idaho Code Ann. § 882 (1901); later codified at 1 Compiled Stat. § 1312 (1919); Idaho Code Ann. § 39-401 (1932); Idaho Code § 39-401 (1943); Idaho Code § 40-501 (1948); repealed and replaced by Idaho Code § 40-604(4) in 1985).</p> <p>QUOTE:  <del>"Section 1145 § 882. Duties of County Commissioners. The board of county commissioners, by proper ordinances, must:</del>  <del>" . . .</del>  <del>"Second 2. — Cause to be surveyed, viewed, laid out, recorded, opened, and worked, such highways as are necessary for public convenience, as in this chapter provided;</del>  <del>"Third 3. — Cause to be recorded as highways such roads as have become such by use or abandonment to the public;</del>  <del>"Fourth 4. — Abolish or abandon such as are unnecessary;"</del></p>	

Historical Statutes and Amendments				
Year = 1911	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: 1911 Idaho Sess. Laws, ch. 55, § 1 (the Highway District Act of 1911) (not codified).</p> <p>QUOTE:  <del>"Section 1. Highways Defined. . . .</del>  Highways are roads, streets, or alleys, and bridges, laid out or erected by the public; or if <del>laid out or erected by others,</del> dedicated or abandoned to the public. . . ."</p> <p>NOTE: This 1911 statute provided for the creation of highway districts for the first time. Its introductory provision (section 1) contained a definition of highways (quoted above) based on a slightly altered version of the language in section 1137. The language of section 1138 did not appear in this statute. In subsequent years, the code reverted to the language of sections 1137 and 1138.</p>			<p>CITE: 1911 Idaho Sess. Laws, ch. 55, § 18 (codified today as amended at Idaho Code § 40-1310(5)).</p> <p>QUOTE:  <del>"Sec. 18. The Highway Board shall have power to receive road petitions and lay out, alter, create and abandon public highways within their respective districts, subject to an appeal therefrom to the District Court of the judicial district in which such highway district is situated, in the same manner in which appeals are taken from the Board of County Commissioners to the District Court."</del></p> <p>NOTE: This 1911 statute authorized the creation of highway districts for the first time. It included general language establishing their authority, including the language above on creation and abandonment of highways.</p>

Historical Statutes and Amendments				
Year = 1918	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: 1 Compiled Laws of Idaho §§ 874, 875 (1918) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).</p> <p>QUOTE:            “§ 874. <u>Highways defined:</u> --- Highways are roads, streets <u>or</u> alleys, and bridges, laid out or erected by the public, or <u>if laid out or erected by others</u>, dedicated or abandoned to the public. ---            “§ 875. Recorded and worked highways: Roads laid out and recorded as highways, by order of the board of commissioners, and all roads used as such for a period of five years, provided the latter shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways. Whenever any corporation owning a toll bridge, or a turnpike, plank, or common wagon road is dissolved, or discontinues the road or bridge, or has expired by limitation, the bridge or road becomes a highway.”</p> <p>NOTE: Highway definition reverted to 1908 version.</p>	<p>CITE: 1 Compiled Laws of Idaho § 876 (1918) (later codified at Idaho Code § 40-203(4), repealed by S.B. 1108 in 1993).</p> <p>QUOTE:            “§ 876. Abandonment of highways. A road not worked or used for the period of five years ceases to be a highway for any purpose whatever.”</p> <p>NOTE: No change.</p>	<p>CITE: 1 Compiled Laws of Idaho § 882 (1918) (later codified at 1 Compiled Stat. § 1312 (1919); Idaho Code Ann. § 39-401 (1932); Idaho Code § 39-401 (1943); Idaho Code § 40-501(1948); repealed and replaced by Idaho Code § 40-604(4) in 1985).</p> <p>QUOTE:            “ § 882. Duties of <del>C</del>commissioners. The board of county commissioners, by proper ordinances, must:            “. . .            “2. — Cause to be surveyed, viewed, laid out, recorded, opened and worked, such highways as are necessary for public convenience, as in this chapter provided;”            “3. — Cause to be recorded as highways such roads as have become such by use or abandonment to the public;”            “4. — Abolish or abandon such as are unnecessary;”</p>	<p>CITE: 1 Compiled Laws of Idaho § 62:18 (1918) (codified in 1961 at Idaho Code §§ 40-1614, codified today as amended at Idaho Code § 40-1310(5)).</p> <p>QUOTE:            “<del>See: 62:18. Powers of highway commissioners. The H</del>highway <del>B</del>board shall have power to receive road petitions and lay out, alter, create and abandon public highways within their respective districts, subject to an appeal therefrom to the <del>D</del>district <del>C</del>court of the judicial district in which such highway district is situated, in the same manner in which appeals are taken from the <del>B</del>board of <del>C</del>county <del>C</del>commissioners to the <del>D</del>district <del>C</del>court.”</p>

Historical Statutes and Amendments				
Year = 1919	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: 1 Compiled Stat. of Idaho §§ 1302, 1304 (1919) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).</p> <p>QUOTE:            “§ 874.<del>1302</del>. Highways defined: Highways are roads, streets or alleys, and bridges, laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the public.            “§ 875.<del>1304</del>. Recorded and worked highways: Roads laid out and recorded as highways, by order of the board of commissioners, and all roads used as such for a period of five years, provided the later shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways. Whenever any corporation owning a toll bridge, or a turnpike, plank, or common wagon road is dissolved, or discontinues the road or bridge, or has expired by limitation, the bridge or road becomes a highway.”</p>	<p>CITE: 1 Compiled Stat. of Idaho § 1305 (1919) (later codified at Idaho Code § 40-203(4), repealed by S.B. 1108 in 1993).</p> <p>QUOTE:            “§ 876-<del>1305</del>. Abandonment of highways. A road not worked or used for the period of five years ceases to be a highway for any purpose whatever.”</p>	<p>CITE: 1 Compiled Stat. of Idaho § 1312 (1919) (later codified at Idaho Code Ann. § 39-401 (1932); Idaho Code § 39-401 (1943); Idaho Code § 40-501(1948); repealed and replaced by Idaho Code § 40-604(4) in 1985).</p> <p>QUOTE:            “ § <del>882</del> 1312. Duties of commissioners. The board of county commissioners, by proper ordinances, must:            “. . .            “2. — Cause to be surveyed, viewed, laid out, recorded, opened and worked, such highways as are necessary for public convenience, as in this chapter provided.            “3. — Cause to be recorded as highways such roads as have become such by use or abandonment to the public.            “4. — Abolish or abandon such as are unnecessary.”</p>	<p>CITE: 1 Compiled Stat. of Idaho § 1510 (1919) (codified today as amended at Idaho Code § 40-1310(5)).</p> <p>QUOTE:            “<del>62:48</del>-§ 1510. Powers of highway commissioners. The highway board shall have power to receive road petitions and lay out, alter, create and abandon public highways within their respective districts, subject to an appeal therefrom to the district court of the judicial district in which such highway district is situated, in the same manner in which appeals are taken from the board of county commissioners to the district court.”</p>

Historical Statutes and Amendments				
Year = 1921	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p>CITE: S.B. 70, 1921 Idaho Sess. Laws, ch. 161, § 3 (initially codified at Compiled Statutes § 1312; later codified at Idaho Code § 39-401; codified as amended today at Idaho Code § 40-604).</p> <p>QUOTE:            “§ <u>Section</u> 1312. The board of County Commissioners, by proper ordinances, must:            “ . . . .            “2. Cause to be surveyed, viewed, laid out, recorded, opened and worked, such highways as are necessary for public convenience, as in this chapter provided.            “3. Cause to be recorded as highways such roads as have become such by use or abandonment to the public.            “4. Abolish or abandon such as are unnecessary.”</p> <p>NOTE: Subsection 4 of the session law reads “necessary.” This is inconsistent with all prior and subsequent statements of this provision, and is plainly an error.</p>	

Historical Statutes and Amendments				
Year = 1927	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p>H.B. 147, 1927 Idaho Sess. Laws, ch. 73 (then codified at section 1312 of ch. 161 of 1921 Idaho Sess. Laws; later codified at Idaho Code § 40-501; later codified at Idaho Code Ann. § 39-401 (1932); Idaho Code § 39-401 (1943); Idaho Code § 40-501(1948); repealed and replaced by Idaho Code § 40-604(4) in 1985).</p> <p>QUOTE:            "Section 1312. DUTIES OF COMMISSIONERS. The board of County Commissioners, by proper ordinances, must:            ". . .            "2. Cause to be surveyed, viewed, laid out, recorded, opened and worked, such highways as are necessary for public convenience, as in this chapter provided.            "3. Cause to be recorded as highways such roads as have become such by use or abandonment to the public.            "4. Abolish or abandon such as are <u>unnecessary</u>."</p> <p>NOTE: Corrected error in subsection 4.</p>	

Historical Statutes and Amendments				
Year = 1932	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: 39 Idaho Code Ann. §§ 39-101, 39-103 (1932) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).</p> <p>QUOTE:  <del>"§ 1302. Section 39-101. —</del> Highways defined: Highways are roads, streets or alleys, and bridges, laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the public.  <del>"§ 1304. Section 39-103. —</del> Recorded and worked highways: Roads laid out and recorded as highways, by order of the board of commissioners, and all roads used as such for a period of five years, provided the later shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways. Whenever any corporation owning a toll bridge, or a turnpike, plank, or common wagon road is dissolved, or discontinues the road or bridge, or has expired by limitation, the bridge or road becomes a highway."</p>	<p>CITE: 39 Idaho Code Ann. § 39-104 (1932) (later codified at Idaho Code §§ 40-104 and 40-203(4), repealed by S.B. 1108 in 1993).</p> <p>QUOTE:  <del>"§ 1305. Section 39-104. Abandonment of highways. —</del> A road not worked or used for the period of five years ceases to be a highway for any purpose whatever."</p>	<p>CITE: 39 Idaho Code Ann. § 39-401 (1932) (later codified at Idaho Code § 39-401 (1943); Idaho Code § 40-501(1948); repealed and replaced by Idaho Code § 40-604(4) in 1985).</p> <p>QUOTE:  <del>"Section 1312. 39-401. Duties of county commissioners. —</del> The board of <del>county</del> commissioners, by proper ordinances, must:  <del>" . . .</del>  <del>"2. Cause to be surveyed, viewed, laid out, recorded, opened and worked, such highways as are necessary for public convenience, as in this chapter provided.</del>  <del>"3. Cause to be recorded as highways such roads as have become such by use or abandonment to the public.</del>  <del>"4. Abolish or abandon such as are unnecessary."</del></p>	<p>CITE: 39 Idaho Code Ann. § 39-1524 (1932) (codified today as amended at Idaho Code § 40-1310(5)).</p> <p>QUOTE:  <del>"§ 1510. 39-1524. Powers of highway commissioners. —</del> The highway board shall have power to receive road petitions and lay out, alter, create and abandon public highways within their respective districts, subject to an appeal therefrom to the district court of the judicial district in which such highway district is situated, in the same manner in which appeals are taken from the board of county commissioners to the district court."</p>

Historical Statutes and Amendments				
Year = 1943	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p>CITE: S.B. 88, 1943 Idaho Sess. Laws, ch. 88, § 1 (then codified at Idaho Code § 39-401; later codified at Idaho Code § 40-501; codified today as amended at Idaho Code § 40-604(4)).</p> <p>QUOTE:  <del>"Section 39-401. Duties of the county commissioners. —The board of county commissioners, by proper ordinances, must:</del>  <del>" . . .</del>  <del>"2. Cause to be surveyed, viewed, laid out, recorded, opened and worked, such highways as are necessary for public convenience, as in this chapter provided.</del>  <del>"3. Cause to be recorded as highways such roads as have become such by use or abandonment to the public.</del>  <del>"4. Abolish or abandon such as are unnecessary."</del>  <del>" . . .</del>  <del>"12. To remove [should be "rename"] any street or highway within the county, excepting those situated within the territorial limits of incorporated cities, towns and villages when such renaming will eradicate confusion and be in the public interest."</del> </p> <p>NOTE: Section 12 granted county commissioners the right to "rename" streets and highways. The session law incorrectly stated this as a right to "remove" them. This error in the session law was corrected in the codified version. Consequently, section 12 should <u>not</u> be cited as an abandonment authority.</p>	





Historical Statutes and Amendments				
Year = 1948	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: Idaho Code §§ 40-101, 40-103 (1948) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).</p> <p>QUOTE:  <del>"Section 39 40-101. — Highways defined. — Highways are roads, streets or alleys, and bridges, laid out or erected by the public, or if laid out or erected by others, dedicated or abandoned to the public.</del>  <del>"Section 39 40-103. — Recorded and worked highways: Roads laid out and recorded as highways, by order of the board of commissioners, and all roads used as such for a period of five years, provided the later shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways. Whenever any corporation owning a toll bridge, or a turnpike, plank, or common wagon road is dissolved, or discontinues the road or bridge, or has expired by limitation, the bridge or road becomes a highway."</del></p> <p>NOTE: The Idaho Code was created in 1948. Former title 39 was reclassified to title 40. No change in language.</p>	<p>CITE: Idaho Code § 40-104 (1948).</p> <p>QUOTE:  <del>"Section 39 40-104. Abandonment of highways. — A road not worked or used for the period of five years ceases to be a highway for any purpose whatever."</del></p>	<p>CITE: Idaho Code § 40-501 (1948).</p> <p>QUOTE:  <del>"Section 39 40-501. <u>Duties of county commissioners.</u> — The board of county commissioners, by proper ordinances, must:</del>  <del>" . . .</del>  <del>"2. Cause to be surveyed, viewed, laid out, recorded, opened and worked, such highways as are necessary for public convenience, as in this chapter provided.</del>  <del>"3. Cause to be recorded as highways such roads as have become such by use or abandonment to the public.</del>  <del>"4. Abolish or abandon such as are unnecessary."</del>  <del>" . . .</del>  <del>"12. To remove-rename any street or highway within the county, excepting those situated within the territorial limits of incorporated cities, towns and villages when such renaming will eradicate confusion and be in the public interest."</del></p> <p>NOTE: No change, except to correct error in section 12.</p> <p>NOTE: This provision was replaced in 1951 with what became section 133(d) in the 1961 recodification.</p>	<p>CITE: Idaho Code § 40-1614 (1948) (codified today as amended at Idaho Code § 40-1310(5)).</p> <p>QUOTE:  <del>"Section 39 40-1614. Powers of highway commissioners. — The highway board shall have power to receive road petitions and lay out, alter, create and abandon public highways within their respective districts, subject to an appeal therefrom to the district court of the judicial district in which such highway district is situated, in the same manner in which appeals are taken from the board of county commissioners to the district court."</del></p>

Historical Statutes and Amendments				
Year = 1950	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: The Highway Administration Act of 1950, S.B. 62, 1950 Idaho Sess. Laws, ch. 87, §§ 2 and 24 (codified today as amended at Idaho Code § 40-109(5)).</p> <p>QUOTE:            "Section 2. HIGHWAYS DEFINED. — Highways are hereby defined as roads, streets, or alleys; and bridges, laid out or erected by established for the public, or if laid out or erected by others, dedicated or abandoned to the public. <u>Such highways shall include necessary culverts, sluices, drains, ditches, waterways, embankments, retaining walls, bridges, tunnels, grade separation structures, roadside improvements, pedestrian facilities, and any other structures or fixtures incidental to the preservation or improvement of such highways.</u>"</p> <p>NOTE: S.B. 62 established the state highway department. Section 24 of the act repealed the definition section (section 40-101) and replaced it with the uncodified section 2 quoted above. The 1950 Act contained no provisions on road creation or passive abandonment.</p>		<p>CITE: The Highway Administration Act of 1950, S.B. 62, 1950 Idaho Sess. Laws, ch. 87, §§ 13.</p> <p>QUOTE:  <u>"Section 13. Removal of Roads from County Road System. — Roads may be abandoned for the purposes of this act and removed from a county road system by the board of county commissioners."</u></p> <p>NOTE: This provision was in effect only one year. The 1951 Act repealed the entire 1950 Act. This provision was replaced in 1951 with a requirement that any abandonment be premised on a public interest determination.</p>	

Historical Statutes and Amendments				
Year = 1951	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: The Highway Administration Act of 1951, S.B. 125, 1951 Idaho Sess. Laws, ch. 93, § 2 (codified today as amended at Idaho Code § 40-109(5)).</p> <p>QUOTE:            "Section 2. HIGHWAYS DEFINED. — Highways are hereby defined as roads, streets, alleys and bridges, laid out or established for the public or dedicated or abandoned to the public. Such highways shall include necessary culverts, sluices, drains, ditches, waterways, embankments, retaining walls, bridges, tunnels, grade separation structures, roadside improvements, pedestrian facilities, and any other structures, <u>works</u> or fixtures incidental to the preservation or improvement of such highways."</p> <p>NOTE: The 1951 Act largely repeated what the 1950 Act did. Again, it repealed the definition section (section 40-101) and replaced it with the uncodified section 2 quoted above. The 1951 Act also contained no provisions on road creation or passive abandonment.</p>		<p>CITE: The Highway Administration Act of 1951, S.B. 125, 1951 Idaho Sess. Laws, ch. 93, § 28 (codified in 1961 at Idaho Code § 40-133(d)) (repealed in 1985, along with Idaho Code § 40-501, and replaced by Idaho Code § 40-604(4)).</p> <p>QUOTE:  <u>"Section 28. DUTIES AND POWERS OF BOARD OF COUNTY COMMISSIONERS. — The Board of County Commissioners shall:</u>  <u>"</u>  <u>"(d) Have authority to abandon any road and remove it from the county highway system, when such action is determined by the Board of County Commissioners to be in the public interest."</u></p> <p>NOTE: The 1951 Act was not codified until 1961, when it appeared, in relevant part, as Idaho Code § 40-133(d).</p> <p>NOTE: The 1951 Act restated the authority of county commissioners to abandon roads as provided in the 1950 Act, expressly adding a requirement for a determination that the action be in the public interest.</p> <p>NOTE: The separate (and largely redundant) statement of authority in section 40-501 remained on the books until 1985, when both provisions were replaced with section 40-604(4).</p>	

Historical Statutes and Amendments				
Year = 1961	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: Idaho Code §§ 40-101, 40-103, 40-107 (1961) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).</p> <p>QUOTE: "Section 40-101." [Repealed.]</p> <p>"Section 40-103. Recorded and worked highways. — Roads laid out and recorded as highways, by order of the board of commissioners, and all roads used as such for a period of five years, provided the later shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways. Whenever any corporation owning a toll bridge, or a turnpike, plank, or common wagon road is dissolved, or discontinues the road or bridge, or has expired by limitation, the bridge or road becomes a highway."</p> <p>"Section 40-107. Highways defined. — Highways are hereby defined as roads, streets, alleys and bridges, laid out or established for the public or dedicated or abandoned to the public. Such highways shall include necessary culverts, sluices, drains, ditches, waterways, embankments, retaining walls, bridges, tunnels, grade separation structures, roadside improvements, pedestrian facilities, and any other structures, works or fixtures incidental to the preservation or improvement of such highways."</p> <p>NOTE: This is the re-codification implements the 1950 and 1951 Acts by replacing section 40-101 with 40-107.</p>		<p>CITE: Idaho Code § 40-133(d) (1961).</p> <p>QUOTE: "40-133. Duties And Powers of Board of County Commissioners. — The Board of County Commissioners shall: ". . . "(d) Have authority to abandon any road and remove it from the county highway system, when such action is determined by the board of county commissioners to be in the public interest."</p> <p>NOTE: This was not new legislation. Rather, this appears to be a codification of the 1951 Act. The provision dealing with abandonment appears without change (except capitalization) at section 40-133(d). Section 40-133(d) was repealed and replaced by section 40-604(4) in the 1985 revision of title 40.</p>	

Historical Statutes and Amendments				
Year = 1961	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	Section 103 was unchanged.			

