

10-28-2009

Halvorson v. North Latah County Highway Clerk's Record v. 7 Dckt. 36825

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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

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36825

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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' FOURTH RECORD
vs.) SUPPLEMENT
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)

STATE OF IDAHO)

)ss.

County of Latah)

Don Halvorson and Charlotte Halvorson depose and say:

1. We are the Plaintiffs named in the above case and hereby submit Plaintiffs' Fourth Record Supplement

2. Attached hereto with reference to the corresponding number is a true and correct copy of Land Patent Details—BLM GLO Records @ <http://www.glorerecords.blm.gov/PatentSearch/Detail.asp?PatentDocClassCode=SER&Accession=1118993&Index=1&QryID=38950.94&DetailTab=1>, Land Patent Details, for Douglas R. Kelly; and <http://www.glorerecords.blm.gov/PatentSearch/Image.asp?PatentDocClassCode=SER&Accession=1118993&Format=PDF&Page=1&Index=1&QryID=39236%2E82>, Document Image, for Douglas R. Kelly referenced as Item No. 1.

3. Attached hereto with reference to the corresponding number is a true and correct copy of Land Patent Details—BLM GLO Records @ <http://www.glorerecords.blm.gov/PatentSearch/Detail.asp?PatentDocClassCode=SER&Accession=IDIDAA+020330&Index=3&QryID=39825.84&DetailTab=1>, Land Patent Details, for Emmett J. Gemmill; and <http://www.glorerecords.blm.gov/PatentSearch/Detail.asp?PatentDocClassCode=SER&Accession=IDIDAA+020330&Index=3&QryID=39825%2E84&DetailTab=2>, Legal Land Description, for Emmett J. Gemmill referenced as Item No. 2.

4. Attached hereto with reference to the corresponding number is a true and correct copy of photograph (all taken in 2006, unless otherwise noted) and/or map referenced as Item No. 3:

(a) p. #1, of “Rierson” fence along Little Bear Ridge Road; NLCHD jurisdiction, showing buried fence by road maintenance;

(b) p. #2 of aerial view of section 15; FSA files circa 1989;

(c) p. #3 of Plaintiffs’ fence on Camps Canyon Road;

(d) p. #4 view looking northwest of 3+/- acre parcel showing Wagner “post” at edge of the road (“A”), east property line (“B”), grassy draw (“C”), “hardened area” where seasonal creek crossed the road (“D”), and (“E”) approximate original intersection of east property line with the old Camps Canyon Road, prior to 1996;

(e) p. #5 Plaintiffs' corral with support fence of wire fence showing new drainage ditch ("B") and old compaction roller pushed into fence knocking off of top rail ("A");

(f) p. #6 Plaintiffs' 5-wire fence at narrowest spot of the "buffer", edge of road and supporting structures when fence was rebuilt in 1997 ("B"), and bottom 2 wires covered with dirt and gravel in summer of 2006;

(g) p. #7 showing scarring and erosion of Plaintiffs property after Wagners pulled the rocks off after the Rimrock survey showed the driveway access to be wholly o Plaintiffs land;

(h) p. #8 Plaintiffs fence (looking west) is buried by snow plow pushing snow into fence;

(i) p. #9 Plaintiffs fence is buried by snow plow pushing snow into fence;

(j) p. #10 Spring thaw 2008 showing damage to fence and gravel on top of melting snow showing how far of in excess Defendants pushed snow;

(k) p. #11 same area as #8 looking east showing distance of travelled road surface. "tire tracks" and Plaintiffs' fence;

(l) p. #12 looking due west showing 3+/- acre parcel showing south property line ("A"), east property ("B"), old farm line before Rimrock survey ("C"), and "hardened area where seasonal creek crossed the road;

(m) p. #13 looking due west showing south property line ("A"), east property ("B"), Wagner survey "post" ("C"), and "hardened area where seasonal creek crossed the road;

(n) p. #14 looking northwest from Camps Canyon Road showing grassy draw ("A"), old pine trees ("B"), approximate path of old road, prior to 1996;

(o) p. # 15 2007 FSA aerial photo with property lines and farm field lines;

(p) p. #16 looking northwest, approximate line of old fence and excavated trees and distance fence is off the road (approximate view of #9);

(q) p. #17 looking south at 8 foot bank left by moving road base to the northeast in 1996;

(r) p. #18 Metsker Map circa early 1950's "TOWNSHIP 39 N., 3 W.B.M."

(s) p. #19 Standard Atlas of Latah County, Geo. A. Ogle & Co. Chicago 1914, showing TOWNSHIP 39N., Range 3 W., showing extent of wagon trails through Camps Canyon;

(t) p. # 20 looking south along east property line after NLCHD excavated the remains of the 8 foot bank, showing road paralleling east property line and 84 +/- feet loss of road frontage;

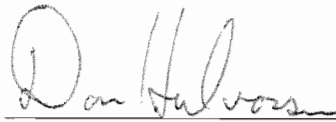
(u) p. #21 Latah County Road Plat Book showing Camps Canyon Road not crossing section 15, that it was not recorded;

(v) p. #22 photo showing congruence of Rimrock survey with original fence line; old barb wire fence embedded into old tree stump 100 years old ("A"), and stake marking west line of SE ¼ NE ¼ ("B").

5. Attached hereto with reference to the corresponding number is a true and correct copy of Defendants' Responses To Plaintiffs' First Request For Admissions (Payne) referenced as Item No. 4.

6. Attached hereto with reference to the corresponding number is a true and correct copy of Defendants' Responses To Plaintiffs' First Interrogatories (Payne) referenced as Item No. 5.

Dated this 17th day of February, 2009.



Don Halvorson

SUBSCRIBED AND SWORN TO before me this 17th day of February, 2009.



NOTARY PUBLIC for the State of Idaho

My commission expires: 11/30/12

The subsequent inquiry is whether defendants' actions interfered with plaintiffs' use and enjoyment of their land to a degree that implicates substantive due process. In *United Artists Theatre Circuit v. Warrington*, 316 F.3d 392 (3d Cir. 2003), the third circuit held that in order to challenge a municipal land-use decision as a violation of substantive due process plaintiffs must show that the defendants' conduct "shocks the conscience." *Id.* at 400 (relying on standard set in *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)). The court noted that "[l]and use decisions are matters of local concern, and such disputes should not be transformed into substantive due process claims based only on allegations that government officials acted with improper motives." *Id.* at 402. In fact, only "conduct intended to injure in some way unjustifiable by any government interest" is the kind of action most likely to be deemed "conscience shocking." *County of Sacramento*, 523 U.S. 833, 849, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

Aardvark, *supra* at 444-445.

The Idaho Supreme court further explained the state court's role in resolving substantive due process claims as follows:

To determine whether an individual's due process rights under the Fourteenth Amendment have been violated, a court must engage in a two-step analysis. It must first decide whether the individual's threatened interest is a liberty or property interest under the Fourteenth Amendment." *Schevers v. State*, 129 Idaho 573, 575, 930 P.2d 603, 605 (1996) (citing *Smith v. Meridian Joint Sch. Dist. No. 2.*, 128 Idaho 714, 722, 918 P.2d 583, 591 (1996)); *see also*, *True v. Dep't of Health and Welfare*, 103 Idaho 151, 645 P.2d 891 (1982) (citing *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975)). Only after a court finds a liberty or property interest will it reach the next step of analysis, in which it determines what process is due. *Schevers v. State*, 129 Idaho 573, 575, 930 P.2d 603, 605.

As stated by the United States Supreme Court, "[t]he requirements of procedural due process apply only to the deprivation of interest encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). Accordingly, the existence of [a party's] right to due process protections regarding her request to participate in the...depends on whether [the party's] interest...is within the scope of the liberty or property language of the Fourteenth Amendment.

The United States Supreme court has noted that property interests are "created...by existing rules,...such as state law." *Id.* Likewise, this Court has indicated that "determination of whether a particular right or privilege is a property interest is a matter of state law." *Ferguson v. Bd. of Trustees of Bonner*

Cty. Sch., 98 Idaho 359, 564 P.2d 971, 975 (1977) (citing *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976)). Further determining the existence of a liberty or property interest depends on the “construction of the relevant statutes,” and the “nature of the interest at stake.” *True*, 103 Idaho at 154, 645 P.2d 891 (citing *Tribe, American Constitutional Law*, § 10-9, at 515-16 (1978)). Hence, whether a property interest exists can be determined only by an examination of the particular statute or ordinance in question. *Bishop*, U.S. 341, 96 S.Ct. 2074.

Applying these standards to Defendants’ motions for summary judgment, because the facts on this record demonstrate that the District has acted within its lawful statutory authority, as construed by Idaho courts throughout the State’s history, in the management of Camps Canyon Road for the public, Defendants’ actions have not “interfered with plaintiffs’ use and enjoyment of their land” to any degree much less “to a degree that implicates substantive due process” or “shocks the conscience.” *Aardvark, supra* at 445.

Plaintiffs repeatedly make unfounded assertions such as “Defendants actions/failures to act...bear no relationship to the public...safety...or general welfare,” which sums up Plaintiffs’ myopic and out-of-touch view of what a “public” road is all about. E.g., see Plaintiffs’ Answering Brief, p. 11. However, Plaintiffs have failed to assert any facts that indicate Defendants’ actions were not justified by a governmental interest.

The United States Supreme court has long viewed with disfavor such “bare allegations of malice” and has held, under such circumstances, that

governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. See *Procunier v. Navarette*, 434 U.S. 555, 565, 98 S.Ct. 855, 861, 55 L.Ed.2d 24 (1978); *Wood v. Strickland*, 420 U.S., at 322, 95 S.Ct., at 1001.

Harlow v. Fitzgerald, 457 U.S. 800, 817-818, 102 S.Ct. 2727, 2738 (1982). The *Harlow* Court adopted a test designed to “avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment, that focuses on the “objective legal

reasonableness of an official's conduct" in determining whether the official "could be expected to know that certain conduct would violate statutory or constitutional rights." *Id.* at 2738 – 2739.

The Court also opined that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Id.* at 2739 [citation omitted]. This doctrine applies directly to the circumstances of the instant case and this qualified immunity protects the individual Defendants in their performance of discretionary functions from civil damages and provides independent authority for the dismissal of all claims against individual Defendants, who, the record aptly demonstrates, acted in accordance with applicable law as known to them at the time of such actions. In addition, Plaintiffs have failed to establish as a threshold matter in the proof a due process violation that the individual Defendants' alleged arbitrary action "can properly be characterized as conscience-shocking in a constitutional sense." *United Artists, supra* at 399, citing *Collins v. Harker Heights*, 503 U.S. 115, 128, 112 S.Ct. 1061 (1992).

The Second Circuit Court of Appeals, in a New York land use case that dealt with similar snow plowing and road widening issues, reached the following decision and made the following observations:

To establish a substantive due process violation, the [plaintiffs] must show that the Town's alleged acts against their land were "arbitrary," conscience-shocking," or "oppressive in the constitutional sense," not merely "incorrect or ill-advised." *Lowrance v. C.O.S. Achtyl*, 20 F.3d 529, 537 (2d Cir. 1994)

...
...although the snow plowing and paving may have been incorrect or ill-advised, such actions on the part of the Town were not so outrageous and arbitrary as to implicate the [Plaintiffs'] substantive due process rights. Rather, they constituted, at most, occasional unlawful encroachments on the "Reserved for Parking" parcel necessitated by the Town's performance of its municipal duties. Any dispute regarding such actions is best resolved in state court. *Zahra v. Town of Southold*, 48 F.3d 674, 680 (2d Cir.1995) ("[T]he Due Process Clause

does not function as a general overseer of the arbitrariness in state and local land-use decisions; in our federal system, that is the province of the state courts.”).

Ferran v. Town of Nassau, 471 F.3d 363, 369-370 (2006).

Likewise, Defendants’ conduct was not “conscience-shocking” in the least. While the driveway permit may, arguably have been issued in error, that act alone fails to rise to the level of arbitrariness or oppressiveness that is required for a substantive due process violation under § 1982. Plaintiffs have failed to meet the required legal tests to establish such a violation, and their substantive due process claims must be dismissed.

2. Procedural Due Process Claims.

Plaintiffs make a variety of assertions regarding alleged violations of their procedural due process rights and primarily in connection with being allegedly deprived of notice and the right to be heard prior to the District’s undertaking any improvement activity on Camps Canyon Road or issuing any access permit. This issue had been addressed previously in Defendants’ Brief, however, the additional analysis set forth above in this Reply Brief applies in that Plaintiffs have not established a claim to a constitutionally or statutorily protected property interest applying state law principles. Therefore, these claims also fail.

Plaintiffs rely on *Homestead Farms v. Board of Commissioners Teton County, State of Idaho*, 141 Idaho 855, 119 P.3d 630 (2005) for the proposition that an evidentiary hearing is required to establish a public highway, however, such reliance is entirely misplaced. *Homestead Farms* holds that county commissioners (and, by implication, highway district commissioners) cannot, by adopting an official map of a public highway system under Idaho Code § 40-202, create public highways. The *Homestead Farms* Court holds that in order for a highway to be included on the official map of the highway district’s system, that highway must have been a public highway prior to adoption of the map. In this case, the Third Affidavit of the District’s

Clerk, Dan Carscallen, contains the District's records of its official map process and an official map of the District's public highway system was undertaken and adopted in accordance with law and proof was presented at a public hearing following due notice that each highway described on the District's official map qualified as a public highway independently of its inclusion on the map. Third Affidavit of Dan Carscallen filed February 13, 2009.

In addition, Title 40, Idaho Code and related statutes provide adequate procedural due process and afford "a full judicial mechanism" under which the District's administrative decisions can be challenged. See *Robin v. Bensalem Township*, 616 F.2d 680 (3rd Cir. 1980). The District has not made any administrative decisions or failed to take any administrative action in violation of Idaho law, and Plaintiffs have not set forth any admissible facts or supporting legal authority to the contrary.

3. Equal Protection Claims.

Plaintiffs have sprinkled their Complaint and other writings with vague assertions that the District has violated their rights to equal protection of the law. These averments have been made without any offer of evidence that Plaintiffs have been "singled out" by the District for discriminatory treatment. The evidence on this record is to the contrary in that the District officials testify that their road improvement policies are applied uniformly and, in fact, that this is the only lawsuit in institutional memory in which taking and due process claims have been made against the District. Plaintiffs have not produced any particularized evidence to support any equal protection claim and any such claims must fail and be dismissed. See *Aardvark, supra* at 446-448.

B. Constitutional Claims Against the District.

Under *Monell v. Dept. of Social Serv.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), a municipality may be found liable for violating an individual's civil

rights under limited circumstances. In order to prevail on such a claim, a plaintiff must demonstrate: 1) the deprivation of a constitutional right; 2) that action was taken pursuant to a custom or policy of the local government unit; and 3) that such action was the cause of the deprivation. *Id.*


As discussed above in connection with Plaintiffs' substantive due process claims against individual Defendants, Plaintiffs have not established that they were deprived of any of their constitutional rights or that any policy of the District exists that is responsible for depriving Plaintiffs of any of their constitutional rights. Without the establishment of any such deprivation or identification of any such infirm policy, Plaintiffs' due process claims against the District fail. Further, there being no reasonable basis upon which to "expand the due process concepts of...property under the Idaho Constitution beyond the contemplation of the Fourteenth Amendment," such claims also fail under Article I, Section 15 of the Idaho Constitution. *Maresch, supra* at 227, P.2d at 20.

CONCLUSION

Defendants respectfully request Defendants' Motion for Summary Judgment be granted as to all Plaintiffs' claims against Defendants in this action.

Dated this 26th day of February, 2009.

RONALD J. LANDECK, P.C.

By: 

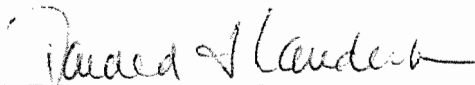
Ronald J. Landeck
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 26th 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
 Hand Delivery



Ronald J. Landeck

CASE NO. CV 2008-00180

2009 FEB 27 PM 4:52

CLERK OF DISTRICT COURT
LATAH COUNTY

BY: Ad 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 DISTRICT COURT
OF THE DISTRICT OF IDAHO, IN AND FOR THE COUNTY OF LATAH

DON & CHARLOTTE HALVORSON)
(Husband and Wife),	) Case No. CV 2008-180
)
Plaintiffs,	) DEFENDANTS' MOTION FOR
	) EXPEDITED HEARING
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, move this Court under Rule 7(b)(3) I.R.C.P. for an order to expedite the hearing of Defendant's Second Motion to Strike and Defendants' Motion To Enlarge Time each filed herewith on February 24, 2009, such that said motions will be heard at 9:00 a.m. on


Tuesday, March 3, 2009, or as soon thereafter as the matter may be called by the Court in the designated courtroom at the Nez Perce County Courthouse.

As grounds for this motion, Defendants rely upon Defendants' Second Motion to Strike and Defendants' Motion to Enlarge Time.

Defendants request oral argument upon this motion.

RESPECTFULLY SUBMITTED this 27th day of February, 2009.

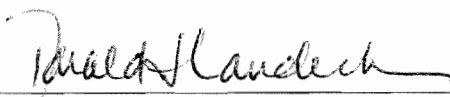
RONALD J. LANDECK, P.C.

By: 
Ronald J. Landeck
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 27th 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	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Federal Express Standard Overnight Mail <input type="checkbox"/> FAX <input type="checkbox"/> Hand Delivery
---	---


Ronald J. Landeck

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

COURT MINUTES

Presiding Judge
CARL B. KERRICK
Reporter
NANCY TOWLER
Date MARCH 3, 2009
Time: 9:00 a.m.

DON & CHARLOTTE HALVORSON)
(Husband and Wife),)
)
Plaintiffs,)
)
vs.)
)
NORTH LATAH COUNTY HIGHWAY)
DISTRICT; BOARD OF)
COMMISSIONERS FOR THE NORTH)
LATAH COUNTY HIGHWAY DISTRICT)
ORLAND ARNEGERG, RICHARD)
HANSEN, SHERMAN CLYDE, in their)
Official Capacites, and in their Individual)
Capacities; DAN PAYNE, in his official)
capacity and in his individual capacity,)
)
Defendants.)
)
)
)

Docket No. CV-2008-180

APPEARANCES:
CHARLOTTE HALVORSON
DON HALVORSON
For, Plaintiff

RONALD LANDECK
For, Defendant

SUBJECT OF PROCEEDINGS: PENDING MOTIONS

BE IT KNOWN, THAT THE FOLLOWING PROCEEDINGS WERE HAD, TO-WIT:
COURTROOM #1

90047 Don and Charlotte Halvorson present.

Ronald Landeck present with Dan Carscalin.

Court reviews pending motions. Plaintiff has a motion for partial summary judgment, Defendant has a motion for enlargement of time, motion for summary judgment, and motions to strike.

90150 Mr. Landeck presents argument re: motion for enlargement of time.

1 Page of 2 Pages

COURT MINUTES MARCH 3, 2009

90300 Mr. Halvorson presents argument re: motion for enlargement of time.
90440 Court grants motion to enlarge time.
90537 Mr. Halvorson presents argument on motion for partial summary judgment.
93018 Mr. Landeck presents argument re: all pending motions.
102623 Mr. Halvorson presents further argument.
103640 Mr. Landeck presents further argument.
103905 Court takes matter under advisement and will issue a written decision.
103930 Recess 10:15 a.m.

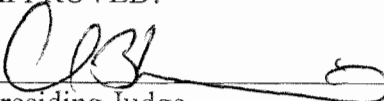
JENNY LANDRUS

Deputy Clerk

2 Page of 2 Pages

COURT MINUTES MARCH 3, 2009

APPROVED:



Presiding Judge

FILED April 6, 2009
 10:48 AM
 BY *CB*
 CLERK, DISTRICT COURT, IDAHO
CARL D. KERRICK

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

DON & CHARLOTTE HALVERSON,)
 Husband and Wife,)
)
 Plaintiff,)
)
 vs.)
)
)
 NORTH LATAH COUNTY HIGHWAY)
 DISTRICT; BOARD OF COMMISSIONERS FOR)
 THE NORTH LATAH COUNTY HIGHWAY)
 DISTRICT ORLAND ARNEGERG, RICHARD)
 HANSEN, SHERMAN CLYDE, in their Official)
 Capacities, and in their Individual Capacities;)
 DAN PAYNE, in his official capacity and in his)
 Individual capacity,)
)
 Defendant.)

CASE NO. CV08-00180
 ORDER VACATING PRETRIAL
 AND JURY TRIAL

The Court previously scheduled this matter for a pretrial conference to be held on April 13, 2009 and a jury trial to be held beginning April 20, 2009. On March 3, 2009 the parties argued several motions which are still pending before the Court. Subsequent to the motions being

ORDER VACATING PRETRIAL
 AND JURY TRIAL

heard on March 3, 2009, the Court presided over a medical malpractice jury trial which lasted four weeks in length. As a consequence, the Court has been unable to devote the necessary time to decide the motions pending before the Court in this case.

THEREFORE, the pretrial conference scheduled to be held on April 13, 2009 and the jury trial to be held beginning April 20, 2009 are hereby VACATED.

Once the motions currently pending before the Court have been decided, a scheduling conference will be placed on the Court's calendar.

IT IS SO ORDERED this 6th day of April, 2009.



CARL B. KERRICK-District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of
the foregoing ^{6 faxed} ORDER VACATING PRETRIAL AND JURY TRIAL
was mailed, postage prepaid, by the undersigned at
Lewiston, Idaho, this 6th day of
April, 2009, to:

Don Halvorson *-hand delivered*
Charlotte Halvorson
1290 America Ridge Road
Kendrick ID 83537

Ronald J. Landeck
P O Box 9344
Moscow ID 83843

Clerk of the Court
P O Box 8068
Moscow ID 83843

PATTY O. WEEKS, Clerk

By *Patsy O. Weeks*
Deputy



FILED May 11, 2009 AT
12:40 CLERK OF DISTRICT COURT, IDAHO
 BY: CEB
CARL E. KERRICK

**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),)
)
 Plaintiffs,)
)
 v.)
)
 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.)
 _____)

CASE NO. CV 2008-00180

**OPINION AND ORDER ON PLAINTIFFS'
 MOTIONS FOR PARTIAL SUMMARY
 JUDGMENT AND DEFENDANTS'
 MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court on Plaintiffs' Motions for Partial Summary Judgment and Other Motions Submitted January 26, 2009 and the Defendants' Motion for Summary

Judgment.¹ The Court heard oral argument on March 3, 2009. The Plaintiffs elected to proceed *pro se* in the matters. The Defendants were represented by Ronald Landeck, attorney at law. The Court, having heard argument and being fully advised in these matters, hereby renders its decision.

BACKGROUND

The Complaint in this matter was filed on March 3, 2008. Issues in the case surround improvements made to a road which traverses a portion of the Plaintiffs' property, Camps Canyon Road.² This road is located in rural Latah County, Idaho, and is maintained by the Defendants, North Latah Highway District (hereinafter "Highway District").

The Plaintiffs argue that any "increase in width or use, or change in location or nature (type) of the public right-of-way/public highway" where Camps Canyon Road traverses the Plaintiffs property may be a deprivation of the Plaintiffs' constitutionally protected property rights. *Complaint*, at 7. Further, the Plaintiffs allege that the Highway District's modifications and maintenance of Camps Canyon Road resulted in the taking of Plaintiffs' property. The Plaintiffs also allege the Defendants have violated their due process rights by failing to provide notice and an opportunity to be heard regarding issues surrounding various decisions the Highway District has made while maintaining Camps Canyon Road.

Procedurally, the Plaintiffs have filed several motions which this Court has addressed. First, the Plaintiffs filed two motions for declaratory judgment, which were denied because one

¹ Defendants have also filed a motion to strike portions of the Plaintiffs' Affidavit filed January 26, 2009. The Court did not take argument on the matter. The Court relies only on relevant facts, admissible as evidence, in support of the motions for summary judgment.

² Additional background of the case is found within the *Opinion and Order on Plaintiffs' Motion for Declaratory Judgment of I.C. § 40-203A and Plaintiffs' Motion for Declaratory Judgment under I.C. § 67-8003(3)*.

motion sought an advisory opinion beyond the purview of Idaho's Declaratory Judgment Act³ and this Court found, for purposes of judicial economy, these matters were best addressed through the underlying civil litigation.

Following the motions for declaratory judgment, the Plaintiffs filed three motions for summary judgment. These motions were denied because the Court found that questions of material fact remained which could not be resolved based upon the motions then before the Court. Further, the Plaintiffs presented novel theories of law which the Court found were unsupported.

Currently before this Court are both parties' motions for summary judgment. The Plaintiffs' brief seeks summary judgment on several issues, in addition to requests for reconsideration of this Court's previous rulings, and other various motions. The Defendants are seeking summary judgment as to all the claims in the Plaintiffs' Complaint.

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. Sonntag*, 141 Idaho 144, 146, 106 P.3d 470, 472 (2005), citing *Infanger v. City of Salmon*, 137 Idaho 45, 44 P.3d 1100 (2002).

When a motion for summary judgment is "supported by a particularized affidavit, the opposing party may not rest upon bare allegations or denials in his pleadings," but must set forth "specific facts" showing a genuine issue. I.R.C.P. 56(e); *Verbillis v. Dependable Appliance Co.*,

³ See *Noh v. Cenarrusa*, 137 Idaho 798, 53 P.3d 1217 (2002).

107 Idaho 335, 337, 689 P.2d 227, 229 (Ct. App. 1984). A “mere scintilla” of evidence or only a “slight doubt” as to the facts is insufficient to withstand summary judgment. *Corbridge v. Clark Equipment Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986), citing *Snake River Equip. Co. v. Christensen*, 107 Idaho 541, 691 P.2d 787 (Ct. App. 1984); see also *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 238, 108 P.3d 380, 385 (2005). Finally, the initial burden of establishing the absence of a genuine issue of material fact is on the moving party, and once this burden is met, it is incumbent upon the non-moving party to establish an issue of fact regarding that element. *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416 (1996).

ANALYSIS

Several issues are before this Court on summary judgment, with voluminous briefing filed in the matter. Due to the lengthy nature of the briefing presented to this Court, the issues will not be presented in the order of the parties’ briefs. The Court will first address the issue which is the crux of this lawsuit, the fact that the roadway in question is a public highway established by public use. Based upon this uncontroverted fact, the width of Camps Canyon Road, as a public highway, can be determined based upon statutory authority. The remaining claims made by the Plaintiffs are resolved accordingly based upon the status of Camps Canyon Road.

For organizational purposes, this Opinion is divided into three sections. First this Court addresses claims associated with the status of the roadway. Second, Plaintiffs’ claims of due process violations will be addressed, and finally, all remaining claims are considered.

A. Claims associated with the status of the roadway.

1. Camps Canyon Road is a public highway established through public use.

Both parties to this lawsuit agree that Camps Canyon Road has been established as a public highway through public use. The Plaintiffs have concurred that the road is a public highway established by prescription within the Plaintiffs' current motion for summary judgment.⁴ Further, in reliance of the fact that Camps Canyon Road is a public highway established through public use, the Plaintiffs also previously brought a motion for summary judgment through the presentation of a novel theory that improvements made to Camps Canyon Road nullified the width of the original right of way.⁵ *See Plaintiffs' Motion for Summary Judgment dated September 19, 2008*. In addition, the Plaintiffs confirmed their agreement that Camps Canyon Road existed as a public highway by prescription in a responsive brief filed earlier in these proceedings:

Further, Plaintiffs do not dispute Camps Canyon Road was at some time used for a period of five years which may have coincided with being worked and kept up at the public expense. If as an element of the specific issue to be adjudicated and for this motion only, Plaintiffs do not dispute Camps Canyon Road existed as an unrecorded prescriptive road/highway/right of way, as is where is until the alterations in 1996.

Plaintiffs' Reply Brief to Defendants' Answering Brief to Plaintiffs' Motion for Partial Summary Judgment, filed November 10, 2008, at 4.

The Defendants have submitted affidavits of facts which support the determination that Camps Canyon Road is a public highway established through public use. *See Affidavit of Orland*

⁴ *See Plaintiffs' Motion for Partial Summary Judgments and Other Motions Submitted January 26, 2009, and Brief*, at 29-31.

⁵ The Plaintiffs set forth a novel argument that the original right-of-way was nullified based upon alterations made by the Highway District in 1996. The Plaintiffs relied on *District of Columbia v. Robinson*, 180 U.S. 92, 21 S.Ct. 283, 45 L.Ed. 440 (1901) in support of this theory. However, the facts of *District of Columbia v. Robinson* can be distinguished from the case at hand because the easement addressed in that case was of smaller proportion: specifically, the easement was limited to the width of the roadway surface. *Id.* at 108-09, 21 S.Ct. at 289. Nothing within the case supports the Plaintiffs' argument that the width of Camps Canyon Road is limited to the surface of the roadway. Further, nothing within *District of Columbia v. Robinson* supports the Plaintiffs' novel theory of nullification of the width of the original right of way.

