Idaho Road Law Handbook

Road Creation, Validation, and Abandonment/Vacation Law in Idaho

By

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TABLE OF CONTENTS

I. PUBLIC ROAD CREATION 14
A. Overview 14
1. Methods of public road creation 14
2. Terminology/semantics — roads, highways, and rights-of-way; abandonment and vacation 20
a. Public roads 20
b. Highways, public highways, and public rights-of-way 20
c. Federal land rights-of-way (FL-ROW) 23
d. County highway system 24
e. Abandonment and vacation 24
3. Roads may be administered by cities, counties or highway districts. 25
4. Confusion over the label "commissioners." 26
B. Private easements 27
1. Express easements 28
2. Implied easements 29
a. Implied easement by necessity (aka "ways of necessity") 29
b. Implied easement by prior use 29
c. Implied grant or implied reservation 30
d. Unity of title 30
(i) In general 30
(ii) Unity of title may not be based on original federal ownership 31
e. Statute of limitations 33
3. Private prescriptive use rights based on adverse use 35
a. Basis and criteria for creation of private prescriptive rights 35
b. The right and duty to maintain the easement, while avoiding burdening the servient estate 38
4. Adverse use against the State (see section IV.U) 42
5. Adverse use against the federal government 42
6. May private prescriptive easements be obtained for roads on State or other public lands? 43
7. Private easements acquired through condemnation 44
C. Blanket legislative declaration (aka legislative fiat) (pre-1881 roads) 44
D. Idaho's public road creation statute (formal declaration and prescription) 45
1. Overview 45
2. Public roads created by formal declaration 48
3. The viewers' report process for "laying out" and constructing roads (1887-1911) 51
4. Public roads created by prescription (public use and maintenance) 54
a. Overview of statutory requirements 54
b. The public use requirement for road creation 57
(i) Use need not be hostile; permissive use qualifies as public use. 57

(ii) What quantum of public use is required? 58
(iii) Idaho law does not require that a road be a major thoroughfare to become a public road. 62
(iv) Inferences of public use may be based on circumstantial evidence..... 65
(v) Use by adjacent landowners qualifies as "public" use..... 68
(vi) Placement of gates across a road is inconsistent with public nature of use..... 69
(vii) Payment of taxes..... 70
c. The public maintenance prong..... 70
(i) There was no maintenance requirement prior to February 2, 1893. 70
(ii) Proof of maintenance 70
(iii) How many years of maintenance are required? 71
(iv) Maintenance is not required in every year. 72
(v) Maintenance is not required of full length. 72
(vi) Gratuitous or quid pro quo maintenance..... 74
(vii) Maintenance by federal government..... 76
d. May public roads be created by prescriptive use on State lands? 77
E. Statutory platting process..... 78
1. Current law..... 78
2. Acceptance of the plat is now required. 82
F. Common law dedication 83
1. When a landowner offers to dedicate a road to the public, and the public accepts, a common law dedication occurs..... 83
2. Common law dedications are irrevocable, except by statutory process..... 86
3. Common law dedications may be "public" or "private."..... 86
4. Sale of lots: Although the buyer "accepts" the dedication, the dedication is to the public not to the buyer. 87
5. The offer to dedicate must be clear and unequivocal..... 87
6. No express words of dedication are required; even an oral dedication may suffice. 88
7. No metes and bounds description is required for existing roads..... 89
8. The required "acceptance" is objective, not subjective. 90
9. No affirmative act required for common law dedication; public use is a form of acceptance. 90
10. Acceptance may occur by other means: e.g., city approval of design review. 91
11. If acceptance of the common law dedication 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..... 92
12. Common law dedication applies to homesteads and (presumably) other patents..... 92

13. The offer must be by the true owner, not one merely authorized to construct a road on federal land. 94
14. Most common law dedications are not subject to passive abandonment (subject to limited exceptions beginning in 2013). 94
15. The doctrine of common law dedication remains vital, at least as to older plats. 94
G. Implied easements based on oral representations 95
H. Road width 97
1. The 2013 road width amendment 97
2. Comparison between 2013 road width provisions and 2013 road abandonment provisions. 101
3. Retroactive effect of the 2013 amendments. 102
4. In any event, Idaho's platting statutes provide an independent mechanism for fixing road width 106
5. Road width statutes are applicable to roads created by prescription (passive road creation) as well as formal action. . 107
6. Pre-2013 law on road width 107
7. Meaning of pre-2013 language about lesser width 113
I. Utilities in road easement 114
J. Easement versus fee simple ownership 115
1. Roads created by deed, condemnation, or other transaction 115
a. In *Knight*, the Court looked to the conveyance instrument itself to determine whether an easement or fee is conveyed. 115
b. In *Lake CDA*, the Court looked to an 1887 statute, which, until 1953, said an easement (not a fee) is acquired. 116
2. Roads created by common law dedication create easements. .. 119
3. Roads created by statutory dedication ("equivalent to a deed in fee simple"—Idaho Code § 50-1312) 120
4. Roads created by prescriptive use create easements. 124
5. R.S. 2477 roads are easements. 124
K. Ownership of bridges and other structures 125
L. Access to public lands 125
II. ABANDONMENT AND VACATION 127
A. Overview of the passive and formal abandonment statutes 127
B. A portion of the length of a highway may be passively abandoned; passive abandonment does not work to narrow the width of a public road. 128
C. Passive abandonment under the 2013 amendment (limited to certain roads created by common law dedication) 129
D. The original passive abandonment statute (1887 to 1993) 132
1. Overview 132
2. Exceptions to the passive abandonment statute 133
3. Both non-use and non-maintenance must be shown. 134
4. Virtually any public use is sufficient to defeat an abandonment claim. 134
5. Road realignment along the same path does not constitute non-use for purposes of abandonment. 137

6. It is not clear whether maintenance need be shown if none was required. 139
7. Gratuitous maintenance by the county does not forestall abandonment. 139
8. Maintenance by the federal government may or may not count. 139
9. The passive abandonment statute is self-executing. 139
E. The remaining passive abandonment provisions were repealed in 1993. 140
F. The independent abandonment statutes were ended in 1993. 140
G. Certain roads are immune from passive abandonment under the pre-1993 statute. 141
1. Roads created by common law dedication were not subject to passive abandonment (subject to a limited exception added in 2013). 141
2. Since 1963, passive abandonment applies only to roads created by prescription. 142
3. In 1963, roads accessing public lands or waters were protected from passive abandonment. 145
4. In 1986 the Legislature protected roads included on official highway maps from passive abandonment. 146
H. History of formal vacation/abandonment statutes. 146
1. Sources of statutory authority 146
2. Early abandonment statutes provided little guidance. 147
3. Detailed formal vacation/abandonment procedures for all roads were adopted in 1986. 147
I. A road may not be vacated if doing so will leave real property without access. 148
J. Formal vacation/abandonment requires more than updating official maps. There is no "abandonment by implication." 148
K. Who gets the property after a road is vacated? 149
L. Under some circumstances, an "acquiring entity charge" may be imposed on the landowner who sought vacation (Idaho Code § 40-203(1)(i)) 150
1. Scope of the legislation 150
a. Statutory language 150
b. Applies only if value exceeds $2,500 151
c. Applies only if vacation sought by landowner. 151
d. Applies only if original landowner received compensation 151
e. Applies only to the vacation of a "parcel" owned in fee simple that is returned to an "acquiring entity." 152
f. Applies only where vacated road did exist as a public road 153
g. Fee is permissive, not mandatory 154
h. Due process concerns 154
2. What does the charge measure? 154
M. Vacation of platted easements other than roads. 155
N. The BFP defense and shelter rule in the context of public roads 155
1. Overview of the BFP defense 155
2. The shelter rule 157

3. The case law is in conflict as to whether the BFP and shelter rule defenses are applicable in the context of public roads. 158
a. Overview of *Trunnell* and *Knight* 158
b. The *Trunnell* case says the BFP defense is not available for public roads. 158
c. The *Knight* case applied the BFP and shelter rule in a public road case. 161
4. Nor do these defenses apply to city streets. 162
5. What should a prospective purchaser do? 163
III. R.S. 2477 RIGHTS-OF-WAY 164
A. Overview 164
1. The enactment and historical context of R.S. 2477 164
2. The repeal and survival of R.S. 2477 166
3. The peculiar political lineup 167
B. The effect and operation of R.S. 2477 169
1. The Act itself provides little guidance. 169
2. The basic mechanics of R.S. 2477: A federal "offer" that must be "accepted" by the State 170
3. R.S. 2477 provided an ongoing offer, not a one-time forgiveness of prior trespasses on federal land. 171
4. Why does being an R.S. 2477 road matter? 171
C. R.S. 2477 rights-of-way may be created only "over public lands, not reserved for public uses." 173
D. Determining the date of the reservation, withdrawal, or patent 174
1. Homesteads 175
2. Mining claims 176
3. Lands subject to reserved mineral interest 179
4. State endowment lands (school lands, etc.) 179
E. Federal and state role in R.S. 2477 rights-of-way 183
1. State law generally controls R.S. 2477 rights-of-way 183
2. State law may not broaden the federal grant. 185
3. The federal government retains some measure of control over R.S. 2477 rights-of-way established and recognized on federal land 186
F. R.S. 2477 roads may be created on the basis of (1) compliance with state road creation statutes or (2) "some positive act" of acceptance. .. 187
G. Other questions about R.S. 2477 roads 191
1. A private party may not hold title to an R.S. 2477 right-of-way. 191
2. Which unit of government holds the R.S. 2477 right-of-way? 192
3. Is the maintenance requirement for passive road creation eliminated for R.S. 2477 rights-of-way? (Probably not.) 192
4. An R.S. 2477 road may be created by common law dedication. 193
5. Acknowledgement of R.S. 2477 rights-of-way (Idaho Code § 40-204A(6)) 194
6. Idaho allows validation of R.S. 2477 roads on federal land where the United States does not contest the claim (the *Nemeth* case). 194
H. The federal land rights-of-way statute (FL-ROW) (§ 40-204A) 199

1. Special treatment of FL-ROW under § 40-204A 199
2. *Hill* found that FL-ROW means all R.S. 2477 roads, not just those still on federal land. 200
3. Section 40-204A has no retroactive effect. 201
4. The effect of the "perpetual term" language in subsection (1) is unclear. 203
5. The 1993 statute has no effect on passive abandonment of R.S. 2477 roads. 204
6. The 1993 legislation mandates use of eminent domain. 204
   a. Federal eminent domain? 204
   b. State eminent domain? 205
7. According to *Hill*, R.S. 2477 roads may be formally abandoned/vacated only if they have been previously "accepted" into the highway system. 205
8. 2013 Amendment glitch: The meaning of "All other highways" in subsection 40-203(6) 210
9. A vacated R.S. 2477 road reverts to an R.S. 2477 road (section 40-203(1)(i)). 212

IV. MECHANISMS UNDER IDAHO LAW FOR RESOLVING PUBLIC ROAD DISPUTES 214

A. Road validation and abandonment/vacation statutes 214
1. Various means of resolving road disputes 214
2. Separate validation and vacation/abandonment statutes 215
3. The validation statute (section 40-203A) 217
4. Validation is not required to establish a road that is dedicated through the platting process, but the exception does not preclude subsequent validation/vacation. 219
5. The abandonment/vacation statute (§ 40-203) 220
6. Public notice and other procedural requirements 220
7. Validation and vacation proceedings may be combined. 222
8. The duty to maintain a public road: Classification as a public highway (§ 40-117(7)) versus public right-of-way (§40-117(9)) 225
9. Rules of evidence 226
10. The public interest 226
   a. Vacation (sections 40-203(1)(h) and 40-203(6)) 227
   b. Validation (section 40-203A(3)) 227
   c. Official highway map 228

B. Judicial review of validation and abandonment/vacation (§ 40-208) 228
1. Timing and procedure 228
2. Burden of proof vs. standard of review 229
3. Written findings and the standard of review 229
   a. Current statutes 229
   b. Written "findings and conclusions" are required in vacation proceedings but not in validation proceedings. 231
   c. Standard of review – questions of law 236
   d. Standard of review at the district court 236
      (i) Pre-2013 standards 237
      (ii) Post-2013 standards 238
      (iii) Review of creation/abandonment findings 238

(iv) Review of the public interest finding 239
e. Standard of review by the appellate court 241
(i) On appeal, factual findings regarding road creation are reviewed under the substantial evidence test 241
(ii) The appellate court will defer to the board's original public interest determination. 242
4. Additional evidence 242
5. Jury and discovery 243
C. Deadlines for reconsideration and judicial review 243
D. Venue 245
E. Res judicata effect of appealed or unappealed validation decision 246
F. May a county or highway district settle or resolve a road dispute outside of the validation process? 247
G. Official road maps (§§ 40-202(1), 40-202(6), 40-1310(9), and 40-604(13)) 249
1. Terminology: highway versus right-of-way 249
2. Overlapping statutes 250
3. Post-2013 procedural requirements for adoption of map. 255
4. Official road maps do not establish title. 256
5. There must be a sound basis for inclusion of a road on the public road map 259
6. Judicial review of official road maps prior to 2013. 260
7. As of 2013, public road status and road width may be determined only via validation and/or abandonment/vacation proceedings (with limited exceptions). 262
H. Burden of proof of proof 262
1. Overview 262
2. Preponderance of the evidence 263
3. Burden of proof in establishing road creation 263
4. The burden of proof rests on the person claiming the road was abandoned. 266
5. The burden of proof where abandonment will result in lack of access to a property 267
6. Standard of review on appeal to the district court 267
7. Burden on appeal from district court 268
8. Review of intertwined facts and law 268
I. The encroachment statute (§ 40-2319) 268
1. Overview 268
2. Right to abate 270
3. Immediate self-help—without notice and without penalties 271
4. Obstructions not requiring immediate action—notice required, penalties accrue 272
a. When the responsible party voluntarily removes the encroachment after notice. 272
b. Abatement action (district court) 273
c. Removal by the county or highway district 273
5. Resolving disputes over road status, location, or width in the context of an encroachment action. 274
6. Case law on unlawful encroachments 275

J. Criminal enforcement actions 277
1. Criminal obstruction of highways (§ 18-3907) 277
2. Criminal nuisance (§§ 18-5901 to 5903) 278
3. Criminal penalties under the road statute 278
K. Standing 279
L. Bias 280
M. *Ex parte* contacts 281
N. Attorney fees 281
O. Unconstitutional takings 282
P. Regulatory takings analysis 283
Q. Jury trial 284
R. 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, unless the commission fails to initiate proceedings or the lawsuit is initiated by the commission. 284
S. State quiet title, declaratory judgment, or other civil action 289
1. State Quiet Title Act (QTA) 289
2. Who may bring a State QTA suit? 290
3. Declaratory judgment 290
4. Other remedies 291
5. Choosing among causes of action: The law prior to the 2013 amendment 292
T. State quiet title act (QTA) – statute of limitations 295
1. When the government initiates a quiet title claim, the statute of limitations clock, if applicable, runs from the time of conduct interfering with the government's claim of right (Idaho Code § 5-202). 295
2. A 2013 amendment may have made Idaho's statute of limitations no longer applicable to road validations and quiet title suits. 295
3. Judicial review and quiet title may not be combined in a single proceeding. 297
U. Adverse possession 298
1. The nature and source of law for adverse possession and prescription 298
2. The statutory period was lengthened from five to 20 years. 300
3. Adverse possession may be pursued by a governmental entity against private persons (but only if taxes are not assessed) 301
4. Quiet title claims against the State are not deemed claims against the sovereignty (*Lyon* 1955). 302
5. Adverse possession against the State and its political subdivisions 303
a. Overview and summary 303
b. By statute in 1864, the State waived sovereign immunity to adverse possession claims (Idaho Code §§ 5-202 and 5-225). 305
c. *Hellerud* (1932) established two exceptions to the waiver so sovereign immunity: (1) land actually reserved for, or dedicated to public use and (2) school lands and other State endowment lands. 310

d. What is the scope of Exception #1 (public use)? 313
(i) *Robinson* 1916: Exception #1 includes city streets and parks. 313
(ii) *Rutledge* 1971: Exception #1 includes submerged land—until it becomes dry land for whatever reason. 314
(iii) *Aldape* 1978: Exception #1 includes submerged land—until it becomes dry land by avulsion. 317
(iv) *Osterloh* 1983: Exception #1 includes submerged land—until it becomes dry land by avulsion. 317
(v) *Tyrolean* 1979: Exception #1 includes city streets. 318
(vi) *Idaho Forest Industries* 1987: Depending on the equities, Exception #1 may or may not include land that is no longer submerged by act of man. 318
(vii) *Pines* 1998: Exception #1 includes state highways. 320
(viii) *Bedke* 2010: Exception #1 includes municipal water pipelines. 321
(ix) *H.F.L.P.* 2014: Exception #1 includes a road used by a city to access its wastewater treatment plant. 322
(x) *Frost* 2021: Exception #1 includes irrigation district property. 323
6. Adverse possession of public roads 323
a. Overview 323
b. Adverse possession of the unused portion of a right-of-way 324
c. Adverse possession of the used portion of a public right-of-way 327
(i) *Robinson* (1916) 328
(ii) *Tyrolean* (1979) 328
(iii) *Total Success I* (2008) 328
d. Adverse possession of a no-longer-used public right-of-way (no reported cases yet) 330
V. MECHANISMS UNDER FEDERAL LAW FOR RESOLVING PUBLIC ROAD DISPUTES 332
A. Federal Quiet Title Act (QTA) 332
1. The federal QTA waives sovereign immunity 332
2. Claims under the federal QTA may not be brought in state court. 335
3. The federal QTA is the exclusive means of resolving title to federal property. 335
4. Other federal statutes waiving sovereign immunity may not be used to end-run the federal QTA. 337
5. Validation of R.S. 2477 roads on federal land 339
6. Only those asserting title may bring suit under the federal QTA. 339

7. What if the federal government wishes to quiet title?.....341
8. Travel management plans 342
9. Environmental suits against counties.....342
10. Indian land exception under the QTA.....343
11. Is there any role left for state proceedings? 344
12. Federal QTA – statute of limitations.....349
a. 180-day notice requirement 349
b. Actions brought by entities other than a State 349
c. Actions brought by a State.....355
d. Actions brought by the federal government.....356
B. Federal APA suits 357
C. Tucker Act 358
D. Forest Service and BLM road management plans 361
1. Travel Management Rule.....361
2. Treatment of R.S. 2477 roads in the Travel Management Rule.....362
3. Vehicle and time of year limitations on use of "open roads" within national forests.....362
4. Commercial hauling.....362
5. National Forest "Road Use Permits" 365
6. Litigation involving travel management plans.....365
a. *Public Lands III* (Forest Service has authority to require a permit).....366
b. *Kane County I* (no obligation to evaluate R.S. 2477 road status).....367
c. *The Wilderness Society* (environmental groups lack standing to challenge self-help ordinance).....368
E. Federal law, regulation, and guidance governing the recognition of rights to use roads on federal land (binding administrative decisions, RDIs, NBDs, and RMAs) 369
1. Overview.....369
2. Binding administrative determinations 369
3. *SUWA* and the end of binding administrative determinations .371
4. Recordable disclaimers of interest ("RDIs") 372
5. Non-binding determinations ("NBDs") 376
6. Road maintenance agreements ("RMAs").....378
F. Intervention in NEPA cases. 379
G. Indian lands.....380
VI. JURISDICTION OVER AND CONTROL OF CITY STREETS 384
A. Table of relevant statutes and regulations.....384
B. Jurisdiction over city streets.....394
C. Jurisdiction and control over city streets in areas overlapped by a highway district.....395
1. Overview.....395
2. Statutes establishing that cities with functioning street departments retain control of streets (except for single county-wide highway districts under Chapter 14 of Title 40). 399
a. Sections 40-203 and 40-203A.....399
b. Section 50-1330 399
c. Section 50-301 400

d. Section 50-311 401
e. Section 40-1323(1) 402
f. Sections 40-1310 and 40-109(1) 403
(i) Section 40-1310(1) 403
(ii) Section 40-1310(5) 403
(iii) Section 40-1310(8) 404
g. Sections 40-1333 405
h. Section 40-204A 406
i. Section 40-604(4) 406
3. Other statutes that interact with the statutes giving jurisdiction to cities with functioning street departments 407
a. Section 50-1317 407
b. Section 50-1320 407
c. Section 50-1321 408
a. Section 50-1306A(6) 408
b. Section 40-208 409
4. The *Sandpoint* decisions 409
D. What procedures apply to vacation or validation of streets by a city with a functioning street department? 414
E. 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. 414
F. The statutes recognizing passive public road creation also apply to city streets. 415
G. Abatement of encroachments 418
1. Authority of cities to abate encroachments 418
2. Public nuisances 418
3. Trespass and malicious injuries 419
4. City ordinances 419
H. Landowner consent requirement for vacation of city streets 420
I. Allocation of vacated property interest to adjacent properties 421
J. Exchanges involving city streets 422
K. Annexation 422
Appendix A: Index to Idaho Road Creation and Abandonment Statutes 424
Appendix B: House Bill 321 (2013) 501
Appendix C: Department of the Interior Guidance on R.S. 2477 Roads 512
Appendix D: About the Author 524
Appendix E: Handbooks Available from Givens Pursley 532

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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:[1]

(1) Formal declaration by the county or highway district (1864 to present). A recording of the formal action has been required since 1887.[2]

(2) Blanket legislative declaration (any public use prior to 2/1/1881).[3]

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[1] Public road creation is in contrast to the establishment of private rights-of-way by prescriptive use or other means.

[2] Idaho's first road creation statute was enacted in 1864. Laws of the Territory of Idaho § 1, p. 578 (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, An Act Relating to Highways …, at p. 12, § 1 (amending the codification 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).

[3] Laws of the Territory of Idaho § 1, p. 578 (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 (1881), pp. 277-78, § 1 (1881). Section 46 of the 1881 statute makes it effective as of the date of enactment. Gen. Laws of the Territory of Idaho (1881), p. 292, § 18 (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, C.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 (1885), § 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

(3) Five years of public use (prior to February 2, 1893).[4]

(4) Five years of public use and maintenance (February 2, 1893 to present).[5]

(5) Common law dedication, including dedication by the federal government via land patents.[6]

(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."[7]

(7) Dedication through the platting process.[8]

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previously recognized public roads rather than a new recognition and creation of public roads created after 1881.

[4] 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] 1893 Idaho Sess. Laws, An Act Relating to Highways, etc., § 1, p. 12 (amending the codification at Rev. Stat. of Idaho Terr. § 851 (1887); codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).

[6] 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) (Schroeder, J.), the Idaho Supreme Court ruled that the doctrine applies equally to the patenting of homesteads on the public land by the federal government.

[7] 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).

[8] 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").

(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.[9] 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 48.

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 44.

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.4 at page 54. 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 83. 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 be even be constructed for decades, but nonetheless remain valid public roads. See discussion in section I.F at page 83 and section II.E at page 140.

[9] Idaho's current road creation statutes are codified at Idaho Code §§ 40-106, 40-109(5), 40-202(3).

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 III at page 164. 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.

The Legislature also has addressed the R.S. 2477 standard in a 1993 Act, calling for liberal recognition of these roads. H.B. 388, 1993 Idaho Sess. Laws, ch. 142 (codified at Idaho Code §§ 40-107(5), 40-204A).[10] See discussion of 1993 legislation in 0 on page 163. However, this 1993 (H.B. 388) Act does not apply retroactively and therefore is of limited practical effect.

See also discussion of special treatment of roads on public lands in the 2013 legislation.

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 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.

[10] In 1993, the Legislature enacted two road law statutes. The first was S.B. 1108, 1993 Idaho Sess. Laws, ch. 412 (ending passive abandonment, defining "public right-of-way," and adding judicial review provisions). The second was H.B. 388, 1993 Idaho Sess. Laws, ch. 142 (addressing federal land rights-of-way (FL-ROW)). A third 1993 bill (H.B. 120, 1993 Idaho Sess. Laws, ch. 103 § 2) modified the "generic" judicial review provision for county decisions set out in Idaho Code § 31-1506 (then 31-1309). That section used to control judicial review of county road decisions. Since 1993, judicial review of road decisions is governed by section 40-208 added by S.B. 1108. See discussion in section IV.B.1 on page 228.

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)[11] 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 February 1, 1881
3.	5 years of public use	Through February 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.	Statutory dedication (platting)	Any time
8.	Conveyance	Any time
9.	Condemnation	Any time

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

Year	Event
1863	Organic Act of the Territory of Idaho, 12 Stat. 808, 814, § 14 (Mar. 3, 1863)
1864	First road creation statute (blanket declaration as to existing roads; formal declaration going forward)

[11] 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").

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)[12]
1887	First "modern" passive abandonment statute enacted.[13]
1890	Statehood (which conveyed the endowment lands to the State).[14]
1893	Road creation statute amended to add five years public maintenance[15]
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[16]
2006	Prescriptive period for private roads by adverse possession changed from five to 20 years

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

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

[14] Idaho Admission Act, ch. 656, 26 Stat. 215 (July 3, 1890). The Idaho Admissions Act has never been codified.

Section 5 of the Idaho Admission Act was amended by:

- Pub. L. No. 431, 56 Stat. 48, ch. 36 (Feb. 6, 1942) (extending the maximum lease period from five to ten years).
- Pub. L. No. 328, 63 Stat. 714, ch. 622 (Oct. 6, 1949) (extending the maximum lease period for hydrocarbon leases).
- Pub. L. No. 93-561, 88 Stat. 1821 (Dec. 30, 1974) (authorizing exchanges and extending the lease period for geothermal leases).
- Pub. L. No. 105-296, 112 Stat. 2822 (Oct. 27, 1998) (complete re-write of section 5).

Section 6 of the Idaho Admission Act was amended by:

- Pub. L. No. 85-84, 71 Stat. 277, ch. 36 (July 3, 1957) (funding for government buildings in the state capitol to include maintenance as well as construction).

[15] 1893 Idaho Sess. Laws, An Act Relating to Highways …, § 1 at p. 12, § 1 (amending the codification at Rev. Stat. of Idaho Terr. § 851; codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).

[16] S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 4 (amending what was then Idaho Code § 40-203(4) to remove passive abandonment provisions).

2013	Public Access Amendments of 2013 (addressing a variety of issues including a new passive abandonment provision, judicial review and quiet title, road width, etc.)[17]
2014	Road Funding and Detachment Act of 2014 (technical amendments establishing mechanism for detachment of a road from a highway district)[18]

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

a. Public roads

The terms "road" and "public road" are not defined terms in Title 40. Title 40 uses "public road" only twice, in Idaho Code §§ 40-204(1) and 40-208(7). Instead, Title 40 most commonly uses a combined reference to "highway or public right-of-way" (thus including all highways, not just public highways). However, there are a few references to "public highway and public right-of-way."

As a matter of convenience, Idaho courts, lawyers, and commentators routinely employ the term "public road" or just "road" as shorthand encompassing both highways (not just public highways) and public rights-of-way when the distinction between the two is not important. That shorthand is employed in this Handbook as well.

In any event, these terms and distinctions are not employed consistently, and the reader is cautioned against reading too much into such shorthand labels.[19]

b. Highways, public highways, and public rights-of-way

Idaho's road statutes define the terms "highway," "public highway," "public right-of-way," and "federal land rights-of-way" (FL-ROW) (discussed in the next section). The terms "right-of-way," "public road" and "road" appear in the Title 40 (the road statutes), but are not defined terms.

The term "highways" is defined to include all "roads … established for the public."[20] This broad definition has no limitation as to whether they have been

[17] 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified at Idaho Code §§ 40 114, 40 202, 40 203, 40 208, 40 2312).

[18] Highway Funding and Detachment Amendments of 2014, 2014 Idaho Sess. Laws, ch. 214 (H.B. 619a) (codified at Idaho Code §§ 40 709, 40 709A).

[19] 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).

[20] The full definition reads today:

constructed, opened, accepted by public authorities, or are publicly maintained. Nor does the term "highway" distinguish between roads owned in fee simple versus mere easements. Accordingly, the term "highways" includes all manner of public roads, including but not limited to those falling withing the definitions of "public highway" and "public right-of-way" (discussed below) as well as roads that have not yet been constructed or opened.

Note that the term "highways" includes city streets, not just highways under the jurisdiction of counties and highway districts. See discussion in section VI.F on page 415.

Prior to 1993, the key provisions of the road statutes referred only to "highways." The definition of "public right-of-way" was added 1993. S.B. 1108, 1993 Idaho Sess. Laws, ch. 412 (codified at Idaho Code § 40-117(9)) (see footnote 23 on page 22). Beginning in 1993, the key references were changed from "highways" to "highways and public rights-of-way" (e.g., Idaho Code §§ 40-203(1), 40-203A(1), and 40-208). Referring to both is redundant, given that the broad definition of highways includes public rights-of-way. Perhaps naming both was intended to clarify and emphasize that the vacation, validation, and judicial review provisions apply both to publicly maintained roads and those that are not. This conclusion is supported by the legislative history.[21]

> "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).

The definition of "highways" was part of the original recodification of Title 40 in 1985. H.B. 265, 1985 Idaho Sess. Laws, ch. 253, § 2. It was amended in ways not relevant here in 1988. H.B. 578, 1988 Idaho Sess. Laws, ch. 184, § 1.

[21] The legislative history of S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 2 shows that the primary purpose of the legislation was to make it eliminate passive abandonment and make it more difficult to vacate pubic roads that access public lands. The 1993 legislation added the definition of "public right-of-way" and added that phrase everywhere that the relevant statutes referenced highways. A presentation by bill supporters during a hearing on

In contrast to the definition of "highways," the terms "public highways"[22] and "public rights-of-way"[23] are defined to include only roads that are open to the public (thus excluding roads that have been platted or dedicated but not yet built).

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the bill was summarized in the minutes, including the following: "It also creates the classification of 'public right-of-way' to protect public access without assuming the obligation of constructing or maintaining the right-of-way for vehicular traffic." Minutes of hearing before the House Transportation & Defense Committee (Mar. 16, 1993). The presenters were Dallas Burkholder of the Attorney General's Office and Ted Ransom of Save Our Access & Rights-of-Way (SOAR). This legislative history underscores the plain language of the legislation showing that the term "public right-of-way" has nothing to do with whether the road is held as an easement or a fee, and relates instead to the absence of public maintenance obligation.

[22] The full definition reads today:

> "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. (Also see "Highways," section 40-109, Idaho Code).

Idaho Code § 40-117(7).

The definition of "public highways" was part of the original recodification of Title 40 in 1985, and has not changed since. H.B. 265, 1985 Idaho Sess. Laws, ch. 253, § 2.

[23] The full definition reads today:

> "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) (enacted as S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 2) (the definition of "public right-of-way" was initially codified to Idaho Code § 40-117(6)).

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).

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.[24] But that is not how they are defined in Idaho. Instead, the difference turns primarily on whether there is an obligation for public maintenance. "Public highway" means public roads that are open to the public and maintained by the state, county, highway district, city, or other governmental entity. In contrast, the term "public right-of-way" describes rights-of-way that are open to public but are not required to be maintained by the government. As noted, 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).

The definition of "public highway" keys into the definition of "highways," 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, because "right-of-way" is not defined in the statutes.

See discussion in section IV.A.8 at page 225 for a discussion of reclassifying public highways to public rights-of-way.

c. Federal land rights-of-way (FL-ROW)

The definition of "federal land right-of-way" (FL-ROW) was added in 1993 at the same time as the term "public right-of-way" was added.[25] FL-ROW is defined as "rights-of-way on federal land within the context of revised statute 2477."[26] The

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[24] Various authorities have drawn distinctions among the terms "highway" 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.

[25] Although both definitions were added in 1993, the arrived by different legislation. The definition of "federal land rights-of-way" was added by H.B. 388, 1993 Idaho Sess. Laws, ch. 142, § 2. The definition of "public right-of-way" was added by S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 2.

[26] The full definition is:

> "Federal land rights-of-way" mean rights-of-way on federal land within the context of revised statute 2477, codified as 43 U.S.C. 932, and other federal access grants and shall be considered to be any road, trail, access or way upon which construction has been carried out to the standard in which public rights-of-way were built within historic context. These rights-of-way may include, but not be limited to, horse paths, cattle trails, irrigation canals, waterways, ditches, pipelines or other means of water transmission and their

definition references "rights-of-way" (an undefined term), not "public rights-of-way." Perhaps that was unintentional.

Notwithstanding the reference to "on federal land," the definition evidently includes all R.S. 2477 roads. See discussion in section III.H.2 on page 200.

d. County highway system

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/vacation) and Idaho Code § 40-203A (validation).

e. Abandonment and vacation

The term "vacation" is unambiguous in the context of road law. It appears only once in Title 40, where it is used in reference to the formal process of withdrawing a highway or public right-of-way from the jurisdiction of a county or highway district. Idaho Code § 40-203(1)(a).

In contrast, the term "abandonment" has different meanings in different contexts. Sometimes it is used interchangeably and redundantly with the term "vacation." For example, Idaho Code § 40-203(1)(a) describes the process for commissioners to formally "abandon and vacate" public roads. In that context, there is no difference between abandonment and vacation, and it is unclear why the Legislature employs two words for the same thing.

However, the term "abandonment" also may refer to passive abandonment pursuant to various Idaho statutes dating to 1887.[27] These statutes do not use the

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> attendant access for maintenance, wagon roads, jeep trails, logging roads, homestead roads, mine to market roads and all other ways.

Idaho Code § 40-107(5).

[27] Idaho's first passive abandonment statute stated 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 Idaho Terr. § 852 (1887). The 1887 passive abandonment statute was amended and recodified many times over the years. In 1932, it was codified to Idaho Code Ann. § 39-104. In 1948, it became Idaho Code § 40-104. In 1985, it was codified to Idaho Code

word "passive." The term passive abandonment is used by courts and commentators to describe abandonment that occurs automatically by operation of law, in contrast to formal action taken by government officials under Idaho Code § 40-203 and its predecessors.[28]

In addition to formal and passive abandonment, the term "abandon" has a more archaic meaning traceable to early Idaho statutes. The meaning is obscure, but it appears that it described the informal gift of a road to the public by a private landowner over whose property the road crossed.[29]

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 VI at page 384.

Outside of city streets controlled by cities, all public roads in Idaho (other than

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§ 40-203. In 1986, it was codified to Idaho Code § 40-203(4). The passive abandonment provisions in section 40-203(4) were repealed in 1993 by S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 4. A new, very limited passive abandonment provision was added in 2013, applicable only to certain roads created by common law dedication. H.B. 321, 2013 Idaho Sess. Laws, ch. 239, § 4 (codified at Idaho Code § 40-203(5)). The term abandonment (used in the sense of passive abandonment) is also found in Idaho Code §§ 40-202(2), 40-202(7), 40-204A(2), and 40-208(6).

[28] The term "passive abandonment" is used in *Farrell v. Bd. of County Comm'rs of Lemhi County,* 138 Idaho 378, 386, 64 P.3d 304, 312 (2002) (Schroeder, J.) and *Sopatyk v. Lemhi Cnty.,* 151 Idaho 809, 815 n.6, 264 P.3d 916, 922 n.6 (2011) (W. Jones, J.). On other occasions, this Court has employed the term "informal abandonment." *E.g., Farrell*, 138 Idaho at 387, 64 P. 3d at 313; *Taggart v. Highway Bd.*, 115 Idaho 816, 817, 771 P.2d 37, 38 (1989) (Shepard, C.J.)*; Floyd v. Bd. of Comm'rs of Bonneville Cnty.* ("*Floyd II*"), 137 Idaho 718, 728, 52 P.3d 863, 873 (2002) (Walters, J.).

[29] Idaho's 1887 road creation statute provided:

> 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.

Rev. Stat. of Idaho Terr. § 850 (1887). This statute survives today, as amended, at Idaho Code § 40-109(5).

state or federal highways) are administered either by the county government or by specially created highway districts.[30] 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 seem 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. H.B. 265, 1985 Idaho Sess. Laws, ch. 253, § 2. Prior to 1985, there was no general definition section. The definition of

[30] "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.

commissioner has not been touched by the Legislature since adopted in 1985. Nor has this definition ever been mentioned in any Idaho appellate decision.[31] Its narrow reference only to county commissioner appears to have been appropriate at the time.[32]

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.[33]

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

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[31] 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.

[32] 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 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.

[33] 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).

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 private easements are created by an express grant, typically a deed. However, private easements also can be created without a signed writing, including easements by implication, easements by necessity, easement by prescription, and easement by estoppel. In addition, private easements may sometimes be acquired by condemnation.

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.

Note: In *Fitzpatrick v. Kent*, 458 P.3d 943 (Idaho 2020) (Brody, J.), the Court held that held that one may not impose an easement on one's own land, even for purposes of an anticipated subsequent conveyance of part of the property. Accordingly, the proper approach is to reserve an easement in the conveyance to the other party.

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 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 (aka "ways of 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*, 210 P.3d 75, 79 (Idaho 2009) (quoting *Bear Island*, 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.[34] 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 new landlocked 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

(i) In general

Implied easements (both easements by necessity and easements by prior use) require a demonstration of prior unity of title. In contrast, unity of title is not a criterion in the establishment of a private easement by prescriptive use.

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[34] *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.").

The common ownership must be shown at the time the implied easement was created, i.e., when the division of the land created the landlocked parcel.

The rule for easements by necessity (aka "ways of necessity") is more generous than for implied easements based on prior use. The actual use need not have occurred at the time of division of the prior common ownership. But it must have been evidently necessary.

> A major background proposition of law providing the context for the presently discussed question with reference to easements by necessity is the one that a way of necessity is dependent on the former unity of ownership of the later, alleged-to-be dominant and servient estates, followed by a severance thereof. And it seems clear that with respect to ways of necessity, although the use need not have been pre-existing, the necessity for a way in order to have access must have instantly come into being, whether or not actually attempted to be used, at the time of severance of the common ownership. Accordingly, the cases at least imply that the necessary unity of title must have existed at the time the severance of title takes place. Some case law pointedly illustrates this principle by holding that the necessary simultaneous ownership was not present at the critical time, although it perhaps could be shown that the same individual owned the subject parcels at different times. And it has been repeatedly held that the fact that land was originally in the public domain or in the ownership of the state does not constitute the necessary unity of ownership to support a way of necessity.

Charles C. Marvel, *What Constitutes Unity of Title or Ownership Sufficient for Creation of an Easement by Implication or Way of Necessity*, 94 A.L.R.3d 502 (footnotes omitted).

(ii) Unity of title may not be based on original federal ownership

Some have sought to trace 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*, 210 P.3d 75 (Idaho 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 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, 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, 210 P.3d at 80 (quoting *United States v. Rindge*, 208 F. 611, 619 (S.D. Cal. 1913)).

The California Supreme Court has weighed in as well. In that 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).

e. Statute of limitations

On January 25, 2023, the Idaho Supreme Court upended 150 years of jurisprudence and ruled that the catch-all, four-year statute of limitations (Idaho Code § 5-224) applies to easements by necessity. *Easterly v. HAL Pacific Properties, L.P.* ("*Easterly I*"), 171 Idaho 500, 522 P.3d 1258 (2023) (Wood, J. Pro Tem.).[35] Thus, a claim for such a private easement would be time-barred if not brought within four

[35] The majority said this is a case of first impression notwithstanding 150 years of decisions involving easements by necessity, none of which have suggested that the statute of limitations presents an issue. The Court explained that it does not raise statute of limitations defenses *sua sponte*, and that for a century and a half since the enactment of the statute of limitations, no one ever raised, preserved, and argued that the statute applies to easements by necessity. *Easterly I*, 171 Idaho at 510, 522 P.3d at 1268. In so ruling, the Court rejected extensive authorities to the contrary, including the statute's common law roots and the Restatement of Property, saying these were nonbinding and cannot overcome the plain words of an unambiguous statute.

years after the statute of limitations accrues (i.e., the time that "the landlocked owner—or any of the predecessors-in-interest—knew or reasonably should have known" that the underlying landowner acted adversely to the holder of the easement). *Easterly I*, 171 Idaho at 522, 522 P.3d at 1268.

The *Easterly I* precedent was short-lived. On a second appeal (following a remand), it was upended by another 3-2 decision in *Easterly v. Clark* ("*Easterly II*"), ___ Idaho ___, 574 P.3d 349 (2025) (Moeller, C.J.) The dissenters in *Easterly I* became the majority in *Easterly II*, joined by newly appointed Justice Meyer. *Easterly II* returned to the rule that had been assumed to apply in Idaho for as long as easements by necessity have been recognized.[36] The Court explained the reversal of its 2023 holding was compelled by public policy.

> One can only imagine the confusion and disruption section 5-224 would create for landowners across the state if it were suddenly applicable to every parcel currently benefitting by a long-standing easement by necessity that has not yet been judicially recognized.
>
> …
>
> For these reasons, today we hold that Idaho Code section 5-224 is inapplicable to a claim of an easement by necessity. An easement by necessity is based on the public policy of encouraging the full use of Idaho's lands. Barring such claims because they are not brought within a certain time period would significantly undermine this public policy.

Easterly II, ___ Idaho at ___, 574 P.3d at 364.[37]

[36] In a footnote, the majority in *Easterly II* noted the extensive scholarly criticism of *Easterly I*, which describe the 2023 decision as an outlier. *Easterly II*, ___ Idaho at ___ n.3, 574 P.3d at 363 n.3.

[37] Neither the *Easterly I* Court nor the *Easterly II* Court explained why the catch-all statute of limitations (Idaho Code § 5-224) applies rather than the statute governing recovery of real property (Idaho Code § 5-203), which, as of 2006, sets a 20-year prescriptive period. The *Easterly I* Court merely declared: "Easement by necessity claims are not otherwise provided for in another statute." *Easterly I*, 171 Idaho at 511, 522 P.3d at 1269. Even the dissent seemed to agree: "[T]here is no specific statute of limitations applicable to a claim of easement by necessity … ." *Easterly I*, 171 Idaho at 521, 522 P.3d at 1279 (dissent).

3. Private prescriptive use rights based on adverse use

a. Basis and criteria for creation of private prescriptive rights

The terms "prescription" and "prescriptive use" are often employed to refer to public roads created by public use under the road creation statute (method 3 above).[38] Indeed, the 1963 amendment to the public road creation statute uses this term (see discussion in section II.D.9 at page 139).[39] This use of the term "prescription" in the public road context should not be confused with the law of prescription applicable to private easements acquired by private parties through on adverse possession. *See, 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. It is called "prescriptive use" in the case of private rights-of-way and other easements.

Adverse possession bears some similarity to passive abandonment. But they are distinct legal theories with distinct legal outcomes. Passive abandonment is focused on non-use by the public as a whole. Adverse possession is focused on the affirmative action of an individual whose "adverse use" invades another person's property—including property in the form of a public right-of-way.

See discussion of adverse possession and private prescriptive rights in section IV.U.1 on page 298.

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

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[38] For example, *Total Success Inv., 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) (Bakes, J.).

[39] 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).

> 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.).

A more comprehensive summary was provided by Justice Burdick:

> A party seeking to establish the existence of an easement by prescription "must prove by clear and convincing evidence use of the subject property, which is characterized as: (1) open and notorious; (2) continuous and uninterrupted; (3) adverse and under a claim of right; (4) with the actual or imputed knowledge of the owner of the servient tenement (5) for the statutory period." *Hodgins v. Sales*, 139 Idaho 225, 229, 76 P.3d 969, 973 (2003). The statutory period in question is five [now 20] years. I.C. § 5–203; *Weaver v. Stafford*, 134 Idaho 691, 698, 8 P.3d 1234, 1241 (2000). A claimant may rely on his own use, or he "may rely on the adverse use by the claimant's predecessor for the prescriptive period, or the claimant may combine such predecessor's use with the claimant's own use to establish the requisite five continuous years of adverse use." *Hodgins*, 139 Idaho at 230, 76 P.3d at 974. Once the claimant presents proof of open, notorious, continuous, uninterrupted use of the claimed right for the prescriptive period, even without evidence of how the use began, he raises the presumption that the use was adverse and under a claim of right. *Wood v. Hoglund*, 131 Idaho 700, 702–03, 963 P.2d 383,

> 385–86 (1998); *Marshall v. Blair*, 130 Idaho 675, 680, 946 P.2d 975, 980 (1997). The burden then shifts to the owner of the servient tenement to show that the claimant's use was permissive, or by virtue of a license, contract, or agreement. *Wood*, 131 Idaho at 703, 963 P.2d at 386; *Marshall*, 130 Idaho at 680, 946 P.2d at 980. The nature of the use is adverse if "it runs contrary to the servient owner's claims to the property." *Hodgins*, 139 Idaho at 231, 76 P.3d at 975. The state of mind of the users of the alleged easement is not controlling; the focus is on the nature of their use. *Id*. at 231-32, 76 P.3d at 975-76.

Beckstead v. Price, 146 Idaho 57, 62, 190 P.3d 876, 881 (2008) (Burdick, J.) (quoting *Akers v. D.L. White Constr., Inc.*, 142 Idaho 293, 303, 127 P.3d 196, 206 (2005) (Burdick, J.)).

Use by persons other than the owner of the easement (such as family, friends, servants, and emergency workers) may be relied on to establish the prescriptive right. *Beckstead*, 146 Idaho at 62, 190 P.3d at 811.

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*, 167 Idaho 325, 340, 470 P.3d 1134, 1149 (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 adverse possession (which is known as prescriptive use or prescription in the context of rights-of-way) is applicable in contests among <u>private</u> parties and, if successful, creates <u>private</u> 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). 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, C.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*, 594 P.2d 1093 (Idaho 1979) (dealing with beach access to Lake Coeur d'Alene; citing *Kirk v. Schultz*, 63 Idaho 278, 119 P.2d 266 (1941) (Budge, C.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* at 1099 (citing the road creation statute, Idaho Code § 40-103 (1948 to 1985), now § 40-202).

b. The right and duty to maintain the easement, while avoiding burdening the servient estate

A seminal case on the issue of a prescriptive easement burdening the servient estate is *Gibbens v. Weishaupt*, 98 Idaho 633, 570 P.2d 870 (1977) (Donaldson, J.). The Court placed the right and duty to maintain the easement on the easement holder (the holder of the dominant estate), which, depending on the facts, may include bearing the cost of constructing and maintaining gates.[40]

> The owner of an easement has the right and duty to maintain, repair, and protect the easement. *Suitts v. McMurtrey*, 97 Idaho 416, 546 P.2d 62 (1976); *Rehwalt v. American Falls Reservoir District No. 2*, 97 Idaho 634, 550 P.2d 137 (1976); *City of Bellevue v. Daly*, *supra*. The owner of the servient estate has no duty to maintain the easement. *Suitts v. McMurtrey*, *supra*; *Kirk v. Schultz*, 63 Idaho 278, 119 P.2d 266 (1941). This duty requires that the easement owner maintain the easement so as not to create an additional burden on the servient estate. In *City of Bellevue*, this Court held that it was the obligation of the easement owner to fence and protect the

[40] The duty to maintain gates recognized in *Gibbens* was based on the dominant estate holder's clear-cut duty to maintain the easement. This does not provide a basis for requiring the holder of a prescriptive easement for irrigation and wastewater ditches to undertake maintenance to reduce the flow of irrigation water where there is no clear-cut duty to do so. *Merrill v. Penron*, 109 Idaho 46, 54-55, 704 P.2d 950, 958-59 (1985) (Swanstrom, J.).

> easement. The Court reasoned that the owner of the land subject to the easement should not be deprived of the use of his land as pasturage because of the existence of the easement. The Court also held that it was not the servient landowner's duty to protect the easement. It would seem proper in this case to require the respondent, the owners of the dominant estate, to absorb the cost of constructing and maintaining any gates necessary to protect the easement and to allow the appellants [the servient estate] reasonable use of their land as pasturage.

Gibbens, 98 Idaho at 640, 570 P.2d at 870 (emphasis added). The *Gibbens* case has been cited approvingly in subsequent Idaho Supreme Court decisions.[41]

This duty remains on the dominant estate owner even when the servient estate owner also uses the road:

> The duty of maintaining the easement rests with the easement owner (i.e., dominant estate), even when the servient landowner uses the easement. Sellers v. Powell, 120 Idaho 250, 251, 815 P.2d 448, 449 (1991). *Sellers v. Powell*, 120 Idaho 250, 251, 815 P.2d 448, 449 (1991). That duty requires the easement owner maintain, repair, and protect the easement so as not to create an additional burden on the servient estate or an interference that would damage the land, such as flooding of the servient estate. *Conley*, 133 Idaho at 271, 985 P.2d at 1133; *Gibbens*, 98 Idaho at 640, 570 P.2d at 877; *Rehwalt v. American Falls Reservoir District # 2*, 97 Idaho 634, 636, 550 P.2d 137, 139 (1976); *Pioneer Irr. Dist. v. Smith*, 48 Idaho 734, 738, 285 P. 474, 475 (1930). This duty to maintain does not mean that the easement owner is required to maintain and repair the easement for the benefit of the servient estate. *Rehwalt*, 97 Idaho at 636, 550 P.2d at 139.
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> …
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> … [T]he Boozers argue the district court's decision to deny their counterclaim for contribution was in error because the district court cited to 28A C.J.S. *Easements* § 170 (1996) for the proposition that "[W]hen

[41] The guidance laid out in *Gibbens* respecting the right and duty of the dominant estate owner to maintain the easement has been followed consistently in subsequent decisions. In contrast, *Gibbens'* holding with respect to private condemnation of easements has been modified by more recent case law. See discussion in section I.B.7 on page 44.

> the dominant tenant and the servient tenant both use an easement, the court may apportion the cost of repair between them accordingly." Although the district court based its denial of the Boozers' counterclaim in part on this proposition, that proposition is not the law in Idaho.

Walker v. Boozer, 140 Idaho 451, 456, 95 P.3d 69, 74 (2004) (Kidwell, J.) (emphasis added).

On the other hand, the right and duty to protect the easement does not give the easement holder the right to fence the easement for the sole benefit of the easement holder to the detriment of servient estate. In *Drew v. Sorensen*, 133 Idaho 534, 989 P.2d 276 (1999) (Silak, J.), the Court explained:

> *Gibbens* indicates that the duty to protect an easement exists to prevent additional burdens to the servient landowner. Sorensen has not shown that fencing off the entire width of the easement is necessary to protect the easement. Sorensen asks this Court to transform the duty to protect the easement into an unqualified right to fence off the entire width of the easement for his own benefit and convenience. Under these circumstances, Sorensen's relocation of the fence cannot be characterized as the exercise of a secondary easement.

Drew, 133 Idaho at 538, 99 P.2d at 280 (distinguishing *Boydstun Beach Ass'n v. Allen*, 111 Idaho 370, 723 P.2d 914 (Ct. App. 1986) (Swanstrom, J.) which involved placement of a fence that benefited both the servient and dominant estates).

The easement holder's duty to maintain the easement was further described by Justice Burdick in the *Beckstead* case:

> The owner of the servient estate does not have a duty to maintain the easement. *Walker v. Boozer*, 140 Idaho 451, 455, 95 P.3d 69, 73 (2004). The owner of the dominant estate has the duty to maintain the easement even when the servient estate landowner uses the easement. *Id*. at 456, 95 P.3d at 74. "That duty requires the easement owner maintain, repair, and protect the easement so as not to create an additional burden on the servient estate or an interference that would damage the land, such as flooding of the servient estate." *Id*. However, the dominant estate owner's duty to maintain does not require the dominant estate "to maintain and repair the easement for the benefit of the servient estate."

> *Id*. When a servient estate owner seeks contribution they must show the dominant estate owner's maintenance created an additional burden or an interference that would damage the servient estate. *Id*.

Beckstead v. Price, 146 Idaho 57, 66, 190 P.3d 876, 885 (2008) (Burdick, J.).

The *Beckstead* decision also addressed the responsibilities of the dominant and servient estate holders with respect to who must bear the expense of maintaining gates on the road:

> In *Gibbens*, this Court held it was proper to impose on the dominant estate owners the expense of constructing and maintaining gates necessary to protect the easement. *Id*. at 640, 570 P.2d at 877. However, *Gibbens* does not require that all expenses associated with gates on the easement be absorbed by the dominant estate owners. Rather, Gibbens looked at the specific facts of the case. *See id*. ("It would seem proper in this case to require" the dominant estate to construct and maintain the necessary gates). In *Lovitt* [*v. Robideaux*, 139 Idaho 322, 78 P.3d 389 (2003) (Kidwell, J.)], this Court looked at whether the district court's order preventing the servient estate from limiting the use of the easement by a locked gate was reasonable. 139 Idaho at 328, 78 P.3d at 395. The Court noted the servient estate owner may choose to construct a gate across an easement but "[u]se of a gate, or any other method of regulating an easement, by the owner of the servient estate must, however, be reasonable." *Id.*

Beckstead, 146 Idaho at 67, 190 P.3d at 886 (first brackets added second brackets original).

The flipside of the dominant estate owner's duty to maintain the easement is the duty of the servient estate owner to avoid interfering with the easement.

> This Court has affirmed district court orders preventing the servient estate from constructing or maintaining gates in a way which interferes with or limits the use of the prescriptive easement by the dominant estate. See *Lovitt v. Robideaux*, 139 Idaho 322, 328–29, 78 P.3d 389, 395–96 (2003); *Gibbens*, 98 Idaho at 640, 570 P.2d at 877.

Beckstead, 146 Idaho at 67, 190 P.3d at 886.

The *Beckstead* Court went on to order the servient estate owners (the Prices) to remove a gate they had installed because "it is evident that the gate the [Prices] have placed near the gate leading to the Beckstead Property has no purpose but to harass and make it more difficult for the [Becksteads] to access their property." *Beckstead*, 146 Idaho at 67, 190 P.3d at 886 (quoting the district court, brackets original by Idaho Supreme Court).

If the dominant and servient estate owners agree to do so, they are free to re-allocate the burdens established by common law:

> "The owner of the dominant estate has the duty to maintain the easement even when the servient estate landowner uses the easement." *Beckstead v. Price*, 146 Idaho 57, 66, 190 P.3d 876, 885 (2008). The district court's error, however, was the failure to recognize that parties' freedom to contract allows them to reallocate duties that would otherwise be imposed by law, provided that such a reallocation of duties is not illegal or violate public policy. *See, e.g., Two Jinn, Inc. v. Idaho Dep't of Ins.*, 154 Idaho 1, 5, 293 P.3d 150, 154 (2013).

Fletcher v. Lone Mountain Road Ass'n, 162 Idaho 347, 543, 396 P.3d 1229, 1235 (2017) (Horton, J.).

4. Adverse use against the State (see section IV.U)

See section IV.U on page 298 for a discussion of "Adverse possession."

5. Adverse use against the federal government

Most claims of access across federal lands (or former federal lands) are based on public road access under R.S. 2477. But one could also assert a claim for a private easement.

If such a claim is made against the United States, it fails. "Adverse 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*, 169 P. 288, 289 (Idaho 1917) (Budge, C.J.). (In addition, such a claim would need to be made under the federal Quiet Title Act.)

But the Idaho Supreme Court—indeed the same Chief Justice Budge as in *Hemphill*—recognized a work-around. If the claim of adverse use (aka prescriptive use) is directed to a subsequent patentee but is based on use by the plaintiff prior to patent, the claim is viable.

But the Idaho Supreme Court—indeed the same Chief Justice Budge as in *Hemphill*—recognized a work-around. By the time of suit, Schultz had obtained a

patent for the land from the United States. Before the patent issued, however, Kirk had begun his adverse use of the road. Even though Kirk could not establish adverse possession against the United States, he could establish adverse use against Schultz as an entryman.

> The principle which is applicable to the case at bar must not be confounded or confused with the doctrine of adverse possession as against the United States. One 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. …
>
> …
>
> Cases might and do arise where those using a private way over public domain may by their conduct, openly and notoriously pursued, apprise one subsequently acquiring title from the United States that they are claiming the way as of right, and thus make their possession adverse as against the entryman who would take title burdened with the easement.