Historical Statutes and Amendments				
Year = 1963	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
		<p>CITE: H.B. 15, 1963 Idaho Sess. Laws, ch. 6, § 1 (then codified at Idaho Code § 40-104, later codified at Idaho Code § 40-203(4), repealed by S.B. 1108 in 1993).</p> <p>QUOTE:            “40-104. ABANDONMENT OF HIGHWAYS. — A road <u>established by prescription</u> not worked or used for the period of five (5) years ceases to be a highway for any purpose whatever. . . .”</p> <p>NOTE: S.B. 15 expressly stated that the passive road abandonment statute applied only to roads originally created by prescription. Prescription, presumably, refers to roads created by use (Methods 2 and 3) under the Road Creation Statute.</p> <p>NOTE: In <i>Taggart v. Highway Board for the North Latah Cnty. Highway Dist.</i>, 115 Idaho 816, 771 P.2d 37 (1989), the limitation to prescriptive roads was applied to a pre-1963 abandonment, suggesting that the 1963 statute merely codified prior law.</p> <hr/> <p>CITE: S.B. 242, 1963 Idaho Sess. Laws,</p>	<p>CITE: S.B. 242, 1963 Idaho Sess. Laws, ch. 267, § 1 (then codified at Idaho Code § 40-104, later codified at Idaho Code § 40-203(4), repealed by S.B. 1108 in 1993).</p> <p>QUOTE:            “40-104. ABANDONMENT OF HIGHWAYS. — A road <u>established by prescription</u> not worked or used for the period of five years ceases to be a highway for any purpose whatever- ; <u>provided, however, that in the case of roads furnishing public access to public lands, state or federal, and/or public waters, no person may encroach upon the same and thereby restrict public use without first petitioning for the abandonment of the road to the county commissioners of the county in which the road is located or if the road be located in a highway district then to the board of commissioners of the highway district in which the same is located, and until such time as abandonment is authorized by the commissioners having jurisdiction thereof, public use of the roadway may not be restricted or impeded by encroachment or installation of any obstruction restricting public use or by the installation of signs or notices that might tend to restrict or prohibit public use.</u>”</p>	<p>CITE: S.B. 243, 1963 Idaho Sess. Laws, ch. 218, § 1 (then codified at Idaho Code § 40-1614, codified today as amended at Idaho Code § 40-1310(5)).</p> <p>QUOTE:            “40-1614. POWERS OF HIGHWAY COMMISSIONERS. — The highway board shall have power to receive road petitions and lay out, alter, create and abandon public highways within their respective districts, subject to an appeal therefrom to the district court of the judicial district in which such highway district is situated, in the same manner in which appeals are taken from the board of county commissioners to the district court- ; <u>provided, however, that where highways furnish public access to public lands, state or federal, and/or public waters, before the same may be abandoned the highway board must first be in receipt of a petition for abandonment and that no abandonment shall be made without conducting a public hearing thereon, notice of which hearing shall be published at least once a week for four (4) successive weeks in some newspaper of general circulation in a county in which the highway district is wholly or partially located, at which hearing any person may appear and show cause</u></p>

Historical Statutes and Amendments				
Year = 1963	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
		<p>ch. 267, § 1 (then codified at Idaho Code § 40-104, later codified at Idaho Code § 40-203(4), repealed by S.B. 1108 in 1993).</p> <p>QUOTE:            "40-104. ABANDONMENT OF HIGHWAYS. — A road <u>established by prescription</u> not worked or used for the period of five years ceases to be a highway for any purpose whatever; <u>provided, however, that in the case of roads furnishing public access to public lands, state or federal, and/or public waters, no person may encroach upon the same and thereby restrict public use without first petitioning for the abandonment of the road to the county commissioners of the county in which the road is located or if the road be located in a highway district then to the board of commissioners of the highway district in which the same is located, and until such time as abandonment is authorized by the commissioners having jurisdiction thereof, public use of the roadway may not be restricted or impeded by encroachment or installation of any obstruction restricting public use or by the installation of signs or notices that might tend to restrict or prohibit public use.</u>"</p> <p>NOTE: S.B. 242 repeated the limitation to prescription contained in H.B. 15. More significantly, it added formal procedures for abandonment when access to public lands is involved. Note that S.B. 243 did the same thing for highway districts.</p> <p>NOTE: These public access provisions were repealed in 1993 (S.B. 1108) because they were redundant with the</p>	<p>NOTE: S.B. 242 repeated the limitation to prescription contained in H.B. 15. More significantly, it added formal procedures for abandonment when access to public lands is involved. Note that S.B. 243 did the same thing for highway districts.</p> <p>NOTE: These public access provisions were repealed in 1993 (S.B. 1108) because they were redundant with the formal abandonment provisions in section 40-203(1) (adopted in 1986, H.B. 556).</p> <p>NOTE: This item is listed under both the "passive" and "formal" abandonment column. It amends the passive abandonment statute. However, S.B. 242 also added formal abandonment requirements to the passive abandonment statute.</p>	<p><u>for or against abandonment. If it appears at such hearing that the highway does serve a public use, said highway may not be abandoned without first providing other suitable public access route or routes to said public lands and/or public waters at the expense of the party petitioning for abandonment of the highway.</u>"</p> <p>NOTE: S.B. 243, the companion bill to S.B. 242, applied to roads governed by highway districts. It also established formal procedures for abandonment where access to public lands is involved. This section was repealed in 1985 when all of title 40 was re-written, and section 1614 became section 1310(5), dropping the special provisions for public access roads. In 1986, however, the Legislature enacted new formal abandonment provisions at section 40-203. In 1993, section 40-1310(5) was amended to state that section 40-203 procedures are mandatory for highway districts.</p>

Historical Statutes and Amendments				
Year = 1963	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
		<p>formal abandonment provisions in section 40-203(1) (adopted in 1986, H.B. 556).</p> <p>NOTE: This item is listed under both the "passive" and "formal" abandonment column. It amends the passive abandonment statute. However, S.B. 242 also added formal abandonment requirements to the passive abandonment statute.</p>		

Historical Statutes and Amendments				
Year = 1985	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: H.B. 265, 1985 Idaho Sess. Laws, ch. 253, § 2 (codified at Idaho Code §§ 40-109(5), 40-202; codified today as amended at Idaho Code §§ 40-109(5), 40-202(3)).</p> <p>QUOTE:  <del>"40-107. Highways defined. 40-109. DEFINITIONS - - H.</del>  <del>"</del>  <del>"(5) 'Highways' mean roads, streets, alleys and bridges laid out or established for the public or dedicated or abandoned to the public. Highways shall include necessary culverts, sluices, drains, ditches, waterways, embankments, retaining walls, bridges, tunnels, grade separation structures, roadside improvements, adjacent lands or interests lawfully acquired, pedestrian facilities, and any other structures, works or fixtures</del></p>	<p>CITE: H.B. 265, 1985 Idaho Sess. Laws, ch. 253, § 2 (codified at Idaho Code § 40-203, repealed by S.B. 1108 in 1993).</p> <p>QUOTE:  <del>"40-104 40-203. ABANDONMENT OF HIGHWAYS. — A road established by prescription not worked or used for the a</del>  <del>period of five (5) years ceases to be a highway for any purpose whatever, ;</del>  <del>provided, however, that if in the case of roads furnishing public access to public lands, state or federal public lands or</del>  <del>waters, and/or public waters, no person may encroach upon the same and thereby restrict public use without first petitioning for the abandonment of the road to the county commissioners of the county or highway district in which the road is located, or if the road be located in a highway district then to the board of</del></p>	<p>CITE: H.B. 265, 1985 Idaho Sess. Laws, ch. 253, § 2 (codified at Idaho Code § 40-604).</p> <p>QUOTE:  <del>"40-604. DUTIES AND POWERS OF COMMISSIONERS. Commissioners shall:</del>  <del>"</del>  <del>"(2) Cause to be surveyed, viewed, laid out, recorded, opened and worked, any highways as are necessary for public convenience.</del>  <del>"(3) Cause to be recorded as highways those that have become such by use or abandonment.</del>  <del>"(4) Have authority to abandon any highway and remove it from the county highway system when that action is determined to be in the public interest."</del>  <p>NOTE: H.B. 265 repealed section 40-501</p> </p>	<p>CITE: H.B. 265, 1985 Idaho Sess. Laws, ch. 253, § 2 (codified as amended at Idaho Code § 40-1310(5)).</p> <p>QUOTE:  <del>"40-1614 40-1310. POWERS AND DUTIES OF HIGHWAY DISTRICT COMMISSIONERS.</del>  <del>"</del>  <del>"(5) The highway board shall have district has the power to receive road petitions and lay out, alter, create and abandon public highways within their respective districts, subject to an appeal therefrom to the district court of the judicial district in which such the highway district is situated, in the same manner in which appeals are taken from the board of county commissioners to the district court provided, however, that where highways furnish public access to public lands, state or federal, and/or public waters, before the same may be</del></p>



Historical Statutes and Amendments				
Year = 1985	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p><del>incidental to the preservation or improvement of the highways. Roads laid out and recorded as highways, by order of a board of commissioners, and all roads used as such for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of a board of commissioners, are highways. Whenever any corporation owning a road or a bridge is dissolved, or discontinues the road or bridge, the bridge or road becomes a highway."</del></p> <p><del>"40-103, 40-202. RECORDED AND WORKED HIGHWAYS. Roads laid out and recorded as highways, by order of the a board of commissioners, and all roads used as such highways for a period of five (5) years, provided the latter they shall have been worked and kept up at the expense of the public, or located and recorded by order of a the board of commissioners, are highways. Whenever any corporation owning a toll bridge, or a turnpike, plank, or common wagon road or a bridge is dissolved, or discontinues the road or bridge, or has expired by limitation, the bridge or road becomes a highway."</del></p> <p>NOTE: H.B. 265 repealed all of title 40, replacing it with a new title. Note that the definition reiterates the provisions of section 40-202.</p>	<p><del>commissioners of the highway district in which the same is located, and u</del>Until such time as abandonment is authorized by the commissioners having jurisdiction thereof, public use of the roadway may not be restricted or impeded by encroachment or installation of any obstruction restricting public use or by the installation of signs or notices that might tend to restrict or prohibit public use."</p> <p>NOTE: Recodified section 40-104 to section 40-203. Changes in language were cosmetic.</p>	<p>and 40-133(d), replacing them with section 40-604 which contained language from each.</p>	<p><del>abandoned the highway board must first be in receipt of a petition for abandonment and that no abandonment shall be made without conducting a public hearing thereon, notice of which hearing shall be published at least once a week for four (4) successive weeks in some newspaper of general circulation in a county in which the highway district is wholly or partially located, at which hearing any person may appear and show cause for or against abandonment. If it appears at such hearing that the highway does serve a public use, said highway may not be abandoned without first providing other suitable public access route or routes to said public lands and/or public waters at the expense of the party petitioning for abandonment of the highway."</del></p> <p>NOTE: The special provisions for public access road abandonment procedures were not included in the 1985 recodification. However, they were replaced in the following year by the abandonment procedures applicable to all roads set out in Idaho Code § 40-203(1).</p>

Historical Statutes and Amendments				
Year = 1986	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: H.B. 556, 1986 Idaho Sess. Laws, ch. 206, § 2 (codified as amended at Idaho Code § 40-202(3)) (codified today as amended at Idaho Code § 40-202(3)).</p> <p>QUOTE:  <del>"40-202 RECORDED AND WORKED DESIGNATION OF HIGHWAYS.</del>  <del>"...</del>  <del>"(3) Roads Highways</del> laid out and recorded as highways, by order of a board of commissioners, and all <del>roads</del> used as highways <u>used</u> for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of the board of commissioners, are highways. Whenever any corporation owning a <del>road or bridge</del> highway is dissolved, or discontinues the <del>road or bridge</del> highway, the <del>road or bridge</del> highway <u>may</u> become a public highway. <u>If a highway created in accordance with the provisions of this subsection is not designated on the official map of the respective highway system, there shall be no duty to maintain that highway, nor shall there be any liability for any injury or damage for failure to maintain it or any highway signs, until the highway is designated as part of the county or highway district system by inclusion on the official map.</u>"</p> <p>NOTE: H.B. 556 expanded former section 40-202. The old "creation" section became subsection 40-202(3). New language at the end of section 40-202(3) clarified there is no duty to maintain highways not on the official map. H.B.</p>	<p>CITE: H.B. 556, 1986 Idaho Sess. Laws, ch. 206, § 3 (codified at Idaho Code § 40-203(4), repealed by S.B. 1108 in 1993).</p> <p>QUOTE:  <del>"40-203. ABANDONMENT AND VACATION OF COUNTY AND HIGHWAY DISTRICT SYSTEM HIGHWAYS.</del>  <del>"...</del>  <del>"(4) A road highway</del> established by prescription not worked or used for a period of five (5) years ceases to be a highway for any purpose whatever, <u>unless the highway is designated as part of a county or highway district system by inclusion on the official map.</u> In the case of <del>roads highways</del> furnishing public access to state or federal public lands or waters, no person may encroach upon them and restrict public use without first petitioning for the abandonment of the <del>road highway</del> to the appropriate commissioners of the county or highway district in which the <del>road highway</del> is located. Until abandonment is authorized by the commissioners having jurisdiction, public use of the <del>roadway</del> highway may not be restricted or impeded by encroachment or installation of any obstruction restricting public use, or by the installation of signs or notices that might tend to restrict or prohibit public use."</p> <p>NOTE: While creating new formal abandonment requirements in subsection 40-203(1) (see note in column to right), H.B. 556 retained the passive road abandonment provision, which became</p>	<p>CITE: H.B. 556, 1986 Idaho Sess. Laws, ch. 206, § 3 (codified at Idaho Code § 40-203(1)).</p> <p>QUOTE:  <del>"40-203. ABANDONMENT AND VACATION OF COUNTY AND HIGHWAY DISTRICT SYSTEM HIGHWAYS.</del>  <del>"(1) A board of county or highway district commissioners, whichever shall have jurisdiction of the highway system, shall use the following procedure to withdraw public highway status from any highway in the county or highway district system:</del>  <del>"(a) The commissioners may by resolution declare its intention to abandon and vacate any highway considered no longer to be in the public interest.</del>  <del>"(b) Any resident within a county or highway district system may petition the respective commissioners for abandonment and vacation. The petitioner shall pay a reasonable fee as determined by the commissioners to cover the cost of the proceedings.</del>  <del>"(c) The commissioners shall establish a hearing date on the proposed abandonment and vacation.</del>  <del>"(d) The commissioners shall prepare a report stating the effects of the proposed abandonment and vacation on the public interest.</del>  <del>"(e) The commissioners shall publish notice of the hearing in accordance with the provisions of section 40-206, Idaho Code, and shall mail notice to owners of land abutting the portion of the highway proposed to be abandoned and vacated at their addresses as shown on the county assessor's tax rolls at least fifteen (15)</del></p>	

Historical Statutes and Amendments				
Year = 1986	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	556 did not amend the definition section (section 40-109(5)).	<p>subsection 40-203(4). However, this section (which in 1963 was limited to roads created by prescription which did not access public lands) was further limited by making it inapplicable to roads designated on the official highway map. The special abandonment proceedings required for roads accessing public lands were also retained.</p> <p>CITE: H.B. 647, 1986 Idaho Sess. Laws, ch. 328, § 4 (codified at Idaho Code § 40-203, repealed by S.B. 1108 in 1993).</p> <p>QUOTE:            "40-203. ABANDONMENT OF HIGHWAYS. A <del>road</del><u>highway</u> established by prescription not worked or used for a period of five (5) years ceases to be a highway for any purpose whatever. In the case of <del>roads</del><u>highways</u> furnishing public access to state or federal public lands or waters, no person may encroach upon them and restrict public use without first petitioning for the abandonment of the <del>road</del><u>highway</u> to the appropriate commissioners of the county or highway district in which the <del>road</del><u>highway</u> is located. Until abandonment is authorized by the commissioners having jurisdiction, public use of the <del>roadway</del><u>highway</u> may not be restricted or impeded by encroachment or installation of any obstruction restricting public use or by the installation of signs or notices that might tend to restrict or prohibit public use."</p> <p>NOTE: H.B. 647 and H.B. 556 were both enacted in 1986. H.B. 647 dealt mostly with other parts of the highway code. It also changed all references from "road" to</p>	<p>days prior to the date of the hearing.  <u>"(f) At the hearing, the commissioners shall review the report prepared under this section and shall accept testimony from persons having an interest in the proceeding.</u>  <u>"(g) After completion of the procedures, the commissioners may retain the highway as such or may by order or resolution declare the highway status withdrawn from all or part of the portion of the highway under consideration.</u>  <u>"(h) The commissioners shall cause any order or resolution to be recorded in the county records and the official map of the highway system to be amended as affected by the abandonment and vacation.</u>  <u>"(2) No highway or part of it shall be abandoned and vacated so as to leave any real property adjoining the highway without an established highway connecting that real property with another highway."</u>  <u>"(3) In the event of abandonment and vacation, rights-of-way or easements may be reserved for the continued use of existing sewer, gas, water, or similar pipelines and appurtenances, for ditches or canals and appurtenances, and for electric, telephone and similar lines and appurtenances."</u>  <u>[For section (4), see H.B. 566 listed under "Passive Abandonment" column.]</u></p> <p>NOTE: H.B. 556 also amended the passive abandonment statute (see discussion in column to the left).</p> <p>CITE: H.B. 556, § 4, 1986 Idaho Sess. Laws, ch. 206 (codified at Idaho Code § 40-203A).</p>	