Arneberg in Opposition to Plaintiffs' Motions for Partial Summary Judgment Filed September 19, October 6 and October 21, 2008; see also Affidavit of Dan Carscallen in Opposition to Plaintiffs' Motions for Partial Summary Judgment Filed September 19, October 6 and October 21, 2008. In addition, the road is listed as a public highway under the jurisdiction of the Highway District on the official map of the Highway District, adopted in 1986. *Affidavit of Dan Carscallen in Opposition to Plaintiffs' Motions for Partial Summary Judgment filed September 19, October 6, and October 21, 2008.*

The Plaintiffs do not refute the fact that Camps Canyon Road is a public highway established through public use, as established in the aforementioned affidavits. When a motion for summary judgment is “supported by a particularized affidavit, the opposing party may not rest upon bare allegations or denials in his pleadings,” but must set forth “specific facts” showing a genuine issue. I.R.C.P. 56(e); *Verbillis v. Dependable Appliance Co.*, 107 Idaho 335, 337, 689 P.2d 227, 229 (Ct. App. 1984). A “mere scintilla” of evidence or only a “slight doubt” as to the facts is insufficient to withstand summary judgment. *Corbridge v. Clark Equipment Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986).⁶

The Idaho Supreme Court recently discussed the requirements for determining whether a public highway exists in *Ada County Highway Dist. v. Total Success Investments, LLC*, 145 Idaho 360, 179 P.3d 323, (2008).

⁶ Within the *Plaintiffs' Affidavit in Support of Plaintiffs' Motion for Partial Summary Judgment and Other Motions Submitted January 26, 2009*, the Plaintiffs aver that the movement of the roadbed of Camps Canyon Road varies from just a few feet to more than fifty feet depending on where it is measured and how it is measured. The Court finds this assertion to be a bare allegation, unsupported by evidence, and further that the statement is not specific to the portion of the roadway in question. Because a mere scintilla of evidence or only a slight doubt as to the facts is insufficient to withstand summary judgment, the Court finds there is no question of material fact regarding the status of Camps Canyon Road as a public highway established by public use.

The requirements for determining whether a public highway exists are set forth in I.C. § 40-202. According to the statute, a public road may be acquired: (1) if the public uses the road for a period of five years, and (2) the road is worked and kept up at the expense of the public. I.C. § 40-202(3); *Floyd v. Bd. of Comm'rs*, 137 Idaho 718, 724, 52 P.3d 863, 869 (2002). The highway district has the burden of proving by a preponderance of the evidence that public rights were established. *See Floyd*, 137 Idaho at 724, 52 P.3d at 869.

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

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

Id. at 365-66, 179 P.3d 328-29.

The record before this Court establishes that the public has used the road for more than five years, and that the Highway Department has worked and maintained the road at the expense of the public. In addition, the Plaintiffs do not refute that the Camps Canyon Road is a public highway. Therefore, it is established that the Camps Canyon Road is a public highway, established by public use. Based upon the status of Camps Canyon Road as a public highway established by public use, the Court can address the remaining issues within the parties’ summary judgment motions.

2. Public highways in Idaho shall not be less than fifty feet wide, including the highway in question, Camps Canyon Road.

Certain statutes in Idaho set forth requirements which apply to public highways.

Pertinent to this case is I.C. § 40-2312, which establishes that the minimum width of a public highway in Idaho is fifty feet.

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

I.C. § 40-2312. This statute made an exception to the fifty foot width requirement for highways which were of a lesser width at the time the statute was enacted in 1887. There is no evidence in the record before this Court that Camps Canyon Road existed prior to 1887, thus the exception is inapplicable to the case at hand. The Plaintiffs have made various arguments claiming the width of Camps Canyon Road should be limited only to the width of the surface of the roadway, however, the facts of this case do not support this argument.

There is a long history in Idaho case law which explains and supports the purpose of a public highway being a minimum width of fifty feet. This purpose was set forth by the Idaho Supreme Court in *Meservey v. Gulliford*, 14 Idaho 133, 93 P. 780 (1908).

It would seem that the right acquired by prescription and user carries with it such width as is reasonably necessary for the reasonable convenience of the traveling public, and, where the public have acquired the easement, the land subject to it has passed under the jurisdiction of the public authorities for the purpose of keeping the same in proper condition for the enjoyment thereof by the public. *See Whitesides v. Green, supra*. And, where the right is so acquired, such width must be determined from a consideration of the facts and circumstances peculiar to each case. However, it must be borne in mind that the statute fixes the width of highways at not less than 50 feet, and common experience shows that width no more than sufficient for the proper keeping up and repair of roads generally.

Id. at 148, 93 P. at 785. While *Meservey* was decided in 1908, it was more recently discussed in 1983, in *Bentel v. Bannock County*, 104 Idaho 130, 656 P.2d 1383 (1983). In *Bentel*, the Idaho Supreme Court found that the fifty foot width of a public highway was necessary not only for proper upkeep and repair of roads, but also for foreseeable public uses, such as sewage systems, runoff, communications and other services.

Meservey simply held that the state need not claim legal title to a highway in an action filed to protect the public interest in a prescriptive roadway easement. It did not address the scope of such easements, other than that one holding of the case is that as to width a 50 foot easement denied by the trial court, being in line with Sec. 932, Rev.Stat. (now I.C. § 40-904) will be upheld, because “common experience shows that width [is] no more than sufficient for the proper keeping up and repair of roads generally.” In more contemporary decisions, other jurisdictions have held the scope of such easements comprehensive enough to include reasonably foreseeable public uses of such roadways, such as subsurface installations for sewage, runoff, communications and other services necessary to the increased quality of life which generally accompanies the growth of civilization. “[A] highway easement acquired by prescription is no less comprehensive than one acquired by grant, dedication or condemnation.”

Id. at 133, 656 P.2d at 1386 (internal citations omitted)

Thus, statutory authority establishes that fifty feet is the minimum width of a public highway in Idaho. This minimum width encompasses the surface area of the roadway, as well as area that is commonly referred to as the right of way. The right of way is that area of undeveloped land next to the highway which is necessary for the proper upkeep and repair of the road.

The thrust of the Plaintiffs’ claims in the case at hand are based upon the theory that the width of Camps Canyon Road is limited to the actual surface of this roadway, without any area for right of way. The Plaintiffs argue that this width continues to change with each improvement made by the Highway District, such as the addition of gravel, or regular maintenance, such as the plowing of snow. While the Plaintiffs may be correct that the width of the actual roadway surface continues to change, the Plaintiffs have established no basis for this Court to conclude that there is an exception to the fifty foot minimum width requirement set forth in I.C. § 40-2312 and supported in *Meservey* and its progeny.

The Plaintiffs fail to establish that the width of the highway easement is limited only to the surface of the roadway of Camps Canyon Road. Therefore, as a matter of law, this Court

determines that Camps Canyon Road is a public highway which spans the width of fifty feet. The fifty foot width of Camps Canyon Road encompasses the surface of the roadway, as well as right of way necessary for the proper upkeep and repair of the road.

“[I]t is well settled under Idaho law that any judgment determining the existence of an easement must also specify the character, width, length and location of the easement.” *Schneider v. Howe*, 142 Idaho 767, 774, 133 P.3d 1232, 1239 (2006); *see also Kosanke v. Kopp*, 74 Idaho 302, 261 P.2d 815 (1953). This Court notes that Camps Canyon Road is located on the official map of the Highway District, adopted in 1986. *Affidavit of Dan Carscallen in Opposition to Plaintiffs’ Motions for Partial Summary Judgment filed September 19, October 6, and October 21, 2008*. Further, as will be discussed in detail below, the road follows the same approximate centerline as it did in 1974. Thus, the character, width, length, and location of the road are a matter of public record and readily ascertainable. *See Schneider*, 142 Idaho at 774, 133 P.3d at 1239. The Plaintiffs have posited that the width of Camps Canyon Road is not fixed, but moves every time gravel is added or the road is maintained or improved. For purposes of clarification, the centerline of the actual surface of the roadway, which has remained the same since 1974, establishes the midpoint of the fifty foot span. The fifty foot width of the roadway is easily ascertainable by measuring twenty five feet from the centerline of the roadway to each side of the road.

3. The Highway District’s improvements and maintenance of Camps Canyon Road occurred within the right of way and not beyond the width of the road.

The Defendants assert that Camps Canyon Road follows the same approximate centerline now that it did in 1974. *Affidavit of Dan Payne in Opposition to Plaintiffs’ Motions for Partial Summary Judgment filed September 19, October 6, and October 21, 2008; Affidavit of Orland*

Arneberg in Opposition to Plaintiffs' Motions for Partial Summary Judgment filed September 19, October 6, and October 21, 2008; Third Affidavit of Dan Payne. In addition, surveyor Larry Hodge affirmed the location of Camps Canyon Road in relation to the Plaintiffs' real property, has not been changed in any significant degree between 1940 and 2004. *See Affidavit of Larry Hodge.* Further, the Highway District asserts that any actions taken to improve the road have fallen within the fifty foot width of the roadway. *Affidavit of Dan Payne in Opposition to Plaintiffs' Motions for Partial Summary Judgment filed September 19, October 6, and October 21, 2008; Affidavit of Orland Arneberg in Opposition to Plaintiffs' Motions for Partial Summary Judgment filed September 19, October 6, and October 21, 2008.*

The Plaintiffs' fence is located within the right of way that is encompassed by the fifty foot width of the road. *Affidavit of Dan Payne in Opposition to Plaintiffs' Motions for Partial Summary Judgment filed September 19, October 6, and October 21, 2008.* The Plaintiffs argue the highway district has damaged their fence, pushed gravel six inches to the northeast, and further damaged the Plaintiffs as a result of issuing driveway permits to the Plaintiffs' neighbors, the Wagners. *Plaintiffs' Affidavit in Support of 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; Plaintiffs' Affidavit in Support of Plaintiffs' Motion for Partial Summary Judgment/Adjudication of the Issue of the Cause for Action Under 42 U.S.C. 1983; Plaintiffs' Affidavit in Support of Plaintiffs' Answering Brief to Defendants' Motion for Summary Judgment and Reply to Defendants' Answering Brief and Objection to Plaintiffs' Motion for Partial Summary Judgments and Other Motions Submitted January 26, 2009.* The Plaintiffs also rely on the affidavits of Ed Swanson, Ole Hanson, and Joe Yockey, who have been long time residents of the area surrounding Camps Canyon Road. These

affidavits establish that changes have been made to the road and that the road looks nothing like it did a few years ago. *Ed Swanson's First Affidavit; Ole Hanson's First Affidavit; Joe Yockey's First Affidavit.*

In order to sustain an action against the Defendants for damage to their property, the Plaintiffs must set forth facts which establish that the Highway District's actions occurred beyond the purview of the right of way of Camps Canyon Road. The Plaintiffs argue that their fence has been damaged, that gravel has been added to the road, that snow has been plowed, and that the road has moved, however, based upon the record before the Court, all of these actions occurred within the right of way of the road. The Plaintiffs have failed to refute the facts presented by the Highway Department establishing that the centerline of the roadway has not substantially moved and that any repairs made to the road have been done within the right of way of the road. In response to a motion for summary judgment, the opposing party must set forth "specific facts" showing a genuine issue. I.R.C.P. 56(e); *Verbillis v. Dependable Appliance Co.*, 107 Idaho 335, 337, 689 P.2d 227, 229 (Ct. App. 1984).

The Plaintiffs have presented evidence that their fence was damaged by the Defendants' in the course of maintaining the road. The Plaintiffs' belief that the width of the roadway is limited to the surface of the road, and the fact that their fence is near the surface of the roadway does not change the width of the entire public highway or create an issue of fact. The Plaintiffs cannot rely on the fact that their fence is located within the right of way to establish possession of property within the right of way.

Possession and use of an unused portion of a highway by an abutting owner is not adverse to the public and cannot ripen into a right or title by lapse of time no matter how long continued. Nor does such possession and use, even though by express permission of the public authority, work an estoppel against the public use. Even in the case of a highway established by user, all portions of the

highway right of way need not be maintained and kept up at public expense. In *Boise City v. Sinsel, supra*, we held that an abutting owner who erected and maintained a building on a portion of a public street under a permit granted by the city council, for a period of 25 years, did not acquire a right to such occupancy, and that the city was not estopped to cancel the permit and require the removal of the building.

Rich v. Burdick, 83 Idaho 335, 345, 362 P.2d 1088, 1094 (1961)(internal citations omitted). The Plaintiffs have not obtained any possessory rights to land within the fifty foot width of the road, thus, the Plaintiffs' claims with regard to the fence fail.

The Plaintiffs also claim that the Highway District has taken additional property which belongs to the Plaintiffs each time it has improved the roads. This claim is unsupported in fact, and thus, is without merit. The purpose of a right of way alongside the surface of a roadway is to allow room for appropriate maintenance, support, and improvements to the roadway. The Highway District has acted within its authority to maintain Camps Canyon Road.

4. The Plaintiffs' takings claims fail because the Highway District's actions do not exceed its statutory authority or fall outside the scope of the right of way of Camps Canyon Road.

The Plaintiffs claim that the Highway District has taken their property through inverse condemnation, expansion, encroachment, alteration, and crossing the property line, amongst other claims. The takings claims are based upon the Highway District's spreading of gravel over Camps Canyon Road and the driveway permit the Highway District issued to the Plaintiffs' neighbors, the Wagners.

As established above, Camps Canyon Road is a public highway established through public use, with a minimum width of fifty feet. Improvements to the road and maintenance done by the Highway District have occurred within the right of way encompassed by the total width of

the public highway. Because the spreading of gravel and improvements to the road occurred within the right of way, no taking of the Plaintiffs' property occurred.

A property owner who believes that his or her property, or some interest therein, has been invaded or appropriated to the extent of a taking, but without due process of law and the payment of just compensation, may bring an action for inverse condemnation. *McQuillen v. City of Ammon*, 113 Idaho 719, 747 P.2d 741 (1987). The property owner cannot maintain an inverse condemnation action unless there has actually been a taking of his or her property. *Covington v. Jefferson County*, 137 Idaho 777, 53 P.3d 828 (2002). The determination of whether or not there has been a taking is a matter of law to be resolved by the trial court. *Id.*

KMST, LLC v. County of Ada, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003).

In *Reisenauer v. State, Dept. of Highways*, 120 Idaho 36, 813 P.2d 375 (Ct. App. 1991), a similar situation was addressed. In *Reisenauer*, the Plaintiffs filed a claim of inverse condemnation after the State widened a portion of highway, even though the widening of the highway occurred within the right of way.⁷ *Reisenauer* is similar to the case at hand based upon the fact that the widening of the highway occurred within the right of way. The *Reisenauer* Court held that the widening of the road, within the right of way, was not a taking of the plaintiffs' property.

Often, after land has been taken for a particular public use and devoted to that use in the customary manner for a number of years, an increase in the public requirements makes an altered or increased use of the land desirable. In such a case, if the new use is of the same character as the use for which the land was taken, and merely amounts to the advancement of the original purpose, as when the wrought portion of a highway is widened so as to include the whole of the original location, or a second track is laid upon a railroad right of way, there is only an exercise of the easement which had been taken in the first place, and the owner of the fee has no ground for complaint, even if he is deprived of privileges in the land taken which he had previously enjoyed, *or his remaining land suffers damages from the increased use by the public from which it had previously been exempt*. All these damages were paid for when the original taking was made, and

⁷ The highway and right of way in question in *Reisenauer* were purchased by the State in the 1930's, thus the establishment of the public highway differs from the manner that Camps Canyon Road was established as a public highway. The analysis from *Reisenauer*, however, is applicable to the case at hand. When the Highway Department maintained and improved Camps Canyon Road, all changes to the highway occurred within the right of way.

Charlotte Halvorson

Charlotte Halvorson

SUBSCRIBED AND SWORN TO before me this 17th day of February, 2009.

Janice Baker

NOTARY PUBLIC for the State of Idaho

My commission expires: 11/30/12

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	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Federal Express Standard Overnight Mail <input type="checkbox"/> FAX (208) 883-4593 <input checked="" type="checkbox"/> Hand Delivery
CARL B. KERRICK DISTRICT JUDGE P.O. Box 896 Lewiston, ID 83501-0896	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Federal Express Standard Overnight Mail <input type="checkbox"/> FAX <input type="checkbox"/> Hand Delivery

Don Halvorson

Don Halvorson

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Accession/Serial #: 1118993 **BLM Serial #:** IDCDA 0014066

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[Patent Description](#) [Legal Land Description](#) [Document Image](#) [Certified Copy](#)

Names

Patentee: DOUGLAS R KELLY

Survey

State: IDAHO
Acres: 11.58
Metes/Bounds: No

Title Transfer

Issue Date: 9/22/1944
Land Office: Coeur D Alene
Cancelled: No
U.S. Reservations: Yes
Mineral Reservations: No
Authority: April 24, 1820: Sale-Cash Entry (3 Stat. 566)

Document Numbers

Document Nr.: 014066
Accession/Serial Nr.: 1118993
BLM Serial Nr.: IDCDA 0014066

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The United States of America,

To all to whom these presents shall come, Greeting:

WHEREAS, a Certificate of the Register of the Land Office at **Coeur d'Alene, Idaho,**
has been deposited in the General Land Office, whereby it appears that full payment has been made by the claimant
Douglas R. Kelly

according to the provisions of the Act of Congress of April 24, 1820, entitled "An Act making further provision for the
sale of the Public Lands," and the acts supplemental thereto, for the **Lot two of Section fifteen in Town-**
ship thirty-nine north of Range three west of the Boise Meridian, Idaho,
containing eleven acres and fifty-eight hundredths of an acre,

according to the Official Plat of the Survey of the said Land, on file in the GENERAL LAND OFFICE:

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, and in conformity with the several Acts of
Congress in such case made and provided, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT unto the said
claimant and to the heirs of the said claimant the tract above described; TO HAVE AND TO HOLD the same, together with all the
rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and
assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other
purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local
customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right-of-way thereon for ditches or canals
constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, **Franklin D. Roosevelt,**

President of the United States of America, have caused these letters to be made
Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the **TWENTY-SECOND**
day of **SEPTEMBER** in the year of our Lord one thousand
nine hundred and **FORTY-FOUR** and of the Independence of the
United States the one hundred and **SIXTY-NINTH**

(SEAL)

By the President: Franklin D. Roosevelt

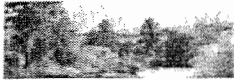
By Ruth W. Talley, Secretary.

R. B. McIntosh

Chief, Patents Division, General Land Office.

RECORD OF PATENTS: Patent Number **1118993**

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Note: This record has not been checked against the Legal Land Patent. We don't have an electronic image for this document.

Names

Patentee: EMMETT J GEMMILL

Survey

State: IDAHO

Acres: 160

Metes/Bounds: No

Title Transfer

Issue Date: 6/21/1890

Land Office: Idaho

Cancelled: No

U.S. Reservations: No

Mineral Reservations: No

Authority: May 20, 1862: Homestead Entry Original (12 Stat. 392)

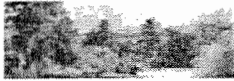
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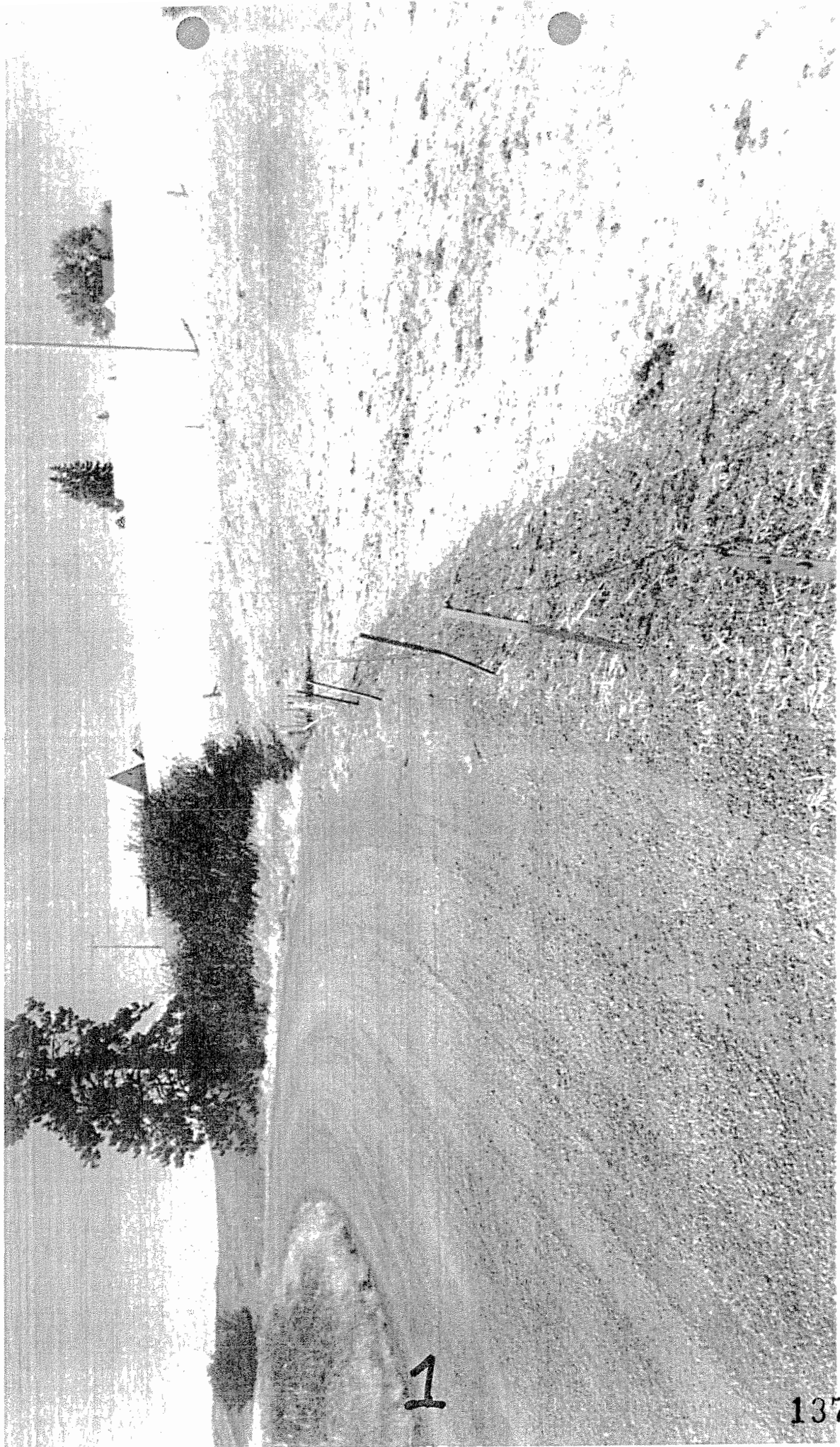
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SENW	15/	39-N	3-W	No	Boise	ID	Latah	
NESW	15/	39-N	3-W	No	Boise	ID	Latah	
NWSE	15/	39-N	3-W	No	Boise	ID	Latah	

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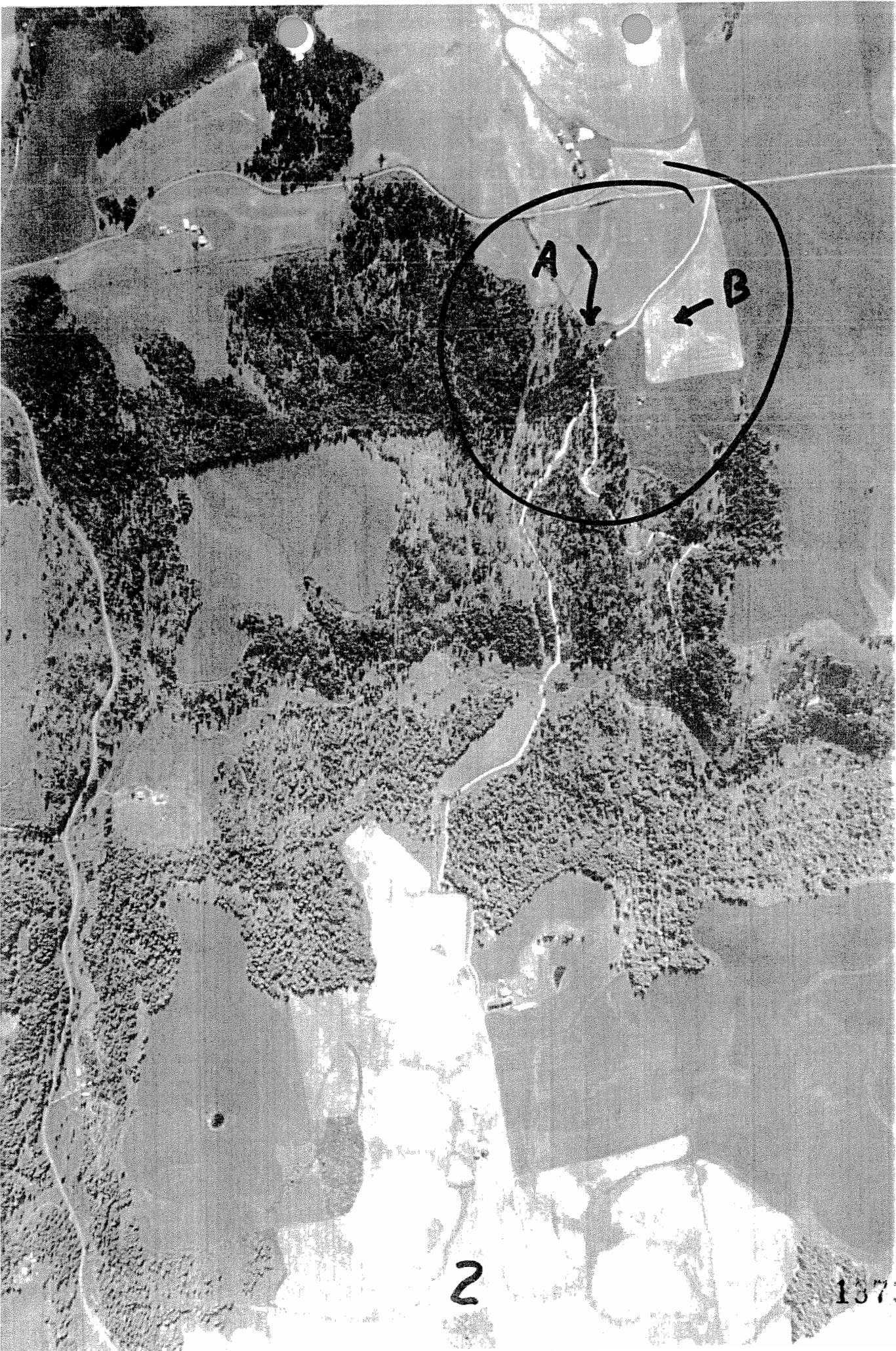
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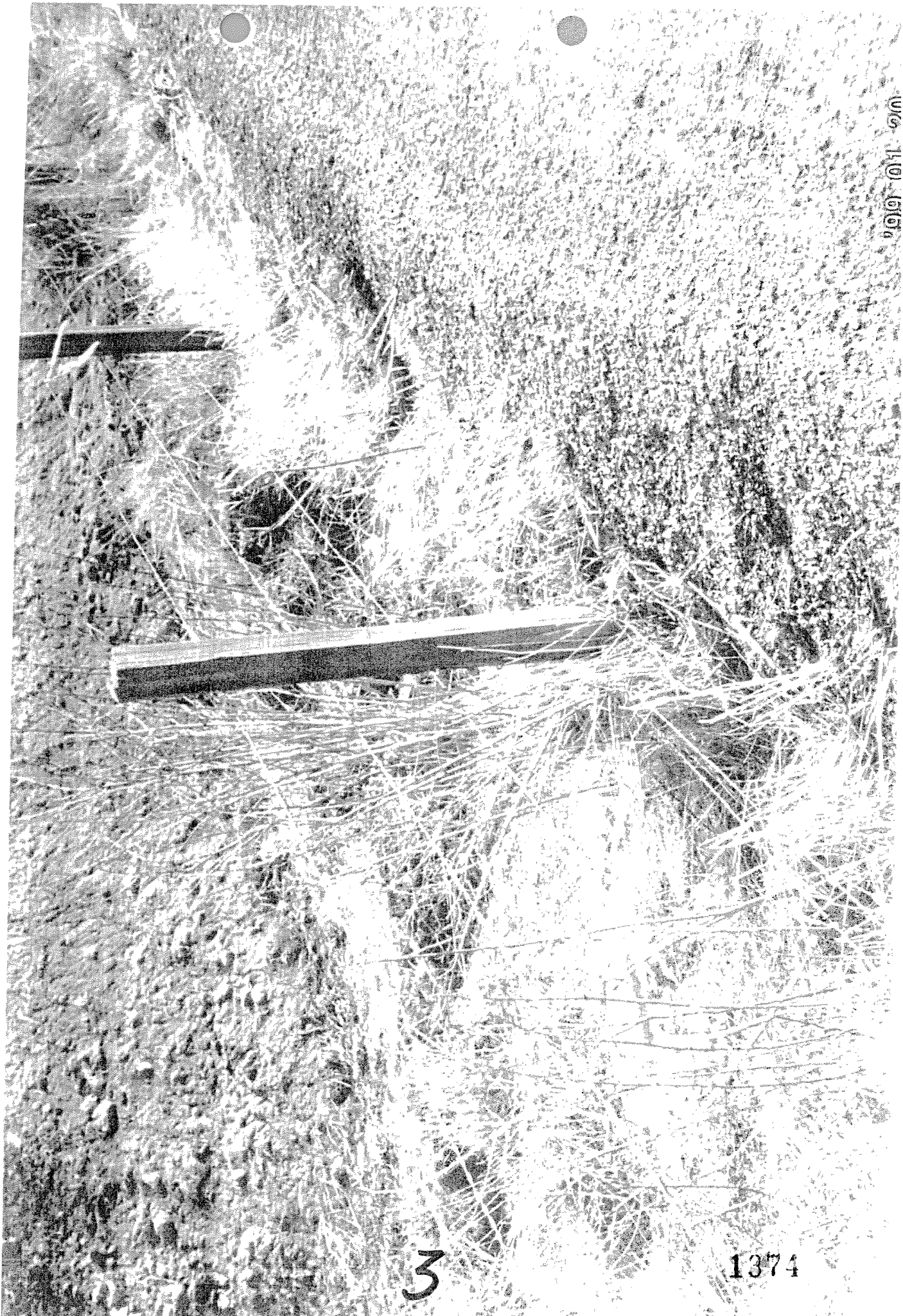