Kirk v. Schultz, 63 Idaho 278, 119 P.2d 266, 269-70 (1941) (Budge, C.J.) (emphasis added).[42]

Note the underlined language in the quotation above. It suggests that adverse possession is permissible against everyone other than the United States. That would suggest that adverse possession against the State or other governmental entities is permissible. But that is probably not what the Court had in mind when it said "everyone." The complex subject of adverse possession against the State is discussed in section IV.U (Adverse possession) on page 298.

6. May private prescriptive easements be obtained for roads on State or other public lands?

This topic is addressed in section IV.U ("Adverse possession") beginning on page 298.

[42] 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* 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* at 1101-02.

7. Private easements acquired through condemnation

Under some circumstances, private parties may be authorized to condemn easements. For example, Idaho's condemnation statute authorizes condemnation of "Byroads, leading from highways to residences and farms." Idaho Code § 7-702(5). In *Gibbens v. Weishaupt*, 98 Idaho 633, 639, 570 P.2d 870, 876 (1977) (Donaldson, J.), the Court confirmed that this authorizes private parties to condemn easements.

This subject is addressed in greater detail in the *Idaho Land Use Handbook*. See also the discussion in that Handbook regarding Idaho Code § 7-701A (which limits the use of the condemnation power by the government when used for the benefit of private parties).

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 § 1, p. 578 (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 (1881), § 1, pp. 277-78 (approved 2/1/1881).[43]

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.[44] 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.

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[43] 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 (1885), § 1, p. 162.

[44] The 1881 statute was enacted on February 1, 1881. Section 46 of the statute makes it effective as of the date of enactment. Gen. Laws of the Territory of Idaho (1881), at p. 292, § 18 (1881).

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, C.J.) to the 1881 blanket legislative declaration (Gen. Laws of the Territory of Idaho (1881), § 1, pp. 277-78 (approved 2/1/1881)). "To satisfy the 1881 law, the use must be regular, not casual 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 "passive" 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)).[45]

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[45] Understanding the history of Idaho's passive and formal public road creation statutes is essential to understanding the case law—which references code provisions that have changed over time.

Idaho's passive and formal public road creation statutes date to 1887: Rev. Stat. of Idaho Terr. §§ 850, 851 (1887). Section 850 set out the definition of highways, while section 851 contained the passive and formal road creation provisions. Until 1985, section 850 and its successors remained essentially a definition of highways. The 1985 recodification redundantly added passive and formal road creation provisions to the latest iteration of section 850 (Idaho Code § 40-109(5)) while repeating functionally identical provisions in the latest iteration of section 851 (Idaho Code § 40-202(3)). See Index to Idaho Road Creation and Abandonment Statutes on page 424.

Over the years section 850 was amended as follows: Idaho Codes Ann. § 1137 (1901); Rev. Codes of Idaho § 874 (1908); 1911 Idaho Sess. Laws, ch. 55, § 1 (the Highway District Act of 1911) (not codified); Compiled Laws of Idaho § 874 (1918); Compiled Stat. of Idaho § 1302 (1919); 39 Idaho Code Ann. § 39-101 (1932); Idaho Code § 40-101 (1948); The Highway Administration Act of 1950, S.B. 62, 1950 Idaho Sess. Laws, ch. 87, § 2; The Highway Administration Act of 1951, S.B. 1(1887)25, 1951 Idaho Sess. Laws, ch. 93, § 2; Idaho Code § 40-107 (1961); H.B. 265, 1985 Idaho Sess. Laws, ch. 253, § 2 (codified at Idaho Code § 40-109(5)); H.B. 578, 1988 Idaho Sess. Laws, ch. 184, § 1 (codified at Idaho Code § 40-109(5)).

Over the years, section 851 was amended as follows: 1893 Idaho Sess. Laws, An Act Relating to Highways, etc., § 1, p. 12 (amending the codification at Rev. Stat. of Idaho Terr. § 851); Idaho Codes Ann. § 1138 (1901); Rev. Codes of Idaho § 875 (1908); Compiled Stat. of Idaho § 1304 (1919); 39 Idaho Code Ann. §§ 39-103 (1932); Idaho Code § 40-103 (1948); Idaho Code § 40-103 (1961); H.B. 265, 1985 Idaho Sess. Laws, ch. 253, § 2 (codified at Idaho Code § 40-202); H.B. 556, 1986 Idaho Sess. Laws, ch. 206, § 2 (codified at Idaho Code § 40-202); H.B. 578, 1988 Idaho Sess. Laws, ch. 184, § 2 (codified at Idaho Code § 40-202(3)); H.B. 627, 1992 Idaho Sess. Laws, ch. 55, § 1 (codified at Idaho Code § 202(3)); S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 1 (codified at Idaho Code § 40-202(3)); S.B. 1117, 1995 Idaho Sess. Laws, ch. 121 § 1 (codified at Idaho Code

The 1887 road creation statute has been amended on a number of occasions over the years (see footnote 127 on page 133). 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 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, An Act Relating to Highways, etc., § 1, p. 12 (amending the codification at Rev. Stat. of Idaho Terr. §§ 850, 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.[46] 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

§ 40-202(3)); S.B. 1407, 2000 Idaho Sess. Laws, ch. 251, § 1 (codified at Idaho Code § 40-202(3)).

[46] A minor substantive amendment was made in 1992. It is discussed in section I.D.2 at page 48.

> 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).

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

2. Public roads created by formal declaration

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—see section I.D.3 on page 51. Curiously, the case law never seems to speak to this basic point.

Since 1864, statutes have provided that roads may be created by official declaration of the county commissioners.[47] Beginning in 1887, formal action has required that the approval be recorded.

[47] Laws of the Territory of Idaho § 1, p. 578 (1864) (containing a blanket declaration as to existing roads and allowing new roads to be created by official action); Compiled and

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. § 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:[48]

> 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, An Act Relating to Highways, etc., § 1, p. 12 (emphasis supplied) (amending the codification at Rev. Stat. of Idaho Terr. § 851 (1887); 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 formal declaration recognizing the road must be recorded. Rev. Stat. of Idaho Terr. § 851 (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).[49]

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 (1885), § 1, p. 162 (recognizing prior blanket declarations as well as declaration by official act of county, but requiring that such roads be opened within four years).

[48] 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.

[49] The recording requirement in Rev. Stat. of Idaho Terr. § 851 (1887) has been recodified with or without amendments repeatedly over the years, including:

- 1893 Idaho Sess. Laws, An Act Relating to Highways, etc., § 1, p. 12 (amending the codification at Rev. Stat. of Idaho Terr. § 851).
- 1899 Idaho Sess. Laws, H.B. 75, § 2, p. 168 (amending the codification at Rev. Stat. of Idaho Terr. § 851).
- Idaho Codes Ann. § 1138 (1901).
- Rev. Codes of Idaho § 875 (1908).

Note: In *Jutila v. County of Shoshone*, ___ Idaho ___, 571 P.3d 399, 404-06 (2025) (Zahn, J.), the Court held that failure to follow the recording requirements does not invalidate roads created by the viewers' report process.

By the way, under current law, formal vacation also requires a recording. Idaho Code § 40-203(1)(j).

No particular form of recording is required. In the early days, most counties maintained separate "road books" where such recordings were entered.[50] An 1887 statute (recodified in 1901) requires that rights-of-way obtained through the viewers' report process be recorded. See discussion in section I.D.3 on page 51.

In 1992 the Legislature amended the road creation statute, adding a requirement that the road be "opened." H.B. 627, 1992 Idaho Sess. Laws, ch. 55, § 1 (codified at Idaho Code § 40-202(3)).[51] 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

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It is codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3).

[50] See, e.g., Idaho Rev. Codes § 1912(3) (1908) (requiring counties to maintain a "road book"). The Idaho Supreme Court has never questioned that recording in the "road book" meets the recording requirement. For example, in *Trunnell v. Fergel*, 153 Idaho 68, 70, 278 P.3d 938, 940 (2012) (Burdick, C.J.), the subject road was established by formal declaration of Bonner County in 1908, and the action was recorded in Bonner County's "Road Book." The Idaho Supreme Court recited the district court's conclusion that this satisfied the recording requirement in Rev. Codes of Idaho § 875 (1908). "This court again concludes that the phrase 'recorded by order of the board of commissioners' does not mandate the recording of the road description or the recording of the actions of the county commissioners in the recorder's office." *Trunnell*, 153 Idaho at 71, 278 P.3d at 941. No appeal of this point was taken. *Trunnell*, 153 Idaho at 71, 278 P.3d at 941.

Other cases have described recording in a county's official road book without any question being raised as to whether this satisfies the recording requirement. *Palmer v. East Side Highway Dist.*, 167 Idaho 813, 816, 477 P.3d 248, 251 (2020) (Stegner, J.) ("The Kootenai County Road Book shows the Road … ."); *Richel Family Trust v. Worley Highway Dist.*, 167 Idaho 189, 196, 468 P.3d 775, 782 (2020) (Stegner, J.) ("The Highway District found 'Road No. 20 was included in the Kootenai County Road Book which depicts accepted public roads.' The Highway District relied on a page from the Kootenai County Road Book.").

Nor does the "presumption of regularity" overcome the recording requirement. In *Palmer*, the original road creation was recorded. The presumption of regularity had to do with a subsequent formal abandonment, which does not require a recording.

As discussed in section I.D.3 on page 51, it does not appear that the Court has ever addressed the separate recording requirement for approval of viewers' reports.

[51] The 1992 Act neglected to make a corresponding change to the definition of "highways" in Idaho Code § 40-109(5).

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 83) also allow roads to be dedicated to public use today, even if they are not constructed for many years.

3. The viewers' report process for "laying out" and constructing roads (1887-1911)

Note: See section I.J.1.b on page 116 for a discussion of why the viewers' report process for opening new roads results in an easement, not fee ownership of the road.

The reference in the formal road creation statute[52] to roads being "laid out" does not refer to roads being constructed. Rather, it refers to the process of mapping and surveying (laying out) the best route of a proposed road. The viewers' report process was used for the formal establishment of new (and newly altered) roads from the early days of Idaho Territory[53] until it was abolished in 1911.[54] The viewers'

[52] The formal road creation statute (Rev. Stat. of Idaho Terr. §§ 850, 851 (1887) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3))) is discussed in section I.D on page 45.

[53] The first statute dealing with viewers' reports appears to be Rev. Stat. of Idaho Terr. §§ 920 to 937 (1887). It was recodified with amendments in 1901 (Idaho Codes Ann. §§ 1185 to 1204 (1901)) and again in 1908 (Rev. Codes of Idaho §§ 916 to 935 (1908)).

[54] In 1911, the Legislature abolished the viewers system. 1911 Idaho Sess. Laws, ch. 60, § 2 p. 166 (repealing sections 916 to 935 except for sections 928 to 933). The viewers' report process was replaced by separate processes for counties and for highway districts. In each case, county or highway district officials undertook the actions previously performed by appointed viewers. The new process for highway districts was enacted on March 11, 1911. 1911 Idaho Sess. Laws, ch. 55, § 15, pp. 127-29 (later codified in 1918 Compiled Laws of Idaho, chap. 62, § 62:15). The process for counties was enacted the following day. 1911 Idaho Sess. Laws, ch. 60, § 3 pp. 166-70 (creating a new §§ 928a and 928b) (later codified in 1918 Compiled Laws of Idaho, chap. 57, §§ 928a and 928b).

Note: The decision in *Richel Family Trust v. Worley Highway Dist.*, 167 Idaho 189, 195, 468 P.3d 775, 781 (2020) (Stegner, J.) describes a "viewer's report" prepared in October of 1913. That is at odds with the fact that the viewers' report process was abolished in 1911. The source of this confusion is revealed by the appellate brief of Respondent Buell. That brief described the operative document (a "release of damages and deed to right of way") as being "similar to the actions the Board sees 'in all of these roads established by viewer reports.'" 2019 WL 3804535 at *6. In other words, the survey and plat were similar to those prepared by appointed viewers, but it was not a viewers' report. Instead, the 1913

report process is described in various Idaho Supreme Court cases.[55]

The viewers' report process is described in detail the initial 1887 statute.[56] In those days, "viewers" were appointed by the county commissioners. It was their job to "lay out" a proposed new road—i.e., determine the best route. This included a process for obtaining the consent of landowners across whose land the proposed road would be constructed, coupled with a condemnation procedure for non-consenting landowners. In those days, many landowners were happy to have a new road constructed, and readily agreed to convey a right-of-way without compensation (which was called "damages" in the old statute).

It bears emphasis that public roads are not created by viewers' reports. The viewers only make a recommendation. The decision to accept the report, pay damages if necessary, and thereby create the public road was made by the county

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survey was prepared by a surveyor named W.T. Shepperd, in accordance with the 1911 statutory scheme. Nevertheless, the Worley Highway District's findings and conclusions, as well as the district court and appellate decisions all refer, incorrectly, to a 1913 "viewer's report."

[55] For example, *Canyon County v. Toole*, 8 Idaho 501, 69 P. 320 (1902) (Quarles, C.J.) is an early case involving condemnation of right-of-way across the property of a landowner who refused to accept the proposed damages. The Court describes the viewers' report process in detail.

[56] The 1887 statute provided that "any ten inhabitants of a road district" (counties were then divided into road districts) may petition the county commissioners to open, alter, or discontinue any road. Rev. Stat. of Idaho Terr. § 920 (1887). If the petition sought the opening of a new road or the alteration of an existing road, the county commissioners would then appoint three disinterested "viewers," one of whom must be a surveyor. The viewers would then "view and lay out" the proposed road over the most practicable route, estimate its cost of construction, and ascertain whether each landowner will consent to the road (i.e., not demand compensation called "damages"). *Id.* §§ 923, 924. The viewers then would submit a report to the county describing the proposed road and giving the viewers' assessment of whether it was needed. *Id*. §§ 924, 925. The viewers' report also would identify each landowner whose land the road could cross, and provide an estimate of the "damages" (compensation) that would need to be paid to the landowner if he or she did not consent to give the right of way for the placement of the road. *Id*. § 925. The county commissioners were required to hold a public hearing and decide whether to accept the viewers' report and, if approved, determine the damages to be offered to nonconsenting landowners. *Id.* § 928. Further steps (including a judicial determination of condemnation) are set out in the event any landowners refuse to accept the proposed damages. *Id.* §§ 929-931.

The viewers' report provisions were recodified with some amendments in 1901. Idaho Codes Ann. §§ 1185 to 1211 (1901). In 1901, a provision was added allowing viewers to be dispensed with upon written consent of all owners of the land to be used for that purpose. *Id*. § 1203.

commissioners. Rev. Stat. of Idaho Terr. § 929 (1887).

Since 1887, Idaho statutes have required that road creation by formal action must be recorded in order to be effective. Rev. Stat. of Idaho Terr. § 851 (1887) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)). See discussion in section I.D.2 on page 48.

In addition to the recording required by Rev. Stat. of Idaho Terr. § 851 (1887) and its successors (see footnote 49 on page 49), the viewers' report statute included an additional recording requirement, which specifically requires that the conveyance instruments be recorded with the county recorder. Merely retaining copies of viewers reports and minutes of their approval is not sufficient. That statute reads in full:

> In all cases where consent to use the right of way for a highway is voluntarily given, purchased, or condemned and paid for, either an instrument in writing conveying the right of way and incidents thereto, signed and acknowledged by the party making it, or a certified copy of the decree of the Court condemning the same, must be made and filed and recorded in the office of the Recorder of the county in which the land so conveyed or condemned must be particularly described.

Rev. Stat. of Idaho Terr. § 934 (1887) (recodified in Idaho Codes Ann. § 1199 (1901) and 1 Rev. Codes of Idaho § 930 (1908)) (emphasis added).[57]

In 1911, the Legislature abolished the viewers system, replacing it with a system involving the appointment of a road overseer for each road district within each county. 1911 Idaho Sess. Laws, ch. 60, § 3 p. 170 (creating a new §§ 928a and 928b) (codified in Compiled Laws of Idaho §§ 928a and 928b (1918)). Although the "viewers" were replaced by a road overseer, the 1911 statute continued to provide a mechanism for adjacent landowners to convey a right-of-way by purchase or condemnation.

In 1919, the responsibility for laying out roads (including acquiring rights-of-way by purchase or condemnation) was placed directly in the hands of the county commissioners. Compiled Stat. of Idaho § 1312(5) (1919).

[57] In *Jutila v. County of Shoshone*, ___ Idaho ___, 571 P.3d 399, 404-06 (2025) (Zahn, J.), the Court held that failure to follow the recording requirements does not invalidate roads created by the viewers' report process. *Jutila* did not mention this recording requirement. Perhaps it, too, may be violated with impunity under *Jutila*.

4. Public roads created by prescription (public use and maintenance)

a. Overview of statutory requirements

Idaho has two statutes dealing with so-called "passive" public road creation based on public use and maintenance without any formal action by governmental authorities. In pertinent part, they read today as follows:

> [A]ll 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, … are highways.

Idaho Code § 40-109(5).

> [A]ll highways used for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, … are highways.

Idaho Code § 40-202(3).

These statutes have a long history.[58] 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 <u>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>.

1893 Idaho Sess. Laws, An Act Relating to Highways, etc., § 1, p. 12 (amending the codification at Rev. Stat. of Idaho Terr. § 851 (1887) (emphasis supplied); codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)). Note that the proviso (the maintenance requirement) was not part of the 1887 version, but was added in 1893.

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

[58] For a detailed history of these statutes, see footnote 45 on page 46. See also the Index to Idaho Road Creation and Abandonment Statutes on page 424.

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.).[59]

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.[60] 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

[59] 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.

[60] 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").

> 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. § 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. 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~~b~~oard of C~~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, An Act Relating to Highways, etc., at § 1, p. 12 (amending the codification at Rev. Stat. of Idaho Terr. § 851 (1887); 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 48. 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 and vacation.

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 II.D.4 at page 134.

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

In *East Side Highway Dist. v. Delavan*, 470 P.3d 1134, 1149 (Idaho 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*,

829 P.2d 1349, 1354 (Idaho 1992); *Simmons v. Perkins*, 118 P.2d 740, 744 (Idaho 1941)).

In so ruling, the *East Side* Court expressly overruled dictum to the contrary in *Lattin v. Adams Cnty.,* 236 P.3d 1257, 1262 (Idaho 2010) (W. Jones, J.). "The statute does not contain a requirement for hostile or adverse use by the public." *East Side* at 341. "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 342. 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?

It is not a simple question of whether there has been some public use or not. Rather, as the Court has said many times, it is a question of the "frequency, nature and quality of the public's use and maintenance of the road and the intentions of the landowners and county relevant to the use and maintenance." *Tomchak v. Walker*, 108 Idaho 446, 448, 700 P.2d 68, 70 (1985) (Bakes, J.) (emphasis added).[61]

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."[62] *Kirk v. Schultz*, 63 Idaho 278, 284, 119 P.2d 266, 268 (1941) (Budge, C.J.). The Court applied this rule both to the passive road creation statute of 1887 and to the blanket territorial declaration of 1881; subsequent cases make clear that it applies to all subsequent passive road creation statutes.

When one landowner (Schultz) gated a road crossing his land, a neighbor (Kirk) brought a civil action (presumably a quiet title action) seeking a ruling that it was a public road (or, in the alternative, that there was a prescriptive easement). The trial court found the public use was merely casual and insufficient to create a public road. The Idaho Supreme Court affirmed.

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[61] The "frequency, nature and quality of the public's use" language in *Tomchak* has been quoted repeatedly. *French v. Sorensen*, 113 Idaho 950, 952, 751 P.2d 98, 100 (1988) (Bistline, J.); *Burrup v. Stanger*, 114 Idaho 50, 53, 753 P.2d 261, 264 (Ct. App. 1988) (Swanstrom, J.), *aff'd*, 115 Idaho 114, 765 P.2d 139 (1988) (per curium); *Roberts v. Swim*, 117 Idaho 9, 16, 784 P.2d 339, 346 (Ct. App. 1989) (Swanstrom, J.); *Floyd v. Bd. of Comm'rs of Bonneville Cnty.* ("*Floyd II*"), 137 Idaho 718, 727, 52 P.3d 863, 872 (2002) (Walters, J.); *Ada County Highway Dist. v. Total Success Inv., LLC* ("*Total Success I*"), 145 Idaho 360, 365, 179 P.3d 323, 328 (2008) (Burdick, J.).

[62] The word "desultory" means "marked by lack of definite plan, regularity, or purpose." The word derives from the Latin term for a circus rider (i.e., a chariot rider) who jumps from horse to horse. Merriam-Webster Unabridged Dictionary (2013).

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. Without explaining the underlying facts, the Court upheld the ruling that even this much use was insufficient. In short, the evidence was conflicting, but there was substantial evidence that the road was "not regularly used." *Kirk*, 63 Idaho at 284, 119 P.2d at 268.

> 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.
>
> 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. Apparently, however, even a well-marked trail later widened into a wagon road may fall short of the standard.

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.[63] 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 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

[63] 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.

> 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*, 167 Idaho 325, 340, 470 P.3d 1134, 1149 (2019) (Stegner, J.).

In *Ada Cnty. Highway Dist. v. Total Success Inv., 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. *Burrup*, 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 328-29, 179 P.3d at 365-66 (referencing *Burrup v. Stanger*, 144 Idaho 50, 753 P.2d 261 (Idaho Ct. App. 1988) (Swanstrom, J.), *aff'd*, 115 Idaho 114, 765 P.2d 139 (1988) (per curium)). The Court found this test was met based on evidence of "extensive public use." *Total Success I*, 145 Idaho at 365,

368, 179 P.3d at 328, 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:[64]

> 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.4.b(iv) at page 65 (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.

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[64] 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.

In *Kirk v. Schultz*, 63 Idaho 278, 119 P.2d 266 (1941) (Budge, C.J.), 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 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).[65]

In *S. Utah Wilderness Alliance v. BLM* ("*SUWA*"), 425 F.3d 735 (10th 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, (10th

[65] The *Boise City* case, by the way, dealt with road abandonment. The reference to section 40-104 is to the passive abandonment statute, later recodified to Idaho Code § 40-203 and repealed altogether in 1993. S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 4 (amending what was then Idaho Code § 40-203(4) to remove passive abandonment provisions).

> 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.[66]

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

> 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

[66] 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 (10th 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).

> "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,[67] 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 III.E at page 183). Instead, the R.S. 2477 road creation theory in *Galli* relied on compliance with the Idaho road creation statute in

[67] 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.[68] 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.[69] Thus, there needed to be evidence of public use beginning in 1899.

Alas, the county commissioners in the *Galli* case got off on the wrong foot. The 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

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[68] 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 III.G.3 at page 192.

[69] 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.

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 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[70] 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

[70] The concurrence mentioned the irrigation ditches, too. The majority only mentioned the cabins and fences.

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 44), 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.[71] The facts showed a boom and bust cycle that lasted barely a year, 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,

[71] 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.

holding that use of a road by adjacent landowners qualifies as public use. *Ada Cnty. Highway Dist. v. Total Success Inv., 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,* 946 P.2d 975, 980 (Idaho 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, 225 P. 1021, 1022 (Idaho 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, 373 P.2d 929, 933 (Idaho 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.[72]

See also *State v. Nesbitt*, 310 P.2d 787 (Idaho 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* 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 February 2, 1893.

As noted above, the road maintenance requirement was not added to the road statute until January 2, 1893.[73] 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.4.a at page 54.) 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

[72] 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.).

[73] 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, An Act Relating to Highways, etc., § 1, p. 12 (amending the codification at Rev. Stat. of Idaho Terr. § 851; codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)).

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.[74] The courts have not had an occasion to articulate a clear standard of proof on this issue.

(iii) How many years of maintenance are required?

A technical reading of the statute might suggest that public use is required for five years while public maintenance is required for no particular period of time. However, in *Roberts v. Swim*, the Court stated that five years of public maintenance is also required.[75] The Court said so again in *Ada Cnty. Highway Dist. v. Total Success Inv., LLC* ("*Total Success I*"), 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

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[74] 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.

[75] "The maintenance of the road by a public agency and the use by the public must be for a period of five years." *Roberts v. Swim*, 117 Idaho 9, 16, 784 P.2d 339, 346 (Ct. App. 1989) (Swanstrom, J.). In another case, in contrast, the Court somewhat ambiguously described the five-year requirement in a way that might be read as applying 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 v. Bd. of Comm'rs of Bonneville Cnty.* ("*Floyd II*"), 137 Idaho 718, 725 52 P.3d 863, 870 (2002) (Walters, J.). However, *Floyd II* did not expressly overrule the earlier and clearer articulation of the requirement in *Swim*.

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 Inv., LLC* ("*Total Success I*"), 145 Idaho 360, 366, 179 P.3d 323, 329 (2008) (Burdick, J.) (quoting *Roberts*, 117 Idaho at 16, 784 P.2d at 346).

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, "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 in order to acquire a right of way by prescription." *Gross v. McNutt*, 4 Idaho 286, 289, 38 P. 935, 936 (1894) (Sullivan, J.).[76]

[76] *Gross* dealt with a road created by five years of public use and maintenance under the 1893 version of the road creation statute: 1893 Idaho Sess. Laws, An Act Relating to Highways, etc., § 1, p. 12 (amending the codification at Rev. Stat. of Idaho Terr. § 851 (1887); codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)). The 1893

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.).

Thus, throughout the length of a publicly maintained road, there may be portions that receive no maintenance in any given year. It is quite another matter to suggest that the a road may be validated beyond those endpoints into areas where the road has not been regularly maintained by at public expense.

In *Roberts v. Swim*, public maintenance occurred up to the Swims' house and stopped there. The Court held that the public road could not be extended onto the portion on the Swim's property that was not publicly maintained. "We are in agreement with the conclusion of the district court that Midnight Creek road above Swim's house was not shown to constitute a public road. … The evidence is also clear that no public maintenance of the road above Swim's house was undertaken." *Roberts*, 117 Idaho at 16, 784 P.2d at 346.

The *Rice* case involved another similar fact situation. The proponent of public road status (the parent of a trespassing and now deceased motorcyclist), urged that the length of the public road should extend onto private land that had been publicly maintained only sporadically on a gratuitous basis. The Court rejected that claim.

> The evidence is clear that the road beyond the boundary of Miniver's property had been built privately by Miniver's predecessor in interest. The testimony of the county officials and the equipment operators from both Bonneville and Bingham Counties indicated that the portion of the road beyond the boundary of Miniver's property was considered to be strictly private.

Rice, 112 Idaho at 1071, 739 P.2d at 370.

A third case, *Cox v. Cox*, 84 Idaho 513, 373 P.2d 929 (1962) (McFadden, J.), reached the same conclusion:

> Appellant points out that this particular road is a continuation of another road with which it connects; that this connective road has been maintained at county expense over the years and hence the maintenance of the

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statute amended the 1887 statute (Rev. Stat. of Idaho Terr. §§ 850 to 852 (1887)). The 1887 statute was the first "modern" road creation law. It replaced the earlier territorial road creation statutes and created the basic statutory format and structure that remains in place today in sections 40-109(5) and 40-202(3). Note that as of 1887, there was no requirement for maintenance. The maintenance requirement was added in 1893.

> connecting road constitutes maintenance at county expense of the road in question, thus making it a public highway. It is appellant's theory that it is not necessary that a highway be worked throughout its entire length, at public expense, to come within the preview of I.C. § 40–103, citing Gross v. McNutt, 4 Idaho 286, 38 P. 935. The holding in that case is not applicable. Here the maintenance work done on the county road was done for the maintenance of that road alone. The record is devoid of evidence that it was done with the thought in mind it be considered as work on the road in question. 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. The road in question was not an integral part of the county road. Access alone to a county road on which public maintenance is done cannot logically be considered as sufficient to make applicable the holding of Gross v. McNutt, (supra).

Cox, 513 Idaho at 520-21, 373 P.2d at 933.

(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)). Note that Idaho Code § 40-103 (enacted in 1948) was originally enacted at Rev. Stat. of Idaho Terr. § 851 (1887) and since 1985 has been codified at Idaho Code § 40-202.

In *Burrup v. Stanger*, 114 Idaho 50, 753 P.2d 261 (Ct. App. 1988) (Swanstrom, J.), *aff'd*, 115 Idaho 114, 765 P.2d 139 (1988) (per curium), 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, 700 P.2d 68 (1985) (Bakes, J.), 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.

Tomchak, 108 Idaho at 448, 700 P.2d at 70 (brackets original). Note that Idaho Code § 40-103 (enacted in 1948) was originally enacted at Rev. Stat. of Idaho Terr. § 851 (1887) and since 1985 has been codified at Idaho Code § 40-202.

(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).[77]

The *French* case involved a road known as Robinson Bar Road.[78] 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

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[77] 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.

[78] 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.

in 1981. Thereafter, the Frenches and another couple brought a quiet title action seeking to establish title in the County[79] 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 no 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.

S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 1 (adding a new subsection, Idaho Code § 40-106(3)).

To the author's knowledge, 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 III.H.3 at page 201.)

d. May public roads be created by prescriptive use on State lands?

The author is not aware of any case law addressing whether public roads may be created by prescriptive use on State lands. As discussed in section IV.U on page 298, there is case law to the effect that private roads created by prescriptive use may be created on some State lands, but not on school lands or reserved lands. However, that law is premised on analysis of the relevant statute of limitations (the foundation of adverse possession and prescriptive rights) as well as other relevant statutes pertinent to school lands.

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[79] 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.S.1 at page 289. 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.

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The outcome could be different in the context of public road creation. First, the issue of sovereign immunity is postured differently. Public road creation on State land does not take property from the State and give it to a private person. Instead, the right-of-way remains in the State (or one of its subdivisions). Second, Idaho's road creation statute, on its face, is applicable to "all highways used for a period of five (5) years." Idaho Code § 40-202(3).[80] It contains no carve-out saying that it is inapplicable if the underlying land is in State ownership. Third, creation of public roads on school lands arguably does not diminish their value. This argument is strengthened by the fact that school lands were granted for the specific purpose of being developed and, under proper circumstances, disposed of for the financial benefit of the schools.

Thus, there is a plausible argument that public roads may be created by prescription on State lands, even school lands. As discussed in section III.D.4 on page 179, this issue arises only after statehood. Prior to statehood, the question would be addressed in the context of R.S. 2477.

E. Statutory platting process

Note: See section I.J.3 on page 120 for a discussion of whether statutory dedications result in an easement or a fee.

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).[81] There are

[80] The road creation statute has been changed many times, but the reference to "all" highways goes back to the first road statutes enacted during territorial times. Laws of the Territory of Idaho § 1, p. 578 (1864).

[81] 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, An Act To Provide for the Organization, Government, and Powers of 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

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:

> 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.

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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").

Idaho Code § 50-1309.[82] This provision is discussed in *Rowley v. Ada Cnty. Highway Dist.*, 156 Idaho 275, 281-82, 322 P.3d 1008, 1014-15 (2014) (Burdick, C.J.).

> 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). People (including title companies) often assume that the reference to "fee simple" means what it says (that the dedication conveys a full fee interest). However, the Idaho Supreme Court has determined that a statutory dedication conveys only an easement. See discussion in section I.J.3 on page 120.

The Court has held that the dedication to the public must be clear on the face of the plat.[83]

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[82] 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).

[83] 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. Absent labeling, words, or other unequivocal showing of intent of dedication to the public, it did not constitute either a statutory or common law dedication to the public. After finding no common law dedication, 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.)).

Note that *Rowley* dealt only with a dedication to the public. In *Ponderosa Home Site Lot Owners v. Garfield Bay Resort, Inc.* ("*Ponderosa I*"), 139 Idaho 699, 85 P.3d 675 (2004) (Kidwell, J.), the Court followed *Rowley* and found there was no common law dedication of a portion of a plat labeled "lake access." The Court remanded for a determination of who owned the "lake access" parcel. A second appeal followed, authored by Justice Burdick (who dissented from the majority's ruling in *Ponderosa I*). In *Ponderosa Homesite Lot*

There is a statutory "curative" provision for certain flaws in earlier recorded plats:

> 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 (enacted by 1899 Idaho Sess. Laws, p. 214, § 106; later codified at Idaho Codes Ann. § 1973 (1901) and 2 Idaho Code Ann. § 49-2213 (1932)). The predecessor of this statute is discussed in *Powell v. McKelvey*, 56 Idaho 291, 53 P.2d 626, 630 (1935) (Givens, C.J.) and *Worley Highway Dist. v. Yacht Club*

Owners v. Garfield Bay Resort, Inc. ("*Ponderosa II*"), 143 Idaho 407, 409, 146 P.3d 673, 675 (2006) (Burdick, J.), the Court held that lake access description on the plat constituted a private common law dedication creating an easement for the benefit of homeowners within the subdivision. Thus, the words "lake access" were insufficient to show an unequivocal intent to create a public common law dedication, but were sufficient to show that the "apparent intent of placing the area marked lake access on the [PHS] plat … must have been to create an inducement to the [PHS] lot buyers." *Ponderosa II*, 143 Idaho at 410 n.2, 146 P.3d at 676 n.2 (brackets and ellipses original) (this was a quotation by the Court of the district court's reasoning, which was not challenged on appeal).

See discussion of *Ponderosa I* and *Ponderosa II* in footnote 116 on page 123.

of Coeur d'Alene, Ltd., 116 Idaho 219, 223, 775 P.2d 111, 115 (1989) (Bengtson, J. Pro Tem.) (see footnote 85 on page 82).

2. Acceptance of the plat is now required.

A statutory dedication to a city or highway district must be accepted by the governmental entity:

> 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.[84]

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 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).

Worley, 116 Idaho at 223, 775 P.2d at 115.[85]

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[84] The last portion of Idaho Code § 50-1312 (requiring acceptance by a highway district) is more broadly articulated in Idaho Code § 50-1313 ("Dedication must be accepted") and in Idaho Code § 50-1309(2) (dealing with dedication of private roads to the public).

[85] *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

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

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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 n.3, 775 P.2d at 115 n.3.

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 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, 278 P.3d 403, 405 (2012) (J. Jones, J.) (citing *Worley Highway Dist. v. Yacht Club of Coeur d'Alene, Ltd.*, 116 Idaho 219, 224, 775 P.2d 111, 116 (1989)). *Paddison* is discussed further in section I.F.9 on page 90.

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.[86] The Court held that a common law dedication occurred nonetheless. *Pullin*, 103 Idaho at 881, 655 P.2d at 88.

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[86] The platting statute referenced in *Pullin* was Rev. Codes of Idaho § 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

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.[87] 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).

The requirements were re-stated by the Court in 2002, 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.)).[88]

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prevent a common law dedication from occurring. But *Pullin* is not clear on this point and could be read otherwise.

[87] This sounds a bit like the offer and acceptance provided for under R.S. 2477, discussed in section III.B.2 at page 170. Indeed, as discussed below, common law dedication is a proper means of "accepting" the federal grant.

[88] 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

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 v. Bd. of Cnty. Comm'rs of Lemhi Cnty.,* 138 Idaho 378, 385, 64 P.3d 304, 311 (2002) (Schroeder, J.)).

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*, 138 Idaho at 386, 64 P.3d at 312. 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/vacation by the county or highway district or by 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 roads, open space, or beach access to the exclusive use of purchasers of lots within the subdivision. *Ponderosa Home Site Lot 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

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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.

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 to the public. 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 225 n.4, 775 P.2d at 117 n.4.

9. No affirmative act required for common law dedication; public use is a form of acceptance.

Paddison Scenic Properties, Family Tr., L.C. v. Idaho Cnty., 153 Idaho 1, 278 P.3d 403 (2012) (J. Jones, J.) involved a road in the National Forest Road System across private property adjacent to the Selway River which served as a connecting link in the Coldwater Ridge Project. In 1931 the property owners conveyed an easement to the United States authorizing construction and maintenance of the road by the federal government. The deed also contained language dedicating the road to the public as a public road under Idaho law.

Subsequent owners of the private property had a change of heart. They sought a declaratory judgment that no public road was created under Idaho law because the county or highway district within which the road was located did not accept the dedication by some affirmative act, nor did they maintain the road (which was instead is maintained by the federal government). Since the 1960s, the Selway River

was accessible by another road (owned by the highway district) also crossing the Paddison property, which Paddison did not contest.

Paddison did not challenge the federal easement, apparently (according to the briefing) because the Forest Service allowed Paddison to gate the road as it crossed their property. It is unclear whether and when the gate was locked, but apparently at least some public use continued to be made of the road. In any event, the district court noted that it was without jurisdiction to consider the federal ownership issue.

The Idaho Supreme Court found, *sua sponte*, that the case was not ripe, because there was no controversy among the parties. Neither the county nor the highway district sought to control the road; each preferred that the Forest Service continue to operate it as a federal right-of-way. But this did not stop the Court from clearly addressing the merits of the case, although technically in dictum.

The question in the case was whether the language in the 1931 deed coupled with public use constituted a common law dedication (a formal dedication having failed). Paddison argued that allowing mere use to suffice is "at odds with modern case law." *Paddison*, 153 Idaho at 3, 278 P.3d at 405. The Idaho Supreme Court thought otherwise.

> 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, 278 P.3d 403, 405 (2012) (J. Jones, J.) (parentheticals original).

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 of the common law dedication is by public use, the acceptance applies to the full stated <u>width</u> of the dedication, but only to the <u>length</u> that was actually used by the public.

In *Thiessen v. City of Lewiston*, 26 Idaho 505, 144 P. 548 (1914) (Truitt, J.), two landowners made an oral dedication of a road 50-feet wide. The Court ruled that a common law dedication had been effected by public use of a portion of the length of the road. As for the portion that had been accepted, the acceptance worked for the full 50 feet, irrespective of how much of the width had actually been used.

The *Theissen* holding was summarized more recently in *Paddison Scenic Properties, Family Tr., L.C. v. Idaho Cnty.*, 153 Idaho 1, 278 P.3d 403, (2012) (J. Jones, J.):

> 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 publicly used portion by a fence and telephone poles, was not accepted. *Id*.

Paddington, 153 Idaho at 3, 278 P.3d at 405.

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.[89] 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' express goal of creating a network of roads in the newly-settled areas. See discussion in section III.A.1 at page 164.

[89] 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).

13. 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 III at page 164), 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.)

14. 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 II.G.1 on page 141. Of course, they may still be vacated by formal declaration of the county[90]—with the possible exception of R.S. 2477 roads. A 2013 amendment created a very limited exception. See discussion in section II.C at page 129.

15. 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

[90] Current requirements for formal abandonment are discussed below in section II.H.3 beginning on page 147.

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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.).[91] In rejecting

[91] *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

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 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).

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.

H. 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.

Since territorial times (1887), statutes have set a 50-foot minimum for road width.[92] 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).[93]

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[92] 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." Rev. Stat. of Idaho Terr. § 932 (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." Gen. Laws of the Territory of Idaho (1885), § 10, p. 165 (approved 2/5/1885).

In 1901, the 1887 statute was re-codified without change: "All highways, except alleys and bridges, must be at least fifty feet wide except those now existing of a less width." Idaho Codes Ann. § 1139 (1901).

In 1919, the statute read: "All highways, except alleys and bridges and streets located within townsites, must be not less than 50 feet wide and not to exceed 100 feet wide, except those now existing of a different width." Compiled Stat. of Idaho § 1350 (1919).

From 1985 until 2013, the statute read: "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." 1985 Idaho Sess. Laws, ch, 253, § 2.

See discussion in section I.H.6 on page 107 regarding another road width statute, Idaho Code § 40-605.

[93] Idaho Code § 40-2312 was first enacted in its present form in 1985 as part of a comprehensive recodification of Idaho's road statutes. H.B. 265, 1985 Idaho Sess. Laws, ch. 253, § 2. Its predecessors are Rev. Stat. of Idaho Terr. § 932 (1887), Idaho Code § 39-601 (1933), and Idaho Code § 40-701 (1966).

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In 2013, the 1887 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.)). The legislation was crafted by an Interim Task Force established on March 27, 2012 by the Senate Transportation Committee. The result was the enactment of H.B. 321, 2013 Idaho Sess. Laws, ch. 239 (codified in part at Idaho Code § 40-2312). The 2013 amendment codified the holdings of cases establishing a minimum 50-foot road width, but carved out specific and limited exceptions.[94]

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) (emphasis added).

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 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).

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[94] The retroactive effect of the 2013 amendments is discussed in I.H.3 at page 102.

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) (emphasis added).

Subsection (2) confirms, that (except for bridges, roads within a city, or roads falling into the exception set out in subsection (3) for roads that have not been maintained recently) roads whose width is not otherwise established by subsection (1) shall be a minimum of 50 feet wide.[95] This codifies the rule set in *Halvorson* and *Sopatyk* (while adding the subsection (3) exception).

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;

[95] Section 40-2312(2) includes exceptions to the 50-foot rule for bridges and roads within cities. It does not say what width should apply in those circumstances. Presumably, something less than 50-feet is appropriate depending on the circumstances. In the case of a bridge, that would presumably be that actual width of the bridge. In the case of a street within a city, that would presumably take into account the physical reality of what has been built.

> (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).[96]

> "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).

For those roads falling with the exception (that is, roads on private lands that have not been publicly maintained in recent years), 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

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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 (for non-maintained roads not on public land). 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 II.C at page 129.)

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, roads that are still in use by the public but are not being publicly 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).[97]

3. Retroactive effect of the 2013 amendments.

The term "retroactive effect" can mean different things in different contexts. In *Flying "A" Ranch, Inc. v. Cnty. Comm'rs of Fremont Cnty.* ("*Flying A*"), 157 Idaho 937, 342 P.3d 649 (2015) (Horton, J.), the Court said that the amendments were not retroactive. However, as discussed below, that holding was made in the context of whether the new statute's standard of review provisions are applicable to a proceeding that was initiated prior to 2013.

Another case, *Nampa Highway Dist. No. 1 v. Knight*, 166 Idaho 609, 462 P.3d 137 (2020) (Moeller, J.) (discussed in section II.N.3.c on page 161), remanded a matter for a determination of road width. The *Knight* Court did not discuss retroactivity, but evidently assumed that the road width statute is not retroactive. The Court instructed the district court to apply the road width statute in effect in 1921. *Knight*, 166 Idaho at 616, 462 P.3d at 144.

Note: If a statute is found to have retroactive effect that impairs vested property rights, that retroactive effect could give rise to a takings claim. In the case of the 2013 amendment, however, takings claims are probably not an issue. If an abandonment occurs under the 2013 amendment, nothing would be "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 allow re-litigation of the status or width of public roads where that has been established by a prior judicial decree or a prior validation/vacation proceeding. The question is whether the substantive provisions of the amendments regarding passive abandonment and road width were intended to apply in post-2013 proceedings addressing the status and width of roads

[97] 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).

based on pre-2013 events.

For example, in a post-2013 determination of an alleged abandonment, may five years of non-use and non-maintenance prior to 2013 result in a finding of passive abandonment even if the road has been maintained in the most recent 15 years? Or does the 2013 statute only allow passive abandonment if 15 years of non-use and non-maintenance occur after 2013?

It may be that the 2013 do not retroactively eliminate passive abandonment that occurred prior to 2013. It may also be that the 15-year provision kicks in immediately as an alternative form of passive abandonment. Both could be true.

Notwithstanding *Flying A* and *Knight*, the legislative intent language of the 2013 amendments arguably suggests that, at least to some extent, the statute operates retroactively. It states that the act is intended to apply to all existing and future roads. Moreover, it says that the statute must go into effect immediately in order "to provide clarity regarding the status or abandonment of highways and public rights-of-way." This seems to suggest that the Legislature intended the statute's non-use provisions to apply immediately upon enactment to all roads, including those that have experienced non-use prior to enactment. Otherwise, a rancher wishing to vacate a road depicted on an old plat would need to wait out another 15 years of non-use. Likewise, it appears the Legislature intended the road width provisions (which address pre-2013 circumstances) to be applicable to all roads, not just those created after 2013.

The statute's legislative intent language reads in full:

> 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.

H.B. 321, 2013 Idaho Sess. Laws, ch. 239 § 1 (emphasis supplied). This intent language, which is part of the enacted statute (though not codified), is reiterated in the bill's statement of purpose. The statute, as enacted, is reproduced in Attachment B on page 501.

As the Idaho Supreme Court said in 2014, legislative intent of retroactive effect need not be stated in so many words:

> "[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 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). *Guzman* did not involve the 2013 amendments.

In *Flying "A" Ranch, Inc. v. Cnty. Comm'rs of Fremont Cnty.* ("*Flying A*"), 157 Idaho 937, 342 P.3d 649 (2015) (Horton, J.), the Court said in a footnote that the 2013 amendments were not retroactive. However, that was in the context of whether the new statute's standard of review provisions to determination of road status that was initiated prior to 2013.

In *Flying A*, the County Commissioners adopted a county road map pursuant to their obligation under Idaho Code § 40-202. The map included the "North Road" as a public road based on its perceived status as an R.S. 2477 road. Landowners through whose property the road ran sought judicial review of the map adoption. The County's decision and the petition for judicial review occurred in 2012, prior to the 2013 amendment to the judicial review provision, Idaho Code § 40-208. In a footnote, the Court applied the standard of review found in the pre-2013 version of section 40-208(7), finding that the 2013 amendment did not have retroactive effect:

> 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.

Although the Court states that the statute is not retroactive, that should be understood in the context that the Court was considering what standard of review to apply to a county determination of road status completed prior to 2013. The *Flying A* Court's conclusion that the 2013 judicial review provisions should not apply a decision made before 2013 is perfectly sensible. The Court did not address whether the amendment's substantive passive abandonment provisions apply to pre-2013 non-use.

In any event, the *Flying A* Court was evidently unaware of the above-quoted section 1 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. The briefing makes clear that the 2013 amendments were not even brought to the Court's attention. See Respondent's Brief, 2014 Westlaw 1673184.

One thing is clear. The 2013 amendments are not retroactive in the sense of allowing re-litigation of previously decided road status determinations. The Court's decisions in *Flying A* and *Knight* suggest that the legislation has no retroactive effect

in any context. The author suggests that may be going too far. At least with respect to the road width provisions, that conclusion is difficult to square with the stated purpose of the legislation, making it applicable to all existing and future roads.

This issue of retroactive legislation is addressed further in the *Idaho Land Use Handbook*.

4. In any event, 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.[98]

5. Road width statutes are applicable to roads created by prescription (passive road creation) as well as formal action.

The road width statutes typically come into play for roads created by prescription, because roads created by formal action are more likely to have an expressly defined width. Indeed, that point was confirmed and codified in 2013 by Idaho Code § 40-2312(1). However, the Idaho Supreme Court has made it clear that the road width statutes apply to all public roads under county or highway district jurisdiction, regardless of how they were created:

> Therefore, "for highways created after the statute's enactment [in 1887], the statute establishes a mandatory width [of fifty feet]," regardless of whether the highway was established by prescription or laid out by the highway district. *Id*. at 205-06, 254 P.3d at 506-07 (explaining that section 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.").

Nampa Highway Dist. No. 1 v. Knight, 166 Idaho 609, 618, 462 P.3d 137, 146 (2020) (Moeller, J.) (citing to *Halvorson v. N. Latah Cnty. Highway Dist*., 151 Idaho 196, 205-06, 254 P.3d 497, 506-07 (2011) (Horton, J.)) (brackets and parentheses original) (see discussion of the *Knight* case in footnote 147 on page 162).

6. Pre-2013 law on road width

The predecessor of the current statute was enacted in 1887, prior to statehood. (See footnote 92 on page 97 for text of prior statutes.)

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[98] *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.

An even earlier version, enacted in 1885, provided for a 60-foot minimum: "No county road shall be less than sixty feet in width." Gen. Laws of the Territory of Idaho (1885), § 10, p. 165 (approved 1/5/1885).

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.[99] 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, Rev. Stat. of Idaho Terr. § 932 (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 indicate otherwise.[100] 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

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[99] The 2013 amendments to Idaho's primary road width statute, Idaho Code § 40-2312, did not address Idaho Code § 40-605.

[100] 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.).

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.), landowners built a fence along a public road. Then they sued the highway district on takings, tort, and due process claims when the highway district's road maintenance activities damaged the fence. The Court first determined that the road was a public road created by prescription (five years of public use and maintenance). It then determined that no validation proceeding or other public event or recording is necessary in the case of roads created by prescription. (See footnote 207 on page 208.) It then turned to the width of the road.

The *Halvorson* Court reaffirmed *Meservey* and *Bentel*, and then went a step further. The Court noted 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.

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.[101] As noted above, the predecessor to section 40-2312 was Rev. Stat. of Idaho Terr. § 932 (1887) (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." Gen. Laws of the Territory of Idaho (1885), § 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.[102]

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

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[101] The *Halvorson* court also does not mention that there was an even earlier statute establishing a 60-foot width.

[102] 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.

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.[103] (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 remand*, *Sierra Club v. Lujan*, 949 F.2d 362 (1991), o*verruled 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

[103] 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.

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. In *Rich*, the road was formally created as 165 feet wide and later formally reduced to 99 feet—much wider than the surface of the two-lane road. 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." *Rich*, 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 10 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.[104]

7. Meaning of pre-2013 language about lesser width

Road width statutes prior to 2013 contained language (stated in various ways over the years) saying that the 50-foot minimum did not apply to roads "now existing of a less width." Rev. Stat. of Idaho Terr. § 932 (1887). See footnote 92 on page 97 for similar language in other pre-2013 statutes. The 2013 amendments eliminated this confusing language.

Although the author believes that the Legislature intended this part of the 2013 amendment to apply retroactively, the *Flying A* and *Knight* decisions call that into question. If the 2013 road width amendments do not apply retroactively, this means

[104] 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.

it may be necessary to go back in time and apply the road width statute in effect at the relevant time.

The first question is, what is the relevant time? That may not always be easy to pin down, particularly for roads created by prescription.

The author is aware of only one case examining what this language means. In a pre-2013 case, the Court said:

> 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.

Sopatyk v. Lemhi Cnty., 151 Idaho 809, 817, 264 P.3d 916, 924 (2011) (W. Jones, J.) (footnote omitted). This statement suggests that the "lesser width" proviso applies only if a lesser width has been "established," for example by a plat, conveyance, or prior validation, or judicial determination. That concept jibes with what was codified in 2013 as Idaho Code § 40-2312(1). Any other interpretation would seem to defeat the whole purpose of the 50-foot minimum.

I. 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). (See section I.J on page 115.) If the owner holds the fee, obviously, it may use the roadway for purposes other than transportation, such as placement of utilities.

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 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*").

As discussed in section I.J.1.bon page 116, roads created by the viewer process create easements, not fee interests (assuming the conveyance documents do not expressly provide otherwise).

J. Easement versus fee simple ownership

A public road may be held by the governmental entity in fee simple or as a type of easement known as a right-of-way.[105] The analysis of which it is varies depending on how the road was created or acquired.[106]

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

a. In *Knight*, the Court looked to the conveyance instrument itself to determine whether an easement or fee is conveyed.

If the interest in the road is conveyed to the governmental entity by deed or other formal conveyance (e.g., by purchase, gift, or condemnation) and the conveyance document states the nature of the legal interest conveyed, one would think that would control. Such was the conclusion in *Nampa Highway Dist. No. 1 v.*

[105] This meaning of term "right-of-way" (as a type of easement) is the ordinary meaning of that term. This meaning is different that the meaning of the term "public right-of-way" set out in Idaho Code § 40-117(9). See discussion in section I.A.2.b on page 20.

[106] 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").

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Knight, 166 Idaho 609, 618-20, 462 P.3d 137, 146-48 (2020) (Moeller, J.).[107] The *Knight* Court analyzed the words of a deed to determine whether it conveyed an easement or the full fee.[108] The deed was entitled "Deed of Right-of-Way," but the language of the deed did not expressly state what was being conveyed. The Court concluded that it conveyed only an easement because the language of the deed described its purpose as a public highway and the deed did not contain the word "forever."

This holding was based solely on the content of the deed itself. The *Knight* case made no mention of the 1887 statute discussed below.[109]

Note: The *Knight* case is discussed further in section I.H.5 on page 107 (dealing with road width), section (I.H.3 on page 102) dealing with the retroactivity of the road width amendments of 2013), and section II.N on page 155 (dealing with the BFP rule).

b. In *Lake CDA*, the Court looked to an 1887 statute, which, until 1953, said an easement (not a fee) is acquired.

Note: The statute discussed here (Idaho Code § 40-2302(1) and its predecessors) should not be confused with Idaho Code § 50-1312 discussed in section I.J.3 on page 120 (dealing with roads created by statutory dedication).

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[107] The *Knight* case also addressed the BFP issue. See discussion in section II.N.3.c on page 161.

[108] Before embarking on its examination of the deed language, the *Knight* Court acknowledged Idaho Code § 55-604, which states: "A fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended." *Knight*, 166 Idaho at 619, 462 P.3d at 147. This statute is not a road statute. It is codified to Title 55 dealing with property conveyancing in general. In any event, the *Knight* Court contrasted section 55-604 with Idaho Code § 55-309, which, as interpreted by *Neider*, provides "[w]hen land is dedicated as a street for public use, the landowner owns to the center of the street and the public acquires an easement, not a title in fee simple." *Knight*, 166 Idaho at 619, 462 P.3d at 147 (quoting *Neider*, 138 Idaho at 507, 65 P.3d at 529) (emphasis added). Evidently, the Court did not view either statute as dictating the answer, and instead went on to analyze the conveyance instrument in order to "give effect to the intent of the parties to the transaction" (again quoting *Neider*, 138 Idaho at 508, 65 P.3d at 530).

[109] On the easement versus fee issue, the *Knight* Court relied primarily on *Neider v. Shaw*, 138 Idaho 503, 508, 65 P.3d 525, 530 (2003) (Kidwell, J.). *Neider* also deciphered whether a conveyance instrument conveyed an easement or the full fee. See footnote 115 on page 122. However, the *Neider* case involved a conveyance to a railroad, so the 1887 statute discussed in the section below would not have been relevant there. But that statute would seem to have been relevant in *Knight*.

Since territorial times, Idaho has had a statute addressing whether a conveyance of property for a public road conveys an easement or the full fee.

It has always been codified within Idaho's road statutes (Title 40). This may suggest that it is applicable only in the context of roads acquired by counties and highway districts (and not cities). However, in the *Lake CDA* case discussed below, it was found to be applicable also to a state highway.

One would think that this statute would not be intended to override the clearly expressed intent of the parties to the transaction. Thus, perhaps, it is limited to situations in which the documents do not clearly specify whether a fee or easement is conveyed. The post-1953 version of the statute clearly embraces this idea. In any event, the statute applies to public roads created by some transaction in which conveyance document does not specify the nature of the interest created.

It appears that the statute may be limited to roads acquired by a transaction of some sort (whether voluntary or through condemnation). This is because it speaks in terms of the governmental entity "taking or accepting land for a highway." Case law addressing roads created in other ways (e.g., through prescription) are discussed below. Those cases make no reference to this statute.

The 1887 statute and its modern successors have received scant attention from the courts. As of this writing, only one appellate case, the *Lake CDA* case discussed below, has addressed it. (As noted above, the *Knight* case did not mention this statute, nor did *Knight* reference *Lake CDA*).

The pre-1953 version declared that when property is taken or accepted for a highway, the public acquires only a right-of-way easement. From 1887 until 1953, the statute read:

> By taking or accepting land for a highway, the public acquires only the right of way and the incidents necessary to enjoying and maintaining it. All trees within the highway, except only such as are requisite to make or repair the road or bridges on the same land are for the use of the owner or occupant of the land.

Rev. Stat. of Idaho Terr. § 860 (1887) (emphasis added) (later codified to Compiled Laws of Idaho § 878 (1918), Idaho Codes Ann. § 1141 (1901), Compiled Stat. of Idaho § 1307 (1919), 2 Idaho Code Ann. § 39-301 (1932), and Idaho Code § 39-301). It was subsequently amended (as discussed below) and is now codified at Idaho Code § 40-2302(1).