Historical Statutes and Amendments				
Year = 1986	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
		<p>"highway" in section 40-203 (which became section 40-203(4) in the other bill). So far as section 40-203 is concerned, H.B. 647 was superseded by H.B. 556.</p>	<p>QUOTE:  <u>"40-203A VALIDATION OF COUNTY OR HIGHWAY DISTRICT SYSTEM HIGHWAY OR PUBLIC RIGHT-OF-WAY.</u>  <u>"(1) Any resident or property holder within a county or highway district system, including the state of Idaho or any of its subdivisions, or any agency of the federal government, may petition the board of county or highway district commissioners, whichever shall have jurisdiction of the highway system, to initiate public proceedings to validate a highway or public right-of-way, including those which furnish public access to state and federal public lands and waters, provided that the petitioner shall pay a reasonable fee as determined by the commissioners to cover the cost of the proceedings, or the commissioners may initiate validation proceedings on their own resolution, if any of the following conditions exist:</u>  <u>"(a) If, through omission or defect, doubt exists as to the legal establishment or evidence of establishment of a highway or public right-of-way;</u>  <u>"(b) If the location of the highway or public right-of-way cannot be accurately determined due to numerous alterations of the highway or public right-of-way, a defective survey of the highway, public right-of-way or adjacent property, or loss or destruction of the original survey of the highways or public rights-of-way; or</u>  <u>"(c) If the highway or public right-of-way as traveled and used does not generally conform to the location of a highway or public right-of-way described on the official highway system map or in the public records.</u></p>	

Historical Statutes and Amendments				
Year = 1986	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p><u>“(2) If proceedings for validation of a highway or public right-of-way are initiated, the commissioners shall follow the procedure set forth in section 40-203, Idaho Code, and shall:</u></p> <p><u>“ . . . .</u></p> <p><u>“(6) . . . commissioners may acquire property to alter the highway or public right-of-way being validated.</u></p> <p><u>“(7) This section does not apply to the validation of any highway, public street or public right-of-way which is to be accepted as part of a platted subdivision pursuant to chapter 13, title 50, Idaho Code.”</u></p>	

Historical Statutes and Amendments				
Year = 1988	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: H.B. 578, 1988 Idaho Sess. Laws, ch. 184, § 2 (codified as amended at Idaho Code § 202(3)).</p> <p>QUOTE:</p> <p>"40-109. DEFINITIONS - - H. "  "(5) 'Highways' mean roads, streets, alleys and bridges laid out or established for the public or dedicated or abandoned to the public. Highways shall include necessary culverts, sluices, drains, ditches, waterways, embankments, retaining walls, bridges, tunnels, grade separation structures, roadside improvements, adjacent lands or interests lawfully acquired, pedestrian facilities, and any other structures, works or fixtures incidental to the preservation or improvement of the highways. Roads laid out and recorded as highways, by order of a board of commissioners, and all roads used as such for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of a board of commissioners, are highways. <del>Whenever any corporation owning a road or a bridge is dissolved, or discontinues the road or bridge, the bridge or road becomes a highway.</del>"</p> <p>"40-202. DESIGNATION OF HIGHWAYS. "  "(3) Highways laid out and recorded, by order of a board of commissioners, and all highways used for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order</p>			

Historical Statutes and Amendments				
Year = 1988	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>of the board of commissioners, are highways. Whenever any corporation owning a highway is dissolved, or discontinues the highway, the highway may become a public highway. If a highway created in accordance with the provisions of this subsection is not designated on the official map of the respective highway system, there shall be no duty to maintain that highway, nor shall there be any liability for any injury or damage for failure to maintain it or any highway signs, until the highway is designated as part of the county or highway district system by inclusion on the official map. "</p> <p>NOTE: The 1988 Amendments deleted obsolete provisions dealing with former toll roads.</p>			

Historical Statutes and Amendments				
Year = 1992	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: H.B. 627, 1992 Idaho Sess. Laws, ch. 55, § 1 (codified as amended at Idaho Code § 202(3)).</p> <p>QUOTE:            "40-202. DESIGNATION OF HIGHWAYS.            "...            "(3) Highways laid out and recorded and opened as described in subsection (2) of this section, by order of a board of commissioners, and all highways used for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of the board of commissioners, are highways. If a highway created in accordance with the provisions of this subsection is not designated on the official map of the respective highway system or is not opened as described in subsection (2) of this section, there shall be no duty to maintain that highway, nor shall there be any liability for any injury or damage for failure to maintain it or any highway signs, until the highway is designated as part of the county or highway district system by inclusion on the official map and opened to public travel. "</p> <p>NOTE: Added language to address roads which have been "opened" to the public. Presumably, roads not yet opened are not subject to abandonment.</p>	<p>CITE: H.B. 872, 1992 Idaho Sess. Laws, ch. 323, § 1 (codified at Idaho Code § 40-203(4)).</p> <p>NOTE: The informal abandonment provision (section 40-203(4)) was unchanged.</p>	<p>CITE: H.B. 872, 1992 Idaho Sess. Laws, ch. 323, § 1 (codified at Idaho Code § 40-203(1)).</p> <p>QUOTE:            "40-203. ABANDONMENT AND VACATION OF COUNTY AND HIGHWAY DISTRICT SYSTEM HIGHWAYS.            "(1) A board of county or highway district commissioners, whichever shall have jurisdiction of the highway system, shall use the following procedure to withdraw public highway status from any highway in the county or highway district system:            "(a) The commissioners may by resolution declare its intention to abandon and vacate any highway considered no longer to be in the public interest.            "(b) Any resident within a county or highway district system may petition the respective commissioners for abandonment and vacation. The petitioner shall pay a reasonable fee as determined by the commissioners to cover the cost of the proceedings.            "(c) The commissioners shall establish a hearing date on the proposed abandonment and vacation.            "(d) The commissioners shall prepare a report stating the effects of the proposed abandonment and vacation on the public interest.            "(e) The commissioners shall publish notice of the hearing in accordance with the provisions of section 40-206, Idaho Code, and shall mail notice to owners of land abutting the portion of the highway proposed to be abandoned and vacated at their addresses as shown on the county</p>	



Historical Statutes and Amendments				
Year = 1992	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p>assessor's tax rolls at least fifteen (15) days prior to the date of the hearing.</p> <p>"(f) At the hearing, the commissioners shall review the report prepared under this section and shall accept testimony from persons having an interest in the proceeding.</p> <p>"(g) After completion of the procedures, the commissioners may retain the highway as such or may by order or resolution declare the highway status withdrawn from all or part of the portion of the highway under consideration.</p> <p><u>"(h) If the commissioners determine that a highway parcel to be abandoned and vacated in accordance with the provisions of this section has a fair market value of twenty-five hundred dollars (\$2,500) or more, a charge may be imposed upon the acquiring party not in excess of the fair market value of the parcel, as a condition of the abandonment and vacation; provided, however, no such charge shall be imposed on the landowner who originally dedicated such parcel to the public for use as a highway.</u></p> <p>"(i) The commissioners shall cause any order or resolution to be recorded in the county records and the official map of the highway system to be amended as affected by the abandonment and vacation."</p> <p>NOTE: Added new section 40-203(1)(h) to the formal abandonment and vacation section providing that when a road worth more than \$2,500 is abandoned, the acquiring entity may be charged the market value as a condition of the abandonment and vacation</p>	

Historical Statutes and Amendments				
Year = 1993	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 1 (codified at Idaho Code § 40-106(3)).</p> <p>QUOTE:  <u>"40-106. DEFINITIONS – E.</u>  <del>" . . .</del>  <u>"(3) 'Expense of the public' means the expenditure of funds for roadway maintenance by any governmental agency, including funds expended by any agency of the federal government, so long as the agency allows public access over the roadway on which the funds were expended and such roadway is not located on federal or state-owned land."</u></p> <p><u>"40-202. DESIGNATION OF HIGHWAYS AND PUBLIC RIGHTS OF WAY.</u>  <del>" . . .</del>  <u>"(3) Highways laid out, recorded and opened as described in subsection (2) of this section, by order of a board of commissioners, and all highways used for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of the board of commissioners, are highways. If a highway created in accordance with the provisions of this subsection is not designated on the official map of the respective highway system or is not opened as described in subsection (2) of this section, there shall be no duty to maintain that highway, nor shall there be any liability for any injury or damage for failure to maintain it or any highway signs, until the highway is designated as part of the county or highway district system by inclusion on the official map as a highway</u></p>	<p>CITE: S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 4 (codified at Idaho Code § 40-203(4)).</p> <p>QUOTE:  <u>"40-203. ABANDONMENT AND VACATION OF COUNTY AND HIGHWAY DISTRICT SYSTEM OR PUBLIC RIGHTS OF WAY.</u>  <del>" . . .</del>  <u>"(4) A highway established by prescription not worked or used for a period of five (5) years ceases to be a highway for any purpose whatsoever, unless the highway is designated as part of a county or highway district system by inclusion on the official map. In the case of highways furnishing public access to state or federal public lands or waters, no person may encroach upon them and restrict public use without first petitioning for the abandonment of the highway to the appropriate commissioners of the county or highway district in which the highway is located <u>abandoned and vacated under the provisions of this section may be reclassified as a public right of way.</u></u></p> <p>NOTE: The above amendment had the effect of eliminating passive road abandonment.</p> <p>CITE: S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 4 (codified at Idaho Code § 40-203(5)).</p> <p>QUOTE:  <u>"(5) Until abandonment is authorized by the commissioners having jurisdiction, public use of the highway or the public right of way may not be restricted or impeded by encroachment or installation</u></p>	<p>CITE: S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 4 (codified at Idaho Code § 40-203(1)).</p> <p>QUOTE:  <u>"40-203. ABANDONMENT AND VACATION OF COUNTY AND HIGHWAY DISTRICT SYSTEM HIGHWAYS OR PUBLIC RIGHTS OF WAY.</u>  <del>"(1) A board of county or highway district commissioners, whichever shall have jurisdiction of the highway system, shall use the following procedure to withdraw public highway status from abandon and vacate any highway or public right of way in the county or highway district system including those which furnish public access to state and federal public lands and waters:</del>  <del>"(a) The commissioners may by resolution declare its intention to abandon and vacate any highway considered no longer to be in the public interest.</del>  <del>"(b) Any resident, or property holder, within a county or highway district system including the state of Idaho, any of its subdivisions, or any agency of the federal government may petition the respective commissioners for abandonment and vacation of any highway or public right of way within the highway system. The petitioner shall pay a reasonable fee as determined by the commissioners to cover the cost of the proceedings.</del>  <del>"(c) The commissioners shall establish a hearing date or dates on the proposed abandonment and vacation.</del>  <del>"(d) The commissioners shall prepare a report public notice stating the effects of their intention to hold a public hearing to consider the proposed abandonment and vacation on the public interest of a highway</del></p>	<p>CITE: S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 7 (codified at Idaho Code § 40-1310(5)).</p> <p>QUOTE:  <u>"40-1310. POWERS AND DUTIES OF HIGHWAY DISTRICT COMMISSIONERS.</u>  <del>" . . .</del>  <del>"(5) The highway district has the power to receive read highway petitions and lay out, alter, create and abandon and vacate public highways and rights of way within their respective districts, subject to an appeal to the district court of the judicial district in which the highway district is situated, in the same manner in which appeals are taken from the county commissioners to the district court under the provisions of sections 40-202, 40-203 and 40-203A, Idaho Code."</del></p> <p>NOTE: S.B. 1108 also closed the loop for highway districts by expressly providing that their authority to abandon under section 40-1310(5) must be exercised pursuant to the procedures spelled out in section 40-203.</p>

Historical Statutes and Amendments				
Year = 1993	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>and opened to public travel <u>as a highway</u>.”</p> <p>NOTE: S.B. 1108 added a new definition of “expense of the public” to clarify that federal expenditures count as public expenditures in the creation of prescriptive roads (reversing result in <i>French v. Sorenson</i> (1988)). (In contrast, note that the abandonment statute only requires that a road be “worked” to avoid abandonment; it does not state that the work must be at the expense of the public.)</p> <p>NOTE: S.B. 1108 added “<u>as a highway</u>” to the provision at end of section 40-202(3).</p>	<p>of any obstruction restricting public use or by the installation of signs or notices that might tend to restrict or prohibit public use. <u>Any person violating the provisions of this subsection shall be guilty of a misdemeanor.</u>”</p> <p>NOTE: S.B. 1108 also criminalized violations.</p> <hr/> <p>CITE: S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 4 (codified at Idaho Code § 40-203(6)).</p> <p>QUOTE: “(6) <u>This section does not apply to the abandonment or vacation of any highway, public street or public right of way which was accepted as part of a platted subdivision pursuant to chapter 13, title 50, Idaho Code.</u>”</p> <p>NOTE: It also stated that platted streets not subject to abandonment procedures.</p>	<p><u>or public right of way which shall be made available to the public not later than thirty (30) days prior to any hearing and mailed to any person requesting a copy more than three (3) working days after any such request.</u></p> <p>“(e) <u>At least thirty (30) days prior to any hearing scheduled by the commissioners to consider abandonment and vacation of any highway, t</u>The commissioners shall publish notice of the hearing in accordance with the provisions of section 40-206, Idaho Code, and shall mail notice to owners of land abutting the portion of the highway <u>or right of way</u> proposed to be abandoned and vacated at their addresses as shown on the county assessor’s tax rolls at least fifteen (15) days prior to the date of the hearing and shall publish notice of the hearing at least two (2) times if in a weekly newspaper or three (3) times if in a daily newspaper, the last notice to be published at least five (5) days and not more the twenty-one (21) days before the hearing.</p>	
	<p>CITE: H.B. 388, 1993 Idaho Sess. Laws, ch. 142 (codified as amended at Idaho Code §§ 40-107(5), 40-204A).</p> <p>NOTE: The full text of section 204A, as amended, is set out above under the heading “Statutes as they read today.”</p> <p>NOTE: H.B. 388 added a new definition for “federal land rights of way” at section 40-107(5) which defines them in terms of the federal statute R.S. 2477. The bill also added a new section 204A dealing with R.S. 2477 rights-of-way. Among other important provisions, section 40-204A(1) recognizes that “construction and first use” are sufficient to accept R.S. 2477 rights-of-way. Section 40-204A(2) states that abandonment principles do not apply to R.S. 2477 rights-of-way.</p>		<p>“(f) At the hearing, the commissioners shall <del>review the report prepared under this section and shall accept testimony from persons having an interest in the proceeding</del> <u>accept all information relating to the proceedings. Any person, including the state of Idaho or any of its subdivisions, or any agency of the federal government, may appear and give testimony for or against abandonment.</u></p> <p>“(g) After completion of the procedures <u>proceedings and consideration of all related information</u>, the commissioners may retain the highway as such or may by order or resolution declare the highway status withdrawn from all or part of the portion of the highway under consideration</p>	

Historical Statutes and Amendments				
Year = 1993	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p><u>shall decide whether the abandonment and vacation of the highway is in the public interest. The decision whether or not to abandon and vacate the highway or public right of way shall be written and shall be supported by findings of fact and conclusions of law.</u></p> <p>“(h) If the commissioners determine that a highway or <u>public right of way</u> parcel to be abandoned and vacated in accordance with the provisions of this section has a fair market value of twenty-five hundred dollars (\$2,500) or more, a charge may be imposed upon the acquiring entity, not in excess of the fair market value of the parcel, as a condition of the abandonment and vacation; provided, however, no such charge shall be imposed on the landowner who originally dedicated such parcel to the public for use as a highway <u>or public right of way.</u></p> <p>“(i) The commissioners shall cause any order or resolution to be recorded in the county records and the official map of the highway system to be amended as affected by the abandonment and vacation.</p> <p>“(j) <u>From any such decision, a resident or property holder within the county or highway district system, including the state of Idaho or any of its subdivisions or any agency of the federal government, may appeal to the district court of the county in which the highway or public right of way is located pursuant to section 40-208, Idaho Code.</u>”</p> <p>NOTE: S.B. 1108 provided extensive amendments to the formal abandonment procedures.</p> <hr/> <p>CITE: S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 6 (codified at Idaho Code</p>	

Historical Statutes and Amendments				
Year = 1993	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p>§ 40-208).</p> <p>QUOTE:</p> <p><u>"40-208. JUDICIAL REVIEW.</u></p> <p><u>"(1) Any resident or property holder within the county or highway district system, including the state of Idaho or any of its subdivisions, or any agency of the federal government, who is aggrieved by a final decision of a board of county or highway district commissioners in an abandonment and vacation or validation proceeding is entitled to judicial review under the provisions of this section.</u></p> <p><u>"(2) Proceedings for review are instituted by filing a petition in the district court of the county in which the commissioners have jurisdiction over the highway or public right of way within twenty-eight (28) days after the filing of the final decision of the commissioners or, if a rehearing is requested, within twenty-eight (28) days after the decision thereon.</u></p> <p><u>"(3) The filing of the petition does not itself stay enforcement of the commissioners' decision. The reviewing court may order a stay upon appropriate terms.</u></p> <p><u>"(4) Within thirty (30) days after the service of the petition, or within further time allowed by the court, the commissioners shall transmit to the reviewing court the original, or a certified copy, of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be ordered by the court to pay for additional costs. The court may require subsequent corrections to the record and may also require or permit additions to the record.</u></p> <p><u>"(5) If, before the date set for hearing,</u></p>	

Historical Statutes and Amendments				
Year = 1993	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p><u>application is made to the court for leave to present additional information, and it is shown to the satisfaction of the court that the additional information is material and that there were good reasons for failure to present it in the proceeding before the commissioners, the court may order that the additional information shall be presented to the commissioners upon conditions determined by the court. The commissioners may modify their findings and decisions by reason of the additional information and shall file that information and any modifications, new findings, or decisions with the reviewing court.</u></p> <p><u>"(6) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the commissioners, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.</u></p> <p><u>"(7) The court shall not substitute its judgment for that of the commissioners as to the weight of the information on questions of fact. The court may affirm the decision of the commissioners or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the commissioners' findings, inferences, conclusions or decisions are:</u></p> <p><u>"(a) In violation of constitutional or statutory provisions;</u></p> <p><u>"(b) In excess of the statutory authority of the commissioners;</u></p> <p><u>"(c) Made upon unlawful procedure;</u></p> <p><u>"(d) Affected by other error of law;</u></p> <p><u>"(e) Clearly erroneous in view of the reliable, probative and substantial information on the whole record; or</u></p>	

Historical Statutes and Amendments				
Year = 1993	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p><u>"(f) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."</u></p> <p>NOTE: S.B. 1108 also added a new provision on judicial review. This provision was construed in <i>Floyd v. Board of Comm'rs of Bonneville County ("Floyd II")</i>, 137 Idaho 718, 52 P.3d 863 (2002).</p> <hr/> <p>CITE: S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 7 (codified at Idaho Code § 40-604).</p> <p>QUOTE:</p> <p>"40-604. DUTIES AND POWERS OF COMMISSIONERS. Commissioners shall:</p> <p>" . . .</p> <p>"(2) Cause to be surveyed, viewed, laid out, recorded, opened and worked, highways <u>or public rights of way</u> as are necessary for public convenience <u>under the provisions of sections 40-202 and 40-203A, Idaho Code.</u></p> <p><del>"(3) Cause to be recorded as all highways those that have become such by use or abandonment and public rights of way within their highway system.</del></p> <p>"(4) Have authority to abandon <u>and vacate</u> any highway <del>and remove it from the county highway system when that action is determined to be in the public interest or public right of way within their highway system under the provisions of section 40-203, Idaho Code."</del></p> <p>NOTE: S.B. 1108 closed the loop by expressly providing that a county commission's authority to abandon under section 40-604(4) must be exercised pursuant to the procedures spelled out in</p>	

Historical Statutes and Amendments				
Year = 1993	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			section 40-203.	



