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IN THE SUPREME COURT
OF THE
STATE OF IDAHO

DON HALVERSON,
Plaintiff / Appellant,
and
CHARLOTTE HALVERSON
Plaintiff

vs.

NORTH LATAH COUNTY HIGHWAY DISTRICT, BOARD OF COMMISSIONERS FOR THE NORTH LATAH COUNTY HIGHWAY DISTRICT; ORLAND ARNEBERG, RICHARD HANSEN, SHERMAN CLYDE, in their official capacities and in their individual capacities; DAN PAYNE, in his official capacity and in his individual capacity,

Defendants / Respondents.

Appealed from the District Court of the Second Judicial District of the State of Idaho, in and for the County of Latah

HON. JOHN R. STEGNER, DISTRICT JUDGE

DON HALVORSON
PRO SE

RONALD J. LANDECK
ATTORNEY FOR RESPONDENTS

Filed this ___ day of _____, 2009

STEPHEN W. KENYON, CLERK

By _____
Deputy

SUPREME COURT CASE NO. 36825-2009

VOLUME VI OF VII VOLUMES

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

DON & CHARLOTTE HALVORSON (Husband and Wife),	Case No. CV 2008-180
Plaintiffs,	BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
vs.	
NORTH LATAH COUNTY HIGHWAY DISTRICT; BOARD OF COMMISSIONERS FOR THE NORTH LATAH COUNTY HIGHWAY DISTRICT, ORLAND ARNEBERG, RICHARD HANSEN, SHERMAN CLYDE, in their individual capacities; DAN PAYNE, in his official capacity and in his individual capacity,	
Defendants.	

INTRODUCTION

Defendants seek summary judgment on all of Plaintiffs' claims in this action because the material facts of this case are not in dispute and all claims can be decided based on undisputed facts as a matter of law. Despite the nature and extent of Plaintiffs' assertions, claims and arguments, it is critical that a proper perspective be placed on this case. Plaintiffs' claims are

premised almost exclusively on two (2) events, the first being the District's widening of Camps Canyon Road in 2005 and 2006 by "less than a foot or two when gravel was spread over the entire portion of the traveled roadway...." and the second being the District's issuance of a public right-of-way approach permit on or about March, 2006, to Plaintiffs' neighbors which was revoked in June, 2006. See Facts below, par. 6 and 13-18. This conduct is not of the heinous variety as the misguided legal attack of Plaintiffs' Complaint would have this Court believe. This Brief will show that the District has, at all times relevant to this action, properly discharged its statutory responsibilities to improve and maintain the public highway known as Camps Canyon Road.

Also, importantly, Plaintiffs did not file a notice of claims under Idaho Code section 6-901 et seq. arising out of the District's alleged "negligent or otherwise wrongful acts or omissions and those of its employees...." until November, 2007, which was well beyond the 180 day limitation period from the date many of Plaintiffs' claims arose.

Regarding to the organization of this Brief, identification of Plaintiffs' claims is made difficult because Plaintiffs' Complaint is intermittently conclusory, speculative, argumentative, generalized, repetitive and disorganized and relies fundamentally on factual assertions that are not admissible in evidence, primarily for reasons of lack of foundation and hearsay. The same descriptors apply to the factual record produced by Plaintiffs in support of their numerous, unsuccessful pretrial motions. Defendants anticipate that similar, unfounded assertions will be forthcoming in response to Defendants' Motion for Summary Judgment. These observations are made to emphasize that particular attention will be required in the consideration of this Motion to distinguish between material and immaterial evidence and between admissible and inadmissible evidence.

In this Brief and supporting affidavits, Defendants will identify and specify the relevant, admissible, material facts of this case, demonstrate that there are no genuine issues as to those facts and prove that summary judgment is appropriate in favor of Defendants and against Plaintiffs on all Plaintiffs' claims in this action.

SUMMARY JUDGMENT STANDARD

Rule 56(b) of the Idaho Rules of Civil Procedure allows a defendant to move for summary judgment against any or all of Plaintiffs' claims. The standard for determining the appropriateness of summary judgment, applied to a case in which the admissibility of evidence was an important consideration, as is the circumstance in this matter in regard to Plaintiffs' speculative, unfounded and hearsay assertions, is held by the Idaho Supreme Court to be as follows.

> Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Thompson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 529, 887 P.2d 1034, 1036 (1994). "I.R.C.P. 56(e) provides that the adverse party may not rest upon mere allegations in the pleadings, but must set forth by affidavit specific facts showing there is a genuine issue for trial." *Carnell v. Barker Mgmt., Inc.*, 137 Idaho 322, 327, 48 P.3d 651, 656 (2002) (citations omitted). "Affidavits supporting or opposing the motion for summary judgment 'shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.'" *Id.* "The admissibility of the evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to determine whether the evidence is sufficient to create a genuine issue for trial." *Id.* "Summary judgment is appropriate where the nonmoving party bearing the burden of proof fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Id.*
>
> Upon moving for summary judgment, the moving party must show the absence of a genuine issue of material fact. *Quinlan v. Idaho Comm'n for Pardons and*

> *Parole*, 138 Idaho 726, 729, 69 P.3d 146, 149 (2003). The burden then shifts to the nonmoving party to show that a genuine issue of material facts does exist. *Id.* The nonmoving party must come forward and produce evidence to set forth specific facts showing a genuine issue of material fact. *Id.* The nonmoving party must present more than speculation or a mere scintilla of evidence to create a genuine issue. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). Failure to do so will result in an order granting summary judgment. *Quinlan*, 138 Idaho at 729, 69 P.3d at 149.

Sprinkler Irrigation Company, Inc. v. John Deere Insurance Company, Inc., 139 Idaho 691, 695-696, 85 P.3d 667, 671-672.

> Further guidance for the trial court in regard to evidentiary decisions in summary proceedings is given in relation to the appellate review standard. Evidentiary rulings shall be reviewed under an abuse of discretion standard. *Perry v. Magic Valley Reg'l. Med. Ctr.*, 134 Idaho 46, 50, 995 P.2d 816 (2000). Upon review to determine whether a trial court abused its discretion, this Court inquires: (1) whether it correctly perceived the issue as discretionary; (2) whether it acted within the boundaries of its discretion and consistently with applicable legal standards; and (3) whether it reached its decision by an exercise of reason. *Swallow v. Emergency Med. of Idaho, P.A.*, 138 Idaho 589, 592, 67 P.3d 68, 71 (2003) (citing *State v. Merwin,* 131 Idaho 642, 962 P.2d 1026 (1998); *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).

Id. at 693, P3d at 762.

ADMISSIBLE MATERIAL FACTS RELEVANT TO PLAINTIFFS' CLAIMS ("Facts")

Plaintiffs' claims in this action arise almost exclusively from two (2) occurrences, the first being improvements made by Defendant North Latah County Highway District (the "District") in 2005 and 2006 to an area of Camps Canyon Road, located principally between property owned by Plaintiffs ("Plaintiffs' real property") and Robert Wagner and Kate Wagner, husband and wife ("Wagners' real property"), approximately 700 feet in length, and the second being the District foreman Dan Payne's (i) issuance and revocation and (ii) reissuance of a driveway approach permit to Robert Wagner in 2006 to access Wagner's real property.

The admissible material facts relevant to Plaintiffs' claims are as follows:

1) Camps Canyon Road was established as a public highway through public use prior to 1930, has retained its status to the present as a public highway under jurisdiction of the District and is shown a public highway on the official map of the District's highway system pursuant to Idaho Code Section 40-202(1). Affidavit of Orland Arneberg filed herein on November 4, 2008 ("Arneberg Affidavit"), par. 5 and 7. Affidavit of Dan Carscallen filed herein on November 4, 2008 ("Carscallen Affidavit"), par. 3 and 4. I have been employed by Defendant North Latah County Highway District ("District") since 1974 and District foreman since 1994. Since 1974, my duties for District foreman have included maintaining and improving projects on Camps Canyon Road with the primary difference being that, as foreman, I oversee and supervise the District's work instead of doing it. At least since 1974, the District has maintained Camps Canyon Road as needed by grading and/or adding gravel. Affidavit of Dan Payne filed herein on November 4, 2008 ("Payne Affidavit"), par. 2 and 4.

2) Although improved over the years, Camps Canyon Road follows the same approximate centerline now that it has since the early 1930's. Arneberg Affidavit, par. 8; Payne Affidavit, par. 8. Larry Hodge, licensed Idaho surveyor, opines that based upon a comparison of aerial maps that the location and course of Camps Canyon Road has not been changed between 1940 and 2004. Affidavit of Larry Hodge filed herein on January 30, 2009 ("Hodge Affidavit"), par. 5. John Dunn LPS, who surveyed for Plaintiffs the Wagner real property, more particularly described in Instrument No. 501677, records of Latah County, Idaho, which is contiguous to real property owned by Plaintiffs more particularly described in Instrument No. 424411, records of Latah

County, Idaho, at the centerline of Camps Canyon Road, commented in his May, 2007 survey notes that:

> Camps Canyon Road (County road) is shown with a 50 foot wide prescriptive R/W. The physical location of the road is on a sidehill and appears to be stable with little, if any, change occurring over time.

See Hodge Affidavit, par. 4(g).

3) Absent special circumstances, which are not applicable in this case, such as when the District has been deeded a public right-of-way less than fifty feet wide or when an improvement predated the establishment of the public road, the District's public road maintenance and improvement activities are undertaken based upon Idaho law that states a public highway shall be not less than fifty (50) feet wide. In my opinion, this minimum width is reasonably necessary to properly maintain a public highway in rural Latah County that is safe and reasonably convenient for the public. Payne Affidavit, par. 10.

4) Absent special circumstances, which are not present in this case, if the District undertakes improvements on a public road established by prescription, such as Camps Canyon Road, those improvements will be made within the District's prescriptive minimum fifty foot (50') wide right-of-way without permission of adjoining landowners because such permission is not necessary as all of the District's work is undertaken within its legal rights. However, the District's foremen will routinely make an effort to inform adjoining landowners of planned improvement projects, particularly major ones, as a courtesy and convenience. In 1996, the District followed this practice when it undertook improvements to Camps Canyon Road without seeking or obtaining the permission from the landowner, Ed Swanson. At no time did Mr. Swanson

dedicate or gift any right-of-way to the District in connection with the 1996 improvements. Mr. Swanson was aware of those improvements and had no objection to them. Second Affidavit of Dan Payne filed herein on January 30, 2009 ("Payne Second Affidavit"), par. 4; Arneberg Affidavit, par 10; Defendants' Second Record Supplement, Items 2 and 3.

5) In 1996, to improve road safety for increased public, vehicular traffic, the District widened the traveled surface of Camps Canyon Road on the north side (the side then owned by Ed Swanson, Plaintiffs' predecessor in interest to Plaintiffs' real property) by approximately 4 feet to its approximate present width by hauling in fill dirt from a ditch cleaning project nearby and grading that dirt and adding some gravel onto the road surface, and the District installed a culvert and covered the exposed bedrock in the road with fill dirt. Payne Affidavit, par. 5.

6) In 2005 and 2006, to improve road safety for increased public vehicular traffic, the District widened the traveled surface of Camps Canyon Road on its southerly side (the side opposite Halvorsons' real property) by drilling and blasting bedrock, adding gravel to level the road surface, sloping and seeding the banks on that side, extending the culvert under the road by approximately four feet (4') and improving the ditch on that southerly side of the road. Payne Affidavit, par. 6. Camps Canyon Road was widened less than a foot or two in 2005 and 2006 on the Plaintiffs' side of the road when gravel was spread over the entire portion of the traveled roadway following the improvements to Wagners' side. Payne Second Affidavit, par. 4.

7) After the District's improvements in 2006, the traveled surface of Camps Canyon Road does not exceed approximately 23 ½ feet in width in the general vicinity of Plaintiffs'

real property at issue in this litigation and averages approximately 21 feet in width in that same stretch. Payne Affidavit, par. 7.

8) In addition to using and maintaining the traveled surface of Camps Canyon Road and in order to properly grade and drain the road for safe public travel, the District must maintain the cut slope, which is the southerly side of Camps Canyon Road in the vicinity of Plaintiffs' property and the ditch and culvert on that southerly side beneath the cut slope, and the District must utilize the fill slope, which is the northerly side of Camps Canyon Road in the vicinity of Plaintiffs' real property, for structural support for the traveled surface of the road and for snow removal and storage in winter months. Payne Affidavit, par. 9.

9) A minimum 50 foot width is reasonably necessary to properly maintain a public highway in rural Latah County that is safe and reasonably convenient for the public. Payne Affidavit, par. 10.

10) The entire stretch of Camps Canyon Road used by the District for public highway purposes in the vicinity of Plaintiffs' real property, including cut slope to fill slope lies within a 50 foot wide right-of-way.

11) Sometime after 1996, Plaintiffs constructed a fence on the steep hillside on the full (northerly) slope adjacent to the traveled surface of Camps Canyon Road and, in places, within fifteen feet (15') of the centerline of Camps Canyon Road. While the fence does not interfere with the public traffic on the traveled surface of Camps Canyon Road, the District's maintenance activities, primarily grading and snow removal, are affected by the fence's placement. That is, given the steepness of the slope on Plaintiffs' property, it is virtually impossible to properly maintain Camps

Canyon Road without some gravel or snow reaching Plaintiffs' fence. Plaintiffs have failed to remove or reconstruct the fence outside of the District's right-of-way and, in fact, Plaintiffs have now used their placement of the fence to support their claim that the District has damaged and trespassed upon their property. To the contrary, the District has been diligent in its efforts to avoid causing any damage to Plaintiffs' misplaced fence or their property. Payne Affidavit, par. 12.

12) Since 2005 and 2006, the only significant activities that have been undertaken by the District on Camps Canyon Road in the area of Plaintiffs' real property and Wagners' real property are graveling, road grading and snow plowing. These activities are essential to proper maintenance of all public roads. These activities and vehicular use contribute to the movement of gravel particularly toward the sides of a road. In the grading process, most gravel is brought back toward the road center, but inevitably some gravel moves outward, which serves to stabilize and support the road but does result in minimal, necessary widening of the road over time. Payne Second Affidavit, par. 5.

13) On or about March, 2006, Robert Wagner, who was in the process of building a residence, applied to the District using the District's standard form to obtain a permit for an approach onto Camps Canyon Road from the Wagners' real property. Dan Payne met with Mr. Wagner who showed me a post next to the road which he said represented his southern property line. North of that post was an old driveway that used to lead to a home and outbuildings on Mr. Wagner's property. At least 50 feet further north of that driveway, Mr. Wagner had begun construction of a driveway which he wanted to be the location of his approach permit. Dan Payne asked why he

didn't want to use the old driveway onto his property, and he replied that his neighbor, Plaintiff Don Halvorson thought it would encroach on his property. Mr. Wagner said something to the effect the location he had selected was well north of the old driveway, would "be safe" and not cause any problems with his neighbor. Dan Payne approved his approach permit application for that location. Payne Second Affidavit, par. 6.

14) On or about April, 2006, Mr. Wagner told Dan Payne that Don Halvorson had complained that the driveway approach was on the Halvorsons' real property. Mr. Wagner then handed Dan Payne a copy of the legal description from the deed to his property, a true and correct copy of which is attached hereto as Exhibit A. Dan Payne met Mr. Wagner at Camps Canyon Road and used a measuring wheel from that legal description's point of beginning in Camps Canyon Road, which Dan Payne lined up with Plaintiffs' fence, and measured "699 feet, more or less, along the County Road." That distance was a great distance past the post Mr. Wagner had set for his southeasterly corner and was south of the old driveway and approximately one hundred feet south of the approach for which the permit had been issued. Payne Second Affidavit, par. 7.

15) On April 12, 2006, Dan Payne attended a meeting of the District commissioners where Don Halvorson and Mr. Wagner were present and spoke about the driveway issue. Dan Payne stated that he had measured the distance along the County Road and that, in his opinion, the permitted approach was approximately 100 feet north of Mr. Wagner's southern property boundary. Mr. Halvorson confirmed that the point of beginning Dan Payne used that was based on his fence location was accurate. Dan Payne asked Mr. Halvorson why he thought the approach was on his property and, if so, what had

happened to the 699 feet of road frontage shown on Mr. Wagner's deed. Mr. Halvorson mentioned something about a "switchback" and that the road had been moved, which Dan Payne knew to be false. Payne Second Affidavit, par. 8.

16) On or about June, 2006, Mr. Wagner told Dan Payne that Mr. Halvorson had produced a survey and that he wanted Mr. Wagner to move his driveway. Mr. Wagner filled out a new application and showed Dan Payne the location, which was at least one hundred feet north of the first, permitted approach. Dan Payne approved this second application on June 9, 2006, a true and correct copy of which is attached to the Payne Second Affidavit as Exhibit B. Dan Payne revoked the first permit and threw it away as it was no longer valid. Payne Second Affidavit, par. 9.

17) Mr. Wagner proceeded over the next weekend to construct the new driveway and he had the rock used in construction of the first driveway pulled onto his property and had the cut that was made for the first driveway filled in with soil. Payne Second Affidavit, par. 10.

18) District has delegated to its foreman the responsibility to review and issue approach permits. Payne Second Affidavit, par. 12; Second Affidavit of Dan Carscallen filed herein on February 2, 2009 ("Carscallen Second Affidavit"), par. 7.

19) Plaintiffs have not filed a petition with the District to initiate a validation proceeding under Idaho Code section 40-203 A. Carscallen Second Affidavit, par. 8.

20) Plaintiffs filed a Tort Claim Notice with the District on November 6, 2007. This is the only tort claim notice filed by Plaintiffs with the District. Carscallen Second Affidavit, par. 3.

21) Key public records related to this action are the following:

a. Instrument No. 501677, records of Latah County, Idaho ("Wagners' Deed" to "Wagners' real property," as defined below).

b. Instrument No. 424411, records of Latah County, Idaho ("Plaintiffs' Deed" to "Plaintiffs' real property").

c. Instrument No. 57421, records of Latah County, Idaho ("1911 Deed").

d. 1940 aerial photo, with mapping annotations, records of Latah County, Idaho ("1940 aerial").

e. 2004 aerial photo, records of Latah County, Idaho ("2004 aerial").

f. Instrument No. 506484, records of Latah County, Idaho ("July, 2006 Survey").

g. Amended Record of Survey, Instrument No. 513819, records of Latah County, Idaho ("May, 2007 Survey"), which describes the boundaries of the Wagners' real property, being, for purposes of this Affidavit, the "2.78 AC±" parcel noted on the May, 2007 survey contiguous to Camps Canyon Road.

Second Record Supplement filed herein on February 2, 2009 ("Second Record Supplement"), par. 2.

THERE ARE NO GENUINE ISSUES OF MATERIAL FACT AND DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW

- Plaintiffs' failure to comply with the notice requirement of Idaho Code section 6-905 bars certain of Plaintiffs' claims under Idaho Code sections 9-101 et seq.

Plaintiffs' only Tort Claim Notice ("Plaintiffs' Notice") was filed with the District on November 6, 2007. Carscallen Second Affidavit, par. 2 and Exhibit A. Plaintiffs' Notice claimed damages to Plaintiffs' fence in 2004 and 2006, to Plaintiffs' real property related to the District's issuance of a driveway permit to Wagners and construction of a driveway in 2006 and for Wagners' trespass on Plaintiffs' real property beginning in 2005 and 2006. Plaintiffs'

Complaint seeks compensation for those damages in Plaintiffs' Complaint as summarized in § 11. A thereof.

The Idaho Tort Claims Act, Idaho Code sections 6-901 et seq. ("ITCA") requires claimants against political subdivisions to submit a written "claim" to the clerk or secretary of the political subdivision within 180 days from the date the claim arose or reasonably should have been discovered. Idaho Code § 6-906. This 180-day period begins to run when the wrongful acts occur, even if the plaintiff doesn't yet know, and could not even know the full extent of his injuries. *Mitchell v. Bingham Mem. Hosp.*, 130 Idaho 420 (1997). All ITCA claims must be written. Idaho Code § 6-902(7). County highway district are political subdivisions for the purposes of the ITCA. *Curl v. Indian Springs Natatorium, Inc.*, 97 Idaho 637 (1976). Where the ITCA bars an action, summary judgment is appropriate. *Nelson v. Anderson Lumber Co.*, 140 Idaho 702 (Ct. App. 2004).

All of Plaintiffs' claims for damages against Defendants under ITCA, prior to May 8, 2007, being 180 days prior to the District's receipt of Plaintiffs' Notice on November 6, 2007, and all Plaintiffs' claims for which a notice of tort claim is required but which are not described in Plaintiffs' Notice must be dismissed for failure to comply with the notice requirements mandated by Idaho Code sections 6-905, 907 and 908. *Overman v. Klein*, 103 Idaho 795, 797, 654 P2d 888, 890 (1982).

The barred claims include claims described in Plaintiffs' Notice for the reason that those claims arose more than 180 days prior to Plaintiffs' filing, as follows: claims for damages to Plaintiffs' fence in 2004, 2005 and 2006 and claims for damages to Plaintiffs' real property, including from construction of the Wagners' driveway in 2006 and claims for damages from any alleged trespass, and/or nuisance from 1996 through May 8, 2007. Complaint § 11. E.

The barred claims also include claims not described at all in Plaintiff's Notice, as follows: claims that the District failed to survey and record surveys in 1996, 2005 and 2006, claims that the District failed to keep and/or maintain District records in 1996, 2005 and 2006, claims that the individual Defendants misrepresented information. *See* Idaho Code section 6-907; *Cook v. State of Idaho*, 133 Idaho 288, 298, 985 P.2d 1150, 1160 (1999).

- District and the individual Defendants while acting within the course and scope of employment are not liable for certain claims of Plaintiffs under Idaho Code sections 6-904 and 6-904B.

The District and the individual Defendants are not liable for Plaintiffs' claims arising out of alleged acts or omission of the individual Defendants, exercising ordinary care, "in reliance upon or the execution or performance of a statutory...function...." Idaho Code section 6-904. Plaintiffs have alleged numerous violations by Defendants of such statutory functions, including those statutes referenced in §§ II. K, O, P. 7 and Q 8. of the Complaint, namely Idaho Code sections 7-701 et seq., 40-203 A, 208, 604, 605, 608, 1307, 1310, 1311, 1312, 1336, 2012, 2302 and 2317, 67-5232 and 8001 et seq.

ITCA establishes a "rebuttable presumption that any act or omission of an employee within the terms and at the place of his employment is within the course and scope of his employment and without malice or criminal intent. Idaho Code section 6-903 (e). Plaintiffs' Complaint does not set forth any facts that rebut this presumption or that show Defendants did not exercise ordinary care in the performance of these functions. To the contrary, Dan Payne's affidavits detail the District's due diligence in all operational matters related to this proceeding. Facts, par. 1, 3, 4, 6-9 and 11. All of these claims of violation of statutory duties fail against the District and all individual Defendants and should be dismissed.

Plaintiffs claim that Defendants have abused their discretion by creating improper standards and policies regarding the District's management of prescriptive right of ways. Complaint, § J. These claims against the District's creation and implementation of policies likewise fail under the express language of Idaho Code section 60-904 which immunizes the Districts and the individual Defendant foreman and commissioners for the "exercise...failure to exercise or perform a discretionary function or duty...whether or not the discretion be abused." *Id.* The legislature has provided such immunity from suit under the "discretionary function" exception to ITCA. The Idaho Supreme Court has set forth the "planning/operational" test for determining whether this immunity exists, and, under this test, a party is immune from activities involving "policy judgments and decision making." *United Pacific Railroad Company v. State of Idaho*, 654 F. Sup. 1236, 1242 (1987) (Dist. Ct. Idaho) (citing *Sterling v. Bloom*, 111 Idaho 211, 723 P2d 755 (1986). Accordingly, Plaintiffs' claims related to policy and standards issues should be dismissed absent sufficient proof to overcome the presumption of no malice or criminal intent.

Plaintiffs claim that the District's issuance of a driveway permit to the Wagners violates the District's duties to Plaintiffs. Idaho Code section 6-904B(3), however, states, in part, as follows:

> A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent and without gross negligence or reckless, willful and wanton conduct as defined in section 6-904C, Idaho Code, shall not be liable for any claim which:
> ...
> 3. Arises out of the issuance...or revocation of...a permit...approval...or similar authorization.

Idaho Code section 6-904B(3).

The rebuttable prescription under Idaho Code section 6-903(e) that the individual Defendants acted within the course and scope of employment and without malice or criminal intent applies to the issuance of a permit. While the immunity of section 6-904B(3) could be breached upon proof that rebuts the presumption or upon proof of "gross negligence or reckless, willful and wanton conduct," there is substantial evidence on this record that Defendants used ordinary care in the issuance and revocation. Plaintiffs' Complaint sets forth no admissible facts to the contrary. Facts, par. 13-18. Plaintiffs' claims as to issuance of this permit should be dismissed.

- Defendants have not exceeded their jurisdiction with respect to Camps Canyon Road, a public highway established by prescription with a statutorily prescribed minimum width of 50 feet.

The facts on this record establish that Camps Canyon Road is a public highway established by prescription since at least 1911. Camps Canyon Road is referenced as a "County Road" in the 1911 Deed, and, beyond that, by Orland Arneberg's recollections of the 1930's and, more recently, by District foreman Dan Payne's continuous observations and work since 1974. The minimum width of public highways established by user in Idaho has been 50 feet since 1887. *Meservey v. Gulliford*, 14 Idaho 133, 93 P.780,784 (1908); Idaho Code Section 40-2312. The only exception to this requirement was for those highways "consisting of a less width at the date of enactment" of Section 932, Rev. St. 1887, in 1887. *Meservey, supra.* Idaho law also holds that all highways "may be as wide as required for proper construction and maintenance in the discretion of the authority in charge of the construction and maintenance. *Id.* In a case that focused on the right to install utilities beneath the surface area of a public road, the Idaho Supreme Court, relying on *Meservey*, rejected the argument "that public prescriptive easements should be construed as narrowly as private prescriptive easements." *Bentel v. County of Bannock*, 104 Idaho 130, 656 P.2d 1383 (1983) at 133. The Court cited approvingly from *Meservey*, for its holding that a 50-foot

easement will be upheld because "common experience shows that width [is] no more than sufficient for the proper keeping up and repair of roads generally." *Bentel*, *supra*, at 133, citing *Meservey*, *supra* at 148.

Meservey states that "the right of the public is not limited to the traveled part, but such user is evidence of a right in the public 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...." *Meservey*, *supra* at 784, citing *Burrows v. Guest*, 5 Utah 91, 12 P.847. *Meservey* further held that "the right acquired by prescription carries with it such width as is reasonably necessary for the reasonable convenience of the traveling public...." *Id.* at 785. The *Meservey* Court, too, stated that "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. *Id.* Moreover, "it should be presumed that a public highway is of the prescribed width unless the contrary is proven." *Hunsaker v. Utah*, 29 Utah 2nd 322, 324, 509 P.2d 352, 354 (1973). *Hunsaker* involved a highway which the landowner asserted was not of the prescribed statutory width because it had been used as a parking lot and gas station and, therefore, the public highway should be confined to the traveled path. The Utah Supreme Court disagreed with plaintiffs and held that such evidence of use "does not rebut the presumed statutory width...." *Id.* at 325. That Court, concurring with *Meservey*, held:

> This Court has reiterated that where the public has acquired the right to a public highway by user, they are not limited to such width as has been actually used. The use carries with it such use as is reasonably necessary for the public easement of travel.

Id.

The District has acted entirely within its legal authority in all matters pertaining to its jurisdiction over Camps Canyon Road. Since the establishment of Camps Canyon Road as a public

highway by user sometime prior to the early 1930's, the District, and its predecessor entities, have not used or occupied more area than the minimum 50 foot width mandated by Idaho law. Payne Affidavit, par. 5-12; Payne Second Affidavit, par. 2-5. Further, there is no evidence to prove the contrary. Unlike *Hunsaker*, there is not even evidence of competing uses, other than the fence constructed by Plaintiffs after 1996 within the District's right of way. Of course, this effort to confine the public road has no effect on the District's public highway rights as Plaintiffs cannot acquire prescriptive rights against the public. *Rich v. Burdick*, 83 Idaho 35, 362 P2d 1088 (1961). Plaintiffs' argument that the District's authority over the road is limited to a lesser width fails as a matter of law.

Applying the statement of facts above to the public highway law of Idaho results in the conclusion that the District has acted entirely within its legal authority in all matters pertaining to its jurisdiction over Camps Canyon Road. Since the establishment of Camps Canyon Road as a public highway by user sometime prior to the early 1930's, the District, and its predecessor entities, have not used or occupied more area than the minimum 50 foot width mandated by Idaho law. Plaintiffs have offered no evidence to the contrary in their previous submittals to this Court. They have merely argued that the District's authority over the road is limited to a lesser width but, as a matter of law, that assertion fails.

- Plaintiffs' constitutional claims fail for the reason that the District has not exceeded its statutory authority.

Because the facts on this record are that the District has the legal right to exclusive general supervision and jurisdiction over the 50 foot wide public right-of-way of Camps Canyon Road, because the District has not exceeded the limits of its jurisdiction and because such jurisdiction has existed since 1911, the 1930's or 1974, depending on the required level of proof with any dictating

the same conclusion, Plaintiffs' taking claims fail as those claims cannot, by definition, be asserted where there has been no taking or deprivation.

Plaintiffs' Complaint makes reference to inverse condemnation claims against Defendants using various terms including "taking," "deprivations," misappropriation," "expansion," "encroachment," "use of our land," "realignment," "loss of our right to use and peacefully enjoy," "seizure/confiscation," "extension," "loss of right to exclude others," "alteration," "widening and relocating," and "crossing property line" ("inverse condemnation claims"). Complaint, §§ E, K, L, O and others. Plaintiffs' inverse condemnation claims in connection with Camps Canyon Road arise exclusively from (i) the District's 2005-2006 alleged "taking" of "less than a foot or two" by the spreading gravel over Camps Canyon Road and (ii) the District's issuance of the Wagners' driveway permit in March, 2006, which was revoked in June, 2006. Plaintiffs also assail the District's policy of widening public, prescriptive road as an unconstitutional, impermissible use of the District's authority.

No genuine issue has been raised in this case about Camps Canyon Road's status as a public, prescriptive highway. That it became a highway by user before 1911 or in the 1930's or even as late as the 1970's is of no moment. The unrebutted proof is that it is a public highway established by prescription. *See* Idaho Code section 40-202(3). There is also no question but that *Meservey* and its progeny Idaho Code section 40-2312, establish a minimum fifty (50) foot width for public, prescriptive highways. Further, Plaintiffs have not offered any proof that any circumstances existed at the point in time that Camps Canyon Road became a public highway to be of a lesser width.

In the recent case of *Ada County Highway District v. Total Success Investments, LLC*, 145 Idaho 360, 179 P3d 323, in deciding a claim that asserted the acquisition of a prescriptive, public

road pursuant to Idaho Code section 40-202(3) was an unconstitutional taking of property, the Idaho Supreme Court held that section 40-202(3) was "not unconstitutional on its face." *Id.* at 369, P3d at 332. The Court then cited the limitations provision of Idaho Code section 5-224 in advising that the "landowner has four years from the accrual of the cause of action to bring a claim of inverse condemnation." *Id.*

Total Success, as applied to this case, instructs that the statute authorizing establishment of public highways by prescription is to be given effect and that a landowner must assert any claims adverse to the public right with four (4) years. Because no such claim was brought by a landowner within four (4) years of the establishment of Camps Canyon Road many years ago, all rights of the public, including in and to the statutorily established minimum fifty (50) foot width, became vested and not subject to any future landowner's claim. Plaintiffs' claims assailing the District's unconstitutional policies related to road maintenance and improvement fail for the same reason because the law clearly permits the District to conduct its operations within the public, prescriptive right-of-way, which the records establishes it has done. For these reasons, Plaintiffs' inverse condemnation claims in all forms related to Camps Canyon Road should be dismissed as a matter of law.

Plaintiffs' remaining inverse condemnation claim arises because a permit was issued to the Wagners that, arguably, would have permitted the Wagners to cross Plaintiffs' real property before reaching their own. District foreman Dan Payne took reasonable and appropriate actions to verify that the permit issued to Plaintiffs' neighbors, the Wagners, was located on the Wagners' property. While there is an issue of fact regarding the boundary line between Plaintiffs' real property and the Wagners' real property, that issue is not material to Plaintiffs' inverse condemnation claim. Plaintiffs relied upon the June, 1996 survey, which was amended by the May, 2007 survey, in

convincing Wagners that a portion of the Wagners' driveway approach crossed Plaintiffs' real property and demanding that Wagners move their approach. Wagners acceded to that demand. Facts, par 16. The permit was revoked, Wagners abandoned the initial driveway approach and the alleged taking ceased. Further, as the permit on its face provides, the Wagners made a representation that they owned the "property to be served," and it was the Wagners, not the District that allegedly "took" and occupied Plaintiffs' real property. Under these circumstances, there was no "taking" whatsoever by the District and, as discussed above, no liability under ITCA for such issuance. Licensed surveyor Larry J. Hodge has opined that the Wagners were likely justified in putting the first driveway where they did and, if so, that the District's grant of a permit was proper in all respects. Facts, par 13 and18; Hodge Affidavit, par. 6-10.

However, even if this boundary issue were to be resolved in Plaintiffs' favor, the District's conduct does not give rise to actions for damages, taking claims and/or due process violations. The facts demonstrate that Dan Payne undertook due diligence in this matter in that he (i) received and reviewed an application, which contains a representation that the applicant is the "owner" of the "property to be served," (ii) personally inspected the approach, noting the historic driveway access for this property and (iii) discussed the property boundary consideration with the applicant. The District had every right to rely on this information in the exercise of its supervisory jurisdiction over the public right-of-way. The District used ordinary care and acted reasonably and in good faith in all matters pertaining to this permit.

Plaintiffs allege violations of their substantive and procedural due process and equal protection rights, although not specifically pled, but generally referenced under the 1st, 5th and 14th amendments to the U.S. Constitution, Article 1, §§ 1, 2, 3, 13, 14 and 17 of the Idaho State Constitution as well as Idaho Code sections 40-203A and 208 and 42 U.S.C. § 1983.

Plaintiffs "predeprivation" due process claims fail for the same reason as the taking claims and also because Idaho Code § 40-203A provides a predeprivation process that allows any property owner within the District system, a right "to initiate public proceedings to validate a highway or public right-of-way" if the "location of the highway... cannot be accurately determined due to numerous allegations of the highway...." among other provisions. Idaho Code § 40-203A(1). This statute speaks directly to Plaintiffs' circumstances, yet, as this Court has previously been advised through a declaratory judgment filed by Plaintiffs, Plaintiffs elected not to avail themselves of this "predeprivation" remedy that Idaho law provides. Carscallen Second Affidavit, par. 8. The Idaho Supreme Court has commented on this process as follows:

> Idaho Code § 40-203A entitles a resident or property holder within the county, who is aggrieved by a decision of the board of commissioners in a validation proceeding to judicial review I.C. § 203A(4)....
>
> 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. § 203A.
>
> Thus, one can safely conclude that "[p]roceedings for review" of county road-validation proceedings, as provided in I.C. § 40-208, are to be characterized as separate proceedings...these proceedings are the exclusive means by which a validation decision can be challenged....
>
> ...one cannot challenge in a separate civil suit the action of a board where that board has acted on matters within its jurisdiction.

Cobbley v. City of Challis, 143 Idaho 130, 135-134, 139 P.3d 732, 735-736 (2006) (citations omitted). Plaintiffs' efforts to force a validation decision "in a separate civil lawsuit" is proscribed by these statutes and must be dismissed.

Neither does the District violate Plaintiffs' due process rights when no conduct by the District has taken place that triggers a right to hearing. The District is well within its legal rights to improve and widen a road without holding a public hearing when that improvement occurs within

the District's public right-of-way. Plaintiffs fail to understand that the District is empowered under law to improve and even widen public highways so long as that activity does not occur beyond the lawful, minimum 50 foot width of that highway. Moreover, even if the District's activities resulted in the District making a claim to the roadway, it would not be a violation of Plaintiffs' due process rights even if no notice was provided to them. *Total Success*, *Supra* at 372, P.3d at 371. The Idaho Supreme Court has held that adequate notice is provided by "the statute itself, I.C. § 40-202(3), which provides that highways include those used and maintained by the public for five years." *Id.* *See also Powers v. Canyon County*, 108 Idaho 967, 970, 703 P.2d 1342, 1345 (1985).

Moreover, the courts have been reticent to apply a broad stroke requiring a hearing before every deprivation of a person's rights. *See Matthews v. Eldridge*, 424 U.S. 319, 335 (1976); *see also Goldberg v. Kelly*, 397 U.S. 254, 268-9 (1970). The *Matthews* and *Goldberg* cases illustrate that the degree of potential deprivation that may be caused by a particular decision is a factor in assessing the validity of the process, as is the fairness and reliability of the process and the probably value, if any, of the additional procedural safeguards. *Id.* A final factor in striking the appropriate due process is the "public interest." This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases...." *Matthews*, *supra* at 347. The administrative costs to the District in matters such as the instant case would outweigh any safeguard. Moreover, this case is unique in the District's history which is evidence that this alleged problem does not need additional safeguards. See Arneberg Affidavit, par. 10.

Therefore, given that Plaintiffs have not shown a deprivation, have an available predeprivation remedy, and have not shown that a hearing is warranted under the due process considerations of this case, Plaintiffs' claims in this regard fail and must be dismissed. In addition,

42 U.S.C. § 1932 claims must be brought before the expiration of the applicable statute of limitations. The statute of limitations for § 1983 claims brought in Idaho courts is two years. *Henderson v. State*, 110 Idaho 308; Idaho Code § 5-219(4) (2005). In this case, Plaintiffs filed their Complaint on March 3, 2008. Therefore, to the extent the Court does not dismiss all Plaintiffs' federal due process claims for the reasons set forth above, this Court should dismiss as untimely all claims based on conduct that took place before March 3, 2006.

Moreover, the issuance of a driveway permit does not require a due process hearing. Idaho Code section 40-1310 (8) expressly provides for delegation of that supervisory authority to the board of commissioners. ("The highway district board of commissioners shall have exclusive general supervisory authority, over all public highways...under their jurisdiction, with full power to establish design standards, use standards...and to control access to said public highways...."); see also *Matthews*, *supra*. This exercise of this express authority to "establish use standards" and "control access" is what occurred in connection with issuance of the first driveway permit. Title 40 of the Idaho Code does not require that the District conduct a due process hearing for issuance of a driveway permit. Other District actions do, including abandonment and validation proceedings, which are not implicated in this case.

- Plaintiffs' claims to abate nuisance should be dismissed as no trespass has occurred and the alleged driveway nuisance has been abated.

Plaintiffs allege continuous torts of nuisance and trespass in relation to road widening for which there is no factual support in this record as discussed at length hereinabove and such equitable claims should be dismissed. Plaintiffs allege a continuing tort of nuisance and trespass in relation to the issuance of the Wagners' driveway permit, however, that permit was revoked by the District and Wagners vacated the disputed area three (3) months after the initial permit was issued and twenty-one (21) months prior to the commencement of this action. Plaintiffs' allegations in this

regard are blatantly false and Plaintiffs' claim for equitable relief in regard to the driveway permit should be dismissed.

- Plaintiffs' remaining claims are infirm for various reasons and, as a matter of law, should be dismissed.

Plaintiffs' remaining claims should be dismissed as a matter of law for various reasons. First, Plaintiffs claim relief based on a number of theories that are not supported by law. Where the Plaintiffs have failed to establish their prima facie case, summary judgment is appropriate. *Garzee v. Barkley*, 121 Idaho 881 (Ct. App. 1992). A claim has been satisfactorily stated if it contains "a concise statement of the facts constituting the cause of action and a demand for relief." *Clark v. Olsen*, 110 Idaho 323 (1986) (citing Id. R. Civ. P. 8(a)(1)(2)). The complaint must be phrased as a series of numbered paragraphs, each of which is limited to a single set of circumstances. *Id.* R. Civ. P. 10(b) Plaintiffs' claims, when taken together, are not concise, as required by Rule 8(a)(1)(2). Plaintiffs' Complaint's length, disorganization, repetitiveness and lack of factual support render Plaintiffs' Complaint unsatisfactory as Plaintiffs' claims are difficult to ascertain.

Plaintiffs complain of some conduct that does not support any cognizable claim – e.g., "the conduct of the defendants…has been deliberate, flagrant, arbitrary, and offensive to the sense of democracy and to the sense of good government…." (Plaintiffs' Complaint at § II.U.), "the lack of any agency structure and the arbitrary disregard to resolve disputes and violations, the fomenting of neighborly disputes…," (*Id.* at § E and *see also*, § E. 6., P., P.2, Q.f.xiii.(a), "negotiating in bad faith" (*Id.*), "misrepresentation of statements and legal views and rulings…and questionable applications of or statements…of standards (*Id* at § Q.f.xii; *see also*, § Q.f.xiii(b)), "violated the doctrine of quasi-estoppel" (*Id.* at §Q.f.xiii(c)) and "testimony…flagrantly intended to thwart any and all remedies…" (*Id.* at § R.(6).) .

Other of Plaintiffs' claims fail to state any cause of action. Plaintiffs' Complaint specifically alleges violation of at least three statutory criminal provisions: § 18-7001, malicious injury to property; § 18-7008, trespass; and, § 18-7012 destruction of fences. Plaintiffs, as civil litigants, have no authority to prosecute criminal offenses, and so these allegations facially fail to state any claim.

Other Plaintiffs' claims fail for lack of any factual assertion and include those related to District's alleged failure to train and failure to supervise, the claim for punitive damages and other claims perhaps unmentioned as a result of the disorganization and complexity of Plaintiffs' Complaint and the difficulty in ascertaining claims.

CONCLUSION

Defendants respectfully request the Court's order granting Defendants' Motion for Summary Judgment against Plaintiffs as to all claims in Plaintiffs' Complaint.

MOTION FOR ATTORNEY FEES

Defendants move under Rule 11(a)(1) I.R.C.P. and Idaho Code Sections 12-120, 12-121 and 12-123 for an award of their attorney fees incurred herein as Plaintiffs' Complaint for the reasons that Defendants are the prevailing parties and that Plaintiffs pursued this action unreasonably, that Plaintiffs acted without a reasonable basis in fact or law and that Plaintiffs pursued claims not well-grounded in fact and warranted by existing law, all as described above in this Brief.

RESPECTFULLY SUBMITTED this 2nd day of February, 2009.

RONALD J. LANDECK, P.C.

By: _____
Ronald J. Landeck
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2009, I caused a true and correct copy of this document to be served on the following individual in the manner indicated below:

DON HALVORSON
CHARLOTTE HALVORSON
1290 AMERICAN RIDGE ROAD
KENDRICK, IDAHO 83537

[ ] U.S. Mail
[ ] Federal Express Standard Overnight Mail
[ ] FAX
[X] Hand Delivery

Ronald J. Landeck

CASE NO CV 2008-00180

2009 FEB -2 PM 3:38

CLERK OF DISTRICT COURT
LATAH COUNTY
BY _____ DEPUTY

RONALD J. LANDECK, ISB No. 3001
RONALD J. LANDECK, P.C.
693 Styner Avenue, Suite 9
P.O. Box 9344
Moscow, ID 83843
(208) 883-1505
FAX (208) 883-4593
Attorneys for Defendants

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

DON & CHARLOTTE HALVORSON (Husband and Wife),	Case No. CV 2008-180
Plaintiffs,	AFFIDAVIT OF LARRY J. HODGE
vs.	
NORTH LATAH COUNTY HIGHWAY DISTRICT; BOARD OF COMMISSIONERS FOR THE NORTH LATAH COUNTY HIGHWAY DISTRICT, ORLAND ARNEBERG, RICHARD HANSEN, SHERMAN CLYDE, in their individual capacities; DAN PAYNE, in his official capacity and in his individual capacity,	
Defendants.	

STATE OF IDAHO)
) ss.
County of Latah)

Larry J. Hodge, upon oath, deposes and says:

1. I am over eighteen (18) years of age, am competent to testify to the matters set forth herein and make this affidavit upon my personal knowledge.

2. I am licensed and work as a professional engineer and land surveyor in the State of Idaho.

3. My firm, Hodge & Associates, Inc., of which I am President, has been retained by Ronald J. Landeck, P.C., attorney at law, to provide expert, professional land surveyor advice to and testimony on behalf of the North Latah County Highway District in this action.

4. In connection with these services, I have reviewed the following attached documents:

a) Instrument No. 501677, records of Latah County, Idaho ("Wagners' Deed" to "Wagners' real property" as defined below).

b) Instrument No. 424411, records of Latah County, Idaho ("Plaintiffs' Deed" to "Plaintiffs' real property").

c) Instrument No. 57421, records of Latah County, Idaho ("1911 Deed").

d) 1940 aerial photo, with mapping annotations, records of Latah County, Idaho ("1940 aerial").

e) 2004 aerial photo, records of Latah County, Idaho ("2004 aerial").

f) Instrument No. 506484, records of Latah County, Idaho ("July, 2006 Survey").

g) Amended Record of Survey, Instrument No. 513819, records of Latah County, Idaho ("May, 2007 Survey"), which describes the boundaries of the Wagners' real property, being, for purposes of this Affidavit, the "2.78 AC±" parcel noted on the May, 2007 survey contiguous to Camps Canyon Road.

5. In my professional opinion, the location of Camps Canyon Road in the area between Plaintiffs' real property and Wagners' real property has not been changed to any significant degree, if at all, between 1940 and 2004.

6. In my professional opinion, a more accurate and legally appropriate record of survey of the boundaries of Wagners' real property, than the survey description contained in the May, 2007 Survey, would be to give effect to all of the distances set forth in Plaintiffs' Deed and Wagners' Deed (which are identical distances despite references to "rods" and "feet" in Plaintiffs' Deed which were converted to "feet" only in Wagners' Deed) from the point of beginning on the County Road back to that same point of beginning. This results in recognition of all distances described in these instruments. The May, 2007 survey, on the contrary, recognizes all distances except (i) the distance of "699 feet, more or less, along the County Road," which the May, 2007 survey shows as 468.6 feet and (ii) the connecting "due North" distance of 104 feet, which the May 2007 survey shows as 156.54 feet.

7. In my opinion, not recognizing the "699 feet, more or less along the County Road" and reducing that to 468.6 feet does not support the intent of the parties to the 1911 Deed. Although the term, "more or less" is used in the 1911 Deed, that term, under generally applied surveying standards, would not permit a deviation of that magnitude. That is, principally, why I believe the survey should incorporate the 699-foot distance along the County Road. Another supporting principle is that the County Road is a de facto monument for surveying purposes and the distance between the two points on that road should take precedence over other calls in the 1911 Deed.

8. Other evidence to support this opinion exists upon observation of the 1940 aerial from the Latah County Assessor's records, which shows the southerly boundary of Wagners' real property running on a southeasterly course and utilizes all distances described in these deeds. I also note that configuration of Wagners' real property in the 1940 aerial includes the driveway serving the Wagners' real property which was then apparently owned and occupied by "Charles

E. Harris," as noted thereon. The distances that comprise the "3.4" acre parcel shown on the 1940 aerial, generally appear consistent with the distances set forth in the 1911 Deed, Plaintiffs' Deed and Wagners' Deed.

9. My opinions are based on my 32 years work as a licensed surveyor and, in various parts upon authoritative sources, including: (i) *Writing Legal Descriptions*, by Gurdon H. Wattles and, in particular, p. 11.18 thereof which deals with ties and boundaries, wherein there is a quote from Corpus Juris for the proposition "concerning course or distance...that the true rule is that one or the other shall be preferred according to the manifest intention of parties and the circumstances of the case;" (ii) a review of some pertinent Idaho case law, including *Hogan v. Blakn*ey, 73 Idaho 274 (1952), which states that "in interpreting and construing deeds, the primary rule to be observed is that the real intention of the parties...is to be sought and carried out whenever possible," and *Campbell v. Weisbrod*, 73 Idaho 82 (1952), in which the Idaho Supreme Court states that in the construction of deeds, the "general rule is that monuments, natural or artificial, or lines marked on the ground, control over calls for courses and distances;" and (iii) *Clark on Surveying and Boundaries* (Fifth Edition), and, in particular, § 16.36, thereof which states that the use of the "term 'more or less' will permit a slight deviation from the measurement."

The above statements are true to the best of my knowledge.

Dated this 29th day of January, 2009.

Larry J. Hodge

SUBSCRIBED AND SWORN TO before me this 29th day of January, 2009.

RENEE C. EVANS NOTARY PUBLIC STATE OF IDAHO

NOTARY PUBLIC for the State of Idaho
My commission expires: 8-17-2013

CERTIFICATE OF SERVICE

I hereby certify that on this 30th (not 29th) day of January (not February), 2009, I caused a true and correct copy of this document to be served on the following individual in the manner indicated below:

DON HALVORSON
CHARLOTTE HALVORSON
1290 AMERICAN RIDGE ROAD
KENDRICK, IDAHO 83537

[X] U.S. Mail
[ ] Federal Express Standard Overnight Mail
[ ] FAX (208) 322-4486
[X] Hand Delivery

Ronald J. Landeck

(2) 2W

501677

46708

WARRANTY DEED

FOR VALUE RECEIVED, JAMES E. HUFF & PATRICIA A. HUFF TRUST, dated July 4, 1999, the grantors, do hereby grant, bargain, sell and convey unto:

ROBERT F. WAGNER AND KATE A. WAGNER
husband and wife

P.O. Box 712
Troy, Idaho 83871

the grantees, the following described premises situated in Latah County, State of Idaho, to-wit:

SEE ATTACHED CONTINUED SCHEDULE A

TOGETHER WITH all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, including all water and water rights, ditch and ditch rights.

SUBJECT to reservations in United States Patent, restrictive covenants, existing and recorded rights-of-way and easements, zoning and building ordinances, and taxes and assessments as prorated between the parties hereto.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantees, their successors, heirs and assigns forever. Said Grantors do hereby covenant to and with said Grantees, that they are the owners in fee simple of said premises; that said premises are free from all encumbrances except as hereinabove set forth and that they will warrant and defend the same from all lawful claims whatsoever.

DATED this 16th day of December, 2005.

JAMES E. HUFF & PATRICIA A. HUFF TRUST

James E. Huff, Trustee
BY:JAMES E. HUFF, Trustee

Patricia A. Huff, Trustee
BY:PATRICIA A. HUFF, Trustee

STATE OF CALIFORNIA
: ss
County of SACRAMENTO

On this 16 day of December, 2005, before me, the undersigned, a Notary Public in and for said state, personally appeared JAMES E. HUFF AND PATRICIA A. HUFF, Trustees of the JAMES E. & PATRICIA A. HUFF TRUST, known to me to be the persons whose names are subscribed to the above and foregoing instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on the date last above written.

Ben M. Wilmoth
NOTARY PUBLIC for: CALIFORNIA, COUNTY OF SACRAMENTO
Residing at: 1060 "C" ST. #35 GALT, CA. 95632
My Commission Expires: 9/21/08

BEN M. WILMOTH
Commission # 1509727
Notary Public - California
Sacramento County
My Comm. Expires Sep 21, 2008

1148

Form No.1056-4
All Policy Forms

CONTINUED SCHEDULE A

The land referred to in this policy is situated in the State of Idaho, County of Latah and is described as follows:

The NE1/4SW1/4, SW1/4NE1/4, NW1/4SE1/4 and the S1/2SE1/4NW1/4 of Section 15, Township 39 North, Range 3 West, B.M.