In 1953, the Legislature flipped the statute around to say the opposite—that fee simple title is acquired (unless the parties agree to something less):

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

1953 Idaho Sess. Laws, ch. 100, § 1 (emphasis added) (then codified at Idaho Code § 39-301) (now codified at Idaho Code § 40-2302(1)).

The 1953 version is still on the books, with inconsequential wording changes.

> 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 [such] lesser estate as they may deem requisite for their purposes.

Idaho Code § 40-2302(1) (codified by 1985 Idaho Sess. Laws, ch. 253 § 2) (emphasis added) (the word "such" in brackets was omitted in the codification, perhaps inadvertently).

In *Lake CDA Investments, LLC v. Idaho Dept. of Lands*, 149 Idaho 274, 278, 233 P.3d 721, 725 (2010) (Eismann, C.J.),[110] the Idaho Supreme Court said the pre-1953 version of the statute means what it says. The district court ruled, and Idaho Supreme Court affirmed, that, until 1953, when a governmental entity takes or accepts land for highway purposes only an easement is conveyed.

The *Lake CDA* case (whose analysis focused solely on the pre-1953 predecessors to Idaho Code § 40-2302) stands in contrast to the analysis employed in *Knight* (which looked to the language of the conveyance document itself and made no reference to the statute). As of this writing, *Lake CDA* is the only appellate court to address this statute.

In the *Lake CDA* case, the Court applied the statute to determine what was conveyed by a 1940 deed. Presumably the statute also would control the nature of the interest acquired during the early days of the State and Territory when counties laid out roads in a process involving viewers' reports (culminating in landowners

[110] *Lake CDA* involved lakefront property in which a public highway ran along the lakeside edge of the property. One of the questions in the case was whether the road was held as an easement or a fee. The State acknowledged that the deed conveyed only an easement, based on the version of Idaho Code § 39-301 in effect before 1953. (See trial court decision at 208 WL 2227623 at *11-12.) Both the district court and the Idaho Supreme Court agreed this concession was compelled by the pre-1953 the version of what is now Idaho Code § 40-2302(1) that was in effect in 1940 (then codified at 2 Idaho Code Ann. § 39-301 (1932)). *Lake CDA*, 149 Idaho at 278, 233 P.3d at 725.

either waiving damages and thereby gifting a right-of-way for construction of the road across their property, or by condemnation). (See discussion of road viewers in section I.D.3 on page 51.) The fact that the pre-1953 "easement only" statute applied to roads acquired through the viewers' report process is confirmed by the fact that the enactment of Rev. Stat. of Idaho Terr., title VI, ch. II, § 860 (1887) was part of the same statute calling for viewers' reports. Rev. Stat. of Idaho Terr., title VI, ch. II, § 920 (1887).

Likewise, the post-1953 statute would control more recent acquisitions (leading to the opposite result—that full fee is conveyed), so long as the conveyance or other relevant documents do not dictate a different result.

2. Roads created by common law dedication create easements.

Common law dedication is judge-made law. That is why it is called common law dedication. See section I.F on page 83. Accordingly, we look to case law, not statute, to determine whether a common law dedication creates a fee or an easement interest.

Note that common law dedication may create either public roads or private roads (the latter being typically for the benefit of purchasers of lots in private developments). Common law dedication may also operate with respect to properties or parcels other than roads, such as open space or beach access.

The Idaho Supreme Court consistently has recognized that common law dedication conveys only an easement.[111]

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[111] "[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.). "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.). 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.). "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). *Saddlehorn* dealt with dedication of common areas, not roads. But the same principle would apply to roads. See also 23 Am.Jur.2d *Dedications* § 59 (2013).

3. Roads created by statutory dedication ("equivalent to a deed in fee simple"—Idaho Code § 50-1312)

Note: The statute discussed here (Idaho Code § 50-1312) should not be confused with Idaho Code § 40-2302(1) and its predecessors discussed in section I.J.1.b on page 116 (dealing with roads taken or given to the public outside of the platting process).

As noted above, common law dedications convey easements, not the fee. The same holds true for statutory dedications. In the case of statutory dedication, however, the law is based on statutes and cases interpreting those statutes.

An Idaho statute dating to 1893 and still on the books provides that a recorded plat dedicating roads and other property to the public conveys the equivalent of a deed in fee simple.

> 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).[112]

This language (except for the highway district proviso) has been on the books since early statehood.[113]

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

[112] The proviso in Idaho Code § 50-1312 applies if a highway district has jurisdiction. It requires the acceptance of the plat by the highway district. Idaho Code § 50-1312 includes no equivalent requirement for cities. However, the next section, Idaho Code § 50-1313, requires that dedications must be accepted and confirmed, and it is applicable both to cities and to highway districts. See discussion in section I.E.2 on page 82.

[113] The language now codified at Idaho Code § 50-1312 was enacted in 1893 and has never been changed (except for the addition of the highway district proviso sometime after 1932). 1893 Idaho Sess. Laws, An Act to Provide for the Organization, Government, and Powers of Cities and Villages, § 93, p. 127. The provision subsequently was codified in 1899 Idaho Sess. Laws, H.B. 75, § 97, p 213; Rev. Codes of Idaho § 2304 (1908); 2 Idaho Code Ann. § 49-2205 (1932)); 1967 Idaho Sess. Laws, ch. 429, § 230; 1978 Idaho Sess. Laws, ch. 78, § 1; and 1992 Idaho Sess. Laws, ch. 262, §4.

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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 two months after the subject plat was recorded. Nevertheless, the Court addressed the 1893 statute and ruled on its meaning. *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.
>
> The provisions of section 3091, Rev. Codes [now Idaho Code § 55-309], were effective at the time of the filing of said plat, and said section is as follows: "The 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." …
>
> … The owner of the lots held the legal title to the center of the street, and the city held, for the benefit of the public, an easement with which the land included in the street was burdened. The public acquired an estate by such dedication adequate to the accommodation of the people, since all that the public can reasonably be held to require in a street is such an estate as will vest the right to the free and unobstructed use thereof, and an easement will confer that right as effectually as an estate in fee.

Shaw, 17 Idaho at 682-83, 107 P. at 400-01.

In reaching this conclusion, *Shaw* relied on a statute first enacted in 1887, and not changed since then. It states: "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." Idaho Code § 55-309 (enacted as Rev. Stat. of Idaho Terr. § 2883 (1887), recodified to Rev. Code of Idaho § 3091 (1909), Compiled Laws of Idaho § 3091 (1919), Compiled Stat. of Idaho § 5359 (1919), and prior Idaho Code § 54-309). In essence, the *Shaw* Court said if the abutting landowner owns to the center of the road, he or she must own the underlying fee, and the road itself must be only an easement. This point was

reiterated by the Court in *Neider v. Shaw*, 138 Idaho 503, 507, 65 P.3d 525, 529 (2003) (Kidwell, J.), discussed below.

In *Mochel v. Cleveland*, 51 Idaho 468, 5 P.2d 539 (1930), the Court held that recording of plat vested only determinable fee for public use of surface of street in city.

An earlier version of the statute (2 Idaho Code Ann. § 49-2205 (1932)) was quoted in *Powell v. McKelvey*, 56 Idaho 291, 53 P.2d 626, 630 (1935) (Givens, C.J.). *Powell* held that 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.

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 what is now Idaho Code § 50-1312 (1899 Idaho Sess. Laws, H.B. 95, § 97, p. 213). However, the Court never addressed the meaning and effect of the "equivalent to a deed in fee simple" language in the quotation. Thus, *Worley* adds nothing to our understanding of this provision.[114]

Neider v. Shaw, 138 Idaho 503, 507, 65 P.3d 525, 529 (2003) (Kidwell, J.) involved a statutory dedication in which the plat depicted roads dedicated to the public.[115] Quoting and relying on *Shaw v. Johnston*, the *Neider* Court reiterated that

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[114] *Worley* involved a plat filed by the federal government subsequent to the closing of Fort Sherman in what is now the City of Coeur d'Alene. The federal plat identified a road located on what is now the yacht club's property. The district court found that although the plat complied with state platting statutes, no statutory dedication of the road occurred. The Idaho Supreme Court noted that the district court failed to explain why it reached this conclusion, noting several possibilities. Rather than remand for a more complete determination by the district court of why there was no effective statutory dedication, the Idaho Supreme Court shifted gears and found that a common law dedication has been effected in any event.

[115] *Neider* involved a triangle-shaped property in Bowmont, Idaho that was conveyed to a railroad company in 1910 "for right of way, station, sidetrack and warehouse purposes." *Neider*, 138 Idaho at 505, 65 P.3d at 527. When the railroad was abandoned in 1994, the triangular railroad property reverted to the heirs and was later conveyed to plaintiff Jay Neider. Neider determined that a fence on the east and a road on the west encroached on his property, and brought a quiet title action. Defendant neighbors to the east argued the fence established a boundary by agreement. Neider countered that boundary by agreement was impossible because a platted but unbuilt road located to the east of the railroad property separated his property from theirs and that a boundary by agreement may only occur between adjacent properties. The Court found that Idaho Code § 50-1312 means that only an easement is created when a street is dedication. Hence the properties were adjoining. The Court then turned to the roads located within the railroad property. Neider contended that the prior owner who conveyed the railroad property conveyed the entire fee. Hence

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.

> When land is dedicated as a street for public use, the landowner owns to the center of the street and the public acquires an easement, not a title in fee simple. [*Shaw v. Johnson*] at 682-83, 107 P. at 400–01 (citing Idaho Rev. Code § 3091 (1908)) (current version with amendments at Idaho Code § 55-309 (2002)).

Neider, 138 Idaho at 507, 65 P.3d at 529 (parentheticals original) (bracketed case added). The statute cited by *Neider*, Idaho Code § 55-309, is the same one discussed by the Court in *Shaw* (see above).

The next case to address the subject was *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 of beach access.[116] The Court again reiterated: "[U]nder Idaho law, a dedication, whether express or common law, creates an easement. Moreover, an easement does not divest the servient estate owner of title." *Ponderosa II*, 143 Idaho at 410, 146 P. at 676. "Once common law dedication is accomplished, it has the legal effect of creating an easement in favor of the lot purchasers." *Ponderosa II*, 143 Idaho at 409, 146 P. at 675. The *Ponderosa II* Court made no mention of Idaho Code § 50-1312 (or any other statute). But the Court was aware of the statute, having cited *Neider* in a footnote. *Ponderosa II*, 143 Idaho at 410 n.3, 146 P. at 676 n.3. Why it even addressed statutory dedication is unclear, because the *Ponderosa II* case dealt with a common law dedication.[117] In any event, the Court has consistently adhered to its

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when he subsequently platted the township of Bowmont, he had no ability to dedicate a road on the railroad property. The Court looked to the conveyance instrument itself to answer that question, finding that the reference to right of way and a reversionary interest "unambiguously reflects the Bows' intent to convey only an easement to the Railroad." *Neider*, 138 Idaho at 508, 65 P.3d at 530. Hence, the original owner continued to own the underlying fee and could effectively plat and dedicate the streets.

[116] *Ponderosa I* and *Ponderosa II* involved a residential plat recorded in 1961 with an area marked "lake access." In *Ponderosa I*, the Court determined these words (without accompanying words of dedication) fell short of clear intent required to constitute either a statutory or common law dedication to the public. However, in *Ponderosa II*, the Court held that the plat did constitution a private common law dedication to the homeowners who were induced to purchase lots. *Ponderosa II*, 143 Idaho at 409, 146 P.3d at 675. See footnote 83 on page 80 discussing these cases and the *Rowley* case.

[117] *Ponderosa II* remains good law. It is cited with approval in subsequent decisions. E.g., *Ross v. Dorsey*, 154 Idaho 836, 844, 303 P.3d 195, 203 (2013) (J. Jones, J.). However, these subsequent cases have focused on common law dedications, not statutory dedications.

conclusion that Idaho Code § 50-1312 (and all its predecessors) conveys an easement, not the full fee.

An earlier version of the statute (2 Idaho Code Ann. § 49-2205 (1932)) was quoted in *Rowley v. Ada Cnty. Highway Dist.*, 156 Idaho 275, 281-82, 322 P.3d 1008, 1014-15 (2014) (Burdick, C.J.), but the Court did address the "fee simple" aspect of the statute.

4. Roads created by prescriptive use create easements.

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.). "This also means that the District does not own the underlying land upon which the highway is located; rather, the District merely has an easement over the road for the benefit of the public." *East Side Highway Dist. v. Delavan*, 167 Idaho 325, 341, 470 P.3d 1134, 1150 (2019) (Stegner, J.).

The easement for roads created by prescriptive use includes the right to lay utilities lines within the easement. *Bentel v. Cnty. of Bannock*, 104 Idaho 130, 133, 656 P.2d 1383, 1386 (1983). See discussion in section I.I on page 114.

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 are easements.

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).[118]

That is 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."

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[118] *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.

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.

K. 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.[119] 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.

L. Access to public lands

Access to public lands is often a major issue with respect to 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.[120] Public land access is a factor only in three contexts: (1) passive abandonment (under a statute repealed in 1993), (2) exemption from a narrow type of passive abandonment adopted in 2013, and (3) part of the public interest determination in any validation or vacation proceeding.

As for the first and second (passive abandonment by operation of law) the loss of access to public lands is an absolute bar to passive abandonment. As for the third (formal vacation), the loss of access to public lands could be a significant factor in the public interest evaluation undertaken by a county or highway district in a

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[119] 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.

[120] 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 and vacation.

validation or vacation/abandonment proceeding. The determination of the public interest, however, is a matter of discretion and judgment on the part of the commissioners, with public access being only one of the factors to be considered. In 1993, the Legislature enacted extensive amendments to the vacation/abandonment statute (Idaho Code § 40-203) aimed at making it more difficult to vacate roads that access public lands. S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 4. This included various procedural requirements and the addition of the public interest determination.

Access to public lands may or may not be an issue with respect to R.S. 2477 roads. 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. Thus, at one time, it provided access to public lands. 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.

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. 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). See discussion in section II.C at page 129.

II. 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. (See section I.A.2.e discussing terminology on page 24.) 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 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).

When first enacted in 1887, the road creation statute contained companion provisions governing "passive" and "formal" abandonment.[121] 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 that also addressed road width. H.B. 321, 2013 Idaho Sess. Laws, ch. 239 (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 (later codified as 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.[122] The same statute also limited passive abandonment to roads created by prescription (public use). See discussion in section II.G.2 on page 142.

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[121] The 1887 statute is Rev. Stat. of Idaho Terr. §§ 850 to 852 (1887). See the attached outline (Appendix A on page 424) to track changes to the statute over the years.

[122] 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) (containing proviso requiring formal abandonment for roads providing public access).

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In 1985, the Legislature repealed all of Title 40 and enacted a completely new codification of the road creation statute. H.B. 265, 1985 Idaho Sess. Laws, ch. 253. 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. H.B. 556, 1986 Idaho Sess. Laws, ch. 206. 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, H.B. 321, 2013 Idaho Sess. Laws, ch. 239 (codified at Idaho Code §§ 40-114, 40-202, 40-203, 40-208, 40-2312), also contained a provision that authorized passive abandonment under very limited circumstances. (See section II.C on page 129.)

B. A portion of the length of a highway may be passively abandoned; passive abandonment does not work to narrow the width of a public road.

Passive abandonment applied to some or all of the length of a road. The abandonment principle does not work with respect to width.

Sometimes this is addressed under the rubric of adverse possession by the adjoining property owner. In *Rich v. Burdick*, 83 Idaho 335, 362 P.2d 1088 (1961) (Taylor, C.J.), the Court held non-use of a portion of the width is not "adverse" and does not effect and abandonment of the unused width. See discussion in section IV.U.6.b on page 324.

The conclusion that abandonment does not apply to road width also flows, by implication, from the principle that acceptance of a common law dedication by public use results in a road corresponding to the entire stated width of the dedication, even if a narrower portion was used. See discussion of *Thiessen v. City of Lewiston*, 26 Idaho 505, 144 P. 548 (1914) (Truitt, J.) and *Paddison Scenic Properties, Family Tr., L.C. v. Idaho Cnty.*, 153 Idaho 1, 278 P.3d 403, (2012) (J. Jones, J.) in section I.F.11 on page 92.

C. 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 (see section I.H.1 on page 97). H.B. 321, 2013 Idaho Sess. Laws, ch. 239 (codified at Idaho Code §§ 40-114, 40-202, 40-203, 40-208, 40-2312). (See discussion in section I.H.1 at page 97.) However, the 2013 legislation also addressed abandonment, creating a new and very narrow class of roads that may be passively abandoned by non-use and non-maintenance. This was set out in a new subsection 40-203(5). As enacted, it read:

> (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 [such as[123]], 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

[123] In 2021 the Legislature struck the words "to wit" replacing them with "such as." S.B. 1101, 2021 Idaho Sess. Laws, ch. 179. The bill had nothing to do with this provision. It would seem that this change was intended as incidental "clean up" of other parts of section 40-203—eliminating phraseology that might be unfamiliar to some. In the author's view, the change from "to wit" to "such as" was not helpful, and could be confusing. This is because the 2013 legislation is explicitly intended to allow passive abandonment in one situation, and one situation only. (The statute says "solely by a particular type of dedication.") The words "to wit" mean "namely" or "more precisely." Changing those words to "such as" might be misunderstood to suggest that the type of dedication identified in the statute is merely an example rather than a specification. That was not the intent of the statute. In any event, given the Statement of Purpose—which is part of the enacted legislation (albeit uncodified), it is safe to assume that no substantive change was intended by the 2021 amendment. (See footnote 125 on page 130.)

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> 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). The statute was amended in 2021 by renumbering the final paragraph of section 40-205(5) as section 40-203(6).[124] S.B. 1101, 2021 Idaho Sess. Laws, ch. 179. This was not intended to have substantive effect.[125]

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[124] When enacted in 2013, the final paragraph of section 40-203(5) (beginning "All other highways") was unnumbered text at the end of subsection 40-203(5). Thus, the reference to "All other highways" referred to highways not falling within the description in the earlier part of subsection 40-203(5). In 2021, the final paragraph of section 40-203(5) was renumbered as section 40-203(6). S.B. 1101, 2021 Idaho Sess. Laws, ch. 179. The thrust of the paragraph that is now subsection 40-203(6) is to reinforce that section 40-204(5) contains the only form of passive abandonment now in effect whereby roads may lose their public road status by operation of law through non-use and non-maintenance. All "other" roads may lose their public road status only through formal action based on a determination that they are not in the public interest. Note that when this was enacted in 2013, there was no passive abandonment statute in effect; the last passive abandonment provision was repealed in 1993. S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 4 (amending what was then Idaho Code § 40-203(4) to remove passive abandonment provisions). The limitation in what is now subsection 40-203(6) is not retroactive. Thus, roads that were passively abandoned by operation of law prior to 1993 remain abandoned, and may be declared abandoned in post-1993 validation/vacation proceedings or quiet title actions. As for whether the 2013 act's substantive provisions regarding passive abandonment apply to pre-2013 non-use, see section I.H.3 on page 102.

[125] The 2021 amendment to Idaho Code § 40-203(5) appears to be no more than incidental "clean-up" of other parts of section 40-203 that had nothing to do with the thrust of the legislation. (The 2021 amendment created a new section 40-203(4)(b) dealing with vacation of unbuilt roads in platted subdivisions in exchange for the dedication of new roads). This is confirmed by the Statement of Purpose, which reflects no intention to make

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 to be displayed on an old plat (such as a General Land Office survey) (thereby creating a common law dedication) but which have not long since fallen out of public use. The statute allowed landowners (typically ranchers) to clear title to their property by petitioning for vacation and pursuing quiet title if the county did not initiate vacation proceedings.

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

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any substantive change to section 40-203(5). See footnote 123 on page 129 regarding another clean-up change included in the 2012 legislation.—the "to wit" language.

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.4.b at page 57.) 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.

D. The original passive abandonment statute (1887 to 1993)

1. Overview

This section explores Idaho's previous "passive abandonment" statute—which was repealed in 1993.[126] S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 4 (amending what was then Idaho Code § 40-203(4) to remove passive abandonment provisions). Although it has been repealed, it remains relevant because roads that were abandoned prior to 1993 remain abandoned and cannot be validated. As discussed elsewhere, a very limited passive abandonment provision was added in 2013.

By passive abandonment, I refer to abandonment based on a lack of use and maintenance, as opposed to affirmative official action. On other occasions, this Court has employed the term "informal abandonment." See footnote 28 on page 25.

Idaho's first passive abandonment statute was adopted in 1887. It stated 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 Idaho Terr. § 852 (1887). From 1887 until it was abolished in 1993, the core of the passive abandonment requirement has been a

[126] A 2013 amendment created a limited exception allowing passive abandonment under specific circumstances involving with common law dedication of roads on federal land. 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified at Idaho Code §§ 40-114, 40-202, 40-203, 40-208, 40-2312).

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showing that the road has been subject to both non-use and non-maintenance for a five-year period.[127]

This language remained intact until 1963, when the Legislature made it applicable only to roads passively created by public use (as opposed to formal road creation).[128] (See section II.G.2 on page 142.) In the same year, the Legislature amended the statute again to make it inapplicable to roads accessing public lands. (See section II.G.3 on page 145.) In 1986, roads listed on official highway maps were immunized from passive abandonment. (See section II.G.4 on page 146.) It was finally repealed in 1993. These amendments are discussed further below.

2. Exceptions to the passive abandonment statute

In sum, the following exceptions exist to the passive abandonment statute:

- Passive abandonment does not apply to roads created by common law dedication. (See section II.G.1 on page 141.)
- Since 1963, passive abandonment only applies to roads created by prescription. (See section II.G.2 on page 142.)
- Since 1963, passive abandonment does not apply to roads accessing public lands. (See section II.G.3 on page 145.)
- Since 1986, passive abandonment does not apply to roads included on official highway maps. (See section II.G.4 on page 146.)
- The original passive abandonment statute was repealed in 1993 and thus applies to no roads after that date. (See section II.E on page 140.) However, a 2013 statute created a new, very limited form of passive abandonment. (See section II.C on page 129.)

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[127] The 1887 passive abandonment statute was amended and recodified many times over the years. Most changes were cosmetic. There was no substantive change until 1963, when limitations involving public access and how the road was originally created were added. (See footnote 131 on page 142.) In 1985, it was codified to Idaho Code § 40-203. H.B. 265, 1985 Idaho Sess. Laws, ch. 253, § 2. In 1986, it was codified to Idaho Code § 40-203(4). H.B. 556, 1986 Idaho Sess. Laws, ch. 206, § 3. The passive abandonment provisions in section 40-203(4) were repealed in 1993 by S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 4 (amending what was then Idaho Code § 40-203(4) to remove passive abandonment provisions). A new, very limited passive abandonment provision was added in 2013. H.B. 321, 2013 Idaho Sess. Laws, ch. 239, § 4 (codified at Idaho Code § 40-203(5)). See Appendix A beginning on page 424.

[128] 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).

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- Dedicated city streets laid out in recorded plats are not subject to passive abandonment, but the passive abandonment is otherwise applicable within cities. *Boise City v. Fails*, 94 Idaho 840, 846, 499 P.2d 326, 332 (1972) (McFadden, J.). (See section VI.F on page 415.)

3. 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.).

Conversely, one arguing against abandonment need only establish public "work" or "use" to defeat the abandonment claim.

4. 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 *Burrup 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 Louden 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) (Shepard, C.J.) and *Burrup v. Stanger*, 114 Idaho 50, 753 P.2d 261 (Ct. App. 1988) (Swanstrom, J.), *aff'd*, 115 Idaho 114, 765 P.2d 139 (1988) (per curium)).

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) (Shepard, C.J.)).

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. If a picture is worth a thousand words, the photograph above says it all. 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.

5. 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?[129] 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 (9th Cir. 1993).

[129] 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.

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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 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 (9th Cir. 1993).

6. 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.4 at page 54). 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.

7. 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.4.c(vi) at page 74).

8. 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.

9. 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).

E. The remaining passive abandonment provisions were repealed in 1993.

In 1993, the Legislature repealed what was left of the passive abandonment statutes. S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 4 (amending what was then Idaho Code § 40-203(4) to remove passive abandonment provisions). Subsequent to that date, roads may be abandoned only by formal action (except for minor exceptions introduced in the 2013 amendments discussed in section II.C on page 129).

In *Sopatyk 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)." *Sopatyk*, 151 Idaho at 815, n.6, 264 P.3d at 922, 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.

F. 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). S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, §§ 7, 8 (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.

G. 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 dealing with common law dedication discussed in section II.C on page 129. Of course, all roads may be vacated by formal declaration of the county or highway district[130]— with the possible exception of R.S. 2477 roads.

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.

[130] Current requirements for formal abandonment are discussed below in section II.H.3 beginning on page 147.

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 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 II.C at page 129. All other forms of common law dedication remain immune from passive abandonment.

2. Since 1963, passive abandonment applies only to roads created by prescription.

In 1963, the passive abandonment statute, which had been on the books since 1887, was amended to make it applicable only to roads created by "prescription," that is, roads created prescriptive use under Idaho Code §§ 40-109(5) and 40-202(3).[131] Thus, as of 1963, only roads created by "use" could be lost by "non-use."

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[131] Two pieces of legislation in 1963 amended what was then § 40-104: H.B. 15 (enacted Feb. 8, 1963) and S.B. 242 (enacted Mar. 25, 1963). A third bill (S.B. 243) addressed access to public lands in what was then § 40-1614.

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 under the road creation statutes (Idaho Code §§ 40-109(5) and 40-202(3)). H.B. 15 amended the statute as follows:

> 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.

Nothing in the case law (either before or after 1963), suggests that the Legislature was merely codifying a common law exception to the passive abandonment statute. Indeed, it would be difficult to imagine how a common law exception could exist, given that such and exception would be contrary to the plain words of the pre-1963 passive abandonment statute. In other words, prior to 1963, the passive abandonment statute was not limited to roads created by prescription. The 1963 amendment was a substantive change in law, adding limitations that were not there before.

Only a few cases have dealt with the issue of passive abandonment prior to 1963 of roads not created by prescriptive use.

In *Taggart v. Highway Bd. for N. Latah Cnty.,* 115 Idaho 816, 771 P.2d 37 (1989) (Shepard, C.J.), the usual roles were reversed: A private landowner brought an action seeking validation of a public road to and across his property. The highway

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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) (amendments shown in redline).

In the same legislative session, S.B. 242 repeated the limitation to prescription contained in H.B. 15. It then added formal procedures for abandonment when access to public lands is involved. Note that S.B. 243 did the same thing for highway districts. 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) amended the statute as follows:

> 40-104. Abandonment of Highways. — 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.

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) (amendments shown in redline).

district took the position that the road had been passively abandoned because, although once a primary route between Princeton and Moscow, since the 1930s it had not been maintained by the district 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 that landowner.

First, it noted that the passive abandonment statute (codified to Idaho Code § 40-203(1) at the time of the decision) does not apply to a road that had been created by formal action. It then declared: "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 amendment to the passive abandonment statute. Nor did the Court comment on the fact that the alleged non-use occurred before 1963. Thus, it appears that the Court was unaware of the 1963 amendment. Indeed, there is nothing in the opinion suggesting that it was applying pre-1963 common law. To the contrary, the Court expressly applied the statute then on the books, unaware that the "created by prescription only" limitation was not added until 1963. In any event, the sentence in the opinion about creation by formal action was dictum, because the Court held that there continued to be sufficient public use to avoid passive abandonment.

In *Galvin v. Canyon Highway Dist. No. 4*, 134 Idaho 576, 580, 6 P.3d 826, 830 (2000) (Walters, J.), the Court briefly referenced the *Taggart* case: "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, the *Galvin* Court did not address whether this principle applies only after 1963.

The decision in *Sopatyk v. Lemhi Cnty.,* 151 Idaho 809, 264 P.3d 916 (2011) (W. Jones, J.) reinforces the conclusion that prior to 1963, formally created roads could be passively abandoned. The Court discussed abandonment prior to 1963 in the context of a case involving road creation by legislative declaration.[132] The Court found no evidence of passive abandonment. However, the very fact that the Court found it was necessary to examine that evidence shows that the limitation added in 1963 was not in effect prior to 1963. In other words, the implication is that prior to

[132] Legislative declaration is a type of formal action. Although it is tied to the roads being then in use, it is not dependent on public use sustained over a period of time—which is the key to prescription.

1963, the passive abandonment statute was not limited to roads created by prescriptive use.

In sum, although no Idaho case has squarely addressed the question, there is nothing in the case law that lends any support to the argument that the limitation enacted in 1963 was a mere codification of prior case law.

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.[133] 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

[133] 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). 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.

> 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.

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 in 1993 by S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 4) (emphasis added).

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. S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 4 (amending what was then Idaho Code § 40-203(4) to remove passive abandonment provisions). 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 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." H.B. 556, 1986 Idaho Sess. Laws, ch. 206, § 3 (codified at Idaho Code § 40-203(4), repealed by S.B. 1108 in 1993 when all passive abandonment was eliminated).

H. History of formal vacation/abandonment statutes

Note: The statutes discussed here speak in terms of "abandonment" and "vacation." For all practical purposes, the terms are interchangeable when used in the context of formal action. In other contexts, abandonment refers to passive abandonment through non-use..

1. Sources of statutory authority

Since territorial times, counties (and later highway districts) have had authority to abandon roads by official declaration of abandonment. For years, separate provisions have set out the general authority of county commissioners and highway district commissioners. Idaho Code § 40-604(4) authorizes counties to

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formally abandon and vacate roads. Idaho Code § 40-1310(5) authorizes highway districts to do the same. Both statutes refer back to the operative provisions for road vacation in Idaho Code § 40-203.

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 roads accessing public land (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. 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, thus ending the confusion over which procedures to follow.

2. Early abandonment statutes provided little guidance.

Originally, two formal 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.

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. 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 Index to Idaho Road Creation and Abandonment Statutes appended hereto on page 424. These abandonment procedures are discussed in section IV.A.3 at page 217.

I. 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).

J. Formal vacation/abandonment requires more than updating official maps. There is no "abandonment by implication."

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.

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.

In *Floyd v. Bd. of Comm'rs of Bonneville Cnty.* ("*Floyd II*"), 137 Idaho 718, 52 P.3d 863 (2002) (Walters, J.), a landowner argued that the County's deletion of a road from the county road maps and inventories, and general failure to treat the road as part of the County's road system constituted "implied abandonment" notwithstanding the fact that the County did not formally abandon the road. The Court rejected that argument, concluding instead that "roads may be informally abandoned by implication." *Floyd*, 137 Idaho at 728, 52 P.3d at 873. This reference to informal abandonment by implication should not be confused with passive abandonment by non-use and non-maintenance, which Floyd expressly recognized would be a valid basis for abandonment. *Id*. This holding was reiterated in *Richel Family Trust v. Worley Highway Dist.*, 167 Idaho 189, 199, 468 P.3d 775, 785 (2020) (Stegner, J.).

K. 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 the fee.

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.[134]

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[134] "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

L. Under some circumstances, an "acquiring entity charge" may be imposed on the landowner who sought vacation (Idaho Code § 40-203(1)(i))

1. Scope of the legislation

a. Statutory language

In 1992, the Legislature added a new provision to the abandonment/vacation statute authorizing, in some cases, a charge to be imposed on the underlying landowner for the value of the vacated road "as a condition of the abandonment or vacation." H.B. 872, 1992 Idaho Sess. Laws, ch. 323, § 1 (then codified at Idaho Code § 40-203(1)(h), now codified at Idaho Code § 40-203(1)(i)).[135]

The provision reads in full today:

> 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 two thousand 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-

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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).

[135] The author uses the term "acquiring entity charge" under section 40-203(1)(i) to distinguish it from the typically smaller administrative fee "to cover the cost of the proceedings" that may be imposed on a petitioners for vacation (Idaho Code § 40-203(1)(b)) and petitioners for validation (Idaho Code § 40-203A(1)).

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> way, said highway or public right-of-way shall revert to a federal land right-of-way.

Idaho Code § 40-203(1)(i) (emphasis added).

Since its enactment in 1992, section 40-203(1)(i) has had only minor amendments.[136] None of those amendments alter the substance of how or when the fee is charged.

b. Applies only if value exceeds $2,500

An "acquiring entity charge" may be imposed only if the value of vacated parcel is $2,500 or more.

c. Applies only if vacation sought by landowner

Such a charge may be imposed only if the landowner affirmatively seeks the vacation (by filing a petition) and not in a vacation initiated by the county, highway district, or someone else.

d. Applies only if original landowner received compensation

Section 40-203(1)(i) includes a proviso indicating that the charge may be imposed only if the original owner received compensation. The proviso states: "no such charge shall be imposed on the landowner who originally dedicated such parcel."[137]

Dedication describes giving real property (e.g., an easement or a fee) as a gift to the governmental entity. Thus, under this proviso, landowners who received

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[136] An amendment in 1993 added the term "or public right-of-way" after the word "highway" throughout the road statutes (including section 40-203(1)(h)). S.B. 1108, 1993 Idaho Sess. Laws, ch 412, § 4. That change is inconsequential; see discussion in footnote 21 on page 21. An amendment in 1995 renumbered the subsection from 40-203(1)(h) to 40-203(1)(i), without any other change to that subsection. S.B. 1117, 1995 Idaho Sess. Laws, ch. 121, § 2. The provision was amended again in 2000, adding the second proviso (providing that vacated R.S. 2477 roads revert to federal land rights-of-way). S.B. 1407, 2000 Idaho Sess. Laws, ch. 251, § 2. An amendment in 2014 cosmetically changed "twenty-five hundred dollars" to "two thousand five hundred dollars." S.B. 1283, 2014 Idaho Sess. Laws, ch. 137, § 1.

[137] The proviso is unclear as to whether it exempts successors in interest, or is literally limited to the individual who originally dedicated the highway parcel. The latter would seem a harsh result, and is at odds with the legislative history discussed below. That would mean, for instance, that if mother and father originally donated the highway parcel, but they are deceased and the land is owned by their daughter at the time of the vacation, she could be charged for the gift made by her parents.

nothing for their property when the road was created may not be charged a fee when the fee interest is returned to the landowner (or the easement extinguished) upon vacation. The reason is simple. The charge is intended to avoid a windfall to a landowner who was fully compensated (via condemnation) when the property was initially taken, and then requests that the road be vacated.

This conclusion is confirmed by the legislative history. The bill's Statement of Purpose reads in full:

> The purpose of this legislation is to clarify that if the commissioners of a county or highway district determine to abandon and vacate a highway parcel according to the procedures contained in Section 40-203, and the commissioners determine that the highway parcel has value in excess of $2500 to the person or entity petitioning for abandonment and vacation, then the commissioners may charge the petitioner up to the fair market value of the parcel as a condition of vacating the parcel to the petitioner. This avoids a gratuitous windfall to the petitioner in those circumstances in which the parcel has significant value. Since highway authorities must pay fair market value to property owners when acquiring new parcels by condemnation, it is reasonable that the same highway authority be able to charge for a parcel with significant value when vacating that parcel.

Statement of Purpose for H.B. 872 (1992) (emphasis supplied).

In other words, the charge is aimed at recouping compensation that was initially paid to the original landowner. The implication is that a charge is not appropriate when the original landowner gifted the right-of-way or fee to the public. If no compensation was paid, there is no windfall when the gift is returned.

e. Applies only to the vacation of a "parcel" owned in fee simple that is returned to an "acquiring entity."

It is also evident that the statute applies only to the vacation of highways that are owned in fee simple. There are two reasons for this.

Note: See section I.J on page 116 for a discussion of when a fee versus an easement is acquired by the county or highway district.

First, the statute refers three times to the vacation of a "parcel."[138] The term "parcel" means a "tract of land." Black's Law Dictionary, 7th ed. The term "parcel" might also be used to describe the geographic location of a right-of-way, i.e., the fee land directly "under" the road that is burdened by the right-of-way. But the term "parcel" does not ordinarily refer to the right-of-way itself.[139]

Second, the statute says that the charge is to be imposed on "the acquiring entity." There would be no "an acquiring party" unless the road was owned in fee simple. When a road held in fee is vacated, the adjacent owner(s) acquire additional land that they did not own when the government owned the road. See discussion in section II.K on page 149. In contrast, if the vacated highway was merely an easement, nothing is "acquired" by anyone. Upon vacation, the owner of the underlying fee (the servient estate) receives no property. When a right-of-way is vacated, the easement simply disappears. When that happens, the underlying fee owner is relieved of a burden on his or her property. The easement is not "acquired" by another person. Hence, there is no "acquiring entity" that may be charged a fee.

f. Applies only where vacated road did exist as a public road

The statute fails to expressly distinguish between two circumstances of vacation. In some instances, the commissioners determine that a road is a public road and then decide that vacation of the existing road is in the public interest. In other instances, the commissioners may rule that the road is not a public road based on the facts and law. The commissioners might then vacate the road (rather than just declining to validate) in order to make crystal clear that there is no public road. In

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[138] In addition to the statute itself, the Statement of Purpose also repeatedly employs the term "parcel" to describe what is being transferred back to the landowner petitioning for vacation. (See the Statement of Purpose is quoted in section II.L.1.d on page 151.) This reinforces the idea that the legislation is limited to circumstances in which the county or highway district vacates a road that it owns in fee simple (not a mere right-of-way).

[139] The charge under that may be imposed under section 40-203(1)(i) applies when there is a vacation of a "highway or public right-of-way parcel." The word "parcel" next to the word "right-of-way" is not inconsistent with the conclusion that "parcel" refers to fee land. This is because the defined term "public right-of-way" used in the statute does not have the ordinary meaning of right-of-way. Rather, the road statutes define "public right-of-way" as a public road "where the public highway agency has no obligation to construct or maintain." Idaho Code § 40-117(10). This term is in contrast to the definition of "public highways" which includes roads that are publicly maintained. Idaho Code § 40-117(8). In other words, the term "public right-of-way includes roads held in fee as well as roads that are mere easements. See discussion in section I.A.2.b on page 20. Thus, the term "public right-of-way parcel" means that a charge may be imposed on a vacated road that is not publicly maintained (or is even unbuilt). It does not mean that a charge may be imposed on a road that is held as a mere easement.

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that scenario, it seems wrong to make the petitioner pay compensation for what is essentially a quiet title determination.

g. Fee is permissive, not mandatory

The statute clearly says that the charge is permissive, not mandatory. The statute does not articulate any standards for when the county or highway district should choose to impose the charge. Presumably, this is left to the discretion of the governmental entity. However, that exercise of discretion is subject to judicial review for abuse of discretion. Idaho Code § 40-208(6) provides that the reviewing court "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."

h. Due process concerns

A final note: This statute raises troubling due process questions about the role of county and highway district commissioners in vacation proceedings. The fact that they are able to exact payments that accrue to their operating budgets as a quid pro quo for ruling in favor of petitioner is fundamentally at odds with both their quasi-judicial and legislative roles.

2. What does the charge measure?

If the commissioners elect to impose a charge, what does the charge measure? The statute speaks in terms of fair market value. This is reinforced by the legislative history (discussed below) which speaks of fair market value on the context of condemnation. Thus, the purpose of the charge is a sort of condemnation in reverse—in which the landowner is required to pay for the benefit he or she receives from the vacation.

Accordingly, the charge is <u>not</u> aimed at reimbursing the county or highway district for costs it incurred in constructing, improving, or maintaining the road, or for costs it incurred in acquiring the property.

When a charge is appropriate, the amount is based on the current value of the property. Presumably that value has increased over time. For example, if the original owner received $100 compensation in 1900, today's owner might be charged many times that. This change in property value is a rough approximation of the time value of money.

The statute says that the charge shall be "not in excess of the fair market value of the parcel." Thus, the determination of market value is the cap. The commissioners are free to charge less, or even nothing, as the circumstances suggest is fair. Considerations of fairness may bring into play facts that go beyond a pure

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analysis of fair market value. For instance, the following considerations might come into play:

- Why the road is being vacated and what public interest is served thereby? E.g., Does the vacation serve an environmental protection purpose?
- Are the commissioners are imposing charges for legitimate public interest purposes or simply as a revenue-generating mechanism?
- Which entity—the government versus the landowner or predecessors thereof—paid for or was compensated for costs associated with acquisition, construction, improvement, or maintenance of the road?

M. 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 VI at page 384.)

N. The BFP defense and shelter rule in the context of public roads

1. Overview of the BFP defense

Under Idaho law, a bona fide purchaser for value (known as a BFP) who acquires property subject to easements or other claims to the property takes the property without those defects if he or she acquired the property in good faith without knowledge of the defects. The BFP defense is based on two Idaho statutes[140] coupled with common law.

[140] Idaho's two BFP statutes date to territorial days:

> Every grant or conveyance of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or

The Idaho Supreme Court summarized the law in a 2016 decision:

> Idaho Code sections 55-606 and 55-812 provide that an unrecorded interest in land is void against subsequent purchasers who acquire title in good faith and for valuable consideration. "[T]he words 'good faith' in [these] statute[s] mean actual or constructive knowledge of the prior interest or defect in title." *Benz v. D.L. Evans Bank*, 152 Idaho 215, 226, 268 P.3d 1167, 1178 (2012). "[O]ne who purchases or encumbrances with notice of inconsistent claims does not take in good faith, and one who fails to investigate the open and obvious inconsistent claim cannot take in good faith." *W. Wood Investments, Inc. v. Acord*, 141 Idaho 75, 86, 106 P.3d 401, 412 (2005); see also I.C. § 55-815 ("An unrecorded instrument is valid as between the parties thereto and those who have notice thereof."). Good faith requires "a reasonable investigation of the property." *Langroise v. Becker*, 96 Idaho 218, 221, 526 P.2d 178, 181 (1974).

Tiller White, LLC v. Canyon Outdoor Media, LLC, 160 Idaho 417, 419, 374 P.3d 580, 582 (2016) (Burdick, J.) (brackets original) (bona fide purchaser without notice of a written but unrecorded easement for the billboard took the property not subject to the easement).

To qualify as a BFP, the person acquiring the property must acquire it "for value" (meaning they paid for it, rather than received it as a gift), and the buyer must have had no knowledge (actual or constructive) of the easement or other competing claim of title.

The flipside is that if the buyer had actual or constructive notice of an easement, he or she takes subject to the easement, even if it wasn't recorded. "One who purchases land expressly subject to an easement, or with notice, actual or

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> encumbrancer, who in good faith, and for a valuable consideration, acquires a title or lien by an instrument or valid judgment lien that is first duly recorded.

Idaho Code § 55-606 (originally enacted as Rev. Stat. of Idaho Terr. § 2929 (1887).

> Every conveyance of real property other than a lease for a term not exceeding one (1) year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded.

Idaho Code § 55-812 (originally enacted as 1864 Idaho Terr. Sess. Laws, p. 528, § 25).

constructive, that it is burdened with an existing easement, takes the land subject to the easement." *Akers v. D.L. White Const., Inc.*, 142 Idaho 293, 301, 127 P.3d 196, 204 (2005) (Burdick, J.) (quoting *Checketts v. Thompson*, 65 Idaho 715, 721, 152 P.2d 585, 587 (1944) (Dunlap, J.) (which in turn was quoting 28 C.J.S. Easements, p. 711, § 48) (later quoted in *Halvorson v. N. Latah Cnty. Highway Dist*., 151 Idaho 196, 205, 254 P.3d 497, 506 (2011) (Horton, J.).

Constructive knowledge is knowledge imputed to the purchaser based on the fact that the easement was properly recorded or other circumstances that should have alerted the purchaser to inquire further.

> To be a bona fide purchaser of real property, one must have purchased the property in "good faith." I.C. § 55-812. "Good faith means a party purchased the property without knowing of any adverse claims to the property." *Sun Valley Hot Springs Ranch, Inc. v. Kelsey*, 131 Idaho 657, 661, 962 P.2d 1041, 1045 (1998). "[O]ne who fails to investigate the open and obvious inconsistent claim cannot take in good faith." *Tiller White, LLC v. Canyon Outdoor Media, LLC*, 160 Idaho 417, 419, 374 P.3d 580, 582 (2016) (quoting *W. Wood Inv., Inc. v. Acord*, 141 Idaho 75, 86, 106 P.3d 401, 412 (2005)).
>
> …
>
> We hold that the existence of the Road was sufficient to impart constructive notice to Appellants' predecessors in interest. … [T]he existence of the Road alone is notice enough to excite the attention of a reasonable person and prompt him or her to inquire further.

Nampa Highway Dist. No. 1 v. Knight, 166 Idaho 609, 616, 462 P.3d 137, 144 (2020) (Moeller, J.) (emphasis added).

2. The shelter rule

In 2020, Idaho embraced a common law extension of the BFP defense known as the "shelter rule." The shelter rule allows a person who is not a BFP to nevertheless defeat the easement or other title defect based on the fact that the person he acquired the property from was a BFP. *Nampa Highway Dist. No. 1 v. Knight*, 166 Idaho 609, 614-17, 462 P.3d 137, 142-45 (2020) (Moeller, J.).

The basic idea is that if a BFP is to be protected from an unrecorded property interest, one of the sticks in her bundle of property rights should be the ability to sell the property—even after the formerly unrecorded interest is tardily recorded thereby

placing new purchasers on notice. Though designed to protect the BFP seller, the shelter rule also benefits the new purchaser (who is not a BFP).

3. The case law is in conflict as to whether the BFP and shelter rule defenses are applicable in the context of public roads.

a. Overview of *Trunnell* and *Knight*

Two Idaho cases have addressed the question of whether the BFP defense is available to a private landowner who acquires a property in good faith without knowledge of an unrecorded public road located on the property. The cases are *Trunnell v. Fergel*, 153 Idaho 68, 278 P.3d 938 (2012) (Burdick, C.J.) and *Nampa Highway Dist. No. 1 v. Knight*, 166 Idaho 609, 462 P.3d 137 (2020) (Moeller, J.). The holdings of the cases are diametrically opposed.

Trunnell held that the BFP defense is inapplicable as to public roads because the only way to abandon/vacate a public road is pursuant to Idaho Code § 40-203. Eight years later, the *Knight* Court reached the opposite conclusion. It simply applied the BFP defense to a public road, without any discussion of *Trunnell* or section 40-203.

The conflicting holdings cannot be explained by differences in procedural posture. Both arose as civil actions, not judicial review of validation or vacation proceedings.[141] The road in *Trunnell* was created by formal action, while the road in *Knight* seems was created by prescription.[142] Neither Court suggested this made any difference, and it is not apparent why it would.

These cases are discussed more fully below.

b. The *Trunnell* case says the BFP defense is not available for public roads.

The case of *Trunnell v. Fergel*, 153 Idaho 68, 278 P.3d 938 (2012) (Burdick, C.J.) arose over a dispute between neighbors involving a public road that the plaintiffs (Trunnell) used to travel across the defendant's (Fergel's) property to reach

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[141] The *Trunnell* complaint was originally filed *pro se*. The case appears to be postured as a quiet title action, but neither the decision nor the briefing use that description, nor do they disclose the statutory basis for the proceeding. The Knight case was a quiet title case. Either case could have been initiated as validation or vacation proceedings. Instead the parties elected to proceed directly to court.

[142] In *Trunnell*, the county approved a viewers' report in about 1909, and the road was recorded in the county road book. *Trunnell*, 153 Idaho at 70, 278 P.3d at 940. There is less information about the origin of the road in *Knight*. The briefing says it was "used and maintained as a public highway since 1921." *Respondent's Brief* at 2, 2011 WL 2358048.

their own property. Trunnell filed a complaint seeking declaratory and injunctive relief. Trunnell contended the road was public, and the neighbor was illegally preventing their use of the road. The road had been established by formal declaration of Bonner County in 1908 (county approval of a viewers' report), and the action was recorded in Bonner County's "Road Book." *Trunnell*, 153 Idaho at 70, 278 P.3d at 940. Thus, there was no doubt that it was a public road, and that issue was not appealed. Instead, Fergel contended that when she and her husband bought the property in 1991 they were without actual or constructive knowledge of the public status of the road and were therefore a "bona fide purchasers" (or BFP) who took the property not subject to any public easement. *Id*.

The trial court agreed with Fergel's BFP defense, but the Idaho Supreme Court reversed. Essentially, the Court found that Idaho's road abandonment/vacation statute trumps the BFP defense.

> Through the enactment of the abandonment statutes [Idaho Code § 40-203], the legislature has elevated public easements above private easements. …
>
> …
>
> The district court determined that Fergel was a bona fide purchaser for value because she had neither actual nor constructive notice of the public nature of County Road 32. However, such a conclusion would allow Fergel to disregard any public interest in County Road 32. In this context, applying the bona fide purchaser for value defense would vitiate any interest the county had in County Road 32, a public highway. By extinguishing that interest, this would be akin to abandonment. 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. Therefore, we find that the district court erred in holding that Fergel took title to her property free of the encumbrance of County Road 32

Trunnell, 153 Idaho at 72, 278 P.3d at 942 (emphasis added).

The *Trunnell* case is a head scratcher. It would seem the Court didn't need to reach the question of how the BFP defense and section 40-203 interact. The Court might have found that Fergel did not qualify as BFP, because Fergel had actual notice, constructive notice, or both. Instead, the decision simply accepted without discussion the conclusion that Fergel was a BFP, focusing entirely on how that fact interacted with section 40-203.

First, a recording of an easement constitutes actual notice for purposes of the BFP defense. Although the acceptance of the road was not recorded in the County Recorder's grantor-grantee index of land title records, it was recorded in the County Road Book. The latter is sufficient to satisfy the recording requirement for formal road creation.[143] Accordingly, one might think that it would also serve as notice sufficient to defeat a BFP defense. This very point was argued by the plaintiffs in their briefing (2011 WL 1762566), but the Idaho Supreme Court did not address it.

Furthermore, "one who purchases property with sufficient knowledge to put him, or a reasonably prudent person, on inquiry is not a bona fide purchaser." *Imig v. McDonald*, 77 Idaho 314, 318, 291 P.2d 852, 855 (1955) (Keeton, J.). The *Trunnell* Court reproduced this very quotation, *Trunnell*, 153 Idaho at 72, 278 P.3d at 942, yet failed to discuss whether it might apply here. The road was visible on Ms. Fergel's property. She described it as "two wheel tracks," but the Court also noted that it was visible in aerial photographs and satellite imagery. *Trunnell*, 153 Idaho at 70, 278 P.3d at 940. It would seem that this would at least create an issue of fact. Although addressed by the trial court and in the appellate briefing, the Idaho Supreme Court's decision made no mention of the issue.

Instead, the Court issued a sweeping declaration that "the legislature has elevated public easements above private easements" and "the bona fide purchaser for value defense is not available to Fergel as the defense would constitute an abandonment of County Road 32 in contravention of I.C. § 40-203." *Trunnell*, 153 Idaho at 73, 278 P.3d at 943.

Because the decision was based on the vacation/abandonment statute (which applies to all manner of public roads) and was not premised on the absence of a recording (which would apply only to formally created roads), it would seem that Trunnell's holding would be equally applicable to a public road created by prescription.

As of this writing, no appellate court has cited *Trunnell*. Indeed, it was contradicted, without explanation, in *Nampa Highway Dist. No. 1 v. Knight*, 166 Idaho 609, 462 P.3d 137 (2020) (Moeller, J.) discussed below.

[143] At the relevant time to the litigation, the recording requirement was codified at Rev. Codes of Idaho § 875 (1908). It is codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3). See footnote 49 on page 49 for other codifications. Numerous Idaho decisions have recognized that recording in the county "road book" (as was the custom in the early days of the territory and state) satisfies the requirement. See footnote 50 on page 50.

c. The *Knight* case applied the BFP and shelter rule in a public road case.

Eight years after *Trunnell*, the Court decided *Nampa Highway Dist. No. 1 v. Knight*, 166 Idaho 609, 462 P.3d 137 (2020) (Moeller, J.). The *Knight* Court, without any mention of *Trunnell*, recognized the applicability of the BFP and shelter rule in a public road case.[144]

In *Knight*, the highway district brought a quiet title action against landowners adjacent to Orchard Avenue in Canyon County.[145] The road had been constructed in 1921 as 22-foot wide two-lane road, and has remained that width ever since. The decision does not discuss the legal basis or property rights associated with the original road. In 1941, "a delegation" (presumably of landowners adjacent to the road) asked the highway district to "put the Road in condition for oiling." *Knight*, 166 Idaho at 613, 462 P.3d at 141. In exchange for agreeing to improve the road, the district asked the landowners to submit "Right of Way deeds for thirty-three feet on each side of center of road." *Id*. The predecessor of the defendant landowners was among those who provided such deeds.[146] In any event, the road was not improved and, for some reason, the deed was not recorded until 1989. Land adjacent to the road was conveyed to various landowners both prior to and after the recording of the deed in 1989. Those acquiring prior to 1989 were arguably BFPs; those acquiring after 1989 (including the defendants) were clearly not BFPs.

The defendants asserted that prior owners (who acquired the property between 1941 and 1989) were BFPs, and that purchasers after 1989 (including the defendants) were protected by the "shelter rule." The shelter rule gives BFP status to subsequent purchasers (even if they have notice) if the seller was a BFP.

The trial court found that the pre-1989 purchasers were not BFPs because the

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[144] It appears that both the Court and the litigants were unaware of the *Trunnell* holding on BFPs. The defendant landowners asserted the BFP/shelter rule defense, making no mention of *Trunnell*. One would have expected the highway district to respond by citing the *Trunnell* holding that the BFP defense is not available in the context of public roads. But the highway district's brief made no mention of this aspect of *Trunnell*, instead citing *Trunnell* in footnote 59 of its brief On appeal only to address an unrelated issue (relating to fee versus easement).

[145] The highway district could have initiated a validation proceeding, instead initiating a quiet title action. Perhaps the district calculated that this matter would ultimately be litigated, so they might as well head straight to court.

[146] There may have been multiple deeds covering other stretches of the road, but only one deed was at issue in the litigation. Neither the decision nor the briefing provide any background facts on what provoked the quiet title action or why it was limited to these defendants.

road was physically present and was obviously a public road, giving rise to a duty to inquire further as to its width. The Idaho Supreme Court agreed that there was a duty to inquire further, but said there must also be a showing that further inquiry would have actually revealed the existence of the 66-foot easement. The Court said that could not be presumed, because the record failed to show that the highway district even knew about the easement at the time. For example, it may have been lost until it was discovered and recorded in 1989. Thus, an inquiry prior to purchase might or might not have provided knowledge of the easement to the pre-1989 purchasers. Accordingly, the Court remanded for a determination of those facts.[147]

The key point is that the Court applied the BFP/shelter rule in the context of a public road. Thus, *Knight* and *Trunnell* leave us with two fundamentally conflicting precedents.

Note that the *Knight* case also addressed other aspects of road law: the road width statute (discussed in section I.H.5 on page 107), retroactivity of the 2013 road width amendments (discussed in section I.H.3 on page 102), and the easement versus fee issue (discussed in section I.J.1.a on page 115).

4. Nor do these defenses apply to city streets.

Although Idaho Code § 40-203 applies only to counties and highway districts, other statutes, notably Idaho Code § 50-311, give cities similar authority to vacate streets. See discussion in section VI.A on page 384. Thus, it would appear that *Trunnell*'s holding would apply equally to cities and city streets that are vacated by municipalities.

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[147] The remand would also address, if necessary, a question about the statute establishing a 50-foot minimum width of roads (Idaho Code § 40-2312). The highway district argued that even if the BFP/shelter rule made the 1941 deed ineffective as to the defendants, they had constructive knowledge that the road was at least 50 feet wide by virtue of the statute. However, that statute, as it existed when the road was constructed in 1921, contained an exemption for roads in "townsites." So, if it turned out on remand that that the defendants were not protected by the BFP/shelter rule, the district court would have to determine whether the road was within a townsite (presumably the City of Nampa) at that time.

In addition, the Court addressed the issue of whether the 1941 deed conveyed a fee simple interest or merely an easement. See discussion in section I.J.1.a on page 115. That issue would be moot, however if, on remand, it was determined that the defendants were not subject to the 1941 deed due to the BFP/shelter rule.