Historical Statutes and Amendments				
Year = 1994	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
				<p>CITE: H.B. 809, 1994 Idaho Sess. Laws, ch. 324 § 4 (codified at Idaho Code § 40-1310(5)).</p> <p>QUOTE:            "40-1310. POWERS AND DUTIES OF HIGHWAY DISTRICT COMMISSIONERS.            ". . .            "(5) The highway district has the power to receive highway petitions and lay out, alter, create and abandon and vacate public highways and public rights-of-way within their respective districts under the provisions of sections 40-202, 40-203 and 40-203A, Idaho Code. <u>Provided however, when a public highway, public street and/or public right-of-way is part of a platted subdivision which lies within an established county/city impact area or within one (1) mile of a city if a county/city impact area has not been established, consent of the city council of the affected city, when the city has a functioning street department with jurisdiction over city streets, shall be necessary prior to the granting of acceptance or vacation of said public street or public right-of-way by the highway district board of commissioners.</u>"</p> <p>NOTE: H.B. 809 provided that highway districts must obtain the consent of city councils before accepting or vacating roads within platted subdivisions.</p>

Historical Statutes and Amendments				
Year = 1995	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: S.B. 1117, 1995 Idaho Sess. Laws, ch. 121 § 1 (codified at Idaho Code § 40-202).</p> <p>NOTE: Added hyphens to "right-of-way."</p>	<p>CITE: S.B. 1117, 1995 Idaho Sess. Laws, ch. 121 § 2 (codified at Idaho Code § 40-203(4)).</p> <p>QUOTE: "40-203. ABANDONMENT AND VACATION OF COUNTY AND HIGHWAY DISTRICT SYSTEM OR PUBLIC RIGHTS OF WAY. ". . . "(4) A highway abandoned and vacated under the provisions of this section may be reclassified as a public right-of-way."</p> <p>NOTE: Added hyphens to "right-of-way" and other technical changes.</p>	<p>CITE: S.B. 1117, 1995 Idaho Sess. Laws, ch. 121 § 2 (codified at Idaho Code § 40-203(1)).</p> <p>QUOTE: "40-203. ABANDONMENT AND VACATION OF COUNTY AND HIGHWAY DISTRICT SYSTEM OR PUBLIC RIGHTS-OF-WAY. "(1) A board of county or highway district commissioners, whichever shall have jurisdiction of the highway system, shall use the following procedure to abandon and vacate any highway or public right-of-way in the county or highway district system including those which furnish public access to state and federal public lands and waters: "(a) The commissioners may by resolution declare its intention to abandon and vacate any highway <u>or public right-of-way</u> considered no longer to be in the public interest. "(b) Any resident, or property owner, within a county or highway district system including the state of Idaho, any of its subdivisions, or any agency of the federal government may petition the respective commissioners for abandonment and vacation of any highway or public right-of-way within their highway system. The petitioner shall pay a reasonable fee as determined by the commissioners to cover the cost of the proceedings. "(c) The commissioners shall establish a hearing date or dates on the proposed abandonment and vacation. "(d) The commissioners shall prepare a public notice stating their intention to hold a public hearing to consider the proposed abandonment and vacation of a highway or</p>	

Historical Statutes and Amendments				
Year = 1995	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p>public right-of-way which shall be made available to the public not later than thirty (30) days prior to any hearing and mailed to any person requesting a copy more than three (3) working days after any such request.</p> <p><u>"(e) At least thirty (30) days prior to any hearing scheduled by the commissioner to consider abandonment and vacation of any highway or public right-of-way, the commissioners shall mail notice by United States mail to owners and operators of an underground facility, as defined in section 55-2202, Idaho Code, that lies within the highway or public right-of-way.</u></p> <p>"(ef) At least thirty (30) days prior to any hearing scheduled by the commissioners to consider abandonment and vacation of any highway or public right-of-way, the commissioners shall mail notice to owners of land abutting the portion of the highway or public right-of-way proposed to be abandoned and vacated at their addresses as shown on the county assessor's tax rolls and shall publish notice of the hearing at least two (2) times if in a weekly newspaper or three (3) times if in a daily newspaper, the last notice to be published at least five (5) days and not more the twenty-one (21) days before the hearing.</p> <p>"(fg) At the hearing, the commissioners shall accept all information relating to the proceedings. Any person, including the state of Idaho or any of its subdivisions, or any agency of the federal government, may appear and give testimony for or against abandonment.</p> <p>"(gh) After completion of the proceedings and consideration of all related information, the commissioners shall decide whether the abandonment and vacation of the</p>	

Historical Statutes and Amendments				
Year = 1995	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p>highway or public right-of-way is in the public interest. The decision whether or not to abandon and vacate the highway or public right-of-way shall be written and shall be supported by findings of fact and conclusions of law.</p> <p><u>      </u></p>	

Historical Statutes and Amendments				
Year = 2000	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
	<p>CITE: S.B. 1407, 2000 Idaho Sess. Laws, ch. 251, § 2 (codified at Idaho Code § 40-203(1)).</p> <p>QUOTE:            "40-202. DESIGNATION OF HIGHWAYS AND PUBLIC RIGHTS-OF-WAY.            " . . .            "(3) Highways laid out, recorded and opened as described in subsection (2) of this section, by order of a board of commissioners, and all highways used for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of the board of commissioners, are highways. If a highway created in accordance with the provisions of this subsection is <del>not designated on the official map of the respective highway system or is not</del> opened as described in subsection (2) of this section, there shall be no duty to maintain that highway, nor shall there be any liability for any injury or damage for failure to maintain it or any highway signs, until the highway is designated as part of the county or highway district system <del>by inclusion on the official map as a highway</del> and opened to public travel as a highway."</p> <p>NOTE: Eliminated references to highway map.</p>		<p>CITE: S.B. 1407, 2000 Idaho Sess. Laws, ch. 251, § 2 (codified at Idaho Code § 40-203(1)).</p> <p>QUOTE:            "40-203. ABANDONMENT AND VACATION OF COUNTY AND HIGHWAY DISTRICT SYSTEM HIGHWAYS OR PUBLIC RIGHTS-OF-WAY.            "(1) A board of county or highway district commissioners, whichever shall have jurisdiction of the highway system, shall use the following procedure to abandon and vacate any highway or public right-of-way in the county or highway district system including those which furnish public access to state and federal public lands and waters:            "(a) The commissioners may by resolution declare its intention to abandon and vacate any highway or public right-of-way considered no longer to be in the public interest.            "(b) Any resident, or property owner, within a county or highway district system including the state of Idaho, any of its subdivisions, or any agency of the federal government may petition the respective commissioners for abandonment and vacation of any highway or public right-of-way within their highway system. The petitioner shall pay a reasonable fee as determined by the commissioners to cover the cost of the proceedings.            "(c) The commissioners shall establish a hearing date or dates on the proposed abandonment and vacation.            "(d) The commissioners shall prepare a public notice stating their intention to hold a public hearing to consider the proposed abandonment and vacation of a highway or</p>	

Historical Statutes and Amendments				
Year = 2000	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p>public right-of-way which shall be made available to the public not later than thirty (30) days prior to any hearing and mailed to any person requesting a copy more than three (3) working days after any such request.</p> <p>“(e) At least thirty (30) days prior to any hearing scheduled by the commissioners to consider abandonment and vacation of any highway or public right-of-way, the commissioners shall mail notice by United States mail to <u>known</u> owners and operators of an underground facility, as defined in section 55-2202, Idaho Code, that lies within the highway or public right-of-way.</p> <p>“(f) At least thirty (30) days prior to any hearing scheduled by the commissioners to consider abandonment and vacation of any highway or public right-of-way, the commissioners shall mail notice to owners of <u>record of</u> land abutting the portion of the highway or public right-of-way proposed to be abandoned and vacated at their addresses as shown on the county assessor's tax rolls and shall publish notice of the hearing at least two (2) times if in a weekly newspaper or three (3) times if in a daily newspaper, the last notice to be published at least five (5) days and not more the twenty-one (21) days before the hearing.</p> <p>“(g) At the hearing, the commissioners shall accept all information relating to the proceedings. Any person, including the state of Idaho or any of its subdivisions, or any agency of the federal government, may appear and give testimony for or against abandonment.</p> <p>“(h) After completion of the proceedings and consideration of all related information, the commissioners shall decide whether</p>	

Historical Statutes and Amendments				
Year = 2000	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
			<p>the abandonment and vacation of the highway or public right-of-way is in the public interest <u>of the highway jurisdiction affected by the abandonment or vacation</u>. The decision whether or not to abandon and vacate the highway or public right-of-way shall be written and shall be supported by findings of fact and conclusions of law.</p> <p>“ . . . ”</p>	

Historical Statutes and Amendments				
Year = 2013	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
		<p>CITE: 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified at Idaho Code § 40-203).</p> <p><u>“(5) In any proceeding under this section or section 40-203A, Idaho Code, or in any judicial proceeding determining the public status or width of a highway or public right-of-way, a highway or public right-of-way shall be deemed abandoned if the evidence shows:</u></p> <p><u>“(a) That said highway or public right-of-way was created solely by a particular type of common law dedication, to wit, a dedication based upon a plat or other document that was not recorded in the official records of an Idaho county;</u></p> <p><u>“(b) That said highway or public right-of-way is not located on land owned by the United States or the state of Idaho nor on land entirely surrounded by land owned by the United States or the state of Idaho nor does it provide the only means of access to such public lands; and</u></p> <p><u>“(c)(i) That said highway or public right-of-way has not been used by the public and has not been maintained at the expense of the public in at least three (3) years during the previous fifteen (15) years; or (ii) Said highway or right-of-way was never constructed and at least twenty (20) years have elapsed since the common law dedication.</u></p> <p><u>“All other highways or public rights-of-way may be abandoned and vacated only upon a formal determination by the commissioners pursuant to this section that retaining the highway or public right-of-way for use by the public is not in the public interest, and such other highways</u></p>	<p>CITE: 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified at Idaho Code § 40-203).</p> <p>QUOTE:</p> <p>“(1) A board of county or highway district commissioners, whichever shall have jurisdiction of the highway system, shall use the following procedure to abandon and vacate any highway or public right-of-way in the county or highway district system including those which furnish public access to state and federal public lands and waters:</p> <p>“(a) The commissioners may by resolution declare <del>its</del><u>their</u> intention to abandon and vacate any highway or public right-of-way <del>considered no longer to be, or to reclassify a public highway as a public right-of-way, where doing so is</del> in the public interest.</p> <p>. . .</p> <p>“(2) No highway or public right-of-way or parts thereof shall be abandoned and vacated so as to leave any real property adjoining the highway or public right-of-way without access to an established highway or public right-of-way. <u>The burden of proof shall be on the impacted property owner to establish this fact.</u></p> <p>“(3) In the event of abandonment and vacation, rights-of-way or easements <del>may</del> <u>shall</u> be reserved for the continued use of existing sewer, gas, water, or similar pipelines and appurtenances, or other underground facilities as defined in section 55-2202, Idaho Code, for ditches or canals and appurtenances, and for electric, telephone and similar lines and appurtenances.</p>	



Historical Statutes and Amendments				
Year = 2013	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
		<p><u>or public rights-of-way may be validated or judicially determined at any time notwithstanding any other provision of law. Provided that any abandonment under this subsection shall be subject to and limited by the provisions of subsections (2) and (3) of this section.</u></p> <p>NOTE: Creates a new type of passive abandonment applicable to: (a) roads created solely by a particular type of common law dedication based on an un-recorded plat, (b) which are not on public lands, and (c) which have not had public use or 3 occasions of public maintenance in the last 15 years (or which were never built). Clarifies that this is the only remaining form of passive abandonment, and that validation proceedings may be brought at any time.</p>	<p><del>“(4) A highway abandoned and vacated under the provisions of this section may be reclassified as a public right-of-way.</del>  <del>“(5) Until abandonment is authorized by the commissioners, public use of the highway or public right-of-way may not be restricted or impeded by encroachment or installation of any obstruction restricting public use, or by the installation of signs or notices that may tend to restrict or prohibit public use. Any person violating the provisions of this subsection shall be guilty of a misdemeanor.</del>  “(6)(4) When a county or highway district desires the abandonment or vacation of any highway, public street or public right-of-way which was accepted as part of a platted subdivision said abandonment or vacation shall be accomplished pursuant to the provisions of chapter 13, title 50, Idaho Code.</p> <p>NOTE: Cleans up language dealing with reclassifying a highway as a public right-of-way. Places burden of proof on landowner to show that abandonment will result in land-locking. Makes retention of utility easements mandatory in event of road abandonment. Eliminates duplicative provision dealing with obstruction. This is handled by 40-2319.</p>	

Historical Statutes and Amendments				
Year = 2014	Road Creation	Passive Abandonment	Formal Abandonment/Vacation & Validation (County and Combined)	Formal Abandonment/Vacation & Validation (Highway Districts)
				<p>CITE: 2014 Idaho Sess. Laws, ch. 137 (S.B. 2183) (codified at Idaho Code § 40-203).</p> <p>QUOTE:</p> <p>(4)(a) <u>When a county or highway district is to consider the abandonment or vacation of any highway, public street or public right-of-way that was accepted as part of a platted subdivision, such abandonment shall be accomplished pursuant to the provisions of this section.</u></p> <p>(b) <u>When a county or highway district desires is to consider</u> the abandonment or vacation of any highway, public street or public private right-of-way which <u>that</u> was accepted as part of a platted subdivision said abandonment or vacation shall be accomplished pursuant to the provisions of chapter 13, title 50, Idaho Code.</p>

	<b>Other Provisions Bearing on Road Creation and Abandonment</b>	
<b>Subject</b>	<b>Citation</b>	<b>Comment</b>
Road tax	CITE: Gen. Laws of the Territory of Idaho, at p. 162, § 20 (1885).	NOTE: Section 21 of this Act provided that every male between 21 and 50 must pay a road tax or perform road labor. Other sections of the Act deal with “viewers.”
Laying out roads; viewers	CITE: Idaho Code Ann. (Political Code) §§ 1185 to 1211 (1901) (repealed).	NOTE: Sections 1185 through 1211 are presented under the heading “Laying Out, Altering and Discontinuing Roads”. It provides a mechanism for citizens within a road district to petition to alter, discontinue or construct a new road. (It does not deal with the dedication or recognition of existing roads.) The statute requires the appointment of “viewers” who must “view and survey any proposed alteration of an old or opening of a new road.” Section 1188. However, this may be dispensed with upon written consent of all owners of the land to be used for that purpose. Section 1203.  NOTE: This outline does not track the origin and subsequent history of these sections.
Public rights-of-way	CITE: 1993 Idaho Sess. Laws, ch. 412, § 1 (S.B. 1108) (codified at Idaho Code § 40-117(9)).	NOTE: Added new definition of “public rights of way” expressly stating that officials have no obligation to construct or maintain. This definition was originally codified to Idaho Code § 40-117(6), but was re-codified in 2011 to 40-117(9) with no change in wording.
Inventory of rights-of-way	CITE: 1998 Idaho Sess. Laws, ch. 184, § 1 (S.B. 1367) (codified at Idaho Code § 40-202).	NOTE: Added new section 40-202(6) requiring an inventory of public rights-of-way.
Mapping	CITE: 1998 Idaho Sess. Laws, Sen. Con. Res. No. 136.	NOTE: Concurrent resolution adopted. It recognized the confusion surrounding identification and mapping requirements for highways including R.S. 2477 rights-of-way. It urged the Local Highway Technical Assistance Council to review the process.
Public rights-of-way	CITE: 2000 Idaho Sess. Laws, ch. 252, § 1 (S.B. 1408) (codified at Idaho Code § 40-117).	NOTE: Amended definition of “Public right-of-way.” Provided that highway agencies may choose, in their discretion, to provide public maintenance of such.