AND a parcel of land located in the SE1/4NE1/4 of said Section 15, being more particularly described as follows:

BEGINNING at a point where the public road passes through the West line of said SE1/4NE1/4, the same being South 201 feet, more or less, of the Northwest corner of said SE1/4NE1/4; thence due South 418 feet; thence due East 379.50 feet; thence due North 104 feet, more or less, to the County Road; thence in a Northwesterly direction 699 feet, more or less, along the County Road to the POINT OF BEGINNING.

501677

AT THE REQUEST OF:
LATAH COUNTY TITLE CO
DATE & HOUR:
12-20-05 4:19 PM
SUSAN PETERSEN
LATAH COUNTY RECORDER
FEE $ 5.00 BY

1149

424411

f64

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS:

That A. Edward Swanson and Gladys Swanson, husband and wife of 1021 Granlund Road, Troy, Idaho 83871, Grantor(s) for and in consideration of the sum of Ten Dollars ($10.00), and other good and valuable consideration, in hand paid, the receipt of which is hereby acknowledged, by these presents grant, bargain, sell, convey and warrant unto Donald L. Halvorson and Charlotte R. Halvorson, husband and wife of 1550 Little Bear Road, Troy, Idaho 83871, Grantees, the following described real property situated in the State of Idaho, County of Latah to wit:

See schedule "c" attached hereto and incorporated herein by reference.

together with all tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and Grantor(s) covenant and warrant that the above-described premises are free and clear from all liens and encumbrances, excepting those of record, and that they will and their heirs, executors, administrators and assigns shall forever warrant and defend a fee simple and marchantable title therein, against all lawful demands, except encumbrances of record.

IN WITNESS WHEREOF, Grantors executed this Warranty Deed on this 9th day of December, 1996.

A. Edward Swanson, Grantor

Gladys Swanson, Grantor

JOHN FRED PORTER NOTARY PUBLIC STATE OF IDAHO

STATE OF IDAHO)
) ss.
COUNTY OF)

On this 9th day of December, 1996 before me a Notary Public in and for said County and State, personally appeared A. Edward Swanson and Gladys Swanson known to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year last above written.

(SEAL)

Notary Public in and for the State of Idaho.
Commission expires: 12-21-98

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Swanson, Grantor

anson, Grantor

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blic in and for the
Idaho.
on expires: 12-21-98

424411

Schedule C

The land referred to in this policy is situated in the State of Idaho, County of Latah and is described as follows:

E1/2SE1/4 of Section 10, Township 39 North, Range 3, W.B.M.

E1/2NE1/4 of Section 15, Township 39 North, Range 3, W.B.M.

SAVE AND EXCEPT the tract of land described as follows, to-wit:

Beginning at a point where the public road passes through the West line of the SE1/4NE1/4 being 12 rods and 3 feet, more or less, South of the Northwest corner of the SE1/4NE1/4 of Section 15; running thence due south 25 rods and 5 1/2 feet; running thence due East 23 rods; running thence due North 6 rods and 5 feet, more or less, to the county road; running thence in a Northwesterly direction 42 rods and 6 feet, more or less, along the county road to the POINT OF BEGINNING.

424411

Instrument Number 57421 ✓ 66 Deed, Page 75

WARRANTY DEED.

This Indenture Witnesseth, that Per Johanson and Anna Johanson, his wife, for the consideration of Sixty-eight and no/100 Dollars to them paid, do by these presents grant, bargain, sell and convey unto Eli H. Harris of Troy, Idaho, the following described real estate situated in Latah County, State of Idaho, to-wit:

A part and parcel of the South-east Quarter of the North-east Quarter of Section Fifteen in Township Thirty-nine North of Range Three West of the Boise Meridian and more particularly described as follows: Beginning at a point where the public road passes through the West line of said forty acres, the same being Twelve rods and three feet more or less South of the North-west corner of the said Southeast Quarter of the Northeast Quarter of of said Section fifteen, running thence due south Twenty-five rods and Five and one half feet, running thence due east Twenty-three rods, running thence due North Six rods and five feet more or less to the County road, running thence in a Northwesterly direction Forty-two rods and Six feet more or less along the County road to the point of beginning.

To have and to hold with their appurtenances thereunto belonging unto the said Eli H. Harris his heirs and assigns forever, free and clear of all incumbrances, and a fee simple title therein will forever warrant and defend against all lawful claims.

In Witness Whereof the said Per Johanson and Anna Johanson have hereunto set their hands and seals on this 10th day of June, A. D. 1911.

Witnesses to mark of
Anna Johanson
A. H. Oversmith
Aug. Wiekstrand

Per Johanson (Seal)
her
Anna X Johanson (Seal)
mark (Seal)

State of Idaho,
ss.
County of Latah,

On this 10th day of June, A. D. 1911, before me, A. H. Oversmith, a Notary Public in and for said County and State, personally appeared Per Johanson and Anna Johanson, his wife, known to me to be the persons whose names are subscribed to the above and foregoing instrument and acknowledged to me that they executed the same.

Witness my hand and official seal on the day and year last above written.

A. H. Oversmith.
Notary Public, residing at Troy, Idaho.

A. H. Oversmith, Notary Public, Latah County Idaho.

Filed for record June 27, 1911 at 9 o'clock A.M.
Request of A. H. Oversmith. Fee $.20.

Homer E. Estes
Recorder

L. Brooks Deputy


Nelson
Axel
E. Swanson
Edward Ramsdale
Douglas R. Kelly
Charles E. Harris
Edward Ramsdale
Johnson
Richard L. Kelly
15
14

1154

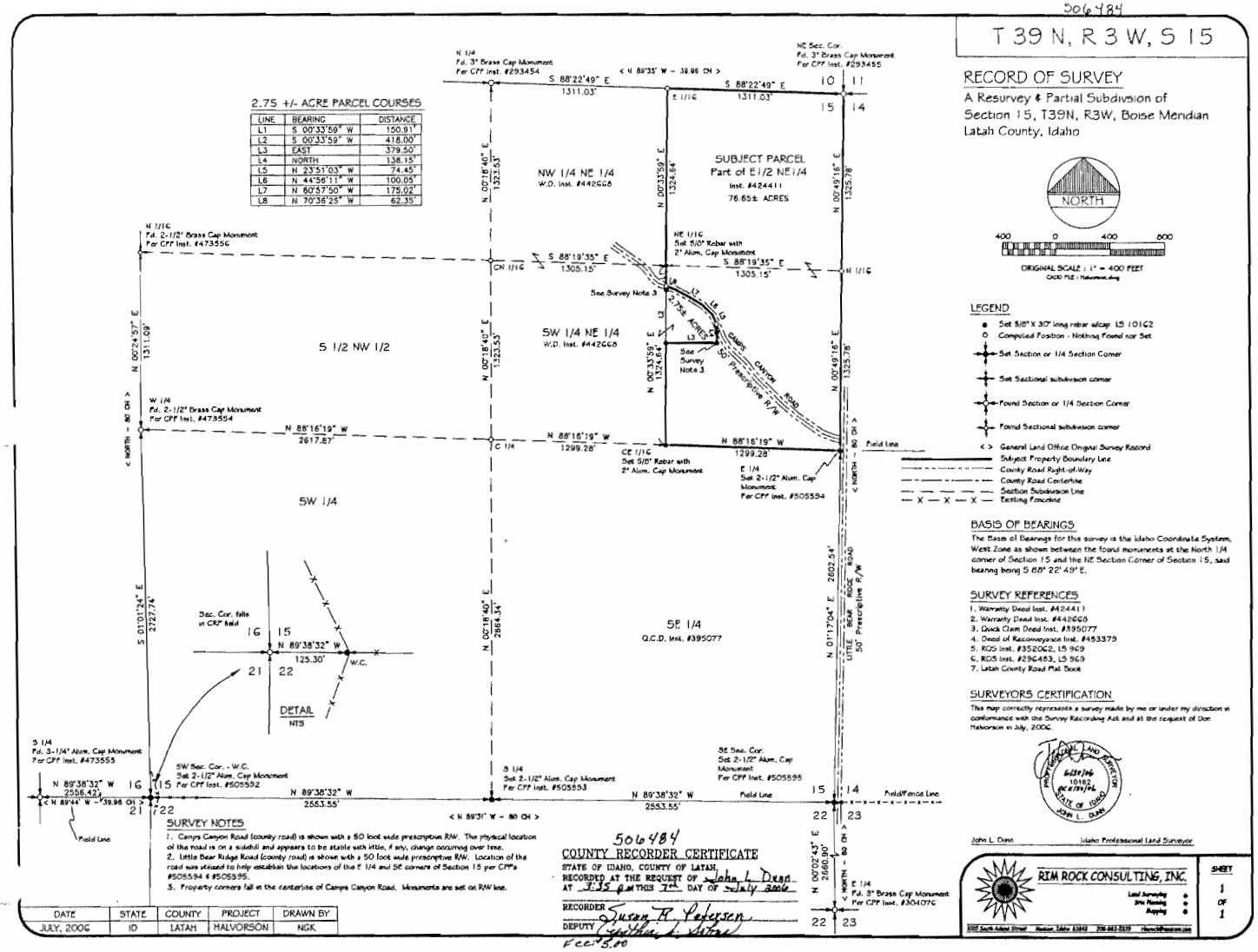
2004 Aerial

506484

T 39 N, R 3 W, S 15

RECORD OF SURVEY

A Resurvey & Partial Subdivision of
Section 15, T39N, R3W, Boise Meridian
Latah County, Idaho



SURVEY NOTES

1. Camps Canyon Road (county road) is shown with a 50 foot wide prescriptive R/W. The physical location of the road is on a sidehill and appears to be stable with little, if any, change occurring over time.
2. Little Bear Ridge Road (county road) is shown with a 50 foot wide prescriptive R/W. Location of the road was utilized to help establish the locations of the E 1/4 and SE corners of Section 15 per CPFs #505594 & #505595.
3. Property corners fall in the centerline of Camps Canyon Road. Monuments are set on R/W line.

LEGEND

- ● Set 5/8" X 30" long rebar w/cap LS 10162
- O Computed Position - Nothing Found nor Set
- Set Section or 1/4 Section Corner
- Set Sectional subdivision corner
- Found Section or 1/4 Section Corner
- Found Sectional subdivision corner
- < > General Land Office Original Survey Record
- Subject Property Boundary Line
- County Road Right-of-Way
- County Road Centerline
- Section Subdivision Line
- X — X — X — Existing Fenceline

NORTH
400 0 400 800
ORIGINAL SCALE : 1" = 400 FEET
CADD FILE : Halvorson.dwg

BASIS OF BEARINGS

The Basis of Bearings for this survey is the Idaho Coordinate System, West Zone as shown between the found monuments at the North 1/4 corner of Section 15 and the NE Section Corner of Section 15, said bearing being S 88° 22' 49" E.

SURVEY REFERENCES

1. Warranty Deed Inst. #424411
2. Warranty Deed Inst. #442668
3. Quick Claim Deed Inst. #395077
4. Deed of Reconveyance Inst. #453379
5. ROS Inst. #352062, LS 969
6. ROS Inst. #296483, LS 969
7. Latah County Road Plat Book

SURVEYORS CERTIFICATION

This map correctly represents a survey made by me or under my direction in conformance with the Survey Recording Act and at the request of Don Halvorson in July, 2006.

JOHN L. DUNN — 10162 — REGISTERED LAND SURVEYOR — STATE OF IDAHO

John L. Dunn — Idaho Professional Land Surveyor

COUNTY RECORDER CERTIFICATE

506484

STATE OF IDAHO, COUNTY OF LATAH,
RECORDED AT THE REQUEST OF John L. Dunn
AT 3:35 pm THIS 7th DAY OF July 2006

RECORDER Susan K. Pedersen
DEPUTY Cynthia L. Sutton
Fee: 15.00

RIM ROCK CONSULTING, INC.
Land Surveying
Site Planning
Mapping
1001 South Adams Street Moscow, Idaho 83843 208-883-3139

SHEET 1 OF 1

DATE	STATE	COUNTY	PROJECT	DRAWN BY
JULY, 2006	ID	LATAH	HALVORSON	NGK

1150

513819

T 39 N, R 3 W, S 15

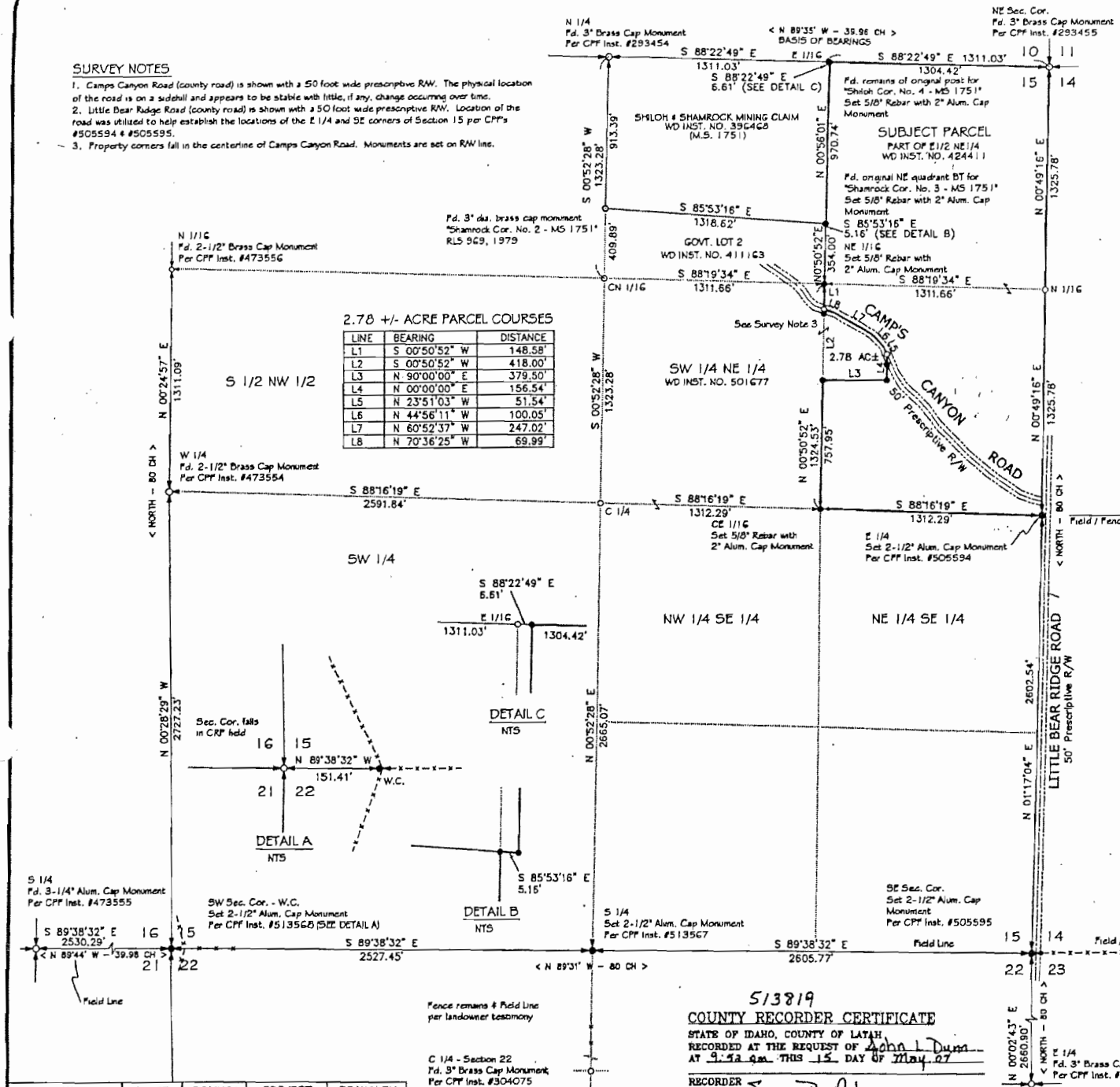
RECORD OF SURVEY - AMENDED

A Resurvey & Partial Subdivision of
Section 15, T39N, R3W, Boise Meridian
Latah County, Idaho

1156

SURVEY NOTES

1. Camps Canyon Road (county road) is shown with a 50 foot wide prescriptive R/W. The physical location of the road is on a sidehill and appears to be stable with little, if any, change occurring over time.
2. Little Bear Ridge Road (county road) is shown with a 50 foot wide prescriptive R/W. Location of the road was utilized to help establish the locations of the E 1/4 and SE corners of Section 15 per CPF's #505594 & #505595.
3. Property corners fall in the centerline of Camps Canyon Road. Monuments are set on R/W line.



2.78 +/- ACRE PARCEL COURSES

LINE	BEARING	DISTANCE
L1	S 00°50'52" W	148.58'
L2	S 00°50'52" W	418.00'
L3	N 90°00'00" E	379.50'
L4	N 00°00'00" E	156.54'
L5	N 23°51'03" W	51.54'
L6	N 44°56'11" W	100.05'
L7	N 60°52'37" W	247.02'
L8	N 70°36'25" W	69.99'

LEGEND

- ● Set 5/8" X 30" long rebar w/cap LS 10162
- ○ Computed Position - Nothing Found nor Set
- Ø Found property corner as described
- Set Section or 1/4 Section Corner
- Set Sectional subdivision corner
- Found Section or 1/4 Section Corner
- < > General Land Office Original Survey Record
- Subject Property Boundary Line
- County Road Right-of-Way
- County Road Centerline
- Section Subdivision Line
- Existing Fenceline

PURPOSE OF AMENDMENT

This survey is amended to reflect evidence found during the execution of a re-survey of MS 1751 and from new evidence brought to me which resulted in the re-positioning of the S 1/4 corner. The section breakdown is revised accordingly and the corners set have been re-positioned. This amended survey supercedes the survey filed as Inst. No. 506484.

BASIS OF BEARINGS

The Basis of Bearings for this survey is the Idaho Coordinate System, West Zone, NAD 83, as shown between the found monuments at the North 1/4 corner of Section 15 and the NE Section Corner of Section 15, said bearing being S 88° 22' 49" E.

SURVEY REFERENCES

1. Warranty Deed Inst. #424411
2. Warranty Deed Inst. #396468
3. Warranty Deed Inst. #501677
4. Warranty Deed Inst. #411163
5. RDS Inst. #352062, LS 969
6. RDS Inst. #296483, LS 969
7. Latah County Road Plat Book
8. GLO Original Survey, 1871, Isaac Collard
9. Segregation Plat of 1904, GLO
10. Mineral Survey 1751, 1902, Daniel Hannah

SURVEYORS CERTIFICATION

This map correctly represents a survey made by me or under my direction in conformance with the Survey Recording Act and at the request of Don Halvorson in July, 2006 and amended in April 2007.

5/18/07 10162 REGISTERED PROFESSIONAL LAND SURVEYOR STATE OF IDAHO JOHN L. DUNN

John L. Dunn - Idaho Professional Land Surveyor

513819

COUNTY RECORDER CERTIFICATE

STATE OF IDAHO, COUNTY OF LATAH
RECORDED AT THE REQUEST OF John L Dunn
AT 9:52 am THIS 15 DAY OF May 07
RECORDER Susan P. Peterson
DEPUTY Cynthia A. Sohns Fee: $5.00

Filed in this office

DATE	STATE	COUNTY	PROJECT	DRAWN BY
JULY, 2006	ID	LATAH	HALVORSON	JLD

RIM ROCK CONSULTING, INC.
Land Surveying • Site Planning • Mapping
1020 South Adams Street Moscow, Idaho 83843 208-883-3339 rimrock@moscow.com

SHEET 1 OF 1

CASE NO CV 2008-00188

2009 FEB -2 PM 3:39

CLERK OF DISTRICT COURT
LATAH COUNTY
BY DEPUTY

RONALD J. LANDECK, ISB No. 3001
RONALD J. LANDECK, P.C.
693 Styner Avenue, Suite 9
P.O. Box 9344
Moscow, ID 83843
(208) 883-1505
FAX (208) 883-4593
Attorneys for Defendants

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

DON & CHARLOTTE HALVORSON (Husband and Wife),	Case No. CV 2008-180
Plaintiffs,	SECOND AFFIDAVIT OF DAN CARSCALLEN
vs.	
NORTH LATAH COUNTY HIGHWAY DISTRICT; BOARD OF COMMISSIONERS FOR THE NORTH LATAH COUNTY HIGHWAY DISTRICT, ORLAND ARNEBERG, RICHARD HANSEN, SHERMAN CLYDE, in their individual capacities; DAN PAYNE, in his official capacity and in his individual capacity,	
Defendants.	

STATE OF IDAHO)
) ss.
County of Latah)

Dan Carscallen, upon oath, deposes and says:

1. I am over eighteen (18) years of age, am competent to testify to the matters set forth herein and make this affidavit upon my personal knowledge.

2. I am the Secretary of the North Latah County Highway District ("District") and, as such, custodian of and responsible for the District's official records.

3. A certain Tort Claim Notice, a true and correct copy of which is attached hereto as Exhibit A, was hand-delivered to me at the District on November 6, 2007, by Plaintiff Don Halvorson. This is the only tort claim notice that the District has received from Plaintiffs.

4. Attached hereto as Exhibit B is a true and correct copy of the District's standard Application and Permit to Use Public Right-Of-Way-Approaches and General Provisions that District foremen require be completed by applicants and approved before approaches can be constructed onto District highways and right-of-way.

5. Attached as Exhibit C hereto is a true and correct copy of a Manual for Use of Public Right of Way Standard Approach Policy prepared by the Local Highway Technical Assistance Council, a State of Idaho legislative agency. The District has adopted this Manual and the District's foremen use this Manual, including the standardized Application and General Provisions set forth on pages 10 and 11 of the Manual, in the review and issuance of approach permits.

6. As stated in Section 1.B. on page 2 of the Manual, the authority of the District to regulate the use of public right-of-way is found in:

> 3. Section 40-1310, Idaho Code, gives highway districts supervisory authority over access to the public right-of-way under their jurisdiction.
>
> 4. Section 50-1330, Idaho Code, gives highway districts authority over the public streets and public right-of-way under their jurisdiction.

Further, Sections 1.B. and 1.C. of the Manual describe the permit process for controlling access onto the public right-of-way. (See Exhibit C, page 8.)

7. At all times relevant to this action the District's Commissioners have delegated the issuing of such approach permits to the District's foremen who are employees of the District. Idaho Code section 40-1310 (1) expressly allows the District's Commissioners to delegate this supervisory responsibility to the District's employees.

8. The District has determined that $750 is a reasonable fee, as permitted under Idaho Code section 40-203 A, to cover the cost of validation proceedings under said section 40-203 A, and has adopted that as the fee for a petitioner to initiate a validation proceeding. At no time have Plaintiffs submitted a petition for validation to the District or paid the required fee.

9. At no time relevant to this action have Plaintiffs filed any petition or other request with the District that, in my opinion as District Secretary with advice from legal counsel, would require publication of notice and a public hearing under applicable law.

10. I have been present at all meetings of the District Commissioners which Plaintiffs, or either of them, attended since 2006. At no time was any commissioner or other representative of the District disrespectful in any manner to Plaintiffs.

The above statements are true and correct to the best of my knowledge and belief.

Dated this 30th day of January, 2009.

Dan Carscallen

SUBSCRIBED AND SWORN TO before me this 30th day of January, 2009.

RENEE C. EVANS NOTARY PUBLIC STATE OF IDAHO

NOTARY PUBLIC for the State of Idaho
My commission expires: 8-17-2013

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2009, I caused a true and correct copy of this document to be served on the following individual in the manner indicated below:

DON HALVORSON
CHARLOTTE HALVORSON
1290 AMERICAN RIDGE ROAD
KENDRICK, IDAHO 83537

[ ] U.S. Mail
[ ] Federal Express Standard Overnight Mail
[ ] FAX (208) 322-4486
[X] Hand Delivery

Ronald J. Landeck

North Latah County Highway District
1132 White Ave.
Moscow, Idaho, 83843

November 1, 2007

Tort Claim Notice

Claimant's Name: Don and Charlotte Halvorson

Current Address: 1290 American Ridge Road (address current for the last 6 months)
Kendrick, Idaho, 83537

Telephone Numbers: Home—(208) 289-5602
Cell—(208) 669-0909

E-mail address: sprngbrkranch@hughes.net

INCIDENT/S INFORMATION

Dates: Fall of 2004 until spring of 2007

Location of Incidents: Latah County, Idaho NESE Section 15 T39NR3WBM

Name of road: Camps Canyon Road

Responsible Agency: North Latah County Highway District

Type of Damage/Injury: Economic and non economic

Description of Complaint/s or Incident/s:

1. During road maintenance an unnamed employee of the NLCHD pushed a wind fallen tree through our fence in the fall of 2004. Under the color of law, and without ordinary care said employee willfully, recklessly, wantonly and with gross negligence damaged our fence and was the direct, proximate, and legal cause of the violation our property rights. Our fence is rightfully built and rightfully positioned and neither our fence nor the buffer between the road bed and our fence is under the authority of the NLCHD. Further our pasture is not the repository for the NLCHD's unwanted debris.

Names of witnesses/involved parties

1. Jon Van Houten (he sawed the tree out of the road)
   Troy, Idaho 83571
   (208) 835-5311

Rec'd 11/06/07 DC

EXHIBIT A
1161

2. Joe Yockey (he saw the grader go by and heard the wires creak)
   1061 Claypit Road
   Troy, Idaho 83571
   (208) 835-6831

2. During the years of 2005 and 2006 the NLCHD has widened Camps Canyon Road and has, under the color of law, confiscated our land along an1/8 mile stretch of the north side of the road in the Northwest corner of NESE of Section 15 and has encroached upon our fence. Confiscation took place without just compensation or due process.

3. Under the color of law, the NLCHD, without ordinary or reasonable care, and with willful, reckless or wanton conduct, or with gross negligence, and both in acting in bad faith and negotiating in bad faith, confiscated a portion of our property by issuing a permit for a driveway access in March 2006 and without revocation of said permit did hold to possession of said property for a determined period of time. We allege that the NLCHD was the direct, proximate, and legal cause of the deprivation of our constitutionally protected property rights, that our property was taken from us without due process or equal treatment under the law, and that our property was taken for non public use. Further, the NLCHD, failed to remedy the taking and in so failing to act has not returned the property to us. Further, the NLCHD misrepresented the facts and situation of the previous/historic driveway.

Names of witnesses/involved parties

1. Bob and Kate Wagner
   Troy, Idaho 83571
   (208) 835-4215

4. Under the color of law, and both in acting in bad faith and in negotiating in bad faith the NLCHD did permit and advocate the construction of a driveway across our property and were the direct, proximate, and legal cause of creating a nuisance which, did damage both in loss of soil and in disfiguration of the landscape, resulted in the loss of enjoyment of our land, and fomented a neighborly dispute. Further, in failing to revoke and remedy this nuisance the NLCHD necessitated actions to abate this nuisance. These actions and the consequential bad feelings which have arisen from these actions would have been totally unnecessary if the NLCHD, its commissioners and its employees had not abdicated their public interest responsibility and had acted reasonably and with ordinary care. Further the NLCHD misrepresented the facts and situation of the previous/historic driveway.

Names of witnesses/involved parties

1. Bob and Kate Wagner
   Troy, Idaho 83571
   (208) 835-4215

5. During the widening of the road, under the color of law, the NLCHD employees pushed a compaction roller through our fence and altered the runoff drainage from the road, undermining the corner support post of our fence and eroding land in the summer of 2006. Under the color of law, without ordinary care, and with willful, reckless or wanton conduct, or with gross negligence, the NLCHD was the direct, proximate and legal cause of damage to our fence and to our ground (erosion). In this action the NLCHD has taken additional land for runoff drainage from the road.
6. During their widening of the road, under the color of law, the NLCHD buried the wires of our fence during the summer of 2006. Under the color of law, the NLCHD, without ordinary care, and with willful, reckless or wanton conduct, or with gross negligence were the direct, proximate and legal cause of damage to our fence. Further, future damage is foreseeable due to the lack of buffer between the road bed and the fence.
7. Under the color of law, the NLCHD, the NLCHD commissioners, and/or the employees of the NLCHD have with deliberate indifference in officially sanctioned acts and omissions or in the manner of inadequate employee training, and in spite of the obvious need for such training have deprived us, of our constitutional rights. Our rights to own, and to enjoy and to restrict access to our land has been deprived by these acts and omissions, in any and in total as stated above, by the NLCHD, the commissioners of the NLCHD, and/ or the employees of the NLCHD. The NLCHD, the commissioners of the NLCHD, and/or the employees of the NLCHD are the direct, proximate, and legal cause of the deprivation of these rights. In clearly established laws the NLCHD, the commissioners of the NLCHD, in their individual and in their official capacities, as stated above have deprived us of these constitutionally protected rights. These actors have done so without ordinary care, and done so recklessly, intentionally, willfully, wantonly, and with gross negligence, and without due process and equal treatment of the law.

AMOUNT OF CLAIM

1. Compensatory damages for 1) the taking and holding of our private property (driveway access) in the sum of $150/day during the time the deprivation of our property rights took place. ($150 X 579 days=$86850) This is the amount accrued to 11/1/07. No final disposition was ever given by the NLCHD.
2) for the value of the land taken by road widening of 2005 and 2006 in the sum of $1000.

2. Damages to fence for all complaints in total in the sum of $1250.
3. Damages to land due to construction of driveway access for loss of top soil, alteration and disfiguration of landscape and subsequent erosion in the amount of $3000.
4. Legal costs in the amount of $500.
5. General or consequential damages (abatement costs) in the amount of $5150.
6. For the loss of the enjoyment of land in the amounts of $25000.
7. Erection of a barrier to prevent further intrusion of soil, gravel, and /or snow during routine maintenance onto our land and damage to our fence.
8. Survey of the entire length of Camps Canyon Road as it crosses the NESE Section15N39WBM and demarcation of the NLCHD right-of-way to be described as follows: From east to west the right-of-way shall extend from the present center of the road 25 feet to the north of the center line and 25 feet south of the centerline for the distance covering the east half of the NESE Section15N39WBM. For the west half of the NESE Section 15N39N3WBM the right-of-way shall be considered to be the north edge of the road bed except in such instances that the road bed encroaches on or comes within 3 feet of the fence. In these instances the right-of-way shall be 3 feet to the north of the present fence. For what remaining distance lies between the half way mark and the property line with the Wagners on the south side of the road bed the right-of-way shall be whatever the old prescriptive right-of-way may remain effective.
9. Return the drainage at the corral to its 1996 position.

_____

Don Halvorson 11/1/07

NORTH LATAH COUNTY HIGHWAY DISTRICT

APPLICATION AND PERMIT TO USE PUBLIC RIGHT-OF-WAY -- APPROACHES

COPY OF PERMIT MUST BE PRESENT AT WORK SITE DURING CONSTRUCTION

PUBLIC ROAD SURFACE TYPE: (DIRT) (GRAVEL) (PAVEMENT)

Start Date: _____

Est. Completion Date: _____

Road Name: _____

Location: _____

Sight Distance: _____

Posted Speed: _____

NOTICE

This permit shall not be valid for excavation until, or unless, the provision of Idaho code, Title 55, Chapter 22 have been complied with.

PRIOR TO EXCAVATION, CALL ONE NUMBER LOCATION SERVICE

Telephone No. 1-800-342-1585

APPROACH

_____ Single Residence

_____ Multiple Residence _____ No. Served

_____ Business type _____

_____ Agriculture

WIDTH _____ SURFACE TYPE _____

ESTIMATED ADT _____ (VEHICLE COUNT)

Must meet the requirements of North Latah County Highway District (NLCHD) Approach Policy and §49-221, Idaho Code.

Other Explain:

ATTACH SKETCH OF PROPOSED WORK AND TRAFFIC CONTROL PLANS:
SPECIAL PROVISIONS:

See reverse side for General Provisions.

I CERTIFY THAT I AM THE OWNER OR AUTHORIZED REPRESENTATIVE OF THE PROPOSED PROPERTY TO BE SERVED AND AGREE TO DO THE WORK REQUESTED HEREON IN ACCORDANCE WITH THE GENERAL REQUIREMENTS PRINTED ON THE REVERSE SIDE, THE SPECIAL PROVISIONS AND THE PLANS MADE A PART OF THIS PERMIT.

NAME OF PERMITTEE	APPLICANT-PLEASE TYPE OR PRINT
ADDRESS	SIGNATURE OWNER/ AUTHORIZED REPRESENTATIVE
CITY STATE ZIP	DATE

SUBJECT TO ALL TERMS, CONDITIONS, AND PROVISIONS SHOWN ON THIS FORM OR ATTACHMENTS, PERMISSION IS HEREBY GRANTED TO THE ABOVE-NAMED APPLICANT TO PERFORM THE WORK DESCRIBED ABOVE.

NORTH LATAH COUNTY HIGHWAY DISTRICT USE

TEMPORARY PERMIT

Tentative approval subject to inspection of installation.

Date: _____

By: _____
NLCHD Authorized Representative

FINAL PERMIT

Approved ☐ Date: _____ Rejected ☐ Date: _____

Corrections Required: _____

Approved by: _____
NLCHD Authorized Representative

NORTH LATAH COUNTY HIGHWAY DISTRICT

GENERAL PROVISIONS

1. ~~A deposit in an amount to be determined by the North Latah County Highway District, (NLCHD) (minimum $200.00) shall accompany this application. If proper construction or repair is made and accepted within ten (10) days, the deposit will be refunded. If proper construction or repair is not completed within ten (10) days, the NLCHD may make repairs and assess the deposit. A $25.00 administrative fee is non-refundable.~~

2. The NLCHD may change, amend or terminate this permit or any of the conditions herein enumerated if permittee fails to comply with its provisions or requirements as set forth herein.

3. Approaches shall be for the bona fide purpose of securing access and not for the purpose of parking, conducting business, or servicing vehicles on the public right-of-way.

4. No revisions or additions shall be made to an approach or its appurtenances on the public right-of-way without the written permission of the NLCHD.

5. The permittee shall furnish all material, labor and equipment involved in the construction of the approach and its appurtenances. This shall include furnishing approved drainage pipe of a size specified on permit (12 inch minimum) curb and gutter, concrete sidewalk, etc., where required. Materials and workmanship shall be good quality and are subject to inspection and approval by the NLCHD.

6. The NLCHD reserves the right to require the permittee, its successors and assigns, at any time, to make such changes, additions, repairs and relocations to any approach or its appurtenances within the public right-of-way as may be necessary to permit the relocation, reconstruction, widening, drainage, and maintenance of the roadway and/or to provide proper protection to life and property on or adjacent to the roadway.

7. Approaches shall conform to the plans made a part of this permit. Adequate drawings or sketches shall be included showing the design, materials, construction requirements and proposed location of the approach. All approaches shall be in accordance with Exhibits 9 and 13 of the Manual for Use of Public Right of Way - Standard Approach Policy.

8. During the construction of the approach(es), such barricades, signs and other traffic control devices shall be erected and maintained by the permittee, as may be deemed necessary by the NLCHD. Said devices shall conform to the current issue of the Manual on Uniform Traffic Control Devices. Parked equipment and stored materials shall be as far from the traveled way as feasible. Items stored within 30 feet of the traveled way shall be marked and protected. The NLCHD may provide barricades (when available) upon request.

9. In accepting this permit, the permittee, its successors and assigns, agrees to hold the NLCHD harmless from any liability caused by the installation, construction, maintenance or operation of the approach(es).

10. If the work done under this permit interferes in any way with the drainage of the roadway, the permittee shall wholly and at his own expense make such provision as the NLCHD may direct to take care of said drainage problem.

11. Upon completion of said work herein contemplated, all rubbish and debris shall be immediately removed and the roadway and roadside shall be left neat and presentable and to the satisfaction of the NLCHD.

12. The permittee shall maintain at his or their sole expense the structure or object for which this permit is granted in a condition satisfactory to the NLCHD.

13. Neither the acceptance of this permit nor anything herein contained shall be construed as a waiver by the permittee of any rights given it by the constitution or laws of the state of Idaho or of the United States.

14. No work shall be started until an authorized representative of the NLCHD has given written notice to the permittee to proceed, except in case of an emergency when verbal authorization may be given with a written permit and fee required within five (5) working days.

15. This permit shall be void unless the work herein contemplated shall have been completed before 30 days unless otherwise arranged with local road foreman.

MANUAL FOR

USE OF PUBLIC RIGHT-OF-WAY

STANDARD APPROACH POLICY

Local Highway Technical Assistance Council
3330 Grace St.
Boise, Idaho 83703
(208) 344-0565/1-800-259-6841

September 1997

MANUAL FOR

USE OF PUBLIC RIGHT-OF-WAY

STANDARD APPROACH POLICY

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1168

IV. DESIGN PRINCIPLES

V. GEOMETRIC RESTRICTIONS

EXHIBITS

Application and Permit to Use Public Right-of-Way

EXHIBIT C

1169

LOCAL HIGHWAY TECHNICAL ASSISTANCE COUNCIL
3330 Grace St.
BOISE, IDAHO 83703

MANUAL FOR

USE OF PUBLIC RIGHT-OF-WAY

STANDARD APPROACH POLICY

PREFACE

This document is one of several produced by the Local Highway Technical Assistance Council, (LHTAC) in an attempt to assist the Local Highway Jurisdictions in controlling the use of their public rights-of-way. It is the intent that the document be applicable to city, county, and highway district jurisdictions equally, regardless of size.

It is hoped that the Local Highway Jurisdictions will officially adopt this document and incorporate it into their city, county, or highway district operational activities. If your present standards exceed those presented in this document, it may be appropriate to adopt the more restrictive of the two. These standards are a suggested standard and may be modified to meet the needs of each Local Highway Jurisdiction.

LHTAC welcomes any comments, questions, and suggestions you may have concerning this manual.

Additional copies of the manual can be obtained by sending a check or money order for $5.00 to LHTAC, 3330 Grace St., Boise, Idaho 83703.

Electronic copies of this manual and others can be obtained by containing LHTAC at 1-800-259-6841 or 1-208-344-0565, or E-mail at lhtac@micron.net, or by writing to LHTAC at the above address.

June 1995

NOTICE

THIS APPROACH DOES NOT HAVE A

PERMIT AS REQUIRED BY THE

_____.

PLEASE CALL _____ FOR

INFORMATION WITHIN 10 DAYS OR

APPROACH MAY BE REMOVED.

DATE: _____

CONTACT: _____

I. GENERAL REQUIREMENTS

A. INTRODUCTION

The efficiency and safety of modern streets and highways are directly related to the number of approaches, the design of approaches, the character of roadside interference and roadside obstacles. Uncontrolled approaches nullify carefully planned safety and maintenance features of highways.

Highway frontage property owners have certain rights of access to and use of public right-of-way. The traveling public has a right to safety, freedom of movement, and the efficient expenditure of highway funds.

The Local Highway Jurisdiction, (LHJ) is responsible for reviewing each application for an approach to see that operational efficiency and safety of the highway are not unduly compromised when granting access to the property owner. Operationally unsafe approaches should not be granted. Alternate means of access should be developed.

The number of approaches should be kept to the minimum required to handle the anticipated volume of vehicles.

B. PERMIT REQUIRED

To help preserve the highways as constructed and provide responsible growth where allowed, any applicant planning to construct an approach to access the public right-of-way for any purpose shall obtain an approved "Application and Permit to Use Right-of-Way (Approaches)." See Exhibit 3.

NO WORK OF ANY NATURE SHALL BE PERFORMED ON PUBLIC RIGHT-OF-WAY UNTIL AN APPROVED PERMIT HAS BEEN ISSUED. In an emergency, approval may be given in advance of processing the permit.

The permit process should be discussed with the applicant regarding the type of permit application and the type of access control in effect for the roadway segment where the permit is requested.

Applicant shall be informed of local policies and rules concerning approaches and shall pay for any changes or adjustments of highway features or fixtures brought about by actions, operations or requirements caused by the applicant.

The authority to regulate the use of the public right-of-way of Local Highway Jurisdictions (LHJ) is cited as follows:

1. Section 50-314, Idaho Code, gives the cities authority over the streets and alleys within their jurisdiction.

2. Section 31-805, Idaho Code, gives counties authority over the public streets and highways within their jurisdiction.

3. Section 40-1310, Idaho Code, gives highway districts supervisory authority over access to the public right-of-way under their jurisdiction.

4. Section 50-1330, Idaho Code, gives highway districts authority over the public streets and public right-of-way under their jurisdiction.

C. RESPONSIBILITY FOR ISSUING PERMITS

The issuing of permits may be delegated to a staff member of the governing authority. Otherwise, all permits will be issued by the elected officials of the governing authority.

D. §49-221, IDAHO CODE

49-221. Removal of traffic hazards.

Please look for updated Idaho Code referenced in this manual at:

http://www3.state.id.us/legislat/idstat.html

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II. DEFINITION OF TERMS, (See Exhibits 1 and 2 - Figures II,A,A and II,A,B)

A. TERMS

- **ACTUAL COSTS -** As used in Section III,B and III,F of this manual, these costs are those incurred by the Local Highway Jurisdiction, (LHJ) for inspection personnel, (public or private) and for contractual services to have plans reviewed when these reviews are beyond the capability of the LHJ. LHJ costs would include wages, (loaded rate) travel, subsistence, and other expenses incurred. Other fees would be for personal services invoices. The intent is to recover LHJ costs only.

- **APPLICANT** - Any person, persons, corporation, partnership, or other singular or plural individuals making application to the LHJ for an approach.

- **APPROACH -** The section of the public right-of-way between the outside edge of the roadway shoulder and the public right-of-way line which is designed as an approved roadway for the movement of vehicles between the public roadway and the abutting property.

- **APPROACH FLARE -** The curve radius connecting the approach to the outside edge of the roadway shoulder. Sometimes referred to as the fillet.

- **APPROACH SKEW ANGLE -** The acute angle between the highway centerline and the extended approach centerline.

- **APPROACH TRANSITION** - The area from the edge of an urban approach sloped to match the curb and border area elevations.

- **APPROACH WIDTH -** Width of the approach excluding flares or transitions measured along the curb line or outside edge of shoulder in urban sections and perpendicular to approach roadway in rural sections.

- **BORDER AREA -** The area outside the roadway, auxiliary lanes and shoulders, constructed and maintained as wide, flat, rounded, and as free from physical obstructions and practical.

- **CONTROLLED ACCESS HIGHWAY -** A highway where rights of abutting landowners or others to access, light, air or view – in connection to a highway – are partially or fully controlled by public authority.

- **CORNER CLEARANCE** - At an intersecting street or highway, the distance measured along the outside edge of shoulder or curb line, between the beginning or end of the intersecting street or road approach flare and extension of the nearest private approach edge, excluding flares or transitions.

- **DISTANCE BETWEEN APPROACHES** - The distance measured along the curb line or outside edge of shoulder between the extensions of the near edges of adjacent approaches, excluding the flares or transitions.

- **FLARE TANGENT DISTANCE OR TRANSITION TANGENT DISTANCE** - The distance, measured along the curb line or outside edge of shoulder, from the extension of the approach edge to the end of the approach flare or transition.

- **FRONTAGE** - The distance for which a separate property is contiguous to public right-of-way measured along the curb line or outside edge of shoulder, between frontage boundary lines of the property.

- **FRONTAGE BOUNDARY LINE** - A line perpendicular to the highway centerline that passes through the point of intersection of the property line and the public right-of-way line.

- **HIGHWAY** - The entire width between the boundary lines of every way publicly maintained when any part is open to the use of the public for vehicular travel, with jurisdiction extending to the adjacent property line – including sidewalks, shoulders, berms, and rights-of-way not intended for motorized traffic. The terms "public street" and "public right-of-way" are interchangeable with highway.

- **JOINT USE APPROACH** - An approach shared by two adjacent property owners for service and connecting both properties.

- **LOCAL HIGHWAY JURISDICTION (LHJ)** - The city, county, or highway district having authority over the public right-of-way.

- **PERFORMANCE BOND** - A document issued by a bonding company authorized to do business in the state of Idaho. The LHJ may allow substitution for the bond by an irrevocable Letter of Credit issued by a financial institution, or a cash deposit.

- **PRIVATE APPROACH** - An approach used for access to a private residential property.

- **PROPERTY LINE CLEARANCE** - The distance measured along the curb line or outside edge of shoulder between the frontage boundary line and the extension of the nearest edge of the approach, excluding flares or transitions.

- **PUBLIC APPROACH** - An approach used by the public for access to a public, commercial, or industrial facility.

- **PUBLIC RIGHT-OF-WAY** - A right-of-way open to the public and under the jurisdiction of an LHJ, where the LHJ has no obligation to construct or maintain said right-of-way for vehicular traffic. A term used to define a specific space.

- **ROADSIDE** - A general term denoting the area adjoining the outer edge of the shoulder.

- **ROADWAY** - That portion of a highway improved, designed or ordinarily used for vehicular travel, exclusive of sidewalks, shoulders, berms and rights-of-way. A divided highway has two (2) or more roadways.

- **SETBACK** - The horizontal distance measured at right angles to the highway centerline between the right-of-way line and permanent fixtures, i.e., fuel-pump islands, signs, display stands, buildings, etc.

- **STANDARD APPROACH HIGHWAY** - All highways within the local jurisdictions not having controlled access restrictions.

- **STOPPING SIGHT DISTANCE** - Distance along a roadway that an object of specified height is continuously visible to the driver. For approaches the driver's height is 3.5' from roadway surface and the object height is 1.5' from the roadway surface.

- **STREET** - Interchangeable with definition for **HIGHWAY** as described above.

- **TEMPORARY APPROACH** - A temporary approach will require a permit in conformance with this Manual. The permit will contain a time certain for removal of the approach. In general, it should be for not more than a three (3) month period.

- **TRAVELED WAY** - The portion of the roadway for the movement of vehicles, exclusive of ditches and roadside areas.

B. MEANINGS OF "SHALL," "SHOULD," "MAY," AND "WILL"

- **SHALL** - A mandatory condition. Where certain requirements in the design or application of the device are described with the "shall" stipulation, it is mandatory when an installation is made that these requirements be met.

- **SHOULD -** An advisory condition. Where the word "should" is used, it is considered to be advisable usage, recommended but not mandatory.

- **MAY -** A permissive condition. No requirement for design or application is intended.

- **WILL -** A mandatory condition. Can be used interchangeably with the term shall and connoting the same meaning.

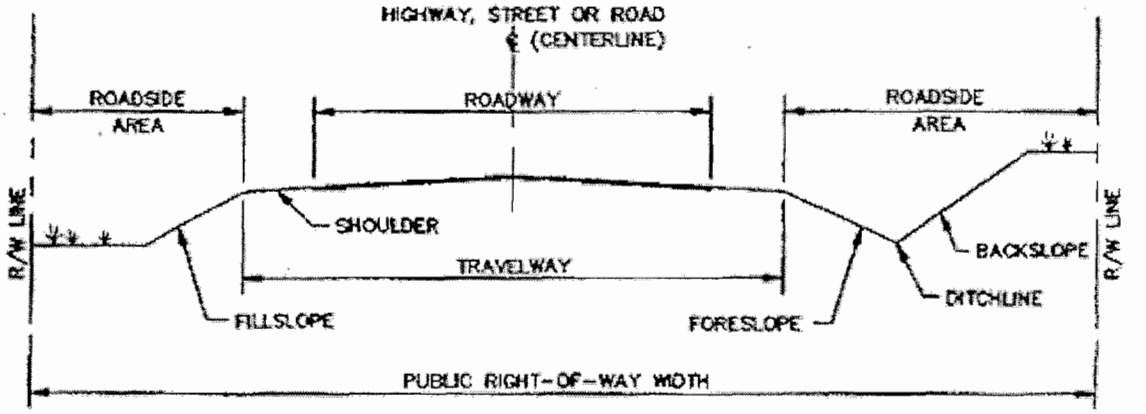

ILLUSTRATION OF DEFINITIONS
APPLYING TO SECTIONS WITHOUT CURB AND GUTTER

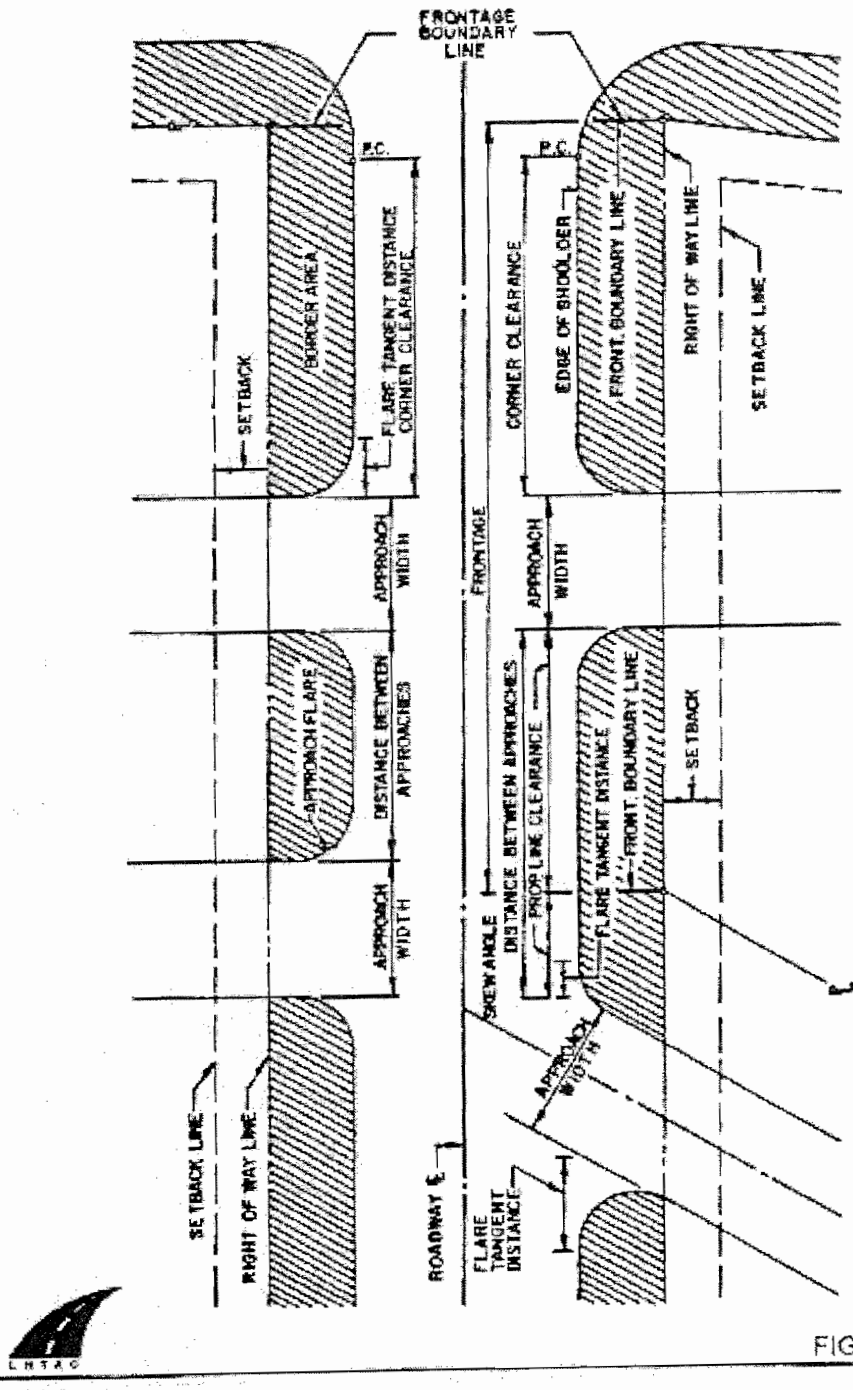

FIGURE II.A.A

ILLUSTRATION OF DEFINITIONS
APPLYING TO CURB AND GUTTER SECTIONS

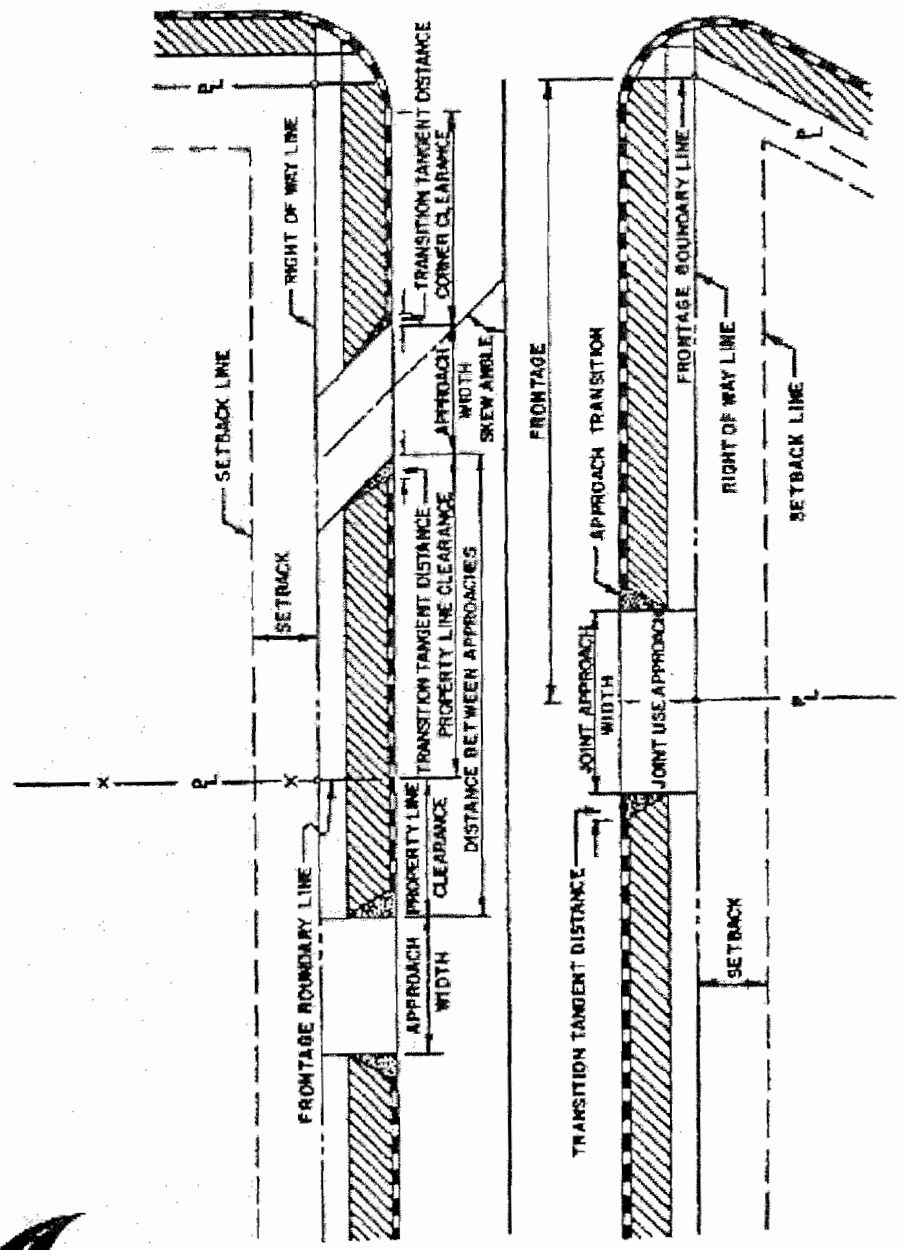

FIGURE II.A.B

III. PERMITS

A. GENERAL RULES FOR APPROACHES

General requirements are listed on Exhibit 3, Application and Permit to Use Public Right-of-Way, Approaches. Additional requirements are as follows:

1. The location, design, construction, and operation of all approaches should comply with the design principles and geometric restrictions established in this manual. The approach should be designed for the actual and future property access requirements.