5. What should a prospective purchaser do?

Because counties, highway districts, and cities are not expected to resolve problems caused by inaccurate plats, it is incumbent upon landowners to address these risks using their own resources and due diligence.

Extended coverage title insurance may be obtained. However, even that is unlikely to provide protection where it is evident upon inspection and survey that an encroachment exists.[148] At least the process of obtaining a title commitment for an extended coverage policy would alert the prospective purchaser to the issue.

The purchaser may also seek protection vis-à-vis the seller by insisting on appropriate warranties in the deed. Needless to say, the seller may be disinclined to provide such warranties.

Ultimately, the purchaser should do the thing that the BFP law encourages: undertake due diligence and make a business judgment about the risk of potential encroachments by public roads.

[148] ALTA (American Land Title Association) title policies typically include standard "exceptions" carving out coverage for such things as easements not in the public records and interests in roads held by the public. An extended coverage policy may eliminate some or all of these exceptions. However, in order to obtain extended coverage, the insured is typically required to undertake a survey of the property. If the survey discloses the existence of such a right-of-way, it will then be excepted by the title company.

III. R.S. 2477 RIGHTS-OF-WAY

A. Overview

1. 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.[149] 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).[150] 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 (10th 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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[149] 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.

[150] 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.

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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, 104th Cong. (Mar. 16, 1995), 1995 WL 113237.

To understand the statue, 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).

2. 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.[151] 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*., 424 P.3d 72, 78 (Utah 2017).

3. 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.

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[151] "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 (10th 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 Envt'l 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 (9th Cir. 2014) (memorandum decision).

For the same reason that some conservatives like R.S. 2477 roads (they establish locally controlled roads on federal lands), 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.[152] 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.[153]

In sum, the pro-R.S. 2477 side is composed of conservationists (sportsmen) and conservative anti-federal government sagebrush rebels. This is a peculiar combination, but they both like roads on public lands. Meanwhile, the anti-R.S. 2477 camp is composed of pro-wilderness environmental protection advocates as well as conservative advocates of private property rights. This is an 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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[152] "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 (10th Cir. 2005) (citation to FLPMA omitted).

[153] 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 (10th Cir. 2005).

B. The effect and operation of R.S. 2477

1. 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:

> The difficulty is in knowing what that means. 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 (10th 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 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."

2. 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[154] offer (or grant) from the federal government to the individual states and territories.[155] As the Alaska Supreme Court nicely put it, "Case law 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.).

However, not much is required to "accept" the grant. Mere construction of the road may suffice. 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

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[154] By "self-executing," it is meant that no further implementing legislation or other federal action is required to make the grant effective.

[155] "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 Envtl. 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), o*verruled on other grounds by Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

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 (10th 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).

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.

3. R.S. 2477 provided an ongoing offer, not a one-time forgiveness of prior trespasses on federal land.

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 that had occurred as of the date of enactment, but established a mechanism going forward for the recognition of such roads.[156]

4. 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

[156] *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).

with the single exception of the more "lax" standard for road creation by "some positive act" rather than full compliance with the requirement for a recorded order for formal road creation.

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 and correctly, 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). However, this adds nothing. Public highways are required to be maintained only to the extent funds are available. Idaho Code § 40-201. Moreover, counties and highway districts have the authority to designate any public road as a "public right-of-way" in which case it carry no maintenance obligation. Idaho Code § 40-117(9).[157]

Third, R.S. 2477 roads are not subject to passive abandonment. Idaho Code § 40-204A(2). This also adds nothing. Section 40-204A is not retroactive, and it was enacted in 1993 when passive abandonment was repealed for all roads. S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 4.

Fourth, Idaho's 1993 legislation addressing R.S. 2477 roads (Idaho Code § 40-204A(2)) may be read to prohibit, prospectively, the abandonment of R.S. 2477 roads except by eminent domain. But it is not at all clear what this means. See discussion in section III.H.6 on page 204.

These four 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, the main point of R.S. 2477 is simply that the federal government gave "permission" to create a public, non-federal road on federal land. Once an R.S. 2477 road is created, it is a public road not much different than other public roads controlled by a county or highway district.

[157] The definition of "public right-of-way" in Title 50 (Idaho Code § 50-1302(13), applicable to municipal corporations) is shorter but similar in concept the definition in Title 40.

C. R.S. 2477 rights-of-way may be created only "over public lands, not reserved for public uses."

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.[158] 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."[159]

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,[160] national parks, national forests, national wildlife refuges, national monuments, and military reservations.

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[158] "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).

[159] *Humboldt County v. United States*, 684 F.2d 1276, 1281 (9th Cir. 1982); *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 602 (9th 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.'").

[160] "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.").

The national policy of land disposal ended in 1976 with the enactment of FLPMA.[161] Today, non-reserved lands are held for public use and managed by the U.S. Bureau of Land Management ("BLM") for multiple purposes.

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).[162] 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 or other form of acceptance. 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.

D. 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.

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[161] 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…."

[162] 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' understanding generally as to withdrawals and reservations.

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.

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.

1. 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.[163]

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").[164]

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[163] 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).

[164] 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

2. 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).[165] 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).

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.[166] 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.[167] Entry often occurs years well after the claim is located and after a valid discovery is made,

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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.

[165] R.S. Morrison & Emilio D. De Soto, *Morrison's Mining Rights* (14th Ed.) at 162 (1910).

[166] 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 where 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.

[167] 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.

perhaps years before patent is issued. Once a valid entry occurs, equitable title shifts to the entryman.[168]

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:[169]

> 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 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* (14th 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

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[168] "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.

[169] The date of entry is sometimes equated with the date of application. Terry S. Maley, *Handbook of Mineral Law* at 693 (1983).

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.[170] 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.[171]

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

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[170] 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.

[171] "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).

until the date of mineral entry. This conclusion is consistent with the clearly established rule for homestead entries discussed above.

3. 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).

4. State endowment lands (school lands, etc.)

See *Idaho Land Use Handbook* for further discussion of State Endowment Lands.

R.S. 2477 roads may be created only on non-reserved federal land. Consequently, whether an R.S. 2477 road can be established on State endowment lands depends on two dates: (1) the date on which the endowment lands were reserved by the federal government prior to transfer to the State (which varies for each section) and (2) the date the endowment lands were actually conveyed to the State (the date of statehood). Either one of these cuts off the ability to create an R.S. 2477 road, but for different reasons. The first date cuts it off, because the land is no longer unreserved federal land. The second date cuts it off because the land is no longer federal land at all.

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.[172] The Idaho Organic Act[173] "reserved" the school lands as of the date each section is surveyed (thus making them unavailable for R.S. 2477 purposes). Whether this date is relevant depends on whether the survey was completed before or after statehood in 1890.[174] In most cases, this reservation date is

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[172] "Sec. 14. And be it further enacted, That when the lands in the territory shall be surveyed, under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby reserved for the purpose of being applied to schools in said territory, and in the states and territories hereafter to be erected out of the same." Organic Act of the Territory of Idaho, 12 Stat. 808, 814, § 14 (Mar. 3, 1863) (emphasis added).

[173] Organic Act of the Territory of Idaho, 12 Stat. 808, 814, § 14 (Mar. 3, 1863).

[174] Idaho was admitted to the Union on July 3, 1890. Section 5 (now section 5(d)) of the Idaho Admission Act expressly reserved all school lands, "whether surveyed or unsurveyed." Idaho's Constitution predates admission and was approved upon admission. Idaho's Constitutional Convention was held in Boise City, in the Territory of Idaho between July 4, 1889 and August 6, 1889. Idaho's Constitution was adopted by the Framers on the final day of the Constitutional Convention, August 6, 1889. It was ratified by the people of Idaho in November 4, 1889, and it was approved by Congress on July 3, 1890 in the Idaho

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irrelevant because most school lands were not surveyed until after statehood.[175] In those instances where the survey occurred prior to statehood that would cut off road creation under R.S. 2477 even earlier than statehood.

The grant of so-called "school lands" (sections 16 and 36) was confirmed and became effective when the State was admitted to the Union on July 3, 1890.[176] In addition to setting aside sections 16 and 36 as school lands, section 11 of the Idaho Admissions Act granted hundreds of thousands of additional acres to Idaho as

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Admission Act, ch. 656, 26 Stat. 215 (July 3, 1890) (see footnote 14 on page 19 for citations to amendments), which had the effect of admitting Idaho to the Union. Idaho was not the subject of a federal enabling act, as other statehood-seeking territories usually were before holding a constitutional convention.

[175] Idaho has approximately 55 million acres. Of these, about 8.5 million were surveyed prior to statehood. Communications with Amalia Baldwin, Principal, Historical Research Associates, Boise, Idaho (May 1, 2023).

[176] The Idaho Admissions Act (aka Idaho Admissions Bill) provides:

> Sec. 4. That sections numbered sixteen and thirty-six in every township of said State, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior.
>
> Sec. 5. That all lands herein granted for educational purposes shall be disposed of only at public sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislature shall prescribe, be leased for periods of not more than five years, and such lands shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

Idaho Admission Act, ch. 656, 26 Stat. 215, 215-16 §§ 4 & 5 (July 3, 1890). The provision allowing exchanges (initially section 5(b), now section 5(c)) was not added until 1974, nearly a century after the enactment of the Idaho Admissions Act. Pub. L. No. 93-562, 88 Stat. 1821 (Dec. 30, 1974). It was further amended in 1998, Pub. L. No. 105-296, 112 Stat. 2822 (Oct. 27, 1998). See footnote 14 on page 19 for citations to other amendments to the Idaho Admission Act.

additional endowment lands to be held in trust for specific beneficiaries including the University of Idaho, the "insane asylum" in Blackfoot, the state penitentiary, and various others. Idaho Admission Act, ch. 656, 26 Stat. 215, ch. 656, at 217, § 11 (July 3, 1890) (see footnote 14 on page 19 for citations to amendments). See, e.g., Idaho Code § 66-1101 (Mental Hospital Permanent Endowment Fund). Altogether, at statehood, Idaho acquired 3,600,000 acres of federal land (known as endowment land) to be held in trust by the State for the sole purpose of funding specified beneficiaries (primarily schools and hospitals).

Section 4 of the Idaho Admissions Act also authorized the State to select "lieu land" in lieu of land that would have been included as endowment land, but already had been sold or otherwise disposed of prior to Admission (for example, by prior patent or reservation). The State's right to select lieu lands was further codified in Revised Statutes §§ 2275 and 2276 (Feb. 28, 1891) (codified at 43 U.S.C. §§ 851 and 852). Idaho's implementing legislation for lieu lands (dating to 1911) is codified at Idaho Code §§ 58-201 to 58-206.

Section 5 of the Idaho Admissions Act was amended in 1974—nearly a century after its adoption—to allow land to be added to Idaho's endowment land by land exchange. See footnote 176 on page 180.

Patents for individual sections were issued by the federal government to the State of Idaho sometime thereafter depending on when each section was surveyed.[177] In any event, the effective date of the conveyance was statehood, not the date of patent.

In sum, prior to statehood, school lands may or may not have been reserved. As explained above, whether they were reserved depends on whether they were surveyed prior to statehood. (See footnote 172 on page 179.) Once the lands were conveyed to the State upon statehood, they were no longer federal lands and, hence, were no longer "reserved" by the federal government. Instead, they were "granted to said State for the support of common schools" with the expectation that they would be "disposed of only at public sale." Idaho Admission Act, ch. 656, 26 Stat. 215, 215-16, §§ 4 & 5 (July 3, 1890) (see footnote 14 on page 19 for citations to amendments). Indeed, the whole purpose of this grant is to allow school lands to be developed and, when appropriate, disposed of for the financial benefit of schools.

Accordingly, R.S. 2477 roads may not be established on State lands after statehood for the simple reason that the land is no longer federal land and R.S. 2477

[177] For example, the survey for T5N R4E § 36 was completed on July 28, 1902 and the patent was issued shortly thereafter (12 years after statehood). In contrast, T6N R5E was surveyed prior to statehood in 1874, and patents for sections 16 and 36 were issued promptly after statehood in July of 1890. Communications with Amalia Baldwin, Principal, Historical Research Associates, Boise, Idaho (May 1, 2023).

applies only to federal land. Prior to statehood, R.S. 2477 roads may be created on section 16 and 36 (State school lands) up until the time that the individual section was surveyed by the federal government. When that happens, the school lands become reserved and are no longer eligible for creation of R.S. 2477 roads.

Whether public roads or private roads may be created on State lands after statehood is an entirely separate question, and is addressed elsewhere in this *Handbook*. See section I.D.4.d (May public roads be created by prescriptive use on State lands?) on page 77 and section IV.U (Adverse possession) on page 298.

Although the opinion was later withdrawn,[178] the Ninth Circuit provided the following useful summary of the law. It must be borne in mind, however, that the court was speaking about roads in Alaska, which has its own territorial and admission statutes. In Idaho, school lands are not reserved until they are surveyed:

> 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, 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 (9th Cir. 1996) ("*Shultz III*"). The statute

[178] 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.

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).

E. Federal and state role in R.S. 2477 rights-of-way

1. 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 Envtl. 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 Envtl. 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.

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S. Utah Wilderness Alliance v. BLM ("*SUWA*"), 425 F.3d 735, 768 (10th Cir. 2005).[179] 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 (9th 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 (9th 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 (9th 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.[180] 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

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[179] 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 Quite Title Act." *The Wilderness Society v. Kane County,* 581 F.3d 1198, 1219 (10th Cir. 2009), *rev'd en banc*, 632 F.3d 1162 (2011) (reversed for lack of standing).

[180] "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 (9th Cir. 1996).

> 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.*, 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).

2. State law may not broaden the federal 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 (10th 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 (8th Cir. 1975) (upholding North Dakota statute accepting the grant as to all section lines).

In *S. Utah Wilderness Alliance v. BLM* ("*SUWA*"), 425 F.3d 735 (10th Cir. 2005), the Tenth Circuit recognized that while state law generally controls acceptance of R.S. 2477 rights-of-way, there are limits as 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.[181]

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 (10th Cir. 2014) (brackets original).

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

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 governmental 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

[181] 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.

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.[182] 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).

F. R.S. 2477 roads may be created on the basis of (1) compliance with state road creation statutes 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

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[182] *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), o*verruled 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.

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, C.J.) (emphasis supplied).[183]

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.[184] 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

[183] 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 Cnty,* 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").

[184] Meanwhile, the Idaho Legislature has made it very clear that it considers R.S. 2477 rights-of-way to be subject to different standards. H.B. 388, 1993 Idaho Sess. Laws, ch. 142 (codified at Idaho Code §§ 40-107, 40-204A). See discussion in section II.H.3 at page 147.

> 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.

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

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).[185]

Note that the "public road creation statutes" that may provide the basis for road creation under R.S. 2477 include 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.[186] Frankly, it is not clear why a "lax" standard would

[185] 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.

[186] 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

be necessary. Placing road decisions into the "county road book" was how these things were recorded back in the day. And the leather made it pretty formal.

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, 339-40, 362 P.2d 1088, 1092-93 (1961) (Taylor, C.J.).

- In 1988, the Court gave the example of "a resolution passed by the county commissioners" as being sufficient. *French v. Sorensen*, 751 P.2d 98, 106, n.4 (Idaho 1988).

These examples suggests that placing an R.S. 2477 road on a county road map may be sufficient. See section IV.G ("Official road maps (§§ 40-202(1), 40-202(6), 40-1310(9), and 40-604(13))") on page 249. Likewise, a county filing or acceptance of an "acknowledgment" of an R.S. 2477 filed by a private citizen under Idaho Code § 40-204A(6) might be sufficient. See section III.G.5 ("Acknowledgement of R.S. 2477 rights-of-way (Idaho Code § 40-204A(6))") on page 194.

Galli put to rest a question left open by *Farrell* and *Kirk*.[187] The Idaho Association of Counties urged in an amicus brief in *Galli* that the "lax" standard should relax both the formal declaration and the prescriptive use components of the Idaho road creation statute, urging that R.S. 2477 roads should be recognized based on (1) less than five years of public use and/or (2) 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 (softening the requirements for formal validation). 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.,* 191 P.3d 233, 237 (Idaho 2008) (W. Jones, J.; J. Jones, J., concurring).[188]

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either test. What the Court referred to as "past[ing] in the old leather-bound County book" is how these matters were recorded.

[187] 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.

[188] For reasons that are unclear, the *Galli* decision applied no maintenance requirement. See discussion in section III.G.3 at page 192.

In *Sopatyk v. Lemhi Cnty., Sopatyk*, 151 Idaho at 809, 264 P.3d 916 (Idaho 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* at 921.

G. Other questions about R.S. 2477 roads

Note: See also discussion in section III.H (The federal land rights-of-way statute (FL-ROW) (§ 40-204A)) beginning on page 199.

1. A private party may not 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. 2477 Right of Way Dispute: Constructing a Solution*, 27 Envtl. 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."[189] *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: [190]

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[189] 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*.

[190] 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.

> [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 (10th Cir. 1978)).

2. 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.

3. Is the maintenance requirement for passive road creation eliminated for R.S. 2477 rights-of-way? (Probably not.)

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., 2nd 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. 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* 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.

4. An R.S. 2477 road may 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 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 if state roads may be created on federal land by common law dedication, which *Farrell* confirmed can happen, then they must be R.S. 2477 roads. Otherwise, there would be no federal permission to create them. Thus, an acceptance of the common law dedication by the homestead patentee, in accordance with Idaho common law, 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.

5. 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 acknowledgement 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).[191]

Another section in the same statute (added in 2000) expressly provides that section 40-203A is the proper procedure for validation of R.S. 2477 rights-of-way. S.B. 1407, 2000 Idaho Sess. Laws, ch. 251 (codified at Idaho Code § 40-203A(5)). Thus, the purpose of subsection 6 quoted above is a mystery. It authorizes any person (presumably including the county itself) to file such a request. It does not say what or on what basis the county is expected to respond (especially if the county filed the acknowledgment). Nor does it say what effect, if any, such an acknowledgment would have. Instead, it simply says that the county recorder (presumably referring to the county clerk) shall record the acknowledgment and any supporting documentation and maintain an index thereto.

It is 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.

6. Idaho allows validation of R.S. 2477 roads on federal land where the United States does not contest the claim (the *Nemeth* case).

See section V.A ("Federal Quiet Title Act (QTA)") on page 332 for a discussion of the federal QTA. This section explores an Idaho decision holding that

[191] Idaho Code § 204A(6) was enacted by H.B. 388, 1993 Idaho Sess. Laws, ch. 142, § 3, with minor amendments in S.B. 1407, 2000 Idaho Sess. Laws, ch. 251, § 3.

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roads may be validated on federal land notwithstanding the federal QTA, *Nemeth v. Shoshone Cnty*, 165 Idaho 851, 453 P.3d 844 (2019) (Moeller, J.). The quick answer is that the *Nemeth* Court held that federal court jurisdiction is exclusive under the federal QTA only when the federal government is contesting the assertion of title. In *Nemeth*, the record failed to show that the federal government was opposed to recognition of the R.S. 2477 road (see footnote 195 on page 197). Even though the decision opens a door to validation of "uncontested" R.S. 2477 roads on federal land, it accomplishes nothing if the federal government ultimately disagrees with the validation. Idaho is powerless to change the fundamental principle of sovereign immunity that the federal government is not bound by decisions purporting to establish title to federal property that are not litigated under the federal QTA.

In *Nemeth*, the Nemeths sought to validate Granite Gulch Road as an R.S. 2477 road. The road is located entirely within the Coeur d'Alene National Forest and provides access to patented mining claims they owned.

The Nemeths filed a petition for validation with Shoshone County seeking validation. Shoshone County declined to initiate validation proceedings, explaining in a letter to the Nemeths that it lacked jurisdiction to determine the legal status of a road on federal land, citing *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).

In the Eagle Creek Road cases, the federal court held the County's validation was of no legal consequence because the only way to establish title is to bring an action in federal court pursuant to the federal QTA. The County's position put the Nemeths in an no-win situation, because the Eagle Creek Road cases also held that private parties lack standing under the federal QTA to establish public roads. That may be an unfair Catch-22, but it was not one of the County's making. The County perceived that it had no ability to undertake a validation proceeding given the recent scolding it received for trying to do the same thing in the Eagle Creek Road cases.

The Nemeths then sued the County, contending that a provision in the FL-ROW statute (Idaho Code § 40-204A(5)) imposed on the County a mandatory duty to undertake a validation proceeding for FL-ROW (R.S. 2477 roads) when a petition for validation is filed.[192]

[192] The Nemeths' initial pleading combined a petition for judicial review and an action for declaratory judgment, both seeking validation of the road as a public road. (Presumably, the Nemeths did not seek relief under Idaho QTA or the federal QTA because they are available only to those asserting ownership on their own behalf. Thus, the case was framed as an action seeking declaratory relief that the county had a duty to rule on the validation.) The county filed a motion to dismiss noting that (1) a county's decision not to initiate validation proceedings is not subject to judicial review, (2) state courts have no jurisdiction

The Idaho Supreme Court held that the validation by the county could proceed, notwithstanding the federal QTA. The Court reasoned that federal QTA jurisdiction is exclusive only if the federal government is affirmatively contesting the assertion of an R.S. 2477 road. The Court based this conclusion primarily on *Mills v. United States*, 742 F.3d 400, 405 (9th Cir. 2014), a case that had not been briefed by either party.[193]

The *Mills* case involved the Fortymile Trail in Alaska, which provided access across federal and private property to a state mining claim owned by Mills. Mills brought claims against both the federal government and the third parties, including a federal QTA claim seeking to establish that the road was an R.S. 2477 claim. One would have expected the court to throw out the claim on the basis the that private parties lacked standing to bring federal QTA claims for public roads. See discussion in section V.A.6 on page 339. For some reason, the court did not address that hurdle to QTA cases, but focused instead on another hurdle. *Mills* held that sovereign immunity is waived under the federal QTA only where title is "disputed" by the United States. "For a title to be disputed for purposes of the QTA, the United States must have adopted a position in conflict with a third party regarding that title." *Mills* at 405.[194]

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to quiet title on federal land, and (3) it is not permissible to combine judicial review and declaratory action. The district court dismissed the case. The Nemeths appealed only the declaratory action, dropping the judicial review.

It is curious that the Nemeths did not file a State QTA suit against the County. That is the mechanism primarily contemplated under Idaho Code § 40-208(7) ("If the commissioners having jurisdiction over the highway system do not initiate a proceeding in response to such a petition within thirty (30) days, the person may seek a determination by quiet title or other available judicial means."). Instead, the Nemeths employed "other available judicial means" in the form of a declaratory action seeking relief under Idaho Code §§ 40-204A and 40-203A.

[193] The *Nemeth* Court also relied on *Sopatyk v. Lemhi Cnty.,* 151 Idaho 809, 264 P.3d 916 (2011) (W. Jones, J.). In that case, the Court held: "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,* 151 at 817, 264 P.3d at 924. In *Sopatyk*, however, this was not a central issue to the case. Nearly all of the road was on federal land, and the Forest Service supported recognition of the road as a public road even where portions of it strayed into federal lands. The bottom line is that under both *Nemeth* and *Sopatyk*, validation of an R.S. 2477 road on federal land may occur where there is no federal objection. However, as discussed below, it is another matter whether the state validation has any actual effect on the federal title absent a federal QTA claim.

[194] This holding—that a person may not quiet title if the federal government goes radio silent and takes no position on who owns the property—is an infernal Catch-22. There is

Based on *Mills*, the *Nemeth* Court found that the County had failed to put on evidence that the United States claimed ownership of the road.[195] Hence, there the QTA's waiver of sovereign immunity did not apply:

> We agree that where title to Federal land is disputed, including a dispute over ownership of a right-of-way, the QTA provides the designated method to adjudicate the controversy. However, "[f]or a title to be disputed for purposes of the QTA, the United States must have adopted a position in conflict with a third party regarding that title." *Mills v. United States*, 742 F.3d 400, 405 (9th Cir. 2014). Where title is not disputed, the waiver of sovereign immunity provided by the QTA does not apply. *Id*. Accordingly, where the United States has not expressly disputed the existence of an R.S. 2477 right-of-way or taken an action that "implicitly disputes" the right-of-way, federal courts do not have jurisdiction to hear a claim against the United States under the QTA. *Id*. at 406.

Nemeth, 165 Idaho at 856, 453 P.3d at 849.[196]

That portion of the *Nemeth* decision is consistent the holding in *Mills*. But the *Nemeth* Court then went a critical step beyond the holding in *Mills* or any other case. *Mills* said only that in this circumstance (when the federal government is mum), sovereign immunity is not waived. *Mills* did not say that this opens the door for litigants to resolve questions of federal ownership in state court. The unavailability

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nothing fair or sensible about it. Indeed, there is nothing fair or sensible about the entire concept of sovereign immunity.

[195] Ironically, the factual basis for the *Nemeth* decision (that the federal government was not contesting title) was not true. In fact, the Forest Service had squarely contested the assertion of county ownership to the road, and said so in writing. Instead, it also offered to provide permits for work-arounds, in which the Nemeths showed no interest. Unfortunately, the County had not thought it necessary to place that in the record. On appeal, new counsel for the County sought to get it before the Court, attaching the document to a motion to strike. But the Court focused solely on what was in the record, declaring the County's oversight at trial was "a tactical choice made by the County and they must live with it on appeal." *Nemeth*, 165 Idaho at 857, 452 P.3d at 850.

[196] As a practical matter, the federal government never participates in county validation proceedings, because it take the position that the federal QTA places jurisdiction exclusively in federal courts. The Idaho Supreme Court appears to understand this, and made clear in *Nemeth* that other evidence, even an implication of dispute, will suffice to establish jurisdiction under the federal QTA.

of the federal QTA does not mean that the federal QTA is no longer exclusive. In fact, *Mills* said the opposite: "Therefore, Mills's claim against the United States for a right of access over the Fortymile Trail must proceed, if at all, under the QTA." *Mills* at 405.

The *Nemeth* Court reached the opposite conclusion:

> The QTA, however, does not preclude state courts from validating federal land rights-of-way under R.S. 2477 because the QTA only allows a federal court to conduct its own validation analysis where title is disputed. As a result, a party can assert a claim to an RS 2477 right-of-way pursuant to state law by filing a petition for validation pursuant to sections 40-204A and 40-203A of the Idaho Code. When a county fails to act on a validation petition, a state court has subject matter jurisdiction to determine whether R.S. 2477 rights-of-way exist in the first instance pursuant to Idaho Code section 40-208(7).

Nemeth, 165 Idaho at 856, 453 P.3d at 849.

In sum, the Idaho Supreme Court says that Idaho may determine title to roads on federal land if the federal government has not disputed the title claim. The author predicts that the federal government, and federal courts, will be unfazed by the *Nemeth* decision. In *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)), Shoshone County validated an R.S. 2477 road on federal land, and the federal court said that this had no effect on title. See discussion in section V.A.11 on page 344.

The bottom line is that Idaho counties and courts may validate R.S. 2477 roads when the federal government has not disputed state ownership of the road. Doing so may have real practical effect on non-federal parties.[197] It may also have some practical effect on how the federal government treats those roads. And it may be persuasive, if not binding, in a future QTA suit over the road. But, if push comes

[197] In *Mills v. United States*, 742 F.3d 400 (9th Cir. 2014), the court allowed a private party to secure a judgment against other private parties determining that the plaintiff was entitled to use an R.S. 2477 road, notwithstanding the unavailability of a QTA action. "If successful, Mills' suit would prevent Doyon, Hungwitchin and Wood from barring Mills' access or suing him for trespass, but would not be binding on the federal government." *Mills* at 408. Thus, a non-QTA action, where a QTA action is unavailable, may be effective as to non-federal parties.

to shove, the author predicts that the state action will be found by federal courts to have no binding legal effect on title to R.S. 2477 roads located on federal lands.

If, on the other hand, the federal government does dispute state ownership of the road, the law is clear, even under *Nemeth*, that the state has no jurisdiction to engage in validation or QTA proceedings.

H. The federal land rights-of-way statute (FL-ROW) (§ 40-204A)

1. Special treatment of FL-ROW under § 40-204A

In 1993 the Idaho Legislature enacted two significant road law statutes (see footnote 10 on page 17). One of them, H.B. 388, 1993 Idaho Sess. Laws, ch. 142, addressed R.S. 2477 rights-of-way, giving them a new name: "federal land rights-of-way" (FL-ROW).

First, it added a new definition for FL-ROW:

> "Federal land rights-of-way" mean rights-of-way on federal land within the context of revised statute 2477, codified as 43 U.S.C. 932, and other federal access grants and shall be considered to be any road, trail, access or way upon which construction has been carried out to the standard in which public rights-of-way were built within historic context. These rights-of-way may include, but not be limited to, horse paths, cattle trails, irrigation canals, waterways, ditches, pipelines or other means of water transmission and their attendant access for maintenance, wagon roads, jeep trails, logging roads, homestead roads, mine to market roads and all other ways.

Idaho Code § 40-107(5) (emphasis added).

Second, it added Idaho Code § 40-204A, establishing substantive and procedural law addressing FL-ROW. The first two subsections (1) and (2) are set out in full below:

> (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 [R.S. 2477 roads], 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.

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> (2) The only method for the abandonment of these rights-of-way [referring to FL-ROW, i.e. R.S. 2477 roads] shall 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.

Idaho Code §§ 40-204A(1) and (2) (emphasis added).[198]

2. *Hill* found that FL-ROW means all R.S. 2477 roads, not just those still on federal land.

The definition of "federal land right-of-way" (FL-ROW) was added in 1993 at the same time as the term "public right-of-way" was added.[199] FL-ROW is defined as "rights-of-way on federal land within the context of revised statute 2477." Idaho Code § 40-107(5) (emphasis added).

The phrase "within the context of revised statute 2477" is clear enough. It says that FL-ROW are R.S. 2477 roads.

But it is not clear what the Legislature meant by the limitation to roads "on federal land." Is this merely a recognition that all R.S. 2477 roads were on federal land when they were created? Or does the definition exclude R.S. 2477 roads that are no longer on non-federal land (because the land has been patented)?

The latter interpretation (that FL-ROW is limited to R.S. 2477 roads now on federal land) appears to be consistent with the enacted Statement of Legislative Intent.[200]

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[198] This measure was enacted as H.B. 388, 1993 Idaho Sess. Laws, ch. 142, § 1 (codified at Idaho Code §§ 40-107(5), 40-204A). Its sole purpose was to add the definition of FL-ROW and section 40-204A. This was one of two bills adopted in 1993 dealing with roads (see footnote 10 on page 17).

[199] Although both definitions were added in 1993, the arrived by different legislation. The definition of "federal land rights-of-way" was added by H.B. 388, 1993 Idaho Sess. Laws, ch. 142, § 2. The definition of "public right-of-way" was added by S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 2.

[200] The Statement of Legislative Intent suggests that the legislation was aimed at R.S. 2477 roads that are still on federal land (i.e., under federal control):

> The State of Idaho recognizes that existing federal land rights of way are extremely important to all of Idaho's citizens. Two-thirds of Idaho's land is under control of the

However, in *Hill v. Blaine Cnty*, 173 Idaho 782, 550 P.3d 264 (2024) (Zahn, J.), the Court implicitly concluded (without discussion) that FL-ROW apply to all R.S. 2477 roads, regardless of where they are now located. This is evident because *Hill* applied Idaho Code § 40-204A(2) to an R.S. 2477 road now located on private land.

3. Section 40-204A has no retroactive effect.

The 1993 legislation reflects a vigorous Legislative endorsement of positions urged by pro-R.S. 2477 forces on everything from road creation to abandonment. For example, 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). 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 statute also declares that R.S. 2477 roads are not subject to passive abandonment (see discussion in section III.H.5 on page 204).

This presents question, do the statute's substantive provisions have retroactive effect with respect to roads created or abandoned before 1993? The answer is no.

In *Farrell v. Bd. of Cnty. Comm'rs of Lemhi Cnty.,* 138 Idaho 378, 64 P.3d 304 (2002) (Schroeder, J.), proponents of the public road (the county, et al.) urged the Court to declare that R.S. 2477 rights-of-way are subject to their own, distinct common law making them immune from the passive abandonment statute. They contended that the language in Idaho Code § 40-204A(2) saying R.S. 2477 roads cannot be passively abandoned is not retroactive, but merely codified the common law to that effect. *Appellants' Opening Brief* at 30-33 (Jan. 22, 2002); *Respondent's Brief* at 21 n.4 (2002 Westlaw 32644483). The Court declined the invitation. Indeed, without any reference to 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 implicitly confirms that (1) Idaho Code § 40-204A is not retroactive and (2) R.S. 2477 rights-of-way are subject to the same passive abandonment rules as any other public road in Idaho, at least with regard to abandonment occurring prior to 1993.

Farrell's implicit holding that section 40-204A is not retroactive was confirmed explicitly in 2006. At the trial court level, District Judge John H.

> federal government and access to such federal lands is integral to public use. …

H.B. 388, 1993 Idaho Sess. Laws, ch. 142, § 1 (emphasis added). Note that the "Statement of Legislative Intent" is not mere legislative history (such as the Statement of Purpose that accompanies a bill); it is part of the enacted legislation.

Bradbury put it bluntly, "[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 Idaho 155, 159, 191 P.3d 233, 237 (2008) (W. Jones, J.) (citing Idaho Code § 40-205).[201] 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."

[201] 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.

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 (absent express legislative intent).[202]

In sum, the 1993 legislation comes too late to change the law of how R.S. 2477 rights-of-way were created in Idaho. Likewise, its provisions on abandonment apply only prospectively, and are presumably modified by more recent legislation (notably the 2013 provisions reintroducing a limited form of passive abandonment).

4. The effect of the "perpetual term" language in subsection (1) is unclear.

The first subsection of section 40-204A (stating that the grant is perpetual) could mean many things.

Perhaps it means that once title to the road shifts 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, but it might have been a point the Legislature thought worth emphasizing.

Perhaps it means that if the road is ever abandoned or vacated, it does not revert back to the United States. That appears to be consistent with the provision in Idaho Code § 40-203(1)(i) saying that if a road created as an FL-ROW is later formally abandoned/vacated it shall "revert" to an FL-ROW (see discussion in section III.H.9 on page 212). Note, however, that the "revert to FL-ROW" portion of subsection 40-203(1)(i) was not enacted until 2000.

[202] See discussion in section I.H.3 on page 102 regarding the retroactive application of the 2013 amendments to the standard of review, as addressed 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 that the 2013 amendments to standard of review do not apply to a decision by the county regarding road status made before 2013.

5. The 1993 statute has no effect on passive abandonment of R.S. 2477 roads.

The last sentence of the second subsection of section 40-204A says that infrequent use will not cause abandonment. In other words, R.S. 2477 roads are not subject to passive abandonment.

> (2) … 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.

Idaho Code §§ 40-204A(2).

As it happens, however, another 1993 statute repealed passive abandonment for all roads (see section II.E on page 140 and footnote 10 on page 17). So this provision did not add anything, given that it has no retroactive effect (see section III.H.3 on page 201).

Presumably, the more recent 2013 amendment (which added back in a limited form of passive abandonment and was aimed primarily at R.S. 2477 roads created by common law dedication) overrides the 1993 statute where it is applicable (because it is more recent and more specific).

6. The 1993 legislation mandates use of eminent domain.

The first sentence of subsection (2) of the 1993 legislation declared that FL-ROW may abandoned only by eminent domain:

> (2) The only method for the abandonment of these rights-of-way [referring to FL-ROW, i.e. R.S. 2477 roads] 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) (emphasis added).

The statute's reference to eminent domain is perplexing.

a. Federal eminent domain?

Conceivably, the Legislature was trying to say that the only way the federal government may "take back" an R.S. 2477 road on federal land is by exercising federal eminent domain authority. That would make some conceptual sense—the idea being that the federal government should pay compensation to the local government that owns the R.S. 2477 road.

b. State eminent domain?

If, on the other hand, the statute contemplates that a county or highway district must initiate eminent domain proceedings under Idaho law (as the *Hill* Court assumed), that simply makes no sense.

One may suppose that the legislative goal was to provide compensation to the public if an FL-ROW loses its status as a public road.[203] But eminent domain undertaken by the Idaho governmental entity that owns the R.S. 2477 road is hardly an effective way of accomplishing that.

Against whom is the county or highway district supposed to initiate proceedings? It owns the road. Should it sue itself and use the money it collects to pay itself back in order to compensate the public? Eminent domain is a procedure by which the public compensates a private party; it does not work where the goal is to compensate the public. In all the years that Idaho Code § 40-204A(2) has been on the books, it has never been used for eminent domain, to the author's knowledge. Nor, to the author's knowledge, has any court ever referenced the eminent domain provision, until *Hill*.

Conceivably, the goal of compensating the public could be achieved if a private party benefiting from the abandonment or vacation of a road were required to pay compensation. Indeed, that is the idea evidently embodied in Idaho Code § 40-203(1)(i) (see discussion in section II.L on page 150). But that is not eminent domain. Thus, the eminent domain provision in section 40-204A(2) remains an enigma.

7. According to *Hill*, R.S. 2477 roads may be formally abandoned/vacated only if they have been previously "accepted" into the highway system.

The "abandonment only by eminent domain" language in subsection 40-203A(2) (discussed above) might be read to preclude counties and highway districts from formally abandoning/vacating R.S. 2477 roads. However, that interpretation is at odds with a 2000 amendment to Idaho Code § 40-203(1)(i) expressly recognizing that R.S. 2477 roads are subject to vacation proceedings. S.B. 1407, 2000 Idaho Sess. Laws, ch. 251, § 2.[204]

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[203] As discussed in section III.H.9 on page 212, Idaho Code § 40-203(1)(i) may be read to say that even if an FL-ROW is vacated, the public still retains a right of access. If so, it is unclear for what the public needs to be compensated.

[204] The bill amended Idaho Code § 40-203(1)(i) to provide that if an R.S. 2477 road is formally abandoned/vacated, it "shall revert to" an FL-ROW. (See discussion in III.H.9 on page 212.) Any doubt that the Legislature contemplated that R.S. 2477 roads are subject to

Note also that section 40-204A(2) uses the term "abandonment," not "vacation." This presents the question, what type of abandonment does the statute preclude—formal abandonment/vacation, passive abandonment, or both? Read in context, it appears to mean only passive abandonment. This is because the next sentence describes the elements of passive abandonment ("frequency of use" and the "passage of time").

The Idaho Supreme Court reached the opposite conclusion in *Hill v. Blaine Cnty*, 173 Idaho 782, 550 P.3d 264 (2024) (Zahn, J.).[205] This was the first reported decision to address section 40-204A(2).

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formal abandonment/vacation is resolved by the Statement of Purpose, which states that the bill:

> 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.

H.B. 388, 1993 Idaho Sess. Laws, ch. 142, § 1 (emphasis added).

[205] In the *Hill* case, Mr. Hill sought an "approach and encroachment permit" from Blaine County that would allow him to repair and maintain an unimproved dirt road known as Imperial Gulch Road ("IGR") that provided access to his mining claim. The relevant portion of the road was located on private property known as the Greenhorn Subdivision and the Deer Creek Ranch. When those subdivisions were created, the developers dedicated and/or conveyed public access easements over the portion of IGR crossing their land. *Hill*, 173 Idaho at ___, 550 P.3d at 267. (Idaho pagination does not appear in Westlaw for this case).

Prior to seeking the permit, Mr. Hill petitioned Blaine County to validate IGR as a public road based on R.S. 2477. Blaine County issued a decision concluding, "The Board finds and declares that the evidence establishes that IGR is a County road, public highway and federal land right-of-way. The Board also finds that validation of IGR is not in the public interest." *Hill*, 173 Idaho at ___, 550 P.3d at 268. The County's decision did not expressly say that the public interest determination meant that the road was not validated. The County evidently thought that was implicit. Mr. Hill did not read the decision that way. "Hill interprets the Validation Decision as a paradoxical decision declaring IGR to be a public road while simultaneously finding that validation was not in the public interest." *Hill*, 173 Idaho at ___, 550 P.3d at 271. "In contrast to Hill, the Board interpreted the Validation Decision as not validating IGR as a public road." *Hill*, 173 Idaho at ___, 550 P.3d at 268.

Due to his misunderstanding of the County's validation ruling, Mr. Hill did not appeal it. Instead, having thought he won the validation petition, he then pursued his approach and encroachment permit. The County denied the permit on the basis that the road had not been validated. After a second round before the County, Mr. Hill appealed the permit denial to district court.

The *Hill* Court implicitly determined that the reference to "abandonment" in section 40-204A includes not just passive abandonment but also refers to formal abandonment and vacation. This assumption is reflected in the Court's declaration that R.S. 2477 roads that have never been "accepted" are not subject to vacation under Idaho Code § 40-203 and may only be abandoned through eminent domain:

> However, section 40-203 is not applicable to IGR [the subject road] because it is an R.S. 2477 road. I.C. §§ 40-203(1), 40-204A(2). Pursuant to Idaho Code section 40-204A(2), a roadway created through R.S. 2477 and never accepted into a county or highway district system, such as IGR, can only be abandoned through eminent domain proceedings.

Hill, 173 Idaho at ___, 550 P.3d at 276 (emphasis added).

The Court did not explain why, under the controlling statutes, the prohibition on use of section 40-203 applies only to those R.S. 2477 roads "never accepted into a county or highway district system."[206] Idaho Code § 40-204A contains no such limitation.

Evidently, the Court views passively created R.S. 2477 roads as being unique in that they do not simply become a part of the relevant county or highway district road system until they that are affirmatively accepted in some way. The Court said: "But Idaho law recognizes that not all rights-of-way are under the control of the state

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The district court agreed with the County that its decision did not validate the road as a public road. However, the district court remanded, explaining that the public access easements granted by the subdivision developers might provide an alternative basis for approving the approach and encroachment permit. Mr. Hill did not wait to see how the remand played out. Instead, he appealed pursuant to Idaho Code § 31-1506, which ties into the IAPA's judicial review provisions, Idaho Code § 67-5270. The Idaho Supreme Court affirmed the district court's decision.

[206] In two other places, the Court speaks of section 40-203 (the vacation provision) as being inapplicable to "a non-R.S. 2477 road" without mentioning the that this is limited to R.S. 2477 roads not previously accepted into the highway system. "Idaho Code section 40-203 provides that in the case of a non-R.S. 2477 road, the Board can only abandon a public highway or public right-of-way if it is in the public interest to do so: … However, section 40-203 is not applicable to IGR because it is an R.S. 2477 road." *Hill*, 173 Idaho at ___, 550 P.3d at 276. However, the very next sentence of the *Hill* decision is the one quoted above in which the Court makes clear that this applies only to R.S. 2477 roads not previously accepted. And the Court elsewhere notes that IGR was not previously accepted. *Hill*, 173 Idaho at ___, 550 P.3d at 275 ("[The County's decision] does not indicate that the County had previously accepted jurisdiction over IGR as a public right-of-way or public highway.").

or its political subdivisions." *Hill*, 173 Idaho at ___, 550 P.3d at 273. The only example of this provided by the Court is the definition of FL-ROW. *Id*.

The Court then said:

> Just because a public right of use for IGR was created pursuant to R.S. 2477 and state law, that does not mean that the County was required to accept jurisdiction over IGR. It is entirely consistent with the effect of validation to require that the Board make a finding that it is in the public interest to assume jurisdiction over a highway or public right-of-way. If this was not required, counties and highway districts would be responsible for all roads created since the enactment of R.S. 2477 regardless of the road's condition or the amount of public use it received. Imposing an obligation like this could have significant financial and administrative consequences for counties and highway districts.
>
> …
>
> The fact that the public had developed a right to use IGR did not automatically impose responsibility for IGR on the County.

Hill, 173 Idaho at ___, 550 P.3d at 275.

To the author's knowledge, no prior decision has suggested that the creation of an R.S. 2477 road in accordance with Idaho law (including passive road creation) does not automatically make it part of the pertinent county or highway district road system.

The Court's expression of concern that if this were the case, counties and highway districts would be subject to "significant financial and administrative consequences" appears misplaced. It is well established that local governments have inherent no duty to maintain public roads; rather, they may elect to designate them "public rights-of-way" which includes no maintenance obligation. Moreover, Idaho Code § 40-204A(4) expressly provides that FL-ROW "shall not require maintenance for the passage of vehicular traffic."

The conclusion that some affirmative validation or other action is necessary is to accept a public road created by prescription is also at odds with the holding in *Halvorson v. N. Latah Cnty. Highway Dist*., 151 Idaho 196, 254 P.3d 497 (2011) (Horton, J.).[207]

[207] In *Halvorson*, the Court explained that validation is not required where a road is created by prescription:

Nor did the Court explain what it meant by "accepted." Presumably, the *Hill* Court was using the term "accept" broadly to include R.S. 2477 roads that have been recognized as public roads in various ways:

- Obviously, it would include roads that have been formally validated under Idaho Code § 40-203A.
- Presumably it would also include roads simply included on the official county road map pursuant to Idaho Code §§ 40-202(1), 20-202(6), 40-604(13), or 40-1310(9). (See discussion in section IV.G beginning on page 249.)
- One would think it would also include roads accepted by "some positive act or acts on the part of the proper public authorities" (the standard articulated in *Kirk v. Schultz*, 63 Idaho 278, 282-83, 119 P.2d 266, 268 (1941) (Budge, C.J.).
- Acceptance may also include R.S. 2477 roads established by quiet title.

In sum, the *Hill* Court reads section 40-204A(2) as precluding the vacation of R.S. 2477 roads if and only if they have not been previously recognized in some way by local officials (or perhaps by a court) as being part of the public road system. This means that a county or highway district lacks the power to vacate an R.S. 2477 road that has not been previously "accepted." Instead such roads must somehow be "abandoned" through eminent domain, whatever that means.

> The Halvorsons argue that it is not the province of the district court to establish the public nature of Camps Canyon Road. … In effect, the Halvorsons 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 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.

Halvorson, 151 Idaho at 203, 254 P.3d at 504. The facts in *Halvorson* are described in section I.H.6 beginning on page 107. *Halvorson* did not involve an R.S. 2477 road. But it is difficult to understand why the same principle would not apply.

8. 2013 Amendment glitch: The meaning of "All other highways" in subsection 40-203(6).

As discussed above, in *Hill v. Blaine Cnty*, 173 Idaho 782, 550 P.3d 264 (2024) (Zahn, J.), the Court concluded that R.S. 2477 roads that have not been "accepted" may not be formally vacated, but must instead be abandoned through eminent domain (whatever that means). The Court rested this conclusion, at least in part, on its reading of subsection (1) and (6) of Idaho Code § 40-203:

> Lastly, Hill repeatedly accuses the Board of attempting to abandon IGR through validation proceedings. Idaho Code section 40-203 provides that in the case of a non-R.S. 2477 road, the Board can only abandon a public highway or public right-of-way if it is in the public interest to do so.
>
> > (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:
> > … .
> > (6) *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.
>
> I.C. § 40-203(1), (6) (emphasis added). However, section 40-203 is not applicable to IGR because it is an R.S. 2477 road. I.C. §§ 40-203(1), 40-204A(2). Pursuant to Idaho Code section 40-204A(2), a roadway created through R.S. 2477 and never accepted into a county or highway district system, such as IGR, can only be abandoned through eminent domain proceedings.

Hill, 173 Idaho at ___, 550 P.3d at 276 (emphasis added).

The Court does not explain how subsections (1) and (6) interact, but it appears that the Court may read the "All other highways" language in subsection (6) to refer to subsection (1). In fact, those subsections are not juxtaposed in that way, as the enacting statute in 2013 makes clear. The confusion over what "All other highways" refers to is a result of a statutory renumbering of the subsections in 2021.

The quick answer is that "All other highways" refers to highways not described in subsection (5). As a consequence, subsection (1) means what it says: all highways and public rights-of-way (including R.S. 2477 roads) are subject to formal abandonment/vacation pursuant to section 40-203.

To explain why, one must step back to 2013. In that year, the Legislature enacted a statute dealing primarily with road width. H.B. 321, 2013 Idaho Sess. Laws, ch. 239 (codified at Idaho Code §§ 40-114, 40-202, 40-203, 40-208, 40-2312). However, the 2013 legislation also addressed abandonment, creating a new and very narrow class of roads (those created by a particular type of common law dedication) that may be passively abandoned by non-use and non-maintenance. This was set out in an entirely new subsection 40-203(5). As enacted, it read:

> (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).

The statute was amended in 2021 by renumbering the final paragraph of subsection 40-205(5) as subsection 40-203(6).[208] S.B. 1101, 2021 Idaho Sess. Laws, ch. 179. This was not intended to have substantive effect.[209]

9. A vacated R.S. 2477 road reverts to an R.S. 2477 road (section 40-203(1)(i)).

In 2000, the Legislature enacted the following proviso to the abandonment/vacation statute: "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." S.B. 1407, 2000 Idaho Sess. Laws, ch. 251, § 2 (amending Idaho Code § 40-203(1)(i)).

This language is enigmatic. It says, in essence, that if a road is created as an FL-ROW, and later abandoned or vacated, it becomes an FL-ROW once again. What does that mean? It appears to assume that a road created as an FL-ROW is not

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[208] The purpose of the "All other highways" paragraph was to explain and emphasize that section 40-204(5) contains the only form of passive abandonment now in effect whereby roads may lose their public road status by operation of law through non-use and non-maintenance. In contrast, all "other" roads may lose their public road status only through formal action by a county or highway district based on a determination that public road status is not in the public interest. Note that when this was enacted in 2013, there was no passive abandonment statute in effect; the last passive abandonment provision was repealed in 1993. S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 4 (amending what was then Idaho Code § 40-203(4) to remove passive abandonment provisions).

[209] The 2021 amendment to Idaho Code § 40-203(5) appears to be incidental "clean-up" of other parts of section 40-203 that had nothing to do with the thrust of the legislation. (The 2021 amendment created a new section 40-203(4)(b) dealing with vacation of unbuilt roads in platted subdivisions in exchange for the dedication of new roads). This is confirmed by the bill's Statement of Purpose, which reflects no intention to make any substantive change to section 40-203(5).

necessarily and automatically part of the county or highway district road system. In other words, it might require some initial or subsequent action by authorities to turn it into a public highway or public right-of-way.[210] In other words, an R.S. 2477 road that had become a public highway or public right-of-way would lose its character as a county or highway district road upon vacation, but would nonetheless retain its character as an R.S. 2477 right-of-way.

This appears to be consistent with the statement of purpose for the 2000 legislation. See footnote 204 on page 205.

Just what that means is unclear. It might mean that once vacated, an R.S. 2477 road is no longer part of the official road system, yet the public retains its right to use the road. That is a deeply troubling thought. Who would then own the right-of-way? Would a member of the public be allowed not only to use the road, but to improve it with bulldozers? Would the county or highway district be powerless regulate public use (or abuse) of the road?

One final note: The "shall revert" language is contained in the section dealing with formal abandonment/vacation. Thus, the proviso deals with what happens after formal proceedings by a county or highway district. But what about quiet title? If a court (rather than a commission) determines that there has been a prior passive abandonment, does the road revert to an FL-ROW? Evidently not.

[210] This seems to be consistent with the holding in *Hill v. Blaine Cnty*, 173 Idaho 782, 550 P.3d 264 (2024) (Zahn, J.). See discussion in III.H.7 on page 205.

IV. MECHANISMS UNDER IDAHO LAW FOR RESOLVING PUBLIC ROAD 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.

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- 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

Idaho's first statute on the subject of determining the status of public roads was enacted in 1887. It addressed both formal road creation and formal abandonment in a single statute. It included no substantive or procedural guidance:

> 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 usage or abandonment to the public;
> 4. Abolish or abandon such as are unnecessary; …

Rev. Stat. of Idaho Terr. § 870 (1887).[211]

[211] The 1887 statute was later codified at Idaho Codes Ann. § 1145 (1901); Rev. Codes of Idaho § 882 (1908); Compiled Laws of Idaho § 882 (1918); Compiled Stat. of Idaho § 1312 (1919); Idaho Code Ann. § 39-401 (1932); Idaho Code § 39-401 (1943); Idaho Code § 40-501(1948). It was repealed and replaced by Idaho Code § 40-604(4) as part of a

With one exception,[212] it was not until 1986 that any substantive or procedural content was added. H.B. 556, 1986 Idaho Sess. Laws, ch. 206, § 3, 4. The 1986 statute added detailed new provisions outlining the process for formal abandonment and vacation as sections 40-203(1), (2), and (3),[213] while adding new section 40-203A to set out validation procedures for the first time.

Since 1986, Idaho's statutes have contained two statutory mechanisms for resolving road disputes.[214] H.B. 556, 1986 Idaho Sess. Laws, ch. 206 (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 apparent why the Legislature set out separate mechanisms for validation and abandonment/vacation, rather than creating a single combined process.

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comprehensive recodification of road statutes in 1985 (H.B. 265, 1985 Idaho Sess. Laws, ch. 253, § 2). In 1993, Idaho Code §§ 40-604(2) and (3) were amended so that the statute now cross-references the substantive and procedural provisions in sections 40-203 and 40-203A. S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, §7.

[212] The exception relates to formal abandonment, not validation. For reasons that are not evident, a separate statute authorizing formal abandonment of county roads existed from 1950 to 1985. It operated in parallel with the abandonment provision in what was then Idaho Code § 40-501[4]. S.B. 62, 1950 Idaho Sess. Laws, ch. 87, § 13. In 1951, (repealed and replaced by S.B. 125, 1951 Idaho Sess. Laws, ch. 93, § 28, which was not codified until 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)). NOTE: The 1951 Act took section 13 of the 1950 act and incorporated it (as section 28(d)) in a list of duties of county commissioners, adding for the first time a requirement that the abandonment be in the public interest. There was no similar parallel statute for road creation or validation.

[213] Section 40-203 first appeared in Idaho Code as part of the a comprehensive recodification of road statutes in 1985. H.B. 265, 1985 Idaho Sess. Laws, ch. 253, § 2. However, the 1985 legislation merely renumbered the old passive abandonment statute (former section 40-104) as section 40-203 with minor changes. The 1986 legislation added formal abandonment/vacation provisions for the first time, while retaining the passive abandonment provision as section 40-203(4).

[214] This handbook addresses statutes governing counties and highway districts. Other statutes govern streets within cities. See discussion in section VI at page 384.

Both sections were part of the same bill enacted in 1986. H.B. 556, 1986 Idaho Sess. Laws, ch. 206, §§ 3 & 4 (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 uncertainly 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").

A county or district may choose to initiate one proceeding or the other, or both.[215] In the author's view, the county or highway district (and private parties as well) are well advised to initiate combined, simultaneous proceedings under both statutes. This is true irrespective of whether the acting on petition or initiating proceedings on its own initiative. Undertaking simultaneous, combined validation/vacation proceedings provides maximum flexibility and underscores that the decision-maker is not pre-judging whether there is a valid road. Failure to do so can lead to troublesome outcomes, such as experienced in *Hill v. Blaine Cnty*, 173 Idaho 782, 550 P.3d 264 (2024) (Zahn, J.).

3. The validation statute (section 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).

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

[215] "Idaho Code section 40-208(7) recognizes the discretion of a highway district to 'initiate validation or abandonment proceedings, or both ….'" *Palmer v. East Side Highway Dist.*, 167 Idaho 813, 820, 477 P.3d 248, 255 (2020) (Stegner, J.).

> 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. Validation is not required to establish a road that is dedicated through the platting process, but the exception does not preclude subsequent validation/vacation.

Idaho's road validation statute includes the following exception: "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." Idaho Code § 40-203A(7).[216]

The exception provides that where a new road is dedicated and accepted pursuant to a platted subdivision, the platting process alone is sufficient to establish that it as a public road. There is no need to undertake a validation proceeding as well. This is true irrespective of whether the city has a functioning street department.