## Other Provisions Bearing on Road Creation and Abandonment

Subject	Citation	Comment
Encroachment actions	CITE: Idaho Code § 40-2319 (1985 Idaho Sess. Laws, ch. 253 § 2; 2000 Idaho Sess. Laws, ch. 252 § 2; 2011 Idaho Sess. Laws, ch. 282 § 1; 2013 Idaho Sess. Laws, ch. 264 § 1).	<p>NOTE: Since 1985, counties and highway districts have been authorized to take legal action and to engage in self help to address certain encroachments on public roads. The 2013 amendments were part of a separate bill, H.B. 171, unrelated to the road width bill, H.B. 321. The 2013 amendment clarified the circumstances under which legal and self-help actions may be taken.</p> <p>QUOTE:</p> <p>"40-2319. Encroachments - Removal - Notice - Penalty for failure to remove - Removal by county or highway district - Abatement.</p> <p>"(1) If any highway or public right-of-way under the jurisdiction of a county or highway district is encroached upon by gates, fences, buildings, or otherwise, the appropriate county or highway district may require the encroachment to be removed.</p> <p>"(2) If the county or highway district has actual notice of an encroachment that is of a nature as to effectually obstruct and prevent the use of an open highway for vehicles or is unsafe for pedestrian or motorist use of an open highway, the county or highway district shall immediately cause the encroachment to be removed without notice.</p> <p>"(3) If the county or highway district elects to remove an encroachment as provided for in subsection (1) of this section, notice shall be given to the occupant or owner of the land, or person causing or owning the encroachment, or left at his place of residence if he resides in the highway jurisdiction. If not, it shall be posted on the encroachment, specifying the place and extent of the encroachment, and requiring him to remove the encroachment within ten (10) days.</p> <p>"(a) If the encroachment is not removed, or commenced to be removed, prior to the expiration of ten (10) days from the service or posting the notice, the person who caused, owns or controls the encroachment shall forfeit up to one hundred fifty dollars (\$150) for each day the encroachment continues unremoved;</p> <p>"(b) If the owner, occupant, or person controlling the encroachment, refuses either to remove it or to permit its removal, the county or highway district shall commence in the proper court an action to abate the encroachment. If the county or highway district recovers judgment, it may, in addition to having the encroachment abated, recover up to one hundred fifty dollars (\$150) for every day the encroachment remained after notice, as well as costs of the legal action and removal; or</p>

## Other Provisions Bearing on Road Creation and Abandonment

Subject	Citation	Comment
		<p>“(c) If the owner, occupant or person controlling the encroachment fails to respond to the notice within five (5) days after the notice is complete, the county or highway district may remove it at the expense of the owner, occupant, or person controlling the encroachment, and the county or highway district may recover costs and expenses, as well as the sum of up to one hundred fifty dollars (\$150) for each day the encroachment remained after notice was complete.</p> <p>“(4) The duties referenced in the provisions of this section, whether statutory or common law, require reasonable care only and shall not be construed to impose strict liability or to otherwise enlarge the liability of the county or highway district. The county or highway district, while responsible for their own acts or omissions, shall not be liable for any injury or damage caused by or arising from the encroachment or the failure to remove or abate the encroachment as provided for in subsection (1) of this section. The provision of this section shall not be construed to impair any defense that the county or highway district may assert in a civil action.</p> <p>“(5) Nothing in this chapter shall be construed to limit, abrogate or supersede the provisions of this title governing the power, authority or jurisdiction of a county or highway district, including the authority to regulate the use of highways or public rights-of-way for pedestrian and motorist safety.”</p>
Definition of maintenance	CITE: 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified at Idaho Code § 40-114(3)).	<p>NOTE: Clarified and expanded the definition of road maintenance sufficient applicable to road creation, abandonment, and road width determinations.</p> <p>QUOTE:</p> <p>“(3) ‘Maintenance’ means to preserve from failure or decline, or repair, refurbish, repaint or otherwise keep an existing highway or <del>structure</del> <u>public right-of-way</u> in a suitable state for use <u>including, without limitation, snow removal, sweeping, litter control, weed abatement and placement or repair of public safety signage.</u>”</p>

## Other Provisions Bearing on Road Creation and Abandonment

Subject	Citation	Comment
Public road map	CITE: 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified at Idaho Code §§ 40-202(6) to (8)).	<p>NOTE: Codified the holding in <i>Homestead Farms, Inc. v. Board of Commissioners of Teton Cnty.</i>, 141 Idaho 855, 119 P.3d 630 (2005) (Trout, J.), clarifying that official road maps are intended to put the public on notice but are not determinative of title.</p> <p>QUOTE:</p> <p>“(6) By July 1, 2005, and <u>at least every five (5) years thereafter</u>, the board of county or highway district commissioners shall <del>have published</del> in map form and <del>made make</del> readily available a map showing the general location of all highways and public rights-of-way under its jurisdiction. Any board of county or highway district commissioners may be granted an extension of time with approval of the legislature by adoption of a concurrent resolution.</p> <p>“(7) <u>Prior to designating a new highway or public right-of-way on the official map, the board of county or highway district commissioners shall confirm that no legal abandonment has occurred on the new highway or right-of-way to be added to the official map. In addition, the board of county or highway district commissioners shall have some basis indicating dedication, purchase, prescriptive use or other means for the creation of a highway and public right-of-way with evidentiary support.</u></p> <p>“(8) <u>The board of county or highway district commissioners shall give advance notice of hearing, by U.S. mail, to any landowner upon or within whose land the highway or public right-of-way is located whenever a highway or public right-of-way is proposed for inclusion on such map and the public status of such highway or public right-of-way is not already a matter of public record. The purpose of this official map is to put the public on notice of those highways and public rights-of-way that the board of county or highway district commissioners considers to be public. The inclusion or exclusion of a highway or public right-of-way from such a map does not, in itself, constitute a legal determination of the public status of such highway or public right-of-way. Any person may challenge, at any time, the inclusion or exclusion of a highway or public right-of-way from such map by initiating proceedings as described in section 40-208(7), Idaho Code.</u>”</p>

## Other Provisions Bearing on Road Creation and Abandonment

Subject	Citation	Comment
Judicial review	CITE: 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified at Idaho Code §§ 40-208(5) to 40-208(7)).	<p>NOTE:</p> <p>Parties may present additional material evidence to court, without leave, for purposes of remand to the board.</p> <p>Makes judicial review de novo, except for issues involving the board's exercise of its discretion in matters of the public interest.</p> <p>Requires private parties to seek validation/vacation by board first. May then initiate quiet title only if board refuses to initiate validation/vacation proceeding. Also requires board to proceed first by validation/vacation proceeding.</p> <p>QUOTE:</p> <p><del>"(5) If, before the date set for hearing, application is made to the court for leave to present additional information, and it is shown to the satisfaction of the court that the additional information is material and that there were good reasons for failure to present it in the proceeding before the commissioners, The parties may present additional evidence to the court, upon a showing to the court that such evidence is material to the issues presented to the court. In such case, the court may order that the additional information shall be presented to the commissioners upon conditions determined by the court. The commissioners may modify their findings and decisions by reason of the additional information and shall file that information and any modifications, new findings, or decisions with the reviewing court.</del></p> <p><del>"(6) The review shall be conducted by the court without a jury and shall be confined to the record. The court shall consider the record before the board of county or highway district commissioners and shall defer to the board of county or highway district commissioners on matters in which such board has appropriately exercised its discretion with respect to the evaluation of the public interest. As to the determination of highway or public right-of-way creation, width and abandonment, the court may accept new evidence and testimony supplemental to the record provided by the county or highway district, and the court shall consider those issues anew. In cases of alleged irregularities in procedure before the commissioners, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.</del></p> <p><del>"(7) The court shall not substitute its judgment for that of the commissioners as to the weight of the information on questions of fact. The court may affirm the decision of the commissioners or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the commissioners' findings, inferences, conclusions or decisions are:</del></p>

## Other Provisions Bearing on Road Creation and Abandonment

Subject	Citation	Comment
		<p> <u>_____ (a) In violation of constitutional or statutory provisions;</u>  <u>_____ (b) In excess of the statutory authority of the commissioners;</u>  <u>_____ (c) Made upon unlawful procedure;</u>  <u>_____ (d) Affected by other error of law;</u>  <u>_____ (e) Clearly erroneous in view of the reliable, probative and</u>  <u>substantial information on the whole record; or</u>  <u>_____ (f) Arbitrary or capricious or characterized by abuse of discretion</u>  <u>or clearly unwarranted exercise of discretion.</u>  <u>Any person other than a board of county or highway district commissioners</u>  <u>seeking a determination of the legal status or the width of a highway or</u>  <u>public right-of-way shall first petition for the initiation of validation or</u>  <u>abandonment proceedings, or both, as provided for in sections</u>  <u>40-203(1)(b) and 40-203A(1), Idaho Code. If the commissioners having</u>  <u>jurisdiction over the highway system do not initiate a proceeding in</u>  <u>response to such a petition within thirty (30) days, the person may seek a</u>  <u>determination by quiet title or other available judicial means. When the</u>  <u>legal status or width of a highway or public right-of-way is disputed and</u>  <u>where a board of county or highway district commissioners wishes to</u>  <u>determine the legal status or width of a highway or public right-of-way, the</u>  <u>commissioners shall initiate validation or abandonment proceedings, or</u>  <u>both, as provided for in sections 40-203 and 40-203A, Idaho Code, rather</u>  <u>than initiating an action for quiet title. If proceedings pursuant to the</u>  <u>provisions of section 40-203 or 40-203A, Idaho Code, are initiated, those</u>  <u>proceedings and any appeal or remand therefrom shall provide the</u>  <u>exclusive basis for determining the status and width of the highway, and</u>  <u>no court shall have jurisdiction to determine the status or width of said</u>  <u>highway except by way of judicial review provided for in this section.</u>  <u>Provided that nothing in this subsection shall preclude determination of the</u>  <u>legal status or width of a public road in the course of an eminent domain</u>  <u>proceeding, as provided for in chapter 7, title 7, Idaho Code."</u> </p>



## Other Provisions Bearing on Road Creation and Abandonment

Subject	Citation	Comment
Road width	CITE: 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified at Idaho Code § 40-2312).	<p>NOTE:</p> <p>Clarifies that if road width is specified in writing or in an oral agreement supported by clear and convincing evidence, that specification controls. Subsection (2) confirms, that, unless the road falls into one the exceptions in subsection (3), its width will be a minimum of 50-feet. This codifies the rule set in <i>Halvorson</i> and <i>Sopatyk</i>.</p> <p>Subsection (3) carves out a limited exception for roads that are not located on public lands and have not received at least three occasions of maintenance in the last 15 years. Their width is based on: (a) physical road surface, (b) existing uses (e.g., wide enough to haul a combine), (c) existing features (defined in 40-109(5)), (d) existing utilities, including maintenance, repair and upgrade, and (e) maintenance and safety requirements.</p> <p>Preserves existing statutory rights of irrigation entities.</p> <p>Roads may be widened beyond the width specified above by condemnation.</p> <p>QUOTE:</p> <p><u>"(1) Where the width of a highway is stated in the plat, dedication, deed, easement, agreement, official road book, determination or other document or by an oral agreement supported by clear and convincing evidence that effectively conveys, creates, recognizes or modifies the highway or establishes the width, that width shall control.</u></p> <p><u>"(2) Where no width is established as provided for in subsection (1) of this section and where subsection (3) of this section is not applicable, such All highways, except bridges and those located within cities, shall be not less than fifty (50) feet wide, except those of a lesser width presently existing, and may be as wide as required for proper construction and maintenance in the discretion of the authority in charge of the construction and maintenance. Bridges located outside incorporated cities shall be the same width to and across the river, creek or stream as the highway leading to it.</u></p> <p><u>"(3) Highways that at the time of a validation or judicial proceeding are not located on land owned by the United States or the state of Idaho or on land entirely surrounded by land owned by the United States or the state of Idaho, and that have not received maintenance at the expense of the public in at least three (3) years during the previous fifteen (15) years, shall be declared to be of such width, and none greater, as is sufficient to accommodate:</u></p>

Other Provisions Bearing on Road Creation and Abandonment		
Subject	Citation	Comment
		<u>“(a) The existing physical road surface;</u> <u>“(b) Existing uses of the highway;</u> <u>“(c) Existing features included within the definition of highways in section 40-109(5), Idaho Code;</u> <u>“(d) Such space for existing utilities as has historically been required for ongoing maintenance, replacement and upgrade of such utilities; and</u> <u>“(e) Space reasonably required for maintenance, motorist and pedestrian safety, necessary to maintain existing uses of the highway.</u> <u>“(4) Nothing in this section shall diminish or otherwise limit the authority and rights of irrigation districts, canal companies or other such entities as provided in chapters 11 and 12, title 42, Idaho Code.</u> <u>“(5) Nothing in this section shall diminish or otherwise limit any right of eminent domain as set forth in chapter 7, title 7, Idaho Code.”</u>

## APPENDIX B: HOUSE BILL 321 (2013)

HOUSE BILL NO.321 (2013) - Highways/right-of-way/map designatn...

<http://www.legislature.idaho.gov/legislation/2013/H0321.pdf>

LEGISLATURE OF THE STATE OF IDAHO  
Sixty-second Legislature First Regular Session - 2013

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 321

BY WAYS AND MEANS COMMITTEE

### AN ACT

RELATING TO HIGHWAYS; PROVIDING LEGISLATIVE INTENT; AMENDING SECTION 40-114, IDAHO CODE, TO REVISE DEFINITIONS AND TO MAKE A TECHNICAL CORRECTION; AMENDING SECTION 40-202, IDAHO CODE, TO REVISE PROVISIONS RELATING TO A CERTAIN MAP, TO ESTABLISH PROVISIONS RELATING TO DESIGNATING A NEW HIGHWAY OR PUBLIC RIGHT-OF-WAY ON THE OFFICIAL MAP, TO ESTABLISH PROVISIONS RELATING TO NOTICE, TO ESTABLISH PROVISIONS RELATING TO THE PURPOSE OF AN OFFICIAL MAP AND TO MAKE A TECHNICAL CORRECTION; AMENDING SECTION 40-203, IDAHO CODE, TO ESTABLISH PROVISIONS RELATING TO A BURDEN OF PROOF, TO REMOVE LANGUAGE RELATING TO A HIGHWAY ABANDONED AND VACATED AND THAT PUBLIC USE OF A CERTAIN HIGHWAY OR PUBLIC RIGHT-OF-WAY MAY NOT BE RESTRICTED, TO ESTABLISH PROVISIONS RELATING TO CERTAIN PROCEEDINGS DETERMINING THE PUBLIC STATUS OR WIDTH OF A HIGHWAY OR PUBLIC RIGHT-OF-WAY, TO ESTABLISH PROVISIONS WHERE CERTAIN HIGHWAYS OR PUBLIC RIGHTS-OF-WAY MAY BE ABANDONED AND VACATED ONLY UPON A FORMAL DETERMINATION AND TO MAKE A TECHNICAL CORRECTION; AMENDING SECTION 40-208, IDAHO CODE, TO REVISE PROVISIONS RELATING TO JUDICIAL REVIEW, TO ESTABLISH PROVISIONS RELATING TO A PETITION AND TO MAKE A TECHNICAL CORRECTION; AMENDING SECTION 40-2312, IDAHO CODE, TO REVISE PROVISIONS RELATING TO WIDTH OF CERTAIN HIGHWAYS AND TO ESTABLISH PROVISIONS RELATING TO CERTAIN HIGHWAYS THAT AT THE TIME OF A VALIDATION OR JUDICIAL PROCEEDING ARE NOT LOCATED ON CERTAIN LANDS; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. LEGISLATIVE INTENT. It is the intent of the Legislature to address right-of-way issues brought forward during the testimony and discussion before the Senate Transportation Committee in the 2012 legislative session relating to House Bill No. 628, as amended. During the 2012 interim session, the President Pro Tempore of the Senate and the Speaker of the House of Representatives established an Interim Task Force encompassing members of the Idaho Senate and the House of Representatives to further study these issues. On October 1, 2012, the Right-of-Way Task Force convened and accepted extensive testimony from stakeholders that included representatives of utility companies, counties and highway districts, irrigation districts and canal companies and various members of the public. It is further the intent of the Legislature to protect private property rights and ensure adequate public rights-of-way for transportation, utility and irrigation and other public facilities. It is the intent of the Legislature that this act shall apply to any and all existing and future highways and public rights-of-way and provide for an immediate implementation date due to the year delay in passing needed legislation, as a result of the yearlong task force efforts and the immediate need to provide clarity regarding the status or abandonment of highways and public rights-of-way.

1 SECTION 2. That Section 40-114, Idaho Code, be, and the same is hereby  
2 amended to read as follows:

3 40-114. DEFINITIONS -- M. (1) "Main traveled way" means the portion of  
4 a roadway for the movement of vehicles, exclusive of shoulders.

5 (2) "Maintain" or "place" means to allow to exist, subject to the provi-  
6 sions of chapter 19, title 40, Idaho Code.

7 (3) "Maintenance" means to preserve from failure or decline, or repair,  
8 refurbish, repaint or otherwise keep an existing highway or ~~structure~~ public  
9 right-of-way in a suitable state for use including, without limitation, snow  
10 removal, sweeping, litter control, weed abatement and placement or repair of  
11 public safety signage.

12 (4) "Mortgage" means a class of liens, including deeds of trust, as are  
13 commonly given to secure advances on, or the unpaid purchase price of, real  
14 property under the laws of the state of Idaho, together with the credit in-  
15 struments, if any, secured by it.

16 SECTION 3. That Section 40-202, Idaho Code, be, and the same is hereby  
17 amended to read as follows:

18 40-202. DESIGNATION OF HIGHWAYS AND PUBLIC RIGHTS-OF-WAY. (1) The  
19 initial selection of the county highway system and highway district system  
20 may be accomplished in the following manner:

21 (a) The board of county or highway district commissioners shall cause a  
22 map to be prepared showing the general location of each highway and pub-  
23 lic right-of-way in ~~their~~ its jurisdiction, and the commissioners shall  
24 cause notice to be given of intention to adopt the map as the official  
25 map of that system, and shall specify the time and place at which all in-  
26 terested persons may be heard.

27 (b) After the hearing, the commissioners shall adopt the map, with any  
28 changes or revisions considered by them to be advisable in the public  
29 interest, as the official map of the respective highway system.

30 (2) If a county or highway district acquires an interest in real  
31 property for highway or public right-of-way purposes, the respective com-  
32 missioners shall:

33 (a) Cause any order or resolution enacted, and deed or other document  
34 establishing an interest in the property for their highway system pur-  
35 poses to be recorded in the county records; or

36 (b) Cause the official map of the county or highway district system to  
37 be amended as affected by the acceptance of the highway or public right-  
38 of-way.

39 Provided, however, a county with highway jurisdiction or highway district  
40 may hold title to an interest in real property for public right-of-way pur-  
41 poses without incurring an obligation to construct or maintain a highway  
42 within the right-of-way until the county or highway district determines  
43 that the necessities of public travel justify opening a highway within the  
44 right-of-way. The lack of an opening shall not constitute an abandonment,  
45 and mere use by the public shall not constitute an opening of the public  
46 right-of-way.

47 (3) Highways laid out, recorded and opened as described in subsection  
48 (2) of this section, by order of a board of commissioners, and all highways

1 used for a period of five (5) years, provided they shall have been worked and  
2 kept up at the expense of the public, or located and recorded by order of a  
3 board of commissioners, are highways. If a highway created in accordance  
4 with the provisions of this subsection is not opened as described in subsec-  
5 tion (2) of this section, there shall be no duty to maintain that highway,  
6 nor shall there be any liability for any injury or damage for failure to main-  
7 tain it or any highway signs, until the highway is designated as a part of the  
8 county or highway district system and opened to public travel as a highway.