2. Alleys should generally conform to approach standards, maintaining sidewalk continuity across the approach.

3. Urban and rural approaches shall conform to standard drawings.

4. The LHJ should encourage the construction of joint-use approaches for the access to adjoining properties – if not prohibited by local ordinance, and providing the application for a joint-use approach is signed by both property owners. Permittees may record the joint-use approach permit signed by both parties with the County Recorder after final permit approval by the LHJ. This would insure that both parties would continue to have use of the approach until the agreement is modified.

5. The LHJ reserves the right to require the Permittee, its successors or assigns, to make any changes, additions, repairs or relocations to any approach or its appurtenances within the public right-of-way for necessary relocation, reconstruction, widening, or maintenance of the highway and/or to provide proper protection of life and property on, or adjacent to, the roadway.

6. Generally, no part of the public right-of-way shall be used for:

   a) the parking of vehicles except in authorized parking areas.

   b) the servicing, refueling, repairing of vehicles except for emergencies.

   c) displays, sales, exhibits, business signs, etc.

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APPLICATION AND PERMIT TO USE PUBLIC RIGHT-OF-WAY

APPROACHES

COPY OF PERMIT MUST BE PRESENT AT WORK SITE DURING CONSTRUCTION

PUBLIC ROAD SURFACE TYPE: (DIRT) (GRAVEL) (PAVEMENT)

Start Date: _____

Est. Completion Date: _____

Road Name: _____

Location: _____

Sight Distance: _____

Posted Speed: _____

NOTICE

This permit shall not be valid for excavation until, or unless, the provision of Idaho code, Title 55, Chapter 22 have been complied with.

PRIOR TO EXCAVATION, CALL ONE NUMBER LOCATION SERVICE

Telephone No. _____

APPROACH

_____ Single Residence

_____ Multiple Residence _____ No. Served

_____ Business type _____

_____ Agriculture

WIDTH _____ SURFACE TYPE _____

ESTIMATED ADT _____ (VEHICLE COUNT)

Must meet the requirements of Local Highway Technical Assistance Council, (LHTAC) Standard Approach Policy and §49-221, Idaho Code.

Other Explain:

ATTACH SKETCH OF PROPOSED WORK AND TRAFFIC CONTROL PLANS:
SPECIAL PROVISIONS:

See reverse side for General Provisions.

I CERTIFY THAT I AM THE OWNER OR AUTHORIZED REPRESENTATIVE OF THE PROPOSED PROPERTY TO BE SERVED AND AGREE TO DO THE WORK REQUESTED HEREON IN ACCORDANCE WITH THE GENERAL REQUIREMENTS PRINTED ON THE REVERSE SIDE, THE SPECIAL PROVISIONS AND THE PLANS MADE A PART OF THIS PERMIT.

NAME OF PERMITTEE	APPLICANT-PLEASE TYPE OR PRINT
ADDRESS	SIGNATURE OWNER/ AUTHORIZED REPRESENTATIVE
CITY STATE ZIP	DATE

SUBJECT TO ALL TERMS, CONDITIONS, AND PROVISIONS SHOWN ON THIS FORM OR ATTACHMENTS, PERMISSION IS HEREBY GRANTED TO THE ABOVE-NAMED APPLICANT TO PERFORM THE WORK DESCRIBED ABOVE.

FOR LOCAL HIGHWAY JURISDICTION USE

TEMPORARY PERMIT

Tentative approval subject to inspection of installation.

Date:

FINAL PERMIT

Approved ☐ Date: _____ Rejected ☐ Date: _____

Corrections Required: _____

Approved by: _____

LHJ Authorized Representative

GENERAL PROVISIONS

1. A deposit in an amount to be determined by the Local Highway Jurisdiction, (LHJ) (minimum $200.00) shall accompany this application. If proper construction or repair is made and accepted within ten (10) days, the deposit will be refunded. If proper construction or repair is not completed within ten (10) days, the LHJ may make repairs and assess the deposit. A $25.00 administrative fee is non-refundable.

2. The LHJ may change, amend or terminate this permit or any of the conditions herein enumerated if permittee fails to comply with its provisions or requirements as set forth herein.

3. Approaches shall be for the bona fide purpose of securing access and not for the purpose of parking, conducting business, or servicing vehicles on the public right-of-way.

4. No revisions or additions shall be made to an approach or its appurtenances on the public right-of-way without the written permission of the LHJ.

5. The permittee shall furnish all material, labor and equipment involved in the construction of the approach and its appurtenances. This shall include furnishing approved drainage pipe of a size specified on permit (12 inch minimum) curb and gutter, concrete sidewalk, etc., where required. Materials and workmanship shall be good quality and are subject to inspection and approval by the LHJ.

6. The LHJ reserves the right to require the permittee, its successors and assigns, at any time, to make such changes, additions, repairs and relocations to any approach or its appurtenances within the public right-of-way as may be necessary to permit the relocation, reconstruction, widening, drainage, and maintenance of the roadway and/or to provide proper protection to life and property on or adjacent to the roadway.

7. Approaches shall conform to the plans made a part of this permit. Adequate drawings or sketches shall be included showing the design, materials, construction requirements and proposed location of the approach. All approaches shall be in accordance with Exhibits 9 and 13 of the Manual for Use of Public Right of Way - Standard Approach Policy.

8. During the construction of the approach(es), such barricades, signs and other traffic control devices shall be erected and maintained by the permittee, as may be deemed necessary by the LHJ. Said devices shall conform to the current issue of the Manual on Uniform Traffic Control Devices. Parked equipment and stored materials shall be as far from the traveled way as feasible. Items stored within 30 feet of the traveled way shall be marked and protected. The LHJ may provide barricades (when available) upon request.

9. In accepting this permit, the permittee, its successors and assigns, agrees to hold the LHJ harmless from any liability caused by the installation, construction, maintenance or operation of the approach(es).

10. If the work done under this permit interferes in any way with the drainage of the roadway, the permittee shall wholly and at his own expense make such provision as the LHJ may direct to take care of said drainage problem.

11. Upon completion of said work herein contemplated, all rubbish and debris shall be immediately removed and the roadway and roadside shall be left neat and presentable and to the satisfaction of the LHJ.

12. The permittee shall maintain at his or their sole expense the structure or object for which this permit is granted in a condition satisfactory to the LHJ.

13. Neither the acceptance of this permit nor anything herein contained shall be construed as a waiver by the permittee of any rights given it by the constitution or laws of the state of Idaho or of the United States.

14. No work shall be started until an authorized representative of the LHJ has given written notice to the permittee to proceed, except in case of an emergency when verbal authorization may be given with a written permit and fee required within five (5) working days.

15. This permit shall be void unless the work herein contemplated shall have been completed before _____.

B. INSTRUCTIONS FOR ISSUING PERMITS

The Application and Permit to Use Public Right-of-Way should be completed by the issuing agency rather than the applicant.

Only the original copy of the application is needed. Copies for LHJ use may be duplicated as required. The applicant receives a copy of the temporary permit during construction, then is give the original of the final permit after approval of the LHJ.

The LHJ may request additional information for some specific approaches prior to or during processing of the applications. This request normally involves traffic operations and plans for some commercial approaches.

Applications shall be signed by the owner or his authorized representative.

A sketch should be provided by the applicant showing the locations (by highway station or other local means) of existing and proposed approach changes, location of other proposed work to be done within the public right-of-way, and highway signs in the area of the approach, i.e., a copy of reduced project plan sheets is sufficient. Two copies of the prints, drawings or sketches are required. Cost of relocating any highway signs shall be borne by the permittee.

A **special provision** should be added to permits for inspection reimbursement for permits requiring large amounts of work on the right-of-way; those which severely impact traffic; or those using sizable amounts of inspection time.

The following **special provision** could be used:

"The_____shall be reimbursed for inspection
(LOCAL HIGHWAY JURISDICTION)
including actual costs."

The "temporary permit" portion should be signed by the authorized representative of the LHJ when issuing. After the facility is completed, the "final permit" portion should be signed by the LHJ – if acceptable.

1. Assignment of Numbers to Permits and Receipts

Permits should be numbered by the fiscal year and the sequence numbers started over each year with 001.

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Example of Assigning Numbers:

The first permit issued in fiscal year 1995 (FY95) would be **95-001.** A single numbering sequence should be used for both the Application and Permit to Use Public Right-of-Way (Approaches) and (Utilities) forms.

C. TRAFFIC CONTROL FOR PERMITS TO USE PUBLIC RIGHT-OF-WAY

The safe, efficient passage and protection of vehicles and pedestrians during any work within the public right-of-way covered by permit is very important and shall be the responsibility of the permittee. During the progress of the work, barricades, signs and other traffic control devices shall be erected and maintained by the permittee in conformance with the current Manual on Uniform Traffic Control Devices, Part VI, latest edition. See Exhibits 4 and 5 - Figures III,C. - A and B.

D. OBTAINING RIGHT-OF-WAY VIA THE LOCAL PLANNING ACT OF 1975

Planning and zoning authorities may require that additional land needed to accommodate acceleration/deceleration lanes, corner radii, etc., be granted to the applicable LHJ by appropriate instrument as a condition for approving any rezoning, special use permit, or subdivision request.

The following are needed to accomplish granting of property:

1. A comprehensive plan for the city/county must be in effect. (§67-6508, I.C.)
2. The transportation component of the plan should have the location and widths of the major thoroughfares identified. (§67-6508, I.C.)
3. When platting a subdivision, §50-1310, Idaho Code, provides for dedication of public right-of-way.

In special cases, a permanent easement (least desirable) can be granted when building setback or other problems preclude other forms of dedication. Instruments conveying land for public right-of-way use should be granted to and accepted by the appropriate city, county, or highway district and recorded with the County Recorder.

2 LANE ROADWAY-OFF TRAVELWAY OPERATIONS

(BASIC TRAFFIC CONTROL PLAN)

PLAN C

TYPICAL APPLICATIONS

Culvert Extensions
Side Slope Changes
Guard Rail Installation and Maintenance
Delineator Installation and Maintenance
Landscaping Operations
Cleaning Ditches and Drainage Structures
Shoulder Repair
Signing Operations

SYMBOLS

Work Area

Traffic Control Sign. Two 6"x6" orange flags attached to each sign is desirable.

Sign on portable or temporary support

GENERAL NOTES

1. Signs are to be removed when no work is being performed. Any unattended obstacle or excavation in the work area shall be protected by type I or II Barricades.
2. Longitudinal dimensions may be adjusted to fit field conditions.
3. All vehicles, equipment, men and their activities should be restricted at all times to one side of the pavement.

Figure III.C.A

Figure III.C.8

E. APPROACHES FOR NEW DEVELOPMENTS

Before an approach permit is granted, a traffic-impact study may be required of all new developments which will generate over 100 cars per hour (total two-way) during the peak hour, or a lesser volume if requested by the LHJ.

1. The study should include data on the following:

   a) Existing peak hour traffic volumes and conditions.

   b) Directional distribution estimates of added traffic.

   c) Projections of added traffic volumes for all appropriate critical hours.

   d) Determination of needed improvements, traffic controls, approach locations and their design and the impact on nearby traffic control.

   e) Identification of any additional highway right-of-way which might be required.

2. The results of the impact study should enable the responsible agencies having jurisdiction to:

   a) Verify the need for capacity improvements along access streets and critical intersections.

   b) Consider the effects on the local transportation system.

   c) Enable the LHJ to check the access design.

   d) Determine a fair and equitable means of cost-sharing between the developer and the public agencies for needed intersection or access improvements, including added traffic lanes and traffic control devices.

The developer is required to coordinate the study with both the LHJ and the local planning agency and/or building department which controls issuance of building permits for the development if they are separate agencies.

The developer shall provide and pay for the study and the LHJ, or its agent, should review the study. See Section III,F, Application Fees, for details on the Special Traffic Studies Fee.

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F. APPLICATION FEES

Application fees for the various types of public right-of-way use permits issued by the LHJ shall be as follows:

1.	Approach Applications	
	a) Standard Approach Policy	$25.00
	b) Partial and Full Control Access	$40.00
2.	Agricultural Use and Other Non-Permanent Use	$20.00
3.	Special Traffic Studies or Appraisal Fee	Actual Cost
4.	Inspector Fee	Actual Cost
5.	Performance Bond	(Furnished by Applicant when required)

In addition to the application fee, the LHJ may require payment of the estimated cost of any studies or appraisals when large development plans must be reviewed and/or extensive LHJ time is expended on a traffic study or review. These fees may be charged at the discretion of the LHJ. Estimated costs would include wages, travel, subsistence and other expenses incurred. The intent is to recover LHJ actual costs only.

Applications may not be processed before payment of the non-refundable application fee.

Application fees may be waived for the following (waiver of the fee does not waive the need for a permit)

- Government Agencies
- Approaches resulting from right-of-way negotiations.

  Future approaches shown on plan – if installed according to plan.

  Agricultural use of right-of-way as part of right-of-way agreement.
- Approach width changes on standard approach sections, if safety and drainage are not adversely affected.

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Those instances where a direct benefit to the LHJ is gained. An explanation justifying the waiver of fee shall be made on the application or attached to it. Examples would be: Allowing an adjacent landowner to level the public right-of-way along with adjacent property to remove earth obstructions and improve safety; plant and maintain grass; and non-obstruction landscaping on the right-of-way.

Inspection fees may be charged at the discretion of the LHJ when substantial inspection time will be required. The fee would include wages, (loaded rate) travel, subsistence and other expenses incurred. The intent is to only recover LHJ costs. When the inspection fee is to be assessed it shall be stipulated under the application special provision.

A performance bond may be required of an applicant at the discretion of the LHJ. The purpose of this bond is to guarantee completion of the work in accordance with the requirements of the permit. The bond amount should be large enough to cover costs to correct potential damage to the highway system the permittee might cause. The bond must be executed by a surety company authorized to conduct business in Idaho. The bond must be executed and incorporated into the permit file before the permittee is authorized to commence work.

The Performance Bond will be returned to the Permittee following the final approval of the facility by the LHJ.

G. SUBSTANDARD APPROACHES

If a substandard approach is constructed, the permittee shall be given ten (10) days to upgrade the approach to the prescribed standards on the permit, or have a plan of action approved by the LHJ with a completion date. Permits shall be revoked for approaches which are not upgraded to the prescribed standards and action taken to remove the approaches.

Exhibit 6 - Figure III,G, "Notice" may be used to post an illegal approach if the owner or the owner's representative cannot be found at the site. If the owner does not respond to notifications, the LHJ may send a certified letter (with a return receipt requested from the post office) to the owner advising of the illegal approach or encroachment and give ten (10) days to obtain the permit. In case of an illegal approach jeopardizing the safety of the traveling public, the LHJ may install appropriate temporary traffic control devices at their discretion.

NOTICE

THIS APPROACH DOES NOT HAVE A PERMIT AS REQUIRED BY THE _____.

PLEASE CALL _____ FOR INFORMATION

WITHIN 10 DAYS OR APPROACH MAY BE REMOVED.

DATE: _____

CONTACT: _____

LHTAC

Figure III,G

Un-approved approaches may be removed by the LHJ and legal action initiated to collect the removal cost, §40-2319, Idaho Code. The above ten (10) day requirement may be reduced if a hazardous situation is created by permittee or party and immediate corrective work is ordered by the LHJ when time is of the essence.

H. MAINTENANCE RESPONSIBILITY

Once the approach has been constructed and approved, the LHJ will maintain the approach as follows, unless otherwise provided:

- **Paved Public Approach** - Maintained to the public right-of-way line.
- **Paved Private Approach** - Maintain to end of radii, permittee maintains beyond radii.
- **Gravel Public Approach to Paved Highway** - Permittee installs an asphalt wedge sufficient to protect the roadway pavement edge (three (3) to six (6) feet back from the edge of road for the width of the approach). It is desirable to pave the approach to the right-of-way line when the road is reconstructed. The LHJ maintains to the right-of-way line.
- **Gravel Public Approach to Gravel Highway** - Maintained to the right-of-way line.
- **Gravel Private Approach to Paved Highway** - Permittee installs an asphalt wedge sufficient to protect the roadway pavement edge (three (3) to six (6) feet back from the edge of road for the width of the approach). The permittee maintains beyond the wedge.

I. APPEAL PROCESS

Applicants denied an approach permit or final approval by the authorized staff member may appeal to the appropriate city council, county commissioners, or highway district commissioners. The decision of the LHJ shall be final.

IV. DESIGN PRINCIPLES

Design principles for the border area, setbacks, approach locations, base and surfacing, and drainage must meet minimum standards set by the Local Highway Jurisdictions or as shown in this manual.

A. BORDER AREA

The border area may require re-grading and/or landscaping when adjacent property and approaches are developed. Border area work shall ensure that adequate sight distance, proper drainage, desirable slopes for maintenance operations and a pleasing appearance are present. (See Exhibit 7 - Figure IV,A.)

The border area shall be free of encroachments and treated as necessary to prevent vehicular use by ditching, special grading, use of concrete or bituminous curbs, fencing, guard rail, guide posts, etc., as long as the devices do not impair adequate sight distance or constitute a hazard to pedestrians or vehicles.

B. SETBACK

Businesses that are located adjacent to the highway cannot lawfully serve patrons in vehicles that are parked or standing on the public right-of-way. Improvements on private property adjacent to the public right-of-way to serve patrons shall be setback from the roadway so that stopping, standing or maneuvering of vehicles on the public right-of-way is not necessary. A minimum setback of fourteen (14) feet from the public right-of-way line is required. When a certain number of parking spaces per square footage of building are required, the parking spaces cannot be included within the public right-of-way.

Sufficient parking and or storage area to prevent the stopping of vehicles on the approach or the backing up of traffic onto the traveled way, especially for parking lots, garages, drive-in cafes/theaters, truck terminals, etc., should be provided off the public right-of-way. Business traffic flow should be designed to exit the main highway onto a local road or street before entering the business and then exit the business onto the main highway whenever possible.

Poles, signs, displays, etc., that restrict the sight distance of a vehicle entering or leaving the property should not be installed.

C. APPROACH LOCATIONS

Approaches shall be located so as not to create undue interference with, or hazard to, the free movement of normal roadway or pedestrian traffic, or cause areas of congestion. Approaches must be located where the roadway alignment and profile are favorable, i.e., away from sharp curves, steep grades, and/or where the sight distance would not be adequate for safe traffic operations. Approach locations that restrict or interfere with the placement and proper functioning of traffic control signs, signals, lighting, or other devices must also be avoided.

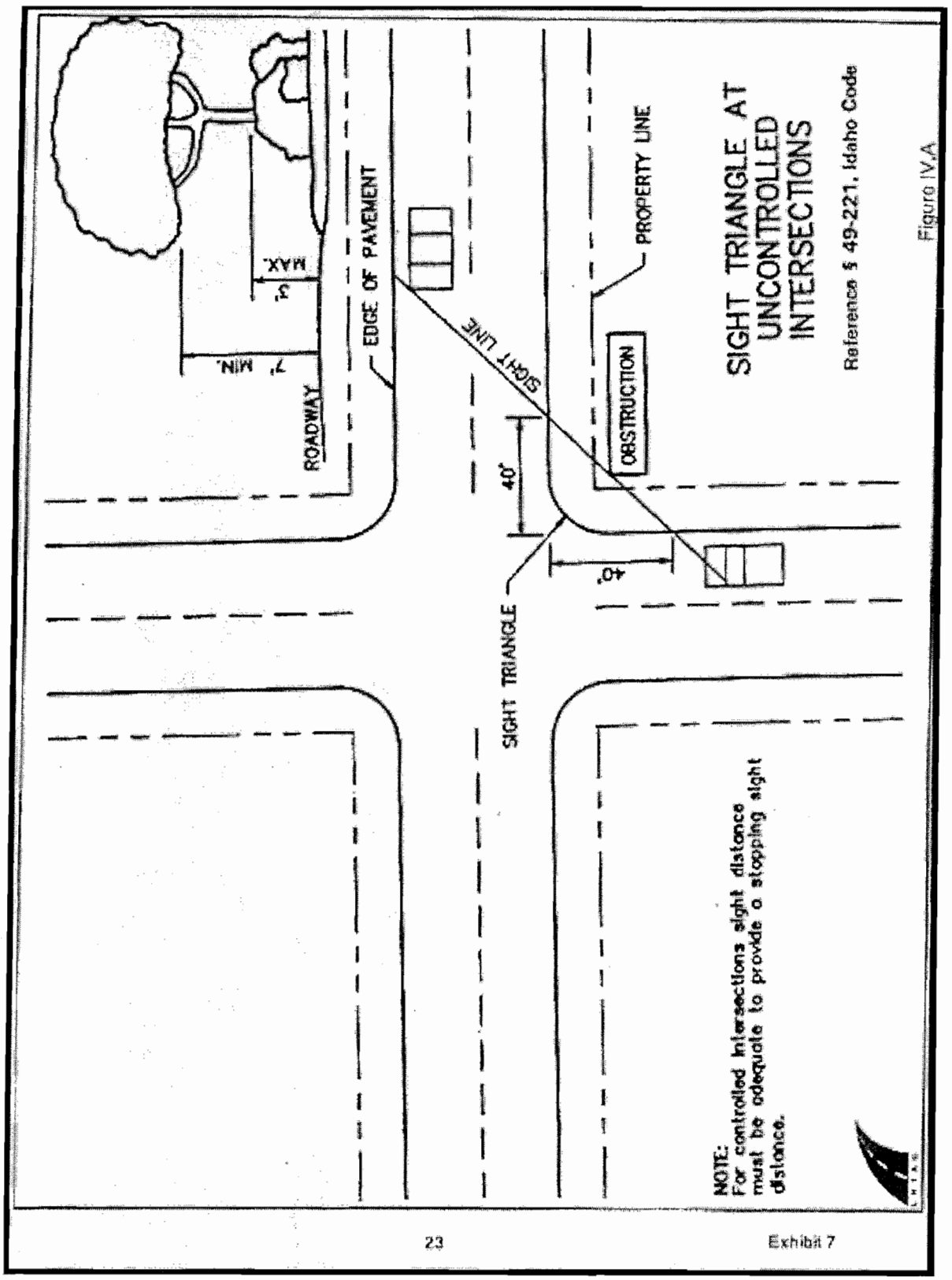
At all approaches the sight triangle depicted in Exhibit 7 - Figure IV,A., shall be protected.

Minimum sight distances for approaches should not be lower than the stopping sight distance on wet pavement (150 feet at 25 mph, 200 feet at 30 mph, 225 feet at 35 mph, 325 feet at 45 mph, 400 feet at 50 mph, and 450 feet at 55 mph). Recommended sight distances are 710 feet at 35 mph, 915 feet at 45 mph and 1130 feet at 55 mph. The recommended distance would allow a 50 foot truck to make a left turn from an approach and clear the near lane before a vehicle in the near lane had to slow down. A downgrade prior to the approach increases the sight distance requirement.

All approaches serving primarily truck traffic shall use a curb return approach in accordance with Exhibit 8 - Figure IV,C. The radius shall be adequate to accommodate the truck turning movements, and the approach width shall be forty (40) feet.

Private approaches onto arterial highway and collector highways should be designed and constructed to provide forward vehicular movement for ingress and egress to the adjacent properties. Approaches should be limited such that a minimum separation of three hundred thirty (330) feet center to center of approach is achieved. If unusual conditions prevent approach locations as specified above, the Applicant may request special consideration by the LHJ. All approaches should conform to the requirements in this policy.

Failure to comply with minimum requirements and/or recommendations may be sufficient cause for the LHJ to deny an approach location, prohibit specific approach usage, or revoke an existing approach permit.


SIGHT TRIANGLE AT
UNCONTROLLED
INTERSECTIONS
Reference § 49-221, Idaho Code
Figure IV.A
PROPERTY LINE
EDGE OF PAVEMENT
ROADWAY
7' MIN.
3' MAX.
SIGHT LINE
OBSTRUCTION
40'
40'
SIGHT TRIANGLE
NOTE:
For controlled intersections sight distance must be adequate to provide a stopping sight distance.
23
Exhibit 7

D. BASE AND SURFACING

The applicant must supply, place, and properly compact the approach fill and base material. All base material should consist of crushed sand-gravel, or crushed sand and rock mixtures containing sufficient granular fines to fill the voids between the larger gravel and stone, and to permit compaction.

In curb and gutter areas, approaches should be paved to the back edge of the sidewalk or right-of-way line, whichever is the least. (See Exhibit 9 - Figure IV,D)

In areas without curb and gutter, the approach base and surfacing should consist of an adequate depth of granular material to protect the roadway edge. The LHJ may require the property owner to furnish and place asphalt surfacing when necessary for maintenance or operational purposes. The surfacing should normally extend a minimum distance of twenty (20) feet from the outside shoulder line, or to the public right-of-way line, whichever is the least. Casually used field approaches may extend a lesser distance; a five (5) foot minimum is recommended. Commercial approaches are normally required to be surfaced. (See Section III,G., for required paving and maintenance.)

E. DRAINAGE

All approaches should drain away from the roadway – except in areas having curb and gutter. Generally, approaches in areas having curb and gutter should be graded so that adjacent properties do not drain to the roadway unless existing storm drain system capacity is demonstrated to be adequate within current design criteria. Approaches should also be constructed so they do not impair the drainage within the public right-of-way, alter the stability of the roadway subgrade, or materially alter the drainage of the areas adjacent to the public right-of-way.

Culverts and drop inlets should be installed where required and should be the type and size specified by the LHJ. Where the border area is re-graded and/or landscaped, the border area should have sufficient slope, culverts, and drop inlets for adequate drainage. Slopes, where practical, should be a 4:1 maximum.

Culverts should be installed in accordance with Exhibit 10 - Figure IV,E.

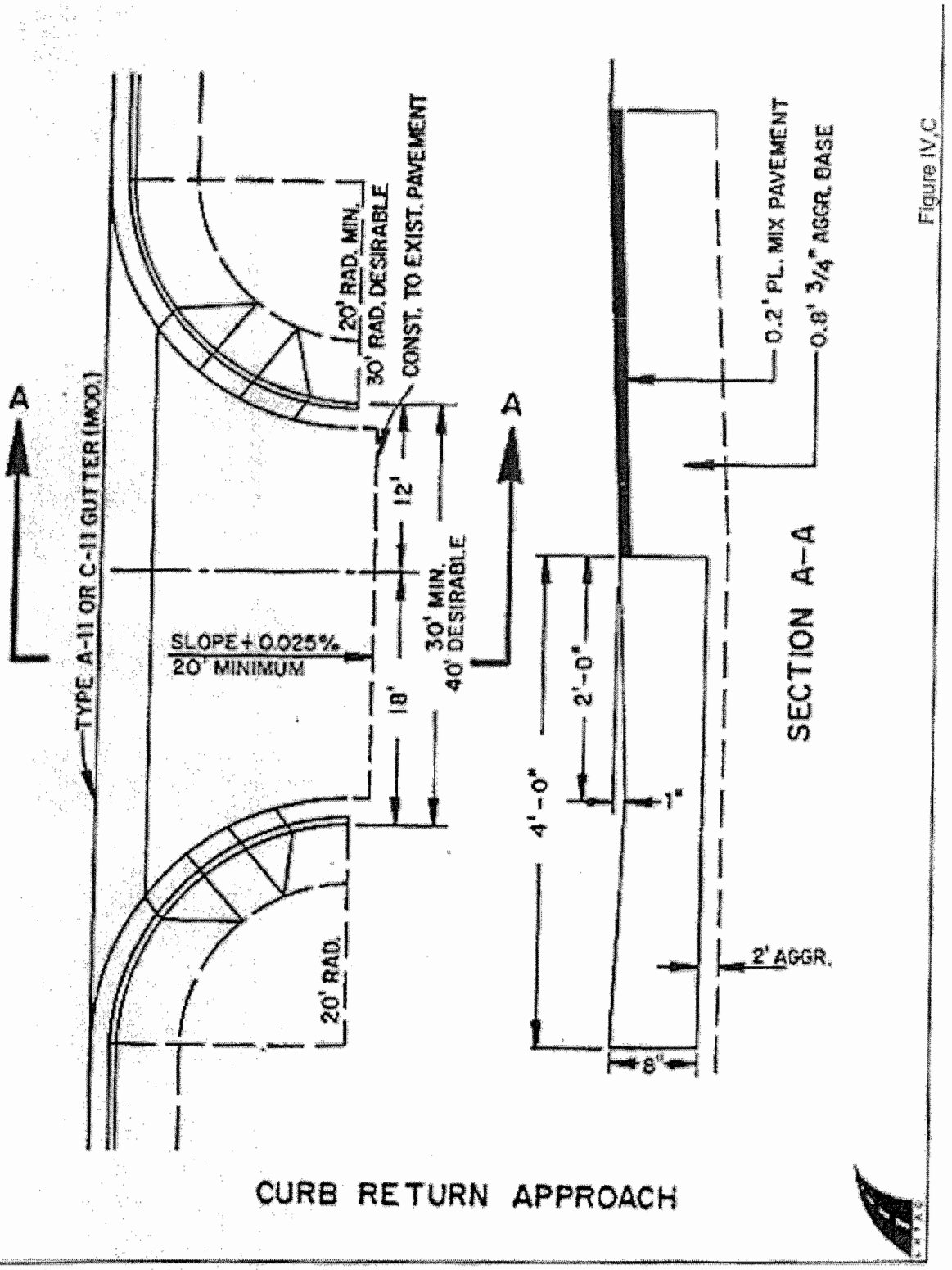
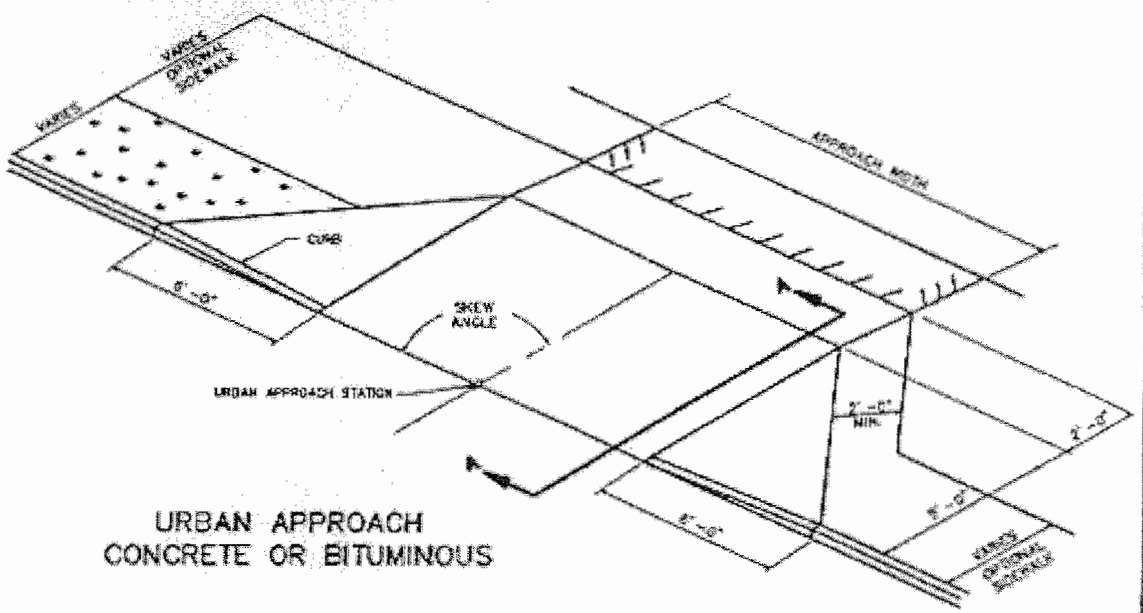
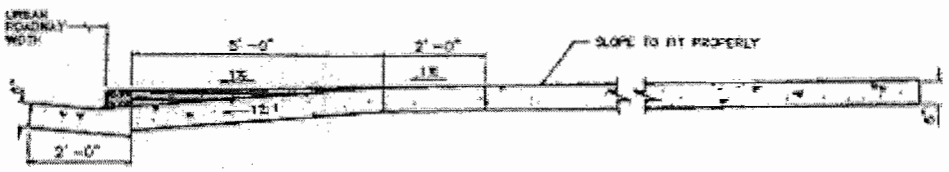

A
A
TYPE A-11 OR C-11 GUTTER (MOD.)
20' RAD. MIN.
30' RAD. DESIRABLE
CONST. TO EXIST. PAVEMENT
12'
18'
30' MIN.
40' DESIRABLE
SLOPE + 0.025%
20' MINIMUM
20' RAD.
0.2' PL. MIX PAVEMENT
0.8' 3/4" AGGR. BASE
4'-0"
2'-0"
1"
2' AGGR.
8"
SECTION A-A
CURB RETURN APPROACH

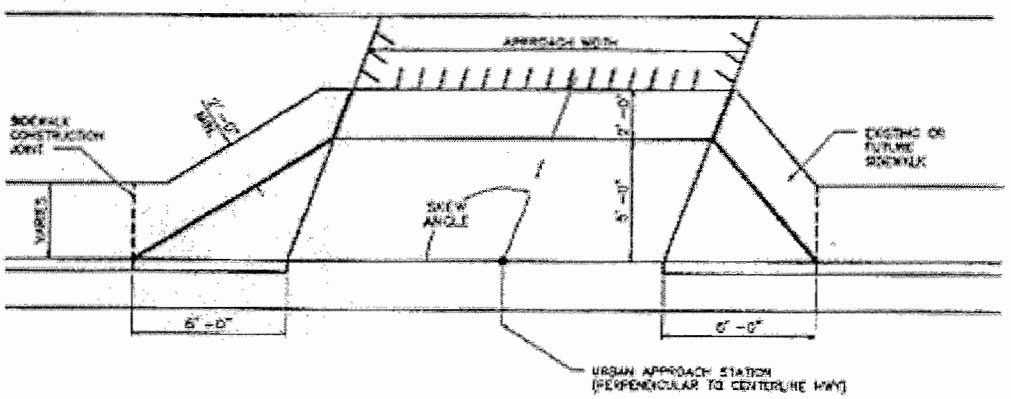
Figure IV.C



URBAN APPROACH
CONCRETE OR BITUMINOUS



SECTION A–A
N.T.S.



TYPICAL SKEWED URBAN APPROACH
N.T.S.

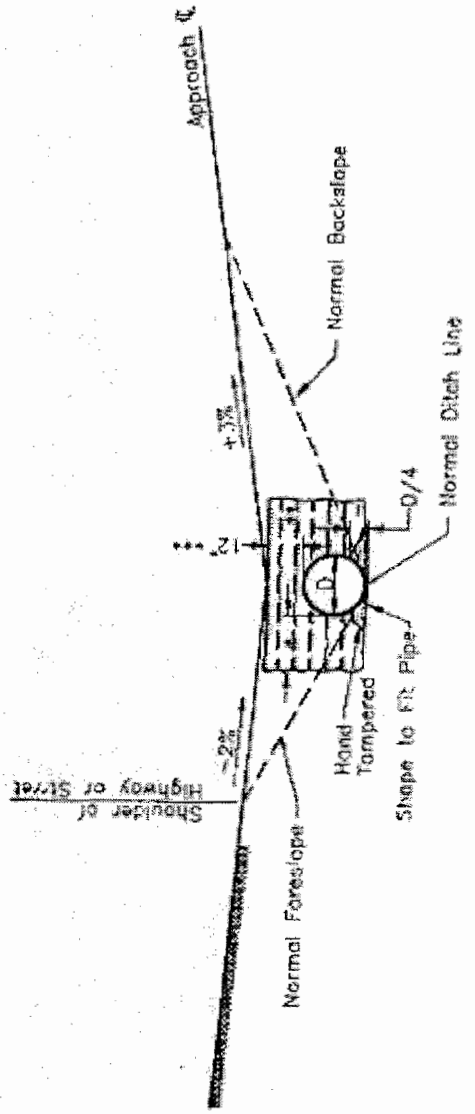
FIGURE IV, D

F. CATTLE GUARDS - (See LHTAC Manual for Highway and Street Standards)

Section 40-2310, Idaho Code, regulates the installation of cattle guards on local highways and should be referenced when the question arises. LHJ's are encouraged to place them on private property when necessary on private approaches.

Section 40-203(5), Idaho Code, speaks to obstruction of the public right-of-way and the misdemeanor offense involved.

33 of 42
EXHIBIT C
1199



NOTE: * D or 12" whichever is greater.
** Mechanical compacted backfill. Place in 6" layers. UHJ to specify type of material acceptable for backfill.
*** May be reduced to 6" on Residential Approaches.

TYPICAL CULVERT INSTALLATION
N.T.S.

Figure IV, E

Exhibit 10

V. GEOMETRIC RESTRICTIONS

A. GENERAL

The following geometric restrictions shall be considered on each Application and Permit to Use Public Right-of-Way Approaches:

a) Number of Approaches
b) Approach Alignment
c) Approach Width
d) Corner Clearance
e) Property Line Clearance
f) Distance Between Approaches
g) Approach Transitions and Flares
h) Approach Grades
i) Volume of Traffic Using Approach

B. NUMBER OF APPROACHES

The number of approaches should be the minimum number required to adequately serve the needs of the property. The Standard Approach Policy should be that not more than two approaches be allowed for any single property tract or business establishment frontage. Traffic circulation on the property, parking and access to other streets shall be reviewed and adjusted to provide a minimum number of approaches. The LHJ shall evaluate each case on an individual merit and allow or disallow additional approaches based on the evaluation.

C. APPROACH ALIGNMENT

Single approaches should intersect as closely as possible at right angles to the roadway. When two approaches are used on one frontage for access to both directions of travel on the travel-way, each approach may be placed at skew angles between 70° and 90° (desirable). (See Exhibit 12, Figure V,H, page 33)

D. APPROACH WIDTH

An approach shall be wide enough to properly serve the anticipated type and volume of traffic. Minimum widths should be used only when space limitations must be considered.

Standard Approach Widths:

	Minimum	Maximum
Residential	Twelve feet (12')	Thirty feet (30')
Agricultural	Twelve feet (12')	Forty feet (40')
Commercial (one-way)	Fifteen feet (15')	Thirty feet (30')
Commercial (two-way)	Twenty feet (20')	Forty feet (40')
Street/Highway	Twenty-eight feet (28')	Forty-eight feet (48')

A design speed of 10 mph minimum and a recommended 15 mph is desirable. The width shall be within the specified limits, except that **approaches in speed zones that are over 35 mph shall be at least a twenty (20) feet wide minimum.**

A joint-use approach should use the maximum dimensions of a single approach. An approach that is adjacent to a public alley may include the alley, if approved by the LHJ; however, the width of the combined approach shall not exceed forty (40) feet.

Commercial approaches in urban areas with volumes exceeding fifty (50) vehicles per hour during a total of any four (4) hours per day should be designed to public highway standards using a curb radius or fillet radius of twenty (20) feet minimum, and a recommended thirty (30) feet on high volume approaches. An approach divider is recommended for a commercial approach to improve operation of the approach. Special approaches serving shopping centers or other major traffic generators shall not be restricted to the width requirements, but shall be designed to serve the traffic; i.e., both a right turn and a left turn lane, divider and entrance lane. These special approaches shall be designed by a professional engineer licensed in the state of Idaho.

E. CORNER CLEARANCE (See Exhibit 11 - Figure V,E.)

1. Approaches should be located as far as possible from intersections to:

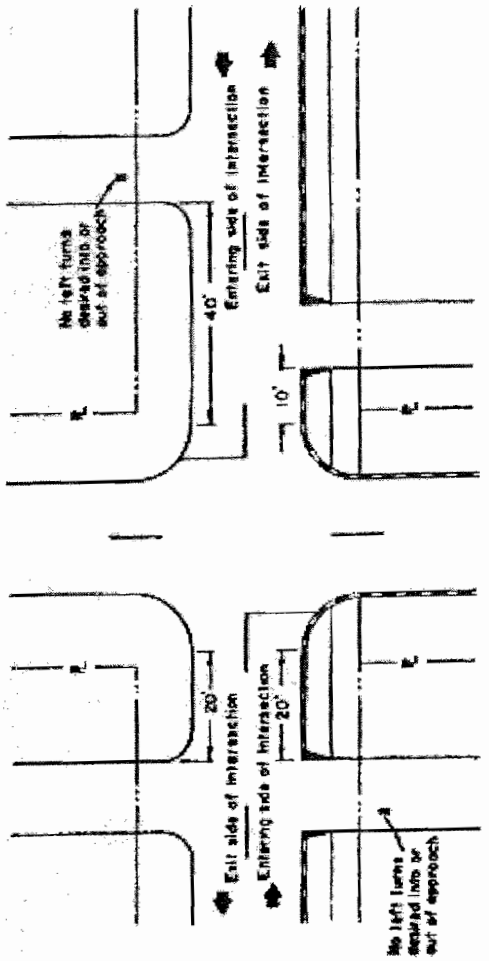
   a) Preserve visibility at the intersection.

   b) Allow a vehicle that is leaving the approach to enter the desired traffic lane before entering the intersection.

   c) Permit a vehicle crossing the intersection to enter the approach in an orderly, safe manner with a minimum of interference to through traffic.

CORNER CLEARANCE DIAGRAM

WITHOUT CURB AND GUTTER



WITH CURB AND GUTTER

Figure V, E

Exhibit 11

d) Facilitate the installation of traffic signs, signals, and lighting where required.

If traffic volumes exceed 250 vehicles per hour, or if the intersection is signalized, the corner clearance shall be at least twice the minimum requirement. Any approach within a limited left or right turn may also be restricted to a right turn in and a right turn out, in addition to the minimum corner clearance requirements.

Less than the minimum distance may be permitted by special circumstances; however, the approach transition or curb flare shall not encroach upon the curb or pavement edge forming the corner radii of the intersection.

Corner clearances are as follows:

With Curb and Gutter	**Minimum**	**Recommended**
Entering Side of Intersection	Corner Radius + 20 ft.	Corner Radius + 40 to 60 ft.
Exit Side of Intersection	Corner Radius + 10 ft.	
Without Curb and Gutter	**Minimum**	**Recommended**
Entering Side of Intersection	Corner Radius + 40 ft.	
Exit Side of Intersection	Corner Radius + 20 ft.	Corner Radius + 20 to 40 ft.

See Exhibit 11 - Figure V,E., Corner Clearance Diagram for further details.

F. PROPERTY LINE CLEARANCE

Minimum property line clearance should be five (5) feet for curbed or urban approaches and equal to the approach radius. A minimum of twenty (20) feet for all other highways is recommended, unless a joint-use approach is installed. The approach shall not extend within the clearance distance except when existing physical features such as a house or garage, etc., require that the approach be located closer to the property line. Field approaches may be allowed adjacent to the property line when required for proper utilization of the field; however, joint-use approaches are recommended whenever the property line allowance is made.

38 of 42
EXHIBIT C
1204

G. DISTANCE BETWEEN APPROACHES

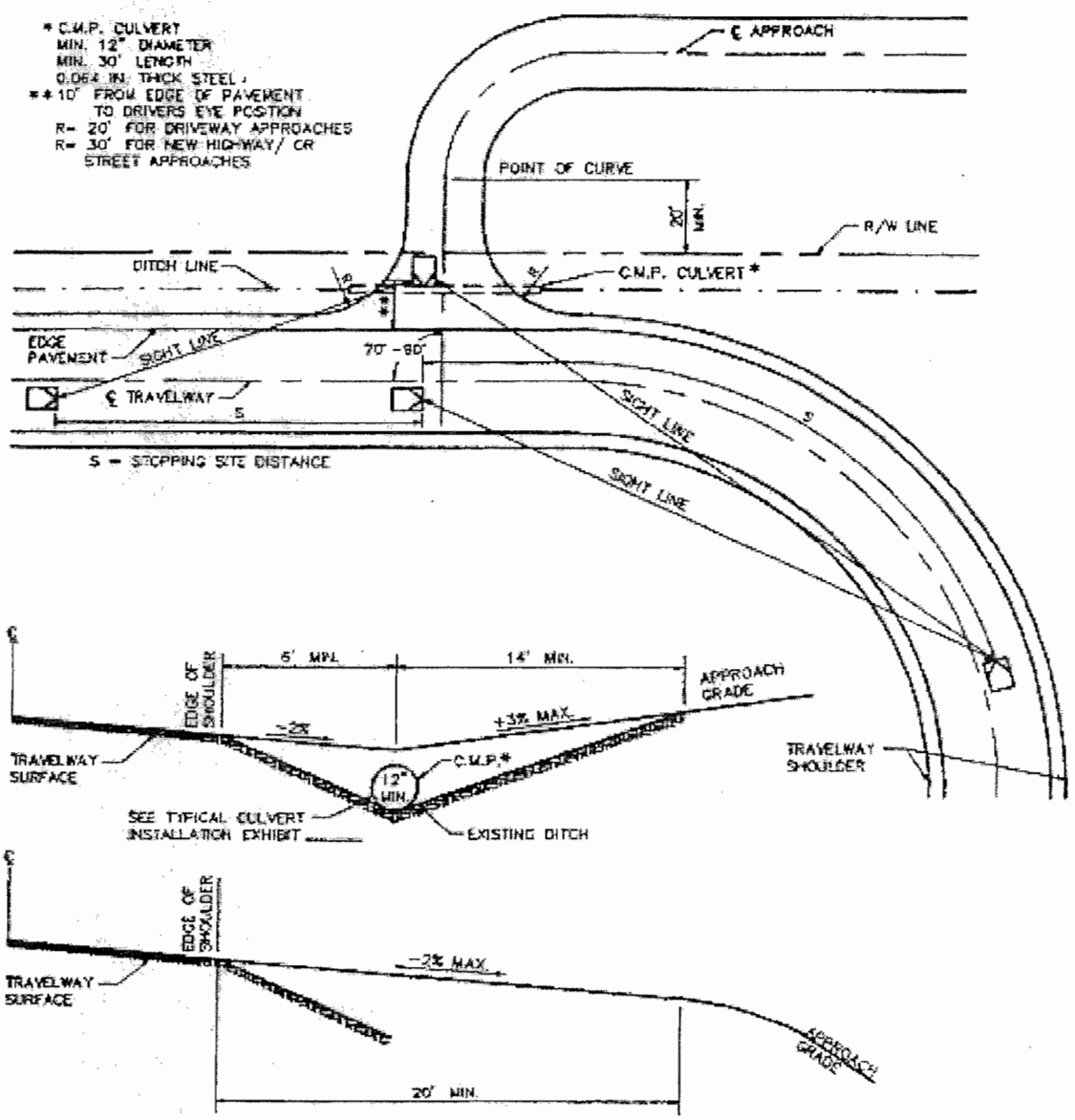
The minimum distance between approaches shall be ten (10) feet for curb and gutter sections and for developed urban areas where curb and gutter do not exist, but are warranted. The minimum distance between approaches for other areas is forty (40) feet except as stated in the following paragraph. In curb and gutter areas with sidewalks, a minimum sidewalk distance between approaches of eight (8) feet at back of sidewalk shall be provided for pedestrian refuge. Where parking is allowed along the highway, the distance between approaches shall be short enough to discourage parking or long enough to provide multiples of parking spaces.