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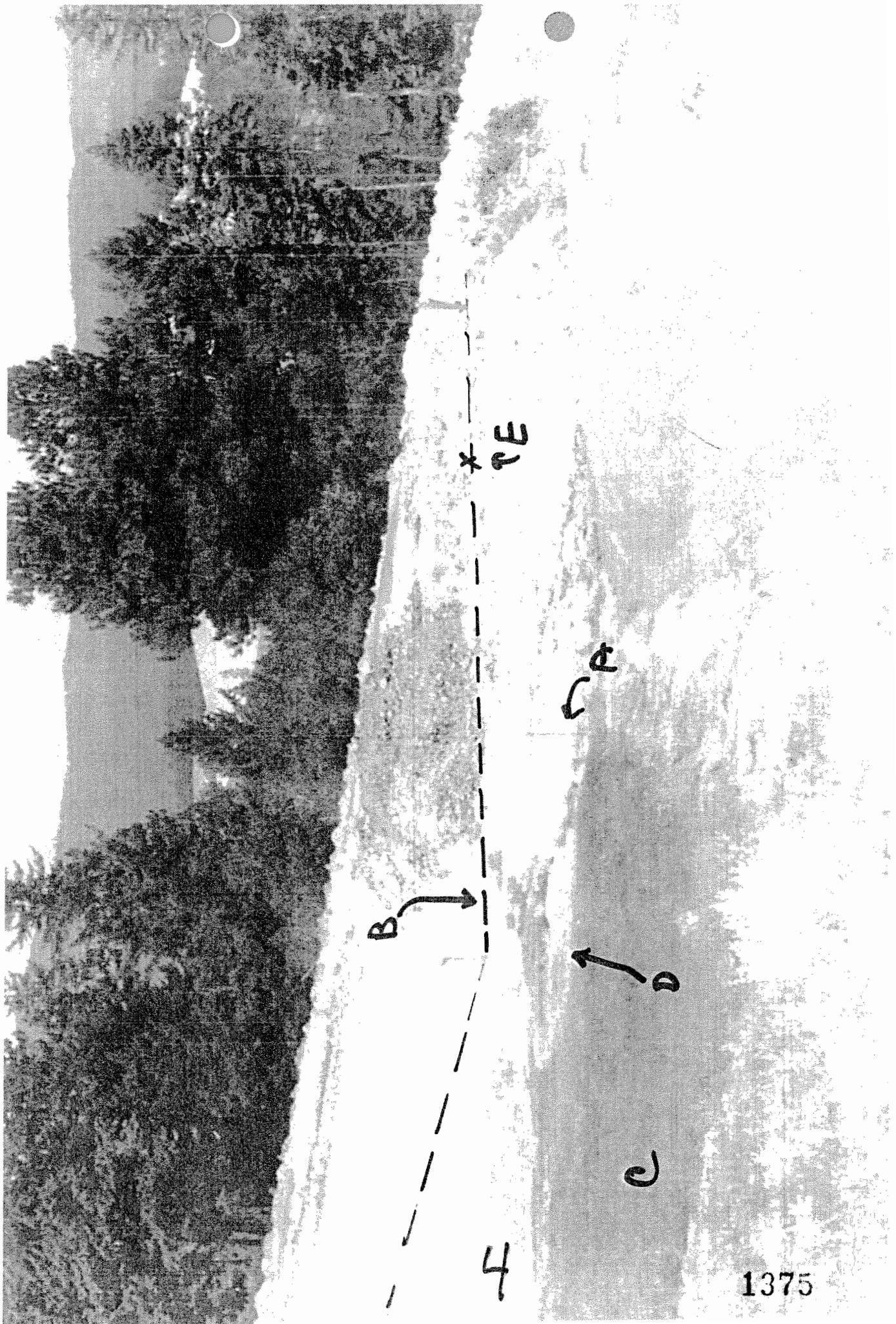
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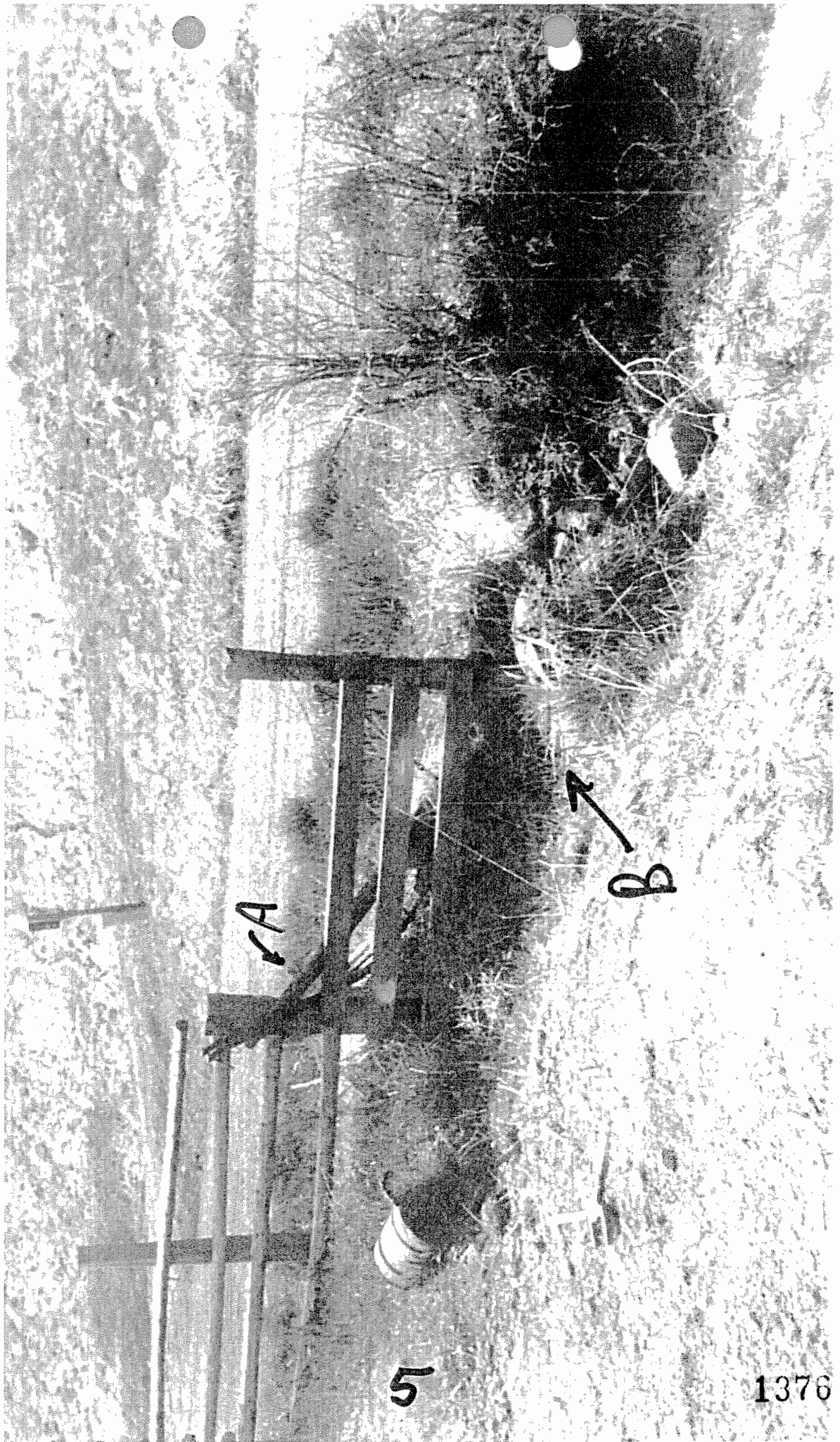
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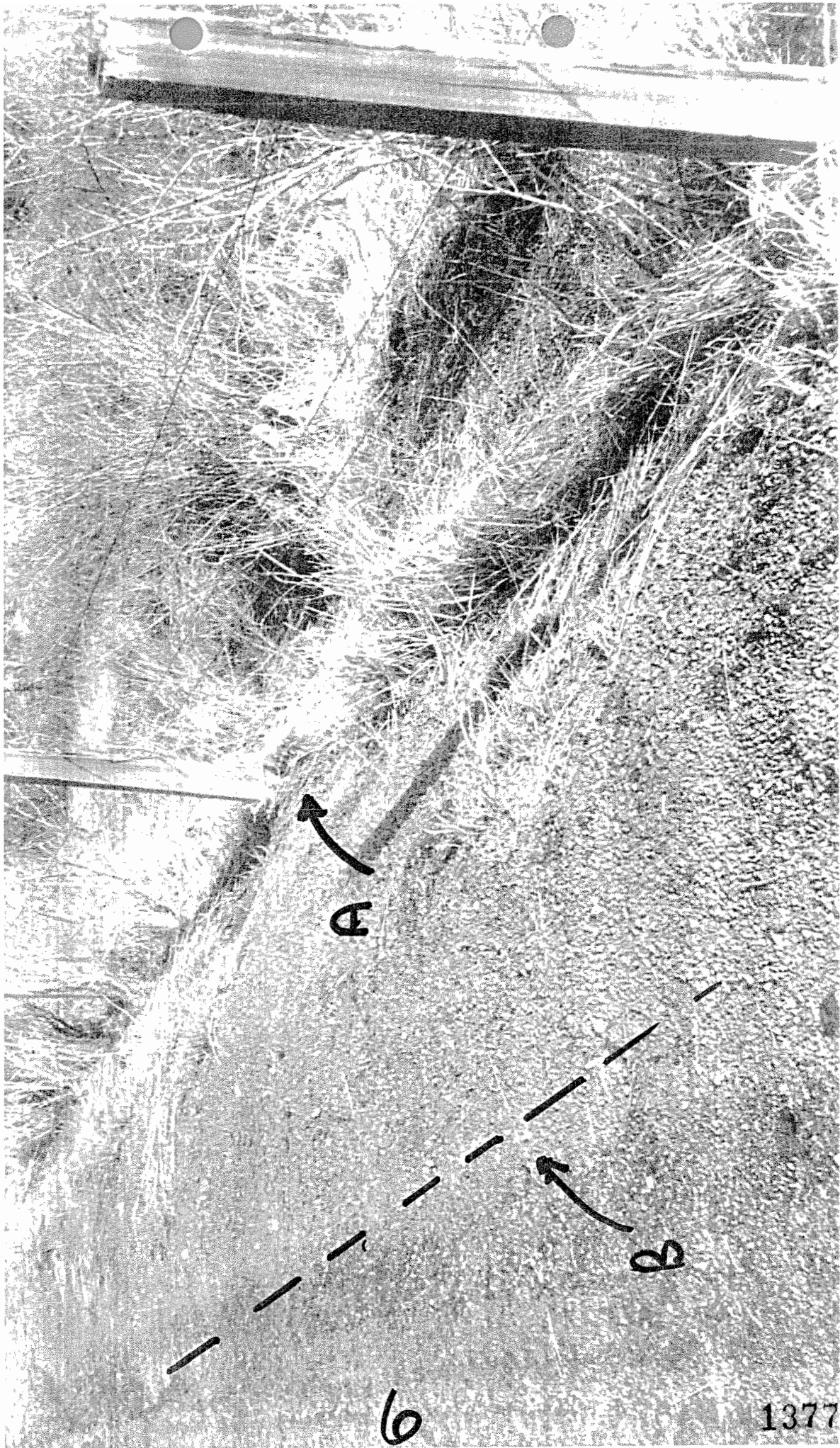


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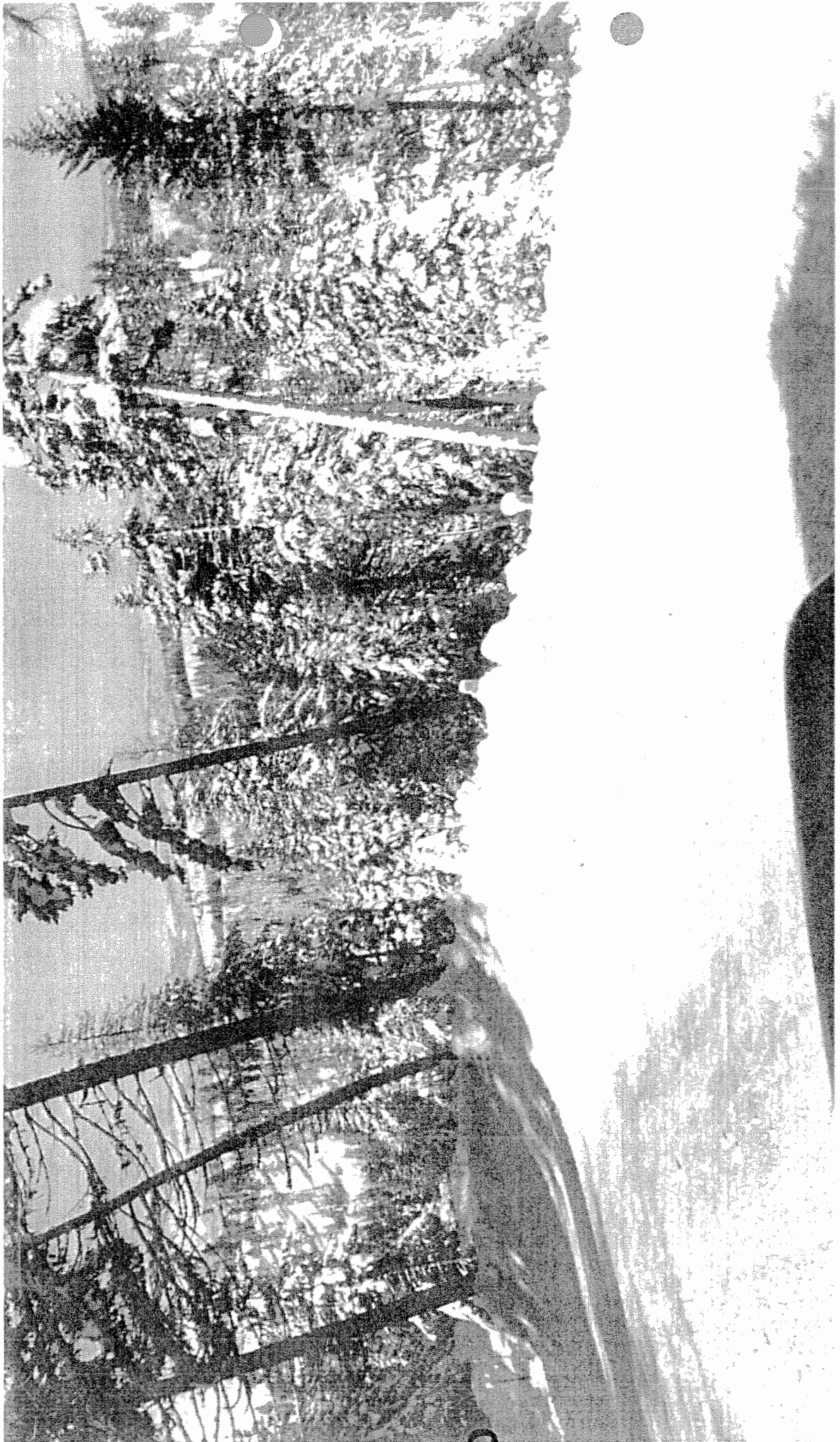
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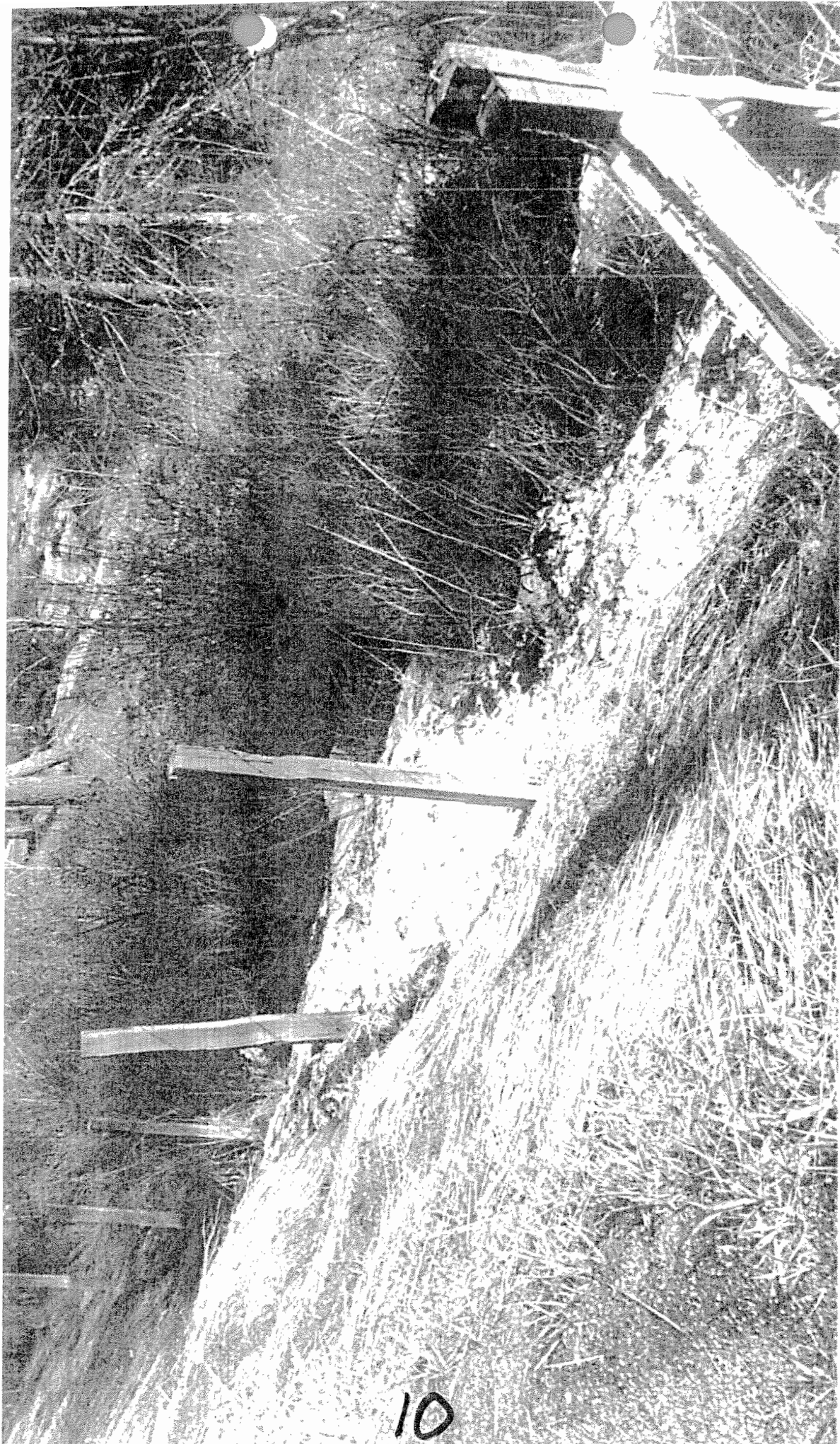
1378