9 (4) When a public right-of-way is created in accordance with the provi-  
10 sions of subsection (2) of this section, or section 40-203 or 40-203A, Idaho  
11 Code, there shall be no duty to maintain that public right-of-way, nor shall  
12 there be any liability for any injury or damage for failure to maintain it or  
13 any highway signs.

14 (5) Nothing in this section shall limit the power of any board of com-  
15 missioners to subsequently include or exclude any highway or public right-  
16 of-way from the county or highway district system.

17 (6) By July 1, 2005, and at least every five (5) years thereafter, the  
18 board of county or highway district commissioners shall have published in  
19 map form and made make readily available a map showing the general location  
20 of all highways and public rights-of-way under its jurisdiction. Any board  
21 of county or highway district commissioners may be granted an extension of  
22 time with approval of the legislature by adoption of a concurrent resolu-  
23 tion.

24 (7) Prior to designating a new highway or public right-of-way on the  
25 official map, the board of county or highway district commissioners shall  
26 confirm that no legal abandonment has occurred on the new highway or right-  
27 of-way to be added to the official map. In addition, the board of county or  
28 highway district commissioners shall have some basis indicating dedication,  
29 purchase, prescriptive use or other means for the creation of a highway and  
30 public right-of-way with evidentiary support.

31 (8) The board of county or highway district commissioners shall give  
32 advance notice of hearing, by U.S. mail, to any landowner upon or within  
33 whose land the highway or public right-of-way is located whenever a highway  
34 or public right-of-way is proposed for inclusion on such map and the pub-  
35 lic status of such highway or public right-of-way is not already a matter  
36 of public record. The purpose of this official map is to put the public on  
37 notice of those highways and public rights-of-way that the board of county  
38 or highway district commissioners considers to be public. The inclusion or  
39 exclusion of a highway or public right-of-way from such a map does not, in it-  
40 self, constitute a legal determination of the public status of such highway  
41 or public right-of-way. Any person may challenge, at any time, the inclusion  
42 or exclusion of a highway or public right-of-way from such map by initiating  
43 proceedings as described in section 40-208 (7), Idaho Code.

44 (9) Nothing in this section or in any designation of the general loca-  
45 tion of a highway or public right-of-way shall authorize the public highway  
46 agency to assert or claim rights superior to or in conflict with any rights-  
47 of-way that resulted from the creation of a facility for the transmission of  
48 water which existed before the designation of the location of a highway or  
49 public right-of-way.

1       SECTION 4. That Section 40-203, Idaho Code, be, and the same is hereby  
2       amended to read as follows:

3       40-203. ABANDONMENT AND VACATION OF COUNTY AND HIGHWAY DISTRICT SYS-  
4       TEM HIGHWAYS OR PUBLIC RIGHTS-OF-WAY. (1) A board of county or highway dis-  
5       trict commissioners, whichever shall have jurisdiction of the highway sys-  
6       tem, shall use the following procedure to abandon and vacate any highway or  
7       public right-of-way in the county or highway district system including those  
8       which furnish public access to state and federal public lands and waters:

9       (a) The commissioners may by resolution declare ~~its~~ their intention  
10      to abandon and vacate any highway or public right-of-way ~~considered~~  
11      ~~no longer to be, or to reclassify a public highway as a public~~  
12      ~~right-of-way, where doing so is in the public interest.~~

13      (b) Any resident, or property holder, within a county or highway dis-  
14      trict system including the state of Idaho, any of its subdivisions, or  
15      any agency of the federal government may petition the respective com-  
16      missioners for abandonment and vacation of any highway or public right-  
17      of-way within their highway system. The petitioner shall pay a reason-  
18      able fee as determined by the commissioners to cover the cost of the pro-  
19      ceedings.

20      (c) The commissioners shall establish a hearing date or dates on the  
21      proposed abandonment and vacation.

22      (d) The commissioners shall prepare a public notice stating their in-  
23      tention to hold a public hearing to consider the proposed abandonment  
24      and vacation of a highway or public right-of-way which shall be made  
25      available to the public not later than thirty (30) days prior to any  
26      hearing and mailed to any person requesting a copy not more than three  
27      (3) working days after any such request.

28      (e) At least thirty (30) days prior to any hearing scheduled by the com-  
29      missioners to consider abandonment and vacation of any highway or pub-  
30      lic right-of-way, the commissioners shall mail notice by United States  
31      mail to known owners and operators of an underground facility, as de-  
32      fined in section 55-2202, Idaho Code, that lies within the highway or  
33      public right-of-way.

34      (f) At least thirty (30) days prior to any hearing scheduled by the  
35      commissioners to consider abandonment and vacation of any highway  
36      or public right-of-way, the commissioners shall mail notice to own-  
37      ers of record of land abutting the portion of the highway or public  
38      right-of-way proposed to be abandoned and vacated at their addresses  
39      as shown on the county assessor's tax rolls and shall publish notice of  
40      the hearing at least two (2) times if in a weekly newspaper or three (3)  
41      times if in a daily newspaper, the last notice to be published at least  
42      five (5) days and not more than twenty-one (21) days before the hearing.

43      (g) At the hearing, the commissioners shall accept all information re-  
44      lating to the proceedings. Any person, including the state of Idaho or  
45      any of its subdivisions, or any agency of the federal government, may  
46      appear and give testimony for or against abandonment.

47      (h) After completion of the proceedings and consideration of all re-  
48      lated information, the commissioners shall decide whether the abandon-  
49      ment and vacation of the highway or public right-of-way is in the public

1 interest of the highway jurisdiction affected by the abandonment or va-  
2 cation. The decision whether or not to abandon and vacate the highway or  
3 public right-of-way shall be written and shall be supported by findings  
4 of fact and conclusions of law.

5 (i) If the commissioners determine that a highway or public right-of-  
6 way parcel to be abandoned and vacated in accordance with the provisions  
7 of this section has a fair market value of twenty-five hundred dollars  
8 (\$2,500) or more, a charge may be imposed upon the acquiring entity,  
9 not in excess of the fair market value of the parcel, as a condition of  
10 the abandonment and vacation; provided, however, no such charge shall  
11 be imposed on the landowner who originally dedicated such parcel to  
12 the public for use as a highway or public right-of-way; and provided  
13 further, that if the highway or public right-of-way was originally a  
14 federal land right-of-way, said highway or public right-of-way shall  
15 revert to a federal land right-of-way.

16 (j) The commissioners shall cause any order or resolution to be  
17 recorded in the county records and the official map of the highway sys-  
18 tem to be amended as affected by the abandonment and vacation.

19 (k) From any such decision, a resident or property holder within the  
20 county or highway district system, including the state of Idaho or any  
21 of its subdivisions or any agency of the federal government, may appeal  
22 to the district court of the county in which the highway or public right-  
23 of-way is located pursuant to section 40-208, Idaho Code.

24 (2) No highway or public right-of-way or parts thereof shall be aban-  
25 doned and vacated so as to leave any real property adjoining the highway  
26 or public right-of-way without access to an established highway or public  
27 right-of-way. The burden of proof shall be on the impacted property owner to  
28 establish this fact.

29 (3) In the event of abandonment and vacation, rights-of-way or ease-  
30 ments may shall be reserved for the continued use of existing sewer, gas,  
31 water, or similar pipelines and appurtenances, or other underground facil-  
32 ities as defined in section 55-2202, Idaho Code, for ditches or canals and  
33 appurtenances, and for electric, telephone and similar lines and appurte-  
34 nances.

35 ~~(4) A highway abandoned and vacated under the provisions of this sec-~~  
36 ~~tion may be reclassified as a public right-of-way.~~

37 ~~(5) Until abandonment is authorized by the commissioners, public use of~~  
38 ~~the highway or public right-of-way may not be restricted or impeded by en-~~  
39 ~~croachment or installation of any obstruction restricting public use, or by~~  
40 ~~the installation of signs or notices that might tend to restrict or prohibit~~  
41 ~~public use. Any person violating the provisions of this subsection shall be~~  
42 ~~guilty of a misdemeanor.~~

43 ~~(6) When a county or highway district desires the abandonment or vaca-~~  
44 ~~tion of any highway, public street or public right-of-way which was accepted~~  
45 ~~as part of a platted subdivision said abandonment or vacation shall be accom-~~  
46 ~~plished pursuant to the provisions of chapter 13, title 50, Idaho Code.~~

47 (5) In any proceeding under this section or section 40-203A, Idaho  
48 Code, or in any judicial proceeding determining the public status or width of  
49 a highway or public right-of-way, a highway or public right-of-way shall be  
50 deemed abandoned if the evidence shows:



1 (a) That said highway or public right-of-way was created solely by a  
2 particular type of common law dedication, to wit, a dedication based  
3 upon a plat or other document that was not recorded in the official  
4 records of an Idaho county;

5 (b) That said highway or public right-of-way is not located on land  
6 owned by the United States or the state of Idaho nor on land entirely  
7 surrounded by land owned by the United States or the state of Idaho nor  
8 does it provide the only means of access to such public lands; and

9 (c) (i) That said highway or public right-of-way has not been used by  
10 the public and has not been maintained at the expense of the public  
11 in at least three (3) years during the previous fifteen (15) years;

12 or

13 (ii) Said highway or right-of-way was never constructed and at  
14 least twenty (20) years have elapsed since the common law dedica-  
15 tion.

16 All other highways or public rights-of-way may be abandoned and vacated  
17 only upon a formal determination by the commissioners pursuant to this sec-  
18 tion that retaining the highway or public right-of-way for use by the pub-  
19 lic is not in the public interest, and such other highways or public rights-  
20 of-way may be validated or judicially determined at any time notwithstanding  
21 any other provision of law. Provided that any abandonment under this subsec-  
22 tion shall be subject to and limited by the provisions of subsections (2) and  
23 (3) of this section.

24 SECTION 5. That Section 40-208, Idaho Code, be, and the same is hereby  
25 amended to read as follows:

26 40-208. JUDICIAL REVIEW. (1) Any resident or property holder within  
27 the county or highway district system, including the state of Idaho or any of  
28 its subdivisions, or any agency of the federal government, who is aggrieved  
29 by a final decision of a board of county or highway district commissioners in  
30 an abandonment and vacation or validation proceeding is entitled to judicial  
31 review under the provisions of this section.

32 (2) Proceedings for review are instituted by filing a petition in the  
33 district court of the county in which the commissioners have jurisdiction  
34 over the highway or public ~~right-of-way~~ right-of-way within twenty-eight  
35 (28) days after the filing of the final decision of the commissioners or, if  
36 a rehearing is requested, within twenty-eight (28) days after the decision  
37 thereon.

38 (3) The filing of the petition does not itself stay enforcement of the  
39 commissioners' decision. The reviewing court may order a stay upon appro-  
40 priate terms.

41 (4) Within thirty (30) days after the service of the petition, or within  
42 further time allowed by the court, the commissioners shall transmit to the  
43 reviewing court the original, or a certified copy, of the entire record of  
44 the proceeding under review. By stipulation of all parties to the review  
45 proceedings, the record may be shortened. A party unreasonably refusing to  
46 stipulate to limit the record may be ordered by the court to pay for addi-  
47 tional costs. The court may require subsequent corrections to the record and  
48 may also require or permit additions to the record.



1 (5) ~~If, before the date set for hearing, application is made to the~~  
2 ~~court for leave to present additional information, and it is shown to the~~  
3 ~~satisfaction of the court that the additional information is material and~~  
4 ~~that there were good reasons for failure to present it in the proceeding~~  
5 ~~before the commissioners, The parties may present additional evidence to~~  
6 ~~the court, upon a showing to the court that such evidence is material to the~~  
7 ~~issues presented to the court. In such case, the court may order that the~~  
8 ~~additional information shall be presented to the commissioners upon condi-~~  
9 ~~tions determined by the court. The commissioners may modify their findings~~  
10 ~~and decisions by reason of the additional information and shall file that~~  
11 ~~information and any modifications, new findings, or decisions with the re-~~  
12 ~~viewing court.~~

13 (6) ~~The review shall be conducted by the court without a jury and shall~~  
14 ~~be confined to the record. The court shall consider the record before the~~  
15 ~~board of county or highway district commissioners and shall defer to the~~  
16 ~~board of county or highway district commissioners on matters in which such~~  
17 ~~board has appropriately exercised its discretion with respect to the evalu-~~  
18 ~~ation of the public interest. As to the determination of highway or public~~  
19 ~~right-of-way creation, width and abandonment, the court may accept new ev-~~  
20 ~~idence and testimony supplemental to the record provided by the county or~~  
21 ~~highway district, and the court shall consider those issues anew. In cases~~  
22 ~~of alleged irregularities in procedure before the commissioners, not shown~~  
23 ~~in the record, proof thereon may be taken in the court. The court, upon re-~~  
24 ~~quest, shall hear oral argument and receive written briefs.~~

25 (7) ~~The court shall not substitute its judgment for that of the com-~~  
26 ~~missioners as to the weight of the information on questions of fact. The~~  
27 ~~court may affirm the decision of the commissioners or remand the case for~~  
28 ~~further proceedings. The court may reverse or modify the decision if sub-~~  
29 ~~stantial rights of the appellant have been prejudiced because the commis-~~  
30 ~~sioners' findings, inferences, conclusions or decisions are:~~

- 31 ~~(a) In violation of constitutional or statutory provisions;~~  
32 ~~(b) In excess of the statutory authority of the commissioners;~~  
33 ~~(c) Made upon unlawful procedure;~~  
34 ~~(d) Affected by other error of law;~~  
35 ~~(e) Clearly erroneous in view of the reliable, probative and substan-~~  
36 ~~tial information on the whole record; or~~  
37 ~~(f) Arbitrary or capricious or characterized by abuse of discretion or~~  
38 ~~clearly unwarranted exercise of discretion~~

39 Any person other than a board of county or highway district commission-  
40 ers seeking a determination of the legal status or the width of a highway or  
41 public right-of-way shall first petition for the initiation of validation or  
42 abandonment proceedings, or both, as provided for in sections 40-203(1)(b)  
43 and 40-203A(1), Idaho Code. If the commissioners having jurisdiction over  
44 the highway system do not initiate a proceeding in response to such a peti-  
45 tion within thirty (30) days, the person may seek a determination by quiet  
46 title or other available judicial means. When the legal status or width of  
47 a highway or public right-of-way is disputed and where a board of county  
48 or highway district commissioners wishes to determine the legal status or  
49 width of a highway or public right-of-way, the commissioners shall initiate  
50 validation or abandonment proceedings, or both, as provided for in sec-

tions 40-203 and 40-203A, Idaho Code, rather than initiating an action for quiet title. If proceedings pursuant to the provisions of section 40-203 or 40-203A, Idaho Code, are initiated, those proceedings and any appeal or remand therefrom shall provide the exclusive basis for determining the status and width of the highway, and no court shall have jurisdiction to determine the status or width of said highway except by way of judicial review provided for in this section. Provided that nothing in this subsection shall preclude determination of the legal status or width of a public road in the course of an eminent domain proceeding, as provided for in chapter 7, title 7, Idaho Code.

SECTION 6. That Section 40-2312, Idaho Code, be, and the same is hereby amended to read as follows:

40-2312. WIDTH OF HIGHWAYS. (1) Where the width of a highway is stated in the plat, dedication, deed, easement, agreement, official road book, determination or other document or by an oral agreement supported by clear and convincing evidence that effectively conveys, creates, recognizes or modifies the highway or establishes the width, that width shall control.

(2) Where no width is established as provided for in subsection (1) of this section and where subsection (3) of this section is not applicable, such All highways, except bridges and those located within cities, shall be not less than fifty (50) feet wide, except those of a lesser width presently existing, and may be as wide as required for proper construction and maintenance in the discretion of the authority in charge of the construction and maintenance. Bridges located outside incorporated cities shall be the same width to and across the river, creek or stream as the highway leading to it.

(3) Highways that at the time of a validation or judicial proceeding are not located on land owned by the United States or the state of Idaho or on land entirely surrounded by land owned by the United States or the state of Idaho, and that have not received maintenance at the expense of the public in at least three (3) years during the previous fifteen (15) years, shall be declared to be of such width, and none greater, as is sufficient to accommodate:

(a) The existing physical road surface;

(b) Existing uses of the highway;

(c) Existing features included within the definition of highways in section 40-109(5), Idaho Code;

(d) Such space for existing utilities as has historically been required for ongoing maintenance, replacement and upgrade of such utilities; and

(e) Space reasonably required for maintenance, motorist and pedestrian safety, necessary to maintain existing uses of the highway.

(4) Nothing in this section shall diminish or otherwise limit the authority and rights of irrigation districts, canal companies or other such entities as provided in chapters 11 and 12, title 42, Idaho Code.

(5) Nothing in this section shall diminish or otherwise limit any right of eminent domain as set forth in chapter 7, title 7, Idaho Code.

SECTION 7. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval.

## STATEMENT OF PURPOSE

### RS22299

The purpose of this legislation is to address several issues arising from the testimony and discussion before the Senate Transportation Committee during the 2012 Legislative Session relating to House Bill 628a. On March 27, 2012, the Senate Transportation Committee formed an Interim Task Force encompassing members of the Idaho Senate and House of Representatives to further study these issues. On October 1, 2012, the Right-of-Way Task Force convened and accepted extensive testimony from several stakeholders and the public. The proposed legislation amends several statutory provisions to address the issues raised with the Interim Task Force and also represents a collaborative resolution of the stakeholder's interests. This legislation protects private property rights and ensures adequate public rights-of-way for transportation and utility facilities. It is the intent of the Legislature that this bill shall apply to any and all existing and future highways and public rights-of-way and includes an emergency clause due to the year delay in legislation and the immediate need to provide clarity regarding the status or abandonment of highways and public rights-of-way.

### FISCAL NOTE

There is no impact to the general fund.

#### Contact:

Representative Thomas F. Loertscher  
(208) 332-1183

Statement of Purpose / Fiscal Note

H0321

**LEGISLATURE OF THE STATE OF IDAHO**  
**Sixty-second Legislature** **First Regular Session - 2013**

**Legislative Co-sponsors**

**RS22299**

Senator Bert Brackets

Representative Thomas Loertscher

**H 321**



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## HOUSE BILL 321

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[Legislative Co-sponsors](#)

H0321.....by WAYS AND MEANS COMMITTEE

HIGHWAYS - Amends existing law relating to highways to revise provisions relating to a certain map, to establish provisions relating to designating a new highway or public rights-of-way on the official map, to establish provisions relating to notice and to establish provisions relating to the purposes of an official map; to remove language relating to a highway abandoned and vacated and that public use of a certain highway or public right-of-way may not be restricted; and to establish provisions relating to actions where certain highways or public rights-of-way may be abandoned and vacated only upon a formal determination.