The words "<u>to be</u> accepted as part of a platted subdivision" make clear that the exception applies only to newly dedicated roads. It does not mean that validation/vacation proceedings are unavailable to resolve a dispute if, years later, a

[216] There is little if any legislative history relevant to the addition of the subsection (7) exception to Idaho Code § 40-203A. This provision was added late in the legislative session as an amendment to an existing bill making numerous other amendments to the road statutes. S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 5. Accordingly, the bill's Statement of Purpose does not address the purpose of subsection (7). As of this writing, there have been no further amendments to subsection (7).

question arises (e.g., whether the road was properly platted, has been vacated, or other issues, such as road width).

Indeed, the 2013 amendment to Idaho Code § 40-208(7) requires that private litigants first present such a question to the county or highway district under the validation and/or vacation statutes and proceed to district court only if the governmental entity declines to initiate such proceedings. This enables the governmental agency to have the first crack at resolving the legal question. It also requires the local governmental agency to apply a public interest analysis to assess whether the road should or should not be a public road today.

As of this writing, no appellate decision has addressed Idaho Code § 40-203A(7) or its interaction with § 40-208(7).[217]

5. 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).

6. 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:

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[217] A 2024 district court decision on a motion to dismiss reached a conclusion at odds with the interpretation of subsection 40-203A(7) set out here. *Maloney Properties LLC v. Johnston*, Case No. CV07-24-00519 (Idaho 5th Jud. Dist. Oct. 10, 2014). The district court held that Idaho Code § 40-203A(7) (enacted in 1993) overrides the 2013 amendment of Idaho Code § 40-208(7) (which requires private parties to file a petition for validation or vacation before proceeding to district court in a case seeking a judicial determination of the public road status or width of a road). Thus, according to the district court, the requirement to validate/vacate first does not apply to roads that were created through the platting process.

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- When the commissioners are initiating the proceeding, they must adopt a resolution initiating the proceedings. A resolution is not required when the commissioners accept a petition to validate or vacate a road. The resolution is expressly required under the vacation statute, Idaho Code § 40-203(1)(a) ("The commissioners may by resolution declare their intention to abandon and vacate").[218] It appears to be required also under the validation statute, Idaho Code § 40-230A(1) ("the commissioners may initiate validation proceedings on their own resolution"). The need for a resolution for the commissioners to initiate validation proceedings is confirmed by the cross reference to the vacation statute, Idaho Code § 40-203A(2) ("the commissioners shall follow the procedure set forth in section 40-203, Idaho Code").

- 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).

- 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).

[218] 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).

- 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.

7. Validation and vacation proceedings may be combined.

Where there is doubt about whether a road is a public road in the first instance, the author suggests that 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. Combined validation/vacation proceedings are authorized and

appropriate in circumstances like this.[219]

There is, however, no requirement to combine these proceedings.

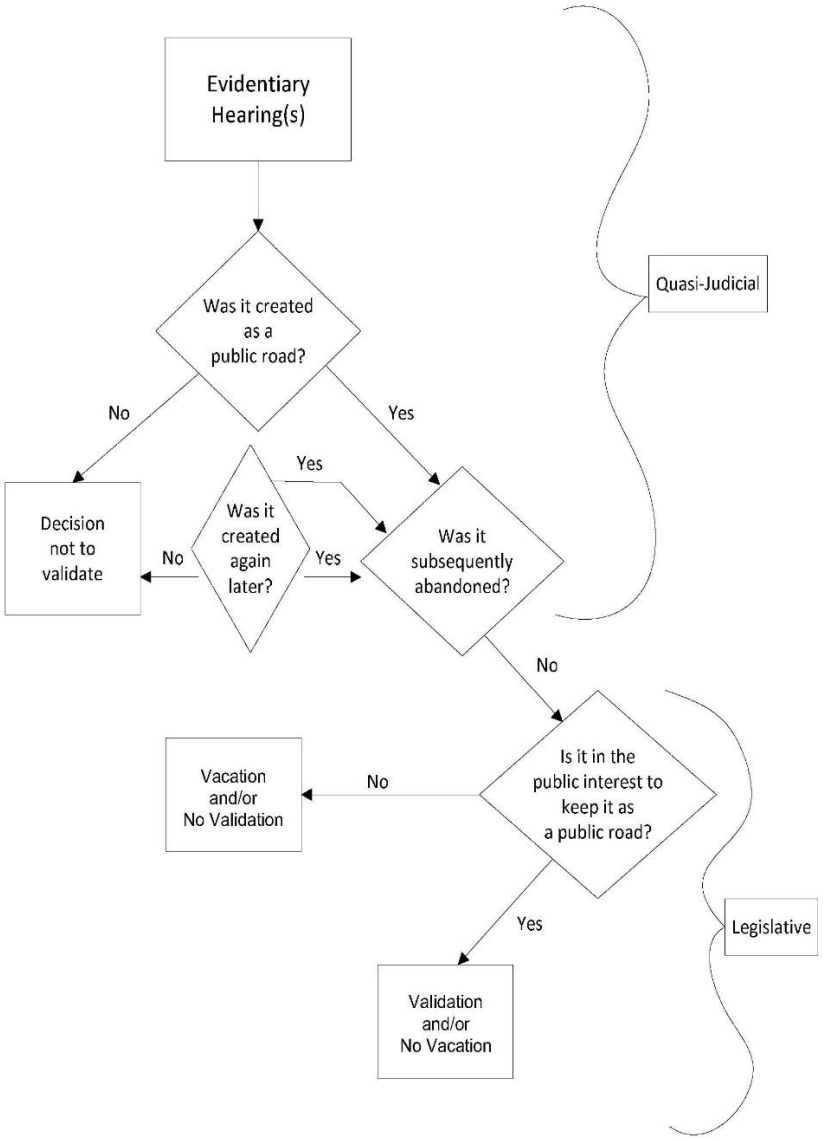
> Idaho Code section 40-208(7) recognizes the discretion of a highway district to "initiate validation or abandonment proceedings, or both, as provided for in [Idaho Code sections] 40-203 and 40-203A[.]" I.C. § 40-208(7). … [T]he Highway District was vested with the discretion to conduct a validation proceeding, an abandonment proceeding, or both … .

Palmer v. East Side Highway Dist., 167 Idaho 813, 820, 477 P.3d 248, 255 (2020) (Stegner, J.) (brackets original, footnote omitted) (upholding highway district's decision to proceed with validation proceedings only).

[219] "Validation procedures are similar to the procedures for vacation of ROWs and, in the proper circumstances, validation and vacation proceedings may be considered simultaneously." David E. Wynkoop, *The Virtues of Validation*, LHTAC News (Aug. 24, 2020) https://mailchi.mp/1a85432021fe/lhtac-news

Indeed, the road statutes themselves make it clear that proceedings may be pursued simultaneously under both sections 40-203 and 40-203A. "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." Idaho Code § 40-208(7) (emphasis added).

The decision-making process for a combined road validation/vacation proceeding is summarized visually in this following flow chart:



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8. The duty to maintain a public road: Classification as a public highway (§ 40-117(7)) versus public right-of-way (§40-117(9))

The first substantive section of the road law title, Idaho Code § 40-201, sets out a duty to maintain highways, but only "within the limits of the funds available."[220] Section 40-201 applies to highways. The term "highway" is defined at Idaho Code § 40-109(5) to include all manner of public roads, including "public highways" (which are open and publicly maintained) and "public rights-of-way" (which are not). (See discussion in section I.A.2.b on page 20.)

Section 40-201 was enacted in 1985 and amended in 1986 and 1987. At that time the only relevant definitions were "highway" (all public roads) and "public highway" (roads open to the public with a public maintenance obligation). The definition of "public right-of-way" was added in 1993, describing public roads that are open but without a public maintenance requirement. (See section I.A.2.b on page 20.) This makes it explicit that counties and highway districts may choose whether a public road will be publicly maintained or not.

In a validation proceeding, a public road may be validated as either a public highway (which must be publicly maintained, to the extent funds are available) or as a public right-of-way (which does not carry such a requirement). Idaho Code § 40-203A(1).

A county or highway district is authorized to reclassify a public highway (which carries a public maintenance obligation) as a public right-of-way (which has no obligation to maintain). Idaho Code §§ 40-203(1)(a),[221] 40-117(7), 40-117(9).

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[220] Section 40-201 reads in full: "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).

[221] When enacted in 1993, the reclassification provision was codified to Idaho Code § 40-203(4) (replacing passive abandonment language in that section). S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 4. In 2013, subsection 40-204(4) was repealed and the reclassification language was inserted instead into Idaho Code § 40-203(1)(a). H.B. 321, 2013 Idaho Sess. Laws, ch. 239 § 4. 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."

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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). One would think that a county or highway district could also reclassify a public right-of-way as a public highway, but the statute does not expressly say so.

Other provisions providing exemption from maintenance requirements are: Idaho Code §§ 40-117(9) (public rights-of-way),[222] 40-202(3) (unopened roads); 40-202(4) (public rights-of-way).

Note that "public land rights-of-way" (PL-ROW), i.e., R.S. 2477 roads, also entail no public maintenance duty. Idaho Code § 40-204A(4). "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).

9. 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).)

10. The public interest

Note: See section IV.B.3.d(iv) on page 239 for a discussion of judicial review of the public interest determination

Both the validation statute (Idaho Code § 40-203A) and the abandonment/ vacation statute (Idaho Code § 40-203) require the commissioners to make a

[222] The definition of "public right-of-way" in Title 50 (Idaho Code § 50-1302(13), applicable to municipal corporations) is shorter but similar in concept the definition in Title 40.

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determination as to whether validation or vacation is in the public interest.[223]

a. Vacation (sections 40-203(1)(h) and 40-203(6))

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).[224] This 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. Prejudging the public interest 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(6).

b. Validation (section 40-203A(3))

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 initiating the proceeding. Instead, 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:

> Upon completion of the proceedings, the commissioners shall determine whether validation of the highway or public right-of-way is in the public interest

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[223] 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).

[224] Since 1951, a public interest determination has been required for formal abandonment (S.B. 125, 1951 Idaho Sess. Laws, ch. 93, § 28, amending what was codified in 1961 at Idaho Code § 40-133(d), and was replaced by Idaho Code § 40-6044) in 1985).

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> and shall enter an order validating the highway or public right-of-way as public or declaring it not to be public.

Idaho Code § 40-203A(3).

It goes without saying that a public interest determination comes into play only if the Commission first determines that the road is a lawful public road at the time. For example, the Commission cannot declare that validating the road is in the public interest notwithstanding that fact that the road had been passively abandoned and not subsequently reestablished.

See section IV.B.3 on page 229 regarding whether the Commission is required to articulate its reasoning as to its public interest determination. Whether required or not, the better practice is to include a thorough explanation.

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..

1. Timing and procedure

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.[225]

The statute governing judicial review of road validation actions (Idaho Code § 40-208) was not enacted until in 1993. S.B. 1108, 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 appeals from county decisions that are not governed by other judicial review statutes. Idaho Code § 31-1506 (codified prior to 1995 as

[225] 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,* 938 P.2d 1214, 1220 (Idaho 1997); *Allen v. Blaine Cnty,* 953 P.2d at 578, 580 (Idaho 1998); *Arthur v. Shoshone Cnty,* 993 P.2d 617, 622 (Idaho Ct. App. 2000).

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section 31-1509, H.B. 70, 1995 Idaho Sess. Laws, ch. 61 § 11). Since 1993, section 31-1509 (now 31-1506) has authorized judicial review of county decisions pursuant to the Idaho Administrative Procedure Act ("IAPA"), thus embracing the IAPA's 28-day deadline. H.B. 120, 1993 Idaho Sess. Laws, ch. 103 § 2 (codified as amended at Idaho Code § 31-1506). Prior to 1993, the statute did not link to the IAPA, but instead set its own 20-day deadline. The pre-1993 version of section 31-1509, 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) (Walters, J.).

In *Cobbley v. City of Challis*, 139 P.3d 732, 735-36 (Idaho 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,* 693 P.2d 1046 (Idaho 1984), the Court reiterated that, when provided, statutory judicial review proceedings are exclusive remedies.

2. Burden of proof vs. standard of review

The "burden of proof" operates at the initial decision-making level (e.g., the jury, the trial judge, or the administrative agency who makes the initial decision). Thus, in a validation or vacation proceeding or in a quiet title action, the burden of proof dictates (1) who has the "burden of production" of evidence on each issue and (2) who bears the "burden of persuasion" and how heavy that burden is.

The standard of review comes into play later—at the time of judicial review and appellate review.

The burden of proof is discussed in section IV.H on page 262. The standard of review is discussed in this section.

3. Written findings and the standard of review

The question of whether (1) written findings and conclusions are required and (2) the standard of review are separate but intertwined issues. Both are discussed below.

a. Current statutes

The current statutes governing these issues are set out in the table below.

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STATUTES ADDRESSING FINDINGS AND STANDARD OF REVIEW

For validation (findings and conclusions not required):

> 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.

Idaho Code § 40-203A(3).

For vacation (findings and conclusions required):

> 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. 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.

Idaho Code § 40-203(h) (emphasis added).

Also applicable to vacation:

> All other highways or public rights-of-way [other than those addressed in section 40-203(5)] 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 … .

Idaho Code § 40-203(6) (originally the last paragraph of 40-203A(5)).

Standard of review:

> … 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. …

Idaho Code § 40-208(6) (emphasis added).

b. Written "findings and conclusions" are required in vacation proceedings but not in validation proceedings.

In a Nutshell: 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. 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.

The pre-1986 validation and vacation/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 abandonment statute then in effect to require an affirmative finding that the road is no longer necessary.[226]

Until 1993, there was no statutory requirement that a county or highway district board adopt "findings and conclusions." In that year, the vacation/abandonment statute was amended to add that requirement. S.B. 1108, 1993 Idaho Sess. Laws, ch. 412 (then codified at Idaho Code § 40-203(1(g)), now codified at Idaho Code § 40-203(1(h)). In contrast, the validation statute has never been amended to add that requirement.

Based on these statutes, the Court held in 2011 that a county board of commissioners is not required to articulate its reasoning when ruling in a validation proceeding. In *Sopatyk v. Lemhi Cnty.,* 151 Idaho 809, 264 P.3d 916 (2011) (W. Jones, J.), the county validated a road but failed to explain why it found validation was in the public interest. The Court observed that the validation statute (Idaho Code § 40-203A(3)) requires no finding and conclusions, in contrast to the

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[226] In *Nicolaus v. Bodine,* 92 Idaho 639, 642, 448 P.2d 645, 648 (1968) (Spear, J.)., the Court 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.

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 its holding in *Nicolaus*: "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 *Farrell*, ranch owners alleged that Indian Creek Road had been formally abandoned based on a prior prosecutor's opinion to that effect. The Court held that a prosecutor's opinion falls short of the formal finding by the County itself that is required to vacate a road. *Farrell*, 138 Idaho at 387, 64 P.3d at 313.

vacation/abandonment statute (Idaho Code § 40-203(1)(h)) which does.[227] The Court also contrasted the validation statute with the even more stringent "reasoned statement" requirement found in the Idaho Administrative Procedure Act (Idaho Code § 67-5248(1)(a)) and LLUPA (Idaho Code § 67-6535(2)).[228]

The Court concluded that because there is no requirement that the board give its reasoning for validating or not validating a road, "[t]his Court's role is simply to determine whether it was clear error for the Board to determine that validating [the road] was in the public interest." *Sopatyk,* 151 Idaho at 816, 264 P.3d at 923.[229] (At

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[227] The Sopatyk Court said:

> Although the Board validated ACR [Anderson Creek Road], Sopatyk complains that the Board at no point expressly explained why validating ACR was in the public interest. The Idaho Code mandates that after holding validation proceedings the Board "shall determine whether validation of the highway or public right-of-way is in the public interest" and enter an order accordingly. I.C. § 40–203A(3). This statute contrasts with the analogous section governing highway abandonment-and-vacation decisions under I.C. § 40-203(1)(h). That section provides that after a hearing to vacate a highway, the Board must issue an order, which "shall be written and shall be supported by findings of fact and conclusions of law." Section 40-203A(3) notably omits a specific requirement for written findings. This statutory requirement by its plain language governs the substantive standard the Board must apply when deciding whether to validate a road.

Sopatyk, 151 Idaho at 816, 264 P.3d at 923.

[228] The *Sopatyk* Court said:

> Likewise, the highway-validation statute is quite different from the Idaho Administrative Procedure Act, which requires that agency orders contain reasoned explanations of decisions and that factual findings "shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings." I.C. § 67-5248(1)(a). It also differs from the Local Land Use Planning Act, which requires written decisions, reasoning, and citation to the facts relied upon in a decision.

Sopatyk, 151 Idaho at 816, 264 P.3d at 923.

[229] The *Sopatyk* Court went on to uphold the county's conclusory determination that validation was in the public interest based on the Court's review of testimony in the record and statements of policy issued by the Legislature. "There is substantial evidence that validating ACR would be in the public interest. This road became public while the underlying land was federal property. The Legislature has recognized that 'existing federal land rights of way are extremely important to all of Idaho's citizens. Two-thirds of Idaho's

this time, the statutory standard of review was "clearly erroneous.")

Sopatyk was decided prior to the 2013 amendments to the judicial review provisions. H.B. 321, 2013 Idaho Sess. Laws, ch. 239 (codified in part at Idaho Code §§ 40-203 and 40-208). Those amendments altered the standard of review (making it even more deferential for review of the public interest determination).[230] But no

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land is under control of the federal government and access to such federal lands is integral to public use.' Act of Mar. 25, 1993, ch. 142, § 1, 1993 Idaho Sess. Laws 375, 376 (creating I.C. § 40-204A, governing creation of public thoroughfares under R.S. 2477). A number of people stated or testified on the record that they regularly use ACR to access the Salmon National Forest for recreation and wood gathering. Further, the Forest Supervisor of the Salmon–Challis National Forest sent a letter to the Board stating that "we believe the best interests of the public would be served" by validating ACR so that the public can reach the National Forest. The Board correctly determined that it is in the public interest for ACR to be a public highway." *Sopatyk,* 151 Idaho at 816-17, 264 P.3d at 923-24.

[230] In *Richel Family Trust v. Worley Highway Dist.*, 167 Idaho 189, 468 P.3d 775, (2020) (Stegner, J.), the Court explained that the 2013 amendments changed the standard for reviewing public interest determinations:

> Our prior articulations of the standard of review involving appeals from the decisions of district courts on review of a highway district or county board of commissioners are not helpful because we utilized a prior version of Idaho Code section 40-208, which contained a standard of review for this Court. In 2013, that version of the statute was modified by the legislature into the Idaho Code section 40-208 that exists today.

Richel, 167 Idaho at 195 n.7, 468 P.3d at 781 n.7.

In *Palmer v. East Side Highway Dist.*, 167 Idaho 813, 821, 477 P.3d 248, 256 (2020) (Stegner, J.), the Court explained that the *Sopatyk* test is now even more relaxed:

> As a preliminary matter, it is clear that statutory amendments passed in 2013 made clear that the public-interest finding is a discretionary determination rather than a factual finding. Compare I.C. § 40-208(7) (1993) (providing deference to factual findings that are not "clearly erroneous in view of the reliable, probative and substantial information on the whole record"); *Sopatyk*, 151 Idaho at 816, 264 P.3d at 923 (interpreting the public-interest finding as a factual finding reviewed under Idaho Code 40-208(7) for clear error), with I.C. § 40-208(6) (italics added) ("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*.").

change was made with respect to whether findings and conclusions must be provided. In sum, a validation decision need not include an explanation of the board's reasoning. If findings and conclusions are provided at all, they may be conclusory.

This conclusion is confirmed in *Palmer v. East Side Highway Dist.*, 167 Idaho 813, 820, 477 P.3d 248, 255 (2020) (Stegner, J.).[231] In *Palmer*, the highway district initiated a validation proceeding but ultimately decided not to validate the road.[232] The highway district issued findings and conclusions stating in conclusory fashion that validation was not in the public interest. The Palmer Trust, which sought validation, argued that the 2013 amendment requiring the district court to defer to the board's decision on the public interest implicitly requires the county or district to provide an explanation of the basis of its determination.

> On appeal to the district court, the Trust argued that the Highway District's decision regarding the public interest should have contained specific facts and analysis supporting its determination about the public interest. …
>
> The Trust now argues that the 2013 amendments to Idaho Code subsections 40-203A(6) and (7) superseded and replaced *Sopatyk*. In particular, the Trust contends that post-*Sopatyk* statutory amendments show the legislative intent that a board's determination regarding the "public interest" is a discretionary decision, i.e., that the reasoning should be sufficient to review for an abuse of discretion under this Court's jurisprudence.

Palmer, 167 Idaho at 820, 477 P.2d at 255.

The *Palmer* Court rejected the Trust's argument, agreeing instead with the highway district, which pointed out that the validation statute still contains no requirement for a written explanation of its reasoning. The Court concluded that the

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Palmer, 167 Idaho at 821, 477 P.3d at 256 (emphasis original).

[231] *Palmer* involved a highway that was formally approved and accepted by Kootenai County through the old "road viewers" process (essentially a condemnation in anticipation of road construction). However, the County determined that the road was formally abandoned by the County two years later when it determined that road construction would be too expensive. The County also found insufficient evidence that the road, if it was built at all, was built in the same location as described in the viewer's report.

[232] In *Palmer*, the highway district's decision on reconsideration was based on both its public interest determination and its legal conclusion that there was insufficient evidence of road creation. *Palmer*, 167 Idaho at 818, 477 P.2d at 253. However, the judicial review and appeal addressed only the public interest determination (and some other issues). *Palmer*, 167 Idaho at 820-21, 477 P.2d at 255-56.

district's reasoning could be discerned and reviewed on appeal based on material contained anywhere in the record.

> The Highway District's finding that it was not in the public interest to validate the Road was both an appropriate exercise of discretion and supported by substantial and competent evidence. … First, on appeal, this Court reviews the Highway District's decision independently of the district court's decision. … Second, the Highway District's reasoning is obvious from the record, which supports the determination that its decision was made by an exercise of reason. … The Highway District's deliberations were contained in the transcript and are part of the administrative record. Although it is not a lengthy discussion, the commissioners' reasoning may be gleaned from the transcript. Finally, the commissioners did not abuse their discretion. The commissioners addressed the facts and arguments presented to them.

Palmer, 167 Idaho at 821, 477 P.2d at 256.[233]

In contrast to validation proceedings, written findings and conclusions are required in an abandonment/vacation proceeding. Idaho Code § 40-203(1)(h).[234]

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[233] Notwithstanding the *Palmer* Court's lenient view of what is required by the statute, the author suggests that the better practice is to include a clearly articulated basis for the validation decision in written decision itself—even though this is not required. Doing so will simplify judicial review and strengthen the board's position if challenged. 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 an exercise of discretion based on the public interest, whether it should be validated or abandoned.

[234] As noted above, written findings and a "reasoned statement" are also required in land use matters. Idaho Code § 67-6535(2). The Idaho Supreme Court has become increasingly aggressive in overturning land use decisions supported by less than thoroughly explained findings and conclusions. *E.g.*, *Veterans Park*, ___ Idaho at ___, ___P.3d at ___, 2025 WL 259177 (2025) (rejecting the city's explanation of why it overturned the planning and zoning commission's decision). However, even in *Veterans Park* itself, the Court said (in its discussion of *IDHW v. Doe*, 173 Idaho 32, ___, 538 P.3d 805, 816 (2023) (Bevan, C.J.)) that there are "certain situations" in which it is appropriate for the Court to look to the record to find support for a government decision: "Thus, while this Court may look to the record to determine whether it contains substantial and competent evidence supporting the decision-maker's findings and conclusions, this Court has only done so in

The author is not aware of appellate case law evaluating the stringency of this requirement.[235] However, in either case (validation or vacation), the statute says the court is to "defer" to the board's public interest determination so long as it has not abused its discretion.

c. Standard of review – questions of law

When questions of law are presented, both the district court and the appellate court exercise free review. "[W]e freely review questions of law and may affirm the commissioners' decision or remand the case for further proceedings." *Galvin v. Canyon Highway Dist. No. 4*, 134 Idaho 576, 578, 6 P.3d 826, 828 (2000) (Walters, J.) (judicial review of county's decision to validate a public road). "Erroneous conclusions of law made by an agency may be corrected on appeal." *Homestead Farms, Inc. v. Bd. of Comm'rs of Teton Cnty.,* 141 Idaho 855, 858,119 P.3d 630, 633 (2005) (Trout, J.).

Galvin and *Palmer* were decided prior to the 2013 amendments modifying the standard of review in road validations and vacations. But that statutory change did not affect the fundamental principle that courts, not lower bodies, say what the law is. The applicable standards of review for questions of fact and all other determinations (notably, the public interest determination) are discussed in the sections below.

d. Standard of review at the district court

Quick Summary: For many years, until 1993, the standard of review on judicial review was *de novo*. From 1993 to 2013, the standard of review was somewhat deferential ("clearly erroneous"—which in Idaho is functionally identical to "substantial evidence"). Since 2013, the standard of review has been divided. The standard with respect to a county's determination of the public interest is extremely deferential (abuse of discretion), while the standard as to all other

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certain situations." *Veterans Park*, ___ Idaho at ___, ___P.3d at ___, 2025 WL 259177, *16 (2025). A county decision to validate or not validate is one of those "certain situations."

[235] An unappealed district court decision by Judge Cynthia K.C. Meyer (who now sits on the Idaho Supreme Court) addressed the extent of the explanation required by the county or highway district in vacation proceedings. The district court observed that the requirement for "findings and conclusions" in section 40-203(1)(h) requires something less than the requirement for a "reasoned statement" under LLUPA (Idaho Code § 67-6535(2)). "This statement requires more than just a blanket statement from the Board either approving or denying the petition to vacate. However, it does not rise to the requirements the Arns argue. The Arns argue that the detailed section 67-6535 requirements apply. They do not." *M3 ID Camp Bay, LLC v. Bonner County*, (1st Jud. Dist., Idaho) (No. CV09-22-0316) (Cynthia K.C. Meyer, J.) at 8. The district court also addressed the standard of review for the board's public interest determination, holding that the decision would not be disturbed if there is substantial evidence supporting it. *Id*. at 15.

aspects of validation or vacation is *de novo*. Moreover, the record can be supplemented by the district court as to matters other than the public interest.

(i) Pre-2013 standards

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 would consider the matter anew (without deference to the administrative decision-maker).[236]

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. S.B. 1108, 1993 Idaho Sess. Laws, ch. 412 (enacting Idaho Code § 40-208); 1994 Idaho Sess. Laws, 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).[237]

[236] 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 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.).

[237] 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").

(ii) Post-2013 standards

In 2013, the Legislature split the baby—adopting different standards of review for different parts of the validation/vacation decision. H.B. 321, 2013 Idaho Sess. Laws, ch. 239 (codified at Idaho Code § 40-208(6)). For the text of statute, see table on page 230.

- It retained a deferential standard and record-based review for challenges to the board's determination of the public interest. Indeed, it made it even more deferential than before, switching from a lenient review standard (clear error) to an even more lenient standard (discretion). Idaho Code § 40-208(6).

- But it returned to 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). The statute provides that the court begins with the record of proceedings before the board. Idaho Code § 40-208(6) (the court "shall consider the record before the board"). But "the court may accept new evidence and testimony supplemental to the record" and "shall consider those issues anew." Idaho Code § 40-208(6). (To consider "anew" is another way of saying *de novo*.) In sum, in 2013, the Legislature restored a *de novo* standard of review for judicial review by the district court of that portion of a validation or vacation decision dealing with road creation, abandonment, or width.

(iii) Review of creation/abandonment findings

Thus, to some extent, the hearing before the county or highway district board is a dry run with respect to all issues other than the public interest. Not only is there a *de novo* review, but the record itself may be expanded. (See section IV.B.4 on page 242.) Indeed, the statute seems 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 process at the county or highway district a mandatory first step (unless the board declines the petition to initiate proceedings). 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 board 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.

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In addition to allowing additional evidence, the Legislature changed the standard to *de novo* review (but only for issues relating to the legal status of the road). Presumably that means that the district court should step into the shoes of the initial decision maker (the board) and decide the issue anew based on the same standards applicable to the board. One might think that would mean the district court should weigh the evidence under the preponderance of the evidence standard. However, in *Richel Family Trust v. Worley Highway Dist.*, 167 Idaho 189, 468 P.3d 775 (2020) (Stegner, J.) (a post-2013 case[238]), the Idaho Supreme Court noted with apparent approval: "The district court concluded that the challenged factual findings were supported by substantial and competent evidence." *Richel*, 167 Idaho at 194, 468 P.3d at 780. That case went on to apply the substantial evidence test to its appellate review, as well. But the key point is that the Court viewed the substantial interests test as appropriate as well in the *de novo* review undertaken by the district court.

(iv) Review of the public interest finding

A deferential standard of review applies to the board's discretionary determination as to the public interest. Idaho Code § 40-208(6) ("shall defer to the board … on such matters in which such board has appropriately exercised its discretion with respect to the public interest").

Under the 2013 amendments, the public interest determination is not a finding of fact. It is a legislative determination of policy. "As a preliminary matter, it is clear that statutory amendments passed in 2013 made clear that the public-interest finding is a discretionary determination rather than a factual finding. " *Palmer v. East Side Highway Dist.*, 167 Idaho 813, 820, 477 P.3d 248, 255 (2020) (Stegner, J.).

Discretionary decisions are reviewed under the abuse of discretion standard.

> To determine whether the trial court abused its discretion, this Court analyzes "[w]hether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason."
>
> *E. Side Highway Dist. v. Delavan*, 167 Idaho 325, 335, 470 P.3d 1134, 1144 (2019) (quoting *Lunneborg v. My*

[238] Proceedings in the case were initiated in 2015. *Richel*, 167 Idaho at 194, 468 P.3d at 780. As of this writing in 2024, *Richel* is the only appellate case to address the 2013 change directing the district court to consider certain issues anew.

> *Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018) (citation omitted)). "[I]f a district court fails to enumerate its reasons for a discretionary decision, and the reasons are not obvious from the record, the Court will remand the case." *DAFCO LLC v. Stewart Title Guar. Co.*, 156 Idaho 749, 756, 331 P.3d 491, 498 (2014) (citing *Quick v. Crane*, 111 Idaho 759, 772-73, 727 P.2d 1187, 1200-01 (1986)).

Palmer v. East Side Highway Dist., 167 Idaho 813, 818, 477 P.3d 248, 253 (2020) (Stegner, J.).

The abuse of discretion standard is most commonly applied in the context of appellate review of lower court decisions, where there is a written decision or opinion to evaluate. Even then, however, it is not required that the decision maker expressly articulate each component of the four-part test in its decision. The reviewing court may evaluate the test based on the record as a whole.

> While the trial court did not expressly cite to the discretionary standard in its memorandum decision regarding piercing the corporate veil, a court is not required to state such standard expressly if the record clearly shows that the court correctly perceived the issue.

Lunneborg v. My Fun Life, 163 Idaho 856, 867, 421 P.3d 187, 198 (2018) (Bevan, J.).

In the context of a road validation case, it is evident that the abuse of discretion standard must applied with particular flexibly because, as discussed in section IV.B.3.b on page 231, an explanation of the board's public interest determination is not required. Accordingly, on judicial review, it suffices that the record as a whole reflects implicitly that the board understood its role and acted within the legal boundaries of its discretion. In short, the abuse of discretion standard is a very deferential standard, particularly in the context of road validation where no explanatory statement is required.

As for vacation proceedings, see footnote 235 on page 236 (substantial evidence test applied in unappealed district court decision).

e. Standard of review by the appellate court

(i) On appeal, factual findings regarding road creation are reviewed under the substantial evidence test

The 2013 amendments address the standard of review only at the district court level. (See discussion above.) The statute is silent as to the standard of review of factual findings on appeal from the district court to the Idaho Supreme Court or the Court of Appeals. This statutory omission was addressed in *Richel Family Trust v. Worley Highway Dist.*, 167 Idaho 189, 468 P.3d 775 (2020) (Stegner, J.):

> From the plain language of Idaho Code section 40-208(6), the statute does not dictate the standard of review for subsequent appeals from the district court. This is because section 40-208(6) mandates the acceptance of new evidence and fact-finding on appeal, which would be an extraordinary practice for this Court to engage in on appeal. Accordingly, we conclude that the standard of review articulated in Idaho Code section 40-208 is not applicable to this Court.
>
> When the statutory standard of review is not defined by the legislature this Court has held that it would apply the general standard of review for cases in which the district court acts in its appellate capacity. … Further, this Court defers to the factual findings made below by either the highway district or district court unless they are unsupported by substantial and competent evidence. *Id*. at 940, 342 P.3d at 652.

Richel, 167 Idaho at 195, 468 P.3d at 781 (emphasis supplied).

Thus, in the case of factual findings respecting the legal status of the road (e.g., whether it was lawfully created or abandoned), the appellate court will examine the district court's findings to determine whether there is substantial evidence to support them.[239]

[239] It is unclear to the author why the *Richel* Court said in the quotation above that it would defer to the factual findings of "either the highway district or district court." *Richel*, 167 Idaho at 200, 468 P.3d at 786. It would seem that as for factual findings, the Court would start with those of the district court (which might differ from those of the board) and measure the district court's findings against the substantial evidence test. In contrast, appellate review of the public interest determination focuses on the original determination (see discussion in section IV.B.3.e(ii) on page 242).

(ii) The appellate court will defer to the board's original public interest determination.

In contrast, in the case of the public interest determination, the appellate court will look past the district court (whose review was itself deferential) and defer directly to original determination of the public interest. In other words, the appellate court will undertake its own examination of the public interest determination applying the same standard as the district court.

> According to the standard of review utilized for judicial review of a validation proceeding, this Court defers to the Highway District's determination of the public interest as a matter within the agency's discretion. I.C. § 40-208.

Richel, 167 Idaho at 200, 468 P.3d at 786.

4. Additional evidence

In 2013, the Legislature amended subsections 40-208(5) and 40-208(6) to allow parties to present additional material evidence to the district court.

> 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 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.

Idaho Code § 40-208(5).

> … 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. …

Idaho Code § 40-208(6).

Although section 40-208(5) is not expressly so limited, section 40-208(6) makes clear that additional evidence is allowed only with respect to the

determinations by the board respecting the legal status of the road, not its discretionary public interest determination.

Subsection 40-208(5) gives the district court two choices. It may accept the evidence and evaluate it, or it may remand to the board to give it a chance to reconsider its decision in light of the new evidence.

As noted by the Court in *Richel Family Trust v. Worley Highway Dist.*, 167 Idaho 189, 468 P.3d 775 (2020) (Stegner, J.), new evidence may be presented at the district court level, not upon further appeal. "[S]ection 40-208(6) mandates the acceptance of new evidence and fact-finding on appeal, which would be an extraordinary practice for this Court to engage in on appeal." *Richel*, 167 Idaho at 195, 468 P.3d at 781.

5. Jury and discovery

Idaho Code § 40-208(6) expressly provides that review shall be without a jury. The statute is silent as to whether discovery may be obtained.

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

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> 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.[240] 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 findings and conclusions, not the date of the decision. The Idaho Supreme Court has so held in the context of the Local Land Use Planning Act ("LLUPA").[241]

The statute also authorizes motions for rehearing (the same thing as reconsideration). Idaho Code § 40-208(2).[242] 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.

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[240] 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*.

[241] See discussion of judicial review in the *Idaho Land Use Handbook.*

[242] 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 Cnty,* 133 Idaho 854, 858-59, 993 P.2d 617, 621-22 (Ct. App. 2000) (Lansing, J.).

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 10 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 (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 appealed or unappealed validation decision

A county or highway district's validation or vacation/abandonment determination has the equivalent of res judicata effect once the decision becomes final.[243] 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 II*"), 143 Idaho 130, 139 P.3d 732 (2006) (J. Jones, J.).[244]

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[243] "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.").

[244] 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

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

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> 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 (42- 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 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).

> 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 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: highway versus right-of-way

First, a word on terminology. (See section I.A.2 on page 20) 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.[245] In contrast, "public rights-of-way" describe rights-of-way that are public but are <u>not</u> required to be maintained by the government.[246] This Handbook uses the term "road" to include both highways and public rights-of-way.

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[245] "'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).

[246] "'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

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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.[247]
- 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.[248]
- Idaho Code § 40-202(6) requires that an official road map be updated every five years.[249]
- Idaho Code §§ 40-604(13) repeats the language in section 40-202(6), but applies only to counties.[250]

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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.

[247] 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. S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 3.

[248] 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. S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 3.

[249] Section 40-202(6) was enacted in 1998. S.B. 1367, 1998 Idaho Sess. Laws, ch. 184, § 1. In 2000, the compliance deadline was advanced from 2000 to 2005. S.B. 1407, 2000 Idaho Sess. Laws, ch. 251. It was amended again in 2013 to make it applicable also to highways. H.B. 321, 2013 Idaho Sess. Laws, ch. 239 § 3.

[250] Subsection 40-604(13) was added in 1998. S.B. 1367, 1998 Idaho Sess. Laws, ch. 184, § 2. 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.

- Idaho Code § 40-1310(9) repeats the language in section 40-202(6), but applies only to highway districts.[251]

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. H.B. 556, 1986 Idaho Sess. Laws, ch. 206, § 2 (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. H.B. 627, 1992 Idaho Sess. Laws, ch. 55, § 1.[252]

In 1993, the Legislature amended sections 40-202(1) and (2) to add "public rights-of-way" (which are not publicly maintained). S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 3.

In 1998, the Legislature enacted Idaho Code § 40-202(6), also requiring an official road map, providing that it be updated at five years.[253] S.B. 1367, 1998 Idaho Sess. Laws, ch. 184, § 1. 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

[251] Subsection 40-1310(9) also was added in 1998. S.B. 1367, 1998 Idaho Sess. Laws, ch. 184, § 3.

[252] 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.

[253] 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."

highways and public-rights-of-way. Thus, sections 40-202(1) (initial designation) and 40-202(6) (five-year updates) are now consistent covering both highways and public rights-of-way.

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. S.B. 1367, 1998 Idaho Sess. Laws, ch. 184, §§ 2 and 3.

In 2013, the Legislature amended section 40-202(6) to make it applicable to both "highways and public rights of way." H.B. 321, 2013 Idaho Sess. Laws, ch. 239, § 3. 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 40-202(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.[254] 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 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

[254] 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.

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 read 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-

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> 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.[255]

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.

[255] 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).

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 Halvorsons 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 Halvorsons are correct in this regard. "[I]f 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." *Id*. at 860, 119 P.3d at 635.

Halvorson, 151 Idaho at 202, 254 P.3d at 503.

These holdings were codified in 2013. H.B. 321, 2013 Idaho Sess. Laws, ch. 239, § 3 (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."[256] *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).

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.

[256] 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).

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.

> In 2001, the Commissioners selected a "Big Sky Map," a commercially-produced map of Teton County, and by colored pen, designated various types of roadways throughout the County which they claimed to be public roadways within the meaning of I.C. § 40-202. They then gave public notice of their intent to adopt this map, and conducted hearings in July 2001 for the purpose of adopting it as the official county highway system map. Homestead Farms, 141 Idaho 857, 119 P.3d at 632.

Homestead Farms, 141 Idaho 857, 119 P.3d at 632.

The Court said commissioners must not include a road on the official map "absent clear evidence these roads were established existing public highways." *Homestead Farms*, 141 Idaho 860, 119 P.3d at 635. 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 (H.B. 321, 2013 Idaho Sess. Laws, ch. 239), 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.) (applying pre-2013 law[257]).

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

[257] Flying A applied pre-2013 law. See section I.H.3 on page 102 on the issue of retroactivity of the 2013 amendments.

> 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, the Court offered no 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).

In any event, the *Flying A* Court's discussion of the standard of review is now obsolete. The Court applied pre-2013 law. The standard of review was substantially modified by the 2013 amendments.

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.R at page 284.

H. Burden of proof of proof

1. Overview

The burden of proof is composed of two burdens (production and persuasion).[258] The party with the burden of production (sometimes called the burden of going forward) has the initial duty to present some evidence on the matter. Only then does the other party have a duty to provide countervailing evidence. The burden of production may switch back and forth during the proceeding. For example, if one party produces evidence of road creation, the burden may switch to the other party to produce evidence that it was subsequently abandoned.

Only when all the evidence is presented, does the burden of persuasion come into play. The burden of persuasion dictates how the decision maker should decide if there some doubt remains on the issue. It dictates the weight of the evidence required (sometimes referred to as the standard of proof) and, by implication, who wins if that burden if not met. Typically, the burden of persuasion is borne by the same party who bears the burden of production on that issue.

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 vacation proceedings)
4. Substantial and competent evidence (required to justify inclusion of a road on the official map)[259]

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[258] "'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).

[259] "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

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The standard of review comes into play later—upon judicial review or appellate review. It is discussed in section IV.B.3 on page 229.

2. Preponderance of the evidence

The burden of persuasion (or standard of proof) for public road creation is "preponderance of the evidence,"[260] not the more demanding "clear and convincing evidence" standard applicable in private prescription cases.[261]

3. Burden of proof in establishing road creation

Ross v. Swearingen, 39 Idaho 35, 225 P. 1021, 1022 (1924) (Lee, J.) involved a dispute between two private parties. Ross filed a petition with Washington County seeking an order compelling his neighbor (Swearington) to remove gates on a public road. The county found the road was not a public road and denied the petition. Ross appealed. After losing at district court, Ross appealed again. The Court held: "Appellants had the burden of establishing the existence of the public road described in the petition." 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, and it makes sense. The burden is on the appellant because it was the party making the allegation (that the road was public). That is consistent with well-established common law principles.[262]

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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.)).

[260] "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)).

[261] *Roberts v. Swim*, 117 Idaho 9, 12, 784 P.2d 339, 342 (Ct. App. 1989) (Swanstrom, J.).

[262] *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).

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 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.

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 II*"), 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 II*, 137 Idaho at 724, 52 P.3d at 869. (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.). This is

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> 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 (7th 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 Cnty, 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)).

consistent with the conclusion that the burden is always on the party urging a particular allegation or affirmative defense.

This conclusion is reinforced by *Ada Cnty. Highway Dist. v. Total Success Inv., 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." Likewise, in *East Side Highway Dist. v. Delavan*, 167 Idaho 325, 340, 470 P.3d 1134, 1150 (2019) (Stegner, J.), the Court said: "The elements [of road creation] must be proven by a preponderance of the evidence." *Roberts*, *Total Success I*, and *East Side* were all quiet title cases in which the highway district was both the plaintiff and the entity advocating for public road status. The Court does not explain its reasoning. It could be that the burden was on the highway districts because they initiated the actions. But these rulings are also consistent with the idea that the burden was on the highway district because it was the entity urging public road status.

The only case (of which the author is aware) in which the persons opposing the public road initiated the quiet title litigation is *Lattin v. Adams Cnty.,* 149 Idaho 497, 236 P.3d 1257 (2010) (W. Jones, J.). This was a lawsuit initiated by landowners who claimed the road crossing their property was not a public road. 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 <u>at trial</u>: "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) suggests that the burden of proof for road creation is not a function of who initiates the litigation but rests on the party who advocates in favor of public road status.

The author notes that the burden of proof is a concept that works best in an adversarial proceeding between competing parties presided over by a neutral decision-maker, e.g. 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.[263] 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.

However, the author would suggest that 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 but was also playing the role of decision maker—bore the burden of proof.

This seems odd. When a county or highway district initiates validation/vacation proceedings, it is required to act as a neutral decision maker, i.e., like a judge, with respect to road creation and abandonment issues. (In contrast, it acts in a legislative capacity with respect to the public interest determination.) One would never say that the judge carries 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 how it can be that the decision maker in a validation/vacation proceeding can bear the burden of proof.

Until there is further guidance from the Court, the author suggests that in validation/vacation proceedings (whether initiated by independently by the commission or on petition of another person), the county or highway district should rule on questions of road creation and road abandonment based on a preponderance of the evidence analysis. In other words, if the facts are not crystal clear, the commission should review the evidence in a neutral fashion and find that a road was lawfully created (or abandoned) only if the evidence shows that creation (or abandonment) is more likely than not.

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.

[263] *Farrell* addressed burden of proof only in the context of it switching to the opponent of the road when it came to proving abandonment.

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 to a property

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. H.B. 321, 2013 Idaho Sess. Laws, ch. 239 (codified at Idaho Code §§ 40-114, 40-202, 40-203, 40-208, 40-2312).

6. Standard of review on appeal to the district court

The standard of review on appeal of a validation decision by a county or highway district is addressed in section IV.B on page 228.

7. 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)).

8. 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).

Burrup 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) (per curium).

I. 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.[264] The statute applies to 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.8 at page 225, 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, H.B. 171, 2013 Idaho Sess. Laws, ch. 264, substantially clarified the operation of the statute and the situations in which a county or highway

[264] 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*").

district can be held liable for failing to address an encroachment.[265] 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;

[265] 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.

(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

(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 publicly maintained, Idaho Code § 40-117(7)). For some reason, the statute references "highway" 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.[266]

[266] The question of how much obstruction is required to mandate removal under this section is addressed by *Total Success Inv., 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.)

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 10 days of the notice, that is the end of the matter. If the responsible party voluntarily removes the encroachment, but not until sometime after 10 days, the party is responsible for a penalty of up to $150 per day[267] beginning on the 11th day after notice.[268]

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).

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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.

[267] 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.

[268] 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).

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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.[269]

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 10 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 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.

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[269] 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.

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, H.B. 321, 2013 Idaho Sess. Laws, ch. 239. See footnote 284 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

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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 on unlawful encroachments

There is very little case law applying section 40-2319. The only reported appellate case addressing the statute is *Total Success Inv., 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 Inv., 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.[270] 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

[270] 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."

> 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 at 693, 227 P.3d at 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.[271]

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[271] 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 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,

This conclusion is reinforced by a 1965 case arising under a prior version of the encroachment statute.[272] In *State v. Kelly*, 403 P.2d 56 (Idaho 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, 339-40, 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.

Rich is one of several encroachment cases that address the issue in the context of whether the encroachment shifts title by way of adverse possession. Others are discussed in section IV.U.6 on page 323.

J. 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 or deviating the water of any stream, or by placing any obstruction in any ditch or stream within or along any

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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.

[272] 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."

> 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).

K. 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 V.A at page 332.

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. R*oe, 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 Envtl. 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.

L. 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.[273]

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.

M. *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.

N. 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,

[273] 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.

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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.

O. Unconstitutional takings

Public road creation by prescriptive use is analogous to private prescriptive easements and adverse possession. The latter two, obviously, do not give rise to takings claims. In the rare cases where litigants have contended that they are entitled to just compensation because roads were created on their property by public use, those claims have failed.

In *Ada Cnty. Highway Dist. v. Total Success Inv., LLC* ("*Total Success I*"), 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 the 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. It is difficult to imagine any fact setting in which in which an "as applied" analysis of the prescriptive use statute would give a different result. As of this writing, none of the dozens of Idaho cases that have cited *Total Success* have addressed the takings claim.

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.

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 created by prescription . Having concluded that the

Halvorsons acquired their property after the passage of five years of public use and maintenance, the Court concluded that the Halvorsons were in no position to complain that their property had been taken by the government.

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).[274]

P. 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.

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

[274] 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 *Evers* case "involved the issue of whether a county can determine that the requirements for creating a public highway were met without giving the landowner notice or an opportunity to present evidence that the road was her private property." *ACHD v. Total Success Investments, LLC*, 145 Idaho 360, 372, 179 P.3d 323, 335 (2008) (Burdick, J.).

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.

Q. 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 Inv., 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.

R. 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, unless the commission fails to initiate proceedings or the lawsuit is initiated by the commission.

See discussion in section V.A (Federal Quiet Title Act (QTA)) on page 332 regarding the availability of relief in State forums when roads on federal lands are involved.

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. H.B. 321, 2013 Idaho Sess. Laws, ch. 239 (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

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districts.[275] 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.[276] Indeed, the status of public roads has even been decided in the context of tort actions.[277] 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.[278]

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.[279]

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[275] 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.

[276] *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 Inv., LLC* ("*Total Success I*"), 145 Idaho 360, 179 P.3d 323 (2008) (Burdick, J.) were both quiet title actions.

[277] 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.

[278] 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.).

[279] 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."

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 (with limited exceptions):

> 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 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).[280]

[280] In *Munden v. Bannock Cnty.*, 169 Idaho 818, 835, 504 P.3d 354, 371 (Stegner, J.), a litigant argued that section 40-208(7) is ambiguous. The Court did not technically rule on that question (because the issue was not raised in the appellant's first brief), but, the Court left no doubt that it felt otherwise: "Idaho Code section 40-208(7) makes clear that the Mundens were required to first petition the Bannock County board or highway district to

As provided in the first sentence of the subsection, the exclusivity provision does not apply to counties and highway districts. They retain the option either to initiate validation/vacation proceeds or to file a quiet title action.[281]

As for everyone else seeking a determination of the legal status or the width of a road, they must "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). 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).[282]

The 2013 legislation also 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 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 <u>not</u> 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, 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.

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determine the legal status of the Road before filing their complaint in the district court." *Munden*, 169 Idaho at 836, 504 P.3d at 372.

[281] *East Side Highway Dist. v. Delavan*, 167 Idaho 325, 470 P.3d 1134 (2019) (Stegner, J.) is an example of a post-2013 lawsuit seeking quiet title and a declaratory judgement that was initiated directly by a highway district without first initiating validation/vacation proceedings.

[282] The requirement to seek validation/vacation before seeking judicial relief (Idaho Code § 40-208(7)) was squarely addressed in *Munden v. Bannock County*, 169 Idaho 818, 840, 504 P.3d 354, 376 (2022) (Stegner, J.) (internal quotation marks omitted) (holding that landowners could not bring a declaratory judgment action respecting the legal status of an allegedly private road or seek inverse condemnation damages without first petitioning for abandonment because "the heart of this dispute concerns the very title to the road").

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 (which allowed judicial review of a county map adoption) is not counter to this conclusion. The *Flying A* Court expressly noted that the pre-2013 statutes were applicable to a county action made prior to 2013. *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. (See discussion of retroactivity in section I.H.3 at page 102.)

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.T at page 295 (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 V.A.12 at page 349 (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.[283] That, too, must be established by formal validation (or a proper judicial proceeding).

[283] 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

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 he 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 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.[284]

S. State quiet title, declaratory judgment, or other civil action

1. State Quiet Title Act (QTA)

See discussion in section V.A (Federal Quiet Title Act (QTA)) on page 332 regarding the availability of relief in State forums when roads on federal lands are involved.

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.

Under the 2013 amendments discussed in section IV.R on page 284, quiet title is available only if the county or highway district declines to act on a petition for validation or vacation.

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legally effective specification or determination of width) can "effectively" establish road width.

[284] 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.

2. Who may bring a State QTA suit?

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. See discussion in section V.A.6 on page 339. 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.

3. 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.[285]

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 be 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

[285] 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) (Bakes, J.), 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 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.).

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.[286] 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).

4. 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).[287]

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.) (applying pre-2013 law).

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).

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[286] 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.

[287] 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.

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.

5. 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.[288] 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 Inv., 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, 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. In ruling on the tort claims, the district court determined that the road was public and had a 50-foot width. The Halvorsons appealed. The Idaho Supreme Court rejected the Halvorsons' argument that the public status of the road could not be determined outside of a road validation proceeding.

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[288] 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.

The Halvorsons 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 Halvorsons 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 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.[289] The *Halvorson* Court did not address the issue of who would be bound by its decision (in an action between a private landowner and the county). See section IV.R on page 284 for a discussion of post-2013 law on this subject.

[289] 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 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).

T. State quiet title act (QTA) – statute of limitations

1. When the government initiates a quiet title claim, the statute of limitations clock, if applicable, runs from the time of conduct interfering with the government's claim of right (Idaho Code § 5-202).

As noted above in section I.B.3 at page 35, private road prescription on land owned by other private parties 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 the statute of limitations governing government actions on real estate, Idaho Code § 5-202.[290] The latter statute applies only to state or local 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. See discussion in section IV.U.6.c(iii) on page 328.

Note that "people of the state" includes local governmental entities (political subdivisions), not just the State government itself. See footnote 308 on page 308.

Is a county or highway district subject to this 10-year statute of limitations in initiating a quiet title action? The answer is "yes," but, as discussed below, the 10-year clock does not begin to run until the landowner engages in conduct interfering with the government's property. See discussion of *Ada Cnty. Highway Dist. v. Total Success Inv., LLC* ("*Total Success I*"), 145 Idaho 360, 179 P.3d 323 (2008) (Burdick, J.) in section IV.U.6.c(iii) on page 328.

As discussed below, the holding in *Total Success I* may be affected by legislation enacted in 2013 providing that quiet title actions for road validation/vacation purposes may be brought at any time. Idaho Code § 40-293(6).

2. A 2013 amendment may have made Idaho's statute of limitations no longer applicable to road validations and quiet title suits.

In *Ada Cnty. Highway Dist. v. Total Success Inv., LLC* ("*Total Success I*"), 145 Idaho 360, 179 P.3d 323 (2008) (Burdick, J.), the Court ruled that actions

[290] See further discussion of Idaho Code § 5-202 in section IV.U beginning on page 298. Note in particular footnote 310 on page 309 explaining the inapplicability of the 2013 amendment to the creation of private right-of-way.

brought by State entities to establish title to public roads are subject to the 10-year statute of limitations in Idaho Code § 5-202, but that statute does not begin to run until there is an interference with the road. See discussion in section IV.U.6.c(iii) on page 328.

It may be that this outcome was affected by amendments to the road statutes enacted in 2013.

That 2013 law (H.B. 321, 2013 Idaho Sess. Laws, ch. 239, § 4) added a new subsection, initially Idaho Code § 40-203(5), now subsection (6), which provided that certain roads meeting three narrow criteria may be passively abandoned. It then concluded, that all other roads (presumably referring to all other roads subject to county or highway district jurisdiction) may be abandoned and vacated only by formal action, and that such highways are subject to validation or quiet title at any time:[291]

> 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(6) (emphasis supplied).[292]

Thus, road validations and quiet title actions—at least those falling under Title 40 (i.e., roads under the jurisdiction of a county or highway district)—may be "determined at any time notwithstanding any other provision of law." "Any other provision of law" arguably includes the 10-year statute of limitations applicable to state and local governmental entities (Idaho Code § 5-202).

This was reinforced in another section of the 2013 legislation:

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[291] This new affirmative language confirmed the law in effect since 1993, when statutes authorizing passive abandonment were repealed. See section II.E on page 140.

[292] The quoted language was added in 2013 by H.B. 321, 2013 Idaho Sess. Laws, ch. 239. Originally it came at the end new subsection 40-203(5). In 2021 it was renumbered as subsection 40-203(6). S.B. 1101, 2021 Idaho Sess. Laws, ch. 179. See footnote 125 on page 130.

> 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.

As far as state judicial proceedings, however, the 2013 amendment arguably has overturned *Total Success I*. In other words, in other words, it may be that a county or highway district may wait as long as it wishes to initiate a quiet title action to establish a public road on the basis of public and maintenance and the private landowner upon whose land the road crosses may not raise the 10-year statute of limitations in Idaho Code § 5-202 as a defense.

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.

U. Adverse possession

1. The nature and source of law for adverse possession and prescription

Adverse possession is a legal concept in which the law rewards the trespasser who maintains an open, notorious, and hostile use of another person's property for a statutorily specified period of time, after which the trespasser is declared to have become the rightful owner by operation of law.

> The doctrine of adverse possession provides that an owner of land may lose his land if he fails to eject trespassers promptly. If the trespasser uses the land as her own for the length of time specified in the state's statute of limitations and satisfies common law and statutory requirements, the owner cannot recover possession.

Paula R. Latovick, *Adverse Possession Against the States: The Hornbooks Have it Wrong*, 29 U. Mich. J.L. Reform 939, 940 (1996). As Justice Oliver Wendell Holmes wrote, "Sometimes it is said that, if a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example." Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 476 (1897).[293]

The concept of adverse possession is clear enough: title to real property may shift to a trespasser if the original owner sits too long on her rights. But there is no

[293] Justice Holmes explained that the connection between property and adverse possession "is further back than the first recorded history. It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man." *Id*. at 477.