8

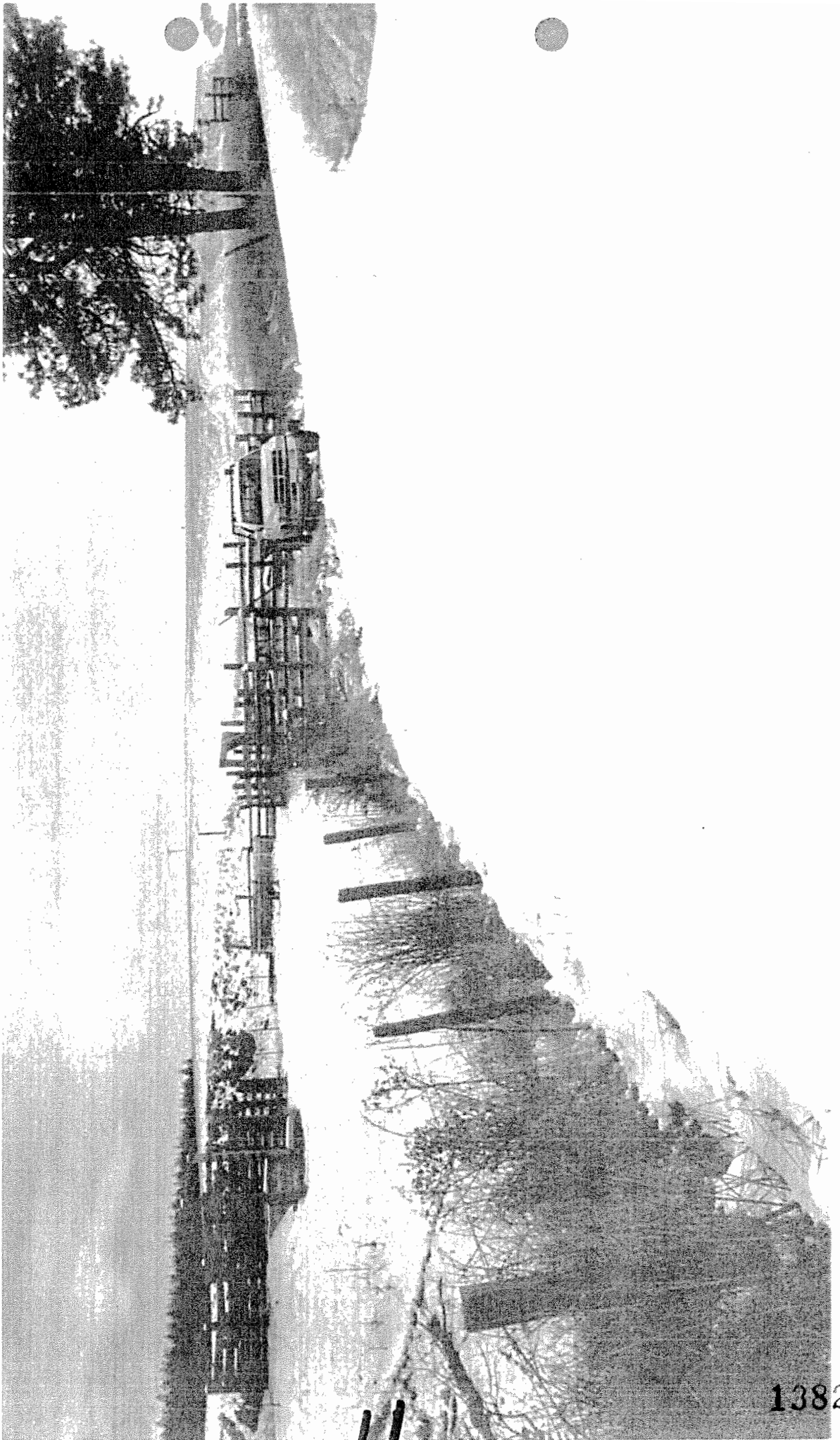
1379





10

1381



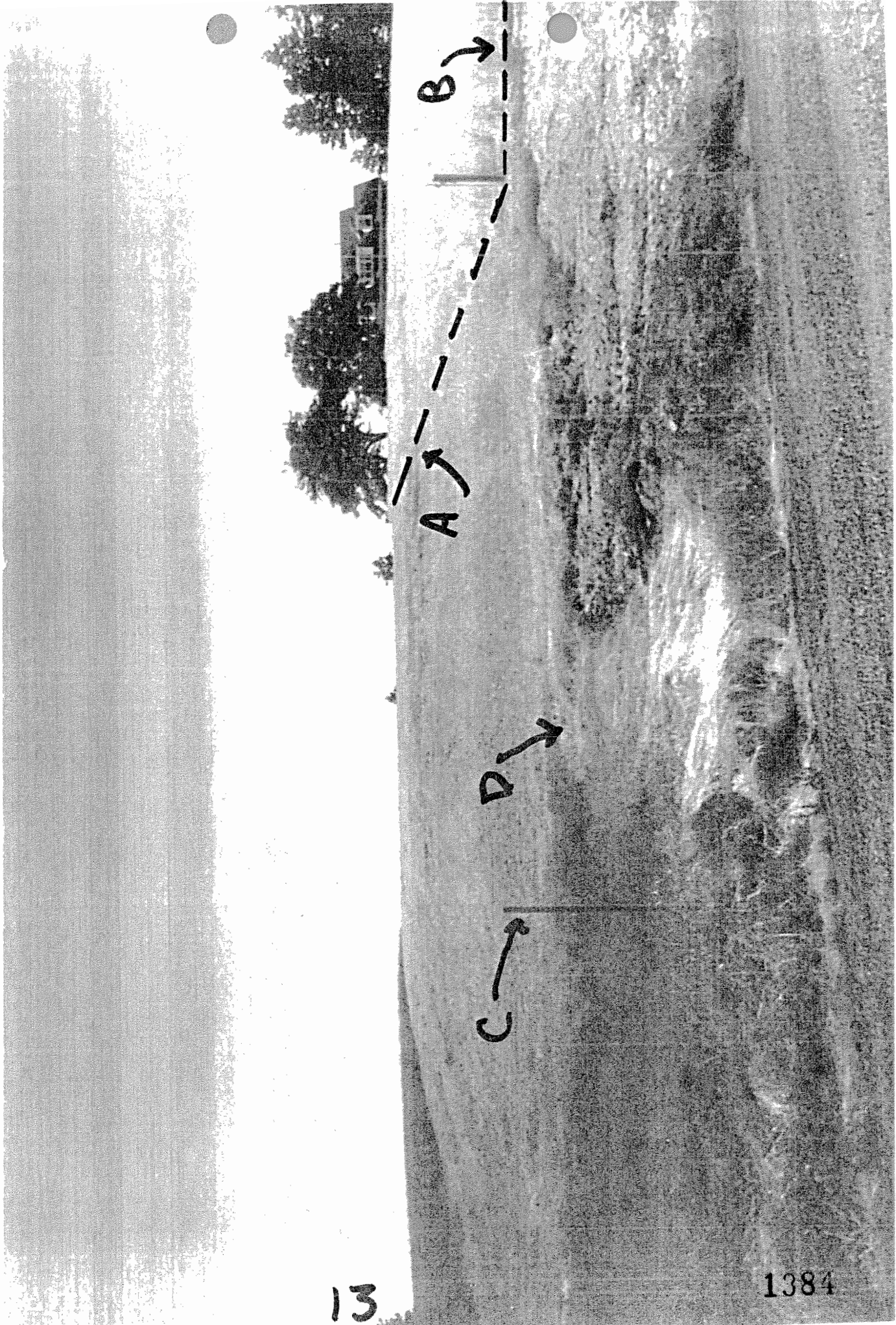


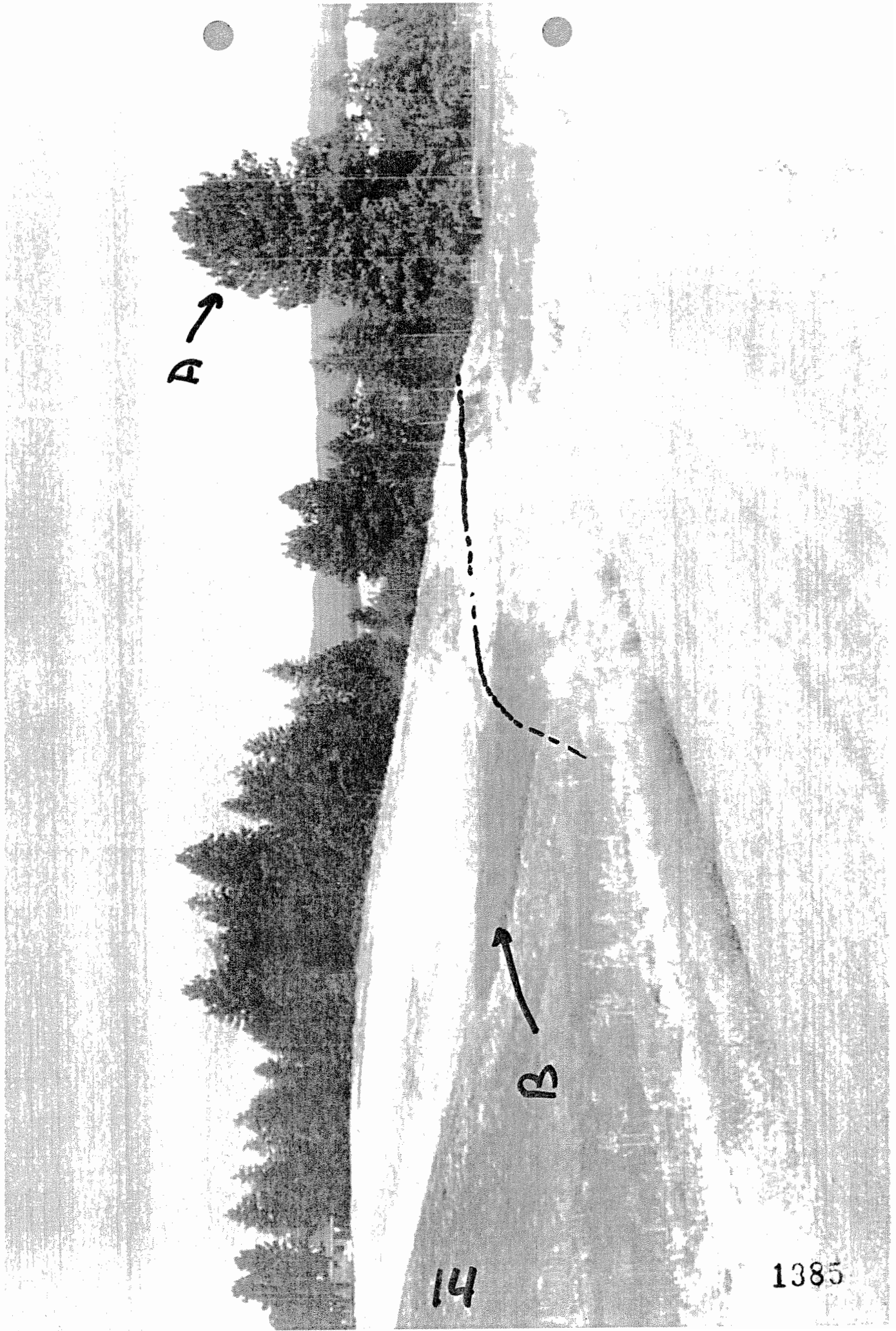
A

B

C

D



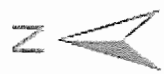
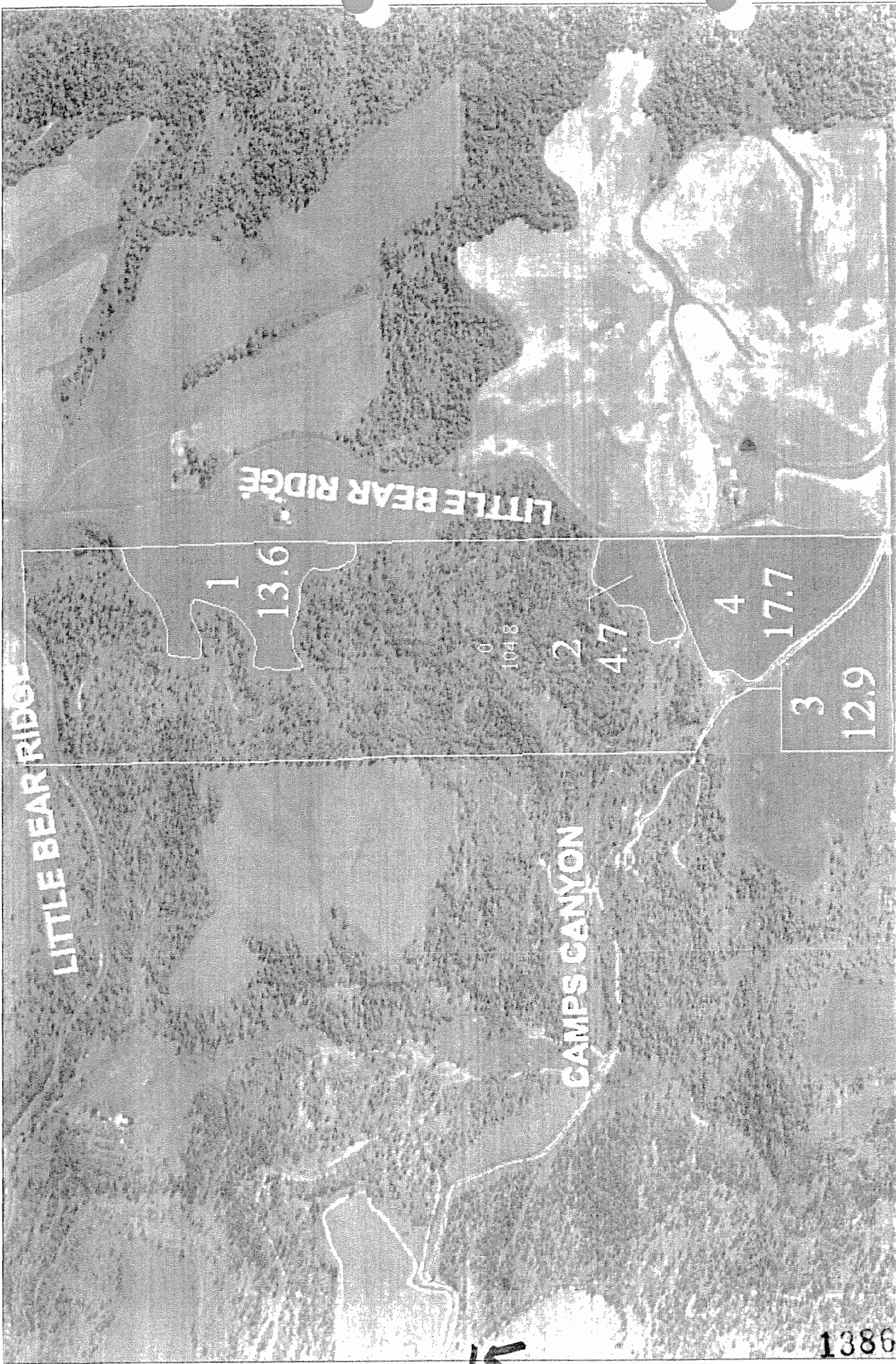


A →

→ B

14

1385



Legend

Farm: 4702

Tract: 672

Cropland: 48.9

clu.SDE.clu_a_id057

coroads-id057



United State Department of Agriculture
 Farm Service Agency
 Latah County Idaho

T38N R3W Sec 10.15
 Located in Latah County
 October 16, 2007
 Prepared by Latah Farm Service Agency



16

A

1387

17

1388

METSKER MAPS

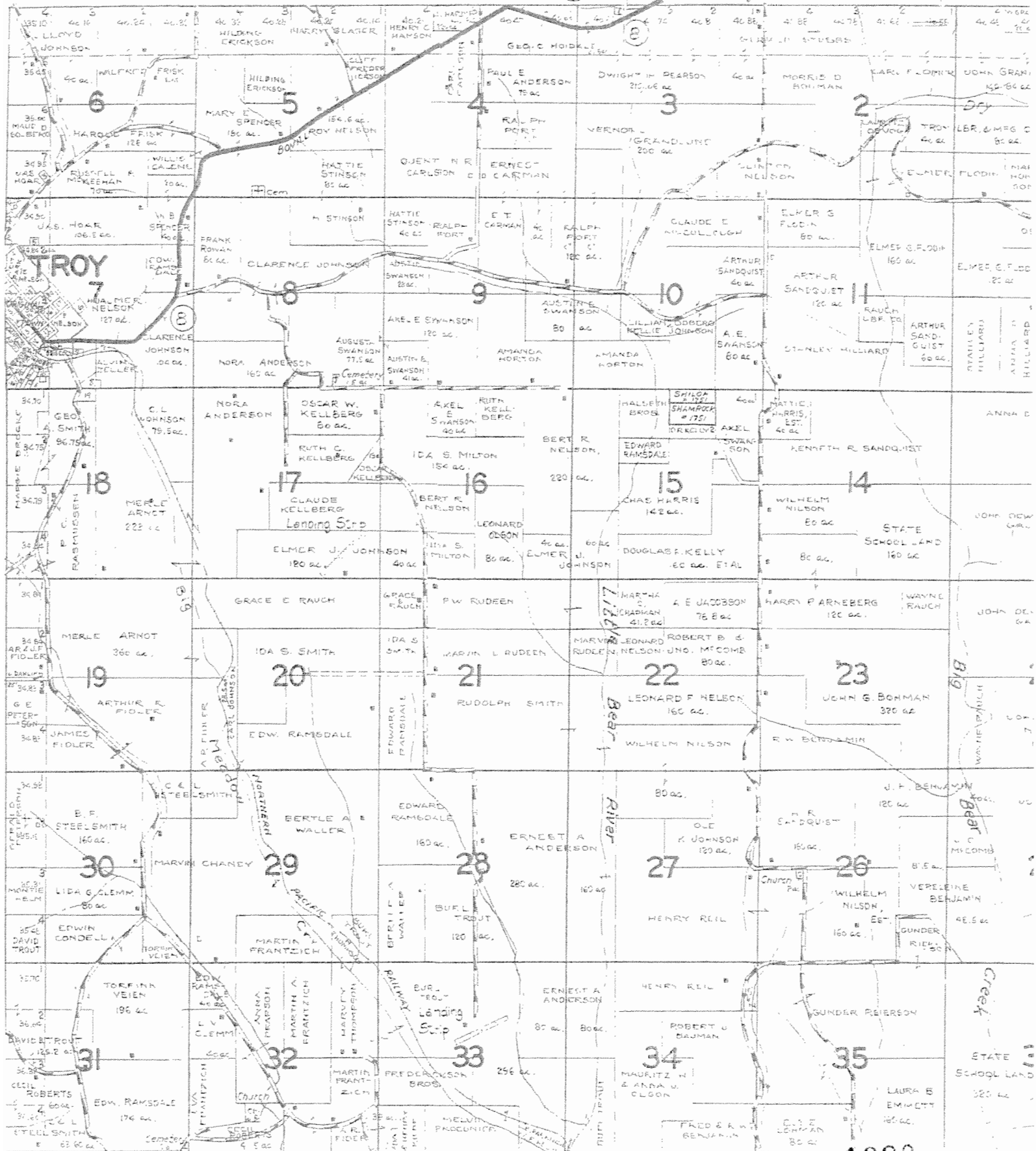
SOUTH 10TH ST. ACROSS WASHINGTON
20 THIRD AVE SEATTLE WASHINGTON

TOWNSHIP 39 N., RANGE 3 W. B.

LATAH COUNTY, IDAHO

23

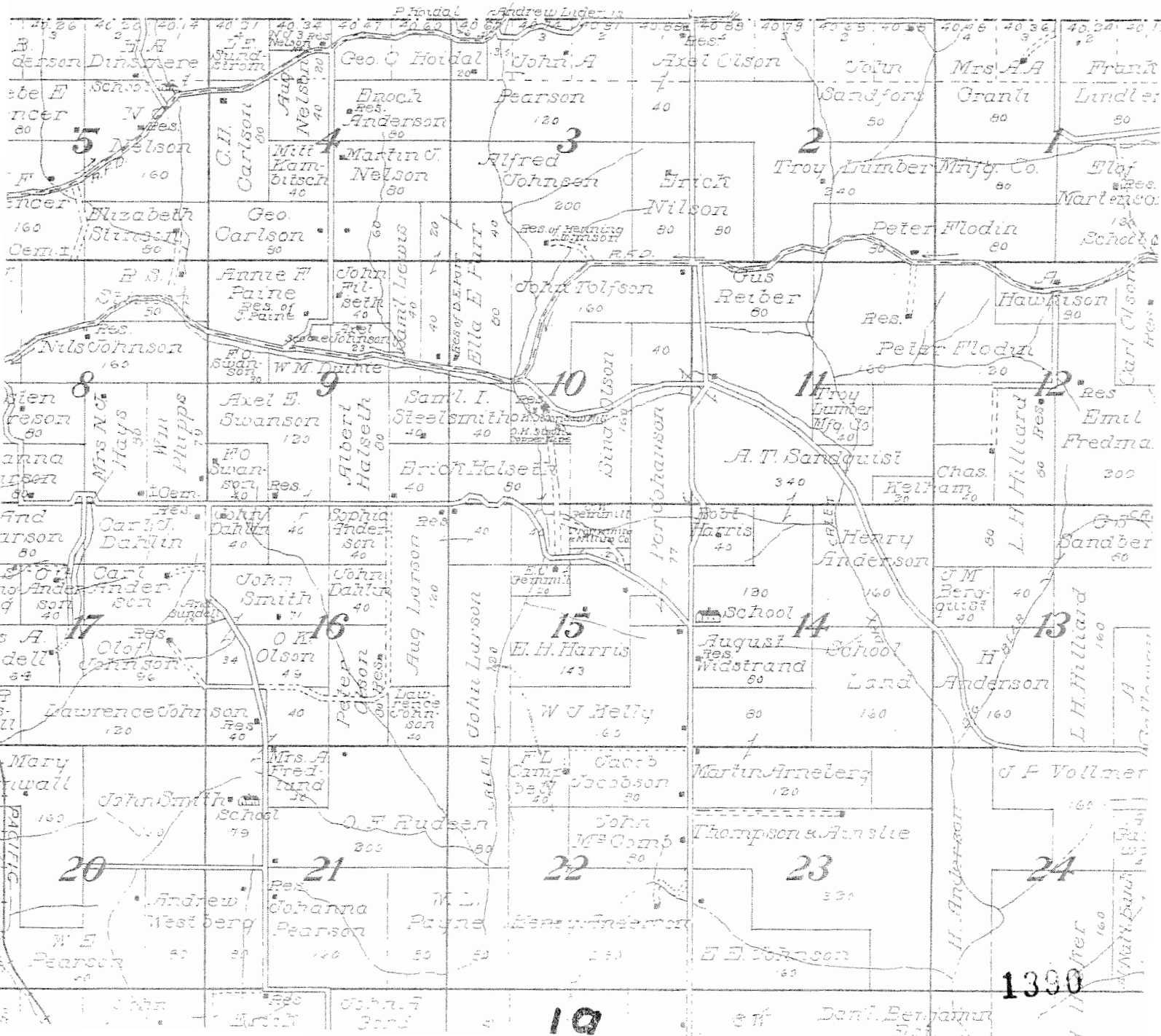
To Deary



MAP OF TOWNSHIP 39 N., RANGE 3 W.

OF THE BOISE MERIDIAN

Scale 1 3/4 inches to 1 mile



1390



5/14/06

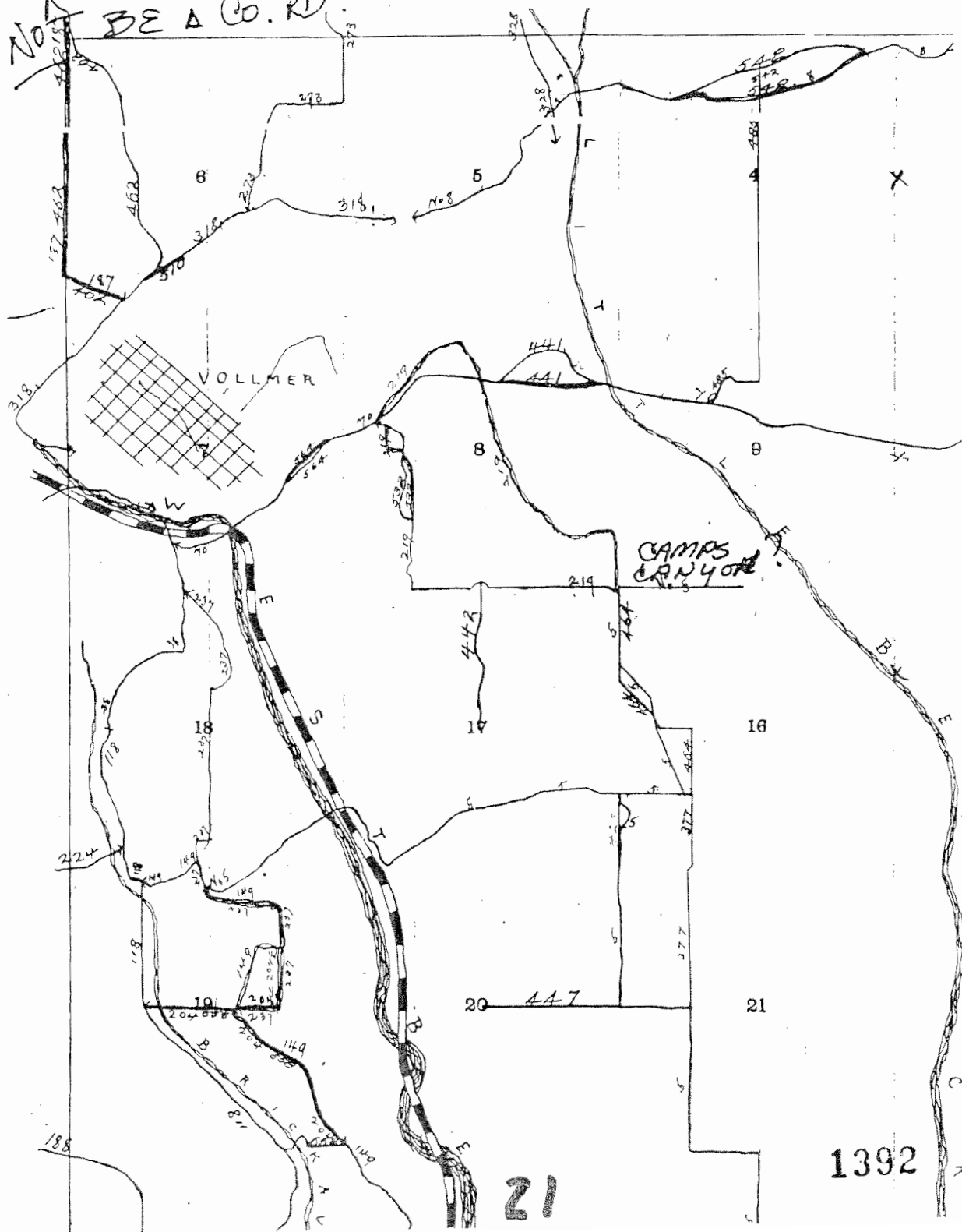
John As I thought - No crossing of Bear Creek
by Camps Canyon Road -

Assume 50' Prescriptive ESMT. TO ROAD DIST.
E of Gravel.

Road Plat Book, I

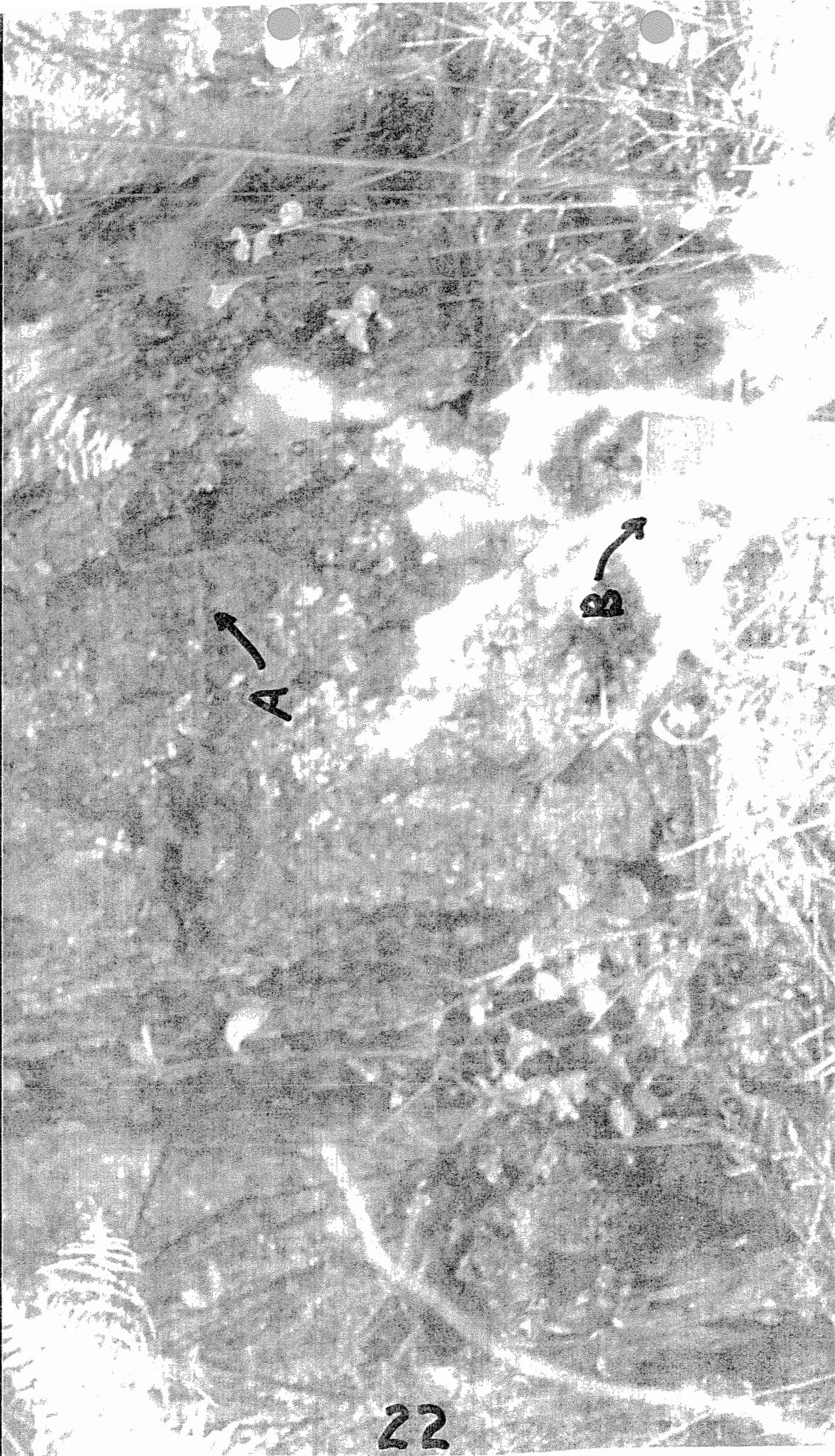
Black line indicates road.
Black and red lines indicate road abandoned.

If not flowed in winter Township 39 North,
MAY NOT BE A Co. RD.



1392

21



A →

→ B

ITEM NO. 4

REQUEST FOR ADMISSION NO. 3:

3.) The 1996 alteration exceeded the limits of the prescriptive right of way in the following manners:

- a. Extension of the road bed and supporting structures beyond the old line fence—the boundary set by the owner as the limit to the prescriptive right of way and recognized by judicial custom and precedent as a prescriptive easement boundary. _____
- b. The usage limit was narrow (less than 12 feet) and any increase of width (greater than 1 to 2%—less than 3 inches) would be considered to be in excess of incidental variation. _____
- c. The actual physical location of CCR was altered in the straightening of the curves and the extension of the road bed around the rock outcropping and the washout of the roadbed. _____
- d. The excavated trees (spontaneously growing—non human planted, 60 to 80 years old) indicated there had been no road usage amongst or under them. _____
- e. Judicial custom and precedent recognizes the rebuttable presumptions of location and width as being as is now as it was at the end of the prescriptive period in the absence of known alterations. The 1996 agreement and the 1996 alteration rebut these presumptions of no change in CCR. _____
- f. There is no archeological evidence of a 50 foot highway ever existing in Camps Canyon and more specifically the usage of the present CCR shows no archeological evidence of ever being 50 feet wide with the natural occurrence of rocks, trees, and steep terrain contradicting such a claim. _____
- g. There is no objective evidence indicating a 50 foot highway was ever established in Camps Canyon. _____

RESPONSE:

Object as to relevance of 1996 activity. Object as to form of Request to the extent it calls for legal conclusion. Without waiver of objection:

- a. Denied.
- b. Denied.

c. Admitted.

d. Denied.

e. Object to this subpart as it calls for a legal conclusion.

f. Denied.

g. Denied.

REQUEST FOR ADMISSION NO. 4:

4.) The 1996 alteration was a "taking" of private property (considered as a gift dedication)._____

RESPONSE:

Object to relevance of 1996 activity. Object to this Request as it calls for a legal conclusion.

REQUEST FOR ADMISSION NO. 5:

5.) No permission was given by Ed Swanson for future widening in the 1996 agreement._____

RESPONSE:

Object to relevance of 1996 activity. Object to form of Request. Without waiver of objection: Admitted, as no such permission was requested by Defendant District.

REQUEST FOR ADMISSION NO. 6:

6.) Ed Swanson waived no future constitutional rights in the 1996 agreement._____

RESPONSE:

Object to relevance of 1996 activity. Object to form of Request as no such waiver was requested. Without waiver of objection: Admitted.

REQUEST FOR ADMISSION NO. 7:

7.) The 1996 alteration accomplished what the 1996 agreement entailed._____

ITEM NO. 5

Documents are set forth in these Responses to the First Request For Admissions and/or these Responses.

INTERROGATORY NO. 2:

2.) Any change in the (a) use, (b) width, (c) location, or (d) nature/type of the right of way/highway of CCR which may be in contravention to Idaho Statutes, Idaho State Constitution, U.S. Constitution, and/or Federal statutes and/or is disputed by an abutting landowner may be adjudicated by what NLCHD available means? Please be complete in your answer indicating the name of the means (process), the format of the process, and how the means (process) is initiated (If the format has a written form and/or a written self explanatory form, this is sufficient to cite the form and where to obtain a copy.), and what form would the decision come in (written and/or verbal)? _____

RESPONSE:

Object to this Interrogatory as it calls for a legal conclusion and/or legal advice.

INTERROGATORY NO. 3:

3.) List all available information and documents you know of, the names, addresses, phone numbers and whereabouts of anyone, who may have information of or the possession of documents concerning the acquisition of the prescriptive right of way/highway, CCR, the time of the prescriptive period for the prescriptive right of way/highway, CCR, the establishment of the prescriptive right of way/highway, CCR, and /or the width, location and use of the prescriptive right of way, CCR, at the end of the prescriptive period for the prescriptive right of way/highway, CCR. _____

RESPONSE:

Object to this Interrogatory as unduly burdensome and oppressive in that it covers an unlimited time frame and seeks information and documents not reasonably calculated to lead to the discovery of admissible evidence. Without waiver of objection, Documents regarding CCR in NLCHD's possession are primarily District foreman's journals and Commissioner Minutes. Width of CCR was widened on the north side in 1996 to approximately its present width. CCR

was widened on south side in 2005 and 2006 by approximately four feet of road surface and the addition of sloping cut banks. All District Commissioners and the foreman, including Payne, for the CCR where subdistrict is located have knowledge of this information.

INTERROGATORY NO. 6:

6.) What is/are the points of difficulty in the resolution of the dispute with the Halvorsens? _____

RESPONSE:

Object to this Interrogatory as not relevant and not calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 7:

7.) Do you consider the Halvorsens' complaints frivolous? _____

RESPONSE:

Object to this Interrogatory as not relevant and not calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 8:

8.) If #7 is an affirmative answer, please state what evidence you would have to support a finding the Halvorsens have no complaint of legal merit and/or no disputed facts. _____

RESPONSE:

Object to this Interrogatory as not relevant and not calculated to lead to the discovery of admissible evidence.

CASE NO. CV 2008-00181

2008 FEB 17 AM 11:39

CLERK OF DISTRICT COURT
LATAH COUNTY

BY *St* 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	) ED SWANSON'S FIRST AFFIDAVIT
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)

STATE OF ~~IDAHO~~)
Washington
)ss.
Asotin
County of ~~Latah~~)

Ed Swanson deposes and says:

1) I and my wife are the previous owners to the farm including the SENE Section 15 T39N R3WBM, except for the 3+/- acre parcel as described in the deed and county records. My father owned the same farm before I did and my grandfather owned it before my father.

2) This farm had been in my family's (father and grandfather) possession for in excess of 70 years and I have lived in the area my whole life.

3) This farm was used for timber, farming and pasture of livestock.

4) I sold this farm to the Halvorsons in December of 1996.

5) In the fall of 1996, prior to my selling the farm to the Halvorsons and during the preliminary stages of agreeing to sell the farm to the Halvorsons, Dan Payne contacted me about making changes to Camps Canyon Road, in the west end of the SENE of Section 15, in the area of the 3+/- acre parcel.

6) To the best of my recollection the matters which Dan Payne talked to me about were (a) cutting down some trees, (b) straightening curves at east and west ends of the 3+/- acre parcel, (c) pushing the road base to the northeast around a rock outcropping of the road. New houses were being built in the canyon and residents were complaining of not being able to travel to their houses.

7) It was my intention to and I gave my verbal permission for the NLCHD to accomplish these changes that Dan Payne talked about. I intended to gift any necessary land to the road district for road purposes.

8) As I was in the process of selling this farm to the Halvorsons, I talked with Don Halvorson soon after my conversation with Dan Payne about what I had given my permission for what the Highway District wanted to do, as I felt he should be aware of these things.

9) It is my recollection that Don Halvorson agreed with my decision and that he felt that it was best for all concerned (the new residents in the canyon) to alter the road.

10) Neither I, nor my opinion of Don Halvorson's intention, expected any compensation for the land, excavation of trees, or damage to the old fence or any of its remaining components of wire and/or posts. All matters were considered by us (I and my recollection of Don Halvorson opinion) that permission was given and all land taken was given.