All approaches serving primarily truck traffic shall use a curb return approach in accordance with Exhibit 8 - Figure IV,C. The radius shall be adequate to accommodate the truck turning movements, and the approach width shall be forty (40) feet. Private approaches onto arterial or collector classified highways shall be designed and constructed to provide forward vehicular movement for ingress and egress to the adjacent properties. Approaches shall be limited such that a minimum separation of 330 feet center to center of approach is achieved. If unusual conditions prevent approach locations as specified above, the applicant may request special consideration by the LHJ.

H. APPROACH TRANSITIONS AND FLARES

In curb and gutter sections, the transition connecting the edge of the approach to the curb shall be as specified in Exhibit 9 - Figure IV,D.

In sections not having a curb and gutter, the circular arcs or approach flares should connect the outside edge of the approach to the outside edge of the roadway shoulders, as specified in Exhibit 12 - Figure V,H. The approach flare tangent distance should not exceed twenty (20) feet.



STANDARD APPROACH POLICY

N.T.S.

LHTAC

FIGURE V, H

I. APPROACH GRADES

On curbed sections, the approach grade should conform to Exhibit 9 - Figure IV,D. If the maximum allowable slope is not great enough to bring the approach to the level of the sidewalk, a depressed sidewalk should be installed. The connection between the original sidewalk and the depressed sidewalk shall be made through a warped section, the slope of which shall not vary more than six percent (6%) from the longitudinal grade of the original sidewalk. All new curbs or sidewalks should be constructed to the line and grade of the existing curb or sidewalk with every effort to construct a sidewalk that is uniformly graded and free of dips. The maximum gradient limits beyond the outer edge of the sidewalk shall be the same as for uncurbed approaches.

On uncurbed sections, the approach grade should be a minus two percent (-2%) for at least six feet (6') beyond the outside shoulder line in order to provide proper drainage in a ditch section of twenty feet (20') in a fill section, as specified in Exhibit 12 - Figure V,H. Beyond this point, the maximum grade for commercial approaches should be a plus or minus six percent (± 6%). The maximum grade for all other types of approaches should a plus or minus eight percent (± 8%) in flat terrain, a plus or minus twelve percent (± 12%) in rolling terrain and plus or minus fifteen percent (± 15%) in mountainous terrain.

J. MAILBOX TURNOUTS

Mailbox turnouts may be combined with or may be independent of approaches in rural areas. It is desired to have the mail carrier stop out of the travel-way whenever possible for safety reasons. The approach applicant should be required to construct a mailbox turnout at the same time if a mail box will be installed. Turnouts with a minimum width of eight (8) feet {ten (10) feet desirable} from the edge of the travel-way are recommended. See Exhibit 13 - Figure V,J, or refer to the Manual for the Location, Support and Mounting of Mailboxes, published by LHTAC April, 1997. Mailbox supports should not be larger than 4-inch by 4-inch wood posts, 1½-inch metal pipe or 1½-inch angles (2.3 pounds per foot) for safety reasons. The box-to-post attachment should be strong enough to resist separation when hit. No massive metal, concrete, stone or other hazardous support should be allowed. Deficient installations should be corrected.

Figure V, J

35 Exhibit 13

CASE NO CV2008-00180

2009 FEB -2 PM 3:38

CLERK OF DISTRICT COURT
LATAH COUNTY
BY DEPUTY

RONALD J. LANDECK, ISB No. 3001
RONALD J. LANDECK, P.C.
693 Styner Avenue, Suite 9
P.O. Box 9344
Moscow, ID 83843
(208) 883-1505
FAX (208) 883-4593
Attorneys for Defendants

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

DON & CHARLOTTE HALVORSON (Husband and Wife),	Case No. CV 2008-180
Plaintiffs,	SECOND AFFIDAVIT OF DAN PAYNE
vs.	
NORTH LATAH COUNTY HIGHWAY DISTRICT; BOARD OF COMMISSIONERS FOR THE NORTH LATAH COUNTY HIGHWAY DISTRICT, ORLAND ARNEBERG, RICHARD HANSEN, SHERMAN CLYDE, in their individual capacities; DAN PAYNE, in his official capacity and in his individual capacity,	
Defendants.	

STATE OF IDAHO)
) ss.
County of Latah)

Dan Payne, upon oath, deposes and says:

1. I am a Defendant in this matter, am over eighteen (18) years of age, am competent to testify to the matters set forth herein and make this affidavit upon my personal knowledge.

2. I have been employed by Defendant North Latah County Highway District ("District") since 1974 and District foreman since 1994. Since 1974, my duties for District foreman have included maintaining and improving projects on Camps Canyon Road with the primary difference being that, as foreman, I oversee and supervise the District's work instead of doing it.

3. Absent special circumstances, which are not present in this case, when the District undertakes improvements on a public road established by prescription, such as Camps Canyon Road, those improvements are made within the District's prescriptive minimum fifty foot (50') wide right-of-way without permission of adjoining landowners because such permission is not necessary as all of the District's work is undertaken within its legal right-of-way. However, the District's foremen will routinely make an effort to inform adjoining landowners of planned improvement projects, particularly major ones, as a courtesy and convenience. In 1996, the District followed this practice when it undertook improvements to Camps Canyon Road in that the District did not seek permission from landowner Ed Swanson who owned what is now the real property owned by Plaintiffs. At no time did Mr. Swanson either dedicate or gift any right-of-way to the District in connection with the 1996 improvements. Mr. Swanson was aware of those improvements and merely had no objection to them.

4. In 2005 and 2006, Camps Canyon Road was widened slightly, meaning less than a foot or two on Plaintiffs' side of Camps Canyon Road when gravel was spread over the entire portion of the traveled roadway following the improvements on Wagners' side of the road.

5. Since 2005 and 2006, the only significant activities that have been undertaken by the District on Camps Canyon Road in the area of Plaintiffs' real property and Wagners' real property are graveling, road grading and snow plowing. These activities are essential to proper

maintenance of all public roads. These activities and vehicular use contribute to the movement of gravel particularly toward the sides of a road. In the grading process, most gravel is brought back toward the road center, but inevitably some gravel moves outward, which serves to stabilize and support the road but does result in minimal, necessary widening of the road over time.

6. On or about March, 2006, Robert Wagner, who was in the process of building a residence, applied to the District using the District's standard form to obtain a permit for an approach onto Camps Canyon Road from the Wagners' real property. I met with Mr. Wagner who showed me a post next to the road which he said represented his southern property line. North of that post was an old driveway that used to lead to a home and outbuildings on Mr. Wagner's property. At least 50 feet further north of that driveway, Mr. Wagner had begun construction of a driveway which he wanted to be the location of his approach permit. I asked why he didn't want to use the old driveway onto his property, and he replied that his neighbor, Plaintiff Don Halvorson thought it would encroach on his property. Mr. Wagner said something to the effect the location he had selected was well north of the old driveway, would "be safe" and not cause any problems with his neighbor. I approved his approach permit application for that location.

7. On or about April, 2006, Mr. Wagner told me that Don Halvorson had complained that the driveway approach was on the Halvorsons' real property. Mr. Wagner then handed me a copy of the legal description from the deed to his property, a true and correct copy of which is attached hereto as Exhibit A. I met Mr. Wagner at Camps Canyon Road and used a measuring wheel from that legal description's point of beginning in Camps Canyon Road, which I lined up with Plaintiffs' fence, and measured "699 feet, more or less, along the County Road." That distance was a great distance past the post Mr. Wagner had set for his southeasterly corner and

was south of the old driveway and approximately one hundred feet south of the approach for which the permit had been issued.

8. On April 12, 2006, I attended a meeting of the District commissioners where Don Halvorson and Mr. Wagner were present and spoke about the driveway issue. I stated that I had measured the distance along the County Road and that, in my opinion, the permitted approach was approximately 100 feet north of Mr. Wagner's southern property boundary. Mr. Halvorson confirmed that the point of beginning I used that was based on his fence location was accurate. I asked Mr. Halvorson why he thought the approach was on his property and, if so, what had happened to the 699 feet of road frontage shown on Mr. Wagner's deed. He mentioned something about a "switchback" and that the road had been moved, which I knew to be false.

9. On or about June, 2006, Mr. Wagner told me that Mr. Halvorson had produced a survey and that he wanted Mr. Wagner to move his driveway. Mr. Wagner filled out a new application and showed me the location, which was at least one hundred feet north of the first, permitted approach. I approved this second application on June 9, 2006, a true and correct copy of which is attached hereto as Exhibit B. I revoked the first permit and threw it away as it was no longer valid.

10. Mr. Wagner proceeded over the next weekend to construct the new driveway and he had the rock used in construction of the first driveway pulled onto his property and had the cut that was made for the first driveway filled in with soil.

11. To the best of my knowledge, Plaintiffs have not complained about the June, 2006 permit or Mr. Wagner's second driveway.

12. As foreman for the eastern subdistrict of the District, the District commissioners have delegated to me the responsibility for the review and issuance of approach permits for my

subdistrict. I follow District standards, including the applicable Local Highway Technical Assistance Council Manual, in the review and issuance of approach permits.

The above statements are true and correct to the best of my knowledge and belief.

Dated this 30th day of January, 2009.

Dan Payne

Dan Payne

SUBSCRIBED AND SWORN TO before me this 30th day of January, 2009.

RENEE C. EVANS NOTARY PUBLIC STATE OF IDAHO

Renee C. Evans

NOTARY PUBLIC for the State of Idaho
My commission expires: 8-17-2013

CERTIFICATE OF SERVICE

I hereby certify that on this ~~30th~~ 2nd (PSL) day of ~~January~~ February, 2009, I caused a true and correct copy of this document to be served on the following individual in the manner indicated below:

DON HALVORSON
CHARLOTTE HALVORSON
1290 AMERICAN RIDGE ROAD
KENDRICK, IDAHO 83537

(PSL) [X] U.S. Mail
[ ] Federal Express Standard Overnight Mail
[ ] FAX (208) 322-4486
[X] Hand Delivery

Ronald J. Landeck

Ronald J. Landeck

Form No. 1056-4
ALTA Policy Form

CONTINUED SCHEDULE A

The land referred to in this policy is situated in the State of Idaho, County of Latah and is described as follows:

The NE1/4SW1/4, SW1/4NE1/4, NW1/4SE1/4 and the S1/2SE1/4NW1/4 of Section 15, Township 39 North, Range 3 West, B.M.

AND a parcel of land located in the SE1/4NE1/4 of said Section 15, being more particularly described as follows:

BEGINNING at a point where the public road passes through the West line of said SE1/4NE1/4, the same being South 201 feet, more or less, of the Northwest corner of said SE1/4NE1/4; thence due South 418 feet; thence due East 379.50 feet; thence due North 104 feet, more or less, to the County Road; thence in a Northwesterly direction 699 feet, more or less, along the County Road to the POINT OF BEGINNING.

501677

AT THE REQUEST OF
LATAH COUNTY TITLE CO.
DATE & HOUR: 12-22-05 4P
SUSAN PETERSEN
LATAH COUNTY RECORDER
FEE $ 6.00 BY

1214
1 of 1
EXHIBIT A

NORTH LATAH COUNTY HIGHWAY DISTRICT

APPLICATION AND PERMIT TO USE PUBLIC RIGHT-OF-WAY -- APPROACHES

COPY OF PERMIT MUST BE PRESENT AT WORK SITE DURING CONSTRUCTION

PUBLIC ROAD SURFACE TYPE: (DIRT) (GRAVEL) (PAVEMENT)

Start Date: 6/10

Est. Completion Date: 6/11

Road Name: Camps Canyon Rd.

Location: West of SE end of Camps CN

Sight Distance: 200

Posted Speed: 55 mph

NOTICE

This permit shall not be valid for excavation until, or unless, the provision of Idaho code, Title 55, Chapter 22 have been complied with.

PRIOR TO EXCAVATION, CALL ONE NUMBER LOCATION SERVICE

Telephone No. 1-800-342-1585

APPROACH

X Single Residence

____ Multiple Residence ____ No. Served

____ Business type ____

____ Agriculture

WIDTH 15 ft. SURFACE TYPE rock

ESTIMATED ADT 10 (VEHICLE COUNT)

Must meet the requirements of Local Highway Technical Assistance Council, (LHTAC) Standard Approach Policy and §49-221, Idaho Code.

Other Explain:

ATTACH SKETCH OF PROPOSED WORK AND TRAFFIC CONTROL PLANS:
SPECIAL PROVISIONS:

See reverse side for Approach Design and attached Special Provisions and Information Sheet.

I CERTIFY THAT I AM THE OWNER OR AUTHORIZED REPRESENTATIVE OF THE PROPOSED PROPERTY TO BE SERVED AND AGREE TO DO THE WORK REQUESTED HEREON IN ACCORDANCE WITH THE GENERAL REQUIREMENTS PRINTED ON THE REVERSE SIDE, THE SPECIAL PROVISIONS AND THE PLANS MADE A PART OF THIS PERMIT.

NAME OF PERMITTEE	APPLICANT-PLEASE TYPE OR PRINT
Robert Wagner	Robert Wagner
ADDRESS	SIGNATURE OWNER/ AUTHORIZED REPRESENTATIVE
P.O. Box 712	Robert A. Wagner
CITY STATE ZIP	DATE
Troy Id. 83871	6/9/06

SUBJECT TO ALL TERMS, CONDITIONS, AND PROVISIONS SHOWN ON THIS FORM OR ATTACHMENTS, PERMISSION IS HEREBY GRANTED TO THE ABOVE-NAMED APPLICANT TO PERFORM THE WORK DESCRIBED ABOVE.

NORTH LATAH COUNTY HIGHWAY DISTRICT USE

TEMPORARY PERMIT

Tentative approval subject to inspection of installation.

Date: 6/9/06

By: Dan Payne
NLCHD Authorized Representative

FINAL PERMIT

Approved ☐ Date: ____ Rejected ☐ Date: ____

Corrections Required: ____

Approved by: ____
NLCHD Authorized Representative

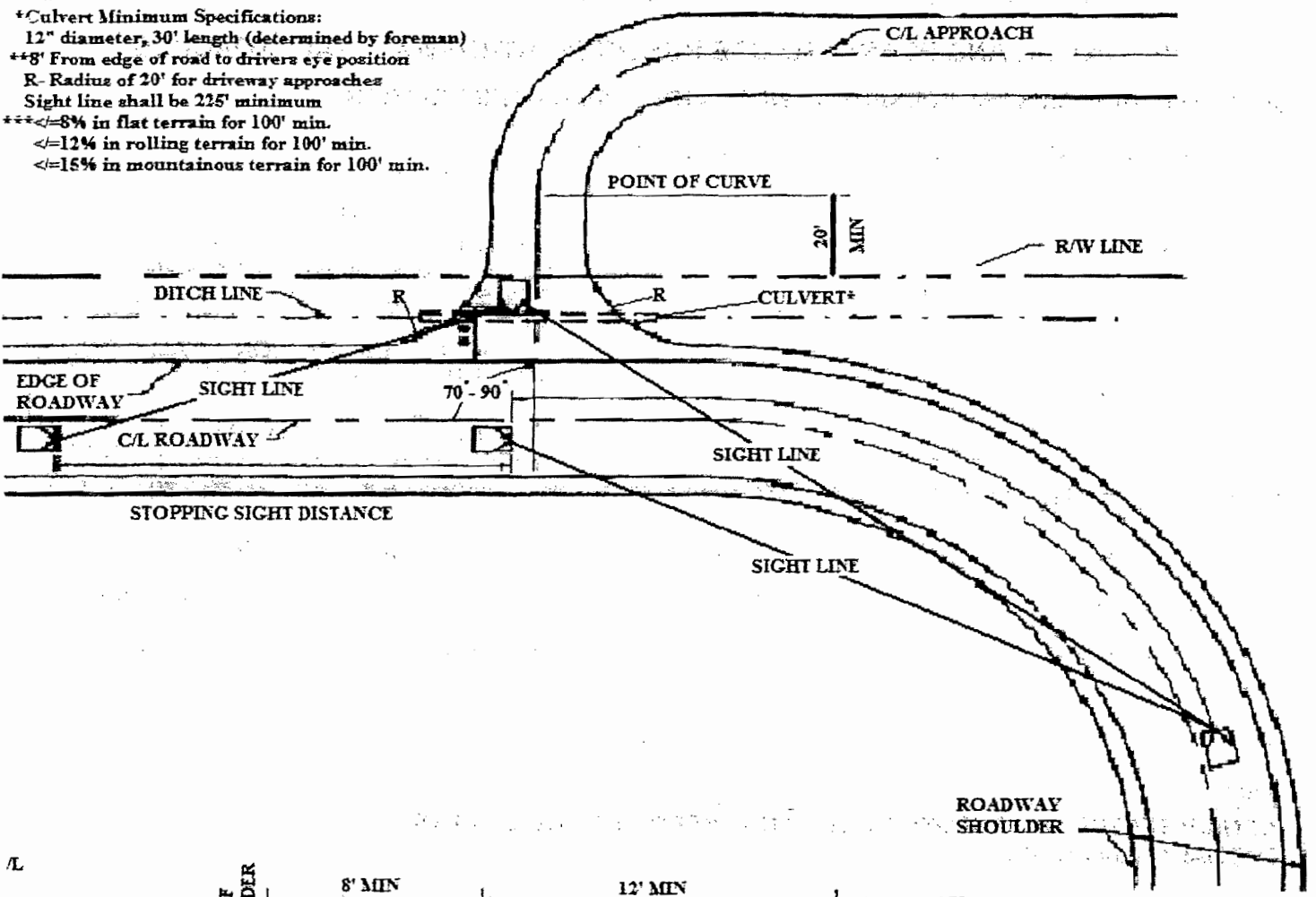
This form may be reproduced for use in making multiple applications.

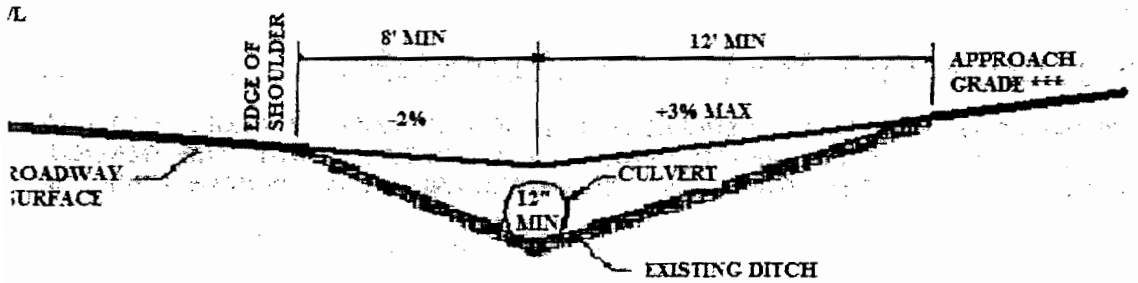
1215

N.L.C.H.D. Fax 877-[redacted]1298

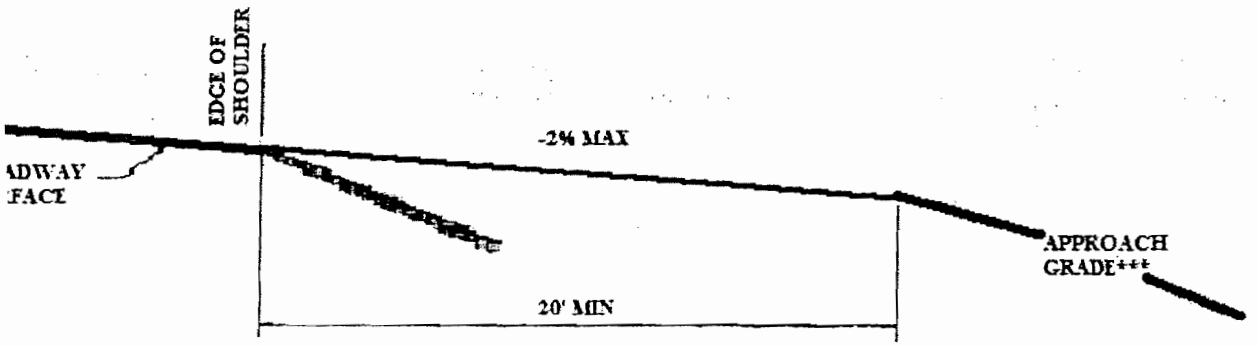
CHD APPROACH DESIGN

*Culvert Minimum Specifications:
12" diameter, 30' length (determined by foreman)
**8' From edge of road to drivers eye position
R- Radius of 20' for driveway approaches
Sight line shall be 225' minimum
***</=8% in flat terrain for 100' min.
</=12% in rolling terrain for 100' min.
</=15% in mountainous terrain for 100' min.





DITCHLINE SECTION



FILLSLOPE SECTION

CASE NO CV 2008-00180

2009 FEB -3 PM 3:14

CLERK OF DISTRICT COURT
LATAH COUNTY
BY _____ DEPUTY

RONALD J. LANDECK, ISB No. 3001
RONALD J. LANDECK, P.C.
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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

DON & CHARLOTTE HALVORSON (Husband and Wife),	Case No. CV 2008-180
Plaintiffs,	DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
vs.	
NORTH LATAH COUNTY HIGHWAY DISTRICT; BOARD OF COMMISSIONERS FOR THE NORTH LATAH COUNTY HIGHWAY DISTRICT, ORLAND ARNEBERG, RICHARD HANSEN, SHERMAN CLYDE, in their individual capacities; DAN PAYNE, in his official capacity and in his individual capacity,	
Defendants.	

Defendants North Latah County Highway District, Orland Arneberg, Richard Hansen, Sherman Clyde and Dan Payne, through their attorney, Ronald J. Landeck, P.C., move this Court to enter summary judgment against Plaintiffs on all claims set forth in Plaintiffs' Complaint pursuant to Rule 56 of the Idaho Rules of Civil Procedure. Plaintiffs further move for an award of attorney fees under Rule 11 (a)(1) I.R.C.P. and Idaho Code sections 12-120, 121 and 123.

1217

This Motion is supported by the pleadings, affidavits and record supplements on file, along with the affidavits, record supplement and Brief filed on February 2, 2009, in conjunction with this Motion.

RESPECTFULLY SUBMITTED this 3rd day of February, 2009.

RONALD J. LANDECK, P.C.

By: Ronald J. Landeck
Ronald J. Landeck
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February, 2009, I caused a true and correct copy of this document to be served on the following individual in the manner indicated below:

DON HALVORSON
CHARLOTTE HALVORSON
1290 AMERICAN RIDGE ROAD
KENDRICK, IDAHO 83537

[ ] U.S. Mail
[ ] Federal Express Standard Overnight Mail
[ ] FAX
[X] Hand Delivery

Ronald J. Landeck
Ronald J. Landeck

FILED February 9, 2009 AT 11:50 A.M. P.M. LEWISTON, IDAHO BY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

DON and CHARLOTTE HALVORSON (Husband and Wife),	)	
Plaintiff,	)	CASE NO. CV-08-00180
vs.	)	ORDER SETTING HEARING
NORTH LATAH COUNTY HIGHWAY DISTRICT; BOARD OF COMMISSIONERS FOR THE NORTH LATAH COUNTY HIGHWAY DISTRICT, ORLAND ARNEBERG, RICHARD HANSEN, SHERMAN CLYDE, in their official capacities, and their individual capacities; DAN PAYNE, in his official capacity and in his individual capacity,	)	
Defendants.	)	

IT IS HEREBY ORDERED that the above-entitled case be set for hearing on Plaintiffs' Motions For Partial Summary Judgments on Tuesday, the 3rd day of March, 2009, at the hour of 9:00 a.m., Pacific Time, at the Nez Perce County Courthouse, Lewiston, Idaho.

DATED this 9th day of February, 2009.

CARL B. KERRICK - District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing ORDER SETTING HEARING was mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 9th day of February, 2009, on:

Don and Charlotte Halvorson
1290 American Ridge Road
Kendrick, ID 83537

Ronald J. Landeck
Landeck, Westberg, Judge & Graham
P.O. Box 9344
Moscow, ID 83843

PATTY O. WEEKS, Clerk

By: _____
Deputy

CLERK OF DISTRICT COURT SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY
EX-OFFICIO
AUDITOR AND RECORDER
STATE OF IDAHO

CASE NO CV 2008-00180

2009 FEB 13 PM 2:25

CLERK OF DISTRICT COURT
LATAH COUNTY
BY _____ DEPUTY

RONALD J. LANDECK, ISB No. 3001
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Attorneys for Defendants

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

DON & CHARLOTTE HALVORSON (Husband and Wife),	Case No. CV 2008-180
Plaintiffs,	DEFENDANTS' ANSWERING BRIEF AND OBJECTIONS TO PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENTS AND OTHER MOTIONS SUBMITTED JANUARY 26, 2009
vs.	
NORTH LATAH COUNTY HIGHWAY DISTRICT; BOARD OF COMMISSIONERS FOR THE NORTH LATAH COUNTY HIGHWAY DISTRICT, ORLAND ARNEBERG, RICHARD HANSEN, SHERMAN CLYDE, in their individual capacities; DAN PAYNE, in his official capacity and in his individual capacity,	
Defendants.	

I. INTRODUCTION.

Defendants submit this Answering Brief and Objections to Plaintiffs' Motions for Partial Summary Judgment and Other Motions submitted January 26, 2009 (collectively "Plaintiffs' Motions"), which make twenty-one (21) separate motions. Of those 21 Plaintiffs'

Motions, sixteen (16) are motions for summary judgment under Rule 56 I.R.C.P. (collectively "Plaintiffs' Summary Judgment Motions"). The remaining five (5) motions (collectively "Plaintiffs' Other Motions") include one (1) declaratory judgment motion (Plaintiffs' Motions, par. 1.20), two (2) discovery motions (Plaintiffs' Motions, par. 1.12 and 1.18), one (1) motion for leave to amend (Plaintiffs' Motions, par. 1.17) and one (1) motion to enlarge time (Plaintiffs' Motions, par. 1.21). For efficiency, Defendants' will address Plaintiffs' Summary Judgment Motions separately from Plaintiffs' Other Motions.

II. DEFENDANTS ARE ENTITLED TO JUDGMENT ON ALL OF PLAINTIFFS' CLAIMS AS A MATTER OF LAW OR, ALTERNATIVELY, THERE ARE GENUINE ISSUES OF MATERIAL FACT THAT PRECLUDE ENTRY OF SUMMARY JUDGMENT FOR PLAINTIFFS.

Generally:

Plaintiffs have not set forth specific facts showing there is a genuine issue for trial or that Plaintiffs are entitled to judgment on any of Plaintiffs' Motions for Summary Judgment. Plaintiffs' Summary Judgment Motions are conclusory, repetitive, generalized, speculative, confusing and disorganized. Further, Plaintiffs rely fundamentally on factual assertions that are not admissible in evidence, primarily because those assertions constitute hearsay or are made without personal knowledge. Plaintiffs' Summary Judgment Motions also duplicate, in great part, motions and briefing previously filed by Plaintiffs in this action, which motions have already been denied by this Court, yet Plaintiffs have again pursued these same claims without supplementing this record with additional, admissible facts. Plaintiffs' Summary Judgment Motions serve only to harass or to cause unnecessary delay or needless increase in the cost of this litigation in violation of Rule 11(a)(1) I.R.C.P.

Moreover, Plaintiffs' Summary Judgment Motions ultimately fail because Defendants have shown through Defendants' Motion for Summary Judgment filed herein that there are no genuine

issues as to the material facts of Plaintiffs' claims and that summary judgment is appropriate in favor of Defendants and against Plaintiffs on all Plaintiffs' claims in this action.

Alternatively, affidavits submitted by Defendants that are part of this record set forth specific facts which, construed in a light most favorable to Defendants, at the very least clearly preclude a determination that Plaintiffs are entitled to judgment as a matter of law as to any of Plaintiffs' Motions for Summary Judgment. Defendants, however, urge the Court to determine that there is no genuine issue as to any material fact in this action and that Defendants are entitled to prevail as to all of Plaintiffs' Motions for Summary Judgment as a matter of law and to enter summary judgment in favor of Defendants as the non-moving party as to all such motions.

Summary Judgment Standard:

Summary judgment should be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether summary judgment is appropriate, the court must construe the pleadings, depositions, admissions and affidavits in a light most favorable to the nonmoving party. *Conway v. Sontag*, 141 Idaho 144, 146, 106 P.3d 470, 472 (2005), *citing Infanger v. City of Salmon*, 137 Idaho 45, 44 P.3d 1100 (2002).

"A motion for summary judgment urges the trial court to hold that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). However, if the court determines, after a hearing, that no genuine issues of material fact exist, the court may enter judgment for the parties it deems entitled to prevail as a matter of law. Thus, in appropriate circumstances, the court is authorized to enter summary judgment in favor of non-moving parties. E.g., *Rasmuson v. Walker Bank & Trust Co.*, 102 Idaho 95, 625 P.2d 1098 (1981); *Just's, Inc. v. Arrington Const. Co., Inc.*, 99 Idaho 462, 583

P.2d 997 (1978). Similar authority exists under the federal counterpart to I.R.C.P. 56. See generally 10 C. Wright & A. Miller, Federal Practice and Procedure § 2720 (1973)." *Barlow's, Incorporated v. Bannock Cleaning Corporation*, 103 Idaho 310, 312, 647 P.2d 766, 768 (Ct. App. 1982).

Admissible Facts and Incorporation of Prior Affidavits and Briefs:

Specific facts admissible in evidence, from which the Court should determine that there are no genuine issues of material fact, are contained in the Third Affidavit of Dan Carscallen filed concurrently herewith and the Brief in Support of Defendants' Motion for Summary Judgment, Defendants' Second Record Supplement in Support of Defendants' Motion for Summary Judgment, Affidavit of Larry Hodge, Second Affidavit of Dan Payne, Second Affidavit of Dan Carscallen, Defendants' Answering Brief to Plaintiffs' Motions for Partial Summary Judgment filed September 19, October 6, and October 21, 2008, Affidavit of Dan Payne, Affidavit of Orland Arneberg, Affidavit of Dan Carscallen, Defendants' First Record Supplement in Opposition to Plaintiffs' Motions for Partial Summary Judgment filed September 19, October 6 and October 21, 2008, all of which were previously filed herein and all of which are incorporated herein by this reference not only for purposes of the factual record but, as appropriate, also for the legal analysis of issues addressed in this Answering Brief. A concise statement of dispositive, admissible material facts not at genuine issue is set forth on pages 4 – 12 of the Brief in Support of Defendants' Motion for Summary Judgment.

Analysis of Plaintiffs' Due Process and Taking Claims:

Fifteen (15) of Plaintiffs' Summary Judgment Motions, being those found in paragraphs 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.8, 1.9, 1.10, 1.13, 1.14, 1.15, 1.16 and 1.19 are related in that each is based, in principal part, on Defendants' alleged interference, in one alleged form or another, with

Plaintiffs' property rights and/or violation of Plaintiffs' due process rights under federal and/or state law and constitutions arising from (i) the District's widening of Camps Canyon Road and/or (ii) its temporary issuance of a driveway permit to Plaintiffs' neighbor. These issues are more specifically addressed on pages 12-26 of the Brief in Support of Defendants' Motion for Summary Judgment and are incorporated herein as if set forth in full.

Plaintiffs' paragraph 1.14 summary judgment motion, in effect, requests, without submittal of additional facts, reconsideration of the Court's Opinion and Order on Plaintiffs' Motions for Summary Judgment filed December 8, 2008. These issues are also specifically addressed in Defendants' Answering Brief to those motions which is incorporated herein as if set forth in full.

In summary response, the District and individual Defendants have, at all times relevant to this action, conducted and discharged the District's duties and responsibilities in accordance with settled law in Idaho as to the establishment, use, maintenance and administration of prescriptive public highways. Plaintiffs' have not produced any admissible, material facts to raise a genuine issue to the contrary, rather, Plaintiffs have made factual assertions that either do not establish the District's breach of any legal duty or that lack personal knowledge and are, therefore, inadmissible.

Analysis of Plaintiffs' Idaho Administrative Procedure Act Claim:

Plaintiffs' paragraph 1.11 summary judgment motion asserts a claim under Idaho Code sections 67-5201 et seq., the Idaho Administration Procedure Act ("IAPA"), seeking judicial review of "agency" action. This motion should be denied for the reason that this issue has not been asserted in Plaintiffs' complaint. This motion should also be denied because the District is not an "agency," as that term is defined under Idaho Code section 67-5201(2), and the actions or inactions of the District in the "acquisition, establishment and alterations to Camps Canyon Road," as urged in the motion, are not subject to or within the purview of IAPA unless made applicable by some

other statute, which is not the case. *Arthur v. Shoshone County*, 133 Idaho 854, 859, 993 P.2d 617, 622 (Ct. App. 2000).

III. OBJECTIONS TO PLAINTIFFS' OTHER MOTIONS.

Plaintiffs' Paragraph 1.12 Motion Is Without Merit and Should be Denied:

Although Plaintiffs variously cite Rules 26, 36 and 37 I.R.C.P. as authority for their paragraph 1.12 motion, the facts alleged by Plaintiffs in support of this motion complain only of the District's recordkeeping practices and its alleged destruction of a revoked driveway access permit. These alleged facts do not support a claim for discovery abuse under Rules 26, 36 and/or 37 I.R.C.P. There is no showing on the face of this motion that the District has failed to answer an interrogatory propounded to it or failed to permit inspection of a requested document. Plaintiffs have simply failed to allege a violation of a rule of discovery.

Plaintiffs also rely upon the "spoliation" doctrine in seeking relief in regard to this motion. Plaintiffs argue that the District has failed to keep records of alterations of Camps Canyon Road, to survey Camps Canyon Road and to record agreements with private landowners. Plaintiffs cite to Idaho Code sections "40-608, 40-2302, 40-605 and 40-1310, amongst others" in support of this argument, yet none of these statutes support Plaintiffs' position. Plaintiffs read into the law what they want, but that is not how the law is interpreted or applied. Under Idaho law, the commissioners of a highway district "have exclusive general supervision and jurisdiction over all highways...within their highway system...." Further, "the highway district shall have power to manage and conduct the business and affairs of the district." Idaho Code section 40-1310(1). Plaintiffs have not shown that any alleged acts of Defendants in regard to this motion violate any Idaho statute.

The spoliation doctrine also applies only in situations in which a party does not want the evidence available to an adverse party. *Courtney v. Big O Tires*, 139 Idaho 821, 824, 87 P.3d 930, 933 (2003). Plaintiffs' assertion, that the District's alleged failure to maintain written records of agreements with private landowners, presumably the alleged agreement with Plaintiffs' predecessor in 1996, or failure to survey alterations on Camps Canyon Road invokes the spoliation doctrine, is without merit. There is not even a scintilla of evidence that the District has done anything in regard to its recordkeeping to keep information from Plaintiffs. "Moreover, the circumstances of the act must manifest bad faith. Mere negligence is not enough, for it does not sustain the inference of consciousness of a weak case." *Id.* (citing McCormick on Evidence, 4th Ed. § 265, pp. 189-194, [1992]). Again, there is not the slightest proof or inference of bad faith. As to the singular event of the initial Wagner driveway permit having been discarded or not being locatable, the District has admitted the permit was issued. There is no dispute as to that fact. Plaintiffs' theory in pursuing this motion is without merit and the motion should be denied.

Plaintiffs' Paragraph 1.18 Motion Should Be Denied:

Plaintiffs' paragraph 1.18 motion is not accompanied by the "certification" required under Rule 37(a)(2) I.R.C.P. that "the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action." *Id.* While a so-called Plaintiffs' First Certification of Compliance with I.R.C.P. Rule 37(a) was filed with the Court on January 26, 2009, this document fails to set forth the required "good faith" information. Rather, that document is a self-serving dissertation not relevant to the "certification" required prior to bringing a motion to compel. Defendants' counsel first became aware that Plaintiffs were pursuing a Rule 37 motion as to any discovery matter in this case when Plaintiffs' Motions were delivered to counsel after having been filed. Because Plaintiffs failed to provide the

required certification, the motion should be denied and Plaintiffs should be required to do as Rule 37(a)(2) mandates.

Further, as to the merits of the motion and without waiver of the objection set forth above, Defendants assert that each and every interrogatory, request for admission and request for production of documents referenced in Plaintiffs' paragraph 1.18 motion and as contained in Plaintiffs' Third Record Supplement was answered as required by applicable discovery rules. Plaintiffs have not even attempted to demonstrate why Defendants' responses are allegedly evasive or insufficient. The only mention of this discovery motion in Plaintiffs' Brief is set forth on pages 151-154 which specifically addresses only two (2) interrogatories and one (1) request for admission to Defendant Orland Arneberg. There do not appear to be any other specific references to this motion in Plaintiffs' Brief despite the list included as part of the paragraph 1.18 motion itemizing numerous, other discovery responses appended to Plaintiffs' Third Supplement. In addition, as to the only three (3) responses that Plaintiffs do discuss in their Brief, Plaintiffs merely engage in argument over the application of those disclosures to the law of the case which does not support the motion to compel. Plaintiffs have completely failed in all respects to justify the prosecution of a motion to compel.

Plaintiffs' Paragraph 1.20 Motion Should be Denied:

Although Plaintiffs' paragraph 1.20 motion is brought under Rule 57 I.R.C.P. and seeks declaratory relief under 42 U.S.C § 1983, it is in fact the same motion, referencing the same alleged facts, the same authorities and the same relief that was requested under Plaintiffs' Motion for Partial Summary Judgment/Adjudication of the Issue of the Cause of Action Under 42 U.S.C. 1983 filed October 21, 2008 ("Plaintiffs' October 21 Motion"), which was denied by this Court in its Opinion and Order filed December 8, 2008. Plaintiffs' Memorandum in support of Plaintiffs' October 21

Motion read, in part, "[i]t is now, as a matter of law, then that Plaintiffs' petition this court to declare their rights, status, immunities, and/or privileges under 42 U.S.C. 1983 and such Federal and State of Idaho constitutions...." This language also constitutes the substance of Plaintiffs' paragraph 1.20 motion.

This matter, therefore, has been previously and fully briefed and ruled upon. There is no need to waste counsel's time and the Court's time dealing with a previously decided issue that is brought forward again with no additional citation of authority and no additional factual support. Defendants incorporate their prior submittals in this matter and respectfully request that the Court deny this motion for the reasons expressed in the Court's Opinion and Order of December 8, 2008, as to Plaintiffs' October 21, 2008 Motion and also for the reasons that, if this declaratory judgment claim should survive Defendants' Motions for Summary Judgment, which Defendants opine it should not, judicial economy, convenience, efficiency and expediency will be served by determining this matter at trial, as was also explained by the Court in its Opinion and Order filed June 9, 2008, deciding related declaratory claims made by Plaintiffs.

Plaintiffs' Paragraph 1.17 Motion Does Not Request Specific Relief and Should be Denied.

Plaintiffs again waste the resources of Court and counsel by making the paragraph 1.17 motion under Rule 15(b) I.R.C.P. to amend their Complaint in this action without specifying the substance of any proposed amendment to their Complaint. It would appear that Plaintiffs are attempting to assure themselves of the opportunity to pursue any possible or potential legal claims at any time they desire in this process without providing proper notice of those claims to Defendants. Such an approach is not countenanced under Idaho law and for good reason. An informative decision of the Idaho Supreme court illuminates the underlying rationale for not allowing this haphazard approach to litigation:

> Under the Idaho Rules of Civil Procedure, the trial court was not limited to deciding the case on the issues as framed by the pleadings. However, the court's authority under I.R.C.P. 15(b) and, consequently, I.R.C.P. 54(c), to determine a case upon unpleaded theories is limited by the proviso in I.R.C.P. 15(b) that for the court to consider unpleaded issues those issues must have been "tried by express or implied consent of the parties...." Although I.R.C.P. 15(b) permits a court to base its decision on a theory fully tried by the parties, an issue not tried either express or implied consent cannot be the basis for the decision. See, e.g., 6 Wright & Miller Fed. Practice & Procedure, Civil s 1493 (1971).
>
> The requirement that the unpleaded issues be tried by at least the implied consent of the parties assures that the parties have notice of the issues before the court and an opportunity to address those issues with evidence and argument. *Cook v. City of Price*, Carbon County, Utah, 566 F.2d 699 (10th Cir. 1977); *Cox v. Fremont County Public Building Authority*, 415 F.2d 882 (10th Cir. 1969); *Otness v. United States*, 23 F.R.D. 279 (D. Alaska 1959).
>
> "Implied consent to the trial of an unpleaded issue is not established merely because evidence relevant to that issue was introduced without objection. At least it must appear that the parties understood the evidence to be aimed at the unpleaded issue." *MBI Motor Co., Inc. v. Lotus/East, Inc.*, 506 F.2d 709, 711 (6th Cir. 1974).
> ...
>
> Where the proof taken at trial is relevant to the pleaded issue in the case it would be manifestly unjust for the court to decide the case on theories not considered by the parties which may be inferentially proven by the evidence.

M.K. Transport, Inc. v. Grover, 101 Idaho 346, 349-350, 612 P.2d 1192, 1196-1197 (1980).

Plaintiffs' errant attempt to circumvent Idaho pleading rules should be summarily rejected.

Plaintiffs' Paragraph 1.21 Motion to Enlarge Time Should be Denied.

Plaintiffs erroneously cite Rule 7(b)(3) I.R.C.P. in support of what appears to be a motion to amend the deadlines and/or, possibly, the trial date set forth in the Court's Order Setting Case for Trial and Pre-trial Conference filed September 5, 2008, as amended by the Court's Amended Order filed November 20, 2008. Plaintiffs do not support this motion with any showing of good cause. It is noted that a portion of the petition seeks an enlargement of time to "name expert witnesses," which act was required by the Amended Order to be done on or before December 31, 2008, and a request for relief from such failure requires that a motion be granted under Rule 6(b) I.R.C.P. upon

demonstration of "excusable neglect." No such showing of excusable neglect has been attempted or made by Plaintiffs in this motion and, accordingly, that relief is not warranted.

Defendants respectfully request that this motion be denied in its entirety.

IV. DEFENDANTS MOVE FOR AN AWARD OF ATTORNEY FEES.

Defendants move for an award of attorney fees against Plaintiffs, as follows:

1. In regard to Plaintiffs' Motions, or any of them, under:
   (i) Rule 11(a)(1) I.R.C.P., on the grounds that Plaintiffs' motions, or any of them, are not well grounded in fact and not warranted by existing law or of a good faith argument for the extension, modification or reversal of existing law and that Plaintiffs' motions, or any of them, were interposed for an improper purpose, including to harass and to cause needless increase in the cost of litigation, as more fully discussed in this Brief; and
   (ii) Idaho Code section 12-120 (1) on the grounds that Defendants are the prevailing parties; and
   (iii) Idaho Code section 12-121 on the grounds that Defendants are the prevailing parties and that Plaintiffs' motions were pursued unreasonably or without foundation, as more fully described in this Brief; and
   (iv) Idaho Code section 12-123 on the grounds that Plaintiffs' motions, or any of them, serve merely to harass Defendants and are not supported in fact or warranted under law or by a good faith argument for extension, modification or reversal of existing law, as more fully described in this Brief.
2. In regard to Plaintiffs' paragraph 1.12 and 1.18 motions, under Rule 37(a)(4) I.R.C.P. on the grounds that the making of these motions, or either of them, was not substantially justified.

3. In regard to Plaintiffs' Summary Judgment Motions, or any of them, under Rule 56(c) I.R.C.P. on the grounds that good cause exists to impose attorney fees against Plaintiffs, as more fully described in this Brief.

DATED this 13th day of February, 2009.

RONALD J. LANDECK, P.C.

By: _____
Ronald J. Landeck
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 2009, I caused a true and correct copy of this document to be served on the following individual in the manner indicated below:

DON HALVORSON
CHARLOTTE HALVORSON
1290 AMERICAN RIDGE ROAD
KENDRICK, *IDAHO* 83537

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_____
Ronald J. Landeck

CASE NO CV 2008-00180

2009 FEB 13 PM 2:25

CLERK OF DISTRICT COURT
LATAH COUNTY
BY _____ DEPUTY

RONALD J. LANDECK, ISB No. 3001
RONALD J. LANDECK, P.C.
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Attorneys for Defendants

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

DON & CHARLOTTE HALVORSON (Husband and Wife),	Case No. CV 2008-180
Plaintiffs,	DEFENDANTS' MOTION TO STRIKE AND BRIEF
vs.	
NORTH LATAH COUNTY HIGHWAY DISTRICT; BOARD OF COMMISSIONERS FOR THE NORTH LATAH COUNTY HIGHWAY DISTRICT, ORLAND ARNEBERG, RICHARD HANSEN, SHERMAN CLYDE, in their individual capacities; DAN PAYNE, in his official capacity and in his individual capacity,	
Defendants.	

Defendants North Latah County Highway District, Orland Arneberg, Richard Hansen, Sherman Clyde and Dan Payne, through counsel, move this Court to strike portions of Plaintiffs' Affidavit filed herein on January 26, 2009, as follows:

1. All statements attributed to any person other than Plaintiffs and all testimony offered by Plaintiffs as to a matter without their personal knowledge of the matter in paragraph 8, which are either inadmissible hearsay or lack adequate foundation.
2. All statements attributed to Mr. Wagner in paragraph 9, which are inadmissible hearsay.
3. All statements attributed to Mr. Munson in paragraph 10, which are inadmissible hearsay.
4. All statements attributed to Patsy Wagner and Gary Osborn and all testimony offered by Plaintiffs as to a matter without their personal knowledge of the matter in paragraph 13, which are either inadmissible hearsay or lack foundation.
5. All testimony offered by Plaintiffs in paragraph 14, which are inadmissible hearsay.
6. All statements attributed to Mr. Wagner in paragraph 15, which are inadmissible hearsay.

Defendants also move to strike from the record factual assertions by Plaintiffs made without their personal knowledge or that constitute inadmissible hearsay set forth in Plaintiffs' Motions for Partial Summary Judgments and other Motions submitted January 26, 2009, and Brief, the specific identification of which in Plaintiffs' rambling, 173-page document are too numerous to efficiently mention.

This Motion is based, in part, upon Rules 56(e) and (g) I.R.C.P. which require that evidence submitted in summary judgment proceedings "shall set forth facts...admissible in evidence."

Based upon the foregoing, Defendants request the Court strike those items listed above as inadmissible and/or not to be considered in connection with Plaintiffs' pending Motions for Partial Summary Judgment and other Motions submitted January 26, 2009.

Defendants request oral argument in support of this motion.

RESPECTFULLY SUBMITTED this 13th day of February, 2009.

RONALD J. LANDECK, P.C.

By: Ronald J. Landeck
Ronald J. Landeck

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 2009, I caused a true and correct copy of this document to be served on the following individual in the manner indicated below:

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CASE NO CV 2008-00180

2009 FEB 13 PM 2:25

CLERK OF DISTRICT COURT
LATAH COUNTY
BY _____ DEPUTY

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

DON & CHARLOTTE HALVORSON (Husband and Wife),	Case No. CV 2008-180
Plaintiffs,	THIRD AFFIDAVIT OF DAN CARSCALLEN
vs.	
NORTH LATAH COUNTY HIGHWAY DISTRICT; BOARD OF COMMISSIONERS FOR THE NORTH LATAH COUNTY HIGHWAY DISTRICT, ORLAND ARNEBERG, RICHARD HANSEN, SHERMAN CLYDE, in their individual capacities; DAN PAYNE, in his official capacity and in his individual capacity,	
Defendants.	

STATE OF IDAHO)
) ss.
County of Latah)

Dan Carscallen, upon oath, deposes and says:

1. I am over eighteen (18) years of age, am competent to testify to the matters set forth herein and make this affidavit upon my personal knowledge.

2. I am the Secretary of the North Latah County Highway District ("District") and, as such, custodian of and responsible for the District's official records.

3. Attached to this Affidavit are true and correct copies of documents maintained by the District in its public records as follows:

1) Minutes of Regular Meeting of the District Board of Commissioners on July 9, 1986, including a copy of District Resolution No. 2, Series 1986.

2) Affidavit of Publication of District Resolution No. 2, Series 1986.

3) Affidavit of Publication of Proposed Official Map of Public Highway System in North Latah County Highway District, Latah County, Idaho (This is only a partial copy, in two pages, of the Proposed Official Map, the actual copy on file with the District's records being a complete copy of the published document).

4) Minutes of Regular Meeting of the District Board of Commissioners held on August 13, 1986.

5) Minutes of Regular Meeting of the District Board of Commissioners held on August 29, 1986.

6) District Resolution No. 3, Series 1986.

The above statements are true and correct to the best of my knowledge and belief.

Dated this 9th day of February, 2009.

Dan Carscallen

SUBSCRIBED AND SWORN TO before me this 9th day of February, 2009.

RENEE C. EVANS NOTARY PUBLIC STATE OF IDAHO

NOTARY PUBLIC for the State of Idaho
My commission expires: 8-17-2013

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 2009, I caused a true and correct copy of this document to be served on the following individual in the manner indicated below:

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Ronald J. Landeck

ITEM 1

The regular meeting of the North Latah County Highway District Board of Commissioners was held at the Moscow Office on JuLY 9, 1986 at 7:30 P.M.. Present were Chairman Orland Arneberg, commissioner Sherman Clyde, foremans Harold Stubbs, Ralph Payne, Dave Anderson and Merle King.

The minutes of the regular meeting on June 25, 1986 were approved.

Sherman Clyde made a motion and Orland Arneberg seconded it to pay the bills as listed on the back of this page. The motion was passed.

Ron Landeck attended the meeting and discussed Resolution # 2 with the Commissioners. Sherman Clyde made a motion and Orland Arneberg seconded it to pass Resolution # 2 as listed below. The motion was passed.

Ron Long, Dan Payne and Randy Voss from the Highway District Crew attended the meeting and ask the Commissioners to consider them for a 10% raise in the up coming budget. The Commissioners said they would work up the budget and give them their answer on July 30 at 8:00 P.M..

Being no further business the meeting was adjourned at 9:50P P.M..

Merle King
Sec.

Orland A. Arneberg
Chairman

LEGAL NOTICES

NORTH LATAH COUNTY
HIGHWAY DISTRICT
LATAH COUNTY, IDAHO
RESOLUTION NO. 2, SERIES 1986

A RESOLUTION OF INTENTION TO ADOPT THE ACCOMPANYING MAP AS THE OFFICIAL MAP OF THE NORTH LATAH COUNTY HIGHWAY DISTRICT SYSTEM FOLLOWING PUBLIC HEARING ON AUG 13, 1986 TO DETERMINE THE PUBLIC INTEREST.

BE IT RESOLVED by the Board of Commissioners of the North Latah County Highway District of Latah County, Idaho:

NOTICE is hereby given that the Board of Commissioners of North Latah County Highway District ("District") has caused the map accompanying this Resolution No. 2, Series 1986 to be prepared showing each highway in the District's jurisdiction and that the District's Board of Commissioners intends to adopt the map as the official map of the District highway system as required by Idaho Code Section 40-202 upon a finding that the public interest will

A public hearing will be held to determine whether the public interest will be served by adoption of the map as the official map of the District highway system and at which all interested persons may be heard. The public hearing is to be held as follows:

DATE: Wednesday, August 13, 1986
TIME: 7:30 p.m.
PLACE: North Latah County Highway District offices 1132 White Avenue, Moscow, Idaho 83843

After the public hearing, the District's Board of 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 District highway system.

DATED this 3rd day of July, 1986.
North Latah County Highway District Board of Commissioners:
Orland Arneberg, Chairman
Sherman Clyde, Commissioner
Wayne Hemmelman, Commissioner
ATTEST: Merle King
District Secretary

ITEM 2

Affidavit of Publication

STATE OF IDAHO
County of Latah ss.