Others have suggested that the better justification for the rule of adverse possession is the need to provide certainty of title. Paul E. Basye, *Clearing Land Titles* § 54 (2d ed. 1970) (noting that adverse possession's "great purpose" is "to quiet titles").

statute expressly saying that in so many words. Instead, the law of adverse possession springs to life from the applicable statute of limitations.

> While most statutes speak only in terms of preventing a lawsuit by the original owner to recover possession, the passing of the statutory time period effectively creates a new title in the adverse possessor.

Paula R. Latovick, *Adverse Possession Against the States: The Hornbooks Have it Wrong*, 29 U. Mich. J.L. Reform 939, 940 (1996).

The statutory period of adverse use is set by the statute of limitations. A notable example is Idaho Code § 5-203 (which applies in cases that do not involve the adverse possession of State property).[294] The statute reads:

> No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appears that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the property in question within twenty (20) years before the commencement of the action; and this section includes possessory rights to lands and mining claims.

Idaho Code § 5-203 ("Action to recover realty").

This statute, like most statutes of limitation, is difficult to parse. In the statute, the plaintiff is the original owner of the property who has lost possession to a trespasser, and the original owner is seeking to "recover" the property. The statute says the plaintiff (the original owner) may do so only if he or she was "seized or possessed of the property" within 20 years (5 years until 2006). In other words, if the plaintiff waits longer that this period since the trespasser arrived, the original owner may not recover the property and title shifts to the trespasser.

An amalgam of other statutory[295] and case law embellishments flesh out the details of this doctrine. These statutes of limitation tend to be archaic (both in age and writing style). Most of Idaho's applicable statutes of limitation date to territorial times (1864).

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[294] Where adverse possession is claimed against the State (including assertions against rights-of-way held by counties or highway districts), the applicable statute of limitations is Idaho Code § 5-202 (which has a ten-year prescriptive period). See discussion in section IV.U.6 on page 323.

[295] Other statutes in the same chapter set out requirements in addition to those found in section 5-203. See, e.g., Idaho Code §§ 5-208, 5-209, and 5-210.

Note that Idaho Code § 5-210 establishes stringent requirements for any claim of adverse possession, notably that the land be either (1) "protected by a substantial enclosure" or (2) cultivated or improved. This statute also requires proof that the person claiming adverse possession has paid all assessed property taxes on the disputed land during the period of adverse possession. (Similar requirements are found in Idaho Code § 5-208 for claims based on a written instrument.)

2. The statutory period was lengthened from five to 20 years.

From 1864 until 2006, the statutory period for adverse possession was five years.[296] In 2006, the Idaho Legislature changed the period from five to 20 years. S.B. 1311, 2006 Idaho Sess. Laws, ch. 158 (codified at Idaho Code §§ 5-203, 5-204, 5-206, 5-210, 5-211, and 5-213) (effective July 1, 2006).

Note: The statutes affected by the 2006 amendment are the statutes of limitation dealing with real property. Elsewhere in Chapter 2 of Title 5 are other statutes of limitation dealing with other matters, for example: written contracts (Idaho Code § 5-216), oral contracts (Idaho Code § 5-217), personal injuries (Idaho Code § 5-219), and actions to recover child support (Idaho Code § 5-245). Plus, of course, the "catch-all" statute of limitations (Idaho Code § 5-224).

However, the change does not apply retroactively.[297] 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 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 20).[298]

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[296] There is one exception. Idaho Code § 5-202 (a special statute of limitations applicable to State property) has a ten-year period. See discussion in section IV.T.1 on page 294.

[297] *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).

[298] 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.

3. Adverse possession may be pursued by a governmental entity against private persons (but only if taxes are not assessed).

"It has generally been held or recognized that the United States, a state, or other governmental body may acquire title to land by adverse possession." A.M. Vann, *Acquisition of title to land by adverse possession by state or other governmental unit or agency*, 18 A.L.R. 3d 678, §1[a].

This is the majority rule, to which Idaho subscribes. In *Hamilton v. Village of McCall*, 90 Idaho 253, 409 P.2d 393 (1965) (Knudson, J.), the Court recognized that the Village of McCall could acquire title from a private landowner by adverse possession under Idaho Code § 5-210.

On the facts of that case, however, McCall failed to establish that its occupation of the property was hostile and adverse because it continued to assess and collect *ad valorem* taxes on the disputed property.

> We are not aware of any method by which a governmental agency can recognize private ownership more emphatically and conclusively than by assessing and collecting ad valorem taxes. In view of these circumstances we are necessarily led to the conclusion that the Village of McCall has not been and is not now in a position to claim open, notorious, hostile, and adverse user for such period of time as is necessary to acquire title to the property in dispute by adverse possession.

Hamilton, 90 Idaho at 260, 409 P.2d at 398.

Nevertheless, the principle was established that an Idaho governmental entity may adversely possess the private property. As a practical matter, however, the landowner will often have the defense that it continued to pay assessed property taxes.

Query: A not uncommon fact setting is that plat maps incorrectly describe the location of property boundaries and public streets. This presents the question: May a city adversely possesses private land where the street is actually located? May the landowner defend adverse possession on the basis the city assessed property taxes on the land where the road lies? May the city overcome that defense by showing that it subtracted from the tax rolls the correct total acreage for the road, and that any discrepancy is no more than technical or clerical error (based on inaccurate plat maps) as opposed to an indication that the occupation of the land by the street is not adverse and hostile?

4. Quiet title claims against the State are not deemed claims against the sovereignty (*Lyon* 1955).

May the State claim that it is "immune" from quiet title actions based on sovereign immunity?[299] For reasons discussed below, the answer appears to be "no."

As discussed in the section V.A (Federal Quiet Title Act (QTA)), on page 332, 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 to federal courts, the Idaho Supreme Court has held that when it comes to title claims against the State of Idaho, such claims are not viewed as claims "against the sovereignty" itself. Hence, they are allowed.

> 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 274, 376, 283 P.2d 1105, 1106 (1955) (Keeton, J.) (emphasis added).

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

[299] See the chapter on Sovereign Immunity in the *Idaho Land Use Handbook* for further discussion of the doctrine.

you get there, the rule is clear that the State is not immune from actions to determine title, unless some other rule of law protects the State.[300]

Assuming *Lyon* remains good law,[301] the bottom line is that the State may not employ the defense of sovereign immunity, carte blanche, to object to a quiet title action (or, presumably, a road validation proceeding). That said, whether the defenses are labeled sovereign immunity or something else, the State has some defenses to claims based adverse possession or prescriptive use (see discussion below).

5. Adverse possession against the State and its political subdivisions

a. Overview and summary

Adverse possession is based on Idaho statutes of limitation that have been on the books since 1864 (prior to statehood). In essence, the applicable statute of limitations (and there are many), sets a deadline by which one dispossessed of real property must bring suit to eject the trespasser and recover possession. If the original landowner sits on her rights beyond that statutory time period, the law deems title to have shifted to the trespasser.

Most cases of adverse possession involve claims of one private landowner against another. Claims of adverse possession by private parties against federal or state entities raise the issue of sovereign immunity.[302] This, in turn, leads to the question of whether sovereign immunity has been waived (typically by statute).

Case law has fleshed out the doctrine of adverse possession, but its roots are statutory. Accordingly, one would think that the case law should be constrained by unambiguous statutory language (in the statutes of limitation, sovereign immunity statutes, and any other relevant statutes or constitutional provisions). Arguably, however, the Idaho Supreme Court has violated that premise by recognizing

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[300] In *Coeur d'Alene Tribe of Idaho v. State of Idaho*, 42 F.3d 1244,1249 (9th Cir. 1994), the Ninth Circuit comments on the holding in *Lyon*, noting the difference between the State waiving its sovereign immunity and not having any immunity to waive. The Ninth Circuit said that irrespective of the holding in *Lyon*, Idaho has not waived its immunity from suit in federal court under the eleventh amendment.

[301] As of this writing, no Idaho appellate court has cited, relied on, or even discussed *Lyon* for this proposition.

[302] The question on the flipside is whether the State and its political subdivisions may adversely possess the land of a private landowner. Obviously, this presents no sovereign immunity issue. Accordingly, the answer is "yes," but only if the governmental entity has not collected *ad valorem* taxes on the land. Doing so fails to satisfy the requirement that the trespass be hostile and adverse.

exceptions to Idaho's statutory waiver of sovereign immunity that are contrary to the plain language of the statute. That said, these exceptions have been recited in many cases. To my knowledge, the Court has not been confronted with the question of whether it has strayed from well-established principles of statutory construction and should reconsider longstanding precedent.

Where land owned by the State or its political subdivisions is involved, the applicable statute of limitations is Idaho Code § 5-202 (which has been on the books since 1864). Because this statute specifically authorizes title actions against the State, it is itself a waiver of sovereign immunity.

However, case law has carved out two important exceptions to this waiver of sovereign immunity.

The seminal decision is *Hellerud v. Hauck*, 52 Idaho 226, 13 P.2d 1099 (1932) (Varian, J.). It declared two exceptions to the waiver of sovereign immunity under section 5-202: (1) land actually reserved for, or dedicated to public use and (2) "school land" and other State endowment lands. I refer to these, respectively, as Exception #1 and Exception #2 to the waiver of sovereign immunity.

Hellerud involved school lands (a type of State endowment lands). That was Exception #2 to the waiver of sovereign immunity. There is ample statutory and constitutional basis for this exception. In contrast, there is no statutory or constitutional basis for *Hellerud*'s Exception #1 for lands "actually reserved for, or dedicated to some public use." Indeed, Exception #1 was dictum.

In the years since *Hellerud* (and in one case before), the Idaho Supreme Court has explored numerous fact settings in which Exception #1 to the waiver of sovereign immunity has been applied (sometimes inconsistently).

A notable case applying Exception #1 is *Rutledge v. State*, 94 Idaho 121, 382 P.2d 515 (1971) (Donaldson, J.). The Court began with the premise that submerged lands at the time of statehood are held in trust by the State and are not subject to adverse possession. The Court noted the waiver of sovereign immunity in Idaho Code § 5-202 but relied on *Hellerud* in holding that not all categories of State land are immune from adverse possession. The question presented was whether submerged land acquired as trust lands remain immune from adverse possession when later altered to become dry land. The answer is, no. In sum, the "held in trust for public use" protection in *Hellerud*'s Exception #1 is not perpetual. Current circumstances on the ground must be taken into account.

The *Rutledge* decision did not say who or what caused one branch of the Boise River around an island to dry up. Though the opinion is not clear on this fact, it implies that that channel was altered by act of man and not force of nature. In any event, the Court specifically said it did not matter. What mattered was that the river was no longer navigable and, hence, subject to adverse possession.

The *Idaho Forest Industries* decision raised questions about the scope of *Rutledge*, but did not overrule it. Instead, it remanded, allowing the district court to ponder whether the equitable principles upon which the public trust doctrine rests may, in some circumstances, allow the State to remain immunized from adverse possession where the change in the submerged land is manmade. It allowed the district court, on remand, "to determine under what circumstances a manmade destruction of navigability could eliminate the public trust status of state land." Thus, under *Idaho Forest Industries*, the manmade nature of the alteration may be is a factor to be considered, but it is not determinative. Rather, an equitable balancing of interests must determine whether formerly submerged lands may be adversely possessed.

b. By statute in 1864, the State waived sovereign immunity to adverse possession claims (Idaho Code §§ 5-202 and 5-225).

Summary: Idaho Code § 5-202 (which was enacted in 1864) is a statute of limitations that specifically authorizes title actions against the State (including its political subdivisions). Consequently, it operates as a waiver of sovereign immunity. Like other statutes of limitations dealing with the recovery of real property, it is the basis for the law of adverse possession. Idaho Code § 5-202 works like all the other statutes of limitations, except that it applies to the State and it has a 10-year clock.

A special problem presents itself when a person asserts adverse possession with respect to a public road or other property of the State or local government. This is the issue of sovereign immunity. (See section V.A.1 on page 332 and footnote 328 on page 332 for background on the perplexing question of why sovereign immunity is part of the common law in America.)

States vary when it comes to whether adverse possession may be asserted against state land.[303] Because sovereign immunity is based originally on common

[303] For a thoughtful overview of the topic of adverse possession against states and other governmental entities, see Paula R. Latovick, *Adverse Possession Against the States: The Hornbooks Have it Wrong*, 29 U. Mich. J.L. Reform 939 (1996). Professor Latovick writes: "Hornbooks generally assert that statutes delimiting acquisition of title by adverse possession do not run against the United States or state governments. While this statement is correct generally as applied to the United States, it often constitutes an inaccurate and misleading description of the law of several states. This Article shows that the laws of many states in fact do permit private parties to acquire state land by way of adverse possession and describes the different legal approaches taken." *Id*. at 939-40 (footnotes omitted). Professor

law, it is subject to modification or codification by the legislative branch. A handful of states have statutes expressly stating that adverse possession is not available against the state.[304] Others have taken the opposite approach.[305]

One commentator explained:

> [A] number of hornbooks and other authorities make the mistake of suggesting simply that the states are not subject at all to adverse possession. Others are closer to the mark in saying that state lands are not subject to adverse possession unless the state has agreed expressly to waive its immunity. Even these authorities mislead, however, by implying that few states have made themselves subject to adverse possession statutes of limitations.
>
> While a majority of states follow the hornbook rule, a survey of state law reveals that a sizeable number of states have waived to a greater or lesser degree their traditional immunity.

Paula R. Latovick, *Adverse Possession Against the States: The Hornbooks Have it Wrong*, 29 U. Mich. J.L. Reform 939, 940 (1996).

An Idaho statute discussed below (Idaho Code § 5-202), shows that Idaho is among the latter. But the case law has carved out exceptions for certain lands expressly held for public use. For these special lands, sovereign immunity remains intact.

As discussed in section I.B.3.a on page 35 and section IV.U.1 on page 298, the law of adverse possession (and prescriptive easements) is founded on Idaho's statute of limitations on actions to recover realty, Idaho Code § 5-203 (see also Idaho Code § 5-202 discussed below and in section IV.T.1 on page 295).

Latovick identifies Idaho as one of the states that has waived sovereign immunity and allowed adverse possession by statute. *Id*. at 952.

[304] For example, an Alaska statute predating its statehood and still in effect provides: "No prescription or statute of limitations runs against the title or interest of the state to land under the jurisdiction of the state. No title or interest to land under the jurisdiction of the state may be acquired by adverse possession or prescription, or in any other manner except by conveyance from the state." Alaska Stat. § 38.95.010 (1955).

[305] For example, a Utah statute establishes a seven-year statute of limitations applicable to state property. Utah Code Ann. § 78B-2-201 (2026) (codified to § 78-12-2 until 2008).

Two provisions in Idaho's statutes of limitation (Idaho Code §§ 5-202 and 5-225) contain waivers of sovereign immunity. Both were enacted in 1864 (see footnotes 306 and 307 below.)

The "generic" waiver statute is section 5-225. It states that all statutes of limitations are applicable to the State: "The limitations prescribed in this chapter apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties." Idaho Code § 5-225.[306]

It would seem that sections 5-225 and 5-203 (the adverse possession statute applicable to private parties), read together, constitute an express legislative statement that the State operate to make the State (including its political subdivisions—see footnote 308 below) subject to adverse possession. However, there is another even more specific statute of limitations expressly applicable to state lands—namely, Idaho Code § 5-202.

Why are there two statutes waiving sovereign immunity in the context of adverse possession? Evidently, the Territorial Legislature felt that there should be a longer period of limitation applicable when adverse possession of government land is at stake (ten years under section 5-202) as opposed to the shorter limitation periods under the other statutes of limitation under the "generic" waiver in section 5-225.

Section 5-202 reads:

> The people of this state will not sue any person for or in respect to any real property or the issues or profits thereof, by reason of the right or title of the people to the same, unless:
>
> 1. Such right or title shall have accrued within ten (10) years before any action or other proceeding for the same is commenced; or,
>
> 2. The people or those from whom they claim, shall have received the rents and profits of such real

[306] What is now Idaho Code § 5-225 was first enacted in 1864, Laws of the Territory of Idaho § 19, p. 556 (1864). In 1881, it was codified to Gen. Laws of the Territory of Idaho (1881), pp. 31-32, § 165 (1881). It was then re-codified to Rev. Stat. of Idaho Terr. § 4061 (1887), Rev. Code of Idaho § 4061 (1909), and Idaho Compiled Laws § 4061 (1919), and Compiled Stat. of Idaho § 6618 (1919).

Section 5-225 makes the State (including its political subdivisions) subject to the various adverse possession statutes—unless some other statute overrides section 5-225. Such is the case in Idaho Code § 5-216, which was amended in 1939 to makes the State and its political subdivisions exempt from the statute of limitations applicable to contract claims. See *City of Idaho Falls v. H-K Contractors, Inc.*, 163 Idaho 579, 416 P.3d 951 (2018) (Bevan, J.), which is discussed further below.

> property, or of some part thereof, within the space of ten (10) years.

Idaho Code § 5-202 (emphasis added).[307] See footnote 315 on page 311 comparing Idaho Code §§ 5-202 and 5-225.

Section 5-202 is applicable to "[t]he people of this state" and the "people" (see emphasis in quotation above). This includes both the State of Idaho itself and its political subdivisions.[308]

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[307] What is now Idaho Code § 5-202 was first enacted in 1864, Laws of the Territory of Idaho § 3, p. 553 (1864). In 1881, it was codified to Gen. Laws of the Territory of Idaho (1881), ch. X, p. 27, § 142 (1881). It was then re-codified to Rev. Stat. of Idaho Terr. § 4035 (1887), Rev. Code of Idaho § 4035 (1909), and Idaho Compiled Laws § 4035 (1919), and Compiled Stat. of Idaho § 6595 (1919). It is referred to in *Hellerud v. Hauck* as C.S. § 6595.

[308] In *Ada Cnty. Highway Dist. v. Total Success Inv., LLC* ("*Total Success I*"), 145 Idaho 360, 368, 179 P.3d 323, 331 (2008) (Burdick, J.), the Court applied Idaho Code § 5-202 to the Ada County Highway District (ACHD), a political subdivision of the State:

> [T]he ten year statute of limitations begins to run upon conduct interfering with the State's claim of right. We hold that because ACHD brought the action within ten years of the encroachment, the suit is not barred by I.C. § 5–202.

The Court did not explain its reasoning. Evidently, it found the statute's reference to "the people" to be inclusive of political subdivisions.

In *Dep't of Health and Welfare v. Beason*, 173 Idaho 672, 679, 546 P.3d 684, 691 (2024) (Zahn, J.), the Court identified *Total Success* as good law on this issue. "Section 5-202 only applies when the State has the right or title to the real property. For example, section 5-202 applies to actions by the State to quiet title. [Citing *Total Success*.]" *Beason*, 173 Idaho at 679, 546 P.3d at 691.

In *Beason*, the State sued the heirs of two Medicaid recipients, seeking to set aside a transfer of real property to the recipients' grandchildren. There was no debate that the State's claim was subject to a statute of limitations. The argument was over which of three possible statutes of limitations constrained the State. The Court found that section 5-202 was not applicable because the state's claim was not based on the State's ownership of the recipients' property (i.e., "the right or title of the people") but was based on the recipients' violation of a statute governing Medicaid benefits. Instead, another statute of limitations applied (Idaho Code § 5-224). "Section 5-202 only applies when the State has the right or title to the real property. For example, section 5-202 applies to actions by the State to quiet title. *See Ada Cnty. Highway Dist. v. Total Success Invs., LLC*, 145 Idaho 360, 368, 179 P.3d 323, 331 (2008)." *Beason*, 173 Idaho at 679, 546 P.3d at 691. Although *Beason* did not involve a political subdivision, the Court's approving reference to *Total Success* (which did involve a political subdivision) reinforces the conclusion that "the people of the state" includes political subdivisions. And, contrary to the City's assertion, nothing in *Beason* intimates the "people of the state" does not include cities and counties within the state..

The Idaho Supreme Court has explained the meaning of this statute: "the state cannot sue for the recovery of land after the same has been held [by an adverse user] for a period of ten years." *Hellerud v. Hauck*, 52 Idaho 226, 13 P.2d 1099, 1100-01 (1932) (Varian, J.).[309] In other words, Idaho Code § 5-202 works like all the other statutes of limitations, except that it applies to the State and it has a 10-year clock. Because this statute specifically authorizes title actions against the State, it is operates as a waiver of sovereign immunity.

Given that the law of adverse possession is based on the applicable statute of limitations, it follows that the effect of Idaho Code § 5-202 is to shift title from the State to the adverse user after 10 years.[310] In other words, the State (including its political subdivisions) has expressly consented to adverse possession claims on State lands.

A broad reading of the applicability of section 5-202 to political subdivisions is consistent with the Court's interpretation of "the state" in Idaho Code §§ 5-216 and 5-225. *City of Idaho Falls v. H-K Contractors, Inc.*, 163 Idaho 579, 416 P.3d 951 (2018) (Bevan, J.). Section 5-225 makes the various statutes of limitations applicable to "the state." In *H-K Contractors*, the Court noted that for over 100 years it has interpreted section 5-225 to encompass political subdivisions of the State. *H-K Contractors*, 163 Idaho at 583-84, 416 P.3d at 955-56 (citing, e.g., *Bannock Cnty v. Bell*, 8 Idaho 1, 5, 65 P. 710, 712 (1901)). In 1939, the Legislature amended Idaho Code § 5-216 (the statute of limitations on contract actions) to make it inapplicable to "the state." In H-K Contractors, the Court held that the meaning of "the state" in section 2-216 should be the same as in section 2-225, thus making cities as well as the State exempt from the statute of limitations on contract claims. "This Court has held that the term "state" in section 5-225 is a general reference to government, rather than just to the State of Idaho. It would be unharmonious for this Court to now interpret the term 'state' in section 5-216 to have a narrower or contradictory meaning within the same Chapter of the Idaho Code. We do not view the Legislature as having intended the term 'state' to have different meanings within Title 5, Chapter 2 of the Idaho Code." *H-K Contractors*, 163 Idaho at 584, 416 P.3d at 956 (citations omitted). Although *H-K Contractors* did not address section 5-202, its analysis suggests that it would be "unharmonious" for "the people of the state" to be interpreted more narrowly than "the state," and that both include political subdivisions.

[309] Pinpoint citations to Idaho Reports for *Hellerud* are not available on Westlaw.

[310] See section IV.T.2 on page 295 for a discussion of the 2013 amendment to the road validation statute and its interaction with Idaho Code § 5-202. The 2013 amendment says that there is no longer a deadline for validating or vacating a public road. But the 2013 amendment has no effect on the creation of private rights-of-way by prescriptive use pursuant to either section 5-202 or 5-203. Nor did it eliminate adverse possession of a public right-of-way. Adverse possession is a common law doctrine that springs from the statutes of limitation, both of which remain on the books.

However, case law (discussed below) has carved out two important exceptions to this waiver of sovereign immunity.

c. *Hellerud* (1932) established two exceptions to the waiver so sovereign immunity: (1) land actually reserved for, or dedicated to public use and (2) school lands and other State endowment lands.

The waiver of sovereign immunity under Idaho Code § 5-202 has been on the books since 1864 (see footnote 307 on page 308). The seminal decision interpreting that statute is *Hellerud v. Hauck*, 52 Idaho 226, 13 P.2d 1099 (1932) (Varian, J.). It declared two exceptions to the waiver of sovereign immunity under section 5-202: (1) land "actually reserved for, or dedicated to some public use" and (2) "school land" and other State endowment lands.[311] *Hellerud*, 13 P.2d at 1101 (no Idaho pinpoint available on Westlaw).

Hellerud dealt with state endowment land. However, the State was not a party. Plaintiffs (Hellerud *et al*.) brought a quiet title action on behalf of the Norwegian-Lutheran Church against Hauck, a former church member on whose farm a log church and cemetery were located. Hauck had a falling out with the church, leading to this litigation. Plaintiffs alleged adverse possession of the church property.[312] The land in question was originally "school land" (section 16 endowment land) held in trust by the State. Hauck purchased the property from the State at auction in 1917 (over a decade after the church was built in trespass), but this

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[311] 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). The grant of these so-called "school lands" (sections 16 and 36) was confirmed and became effective when the State was admitted to the Union on July 3, 1890. Idaho Admission Act, ch. 656, 26 Stat. 215, 215-16 §§ 4 & 5 (July 3, 1890) (see footnote 14 on page 19 for citations to amendments). In addition to setting aside sections 16 and 36 as school lands, section 11 of the Idaho Admissions Act granted hundreds of thousands of additional acres to Idaho as additional endowment lands to be held in trust for specific beneficiaries including the University of Idaho, the "insane asylum" in Blackfoot, the state penitentiary, and various others. Idaho Admission Act, ch. 656, 26 Stat. 215, 217, § 11 (July 3, 1890) (amended by Pub. L. No. 105-296 (Oct. 27, 1998)). Another pre-statehood act granted 72 sections of land to each of five territories, including Idaho. 21 Stat. 326 (Feb. 18, 1881) (see *State v. Peterson*, 61 Idaho 50, 97 P.2d 603, 604 n.3 (1939) (Givens, J.)). After selling off over a million acres of endowment lands, there are now nearly 2.5 million acres of endowment lands still held by the State. See *Idaho Land Use Handbook* for further discussion of state endowment lands.

[312] Plaintiffs relied on what is now Idaho Code §§ 5-203, 5-209, and 5-210, which were then codified to Idaho Compiled Stat. §§ 6595, 6602, and 6603.

was only a land contract. Title did not pass from the State to Hauck until the purchase price was fully paid in 1927. Plaintiffs did not bring suit until 1931, less than five years after Hauck gained ownership. Adverse possession prior to that did not count because it would have been adverse possession against the State, and the State was immune under *Hellerud*'s second exception. Hence, the adverse possession against Hauck lasted less than the necessary five years.

The Court began its analysis by observing that the State is protected by sovereign immunity unless it consents to be sued: "The general rule is to the effect that in the absence of a statute making the state subject to the statute of limitations no title by adverse possession can be acquired against the state." *Hellerud*, 13 P.2d at 1100.[313] In the next breath, the Court recognized that express consent is found in what is now Idaho Code § 5-202,[314] thus making the general rule not applicable in Idaho.[315]

After quoting what is now Idaho Code § 5-202 and explaining that it operates to allow adverse possession against the State,[316] the Court declared two exceptions (not found in the state statute), the effect of which is to exempt certain public property from adverse possession:

> There are exceptions to the rule applying the adverse possession statutes to state lands, as where the land has been actually reserved for, or dedicated to some public use. [Citations to *Robinson v. Lemp*, 29 Idaho 661, 161 P. 1024, 1026 (1916) (Morgan, J.), a California case, and

[313] For this proposition, *Hellerud* cites two early twentieth century treatises, *Corpus Juris* (C.J.) and *Ruling Case Law* (R.C.L.). In other words, sovereign immunity is a common law doctrine.

[314] The Court referred to what is now Idaho Code § 5-202 as C.S. § 6595, which is more properly cited as Compiled Stat. of Idaho § 6595 (1919). This statute was first enacted in 1864. Laws of the Territory of Idaho § 3, p. 553 (1864). Though recodified many times, it has not been amended since its enactment.

[315] As noted above, another statute subjecting the State to adverse possession is Idaho Code § 5-225. Section 5-225 is a generic provision making the State subject to the various statutes of limitation applicable to private parties (except where provided otherwise, such as in section 5-216). The *Hellerud* Court did not address section 5-225 (which is of the same vintage as section 5-202), presumably because it did not need to do so. Section 5-202 is more specific, applying to real property or profits therefrom owned by the State or its political subdivisions.

[316] Note that Idaho Code § 5-202 applies to the "people of this state," which includes both the State of Idaho and its political subdivisions. See footnote 308 on page 308. That did not matter here, however, because the issue was ownership of school lands by the State itself.

> a treatise.] And where the state land is school land, as in the case at bar (see Idaho Admission Bill, 26 U. S. Stat. Sess. 1, c. 656, p. 215, § 4), and the act granting said lands to the state prescribes a minimum amount per acre at which they may be disposed of by the state (Idaho Admission Bill, supra, § 11), under constitutional restrictions such as ours, providing: "That no school lands shall be sold for less than ten dollars per acre. No law shall ever be passed by the legislature granting any privileges to persons who may have settled upon any such public lands, subsequent to the survey thereof by the general government, by which the amount to be derived by the sale, *or other disposition of such lands, shall be diminished, directly or indirectly*." (Italics ours) (Idaho Constitution, Art. 9, § 8), state adverse possession statutes do not apply. Title to school grant lands cannot be acquired as against the state no matter how long they have been adversely occupied. [Out-of-state citations omitted.]

Hellerud, 13 P.2d at 1101 (no Idaho pinpoint available on Westlaw) (underlining and bracketed note added).

Hellerud involved school lands (which are State endowment lands). That was Exception #2 to the waiver of sovereign immunity. There is ample statutory and constitutional basis for this exception. The quotation above documents that other law overrides that waiver of sovereign immunity in Idaho Code § 5-202 when it comes to State endowment lands.[317]

[317] For the proposition that State school lands are not subject to adverse possession, *Hellerud* relied authorities from other states and on its own analysis of Idaho's Constitution. These principles are now well established in Idaho. The constitutional and statutory basis for protecting school lands and other state endowment property from adverse possession was forcefully articulated seven years later in *State v. Peterson*, 61 Idaho 50, 97 P.2d 603 (1939) (Givens, J.). This case involved a loan given by the State to the Petersons using money from the permanent educational public school fund (proceeds from the sale of State endowment lands). The Petersons stopped making payments on their mortgage in 1932, but the State did not initiate foreclosure until 1938. The Petersons argued that the foreclosure was barred by the five-year statute of limitations for written contracts (Idaho Code § 5-216) which was made applicable to the State by Idaho Code § 5-225. Citing the Idaho Constitution, the Court observed, "Thus these public school endowment funds are trust funds of the highest and most sacred order, made so by Act of Congress and the Constitution, so considered by the members of the Constitutional Convention." *Peterson*, 97 P.2d at 604. "The trust relationship here is of the highest order and should be protected to the utmost. Many if not

In contrast, there was no statutory or constitutional basis for *Hellerud*'s Exception #1 for lands "actually reserved for, or dedicated to some public use." For that exception, *Hellerud* relied on a single Idaho case, *Robinson* (which, as noted above, was itself based on non-Idaho common law). Because the facts of *Hellerud* involved Exception #2 to the waiver of sovereign immunity, the decision provided no further insight or analysis with respect to the basis or scope of the first exception.

It is worth noting that modern Idaho cases consistently place great weight on confining the law to the language of an unambiguous statute. "[P]olicy arguments for altering unambiguous statutes must be advanced before the legislature." *Rogers v. Household Life Ins. Co.,* 150 Idaho 735, 739, 250 P.3d 786, 790 (2011) (Horton, J.). *Robinson* and *Hellerud*, in contrast, were handed down at a time when the Court felt less constrained to depart from clear legislative language by tacking on exceptions to legislation based on wisdom found in treatises and the common law of other states. While *Hellerud* articulated a clear statutory and constitutional basis for Exception #2 (endowment lands), it offered none for Exception #1 (public use).

d. What is the scope of Exception #1 (public use)?

The scope of *Hellerud*'s Exception #2 (endowment lands) is well defined.

The harder question is what is the scope of *Hellerud*'s #1 (public use). It must be said that the case law is inconsistent and contradictory to some extent. However, it seems that the predominant theme is that property of the State and its political subdivisions that is held in trust for the benefit of the public and continues to be used for the benefit of the public is immune from adverse possession. The cases addressing this issue are discussed below in chronological order.

(i) *Robinson* 1916: Exception #1 includes city streets and parks.

The first appellate decision (which predates *Hellerud*) to address the subject of sovereign immunity and adverse possession was *Robinson v. Lemp*, 29 Idaho 661, 161 P. 1024 (1916) (Morgan, J.).[318] The Court did not mention Idaho Code 5-202.

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all of the land grant states which have had occasion to consider the question have held that the statute of limitations governing adverse possession do not apply to the state (*Hellerud v. Hauck*, 52 Idaho 226, 13 P.2d 1099), and particularly and specifically where trust funds of this nature are involved." *Peterson*, 97 P.2d at 606 (citations to out-of-state authorities omitted).

[318] A predecessor to the case is *Hodges v. Lemp*, 24 Idaho 399, 135 P. 250 (1913) (Ailshie, C.J.), which further fleshes out the facts. (Hodges was Mayor at the time of the first suit, Robinson was mayor in the second.)

Instead, the decision was based on general common law principles drawn from non-Idaho sources.

Robinson dealt with "town site" lands acquired by Boise City from the federal government for the purpose of disposal to occupants of the town. The city sued the executor of Lemp (also named Lemp). Evidently, the original Lemp did not properly obtain title to his property, but nonetheless occupied it and paid taxes thereon for many years. The question presented was whether Lemp had acquired title against the city by adverse possession. The Court quoted *McQuillan on Municipal Corporations* for the proposition that city property is subject to adverse possession if and only if the property is not held for a public use such as streets and parks:

> The rule is established by the great weight of authority that title to property held by a municipality for public use, such as for streets, parks, public building sites, etc., cannot be acquired by adverse possession, but the opposite rule prevails where the property is held by it for other than a public use.

Robinson, 161 P. at 1026 (no pinpoint to Idaho Reporter available on Westlaw).

Because the town site lands were not held in trust for a public purpose, but instead were intended for disposal, adverse possession against the city was effective.

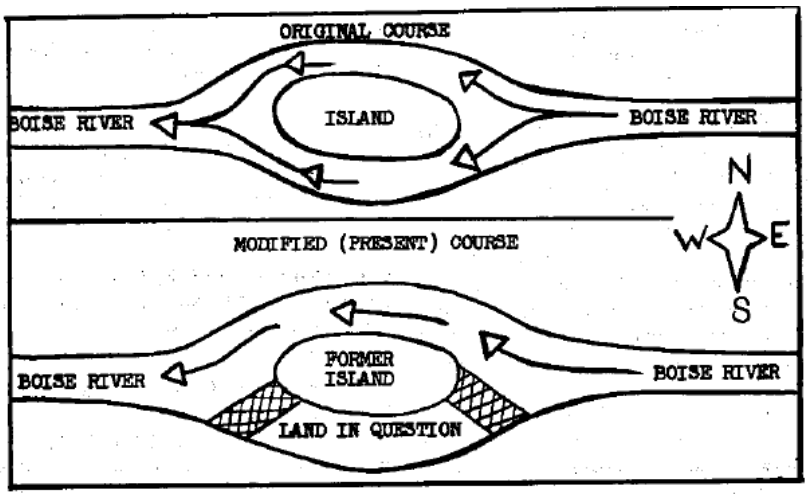
Robinson predated *Hellerud* (the first case to discuss what is now Idaho Code § 5-202). *Hellerud* cited *Robinson* whose holding formed the basis for *Hellerud*'s Exception #1. *Hellerud* is discussed below.

Note that *Robinson*'s exemption of public streets from adverse possession is consistent with *Tyrolean*, but inconsistent with *Total Success I* (discussed below). See discussion in section IV.U.6 (Adverse possession of public roads) on page 323).

(ii) *Rutledge* 1971: Exception #1 includes submerged land—until it becomes dry land for whatever reason.

The case of *Rutledge v. State*, 94 Idaho 121, 382 P.2d 515 (1971) (Donaldson, J.) addressed that applicability of *Hellerud*'s Exception #1 to formerly submerged land. The Court unanimously upheld the trial court's ruling that changed circumstances must be taken into account, and that *Hellerud*'s first exception is inapplicable once the land is no longer submerged.

Plaintiffs Bertha Rutledge and her children owned the Evergreen Motel on the west side of Capital Boulevard down the hill from the train depot in Boise, on land that was once submerged. At the time of statehood, the Boise River had two channels surrounding a small island. Sometime in the early 1900s, the south channel was "in some way diverted or its flow changed" leaving only the north channel "as the main and only channel of the river in this locality." *Rutledge*, 94 Idaho at 122, 482 P.2d at 516. (The "graphic representation" reproduced above was included by the Court in its published decision. *Rutledge*, 94 Idaho at 122, 482 P.2d at 516.)



After it became dry land, the land under the old south channel came to be possessed by Rutledge's predecessor, who built the Evergreen Motel within the old south channel. In 1969, Rutledge brought suit to quiet title based on adverse possession against the State, which claimed it owned the former riverbed in trust for the public.

Citing *Hellerud*, the Court acknowledged that the State ordinarily is immune from adverse possession with respect to lands submerged at statehood. However, the Court ruled that land no longer submerged "does not fall within" *Hellerud*'s exceptions. *Rutledge*, 94 Idaho at 123, n.3, 482 P.2d at 517, n.3 ("The land in question is not school endowment land and it has long since ceased to be 'land dedicated to a public use.'"). The Court explained:

> When the reason for holding property in trust for the public benefit ceases, e. g., a navigable stream dries up or is diverted etc., and it is no longer navigable, it is no longer a unique or special benefit to the general public. It is the same as any other of the State owned lands since it has lost the special characteristic of navigability. Thus the reasons for clothing such property with a protective shield of immunity from acquisition by adverse possession also become meaningless.

Rutledge v State, 94 Idaho 121, 123, 482 P.2d 515, 517 (1971) (Donaldson, J.) (emphasis added).

The cause of the channel dry-up was disputed. However, the language employed strongly suggest that it was by act of man, not force of nature. In other words, this was not a situation of accretion, reliction, or avulsion (terms that do not appear in the decision). The river did not shift or carve a new channel of its own accord. Instead, it appears that one channel was deliberately taken out of use as a river. "The Boise River was in some way diverted or its flow changed … ." *Rutledge*, 94 Idaho at 122, 482 P.2d at 516 (emphasis added). "[T]he waters may have been moved or diverted thus leaving the beds dry." *Rutledge*, 94 Idaho at 123, 482 P.2d at 517 (emphasis added). "When the reason for holding property in trust for the public benefit ceases, e.g., a navigable stream drys up or is diverted etc., and it is no longer navigable, it is no longer a unique or special benefit to the general public." *Id.* (emphasis added). Finally, the Court's drawing (reproduced above) labels the new river course as "MODIFIED (PRESENT) COURSE." *Rutledge*, 94 Idaho at 122, 482 P.2d at 516.[319]

The important thing is that the Court stated that the cause of the dry-up did not matter. "The parties to this lawsuit disagree as to the causes of such change, however, this fact is irrelevant in the Court's decision." *Rutledge*, 94 Idaho at 122, 482 P.2d at 516. Thus, it is of no consequence whether the land dried up as a result of natural forces or as a result of acts by men who blocked the flow to the south channel. Once the riverbed was no longer uniquely useful to the public, it no longer fell within *Hellerud*'s Exception #1, and it became subject to adverse possession.

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[319] As of this writing, three subsequent appellate decisions have described the facts in *Rutledge*, two of them inaccurately.

In *Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement Dist.*, 112 Idaho 512, 517, 733 P.2d 733, 738 (1987) (Bakes, J.), stated: "We note that no issue was raised in the *Rutledge* case regarding the manner by which that portion of the Boise River had lost its navigable status. … Although the parties in *Rutledge* argued about whether the shift in the Boise River channel was the result of avulsion or accretion and reliction, there was nothing in the *Rutledge* case to indicate that the change in the channel was caused either by Rutledge or by his predecessors in interest." It is true that the parties disagreed about the cause, but there was no mention of avulsion, accretion, reliction, or other natural cause. The argument appears to have been over whose action caused the channel to dry up.

Likewise, in *Pines, Inc. v. Bossingham*, 131 Idaho 714, 717, 963 P.2d 397, 400 (Ct. App. 1998), the Court of Appeals inaccurately said that *Rutledge* "dealt with the natural rechanneling of a navigable stream." In any event, this incorrect description of the facts of *Rutledge* was dictum. The *Pines* case had nothing to do with state ownership of navigable waterways. Indeed, the Court pointed this out in explaining why *Rutledge* was inapposite. *Pines*, 131 Idaho at 717, 963 P.2d at 400.

The third case to describe the facts of Rutledge is *Aldape v. State*, 98 Idaho 912, 913 n.1, 575 P.2d 891, 892 n.1 (1978). This time the Court more accurately summarized the case, saying that it involved "the abandoned channel of a river."

(iii) *Aldape* 1978: Exception #1 includes submerged land—until it becomes dry land by avulsion.

A few years later, a similar fact pattern produced the same answer as *Rutledge*. In *Aldape v. State*, 98 Idaho 912, 913 n.1, 575 P.2d 891, 892 n.1 (1978) (Shepard, C.J.), the Aldapes sought to quiet title based on adverse possession against the State and other private parties.

This *Aldape* case followed a similar fact pattern to *Rutledge*. In *Rutledge*, there were two channels of the Boise River. The southern channel of the river was diverted or blocked, leaving only the northern channel. *Aldape* evidently involved a different stretch of the same river. *Rutledge* appears to have involved a man-made alteration of the river (though the Court said the cause of the dry-up did not matter). In *Aldape*, the Boise River cut an entirely new channel. "Sometime after the survey and the issuance of the original patents, the Boise River cut a new channel to the north of the original channel." *Aldape*, 98 Idaho at 913, 575 P.2d at 892. The Court did not use the term avulsion, but that is the term that would describe such a change.

The Aldapes prevailed against the State, and the State did not appeal. The appeal was limited to adverse possession claims against the other, non-governmental defendants. In the Court's footnote quoted below, the Idaho Supreme Court, citing *Hellerud* and *Rutledge*, explained why the Aldapes prevailed against the State:

> Ordinarily title by adverse possession may not be acquired against the State. Hellerud v. Hauck, 52 Idaho 226, 13 P.2d 1099 (1932). However, see Rutledge v. State, 94 Idaho 121, 482 P.2d 515 (1971), where the State property involved was the abandoned channel of a river.

Aldape, 98 Idaho at 913 n.1, 575 P.2d at 892 n.1. Nothing in *Aldapa* suggests that *Rutledge* is limited to natural changes in the riverbed.

(iv) *Osterloh* 1983: Exception #1 includes submerged land—until it becomes dry land by avulsion.

In *Osterloh v. State*, 105 Idaho 50, 52, 665 P.2d 1060, 1062 (1983) (Huntley, J.), the Court relied on *Rutledge* in holding that the plaintiffs could have asserted (but failed to assert) adverse possession of a portion of the riverbed of the Portneuf River near Lava Hot Springs which had become dry land due to avulsion. Nothing in *Osterloh* suggests that *Rutledge* is limited to natural changes in the riverbed.

(v) *Tyrolean* 1979: Exception #1 includes city streets.

In *Tyrolean Assoc. v. City of Ketchum*, 100 Idaho 703, 604 P.3d 717 (1979) (Dunlap, J. Pro Tem.), the Court declared a blanket exemption from prescription for city streets and sidewalks.

A motel owner maintained an unpermitted, off-site sign in the public right-of-way of Main Street in Ketchum, in violation of the city's zoning ordinance. The motel operator brought suit claiming the ordinance worked an unconstitutional taking of its property. On appeal, the Court found there was no taking because the motel operator had no property right in the location of the sign on public property.

> It is well established in Idaho that a city has exclusive control over its streets, highways and sidewalks within its municipal boundaries. A city has no right to grant to an individual the permanent use of a public street. Furthermore, no one has a vested right to use the streets and public rights-of-way for private gain. A fortiori no right to use public property for private purposes can be acquired by prescription or acquiescence against a municipality.
>
> In the instant case, as the Tyrolean sign is located on the public right-of-way, Tyrolean Associates have no vested property interest in maintaining the sign in its present location.

Tyrolean, 100 Idaho at 704-05, 604 P.2d at 718-19 (citations omitted) (emphasis added).

It in short opinion, the Court offered no further analysis in support of its sweeping declaration of immunity from adverse possession for "public property." *Tyrolean* is consistent with the broad language in *Robinson* (discussed above), but its holding is difficult to square with *Total Success I* (discussed below). Note: *Tyrolean* made no mention of either *Hellerud* or *Rutledge*.

(vi) *Idaho Forest Industries* 1987: Depending on the equities, Exception #1 may or may not include land that is no longer submerged by act of man.

In *Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement Dist.*, 112 Idaho 512, 733 P.2d 733 (1987) (Bakes, J.), the Court raised questions about the scope of *Rutledge*, but did not overrule it. Instead, it remanded, allowing the district court to ponder whether the equitable principles upon which the public trust doctrine rests may, in some circumstances, allow the State to remain immunized from adverse

possession where the change in the submerged land is manmade. Thus, under *Idaho Forest Industries*, the manmade nature of the alteration may be is a factor to be considered, but it is not determinative. Rather, an equitable balancing of interests must determine whether formerly submerged lands may be adversely possessed.

The plaintiff ("IFI") sought to quiet title as against both a watershed improvement district and the State of Idaho (as third party defendant). The disputed property was 30 acres of land that formerly was periodically inundated by Hayden Lake. The State claimed ownership of the formerly submerged land under the equal footing doctrine. In 1910, a predecessor of IFI constructed a dike on the property causing the land to become dry land, used for grazing and crop production.

The Court began by recognizing that the beds of navigable waters at the time of statehood belong the State under the equal footing doctrine and are held in trust under the public trust doctrine. The two doctrines work in conjunction, but serve distinct roles. The first establishes the State's title; the second restricts the State's ability to alienate trust lands. *Idaho Forest Industries*, 112 Idaho at 516, 733 P.2d at 737.

IFI claimed title based on deed and adverse possession against the State. IFI's chain of title traced to a 1909 patent to its predecessor in interest. "The deeds in both these conveyances describe the eastern boundary of the property as the meander line of Hayden Lake, but fail to specifically locate the meander line." *Idaho Forest Industries*, 112 Idaho at 514, 733 P.2d at 735.

> The only direct evidence submitted to the district court by appellants regarding the natural high water mark of Hayden Lake at or prior to statehood consisted of the original survey conducted by the Government Land Office (GLO) in 1880. The 1880 survey does depict the meander line of Hayden Lake. However, as indicated by the district court and admitted by the parties, the GLO meander line is obviously inaccurate and bears no resemblance to the shoreline of the lake.

Idaho Forest Industries, 112 Idaho at 519, 733 P.2d at 740.

Notwithstanding the uncertainty over the true location of the original meander line, IFI conceded that some of its land was submerged at the time of statehood. *Idaho Forest Industries*, 112 Idaho at 514, 733 P.2d at 735. Citing *Rutledge*, IDF contended that, because the land is no longer submerged, it is subject to adverse possession. The district court agreed. The Idaho Supreme Court reversed and remanded, without reaching a final determination. However, it questioned whether *Rutledge* should apply to submerged land altered by man. The Court observed that *Rutledge* did not say whether the change was man-made or not. (See footnote 319 on

page 316.) It then ignored the fact that *Rutledge* said this did not matter. "The parties to this lawsuit disagree as to the causes of such change, however, this fact is irrelevant in the Court's decision." *Rutledge*, 94 Idaho at 123, 482 P.2d at 517. The *Idaho Forest Industries* Court then pondered whether *Rutledge* should be limited to natural changes.

> While those equitable principles in certain circumstances may no longer apply to public trust property which has lost its navigable status naturally, *Rutledge v. State, supra,* it may well be that a loss of navigability resulting from a manmade dike or diversion may not, for equitable reasons, eliminate or destroy the public trust status of land which was once subject to that public trust. We deem it inappropriate on the status of this record to attempt to determine under what circumstances a manmade destruction of navigability could eliminate the public trust status of state land. There are important material issues of fact which must be resolved before a final equitable decision could be made.

Idaho Forest Industries, 112 Idaho at 517-18, 733 P.2d at 738-39.

In other words, the Court made no ruling limiting *Rutledge*. Instead, it emphasized that the public trust doctrine is grounded in "common law equitable principles." *Idaho Forest Industries*, 112 Idaho at 517, 733 P.2d at 738. It then left it to the trial court to determine how the equities might play out and "whether or not the subject property ever was subject to the public trust doctrine" (given the uncertainty about the location of the original meander line). *Idaho Forest Industries*, 112 Idaho at 518, 733 P.2d at 739.

In sum, under *Idaho Forest Industries*, the manmade nature of the alteration may be is a factor to be considered, but it is not determinative. Rather, an equitable balancing of interests must determine whether formerly submerged lands may be adversely possessed.

(vii) *Pines* 1998: Exception #1 includes state highways.

Pines, Inc. v. Bossingham, 131 Idaho 714, 717, 963 P.2d 397, 400 (Ct. App. 1998) (Perry, J.) dealt with a small property adjacent to an off-ramp of Highway 95 in Coeur d'Alene. (See section IV.U.6.c on page 327 for a more thorough discussion of this case.) The plaintiff asserted adverse possession against another landowner and the State of Idaho. Even though the case had nothing to do with submerged land, the plaintiff urged the Court to "apply the rationale" of *Rutledge* to allow adverse

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possession of the unused portion of a state highway. *Pines* declined to the suggestion, saying *Rutledge* was inapposite:

> Pines asks this court to apply the rationale of *Rutledge v. State*, 94 Idaho 121, 482 P.2d 515 (1971), to the facts of this case. Such an application would clearly be in error. *Rutledge* did not involve a highway right-of-way nor did it deal in property purchased by public funds.

Pines, 131 Idaho at 717, 963 P.2d at 400.

The *Pines* Court ruled that "the main body of law concerning adverse possession of State owned land has consistently held that a highway right-of-way, even the unused potions therein, is not subject to adverse possession." In so ruling, it did not mention sovereign immunity or otherwise explain the basis for its decision, except to point to prior cases involving adverse possession of public roads.[320]

Pines is discussed further in section IV.U.6.b (Adverse possession of the unused portion of a right-of-way) on page 324.

(viii) *Bedke* 2010: Exception #1 includes municipal water pipelines.

In *In Re SRBA, Bedke v. City of Oakley*, 149 Idaho 532, 237 P.3d 1 (2010) (Horton, J.), two pro se litigants claimed an appropriation of water rights in the Snake River Basin Adjudication ("SRBA") based water diverted by the City of Oakley and delivered to the Bedkes under a contract. The Court noted that they may have made beneficial use of the water, but they failed the other test for appropriation because they were not the ones who diverted it from the source springs. The Bedkes argued that if a diversion is required, they acquired "some sort of conveyance right" in the city's pipeline by prescription. This argument went nowhere because everyone (the special master, the district court, and the Idaho Supreme Court) recognized there was no adversity when receiving water under a contract. The Court could have stopped there. But the Court also quoted from the special master's ruling to the effect that

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[320] The *Pines* Court referenced three other cases addressing whether private parties may adversely possess the unused portion of a public road. None of those cases mentioned *Hellerud* or *Rutledge*. Two of them held that adverse possession did not occur, but only because occupation of the unused portion does not satisfy the substantive requirement that the use be "adverse" to the public's ownership. *Rich v. Burdick*, 83 Idaho 335, 362 P.2d 1088 (1961) (Taylor, C.J.) and *Pullin v. City of Kimberly*, 100 Idaho 34, 592 P.2d 849 (1979) (Donaldson, J.). In so holding, these cases necessarily imply that adverse possession may occur against a public entity owning a public road, but not under these facts. The holding in the third case, *Bare v. Dep't of Highways*, 88 Idaho 467, 470-71, 401 P.2d 552, 553-54 (1965) (Taylor, J.), is less clear, but the Court employed broad language suggesting that adverse possession (or prescription) never applies as to any portion of a public road.

"Idaho has followed the general rule that property held by a municipality in trust for public use cannot be acquired by adverse possession or prescription. [Citing *Hellerud*.]" *Bedke*, 149 Idaho at 540-41, 237 P.3d at 9-10 (quoting with approval a statement of the special master). The *Bedke* Court went on to say that this question was definitively answered in *Tyrolean* "when we held that 'no right to use public property for private purposes can be acquired by prescription or acquiescence against a municipality.'" *Bedke*, 149 Idaho at 541, 237 P.3d at 10. The *Bedke* Court employed overbroad language in describing the cases relied on. What is clear is that a city's municipal water delivery pipeline falls within Hellerud's first exception. Note that if *Hellerud* were overruled, the outcome would not change. Receiving water from a municipal pipeline under contract is not adverse and does not create a prescriptive property right.

(ix) *H.F.L.P.* 2014: Exception #1 includes a road used by a city to access its wastewater treatment plant.

In *H.F.L.P. v. City of Twin Falls*, 157 Idaho 672, 339 P.3d 557 (2014) (Burdick, C.J.), the Court affirmed the decision of then District Court Judge Bevan, who now serves as Chief Justice. H.F.L.P. was a land-owing business entity. It asserted a prescriptive easement to use a dirt road in the Snake River Canyon. The road was controlled by the city, located primarily on city property, and used by the city to access its wastewater treatment facility. For many years H.F.L.P. and its predecessors had also used the road to access parcels of land they owned. The city placed a locked gate on its road, but gave landowners a key.[321] When the landowners sought a building permit, it was denied because they could not prove lawful access. H.F.L.P then sued the city asserting a prescriptive easement and an easement by necessity. On appeal, the Court found that the landowners failed to satisfy the substantive requirements for a prescriptive easement (e.g., the use was permissive, not adverse). The Court then tacked on a footnote offering this dictum: "In any event, H.F.L.P.'s prescriptive easement claim must fail because prescriptive easements cannot be obtained against public lands." *H.F.L.P.*, 157 Idaho at 683 n.3, 339 P.3d at 568 n.3. The Court offered no analysis, other than citations to *Hellerud*, *Tyrolean* (a case dealing with city streets, which made no mention of *Hellerud* or *Rutledge*), and a California case. The Court, quoting the district court, noted: "[t]he

[321] "The City owns roughly twenty-seven parcels in the Snake River Canyon, beginning at the waste water treatment plant … . The road begins at the treatment plant and runs west/northwest … ." *H.F.L.P.,* 157 Idaho at 676, 339 P.3d at 561. "At one point in the 1960's after the City took over the treatment plant, the Uries encountered a gate—which was on the southeast part of the treatment plant property—and they attempted to dismantle it. Thereafter, a man from the treatment plant stopped the Uries from dismantling the gate and provided them with a key to the gate. The Uries and their successors [H.F.L.P.] have had a key ever since then." *H.F.L.P.,* 157 Idaho at 676, 339 P.3d at 561.

land in question over which the prescriptive easement is sought has been public land for as long as the court knows based on the information provided by H.F.L.P." *H.F.L.P.,* 157 Idaho at 683 n.3, 339 P.3d at 568 n.3.

(x) *Frost* 2021: Exception #1 includes irrigation district property.

In *Frost v. Gilbert*, 169 Idaho 250, 267, 494 P.3d 798, 815 (2021) (Stegner, J.), a farmer sought to quiet title to an easement by prescription (for access and placement of irrigation equipment) against neighboring landowners. The access may have crossed irrigation district property. Relying on *H.F.L.P.*, the Court found that irrigation district property is public property exempt from adverse possession:

> Moreover, even if a portion of the switchback were built over property owned by the Emmett Irrigation District, we are persuaded that this property would fall under the rule we recently restated: "[P]rescriptive easements cannot be obtained against public lands." *H.F.L.P., LLC*, 157 Idaho at 683, 339 P.3d at 568. We have long held that irrigation districts are quasi-public municipal corporations which own property in trust for landowners within their jurisdiction. *See Lewiston Orchards Irr. Dist. v. Gilmore*, 53 Idaho 377, 23 P.2d 720, 722 (1933); *Robinson v. Lemp*, 29 Idaho 661, 161 P. 1024, 1026 (1916) (quotation from *Robinson* omitted]). The irrigation district property was held for public use and could not be the subject of a prescriptive easement. *See also* 2 C.J.S. *Adverse Possession* § 20. Accordingly, we affirm the district court's finding that a prescriptive easement had not been proved. … To the extent the switchback was built over irrigation district property, a prescriptive easement could not have been obtained.

Frost v. Gilbert, 169 Idaho 250, 267, 494 P.3d 798, 815 (2021) (Stegner, J.).