11) There was an old line fence on the north side of Camps Canyon road and it was in need of repair and my recollection of Don Halvorson was that he unquestionably accepted the responsibility to reconstruct it at his own time and expense, when time and weather permitted

and the alteration of the road was completed. Since that time I have not been aware of anything otherwise.

12) During the late spring or early summer of 1997, my wife and I were traveling across Camps Canyon Road and we ran into Don Halvorson by the fence which he had built. My wife, Gladys, commented to Don that it was a nice fence. I asked Don why he had built the fence so far from the edge of the road and said he didn't need to give the Highway District so much land. Don said it was best to leave a buffer between the road and fence for maintenance, snow removal, and that he wasn't giving the land to the Highway District.

13) My wife and I have found Don and Charlotte to be truthful, honest, and cooperative and sincerely accommodating in all or any dealings we have had with them. They are and strive to be good neighbors.

14) I have had no reason to believe that I needed in any way to have to check up on the NLCHD to ensure that they accomplished whatever legal matters they were required to do.

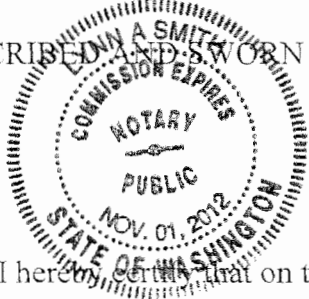
The above statements are true to the best of my knowledge.

Dated this 5 day of Feb, 2009

Ed Swanson

Ed Swanson

SUBSCRIBED AND SWORN TO before me this 5 th day of February, 2009.



Ed A. Smith

NOTARY PUBLIC for the State of ~~Idaho~~ ^{Washington}

My commission expires: Nov 1, 2012

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	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Federal Express Standard Overnight Mail <input type="checkbox"/> FAX (208) 883-4593 <input checked="" type="checkbox"/> Hand Delivery
CARL B. KERRICK DISTRICT JUDGE P.O. Box 896	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Federal Express Standard Overnight Mail <input type="checkbox"/> FAX

Don Halvorson

CASE NO. CV 2008-00180

2009 FEB 17 AM 11:39

CLERK OF DISTRICT COURT
LATAH COUNTY

BY AK 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)	OLE HANSON'S FIRST AFFIDAVIT
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)	

STATE OF IDAHO)

)ss.

County of Latah)

Ole Hanson deposes and says:

1) I have lived in the area all my life and am familiar with Camp's Canyon Road in Section 15.

2) I farmed with my brother, Larry Hanson, for many years on both Burnt Ridge and Little Bear Ridge and travelled Camps Canyon Road through section 15 often as it was a

convenient way between the ridges to move farm machinery as there was very little if any traffic on the road.

3) In those years, prior to the recent changes starting around 2005, Camps Canyon Road was a narrow, one lane road. It was difficult to move large machinery across Camps Canyon Road as the road was very narrow, but also there were few places to pass oncoming traffic.

4) My brother, Larry Hanson and I farmed the Harris/Huff place (now the Wagner farm) for many years. In later years Larry farm it by himself.

5) My brother, Larry Hanson and I accessed the Harris/Huff place from Camps Canyon Road, approximately due south of where the Halvorsons' corral is now and maybe a little to the east of where the Halvorson's gate is now.

6) In those years, when we farmed the Harris /Huff place, Austin Swanson and later his son Ed Swanson owned the land north and east of Camps Canyon Road from where we entered the Harris/Huff farm.

7) I remember that there was a property line east of the entrance to the Harris/Huff farm as once I considered cutting hay on the grassy draw east of the entrance and Austin Swanson told me that there was a property line there and that the draw was on his place. Access to the Harris/Huff place was west of that draw.

8) Camps Canyon Road has changed so much in the recent years; it is hard to remember exactly how it used to run, but it looks nothing like it did a few years ago.

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

Dated this 16th day of Feb, 2009 Ole Hanson
Ole Hanson

SUBSCRIBED AND SWORN TO before me this 16th day of Feb, 2009.

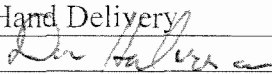


John F. Porter
NOTARY PUBLIC for the State of Idaho
My commission expires: 12-21-2010

CERTIFICATE OF SERVICE

I hereby certify that on this 17 th 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	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Federal Express Standard Overnight Mail <input type="checkbox"/> FAX (208) 883-4593 <input checked="" type="checkbox"/> Hand Delivery
CARL B. KERRICK DISTRICT JUDGE P.O. Box 896 Lewiston, ID 83501-0896	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Federal Express Standard Overnight Mail <input type="checkbox"/> FAX <input type="checkbox"/> Hand Delivery



Don Halvorson

4) I am familiar with Camps Canyon Road as it was prior to all the recent changes, as I have worked in this area for several years.

5) There was always a fence which ran along the northeast side of Camps Canyon Road west of the old bull pine trees before the Highway District made alterations to the road. After those alterations the Halvorsons rebuilt the fence a ways off of the edge of the road.

6) The Halvorsons built a corral at the edge of the canyon north of Camps Canyon Road after the Highway District made changes in the road there shortly after the Halvorsons brought that farm from the Swansons.

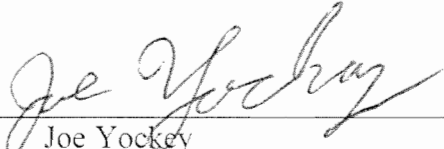
7) I wintered my cows at the Halvorsons corral for a few years after they moved their cows down near Juliaetta where they lived. During those years, the neighbor, John Van Houten and I plowed the snow on the road when necessary as the Highway District did not plow snow on Camps Canyon Road in section 15.

8) The Highway District has made so many changes to Camps Canyon Road by the Halvorsons corral that it is hard to remember what the old road looked like. Prior to the recent changes in the road, Camps Canyon Road in the area of the Halvorsons' corral was a narrow road, big enough for only one vehicle at a time, and there were old, big trees on both sides of the road and there was an old fence that ran along the north side of the road for as long as I can remember.

9) Personally, I have fences along the edge of Claypit Road and I have moved them out a few times and I have found that no matter what I do, the Highway District grades into or plows over my fences. I have complained but they say they have a right to do this.

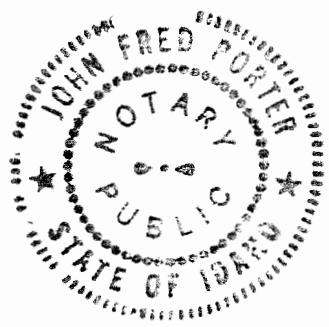
The above statements are true to the best of my knowledge.

Dated this 13 day of Feb, 2009



Joe Yockey

SUBSCRIBED AND SWORN TO before me this 13 th day of Feb., 2009.



John F. Porter
NOTARY PUBLIC for the State of Idaho
My commission expires: 12.21.2010

CERTIFICATE OF SERVICE

I hereby certify that on this 17 th 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	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Federal Express Standard Overnight Mail <input type="checkbox"/> FAX (208) 883-4593 <input checked="" type="checkbox"/> Hand Delivery
CARL B. KERRICK DISTRICT JUDGE P.O. Box 896 Lewiston, ID 83501-0896	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Federal Express Standard Overnight Mail <input type="checkbox"/> FAX <input checked="" type="checkbox"/> Hand Delivery

Don Halvorson

Don Halvorson

CV 2008-00180
 2009 FEB 17 11:14 AM
 CLERK OF DISTRICT COURT
 BY A 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' MOTION
vs.)	TO STRIKE
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)	

Plaintiffs Don and Charlotte Halvorson move this Court to strike portions of Defendants' Affidavits filed herein on February 13, 2009 and February 2, 2009 and November 4, 2008 as follows:

1. All statements attributed to any person other than Defendant Arneberg and all testimony offered by Defendant Arneberg in Affidavit of Orland Arneberg in Opposition to Plaintiffs' Motions for Partial Summary Judgment Filed September 19, October 6 and October 21, 2008 as to a matter without his personal knowledge of the matter in paragraph 7 which are

either inadmissible hearsay or lack foundation. Through discovery Plaintiffs have requested the Defendants bring forth such agency records of public evidentiary hearings regarding the establishment of Camps Canyon Road, in the pertinent part and they have indicated to Plaintiffs that no such hearings have taken place. Furthermore Defendant Arneberg would not have been able to have personal knowledge for five years prior to 1930 of public use and maintenance for at least five years prior to 1930, notwithstanding that a conclusory statement is adequate replacement for a public hearing that provides evidence that Camps Canyon Road has been kept up and worked at the public expense at least for five years before 1930.

2. All statements attributed to any person other than Defendant Arneberg and all testimony offered by Defendant Arneberg in Affidavit of Orland Arneberg in Opposition to Plaintiffs' Motions for Partial Summary Judgment Filed September 19, October 6 and October 21, 2008 as to a matter without his personal knowledge of the matter in paragraph 8 which are either inadmissible hearsay or lack foundation.

3. All statements attributed to any person other than Defendant Arneberg and all testimony offered by Defendant Arneberg in Affidavit of Orland Arneberg in Opposition to Plaintiffs' Motions for Partial Summary Judgment Filed September 19, October 6 and October 21, 2008 as to a matter without his personal knowledge of the matter in paragraph 9 which are either inadmissible hearsay or lack foundation. Not all prescriptive rights of way are 50 feet wide. Prescriptive rights of way require evidence showing that they have been used and worked and kept up at the expense of the public for five years to the extent of 50 feet.

4. All statements attributed to any person other than Dan Carscallen and all testimony offered by Dan Carscallen in Affidavit of Dan Carscallen in Opposition to Plaintiffs' Motions for Partial Summary Judgment Filed September 19, October 6 and October 21, 2008 as to a matter without his personal knowledge of the matter in paragraphs 3 and 4 which are either inadmissible hearsay or lack foundation. I.C. § 40-202(1) does not authorize Commissioners to adjudicate the status of any road as public or private (see *Homestead Farms v. Board of Comm'rs Teton County, state of Idaho*, 141 Idaho 855, 119 P 3d 630 (2005)).

5. All statements attributed to any person other than Defendant Payne and all testimony offered by Defendant Payne in Affidavit of Dan Payne in Opposition to Plaintiffs' Motions for Partial Summary Judgment Filed September 19, October 6 and October 21, 2008 as to a matter without his personal knowledge of the matter in paragraph 5 which are either inadmissible hearsay or lack foundation. See *Plaintiffs' Fourth Record Supplement*, Item No. 4, at 3-4, Request For Admission No. 3 subpart c. and *Plaintiffs' Fourth Record Supplement*, Item No. 5, at 4, Interrogatory No. 3) (Defendant Payne does not mention adding four feet to the north side of the north side of the road in 1996, he simply says the physical location changed and he widened it to the north; plaintiffs have no actual measurements of either as recorded by Defendants nor orders of Commissioners to lay out and or how far to widen or move).

6. All statements attributed to any person other than Defendant Payne and all testimony offered by Defendant Payne in Affidavit of Dan Payne in Opposition to Plaintiffs' Motions for Partial Summary Judgment Filed September 19, October 6 and October 21, 2008 as to a matter without his personal knowledge of the matter in paragraph 6 which are either inadmissible hearsay or lack foundation. See *Plaintiffs' Fourth Record Supplement*, Item No. 4, at 3-4, Request For Admission No. 3 subpart c. and *Plaintiffs' Fourth Record Supplement*, Item No. 5, at 4, Interrogatory No. 3) (Defendant Payne's log does not mention adding four feet to the north side of the north side of the road in 1996, he simply says the physical location changed and he widened it to the north; plaintiffs have no actual measurements of either as recorded by Defendants nor orders of Commissioners to lay out and or how far to widen or move).

7. All statements attributed to any person other than Defendant Payne and all testimony offered by Defendant Payne in Affidavit of Dan Payne in Opposition to Plaintiffs' Motions for Partial Summary Judgment Filed September 19, October 6 and October 21, 2008 as to a matter without his personal knowledge of the matter in paragraph 8 which are either inadmissible hearsay or lack foundation. (see *Plaintiffs' Third Record Supplement*, Item No. 3, at 16-17, Interrogatory Nos. 40 – 44 (Defendant Payne says he has moved the centerline and no records show how much).

8. All statements attributed to any person other than Defendant Payne and all testimony offered by Defendant Payne in Affidavit of Dan Payne in Opposition to Plaintiffs' Motions for Partial Summary Judgment Filed September 19, October 6 and October 21, 2008 as to a matter without his personal knowledge of the matter in paragraph 11 which are either inadmissible hearsay or lack foundation. Defendants have no evidence in their records for this conclusion.

9. All statements attributed to any person other than Defendant Payne and all testimony offered by Defendant Payne in Second Affidavit of Dan Payne as to a matter without his personal knowledge of the matter in paragraph 3 which are either inadmissible hearsay or lack foundation. All statements attributed to Mr. Swanson.

10. All statements attributed to any person other than Defendant Payne and all testimony offered by Defendant Payne in Affidavit of Dan Payne in Opposition to Plaintiffs' Motions for Partial Summary Judgment Filed September 19, October 6 and October 21, 2008 as to a matter without his personal knowledge of the matter in paragraphs 6, 7, 8, 9, and/or 10 which are either inadmissible hearsay or lack foundation. All statements attributed to Mr. Wagner. All statements attributed to Mr. Halvorson.

11. All testimony offered by Mr. Hodge in Affidavit of Larry J. Hodge as to a matter without his personal knowledge of the matter in paragraph 8 which are either inadmissible hearsay or lack foundation. Statement that the 1940 aerial photo includes the driveway serving the Wagners' real property and the consistency of 3.4 acres with the 1911 deed of 3+/- acres and that the southerly boundary of Wagners' real property running on a southeasterly course.

Based upon the foregoing, Plaintiffs request the Court strike those items listed above as inadmissible and/or not to be considered in connection with Defendants' pending Motions for Partial Summary Judgment. Plaintiffs also move to strike from the record factual assertions by Defendants made without their personal knowledge or that constitute inadmissible hearsay set forth in Defendants' Motion for Summary Judgment, Brief in Support of Defendants' Motion for Summary Judgment, and Defendants' Answering Brief and Objections to Plaintiffs' Motions for partial Summary Judgments and Other Motions Submitted January 26, 2009 the specific

identification of which in Defendants' rambling page document are too numerous to efficiently mention.

This Motion is based, in part, upon Rules 56(3e) and (g) I.R.C.P. which require that evidence submitted in summary judgment proceedings "shall set forth facts...admissible in evidence."

Plaintiffs request oral argument in support of this motion.

On this 17th Day of February, 2009

RESPECTFULLY SUBMITTED,

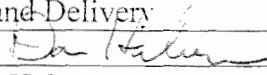


Don Halvorson

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	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Federal Express Standard Overnight Mail <input type="checkbox"/> FAX (208) 883-4593 <input checked="" type="checkbox"/> Hand Delivery
CARL B. KERRICK DISTRICT JUDGE P.O. Box 896 Lewiston, ID 83501-0896	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Federal Express Standard Overnight Mail <input type="checkbox"/> FAX <input type="checkbox"/> Hand Delivery



Don Halvorson

CASE NO CV 2008-100/80

2009 FEB 24 PM 4: 57

CLERK OF DISTRICT COURT
LATAH COUNTY
BY Do 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' SECOND 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' Fourth Record Supplement, Plaintiffs' Affidavit, Joe Yockey's First Affidavit and Plaintiffs' Answering Brief, all of which were filed herein on February 17, 2009, as follows:

1. PLAINTIFFS' FOURTH RECORD SUPPLEMENT:

- 1.1 Item Nos. 1 and 2, set forth in paragraphs 2 and 3, are inadmissible hearsay, lack foundation and lack proper certification.
- 1.2 Item Nos. 3(a) – (v), including all photographs and documents and Plaintiffs' narrative statements both on the photographs and within the text of said Supplement, for lack of adequate foundation and proof of authenticity.
- 1.3 Item Nos. 3(r), (s) and (u) which are inadmissible hearsay and lack adequate foundation and proper certification.

2. PLAINTIFF'S AFFIDAVIT:

- 2.1 All testimony offered by Plaintiffs in paragraph 2 as to matters without their personal knowledge for lack of adequate foundation.
- 2.2 All statements attributed to Dan Payne and Ed Swanson in paragraph 8 which are inadmissible hearsay and/or lack adequate foundation. Further, all statements beginning with the phrase, "Prior to these alterations" on page 3, through the phrase, "Martin Huff, et al." on page 4 for lack of adequate foundation. Further, all statements attributed to Larry Hansen in paragraph 8 which are inadmissible hearsay.
- 2.3 All statements attributed to Mr. Wagner in paragraph 9 which are inadmissible hearsay.
- 2.4 All statements by Plaintiffs in paragraph 9 as to matters without their personal knowledge for lack of adequate foundation.
- 2.5 All statements by representative of Clearwater Power Company or statements regarding conduct by Clearwater Power Company in paragraph 11 which are either inadmissible hearsay or lack adequate foundation.
- 2.6 All statements attributed to Mr. Munson in paragraph 12 which are inadmissible hearsay.

- 2.7 All statements attributed to Patsy Wagner and Gary Osborne in paragraph 13 which are inadmissible hearsay and all testimony offered by Plaintiffs as to a matter without their personal knowledge of the matter in paragraph 13 for lack of adequate foundation.
- 2.8 All testimony offered by Plaintiffs in paragraph 15 for lack of adequate foundation and which are based on inadmissible hearsay.
- 2.9 All statements attributed to Mr. Wagner in paragraph 15 which are inadmissible hearsay.
- 2.10 All statements in paragraph 16 which are oral testimony offered by Plaintiffs as to matters without their personal knowledge for lack of adequate foundation.
- 2.11 All testimony offered by Plaintiffs in paragraph 24 for lack of adequate foundation.
- 2.12 All testimony offered by Plaintiffs in paragraph 26 for lack of adequate foundation.
- 2.13 All statements in paragraph 27 which are not relevant to this proceeding.

3. JOE YOCKEY'S FIRST AFFIDAVIT:

- 3.1 All testimony offered by Mr. Yockey in paragraph 5 for lack of adequate foundation.
- 3.2 All testimony offered by Mr. Yockey in paragraph 8 for lack of adequate foundation.
- 3.3 All testimony offered by Mr. Yockey in paragraph 9 as not relevant to this proceeding.

4. PLAINTIFFS' ANSWERING BRIEF:

- 4.1 All testimony offered by Plaintiff Don Halvorson as to what the John Dunn survey shows and Mr. Halvorson's interpretations and applications of the Dunn survey for lack of adequate foundation and which are based on inadmissible hearsay.
- 4.2 All testimony offered by Plaintiff Don Halvorson as to statements by Ed Swanson which are inadmissible hearsay.

- 4.3 All statements by Plaintiff Don Halvorson as to the location, movement, width, condition and/or maintenance of Camps Canyon Road prior to 1996, which are based upon inadmissible hearsay or lack adequate foundation.
- 4.4 All statements by Plaintiff Don Halvorson attributed to Wagners which are inadmissible hearsay.
- 4.5 All statements by Plaintiff Don Halvorson as to Defendants' intentions for lack of adequate foundation.

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 February 17, 2009.

Defendants request oral argument in support of this motion.

RESPECTFULLY SUBMITTED this 24th 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 24th 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
 Hand Delivery



Ronald J. Landeck

CASE NO. CV 2008-00180

2005 FEB 24 PM 4:56

CLERK OF DISTRICT COURT
LATAH COUNTY

BY AC DEPUTY

RONALD J. LANDECK, ISB No. 3001
RONALD J. LANDECK, P.C.
693 Styner Avenue, Suite 9
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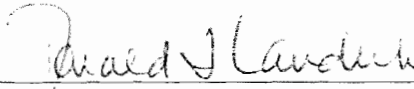
IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

DON & CHARLOTTE HALVORSON)	
(Husband and Wife),	)	Case No. CV 2008-180
)	
Plaintiffs,	)	DEFENDANTS' MOTION TO
	)	ENLARGE TIME
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 move to enlarge time under Rule 6(b) I.R.C.P. to file Defendants' Reply Brief in Support of Defendants' Motion for Summary Judgment. As grounds therefore, Defendants' Counsel asserts that the length and breadth of Plaintiffs' Answering Brief require additional time.

RESPECTFULLY SUBMITTED this 24th day of February, 2009.

RONALD J. LANDECK, P.C.

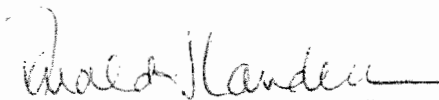
By: 
Ronald J. Landeck
Attorneys for Defendants

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KENDRICK, IDAHO 83537

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Ronald J. Landeck

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. I have reviewed portions of Plaintiffs’ Answering Brief related to alleged changes in Camps Canyon Road. In particular, I have read the following statement from Plaintiffs’ Answering Brief found on pages 56 and 57 thereof (“Plaintiffs’ Allegations”):

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 cited 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 500 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 Records Supplement*, Item No. 3, at 20)....

4. No part of Plaintiffs' Allegations is based in fact based upon my observations as an employee of the District since 1974 and based upon my observations of the terrain adjacent to Camps Canyon Road.

5. Camps Canyon Road follows the same approximate centerline now as it did in 1974, and, in my opinion, as it has throughout its history. There is no physical evidence that a road was located "50 and 84 feet" from the road as it existed in 1996 as alleged by Plaintiffs. There is no visual evidence that an "old road" existed anywhere at any time near Camps Canyon Road other than over and upon the location of Camps Canyon Road as it exists today.

6. Plaintiffs' Allegations suggest that the "change in the curves" or "straightening" of Camps Canyon Road account for a loss in the road frontage of Camps Canyon Road compared to the 699 feet described in the Wagners' deed. As I stated in the Second Affidavit of Dan Payne filed herewith, I personally measured the distance "699 feet, more or less, along the County Road." That distance placed me "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." The only "change in the curves" of Camps Canyon Road in this area occurred as a result of the widening of Camps Canyon Road in the vicinity of the "old driveway" which was well over 600 feet from the northwesterly boundary of the 3+/- acre parcel. There is absolutely no basis for any statement by Plaintiffs that the District's widening or straightening of Camps Canyon Road changed the dimensions along the centerline of Camps Canyon Road by more than a minimal distance, if at all. I have marked with a circled "X" and arrow with my initials at the end of the arrow on two documents the location of the District's road widening activity in 1996, which was the only activity undertaken by the District since 1974 that did result in the straightening of any curve in the area of the 3+/-acre

parcel and Camps Canyon Road. Those documents that I have so marked are the "1940 aerial" photograph and "May 2007 Survey," as those terms are defined in Defendants' Second Record Supplement.

7. I have also reviewed 2 photographs, Item 3(n), photograph #14 and Item 3(q), photograph #17 attached to Plaintiffs' Fourth Record Supplement." Those photographs accurately portray the location of Camps Canyon Road from 1974 to the present and, in my opinion, from the inception of Camps Canyon Road. No part of Camps Canyon Road ever followed the course of line "C" marked on photograph #14. No part of Camps Canyon road was ever located on top of the embankment shown on photograph #17. Plaintiffs' allegations to the contrary are not true.

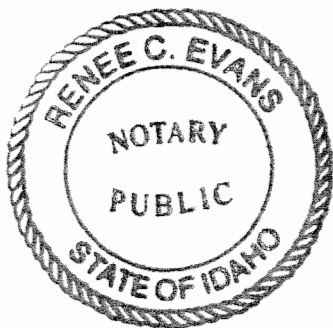
The above statements are true and correct to the best of my knowledge and belief.


Dated this 24th day of February, 2009.



Dan Payne

SUBSCRIBED AND SWORN TO before me this 24th day of February, 2009.





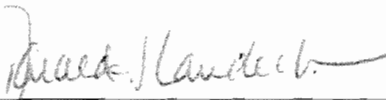
NOTARY PUBLIC for the State of Idaho
My commission expires: 8-17-2013

CERTIFICATE OF SERVICE

I hereby certify that on this 24th 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
- Hand Delivery



Ronald J. Landeck

Nelson

500 BA
SF
2A7

Edward Ramoza
SP

Douglas R. Kelly
SP

Charles E. Harris
SP

Edward Ramoza
SP

Axel
E. Swanson
SP

DP
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Richard L. Kelly
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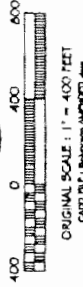
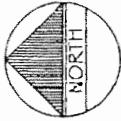
DP
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513819

T 39 N, R 3 W, S 15

RECORD OF SURVEY - AMENDED

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



LEGEND

- Set 5/8" x 3/4" iron rebar w/ cap LS 10162
- Computed Position - Nothing Found nor Set
- 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
- ⊙ 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 resurvey 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 approximates the survey filed as Inst. No. 506409.

BASIS OF BEARINGS

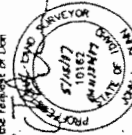
The Basis of Bearings for this survey is the Idaho Coordinate System, West Zone, NAD 83 as shown between the fixed monuments at the North 1/4 corner of Section 15 and the NE Section Corner of Section 15, said bearing being S 00° 22' 49" E.

SURVEY REFERENCES

1. Warranty Deed Inst. #424411
2. Warranty Deed Inst. #396468
3. Warranty Deed Inst. #501677
4. Warranty Deed Inst. #411163
5. ROS Inst. #352082, LS 969
6. ROS Inst. #296468, LS 969
7. Latah County Road Plat Book
8. GLO Original Survey, 1871, Isaac Colvard
9. Segregation Plat of 1904, GLO
10. Mineral Survey 1751, 1902, David Hanson

SURVEYORS CERTIFICATION

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

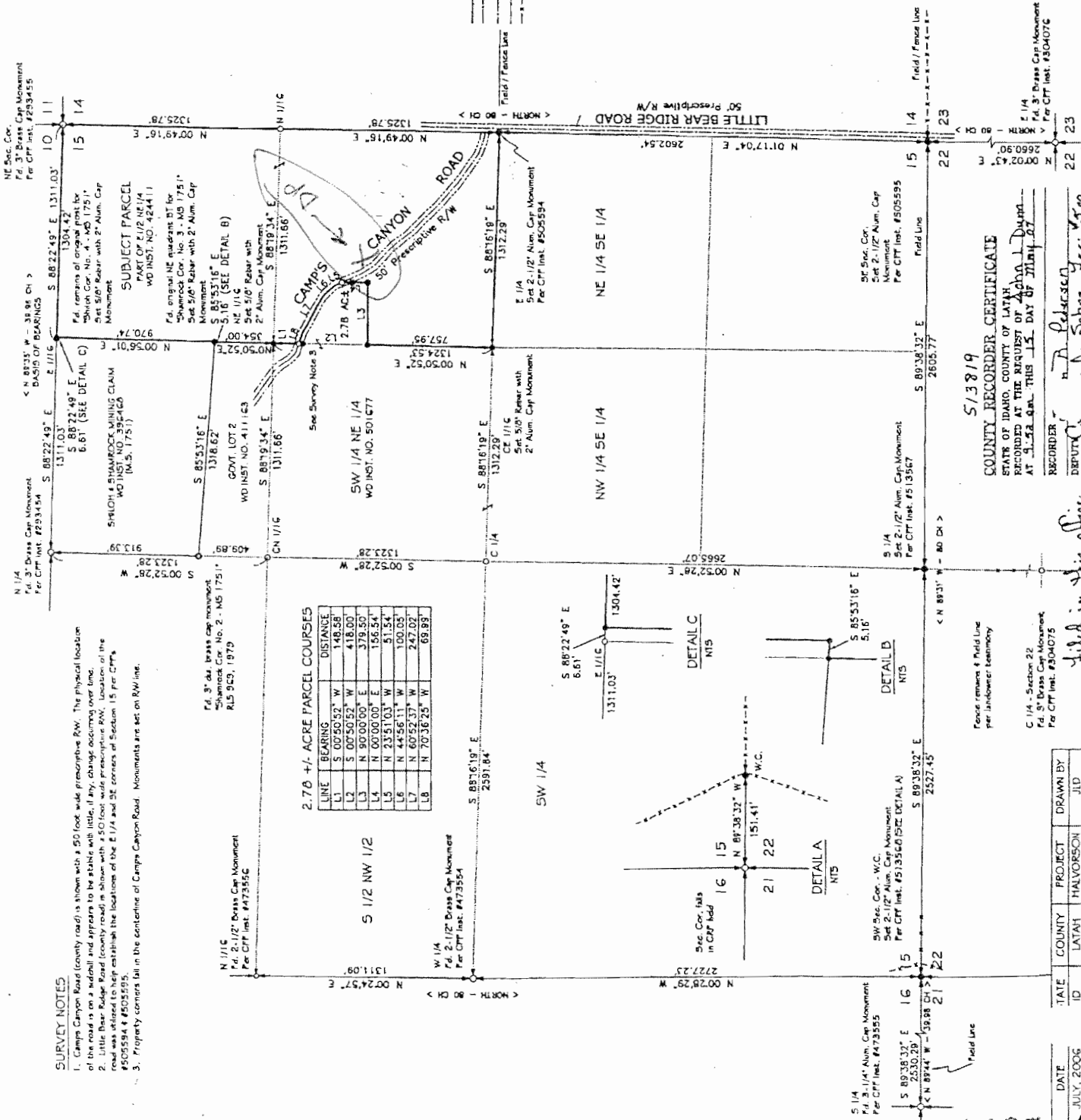


John L. Dean - Latah Professional Land Surveyor



RIM ROCK CONSULTING, INC.
1000 West Valley Street, Boise, Idaho 83726
208-333-8888

SHEET	1
OF	1



513819

COUNTY RECORDER CERTIFICATE
STATE OF IDAHO, COUNTY OF LATAH
RECORDED AT THE REQUEST OF John L. Dean
AT 3:54 P.M. THIS 15 DAY OF July, 2007
RECORDER: John A. Peterson DEPUTY
FILED IN THIS OFFICE

DATE	COUNTY	PROJECT	DRAWN BY
JULY, 2006	LATAH	HALVORSON	JLD

CASE NO. CV 2008-00180

2009 FEB 26 PM 4:54

CLERK OF DISTRICT COURT
LATAH COUNTY
BY SA DEPUTY

RONALD J. LANDECK, ISB No. 3001
RONALD J. LANDECK, P.C.
693 Styner Avenue, Suite 9
P.O. Box 9344
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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' REPLY BRIEF
	)	IN SUPPORT OF DEFENDANTS'
vs.	)	MOTION FOR SUMMARY
	)	JUDGMENT
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

The pleadings and affidavits filed by Defendants and Plaintiffs show that there is no genuine issue as to any material fact and that, based on admissible facts, Defendants are entitled to judgment as a matter of law on all of Plaintiffs' claims. Defendants' Reply Brief will support dismissal of Plaintiffs' claims by responding to arguments made in Plaintiffs' Answering Brief,

supplementing the factual discussion previously set forth in Defendants' Brief and focusing on decisive legal principles.