Ray Rosch

being first duly sworn, on oath, deposes and says:

That he is the printer of The IDAHONIAN, a newspaper of general circulation, printed and published daily except Sunday at Moscow, Latah County, Idaho, in compliance with Sections 60-106, 60-107, and 60-108 of the Idaho Code and the amendments thereto; that the notice of which the annexed is a full, true and correct printed copy was published in the regular and entire issues of said newspaper and not in a supplement thereto, upon the following dates:

July 21, 22, 23, 24, 25, 26, 28, 1986

the same being the dates designated for the publication of said legal notice.

Ray Rosch

Subscribed and sworn to before me this 30TH day of July 1986

Carol Fleener

Notary Public,
residing at Moscow, Idaho

NORTH LATAH COUNTY HIGHWAY DISTRICT LATAH COUNTY, IDAHO RESOLUTION NO. 2, SERIES 1986

A RESOLUTION OF INTENTION TO ADOPT THE ACCOMPANYING MAP AS THE OFFICIAL MAP OF THE NORTH LATAH COUNTY HIGHWAY DISTRICT SYSTEM FOLLOWING PUBLIC HEARING ON AUG. 13, 1986 TO DETERMINE THE PUBLIC INTEREST.

BE IT RESOLVED by the Board of Commissioners of the North Latah County Highway District of Latah County, Idaho:

NOTICE is hereby given that the Board of Commissioners of North Latah County Highway District ("District") has caused the map accompanying this Resolution No. 2, Series 1986 to be prepared showing each highway in the District's jurisdiction and that the District's Board of Commissioners intends to adopt the map as the official map of the District highway system as required by Idaho Code Section 40-202 upon a finding that the public interest will be served by adoption of the map.

A public hearing will be held to determine whether the public interest will be served by adoption of the map as the official map of the District highway system and at which all interested persons may be heard. The public hearing is to be held as follows:

DATE: Wednesday, August 13, 1986
TIME: 7:30 p.m.
PLACE: North Latah County Highway District offices 1132 White Avenue, Moscow, Idaho 83843

After the public hearing, the District's Board of 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 District highway system.

DATED this 3rd day of July, 1986.

North Latah County Highway District Board of Commissioners:
Orland Arneberg, Chairman
Sherman Clyde, Commissioner
Wayne Hemmelman, Commissioner
ATTEST: Merle King
District Secretary

Prepared by:
Ronald J. Landeck
Siebe, Landeck, Westberg & Gould
Attorneys for North Latah County Highway District
P.O. Box 9344
Moscow, Idaho 83843
(208) 883-1505

July 21, 22, 23, 24, 25, 26, 28, 1986

1242

1 of 1
ITEM 2

ITEM 3

Affidavit of Publication

STATE OF IDAHO
County of Latah ss.

Ray Rosch

being first duly sworn, on oath, deposes and says:

That he is the printer of The IDAHONIAN, a newspaper of general circulation, printed and published daily except Sunday at Moscow, Latah County, Idaho, in compliance with Sections 60-106, 60-107, and 60-108 of the Idaho Code and the amendments thereto; that the notice of which the annexed is a full, true and correct printed copy was published in the regular and entire issues of said newspaper and not in a supplement thereto, upon the following dates:

July 21, 22, 23, 24, 25, 26, 28, 1986

the same being the dates designated for the publication of said legal notice.

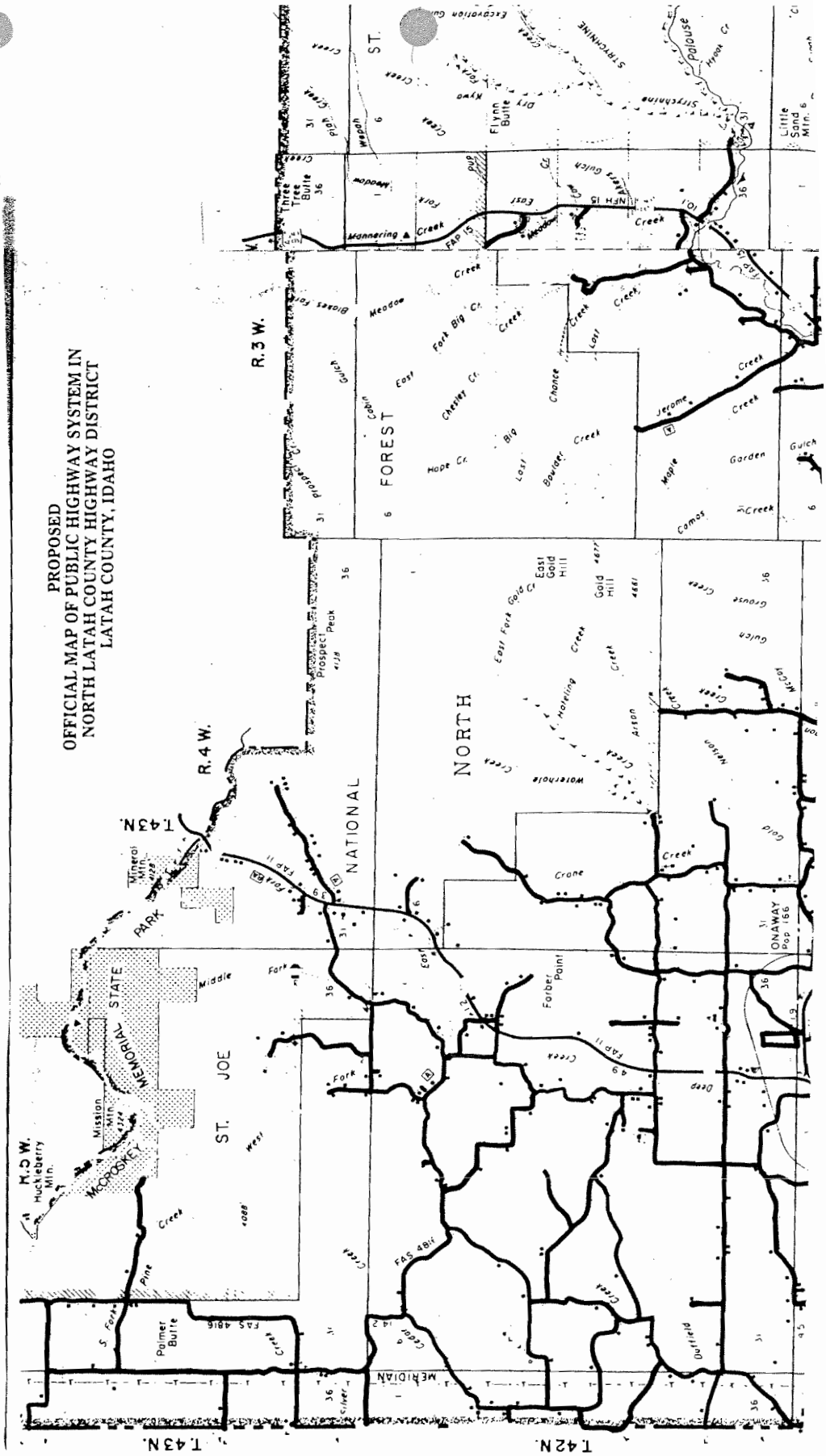
Ray Rosch

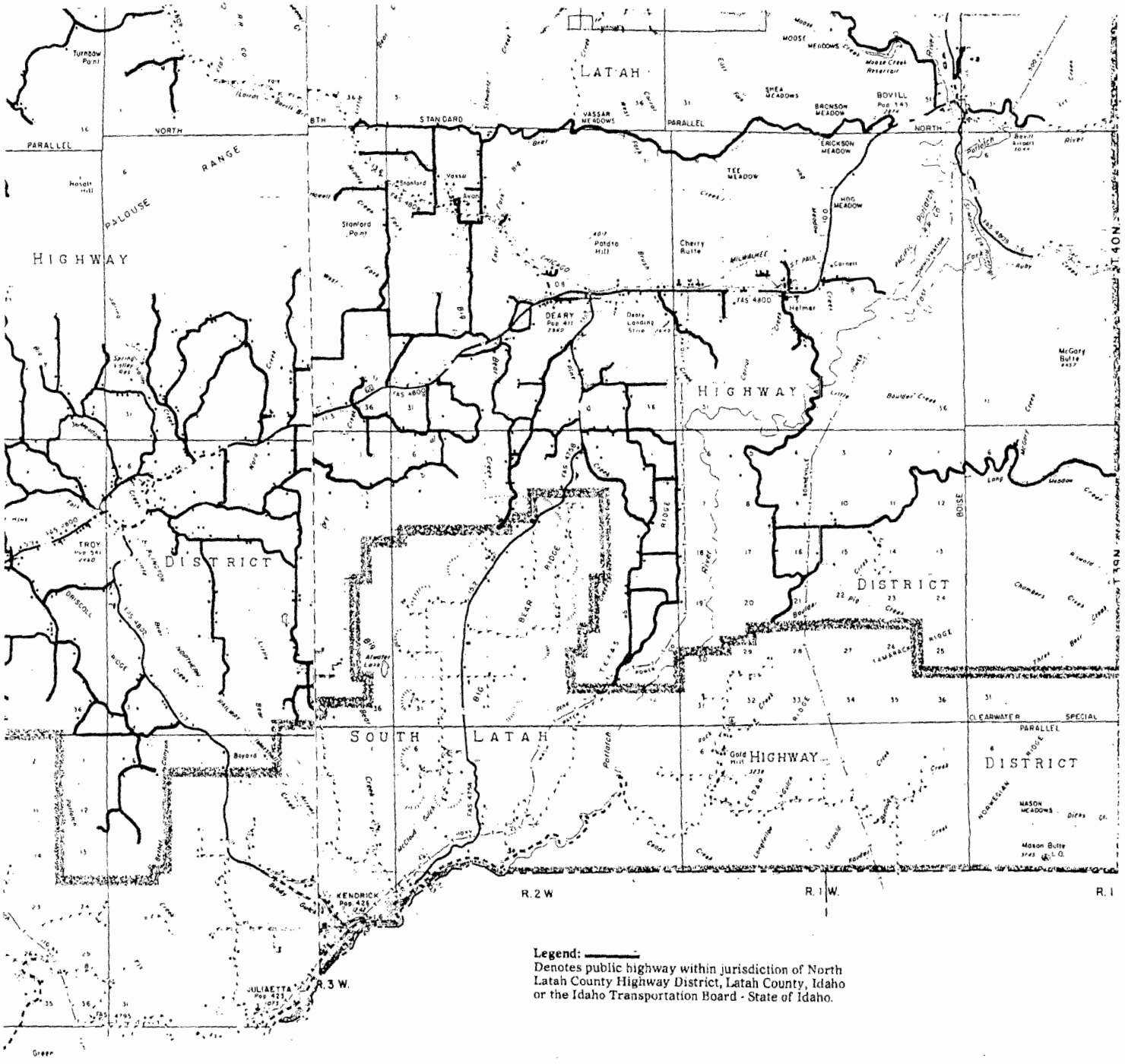
Subscribed and sworn to before me this 30th day of July 1986

Carol Fleenor

Notary Public, residing at Moscow, Idaho

PROPOSED
OFFICIAL MAP OF PUBLIC HIGHWAY SYSTEM IN
NORTH LATAH COUNTY HIGHWAY DISTRICT
LATAH COUNTY, IDAHO




LATAH
NORTH PARALLEL
STANDARD
PALOUSE RANGE
HIGHWAY
DEARY
Pop 411
DISTRICT
TROY
Pop 541
SOUTH LATAH
HIGHWAY
DISTRICT
CLEARWATER SPECIAL PARALLEL
DISTRICT
KENDRICK
Pop 425
JULIAETTA
Pop 523
R. 2 W.
R. 1 W.
R. 1
R. 3 W.
T 40 N.
T 39 N.
Legend:
Denotes public highway within jurisdiction of North Latah County Highway District, Latah County, Idaho or the Idaho Transportation Board - State of Idaho.

ITEM 4

The regular meeting of the North Latah County Highway District Board of Commissioners was held at the Moscow Office on Aug. 13, 1986 at 7:30 P.M.. Present were Chairman Orland Arneberg, commissioner Sherman Clyde, Wayne Hemmelman, foremans Harold Stubbs, Ralph Payne, Dave Anderson and Merle King.

The minutes of the regular meeting on July 23, 1986 were approved.

Sherman Clyde made a motion and Wayne Hemmelman seconded it to pay the bills as listed on the back of this page. The motion was passed.

The bids to paint the Potlatch River Bridge were opened at 7:00 and went as follows; George Germer bid $11975.00 to paint the bridge. Earl Russell Const bid $9833.00 to paint the bridge. Hodge and Assoc. said they will take the bids and look them over and then let them know their decision.

The public hearing to adopt an official map for the North Latah County Highway District showing the roads that the Highway District is going to maintain and be liable for was held at 7:30 P.M.. There were approximately forty people attending the meeting. Ron Landeck the Highway Districts attorney started out the meeting by explaining that the map showed the roads that the Highway District is going to maintain and be liable for and explained that this is not a mass abandonment of any roads. Then their was a list read of roads that were left off of the map inadvertenly and would be added back on.

Bill Bartlet ask about the road that goes on further to the property he purchased in T42,R4W,S19,20,17 than what the map shows. Bill wants to know why the road was left off of the map. Foreman Harold Stubbs said that he has never done any maintenance on the road any further than what the map shows since 1972 and does not know what happened before that.

Mel Taggart gave the Commissioners a petition signed by 21 people asking them to maintain road #460 and wants the road put on the official map. Mel also said he wanted to go on record as agreeing with Bill Bartlet in that he should have a road to his property.

Larry Lacy ask about getting his road put on the map. He said he has done a lot of work on the road and has attended several meetings asking for this to be done. Larry got a lot of support from Barbra Harrison. Foreman Harold Stubbs said he has not maintained the road in over 14 year except for one courtesy grading.

Lee Lisher presented the Commissioners with a letter listing some roads that in his opinion were left off of the map. The roads are the Long Creek Road, Ballard Hill Road, and the road going to Larry Lacys.

James Cooly ask some questions on liability and how a person

would know if a road is a county road or not. Ron Landeck answered some of his questions

Terry Walser ask Ron Landeck about the different ways to abandon a road.

Mel Taggart gave the Commissioners some old petitions and road descriptions of a road that went up the Palouse River above Laird Park that was replaced by the road that goes over the tailing pile left from the dredge. A spokesman for James Suel said he objects to anything being done to the old road (MS3339).

Sherman Clyde ask the people if they wanted the county to maintain all of the old roads in the county. Most people that spoke up didn't think they should.

Someone said they thought the Highway District should put all of the old right of ways on the map. James Duey spoke up and said he didn't want any of the tax payers dollars spent on researching all of the old roads.

Barbra Harrison said she wanted the Commissioners to go out and look at Larry Lacys road. Sherman Clyde said they would.

Floyd Trail ask if the County can escape any liability.

Terry Walser showed the Commissioners a road that was left off of the map. The Commissioners added the road to the map.

Les Pixley and Mildred Pixley ask about the road that goes on past the Marshal Road to the Van Hughes estate. The Commissioners said they will check and see if the road should have been put on the map.

Bill Bartlet said he wanted to go on record that he protested his road not being listed on the map.

Terry Walser said that the road that goes to the Oriley place that runs through the Walser place should not be on the map and wants it taken off. Foreman Harold Stubbs said that he knows the county has worked on the road for at least 28 years. Terry was told that he would have to petition the road closed.

Ron Landeck read letters received from Lola Clyde, Francis Dupont, Renfrew, Bennett Lumber Co., Mel Taggart, Joeseph Breckner, Ron Mahoney, James Cooley, and Lee Lisher. All letters are on file.

Grant Morton from the Planning and Zoning Commission wants the Highway District to wait until they can give them written testimony before they make a decision.

There was a lot of discussion that was going on simultaneously about various things.

There is a written transcript of the meeting on file.

The Commissioners closed the public hearing at 9:50 P.M. and will take written testimony until their next meeting on Aug. 27.

Sherman Clyde made a motion and Wayne Hemmelman seconded it to have Guilfoy Insurance get liability insurance for the Highway District for approx $42000.00 The motion was passed.

Wayne Hemmelman made a motion and Sherman Clyde seconded it to get the electrical service work done in all three new buildings. The motion was passed.

Being no further business the meeting was adjourned at 11:07 P.M..

Sec.

Chairman

ITEM 5

The regular meeting of the North Latah County Highway District Board of Commissioners was held at the Moscow Office on Aug. 29, 1986 at 7:30 P.M.. Present were Chairman Orland Arneberg, commissioner Sherman Clyde, Wayne Hemmelman, foremans Harold Stubbs, Ralph Payne, Dave Anderson and Merle King.

The minutes of the regular meeting on Aug. 13, 1986 were approved.

The Budget Hearing was held at 7:30 P.M.. Chairman Orland Arneberg ask if there was any comments on the budget. There was none. Sherman Clyde made a motion and Wayne Hemmelman seconded it to pass and adopt the budget as advertised. The motion was passed.

Edd from Hodge and Assoc. attended the meeting and said that the bid from Earl Russell to paint the Potlatch River Bridge is in order and brought the contracts in to be signed. Wayne Hemmelman made a motion and Sherman Clyde seconded it to accept Earl Russells bid and to sign the contracts. The motion was passed.

The public hearing to take written testimony for the adoption of an official map was opened. Ron Landeck the Highway Districts attorney read letters received from the following people. Mr. & Mrs. Palmer, Clifford French, Dean Elliot, Bill Bartlett, Byron Fitch, petition for road referred to as Meckel Road, and petition from Mel Taggart for road # 460. Letters are on file.

The Bartletts and Cooleys and a couple other people attended the meeting and ask a few questions but their was no more oral testimony taken.

Commissioners had foreman Harold Stubbs check the roads on the map marked exhibit B colored in brown and say if they have been maintained by the Highway District. Harold said that the only road in his district that has been maintained since 1972 is the first quarter mile of the Bartlett Road. The Commissioners ask Sec. Merle King to look at the remaining roads marked in brown on the map and say if they have been maintained by the district. Merle said that to best of his knowledge that the roads in the Moscow District have not been maintained since he started work here in 1967 and since 1972 in the Deary District.

Sherman Clyde made a motion and Wayne Hemmelman seconded it to adopt the map marked as exhibit A with the changes marked in yellow as the official Highway District map and to adopt Resolution No.3 Series 1986 that is attached to the back of this page. The motion was passed.

Mike McGahn and Gary Presel from the City of Moscow attended the meeting and wanted the City of Moscow and the Highway District to do a joint oiling job on Mt.Veiw, Joseph St. and D st. Sherman Clyde made a motion and Wayne Hemmelman seconded it to do a joint oiling job on Mr. Veiw and Joseph but will check on D st before they do any work on it. The motion was passed.

Ron Landeck said that Dwain Waterman wants the Highway District to waive the $100 review fee for abandoning roads. Wayne Hemmelman made a motion and Sherman Clyde seconded it not to waive the fee. The motion was passed.

Being no further business the meeting was adjourned at 9:35 P.M..

Sec.

Chairman

ITEM 6

NORTH LATAH COUNTY HIGHWAY DISTRICT
Latah County, Idaho

RESOLUTION NO. 3, Series 1986

A RESOLUTION ADOPTING THE ACCOMPANYING MAP AS THE OFFICIAL MAP OF THE NORTH LATAH COUNTY HIGHWAY DISTRICT ("DISTRICT") SYSTEM

RECITALS:

1. Idaho Code Section 40-202(1)(a)(b) provides as follows:

> (a) The board of county or highway district commissioners shall cause a map to be prepared showing each highway in their 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. On August 13, 1986, after legal notice was given, a public hearing was held at which all interested persons were heard regarding the adoption of the official map of the District highway system.

3. On August 27, 1986, a continuation of the public hearing was held, at which written comments were received from the public and staff comments were received regarding the public input at the August 13, 1986 hearing. Thereafter, the District's Board of Commissioners approved this resolution.

BE IT RESOLVED by the Board of Commissioners of the North Latah County Highway District of Latah County, Idaho:

Upon review of all testimony and evidence, the District's Board of Commissioners makes the following findings of fact:

A. The map accompanying this Resolution No. 3, Series 1986 describes each highway within the jurisdiction of the North Latah County Highway District.

B. Each highway described on the accompanying map has been maintained regularly by the District since the District's organization in 1972.

C. Those roads which any member of the public requested be included on the accompanying map and were not so included have not been maintained by the District since at least 1972 and, further, no member of the public produced evidence indicating public maintenance for five (5) consecutive years immediately prior to 1963.

D. The public interest is served by the adoption of the accompanying map as the official map of the North Latah County Highway District System.

E. The adoption of the accompanying map as the official map of the North Latah County Highway District System shall in no way impair, hinder or affect private rights of access on roads within the boundaries of the North Latah County Highway District System, the rights of access to which have been obtained by public or private use or both.

NOW THEREFORE, the map accompanying this Resolution No. 3, Series 1986, is adopted as the official map of the North Latah County Highway District System, which official map bears our signatures and is on file at the offices of the North Latah County Highway District, 1132 White Avenue, Moscow, Idaho 83843.

DATED this 24 day of September, 1986.

North Latah County Highway District
Board of Commissioners:

Orland Arneberg
Orland Arneberg, Chairman

Sherman Clyde
Sherman Clyde, Commissioner

Wayne Hemmelmen
Wayne Hemmelmen, Commissioner

Attest:

Merle King
Merle King, District Secretary

Prepared by:

Ronald J. Landeck
Siebe, Landeck, Westberg & Gould
Attorneys for North Latah County
Highway District
P.O. Box 9344
Moscow, ID 83843

CASE NO CV 2008-00180

2009 FEB 13 PM 2:25

CLERK OF DISTRICT COURT
LATAH COUNTY
BY _____ DEPUTY

RONALD J. LANDECK, ISB No. 3001
RONALD J. LANDECK, P.C.
693 Styner Avenue, Suite 9
P.O. Box 9344
Moscow, ID 83843
(208) 883-1505
FAX (208) 883-4593
Attorneys for Defendants

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

DON & CHARLOTTE HALVORSON (Husband and Wife),	Case No. CV 2008-180
Plaintiffs,	DEFENDANTS' DISCLOSURE OF EXPERT WITNESSES
vs.	
NORTH LATAH COUNTY HIGHWAY DISTRICT; BOARD OF COMMISSIONERS FOR THE NORTH LATAH COUNTY HIGHWAY DISTRICT, ORLAND ARNEBERG, RICHARD HANSEN, SHERMAN CLYDE, in their individual capacities; DAN PAYNE, in his official capacity and in his individual capacity,	
Defendants.	

Defendants, through counsel and pursuant to the Court's Amended Order Setting Case for Trial and Pre-Trial Conference, hereby disclose Defendants' expert witnesses whom Defendants reserve the right to call as expert witnesses at the trial of this matter, as follows:

1. Larry J. Hodge
   Hodge & Associates, Inc.
   405 S. Washington St.
   Moscow, ID 83843
   (208) 882-3520
   (licensed professional engineer and licensed professional land surveyor)

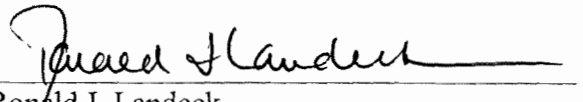
2. John L. Dunn
   Rim Rock Consulting, Inc.
   115 South Washington St., Suite 3
   Moscow, ID 83843
   (208) 883-5339
   (licensed professional land surveyor)

3. Susan Peterson
   Latah County Clerk/Auditor/Recorder
   Latah County Courthouse
   Moscow, ID 83843
   (208) 883-2249

4. Pat Vaughan
   Latah County Assessor
   Latah County Courthouse
   Moscow, ID 83843
   (208) 883-5710

Respectfully submitted this 13th day of February, 2009.

RONALD J. LANDECK, P.C.

By: 
Ronald J. Landeck
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 2009, I caused a true and correct copy of this document to be served on the following individual in the manner indicated below:

DON HALVORSON
CHARLOTTE HALVORSON
1290 AMERICAN RIDGE ROAD
KENDRICK, IDAHO 83537

[X] U.S. Mail
[ ] Federal Express Standard Overnight Mail
[ ] FAX (208) 322-4486
[ ] Hand Delivery

Ronald J. Landeck

CASE NO CV 2008-00180

2009 FEB 17 AM 11:38

CLERK OF DISTRICT COURT
LATAH COUNTY
BY _____ DEPUTY

Don Halvorson
1290 American Ridge Road
Kendrick, Idaho, 83537
(208) 289-5602
Plaintiff, Pro se

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

Don & Charlotte Halvorson (Husband and Wife)	)	Case No. CV 2008-180
Plaintiffs	)	PLAINTIFFS' ANSWERING
vs.	)	BRIEF TO DEFENDANTS'
North Latah County Highway District; Board of	)	MOTION FOR SUMMARY
Commissioners for the North Latah County	)	JUDGMENT AND REPLY TO
Highway District, Orland Arneberg, Richard	)	DEFENDANTS' ANSWERING
Hansen, Sherman Clyde, in their Official	)	BRIEF AND OBJECTIONS
Capacities, and in their Individual Capacities;	)	TO PLAINTIFFS' MOTIONS FOR
Dan Payne, in his Official Capacity and in his	)	PARTIAL SUMMARY
Individual Capacity	)	JUDGMENTS AND OTHER
Defendants	)	MOTIONS SUBMITTED
	)	JANUARY 26, 2009

I. Introduction

This Answering Brief to Defendants' Motion for Summary Judgment is supported by Ed Swanson's Affidavit, Ole Hanson's Affidavit, Joe Yockey's Affidavit, Plaintiffs' Fourth Record

Supplement, Plaintiffs' Affidavit is Support of Plaintiffs Answering Brief to Defendants' Motion for Summary Judgment and Reply to Defendants' Answering Brief and Objections to Plaintiffs Motions for Partial Summary Judgments and Other Motions Submitted January 26, 2009.

Defendants seek summary judgment on all of Plaintiffs' claims. However, the Court has already given sufficient reason for denial of Defendants' Motion— "Specifically, the determination of the width of the right of way of Camps Canyon Road must be addressed." (see Opinion and Order On Plaintiffs Motions For Summary Judgment And Defendants' Motion For Protective Orders, For Enlargement Of Time And For Attorney Fees (hereafter *Opinion*), at 9). The width of the Camps Canyon right of way has not been factually determined—this is undisputed. The Court confirms this. Plaintiffs allege this has harmed them—they have not been afforded due process. However, Defendants claim they are authorized "to improve" and "to maintain", each or either of which includes as Defendants state adding additional width to the road surface and supporting structures of a claimed unrecorded prescriptive right of way (see *Defendants' Brief*, at 7 par. 6; see *Payne Second Affidavit*, pars. 4 and 5) without a factual determination of the width of the easement. It is here, on the undisputed facts that no evidentiary hearing has been held and that Defendants say it is within their policies/customs that they are not required to give Plaintiffs an evidentiary hearing that Plaintiffs petition for Partial Summary say based on these undisputed facts that this dispute requires due process. Without the evidence in the record, Defendants findings and conclusions are arbitrary and capricious and Defendants' actions and/or failures to act in these matters are arbitrary and capricious, an abuse of the Defendants' discretion, and/or illegal (see *Complaint* pp. 8-25). There is also the issue of the first Wagner driveway access and the challenge faced by the Wagners in building a driveway access when confronted with an 8 foot embankment left by Defendants 1996 alterations to Camps Canyon Road (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 17 (photo showing the remains of the 8 foot embankment at the surveyed east property line after the Wagners had built new driveways on either side of it—the first to the east and south of the

property line and the 2nd to the west of the property line); see Ole Hanson Affidavit at 2, par. 7 (the east property line was well known to people working on both sides of it)).

Camps Canyon Road has always been an alternative canyon short cut having an early start as a road (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 19 (Standard Atlas of Latah County Idaho circa 1914 shows Camps Canyon Road as well as other roads in Camps Canyon)). However, its early beginning fizzled and it remained a wagon trail (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 18 (Metsker Map of circa early 1950's shows Camps Canyon Road only extending west of Little Bear Ridge Road to and stopping at the 3+/- acre parcel)).

Camps Canyon Road has been an unrecorded prescriptive right of way for over 120 years, probably 130 years or more. However, if Plaintiffs make this statement, it is conclusory. *Camps Canyon Road has been a prescriptive right of way since before 1930.* Likewise, if Defendants make this statement it is conclusory. To establish a public prescriptive way requires a public evidentiary hearing as it is on the public's testimony that the NLCHD record is made on which the supposedly impartial NLCHD Commissioners make findings and conclusions. It was created by public use and its use can only be supported by the evidence the public brings (see *Homestead Farms v. Board of Comm'rs Teton County, state of Idaho*, 141 Idaho 855, 119 P 3d 630 (2005); and can only be done by Defendants under certain circumstances (see *Galvin v. Canyon County High. Dist. No. 4, 134 Idaho 579, 6 P.3d 829* ("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 a new public rights")..

Contrary to Defendants' claim that there are two events from which Plaintiffs' claims arise (see Brief in Support of Defendants' Motion For Summary Judgment (hereafter *Defendants' Brief*), at 2), there are many events from which Plaintiffs' allegations arise. There are, however, two sides of Camps Canyon Road; and as such, there are two ongoing issues from which these allegations arise. The issues arise from the Defendants making two claims adverse

to Plaintiffs property and liberty rights of which the Defendants claim they are authorized to do and are rightful in denying Plaintiffs due process. On both sides of the road Defendants claim they are authorized to invade and occupy Plaintiffs' land and to do so without the civil procedures of public hearings and of eminent domain or the positive guaranties of the 5th and 14th Amendments of the Constitution of the U.S. to the Plaintiffs and/or without any of the statutory safeguards and/or remedies for erroneous deprivations. In both instances Plaintiffs claim Defendants are in wrongful possession of Plaintiffs' land and that this improper interference with Plaintiffs' property rights is particularly egregious on the south side of the road as the Defendants have allowed the invasion and occupation of a third party (see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (the U.S. Supreme Court reasoned that an owner suffers a special kind of injury when a "stranger" invades and occupies the owners' property, and that such an occupation is qualitatively more severe than a regulation on the use of the property).

Defendants do not retreat from their claims. Further injury has occurred and both issues remain as threats of further irreparable harm. As Defendants claim in their Brief in support of their Motion, they continue to hold to these claims (*Defendants' Brief*), at 2 ("This Brief will show that the District has, at all times relevant to this action, properly discharged its statutory responsibilities to improve and maintain the public highway known as Camps Canyon"). Defendants' "[discharge of their] statutory responsibilities to improve" is an autocratic self proclamation of Defendants' misplaced "prescriptive right" and is in excess of the authority the legislature has intended the NLCHD have to maintain Camps Canyon Road, or for that matter any unrecorded prescriptive right of way (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 1 (Photo of neighbor's fence along Little Bear Ridge Road, fence now lies buried under gravel by the diligent maintenance of the Defendants (see Defendants' Brief at 9, par. 11)). Defendants have lost sight of their responsibilities to the public (i.e. following the rules) and it appears they have come to believe that they are the Public (see Defendants Affidavits in recent Plaintiffs'

petitions for partial summary judgment (Defendants try to hold a public validation proceeding without the public, by their own testimony and to even establish Camps Canyon Road as "public" by their own decree. Placing Camps Canyon Road on their map requires public testimony not solely the Defendants')). The injuries for which Plaintiffs bring suit are related to this lack of public input and specifically the denial of the opportunity for Plaintiffs to respond to Defendants' adverse actions in regards to Plaintiffs' property. The issues Plaintiffs bring are matters of *was due process required in these actions/failures to act.*

Defendants deny that these matters are matters requiring due process; and furthermore, Defendants state that these exertions of their governmental power are matters of Defendants' policy (see *Plaintiffs' Third Record Supplement*, Item No. 20, at 8-9 ("The District's policy for improving public highways under its jurisdiction is based on Idaho Code §40-2312 and the holdings of *Meservey...* ") and based on law. Summary judgment is the order of the day and it belongs to Plaintiffs. Plaintiffs have said that their land has been wrongfully taken and therefore their constitutional rights have been violated. Defendants do not deny these actions, as they readily admit that these actions are a matter of their policies or customs (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 3 and 6 (in the late fall of 2005, but mostly in 2006 Defendants pushed dirt and gravel into Plaintiffs' buffer (there was 5-10 feet of space between the road support and Plaintiffs' fence before this) and covered the wires of Plaintiffs' fence); see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 5 (in 2006 in order to widen the road, Defendants filled the old drainage ditch and pushed the old compaction roller into Plaintiffs fence and created a new drainage ditch which has undermined Plaintiffs fence and caused additional erosion); see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 4 (the first Wagner driveway access was issued for an access wholly on Plaintiffs' property). They attempt to defend their exertions of governmental power by saying they were reasonably negligent and/or the state legislature made them do it, under statutory authority. Being reasonably negligent is not rationally based to a legitimate governmental interest, therefore their only valid defense left is

that someone else (the state legislature or the Wagners made them do it). Plaintiffs allege Defendants are the direct, legal, proximate and substantial cause of these damages of and invasions into Plaintiffs" property and that these damages and invasions are within the scope of responsibility of Defendants' actions/failures to act (see *Complaint*).

Plaintiffs are not here to say that the Defendants can not widen the road if they believe that it is necessary, even if the only reason may be that they may lose state and/or federal funding if they don't. Their reasoning in this regard, however correct or misguided it may be, is not the issue. Likewise, Plaintiffs are not here to say, considering the alterations to Camps Canyon Road, that it was not the better idea to put a driveway access heading east through the grassy draw rather than going north as the historic driveway approached Camps Canyon Road. What Plaintiffs are saying is that the actions/failures to act in these issues are improper interference with Plaintiffs' property rights. The Defendants cannot simply move Camps Canyon Road anywhere they want without going through certain civil procedures; nor can they simply bury Plaintiffs' fence and/or fill Plaintiffs' buffer with gravel and dirt to increase the width and/or support of Camps Canyon Road, even if it is within the right of way without certain civil procedures as Camps Canyon Road is an unrecorded prescriptive right of way and there are laws prohibiting damaging Plaintiffs fence and trespassing and creating nuisances on Plaintiffs' land. Defendants cannot simply give permission for the neighbors to take Plaintiffs' land for a driveway access regardless of which party, the Wagners or the Defendants, prefers it that way. Furthermore, Plaintiffs and Defendants agree these interferences are not random acts.

Also, almost in the same breath in which Defendants claim that the issues for which Plaintiffs allege harm are matters of their policy, that is, that these alleged wrongful exertions of Defendants governmental power are "not unauthorized", Defendants suggest these claims arise under the ITCA. However, Plaintiffs point out that these interferences were not only matters of policy, final policy makers approval and/or official decision; but also, these interferences were arbitrary and capricious, an abuse of the Defendants' discretion and/or illegal and these

interferences have resulted in the invasion of Plaintiffs property (see *Complaint*). Therefore, Plaintiffs deny that ITCA offers an adequate remedy. However, without waiver of this denial, Plaintiffs continue.

When Defendants absolutely confirmed that they were in no way going to consider the matters of which Plaintiffs alleged they were being harmed (to give Plaintiffs' due process in these matters), and that Defendants were not going to take any evidence to consider the underlying issue of limits of Camps Canyon Road (allow an evidentiary hearing) unless Plaintiffs paid them a $750 fee, and when Defendants said Plaintiffs' only other choice was to get a lawyer, then Plaintiffs, within 30 days of that final decision that the Defendants had no viable agency remedy for Plaintiffs' complaints, filed a tort claim notice with the clerk of the NLCHD (see *Plaintiffs' Third Record Supplement*, Item No. 6, at 5-8 (At the 6/16/07 meeting of the Commissioners, Defendants give Plaintiffs choice of fee or to get a lawyer, even though Plaintiffs say they will represent themselves); see also *Plaintiffs' Third Record Supplement*, Item No. 9, at 20, (Defendants deny Plaintiffs' request to talk directly with their counsel as Plaintiffs would not have to pay any money if they didn't have a lawyer); see also *Defendants' Brief*, at 2 (Plaintiffs file a tort claim notice in November, 2007)). In the alternative, Plaintiffs plead that Plaintiffs' tort claim notice gave Defendants adequate and timely notice. Defendants were given fair warning of Plaintiffs objection to Defendants actions on 4/12/06 and kept Defendants abreast of Plaintiffs objections throughout the whole time until Plaintiffs filed the Tort Claim Notice when Defendants indicated that there were no agency remedies they would consider.

Defendants have been given the information for them to initiate validation proceedings on their own resolution (see *Harris v. County of Riverside*, 904 F.2d 497 (1990); see also *Ware v. Idaho State Tax Comm'n,* 98 Idaho 477, at 483 (1977) (the Defendants had clearly not fulfilled their statutory obligations and were estopped from denying a refund). Establishing an unrecorded prescriptive right of way by public hearing is the job of the Defendants and they have permission to do so, if legal establishment is in doubt (see Idaho Code § 40-203a (1)).

Defendants have abused their discretion and violated the law. Plaintiffs allege that Defendants were required under Idaho Code § 40-203a to initiate validation proceedings under their own resolution on 4/12/06 when the legal establishment of the road was questioned as the Defendants had acted upon their findings and conclusions. Defendants continue to threaten imminent irreparable harm and the trespass and nuisance go unabated (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 4 and 7 (Wagners first driveway access left the land scarred, bare of vegetation and exposed to erosion and the pike of rocks still remain minimally on Plaintiffs land as well as scattered over it); (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 3, 5, and 7 (intrusion into Plaintiffs' buffer has not been abated nor has the injuries to Plaintiffs' fence)). Defendants continue to threaten more irreparable harm ((see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 8 and 9 (Defendants continue to intentionally push snow into Plaintiffs' fence, winter of 2007-8); (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 10 (damage of Plaintiffs' fence and gravel contained in snow removal is several feet beyond Plaintiffs' fence indicating Defendants intentions to place the snow on the fence, spring of 2008); (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 11 (winter of 2006-7, notice the space between the car tracks and the fence; adequate room for snow without necessary damage to the fence)). Furthermore, on neither side of the road have the Defendants said they could not legally or would not continue their activity (Defendants say they impliedly revoked the first Wagner driveway access permit. They have not defined what that means. Are abutting land owners impliedly restricted to one access to the road? They have not said that they would not again issue a permit in the same place. Indeed their Brief indicates they deny negligence; and, that it is not only plausible but valid (reasonable) for them to do to issue the permit.) Furthermore, Defendants have no good faith immunity (see *Owen v. Independence,* 445 U.S.622 ("c) The application and rationale underlying both the doctrine whereby a municipality was held immune from tort liability with respect to its "governmental" functions but not for its "proprietary" functions, and the doctrine whereby a municipality was immunized for its "discretionary" or

"legislative" activities but not for those which were "ministerial" in nature, demonstrate that neither of these common-law doctrines could have been intended to limit a municipality's liability under 1983. The principle of sovereign immunity from which a municipality's immunity for "governmental" functions derives cannot serve as the basis for the qualified privilege respondent city claims under 1983, since sovereign immunity insulates a municipality from unconsented suits altogether, the presence or absence of good faith being irrelevant, and since the municipality's "governmental" immunity is abrogated by the sovereign's enactment of a statute such as 1983 making it amenable to suit. And the doctrine granting a municipality immunity for "discretionary" functions, which doctrine merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality, cannot serve as the foundation for a good-faith immunity under 1983, since a municipality has no "discretion" to violate the Federal Constitution. (d) Rejection of a construction of 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations is compelled both by the purpose of 1983 to provide protection to those persons wronged by the abuse of governmental authority and to deter future constitutional violations, and by considerations of public policy. In view of the qualified immunity enjoyed by most government officials, many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. The concerns that justified decisions conferring qualified immunities on various government officials - the injustice, particularly in the absence of bad faith, of subjecting the official to liability, and the danger that the threat of such liability would deter the official's willingness to execute his office effectively - are less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue")).

As this Court has said, the issue of the width (and one can include the location, use, and character) of Camps Canyon Road, in the pertinent part, pervades the ongoing issues on both side of the road. This issue of the width of the easement—the legal establishment of it—is complicated by the undisputed alteration in Camps Canyon Road in 1996 (see *Plaintiffs Affidavit*

at 2, par. 8; *Ed Swanson Affidavit*, at 2-3, pars. 5-12; see *Ole Hanson Affidavit*, at 1-2, pars. 2-8; see *Joe Yockey Affidavit*, at 2, pars. 4-8; see *Plaintiffs' Third Record Supplement*, Item No. 1, at 3, Request For Admission No. 3, subpart c.; see *Plaintiffs' Third Record Supplement*, Item No. 2, at 4-5, Interrogatory No. 3; see *Plaintiffs' Third Record Supplement*, Item No. 3, at 16-17, Interrogatory Nos. 40 – 44; (Defendants have altered Camps Canyon Road several times and altered the centerline; see Second Payne Affidavit at 2 and 3)). Whatever the eventual outcome of the factual determination Defendants disturbed the status quo in 1996 and are claiming the same thing they did then which is not plausible. Defendants again starting in the late fall of 2005 to disturb the status quo. Plaintiffs do not disagree with the court that the limits of the Camps Canyon right of way need to be factually determined. However, this only confirms that a dispute exists and does not then answer when such factual determination is required. On the issue on the north side of the road and the widening of Camps Canyon Road, is governed by I.C. § 40-605 and/or I.C. § 40-1310, and/or I. C. § Title 40-Chapter 20, and/or I.C. § Title 7-Chapter 7, and/or the 5th and 14th Amendments of the Constitution, and/or Article I § 13 and 14 of the Idaho State Constitution, and/or the Idaho Doctrine of Quasi-Judicial Capacity, and amongst others and as these statutes and constitutions are harmoniously construed, Plaintiffs contend when was before the widening occurred.

If not then, and without waiver of this contention, the Plaintiffs contend that due process was due on 4/12/06, or immediately thereafter (aside, with the first Wagner driveway access permit to be temporarily revoked until that hearing took place). Furthermore, on 4/12/06 due process was now called for under I.C. § 40-203a under the Commissioners own resolution as the legal establishment was in question. Failure to provide a hearing under I.C. § 40-203a under Commissioners own resolution now became in violation of Plaintiffs' equal protection rights, as Plaintiffs have a right to private action under I.C. § 40-203a as well as a right to due process (see *Owen*, above ("since a municipality has no "discretion" to violate the Federal Constitution")). Furthermore, Defendants denial of (i) Plaintiffs of predeprivational hearing, (ii) a post

deprivation hearing, (iii) Plaintiffs' requests that Defendants initiate validation proceedings on their own resolution on several occasions and (iv) Plaintiffs' Requests For Regulatory Takings Analysis were arbitrary and capricious, an abuse of Defendants' discretion and/or illegal and a manifestation of Defendants deliberate indifference to the erroneous deprivations of Plaintiffs property and property rights.

Plaintiffs also contend that post deprivational remedies under the ITCA are inadequate when the actions were "not unauthorized" and a predeprivational hearing was feasible (see *Zinermon v. Burch* 494 U. S. 113 starting at 124).

Defendants actions/failures to act are also arbitrary and capricious, an abuse of Defendants' discretion and/or illegal as Defendants' exertions of their governmental power, as well as Defendants' findings and conclusions, bear no relation to the public health, safety, morals, or general welfare; are in excess of Defendants' statutory authority (I. C. § 40-2312 does not mandate a 50 foot—25 feet from centerline and the holdings of Meservey require an evidentiary hearing); are not supported by substantial evidence in the record (an unrecorded prescriptive right of way has no public evidentiary hearing to establish the attributes—"public interest", width, location, etc.); run counter to the evidence in this case and the agency record to the findings and conclusions Defendants make (Defendants acknowledge numerous alterations in Camps Canyon Road, in the pertinent part, with no surveys and or accurate descriptions of the land required for the alterations, and no records of the Defendants'/Commissioners' orders for laying out of and/or for the alterations themselves); are so implausible (Camps Canyon Road cannot rationally be occupying the identical strip of land it did at the end of the prescriptive period as it is claimed to be acquired prior to 1996; as in 1996 Camps Canyon Road underwent significant alteration with the permission of the then owner (see *Ed Swansons' First Affidavit, at 2, par.7*; see *Plaintiffs' Affidavit, at 2-3, par. 8*); and even if Defendants began the 1996 alterations with a 50 foot—25 feet from centerline right of way, they have no survey and/or accurate record of the lands required for the alteration to support their claim that no private

property was taken or that they did not exceed the limits of the original width of the usage of the road or that they did not exceed the limits of the old fence line (see *Ed Swansons' First Affidavit, at 2, par.11*; see *Joe Yockeys's' Affidavit, at 2, par. 5 and 8;* see *Plaintiffs' Affidavit, at 2-3, par. 8*); and the old trees (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 2 (1989 FSA aerial photo, showing large trees where fence line stood; large trees were cut down and excavated in 1996 by Highway District (see *Plaintiffs' Third Record Supplement*, Item No. 9, at 13 (Dan and Gary cut down trees on Camps Canyon Road))), and furthermore, if they do have a mandated 50 foot—25 feet from centerline right of way as they do continue to claim, their continued claim of 25 feet from centerline would exceed the original 25 feet from centerline claim at the outer edges and thus negate their claim that no private property was taken) that they could not be ascribed to a difference in view or the product of agency expertise; are in contravention to the statutes and the constitutions of the State of Idaho and the U.S.; are relying on factors the Idaho state legislature did not intend (a mandated width which gives them authority under I.C.§ 40-2312 "to improve" and to "maintain"); and fail to circumscribe their broad authority to determine right of way boundaries and legal limitations with the statutory safeguards of the requirements of due process and/or the equal treatment under the law (see the 5th Amendment to the U.S. Constitution), legally conducted professionally done surveys (see I.C. §§ 40-1310 and 605 and I.C §§ 31-2707 and 2709), accurate descriptions of the lands required for the alterations(see I.C. §§ 40-1310 and 605), the recording of the commissioners' orders for laying out of and for the alteration itself (see I.C. §§ 40-608), and for recording of and conveying of the agreements with abutting landowners(see I.C. §§ 40-2302), remedies for erroneous deprivations (see *Zinermon v. Burch* 494 U. S. 113 starting at 124; see also *Zimmerman v. City of Oakland*, 255 F.3d 734, (9th Circuit, 2001); see also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-436 (1982) (availability of postdeprivation remedy is inadequate when deprivation is foreseeable, predeprivation process was possible, and official conduct was not ``unauthorized''); and/or are in real and ever present conflict with a litany of other statutes, many of which are of

criminal and malicious intent (see *Roeder Holdings v. Ada County,* 41 P.3d 237, citing *Idaho County Nursing Home v. Dep't of Health*, 120 Idaho 933, 937, 821 P.2d 988, 992 (1991) ("When a conflict exists between a statute and a regulation, the regulation must be set aside to the extent of the conflict").

Whether I.C. § 40-202 gives effective notice to abutting land owner (see *Defendants' Brief* at 19-20) is not relevant as Camps Canyon Road had not even been established as being in the public interest (see *Homestead Farms v. Board of Comm'rs Teton County, state of Idaho*, 141 Idaho 855, 119 P 3d 630 (2005) (establishing the public interest requires an evidentiary hearing)). When Plaintiffs gave Defendants fair warning at the 4/12/06 meeting the next step was up to Defendants—to provide a hearing as the validity of the right of way was in doubt. Defendants have a duty, not to take private property without due process (5th Amendment) or not to take private property without trying to make an agreement with Plaintiffs, and without surveying and without accurately describing the lands required for the alteration prior to the alteration (see I.C. §§ 40-1310 and 605 and Title 40-Chapter 20). Defendants' failure to establish the right of way (public hearing, they now have been given permission to correct the error, to do so under their own resolution (see I.C § 40-203a (1)(a), the "may" turns to "shall" (see *Oppenheimer Industries v. Johnson Cattle Co., 112 Idaho 423, 732 P. 2d 661 (1986)* (in this case, the IDAPA had set forth required conduct of a brand inspector in two distinct contextual settings. (e.g. When a brand inspector is confronted with a "fresh brand", he shall not and when he is confronted with two or more brands, he may). The shall not made the may mandatory when the brand inspector was confronted with the confluence of both circumstances) as they have already acted), and thus those failures added to the failure to lay out (survey and describe), and failure to keep records of orders for laying out and for alteration (I.C. §§ 40-608) has left Defendants without substantial evidence in the record to make a finding or draw a conclusion that they in 1996 or in 2005 or in 2006 or even now as they continue widen as a matter of policy "to improve and to maintain" Camps Canyon Road, or for that matter any and all unrecorded

prescriptive rights of way (see Plaintiffs' petition for facial invalidity of Defendants' standard operating procedure to widen prescriptive ways), have a 50 foot—25 feet from centerline right of way or ever did or that they have not taken private property (whether gifted or not) or that they are not now taking private property or that they will continue to do so with their diligent maintenance policies (see *Second Payne Affidavit*, at pars. 3-5; see *Defendants' Brief* at 9, par. 11). The evidence to support Defendants' conclusory "ADMISSIBLE MATERIAL FACTS RELEVANT TO PLAINTIFFS' CLAIMS" is distinctly absent, intentionally done, and blatantly arbitrary and capricious, an abuse of Defendants discretion, and or illegal. Plaintiffs have not requested this Court to tell the Defendants that they must validate Camps Canyon Road (see Court's Opinion denying Plaintiffs petition to reconsider Plaintiffs' requests for declaratory judgments), they have said that the Defendants have violated Plaintiffs' rights to due process and equal protections as the Defendants have no rational basis for the constitutional violations they effect on Plaintiffs. At a minimal requirement, Defendants need at least a rational basis for a legitimate governmental interest. At the declaratory judgment hearings, Defendants did not show any relation of their actions/failures to act to the public health, safety, morals, and/or general welfare.

Indeed the litany of allegations grows and grows as Defendants defend and deny all matters on a legal interpretation of Idaho Code § 40-2312. Plaintiffs agree with the Court's findings that the right of way needs to be factually determined. However, Plaintiffs allege that the timeliness of that factual determination underlies the factual determination itself. If it is then eventually factually determined that the right of way of Camps Canyon Road is indeed 50 feet—25 feet from centerline and that however irrational it may be to say that the present claim is identical to the original claim or that indeed a new claim has grown and it is eventually determined that the new claim is valid, Plaintiffs allege that Defendants could not do what they did. For if these exertions of governmental authority are as Defendants claim "...the District has, at all times relevant to this action, properly discharged its statutory responsibilities to

improve and maintain the public highway known as Camps Canyon" (*Defendants' Brief*, at 2), and "The District's policy for improving public highways under its jurisdiction is based on Idaho Code §40-2312 and the holdings of *Meservey...* ", and "The District is well within its legal rights to widen a road (have Defendants conveniently left out the words *unrecorded prescriptive*?) without holding a public hearing (deeded rights of way may not require a public hearing as they are not established by public testimony; however, are not then, the Defendants discriminating against abutting land owners abutting to unrecorded prescriptive rights of way as there is no record of attributes of the right of way in the case of the unrecorded prescriptive right of way as there is in the case of the deeded right of way) when that activity occurs within the area of the District's right of way" (see *Plaintiffs' Third Record Supplement*, Item No. 20, at 8); then, either Defendants have invalid policies/customs, as they fail to identify their own disclaimer—"under usual circumstances"—that as applied to Plaintiffs and Plaintiffs' situation, Defendants' policies and/or customs are invalid; or Defendants' policies and/or customs are invalid facially; and/or I.C.§ 40-2312 is overly broad and/or vague.