6. Adverse possession of public roads

a. Overview

Prescriptive use by the public ripens into creation of a public road. But there are instances where private parties have asserted private ownership to a portion of a public right-of-way. The classic fact pattern is a portion of a gas station inadvertently overlapping an unused portion of the adjacent highway.

As discussed below, the cases are clear that use of the unused portion of a public road is not deemed "adverse" and therefore does not satisfy the substantive

requirements for adverse possession. As for private use of the used portion of a public road, the case law is in conflict. As for private use of a road that is no longer used by the public, that is an open question.

This discussion overlaps, obviously, with the discussion the sections above. But it seems helpful to analyze in one place the various (and conflicting) cases dealing specifically with adverse possession of public roads.

b. Adverse possession of the unused portion of a right-of-way

In *Rich v. Burdick*, 83 Idaho 335, 362 P.2d 1088 (1961) (Taylor, C.J.), state highway directors sued the owner of a gas station that encroached on U.S. Highway 30 near in Bear Lake County. Although labeled a "U.S. highway," the opinion describes it as being a State-owed road at the time of the litigation, though originally created by formal dedication as a county road. The decision offers no explanation as to how the road came into State ownership. The decision does not appear to turn on whether it a State highway or a county road. Instead, the Court announces a general rule that adverse possession does not occur with respect to the unused portion of a highway (because it is not adverse).

> 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 or right to the use thereof.
>
> Possession and use of an unused portion of a highway by an abutting owner is not adverse to the public and cannot ripen into a right or title by lapse of time no matter how long continued.

Rich, 83 Idaho at 345, 362 P.2d at 1094 (emphasis added, citations omitted).[322] In other words, the use of the unused portion of the road was not adverse (i.e., was permissive), and therefore did not ripen into adverse possession. The implication of *Rich* is that if the use by the landowner actually had interfered with the public use of the road, that would have been an effective adverse possession.

[322] A subsequent case, *Dalton Highway Dist. of Kootenai Cnty. v. Sowder*, 88 Idaho 556, 563, 401 P.2d 813, 816 (1965) (McQuade, C.J.), contains dictum that inaccurately summarizes the holding in *Rich*: "The holding of this court in the Burdick case is that long and continuous possession of public lands will not ripen into ownership, even though accomplished through the express permission of the public authority." In Rich, there was no adverse possession because the use of the unused portion was essentially permissive (not even though it was permissive). This mischaracterization of the *Rich* case had no bearing on the decision, which rested on issues of misrepresentation by the highway district and equitable estoppel.

In *Bare v. Dep't of Highways*, 88 Idaho 467, 401 P.2d 552 (1965) (Taylor, J.) the plaintiff owned a gas station and motel complex that encroached on the unused portion of State Highway No. 28 in the Village of Mud Lake. More than a decade after this encroachment occurred, the Department of Highways decided to improve and widen the road. The agency gave notice to the landowner and ultimately placed a barrier on one side of the island holding the gas pumps. Bare sued, claiming adverse possession. *Bare*, like *Rich v. Burdick*, involved a claim of adverse possession to the unused portion of a highway. The Court rejected the claim, citing *Rich* and several older cases dealing with adverse possession of the used portion of a road. The decision could have rested on the reasoning of *Rich* (that a public road may be adversely possessed, but occupation of the unused portion is not adverse). Instead, however, made a broad statement that is at odds with *Rich*: "An abutting owner cannot acquire a right to use a portion of a highway right-of-way for a private business purpose by prescription or acquiescence. … The term 'highway' includes the entire width of the right-of-way, whether or not the entire area is actually used for highway purposes." *Bare*, 88 Idaho 470-71, 401 P.2d at 553-54. The *Bare* Court cited some older cases (e.g., *State v. Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596 (1959) (Smith, J.)), holding that there can be no adverse possession of the used portion of a public road.

In *Pullin v. City of Kimberly*, 100 Idaho 34, 592 P.2d 849 (1979) (Donaldson, J.), the Pullins sued to enjoin the City of Kimberly to quiet title to a 25-foot strip of property that at one time had been dedicated as a street for public use. The opinion is less than clear on the facts, but it appears that the strip of land was the unused portion of a road still in use as a city street. The Pullins contended that the city had represented to them that the 25-foot strip had been vacated, but the city disproved that by affidavit. On appeal, the Pullins came up with an alternative argument based on adverse possession.[323] The Court rejected that out-of-hand:

> The only other theory available to the Pullins was that of adverse possession. However, it is well settled in Idaho that an abutting landowner's use or possession of an unused portion of a highway is not adverse to the public and cannot ripen into a right or title by lapse of time no matter how long continued.

Pullin, 100 Idaho at 36, 592 P.2d at 851 (citing *Rich v. Burdick*) (emphasis added, footnote omitted). The *Pullin* decision does no more than recite the rule set out in *Rich v. Burdick*.

[323] It is unclear why the Court entertained this after-thought, which was neither pled nor argued below. The Court seemingly blamed the trial court for not considering "other theories upon which the Pullins could have based their claim of ownership." *Pullin* at 851.

Thus, *Rich* (state highway) and *Pullin* (city street) both hold that there can be no adverse possession of the unused portion of a road because such use is not deemed to be "adverse" to the public. Neither was premised on the defense of sovereign immunity. *Bare* (state highway) is less clear. On the facts, it is similar to *Rich* and *Pullin*, but it employed language suggesting that adverse possession is never available with respect to public roads.

In *Pines, Inc. v. Bossingham*, 131 Idaho 714, 963 P.2d 397, 400 (Ct. App. 1998) (Perry, J.), neighbors disputed ownership of a landlocked parcel of surplus State property (not reserved or school lands) "located adjacent to an off-ramp for State Highway 95 in near Coeur d'Alene." *Pines*, 131 Idaho at 715, 963 P.2d at 398. The Bossinghams purchased the parcel from the State at auction for $495 (for no apparent purpose). Adjacent to the Bossingham parcel was land on which Pines operated a motel and restaurant. While the Bossingham parcel was still owned by the State, Pines encroached upon it—paving it and putting in parking spaces. Before long, the two neighbors launched incessant lawsuits over the $495 parcel.[324] Among the issues was Pines' contention that its encroachment onto the neighboring parcel while owned by the State constituted adverse possession. The Idaho Supreme Court rejected that argument without much analysis, providing instead only a quotation from the district court's decision:

> In addressing this issue, the district court stated:
>
> > …
> >
> > Conversely, the main body of law concerning adverse possession of State owned land has consistently held that a highway right-of-way, <u>even the unused portions</u> therein, is not subject to adverse possession. *See Rich v. Burdick*, 83 Idaho 335, 362 P.2d 1088 (1961). Therefore, as a matter of law, I find that Pines' claim of adverse possession against the State, even if not barred by the doctrine of res judicata, is unfounded as contrary to law.

[324] Judge Schwartzman commented on the waste of judicial resources: "Realistically, for all the parties excepting their legal counsel, these cases have been nothing short of a financial drain and legal boondoggle, an exercise in futility. Hopefully, the attorneys obtained their retainers up front." *Pines*, 131 Idaho at 717, 963 P.2d at 400 (Schwartzman, J., concurring).

> On review, we agree with the district court's analysis and conclude that, under *Rich v. Burdick*, 83 Idaho 335, 362 P.2d 1088 (1961), Pines' adverse possession claim is unfounded as contrary to law. *See also Pullin v. City of Kimberly*, 100 Idaho 34, 36, 592 P.2d 849, 851 (1979) ("[I]t is well settled in Idaho that an abutting landowner's use or possession of an unused portion of a highway is not adverse to the public and cannot ripen into a right or title no matter how long continued."); *Bare v. Dep't of Highways*, 88 Idaho 467, 470, 401 P.2d 552, 553 (1965) ("An abutting owner cannot acquire a right to use a portion of a highway right-of-way for a private business purpose by prescription or acquiescence.").

Pines, 131 Idaho at 717, 963 P.2d at 400 (emphasis added).

Note that the district court's analysis of *Pines* quoted by the Idaho Supreme Court above misstated the holding in *Rich*. The district court implies that adverse possession never works against state highways (even the unused portions). The district court's suggestion that the cases consistently have held that adverse possession is unavailable as to the entire "right-of-way, even the unused portions" is wrong. The Idaho Supreme Court's decision in *Pines* then goes on to correctly describe the holding in *Pullin* (that adverse possession of the unused portion of a public road fails not because of sovereign immunity but because of lack of adversity). Thus, the Court has made contradictory statements about whether adverse possession is or is not possible. It is difficult to say what the holding is.

c. Adverse possession of the used portion of a public right-of-way

The cases in the previous section (dealing with adverse possession of the unused portion of a road) are premised on the observation in the seminal case that "use of an unused portion of a highway by an abutting owner is not adverse to the public." *Rich v. Burdick*, 83 Idaho 335, 345, 362 P.2d 1088, 1094 (1961) (Taylor, C.J.). The compelling implication is that adverse possession may occur with respect to the used portion of the road. Otherwise, why draw a distinction between the used and unused portions? And why base the holding on the absence of adversity? Indeed, the conclusion that the used portion of the road is subject to adverse possession follows from the waiver of sovereign immunity in Idaho Code § 5-202. However, the cases of *Robinson* and *Tyrolean* discussed below hold that adverse possession is not available as to public roads.

(i) *Robinson* (1916)

In *Robinson v. Lemp*, 29 Idaho 661, 161 P. 1024, 1026 (1916) (Morgan, J.), the Court announced the blanket rule that "title to property held by a municipality for public use, such as for streets, parks, public building sites, etc., cannot be acquired by adverse possession, but the opposite rule prevails where the property is held by it for other than a public use." This case is discussed in detail in section IV.U.5.d(i) on page 313.

(ii) *Tyrolean* (1979)

In 1979, the Court declared, without much explanation, that streets and roads in public use are not subject to prescription (adverse possession).

> A fortiori no right to use public property for private purposes can be acquired by prescription or acquiescence against a municipality. Pullin v. City of Kimberly, 100 Idaho 34, 592 P.2d 849 (1979); West v. Smith, 95 Idaho 550, 511 P.2d 1326 (1973); Bare v. Department of Highways, supra; Yellow Cab Taxi Service v. City of Twin Falls, supra; cf. Snyder v. State, supra (inverse condemnation).

Tyrolean Assoc. v. City of Ketchum, 100 Idaho 703, 704, 604 P.3d 717, 718 (1979) (Dunlap, J. Pro Tem.). The Court cited the cases in the quotation, but made no reference to *Robinson*.

The holding from *Tyrolean* was quoted with approval in *In Re SRBA, Bedke v. City of Oakley*, 149 Idaho 532, 541, 237 P.3d 1, 10 (2010) (Horton, J.) and paraphrased in a footnote in *H.F.L.P. v. City of Twin Falls*, 157 Idaho 672, 683 n.3, 339 P.3d 557, 682 n.3 (2014) (Burdick, C.J.) ("prescriptive easements cannot be obtained against public lands"). These cases are discussed in section IV.U.5.d(viii) on page 321

(iii) *Total Success I* (2008)

Ada Cnty. Highway Dist. v. Total Success Inv., LLC ("*Total Success I*"), 145 Idaho 360, 179 P.3d 323 (2008) (Burdick, J.) is different in posture and holding from *Robinson* and *Tyrolean*, but not necessarily in conflict. This is because *Total Success I* did not involve a private party asserting adverse possession or prescriptive use against a governmental entity. It was the other way around. ACHD brought suit. However, *Total Success I* did recognize that the governmental agency's ability to bring suit to assert title against a private party would be cut off ten years after the agency's claim accrued.

In *Total Success I*, ACHD brought a quiet title action asserting ownership of a public road (which had shifted onto private property over the years) based on Idaho Code § 40-202(3).[325] Under section 40-202(3), title would shift automatically to ACHD after five years of public use and maintenance. The landowner raised as a defense the statute of limitations in Idaho Code § 5-202. Essentially, the landowner said that the shift in title after five years of use and maintenance occurred decades ago, so it was too late for ACHD to assert that it gained title through prescription.

The Court recognized that a plain reading of the statute would do just that. In other words, it would prevent a county or highway district from establishing title to public roads based on public prescriptive use unless the governmental entity sued to establish title within ten years after the five-year prescriptive period was satisfied.[326] The Court concluded this would lead to an absurd result (which would upend public ownership of virtually every public road obtained by prescription).

> 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

[325] *Total Success I* involved an alley that was platted in 1906. In 1957, power poles were placed along the alley forcing misalignment of the alley. For decades, people traveled on the alley somewhat to the west of where it was platted. In 1997, the defendant's predecessor leased property to the operator of a cell tower that was adjacent to the alley. When the defendant later acquired the property, it conducted a survey and moved the fence around the cell tower six feet east of the original property line, the effect of which was to block use of the alley by all but small motor vehicles. ACHD asserted that over the years, a public road in the existing location had been established by prescriptive public use and maintenance under Idaho Code § 40-202.

[326] The Court determined (or assumed) that Idaho Code § 5-202 applies not just to property of the State government itself, but also to rights-of-way owned by counties and highway districts. See footnote 308 on page 308.

> limitations begins to run upon conduct interfering with the State's claim of right. We hold that because ACHD 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 ownership comes into existence (after five years of public use and maintenance) but from the time that someone interferes with the public's use of the road.

In most cases applying section 5-202, it is the private party that asserts title against the governmental entity based on adverse possession or prescriptive use. As noted, the procedural posture of *Total Success I* is different. Here, the governmental entity (ACHD) was the plaintiff, asserting ownership of a public road against a private landowner based on the public road statute (section 40-202(3)). Accordingly, *Total Success I* does not directly present the issue central to *Hellerud*, *Robinson*, and *Tyrolean*—whether a private party may adversely possess government property held for public use.

However, in *Total Success I*, the ten-year statute of limitations in section § 5-202 was found to apply (with the clock starting upon interference with ACHD's claim of right). ACHD's claim was brought within ten years of interference, so the section 5-202 defense failed. But the holding in *Total Success I* makes clear that if ACHD had waited longer to bring suit, its quiet title claim would have failed.

Had that been the situation, would ACHD's claim of ownership simply be denied (without deciding who does own the land)? Or could the court declare the private party was the true owner? What if ACHD was not the plaintiff? What if a private party were to wait ten years and then bring suit asserting ownership? Could title be established in the private party? Or would cases like *Tyrolean* prevent the private party from prevailing against the government?

If *Total Success I* is limited to the procedural circumstance in which the government asserts ownership but is barred by section 5-202 and ownership is not established in the private party, then *Total Success I* is not inconsistent with *Tyrolean*. But it does seem odd that the court is prevented from recognizing title in ACHD if ACHD brings suit (per *Total Success I*), but would also be prevented from recognizing title in a private part if the private party brings suit (per *Tyrolean*).

d. Adverse possession of a no-longer-used public right-of-way (no reported cases yet)

But what about adverse possession of the entire public right-of-way where the road has not been used for many years? Typically, non-use of the road results in abandonment of the public road (to the extent passive abandonment statutes in effect at the time allow that). But not all roads are subject to passive abandonment (e.g.

roads created by formal dedication or conveyance, or nearly all roads after 1993). See discussion in section II.G on page 141. What would happen, for example, if a road that was not subject to passive abandonment were to fall into non-use and the farmer across whose land the road traverses begins farming over the old dirt road? May the farmer quiet title based on adverse possession for the statutory period?

The author is not aware of any case law addressing this fact setting. However, it appears that the State has consented to adverse possession of State property (so long as public use is made of the road and no State endowment land is involved). In *Rutledge v. State*, 94 Idaho 121, 382 P.2d 515 (1971) (Donaldson, J.) would apply by analogy here. There the Court held that formerly submerged riverbed lost its unique public character when it was dried up, and became subject to adverse possession. Arguably, the same reasoning would apply when a public road stops being used and maintained as a public road.

If adverse possession does apply, note that Idaho Code § 5-210[327] establishes stringent requirements for any claim of adverse possession, notably that the land be either (1) "protected by a substantial enclosure" or (2) cultivated or improved. This statute also requires proof that the person claiming adverse possession has paid all assessed property taxes on the disputed land for the period of adverse possession. Thus, if a farmer cultivates the land where the road used to be (and paid taxes on it), that would do the trick. What about a landowner who places a gate across a road? Is that a "substantial enclosure"? Arguably, yes. Although it does not enclose the entire road, it serves the same purpose.

[327] Section 5-210 is entitled "Oral claim – Possession defined – Payment of taxes." Perhaps one could argue that this limits the applicability of the statute to "oral claims" in the sense of "she told me this was my land" as opposed to purely hostile occupation. On the other hand, the language of the statute itself is not so limited.

V. MECHANISMS UNDER FEDERAL LAW FOR RESOLVING PUBLIC ROAD DISPUTES

A. Federal Quiet Title Act (QTA)

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.[328] Yet it somehow survived the Revolutionary War as part of our common law.

> 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

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[328] As one commentator put it:

> Although the government authorizes adverse possession, it exempts itself from these statutes under the doctrine of sovereign immunity. The doctrine that the sovereign was immune from the tolling of statutes of limitations, termed nullum tempus occurrit regi, or sovereign immunity, originated in England as a means of protecting the king, who was too busy acting for the benefit of his subjects to look after his land. Sovereign immunity was further justified under the dramatic yet questionable policy that "might makes right," or to put it another way, "the King established his own rules for litigation."

Walter Quentin Impert, *Whose Land Is It Anyway?: It's Time To Reconsider Sovereign Immunity from Adverse Possession*, 49 U.C.L.A. Law Rev. 447, 449 (2001) (footnotes omitted).

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(2004) (footnotes omitted).[329]

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.[330] A federal quiet title action may be brought by anyone claiming an interest in real property that is also claimed by the United States.[331]

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:

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[329] The Ohio Supreme Court offered this commentary on the oddity of sovereign immunity in America:

> The history of the [sovereign immunity] doctrine in this country is associated with the English common-law concept that "the king can do no wrong." That concept evolved from the personal prerogatives of the King of England, who was considered the fount of justice and equity in the English common-law. In the English feudal system, the lord of the manor was not subject to suit in his own courts. The king, as highest feudal lord, enjoyed this protection on the theory that no court was above him. Further, the king was considered the supreme power and was, thus, infallible. His person was considered sacred, and the law ascribed to him the attribute of sovereignty. Therefore, it was his personal royal prerogative not to be subjected to suit in his own courts. Accordingly, the king could do no wrong.
>
> Although the notion of sovereign immunity is best suited to a government of royal power, American courts nonetheless accepted the doctrine in the early days of the republic. However, courts and commentators have remained mystified *why* the doctrine was ever accepted in this country.

Butler v. Jordan, 750 N.E.2d 554, 558-59 (Ohio 2001) (citations omitted) (emphasis original).

[330] 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).

[331] 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 Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012) (Kagan, J.).

- 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."[332]
- 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.[333]

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 (9th Cir. 1983).

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[332] "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.).

[333] "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.

2. Claims under the federal QTA may not be brought in state court.

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 (9th Cir. 1980).

3. The federal QTA is the exclusive means of resolving title to federal property.

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. [334]

> 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 (9th Cir. 2005) (dispute over plaintiff's right to an easement over national forest); *McFarland v. Norton*, 425 F.3d 724, 726-27 (9th 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 (9th Cir. 1995) (per curium) (dispute regarding the scope of easement over national wildlife refuge); *Narramore v. United States*, 852 F.2d 485, 490-92 (9th Cir. 1988) (dispute over whether flooding exceeded the scope of an easement).

Robinson v. United States, 586 F.3d 683, 686 (9th Cir. 2009).

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

[334] 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).

> 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).

In *S. Utah Wilderness Alliance v. BLM* ("*SUWA*"), 425 F.3d 735 (10th Cir. 2005), the Tenth Circuit impliedly allowed (on remand) a determination of title to federal property outside of a federal quiet title action.[335] Four years later, the Tenth Circuit politely repudiated this approach, reaffirming that the federal QTA is exclusive:

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[335] 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.

> 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 (10th Cir. 2009) (parentheticals and brackets original, but footnotes omitted), *rev'd en banc*, 632 F.3d 1162 (2011) (reversed for lack of standing).

4. Other federal statutes waiving sovereign immunity may not be used to end-run the federal 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.[336]

[336] "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 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

However, use of other statutes waiving sovereign immunity may not be used to end run the federal QTA. For example, the federal Administrative Procedure Act ("APA") (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 (9th Cir. 1999) (citing *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996)). Where the core of the suit is to resolve title, a litigant must employ the QTA and may not use the APA instead if the QTA is unavailable for some reason:

> 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 (9th 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 (9th 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

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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.

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. See also *McMaster v. United States*, 731 F.3d 881, 900 (9th Cir. 2013) and *Mills v. United States*, 742 F.3d 400, 405 n.6 (9th Cir. 2014) to that effect.

5. Validation of R.S. 2477 roads on federal land

See discussion in section III.G.6 ("Idaho allows validation of R.S. 2477 roads on federal land where the United States does not contest the claim (the *Nemeth* case).") on page 194.

6. Only those asserting title may bring suit under the federal QTA.

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 (10th 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 a 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 (10th 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 (8th 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 (10th Cir. 1978)).

The long and hard fought litigation in *S. Utah Wilderness Alliance v. BLM* ("*SUWA*"), 425 F.3d 735, 782 (10th 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 (10th 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 356 at page 372.

Another 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 (10th 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 (8th Cir. 2001).

One outlier is *Shultz v. Dep't of Army* ("*Shultz II*"), 10 F.3d 649 (9th Cir. 1993), *opinion withdrawn*, 96 F.3d 1222 (9th 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.[337]

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 (10th Cir. 2010),[338] 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.[339] 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.

7. 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

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[337] 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 curium).

[338] The intervention issue is discussed further by a divided court, sitting *en banc*, in *San Juan County v. United States*, 503 F.3d 1163 (10th Cir. 2007).

[339] 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.

when it is the plaintiff. It simply brings an ordinary common law or statutory quiet title action in federal court.

8. 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 (10th 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 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.

9. Environmental suits against counties

In one case, an environmental group succeeded (until an *en banc* rehearing ruling denied them standing) in obtaining injunctive relieve 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 (10th 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 (10th 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 Societ*y court distanced itself (essentially repudiating) language in *S. Utah Wilderness Alliance v. BLM* ("*SUWA*"), 425 F.3d 735, 788 (10th 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.

10. 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).[340]

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 V.B on page 357) or as a Tucker Act taking claim (for recovery of damages only) (see section V.C on page 358).

11. Is there any role left for state proceedings?

Note: See discussion of related topic in section III.G.6 ("Idaho allows validation of R.S. 2477 roads on federal land where the United States does not contest the claim (the Nemeth case)") on page 194.

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.[341] 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.

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[340] "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).

[341] 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

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?

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).[342]

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road is not an R.S. 2477 road, they will have saved the expense of litigating the matter in federal court.

[342] 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

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 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.

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.

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' 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, C.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.[343] 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[344]).

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[343] 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.

[344] 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)

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).

12. 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

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(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.

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> 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).[345]

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 (5th 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)).

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 (9th Cir. 2013) (overruling *Marley v. United States*, 567 F.3d 1030 (9th Cir.

[345] 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).

2008)). *Kwau Fun Wong* was compelled by the Supreme Court's ruling in *Sebelius v. Auburn Regional Medical Center*, 133 S. Ct. 817 (2013).

The U.S. Supreme Court resolved any doubt on that point in *Wilkins v. United States*, 143 S. Ct. 870 (2023) (Sotomayor, J.). The *Wilkins* Court held that the QTA's statute of limitations is not jurisdictional, but is instead a claims-processing rule that can be subject to equitable tolling. In other words, a court may find cause to "forgive" a plaintiff's untimeliness.

The statute of limitations 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.[346] 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 Emlly 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 (9th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981)).

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 Emlly and Chetco

[346] 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.

> Routes when the government required a mineral survey to allow access to the Allemen 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 Emlly 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 Inv., LLC* ("*Total Success I*"), 145 Idaho 360, 179 P.3d 323 (2008) (Burdick, J.), as discussed in section IV.T at page 295.

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 (9th Cir. 2005), *second appeal, on a different issue*, *McFarland v. Kempthorne*, 545 F.3d 1106 (9th 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 (9th 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 (9th 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),[347] 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

[347] This case has not been published as of May 7, 2011.

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 (9th Cir. 2005)).

In *Cnty. of Shoshone v. United States*, 589 Fed. Appx. 834, 835 (9th 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.

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 III*"), ___ 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-bared, 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.[348] 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

[348] "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 (9th 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.).

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 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 act 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"[349] 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.

[349] The Travel Management Rule addresses not only roads (used for motor vehicle travel), but trails and off-road areas.

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 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.[350] 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
> (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

[350] 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.

> 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 (9th 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 (10th 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

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> 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 (10th 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 unadjudicated 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 or R.S. 2477 roads. *S. Utah Wilderness Alliance v. BLM* ("*SUWA*"), 425 F.3d 735, 754 (10th 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.[351]

The although purporting to establish federal standards for R.S. 2477 roads,[352] 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,"[353] 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

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[351] 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, 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.
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> …
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> 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.

[352] 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.

[353] 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).

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.[354] 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 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*").[355] (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 (10th 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

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[354] "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 Envt'l L. 289, 294-95 (1997).

[355] Following *SUWA*, this guidance was revoked by *Norton Policy*, discussed below.

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.[356] 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.

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

[356] 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.

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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.[357] The Norton amendments to the rules relaxed the 12-year deadline for seeking the disclaimer.[358]

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.)

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[357] 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."

[358] 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).

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 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.
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> …
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> 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.
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> 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.[359] 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.

[359] 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.

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 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.
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> …
>
> 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 (9th 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."[360] Indian reservations are deemed reserved lands, not public lands, for purposes of R.S. 2477.[361]

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

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[360] 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)).

[361] "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*, 394 F.2d 8, 11 (8th Cir. 1968). *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.").

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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 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 V.A.10 at page 343), litigation under the federal APA (see section V.B at page 357), and the litigation under the Tucker Act (see section V.C at page 358).

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VI. JURISDICTION OVER AND CONTROL OF CITY STREETS

A. Table of relevant statutes and regulations

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, 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."[362]	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(3). See discussion in section VI.C.4 on page 409 regarding dictum in *Sandpoint III* addressing the interaction of section 40-104(1) and sections 40-109, 40-1310, 40-1333, and 50-1330.

[362] 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*.

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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(3). See discussion in section VI.C.4 on page 409 regarding dictum in *Sandpoint III* addressing the interaction of section 40-104(1) and sections 40-109, 40-1310, 40-1333, and 50-1330.
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 *Sandpoint IV*, 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.[363] In addition, there are a number of town sites that have been platted in Idaho that never became municipalities at all.[364]
Idaho Code § 40-203A	This is the road validation statute. It 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)	"This section [the road validation statute] 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."	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.

[363] 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.

[364] *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 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).	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 not 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 within their highway system 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 *Sandpoint* 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 VI.C.4 on page 409 regarding dictum in *Sandpoint III* addressing the interaction of section 40-104(1) and sections 40-109, 40-1310, 40-1333, and 50-1330.

Idaho Code § 40-1310(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."	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.
Idaho Code § 40-1310(8)	"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 … ."	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).
Idaho Code § 40-1323(1)	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."	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).

Idaho Code § 40-1324	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."	Proviso deals only with bonds issued by city, not validation or vacation.
Idaho Code § 40-1333	"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.	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 VI.C.4 on page 409 regarding dictum in *Sandpoint III* addressing the interaction of section 40-104(1) and sections 40-109, 40-1310, 40-1333, and 50-1330.
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 § 40-1410(2)[365]	"Title to all machinery, buildings, lands and property of every kind and nature, belonging to each city highway system, highway district and county highway system shall immediately upon the dissolution of the system or district and without further conveyance, be vested in the commissioners [of the single, county-wide highway district] as custodians"	This provision automatically conveys whatever property each city owns in city streets (whether fee or right-of-way) to the county-wide highway district. Thus, ACHD became the owner of all city streets within Ada County. (Voters approved the creation of ACHD in May 1971, which became effective in January 1972.)
Idaho Code §§ 40-1501 to 40-1519	Chapter 15 contains the consolidation provisions whereby two adjacent highway districts may be consolidated into one district.	

[365] Idaho Code § 40-1410(2) was previously codified to Idaho Code § 40-2715. See *Worley Highway Dist. v. Kootenai Cnty*, 98 Idaho 925, 926 n.2, 576 P.2d 206, 207 n.2 (1978) (Donaldson, J.).

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 *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. 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)[366]	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 (within chapter 14). 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 *Sandpoint III* 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 *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. The Court did not explain whether or how these statutes apply to cities with functioning street departments that are overlapped by highway districts.

[366] Earlier versions of Idaho Code § 40-1713 pre-date the comprehensive re-codification of road statutes in 1985 (H.B. 265, 1985 Idaho Sess. Laws, ch. 253). See *Worley Highway Dist. v. Kootenai Cnty*, 98 Idaho 925, 926 n.1, 576 P.2d 206, 207 n.1 (1978) (Donaldson, J.) (quoting an earlier version codified at Idaho Code § 40-2703). The pre-1985 version of the statute did not include the exclusion of city streets.

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 *Sandpoint II*, the Court relied on this provision in holding that the city could not "inherit" funds of the highway district if it were dissolved.
Idaho Code § 40-2308	"Every gas, water, or railroad corporation has the power to lay conductors and tracks through the public ways and squares in any city with the consent of the city authorities, and under reasonable regulations and for just compensation, as the city authorities and the law prescribe."	This statute (along with Idaho Code §§ 50-328 to 50-329A) authorizes cities to enter into franchise agreements with utilities based on ownership of city streets.

TITLE 50 STATUTES **ADDRESSING ROAD JURISDICTION AND AUTHORITY OF CITIES, COUNTIES, AND HIGHWAY DISTRICTS**		
Citation	**Quotation and/or summary of provision**	**Comment**
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 to the extent the city is overlapped by a highway district.
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.

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Idaho Code § 50-314	"Cities shall have power to: control and limit the traffic on streets, avenues and public places; regulate and control all encroachments upon and into all sidewalks, streets, avenues, and alleys in said city; remove all obstructions from the sidewalks, curbs, gutters and crosswalks at the expense of the person placing them there."	This is another broad grant of authority that reinforces the right of cities to validate and vacate city streets.
Idaho Code §§ 50-328 to 50-329A		These statutes (along with Idaho Code § 40-2308) authorize cities to enter into franchise agreements with utilities based on ownership of city streets.
Idaho Code § 50-334	Cities are empowered to declare what shall be deemed nuisances, to prevent, remove and abate nuisances at the expense of the parties creating, causing, committing or maintaining the same, to levy a special assessment as provided in section 50-1008, Idaho Code, on the land or premises whereon the nuisance is situated to defray the cost or to reimburse the city for the cost of abating the same, and this power shall extend three (3) miles beyond the city limits, provided however, that the expense of declaring, preventing, removing and abating nuisances outside the city limits shall rest with the city when the nuisance comes within the three (3) mile area by reason of expansion of city boundaries.	This statute deals with the authority of cities to abate nuisances. It does not relate to the authority of cities to vacate or validation streets. But it is included here because it may be used by cities to abate encroachments on city streets.
Idaho Code § 50-1301(3)	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.

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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) except for streets within cities with functioning street departments.	This is the clearest legislative statement in title 50 of the principle highway districts do not 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 VI.C.4 on page 409 regarding dictum in *Sandpoint III* addressing the interaction of section 40-104(1) and sections 40-109, 40-1310, 40-1333, and 50-1330.

ITD ADDRESSING JURISDICTION AND CONTROL OF STATE HIGHWAYS		
Citation	**Quotation and/or summary of provision**	**Comment**
Idaho Code § 40-312(3)	"Make reasonable regulations for the installation, construction, maintenance, repair, renewal and relocation of facilities of any utility or communication transmitting entity, in, on, along, over, across, through or under any project on the federal-aid primary or secondary systems or on the interstate system, including extensions within urban areas. …"	This section provides authority of ITD over the placement of utilities in state highways.
IDAPA 39.03.43		These are ITD's rules governing the placement of utilities in state highways. Note that principal streets in many cities are actually state highways. The regulations incorporate by reference ITD's *Utility Accommodations Policy* (July 2023) with is the actual governing document. It is available online at www.itd.idaho.gov.

B. Jurisdiction over city streets

In general, it is well established that cities have control over city streets (except for single county-wide highway districts under Chapter 14 of Title 40).

> It is well established in Idaho that a city has exclusive control over its streets, highways and sidewalks within its municipal boundaries. City of Nampa v. Swayne, 97 Idaho 530, 547 P.2d 1135 (1976); Snyder v. State, supra; Yellow Cab Taxi Service v. City of Twin Falls, 68 Idaho 145, 190 P.2d 681 (1948). A city has no right to grant to an individual the permanent use of a public street. Boise v. Sinsel, 72 Idaho 329, 241 P.2d 173 (1952). Furthermore, no one has a vested right to use the streets and public rights-of-way for private gain. Yellow Cab Taxi Service v. City of Twin Falls, supra. A fortiori no right to use public property for private purposes can be acquired by prescription or acquiescence against a municipality. Pullin v. City of Kimberly, 100 Idaho 34, 592 P.2d 849 (1979); West v. Smith, 95 Idaho 550, 511 P.2d 1326 (1973); Bare v. Department of Highways,

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> supra; Yellow Cab Taxi Service v. City of Twin Falls, supra; cf. Snyder v. State, supra (inverse condemnation).

Tyrolean Assoc. v. City of Ketchum, 100 Idaho 703, 704, 604 P.3d 717, 718 (1979) (Dunlap, J. Pro Tem.). (This holding was quoted with approval in *In Re SRBA, Bedke v. City of Oakley*, 149 Idaho 532, 541, 237 P.3d 1, 10 (2010) (Horton, J.).)

> In Idaho the 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. *Keyser v. City of Boise*, 30 Idaho 440, 165 P. 1121 (1917). A city has exclusive control by virtue of its police power over its streets, highways and sidewalks within the municipal boundaries. *Tyrolean Associates v. City of Ketchum*, 100 Idaho 703, 604 P.2d 717 (1979); *City of Nampa v. Swayne*, 97 Idaho 530, 547 P.2d 1135 (1976); *Snyder v. State*, 92 Idaho 175, 438 P.2d 920 (1968); *Yellow Cab Taxi Service v. City of Twin Falls*, 68 Idaho 145, 190 P.2d 681 (1948). In *Boise City v. Sinsel*, *supra*, the Court held that the holder of a permit to install an obstruction on the public street acquires no vested property right because the city has no right or authority to grant a private right to permanent use of the public streets.

Kleiber v. City of Idaho Falls, 110 Idaho 501, 716 P.2d 1273 (1986) (Shepard, J.).

C. Jurisdiction and control over city streets in areas overlapped by a highway district

1. Overview

Under Idaho law, cities with functioning street departments have jurisdiction and control over city streets even when the city is overlapped by a highway district (except for single county-wide highway districts under Chapter 14 of Title 40). The authority of cities that are <u>not</u> overlapped by a highway district is even more self-evident. Cities have broad authority to validate and vacate streets within their boundaries. See, e.g., 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 … ."). In undertaking such validation or vacations, cities are not constrained by procedural and other limitations applicable to counties and highway districts under Idaho Code §§ 40-203, 40-203A, and 40-208. Thus, for example, a city, if it chose, could bring a quiet title action or a civil trespass/ejectment action, instead of or in addition to initiating validation/vacation proceedings.

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.[367] Thus, cities with functioning street departments[368] 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 (again, with the exception of "single county-wide highway districts" created under Chapter 14 of Title 40).

As discussed in section VI.C.4 on page 409, *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

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[367] 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." N.B., 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 (within chapter 14). The version in section 40-1713(2)(b) excludes city streets (in cities with functioning street departments) from highway district jurisdiction.

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 (within chapter 14) authorizes the creation of 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.).

[368] The term "functioning street department" is defined by statute as: "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(3).

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.

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).[369] 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.[370]

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[369] 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).

[370] 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.

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.[371]

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.[372] The fact is, many Idaho cities with functioning street departments are overlapped by highway 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.[373]

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[371] 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.

[372] 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, 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.

[373] 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.

Idaho statutes addressing the subject (see table on page 384) are consistent and, read together, point to the following conclusion: If the city has a functioning street department, is 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 under Chapter 14 of Title 40).

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 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

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> 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).[374] 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 VI.C.4 on page 409 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.

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[374] 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.

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.[375] 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 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.

Regarding vacation of city streets, section 50-311 provides:

> 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. This provision presumes that that city owned the street or alley in fee simple, which is generally the case. If the city owned a mere easement

[375] 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).

(right-of-way) in the street or alley, that interest would simply disappear upon vacation, and there would be nothing to distribute to adjacent property owners.

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. <u>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.</u>

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 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 VI.C.4 on page 409 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 § 40-1310(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).[376] 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

[376] The reference to "functioning street department" was added in 1994. 1994 Idaho Sess. Laws, ch. 324, § 2.

> 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).

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).[377]

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.

[377] 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 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.

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See discussion in section VI.C.4 on page 409 regarding dictum in *Sandpoint III* addressing the interaction of section 40-104(1) and sections 40-109, 40-1310, 40-1333, and 50-1330.[378]

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).[379]

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

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[378] 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 362 on page 384) 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.

[379] Section 40-204A(5) was originally enacted in 1993. H.B. 388, 1993 Idaho Sess. Laws, ch. 142, § 3. The language quoted above was not added until 2000. S.B. 1407, 2000 Idaho Sess. Laws, ch. 251, § 3.

with functioning highway departments (except in single county-wide highway districts created under Chapter 14 of Title 40).

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 50-1320

Idaho Code § 50-1320 provides:

> The part so vacated, if it be a lot or tract, shall vest in …; or if the same be a street, all right and title thereto shall be distributed in accordance with section 50-311.

Idaho Code § 50-1320. See discussion of section 50-311 under section VI.C.2.d on page 401. This provision links to Idaho Code 50-1317, which applies only to streets within a city that is not exercising its corporate functions[380]). Section 50-1317

[380] The title to section 50-1317 might suggest it also applies to unincorporated areas generally, but that is not reflected in the words of the statute.

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expressly provides that it does not apply to streets under the jurisdiction of highway districts.[381]

c. Section 50-1321

Idaho Code § 50-1321 requires (with some exceptions) the consent of adjoining landowners in order to vacate a public street or public right-of-way that has been "duly accepted and recorded as part of a plat or subdivided tract." This section requires that the written consent must be delivered to "public highway agency" having jurisdiction over said public street or public right-of-way.

The scope and applicability of this section in unclear. It resides within Title 50, dealing with "Municipal Corporations." It is part of Chapter 13, dealing with "Plats and Vacations." Thus, one would expect that it would apply only to streets under city control. Yet it contains a reference to "public highway agency" which is broadly defined (Idaho Code § 50-1301(11)) to include cities, counties, highway districts, etc. Thus, it arguably adds an additional requirement to the vacation process set out in Idaho Code § 40-203. In any event, it only applies to roads created through the platting process.

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.

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[381] "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.

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.

b. Section 40-208

See discussion in section VI.E on page 414.

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.[382] 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. 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

[382] "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.).

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 muddied 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.

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).[383] *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.

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.[384] 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 362 on page 384. 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.

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[383] *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.

[384] 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.)

Section 40-104(1) is the definition of "city system" which excludes roads that are "part of a highway district system."[385] 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)[386]) 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.[387]

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

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[385] 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).

[386] 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).

[387] 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 (H.B. 265, 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 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.

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.[388]

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.[389] 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

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[388] 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.

[389] "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.

parties litigated the case focused on a constitutional challenge to the joint powers agreement. The Court did not want to go there and instead decided the case based on the failure of the joint powers agreement to conform to statutory procedures.[390] 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.

D. 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.

E. 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) (enacted by H.B. 321, 2013 Idaho Sess. Laws,

[390] "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.

ch. 239) 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 in which one party sought validation or vacation and the opposing party initiated a quiet title action. Thus, for roads under the jurisdiction of a county or highway district, a party may no longer file a quiet title action without first seeking validation or vacation from the county or highway district.

However, any such restriction on the court's jurisdiction in section 40-208 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.

Accordingly, the requirement that "[a]ny person other than a board of county or highway district commissioners" must first petition for the initiation of validation/vacation proceedings does not apply to a city or a person challenging a city as to the legal status or width of alleged city streets that are under the jurisdiction of a city. Indeed, such a requirement would be absurd, because the county or highway district has no jurisdiction to entertain such a validation/vacation petition.

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.

F. The statutes recognizing passive public road creation also apply to city streets.

Idaho has two statutes dealing with so-called "passive" public road creation based on public use and maintenance without any formal action by governmental authorities. In pertinent part, they read today as follows:

> [A]ll 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, … are highways.

Idaho Code § 40-109(5).

> [A]ll highways used for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, … are highways.

Idaho Code § 40-202(3).

These statutes trace back to territorial days, Rev. Stat. of Idaho Terr. § 851 (1887).[391]

Most cases dealing with these statutes arise in the context of roads under the jurisdiction of counties and highway districts. However, the passive road creation statutes also apply to streets under the jurisdiction of Idaho cities.

This conclusion is evident in the language of the statutes themselves. They both apply to "all roads" and to "all highways." The term "road" is not defined in Title 40. But "highways" is defined broadly to include city streets.

> "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).

[391] For a detailed history of these statutes, see footnote 45 on page 46. See also the Index to Idaho Road Creation and Abandonment Statutes on page 424.

The applicability of the passive public road creation statutes to city streets in confirmed by the Idaho Supreme Court in the following cases:

- The case of *Village of Sandpoint v. Doyle*, 14 Idaho 749, 95 P. 945 (1908) (Ailshie, C.J.) did not involve passive road creation. However, the Court cited and applied the definition of "highways" in Rev. Stat. of Idaho Terr. § 850 (1887) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)) in a context applicable to cities (the Village of Sandpoint).

- In *Aztec Ltd., Inc. v. Creekside Inv. Co.*, 100 Idaho 566, 602 P.2d 64 (1979) (Bakes, J.), the Court applied Idaho's passive public road creation statute to a street within the City of Pocatello. The street (which had been used for many years by local residents) had not been platted or dedicated to public use. The City paved the street in 1973, and the suit was commenced in 1977. The Court found that the street had not been publicly maintained for a sufficient period to satisfy the five-year minimum. However, the decision left no doubt that the passive road creation statute applies to city streets.[392]

- In *Boise City v. Fails*, 94 Idaho 840, 499 P.2d 326 (1972) (McFadden, J.), the Court applied Idaho's passive road abandonment statute to a city street within the City of Boise. (The Court found dedicated city streets laid out in recorded plats are not subject to passive abandonment, but that passive abandonment is otherwise applicable within cities. *Fails*, 94 Idaho at 846, 499 P.2d at 332.) By analogy, passive road creation statutes would also be applicable to streets within Idaho cities.

The reason that so few cases arise dealing with passive road creation within cities may be that city streets are typically created through the platting process—hence eliminating the need for passive road creation. However, in cases where the plat incorrectly displays the location of the road due to surveyor error or other mistake, passive road creation could be relied on the a city to establish a public road in the actual physical location.

In such situations, an alternative approach might be to rely on common law dedication. Common law dedication is ordinarily (but not always) employed where there is a failure to comply with some technicality of the platting statutes. See

[392] The *Aztec* Court referred to the passive road creation statute as Idaho Code § 40-103. That is the same statute that began as Rev. Stat. of Idaho Terr. § 851 (1887) and is now codified at Idaho Code § 40-202(3). See footnote 45 on page 46. The Court also cited Idaho Code § 5-203, which is the statute of limitations governing adverse possession (aka prescription in the context of rights-of-way).

discussion in section I.F on page 83. Arguably, the common law doctrine would also apply to cure a technical defect in description of the road location.

G. Abatement of encroachments

Cities have ample authority to abate encroachments onto city streets. They may proceed directly under the statutes and ordinances discussed below. There is not requirement that cities first validate or judicially establish the legal status of the public road before abating an encroachment.

1. Authority of cities to abate encroachments

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 … ."
Idaho Code § 50-314	"Cities shall have power to: control and limit the traffic on streets, avenues and public places; regulate and control all encroachments upon and into all sidewalks, streets, avenues, and alleys in said city; remove all obstructions from the sidewalks, curbs, gutters and crosswalks at the expense of the person placing them there."
Idaho Code § 50-334	Cities are empowered to declare what shall be deemed nuisances, to prevent, remove and abate nuisances at the expense of the parties creating, causing, committing or maintaining the same, to levy a special assessment as provided in section 50-1008, Idaho Code, on the land or premises whereon the nuisance is situated to defray the cost or to reimburse the city for the cost of abating the same, and this power shall extend three (3) miles beyond the city limits, provided however, that the expense of declaring, preventing, removing and abating nuisances outside the city limits shall rest with the city when the nuisance comes within the three (3) mile area by reason of expansion of city boundaries.

2. Public nuisances

Other Idaho statutes allow encroachments of city streets to be abated as a public nuisance.

Idaho Code § 18-5901	"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 § 18-5903	Every person who maintains or commits any public nuisance, the punishment for which is not otherwise prescribed, or who wilfully [sic] omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor.
Idaho Code § 52-101	Anything which is injurious to health or morals, 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, 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 nuisance.

See Galvin v. Appleby, 78 Idaho 457, 305 P.2d 309 (1956) (Walters, J.) (Encroachment of building on public street right of way is a public nuisance and

subject to abatement.); *Boise City v. Sinsel*, 72 Idaho 329, 241 P.2d 173 (1952) (Porter, J.) (A warehouse and platform encroaching 19 ½ feet onto a city street was a public nuisance per se.); *Rowe v. City of Pocatello*, 70 Idaho 343, 218 P.2d 695 (1950) (Taylor, J.) (A nuisance per se is subject to abatement under statute or common law in absence of any municipal ordinance.).

3. Trespass and malicious injuries

In addition, persons encroaching on city streets also may be subject to criminal prosecution under Idaho's trespass malicious injuries to property statutes:

Idaho Code § 18-7001	(1) Except as otherwise provided in subsection (2) of this section, every person who maliciously injures or destroys any real or personal property not his own, or any jointly owned property without permission of the joint owner, or any property belonging to the community of the person's marriage, in cases otherwise than such as are specified in this code, is guilty of a misdemeanor and shall be punishable by imprisonment in the county jail for up to one (1) year or a fine of not more than one thousand dollars ($1,000), or both. (2) A person is guilty of a felony, and shall be punishable by imprisonment in the state prison for not less than one (1) year nor more than five (5) years, and may be fined not more than one thousand dollars ($1,000), or by both such fine and imprisonment, if: (a) The damages caused by a violation of this section exceed one thousand dollars ($1,000) in value; or (b) Any series of individual violations of this section are part of a common scheme or plan and are aggregated in one (1) count, and the damages from such violations when considered together exceed one thousand dollars ($1,000) in value.
Idaho Code § 18-7008	(1) Definitions. As used in this section: … (d) "Enter" or "enters" means going upon or over real property either in person or by causing any object, substance or force to go upon or over real property. … (2) Acts constituting criminal trespass. (a) A person commits criminal trespass and is guilty of a misdemeanor, except as provided in subsection (3)(a)(i) of this section, when he enters or remains on the real property of another without permission, knowing or with reason to know that his presence is not permitted. A person has reason to know his presence is not permitted when, except under a landlord-tenant relationship, he fails to depart immediately from the real property of another after being notified by the owner or his agent to do so, or he returns without permission or invitation within one (1) year, unless a longer period of time is designated by the owner or his agent. …

4. City ordinances

In addition, of course, Idaho cities have authority to adopt and enforce their own ordinances addressing the abatement of encroachments.

H. 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.

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I. 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. However, the statute only makes sense with respect to streets owned by the city in fee simple. If the city held merely a right-of-way interest, the vacation of that easement 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 was first enacted as Rev. Stat. of Idaho Terr. § 2883 (1887) and was recodified to Rev. Code of Idaho § 3091 (1909), Compiled Laws of Idaho § 3091 (1919), Compiled Stat. of Idaho § 5359 (1919), and prior Idaho Code § 54-309.) See discussion in section I.J.3 on page 120.

J. 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.")

K. Annexation

Idaho's annexation statute requires that if land is annexed by a city, any roads within the annexed area not be carved out of the annexation.

> General authority. Cities have the authority to annex land into a city upon compliance with the

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> procedures required in this section. In any annexation proceeding, all portions of highways lying wholly or partially within an area to be annexed shall be included within the area annexed unless expressly agreed between the annexing city and the governing board of the highway agency providing road maintenance at the time of annexation. Provided further, that said city council shall not have the power to declare such land, lots or blocks a part of said city if they will be connected to such city only by a shoestring or strip of land which comprises a railroad or highway right-of-way.

Idaho Code § 50-222(2) (emphasis added).

The purpose of this provision, presumably, is to ensure that cities do not leave roads (and the cost of their maintenance) under the jurisdiction of the county. In contrast, if the road falls within the jurisdiction of a highway district, that jurisdiction would not be affected by the annexation.

Appendix A: INDEX TO IDAHO ROAD CREATION AND ABANDONMENT STATUTES

Statutory language is shown in quotation marks.
Redlining shows changes made by session law.
Amendments affecting only other parts of statute are omitted here.

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Quick Reference to Citations			
Road Creation	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County only and Combined County & Highway District)**	**Formal Abandonment/Vacation & Validation (Highway Districts only)**
Today: I.C. §§ 40-106, 40-109(5), 202(3), 40-204A. **History**: Laws of the Territory of Idaho § 1, p. 578 (1864). Idaho Territory Laws, pp. 677-78, § 1 (approved 1/12/1875). — break in history — Idaho Territory Laws, pp. 277-78, § 1 (approved 2/1/1881). Gen. Laws of the Territory of Idaho (1885), § 1, p. 16. — break in history — Rev. Stat. of Idaho Terr. §§ 850, 851 (1887). 1893 Idaho Sess. Laws, An Act Relating to Highways …, § 1, p. 12. 1899 Idaho Sess. Laws, H.B. 75, § 2, p. 168. Idaho Codes Ann. §§ 1137, 1138 (1901). 1 Rev. Codes of Idaho §§ 874, 875 (1908). 1911 Idaho Sess. Laws, ch. 55. Compiled Laws of Idaho §§ 874, 875 (1918). Compiled Stat. of Idaho §§ 1302, 1304 (1919). 39 I.C. Ann. §§ 39-101, 39-103 (1932). I.C. §§ 40-101, 40-103 (1948). 1950 Idaho Sess. Laws, ch. 82. 1951 Idaho Sess. Laws, ch. 93. 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).	**Today**: The operative provisions of I.C. § 40-203(4) were repealed in 1993; I.C. § 40-204A. **History**: Rev. Stat. of Idaho Terr. § 852 (1887). Idaho Codes Ann. § 1139 (1901). 1 Rev. Codes of Idaho § 876 (1908). Compiled Laws of Idaho § 876 (1918). Compiled Stat. of Idaho § 1305 (1919). I.C. Ann. § 39-104 (1932). I.C. § 40-104 (1948). I.C. § 40-104 (1963). I.C. § 40-203 (1985).	**Today**: I.C. §§ 40-203(1), 40-604(4), 40-203A. **History—General Authority**: Rev. Stat. of Idaho Terr. § 870 (1887). Idaho Codes Ann. § 1145 (1901). 1 Rev. Codes of Idaho § 882 (1908). Compiled Laws of Idaho § 882 (1918). Compiled Stat. of Idaho § 1312 (1919). I.C. Ann. § 39-401 (1932). I.C. § 39-401 (1943). I.C. § 40-501(1948). — break in history — 1950 Idaho Sess. Laws, ch. 82. 1951 Idaho Sess. Laws, ch. 93. I.C. § 40-133(d)) (1961). — break in history — I.C. §§ 40-604(2), (3), (4) (1985). I.C. §§ 40-604(2), (3), (4) (1993). **History—Specific Procedures:** S.B. 242, 1963 Idaho Sess. Laws, ch. 267, §1 (amending I.C. § 40-104). H.B. 265, § 2 (codified at I.C. § 40-203. 1985 Idaho Sess. Laws, ch. 253 I.C. § 40-203(1) (1986). I.C. § 40-203(1) (1993).	**Today**: I.C. § 40-1310(5). **History**: Idaho Sess. Laws, ch. 55 (1911). Compiled Laws of Idaho § 62:18 (1918). 1 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).

OVERVIEW

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).

The law since 1893 has provided two methods of road creation:

Method 1 (formal declaration):
"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."

Method 2 (public use & 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."

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)).

In 1993 (H.B. 388) the Legislature adopted a new section 204A which declared that "construction and first use" are sufficient to create R.S. 2477 rights-of-way.

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."

The passive abandonment statute has been restricted and narrowed repeatedly, and was finally repealed in 1993.

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.

In the same year, S.B. 267 established mandatory formal procedures for abandonment of roads providing access to public lands.

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.

In 1993 (S.B. 1108) the Legislature repealed the passive abandonment provision altogether.

In this outline, "formal abandonment" refers to mechanisms for abandonment by affirmative, official declaration.

Idaho's first formal abandonment statute was enacted in 1887.

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." Since 1951, a public interest determination has been required for formal abandonment (S.B. 125, 1951 Idaho Sess. Laws, ch. 93, § 28).

Nicolaus v. Bodine (1968) construed section 40-501 to require formal findings that the road is no longer necessary.

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).)

In 1986, the Legislature set out detailed abandonment procedures for all roads, applicable to both counties and highway districts. Idaho Code § 40-203(1).

For many years, the general provisions existed alongside the specific procedural requirements.

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.

In *Nicolaus v. Bodine* (1968), the Court held that road districts must comply not only with section 40-1614, but also section 40-501 (applicable to county commissioners).

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.)

In 1986, the Legislature enacted new formal abandonment provisions for all roads at section 40-203(1) (see column to the left).

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.

Today, section 40-203(1) sets out the sole statutory mechanism for the abandonment/vacation of public roads and rights-of-way.

In 1993, the Legislature amended section 40-1305(5) to incorporate the same procedures for abandonment set out in section 40-203.

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OVERVIEW			
	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. 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.	In 1993, the Legislature amended section 40-604(4) to incorporate the same procedures for abandonment set out in section 40-203.	

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	CITE: Idaho Code § 40-202(3). 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." ——————————— CITE: Idaho Code § 40-106(3). 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	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)).	CITE: Idaho Code § 40-203. 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	CITE: Idaho Code § 40-1310(5). 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."

Statutes As They Read Today				
Year = Today	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County only and Combined County & Highway District)**	**Formal Abandonment/Vacation & Validation (Highway Districts only)**
	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." CITE: Idaho Code § 40-109(5). 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." CITE: Idaho Code § 40-117(9). QUOTE: "40-117. Definitions – P.		intention to hold a public hearing to consider the proposed abandonment and vacation of a highway 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. "(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. "(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 …..-one (21) days before the hearing.	

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Year = Today	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County only and Combined County & Highway District)**	**Formal Abandonment/Vacation & Validation (Highway Districts only)**
	"… "(9) '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. _____ CITE: Idaho Code § 40-204A. QUOTE : "40-204A. Federal land rights-of-way. — "(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		"(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. "(h) 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. 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. "(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	

Statutes As They Read Today				
Year = Today	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County only and Combined County & Highway District)**	**Formal Abandonment/Vacation & Validation (Highway Districts only)**
	perpetual term granted by the congress of the United States. "(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. 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. "(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. "(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. "(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		federal land right-of-way, said highway or public right-of-way shall revert to a federal land right-of-way. "(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. "(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 Code. "(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. "(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.	

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Year = Today	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County only and Combined County & Highway District)**	**Formal Abandonment/Vacation & Validation (Highway Districts only)**
	rights granted under the provisions of the original act, Revised Statute 2477. "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. "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. "(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."		"(4) A highway abandoned and vacated under the provisions of this section may be reclassified as a public right-of-way. "(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. "(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." CITE: Idaho Code § 40-604. 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.	