03/19 Introduced, read first time, referred to JRA for Printing

Reported Printed and Referred to Transportation & Defense

03/25 Reported out of Committee with Do Pass Recommendation,  
Filed for Second Reading

03/26 Rules Suspended: Ayes 64 Nays 0 Abs/Excd 6, read three times -

**PASSED - 58-11-1**

**AYES** -- Anderson(01), Anderson(31), Anderst, Andrus, Bateman, Batt, Bell, Bolz, Boyle, Burgoyne, Chew, Clow, Collins, Crane, Dayley, DeMordaunt, Denney, Erpelding, Eskridge, Gannon, Gibbs, Hancey, Hartgen, Henderson, Hixon, Holtzclaw, Kauffman, King, Kloc, Loertscher, Luker, Malek, Melline, Monks, Morse, Moyle, Nielsen, Packer, Patterson, Pence, Perry, Raybould, Ringo, Romrell, Rusche, Sims, Smith, Stevenson, Thompson, Trujillo, VanOrden, Vander Woude, Ward-Engelking, Wills, Wood(27), Woodings, Youngblood, Mr. Speaker

**NAYS** -- Agidius, Barbieri, Barrett, Gestrin, Harris, Horman, McMillan, Mendive, Miller, Shepherd, Wood(35)

**Absent and excused** -- Palmer

**Floor Sponsor - Loertscher**

Title apvd - to Senate

Received from the House passed; filed for first reading

Introduced, read first time; referred to: Transportation

Reported out of Committee with Do Pass Recommendation; Filed for second reading

03/27 Read second time; filed for Third Reading

03/28 Read third time in full - **PASSED - 33-0-2**

**AYES** -- Bair, Bayer, Bock, Brackett, Buckner-Webb, Cameron, Davis, Durst, Fulcher, Goedde, Guthrie, Helder, Hill, Keough, Lacey, Lakey, Lodge, Martin, McKenzie, Mortimer, Nonini, Nuxoll, Patrick, Pearce, Rice, Schmidt, Siddoway, Stennett, Thayne, Tippets, Vick, Werk, Winder

**NAYS** -- None

**Absent and excused** -- Hagedorn, Johnson

**Floor Sponsor - Brackett**

Title apvd - to House

03/29 Returned from Senate Passed; to JRA for Enrolling

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## APPENDIX C: DEPARTMENT OF THE INTERIOR GUIDANCE ON R.S. 2477 ROADS



THE SECRETARY OF THE INTERIOR WASHINGTON

WASHINGTON

MAR 22 2006

### Memorandum

To: Assistant Secretary, Land and Minerals Management  
Assistant Secretary, Fish, Wildlife and Parks  
Assistant Secretary, Indian Affairs  
Assistant Secretary Water and Science

From: Secretary /s/

Subject: Departmental Implementation of *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735 (10th Cir. 2005); Revocation of January 22, 1997, Interim Policy; Revocation of December 7, 1988, Policy

The decision by the United States Court of Appeals for the Tenth Circuit in *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735 (10th Cir. 2005) (hereinafter *SUWA v. BLM*), necessitates that the Department of the Interior revisit its existing policies interpreting and implementing the statute commonly known as “R.S. 2477.” See Act of July 26, 1866, ch. 262, § 8. 14 Stat. 251, 253, codified in 1873 as section 2477 of the Revised Statutes, recodified in 1938 as 43 U.S.C. § 932. R.S. 2477 provided in its entirety:

*And be it further enacted*, That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

In 1976, R.S. 2477 was repealed by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 *et seq.*, Pub. L. No. 94-579 § 706(a), 90 Stat. 2743. FLPMA did not, however, terminate valid rights of way that had been established under R.S. 2477 prior to its repeal. Instead, Congress specified that any valid R.S. 2477 rights of way existing as of the date FLPMA was approved, October 21, 1976, would continue in effect. This has led to a number of difficult administrative problems and extensive litigation, culminating in the *SUWA v. BLM* decision.

In light of that decision, I have concluded that the interim departmental policy on R.S. 2477, which was issued in 1997, must be revised. Accordingly, this memorandum revokes the interim policy and directs affected Interior agencies to issue, as necessary, revised instructions or guidance consistent with the *SUWA v. BLM* decision and this memorandum.

The purpose of this document is to clarify how the Department will carry out its obligations following *SUWA v. BLM*. As neither this document nor the guidance contemplated herein will be a final rule or regulation, they need not be published in the Code of Federal Regulations, and they

Attachment 1, p. 1

do not impose binding rights or obligations on the agency or private parties. They are statements of policy, not codifications of binding rules. See *The Wilderness Soc'y v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006). Therefore, neither is inconsistent with Congress's direction in Pub. L. No. 104-208.

## **I. Background**

Although R.S. 2477 was repealed nearly 30 years ago, controversies continue to arise about the existence and scope of the rights of way it granted. R.S. 2477 has been subject to inconsistent judicial and administrative interpretations throughout its history. Because R.S. 2477 did not require that the rights of way be recorded or otherwise documented, it is often difficult for Federal land managers, State, local, and tribal governments, and public land users to know which right of way claims are valid, where they are located, and how they may be used.

### **A. 1988 Hodel Policy**

On December 7, 1988, Secretary Hodel signed a memorandum that discussed his policy for the administrative recognition of asserted R.S. 2477 rights of way. The policy defined the key terms in the statute: "construction," "highway," and "public lands, not reserved for public uses." Secretary Hodel noted that "under R.S. 2477, the United States had (has) no duty or authority to adjudicate an assertion or application." Nevertheless, he determined that "it is necessary in the proper management of Federal lands to be able to recognize with some certainty the existence, or lack thereof, of public highway grants obtained under R.S. 2477." He thus directed Interior land managing agencies to develop internal procedures for administratively recognizing those highways, consistent with the criteria established in his policy and for recording such highways on the land status records for the area managed by that agency

### **B. 1997 Babbitt Policy**

On January 22, 1997, Secretary Babbitt revoked the Hodel policy and established an "Interim Departmental Policy on Revised Statute 2477 Grant of Right-of-Way for Public Highways; Revocation of December 7, 1988 Policy." Secretary Babbitt clarified this interim policy in a memorandum of February 20, 1997. Following Congress's prohibiting the Department from issuing a final rule or regulation regarding the adjudication of R.S. 2477 claims in Pub. L. No. 104-208, the Babbitt policy directed that R.S. 2477 determinations be postponed unless the claimant demonstrated an immediate and compelling need for a determination. Where such a need was demonstrated, the policy provided a claim-handling process. The Babbitt policy redefined some of the key elements of R.S. 2477 and directed Interior agencies to "apply state law in effect on October 21, 1976, to the extent that it is consistent with federal law." Since issuance of the Babbitt policy in 1997, few administrative determinations have been completed.

Attachment 1, p. 2

## ***II. Southern Utah Wilderness Alliance v. Bureau of Land Management***

*SUWA v. BLM* involved numerous allegations that the grading and expansion of 16 routes on Bureau of Land Management (BLM) lands by three counties in southern Utah constituted trespass. The counties asserted that although their activities had not been authorized by the BLM, they were legal because they were conducted on valid R.S. 2477 rights of way. The Tenth Circuit made several important rulings.

First, the court addressed the BLM's trespass claims against the counties, and held that “when the holder of an R.S. 2477 right of way across federal land proposes to undertake any improvements in the road along its right of way, beyond mere maintenance, it must advise the federal land management agency of that work in advance.” This notice is necessary to “afford” the agency a fair opportunity to carry out its own duties to determine whether the proposed improvement is reasonable and necessary in light of the traditional uses of the rights of way as of October 21, 1976, to study potential effects, and if appropriate, to formulate alternatives that serve to protect the lands.”

Next, the court found that the BLM lacks the authority to make binding determinations on the validity of R.S. 2477 rights of way. The court emphasized, however, that its ruling “does not mean that the BLM is forbidden from determining the validity of R.S. 2477 rights of way for its own purposes. The BLM has always had this authority.”

The court then held “that federal law governs the interpretation of R.S. 2477, but that in determining what is required for acceptance of a right of way under the statute, federal law ‘borrows’ from long-established principles of state law, to the extent that state law provides convenient and appropriate principles for effectuating congressional intent.”

Finally, the court stated that (1) the burden of proving the existence of an R.S. 2477 right of way in court lies on the claimant; (2) continuous use over a specified period of time would establish an R.S. 2477 right of way in most Western States; (3) mechanical construction generally is not required; (4) whether a route connected identifiable destinations is relevant, but not determinative, to whether it is a valid R.S. 2477 right of way; and, (5) that a 1910 coal withdrawal was not a reservation for public use under R.S. 2477.

Thus, while the Department may make non-binding, administrative determinations for its own land-use planning and management purposes, it cannot create a single national standard governing the validity of all R.S. 2477 claims, but instead must look to the particular laws of each State in which a claimed right of way is situated.

Attachment 1, p.3



### III. Actions

These holdings effectively require the Department to alter its current administration of R.S. 2477. Though *SUWA v. BLM* is a Tenth Circuit decision, its analysis and holdings are comprehensive and persuasive, and do not appear to conflict with any other circuit's decisions. The Department therefore should apply its principles nationwide, keeping in mind that one of the most important of those principles is that State law generally must be used to assess R.S. 2477 claims. Accordingly, this memorandum:

- (1) revokes the Interim Departmental Policy on Revised Statute 2477, signed by Secretary Babbitt on January 22, 1997, and clarified on February 20, 1997;
- (2) confirms that the departmental policy signed by Secretary Hodel on December 7, 1988, and revoked by Secretary Babbitt in 1997, remains revoked;
- (3) directs the Department to coordinate the termination of the Memorandum of Understanding between the Department and the State of Utah dated April 9, 2003, recognizing that it is inoperative in light of the Tenth Circuit's decision in *SUWA v. BLM* and the revocation of the 1997 Interim Departmental Policy;
- (4) confirms the Department's recognition of the Tenth Circuit's ruling that communication and cooperation between holders or claimants of R.S. 2477 rights of way and land managers, rather than unilateral action, are necessary for the proper administration of Federal lands;
- (5) directs affected Interior bureaus to revise any existing guidance or policies on R.S. 2477 consistent with the legal principles established in *SUWA v. BLM* and this memorandum and its attached guidelines;
- (6) directs all Interior bureaus to ensure that their administration of claimed and recognized rights of way upholds the Department's right and obligation to protect the underlying and surrounding Federal lands it manages, paying particular attention to the effects of right of way use in sensitive areas, such as units of the National Park System, units of the National Wildlife Refuge System, and congressionally-designated wilderness or wilderness study areas; and,
- (7) directs all Interior bureaus to develop safeguards to ensure that their implementation of these principles does not infringe on the rights of private landowners or Indian tribes whose land may be crossed or abutted by claimed rights of way.

Attachment 1, p. 4

Administering R.S. 2477 implicates the sometimes-conflicting interests of citizen advocacy groups, private property owners, tribal, State, and local governments, and the Federal Government. But as the court said in *SUWA v. BLM*, “Both levels of government have responsibility and a deep commitment to, the common good, which is better served by communication and cooperation than by unilateral action.” Department of the Interior bureaus therefore should ensure that their administration of R.S. 2477 encourages conservation through consultation, communication, and cooperation with tribes, States, counties, private landowners, and interested citizens.

Attachment

cc: Deputy Secretary

Attachment 1, p. 5

## **ATTACHMENT – Guidelines for Implementation of *SUWA v. BLM* Principles**

Department land managers (and right of way claimants) should recognize that there are a number of options available for addressing claimed rights of way that may be preferable to administrative R.S. 2477 determinations. Title V of FLPMA or other right of way authorities, recordable disclaimers, and the Quiet Title Act each may offer more certainty to bureaus and to claimants. Where the land managing bureau and a claimant wish only to maintain the existing *status quo*, an agreement such as the BLM's road maintenance agreements (RMAs) or similar tools of other bureaus may be useful. Finally, bureaus in some circumstances may need to make informal, nonbinding administrative validity determinations (NBDs). Bureaus confronted with right of way issues should use this guidance, along with the decision in *SUWA v. BLM*, to decide when and how to use each of these tools.

The Tenth Circuit's decision does not affect FLPMA Title V or other similar authorities that allow bureaus to grant rights of way irrespective of R.S. 2477. Title V, for example, allows the BLM, in appropriate circumstances, to grant rights of way for, among other things, "roads, trails, highways. . . , or other means of transportation." 43 U.S.C. § 1761 (a). If a route or proposed improvement to a route has an unclear R.S. 2477 status, but the land manager and county or other claimant agree on the need for the route or improvement, one of these types of right of way might best serve the needs of all involved.

Recordable disclaimers, which are authorized by FLPMA § 315, 43 U.S.C. § 1745, and discussed in detail in 43 CFR § 1864, likewise remain available to settle questions regarding the United States' interest in rights of way. Such disclaimers have the same effect as a quitclaim deed, estopping the United States from asserting a claim to the interest that is disclaimed.

As the *SUWA v. BLM* court noted, ultimately deciding who holds legal title to an interest in real property, including an R.S. 2477 right of way, "is a judicial, not an executive, function." 425 F.3d at 752. Thus, if a claimant seeks a definitive, binding determination of its R.S. 2477 rights, it must file a claim under the Quiet Title Act, 28 U.S.C. § 2409a.

Where a county seeks only to preserve the status quo on a road, determining its ownership may not be necessary. Instead, the bureau should consult with the claimant about entering into an agreement that allows for the upkeep of the status quo by routine maintenance. The BLM has used RMAs for this purpose for many years. Other bureaus should consider whether such agreements or a similar tool may offer similar benefits for them. Such agreements would not make any determination regarding the validity of any R.S. 2477 claims, and would not affect the legal right of either party to assert or contest such a claim. A land manager should only agree to include a road in a RMA if preservation of the status quo through routine maintenance is consistent with the land manager's obligation to protect the surrounding and underlying Federal lands. RMAs should not be finalized until the public has received notice and had an opportunity to comment on the roads to be covered and the maintenance levels to be permitted. In cases where none of these other tools is appropriate, a bureau may need to make an NBD for its own planning purposes or to address proposals for road use. Because NBDs create no binding

legal rights, bureaus should keep the process as simple and straightforward as possible. If a bureau must make an NBD, it should seek relevant information from the claimant, internal resources, and the public. If the proposed route crosses or abuts private land or land managed by another government agency, the bureau should ensure that the private landowner or other agency is notified and has an opportunity to comment. Once a preliminary determination is made, the public should be given notice and an opportunity to comment. Because the relevant legal rules that must be applied may vary from State to State, however, bureaus should work with the Office of the Solicitor to analyze the applicable rules before finalizing any NBDs.

Once it has gathered this information, the bureau should decide “on a preponderance of the evidence standard” if it supports the existence of a right of way under State law in effect prior to the repeal of R.S. 2477. See *SUWA v. BLM* at 750. If a bureau makes a positive NBD that an R.S. 2477 right of way may exist, it should provide the holder with written notice of the NBD and incorporate the NBD in all relevant planning processes and documents. It should also consider entering into an RMA with the holder to cover routine maintenance of the route.

If a right of way does exist, or if a route is covered by an RMA or comparable agreement, the bureau should keep in mind that the Federal Government still retains its right and obligation to reasonably regulate for the protection of the underlying and surrounding Federal lands. As the *SUWA v. BLM* court indicated, regulation should be done so as to minimize interference with the rights of the public to use the route consistent with the R.S. 2477 grant.

Bureaus should ensure that their use of these tools and their other instructions and guidance are consistent with the criteria set out by the Tenth Circuit in *SUWA v. BLM* on the validity and scope of R.S. 2477 claims. A determination of whether a claimed route or use of a route is within the valid scope of an R.S. 2477 right of way often turns on questions of State law, but certain principles can be identified. A discussion of those criteria follows.

## 1. *Determining the Validity of R.S. 2477 Claims*

### a. Public Highway

R.S. 2477 rights of way must be “public highways.” What constitutes a “public highway” will again generally be determined by looking to State law regarding public easements, but in general, a public highway is a definitive route or way that is freely open for all to use. See *SUWA v. BLM*, 425 F.3d at 765, 782-83. It need not necessarily be open to vehicular traffic. *Id.* Multiple ways through a general area may not qualify as a definitive route, though evidence may show that one or more of the ways qualifies as a highway depending on climate, topography, historic use, and other factors. See *id.* at 767. The route need not lead to an identifiable destination, although that may be one factor to consider in assessing whether the route is in fact a public highway. See *id.* at 783.

#### b. Public Lands Not Reserved for Public Uses

R.S. 2477 limited its reach to “public lands, not reserved for public uses.” For purposes of R.S. 2477, public lands are those lands that are open to the operation of the various public land laws enacted by Congress. Lands were “reserved for public use” only when they were both “withdraw[n] from the operation of the public land laws, [and] also dedicate[d] to a particular public use.” *SUWA v. BLM*, 425 F.3d at 784. Therefore, public land that was “withdrawn” but not reserved for any particular use remained subject to R.S. 2477. Land that was temporarily withdrawn from only certain kinds of private appropriation for study or later classification cannot be said to have been “reserved for public use.” Nor was any land that remained open to settlement, sale, or entry under certain public land laws exempt from operation of R.S. 2477.

The *SUWA v. BLM* court recognized the need to examine the text of the specific withdrawal or reservation in question, but in general lands set aside for “specific public uses; such as parks, military posts, Indian lands, etc.” are “reserved for public uses.” *Id.* (quoting Black’s Law Dictionary 1031 (1st ed. 1891)). No R.S. 2477 rights of way could be established on such reserved lands after the date of the reservation. While such a reservation would not extinguish any R.S. 2477 rights of way established prior to the date of the reservation, bureaus should carefully consider the question of abandonment (discussed below) on such lands.

#### c. Acceptance

As the *SUWA v. BLM* court held, “the establishment of a public right of way require[s] two steps: the landowner’s objectively manifested intent to dedicate property to the public use as a right of way, and acceptance by the public.” 425 F.3d at 769. R.S. 2477 has always been interpreted as “an express dedication of the right of way by the landowner, the United States.” *Id.* Therefore, the difficult question is “whether any particular disputed route ha[s] been ‘accepted’ by the public before the land had been transferred to private ownership or otherwise reserved.” *Id.* at 770.

This presents difficulties on two levels. First, as the court ruled, “in determining what is required for acceptance of a right of way under the statute, federal law ‘borrows’ from long-established principles of state law, to the extent that state law provides convenient and appropriate principles for effectuating congressional intent.” *Id.* at 768. Thus, the Department cannot create a national standard for deciding whether a right of way was validly created, but must look to the law of each State where a claim arises.