Defendants have no valid legal theory under which they defend their actions/failures to act as neither have the Wagners mandated the Defendants to do what they did, nor has the state legislature mandated that the width of Camps Canyon Road or any unrecorded prescriptive right of way be 50 feet—25 feet from centerline. Furthermore, Defendants' counsel cannot mandate what it is that Plaintiffs plead (see Defendants' Brief, at 4 ("Plaintiffs' claims in this action arise almost exclusively from two (2) occurrences..."). See Idaho Rules of Civil Procedure Rule #8 (b) which reads' "Rule 8(b). Defenses - Form of denials. A party shall state in short and plain terms the defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is

true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11." Nowhere does it say that Plaintiffs must change their pleadings to meet Defendants chosen denials. Defendants have generally denied on the grounds of "good faith". There is no such defense and Defendants' petition for summary judgment must be denied and Plaintiffs petition for partial summary judgment should be granted. The Defendants request for summary judgment and their defense to Plaintiffs petition for partial summary judgment for Defendants' liability under § 1983, 1988, et seq. are frivolous and/or without merit. Without waiver, Plaintiffs continue.

The Defendants have disrupted the status quo on both sides of the road and have invaded, occupied Plaintiffs' land and permitted the intrusion of third parties onto Plaintiffs' land, and have improperly interfered with Plaintiffs property rights (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 1-11). On the south side of the road, the first Wagner driveway access permit was issued for an access wholly on Plaintiffs' land (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 4 (Plaintiffs have the fee in the land whether or not it is eventually factually determined that the Defendants have a 50 foot—25 feet from centerline right of way) which has been shown to be so, wholly on Plaintiffs' land by a valid, professionally done survey by a licensed Idaho Land Surveyor and there has been no other survey, admissible as evidence, to rebut this finding. Defendants intentionally issued, continued, failed to revoke the first Wagner drive way access permit; trespass is illegal and an intentional tort (Defendants immunity to liability, no malice or criminal behavior, is misplaced (see Defendants' Brief at 12-16)). On the north side of the road, the intrusions into Plaintiffs' buffer are admitted to as "not

unauthorized" acts/failures to act and for which Plaintiffs have colorable claim to and for which Plaintiffs have positive constitutional guaranties to equal protection and due process (procedural and substantive). It is then this issue, the physical invasions of Plaintiffs' land, whether colorable and/or factual, as no reasonable person would find otherwise, and that these invasions were so arbitrary and capricious and/or not for public use that have denied Plaintiffs due process and equal protection to which Plaintiffs ascribe the harm as effected by Defendants' actions/failures to act and for which the eventual factual determination of the width of the right of way may mitigate some of the damages claimed by Plaintiffs (see *Logan v. Zimmerman Brush Co.*, 455 U. S. 422, at 432 (1982) ("Each of our due process cases has recognized, either explicitly or implicitly, that because 'minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.' *Vitek v. Jones*, (1980). See *Arnett v. Kennedy*, 416 U.S., at 166-167 (POWELL, J., concurring in part); id., at 211 (MARSHALL, J., dissenting). Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest. The Court has considered and rejected such an approach: `While the legislature may elect not to confer a property interest, . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. . . . [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.' *Vitek v. Jones*, 445 U.S., at 490_-491, n. 6, quoting *Arnett v. Kennedy*, 416 U.S., at 167 (opinion concurring in part)")) that the Plaintiffs bring suit under 42 U.S.C. 1983.

Plaintiffs' continue to dispute Defendants' claims of a 50 foot-25 feet from centerline right of way as well as many other purposely obfuscated contentions of Defendants. Plaintiffs will specifically answer these disputed facts and concur that which is not disputed as they arise later. However, Plaintiffs petition Court to deny Defendants Motion for Summary Judgment as it is easily, obviously, concisely put that the Defendants' "ADMISSIBLE MATERIAL FACTS..."

are not even material. However, without waiver of this objection Plaintiffs will observe what is disputed.

First, Plaintiffs emphatically dispute Defendants' thesis of Defendants' Brief. The only part of this thesis Plaintiffs agree with Defendants is that they were (i)"acting under the color of state law" and (ii) under and as a matter of agency policy at all times relevant. It is a matter of Defendants not "properly discharg[ing their] statutory responsibilities" for which Plaintiffs have filed this action and are presently in Court and for which Plaintiffs petition, as a matter of law, for partial summary judgment for this Court to grant order that Defendants are liable with damages to be determined under 42 U.S.C. §§ 1983 1988 et seq. In Defendants' defenses, they have said that all matters are matters of law, even the 50 foot—25 feet from centerline right of way. They have seemingly dropped their contention to have validly issued, continued and/or not revoked the first Wagner driveway access permit on the basis it was within the reaches of Defendants' unrecorded prescriptive right of way (see *Plaintiffs' Third Record Supplement*, Item No. 12, at 8 Interrogatory No. 18). They continue with their reasonable negligence ("good faith") defense that it was within the road frontage of the Wagner deed (see *Plaintiffs' Third Record Supplement*, Item No. 12, at 9 and 4-6 Interrogatory Nos. 19, 12, and 8-11 (Defendants claim the good faith measurement of 699' of road frontage on the Wagner deed and say that it was not their decision to revoke the permit, that the 2nd permit impliedly revoked the first). Without waiver of Plaintiffs' objection that this good faith defense is not of legal merit, Plaintiffs simply say that the Defendants knew that the road frontage was not a dependable statistic as they had changed the centerline of Camps Canyon Road. Furthermore, no reasonable persons would disagree at this point in history or in any linear applications of Euclidean geometry that the distance between two points is not a straight[ened] line. If one changes the centerline one can no longer rely on it being accurate. If one straightens the centerline one can no longer rely on it being accurate, the same length and/or longer. Shorter is the only answer unless you live in a non Euclidean world, which may be true but Defendants have shown no evidence of this and we

are confined to settle this case within well established law (property lines are confined to a two dimensional system) which a reasonable person could understand.

To recapitulate, Plaintiffs incorporate by reference all the preceding paragraphs in this document, that in all of these matters and at all times relevant and at all times acting under the color of state law, that Defendants, in their individual capacities and in their official capacities were performing "not unauthorized" functions under the policies, customs, and/or standard operating procedures of the NLCHD and/or all such action/failures to act were with the expressed and implied approval of and/or were the actual actions/failures to act of the final policy makers of the agency (see *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978); see also Gillette v. Delmore, 979 F.2d 1342, 1346 (9th Cir. 1992) (per curiam), cert. denied, 114 S.Crt. 1345 (1993) (Municipal liability may be established in one of three ways) and that both the issues for which Plaintiffs ascribe to and/or allege to having been harmed by (see *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 US 172, 193 (1985) (The matter of the "issue that inflicts the actual, concrete injury" determines the necessary proofs); see also *Harris v. County of Riverside*, 904 F.2d 497 (1990) are within the scope of responsibility of and/or the actual actions/failures to act and/or were done with the approval of the final policy makers of the NLCHD. Furthermore, Plaintiffs allege that Defendants are the direct, proximate, legal and substantial cause of these physical invasions of Plaintiffs' land and the denial of due process (substantive and procedural) and equal protection to Plaintiffs as well as "taking, seizing of, and or conversion of Plaintiffs' land for a not for public use. Without waiver of anything Plaintiffs have said, Plaintiffs continue.

As to the second level issue, in the underlying issue of the factual determination of the right of way of Camps Canyon Road, Plaintiffs allege that the mandated 50 foot—25 feet from centerline prescriptive right of way as applied to their property abutting to and underlying the easement across their land is unreasonable, arbitrary and capricious, bears no reasonable relationship to the public health, safety, and welfare, an abuse of the Defendants' discretion,

and/or is illegal. Furthermore, in the underlying issue of a factual determination of the right of way of an unrecorded prescriptive right of way, Plaintiffs allege that the mandated 50 foot—25 feet from centerline prescriptive right of way is invalid facially. Further, Plaintiffs allege that any policy, custom standard operating procedure which includes a mandated 50 foot—25 feet from centerline right of way and/or a presumed 50 foot—25 feet from centerline right of way without an evidentiary hearing and an opportunity for a meaningful rebuttal at a meaningful time and a rational response in matters relevant to Camps Canyon Road as it traverses the SENE Section 15 T39N R3WBM is invalid whether it is formulated under I.C. § 40-2312 or any other statute to the extent it authorizes "improving" and/or "maintaining" (in the sense that maintenance (including the addition of cut slopes; that is if Plaintiffs give Defendants permission to work on the slopes it does not imply that the Plaintiffs or any abutting landowner has waived his constitutional rights) does not mean preservation of and means widening, straightening, altering, changing, extending the fill slopes by pushing gravel over the edge of the traveled surface and adding support, and/or relocating the centerline of (see *Defendants' Brief*, at 7-8, par. 6, pars. 4 and 5, and par. 8), straightening, altering, changing, widening and/or relocating the centerline of Camps Canyon Road. Furthermore, Plaintiffs allege that the denial of a hearing to determine the limits of the Camps Canyon Road right of way through the SENE Section 15 T39N R3WBM under that statute and/or the holdings of Meservey or any other form of authorization when Plaintiffs' land, fence property rights and or liberty rights are adversely affected by the findings, conclusions, actions and/or failures to act by the Defendants and/or the defined right of way of Camps Canyon Road are invalid, a taking without due process and/or equal protection guaranteed by the 5th and 14th Amendments to the United States Constitution. Any such policy so derived is invalid on its face and/or as applied to Plaintiffs.

There is no dispute amongst Defendants and Plaintiffs that Defendants have acted upon their claim of a 50 foot—25 feet from centerline right of way—they have widened the road,

issued and failed to revoke the first Wagner driveway access permit and determined that damage to Plaintiffs' fence is a result of the fence being within the right of way. The dispute is ripe.

Furthermore, Plaintiffs allege, that in all matters as Plaintiffs allege harm (i.e., that due process was due), Defendants were deliberately indifferent to the improper interference with and the deprivation of Plaintiffs property rights whether as a matter of approval of a subordinate' actions/failures to act, as a matter of official acts, and/or as a matter of a failure to train employees in light of obvious constitutional violations.

Furthermore, Plaintiffs allege, that in all matters as Plaintiffs allege harm (i.e., that due process was due), Defendants were acting under well established law any reasonable person could understand. ("The District's policy for improving public highways under its jurisdiction is based on Idaho Code §40-2312 and the holdings of *Meservey*... "). Idaho Code §40-2312 is unambiguous; that the matter of the width of an unrecorded prescriptive right of way is expressly not mandated, that clearly a choice of 50 feet, greater than 50 feet or less than 50 feet are possible and as harmoniously construed with the U.S. and Idaho State Constitutions and Idaho State statutes and with the holdings of *Meservey*; that 50 feet is a place to start, unless there is a fence or some other way the landowner limited the width, then that is the starting width; and the width is to be factually determined with a "consideration of the facts peculiar to the case". Plaintiffs' petition for partial summary judgment can stop right here (see *Roberts v. Transportation* Department, 121 Idaho 727(1991) the agency cannot subvert the legislation by promulgating its own rules); see *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842-843 (1984) (if the court finds that Congress had a specific intent then that is the end of the inquiry, the statute is enforced regardless of the agency's interpretation)). Defendants can contemplate the "width of the road" all they want and insure that the road to their house is paved while other members of the public struggle to get out of the canyon from their newly built homes; however, if they act on their decision, a mandated 50 foot—25 feet from centerline right of way, they have made a "final decision" and must follow the law (see *Czaplicki*

v. Gooding Joint School District No. 231, 116 Idaho 326, 775 P.2d 640 ("[D]iscretionary function does not shield negligent implementation of statutes..."); see also *Gooding Highway District v. Idaho Irrigation C.*, 30 Idaho 232, 165 P 99 (1917) ("In order that act of county commissioners in laying out of highways be valid, whether upon public domain or private property, board must conform to law giving such authority, as power to establish highways rests in legislature and right may be exercised only in such manner as legislature provides"); see also *Owen*, above)). Without waver that we could also stop right here also, Plaintiffs continue.

Defendants have exceeded their authority under Idaho Code §40-2312; (i) this statute does not give Defendants the authority "to improve" and/or "to maintain", to alter, to straighten, to widen, to change and/or to "improve" and/or to "maintain" an unrecorded prescriptive right of way; (ii) furthermore, Idaho Code §40-2312 speaks to Defendants' discretion to determine "the width" (a noun) of a highway; (iii) the statute does not mandate a 50 foot width; (iv) the statute does not mandate or mention a 25 feet from centerline width; (v) the statute does not deny an abutting landowner due process and/or equal protection or an evidentiary hearing when the Defendants choose to alter, to straighten, to widen, to change and/or to "improve" and/or to "maintain" and/or to determine a fence is encroaching on an unrecorded prescriptive right of way; (vi) the statute does Plaintiffs contend that the only path from the statute determining "the width" (Idaho Code §40-2312) to the statutes authorizing the actions of such notions of "to improve", such as to widen, to straighten, to alter, and/or to change a highway (as to be found in Idaho Code §40-1310 and/or Idaho Code §40-605) is through the hallowed halls of a public evidentiary hearing and Plaintiffs dispute that the Defendants are in any way, shape or form "properly discharg[ing their] statutory responsibilities".

Defendants have no rational basis for which to deny Plaintiffs rights to due process (substantive and procedural) and /or equal protection of the law. Furthermore, as Defendants have violated Plaintiffs' substantive 5th Amendment rights they are compelled to show reason for the ends which would necessitate such means.

Plaintiffs begin first with answering Defendants' claim that these matters may be settled under the ITCA without waiver of Plaintiffs' objections that the ITCA is an adequate remedy.

II. Defendants affirmative defense of the time bar of the 180 day notice requirement of the ITCA and /or ITCA as an adequate remedy—Plaintiffs dispute that the ITCA is adequate and therefore the only course of action is under 42 U.S.C. § 1983.

Plaintiffs incorporate by reference all proceeding paragraphs of this document and continue. First Plaintiffs seek action under 42 U.S.C. § 1983, 1988, et seq. and such tort claim notice is not required (see *Felder v. Casey*, 487 U.S. 131 (1988) (state laws requiring pre-suit notification prior to initiating an action against the state or its subdivisions do not apply); see also *Patsy v. Board of Regents of Florida,* 457 U.S 496 (Plaintiffs need not exhaust agency remedies before bringing § 1983 suit)).

Secondly, the intentional tort of trespass and the tort of nuisance are not covered under the ITCA (see *Cobbley v. City of Challis*, 138 Idaho, at 159).

Third, Plaintiffs reasonably approached the Defendants on 4/12/06 at the regular meeting of the NLCHD Commissioners and gave them fair warning that Plaintiffs did not agree with their action to issue the first Wagner driveway access permit and/or with Defendants' refusal to get a professional survey done to resolve the matter and/or with Defendants' failure to require the Wagners to get a professionally done survey, and/or with Defendants' failure to revoke the permit when Plaintiffs said that they would call for a survey when Defendants refused to. Plaintiffs also gave the Defendants fair warning that Defendants' entrance into Plaintiffs' buffer was an improper interference with Plaintiffs' property rights as was the action of/failure to act of the issuance/revocation of the first Wagner driveway access permit. Plaintiffs have kept Defendants abreast of Plaintiffs complaints and sincerely sought resolution of the issues with Defendants, although Defendants rebuffed any attempt Plaintiffs made at agency remedy, claiming in effect that Defendants' "prescriptive right" of a 50 foot—25 feet from centerline

right of way gave Defendants authority to deny Plaintiffs due process. Neither action/failure to act has been abated. Defendants continue to occupy Plaintiffs buffer and continue to further encroach and impinge on Plaintiffs' fence; as well as the Defendants have not acknowledged the revocation of the first Wagner driveway access permit, nor have they denied their claimed statutory right to issue a permit across the east property line of the 3+/- acre parcel (see *Plaintiffs' Third Record Supplement*, Item No. 17, at 5-6, 10-11 Interrogatory Nos10-14 and 23-24). Accrual does not begin until abatement has occurred and/or the injurious acts/failures to act have ceased (see McCabe v. Craven, ___Idaho ___ (2007), Docket No. 32219) (a continuous tort). Defendants claim of "prescriptive right "to improperly interfere with Plaintiffs' property rights and the wrongful taking of and damage to Plaintiffs' property continues unabated and threatening of further irreparable harm.

Fourth, a post deprivation action under the ITCA is not "adequate" when the actions/failures to act are "not unauthorized" and a predeprivation hearing is feasible (see *Parratt v. Taylor*, 451 U.S. 527 (1981); and see *Zinermon v. Burch* 494 U. S. 113 starting at 124; see also *Zimmerman v. City of Oakland*, 255 F.3d 734, (9th Circuit, 2001); see also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-436 (1982) (availability of postdeprivation remedy is inadequate when deprivation is foreseeable, predeprivation process was possible, and official conduct was not ``unauthorized'').

Fifth, Defendants are now estopped from the defense that these matters are now time barred after receiving the benefit of the defense of "no final decision" on Plaintiffs' Motion for declaratory judgment on I.C. § 67-8003(3). Defendants have sought and received the benefit of the defense that these allegations that Plaintiffs make are matters of Defendants discretion (that they were legislative in nature) and they now are claiming they are not discretionary and therefore time barred (see also *Owen*, above).

Sixth, Plaintiffs have alleged that Defendants have violated Plaintiffs property and liberty rights from the execution of Defendants governmental policies, customs and/or standard

operating procedures (see *Monell v. Department of Social Svcs.*, 436 U.S. 658, 694 (1978). Not only are Defendants the NLCHD final policy makers they have endorsed all incidents of action and/or failures to act and/or all acts/failures to act are a result of Defendants policies, customs, and/or standard operating procedures (see *Defendants' Brief*), at 2, above) (Defendants' thesis is that at all relevant times Defendants were acting within their statutory duties)—issuance/revocation of the first Wagner driveway access permit and invasion of Plaintiffs' buffer and encroachment on Plaintiffs' fence. The potential liability under 42 U.S.C. § 1983 is not disputed (see *Wade v. City of Inglewood*, 108 F.3d 1387 (9th Cir. 1997)) as the Defendants say, it is a matter of law, that Defendants have done and may continue their arbitrary and capricious, irrational, unreasonable and vindictive actions and/or failures to act. Plaintiffs are not complaining of matters which even Defendants believe to be random acts.

Seventh, Plaintiffs' allegations of due process violations (substantive and procedural) as well as alleged equal protection violations are based on the situation Plaintiffs find themselves in as a result of Defendants' irrational and vindictive actions and/or failures to act. Plaintiffs were singled out for differential treatment causing mental and physical anguish, as Defendants sole purpose in allotting time on the agenda for Plaintiff, Don Halvorson, to speak was to ram the first Wagner driveway access permit through at a public meeting, to give the permit an air of legality and to paint the Halvorsons as the sole cause for the Wagners not getting a driveway access to their property rather than the Defendants accepting responsibility for having destroyed the historical driveway access in the 1996 alteration, calling for a survey and properly carrying out any necessary deed changes to resolve the problem(see *Plaintiffs' Third Record Supplement*, Item No. 10, at 1). After having to go to the expense of obtaining a survey and once again trying to work things out with the Wagners, the Defendants, on Plaintiffs' information and belief, as told to Plaintiffs by Bob Wagner; the Defendants refused to accept deeded easement to resolve the driveway issue (see *Plaintiffs Affidavit* at 9, par. 15). Plaintiffs have alleged and Defendants do not dispute that Defendant and Chairman of the NLCHD Commissioners, Orland Arneberg is

the friend, neighbor and business partner of Ridgeview Farms, whose owners are the brother-in-law of Bob Wagner and the relative of Defendant Dan Payne. Plaintiffs claim that they have been victimized by the Defendants, who have acted under the color of state law, and do not have the ability of an adequate resolution under traditional recognized categories of causes of action, such as negligence, malicious trespass, inverse condemnation, amongst others as the Defendants flagrantly abused the procedural processes of statutory safeguards and remedies for erroneous deprivations (see *Plaintiffs Affidavit*, at 12, par. 28), (see *Lingle v.Chevron U.S. A. Inc.,* (04-163) 544 U.S. 528 (2005) 363 F.3d 846, ("Conversely, if a government action is found to be impermissible--for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process--that is the end of the inquiry. No amount of compensation can authorize such action.")

Plaintiffs filed their tort claim notice within 30 days of the time that Defendants had issued Plaintiffs the ultimatum, that Plaintiffs had only two choices: (i) pay a $750 fee and file a petition for validation of Camps Canyon Road, or (ii) get a lawyer. Plaintiffs filed their tort claim notice in a timely manner as Defendants had indicated that the Plaintiffs had exhausted agency remedies. Furthermore, Plaintiffs have only sought cause of action solely under the theory of negligence in the alternative.

Plaintiffs allege that the policies, customs, standard operating procedures and/or Defendants' exertion of their governmental powers are facially invalid as well as invalid as applied to Plaintiffs, and Plaintiffs' situation. Not only have Defendants discriminated toward abutting land owners abutting to unrecorded prescriptive rights of way as opposed to similarly situated abutting land owner of recorded rights of way (as in deeded), Defendants have also discriminated against Plaintiffs in the determination of the legality of the first Wagner driveway access permit. Furthermore, when the survey showed they lost the argument they simply ignored the resolution and in retaliation pushed dirt, gravel, and snow upon Plaintiffs' fence. There are proper civil procedures for determining whether Plaintiffs' fence is wrongfully positioned, but

ignoring those procedures in lieu of retaliation is actionable criminally as well as under § 1983 (see *Villiage of Willowbrook v. Olech* 528 U.S. 562 (2000)).

Plaintiffs have responded to Defendants claims of a mandated 50 foot—25 feet from centerline width for an unrecorded prescriptive right of way and continue their allegations that not only do Defendants not have a 50 foot—25 feet from centerline right of way; that even if it is found that they do, the Defendants could not do what they did—widened the road, issued, continued, and failed to revoke the first Wagner driveway access permit and determined that damage to Plaintiffs' fence is a result of the fence being within the right of way without the due process of an evidentiary hearing and an opportunity for Plaintiffs to meaningfully respond at a meaningful time (see *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), (United States Supreme Court ruled that an implied cause of action existed for an individual whose Fourth Amendment freedom from unreasonable search and seizures had been violated by federal agents); see *McCulloch v. Glasgow*, 620 F. 2d 47 (5th Circuit 1980), (plaintiff was entitled to Due Process before road was built over land of disputed ownership); see *Fuentes v. Shevin*, 407 U.S. 67, 92S.Ct. 1983, 32 L.Ed.2d 556 (1972), (14th Amendment property right even though dispute exists); see *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) ("...right to procedural due process is 'absolute' in the sense it does not depend upon the merits of a claimants' assertion..."); see *Cooper v. Board of County Commissioners of Ada County*, 101 Idaho 407, 614 P.2d 947 (1980), (the test for functioning in a quasi-judicial capacity and due process requirements); see also *Lingle v. Chevron, U.S. A. Inc.* (04-163), 544 U.S. 528, 363 F.3d 846, (2005) ("Conversely, if a government action is found to be impermissible for instance because it fails to meet the public use requirement or is so arbitrary as to violate due process that is the end of the inquiry. No amount of compensation can authorize such action"); see also Crown Point Dev., Inc. v. City of Sun Valley, 506 F.3d 851, 855-56 (9th Cir. 2007)). Plaintiffs allege that these "not unauthorized" actions/failures to act required a predeprivational hearing; as such was feasible, practicable, and predictable (see *Parratt v. Taylor*, as compared to

"unauthorized" actions not found in *Zinermon v. Burch* 494 U. S. 113 starting at 124) 451 U. S. 527 (1981). Furthermore, Plaintiffs allege once again that the denial of a hearing to determine the limits of the Camps Canyon Road right of way through the SENE Section 15 T39N R3WBM violates their 5th Amendment rights to procedural due process, equal protection, and substantive due process as guaranteed by the 14th Amendment to the United States Constitution. In this form, Defendants' exertion of their governmental powers, their customs, policies, and/or standard operating procedures are invalid facially in the first instance, and/or as applied to Plaintiffs, their situation and/or to their property as Defendants do not circumscribe their broad authorities with statutory safeguards and remedies for erroneous deprivations and/or Defendants have admitted to the actions/failures to act for which Plaintiffs claim harm and damages and for which Defendants claim they were within their legal right to deny Plaintiffs due process and/or equal protection. Furthermore, Defendants have shown no rational basis to regulate Plaintiffs' property or to deprive Plaintiffs of their rights to peacefully enjoy their land, their right to restrict others from their land and their right to a clear and marketable title to their land. Defendants have violated Plaintiffs 5th Amendment rights and as such are compelled to bring forth such ends which would justify such means to deprive Plaintiffs of due process in the invasion of Plaintiffs' land by the Defendants and third parties and to wrongfully take Plaintiffs land for not a public use and to destroy Plaintiffs' property. These actions/failures to act of Defendants are far from "properly discharg[ing their] statutory responsibilities"; rather they are arbitrary and capricious, an abuse of Defendants' discretion and/or illegal. Defendants bring forth an argumentative justification for their admitted to actions and/or failures to act, based on unreasonable legal conclusions and findings which are not supported by substantial evidence of their agency record and which run contrary to the evidence of their agency record and/or of the record of this case. Defendants' affidavits are conclusory and brought forth in bad faith.

Defendants are liable under § 1983, on an individual basis as well as on an official basis and have shown no objective standard of a law which has not been well established or that a

reasonable person could not understand the adherence to which would legally justify their actions/failures to act. The correct cause of action in the present case is 42 U.S.C. § 1983.

III. Plaintiffs' Response to *Defendants' Admissible Material Facts Relevant To Plaintiffs' Claims ("Facts")*

To begin with Defendants opening remarks again misstates the situation, as Plaintiffs have already said. "Plaintiffs' complaints in this action arise from almost exclusively from two (2) occurrences, the first being improvements made by Defendant North Latah County Highway District ("the District") in 2005 and 2006 to an area of Camps Canyon Road, located primarily between property owned by Plaintiffs ("Plaintiffs' real property") and Robert Wagner and Kate Wagner, husband and wife ("Wagners' real property"), approximately 700 feet in length, and the second being the District foreman Dan Payne's (i) issuance and revocation and (ii) reissuance of a driveway approach permit to Robert Wagner in 2006 to access Wagner's real property" (see *Defendants' Brief*, at 4).

Defendants again want to redefine Plaintiffs' pleadings to fit their denials and as such Plaintiffs incorporate all previous parts of this document by reference (see *Owen*, above).

Plaintiffs allege and bring forth specific evidence that Defendants' claim of a 50 foot—25 feet from centerline right of way is arbitrary and capricious, an abuse of Defendants discretion, and/or illegal; as I.C. § 40-2312 does not mandate a 50 foot—25 feet from centerline right of way, does not deny an abutting land owner a right to due process in alterations to an unrecorded prescriptive right of way; does not deny an abutting land owner a right to due process in determining if a fence is located within an unrecorded prescriptive right of way, does not deny an abutting land owner a right to due process if the Defendants issue/fail to revoke a driveway access permit wholly on another abutting land owner's property; as I.C. § 40-2312 and the holdings of Meservey intends that an unrecorded prescriptive right of way may be presumed to be 50 feet or any other width and may not be presumed to be fifty feet if an abutting land owner had limited the width of an unrecorded prescriptive right of way, or unless the highway was of a

lesser width; as Defendants admit that there have been no evidentiary hearings on the matter of Camps Canyon Road, in the pertinent part; there is no substantial evidence in the record to support Defendants' claims and all evidence in the record runs contrary to their continuation of the original prescriptive claim as they have admitted to moving and then widening the section of road in dispute. Furthermore, Defendants admit that they have done no surveys and have made no accurate descriptions of the required lands in any of the alterations admitted to (see Idaho Code §§ 40-605 and 40-1310) nor have they any agency record of Commissioners orders to lay out and/or make the alterations they admit to (see Idaho Code §§ 40-608). Furthermore, Defendants have not shown that Camps Canyon Road has been worked and used as it is now for a period of 5 years.

1) Defendants' first material fact: Establishment of Camps Canyon Road as a public highway under the jurisdiction of the District. This is conclusory. The District does not have substantial evidence in the agency record to support this conclusion and finding as there has been no public evidentiary hearing to show that a finding or conclusion that Camps Canyon Road in the SENE Section 15 T39N R3WBM is a public highway.

(a) Plaintiffs do not dispute nor aver that Camps Canyon Road is a public highway, and that its status as an unrecorded prescriptive right of way may predate the formation of the 3+/- acre parcel and may extend as far back as to the pre-homesteading period into the 1870s as the road itself was the only access to the Emmett Gemmill homestead entry of 1890 (see *Plaintiffs' Fourth Record Supplement*, Item No. 2 (BLM Homestead Entry Records of Emmett J. Gemmill) However, there is no substantial evidence in the agency record to establish Camps Canyon Road as a public highway or to conclude that the present road occupies the identical strip of land that the original prescriptive claim did; or that the original prescriptive way was 50 feet—25 feet from centerline wide (see *Homestead Farms v. Board of Comm'rs Teton County, state of Idaho*, 141 Idaho 855, 119 P 3d 630 (2005) (Justice Eismann **SPECIALLY CONCURRING**) (Highways in this unrecorded category require evidence showing that the road

was used for a period of five years and worked and kept up at the expense of the public, with the exception of those unrecorded ways which may have been established before 1893 when no public upkeep was required. Such evidence must be taken at an open public meeting and therefore should be part of the public record).

(b) Furthermore the evidence in the agency record and this present case runs contrary to such a claim as the present claim does not occupy the identical strip of land that the original claim did as the Defendants have altered Camps Canyon Road on several occasions (see *Plaintiffs Affidavit* at 8; see *Swanson Affidavit*). This is undisputed as Defendants admit to no evidentiary hearings and to altering the physical location (see *Plaintiffs' Third Record Supplement*, Item No. 2, at 4-5, Interrogatory No. 3) of the pertinent part of Camps Canyon Road as well as having widened it numerous times (see *Plaintiffs' Third Record Supplement*, Item No. 1, at 3, Request For Admission No. 3, subpart c.; see *Plaintiffs' Third Record Supplement*, Item No. 3, at 16-17, Interrogatory Nos. 40 – 44; (Defendants have altered Camps Canyon Road several times and altered the centerline; see Second Payne Affidavit at 2 and 3).

(c) It is also undisputed that there are no known alterations to Camps Canyon Road prior to 1996.

(d) Whether Orland Arneberg can aver, at the age of 4 years and based on his own knowledge, that Camps Canyon Road was worked at the expense of the public and used by the public for a minimum of five years which includes a year before Mr. Arneberg was born is irrational and this affidavit is made in bad faith. Furthermore it is Mr. Arneberg's elected duty, and he has taken oath to obey and enforce the laws of the land to do so, to impartially consider the establishment of Camps Canyon Road, in the pertinent part, and it is not his duty, on his own testimony, to self proclaim the establishment of unrecorded prescriptive right of way, Camps Canyon Road, in the pertinent part, to be Public (Idaho Code § 40-203a prohibits this). Mr. Landeck has been to law school, we assume and it appears to be an admission of a weak case and an attempt to abuse the process of discovery that he brings forth such affidavits.

(e) The material fact here is there that is no agency record, no public evidentiary hearing, on which Defendants can base their conclusions and/or findings whether Plaintiffs do not dispute it or not. This is conclusory and Defendants bring forth no evidence to support this statement. Such attempts to deceive this Court (see *Opinion* at 9 (The Defendants have submitted affidavits from the commissioners of the Highway District which have stated that the Commissioners actions regarding Camps Canyon Road have been within the lawful authority of the Highway District")) are subject to sanction.

2) Although improved over the years, Camps Canyon Road follows the same approximate centerline now that it has since the early 1930's.

(a) Defendants do not define what approximate might mean, or how one might measure approximate, or estimate the significance of approximate. This is conclusory and is not probative and is meant only to add confusion. A taking is not limited by its size (see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (the space occupied by a cable t.v. box is considered a taking). It is the physical invasion and/or occupation of the land which defines taking and not whether it was approximately done or not done. Therefore Defendants' statement is meaningless and of no probative value. One could say that *Mathews* (see *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)) speaks to this and suggests that fairness is a matter of weighing the deprivation with the reliability of the process and probable value of new procedures and even the public interest of the social costs. However, Plaintiffs are not suggesting new procedures. Plaintiffs suggest that there are ample statutory safeguards and remedies for erroneous deprivations for which Defendants simply circumvent (establish the right of way before altering, including talking to the abutting owner, survey and describe, come to an agreement record and convey, keep records of Commissioners orders, etc.). One cannot conclude the process does not work until one tries it. Defendants' actions imply malicious compliance and arrogance. Defendants have not brought forth a cost/benefit analysis of the comparison of obtaining private property at fair market value (on the cheap) with paying the full

extent of common law damages (at the expense of the public purse—not at the expense of the Defendants to achieve their political and private goals and the additions to Mr. Landeck's pocketbook). They have not chosen to avail themselves of this defense with any evidence that the old procedures do not work and/or the new ones might be costly.

(b) Defendants statement is conclusory. Defendants bring forth no admissible survey to support Defendants conclusion. The Rimrock survey is in contradiction to the conclusion that the centerline of Camps Canyon Road is identical to what it was in 1911. It is irrational for Defendants to suggest that they can "accurately determine" the location of the public right of way (see Idaho Code § 40-302a(1)(b) "If the location of the public highway or right-of-way cannot be accurately determined due to numerous alterations...") through this aerial photo. "Approximate centerline" is not the intention of the statute and state legislature or of a per se taking.

(c) Plaintiffs object to the admission of the aerial photos as material evidence. The aerial photos of 1940 and 2004 are of questionable origin and validity. Mr. Hodge avers that the 1940 photo is from the Latah County Assessors office (*Hodge Affidavit,* at par. 8) and the Defendants only represent all the items in their Second Record Supplement as "Latah County, Idaho Records", and as such, have identified the source of the documents and/or photos for verification. However this aerial photo indicates that Doug Kelly owns the old mining claim in 1940 (if this is indeed a 1940 photo and Doug Kelly did not pick up the old mining claim to the north of the Harris place until 1944 (*Plaintiffs' Fourth Record Supplement*, Item No. 1, at 1-3). Further, the attempts by Defendants at the 3/21/07 meeting of the NLCHD Commissioners to bring forth this aerial photo as evidence (identified there as circa 1949 (see *Plaintiffs' Fourth Record Supplement*, Item No. 5, at 2-3) without first allowing Plaintiffs any attempt to analyze the data and to deny Plaintiffs any procedural due process by transcribable verbatim record of the meeting is exemplary of their contempt for any fair and democratic procedures. Plaintiffs object to the admission of this photo on the basis of its obvious inaccuracy to its date of origin.

(d) Without waiver of Plaintiffs objection to the admission as evidence of the aerial photos, Plaintiffs continue to state that an analysis of the photos, whether they are valid and/or of sufficient accuracy to determine movement of Camps Canyon Road, shows movement of the portion of the road in question and that the movement occurred between 1989 and 2004 (see *Plaintiffs Affidavit*, at par. 19, 20, and 23).

(e) Without waiver of Plaintiffs objection to the admission as evidence of the aerial photos and without waiver that a proper analysis of the photos shows movement, Plaintiffs object to the admission of the aerial photos as evidence as they are argumentative and without any probative value to "accurately determine" the location of the centerline of the Camps Canyon Road right of way. Neither of the photos is shown to be orthogonally rectified and many of these aerial photos are mosaics. The weight given to these photos must be greatly reduced to afford any fairness of determining the accurate location of the centerline of Camps Canyon Road right of way. The east property line of the 3+/- acre parcel was well known (see Ole Hanson Affidavit at 2, par. 7), and Mr. Hodge has no foundation for his claim and/or personal knowledge of the east property line to express that its location is debatable via a 1940 aerial photo showing someone arbitrarily drawing lines of farm lines on it.

(f) The Rimrock survey shows (as compared to the 1911 Deed description) that the centerline of Camps Canyon Road has moved 84+ feet to the north at its intersection with the east property line of the 3+/- acre parcel and 50 feet to the north at its intersection with the west property line of the 3+/- acre parcel (see *Plaintiffs' Third Record Supplement*, Item No. 4, at 2 (at 3/21/07 meeting of the NLCHD Commissioners Plaintiffs movement to Defendants).

(g) At 7, Mr. Hodge states that the County Road is a de facto monument for surveying purposes and the distances between the points on that road should take precedence over other calls in the 1911 deed. However the law determines the centerline of the road to be a monument, Plaintiffs see the logic in making such a claim and have requested this Court for an adverse evidentiary ruling against the Defendants for spoliation of evidence and Mr. Hodge's

testimony is in line with Plaintiffs' petition. This is supportive of Plaintiffs' claim that the Defendants' random alterations of Camps Canyon Road centerline without survey and/or accurate descriptions of the required lands for the alteration puts the road as a monument at risk and as well as an Idaho Statute as being overly broad and/or vague to allow for per se takings in the event that I.C.§ 40-2312, I.C.§ 40-1310, I.C.§ 40-605 or any other statute do not prohibit this action. Such statutory interpretations which would allow for the deliberate indifference to private property lines would require a rational basis to a legitimate governmental interest. Defendants have shown no relation to the public safety, morals, health, or general welfare that would justify such means. The civil process of eminent domain, surveying and recording are legitimate governmental interests and are the intended governmental interest and do not prohibit the legal acquisition of land for alterations. The alteration in an unrecorded prescriptive right of way, in the present case Camps Canyon Road, without a prior survey destroys a survey monument as per Mr. Hodge. This is illegal and furthermore the recovery of a lost monument requires a hearing, (see *Henrickson v. Nampa Highway District*, _____Idaho ____, (2004). This is in support of Plaintiffs overall objection to the wrongful procedures of the Defendants.

(h) At 8, Mr. Hodge suggests that the excess road frontage not to be measured along the road but somewhat randomly out into the Wagners or Plaintiffs fields according to a 1940 aerial photo. This can no longer be done as the road no longer extends into that area as the curves at the east end of the 3+/- acre parcel were straightened and the road bed was moved to the northeast. Mr. Swanson avers that the Defendants asked to straighten curves (see Swanson Affidavit) and the Defendants have admitted to straightening the curves and the straightening was done under the watch of Defendants Payne and Arneberg (see *Plaintiffs' Third Record Supplement*, Item No. 13, at 10-11, Interrogatory No.16). There is no probative value in asking a witness to suggest that an unreliable statistic, the road frontage of the 3+/- acre parcel, a fact to which no one disputes has been altered, is now reliable. To what purpose does Mr. Landeck subject Mr. Hodge to, to aver to a fact that Mr. Landeck knows to be inaccurate?

(i) At 6, Mr. Hodge faults Mr. Dunn for not including the road frontage in his survey. Mr. Hodge states that all the distances described in these distances need to be recognized and notes the east property line and the road frontage as not identical to the deed. Mr. Hodge conveniently leaves out the first call in the deed. The intersection of the west property line with Camps Canyon Road has moved 50 feet to the north. This is a fact that is in line with the undisputed facts that in 1996 the curves of Camps Canyon Road were altered and thus shift all lines to the north 50 feet (see *Plaintiffs' Third Record Supplement*, Item No. 3, at 16-17, Interrogatory Nos. 40 – 44; see *Plaintiffs' Third Record Supplement*, Item No. 1, at 3, Request For Admission No. 3, subpart c.). Plaintiffs made no attempts to influence Mr. Dunn in any way to make the survey come out a certain way. An Idaho Land Surveyor works for the public to make legal determinations of property lines, even though they may be paid by an individual. Furthermore, Mr. Dunn was chosen for his fairness and knowledge of the subject.

(j) Further Mr. Hodge also leaves out that the acreage on the photo reads 3.4 acres which is not in congruence with the deed description of 3 acres (see *Plaintiffs' Third Record Supplement*, Item No. 4, at 6) (Latah County Assessors map with deed which indicates the acreage to be 3 acres). Where do the extra 0.4 acres come from? Who is it that is making these acreage determinations? The southeasterly course of the outline of the south boundary of the 3.4 acre farm parcel is not the south property line of the 3+/- acre parcel (see Hodge Affidavit at 3, par. 8). The Swansons farmed the adjoining land by extending the farmable ground from the mutual southwest corner of the 3+/- acre parcel and the heading east and swinging south to avoid the grassy water draw at the bottom of the hill (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 2 (the same farm line continues through 1989). Mr. Hodge has no personal knowledge of those who have created this farm line or why they farmed as they did; there is no reason to conclude this southerly direction is a property line. This southeasterly course made a farm line which was inaccurately and/or made not indicative of a property line and hence the recording of the additional 0.4 acres. The actual property line heads due east from the southwest

corner of the 3+/- acre parcel (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 15 (the FSA aerial photo in 2007, shows the addition with computerized technology the addition of more accurately placed property lines which enables the FSA to better estimate the acreage and who owns what). The deed calls for a due east direction of the south property line and Mr. Hodge now denies his own recommendation that all calls be recognized (see Hodge Affidavit at 3, par. 6).

(k) At 8, Mr. Hodge does not indicate where on the photo that he sees Charley Harris' driveway through the 3+/- acre parcel. If he is referring to the light colored area at the east end of the parcel that is where the seasonal runoff creek dumps into the road ditch. It is not the old driveway access as it is the drainage of the grassy draw (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 4, 12, 13, and 14 (photos showing the hardened area where the original road ran and where the runoff drainage met the road)).

(l) Aerial photos are informative but they are limited by a lot of variables. Mr. Dunn went out of his way to accommodate Mr. Wagner and investigated whatever evidence Mr. Wagner would bring in. Idaho Code § 31-2709 reads, "SURVEYS MUST CONFORM TO UNITED STATES MANUAL. No surveys or resurveys hereafter made shall be considered legal evidence in any court within the state, except such surveys as are made in accordance with the United States manual of surveying instructions, the circular on restoration of lost or obliterated corners and subdivisions of sections, issued by the general land office, or by the authority of the United States, the state of Idaho, or by mutual consent of the parties." The only survey here is the Rimrock survey; Mr. Dunn's credentials are impeccable. If Mr. Hodge truly wishes to confront Mr. Dunn's CONFORM[ANCE] TO UNITED STATES MANUAL, let him bring in a survey of his own. There is no probative value in Mr. Landeck's attempt to subvert the issue of whether the Defendants arbitrarily and capriciously issued and/or continued and/or failed to revoke the first Wagner driveway access permit, and/or whether they abused their discretion in doing so, and/or did so illegally into an issue of whether two surveyors may have reasonably

considered the road frontage of the 3+/- acre parcel differently when the issue is not even disputed. The material facts are; (i) The curves were straightened and the road bed was relocated in 1996; (ii) how much is not recorded; (iii) The Rimrock survey is admissible evidence; (iv) The Wagner and/or Payne "surveys" are not admissible evidence; (v) The shortest distance between two points as in the intersection of the east and west property lines with Camps Canyon Road is a straight[ened] line; (vi) What Mr. Hodge opines is put in doubt as to him being accurately informed (what does Mr. Hodge opine if he is informed that the centerline of Camps Canyon Road has been altered—does he then contend the road frontage call prevails; or does it fall out of the equation?). As Mr. Hodge opines that all distances be recognized described in the instruments and this may reasonably be accomplished by the recognition of the undisputed fact that Camps Canyon Road has had its physical location and centerline altered in 1996. Furthermore, Defendants suggestion here that maybe two surveyors might disagree on how to do the survey is admissible without a survey by Mr. Hodge and the subject is immaterial (see *Owen* above, (a good faith defense is not relevant)).

(m) Plaintiffs on 4/12/06 requested that the Defendants and the Wagners obtain a professional survey (see *Plaintiffs' Third Record Supplement*, Item No.10, at 1) (Plaintiffs request Defendants get a professionally done survey and Defendants relied on the surveys that Mr. Wagner and Dan Payne and others performed ((see *Plaintiffs' Third Record Supplement*, Item No. 1, at 12, Request for Admission No. 27 (Defendants knew Wagner had done his own survey). Neither Mr. Hodge and/or the Defendants have a survey on which may be considered legal evidence and no one says they cannot conduct their own survey. Mr. Dunn's survey stands as the only legally admissible evidence. The Dunn survey showed the Wagner driveway access to be wholly on Plaintiffs' land and the Defendants (as final policy makers) decision to issue and/or to continue and/or not to revoke the first Wagner driveway access permit was arbitrary and capricious, an abuse of Defendants discretion, and/or illegal. They issued, continued, and/or failed to revoke the first Wagner driveway access permit which was trespassing based on

insufficient evidence in the record and/or on not legally admissible evidence. Furthermore, they knew the centerline was no longer accurate as they had altered it and their attempt now to say that the centerline issue is now debatable is an admission to the arbitrary and capricious acts/failures to act. Defendants are estopped from claiming both (i) the evidence in the record is substantial enough to support the Defendants, as final policy makers, issuance, continuance, and/or failure to revoke the first Wagner driveway access permit and (ii) now to claim that it is debatable.

(n) Rather than making the deed description meet the wants of the Defendants, there is a plausible explanation for which all variables fit and/or are allowable, all survey lines; as well as the aerial photos. Furthermore, it not only fits with what the Plaintiffs allege and with what the Defendants admit to—Camps Canyon Road has been altered, straightened, and widened. Its centerline in the pertinent part is not where its centerline originally was. Indeed this still leaves room for discussion of how much movement has occurred. That is where the argument lies; not in whether the right of way was changed and continues to be altered; but how much it has been changed; however unimportant that might be (see *Loretto* (small is not relevant, in per se invasions and/or occupations)..

(o) Plaintiffs have done an analysis on these and other photos under the assumption that what the Defendants averred to on 3/21/07 should be accurate (see *Plaintiffs' Third Record Supplement*, Item No.5, at 2-3 (Defendants and Defendants' counsel state that the aerial photos should show the alterations Plaintiffs allege and without any rational basis for their claim, as to how they made the determination that there was no evidence of movement of Camps Canyon Road in the aerial photos). In doing so Plaintiffs have found the results to show that the road location has changed as Mr. Dunn's survey would suggest and Defendants admit to having altered (see *Plaintiffs' Third Record Supplement*, Item No. 4, at 1 through 9 (Plaintiffs' letter explains the changes in location of the east and west property lines of the 3+/- acre parcel with Camps Canyon Road); see also *Plaintiffs' Third Record Supplement*, Item No. 5, at 2-3

(Defendants attest to accuracy of photos without rational basis to substantiate a claim that the photos show no movement in the road); *Plaintiffs' Third Record Supplement*, Item No. 6, at 5-6 (Plaintiffs were allowed time on the agenda to show their analysis of the aerial photos which showed movement of the road and Plaintiffs are then denied the right to show the evidence).

(p) There is a more reasonable answer to the problem posed by Mr. Hodge—that the road frontage distance be recognized and this recognition can be granted without the sacrifice of the other measurements and angles. This present case is not premised on the fact that two reasonable minds can differ, it is premised on the claim of the Defendants that they can decide a debatable question on an invalid policy and make conclusions and findings arbitrarily and capriciously not supported by the evidence in the record and can after the fact create a record to support their claims. One only needs to consider that Defendants have admitted to making changes in the road and that the alterations are significant enough to show both the loss of a quarter acre of land area and a loss of 200 feet of road frontage and that these alterations may only show as slight variations in the path of a line across the aerial photos (the area on a map scaled to be 40 acres = 4 square inches would require a total of 0.25 square inches to show the loss of acreage from the original deed to the Rimrock survey). Furthermore, Defendants' denials of significant change are irrelevant as the U.S. Supreme Court in states that the physical space a small cable T.V box occupies is a taking (see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

(q) John Dunn, the Latah County Surveyor, who performed the Rimrock survey of July 2006, and whom Mr. Hodge reprimands for not including a destroyed measurement in his survey, was in the same situation that Plaintiffs are in now and that Bob Wagner also shared in. All three of us are at the mercy of an agency which is deliberately indifferent to what is valid private property and Defendants arbitrarily alter lines within easements they have arbitrarily determined and all three are then required to prove what is no longer there or adequately recorded whether it is a straightened road, a driveway access, or a fence. If Mr. Dunne writes on

his survey "Camps Canyon Road (County road) is shown with a 50 foot wide prescriptive R/W. The physical location of the road is on a side hill and appears to be stable with little, if any, change occurring over time", he must make some basic assumptions whether Mr. Arneberg chooses to be truthful or not about previous alterations (see *Plaintiffs' Third Record Supplement*, Item No. 5, at 3 ("Orland Arneberg said he's lived out there his whole life and can testify that the road hasn't moved.") or if Dan Payne can successfully conceal and/or adequately destroy the necessary evidence (*Plaintiffs' Third Record Supplement*, Item No. 6, at 7 "Dan Payne said that unless Mr. Halvorson could prove the highway district pushed the tree through the fence he should drop the issue"). Any investigation has a beginning and as so assumptions are made, whether such assumptions are out of the prevue of Mr. Dunn (he is not the one who determines the width of the easement of Camps Canyon Road, nor is he an archeologist) or simply a matter at where a rational investigation begins. Mr. Dunn notes his beginning assumptions and that he will "show[n]" his findings as a 50 foot prescriptive right of way in a stable environment.

In regards to Defendants' " ADMISSIBLE MATERIAL FACTS RELEVANT TO PLAINTIFFS' CLAIMS ('Facts')" # 1 &2, **it is not clear as to what Mr. Landeck intends by questioning the validity of Mr. Dunn's survey or the implications that there might be reason for dispute whether the Defendants had reason to believe that the bare area on a aerial photo at the east end of a arbitrarily drawn farm field line which was the seasonal creek (**see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 4, 12, 13, and 14 (photos showing the hardened area where the original road ran and where the runoff drainage met the road)), **to be Charlie Harris' historic driveway when his summary judgment is to be denied on such disputed facts and Plaintiffs petition for summary judgment is to be granted by those disputes he proposes. However it is that Mr. Landeck seeks to prove his Defendants might be reasonably negligent, he is again proving Plaintiffs case that that reasonable negligence as viewed as a "not unauthorized" action is not relevant to a constitutional tort. Once again Mr. Landeck must come forth with a rational basis to a legitimate**

governmental interest to burden Plaintiffs with carrying the load of the Wagners' driveway access and/or the additional width of the road. There is no legitimate governmental interest to deny Plaintiffs their 5th Amendment rights and/or to be reasonably negligent.

3) Mr. Payne's conclusions and findings are arbitrary and capricious, an abuse of the Defendants' discretion and/or illegal. Idaho Code does not mandate an unrecorded prescriptive right of way be fifty feet wide nor does it mention a 25 feet from centerline right of way and if it did it would be unconstitutional (see *Keidel V. Rask,* 304 N.W. 2d 402 (N.D 1981); see also *Barfnecht v. Town Board of Hollywood Tp.*, 232 N.W.2d 420 (Minn. 1975)). Defendants must seek a constitutionally valid interpretation of the Idaho statutes ("An appellate court is obligated to seek an interpretation of a statute that will uphold its constitutionality. *Cobb*, 132 Idaho at 197, 969 P.2d at 246. In addition, 'a statute should not be held void for uncertainty if any practical interpretation can be given it.' *Id.* at 197, 969 P.2d at 246", *State of Idaho v. John Doe,* ___Idaho___, (2004) (Opinion No. 69)). Plaintiffs have alleged that Defendants policies, customs, standard operating procedures and/or exertion of their governmental powers are invalid, facially and/or as applied to Plaintiffs (see *Parratt v. Taylor*, 451 U.S. 527 (1981); and see *Zinermon v. Burch* 494 U. S. 113 starting at 124; see also *Zimmerman v. City of Oakland*, 255 F.3d 734, (9th Circuit, 2001); see also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-436 (1982) (availability of postdeprivation remedy is inadequate when deprivation is foreseeable, predeprivation process was possible, and official conduct was not ``unauthorized''). Mr. Payne's opinion is conclusory. Mr. Payne shows no criteria on which he relies on to make a judgment that 50 feet implies public safety and or convenience, nor is any such judgment rationally related to the burden placed upon the servient estate (see *Agins v. Tiburon,* 447 U. S. 255, 260 (1980), ("The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest"). There is no de minimis applicability in this situation of where such gains from the application of the statute are being weighed against the administrative

burdens to the Plaintiffs, as implied authority to make cost-benefit decisions must be derived from statute and not from a general de minimis doctrine. Mr. Payne's affiances here are conclusory and not meant to lead to admissible evidence.