FACTUAL DISCUSSION

Plaintiffs have failed to set forth genuine issues of material fact or have made allegations that are not admissible in evidence. In particular, key dispositive, undisputed, material, admissible facts on this record include the following:

1. The District has conducted all of its activities on Camps Canyon Road, a public highway, established by user, within the minimum 50-foot width mandated by Idaho law.

(Plaintiffs agree that Camps Canyon Road "was originally an unrecorded prescriptive right-of-way," see, eg., Plaintiffs' Motions for Partial Summary Judgments and other Motions submitted January 26, 2009, and Brief, p. 33.)

2. Plaintiffs' only Tort Claim Notice was filed with the District on November 6, 2007.
3. On or about March, 2006, acting upon Mr. Wagner's application for a driveway permit in which Mr. Wagner certified that he was the owner of the proposed property to be served, District foreman Dan Payne physically inspected the access, observed that it was well north of an old driveway that had served Mr. Wagner's property, approved the application and issued an access permit to Wagners. Plaintiff Don Halvorson attended a meeting of the District Commissioners and complained about the issuance of that permit and asserted that the permitted access was located on Plaintiffs' property. On or about June, 2006, Mr. Wagner submitted a new access permit application, which is not of issue in this matter, and the District revoked and disposed of the March, 2006 permit. Second Affidavit of Dan Payne, pp. 3-5 filed February 2, 2009; Second Affidavit of Dan Carscallen, Exhibit B, filed February 2, 2009.

Plaintiffs have summarized and set forth other admissible, material facts relevant to Plaintiffs' claims in the Brief in Support of Defendants' Motion for Summary Judgment at pages 4 through 12.

Plaintiffs' latest factual submittals do not set forth any genuine issues of material fact and, in particular, the Affidavit of Ed Swanson, whose family owned Plaintiffs' property for 70 years and who was Plaintiffs' predecessor in interest in that property, does not support Plaintiffs' disingenuous allegation that the District moved Camps Canyon Road in 1996. Plaintiffs, in an effort to obfuscate the truth and create an issue of fact where none exists, have alleged that "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, e.g., Plaintiffs' Answering Brief, p. 34. Plaintiffs base this proposition on discrepancies between the 1911 Deed that first identifies the 3 acre +/- parcel, Instrument No. 57421, records of Latah County, Idaho, (the "1911 Deed") (see copy of 1911 Deed attached to Defendant's Second Record Supplement) and the Amended Record of Survey, Instrument No. 513819, records of Latah County, Idaho (referenced in and attached to Defendants' Second Record Supplement as the "May, 2007 Survey") that locates the parcel, including its common boundary with Plaintiffs' property along the centerline of Camps Canyon Road.

Licensed surveyor John Dunn, who made and filed the May, 2007 survey, included a survey note therein in which he expressly acknowledge that Camps Canyon Road has not moved, as follows:

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.

Likewise, Larry J. Hodge, Professional Land Surveyor, having viewed aerial photos of the area taken on or about 1940 and 2004, opines that “the location of Camps Canyon Road in the area between Plaintiffs’ real property and Wagners’ real property has not changed to any significant degree, if at all, between 1940 and 2004.” Affidavit of Larry J. Hodge, filed February 2, 2009. Mr. Hodge also opines that he would have surveyed the 3+/- 1-acre parcel differently to include the call of “699 feet, more or less along the County road.” The difference of opinion as to what constitutes an appropriate survey of Camps Canyon Road does not create a material issue of fact in this case because this difference of opinion between surveyors is not relevant as to whether the District moved Camps Canyon Road in 1996. Rather, the survey issue instructs that just because a discrepancy exists between a deed and a survey, a reasonable inference cannot be drawn that a road has been moved. Although both surveyors acknowledge that a survey discrepancy exists, nonetheless both surveyors agree that Camps Canyon Road has changed little, “if at all,” over time.

Plaintiffs themselves offer testimony through their most recent, supporting affidavits about an old fence that had been located along their side of Camps Canyon Road that was removed during the 1996 improvements. This evidence of Plaintiffs’ directly contradicts Plaintiffs’ proposition that Camps Canyon Road had been previously located between 84+ and 50 feet away from its pre-1996 location. Plaintiffs attempt to have it both ways and that cannot happen. Plaintiffs should approach this Court with the candor that is required and not play games with the truth in an effort to achieve whatever ends they seek.

In addition, this record is replete with affidavit testimony and photographs from at least as far back as living memory and photographic records can tell and show that Camps Canyon Road has not moved. In particular, the affidavits of Dan Payne and Orland Arneberg,

respectively, affirm that Camps Canyon Road follows “the same approximate centerline” now that it did when Mr. Payne began work for the District in 1974 and when Mr. Arneberg first traveled the road in the early 1930’s.” Plaintiffs have offered no admissible evidence to create any genuine issue of fact regarding the location of Camps Canyon Road throughout its history.

This record does establish that Camps Canyon Road was widened in 1996 and again in 2005/2006, by approximately four (4) feet on each side of the road, to improve road safety for increased public vehicular traffic. Affidavit of Dan Payne. Although Dan Payne and Ed Swanson do not have the same recollections regarding their discussion, if any, concerning the District’s 1996 improvements, that issue is not material because there is no recorded instrument evidencing any gift or dedication of land for public highway purposes as required under Idaho law. Defendants’ Brief, pp. 6-7.

Dan Payne’s Affidavit also sets forth specific detail regarding the dimensions of the traveled surface of Camps Canyon Road from 1996 to 2006 which, in the area that is the subject of this litigation, does not now exceed 23 ½ feet in width at any point and averages approximately 21 feet in width throughout. Defendants’ Brief, pp. 7-8. Further, Mr. Payne testifies that, in addition to using and maintaining the traveled surface, to properly grade and drain a road safe for public travel, the District maintains cut slope and fill slope for ditches, structural support and snow storage, and that a minimum of 50 feet is reasonably necessary for proper maintenance of a public highway in rural Latah County. He also testifies that 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. Defendants’ Brief, p. 8. For all the verbiage in Plaintiffs’ filings, Plaintiffs have not set forth facts alleging that the public’s use and/or the District’s activities in the area of Plaintiffs’

real property along Camps Canyon Road exceed or have exceeded either a 50-foot overall width or a 25-foot width from the centerline of Camps Canyon Road.

In 1997, Plaintiffs constructed a fence adjacent to the traveled surface of Camps Canyon Road. That fence, in places, was constructed by Plaintiffs within 15 feet of the centerline of Camps Canyon Road. Photographs No. 5, 6, 10, 11 and 16 submitted with Plaintiffs' Fourth Record Supplement show that the District has diligently avoided harm to Plaintiffs' fence that encroaches on the public highway right-of-way.

ANALYSIS

Plaintiffs' Takings Claims Related to the District's Improvements to Camps Canyon Road Fail Because There Has Not Been a Taking.

All of Plaintiffs' "takings claims" under the Fifth Amendment of the Constitution of the United States made applicable to the states through the 14th Amendment and under Article 1, § 14 of the Constitution of the State of Idaho fail because Plaintiffs cannot maintain an inverse condemnation action "unless there has actually been a taking of [Plaintiffs'] property." *KMST, LLC v. County of Ada*, 138 Idaho 577, 579-560, 67 P.3d 56, 59-60 (2003). The determination of whether or not there has been a taking is a matter of law to be resolved by the trial court. *Id.*

The threshold step in a takings inquiry, whether in a case of a regulatory or physical nature, "is to determine whether the Plaintiffs *ever* possessed the property interest they now claim has been taken by the challenged governmental action." See *Kim v. City of New York*, 681 N.E.2d 312, 314 (N.Y. Ct. App. 1997) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027, 112 S.Ct. 2886, 2899. The purpose of this "logically antecedent inquiry into the nature of the owners' estate" is to determine whether principles of the allegedly taken property was a "stick in the bundle of property rights" acquired by the owner. (*Lucas, supra*, 505 U.S. at 1027, 112 S.Ct. at 2899). Thus it is the "objectively reasonable application" of the

corpus juris of Idaho, constitutional, statutory and common law, when the owner acquired the property, that defines “the rights and restrictions contained in a property owner’s title.” *Lucas, supra*, 505 U.S. at 1032, n.18, 112 S.Ct. at 2902, n.18; *Kim, supra*, at 315-316, 319. In the instant case, Plaintiffs acquired their property on or about 1996 subject to an existing public highway established by user and the concomitant “rights and restrictions” of Idaho public highway law.

Applying Idaho public highway law, as originally mandated and now codified in Idaho Code §40-2302, as interpreted from early days of statehood in the case of *Meservey v. Gulliford*, 14 Idaho 133, 93 P. 780, 784 (1908) and as followed to this day, to the undisputed, material facts of this case, this Court should find, conclude and determine that (i) Camps Canyon Road is a public highway that was established “by user” on or before 1911 (being the year specific references are made to “County road” in the 1911 Deed), and (ii) Camps Canyon Road is 50 feet wide and centered on the line thereof as surveyed on the May, 2007 Survey.¹ There are no admissible facts on this record that create a genuine issue of fact that contradicts these findings, conclusions and determinations.

Meservey’s holdings provide established, legal authority for the District’s 1996 and 2005/2006 improvement to Camps Canyon Road, which principally included widening of the traveled surface and improving drainage in the interests of public safety. (The public has the right “to use the whole tract as a highway, by widening the traveled part or otherwise as the increased travel and exigencies of the public may require....” *Id.* at 784-785.) Idaho public highway law has long held that:

¹ The only, particularized evidence of the historic centerline of Camps Canyon Road is set forth in the Affidavit of Dan Payne and that testimony shows that Camps Canyon was widened, in pertinent part, approximately 4 feet on each side of the road. The May, 2007 Survey has located the present centerline and use of that surveyed legal description provides such certainty as the law may require. See *Kosanke v. Kopp*, 74 Idaho 302, 261 P.2d 815 (1953).

Mere non-user of a portion of the total width of a highway over a period of years does not constitute an abandonment, or estop the public from claiming the title or right to the use thereof.

....

Possession and use of an unused portion of a highway by an abutting owner is not adverse to the public and cannot ripen into a right or title by lapse of time no matter how long continued.

...

Nor does such possession and use, even though by express permission of the public authority work an estoppel against the public use.

...

Even in the case of a highway established by user, all portions of the highway right of way need not be maintained and kept up at public expense.

Rich v. Burdick, 83 Idaho 335, 345, 362 P.2d 1088, 1994 (1961) [citations omitted].

It becomes evident, applying Idaho law, that Plaintiffs' "bundle of property rights" when Plaintiffs' acquired their property on or about 1996 is subject to the rights of the public to utilize a 50-foot wide right-of-way for public highway purposes and subject to the statutory authority of the District to maintain and improve that public right-of-way. As a result, Plaintiffs cannot maintain an inverse condemnation claim against the District based upon the factual record before this Court of the District's actions and policies in the discharge of the District's statutory responsibilities in connection with Camps Canyon Road.

Although Plaintiffs argue that Ed Swanson dedicated right-of-way to the District in 1996, there is no evidence on this record of any such written dedication or deed of gift to the District, despite that such proof is required by Idaho Code §40-2302(2) before the District can acquire any such rights. ("In all cases where consent to use the right-of-way for a highway is voluntarily given...an instrument in writing conveying the right-of-way and incidents to it, signed and acknowledged by the party making it...must be made, filed and recorded in the office of the recorder of the county in which the land conveyed...shall be particularly described." Idaho Code

section 40-2302(2).) There being no such evidence in this record, the only inference that can be drawn is that no such gift or dedication occurred.

Nor have Plaintiffs have set forth any facts showing that there has been an abandonment or extinguishment of the public's rights in Camps Canyon Road. Plaintiffs merely present unfounded argument that any improvement, alteration or widening of Camps Canyon Road constitutes an unlawful taking of their property. Plaintiffs have not sustained their burden to show the public's rights in Camps Canyon Road are other than as Defendants have established on this record. Plaintiffs' argument that Camps Canyon Road "may be informally abandoned..." is unpersuasive, contrary to law and cannot be upheld. *Floyd v. Bonneville County*, 137 Idaho 718, 728, 52 P.3d 863, 873 (2002).

Although Plaintiffs also challenge the constitutionality of Idaho Code section 40-202(3), that constitutional issue was decided in the recent case of *Ada County District v. Total Success Investments, LLC*, 145 Idaho 360, 179 P.3d 323 (2008), which held the statute "not unconstitutional on its face." The Court acknowledged the limitations provision of Idaho Code § 5-224 applicable to inverse condemnation actions was "four years from the accrual of the cause of action." *Id.* at 369, P.3d at 332. As the establishment of Camps Canyon Road occurred at least 70 years ago, the limitations period for any such cause of action has run. Plaintiffs are time barred from bringing any claim challenging the establishment of the public's rights in Camps Canyon Road.

Plaintiffs' Taking Claims Related to the District's Issuance of the First Access Permit Fail Because the District (i) Did Not Take Plaintiffs' Property, (ii) Did Not Intend to Appropriate Plaintiffs' Property and (iii) Did Not Interfere Substantially, If at All, With Plaintiffs' Property Rights.

Plaintiffs assert takings claims under the United States and State of Idaho constitutions related to the issuance of the Wagners' first access permit and alleged damages to Plaintiffs'

property from the Wagners' construction on or about March, 2006, of a driveway. Wagners abandoned that initial driveway by June, 2006, and filled in the area that had been excavated. The District did not occupy or undertake any construction activity on Plaintiffs' property and, as a result, did not take Plaintiffs' property or trespass upon Plaintiffs property. It is the Wagners' conduct, if any, that is actionable in regard to any damage to Plaintiffs' property.

To assert a claim against Defendants for inverse condemnation, Plaintiffs "must establish that treatment under takings law, as opposed to tort law is appropriate under the circumstances." *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. Ct. App. 3003). The *Ridge Line* Court described the "tort-taking inquiry" as requiring consideration of "whether the effects" the party "experienced were the predictable result of the government's action and whether the government's actions were sufficiently substantial to justify a taking." *Id.* Elaborating on this two-part analysis, the Court stated:

'Inverse condemnation law is tied to and parallels, tort law.' 9 *Patrick J. Rohan & Melvin A. Reskin, Nichols on Eminent Domain* § 34.03[1] (3d ed. 1980 & Supp. 2002). Thus, not every "invasion" of private property resulting from government activity amounts to an appropriation. *Id.* The line distinguishing potential physical takings from possible torts is drawn by a two-part inquiry. First, a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the "direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action.'

...

Second, the nature and magnitude of the government action must be considered. Even where the effects of the government action are predictable, to constitute a taking, an invasion must appropriate a benefit to the government at the expense of the property owner, or at least preempt the owners' right to enjoy his property for an extended period of time, rather than merely inflict an injury that reduces its value.

Id. at 1355-1356.

It is apparent that the District's issuance of an access permit (and its timely revocation), the consequent actions by Wagners and their timely abandonment and reconstruction of the

aborted driveway access do not pass the “takings test” in both respects. First, Dan Payne’s Affidavit details the good faith, due diligence he applied to the issuance (and timely revocation) of that first permit. Even if Dan Payne were found to be negligent in his discharge of this duty, which Defendants do not believe to be the case, such conduct would fall far short of the “direct, natural or probable result” of what Dan Payne did in issuing the permit. Second, even if the effects of Dan Payne’s action were deemed to be predictable, the District’s action did not “appropriate a benefit to the government at the expense of the property owner or at least preempt the owners’ right to enjoy his property for an extended period of time.” *Id.* Courts are required to consider “whether the government’s interference was substantial and frequent enough to rise to the level of a taking...’[i]solated invasions, such as one or two floodings..., do not make a taking..., but repeated invasions of the same type have often been held to result in an involuntary servitude.” *Id.* (citations omitted). At most, giving Plaintiffs the benefit of all reasonable inferences, the District’s action merely inflicted an injury that reduced the property’s value. The District neither appropriated “a benefit to the government” nor did it preempt Plaintiffs’ “right to enjoy...for an extended period of time.” Such conduct is not cognizable under takings law, rather, it may only be pursued under tort law principles. As discussed in Defendants’ Brief, Plaintiffs are barred from pursuing tort relief because of their failure to timely file a notice of tort claim in regard to this alleged conduct.

Plaintiffs’ Due Process and Equal Protections Claims Fail as a Matter of Law.

A. Claims Against Individual Defendants.

1. Substantive Due Process (With Reference to Defendants’ Qualified Immunity)

Plaintiffs contend that Defendants Arneberg, Clyde, Hansen and Payne violated their substantive due process rights related to the District’s (i) policy and actions regarding the

widening of Camps Canyon Road and (ii) issuance of the Wagners' access permit in March, 2006. Plaintiffs bring their claims principally pursuant to 42 U.S.C. § 1983 which provides for civil liability for any person who, under color of state law, subjects another "to the deprivation of any rights, privileges or immunities secured by the Constitution and bylaws." 42 U.S.C. § 1983. Section 1983 "does not create a cause of action," rather, it provides a vehicle for courts to review alleged violations of constitutional or statutory law. See *Aardvark Childcare and Learning Center, Inc. v. Township of Concord*, 401 F. Supp. 2d 427, 444 (East. Dist. Pa. 2005).

Plaintiffs principal contentions in this regard are that Plaintiffs' constitutionally protected property rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 13 of the Idaho Constitution as well as numerous Idaho statutes are being violated by the District's widening of Camps Canyon Road and by the District's custom and policy in relying upon Idaho Code section 40-2312 and the Idaho Supreme Court's holdings in *Meservey* and its progeny by which the District maintains and improves public prescriptive roadways within a 50-foot width. Plaintiffs also contend that these substantive due process rights are also being violated by the District's issuance of the Wagners' access permit in March, 2006.

Legal standards applicable to a § 1983 claim are set forth as follows:

In order to prevail on a § 1983 claim, plaintiffs must establish that: 1) a deprivation of a constitutionally or federally secured right occurred, and 2) the alleged deprivation was committed by a person acting under color of state law.

...

In order "to prevail on a non-legislative substantive due process claim, 'a plaintiff must establish as a threshold matter that he has a protected property interest to which the Fourteenth Amendment's due process protections applies.'"

...

Real property ownership is undisputably a property interest protected by substantive due process.

...

the owner's good fortune in not suffering injury for several years for which he had been fully paid cannot be the basis of a property right protected by the Constitution, or entitle him to be paid both when the right to inflict the damage is acquired by the public and when the damage is actually inflicted. 26 Am.Jur.2d *Eminent Domain* § 206, at 889 (1966) (emphasis added). Because it is clear that the Reisenauers' predecessors in interest were paid just compensation for the right-of-way acquired by the state in 1937, the Reisenauers cannot obtain any additional compensation for alleged inverse condemnation.

Id. at 40, 813 P.2d at 379 (emphasis in original).

In the case at hand, the Plaintiffs claims fail because the improvements and maintenance of Camps Canyon Road occurred within the fifty foot width of the roadway. The Plaintiffs have maintained a fence within the boundaries of the right of way, however, the location of the fence does not create a right of occupancy within the right of way. A similar determination was reached with regard to the placement of a building within the right of way of a road in *Rich v. Burdick*, 83 Idaho 335, 362 P.2d 1088 (1961).

Even in the case of a highway established by user, all portions of the highway right of way need not be maintained and kept up at public expense. *Kosanke v. Kopp*, 74 Idaho 302, 261 P.2d 815. In *Boise City v. Sinsel*, *supra*, we held that an abutting owner who erected and maintained a building on a portion of a public street under a permit granted by the city council, for a period of 25 years, did not acquire a right to such occupancy, and that the city was not estopped to cancel the permit and require the removal of the building.

Id. at 345, 362 P.2d at 1094. Because the Plaintiffs have no possessory rights to the property within the right of way, the Highway District's use of the right of way for maintenance and improvements to Camps Canyon Road does not establish a taking as contemplated by the 14th Amendment. Therefore, the Defendants' motion for summary judgment on this issue is granted.

In addition, the Plaintiffs claim that portions of their property were taken when the Highway Department issued driveway permits to the Plaintiffs' neighbors, the Wagners. The issuance of the driveway permits will be discussed in more detail below. However, with regard

to the taking of property, this Court finds no evidence that the driveway permits issued by the Highway District encompassed property beyond the borders of the right of way of Camps Canyon Road. Therefore, the Defendant's motion for summary judgment is granted with respect to the Plaintiffs' takings claims.

B. Resolution of Plaintiffs' constitutional claims

A large portion of the Complaint sets forth claims of violations of due process and equal protection of law. Based upon the foregoing analysis, the Highway District has statutory authority to maintain Camps Canyon Road and make improvements to the road within the boundaries of the fifty foot width of the road. In addition to the status of the roadway, the bulk of the Plaintiffs' claims are based upon whether the Highway District violated the Plaintiffs' constitutional rights by failing to give notice or hold public hearings regarding improvements to Camps Canyon Road, or the issuance of a driveway permit to the Plaintiffs' neighbors, the Wagners.

1. Plaintiffs' procedural due process claims fail as a matter of law.

The Plaintiffs allege violation of procedural due process throughout their complaint. The main focus of these claims are based upon the Plaintiffs' perception the Highway District failed to provide notice or a hearing prior to maintaining the road, improving the road, or issuing driveway permits for access to Camps Canyon Road. Procedural due process requires that notice and an opportunity to be heard be afforded to a person whose protected rights are being adjudicated.

Procedural due process "basically requires that a person, whose protected rights are being adjudicated, is afforded an opportunity to be heard in a timely manner." *Powers v. Canyon County*, 108 Idaho 967, 969, 703 P.2d 1342, 1344 (1985). There must be notice and the opportunity to be heard must "occur at a meaningful time and in a meaningful manner. . . ." *Cowan v. Bd. of Comm'rs*, 143

Idaho 501, 512, 148 P.3d 1247, 1258 (2006) (quoting *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999)) (internal quotations omitted).

Ada County Highway Dist. v. Total Success Investments, LLC, 145 Idaho 360, 371, 179 P.3d 323, 334 (2008). The Plaintiffs' claims that they were not afforded an opportunity to be heard in a timely manner fails because the improvements and maintenance of Camps Canyon Road did not change or alter the Plaintiffs property, or affect a protected right of the Plaintiffs. The actions fell within the authority of the Highway District to maintain public roadways.

The Highway District is given the authority to maintain public roadways pursuant to I.C. § 40-1310(1).

The commissioners of a highway district have exclusive general supervision and jurisdiction over all highways and public rights-of-way within their highway system, with full power to construct, maintain, repair, acquire, purchase and improve all highways within their highway system, whether directly or by their own agents and employees or by contract. Except as otherwise provided in this chapter in respect to the highways within their highway system, a highway district shall have all of the powers and duties that would by law be vested in the commissioners of the county and in the district directors of highways if the highway district had not been organized. Where any highway within the limits of the highway district has been designated as a state highway, then the board shall have exclusive supervision, jurisdiction and control over the designation, location, maintenance, repair and reconstruction of it. The highway district shall have power to manage and conduct the business and affairs of the district; establish and post speed and other regulatory signs; make and execute all necessary contracts; have an office and employ and appoint agents, attorneys, officers and employees as may be required, and prescribe their duties and fix their compensation. Highway district commissioners and their agents and employees have the right to enter upon any lands to make a survey, and may locate the necessary works on the line of any highways on any land which may be deemed best for the location.

I.C. § 40-1310(1). A due process hearing is not required every time a highway district maintains and repairs roads within its jurisdiction. See *Lu Ranching Co. v. U.S.*, 138 Idaho 606, 608, 67

...P.3d 85, 87 (2003). Without some evidence there was adjudication of the Plaintiffs' protected rights, the Plaintiffs' procedural due process claims fail.

2. The Plaintiffs fail to establish violation of due process rights pursuant to the Fourteenth Amendment.

In addition, the Plaintiffs bring their due process claims pursuant to 42 U.S.C. § 1983 which provides for civil liability for any person who, under color of law, subjects another "to the deprivation of any rights, privileges or immunities secured by the Constitution and bylaws." 42 U.S.C. § 1983. "Section 1983 'does not confer any substantive rights. It is a vehicle for vindicating rights secured by the United States Constitution or federal law.' *BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 176, 108 P.3d 315, 323 (2004), citing *Bryant v. City of Blackfoot*, 137 Idaho 307, 314, 48 P.3d 636, 643 (2002).

The application of due process was discussed in depth in *Mareh v. State, Dept. of Health and Welfare ex rel. Caballero*, 132 Idaho 221, 970 P.2d 14 (1998).

"To determine whether an individual's due process rights under the Fourteenth Amendment have been violated, a court must engage in a two-step analysis. It must first decide whether the individual's threatened interest is a liberty or property interest under the Fourteenth Amendment." Only after a court finds a liberty or property interest will it reach the next step of analysis, in which it determines what process is due.

As stated by the United States Supreme Court, "[t]he requirements of procedural due process apply only to the deprivation of interest encompassed by the Fourteenth Amendment's protection of liberty and property." . . .

The United States Supreme Court has noted that property interests are "created . . . by existing rules, . . . such as state law." *Id.* Likewise, this Court has indicated that "determination of whether a particular right or privilege is a property interest is a matter of state law." Further, determining the existence of a liberty or property interest depends on the "construction of the relevant statutes," and the "nature of the interest at stake." Hence, whether a property interest exists can be determined only by an examination of the particular statute or ordinance in question.

Id. at 226, 970 P.2d at 19 (internal citations omitted).

First, this Court must decide whether there is a property interest under the Fourteenth Amendment. As the foregoing opinion indicates, Camps Canyon Road is a public highway, fifty feet in width. The Highway District has statutory authority to maintain public roadways pursuant to I.C. § 40-1310(1). The Plaintiffs have not shown that the Highway District acted beyond the scope of its authority regarding Camps Canyon Road. Thus, there is no property interest under the Fourteenth Amendment, and no liberty interest which must be protected by due process of law.

The Defendants' management of Camps Canyon Road has not interfered with the Plaintiffs' use and enjoyment of their land, as there is no evidence that the Defendants' actions have occurred beyond the right of way of Camps Canyon Road. The Plaintiffs have not established a due process violation pursuant to the Fourteenth Amendment. Thus, the Plaintiffs claims fail on this issue and the Defendants' motion for summary judgment is granted.

3. The Plaintiffs have not been denied to opportunity to participate in a validation proceeding.

A major component of the Plaintiffs' due process claims against the Defendants are based upon the Plaintiffs' perception the Highway Department failed to hold a validation hearing regarding the status and location of Camps Canyon Road. The Plaintiffs argue that a validation hearing should have been held before the Highway Department widened the road or issued the driveway permits to the Wagners.

This issue was previously addressed when the Plaintiffs filed a motion for declaratory judgment arguing that the Defendants were required to hold proceedings to validate the public road pursuant to I.C. § 40-203A. Through the motion for declaratory judgment the Plaintiffs asked this Court to require the Defendants to hold validation proceedings. This Court denied the

motion for declaratory judgment in part because the Court could find no authority through which it could mandate the Highway District to hold such proceedings, nor did the Court find that the fee requirement of the statute unreasonable. *See Opinion and Order on Plaintiffs' Motion for Declaratory Judgment of I.C. § 40-203A and Plaintiffs' Motion for Declaratory Judgment Under I.C. § 67-8003(3).*

I.C. § 40-203A sets forth procedures for holding a validation hearing when certain conditions exist. The pertinent portion of this statute states:

Any resident or property holder within a county or highway district system, including the state of Idaho or any of its subdivisions, or any agency of the federal government, may petition the board of county or highway district commissioners, whichever shall have jurisdiction of the highway system, to initiate public proceedings to validate a highway or public right-of-way, including those which furnish public access to state and federal public lands and waters, provided that the petitioner shall pay a reasonable fee as determined by the commissioners to cover the cost of the proceedings, or the commissioners may initiate validation proceedings on their own resolution, if any of the following conditions exist:

- (a) If, through omission or defect, doubt exists as to the legal establishment or evidence of establishment of a highway or public right-of-way;
- (b) If the location of the highway or public right-of-way cannot be accurately determined due to numerous alterations of the highway or public right-of-way, a defective survey of the highway, public right-of-way or adjacent property, or loss or destruction of the original survey of the highways or public rights-of-way; or
- (c) If the highway or public right-of-way as traveled and used does not generally conform to the location of a highway or public right-of-way described on the official highway system map or in the public records.