The second difficulty is in the type of evidence that is required to demonstrate that a right of way was established prior to the earlier repeal of R.S. 2477 or the reservation of the land for public use. Though the appropriate factors to consider will vary depending on the location of the claim, and land managers should work with regional and field solicitors’ offices to identify the relevant legal criteria in each State, the following will be common considerations (all of which are discussed in *SUWA v. BLM*):

- In most, but not all, Western States, acceptance requires no local governmental or official act, but can be manifested by continuous public use over a specified period of time;
- Affirmative acts of acceptance by a local government authority are nevertheless appropriate to consider. For example, the inclusion of a highway in a State, county, or other local road system is strong evidence of acceptance, as is the expenditure of money for construction or maintenance. In some States, official action may even be determinative. These facts may also be helpful in determining whether the claimed right of way was public in nature;
- Mechanical construction is not a necessary condition for finding a valid R.S. 2477 right of way, but it is evidence of the existence and scope of the public use that defined the right of way. In the words of the *SUWA v. BLM* court, “Congress did not require mechanical construction where no construction was needed.” 425 F.3d at 781. The “construction” required by the language of the statute “would be the construction necessary to enable the general public to use the route for its intended purposes;” *Id.*
- While State law generally controls the existence and scope of an R.S. 2477 right of way, it cannot “override federal requirements or undermine federal land policy” behind R.S.2477. *Id.* at 766. Thus, long-standing Department interpretation has refused to recognize State laws that purport to create rights of way on section lines or otherwise accept R.S. 2477 rights of way “in advance of an apparent necessity therefore, or on the mere suggestion that at some future time such roads may be needed.” *Douglas County, Washington*. 26 *Pub. Lands Dec.* 446,447 (1898).

#### d. Abandonment

Although the *SUWA v. BLM* court did not address the issue of abandonment, its holding that State law generally controls the validity and scope of R.S. 2477 claims means that any argument that an R.S. 2477 right of way was abandoned, including by relinquishment by proper authority, also should be analyzed using appropriate State law in effect at the time of the abandonment.

### 2. *Determining the Scope of R.S. 2477 Rights of Way*

While a right of way is a property right, the *SUWA v. BLM* court clarified that it “is not tantamount to fee simple ownership of a defined parcel of territory. Rather, it is an entitlement to use certain land in a particular way.” 425 F.3d at 747. Thus, “the scope of an R.S. 2477 right of way is limited by the established usage of the route as of the date of repeal of the statute.” *Id.* at 746. State laws that purport to expand the width and uses permitted on any right of way are subject to this principle of Federal law.

As the Tenth Circuit stated, however, this does not mean “that the road ha[s] to be maintained in precisely the same condition it was in on October 21, 1976; rather, it [can] be improved as necessary to meet the exigencies of increased travel, so long as this [is] done in the light of traditional uses to which the right of way was put as of repeal of the statute in 1976.” *Id.*

### *Use, Maintenance, and Improvements of Rights of Way*

As both the Tenth and the Ninth Circuits recently have recognized, land managers may take reasonable steps to ensure that the use of roads within Federal land does not violate the Federal landowners' duty to protect the surrounding and underlying lands, even if the roads are valid rights of way. See *SUWA v. BLM*, 425 F.3d at 747; *Hale v. Norton*, No. 03-36032 (9th Cir. Feb. 9, 2006). Moreover, agency review and approval for other than routine maintenance is required under the analysis in *SUWA v. BLM*. This derives from the legal premise that "the easement holder must exercise its rights so as not to interfere unreasonably with the rights of the owner of the servient estate." *SUWA v. BLM*, 425 F.3d at 747. The Federal owner of that estate, however, "may not use its authority, either by delay or unreasonable disapproval, to impair the rights of the holder of the R.S. 2477 right of way." *Id.* at 748.

There are three main categories into which post-determination activities on rights of way may be placed. The principles discussed above and in *SUWA v. BLM* apply to each of the following situations differently, but the same basic principles of coordination and communication should guide land managers.

#### 1. Non-traditional use

R.S. 2477 does not give either the holder of a right of way or the Department authority to expand the scope of a right of way beyond the established right of way as of the date of repeal of the statute or reservation for public use of the lands. That the activity may take place within the physical boundaries of the traditional right of way is not relevant if the proposed use is not of a type for which the right of way was established. As discussed above, this does not mean "that the road had to be maintained in precisely the same condition it was in on October 21, 1976; rather, it could be improved as necessary to meet the exigencies of increased travel, so long as this was done in the light of traditional uses to which the right of way was put as of repeal of the statute in 1976." *Id.* at 746. Any uses that go beyond those occurring on October 21, 1976, or an earlier date of reservation must be authorized under another provision of law, such as Title V of FLPMA.

#### 2. Traditional use, routine maintenance

The holder of an R.S. 2477 right of way across Federal land who wishes simply to conduct routine maintenance or to use the right of way in the same manner as it was used on October 21, 1976, or an earlier date of reservation may do so without consultation with the Department. It may nevertheless be in the best interests of both the right of way holder and the land manager to recognize these rights in an RMA or comparable agreement in which the parties may also elect to apply similar processes for consultation.

### 3. Traditional use, change in character

The holder of an established R.S. 2477 right of way, though still using the route for the traditional uses to which it was put as of the earlier repeal of R.S. 2477 or the reservation of the land, may find it necessary to improve or change the character of the route in some way “to meet the exigencies of increased travel.” *Id.* at 746. The Tenth Circuit held that so long as such improvements are “needed to accommodate traditional uses,” they are not outside the scope of the right of way, and are therefore permissible. *Id.* at 748.

Nonetheless, “[j]ust because a proposed change falls within the scope of a right of way does not mean that it can be undertaken unilaterally.” *Id.* It is well established that “changes in roads on R.S. 2477 rights of way across federal lands are subject to regulation by the relevant federal land management agencies.” *Id.* at 746. Therefore, “[e]ven legitimate changes in the character of the roadway require consultation when those changes go beyond routine maintenance.” *Id.* at 748.

When determining whether a proposed activity is “routine maintenance” or “construction of improvements,” bureaus should be guided by the *SUWA v. BLM* decision, which emphasizes that routine maintenance only “preserves the status quo” while construction, by contrast, involves improving or changing the nature of the road.<sup>1</sup>

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<sup>1</sup> The *SUWA v. BLM* court’s extensive discussion is quoted below in its entirety:

In drawing the line between routine maintenance, which does not require consultation with the BLM, and construction of improvements, which does, we endorse the definition crafted by the district court in [*United States v. Garfield County*, 122 F. Supp. 2d 1201 (D. Utah 2000)]:

Defined in terms of the nature of the work, “construction” for purposes of 36 C.F.R. § 5.7 includes the widening of the road, the horizontal or vertical realignment of the road, the installation (as distinguished from cleaning, repair, or replacement in kind) of bridges, culverts and other drainage structures, as well as any significant change in the surface composition of the road (*e.g.*, going from dirt to gravel, from gravel to chipseal, from chipseal to asphalt, etc.), or any “improvement,” “betterment,” or any other change in the nature of the road that may significantly impact Park lands, resources, or values. “Maintenance” preserves the existing road, including the physical upkeep or repair of wear or damage whether from natural or other causes, maintaining the shape of the road, grading it, making sure that the shape of the road permits drainage [and] keeping drainage features open and operable—essentially preserving the status quo.

122 F. Supp. 2d at 1253 (footnote omitted). Under this definition, grading or blading a road for the first time would constitute “construction” and would require advance consultation, though grading or blading a road to preserve the character of the road in accordance with prior practice would not. Although drawn as an interpretation of 36 C.F.R. § 5.7, which applies within national parks, the district court noted that: “This construction comports with the commonly understood meanings of the words, the pertinent statutes, agency interpretations, and the past experience of the parties on the Capitol Reef segment, including the experience leading up to February 13, 1996.” *Id.* We therefore find it applicable to distinguishing between routine maintenance and actual improvement of R.S. 2477 claims across Federal lands more generally.

Drawing the line between maintenance and construction based on “preserving the status quo” promotes the congressional policy of “freezing” R.S. 2477 rights of way as of the uses established as of October 21, 1976. [*Sierra Club v. Hodel*, 848 F.2d 1061, 1081 (10th Cir. 1988)]. It protects existing uses without interfering unduly with Federal land management and protection. As long as the Counties act within the



The Tenth Circuit therefore clarified that the holder of an R.S. 2477 right of way across Federal land who proposes to undertake any improvements beyond mere maintenance on its right of way

must advise the Federal land management agency of that work in advance, affording the agency a fair opportunity to carry out its own duties to determine whether the proposed improvement is reasonable and necessary in light of the traditional uses of the rights of way as of October 21, 1976, to study potential effects, and if appropriate, to formulate alternatives that serve to protect the lands. . *Id.* at 748.

When a right of way holder approaches an agency with a plan to improve the existing condition of an R.S. 2477 road, the “initial determination of whether the construction work falls within the scope of an established right of way is to be made by the federal land management agency.” *Id.*

The agency should also work with the holder to ensure that the improvements are “reasonable and necessary,” as determined by State law, in light of the traditional uses to which the right of way was put. Moreover, the Department still must meet its obligation to reasonably regulate the underlying and surrounding Federal lands. This means that if an improvement is proposed, the agency should “study potential effects, and if appropriate, [] formulate alternatives that serve to protect the lands.” *Id.*

The agency “has an obligation to render its decision in a timely and expeditious manner.” *Id.* It “may not use its authority, either by delay or unreasonable disapproval, to impair the rights of the holder of the R.S. 2477 right of way. In the event of disagreement, the parties may resort to the courts.” *Id.* It has long been established that the Quiet Title Act is the exclusive remedy against the United States for finally resolving such disputes of title.

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existing scope of their rights of way, performing maintenance and repair that preserves the existing state of the road, they have no legal obligation to consult with the BLM (though notice of what they are doing might well avoid misunderstanding or friction). If changes are contemplated, it is necessary to consult, and the failure to do so will provide a basis for prompt injunctive relief. “Bulldoze first, talk later” is not a recipe for constructive intergovernmental relations or intelligent land management

*SUWA v. BLM*, 425 FJd at 748-49.

Attachment 1, p. 12

## APPENDIX D: ABOUT THE AUTHOR

### CHRISTOPHER H. MEYER



Chris Meyer is a partner at Givens Pursley LLP. For over three decades, Chris has been a leader in the fields of water law, planning and zoning law, constitutional law, and road and public access law. He has extensive litigation experience at the administrative, district court and appellate levels (including 21 Idaho Supreme Court cases). *Best Lawyers in America* has named him “Lawyer of the Year” seven times in the fields of land use, water, and natural resources. Super Lawyers placed Chris in the “Top 100 Lawyers” list for the Mountain West. Chris has played a significant role in shaping legislation and is described in the *Idaho Yearbook Directory* as “centrally located in the world of Idaho public affairs” and “a key figure in Idaho water law.” He serves on the Board of Advisors to the National Judicial College’s “Dividing the Waters” water law program for judges. For two decades, he served as President of the Idaho

Environmental Forum. His clients include cities, counties, highway districts, municipal water providers, Fortune Ten companies, energy companies, food producers, mining companies, and land developers. Before joining Givens Pursley in 1991, Chris practiced natural resources law with the National Wildlife Federation in Washington, D.C. and later taught water law and negotiation at the University of Colorado Law School’s environmental law clinic. Chris earned his law degree, cum laude, from the University of Michigan in 1981. He earned is A.B. degree from the same school with high honors in economics, Phi Beta Kappa, James B. Angell Scholar, and Osterweil Prize in Economics.

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#### LEGAL EMPLOYMENT

##### **GIVENS PURSLEY LLP, Boise, Idaho.**

Partner. August 1991 to present.

##### **UNIVERSITY OF COLORADO LAW SCHOOL, Boulder, Colorado.**

Associate Professor Adjoint. August 1984 to July 1991. Held this teaching position while serving as counsel to NWF Natural Resources Clinic. Taught seminars in advanced water law, environmental law, and negotiation.

##### **NATIONAL WILDLIFE FEDERATION, Washington, D.C.**

Counsel. May 1981 to July 1984.

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#### PROFESSIONAL RECOGNITION

Best Lawyers in America  
([www.bestlawyers.com](http://www.bestlawyers.com))

Listed since 2007 in four categories: water law, land use & zoning law, natural resources, and environmental law.

Named “Lawyer of the Year” in Boise, Idaho seven times in the last decade:

- 2019 – top natural resources lawyer
- 2018 – top land use and zoning lawyer
- 2017 – top water lawyer

- 2015 – top land use and zoning lawyer
- 2014 – top natural resources lawyer
- 2013 – top environmental lawyer
- 2011 – top natural resources lawyer

#### Mountain States Super Lawyers

([www.superlawyers.com](http://www.superlawyers.com))

Listed since 2007 for energy and natural resources law. Named to “Top 100 Lawyers” in the Mountain West in 2019.

#### Chambers USA

([www.chambersandpartners.com/guide/usa/5](http://www.chambersandpartners.com/guide/usa/5))

Listed since 2008 in Band 1 (highest ranking) for natural resources and environmental law.

#### Who’s Who Legal - Environment

([www.whoswholegal.com](http://www.whoswholegal.com))

One of only 11 environmental / natural resources lawyers recognized in Idaho.

Listed since 2010.

#### Litigation Counsel of America

([www.litcounsel.org](http://www.litcounsel.org))

Inducted in 2010 as fellow in honorary society composed of less than one-half of one percent of American lawyers.

#### Marquis’ Who’s Who in the World, Who’s Who in America, and Who’s Who in American Law

([www.marquiswhoswho.com](http://www.marquiswhoswho.com))

#### Martindale-Hubbell

([www.martindale.com](http://www.martindale.com))

Listed since 1996 with highest ranking (AV).

#### Idaho Yearbook Directory (2001)

([www.ridenbaugh.com/catalog.htm](http://www.ridenbaugh.com/catalog.htm))

Described as a “key figure in Idaho water law” and “centrally located in the world of Idaho public affairs.”

Listed among top 100 most influential Idahoans.

#### Dividing the Waters, the National Judicial College, a water law training program for judges.

Serves on the Board of Advisors.

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### EDUCATION

#### University of Michigan, School of Law

Juris Doctor, 1981

- cum laude

#### University of Michigan

Degree in economics, 1977

- High distinction (magna cum laude)
- Phi Beta Kappa
- James B. Angell Scholar
- Honors program in economics, class honors
- Osterweil Prize in Economics

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## LITIGATION

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- Nemeth v. Shoshone County*, Idaho Supreme Court Docket No. 46118-2018 (exclusivity of federal quiet title act in Idaho road matters).
- N. Idaho Bldg. Contractors Ass'n v. City of Hayden*, 164 Idaho 530, 432 P.3d 976 (2018) (Bevan, J.) (constitutionality of sewer capitalization fees).
- Black Canyon Irrigation Dist. v. State*, 163 Idaho 144, 408 P.3d 899 (2018) (Burdick, C.J.) (defending district court's rejection of late claims for refill water).
- United States v. Black Canyon Irrigation Dist.*, 163 Idaho 54, 408 P.3d 52 (2017) (Burdick, C.J.) (defending district court's rejection of late claims for refill water).
- Greater Boise Auditorium Dist. v. Frazier*, 159 Idaho 266, 360 P.3d 275 (2015) (W. Jones, J.; Eismann, J., concurring) (defended district in constitutional challenge to government financing).
- In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63*, Idaho Department of Water Resources (Oct. 15, 2015) (Spackman, Director) (water rights).
- N. Idaho Bldg. Contractors Ass'n v. City of Hayden*, 158 Idaho 79, 343 P.3d 1086 (2015) (Eismann, J.; J. Jones, J., concurring) (constitutionality of sewer capitalization fees).
- Washington County v. Bilbao*, Case No. CV-2014-1854 (Idaho, Third Judicial Dist., Dec. 8, 2014) (successfully represented Washington County in public access litigation).
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- Buckskin Properties, Inc. v. Valley County*, 154 Idaho 486, 300 P.3d 18 (2013) (J. Jones, J.) (defended county in constitutional challenge to development impact fees).
- Idaho Conservation League v. U.S. Forest Service*, 2012 WL 3758161 (Aug. 29, 2012) (Lodge, J.) (NEPA and forest management litigation involving mining exploration).
- Sopatyk v. Lemhi County*, 151 Idaho 809, 264 P.3d 916 (2011) (W. Jones, J.) (defended county's validation of Anderson Creek Road as a public road).
- White Cloud v. Valley County*, 2011 WL 4583846 (D. Idaho Sept. 30, 2011) (Lodge, J.); *White Cloud v. Valley County*, 2012 WL 13018504 (D. Idaho Aug. 8, 2012) (Lodge, J.) (defended county in challenge to road development fees). Subsequent to this decision, the surviving state law question was certified to the Idaho Supreme Court, which ruled in Valley County's favor, *In the Matter of Certified Question of Law – White Cloud v. Valley County*, 156 Idaho 77, 320 P.3d 1236 (2014) (J. Jones, J.), and the federal case was dismissed with prejudice (Case 1:09-cv-00494-EJL-CWD Document 162).
- Alpine Village Co. v. City of McCall*, 2011 WL 3758118 (D. Idaho 2011) (Winmill, C.J.) (defended city in action involving housing fees). The city sought removal to federal court. On remand, the city prevailed in *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.).

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*In Re SRBA*, Case No. 39576, Subcase Nos. 63-02779 et al. (Idaho, Fifth Judicial Dist., June 3, 2009), Subcase Nos. 63-02449 et al. (Fifth Judicial Dist., May 20, 2009) (secured partial decrees for each of the City of Nampa’s water rights).

*In Re SRBA*, Case No. 39576, Subcase Nos. 29-00271 et al. (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (Melanson, J.), *aff’d*, *City of Pocatello v. State*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.) (upholding position of *amici curiae* regarding alternative points of diversion in City of Pocatello municipal water rights litigation).

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#### BAR MEMBERSHIPS

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Member of the bars of Idaho, Colorado, and the District of Columbia.  
Admitted to practice in federal courts in the District of Columbia, Eighth, Ninth, and Tenth Circuits.

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#### PERSONAL

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Born September 29, 1952, in Springfield, Missouri.  
Married to Karen A. Meyer. One child, C. Andrew Meyer (graduate of Tulane Law School now practicing in Boulder, Colorado).  
Chris has made his home in Boise, Idaho since 1991. He has lived in fifteen cities in thirteen states: Arkansas, Colorado, Florida, Idaho, Indiana, Iowa, Maryland, Michigan, Missouri, New York, Virginia, Washington, D.C., and Florence, Italy. He has lived in Boise for the last 27 years.

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