4) Same as 3) above; This is conclusory and not meant to lead to admissible evidence Mr. Payne simply states that he is following the policies, customs of the Defendants. This is repetitious rebutted testimony . Mr. Payne's Affidavit confirms there is a dispute over the permission of Mr. Swanson (see *Ed Swanson Affidavit* at par. 7). Defendants' conclusions and findings in Mr. Payne's inference is that Mr. Swanson conferred with him at Mr. Payne's initiation so that Mr. Payne could make Mr. Swanson aware of the abusive action of which Mr. Payne was about to undertake is somewhat obscure (see *Payne Affidavit*, par. 4 and *Arneberg Affidavit*, at par. 10); *Defendants' Second Record Supplement*, Items 2 and 3, (Swansons had fee in the land in 1996 and Plaintiffs acquired fee in the land; colorable evidence that the Swansons then and the Plaintiffs now have a right to a meaningful response at a meaningful time; however it is that Defendants arrogantly believe they absolutely rule the road. The question here is do the Defendants have the right to alter the road not only at their decree, but also can they do it without engaging the abutting land owners in affording them due process and equal protection or to even ignore the intentions of the abutting landowners when they seek them out. Whatever it is that Mr. Payne and/or Mr. Arneberg believe about the issue of whether due process and equal protection are required or not is not relevant to the question; it is strictly an objective question of well established law and how a reasonable person would view it—not Mr. Arneberg or Mr. Payne. These affidavits are simply their conclusions of law and not evidence of lack of dispute. For the Defendants to prevail they must show no requirement of due process not simply admit they didn't provide it. As arrogant as this stance is it is also frivolous. Defendants have brought forth no substantial evidence here to support any theory that they did not need to provide Mr. Swanson then or the Plaintiffs now due process and the record runs contrary in this case as in all instances the Defendants are intending to adversely effect a land owners' property and liberty

rights with per se violations (at this point the only defense Defendants have is to claim they are quelling a nuisance (see Idaho Code § 22-4504 (proscribes such declaration). Defendants are liable, in their official capacities for their invalid policies (see *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992) (per curiam), cert. denied, 114 S.Crt. 1345 (1993) (Municipal liability may be established in one of three ways). Defendants are liable in their individual capacities weighed on an objective standard of reasonableness (see *Anderson v. Creighton*, 483 U.S. 635 (1987) (held, "...may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in the light of the legal rules that were clearly established at the time the action was taken", citing *Harlow v. Fitzgerald*, 457 U.S. 800)). Defendants have only confirmed their official and individual liabilities and hang both heavily on I.C. § 40-2312 for the ongoing harmful issue on the north side of the road, as they rely heavily on an mandated 50 foot—25 feet from centerline right of way to preclude due process and/or equal protection for the widening and/or property damage in widening and/or encroachment of a fence. On the south side of the road the Defendants rely on I.C. § 40-2312 to authorize the issuance of, continuation of, and/or the failure to revoke of a driveway access permit for a permit wholly on Plaintiffs' land and that denial of Plaintiffs' objections to the actions/failures to act adverse to Plaintiffs' property and liberty rights and to the positive guaranties of the U.S. Constitution are rationally related to a legitimate governmental interest. Defendants' affiances provide no rational basis for their findings and conclusions; they are conclusory, and are unreasonable and not rationally related to a legitimate governmental interest and/or bear no relation to the public health, safety, morals or general welfare and are arbitrary and capricious, an abuse of Defendants' discretion and/or illegal. More specifically:

(a) Second Affidavit of Dan Payne, at 4; is an admission of the issue for which Plaintiffs allege as to be harmful, the only step necessary to grant summary judgment in favor of Plaintiffs is, as a matter of law, to determine if such actions/failures to act require the due process of law, an evidentiary public hearing in this case (see *Williamson County Regional Planning*

Comm'n v. Hamilton Bank, 473 US 172, 193 (1985) (The matter of the "issue that inflicts the actual, concrete injury" determines the necessary proofs); see also *Harris v. County of Riverside*, 904 F.2d 497 (1990);

(b) Arneberg Affidavit, at 10; Defendants' policies, customs, standard operating procedures are invalid as Defendants fail to circumscribe their broad authority to determine right of way boundaries and legal limitations with the statutory safeguards of the requirements of due process and/or the equal treatment under the law (see the 5th Amendment to the U.S. Constitution), legally conducted professionally done surveys (see I.C. §§ 40-1310 and 605 and I.C §§ 31-2707 and 2709), accurate descriptions of the lands required for the alterations(see I.C. §§ 40-1310 and 605), the recording of the commissioners' orders for laying out of and for the alteration itself(see I.C. §§ 40-608), and for recording of and conveying of the agreements with abutting landowners(see I.C. §§ 40-2302), remedies for erroneous deprivations (see *Zinermon*);

(c) Defendants Second Record Supplement, Items 2 and 3; Defendants have provided evasive answers and have failed to answer Plaintiffs' discovery requests for the information, documents, agency records, facts and opinions of fact on which Defendants base their findings and conclusion of law. There is nothing in either the Wagner or the Plaintiffs deed which says more than a public, county road passes over the SE ¼ NE ¼ and the centerline forms the northeast boundary between the two. This boundary has a determined length which starts and ends at two determinable points that is where two imaginary geographic lines cross said road. If said road is altered and these monument points are destroyed by moving the centerline of the road are these points then not retrievable, simply because they are now 50 and 84 feet, more or less south of the now centerline of Camps Canyon Road. One could by meets and bounds discover these points; yet no rational person would say the road is still there, nor would he say that a straightened line is as long as a convoluted one. How does the road gets from point a to point b without certain statutory safeguards including positive constitutional guaranties, and remedies for erroneous takings? It is unreasonable to conclude that this type of clandestine

alteration was the unambiguous intent of the legislature when it enacted I.C. § 40-2312. Nor was this activity, which would clearly be banned in the broad daylight of the open court room (a waiver of constitutional right requires both knowledge and intent to do so), be the unambiguous intent of the Idaho State legislature when it enacted I.C. §§ 40-1310 and 605 and prohibited the taking of private land without prior survey, accurate description of the lands required, and admonishing the commissioners to endeavor to come to an agreement with the abutting landowners. None of those statutes carries the inference that the government official may tell the abutting landowner of his intended adverse actions, if it be convenient to do so, and either way the official is authorized to do as he so decides, however capriciously, irrationally and/or arbitrarily he decides; with the mandate that if she should complain the official shall have the authority to ignore her with the unabashed deference and comity of the court.

5) Same as 3) above; Defendants conclusions and findings are no supported by substantial evidence in the record and/or run contrary to the record of this case and the agency record and/or are unreasonable and not rationally related to a legitimate governmental interest and/or bear no relation to the public health, safety, morals or general welfare and are arbitrary and capricious, an abuse of Defendants' discretion and/or illegal. Defendant Payne's affiances are to be stricken for improperly augmenting the agency record. More specifically:

(a) Payne Affidavit, at 5; Defendants' affidavit is made in bad faith; Dan Payne supplements his required record keeping to fit his claims. There is no evidence in Defendant Payne's log to substantiate the specific claims he makes. There is no evidence in the records of the agency to support any conclusion that Defendants were in compliance with the laws (see I.C. §§ 40-1310 and 605; see I.C. §§ 40-608; see I.C §§ 31-2707 and 2709, and see I.C. §§ 40-2302).

(b) Defendants records and logs are admissible evidence, however empty they may be.

6) Same as 3) above; Defendants conclusions and findings are not supported by substantial evidence in the record and/or run contrary to the record of this case and the agency

record and/or are unreasonable and not rationally related to a legitimate governmental interest and/or bear no relation to the public health, safety, morals or general welfare and are arbitrary and capricious, an abuse of Defendants' discretion and/or illegal. More specifically:

(a) Payne Second Affidavit, at 4; Defendants' affidavit is made in bad faith; Dan Payne supplements his required record keeping to fit his claims. There is no evidence in Defendant Payne's log to substantiate the specific claims he makes. There is no evidence in the records of the agency to support any conclusion that Defendants were in compliance with the laws (see I.C. §§ 40-1310 and 605; see I.C. §§ 40-608; see I.C §§ 31-2707 and 2709, and see I.C. §§ 40-2302).

(b) Defendants records and logs are admissible evidence.

7) Payne Affidavit at 7; If you take Mr. Payne's two previous affiances in 5) (see Payne Affidavit, par. 5) and 6) (see Payne Affidavit, par. 6), specifically that he added 4' to the north side of Camps Canyon Road in 1996 and again added 4' to the road in 2005 and 2006 and then subtract those additions from what Mr. Payne now ascribes to be the width of the road; that 21 feet – 4 feet -4 feet = 13 feet; and then subtract from that the additional 2 feet of width (see Payne Second Affidavit, par. 4); that is 13 feet -2 feet =11 feet. One now arrives at what Plaintiffs state the original right of way was in width (see Plaintiffs Affidavit submitted in support of partial summary judgments and other motions submitted January 26, 2009 (*Plaintiffs' Affidavit)*, at 8; The width of the road was less than 12 feet including supporting structures. Defendants have no evidentiary hearing and/or substantial evidence in their record to support a finding and conclusion of a fifty foot—25 feet from centerline right of way. Prior to all these alterations Camps Canyon Road was a narrow, little used, canyon road; it was steep and winding at the west end of the SE1/4 NE1/4. These facts are undisputed. The question is, as a matter of law, can this original **unrecorded** prescriptive right of way be mandate to have a width of 50 feet—25feet from centerline?

8) and 9) Payne Affidavit at 9 and at 10; I.C. §40-114 (3) "'Maintenance' means to preserve from failure or decline, or repair, refurbish, repaint or otherwise keep an existing highway or structure in a suitable state for use." There is no reference at all to widening, straightening, altering, or changing in anyway, in fact the implication of maintenance is to preserve the present condition and not allow it to change. The intention of keeping the physical extensions of a right of way distinguishable from the required activities of repair and refurbishment is apparent and consistent (compare to I.C.§ 40-605). Mr. Payne brings forth no evidence of or a rational basis for the need for enveloping additional land without the proper interference with Plaintiffs property rights—eminent domain. There is no apparent need to increase the burden on the servient estate by enveloping more land than is necessary. The dominant estate can effect repairs to the road without any increase in the burden to the servient estate but simply asking and communicating what repairs are necessary. If there is reason to, that is a rational basis for increasing the burden of the servient estate, the legitimate governmental interest is to spread that burden amongst the public (see *Pennell v. City of San Jose*, 485 U.S.1, 9 (1988) ("'[i]t is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U. S. 304, 482 U. S. 318-319 (1987) (quoting Armstrong v. United States, 364 U. S. 40, 364 U. S. 49 (1960))"; See also *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893); See *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (stating that the Due Process Clause is intended, in part, to protect the individual against "the exercise of power without any reasonable justification in the service of a legitimate government objective"). Plaintiffs land and/or fence is neither immoral, unsafe, unhealthful, nor do they cause a diminution in the general welfare of the public or the Wagners; Defendants have no rational basis for regulating any harmful effects of the land use provided Plaintiffs by the County of Latah. Defendant Payne brings forth no

rational basis for the increase burden to the servient estate, simply a conclusion that the District "must maintain".

In regards to Defendants' "ADMISSIBLE MATERIAL FACTS RELEVANT TO PLAINTIFFS' CLAIMS ('Facts') #s 3 through 12, **it is not clear what Mr. Landeck' s intentions are, as he seems to argue just for the sake of arguing. Mr. Landeck's argument simply begs the question, "Is the envelopment of more land permissible without due process and equal protection?" Whether it is called width, widening, straightening, altering, "to maintain" and/or "to improve", the name does not mandate an action prohibited by law and constitution. The "as is, where as" precedent conditions must first be determined and established before the action is permitted as it is a per se taking. Furthermore all Mr. Payne's affiances are conclusory. Mr. Payne brings forth no points of discussion of why maintenance requires extension of the easement and hence the increase burden on the servient estate. He simply says in effect maintenance mandates a 50 foot—25 feet from centerline right of way. The Defendants bring forth no public opinion that for their convenience or easement of travel maintenance or statute mandates a 50 foot-25 feet from centerline right of way, that maintenance can not adequately be performed by reasonable persons and permission of landowners. What is at stake is the clandestine extension of width and burden upon the servient estate without due process of law. Furthermore, Mr. Payne and Defendants ' counsel go out of their way to state that none of these matters have anything to do with the public (see Defendants' Brief at 8, par. 11 ("While the fence does not interfere with the public traffic on the traveled surface of Camps Canyon Road, the District's maintenance activities, primarily grading and snow removal, are affected by the fence's placement)). There are no complaints from the public listed.**

10) **"The entire stretch of Camps Canyon Road used by the District for public highway purposes in the vicinity of Plaintiffs' real property, including cut slope to fill slope**

lies within a 50 foot right of way." This is as Mr. Landeck, as an educated lawyer, is so fond of saying, "intermittently conclusory, speculative, argumentative, generalized, repetitive and disorganized" (see *Defendants'* Brief at 2) statement, which "relies on factual assertions that are not admissible in evidence, primarily for lack of foundation and hearsay" (see Defendants' brief at 2) and are not supported by substantial evidence in the agency record and for which Defendants have provided no rational basis or relation to a legitimate governmental interest (Plaintiffs, having no legal education, do not require anything is excess of what a reasonable person might expect of governmental officials—a rational basis). To the extent that Camps Canyon Road lies on a naturally occurring slope as it traverses Plaintiff real property, the road surface would logically require support as it is not in any way suspended and detached from the physical structure of the earth beneath it. Furthermore, that supporting slope itself is not in any way suspended from or detached from the rest of the naturally occurring slope at approximately 50 feet or the draw beneath the slope itself. It is then no further stretch of the imagination to see that indeed the County of Latah as well as the State of Idaho is supportive of that draw and naturally occurring slope also. These matters, such as the County of Latah and the State of Idaho are defined on the basis of their limitations, that is, they have a rationally and/or legally defined border, somewhat permanently established. If the Defendants are saying that the border or limitation of Camps Canyon Road is legally established at 50 feet, this has no relevance to the slopes above or below the road surface as, it is a matter of law and this question has previously been discussed as being not bound in any statute and is arbitrary and capricious an abuse of defendants discretion and/or illegal. On the other hand if Defendants are saying that the support of the road ends at 25 feet from centerline on the downhill side or that the slope which extends above the road surface is supportive, then these inferences or statements are irrational conclusions and findings without substantial evidence in the record and run contrary to any sense of rationality and are therefore arbitrary and capricious an abuse of defendants discretion and/or illegal. Plaintiffs have in no way sought to interfere with the status quo of the support of Camps

Canyon Road as it traverses their land. The complaint Plaintiffs have is that the Defendants have admitted to increasing the burden on Plaintiffs land (both in the road surface itself as well as the support that is required for an ever increasing size of road); and as the Defendants admit (see *Payne Second Affidavit* at 4). Plaintiffs' complaint is that this is, as are other matters, an improper interference with Plaintiffs' property rights as it is done without the due process and/or equal protection of the law. Defendants' statements and affiances are conclusory and not meant to lead to admissible evidence.

11) and 12) **Snow plowing and graveling and road grading as enveloping more land and damage to Plaintiffs' fence;** Once again Defendants admit to (Payne Affidavit, at 12) the issue to which Plaintiffs ascribe to as being harmful and egregious. The only step necessary to grant summary judgment in favor of Plaintiffs is, as a matter of law, to determine if such actions/failures to act require the due process of law (see *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 US 172, 193 (1985) (The matter of the "issue that inflicts the actual, concrete injury" determines the necessary proofs); see also *Harris v. County of Riverside*, 904 F.2d 497 (1990). Plaintiffs have alleged that Defendants have physically invaded their land and damaged their fence. These actions are not disputed. Furthermore, Defendants argumentatively state, as here that Plaintiffs' fence lies within their right of way. There is no dispute that Plaintiffs have fee in the land in question. The issues then lie in whether the land in question lies within the right of way and if such right of way exists do the Defendants have the right to encroach and injure Plaintiffs fence. Defendants do not have substantial evidence in their record to support such a claim that they have a 50 foot—25 feet from centerline right of way; and, all evidence in the record of this case and as well as the agency record consist on repetitious, rebutted testimony of Defendants claims, and all evidence in this case as well as the agency record runs contrary to the claims of the Defendants and most importantly so Defendants have stated emphatically so that no due process and/or equal protection is required. They bring forth no rational basis for the burden they place on Plaintiffs, Plaintiffs' land nor do they show

any ends which would justify the means they take—to physically invade and occupy Plaintiffs land without any recourse available to Plaintiffs. When their encroachments now have surpassed the intended protection of Plaintiffs' buffer there may be reason for the defendants to halt their intrusive, vindictive behavior.

(a) In the first instance Plaintiffs fence is protected from malicious injury by statute. Defendants policies, customs, standard operating procedures are invalid as to the extent that they are proscribed by law (see *Czaplicki v. Gooding Joint School District No. 231,* 116 Idaho 326, 775 P.2d 640) ("[D]iscretionary function does not shield negligent implementation of statutes..."); see also *Owen*, above).

(b) Furthermore, this action requires notice and hearing before action is taken—due process is required by I.C. §§ 40-2317, and 2319, many legal doctrines, including but not limited to the 5th Amendment of the U.S. Constitution. Defendants claims of reasonable and diligent behavior is denied by their own admissions as Camps Canyon Road as an unrecorded prescriptive right of way has a history of probably in excess of 100 years. During that time until 1996 maintenance and use resulted in a 11-12 foot road surface including supporting structures (calculated by Defendants' own figures; average width of the road now=21 feet (see Defendants' Brief, at 7, par. 7) minus 2005 and 2006 and 1996 additions of 10 feet (see Defendants' Brief, at 7, par. 5 and 6). During the years (2005-2006) of Mr. Payne's diligent maintenance and under the policies of the NLCHD, the width has grown by six feet (see Payne Second Affidavit, at 4, 5; see also *Defendants' Brief*, at 7, par. 5 and 6); at that rate the road surface would be well over three hundred feet now (100/2x6=300). Defendants deny their disclaimer—absent special circumstances—it is apparent circumstances are other than they were. There are no exigent circumstances. Defendants' authority "to improve" and "to maintain" is unstoppable. Defendants claims are arbitrary and capricious, an abuse of Defendants discretion, and/or illegal. Plaintiffs' fence as well as Plaintiffs' buffer is wholly northeast and beyond the original road surface and supporting structures and is wholly northeast and beyond the original line fence and

is northeast and beyond the original 25 feet from centerline right of way if such right of way existed is most if not all save for a small section northeast of the old logging road and the Plaintiffs left the buffer to protect their fence and allow for snow removal, adequately "sized" for the road accomplished by the Highway District in 1996 (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 16 (photos showing the area left by Plaintiffs and as already reduced by the extensions to the road by Defendants and as photographed in 2007)) and not at all required by Plaintiffs to leave. Plaintiffs could have built their fence at the edge of the road (see *Ed Swanson Affidavit*, at par.12).

(c) "That is, given the steepness of the slope on Plaintiffs' property, it is virtually impossible to properly maintain Camps Canyon Road without some gravel or snow reaching Plaintiffs' fence" (see *Defendants' Brief* at 8, par. 11). First of all, Plaintiffs are not talking about a small amount of incidental snow (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 8, and 9 (photos showing the pushing of snow with deliberate indifference into the fence, winter of 2007-8). Secondly, Plaintiffs and the neighbors plowed the snow on Camps Canyon Road for years without difficulties (see *Plaintiffs' Affidavit* par. 2). Third, most of the several miles of fences that Plaintiffs maintain are in the South Latah County Highway District. Of the mile and half of fence on this farm, all is out of the reach of the NLCHD save for this 700 feet (see *Plaintiff's Affidavit* par. 27). This stretch of fence requires more time and expense to repair then at least a mile of fence unexposed to the Defendants. If Defendants have reached an operational conclusion that it is indeed "virtually impossible", excluding any malicious compliance, "to properly maintain", then their approach to widen the road and use up Plaintiffs' buffer rather than to maintain it as intended for snow storage is irrational. If one does not have space enough for storage for snow now why would you both increase the need for more storage by widening the road (more road=more snow) and decrease the availability for the storage already needed by widening the road (more road =less buffer)? "While the fence does not interfere with the public traffic on the travelled surface of Camps Canyon Road, the District's

maintenance activities, primarily grading and snow removal, are affected by the fence's placement" (see *Defendants' Brief* at 8, par. 11). Plaintiffs' land and fence is not unsafe, unhealthful, immoral, nor does it cause a diminution in the general welfare of the public. Defendants have many options. The choice they take is illegal to damage the fence rather than follow the statute, give notice and/or hold evidentiary hearing on the width of the easement. This is deliberate indifference erroneous deprivation.

13) through 18) **The first Wagner driveway access permit, the south and the east property lines of the 3+/- acre parcel (Plaintiffs address Defendants statements of material facts without waiver that Defendants measurements and claims of real property lines are not base on relevant evidence which would lead to admissible evidence; Defendants have not submitted any surveys (see I.C. § 31- 2709):**

(a) Defendants' counsel and Defendant Payne seem to relate difficulties related to the south property line of the 3+/- acre parcel. Although the south property line is less involved in the *Complaint* Plaintiffs have with the Defendants wrongfully taking of Plaintiffs' land, it is a matter which should also be addressed (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 4, 12, 13, and 14 (photos showing the south property line as established by the Rimrock Survey—marked by the posts—and the original line—as marked by the field line). Mr. Wagner had difficulty in establishing the position of the south property line due to a lot of possible reasons; he started from a point not in section 15, he had to use his magnetic compass under a 15000 volt power line, and had to confront an 8 foot embankment (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 17 (photo looking south along the east property line; with Mr. Wagner's "post" in the distance at the edge of the road, showing how far he was off in his survey).

(b) Furthermore, the 3+/- acre parcel is tied to the centerline of Camps Canyon Road as a flea to a dog's tail. Whenever the centerline of the unrecorded prescriptive right of way waged so went the 3+/- acre parcel as no recorded survey of the 3+/- acre parcel was found

either. The shift in the south property line was significant. However it is that the intersection of the west line of the SE1/4 NE1/4 of section with Camps Canyon Road has changed over the years (see *Plaintiffs' Third Record Supplement*, Item No. 1, at 3, Request For Admission No. 3, subpart c.; see *Plaintiffs' Third Record Supplement*, Item No. 3, at 16-17, Interrogatory Nos. 40 – 44; (Defendants have altered Camps Canyon Road several times and altered the centerline; see Second Payne Affidavit at 2 and 3); and, with the undisputed fact that the road in the pertinent part was essentially a narrow, little used and stable steep canyon road until 1996 (see Plaintiffs' Affidavit at 2-3, par. 8; see Joe Yockey's Affidavit, at 2, par. 8) and, that most other parts of Camps Canyon Road in section 15 remained so until 2005. For all intents and purposes the major shift in that intersection, as is supported by the evidence, occurred in 1996 and absent any other known alterations; and, without any survey or accurate description of the lands required for said alteration in 1996, and thus no recording of survey and/or agreements or conveyance occurred, resulted in the shift of the southern property line of the 3+/- acre parcel to the north by approximately 50 feet. Had the Defendants done a survey and recorded the results in 1996, the majority of this shift could have been avoided (see Hodge Affidavit, the road is a monument). This emphasizes Mr. Hodge's point that the road lies as a monument and requires the respect of the Highway District. This also emphasizes that the Wagners were also victims of the Defendants. This also emphasizes the difficulty Mr. Dunn encountered with conducting the survey. Whether the Wagners need to be joined to this action is for the Court to decide. At this point Plaintiffs rely only on the fact that the determination of the post Mr. Payne refers to was not based on a professionally done survey and does not appear to lead to admissible evidence for whatever reason Defendants rely on it. Defendants' description of the south property line and the land north of Mr. Wagner's post, "North of that post was an old driveway that used to lead to a home and outbuildings on Mr. Wagner's property" (Dan Payne, see *Defendants' Brief* at 9, par. 13) may be disoriented in direction. North of Mr. Wagners' post lies the present County Road; fifty feet across the County Road lies yellow pine (ponderosa) trees in excess of 100 years old

(see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 14 and 2 (photo looking northeast from Camps Canyon Road showing 100 year old pine trees north of where Mr. Payne says Charlie's old driveway was north and/or in the middle of those trees)). Mr. Payne may mean west instead of north as the east property line lays approximately 50 feet west of Mr. Wagner's post and 104 feet north along that line is where the east property met the centerline of the road (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 4 (photo looking northeast from Camps Canyon Road showing east property line in the middle of the photo about 40-50 feet due west of Mr. Wagner's post). West of the property line and in close proximity to it Charlie's driveway entered the road heading almost due north (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 4 (photo looking northeast from Camps Canyon Road showing approximate position of the intersection of Camps Canyon Road with the east property line of the 3+/- acre Parcel as it was when the road was higher on the slope)).

(b) The east property line of the 3+/- acre parcel is a different matter, as it remains geographically unchanged in position from east to west and its presence is a well known fact. Any change here is based on the accuracy of technological advances and Mr. Dunn's thoughtful consideration to the variables involved. It may have been extended and started in a different place as the southern property line was shifted north and the curves at the east end of the 3+/- acre parcel were straightened in 1996 (see *Plaintiffs' Third Record Supplement*, Item No. 13, at 10-11, Interrogatory No. 16). These two facts alone account for more than 100 feet of the loss of road frontage as the change in the curves resulted in the road and the east property line paralleling each other for a short distance and the property line had to chase the road for an additional 30 feet (more than the shift of 50 feet to the north in the southern property line) (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 20 (photo looking due south along east property line (this photo was taken in 2006 after the Highway District cleared the last remaining evidence of the 8 foot embankment left by the 1996 alteration in the late summer of 2006)), as sited by the two posts showing how the post 1996 road parallels the property line and thus a loss

of road frontage; as the calculation of road frontage does not start until the east property line crosses the centerline of the road; there may be parts of the old road which are geographically 50 and 84 feet from the post 1996 road but the distance varies throughout the 700 or so feet of the road)) and another 20 plus feet as the west intersection moved north 50 feet and the east intersection moved north 80 plus feet. This shift to the north resulted in another untoward effect in regards to the old historic driveway as north is down hill and the road bed necessarily dropped down hill from where the height of the historic driveway met the road and left an 8 foot embankment (see *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 17(photo looking due south along east property line (this photo was taken in 2006 after Wagners built their 2nd driveway in June of 2006 and about three months before *Plaintiffs' Fourth Record Supplement*, Item No. 3, at 20)). Without the accurate information of the 1996 alterations, the Wagners were left with the impression that the historic driveway headed due east and thus straight into the east property line (see *Plaintiffs' Third Record Supplement*, Item No. 1, at 12, Request for Admission No. 27).

(c) The survey that Bob Wagner had done had passed the east property line some forty feet before he reached the road and placed the post alongside the road (Mr. Wagner's survey is inadmissible as evidence), whether or not Mr. Wagner had begun his survey from a point located in Section 16 and a fact that Mr. Wagner had spoken with Ron Munson about sometime around the time Mr. Wagner conducted his survey and that Mr. Munson had told him that may not work (see *Plaintiff's Affidavit* par. 12). Neither Defendants nor the Wagners have a professionally done survey on which to base any rational decision as to why they positioned a post where they did and as such the references Defendant Payne makes in reference to a non existent southern property line extending to the road are nonsensical. Bob Wagner had been told in the fall of 2005 that his post was not accurately placed and Defendant Payne and Defendant Arneberg were well aware of these facts as a result of their close relationship with the Wagners and the Ridgeview Farms owners (see *Plaintiffs' Third Record Supplement*, Item No. 1, at 10-11,

Request for Admission Nos. 23-26; see also *Plaintiffs' Third Record Supplement*, Item No. 3, at 10-11, Request for Admission No. 25-26; see also *Plaintiffs' Third Record Supplement*, Item No. 12, at 4-11, Interrogatory Nos. 6-21). Defendants Payne and Arneberg were well acquainted with the Wagners situation, even before the permit was issued and knew Plaintiffs did not agree with the Wagners' survey; Defendants Arneberg, Clyde and Payne were in the same official positions now as they were in 1996 when the NLCHD made the alterations to Camps Canyon Road and the changes to the centerline of the road, the straightening of the curves and the movement of the road bed to the northeast and knew the measurement of the road frontage referred to in the deed was not accurate; Defendants conclusions and findings that the first Wagner driveway access permit was valid were arbitrary and capricious, an abuse of Defendants' discretion, and/or illegal. Furthermore, Defendants are the final policy makers of the agency and they gave their approval of the permit by failing to revoke the permit when they were told the Wagner driveway access was wholly on the Plaintiffs' land, by refusing to call for a survey to resolve the issue, by refusing to require the Wagners to call for a survey to resolve the problem and by refusing to revoke the permit when the Plaintiffs said that they would call for a survey. Furthermore Defendants failed to afford Plaintiffs due process to resolve the problem when all parties were present and time was allotted of the agenda.

19) There is no dispute that Plaintiffs have considered that matter of paying a $750 fee and petitioning Commissioners to validate Camps Canyon Road to be futile and an idle waste of Plaintiffs' time money and effort. There is also no dispute that Plaintiffs have supplied Defendants with sufficient data for the Commissioners to validate Camps Canyon Road on their own resolution. Idaho offers two exceptions to the requirement to exhaust agency remedies (see *Fairway Development* are applicable to their appeal. This Court in *Fairway Development* acknowledged that the general rule that administrative remedies must be exhausted before a district court will acquire subject matter jurisdiction to hear a case, has been deviated from in certain cases. The Court stated: In relaxing the doctrine of exhaustion, this Court held that the

rule will be departed from under certain circumstances, first, where the interests of justice so require and secondly, where the agency acts outside its authority. *Fairway Dev.*, 119 Idaho at 125, 804 P.2d at 298 (citing *Grever v. Idaho Tel. Co.*, 94 Idaho 900, 903, 499 P.2d 1256, 1259 (1972). Exhaustion of agency remedies is not required under § 1983 (see *Monroe v. Pape*, 365 U.S. 167, 183 (1961) (exhaustion of judicial remedies is not a prerequisite); see also *Patsy v. Florida Board of Regents*, 457 U.S. 496, 501 (1982) (exhaustion of administrative remedies is not a prerequisite)). Plaintiffs are not required to engage in idle and/or futile conduct to resolve these matters. I.C. § 40-203a allows Commissioners to initiate validation proceedings under their own resolution only if one of three conditions exist: (i) On 4/12/06 Plaintiffs questioned the legal establishment of the Camps Canyon Road right of way (alterations had been made to the right of way in 1996 with the permission of the previous owner (see Ed Swanson Affidavit) and the Defendants were now claiming prescription (see *Plaintiffs' Affidavit*, at 8 and 13) and availed Defendants of the facts that alterations had been made to Camps Canyon Road (see *Plaintiffs' Affidavit*, at 8 and 13) and that Defendants were not knowledgeable of the accurate location of the right of way if they believed that the first Wagner driveway access permit was not on Plaintiffs land (see *Plaintiffs' Third Record Supplement*, Item No. 12, at 9, (however Dan Payne is also knowledgeable of the 1996 alterations to Camps Canyon Road, as he conducted the alterations (see *Plaintiffs' Third Record Supplement*, Item No. 3, at 16-17, Request For Admission Nos. 40-44). Dan Payne altered the centerline of Camps Canyon Road on several occasions; yet he used the measurement of the centerline to determine the validity of the first Wagner driveway access permit; (ii) On 3/21/07, Plaintiffs represented the facts of (i) and supplemented those facts with the results of the Rimrock survey which showed movement of the intersection points of the east and west property lines of the 3+/- acre parcel of greater than 50 feet. The present location of Camps Canyon Road no longer agreed with the Latah County records (our deed) (see *Plaintiffs' Third Record Supplement*, Item No. 4, at 2-3). The Idaho Doctrine of Quasi-Estoppel estops Defendants from asserting reliability of the deed description

for issuance/failure to revoke the first Wagner driveway access permit and then denying the reliability of the deed in negating the movement of Camps Canyon Road in the vicinity of the 3+/- acre parcel. All three "permission given" factors of I.C. § 40-203a for Commissioners to initiate validation proceedings under their own resolution had been shown to Commissioners and they refused to respond. It would be futile to believe the $750 fee and the same data would result in a meaningful response. Further Defendants demands of the $750 fee and that Plaintiffs apply for validation proceedings would only result in the declaration of Camps Canyon Road in the vicinity of the 3+/- acre parcel as being "in the public interest" or not (a fact not in dispute—the only dispute is with the doubts of location, public records, numerous alterations, claim of legal establishment as an unrecorded prescriptive right of way). The questions (as a right to private action) of doubt are better addressed by the Commissioners initiating validation proceedings under their own resolution. See *Ware v. Idaho State Tax Comm'n*, 98 Idaho 477, 567 P.2d 423 (1977). Defendants and Court incorrectly identifies I.C. § 40-203a as a predeprivation remedy and as a post deprivation remedy I.C. § 40-203a is inadequate on the grounds: (a) a predeprivation remedy is feasible, predictable, and practicable; (b) exhaustion of agency remedies is not necessary under §1983; and even if exhaustion of agency remedies was required, this case meets both exceptions to exhaustion in Idaho as the Defendants are alleged to be biased both in their culpability to improperly altering Camps Canyon Road and their ties to the aspirations of and the ex parte communications with the Wagners and it would be unjust to require Plaintiffs pay a $750 fee to petition Defendants to validate Camps Canyon Road when Plaintiffs had already shown them the evidence for questioning the validity of Defendants claims and Defendants stated that they were not interested and the Defendants were acting outside their authority, to operate without a valid right of way; and (c) Defendants are estopped from claiming Plaintiffs should file for validation proceedings when it is their duty for providing Plaintiffs with a valid right of way (see *Ware v. Idaho State Tax Comm'n,* 98 Idaho 477, at 483 (1977) (d) See Owen, above).

20) See above Plaintiffs have already replied to Defendants Tort claim notice defense.

21) Key Public Records: Defendants identification of Public records as Latah County Records are misleading and insufficient for proper identification and/or location of any such documents and some may contain unintended and inaccurate information.

IV. Disputed material facts: Plaintiffs petition Court to deny Defendants Motion for summary judgment on Plaintiffs' claims as the following material facts are disputed:

1) Plaintiffs dispute the width of the easement of Camps Canyon Road right of way, in the pertinent part (see this Court's Opinion and Order On Plaintiffs Motions For Summary Judgment And Defendants' Motion For Protective Orders, For Enlargement Of Time And For Attorney Fees (hereafter *Opinion*), at 6, 7, and 9);

2) Plaintiffs dispute the placement of Plaintiffs' fence and Plaintiffs' buffer is within Defendants right of way/easement of Camps Canyon Road right of way, in the pertinent part (see *Opinion*, at 6-9);

3) Plaintiffs dispute that an unrecorded prescriptive right of way requires/has a mandated a width of 50 feet—25 feet from centerline for maintenance (see *Opinion*, at 6-9);

4) Plaintiffs dispute that an unrecorded prescriptive right of way requires/has a mandated width of 50 feet—25 feet from centerline for support (see *Opinion*, at 6-9);

5) Plaintiffs dispute that the Camps Canyon Road right of way, in the pertinent part, has a width of 50 feet—25 feet from centerline of usage (see *Opinion*, at 6-9);

6) Plaintiffs dispute that the Camps Canyon Road right of way, in the pertinent part, has a mandated/requires a width of 50 feet—25 feet from centerline for maintenance (see *Opinion*, at 6-9);

7) Plaintiffs dispute that the Camps Canyon Road right of way, in the pertinent part, has a width of 50 feet—25 feet from centerline (see *Opinion*, at 6-9);

8) Plaintiffs dispute that the Defendants have any authority to regulate the use of Plaintiffs' land (see Idaho Code I.C. § 22-4504 prevents the adoption of ordinances or

resolutions declaring as a nuisance any agricultural operations operated in accordance with generally recognized agricultural practices ("When a conflict exists between a statute and a regulation, the regulation must be set aside to the extent of the conflict", see *Roeder Holdings* citing *Idaho County Nursing Home v. Dep't of Health*, 120 Idaho 933, 937, 821 P.2d 988, 992 (1991)));

9) Plaintiffs dispute that the aerial photo Mr. Hodge has been given to analyze is from the year 1940.

10) Plaintiffs dispute that the bare area on the eastern edge on the 3.4 acreage parcel on the "1940" aerial photo Mr. Hodge has been given to analyze is Charlie Harris' old driveway entrance as that bare spot is the spring run off from the hill and draw to the south and west above it.

11) Plaintiffs dispute that the Defendants have "properly discharged [their] statutory responsibilities "*to improve and to maintain* the public highway known as Camps Canyon".

12) Plaintiffs dispute that in regards to an unrecorded prescriptive right of way, the Defendants have a 50 foot—25 feet from centerline right of way mandated by any Idaho Statute.

NONE OF THE ABOVE DISPUTED FACTS ARE MATERIAL TO PLAINTIFFS' PETITION FOR SUMMARY JUDGMENT BASED ON THE FOLLOWING UNDISPUTED FACTS:

VI. Undisputed material facts: Plaintiffs petition Court to grant Plaintiffs' partial summary judgment on Plaintiffs' claims of Defendants' liability, under the color of law, as matters of law, as the following material facts are undisputed:

1) The width of the easement of Camps Canyon Road has not been factually determined (see *Opinion*, at 6-9).

2) No public evidentiary hearing has ever been held to establish the unrecorded prescriptive highway Camps Canyon Road in SENE Section 15 T39N R3WBM as a public right of way/highway.

3) No public evidentiary hearing has ever been held to establish the location, width, use, centerline and/or other limiting characteristics of the unrecorded prescriptive highway Camps Canyon Road in SENE Section 15 T39N R3WBM.

4) No factual determination, public evidentiary hearing, of the width of the easement of Camps Canyon Road in SENE Section 15 T39N R3WBM has ever been accomplished by the agency, NLCHD, under whose jurisdiction Camps Canyon Road lies.

5) Defendants have no material, admissible evidence in the agency's records that Camps Canyon Road has ever been legally established as a 50 foot—25 feet from centerline right of way.

6) Camps Canyon Road in SENE Section 15 T39N R3WBM has never been laid out, surveyed (except as called for by Plaintiffs and accomplished by Rimrock Consultants in July 2006 and as amended by Rimrock Consultants in May 2007), and/or recorded by Defendants.

7) Defendants have not in all matters relevant afforded Plaintiffs in any form or manner nor do they contend that they have in any manner attempted to provide Plaintiffs with due process, notice of their intended actions, an evidentiary hearing on any matter relevant and have furthermore denied and/or not allowed Plaintiffs reasonable access to any hearing, evidentiary hearing or due process on any matter relevant.

8) Defendants have made alterations to Camps Canyon Road in SENE Section 15 T39N R3WBM which include:

(a) In 1996, in the vicinity of the 3+/- acre parcel, the straightening of curves, the relocation of the centerline to the northeast in varying amounts and at varying places, and the widening of the road surface and supporting structures;

(b) In 2006, in the vicinity of the 3+/- acre parcel and on the northeast side of the road widening of the road by at least two feet;

(c) From 2005 until present and as a continuing maintenance activity small amounts of widening, as gravel moves outward toward the convexity of curves and downhill—in

the present instance in the vicinity of the 3+/- acre parcel to the northeast, "which serves to support the road but does result in minimal, necessary widening of the road over time is widening of the road and has had impacts on the width of the burden on the servient estate.

(d) None of the amounts of widening due to any reason or no distances of movement of the centerline as a result of any widening and/or relocation of the centerline as a result of alterations in curves are or have ever been recorded in any agency record keeping.

9) The only known recorded data to exist to cite any location of the centerline of Camps Canyon Road in SENE Section 15 T39N R3WBM, specifically in the vicinity of the 3+/- acre parcel prior to the aforementioned surveys is Plaintiffs' and/or the Wagners' deed description.

10) The Wagners and the Plaintiffs have fee simple entitlement to the lands of the SENE Section 15 T39N R3WBM in their attributable portions as described in their deeds.

11) The NLCHD has an unrecorded prescriptive right of way across the SENE Section 15 T39N R3WBM acquired prior to 1916, as circumstantially shown on Plaintiffs' deed and which may predate any such "previously existing" status as cited in Meservey as may be circumstantially shown by the time period of homesteading in the area.

12) In all matters relevant and at all times relevant, Defendants have operated under the color of state law and in all matters of performance, whether discretionary or operational, as to be described as the official acts of the final policy makers, and/or as under the customs, official policies, or standard operating procedures of the NLCHD, and/or the approved acts/failures to act of any subordinate by the official policy makers of the NLCHD.

13) The presence of Camps Canyon Road in the SENE Section 15 T39N R3WBM on the NLCHD's road map does not establish, without more, as in an evidentiary hearing, the section of Camps Canyon Road in the pertinent part, as a 50 foot—25 feet from centerline, or as a public highway, whether Plaintiffs choose to dispute Camps Canyon Road as a public highway or not.

14) The first Wagner driveway access permit was issued early in the year of 2006, on or before March, 2006.

15) Defendant Payne did intentionally destroy the first Wagner Access permit.

16) Defendants did intentionally alter, widen, straighten, and/or move the centerline of Camps Canyon Road in the SENE Section 15 T39N R3WBM.

17) The first Wagner access permit was issued for an access to Camps Canyon Road in the SENE Section 15 T39N R3WBM wholly on Plaintiffs' land.

18) Defendant Arneberg said that Camps Canyon Road in the pertinent part has never moved at the 3/21/07 meeting of the Commissioners of the NLCHD.

19) Defendants have no material evidence in their agency records to support a conclusion or finding that the width of an unrecorded prescriptive right of way needs to be 50 feet—25 feet from centerline wide, or in the present case that the width of Camps Canyon Road in the SENE Section 15 T39N R3WBM needs to be 50 feet—25 feet from centerline wide as a matter of maintenance.

19) Defendants have no material evidence in their agency records to support a conclusion or finding that the width of an unrecorded prescriptive right of way needs to be 50 feet—25 feet from centerline wide, or in the present case that the width of Camps Canyon Road in the SENE Section 15 T39N R3WBM needs to be 50 feet—25 feet from centerline wide as a matter of support for the road.

20) Defendants have no material evidence in their agency records to support a conclusion or finding that the width of the unrecorded prescriptive right of way, Camps Canyon Road in the SENE Section 15 T39N R3WBM needs to be 50 feet—25 feet from centerline wide as a matter of usage, that is, was ever used to the extent of 50 feet—25 feet from centerline.

21) Defendants have no material evidence to support a conclusion or finding that the width of the easement of Camps Canyon Road in the SENE Section 15 T39N R3WBM, in the pertinent part, as presently claimed is within the width of the unrecorded prescriptive right of way as was originally acquired by use.

22) Defendants have no material evidence to support a conclusion or finding that the location of the easement of Camps Canyon Road in the SENE Section 15 T39N R3WBM, in the pertinent part, as presently claimed is in the loction of the unrecorded prescriptive right of way as was originally acquired by use.

23) Defendants have no material evidence to support a conclusion or finding that the centerline of the easement of Camps Canyon Road in the SENE Section 15 T39N R3WBM, in the pertinent part, as presently claimed is in the same location of the unrecorded prescriptive right of way as was originally acquired by use.

24) Defendants have no material evidence to support a conclusion or finding that the strip of land now occupied by the easement of Camps Canyon Road in the SENE Section 15 T39N R3WBM, in the pertinent part, as presently claimed is in the identical strip of land of the unrecorded prescriptive right of way as was originally acquired by use.

VII. PLAINTIFFS ARE ENTITLED TO JUDGMENT ON ALL OF DEFENDANTS' DEFENSES AS A MATTER OF LAW OR, ALTERNATIVELY, THERE ARE GENUINE ISSUES OF MATERIAL FACT THAT PRECLUDE ENTRY OF SUMMARY JUDGMENT FOR DEFENDANTS. Furthermore, PLAINTIFFS ARE ENTITLED TO JUDGMENT ON ALL OF DEFENDANTS' DEFENSES AS A MATTER OF LAW OR, ALTERNATIVELY, THERE ARE NO GENUINE ISSUES OF MATERIAL FACT THAT PRECLUDE ENTRY OF SUMMARY JUDGMENT FOR PLAINTIFFS (see Plaintiffs' Motions For Plaintiffs Partial Summary Judgments And Other Motions Submitted January 26, 2009 and specifically of Defendants liability under 42 U.S. C. § 1983).

Generally:

Defendants have not set forth specific facts showing there is a genuine issue for trial with the exception of damages as to be determined or that Defendants are entitled to judgment on Defendants' Motion for Summary Judgment. Defendants' Summary Judgment Motion is conclusory, repetitive, generalized, speculative, confusing and disorganized. Further,

Defendants rely fundamentally on factual assertions that are not admissible in evidence, primarily because those assertions constitute hearsay or are made without personal knowledge and or are not relevant. Defendants' Summary Judgment Motions also ignore responding to complaints of Plaintiffs in great part, and briefing their own versions of Plaintiffs' complaints in this action, and Defendants have again pursued these defenses without supplementing this record with additional, admissible facts. Defendants' Summary Judgment Motion serves only to harass or to cause unnecessary delay or needless increase in the cost of this litigation in violation of Rule 11(a)(1)I.R.C.P.

Moreover, Defendants' Summary Judgment Motion ultimately fails because Plaintiffs have shown through Plaintiffs' Answering Brief To Defendants' Motion for Partial Summary Judgment And Reply To Defendants' Answering Brief And Objections To Plaintiffs' Motions For Partial Summary Judgments And Other Motions Submitted January 26, 2009 and Plaintiffs' Motions For Partial Summary Judgments And Other Motions Submitted January 26, 2009 filed herein that there are genuine issues as to the material facts of Defendants' defenses and that summary judgment is appropriate in favor of Plaintiffs and against Defendants on all Defendants' defenses in this action.

Alternatively, affidavits and record supplements submitted by Plaintiffs that are part of this record set forth specific facts which, construed in a light most favorable to Plaintiffs, at the very least clearly preclude a determination that Defendants are entitled to judgment as a matter of law as to Defendants' Motion for Summary Judgment. Plaintiffs, however, urge the Court to determine that there are genuine issues as to any material facts in this action as so defended by Defendants and that Plaintiffs are entitled to prevail as to Defendants' Motion for Summary Judgment as a matter of law and to enter summary judgment in favor of Plaintiffs as the non-moving party in Defendants' motion.

Disputed Material Facts And Inadmissible Facts and Incorporation of Prior Affidavits and Briefs, in regards to Defendants' Motion for Summary Judgment:

Specific facts admissible in evidence, from which the Court should determine that there are genuine issues as are enumerated in this Answering Brief and as well as in Plaintiffs' Motions For Partial Summary Judgments And Other Motions Submitted January 26, 2009, and as are contained in Ed Swanson's First Affidavit, Joe Yockey's First Affidavit, and Plaintiffs Affidavit In Support Of Plaintiffs' Answering Brief To Defendants' Motion For Summary Judgment filed concurrently herewith and the Plaintiffs' Reply To Defendants' Answering Brief To Plaintiffs' Motion for Partial Summary Judgments Filed September 19, October 6, And October 21, 2008, Defendants Motion To Strike And Defendants' Motion For Attorney Fees, Plaintiffs' Memorandum In Support Of Plaintiffs' Motion for Partial Summary Judgment/Adjudication Of The Issue Of The Cause Of Action Under 42 U.S.C. § 1983, Plaintiffs' First Record Supplement In Support Of Plaintiffs' Motions for Partial Summary Judgment/Adjudication Of The Issue Of The Cause Of Action Under 42 U.S.C. § 1983, Plaintiffs' Affidavit In Support Of Plaintiffs' Motions for Partial Summary Judgment /Adjudication Of The Issue Of The Of The Nullification Of The Original Prescriptive Right Of Way And Subsequent Burden Of Proof Of Prescription, Plaintiffs' Affidavit In Support Of Plaintiffs' Motions for Partial Summary Judgment /Adjudication Of The Issue Of The Cause Of Action Under 42 U.S.C. § 1983, Plaintiffs' Motion For Partial Summary Judgment /Adjudication Of The Issue Of The Nullification Of The Original Prescriptive Right Of Way And Subsequent Burden Of Proof Of Prescription And/Or Validation Of A Legally Established Right Of Way, Plaintiffs' Motion for Partial Summary Judgment /Adjudication Of The Issue Of The Facial Validity Of The NLCHD's Standing Operating Procedure For Widening A Prescriptive Right-Of-Way, Plaintiffs Third Record Supplement, Fourth Record Supplement, Plaintiffs' Affidavit In Support Of Plaintiffs' Motions for Partial Summary Judgments And Other Motions Submitted January 26, 2009, Plaintiffs Motion For Declaratory Judgment Under I.C. § 40-203a, Plaintiffs

Motion For Declaratory Judgment Under I.C. § 67-8003(3), Plaintiffs Motion For Reconsideration of Declaratory Judgment Under I.C. § 40-203a and Under I.C. § 67-8003(3) all of which were previously filed herein and all of which are incorporated herein by this reference not only for purposes of the factual record but, as appropriate, also for the legal analysis of issues addressed in this Plaintiffs' Answering Brief and Reply To Defendants Answering Brief . A concise statement of dispute, admissible material facts at genuine issue is set forth starting on page 56 above of this Plaintiffs' Answering Brief To Defendants' Motion for Summary Judgment And Reply To Defendants Answering Brief And Objections To Plaintiffs' Motions For Partial Judgments And Other Motions Submitted January 26, 2009.