I.C. § 40-203A(1). A validation hearing can be initiated by either a resident or property holder, or by the commissioners of the highway district. If a resident or property owner requests such a hearing, the statute requires that person to pay a reasonable fee to cover the costs of the proceeding.

The Plaintiffs continue to assert that the Highway District must hold a validation hearing because the Plaintiffs have asserted the location Camps Canyon Road cannot be determined. *See* I.C. § 40-203A(1)(b). The Plaintiffs have not paid the reasonable fee necessary to cover the costs of the proceeding, insisting it is the duty of the Highway District to hold such proceedings.

A plain reading of this statute establishes that the Highway District is not required to initiate validation proceedings at the request of a resident or property holder unless the resident or property holder pays a reasonable fee to cover the costs of the proceedings. The Highway District commissioners *may* initiate validation proceedings on their own resolution, but there is no mandate in this statute requiring such a proceeding upon the request of a resident or property holder, unless the reasonable fee to cover the cost of the proceedings is paid by the person making such a request. *See* I.C. § 40-203A(1). The Highway District does not violate the Plaintiffs due process rights if the Plaintiffs fail to make a formal request to initiate validation proceedings and pay the reasonable fee. It would be a different case if the Highway District simply refused to hold a hearing after the resident or property owner paid the fee and completed whatever paperwork was necessary to initiate the proceedings, however, there is no evidence in the record before this Court that the Plaintiffs have formally requested a validation hearing, and paid the fee as required by the statute. *See* I.C. § 40-203A(1).

The Plaintiffs filed a Notice of Tort Claim with the Highway District, however, no petition to validate a highway or public right of way was filed. *Second Affidavit of Dan Carscallen*. The Plaintiffs cannot claim violations of due process when the Plaintiffs failed to request or initiate a validation hearing. Thus, the Plaintiffs' claims against the Defendants fail on this issue and the Defendants' motion for summary judgment is granted.

d. Plaintiffs' claim related to the issuance of the Wagner's access permits are denied.

The Defendants are not required to hold a public hearing prior to issuing a driveway permit.

The highway district board of commissioners shall have the exclusive general supervisory authority over all public highways, public streets and public rights-of-way under their jurisdiction, with full power to establish design standards, establish use standards, pass resolutions and establish regulations in accordance with the provisions of title 49, Idaho Code, and control access to said public highways, public streets and public rights-of-way.

I.C. § 40-1310(8). Title 40 does create a requirement that a hearing be held in some instances; however, controlling access to public highways through the issuance of a permit does not require a hearing. The determination of whether due process has been adequately afforded requires the consideration of many factors. It is not necessary for every action taken by the Highway District to be preceded by a due process hearing.

Factors to be considered in determining the adequacy of process are the importance of the private interest at stake, the risk of an erroneous deprivation of rights given the processes at hand and the probable value, if any, of additional or substitute procedural safeguards, and the government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Lu Ranching Co. v. U.S., 138 Idaho 606, 608, 67 P.3d 85, 87 (2003), citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976). The Highway District exercised its authority to control access to the public highway, Camps Canyon Road, and issue a driveway permit to the Wagners. The District's actions were not of the sort that required a due process hearing. Thus, the Plaintiffs' claims on this issue are dismissed and the Defendants' motion for summary judgment is granted.

C. Remaining Issues

The bulk of the Plaintiffs' claims are dismissed based upon the analysis above, and the clarification that Camps Canyon Road is a public highway that is fifty feet in width. In the alternative, however, certain claims would also be dismissed based upon the Idaho Torts Claims Act. An analysis of the Idaho Tort Claims Act (hereinafter "ITCA") is set forth below. Finally, the Court will address the remaining claims within the Complaint, which are properly dismissed pursuant to the Defendants' motion for summary judgment.

1. Notice of a tort claim against a state entity must be filed within 180 days from the date the claim arose.

I.C. § 6-905 requires that tort claims filed against the state, or an employee of the state,⁸ must be filed within one hundred eighty days from the date the claim arose or reasonably should have been discovered.

All claims against the state arising under the provisions of this act and all claims against an employee of the state for any act or omission of the employee within the course or scope of his employment shall be presented to and filed with the secretary of state within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered, whichever is later.

⁸ I.C. § 6-902 provides the following definitions:

1. "State" means the state of Idaho or any office, department, agency, authority, commission, board, institution, hospital, college, university or other instrumentality thereof.

...

4. "Employee" means an officer, employee, or servant of a governmental entity, including elected or appointed officials, and persons acting on behalf of the governmental entity in any official capacity, temporarily or permanently in the service of the governmental entity, whether with or without compensation, but the term employee shall not mean a person or other legal entity while acting in the capacity of an independent contractor under contract to the governmental entity to which this act applies in the event of a claim.

I.C. § 6-902(1),(4). The parties do not challenge whether the Highway District falls under the definition of "state," nor is there any argument against the determination that the commissioners of the Highway District are "employees" as defined in this statute.

I.C. § 6-905.⁹ The Plaintiffs filed a Tort Claim Notice on November 6, 2007. *Second Affidavit of Dan Carscallen*, at 2. The Tort Claim Notice sets forth claims arising from the “Fall of 2004 until spring of 2007.” *Second Affidavit of Dan Carscallen, Exhibit A*, at 1-3. Within the Tort Claim Notice the Plaintiffs informed the Highway District they would be seeking compensatory damages for the taking and holding of private property, the value of land taken during road widening, damages to the fence, damages to the Plaintiffs’ land, and loss of enjoyment of the land. *Id.* at 3-4.

Pursuant to I.C. § 6-905, all tort claims alleged by the Plaintiffs which arose prior to May 8, 2007, are dismissed.¹⁰ “The Supreme Court has consistently held that ‘the filing of a notice of

⁹ The purpose of the notice requirement is set forth in *Farber v. State*, 102 Idaho 398, 630 P.2d 685 (1981).

The purposes of I.C. § 6-905 are to (1) save needless expense and litigation by providing an opportunity for amicable resolution of the differences between parties, (2) allow authorities to conduct a full investigation into the cause of the injury in order to determine the extent of the state's liability, if any, and (3) allow the state to prepare defenses. *See Newlan v. State*, 96 Idaho 711, 716-17, 535 P.2d 1348, 1353-54 (1975); *Jorstad v. City of Lewiston*, 93 Idaho 122, 125, 456 P.2d 766, 769 (1969). Unless the contract and all of the acts performed pursuant to the contract have been completed, it would be difficult for the state to determine the nature or extent of its liability or prepare a defense to any claim. Furthermore, if parties can present the state with a complete and definite claim for damages arising from the continuing tort, then the state may attempt a settlement on the basis of clearly ascertainable facts.

Id. at 401, 630 P.2d at 688.

¹⁰ The statute requires notice to be filed within 180 days of the date the claim arose or reasonably should have been discovered. The Idaho Supreme Court has clarified the time requirement in *Mitchell v. Bingham Memorial Hospital*.

This Court has held that “[k]nowledge of facts which would put a reasonably prudent person on inquiry is the equivalent to knowledge of the wrongful act and will start the running of the [180 days].” *McQuillen v. City of Ammon*, 113 Idaho 719, 722, 747 P.2d 741, 744 (1987). The Court has further held that the statutory period begins to run from the occurrence of the wrongful act even if the full extent of damages is not known at that time. *Id. See also Ralphs v. City of Spirit Lake*, 98 Idaho 225, 227, 560 P.2d 1315, 1317 (1977). In a recent case, the Court of Appeals clarified the amount of knowledge required to begin the notice period: “The statute does not begin running when a person fully understands the mechanism of the injury and the government's role, but rather when he or she is aware of such facts that would cause a reasonably prudent person to inquire further into the circumstances surrounding the incident.” *Mallory v. City of Montpelier*, 126 Idaho 446, 448, 885 P.2d 1162, 1164 (Ct.App.1994). The claimant in *Mallory* had argued that the notice period should not start running until she knew the exact cause of her injury. The Court of Appeals held that “such an interpretation would allow a party to delay completion of an investigation for months or even years before submitting a notice under the [ITCA].” 126 Idaho at 449, 885 P.2d at 1165.

Mitchell v. Bingham Memorial Hosp., 130 Idaho 420, 423, 942 P.2d 544, 547 (1997).

claim as required by the Act is ‘a mandatory condition precedent to bringing suit, the failure of which is fatal to a claim, no matter how legitimate.’” *Greenwade v. Idaho State Tax Comm’n*, 119 Idaho 501, 503, 808 P.2d 420, 422 (Ct. App. 1991); quoting *Banks v. University of Idaho*, 118 Idaho 607, 608, 798 P.2d 452, 453 (1990); see also *McQuillen v. City of Ammon*, 113 Idaho 719, 722, 747 P.2d 741, 744 (1987).

Thus, the Defendant’s motion for summary judgment is granted on the following claims: claims for damage to the Plaintiffs’ fence in 2004, 2005 and 2006; claims for damages to the Plaintiffs’ real property occurring prior to May 8, 2007; claims for damages from any alleged trespass or nuisance from 1996 through May 8, 2007; claims for failure to survey or record surveys prior to May 8, 2007; claims the Highway District failed to keep or maintain district records prior to May 8, 2007; and claims that commissioners of the Highway District misrepresented information prior to May 8, 2007.

2. Separate claims filed against the individual commissioners are dismissed pursuant to I.C. § 6-904 and I.C. § 6-904B.

The Complaint alleges separate causes of action against the individual commissioners of the Highway District. The claims against the individual commissioners are for actions which were taken within the course and scope of the commissioners’ statutory duties regarding the Highway District. The ITCA provides exceptions to governmental liability within I.C. § 6-904. This provision is applicable to the individual commissioners in the case at hand.

A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:

1. Arises out of any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statutory or regulatory function, whether or not the statute

or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

I.C. § 6-904(1). All actions taken and decisions made regarding Camps Canyon Road have been made while the commissioners have been acting within the course and scope of their employment. I.C. § 6-903(e) establishes “a rebuttable presumption that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment and without malice or criminal intent.”

The Plaintiffs have not challenged that the actions of the commissioners were in the course and scope of their duties as commissioners of the highway district. Further, the Plaintiffs have not asserted that the actions made by the commissioners with regards to Camps Canyon Road were done with malice or criminal intent. Thus, any tort claims against the individual commissioners while acting within the course and scope of their duties as commissioners of the Highway Department fall within this exception to liability.

Further, I.C. § 6-904B sets forth exceptions to governmental liability in instances where a government employee is authorized to issue a permit.

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:

1. Arises out of the detention of any goods or merchandise by any law enforcement officer.

...

3. Arises out of the issuance, denial, suspension or revocation of, or failure or refusal to issue, deny, suspend, or revoke a permit, license, certificate, approval, order or similar authorization.

I.C. § 6-904B(1),(3). Any tort claims arising out of the commissioners' issuance of a driveway permit to the Plaintiffs' neighbors, the Wagners, falls within this exception to liability. In addition, I.C. § 6-904B(4) sets forth an exception to government liability in cases where an inspection of property is necessary. The pertinent portion of the statute establishes an exception when liability "[a]rises out of the failure to make an inspection, or the making of an inadequate inspection of any property, real or personal, other than the property of the governmental entity performing the inspection." I.C. § 6-904B(4). In the case at hand, Commissioner Dan Payne stated he inspected the property where the Plaintiffs' neighbors, the Wagners, requested a driveway permit. *Second Affidavit of Dan Payne*, at 3.

Based upon the relevant provisions of the ITCA, any tort claims brought against the individual commissioners in the matter at hand fall within the exceptions to governmental liability. Therefore, the Defendants' motion for summary judgment with regard to these claims is granted.

3. Plaintiffs fail to establish a prima facie case on remaining claims within the complaint.

A lengthy Complaint was filed in this matter, alleging various claims not specifically addressed by this Court in the foregoing sections of this Opinion. The Plaintiffs fail to establish a prima facie case on these claims, thus summary judgment is appropriate. *See Garzee v. Barkley*, 121 Idaho 771, 828 P.2d 334 (Ct. App. 1992).

We note, however, that the existence of disputed facts will not defeat summary judgment when the plaintiff fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial. *See Jerome Thriftway Drug, Inc. v. Winslow*, 110 Idaho 615, 717 P.2d 1033 (1986); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Bennett v. Parker*, 898 F.2d 1530, 1532 (11th Cir.1990), *cert. denied*, 498 U.S. 1103, 111 S.Ct. 1003, 112 L.Ed.2d 1085 (1991).

Facts in dispute cease to be “material” facts when the plaintiff fails to establish a prima facie case. In such a situation, there can be “no genuine issue of material fact,” since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Celotex*, 477 U.S. at 322-33, 106 S.Ct. at 2552-58. This rule facilitates the dismissal of factually unsupported claims prior to trial.

Id. at 774, 828 P.2d at 337 (Ct. App. 1992).

Statements of conduct within the Complaint that do not support any cognizable claim include: “the conduct of the defendants . . . has been deliberate, flagrant, arbitrary, and offensive to the sense of democracy and to the sense of good government. . . .” (*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, § E.6., P., P.2., Q.f.xiii.(a)); “negotiating in bad faith” (*Id.*); “misrepresentations of statements and legal views and rulings . . . and questionable applications of statements . . . of standards” (*Id.* at § Q.f.xii, § 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)).

In addition, the Plaintiffs set forth three criminal provisions that the Plaintiffs have no authority to prosecute: I.C. § 18-7001, malicious injury to property; I.C. § 18-7008, trespass; and I.C. § 18-7012, destruction of fences. Because the Plaintiffs have no authority to prosecute criminal offenses, these claims are appropriately dismissed at summary judgment.

Finally, the Plaintiffs’ claims in relation to the District’s alleged failure to train and to supervise and the claim for punitive damages fail for lack of factual assertion in support of the claims. The Defendants’ motion for summary judgment is granted on these claims.

4. Plaintiffs' various motions in addition to the motion for summary judgment are denied.

In addition to their motion for summary judgment, various other motions were made within the *Plaintiffs' Motions for Partial Summary Judgments and Other Motions Submitted January 26, 2009, and Brief*. These motions include a motion to amend the complaint, a motion to compel discovery, motions for reconsideration, and motions for sanctions against the Defendants.

The Plaintiffs' seek to amend the complaint to encompass any claim that conforms to the evidence. Specifically, "Plaintiffs petition the Court for leave of the Court to make such amendments to their Complaint as may be necessary to cause Plaintiffs' pleadings to conform to the evidence and to raise these issues and to supplement and amend damages and relief as appropriate." *Plaintiffs' Motions for Partial Summary Judgments and Other Motions Submitted January 26, 2009, and Brief*, at 23-24 (Section 1.17). The Plaintiffs' motion to amend is denied. The request does not encompass a specific issue, and further, this Court notes the Complaint on this matter is twenty-seven pages long. I.R.C.P. 8(e)(1) requires pleadings to "be simple, precise, and direct."

In addition, the Plaintiffs have filed a motion to compel discovery within their motions for summary judgment. *Plaintiffs' Motions for Partial Summary Judgment and Other Motions Submitted January 26, 2009, and Brief*, at 24 (Section 1.19). The Court denies the motion to compel, and notes a protection order has already been issued in this matter due to Plaintiffs' requests for discovery which have far exceeded the limitations as set forth in the rules of civil procedure. *Opinion and Order on Plaintiffs' Motions for Summary Judgment and Defendants' Motion for Protective Orders, for Enlargement of Time and for Attorneys' Fees*.

The Plaintiffs seek sanctions against the Defendants and Defendants' counsel for claims of discovery abuse and spoliation of evidence. *See Plaintiffs' Motions for Partial Summary Judgment and Other Motions Submitted January 26, 2009, and Brief*, at 24 (Section 1.12 and 1.18) The Court finds these motions without basis or merit, and thus, the motions are denied.

In addition, the Plaintiffs ask this Court to reconsider its previous rulings on the Plaintiffs' motions for partial summary judgment filed on September 19, October 6, and October 21. The motions for reconsideration are denied.

CONCLUSION

Both parties to the lawsuit have submitted motions for summary judgment. Based upon the foregoing analysis, the Plaintiffs' motions for partial summary judgment, and various motions, are denied and the Defendants' motion for summary judgment is granted.

ORDER

It is hereby ordered that the Plaintiffs' Motions for Partial Summary Judgments and Other Motions Submitted January 26, 2009, are hereby DENIED. It is further ordered that the Defendants' Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

DATED this 11th day of May 2009.



CARL B. KERRICK – District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing OPINION AND ORDER ON PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT was mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 11 day of May, 2009, on:

Don Halvorson
1290 American Ridge Road
Kendrick ID 83537

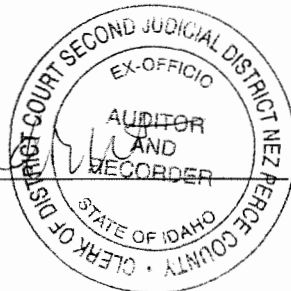
Ronald Landeck
Attorney at Law
693 Styner Avenue, Suite 9
Moscow ID 83843

Latah County District Court
Attn: Sue
P.O. Box 8068
Moscow, ID 83843

PATTY O. WEEKS, CLERK

By: _____

Deputy



CASE NO. CV 2008-00180

2009 MAY 21 PM 4:25

CLERK OF DISTRICT COURT
LATAH COUNTY
BY: AK 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

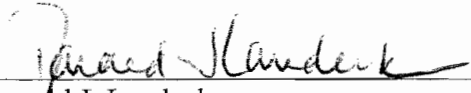
IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

DON & CHARLOTTE HALVORSON)	
(Husband and Wife),	)	Case No. CV 2008-180
)	
Plaintiffs,	)	DEFENDANTS' MOTION FOR
	)	ATTORNEY FEES AND COSTS
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, respectfully move this Court pursuant to Idaho Code sections 12-117 and/or 12-121 and/or Rules 54(d) and 54(e) I.R.C.P. and/or Rules 26(c) and (f) and 37(a)(4) for their costs and attorney fees incurred in this action. This motion is made upon the record of this action, including Defendants' Memorandum of Attorney Fees and Costs and Affidavit of Ronald J. Landeck in Support of Defendants' Memorandum of Attorney Fees and Costs filed herewith.

DATED this 21st day of May, 2009.

RONALD J. LANDECK, P.C.

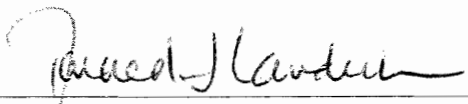
By: 
Ronald J. Landeck
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 2009, I caused a true and correct copy of this document to be served on the following individuals 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
 Hand Delivery


Ronald J. Landeck

I. LEGAL BASIS FOR AWARD OF ATTORNEY FEES

A. Idaho Code section 12-121.

Defendants, as prevailing parties in this action, are entitled to attorney fees under Idaho Code section 12-121 and I.R.C.P. 54(e)(1) because Plaintiffs filed and pursued all causes of action under their Complaint unreasonably and without legal and factual foundation. As the Court concluded in its Opinion and Order on Plaintiffs' Motions for Partial Summary Judgment and Defendants' Motion for Summary Judgment filed May 11, 2009 (the "Order"), the record before this Court establishes that Camps Canyon Road is a public highway established by public use. Despite agreeing and concurring that this public highway status existed, Plaintiffs nevertheless pursued claims for relief that either were inconsistent with their position that Camps Canyon Road was a public highway established by public use or were not supported factually. Plaintiffs did not place a reasonable construction on Idaho law in that they refused to accept that the North Latah County Highway District was acting within its legal authority when it conducted operations within the fifty-foot width of Camps Canyon Road, and Plaintiffs failed to offer any facts that the Highway District acted outside the width of fifty feet. Plaintiffs' unreasonable construction of Idaho public highway law coupled with Plaintiffs' relentless and misguided insistence on legal principles that did not apply to the facts of this case entitles Defendants to an award of attorney fees under Idaho Code section 12-121. See *Daw v. School District 91*, 136 Idaho 806, 41 P.3d 234 (2001).

Plaintiffs pursued claims for property damage after failing to file a written notice of tort claim with the Highway District as required by Idaho law. Plaintiffs also pursued relief for conduct that does not support any cognizable claim, for criminal matters Plaintiffs have no authority to prosecute and for claims that lacked factual assertion in support.

In sum, Plaintiffs pursued all claims in this matter either unreasonably or without legal basis or without factual support.

B. Idaho Code section 12-117:

Defendants, as prevailing parties in an action involving a “taxing district,” Defendant North Latah County Highway District, shall, under Idaho Code section 12-117, receive an award of reasonable attorney fees if the Court finds that Plaintiffs, as the parties against whom judgment has been rendered, acted without a reasonable basis in fact or law. As asserted in section I.A. above of this Memorandum, which assertions are incorporated herein, Plaintiffs acted without a reasonable basis in both law and fact and, under such circumstances, Idaho Code section 12-117 requires that reasonable attorney fees be awarded to the Highway District, its employees and representatives as prevailing parties on all issues litigated by Plaintiffs in this matter. *Daw, supra.*

C. Rules 26(c) and (f) and 37(a)(4) I.R.C.P.:

Defendants’ First Motion for Protective Orders filed October 22, 2008, requested attorney fees for dealing with Plaintiffs’ unreasonable and improper discovery requests. In its Opinion and Order on Plaintiffs’ Motions for Summary Judgment and Defendants’ Motion for Protective Order, For Enlargement of Time and for Attorney Fees filed December 8, 2008, the Court concluded that Defendants’ discovery requests propounded had “become oppressive and an undue burden,” and granted the protective order but declined “to grant an award of attorney fees at this time.” Defendants, on several occasions, had notified Plaintiffs of their abusive discovery practices but Plaintiffs chose to ignore the rules of discovery and disregarded those warnings. Defendants respectfully request, for the reasons set forth in their October 22, 2008 Motion, that the Court grant an award of attorney fees at this time.

D. Rule 54(e)(3) I.R.C.P.:

Applying Rule 54(e)(3) I.R.C.P. factors, including requisite time, labor and skill, prevailing charges for like work and results obtained, Defendants are entitled to the full amount of attorney fees claimed herein.

II. LEGAL BASIS FOR AWARD OF COSTS

Defendants, as the prevailing parties are entitled as a matter of right under Rules 54(d)(1)(B) and (C) I.R.C.P. to those costs detailed below.

III. AMOUNT OF ATTORNEY FEES AND COSTS

To the best of the Defendants' knowledge and belief, the items detailed below are correct and the attorney fees and costs claimed are in compliance with Rule 54 I.R.C.P. and any other applicable law.

A. Attorney Fees.

Reasonable attorney fees incurred and billed to Defendants (i) by Landeck, Westberg, Judge & Graham, P.A., for legal services performed by attorneys in connection with this action from March 12, 2008, through September 30, 2008, and (ii) by Ronald J. Landeck, P.C. for legal services performed by attorneys in connection with this action from October 1, 2008, through May 10, 2008:

Attorney fees supported by Affidavit of Ronald J. Landeck filed herewith:	\$77,382.00
Total attorney fees:	\$77,382.00

B. Costs as a matter of right.

Defendants have incurred the following costs recoverable as a matter of right:

Court filing fees:	\$14.00
Fees for service of pleading or document:	\$50.00
Total costs as a matter of right:	\$64.00

C. Discretionary costs.

Defendants have incurred the following costs that were necessary and exceptional costs reasonably incurred that should, in the interest of justice, be assessed against Plaintiffs:

Fees charged by Hodge & Associates, Inc. for professional surveying services performed by Larry J. Hodge, Idaho licensed professional land surveyor, who researched Camps Canyon Road historical deeds and photographs and submitted an affidavit that was a necessary and exceptional cost in order to clarify misconceptions created by Plaintiffs in their pleadings, documents and/or briefs as to the true location of Camps Canyon Road:	\$1,232.50
Total discretionary costs:	\$1,232.50

D. Attorney fees in regard to Defendants' First Motion for Protective Order.

The portion of the reasonable attorneys fees incurred and billed to Defendants listed in paragraph III.A above that is attributable to legal services performed by attorneys in connection with Defendants' First Motion for Protective Order and supported by Affidavit of Ronald J. Landeck filed herewith:	\$6,490.00
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IV. FURTHER SUPPORT

This Memorandum is further supported by the Affidavit of Ronald J. Landeck filed contemporaneously herewith and incorporated herein.

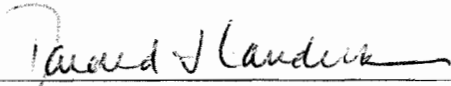
V. CONCLUSION

Defendants respectfully move the Court for an order awarding Defendants reasonable attorney fees in the amount of \$77,382.00, costs as a matter of right in the amount of \$64.00 and

discretionary costs in the amount of \$1,232.50, all as set forth in this Memorandum and further supported by the Affidavit of Ronald J. Landeck filed herewith.

DATED this 21st day of May, 2009.

RONALD J. LANDECK, P.C.

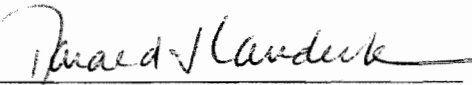
By: 
Ronald J. Landeck
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 2009, I caused a true and correct copy of this document to be served on the following individuals 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
- Hand Delivery


Ronald J. Landeck

CASE NO CV2008-00180

2009 MAY 21 PM 4:26

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),)

Plaintiffs,)

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.)

Case No. CV 2008-180
AFFIDAVIT OF RONALD J. LANDECK
IN SUPPORT OF DEFENDANTS'
MEMORANDUM OF ATTORNEY
FEES AND COSTS

STATE OF IDAHO)
) ss.
County of Latah)

Ronald J. Landeck, being first duly sworn upon oath, deposes and says:

1. I am an attorney licensed to practice law in the State of Idaho and was so licensed at all times relevant to this action. I was an attorney in the firm of Landeck, Westberg, Judge & Graham,

P.A. at all times relevant to this action through September 30, 2008, and have been an attorney in the firm of Ronald J. Landeck, P.C. from October 1, 2008, to the present, representing all Defendants in the above-entitled action (collectively "both law firms").

2. Defendants, through counsel, have filed concurrently herewith a Memorandum of Attorney Fees and Costs in this action (the "Memorandum").

3. On Defendants' behalf, I have reviewed true and correct copies of billing statements of both law firms that itemize the costs and attorney fees Defendants have incurred and are entitled to recover from Plaintiffs under Idaho law in connection with this action.

4. To the best of Defendants' knowledge and belief the items of costs and attorney fees set forth in said billing statements of both law firms are correct and the costs claimed are in compliance with Rule 54 I.R.C.P.

5. The basis of the attorney fees claimed is as set forth in the Memorandum which is incorporated herein for all purposes of this Affidavit as if set forth fully herein.

6. The method of computation of the attorney fees claimed is that Defendants have been charged or assessed by both law firms an amount for attorney fees that has been determined by multiplying the hours or partial hours of legal services performed by an attorney at the rate per hour for that attorney as shown on both law firms' said billing statements. As shown by said billing statements, attorney Ronald J. Landeck performed a total of 346.1 hours of legal services at the rate of \$220 per hour for total attorney fees charged to Defendants of \$76,142 and attorney James L. Westberg performed a total of 6.2 hours of legal services at the rate of \$200 per hour for total attorney fees charged to Defendants of \$1,240.

7. The amount of attorney fees and costs claimed by Defendants are as follows:

A. Attorney fees as calculated in paragraph 6 above: \$77,382.00

Total attorney fees claimed: \$77,382.00

B. Costs as a matter of right:

Defendants have incurred the following costs which are recoverable as a matter of right:

Court filing fees: \$14.00

Fees for service of pleading or document: \$50.00

Total costs claimed as a matter of right: \$64.00

C. Discretionary costs:

Defendants have incurred the following costs that were necessary and exceptional costs reasonably incurred that should, in the interest of justice, be assessed against Plaintiffs:

Fees charged by Hodge & Associates, Inc. for professional surveying services performed by Larry J. Hodge, Idaho licensed professional land surveyor, who researched Camps Canyon Road historical deeds and photographs and submitted an affidavit that was a necessary and exceptional cost in order to clarify misconceptions created by Plaintiffs in their pleadings, documents and/or briefs as to the true location of Camps Canyon Road: \$1,232.50

Total discretionary costs claimed: \$1,232.50

D. Attorney fees in regard to Defendants' First Motion for Protective Order.

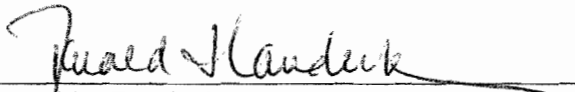
Ronald J. Landeck performed a total of 29.5 hours of legal services at the rate of \$220 per hour for total attorney fees of \$6,490.00 in connection with Defendants' First Motion for Protective Order. That portion of the reasonable attorneys fees incurred and billed to Defendants listed in paragraph 6 above attributable to legal services performed by attorneys in connection with Defendants' First Motion for Protective Order: \$6,490.00

Total attorney fees claimed in regard to Defendants' First Motion for Protective Order: \$6,490.00

8. I hold the opinion that the costs and attorney fees set forth in this Affidavit were reasonable and necessary to secure judgment in favor of Defendants.