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Year = Today	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County only and Combined County & Highway District)**	**Formal Abandonment/Vacation & Validation (Highway Districts only)**
			"(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."	
			CITE: Idaho Code § 40-203A. 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 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: " (a) If, through omission or defect, doubt exists as to the legal	

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Statutes As They Read Today				
Year = Today	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County only and Combined County & Highway District)**	**Formal Abandonment/Vacation & Validation (Highway Districts only)**
			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. "(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: "(a) If the commissioners determine it is necessary, cause the highway or public right-of-way to be surveyed; "(b) Cause a report to be prepared, including consideration of any survey and any other information required by the commissioners; "(c) Establish a hearing date on the proceedings for validation; "(d) Cause notice of the proceedings to be provided in the same manner as for abandonment and vacation proceedings; and "(e) At the hearing, the commissioners shall consider all	

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Statutes As They Read Today				
Year = Today	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County only and Combined County & Highway District)**	**Formal Abandonment/Vacation & Validation (Highway Districts only)**
			information relating to the proceedings and shall accept testimony from persons having an interest in the proposed validation. "(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. "(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. "(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. "(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	

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Statutes As They Read Today				
Year = Today	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County only and Combined County & Highway District)**	**Formal Abandonment/Vacation & Validation (Highway Districts only)**
			validation proceeding, or if such is not practical, the commissioners may acquire property to alter the highway or public right-of-way being validated. "(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."	

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Historical Statutes and Amendments				
Year = 1864	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: Laws of the Territory of Idaho § 1, p. 578 (1864). 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: 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." 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.			

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Historical Statutes and Amendments				
Year = 1875	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: Compiled and Revised Laws of the Territory of Idaho § 1, pp. 677-78, (approved 1/12/1875). 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: ~~P~~provided, ~~T~~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. 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." NOTE: This was the second blanket declaration. This statute, however, expressly excluded avoided turning toll roads into public roads.			

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Historical Statutes and Amendments				
Year = 1881	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: Gen. Laws of the Territory of Idaho (1881), pp. 277-78, § 1 (approved 2/1/1881). QUOTE: "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." NOTE: This 1881 law restated the blanket declaration of 1875 and then included another blanket declaration, again excluding toll roads.			

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Historical Statutes and Amendments				
Year = 1885	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: Gen. Laws of the Territory of Idaho § 1 (1885), p. 162 (approved 2/5/1885). QUOTE: "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." 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.	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.)		

Historical Statutes and Amendments				
Year = 1887	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: Rev. Stat. of Idaho Terr. §§ 850, 851 (1887) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)). QUOTE: "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." NOTE: The 1887 codification replaced the earlier territorial road creation statutes and created the basic statutory format that remains in place today in sections 40-109(5) and 40-202(3). Note that as of 1887, there was no requirement for maintenance. The maintenance requirement was added in 1893. 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." *Galli*	CITE: Rev. Stat. of Idaho Terr. § 852 (1887) (later codified at Idaho Code § 40-203(4) (repealed by S.B. 1108 in 1993). QUOTE: "Sec. 852. A road not worked or used for the period of five years ceases to be a highway for any purpose whatever." NOTE: This was Idaho's first passive 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.	CITE: Rev. Stat. of Idaho Terr. § 870 (1887) (later codified at Idaho Codes Ann. § 1145 (1901); 1 Rev. Codes of Idaho § 882 (1908); Compiled Laws of Idaho § 882 (1918); Compiled Stat. of Idaho § 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-references to Idaho Code §§ 40-202, 40-203, and 40-203A added in 1993). QUOTE: "Section 870. 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 usage or abandonment to the public; "4. Abolish or abandon such as are unnecessary;" NOTE: In 1985 this statute was repealed (along with parallel provisions in section 40-133(d)) and replaced with Idaho Code § 40-604(4). NOTE: This statute may be traced back to Gen. Laws of the Territory of Idaho (1885), § 17, p. 162, but that earlier version of the statute did not authorize abandonment.	

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Historical Statutes and Amendments				
Year = 1887	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	v. Idaho Cnty., 146 Idaho 155, 160, 191 P.3d 233, 238 (2008).			

Historical Statutes and Amendments				
Year = 1890	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: Idaho Admission Act, ch. 656, 26 Stat. 215 (July 3, 1890) (see footnote 14 on page 19 for citations to amendments). This act admitted Idaho to the Union. NOTE: Idaho's Constitutional Convention was held between July 4, 1889 and August 6, 1889. Idaho's Constitution was adopted in Boise City, in the Territory of Idaho, on August 6, 1889. On July 3, 1890, Idaho was admitted to the Union by Act of Congress.			

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Historical Statutes and Amendments				
Year = 1893	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: 1893 Idaho Sess. Laws, An Act Relating to Highways, etc., § 1, p. 12 (then codified at Rev. Stat. of Idaho Terr. § 851; codified today as amended at Idaho Code § 40-202(3)). QUOTE: "~~Sec.~~ Section 851. Roads laid out and recorded as highways, by order of the ~~B~~board of ~~C~~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." 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. 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).		CITE: 1893 Idaho Sess. Laws, An Act Relating to the Powers and Duties of the Board of County Commissioners …, § 1, p. 184 (amending Revised Statutes of Idaho Territory § 870 (1887); later codified at 1 Idaho Codes Ann. § 1145 (1901); 1 Rev. Codes of Idaho § 882 (1908); Compiled Laws of Idaho § 882 (1918); Compiled Stat. of Idaho § 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). QUOTE: "Section 870. The Board of County Commissioners, by proper ordinances, must~~:~~ "… "~~2.~~ 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~~;~~. "~~3.~~ Third. — Cause to be recorded as highways such roads as have become such by usage or abandonment to the public~~;~~. "~~4.~~ Fourth. — Abolish or abandon such as are unnecessary~~;~~."	

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Historical Statutes and Amendments				
Year = 1893	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: 1893 Idaho Sess. Laws, An Act Relating to the Powers and Duties of the Board of County Commissioners …, § 1, p. 184 (amending Revised Statutes of Idaho Territory § 870 (1887); later codified at 1 Idaho Codes Ann. § 1145 (1901); 1 Rev. Codes of Idaho § 882 (1908); Compiled Laws of Idaho § 882 (1918); Compiled Stat. of Idaho § 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). QUOTE: "Section 870. The Board of County Commissioners, by proper ordinances, must~~:~~ "… "~~2.~~ 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~~;~~. "~~3.~~ Third. — Cause to be recorded as highways such roads as have become such by usage or abandonment to the public~~;~~. "~~4.~~ Fourth. — Abolish or abandon such as are unnecessary~~;~~."			

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Historical Statutes and Amendments				
Year = 1901	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: Idaho Codes Ann. §§ 1137, 1138 (1901) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)). QUOTE: "Section ~~850.~~ 1137. What are Highways: 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.~~ 1138. Further Enumeration: 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."	CITE: Idaho Codes Ann. § 1139 (1901) (later codified at Idaho Code § 40-203(4), repealed by S.B. 1108 in 1993). QUOTE: "~~Sec. 852~~ Section 1139. Abandonment of Highway: A road not worked or used for the period of five years ceases to be a highway for any purpose whatever."	CITE: 1901 Idaho Sess. Laws, at page 82 (codified at Idaho Codes Ann. § 1145 (1901); Compiled Stat. of Idaho § 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). QUOTE: "Section ~~870~~ 1145. Duty of County Commissioners: The ~~B~~board of ~~C~~county ~~C~~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 use~~usage~~ or abandonment to the public; "Fourth. — Abolish or abandon such as are unnecessary;"	

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Historical Statutes and Amendments				
Year = 1908	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: 1 Rev. Codes of Idaho §§ 874, 875 (1908) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)). QUOTE: "~~Section 1137~~ § 874. ~~What are Highways:~~ 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. "~~Section 1138~~ § 875. ~~Further Enumeration:~~ 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."	CITE: 1 Rev. Codes of Idaho § 876 (1908) (later codified at Idaho Code § 40-203(4), repealed by S.B. 1108 in 1993). QUOTE: "~~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."	CITE: 1 Rev. Codes of Idaho § 882 (1908) (later codified at Compiled Laws of Idaho § 882 (1918); Compiled Stat. of Idaho § 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). QUOTE: "~~Section 1145~~ § 882. Duty~~ies~~ of ~~County~~ Commissioners. The board of county commissioners, by proper ordinances, must: "… "~~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; "~~Third~~ 3. — Cause to be recorded as highways such roads as have become such by use or abandonment to the public; "~~Fourth~~ 4. — Abolish or abandon such as are unnecessary;"	

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Historical Statutes and Amendments				
Year = 1911	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: 1911 Idaho Sess. Laws, ch. 55, § 1 (the Highway District Act of 1911) (not codified). QUOTE: "Section 1. ~~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. . . ." 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.			CITE: 1911 Idaho Sess. Laws, ch. 55, § 18 (codified today as amended at Idaho Code § 40-1310(5)). QUOTE: "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." 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.

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Historical Statutes and Amendments				
Year = 1918	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: Compiled Laws of Idaho §§ 874, 875 (1918) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)). QUOTE: "§ 874. 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. 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." NOTE: Highway definition reverted to 1908 version.	CITE: Compiled Laws of Idaho § 876 (1918) (later codified at Idaho Code § 40-203(4), repealed by S.B. 1108 in 1993). 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." NOTE: No change.	CITE: Compiled Laws of Idaho § 882 (1918) (later codified at Compiled Stat. of Idaho § 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). QUOTE: " § 882. Duties of ~~C~~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~~;~~."	CITE: 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)). QUOTE: "~~Sec.~~ 62:18. Powers of highway commissioners. The ~~H~~highway ~~B~~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 ~~D~~district ~~C~~court of the judicial district in which such highway district is situated, in the same manner in which appeals are taken from the ~~B~~board of ~~C~~county ~~C~~commissioners to the ~~D~~district ~~C~~court."

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Historical Statutes and Amendments				
Year = 1919	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: Compiled Stat. of Idaho §§ 1302, 1304 (1919) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)). QUOTE: "§ ~~874.~~1302. 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.~~1304. 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."	CITE: Compiled Stat. of Idaho § 1305 (1919) (later codified at Idaho Code § 40-203(4), repealed by S.B. 1108 in 1993). QUOTE: "§ ~~876.~~ 1305. Abandonment of highways. A road not worked or used for the period of five years ceases to be a highway for any purpose whatever."	CITE: 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). QUOTE: " §~~882~~ 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."	CITE: Compiled Stat. of Idaho § 1510 (1919) (codified today as amended at Idaho Code § 40-1310(5)). QUOTE: "~~62:18.~~ § 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."

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Historical Statutes and Amendments				
Year = 1921	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
			CITE: S.B. 70, 1921 Idaho Sess. Laws, ch. 161, § 3 (initially codified at Compiled Stat. § 1312; later codified at Idaho Code § 39-401; codified as amended today at Idaho Code § 40-604). QUOTE: "§ Section 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 ~~un~~necessary." 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.	

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Historical Statutes and Amendments				
Year = 1927	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
			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). 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 unnecessary." NOTE: Corrected error in subsection 4.	

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Historical Statutes and Amendments				
Year = 1932	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: 39 Idaho Code Ann. §§ 39-101, 39-103 (1932) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)). QUOTE: "~~§ 1302.~~ Section 39-101. — 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. "~~§ 1304.~~ Section 39-103. — 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."	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). QUOTE: "~~§ 1305.~~ Section 39-104. Abandonment of highways. — A road not worked or used for the period of five years ceases to be a highway for any purpose whatever."	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). QUOTE: "Section ~~1312.~~ 39-401. Duties of county ~~C~~commissioners. — The board of ~~C~~county ~~C~~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."	CITE: 39 Idaho Code Ann. § 39-1524 (1932) (codified today as amended at Idaho Code § 40-1310(5)). QUOTE: "~~§ 1510.~~ 39-1524. 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."

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Historical Statutes and Amendments				
Year = 1943	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
			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)). QUOTE: "Section 39-401. ~~Duties of the county 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." ". . . "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." 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 not be cited as an abandonment authority.	

Historical Statutes and Amendments				
Year = 1948	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: Idaho Code §§ 40-101, 40-103 (1948) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)). QUOTE: "~~Section 39-101~~ 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. "~~Section 39-103~~ 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." NOTE: The Idaho Code was created in 1948. Former title 39 was reclassified to Title 40. No change in language.	CITE: Idaho Code § 40-104 (1948). QUOTE: "~~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."	CITE: Idaho Code § 40-501 (1948). QUOTE: "Section ~~39-401~~ 40-501. Duties of county 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." ". . . "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." NOTE: No change, except to correct error in section 12. NOTE: This provision was replaced in 1951 with what became section 133(d) in the 1961 recodification.	CITE: Idaho Code § 40-1614 (1948) (codified today as amended at Idaho Code § 40-1310(5)). QUOTE: "Section ~~39-1524~~ 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."

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Historical Statutes and Amendments				
Year = 1950	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: The Highway Administration Act of 1950, S.B. 62, 1950 Idaho Sess. Laws, ch. 87, § 2 (codified today as amended at Idaho Code § 40-109(5)). 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. 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." 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.		CITE: The Highway Administration Act of 1950, S.B. 62, 1950 Idaho Sess. Laws, ch. 87, § 13 (repealed and replaced by S.B. 125, 1951 Idaho Sess. Laws, ch. 93, § 28, which was not codified until 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)). QUOTE: "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." NOTE: Section 13 was the only provision of the legislation pertinent to county road abandonment or creation. This was a stand-alone provision, not part of a list of duties of county commissioners. 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. NOTE: See Note under 1951 legislation re parallel tracks of this provision and section 40-501.	

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Historical Statutes and Amendments				
Year = 1951	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	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)). 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, works or fixtures incidental to the preservation or improvement of such highways." 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.		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)). QUOTE: "Section 28. 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." NOTE: The 1951 Act took section 13 of the 1950 act and incorporated it (as section 28(d)) in a list of duties of county commissioners, adding for the first time a requirement that the abandonment be in the public interest. NOTE: As in the 1950 act, subsection 28(d) was the only provision of the legislation pertinent to county road abandonment or creation. NOTE: The 1951 Act was not codified until 1961, when it appeared, in relevant part, as Idaho Code § 40-133(d). NOTE: For reasons that are not evident, the abandonment provision in the 1950/1951/1961 statutes was codified separately and operated on a parallel	

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Historical Statutes and Amendments				
Year = 1951	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
			track with the abandonment provision in section 40-501[4] until 1985. In 1985, Title 40 was repealed and replaced with an entirely revised Title 40. In the 1985 version, former sections 40-501[4] and 40-133(d)) were combined into new section 40-604(4).	

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Historical Statutes and Amendments				
Year = 1961	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: Idaho Code §§ 40-101, 40-103, 40-107 (1961) (codified today as amended at Idaho Code §§ 40-109(5) and 40-202(3)). QUOTE: "Section 40-101." [Repealed.] "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." "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."		CITE: Idaho Code § 40-133(d) (1961). QUOTE: "40-133. Duties ~~A~~and ~~P~~powers of ~~B~~board of ~~C~~county ~~C~~commissioners. — The ~~B~~board of ~~C~~county ~~C~~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." 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 comprehensive revision of Title 40. NOTE: See Note under 1951 legislation re parallel tracks of this provision and section 40-501.	

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Historical Statutes and Amendments				
Year = 1961	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	NOTE: This is the re-codification implements the 1950 and 1951 Acts by replacing section 40-101 with 40-107. 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)**
		NOTE: Two pieces of legislation in 1963 amended what was then § 40-104 (H.B. 15 and S.B. 242). A third bill (S.B. 243) addressed access to public lands in what was then § 40-1614. 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). QUOTE: "40-104. ABANDONMENT OF HIGHWAYS. — A road established by prescription not worked or used for the period of five (5) years ceases to be a highway for any purpose whatever." 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	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). QUOTE: "40-104. ABANDONMENT OF HIGHWAYS. — 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	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)). 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~~.~~ ; 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

Historical Statutes and Amendments				
Year = 1963	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
		by use (Methods 2 and 3) under the Road Creation Statute. NOTE: In *Taggart v. Highway Board for the North Latah Cnty. Highway Dist.*, 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. --- 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). QUOTE: "40-104. ABANDONMENT OF HIGHWAYS. — 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	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." 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. 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). 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.	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." 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.

Historical Statutes and Amendments				
Year = 1963	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
		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." 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. 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). 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.		

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Historical Statutes and Amendments				
Year = 1985	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	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)). QUOTE: "~~40-107. Highways defined.~~ 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. Whenever any corporation owning a road or a bridge is dissolved, or discontinues the road or bridge, the bridge or road becomes a highway." "~~40-103.~~ 40-202. RECORDED AND WORKED HIGHWAYS. Roads laid out	CITE: H.B. 265, 1985 Idaho Sess. Laws, ch. 253, § 2 (codified at Idaho Code § 40-203, repealed by S.B. 1108 in 1993). QUOTE: "~~40-104~~ 40-203. ABANDONMENT OF HIGHWAYS. — A road established by prescription not worked or used for ~~the~~ a period of five (5) years ceases to be a highway for any purpose whatever. ~~; provided, however, that~~ iIn the case of roads furnishing public access to public lands, state or federal public lands or 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 commissioners of the highway district in which the same is located, and u~~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." NOTE: Recodified section 40-104 to section 40-203. Changes in language were cosmetic.	CITE: H.B. 265, 1985 Idaho Sess. Laws, ch. 253, § 2 (codified at Idaho Code § 40-604). QUOTE: "~~40-104~~ 40-203. ABANDONMENT OF HIGHWAYS. — A road established by prescription not worked or used for ~~the~~ a period of five (5) years ceases to be a highway for any purpose whatever. ~~;~~ ~~provided, however, that i~~In the case of roads furnishing public access to public lands, state or federal public lands or 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 commissioners of the highway district in which the same is located, and u~~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." NOTE: Recodified section 40-104 to section 40-203. Changes in language were cosmetic.	

Historical Statutes and Amendments				
Year = 1985	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	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." 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.			

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QUOTE: "40-604. DUTIES AND POWERS OF COMMISSIONERS. Commissioners shall: ". . . "(2) Cause to be surveyed, viewed, laid out, recorded, opened and worked, any highways as are necessary for public convenience. "(3) Cause to be recorded as highways those that have become such by use or abandonment. "(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." NOTE: H.B. 265 repealed section 40-501 and 40-133(d), replacing them with section 40-604 which contained language from each.	CITE: H.B. 265, 1985 Idaho Sess. Laws, ch. 253, § 2 (codified as amended at Idaho Code § 40-1310(5)). QUOTE: "~~40-1614~~ 40-1310. POWERS AND DUTIES OF HIGHWAY DISTRICT COMMISSIONERS. ". . . "(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 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~~." 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).

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Historical Statutes and Amendments				
Year = 1986	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: H.B. 556, 1986 Idaho Sess. Laws, ch. 206, § 2 (codified at Idaho Code § 40-202; codified today as amended at Idaho Code § 40-202(3)). QUOTE: "40-202 ~~RECORDED AND WORKED~~ DESIGNATION OF HIGHWAYS. ". . . "(3) ~~Roads~~ Highways laid out and recorded ~~as highways~~, by order of a board of commissioners, and all ~~roads used as~~ 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. Whenever any corporation owning a ~~road or bridge~~ highway is dissolved, or discontinues the ~~road or bridge~~ highway, the ~~road or bridge~~ highway may become~~s~~ 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. " NOTE: H.B. 556 expanded former section 40-202. The old "creation" section became subsection 40-202(3). New language at the end	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). QUOTE: "40-203. ABANDONMENT AND VACATION OF COUNTY AND HIGHWAY DISTRICT SYSTEM HIGHWAYS. ". . . "(4) A ~~road~~ highway established by prescription not worked or used for a period of five (5) years ceases to be a highway for any purpose whatever, unless the highway is designated as part of a county or highway district system by inclusion on the official map. In the case of ~~roads~~ 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 ~~road~~ highway to the appropriate commissioners of the county or highway district in which the ~~road~~ highway is located. Until abandonment is authorized by the commissioners having jurisdiction, public use of the ~~roadway~~ 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." NOTE: While creating new formal abandonment requirements in subsection 40-203(1) (see note in	CITE: H.B. 556, 1986 Idaho Sess. Laws, ch. 206, § 3 (codified at Idaho Code § 40-203(1)). 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	

Historical Statutes and Amendments				
Year = 1986	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	of section 40-202(3) clarified there is no duty to maintain highways not on the official map. H.B. 556 did not amend the definition section (section 40-109(5)).	column to right), H.B. 556 retained the passive road abandonment provision, which became 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. CITE: H.B. 647, 1986 Idaho Sess. Laws, ch. 328, § 4 (codified at Idaho Code § 40-203, repealed by S.B. 1108 in 1993). QUOTE: "40-203. ABANDONMENT OF HIGHWAYS. A ~~road~~ highway 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 ~~roads~~ 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 ~~road~~ highway to the appropriate commissioners of the county or highway district in which the ~~road~~ highway is located. Until abandonment is authorized by the commissioners having jurisdiction, public use of the ~~roadway~~ highway may not be restricted or impeded by encroachment or installation of any	county assessor's tax rolls at least fifteen (15) days prior to the date of the hearing. "(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. "(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. "(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. "(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." "(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." [For section (4), see H.B. 566 listed under "Passive Abandonment" column.] NOTE: H.B. 556 also amended the passive abandonment statute (see discussion in column to the left).	

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Historical Statutes and Amendments				
Year = 1986	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
		obstruction restricting public use or by the installation of signs or notices that might tend to restrict or prohibit public use." 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 "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.	CITE: H.B. 556, § 4, 1986 Idaho Sess. Laws, ch. 206 (codified at Idaho Code § 40-203A). 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 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: "(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	

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Historical Statutes and Amendments				
Year = 1986	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
			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. "(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: ". . . . "(6) . . . commissioners may acquire property to alter the highway or public right-of-way being validated. "(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."	

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Historical Statutes and Amendments				
Year = 1988	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: H.B. 578, 1988 Idaho Sess. Laws, ch. 184, §§ 1, 2 (codified as amended at Idaho Code §§ 109(5), 40-202(3)). 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. ~~Whenever any corporation owning a road or a bridge is dissolved, or discontinues the road or bridge, the bridge or road becomes a highway.~~" "40-202. DESIGNATION OF HIGHWAYS. ". . . "(3) Highways laid out and recorded, by order of a board of commissioners,			

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Historical Statutes and Amendments				
Year = 1988	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	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. ~~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. " NOTE: The 1988 Amendments deleted obsolete provisions dealing with former toll roads.			

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Historical Statutes and Amendments				
Year = 1992	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: H.B. 627, 1992 Idaho Sess. Laws, ch. 55, § 1 (codified as amended at Idaho Code § 202(3)). 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. " NOTE: Added language to address roads which have been "opened" to the public. Presumably, roads not yet opened are not subject to abandonment.	CITE: H.B. 872, 1992 Idaho Sess. Laws, ch. 323, § 1 (then codified at Idaho Code § 40-203(1)(h), now codified at Idaho Code § 40-203(1)(i)). NOTE: The passive abandonment provision (section 40-203(4) as of 1986) was unchanged.	CITE: H.B. 872, 1992 Idaho Sess. Laws, ch. 323, § 1 (then codified at Idaho Code § 40-203(1)(h), now codified at Idaho Code § 40-203(1)(i)). 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	

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Historical Statutes and Amendments				
Year = 1992	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
			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. "(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. "(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. "(h) <u>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> "<u>(i)</u> 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." 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	

Historical Statutes and Amendments				
Year = 1992	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
			acquiring entity may be charged the market value as a condition of the abandonment and vacation.	

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Historical Statutes and Amendments				
Year = 1993	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, §§ 1, 3 (codified at Idaho Code §§ 40-106(3), 40-202(3)). 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 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." "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 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	CITE: S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 4 (initially codified at Idaho Code § 40-203(4)). In 2013, subsection 40-204(4) was repealed and the reclassification language was inserted instead into Idaho Code § 40-203(1)(a). H.B. 321, 2013 Idaho Sess. Laws, ch. 239 § 4. QUOTE: "40-203. ABANDONMENT AND VACATION OF COUNTY AND HIGHWAY DISTRICT SYSTEM OR PUBLIC RIGHTS OF WAY. ". . . "(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~~ abandoned and vacated under the provisions of this section may be reclassified as a public right of way. NOTE: The above amendment had the effect of eliminating passive road abandonment.	CITE: S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 4 (codified at Idaho Code § 40-203(1)). 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 ~~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: "(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, 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. "(c) The commissioners shall establish a hearing date or dates on the proposed abandonment and vacation. "(d) The commissioners shall prepare a ~~report~~ public notice stating ~~the effects~~	CITE: S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 7 (codified at Idaho Code § 40-1310(5)). QUOTE: "40-1310. POWERS AND DUTIES OF HIGHWAY DISTRICT COMMISSIONERS. ". . . "(5) The highway district has the power to receive ~~road~~ 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." 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.

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Historical Statutes and Amendments				
Year = 1993	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	signs, until the highway is designated as part of the county or highway district system by inclusion on the official map as a highway and opened to public travel as a highway." 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 *French v. Sorenson* (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.) NOTE: S.B. 1108 added "as a highway" to the provision at end of section 40-202(3).	CITE: S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 4 (codified at Idaho Code § 40-203(5)). QUOTE: "(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 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." NOTE: S.B. 1108 also criminalized violations. CITE: S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 4 (codified at Idaho Code § 40-203(6)). QUOTE: "(6) 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." NOTE: It also stated that platted streets not subject to abandonment procedures.	~~of~~ their intention to hold a public hearing to consider the proposed abandonment and vacation ~~on the public interest~~ of a highway 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. "(e) At least thirty (30) days prior to any hearing scheduled by the commissioners to consider abandonment and vacation of any highway, t~~T~~he 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 or right of way 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.	
	CITE: H.B. 388, 1993 Idaho Sess. Laws, ch. 142 (codified as amended at Idaho Code §§ 40-107(5), 40-204A).		"(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~~	

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Historical Statutes and Amendments				
Year = 1993	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	NOTE: The full text of section 204A, as amended, is set out above under the heading "Statutes as they read today." 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.		~~proceeding~~ 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. "(g) After completion of the ~~procedures~~ proceedings and consideration of all related information, 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~~ 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. "(h) 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. "(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	

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Historical Statutes and Amendments				
Year = 1993	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
			affected by the abandonment and vacation. "(j) 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." NOTE: S.B. 1108 provided extensive amendments to the formal abandonment procedures. CITE: S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 6 (codified at Idaho Code § 40-208). QUOTE: "40-208. JUDICIAL REVIEW. "(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. "(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	

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Historical Statutes and Amendments				
Year = 1993	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
			or, if a rehearing is requested, within twenty-eight (28) days after the decision thereon. "(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. "(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. "(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 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. "(6) The review shall be conducted by the court without a jury and shall be	

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Historical Statutes and Amendments				
Year = 1993	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
			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. "(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: "(a) In violation of constitutional or statutory provisions; "(b) In excess of the statutory authority of the commissioners; "(c) Made upon unlawful procedure; "(d) Affected by other error of law; "(e) Clearly erroneous in view of the reliable, probative and substantial information on the whole record; or "(f) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." NOTE: S.B. 1108 also added a new provision on judicial review. This provision was construed in *Floyd v. Board of Comm'rs of Bonneville County ("Floyd II")*, 137 Idaho 718, 52 P.3d 863 (2002).	

Historical Statutes and Amendments				
Year = 1993	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
			CITE: S.B. 1108, 1993 Idaho Sess. Laws, ch. 412, § 7 (codified at Idaho Code § 40-604). 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 ~~as~~ all highways ~~those that have become such by use or abandonment~~ and public rights of way within their highway system. "(4) Have authority to abandon and vacate any highway ~~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." 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 section 40-203.	

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Historical Statutes and Amendments				
Year = 1994	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
				CITE: H.B. 809, 1994 Idaho Sess. Laws, ch. 324 § 4 (codified at Idaho Code § 40-1310(5)). 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 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." NOTE: H.B. 809 provided that highway districts must obtain the consent of city councils before accepting or vacating roads within platted subdivisions.

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Historical Statutes and Amendments				
Year = 1995	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: S.B. 1117, 1995 Idaho Sess. Laws, ch. 121 § 1 (codified at Idaho Code § 40-202(3)). NOTE: Added hyphens to "right-of-way.	CITE: S.B. 1117, 1995 Idaho Sess. Laws, ch. 121 § 2 (codified at Idaho Code § 40-203(4)). 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." NOTE: Added hyphens to "right-of-way" and other technical changes.	CITE: S.B. 1117, 1995 Idaho Sess. Laws, ch. 121 § 2 (codified at Idaho Code § 40-203(1)). 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 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	

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Historical Statutes and Amendments				
Year = 1995	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
			proposed abandonment and vacation of a highway 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. "(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. "(~~e~~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 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. "(~~f~~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	

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Historical Statutes and Amendments				
Year = 1995	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
			and give testimony for or against abandonment. "(~~g~~h) 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. 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. "..."	

Historical Statutes and Amendments				
Year = 2000	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
	CITE: S.B. 1407, 2000 Idaho Sess. Laws, ch. 251, § 1 (codified at Idaho Code § 40-202(3)). 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 ~~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~~ and opened to public travel as a highway." NOTE: Eliminated references to highway map.		CITE: S.B. 1407, 2000 Idaho Sess. Laws, ch. 251, § 2 (codified at Idaho Code § 40-203(1)). 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	

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Historical Statutes and Amendments				
Year = 2000	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
			hold a public hearing to consider the proposed abandonment and vacation of a highway 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. "(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. "(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. "(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	

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Historical Statutes and Amendments				
Year = 2000	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
			government, may appear and give testimony for or against abandonment. "(h) 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 <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. "(i) … <u>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.</u>"	

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Historical Statutes and Amendments				
Year = 2013	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
		CITE: 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified at Idaho Code § 40-203). "(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: "(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	CITE: 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified at Idaho Code § 40-203). QUOTE: "(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~~ their intention to abandon and vacate any highway or public right-of-way ~~considered no longer to be~~, or to reclassify a public highway as a public right-of-way, where doing so is in the public interest. . . . "(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. The burden of proof shall be on the impacted property owner to establish this fact. "(3) In the event of abandonment and vacation, rights-of-way or easements ~~may~~ shall 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.	

Historical Statutes and Amendments				
Year = 2013	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
		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." 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.	~~"(4) A highway abandoned and vacated under the provisions of this section may be reclassified as a public right-of-way.~~ ~~"(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.~~ "~~(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. 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.	

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Historical Statutes and Amendments				
Year = 2014	**Road Creation**	**Passive Abandonment**	**Formal Abandonment/Vacation & Validation (County and Combined)**	**Formal Abandonment/Vacation & Validation (Highway Districts)**
				CITE: 2014 Idaho Sess. Laws, ch. 137 (S.B. 2183) (codified at Idaho Code § 40-203). QUOTE: (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 platted subdivision, such abandonment shall be accomplished pursuant to the provisions of this section. (b) When a county or highway district ~~desires~~ is to consider the abandonment or vacation of any ~~highway, public street or public~~ private right-of-way ~~which~~ that 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.

Note: There have been further amendments to these provisions since 2014.

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	Other Provisions Bearing on Road Creation and Abandonment	
Subject	**Citation**	**Comment**
Road tax	CITE: Gen. Laws of the Territory of Idaho (1885), § 20, p. 162.	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: Rev. Stat. of Idaho Terr. §§ 920 to 937 (1887) (recodified in 1901). CITE: Idaho Codes Ann. §§ 1185 to 1211 (1901) (later repealed).	NOTE: These sections are set out under the heading "Laying Out, Altering and Discontinuing Roads". They provided a mechanism for citizens within a road district to petition to alter, discontinue, or construct and open a new road. (These provisions do not deal with the dedication or recognition of existing roads.) See section I.D.3 on page 51. NOTE: This outline does not track the 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.

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	Other Provisions Bearing on Road Creation and Abandonment	
Subject	**Citation**	**Comment**
Encroachment actions	CITE: Idaho Code § 40-2319 (H.B. 265, 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).	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. QUOTE: "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 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

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	Other Provisions Bearing on Road Creation and Abandonment	
Subject	**Citation**	**Comment**
		"(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."
Definition of maintenance	CITE: 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified at Idaho Code § 40-114(3)).	NOTE: Clarified and expanded the definition of road maintenance sufficient applicable to road creation, abandonment, and road width determinations. QUOTE: "(3) 'Maintenance' means to preserve from failure or decline, or repair, refurbish, repaint or otherwise keep an existing highway or ~~structure~~ 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."

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	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)).	NOTE: Codified the holding in *Homestead Farms, Inc. v. Board of Commissioners of Teton Cnty.,* 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. QUOTE: "(6) By July 1, 2005, and at least every five (5) years thereafter, the board of county or highway district commissioners shall ~~have~~ publish~~ed~~ in map form and ~~made~~ 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."

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Judicial review	CITE: 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified at Idaho Code §§ 40-208(5) to 40-208(7)).	NOTE: Parties may present additional material evidence to court, without leave, for purposes of remand to the board. Makes judicial review *de novo*, except for issues involving the board's exercise of its discretion in matters of the public interest. 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. QUOTE: "(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. "(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. "(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:~~
		~~(a) In violation of constitutional or statutory provisions;~~

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	Other Provisions Bearing on Road Creation and Abandonment	
Subject	**Citation**	**Comment**
		~~(b) In excess of the statutory authority of the commissioners;~~ ~~(c) Made upon unlawful procedure;~~ ~~(d) Affected by other error of law;~~ ~~(e) Clearly erroneous in view of the reliable, probative and substantial information on the whole record; or~~ ~~(f) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.~~ 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 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.”

Road width	CITE: 2013 Idaho Sess. Laws, ch. 239 (H.B. 321) (codified at Idaho Code § 40-2312).	NOTE: 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 *Halvorson* and *Sopatyk*. 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. Preserves existing statutory rights of irrigation entities. Roads may be widened beyond the width specified above by condemnation. QUOTE: "(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;

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	Other Provisions Bearing on Road Creation and Abandonment	
Subject	**Citation**	**Comment**
		"(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."

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Appendix B: HOUSE BILL 321 (2013)

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.

SECTION 2. That Section 40-114, Idaho Code, be, and the same is hereby amended to read as follows:

40-114. DEFINITIONS -- M. (1) "Main traveled way" means the portion of a roadway for the movement of vehicles, exclusive of shoulders.

(2) "Maintain" or "place" means to allow to exist, subject to the provisions of chapter 19, title 40, Idaho Code.

(3) "Maintenance" means to preserve from failure or decline, or repair, refurbish, repaint or otherwise keep an existing highway or ~~structure~~ 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.

(4) "Mortgage" means a class of liens, including deeds of trust, as are commonly given to secure advances on, or the unpaid purchase price of, real property under the laws of the state of Idaho, together with the credit instruments, if any, secured by it.

SECTION 3. That Section 40-202, Idaho Code, be, and the same is hereby amended to read as follows:

40-202. DESIGNATION OF HIGHWAYS AND PUBLIC RIGHTS-OF-WAY. (1) The initial selection of the county highway system and highway district system may be accomplished in the following manner:

(a) The board of county or highway district commissioners shall cause a map to be prepared showing the general location of each highway and public right-of-way in ~~their~~ its jurisdiction, and 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.

(b) After the hearing, the commissioners shall adopt the map, with any changes or revisions considered by them to be advisable in the public interest, as the official map of the respective highway system.

(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.

Provided, however, a county with highway jurisdiction or highway district 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 within the right-of-way until the county or highway 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 public right-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.

(4) When a public right-of-way is created in accordance with the provisions of subsection (2) of this section, or section 40-203 or 40-203A, Idaho Code, there shall be no duty to maintain that public right-of-way, nor shall there be any liability for any injury or damage for failure to maintain it or any highway signs.

(5) Nothing in this section shall limit the power of any board of commissioners to subsequently include or exclude any highway or public right-of-way from the county or highway district system.

(6) By July 1, 2005, and at least every five (5) years thereafter, the board of county or highway district commissioners shall ~~have~~ published in map form and ~~made~~ 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.

(9) Nothing in this section or in any designation of the general location of a highway or public right-of-way shall authorize the public highway agency to assert or claim rights superior to or in conflict with any rights-of-way that resulted from the creation of a facility for the transmission of water which existed before the designation of the location of a highway or public right-of-way.

SECTION 4. That Section 40-203, Idaho Code, be, and the same is hereby amended to read as follows:

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~~ their intention to abandon and vacate any highway or public right-of-way ~~considered no longer to be~~, or to reclassify a public highway as a public right-of-way, where doing so is in the public interest.

(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 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 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 not more than three (3) working days after any such request.

(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.

(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 than twenty-one (21) days before the hearing.

(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.

(h) 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. 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.

(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.

(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.

(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 Code.

(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. The burden of proof shall be on the impacted property owner to establish this fact.

(3) In the event of abandonment and vacation, rights-of-way or easements ~~may~~ shall 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.

~~(4) A highway abandoned and vacated under the provisions of this section may be reclassified as a public right-of-way.~~

~~(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.~~

(~~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.

(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:

(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.

SECTION 5. That Section 40-208, Idaho Code, be, and the same is hereby amended to read as follows:

40-208. JUDICIAL REVIEW. (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.

(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~~ 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.

(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.

(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.

(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.

(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.

(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:~~

~~(a) In violation of constitutional or statutory provisions;~~

~~(b) In excess of the statutory authority of the commissioners;~~

~~(c) Made upon unlawful procedure;~~

~~(d) Affected by other error of law;~~

~~(e) Clearly erroneous in view of the reliable, probative and substantial information on the whole record; or~~

~~(f) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion~~

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 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 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 Brackett

Representat ve Thomas Loertscher

H 321

Printer Friendly Version

HOUSE BILL 321

Full Bill Information

Individual Links:
Bill Text
Statement of Purpose / Fiscal Note
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, Meline, 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, Heider, Hill, Keough, Lacey, Lakey, Lodge, Martin, McKenzie, Mortimer, Nonini, Nuxoll, Patrick, Pearce, Rice, Schmidt, Siddoway, Stennett, Thayn, 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.

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.

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.

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 cooper 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

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ATTACHMENT – Guidelines for Implementation of *SUWA v. BLM P*rinciples

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.[1]

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1 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 (l0th 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.

Appendix D: ABOUT THE AUTHOR

CHRISTOPHER H. MEYER

Chris Meyer is a partner at Givens Pursley LLP in Boise, Idaho.

For over four decades, Chris has been a leader in the fields of water law, road and public access law, land use law, natural resources law, and constitutional law—particularly impact fees and taxation. He has extensive litigation experience at the administrative, district court and appellate levels (including 22 Idaho Supreme Court cases).

Best Lawyers in America has named him "Lawyer of the Year" 14 times in the fields of water, land use, natural resources, and environmental law. Three times, 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."

Chris 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. He served for five years on the Board of Directors of Opera Idaho. His clients include cities, counties, private municipal water providers, Fortune Ten companies, land owners, land developers, energy companies, food producers, and mining companies.

Before joining Givens Pursley in 1991, Chris practiced natural resources law with the National Wildlife Federation in Washington, D.C. He later taught water law and negotiation at the University of Colorado Law School's environmental law clinic.

LEGAL EMPLOYMENT

GIVENS PURSLEY LLP, Boise, Idaho.
Partner. August 1991 to present.

UNIVERSITY OF COLORADO LAW SCHOOL, Boulder, Colorado.
Associate Professor Adjoint. August 1984 through 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.

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
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- Osterweil Prize in Economics

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PROFESSIONAL RECOGNITION

Best Lawyers in America (www.bestlawyers.com)

Listed since 2006 in four categories: water law, land use & zoning law, natural resources, and environmental law.

Named "Lawyer of the Year" 14 times since 2011:

- 2026 – top natural resources lawyer in Idaho
- 2025 – top land use and zoning lawyer in Idaho
- 2025 – top environmental lawyer in Idaho
- 2024 – top water lawyer in Idaho
- 2024 – top natural resources lawyer in Idaho
- 2022 – top natural resources lawyer in Idaho
- 2021 – top land use and zoning lawyer in Idaho
- 2019 – top natural resources lawyer in Idaho
- 2018 – top land use and zoning lawyer in Idaho
- 2017 – top water lawyer in Idaho
- 2015 – top land use and zoning lawyer in Idaho
- 2014 – top natural resources lawyer in Idaho
- 2013 – top environmental lawyer in Idaho
- 2011 – top natural resources lawyer in Idaho

Chambers USA (https://chambers.com/lawyer/christopher-meyer-usa-5:268527)

Listed since 2008 in Band 1 (highest ranking) for natural resources and environmental law.

Mountain States Super Lawyers (www.superlawyers.com)

Named to "Top 100 Lawyers" in the Mountain West in 2019, 2022, 2021.

Listed since 2007 for energy and natural resources law.

Global Law Experts (www.globallawexperts.com)

2024 – Named lawyer of the year in Idaho for land use and zoning law

The Lawyer Network (www.thelawyer-network.com)

2023 – Named lawyer of the year in Idaho for land use and zoning law

Litigation Counsel of America (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)

Martindale-Hubbell (www.martindale.com)

Listed since 1996 with highest ranking (AV).

Idaho Yearbook Directory (2001) (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 (https://www.judges.org/dividing_the_waters/about-dtw/)

Joined Board of Advisors to this water law training program for judges.

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LITIGATION

Jutila v. Cnty. of Shoshone, ___ Idaho ___, 571 P.3d 399, (2025) (Zahn, J.) (successfully defended County's decision not to validate public road).

City of Middleton v. City of Star, Case No. CV14-21-10560 (Idaho Dist. Ct.) (Mar. 7, 2022) (Brent L. Whiting, J.) (successful defense of motion to dismiss in case involving annexation into another city's area of city impact; case settled).

Riverside Irr. Dist. v. IDWR, Case No. CV14-21-05008 (Idaho Dist. Ct.) (Dec. 28, 2021) (Eric J. Wildman, D.J.) (successful defense of City of Nampa's wastewater reuse program).

Nemeth v. Shoshone Cnty., 165 Idaho 851, 453 P.3d 844 (2019) (Moeller, J.) (represented county in road case involving authority of Idaho counties to validate roads on federal lands).

N. Idaho Bldg. Contractors Ass'n v. City of Hayden, 164 Idaho 530, 432 P.3d 976 (2018) (Bevan, J.) (Cynthis K.C. Meyer, D.J.) (represented city in challenge to sewer capitalization fees).

Black Canyon Irrigation Dist. v. State, 163 Idaho 144, 408 P.3d 899 (2018) (Burdick, C.J.) (Eric J. Wildman, D.J.) (successfully defended 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.) (Eric J. Wildman, D.J.) (successfully defended 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) (successfully defended auditorium 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) (successfully defended IDWR's accounting system for storage 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) (Benjamin R. Simpson, D.J.) (represented city in challenge to sewer capitalization fees).

Washington Cnty. v. Bilbao, Case No. CV-2014-1854 (Idaho, Third Judicial Dist., Dec. 8, 2014) (Susan E. Wiebe, D.J.) (successfully represented Washington County in public access litigation).

Cnty. of Shoshone v. United States, 589 Fed. Appx. 834 (9th Cir. 2014) (per curium) (represented county in road case involving federal sovereign immunity).

A&B Irrigation Dist. v. State, 157 Idaho 385, 336 P.3d 792 (2014) (Burdick, C.J.) (Eric J. Wildman, D.J.) (successfully defended challenge to IDWR's single fill rule—Basin-Wide Issue No. 17).

In the Matter of Certified Question of Law – White Cloud v. Valley Cnty., 156 Idaho 77, 320 P.3d 1236 (2014) (J. Jones, J.) (represented county in certified question involving the statute of limitations for challenges to allegedly illegal road development fees).

Hehr v. City of McCall, 155 Idaho 92, 305 P.3d 536 (2013) (Burdick, C.J.) (Michael R. McLaughlin, D.J.) (successfully defended city in action involving impact fees – the Greystone Village case).

Alpine Village Co. v. City of McCall, 155 Idaho 92, 303 P.3d 617 (2013) (Burdick, C.J.) (Michael R. McLaughlin, D.J.) (successfully defended city in challenge to impact fees).

Buckskin Properties, Inc. v. Valley Cnty., 154 Idaho 486, 300 P.3d 18 (2013) (J. Jones, J.) (Michael R. McLaughlin, D.J.) (successfully 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.) (represented mining company in NEPA and forest management litigation).

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Sopatyk v. Lemhi Cnty., 151 Idaho 809, 264 P.3d 916 (2011) (W. Jones, J.) (Joel E. Tingey, D.J.) (successfully defended county's validation of Anderson Creek Road as a public road).

White Cloud v. Valley Cnty., 2011 WL 4583846 (D. Idaho Sept. 30, 2011) (Lodge, J.); *White Cloud v. Valley Cnty.*, 2012 WL 13018504 (D. Idaho Aug. 8, 2012) (Lodge, J.) (successfully 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 Cnty.*, 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.) (successfully 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.).

Mann v. Peters, Case No. CV-2011-57 (Idaho, Fifth Judicial Dist., Aug. 11, 2011) (Robert J. Elgee, D.J.) (successfully represented landowner in case upholding right to develop an "accessory dwelling unit").

American Independence Mines and Minerals Co. v. USDA, 733 F. Supp. 2d 1241 (D. Idaho 2010) (Lodge, J.) (NEPA, standing, and road law issues).

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) (John M. Melanson, D.J.) (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) (John M. Melanson, D.J.) and (Idaho, Fifth Judicial Dist., April 12, 2010) (Eric J. Wildman, D.J.), *aff'd, City of Pocatello v. State*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.) (successfully represented *amicus curiae* municipal water provider in case regarding alternate points of diversion for water rights).

Galli v. Idaho Cnty., 146 Idaho 155, 191 P.3d 233 (2008) (W. Jones, J.; J. Jones, J., concurring) (*amicus curiae* brief in public access case).

Cove Springs Development, Inc. v. Blaine Cnty., Case No. CV2008-22 (Idaho, Fifth Judicial Dist., June 3, 2008) (Robert J. Elgee, D.J.) (successfully represented developer in action declaring unlawful and unconstitutional various exaction and comprehensive plan ordinance provisions).

Schaefer v. City of Sun Valley, Case No. CV-06-882 (Idaho, Fifth Judicial Dist. July 3, 2007) (Robert J. Elgee, D.J.) (secured ruling declaring Sun Valley's affordable housing fee to be unconstitutional).

American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources, 143 Idaho 862, 154 P.3d 433 (2007) (Trout, J.) (R. Barry Wood, D.J.) (successfully represented ground water appropriators in litigation over conjunctive management of ground and surface water).

Chisholm v. Idaho Department of Water Resources, 142 Idaho 159, 125 P.3d 515 (2005) (Burdick, J.) (John K. Butler, D.J.) (successfully represented dairy in challenge to water rights involving the local public interest).

Davisco Foods Int'l, Inc. v. Gooding Cnty., 141 Idaho 784, 118 P.3d 116 (2005) (Schroeder, J.; J. Jones, dissenting) (Monte B. Carlson, D.J.) (represented dairy in land use challenge).

Colorado Water Conservation Bd. v. City of Central, 125 P.3d 424 (Colo. 2005) (Martinez, J.) (article by Christopher Meyer cited by court).

Farrell v. Bd. of Cnty. Comm'rs of Lemhi Cnty., 138 Idaho 378, 64 P.3d 304 (2002) (Schroeder, J.) (James C. Herndon, D.J.) (successfully represented county in public road access case—the Indian Creek Road case).

Potlatch Corp. v. United States, 134 Idaho 916, 12 P.3d 1260 (2000) (Schroeder, J.) (Daniel C. Hurlbutt, D.J.; Silak and Walters, JJ, dissenting) (successfully represented timber company in case rejecting federal reserved water rights for wilderness).

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State v. Hagerman Water Right Owners, Inc., 130 Idaho 727, 947 P.2d 400 (1997) (Schroeder, J.) (Daniel C. Hurlbutt, D.J.) (successfully represented ground water appropriators in establishing partial forfeiture rule for water rights).

Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators, Inc., 129 Idaho 454, 926 P.2d 1301 (1996) (Schroeder, J.) (Daniel C. Hurlbutt, D.J.) (successfully represented ground water appropriators in interpretation of water right amnesty statute).

The Klamath Tribes, 135 I.B.L.A. 192, 1996 WL 518742 (Apr. 12, 1996) (Mullen, J.) (successfully represented mining company in defending challenge by Indian tribe to cultural resource use permit).

State, ex rel. Higginson v. United States, 128 Idaho 246, 912 P.2d 614 (1995) (McDevitt, C.J.) (successfully represented ground water appropriators in defense of constitutional challenge to Snake River Basin Adjudication amendments).

Nebraska v. Rural Electrification Admin., 23 F.3d 1336 (8th Cir. 1994) (Heaney, J.), aff'g, 1993 WL 662353 (D. Neb 1993) (Urbom, J.) (successfully represented Platte River Whooping Crane Trust in challenge to its authority to litigate).

Sierra Club v. Yeutter, 911 F.2d 1405 (10th Cir. 1990) (Tacha, J.) (filed *amicus curiae* brief on behalf of National Wildlife Federation in case seeking to establish federal reserved water rights).

State v. Morros, 766 P.2d 263 (Nev. 1988) (per curiam) (successfully represented National Wildlife Federation in case establishing recognition of instream flows under state law).

Catherland Reclamation Dist. v. Lower Platte North Natural Resources Dist., 433 N.W.2d 161 (Neb. 1988) (Fahrnbruch, J.) (successfully represented National Wildlife Federation in water rights case involving state endangered species act).

Hitchcock and Red Willow Irrigation Dist. v. Lower Platte North Natural Resources Dist., 410 N.W.2d 101 (Neb. 1987) (Hastings, J.) (successfully represented National Wildlife Federation in challenge to water project).

Tulalip Tribes of Washington v. FERC, 732 F.2d 1451 (9th Cir. 1985) (East, J.) (successfully represented National Wildlife Federation in challenge to hydropower licensing regulation).

Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984) (filed *amicus curiae* brief in case involving mitigation for hydroelectric developments on public lands) (White, J.).

National Wildlife Fed'n v. Marsh, 568 F. Supp. 985 (D.D.C. 1983) (Parker, J.) (successfully represented National Wildlife Federation in challenge to oil refinery on Chesapeake Bay in case involving administrative law and NEPA).

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982) (Stevens, J.) (filed *amicus curiae* brief whose position was adopted by the Supreme Court in case involving water law and the dormant commerce clause) (*amicus curiae* brief available at 1982 WL 608572).

LEGISLATION

RAFN Amendments (addressing geothermal water), H.B. 676 (2026 Idaho Sess. Laws ch. ____).

RAFN Amendments (facilitating licensing of municipal water rights for reasonably anticipated future needs), S.B. 1316 (2020 Idaho Sess. Laws ch. 164).

H.B. 1 (2019) (subordination of certain water storage rights, facilitating settlement of many years of litigation over refill of storage rights).

Tax Deed Amendments of 2016 (easements), S.B. 1388.

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Highway Funding and Detachment Amendments of 2014 (road law), H.B. 619a, 2014 Idaho Sess. Laws ch. 214, codified at Idaho Code §§ 40-709, 40-709A.

Public Access Amendments of 2013 (road law), H.B. 321, 2013 Idaho Sess. Laws ch. 239, codified at Idaho Code §§ 40-114, 40-202, 40-203, 40-208, 40-2312.

Exemption from water rights for land application of municipal effluent (water rights), H.B. 608, 2012 Idaho Sess. Laws ch. 218, codified at Idaho Code §§ 42-201(8), 42-221(P).

Local Public Interest Amendments (water rights), 2003 Idaho Sess. Laws ch. 298, codified at Idaho Code §§ 42-202B(3), 42-203A(5), 42-222(1), 42-240(5), 42-1763.

Municipal Water Rights Act of 1996 (water rights), 1996 Idaho Sess. Laws ch. 297, codified at Idaho Code §§ 42-202(2), 42-202B, 42-217("4."), 42-219(1) & (2), 42-222(1), 42-223(2), 43-335, 43-338.

Idaho Administrative Procedure Act (logical outgrowth rule), 1992 Idaho Sess. Laws ch. 263, codified at Idaho Code § 67-5227.

PUBLICATIONS

Meyer, Nelson & Lee, *Idaho Land Use Planning Handbook*, Givens Pursley (2025).

Meyer, *Water Law Handbook: The Acquisition, Use, Transfer, Administration, and Management of Water Rights in Idaho*, Givens Pursley (2026).

Meyer, *Road Law Handbook: Road Creation and Abandonment Law in Idaho*, Givens Pursley (2026).

Meyer, *Ethics Handbook: Ethical Considerations for the Client and Lawyer in Idaho*, Givens Pursley (2026).

Spooner, *The Legal Climate of Climate Change - Water*, Michigan Law Quadrangle Notes (Spring/Summer 2018) (featuring Reed Benson, Chris Meyer, and Gary Ballestros).

Meyer, *Urban Growth, Land Use Planning, and Water Rights in Idaho* (the Idaho Chapter of a publication by the National Judicial Council) (2017).

Fereday & Meyer, *What is the Federal Reserved Water Rights Doctrine, Really? Answering this Question in Idaho's Snake River Basin Adjudication*, 51 Idaho L. Rev. 341 (2016).

Meyer, *Cap Fee Basics and News from the Legal Front*, Association of Idaho Cities (2016).

Meyer, *The Non-Appropriation Lease After Greater Boise Auditorium District v. Frazier*, Idaho Association of Counties (2015).

Meyer, *Mitigation of Injury to Water Rights: Law & Strategy in Idaho*, The Water Report, at 14 (Dec. 2015).

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Meyer, "*Development, Codification, and Application of the Growing Communities Doctrine in Idaho*," presented at American Bar Association, Section of Environment, Energy, and Resources, 28th Annual Water Law Conference: Whose Spigot Is It? (Feb. 18-19, 2010).

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Meyer, Idaho Chapter Author for *Brownfields Law and Practice*, Matthew Bender & Co., Inc. (2004) (named *Best Law Book of the Year* by the American Association of Publishers).

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Meyer, *A Comprehensive Guide to Redeveloping Contaminated Property* (Idaho Chapter), American Bar Association (2002).

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Meyer, *All I Really Need To Know About Legal Ethics I Learned in Law School*, 43 The Advocate (Idaho Bar Assn.) 15 (2000).

Allen, Himberger, Honhorst & Meyer, *Land Use Law in Idaho,* National Business Institute (1999).

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Meyer, *New Developments in Water Rights on Public Lands: Federal Rights and State Interests*, paper presented at conference sponsored by the Natural Resource Law Center, University of Colorado School of Law, Water as a Public Resource: Emerging Rights and Obligations (1987).

Meyer, *Navigating the Wetlands Jurisdiction of the Army Corps of Engineers*, 9 Resource L. Notes 3, Natural Resources Law Center (1986).

Meyer, Two papers published in *Winning Strategies for Rivers: Proceedings of the Tenth Annual National Conference on Rivers*, American Rivers Conservation Council (1985).

Osann, Campbell, Meyer, & Allemang, *Shortchanging the Treasury: The Failure of the Department of the Interior to Comply with the Inspector General's Audit Recommendations to Recover the Costs of Federal Water Projects*, National Wildlife Federation (1984).

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Meyer, *Sporhase v. Nebraska: A Spur to Better Water Resource Management*, 1 Envtl. Forum 28, Environmental Law Institute (1983).

Burwell & Meyer, *A Citizen's Guide to Clean Air and Transportation: Implications for Urban Revitalization*, U.S. Environmental Protection Agency (1980).

Meyer, *The Effects of Labor Organization on the Functional Distribution of Income in Manufacturing Industries in the United States for the Years 1948 through 1972*, Senior Honors Thesis, University of Michigan (1978).

BAR MEMBERSHIPS

Member of the bars of Idaho (active) and Colorado and the District of Columbia (inactive).

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Admitted to practice in federal courts in the District of Columbia, Eighth, Ninth, and Tenth Circuits.

PERSONAL

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 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 34 years.

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