Admissible Facts and Incorporation of Prior Affidavits and Briefs, in regards to Plaintiffs' Motion for Summary Judgment:

Specific facts admissible in evidence, from which the Court should determine that there are no genuine issues of material fact as petitioned for in this Answering Brief And Reply To Defendants Answering Brief and as well as in Plaintiffs' Motions For Partial Summary Judgments And Other Motions Submitted January 26, 2009, as are contained in Ed Swanson's First Affidavit, Joe Yockey's First Affidavit, and Plaintiffs Affidavit In Support Of Plaintiffs' Answering Brief To Defendants' Motion For Summary Judgment filed concurrently herewith and the Plaintiffs' Reply To Defendants' Answering Brief To Plaintiffs' Motion for Partial Summary Judgments Filed September 19, October 6, And October 21, 2008, Defendants Motion To Strike And Defendants' Motion For Attorney Fees, Plaintiffs' Memorandum In Support Of Plaintiffs' Motion for Partial Summary Judgment/Adjudication Of The Issue Of The Cause Of Action Under 42 U.S.C. § 1983, Plaintiffs' First Record Supplement In Support Of Plaintiffs' Motions for Partial Summary Judgment/Adjudication Of The Issue Of The Cause Of Action Under 42 U.S.C. § 1983, Plaintiffs' Affidavit In Support Of Plaintiffs' Motions for Partial Summary Judgment /Adjudication Of The Issue Of The Of The Nullification Of The Original

Prescriptive Right Of Way And Subsequent Burden Of Proof Of Prescription, Plaintiffs' Affidavit In Support Of Plaintiffs' Motions for Partial Summary Judgment /Adjudication Of The Issue Of The Cause Of Action Under 42 U.S.C. § 1983, Plaintiffs' Motion For Partial Summary Judgment /Adjudication Of The Issue Of The Nullification Of The Original Prescriptive Right Of Way And Subsequent Burden Of Proof Of Prescription And/Or Validation Of A Legally Established Right Of Way, Plaintiffs' Motion for Partial Summary Judgment /Adjudication Of The Issue Of The Facial Validity Of The NLCHD's Standing Operating Procedure For Widening A Prescriptive Right-Of-Way, Plaintiffs Third Record Supplement, Fourth Record Supplement, Plaintiffs' Affidavit In Support Of Plaintiffs' Motions for Partial Summary Judgments And Other Motions Submitted January 26, 2009, Plaintiffs Motion For Declaratory Judgment Under I.C. § 40-203a, Plaintiffs Motion For Declaratory Judgment Under I.C. § 67-8003(3), Plaintiffs Motion For Reconsideration of Declaratory Judgment Under I.C. § 40-203a and Under I.C. § 67-8003(3) all of which were previously filed herein and all of which are incorporated herein by this reference not only for purposes of the factual record but, as appropriate, also for the legal analysis of issues addressed in this Plaintiffs' Answering Brief and Reply To Defendants Answering Brief . A concise statement of undisputed, admissible material facts at genuine issue is set forth starting on page 57 above of this Plaintiffs' Answering Brief To Defendants' Motion for Summary Judgment And Reply To Defendants Answering Brief And Objections To Plaintiffs' Motions For Partial Judgments And Other Motions Submitted January 26, 2009.

VIII Standard for Summary Judgment

"Judgment shall be granted to the moving party if the nonmoving party fails to make a showing sufficient to establish an essential element to the party's case." *McColm-Traska v. Baker*, 139 Idaho 948, 950-51, 88 P.3d 767, 769-70 (2004).

"The requirement found in Idaho caselaw that a party moving for summary judgment 'present evidence' is not a requirement that the party 'present specific facts' as Foster implies.

'Evidence' and 'facts' are related but nonetheless different concepts. As a result, the summary judgment process imposes different requirements on a movant than those faced by the adverse party. Although the party moving for summary judgment must establish through 'evidence' the absence of any genuine issue of material fact, there is no requirement the movant present specific facts. *See Smith [v. Meridian Joint Sch. Dist. No. 2]*, 128 Idaho at 719, 918 P.2d at 588. Once the movant has made and appropriately supported its motion, it is the responsibility of the adverse party to come forward with evidence, *id.*, and to 'set forth specific facts showing that there is a genuine issue for trial' I.R.C.P. 56(e)." *Foster v. Traul*, 141 Idaho 890, 120 P.3d 278 (2005). (Emphasis added.)

IX. Analysis of Defendants Defenses and Plaintiffs' 42 U.S.C. Cause of Action

In regards to Plaintiffs' § 1983 Claim, Defendants bring forth no new defenses and reference Defendants' Brief in Support of Defendants' Motion for Summary Judgment pp. 12-26 as set forth in full.

Plaintiffs have responded to Defendants' Motion and will here recapitulate the elements of § 1983:

Plaintiffs have alleged Defendants have physically invaded and continue to occupy their land and have permitted third parties to invade and occupy Plaintiffs' land in the SENE Section 15 T39N R3WBM in matters of the easement of Camps Canyon Road traversing their land from the late fall of 2005 and up and through the present resulting in irreparable harm and threatening imminent future irreparable harm. Plaintiffs claim Defendants are in wrongful possession of Plaintiffs land and that Defendants have improperly interfered with Plaintiffs' property rights and have violated Plaintiffs' liberty rights by arbitrarily and capriciously denying Plaintiffs procedural due process and equal protection of the law and other statutory safeguards and remedies for their erroneous deprivations of Plaintiffs property. In any and all matters Defendants have denied Plaintiffs notice and hearing when practicable, predictable, and feasible. In any and all matters Defendants have denied Plaintiffs evidentiary hearing when practicable,

predictable, and feasible and sought and requested by Plaintiffs. In any and all matters Defendants have denied Plaintiffs exhaustion of statutory agency remedies for the erroneous deprivations. Plaintiffs allege that Defendants are the proximate, direct, legal, and substantial causes of the invasions of their land and the irreparable harm as thus resulted.

The matters here are not contested by Defendants;

1) At all times relevant, Defendants have acted/failed to act under the color of state law (see *Lugar v. Edmondson Oil Company*, 457 U.S. 922, 937 (1982);

2) Local governments and individuals, Defendants are persons and subject to suit for damages, declaratory, and/or injunctive relief and prospective relief (see *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); see also *Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

3) Defendants liability attaches for actions/ failures to act under agency's policies/customs, approval of actions/failures to act by final policy makers (see *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978); see also *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992) (per curiam), cert. denied, 114 S.Crt. 1345 (1993) (Municipal liability may be established in one of three ways).

4) Defendants liability attaches for actions/ failures to act when agency fails to train its employees and the failure to train amounts to deliberate indifference to an obvious need for such training, and the failure to train will likely result in the employee making the wrong decision (see *City of Canton v. Harris*, 489 U.S. 378 (1989).

5) Defendants liability attaches for policies, customs, standard operating procedures of broad authority not circumscribed by statutory safeguards and remedies for erroneous remedies (see *Zinermon v. Burch* 494 U. S. 113 starting at 124; see also *Zimmerman v. City of Oakland*, 255 F.3d 734, (9th Circuit, 2001); see also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-436 (1982) (availability of postdeprivation remedy is inadequate when deprivation is foreseeable, predeprivation process was possible, and official conduct was not ``unauthorized'').

6) Plaintiffs' legitimate claim to entitlement, constitutionally protected property interest rests in their deed to the lands of the SENE Section 15 T39N R3WBM including lands underlying Camps Canyon Road save for the 3+/- acre parcel.

7) Defendants rest their defense on their policies for improving public highways is based on Idaho Code §40-2312 (see *Plaintiffs' Third Record Supplement*, Item No. 20, at 8-9) ("The District's policy for improving public highways under its jurisdiction is based on Idaho Code §40-2312 and the holdings of *Meservey* and its progeny. The District is well within its legal rights to widen a road without holding a public hearing when that activity occurs within the area of the District's public right-of-way. Plaintiffs fail to accept or understand that the District is empowered under law to improve and even widen public highways so long as it does not exceed, under usual circumstances, the lawful 5- foot width of that highway")). Defendants also claim that all prescriptive rights of way are mandated to be 50 feet-25 feet from centerline by Idaho Code § 40-2312 (see *Plaintiffs' Third Record Supplement*, Item No. 18, at 3-4, Requests for Admissions Nos. 4,5, and 6). Defendants defenses rest entirely on their interpretation of Idaho Code §40-2312 and the holdings of *Meservey* and its progeny citing their authority for a mandated 50 foot—25 feet from centerline right of way and denial of evidentiary hearings—due process. Defendants' exertions of their governmental powers are in excess of their statutory authority.

8) In regards to Defendants' policy to improve and to maintain public highways as it is applied to Plaintiffs and/or Plaintiffs' situation is invalid as Camps Canyon road in SENE Section 15 T39 N R3WBM is claimed to be a prescriptive right of way. As a matter of law Defendants have exceeded their authority by mandating a 50 foot—25 feet from centerline right of way and they have subverted the legislature's intentions by denying Plaintiffs an evidentiary hearing. There are no disputed facts in this issue as Defendants say the law says that they do not have to provide an evidentiary hearing. Defendants do not have substantial evidence in the agency record and/or Defendants were in excess of the authority of statutes and/or had failed

follow the provisions of the statutes as the legislature had intended to deny Plaintiffs due process and/or equal protection of the law prior to widening Camps Canyon Road, in the pertinent part. Defendants do not have substantial evidence in the agency record and/or Defendants are in excess of the authority of statutes to deny Plaintiffs due process when on 4/12/06 Plaintiffs complained to Defendants that they did not have a 50 foot-25 feet from centerline right of way to widen Camps Canyon Road, in the pertinent part. Defendants actions/failures to act, conclusions and findings were arbitrary and capricious, an abuse of Defendants' discretion, and/or illegal.

9) Defendants did not have substantial evidence in the agency record and/or Defendants were in excess of the authority of statutes and/or had failed follow the provisions of the statutes as the legislature had intended to deny Plaintiffs due process and/or equal protection of the law when on 4/12/06 Plaintiffs complained that Defendants had issued the first Wagner driveway access permit for an access wholly on Plaintiffs' land and/or to continue the permit and/or to not revoke the permit and/or to not call for a survey and/or to not require the Wagners to call for a survey and/or when Plaintiffs said they would call for a survey, where a survey would be in accordance with the United States manual of surveying instructions. Defendants actions/failures to act, conclusions and findings were arbitrary and capricious, an abuse of Defendants' discretion, and/or illegal.

10) Defendants did not have substantial evidence in the agency record and/or Defendants were in excess of the authority of statutes and/or had failed follow the provisions of the statutes as the legislature had intended to deny Plaintiffs due process and/or equal protection of the law when on 3/21/07 Plaintiffs complained that Defendants had issued the first Wagner driveway access permit for an access wholly on Plaintiffs' land and Defendants had failed to revoked said permit and had denied it was not within their authority to issue, continue, and/or not revoke the first Wagner driveway access permit and/or permit anyone access to Camps Canyon Road across Plaintiffs land and/or to add additional width to the road, change the drainage, and/or injure Plaintiffs' fence whether the pushing of dirt and gravel into Plaintiffs' buffer and

onto Plaintiffs fence was in retaliation for Plaintiffs being correct in the positioning on the east property line of the 3+/- acre parcel, and/or a matter of widening of and/or a matter of maintenance and/or a matter of improving Camps Canyon Road. Defendants actions/failures to act, conclusions and findings were arbitrary and capricious, an abuse of Defendants' discretion, and/or illegal.

11) Defendants did not have substantial evidence in the agency record and/or Defendants were in excess of the authority of statutes and/or had failed follow the provisions of the statutes as the legislature had intended to deny Plaintiffs due process and/or equal protection of the law when on 3/21/07 Plaintiffs complained that the validity of the Camps Canyon right of way was in doubt whether as a matter of the legal establishment of Camps Canyon Road as a public right of way and/or as a 50 foot—25 feet from centerline prescriptive right of way and Defendants had issued the first Wagner driveway access permit for an access wholly on Plaintiffs land and the Rimrock survey, as performed in accordance with the United States manual had shown the intersections of the east and west property lines of the 3+/- acre parcel with Camps Canyon Road were not in accordance with the public record of Plaintiffs' deed description and the Defendants had made numerous alterations to Camps Canyon Road, including 1996, 2005, 2006, as well as multiple extensions of width as a result of Defendants policies of widening a prescriptive right of way and/or maintenance and/or improvement of a prescriptive right of way by denying Plaintiffs a hearing and/or by not initiating validation proceedings of Camps Canyon Road under their own resolution in accordance with I.C. § 40-203a. Defendants actions/failures to act, conclusions and findings were arbitrary and capricious, an abuse of Defendants' discretion, and/or illegal.

12) Defendants did not have substantial evidence in the agency record and/or Defendants were in excess of the authority of statutes and/or had failed follow the provisions of the statutes as the legislature had intended to deny Plaintiffs due process and/or equal protection of the law when in July of 2007, Plaintiffs had hired a lawyer and obtained and agreed on an informal

meeting with Defendants and Ed Swanson to determine the width of the easement on site of Camps Canyon Road and Defendants abdicated their duty to a written response to Plaintiffs of their reasoned findings and conclusions whatever those findings and conclusions may have been. Defendants actions/failures to act, conclusions and findings were arbitrary and capricious, an abuse of Defendants' discretion, and/or illegal.

13) Defendants did not have substantial evidence in the agency record and/or Defendants were in excess of the authority of statutes and/or had failed follow the provisions of the statutes as the legislature had intended to deny Plaintiffs due process and/or equal protection of the law when Plaintiffs filed Requests For Regulatory Takings Analysis for actions which Defendants had already accomplished and adversely affected Plaintiffs property rights as alleged per se takings and Defendants did not respond. Defendants actions/failures to act, conclusions and findings were arbitrary and capricious, an abuse of Defendants' discretion, and/or illegal.

14) Defendants did not have substantial evidence in the agency record and/or Defendants were in excess of the authority of statutes and/or had failed follow the provisions of the statutes as the legislature had intended to deny Plaintiffs due process and/or equal protection of the law when Plaintiffs requested to speak with Defendants' counsel directly at the 8/8/07 meeting and Defendants denied Plaintiffs' request unless Plaintiffs got a lawyer and/or denied Plaintiffs right to represent themselves. Defendants actions/failures to act, conclusions and findings were arbitrary and capricious, an abuse of Defendants' discretion, and/or illegal.

15) Defendants did not have substantial evidence in the agency record and/or Defendants were in excess of the authority of statutes and/or had failed follow the provisions of the statutes as the legislature had intended to deny Plaintiffs due process and/or equal protection of the law when Plaintiffs attended the 9/12/07 meeting and after having obtained time on the agenda to present Plaintiffs' analysis of the Defendants' aerial photos and were expecting to receive Defendants' decision on Plaintiffs proposal for settlement of Plaintiffs' claims as requested by NLCHD clerk at the 8/8/07 meeting and Defendants deny Plaintiffs the opportunity

to present their evidence of their analysis of the aerial photos and Defendants did not respond to Plaintiffs' settlement proposal and Plaintiffs were denied the opportunity to represent themselves and were told to get a lawyer if they did not submit a $750 fee and an application for validation. Defendants actions/failures to act, conclusions and findings were arbitrary and capricious, an abuse of Defendants' discretion, and/or illegal.

16) There are no genuine issues of fact in these matters as Plaintiffs have shown that no due process and/or equal treatment of the law was afforded to Plaintiffs and/or no evidentiary hearings have been held in regards to Camps Canyon Road in section 15 of T39N R3WBM and Defendants have admitted that no hearings have been before the board on these matters and that no final decisions have been made notwithstanding Plaintiffs allegations that such hearings should have been afforded Plaintiffs and/or such final decisions were made as Defendants had acted and/or failed to act arbitrarily and capriciously, abused their discretion in these matters, and/or had acted and/or failed to act illegally in these matters.

17) Plaintiffs have alleged that Plaintiffs land has been wrongfully invaded and occupied by Defendants actions/failures to act and that Defendants had acted and/or failed to act arbitrarily and capriciously, abused their discretion in these matters, and/or had acted and/or failed to act illegally in these matters. Defendants have brought forth no specific admissible evidence to show that they had not acted and/or failed to act arbitrarily and capriciously, abused their discretion in these matters, and/or had acted and/or failed to act illegally in these matters in denying Plaintiffs due process and/or equal treatment of the law in any and all plausible, colorable claims of improper interference with Plaintiffs property rights and the wrongful per se taking of Plaintiffs' land.

18) The Rimrock survey has shown the first Wagner driveway access to Camps Canyon Road to be wholly on Plaintiffs land and Defendants bring forth no specific, admissible evidence to rebut this. Plaintiffs have alleged that Plaintiffs land has been wrongfully invaded and that Defendants actions/failures to act have permitted third parties to wrongfully invade and occupy

Plaintiffs' land and/or that Defendants have taken Plaintiffs land for not a public use and that Defendants had acted and/or failed to act arbitrarily and capriciously, abused their discretion in these matters, and/or had acted and/or failed to act illegally in these matters.

19) As there are no genuine issues of material and admissible fact in these matters of factual and/or plausible wrongful possessions of Plaintiffs' land by Defendants and/or third parties and in that Defendants did not have substantial evidence in the agency record and/or Defendants were in excess of the authority of statutes and/or had failed follow the provisions of the statutes as the legislature had intended to deny Plaintiffs due process and/or equal protection and that Defendants actions/failures to act, conclusions and findings were arbitrary and capricious, an abuse of Defendants' discretion, and/or illegal and were a matter of agency policy, custom, and/or standard operating procedure, and/or official acts and/or approval of subordinates' actions/failures to act by the final policy makers of the agency and that there are no genuine issues of admissible material facts that these actions and/or failures to act were not "unauthorized" and that Defendants have not shown a relation to public health, safety, morals, and/or general welfare to burden Plaintiffs and Plaintiffs' land with additional and/or new envelopments of more and/or new land and that Defendants are prohibited from regulating Plaintiffs' land as a nuisance and that Plaintiffs' use of their land is not unsafe, immoral, unhealthful and/or results in any diminution of the public's general welfare and that all matters in the issue of liability under 42 U.S.C. § 1983 are matters of law and not issues of fact, Plaintiffs are entitled to judgment as a matter of law (see *Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972)* (chattels protected by 14th Amendment even though possession is disputed); see *McCulloch v. Glasgow, 620 F.2d 47 (5th Cir. 1980)* (Due Process required before road is built over disputed land); see *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) "(e) Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, the denial of procedural due process

should be actionable for nominal damages without proof of actual injury, and therefore if it is determined that the suspensions of the students in this case were justified, they nevertheless will be entitled to recover nominal damages"); see also *Evers v. The County of Custer, 745 F.2d 1196 (1986)*, (quoting Owen, 445 U.S. at 650-52, 100 S. Ct. at 1415-16 (1979) "The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city might encourage those in a policy-making position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements of constitutional rights"); see *United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951) (Government's seizure and operation of a coal mine to prevent a national strike of coal miners effected a taking); see *Pumpelly v. Green Bay Co., 80 U.S. (13 Wall) 166, 177-78 (1872)*; see *Loretto v. Teleprompter Manhatten CATV Corp., 458 U.S. 419, 102 S. Ct. 3164 (1982)*; see *U. S. v. Dickinson, 331 U.S. 745 (1947)* ("When dealing with a problem which arises under such diverse circumstances procedural rigidities should be avoided. All that we are here holding is that when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really 'taken'... When the governmental acts/omissions deny the landowner the fundamental rights of ownership—the right to possess, right to exclude others, and/or the right to dispose of all or a portion of the property—these are 'takings'"); see *Kaiser Aetna v. United States, 444 U.S. 164, 179-80, 100 S.Ct. 383, 392-93, 62 L.Ed.2d 323 (1979)*. (a property owner's right to exclude others is "universally held to be a fundamental element of the property right"); see *Lingle v.Chevron U.S. A. Inc.*, (04-163) 544 U.S. 528 (2005) 363 F.3d 846, ("Conversely, if a government action is found to be impermissible--for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process--that is the end of the inquiry. No amount of compensation can

authorize such action"); see *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 855-56 (9th Cir. 2007); see *Harris v. County of Riverside*, 904 F.2d 497 (1990); see also *Ware v. Idaho State Tax Comm'n,* 98 Idaho 477, at 483 (1977); (see *Aztec Ltd., Inc. v. Creekside Investment Co.*, 100 Idaho 566, 569, 602 P.2d 64, 67 (1979), ("An increase in width does more than merely increase the burden upon the servient estate; it has the effect of enveloping additional land.").

CONCLUSION

Defendants have no rational basis for issuing the first Wagner driveway access permit and not revoking it when they were given fair warning that it was located wholly on Plaintiffs property. The only reasonable solution to the problem was a professional survey. Defendants' decision to not get a survey on their own resolution was arbitrary for both sides of the road. Defendants' decision to require the Wagners to get a survey professionally done was arbitrary. Defendants' decision to not get a survey on their own resolution was arbitrary for both sides of the road. Defendants' decision to not get a survey on their own resolution was arbitrary for both sides of the road. Defendants' actions/failures to act in continuing/not revoking the permit when Plaintiffs said they would get a survey were arbitrary. The only legal evidence Defendants have to support their issuance of the permit is the Rimrock survey which shows the first Wagner driveway access to be wholly on Plaintiffs' land. No reasonable person would debate that the shortest distance between two points—the west property line of the 3+/- acre parcel intersection with Camps Canyon Road and the east property line of the 3+/- acre parcel intersection with Camps Canyon Road—is not a straight line. It would be intuitively obvious that if Defendants have admitted to straightening curves and altering the centerline of Camps Canyon Road that the distance would be shorter than previously calculated and/or that the previous calculation would not be reliable. Furthermore, when "Dan Payne said to Mr. Wagner, to the effect of 'Check it. If you are within any public prescriptive right-of-way, your driveway access permit is okay'", he misleads Mr. Wagner; however, with regards to Plaintiffs he has "taken" their land and in effect given it to the Wagners as he has said to Mr. Wagner you may ignore the east property line and

parenthetically I and Mr. Arneberg do not then have to confess that it was the NLCHD which destroyed the historical driveway access and left an 8 foot embankment in its place instead. Whether Mr. Wagner wants to pursue Mr. Landeck's theories under the ITCA is up to Mr. Wagner. Plaintiffs are here under § 1983, as it is Plaintiffs' land and property rights Mr. Payne has improperly interfered with. The Defendants were as final policy makers given a choice on 4/12/06 and with deliberate indifference to the erroneous deprivation did not withdraw/revoke the permit, refused to get a survey to provide a rational basis for their decision, and refused to require the Wagners to get a survey to provide a rational basis for their decision to continue the permit. Defendants/Commissioners as final policy makers approved the actions of Mr. Payne on both sides of the road and all matters relevant are matters of policy of the NLCHD. Furthermore, Defendants acted arbitrarily and capriciously, abused their discretion, and/or acted illegally when they continued/failed to revoke the permit when Plaintiffs said that they would call for a survey, as Defendants only increased their risk for liability. They could have at no expense to themselves and at no risk of liability to the Wagners have said that they would withdraw the permit until after the survey is completed, as no reasonable person would quarrel with a decision by the Defendants to remain neutral until some data comes in. However this would not be in line with whatever the Defendants intentions may be. Did they want to avoid admission that the may have improperly moved Camps Canyon Road? Did they simply want to make sure that the Wagners got their driveway? Did they simply want to burden the Plaintiffs with the expense of the survey and/or the providing of the land for the Wagners first driveway access? There is no rational basis for a legitimate governmental interest in any of these questions as there is in not for public use. Defendants' acts/failures to act, conclusions and findings are arbitrary and capricious, an abuse of the Defendants' discretion, and/or illegal.

The Rimrock survey shows that the 3+/- acre parcel has moved to the north, that the road frontage and acreage have been reduced, that the first Wagner driveway access permit was issued, was continued and has failed to have been revoked for an access wholly on Plaintiffs'

land; none of which is inconsistent with the undisputed facts. Defendants bring forth no admissible, material evidence to support their rebutted testimony that there is a debatable issue of the legal establishment of the Camps Canyon Road right of way, that the location of the Camps Canyon Road right of way does not agree with the public record of the Plaintiffs' and/or the Wagners' deeds, or that the Defendants, after numerous alterations are unsure as to the accurate location of the Camps Canyon Road right of way. The Wagners' surveys as well as Mr. Payne's survey are not professionally done surveys and the road frontage distance Mr. Payne measured and the width of the right of way he established are not supported by a professionally done survey. However it is, that they may be sure of the correct location and simply may want to prepare false testimony (see *Plaintiffs' Third Record Supplement*, Item No. 5, at 3 ("Orland Arneberg said he's lived out there his whole life and can testify that the road hasn't moved"), is a matter for the criminal courts, the tabloids and/or the tv or newspaper stories. The intentions and mental states of the Defendants may have some issue in the final judgment of punitive damages but the liability of the Defendants individually is of a reasonable standard. Defendants have not sought any qualified immunity. Immunity under ITCA is for those who act in good faith and simply may have erred. Defendants were given several chances to act reasonably.

Summary judgment belongs to Plaintiffs as it is the Defendants' arbitrary and capricious exertion of their governmental powers, the abuse of their discretion and/or their illegal actions and/or failures to act which have caused Plaintiffs harm; Defendants failures to provided due process and equal protection when it is feasible to do so and when the actions/failures to act are "not unauthorized" and when it is at that moment in time when Defendants need a rational basis for what they do. There are no exigent circumstances. These are intentional denials. Defendants' findings and conclusions are arbitrary and capricious as there is not substantial evidence in the record to support their claims and all evidence in the record runs contrary to Defendants conclusions and findings (a claim of an unrecorded prescriptive right of way is a self admission of no substantial evidence in the record to support findings and conclusions);

Defendants deprivation of Plaintiffs' constitutionally protected property and/or liberty rights and land without due process and equal protection and/or rational basis for a legitimate governmental interest; and only the issues of

In *District of Columbia v. Robinson*, 180 U.S. 92 at 108 (1901), 21 S. Ct. 283 ("It was an easement in the land, not the fee to the land, which the public acquired by the road, and the measure of the easement was the width of the road"), the debate was over the facts of the case whether the Defendants could locate or even show they had intended to survey the road. The question here is whether or not a factual debate is required and not whether two reasonable people may differ on what the width of the easement might be. The width of the easement equals the width of the road is the inference from both Robinson and Meservey as both consider the width of the easement or the width of the road as a rebuttable presumption. Fifty feet is a starting point at the outer extremity, unless there is a fence then the fence is the outermost starting point. One may equally logically start at the narrowest staring point—the beaten used path of travel and precede outwards, as many states do. The Defendants in this case want nothing to do with either perspective—no rebuttable presumption at all.

Camps Canyon Road may be maintained in its physical attributes of location and width as a presumption and must remain so unchanged for at least a period of five years of use and maintenance to be so legally established; but when the status quo is interrupted, as it has been here on several occasions, there must be authority for this interruption as the interruption denies its unrecorded establishment. Not being arbitrary and capricious=evidentiary record which is antithetical to unrecorded. Defendants would lose their absolute power if they should have to inquire of any, save for their relatives, business partners, and/or friends (heaven forbid if they should have to ask the Public what they might want) what should be done with Camps Canyon Road. The prerequisite for two reasonable persons to disagree is that they both be reasonable. We have yet to arrive at that point.

Defendants thesis "This Brief will show that the District has, at all times relevant to this action, properly discharged its statutory responsibilities to improve and maintain the public highway known as Camps Canyon."

***Plaintiffs' Third Record Supplement*, Item No. 20, at 8** "The District is well within its legal rights to widen a road without holding a public hearing when that activity occurs within the area of the District's public right-of-way. Plaintiffs fail to accept or understand that the District is empowered under law to improve and even widen public highways so long as it does not exceed, under usual circumstances, the lawful 50 foot width of that highway."

Between "the width", road and/or easement, and "to improve" and "to maintain" if in any way, shape or form the infinitives imply the envelopment of more land lies a rebuttable presumption.

***Defendants' Brief*, at 16** "The minimum width of public highways established by user in Idaho has been 50 feet since 1887."

***Meservey* holds, "...and must be determined by the facts and circumstances peculiar to the case, and is presumed to be 50 feet in width, unless the facts and circumstances of the case clearly indicate that the owner, over whose land the road runs, has limited the width of said road to less than 50 feet prior to the time the road became a highway by user."** Is this simply a *Parratt* "unauthorized" action, to stop at a comma in a reference and leave out the determining factors; something lawyers learn in law school to purposely obfuscate the issues. Clearly, *Meservey* calls for a rebuttable presumption and factual determination. There is nothing in I. C.§ 40-2312 or *Meservey* to mandate a width of 50 feet, although it may be as wide as required. How it gets to the desired width is another story and a taking can be as small as a cable t.v. box (see *Loretto*).

Defendants' Counsel spends a good deal of time trying to explain what it is that Plaintiffs have argued, rather than to listen to what the Plaintiffs have complained of. Defendants have exceeded their authority declaring that the minimum width of an unrecorded prescriptive right of

way is mandated by Idaho law to be 50 feet (see Defendants' Brief, at 18). Plaintiffs have been denied an opportunity for a meaningful response at a meaningful time to address the adverse effects and improper interference Defendants actions have had and are continuing to have on Plaintiffs land and property and liberty rights. "Specifically, the determination of the width of the right of way of Camps Canyon Road must be addressed" (*Opinion,* at 9). Plaintiffs agree with the Court's holding, however, there is the matter not considered which is "at a meaningful time". A meaningful time is not after the fact, at a time when the Defendants have already destroyed the evidence for the factual determination. A predeprivation hearing is usually required and a post deprivational hearing is inadequate if the action/failure to act is "not unauthorized" and is predictable and foreseeable (see *Zinermon*). There are no exigent circumstances nor are any of Defendants' legal theories of any merit. Defendant can not operate under I.C.§ 40-2312. They can scream and holler and pontificate all they want about the width of the right of way but when it comes to disturbing the status quo and putting the shovel to Plaintiffs land they are first prohibited from the taking of Plaintiffs land without due process and without a survey and an accurate description of the lands required (see I.C.§ 40-605 and I.C.§ 40-1310) as without both their actions and/or failures to act would be arbitrary and capricious, an abuse of the Defendants' discretion and/or illegal. Defendants' discretion, whether they abuse it or not, does not allow them to break the law (see *Czaplicki v. Gooding Joint School District No. 231, 116 Idaho 326, 775 P.2d 640* ("[D]iscretionary function does not shield negligent implementation of statutes...").

Without the survey and the description Defendants are left without substantial evidence in their record for their findings and conclusions and even if the centerline was only moved two feet to the northeast or the width was extended to the northeast the outskirts of the new claim of 25 feet from centerline envelopes more land (see *Aztec Ltd., Inc. v. Creekside Investment Co.*, 100 Idaho 566, 569, 602 P.2d 64, 67 (1979), ("An increase in width does more than merely

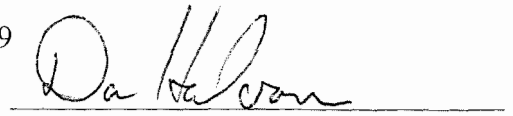
increase the burden upon the servient estate; it has the effect of enveloping additional land.") This is a per se taking no matter how small (see *Loretto*).

"Each of our due process cases has recognized, either explicitly or implicitly, that because 'minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.' *Vitek v. Jones*, 445 U.S. 480, 491 (1980). See *Arnett v. Kennedy*, 416 U.S., at 166-167 (POWELL, J., concurring in part); id., at 211 (MARSHALL, J., dissenting). Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest. The Court has considered and rejected such an approach: 'While the legislature may elect not to confer a property interest, . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. . . . [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.' *Vitek v. Jones*, 445 U.S., at 490-491, n. 6, quoting *Arnett v. Kennedy*, 416 U.S., at 167 (opinion concurring in part)." *Logan v. Zimmerman Brush Co.*, 455 U. S. 422, at 432 (1982).

Plaintiffs respectfully request this Court's order for denying Defendants' Motion For Summary Judgment.

Plaintiffs respectfully request this Court's order for granting Plaintiffs' Motion For Partial Summary Judgment for Defendants liability under 42 U.S.C. §§ 1983,188, et seq. with damages to be determined.

On this 17th Day of February, 2009

RESPECTFULLY SUBMITTED, 

Don Halvorson

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February, 2009, I caused a true and correct copy of this document to be served on the following individual in the manner indicated below:

RONALD J. LANDECK LANDECK, WESTBERG, JUDGE & GRAHAM, P.A. 414 S. Jefferson P.O. Box 9344 Moscow, ID 83843	[ ] U.S. Mail [ ] Federal Express Standard Overnight Mail [ ] FAX (208) 883-4593 [X] Hand Delivery
CARL B. KERRICK DISTRICT JUDGE P.O. Box 896 Lewiston, ID 83501-0896	[X] U.S. Mail [ ] Federal Express Standard Overnight Mail [ ] FAX [ ] Hand Delivery

Don Halvorson

CASE NO CV-2008-00180

2009 FEB 17 AM 11:39

CLERK OF DISTRICT COURT
LATAH COUNTY
BY _____ DEPUTY

Don Halvorson
1290 American Ridge Road
Kendrick, Idaho, 83537
(208) 289-5602
Plaintiff, Pro se

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

Don & Charlotte Halvorson (Husband and Wife))	Case No. CV 2008-180
Plaintiffs)	PLAINTIFFS' AFFIDAVIT IN
vs.)	SUPPORT OF PLAINTIFFS'
North Latah County Highway District; Board of)	ANSWERING BRIEF TO
Commissioners for the North Latah County)	DEFENDANTS' MOTION FOR
Highway District, Orland Arneberg, Richard)	SUMMARY JUDGMENT AND
Hansen, Sherman Clyde, in their Official)	REPLY TO DEFENDANTS'
Capacities, and in their Individual Capacities;)	ANSWERING BRIEF AND
Dan Payne, in his Official Capacity and in his)	OBJECTIONS TO PLAINTIFFS'
Individual Capacity)	MOTIONS FOR PARTIAL
Defendants)	SUMMARY JUDGMENTS AND
)	OTHER MOTIONS SUBMITTED
)	JANUARY 26, 2009

STATE OF IDAHO)

)ss.

County of Latah)

Don and Charlotte Halvorson depose and say:

1. We are the plaintiffs named in the above case.
2. On information and belief and Plaintiffs observations, the maintenance of Camps Canyon Road in the vicinity of the 3+/- acre parcel from 1996 until 2005 amounted to an annual, sometimes biannual grading of the road. Plaintiffs and neighbors plowed the snow for most of these years. In the late fall grading of 2005, the NLCHD floated a small amount of gravel towards Plaintiffs' fence. This practice has persisted through the present.
3. We first became aware of Defendants claim of prescription and/or to a claim of 50 foot—25 feet from centerline right of way to the lands abutting to and underlying Camps Canyon Road in the vicinity of the 3+/- acre parcel in our fee simple title on 4/12/06 at the regular meeting of the Commissioners of the NLCHD.
4. We first became aware of Defendants claim of prescriptive right to damage our fence, issue and not revoke the first Wagner driveway access permit, and to widen Camps Canyon Road in the late fall of 2005 on 4/12/06.
5. We gave Defendants fair warning of our disagreement with their claims of prescription to our land and their claims of prescriptive right to damage our fence, to issue and not to revoke the first driveway access permit, and to widen Camps Canyon Road in the late fall of 2005 on 4/12/06.
6. We continued from 4/12/06 to give Defendants fair warning of our fact/s opinion/s of fact/s and interpretation of the application of law to our facts and opinion/s of facts and sought remedy and settlement with Defendants until they gave us the ultimatum of either paying $750 and file for petition to validate Camps Canyon Road or getting a lawyer in September of 2007.

7. Plaintiffs identify their recorded deed as a warranty deed recorded in Latah County as instrument #424411 dated 12/9/1996 as a fee simple and merchantable title for the real property, situated in the State of Idaho, County of Latah as described in said instrument, including that land which underlies Camps Canyon Road as described in said deed.
8. In the fall of 1996, we were in the process of buying the farm which includes the SENE Section 15 T39N R3WBM from Ed and Gladys Swanson. During that time the NLCHD, on information and belief through foreman, Dan Payne, approached Ed Swanson about alterations they wanted to make to Camps Canyon Road in the vicinity of the 3+/- acre parcel to improve the road for new houses built in the canyon. On information and belief the NLCHD wanted to cut down some old trees, straighten curves at the east and west ends of the 3+/- acre parcel, move the road bed to the northeast, and to skirt the rock outcropping. On information and belief, Ed Swanson gave Dan Payne/the NLCHD permission to make the changes. Ed Swanson told us about his dealings with Payne and we accepted the change in the road and confirmed Ed Swanson's permission. Prior to these alterations Camps Canyon Road, in the vicinity of the 3+/- acre parcel, was approximately 12 feet wide, including ditches and supporting structures; there were two curves in the road at the east end of the 3+/- acre parcel. Traveling from southeast to northwest the Harris/Huff historic driveway left the road at the peak of the second curve creating a switchback (after the first curve the road was traveling almost due north---leaving the road the driveway was headed almost due south) and thereby skirting the east property line of the 3+/- acre parcel. Northwest of the old driveway access the road passed over a rock outcropping, then headed slightly to the southwest, into the woods where a logging road left the road at the peak of the curve and then the road switched back to the north and then again back to the south descending a steep decline in the road and crossing

the west property line of the 3+/-acre parcel at the peak of the second curve. The alterations of 1996 straightened the curves at both the east end and the west end of the 3+/- acre parcel. On information and belief in the straightening of the curves at the east and at the west ends of the 3+/- acre parcel altered the geographical intersections of the east and west property lines with Camps Canyon Road to the north as the straightening moved the road bed to the northeast. The movement of the road bed to the northeast also resulted in the dropping of the road bed as the terrain slopes to the northeast and thus the northeast movement was downhill. The movement of the road varied from just a few feet to more than 50 feet depending on where it is measured and how it is measured. In its narrowest point of movement, the new road bed laid northeast of the old trees, which were cut down and their stumps were excavated out, and the old fence line. After the 1996 alterations, there was an 8 foot embankment left where the historic driveway entered the road and since that time no one exited the Harris place from the old driveway from that point on (the Harris place was owned by absentee owners---Martin Huff, et. al). On his last year of farming the Huff place, the renter, Larry Hansen, asked Plaintiffs if they could exit the Huff Place through Plaintiffs' land to carry on their farming operations and finally remove their machinery as there was no driveway access left. Farming access from then on was gained from the south out of the old Doug and Edna Kelly place as the new renters, Ridgeview Farms took over the farming at about the same time as the alterations took place. In the spring of 1997, we rebuilt the fence leaving a buffer between the fence and the northeast of the road bed and supporting structures of 5 to 10 feet in the east end and the narrowest part of the buffer (a narrow strip of the road frontage about 20 feet long at the peak in the curve of the new road). The buffer was left to prevent damage to the fence from snow removal (ratio of space at edge of road to road surface: 24 foot road surface in a 50 foot right of way=24/50=.48; .48X15 foot road

surface=7.2 feet: there may have been a small area undersized (less than 5 feet), however this formula includes a variable of supporting structures which also store snow; in most of the length of the road the buffer exceeded 10 feet.) from the road and no gift was intended of the buffer for future widening of the road. For several years after the 1996 alterations, up until we moved the cows to a different wintering ground in the early 2000's we shared snow plowing of the road with the neighbors and had no problems with the storage of snow.

9. The first time I, Don Halvorson, talked with Bob Wagner about his proposed plans for a driveway access to Camps Canyon Road was in the fall of 2005. Bob Wagner had done his own survey of the 3+/- acre parcel and he wanted to confirm his findings with me. I told him his survey was wrong as the east property line of the 3+/- acre parcel was 40+ feet to the west of where Mr. Wagner had staked it out, that the old historic driveway did not cross the grassy draw and did not approach Camps Canyon Road in a easterly direction, but rather the old driveway ran along the east property line and entered Camps Canyon Road in a northerly direction, directly across from Plaintiffs' corrals. Because of the two sharp curves east of the 3+/- acre parcel a switchback was created by entering the driveway from the east off of Camps Canyon Road. I also told Mr. Wagner that the NLCHD had altered Camps Canyon Road in 1996 and where the old historic driveway approached Camps Canyon Road now stood an eight foot embankment as the NLCHD had straightened the two sharp curves and moved the road bed to the northeast. The terrain slopes to the north-northeast along the 3+/- acre parcel and movement of the road bed to the northeast necessitated the lowering of the road bed and left the abrupt embankment. I told Mr. Wagner he needed to get a professionally done survey and talk with the NLCHD about the changes they had made in 1996. Subsequent to the initial call Bob Wagner called several times in regards to his driveway and construction plans. I told Bob Wagner

that the NLCHD had created the problem and that I would stand with him on the issue but that his proposed plans were trespassing, and one way or another he needed to correct the problem.

10. We first became aware of the construction of the Wagners first driveway access to Camps Canyon Road in the vicinity of the 3+/- acre Parcel on or about 4/8/06. The access to and into Camps Canyon Road crossed the east property line of the 3+/- acre parcel in its entirety, the west edge of the driveway being 20 feet east of the east property line.
11. On 4/10/06, I, Don Halvorson, called NLCHD foreman, Dan Payne, and Clearwater Power new construction foreman, known only to me as Clint, to inform them that the Wagners driveway access was on our property crossing the east property line of the 3+/- acre parcel. On information and belief, Clearwater power did not attempt to install the underground electric line as planned without confirmation by the Wagners that the installation would be on the Wagners land and/or within the legal limits of the highway right of way.
12. On the morning of 4/12/06, I, Don Halvorson, met with the Latah County Surveyor, Ron Munson, in regards to the first Wagner driveway access permit and the position of the property lines of the 3+/- acre parcel and Camps Canyon Road. Ron Munson told me that the best first step was to get a survey; Mr. Munson also said he had talked with Bob Wagner about the problem and had suggested to Bob Wagner that Bob Wagner's proposed survey plan may not be accurate. That same morning, I contacted Rimrock Consultants and talked with John Dunne. Mr. Dunne said he would begin the paper work and I would get back with him. After the NLCHD meeting I told Mr. Dunne to go ahead with the survey.
13. On 4/12/06, I, Don Halvorson, attended the regular meeting of the NLCHD Commissioners at 1132 White Ave Moscow Idaho. The only person I had talked to

in any regards of any NLCHD meeting, other than my wife, was Dan Payne. On 4/10/06 I had asked Dan Payne when and where the Commissioners had their meetings. I made no requests of Payne or any other member of the NLCHD to be put on the agenda. My intention was, time permitting on 4/12/06, I would attend the NLCHD meeting in order to see how the meetings were run and to ascertain the procedure to speak with the Commissioners about the improper interference with our property rights. To the best of my recollection, those in attendance were Orland Arneberg, Richard Hansen, Ron Landeck, Dan Payne, Dan Carscallen, Paul Stubbs, Don Brown, Gary Osborn, John Bohman, Bob and Kate Wagner, Francis and Patsy Wagner, and a woman unknown to me. Orland Arneberg called first on me to speak although I was not on the agenda. I brought the fact, that I was not on the agenda, to Orland Arneberg's attention. Mr. Arneberg did not respond but Dan Payne volunteered that he had not notified anyone of the meeting and that Bob Wagner had been in his office every day in regards to his driveway access. I then proceeded to speak and complained to Commissioners that the permit for the Wagner driveway access was issued for access wholly across our property and I showed them how the driveway crossed the east property line by showing them aerial photos and where the east property line was and where the old driveway was. I also complained about the dirt and gravel being pushed into the buffer between our fence and the road bed since late fall 2005 extension of width to Camps Canyon Road and continuing with the maintenance of the road. I told them we had not given them permission to do so and that the NLCHD did not have the authority to do so. I also complained of the injury to our fence, on our information and belief, due to the pushing of a wind fallen tree through the fence by the grader operator in the fall of 2004. Defendants stated all matters were within their 50 foot/25 feet from centerline prescriptive right of way (Defendants called it their "prescriptive right"). I reminded Commissioners that the

NLCHD had altered Camps Canyon Road in the vicinity of the 3+/- acre parcel in 1996 and that, there no longer existed a prescriptive right of way in the vicinity of the 3+/- acre parcel and even if such prescriptive right of way did exist, there was no extension of the right of way (prescriptive or otherwise) to 25 feet from centerline encumbering our property greater than the width of Camps Canyon Road and its supporting structures. Mr. Landeck quoted from the Idaho Code reading I.C. § 40-2317 (an implied threat that a fine of $150/day could be enforced, however no notice was given to us to remove our fence). I told the Defendants that they had no right to destroy our fence regardless of the type or width of the right of way they may have. I asked the NLCHD to conduct a survey to substantiate their claims that the driveway access was within their right of way, if such right of way existed. I told Commissioners that the driveway access crossed the east property line of the 3+/-acre parcel. Mr. Payne and Mr. Arneberg stated that the driveway access permit was still valid as it was within the prescriptive right of way. I told them that there was no prescriptive right of way and even if there was, the NLCHD only had an easement. Mr. Payne said the driveway access was within the 699 feet road frontage on the Wagner deed. I pointed out to Dan Payne that in 1996 he had altered (straightened) the road. Mr. Arneberg responded that the road had not been moved in his tenure or under his watch. I suggested that the Wagners and the NLCHD share the expense of the survey as the NLCHD was largely responsible for the driveway problem. The meeting was totally without order, Defendants being biased, argumentative and confrontational. It ended abruptly when the Commissioners refused to call for a survey, I stated that the County surveyor stated that a survey was the correct place to start, and then I stated that I would call for a survey. After the meeting, Patsy Wagner started yelling that we were ruining her children's lives and Gary Osborn came up to me and said that I was probably right. Gary Osborn stated that they [implying those

in attendance of the meeting, including Orland Arneberg, and Dan Payne] should not have done this [tried to ram the driveway through some sort of legal process], but that he was interested in resolving the matter. I told him the place to start was a survey and that the Wagners and the NLCHD needed to do so and cooperate. The Wagners and their friends and contractors continued to use the driveway access, and on Plaintiffs' information and belief were not restricted from any and all use at any time by Defendants and that the first permit was not ever revoked and that the Defendants still claim "a prescriptive right" to issue a driveway access permit in the same area to resident of the now Wagner place. Defendants have never said otherwise than the First Wagner Permit was within their policy and valid.

14. In early June of 2006, Rimrock Consultants set out the stakes for the 3+/- acre parcel property lines revealing the trespass of the first Wagner driveway access across the east property line of the 3+/-acre parcel. The Wagner driveway access was wholly on Plaintiffs' land.
15. We tried to work out an agreement with the Wagners by offering our cooperation in bringing a deeded easement to the NLCHD. On our information and belief, Bob Wagner told us that the NLCHD turned down the idea of a deeded easement and the Wagners obtained a second permit and built a new driveway access on or about 6/10/06. On information and belief, Bob Wagner stated the NLCHD turned down the deeded easement on the grounds that the width of the easement would need to be 51 feet as measured from the northeast side of the road to wholly include the first Wagner driveway access.
16. In the fall of 2006 the NLCHD blasted out some of the old rock outcropping, placed a culvert for the second Wagner Driveway opposite the culvert for our, Halvorsons', access to our corral and thus limiting the road surface to about 19 feet between the two driveway accesses and extended the road surface to the northeast, immediately to

the west of the culvert installation by pushing an old compaction roller and gravel and dirt into our fence and realigning the drainage ditch. Prior to this the width of the road in this area was about 15 feet including ditches and supporting structures. This alteration added 4 to 5 feet of width, including ditches and supporting structures to the road on the northeast side of the road from the west end of Plaintiffs' corral.

17. In the winter of 2006-2007 we, the Plaintiffs, contacted Mr. Landeck about the problems we were having with the NLCHD activities—the improper interference with our property rights. He said he was not authorized to talk with us although he did not say he was not the NLCHD attorney. He only said we had to talk with the NLCHD clerk if we had a problem.
18. In the winter of 2006-2007 we, the Plaintiffs, contacted the NLCHD clerk about the problems we were having with the activities of the NLCHD. He said he was not able to answer legal questions and was unable to give us advice on how to proceed. We proposed writing a letter containing our complaints and outlining our requests and meeting with the Commissioners. It took several months to get what we expected to be a hearing on the matter on 3/21/07.
19. On 3/21/07, Plaintiffs, Don Halvorson and Charlotte Halvorson, attended the regular meeting of the NLCHD Commissioners at 1132 White Ave Moscow Idaho. Plaintiffs had asked for a meeting with Commissioners and had received time on the agenda for 3/21/07. Plaintiffs supplied Defendants with letter (dated 3/8/07) in advance of the 3/21/07 meeting indicating Plaintiffs' concerns and seeking resolution to the right of way issues with Camps Canyon Road in the vicinity of the 3+/- acre parcel by means of a validation procedure initiated on Commissioners own resolution and/or some other means expecting a formal type of hearing. At this meeting Plaintiffs showed Defendants/Commissioners that after the 1996 alteration Camps Canyon Road no longer agreed with the public record, and asked Defendants/Commissioners to

validate Camps Canyon Road under their own resolution. Plaintiffs had supplied Defendants with a copy of the Rimrock survey. Defendants brought forth aerial photos from 1965 and 1949 without prior notice to Plaintiffs. We received no hearing or meaningful response to our complaints. The Commissioners were biased and bent only on finding reason not to have to listen to us.

20. Plaintiffs were not given any advance notice of the presentation of the aerial photos at the 3/21/07 meeting—without the ability to make any advance analysis of the aerial photos. Plaintiffs requested copies of the photos and it took about 6 weeks for Plaintiffs to receive copies of the photos. These copies were of such poor quality that they were useless for any analysis. Plaintiffs requested better quality copies after about three weeks Plaintiffs received somewhat better quality photos, assumed Defendants'/Commissioners' averred authenticity and accuracy, and found these aerial photos to show the movement of Camps Canyon Road in the vicinity of the 3+/- acre parcel as Plaintiffs had alleged. Plaintiffs showed Defendants counsel the results of Plaintiffs analysis at the 7/07 informal meeting on site at Camps Canyon Road.
21. On 8/8/07 Plaintiffs attended the regular meeting of the Commissioners and ask that they could talk directly to the NLCHD attorney to try to work out a resolution to the problems. The Commissioners felt that our representing ourselves was inappropriate as without having an attorney to pay, we didn't have to spend enough money and therefore the commissioners denied our requests.
22. On 8/28/07 (letter dated 8/23/07) we requested the NLCHD to declare the applicability of I.C. § 40-203a to the situation and the issues that were involved in the problems we were having with the activities of the NLCHD. We received no response.

23. We asked for and received time on the agenda to show Commissioners the results of our analysis of the aerial photos for 9/15/07. On 9/15/07 Defendants' counsel denied us the opportunity to show our analysis and he told us to get a lawyer.
24. On information and belief, Plaintiffs believe Defendants to be final policy makers of the NLCHD.
25. Plaintiffs sought and obtained 2nd Wagner driveway access permit, as public information from the NLCHD clerk, however were unable to obtain the first Wagner driveway access permit as on Plaintiffs' information and belief, the NLCHD clerk said the first Wagner driveway access permit had been destroyed.
26. Defendants continue their widening and maintenance activities in the vicinity of the 3+/- acre parcel, covering Plaintiffs land with rock, dirt, gravel and debris, and encroaching on and damaging Plaintiffs' fence.
27. None of the several miles of fence Plaintiffs have in the South Latah County Highway District, and some of which has been in closer proximity to the edge of the road than the 700 feet of fence abutting to Camps Canyon Road for many, many years and many, many snow falls and gradings with occasional injury to snow and gravel and life goes on peacefully and amicably.
28. Plaintiffs have spent time, money and effort to resolve these issues and have

The above statements are true to the best of our knowledge.

Dated this 17 day of February 2009.

Don Halvorson

Don Halvorson

SUBSCRIBED AND SWORN TO before me this 17 day of February 2009.

Janice Bader

NOTARY PUBLIC for the State of Idaho
My commission expires: 11/30/12

Charlotte Halvorson

SUBSCRIBED AND SWORN TO before me this 17 day of February, 2009.

NOTARY PUBLIC for the State of Idaho
My commission expires: 11/30/12

CERTIFICATE OF SERVICE

I hereby certify that on this 17 day of February, 2009, I caused a true and correct copy of this document to be served on the following individual in the manner indicated below:

RONALD J. LANDECK LANDECK, WESTBERG, JUDGE & GRAHAM, P.A. 414 S. Jefferson P.O. Box 9344 Moscow, ID 83843	[ ] U.S. Mail [ ] Federal Express Standard Overnight Mail [ ] FAX (208) 883-4593 [x] Hand Delivery
CARL B. KERRICK DISTRICT JUDGE P.O. Box 896 Lewiston, ID 83501-0896	[x] U.S. Mail [ ] Federal Express Standard Overnight Mail [ ] FAX [ ] Hand Delivery

Don Halvorson