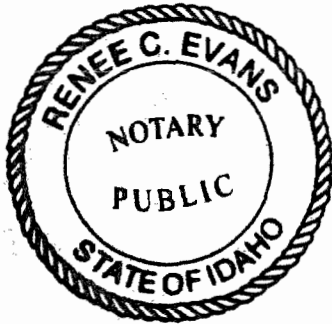
9. The above statements are true and correct to the best of my knowledge and belief.

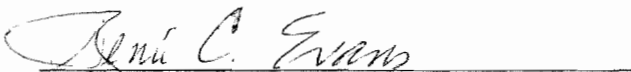
DATED this 21st day of May, 2009.



Ronald J. Landeck

SUBSCRIBED AND SWORN to before me this 21st day of May, 2009.






Notary Public for Idaho
My commission expires: 8-17-2013

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 2009, I caused a true and correct copy of this document to be served on the following individuals 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
- Hand Delivery



Ronald J. Landeck

CASE NO CV2008-00182

2009 JUN -1 AM 10: 55

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' MOTION
vs.	) TO STRIKE DEFENDANTS'
North Latah County Highway District; Board of	) MOTION FOR ATTORNEY FEES
Commissioners for the North Latah County	) AND COSTS AND PLAINTIFFS'
Highway District, Orland Arneberg, Richard	) ANSWERING BRIEF TO
Hansen, Sherman Clyde, in their Official	) DEFENDANTS' MOTION FOR
Capacities, and in their Individual Capacities;	) ATTORNEY FEES AND COSTS
Dan Payne, in his Official Capacity and in his)
Individual Capacity)
Defendants)

Plaintiffs move this Court to strike and/or to deny Defendants' Motion for Attorney Fees and Costs pursuant to the following:

- (i) Under I.C. § 12 117;
- (ii) Under I.C. § 12 121;
- (iii) Rules 54 (d) and 54 (e) I.R.C.P.;
- (iv) Rules 26 (c) and (f) and 37 (a)(4);

PLAINTIFFS MOTION TO STRIKE DEFENDANTS' MOTION FOR ATTORNEY FEES
AND COSTS AND PLAINTIFFS' ANSWERING BRIEF TO DEFENDANTS' MOTION FOR
ATTORNEY FEES AND COSTS

For the following reasons:

(i) As the Court has made no findings or conclusions that Plaintiffs' actions were in any way frivolous, unreasonable or without foundation (see *Stout v. Key Training*, 144 Idaho 195, 158 P.3d 971 (2007))("Key Training argues it is entitled to attorney fees on appeal pursuant to I.C. § 12-121. That statute allows an award of 'reasonable attorney's fees to the prevailing party. . . .' I.C. § 12-121. Attorney fees are awarded to the prevailing party only if 'the Court determines that the action was brought or pursued frivolously, unreasonably or without foundation.' *Baker v. Sullivan*, 132 Idaho 746, 751, 979 P.2d 619, 624 (1999)").

(ii) Plaintiffs' claim to possessory rights, an entitlement to, and/or a constitutionally protected property right in the case at hand is not frivolous, unreasonable and/or unfounded as Plaintiffs hold the fee in the lands in dispute. Defendants claim is a claim of a prescriptive right of way across Plaintiffs' land and as such is only an easement across Plaintiffs' land. whether the Court finally rules that I.C. § 40-2312 has eliminated Plaintiffs' possessory right to any 50 foot and/or 25 feet from centerline strip of land the Defendants choose to align or locate Camps Canyon Road on in the SENE Section 15 T39N R3WBM or not and/or that the Defendants may realign and/or alter the location of the easement anywhere in the SENE Section 15 T39N R3WBM without the need for due process, equal treatment of the law and/or a rational basis for doing so or not.

(iii) History of this case shows Plaintiffs' actions to not be frivolous, unreasonable, or unfounded, and that Plaintiffs pursued all claims in this matter either reasonably or with legal basis or with factual support. This legal action began as Defendants stated that the only way Plaintiffs would receive a hearing on these matters was for Plaintiffs to pay a \$750 fee or get a lawyer. The paying of the fee would have been futile as the Defendants had already been given sufficient evidence to validate the road under their own resolution and the invasions of the land had already begun and were thus ripe (see *Harris v. County of Riverside* 904 F.2d 497 (9th Cir. 1990) (Plaintiff deprived of the commercial use of his property required to pay a substantial fee to regain that use or prompt county to issue a final decision has been deprived of his property without due process.))

Plaintiffs' first motion was for a statutorily permitted declaratory ruling for Defendants failing to respond to Plaintiffs' filing of Requests for Regulatory Takings analysis, a simple request of an evaluation of the impact of an administrative action of a local governmental agency on private property owners, the Plaintiffs. The Plaintiffs' purpose in filing the requests was to establish a review of the NLCHD's actions/failures to act which resulted in an alleged taking of Plaintiffs' property without due process of law.

Likewise Plaintiffs served Defendants with requests for admissions and interrogatories then to answer the same question—on what authority do Defendants base the actions/failures to act in what Plaintiffs consider to be invasions and occupations of their land? The Defendants' defense of not filing a response/s to the IRTA requests was that “no final decision” had been made by the Defendants. Defendants in initial response to Plaintiffs' requests for admissions and interrogatories evaded and/or insufficiently answered the initial as well as what turned out to be the ultimate question as to the clarification of their authority—I.C. § 40-2312 mandates a 50 width of a public right of way regardless of the determination of the circumstances peculiar to Camps Canyon Road in the SENE Section 15 T39N R3WBM, regardless that the road had an uncontroverted history, as recorded by Defendants' requests for admission and interrogatory responses, of alteration and/or no recordation, and/or regardless of the disputed facts of the limitation of the original roadway by the previous owners fence, of the lack of user invasion of the land as signified by the presence of large old growth trees, of the disputed fact of the permission granted by the previous owner for the prior alterations, of the lack of agreement of the recorded deed with the survey conducted by Rimrock Consultants showing the intersection points of the east and west property lines with Camps Canyon Road to have changed from 50 to 80 feet, and despite the Idaho State Supreme Court holdings in *Meservey v. Gulliford*, 93 P 780, 780-781 (“11...and the width of roads or highways established by prescription or public use 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.”) and (“2...The provisions...for making encroachments upon public highways,...does not apply to highways

established by prescription or user before such highways have been recorded as provided by law.") and despite the Chairman of the Commissioners admitting that he had no knowledge of any recordation of the road in question and the only knowledge of the establishment of the road he had was that the road was altered in 1996.

Plaintiffs' alleged violations were of per se violations—they were final decisions when they occurred and were ongoing and of imminent recurrence and irreparable harm if factually found to be true. (An otherwise valid exercise of the police power constitutes a taking for which compensation is due if the owner suffers a permanent, physical occupation of the property. *Yee v. Escondido*, 112 S. Ct. 1522 (1992); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2900 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-28 (1982); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871); *Ferguson*, 852 P.2d at 207. Physical invasions have been found where the government interferes with the owner's "right to exclude." See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (public access to pond); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (public easement to beach); *Loretto*, 458 U.S. at 427-28 (installation of cable); *Pumpelly*, 80 U.S. at 166 (flooding); *Hawkins v. City of La Grande*, 843 P.2d 400 (Or. 1992) (one-time flooding). *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, at 186 (final decision), at 195-196 (due process may be violated regardless of the post deprivation remedy). *Sinaloa Lake Owners Association, et al. v. City of Simi Valley*, 882 F.2d 1398 (9th Cir.1989) (a physical taking is a final decision, and thereby satisfies *Williamson County's* first exhaustion requirement; an appropriate point for determining the adequacy of the state compensation procedures is at the time of the alleged taking occurs, see *Williamson*; the rationale for requiring exhaustion of state compensation remedies in taking cases does not extend to a claim that plaintiffs were denied due process). The Court ruled that the matters could be determined in the present civil case with the caveat that the matters would be considered there.

Plaintiffs' then brought forth a second motion for declaratory ruling under I.C. § 40-203a, as for all intents and purposes, permissive steps for review of the doubts of the legal establishment

of the segment of the road in question had been fulfilled for the Commissioners to validate the road under their own resolution and answer the elusive question—as to what is the basis of the Defendants’ authority to allegedly invade and occupy and/or allow third parties to invade and/ or occupy Plaintiffs’ land?

At any time Defendants could have easily stated whether through I.C. § 40-203a or under the IRTA, responses to Plaintiffs’ requests for admissions, or Plaintiffs’ Interrogatories that in their interpretation of I.C. § 40-2312 a 50 foot width and/or 25 feet from centerline is mandated and/or statutorily determined and that statute allows for the alterations in the road in question without any required civil procedures and/or response to Plaintiffs’ inquiries into the disputed lands considering the history of the road. We would simply be at the same place we are at now one year later. It was not unreasonable of the Plaintiffs to proceed with further discovery and requests for partial summary judgment based on one of two theories—either the right of way has been statutorily determined and authorized Defendants’ actions/failures to act of invasions of Plaintiffs’ land, as a matter of law, or that the right of way has been or needs to be factually determined.

In a series of Motions for partial summary judgments brought forth by Plaintiffs stating that the Defendants, and to which Defendants’ agreed in theory, were statutorily determining the width of the right of way and as a matter of law requested the Court to rule on the Defendants’ interpretation of the statutes concerning. The Court ruled that the right of way need to be factually determined. It would then not be unreasonable for the Plaintiffs to conclude that the allegation of a per se taking that needed to be factually determined would require due process (see *Idaho Historic Preservation Council, Inc. v. City Council*, 134 Idaho 651, 8 P.3d 646 (2000) “The test for determining whether a local governing body sits in a quasi-judicial capacity was expressed in *Cooper v Board of County Commissioners of Ada County*, 101 Idaho 407, 614 P.2d 947 (1980). In that case, this Court stated: Basically, this test involves the determination of whether action produces a general rule or policy which is applicable to an open class of individuals, interest (sic), or situations, or whether it entails the application of a general rule or

policy to specific individuals, interests, or situations. If the former determination is satisfied, there is legislative action; if the latter determination is satisfied, the action is judicial. *Id.* at 941, 614 P.2d at 950 (quoting *Fasano v. Board of County Comm'rs*, 507 P.2d 23, 27 (Or. 1973)). Since S-Sixteen's appeal of the Commission's decision to deny the certificate of appropriateness required the City Council to apply a general rule to specific parties and interests, the City Council was sitting in a quasi-judicial capacity.") *Carey v. Phipps*, 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..."). *McCulloch v. Glasgow*, 620 F.2d 47 (5th Cir. 1980) (Mayor authorized malicious intrusion into disputed land without due process to plaintiffs). *Evers v. The County of Custer*, 745 F.2d 1196 (9th Cir. 1984) (County was not immune from 42 USC 1983 suit in declaring road to be public without giving property owner due process.) *Fuentes v. Shevin*, 407 U.S. 67 (1972) (Due process due plaintiffs over disputed chattels). *Harris v. County of Riverside* 904 F.2d 497 (9th Cir. 1990) (Plaintiff deprived of the commercial use of his property required to pay a substantial fee to regain that use or prompt county to issue a final decision has been deprived of his property without due process).

As corollaries to the reasonable inquiry that a factual determination of the width of the easement would require due process, the questions of substantive due process, equal protection of the law, a rational basis for Defendants actions/failures to act, findings and/or conclusions, whether due process was afforded Plaintiffs' predecessor in the land, and/or the presence of substantial evidence in the agency record to support Defendants conclusions and findings would also reasonably arise, as Defendants' responses to these questions were that none of these were necessary.

Plaintiffs' most recent motions for partial summary judgments on these matters are not then unreasonable. The Defendants have admitted to widening the road and subsequent intrusions into Plaintiffs' buffer and resultant injuries to Plaintiffs fence and the issuance, continuation of and not revoking the first Wagner driveway access permit when Plaintiffs gave them fair warning that they were operating out of their authority, the Defendants make no claim that these

actions/failures to act were “not unauthorized”, the Plaintiffs’ hold the fee in the land, the invasions of the disputed lands Plaintiffs allege are of less than a five year duration, and the disputes to which Plaintiffs sought answers were plausible and needed to be clarified. Under such circumstances, Plaintiffs’ actions are reasonable and bringing action under 42 USC 1983, 1988 is a legitimate and a reasonable manner in which to proceed;

(iv) Attorney Fees to a prevailing defendant under 42 USC 1983,1988 are allowed only upon a finding that the plaintiffs’ action was frivolous, unreasonable, or without foundation (see 42 USC 1983; see also *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 421-422 (1978);

(v) Defendants have not shown that their fees and costs are reasonable (see *Lettunich v. Lettunich*, 145 Idaho 746, 185 P.3d 258 (2008)“The trial court *must* consider all of the factors listed in I.R.C.P. 54(e)(3). *Hines v. Hines*, 129 Idaho 847, 855, 934 P.2d 20, 28 (1997). Although some of the information may come from the court’s own knowledge and experience and some may come from the record in the case, some can only be supplied by the party. *Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.*, 139 Idaho at 769, 86 P.3d at 483. It is incumbent upon the party seeking the fees to provide the necessary information. *Id.*”).

Defendants’ counsel in his ex parte motion for enlargement of time indicated that he was informed and knowledgeable of the case indicating he knew the basis for Defendants’ claims. Defendants’ counsel does not indicate how the enormous amount of time was spent, as he did not have to research what he supposedly already knew. Many of Defendants’ filings were done for Defendants’ counsel to obtain time off or delay hearing for vacations, medical reasons, and/or the moving of his office. Furthermore the Court history of this case shows the Plaintiffs’ questions could have easily been answered the very first day in Court and that the issues were protracted by Defendants evasiveness on what it was that they basing there authority, as in “no final decision” has been made.

“To properly exercise its discretion on a request for attorney fees, a trial court must, at a minimum, consider the twelve factors outlined in I.R.C.P. 54(e)(3). *Boel v. Stewart Title Guar. Co.*, 137 Idaho 9, 16, 43 P.3d 768, 775 (2002); *Bldg. Concepts, Ltd.*, 114 Idaho at 645, 759 P.2d at 936; *Nalen v. Jenkins*, 113 Idaho 79, 81, 741 P.2d 366, 368 (Ct. App. 1987). These factors are:

PLAINTIFFS MOTION TO STRIKE DEFENDANTS’ MOTION FOR ATTORNEY FEES
AND COSTS AND PLAINTIFFS’ ANSWERING BRIEF TO DEFENDANTS’ MOTION FOR
ATTORNEY FEES AND COSTS

- (A) The time and labor required.
- (B) The novelty and difficulty of the questions.
- (C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.
- (D) The prevailing charges for like work.
- (E) Whether the fee is fixed or contingent.
- (F) The time limitations imposed by the client or the circumstances of the case.
- (G) The amount involved and the results obtained.
- (H) The undesirability of the case.
- (I) The nature and length of the professional relationship with the client.
- (J) Awards in similar cases.
- (K) The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.
- (L) Any other factor which the court deems appropriate in the particular case.

I.R.C.P. 54(e)(3). The trial court is required to consider the existence and applicability of each factor without placing undue weight or emphasis upon any one element. *Nalen*, 113 Idaho at 81, 741 P.2d at 368. The trial court need not specifically address all of the factors in writing, so long as the record clearly indicates that all of them were considered. *Boel*, 137 Idaho at 16, 43 P.3d at 775; *Brinkman*, 115 Idaho at 351, 766 P.2d at 1232. It is incumbent upon the appellant to demonstrate that the court failed to consider or apply the appropriate criteria. *Irwin Rogers Ins. Agency, Inc. v. Murphy*, 122 Idaho 270, 277, 833 P.2d 128, 135 (Ct. App. 1992)" *Medical Recovery Services, LLC, v. Jones*, ___ Idaho ___ (Crt App Opinion # 83 2007)

(vi) Plaintiffs' action served a public purpose and has legal merit both in the facts of the case and foundation in the law. I.C. § 40-2312 contains the word shall yet offers exception to a 50 foot right of way and even uses the word discretion in antithesis to the notion of a mandated 50 foot right of way. Furthermore, no mention of a 25 foot right of way is made. The holdings of *Meservey* as stated above are contrary to the Defendants' interpretation of the law. The Defendants interpretation of the statute denies Idaho's requirement of adverse use with out the permission of the owner of a prescriptive right of way, the 5th and 14th Amendments to the U.S. constitution and numerous Idaho criminal statutes (Plaintiffs made no criminal allegations and only brought forth these statutes to indicate that Idaho has laws against their actions which their interpretation of I.C. § 40-2312 permits).

Idaho law allows for the establishment of a highway by user, under the fulfillment of five elements, 1) open and notorious; 2) continuous and uninterrupted; 3) adverse and under a claim of right; 4) with the actual or imputed knowledge of the owner of the servient tenement 5) for the statutory period (see *Hodgins v. Sales*, 139 Idaho 225 (2003)).

Adverse use, also referred to as hostile use or use under a claim of right are synonymous and are characterized as an actual invasion or infringement made without permission of the owner (see *Hodgins v. Sales*, 139 Idaho 225 (2003); see also *Cox v. Cox* 84 Idaho 513, 514 (1962) (“10. Highways 7(1) To establish prescriptive right in roadway, use of it must constitute some actual invasion or infringement of the rights of the owner.”) Since the alleged invasions of the Plaintiffs’ land by the Defendants are new—less than five years of duration and therefore not yet part of the highway (see I.C. § 40-202) and are per se takings, as alleged, and/or infringement of the Plaintiffs’ property rights by Defendants without due process and/or equal protection of the law is prohibited by the Constitutions of the U.S. and the State of Idaho, Idaho provides statutorily for the Defendants to legally establish public rights. The uncontroverted evidence of this case shows that centerline and width of Camps Canyon Road were altered in 1996 and that old growth trees were excavated by the necessity of the straightening, realignment and widening of the pertinent part of the road. Factual dispute exists as to whether these alterations were done with permission of the previous owner and/or were significant in the taking of private property whether the taking was a gift or not. Furthermore, this Court ruled that the width of the easement needed to be factually determined.

(vii) Rules 26 (c) and (f) and 37(a)(4) I.R.C.P.: As Defendants’ counsel has stated the court declined to award attorney fees on Defendants’ motion and Plaintiffs have not violated the Court’s Order. Furthermore Defendants bring forth no new information on the subject.

Plaintiffs respectfully petition Court to strike and/or summarily deny Defendants motion for attorney fees and costs as Plaintiffs’ actions were not frivolous, unfounded, or unreasonable.

On this 1st Day of June, 2009

RESPECTFULLY SUBMITTED,

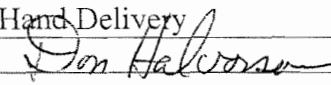


Don Halvorson

CERTIFICATE OF SERVICE

I hereby certify that on this 1ST day of June, 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	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Federal Express Standard Overnight Mail <input type="checkbox"/> FAX (208) 883-4593 <input type="checkbox"/> Hand Delivery
CARL B. KERRICK DISTRICT JUDGE P.O. Box 896 Lewiston, ID 83501-0896	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Federal Express Standard Overnight Mail <input type="checkbox"/> FAX <input type="checkbox"/> Hand Delivery



Don Halvorson

CASE NO. CV 08-0180

2009 JUN 19 PM 2:01

CLERK OF DISTRICT COURT
LATAH COUNTY

BY RL DEPUTY

Don and Charlotte Halvorson

Appellants Pro Se

1290 American Ridge Road
Kendrick, Idaho 83537

(208) 289-5602

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,)
)
Plaintiffs and Appellants)
)
v.)
)
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 and Respondents)
)

Case No. CV 2008-180

NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENTS, 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, AND THE PARTIES' ATTORNEY, RONALD LANDECK, Attorney at law, 693 Styner Avenue, Suite 9, Moscow, Idaho 83843, AND THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellants, Don and Charlotte Halvorson, appeal against the above-named respondents to the Idaho Supreme Court from The Order, granting Defendants' Motion for Summary Judgment and denying Plaintiffs' Motions for Partial Summary Judgment and Other Motions Submitted January 26, 2009 entered in the above-entitled action on the 11th day of May, 2009, Honorable Judge Carl Kerrick presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(2) and/or 12(a) I.A.R.

3. A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal are as follows:

(a) Whether the District Court erred in determining that the Defendants were operating within a legally established 50 foot ~~25~~ feet from centerline right of way *Of* when the Defendants claimed a prescriptive right of way which had never been laid out or recorded, when the road had previously been altered with permission of the Plaintiffs' predecessor in the land, and when the surveyed present location of the road no longer agreed with the location of the road on the recorded deed;

(b) Whether the District Court erred in determining that the width of prescriptive right of way is a minimum and/or a mandated 50 feet—25 feet from centerline by statute and thus divests all Plaintiffs' possessory rights to any 50 foot strip of land in the SENE Section 15 T39N R3WBM; and/or whether that the District Court erred in not determining that the width of a prescriptive right of way must be determined by the facts and circumstances peculiar to the case and is presumed to be fifty feet unless the facts and circumstances of the case indicate that the owner has limited the width to less than fifty feet prior to the time the road became a highway by user; and/or whether that the District Court erred in determining that the Defendants were not required to give Plaintiffs due process and/or equal protection of the law in the matter of determining the width of the easement and/or right of way;

(c) Whether in cross summary judgments the District Court erred in determining that the Defendants/Respondents were not required to provide Plaintiffs/Appellants due process procedural and substantive and/or equal protection of the law on the issues of widening Camps Canyon Road, invading Plaintiffs' buffer, injury to Plaintiffs' fence and/or issuing, continuing and/or not revoking the first Wagner driveway access permit when Plaintiffs/Appellants had given Defendants/Respondents fair warning that the first Wagner driveway access was wholly on Plaintiffs' land and that the Defendants were operating out of their authorized right of way;

(d) Whether the District Court erred in determining that the Defendants/Respondents were not required to provide due process to Plaintiffs in the question of Plaintiffs' fence encroaching on the right of way when the Defendants' claim was to an unrecorded prescriptive right of way and/or when destruction of the fence is unlawful;

(e) Whether the District Court erred in determining that the Defendants/Respondents had a rational basis for their conclusions and findings regarding Plaintiffs' and Plaintiffs' situation in regards to Camps Canyon Road as it traverses the SENE Section 15 T39N 3WBM and/or that public rights of use, location, width, nature of easement, amongst others had been legally established or adjudicated as Defendants/Respondents claim was to an unrecorded prescriptive right of way and/or whether the District Court erred in determining that the Defendants'/Respondents' actions and/or failures to act were not arbitrary and capricious, an abuse of Defendants

discretion and/or illegal and/or that the Defendants/Respondents had not violated Plaintiffs' substantive due process and/or equal protection rights;

(f) Whether the District Court erred in not determining that the Defendants had the burden of proof to show and/or they had not sustained their burden of proof that they had established the rights they claimed, to a prescriptive right of way to a 50 foot—25 feet from centerline right of way, to widen Camps Canyon Road in the pertinent part, and/or to permit the Wagners to cross property lines and/or to permit the Wagners to traverse Plaintiffs' land to get to the permitted driveway access;

(g) Whether the District Court erred in its determination that the Plaintiffs/Appellants did not have a protected property right as they had the fee in all the lands in dispute and/or that the Defendants'/Respondents' actions/failures did not alter Plaintiffs'/Appellants' property rights and/or that I. C. § 40-2312 had divested Plaintiffs of all property rights in any 50 foot strip of land in SENE Section 15 T39N R3WBM;

(h) Whether the District Court erred in its determination that the Plaintiffs were not denied an opportunity to participate in a validation proceeding and/or that that Plaintiffs' motion for declaratory judgment under I. C. § 40-203a was advisory in nature when Defendants failure to initiate validation proceedings under the Commissioners resolution was an application of the law and/or whether the District Court erred in its denying Plaintiffs a Declaratory ruling under I.C. § 67-8003(3) which basically presented the same set of facts and theories of law that the cross summary judgment did;

(i) Whether the District Court erred in its determination that a tort claim notice was applicable in this case and/or whether if it was applicable that it was not timely sent;

(j) Whether the District Court erred in its determination that Plaintiffs' complaints of Defendants'/Respondents' invidious conduct, bias toward the Wagners, vindictive actions/failures to act, deliberate indifference and/or callous disregard to Plaintiffs' constitutional rights and/or liberties and/or Defendants' failure to properly train its employees in the obvious need to do so do not support any cognizable claim;

(k) Whether the District Court erred in its determination to deny Plaintiffs an opportunity to amend their complaint for continued irreparable harm of repeated damage to Plaintiffs' fence and further encroachment of Plaintiffs' buffer since Plaintiffs' filing of the Complaint;

(l) Whether the District Court erred in its determination to deny Plaintiffs' discovery and/or spoliation motions and/or motion for sufficiency of Defendants' answers in as Plaintiffs/Appellants stated that Defendants/Respondents have continually changed their stories, offered affidavits in bad faith asserting records which they either have not produced and/or are not existent in regards to the establishment of the public/Plaintiffs' rights of the easement which traverses Plaintiffs' land;

(m) Whether the District Court erred in determining that Plaintiffs' 42 USC 1983-1988 claim was not actionable as Plaintiffs had fee in the lands in dispute, the disputed lands had not been used for a period of five years and the Defendants had admitted that they had not provided Plaintiffs with any hearing, pre or post claim of Plaintiffs alleged deprivation of Plaintiffs' constitutional rights and/or liberties;

(n) Whether the District Court erred in not considering the District Court's unconstitutional ruling that I.C. § 40-2312 eliminates all Plaintiffs' possessory rights to any 50-25 feet from centerline in the SENE Section 15 T39N R3WBM without due

process and/or equal protection of the law and/or that I.C. § 40-2312 is unconstitutional as interpreted by the Defendants to mandate a 50 foot—25 feet from centerline right of way and/or that I.C. § 40-2312 is unconstitutional on its face as it mandates an unrecorded prescriptive right of way to be 50 feet—25 feet from centerline and is a taking without due process and/or equal protection of the law and/or without just compensation and/or not for public use;

(o) Appellants come forth before the Idaho State Supreme Court to petition Court to enjoin the District Court from granting Respondents summary judgment, and denying Appellants declaratory relief from the irreparable harm of the abuse of, the deliberate indifference to and the callous disregard for the Appellants' constitutional rights.

4. Has an order been entered sealing all or any portion of the record? If so, what portion? To Appellants' knowledge no order has been issued sealing any portion of the record of this case.

5.(a) Is a reporter's transcript requested? Yes, a reporter's transcript is requested.

(b) The appellant requests the preparation of the following portions of the reporter's transcript. Transcripts of all pretrial proceedings, including:

(i) Plaintiffs' Motion to Reconsider Defendants' Motion to Enlarge Time heard on April 15, 2008;

(ii) Plaintiffs' Motion for Declaratory Judgment of I.C. 40-203a heard on May 13, 2008;

(iii) Plaintiffs' Motion for Declaratory Judgment under I.C. 67-8003 (3) heard on May 27, 2008;

(iv) Plaintiffs' Motion for Reconsideration of Declaratory Judgments under I.C. 40-203a and I.C. 67-8003(3) heard on August 26, 2008;

(v) Plaintiffs' Motions for Partial Summary Judgments dated September 19, October 6, and October 21, 2008 and Defendants' Motion for Protective Orders heard on November 18, 2005;

(vi) Plaintiffs' Motions for Partial Summary Judgments and Other Motions submitted January 26, 2009 and Defendants' Motion for Summary Judgment heard on March 3, 2009.

6. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.

(i) Plaintiffs' Motion For Declaratory Judgment Under I.C. § 67-8003(3);

(ii) Plaintiffs' Brief in Support of Plaintiffs' Motion For Declaratory Judgment Under I.C. § 67-8003(3);

(iii) Plaintiffs' Motion For Declaratory Judgment of I.C. § 40-302a;

(iv) Plaintiffs' Brief in Support of Plaintiffs' Motion For Declaratory Judgment of I.C. § 40-302a;

(v) Plaintiffs' Affidavit in Support of Plaintiffs' Motion For Declaratory Judgment of I.C. § 40-302a;

(vi) Plaintiffs' Reply To Defendants' Objection To Plaintiffs' Motion For Declaratory Judgment Under I.C. § 67-8003(3) And Brief;

(vii) Plaintiffs' Motion/Brief To Reconsider Court's Opinion and Order on Plaintiffs' Motion For Declaratory Judgment of I.C. § 40-302a and Plaintiffs' Motion For Declaratory Judgment Under I.C. § 67-8003(3);

(viii) 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;

(ix) Plaintiffs' Affidavit in Support of 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;

(x) Plaintiffs' Motion For Partial Summary Judgment/Adjudication of the Issue Of The Facial Validity Of The NLCHD's Standing Operating Procedure/Policy/Custom For Widening a Prescriptive Right Of Way;

(xi) Plaintiffs' Motion For Partial Summary Judgment/Adjudication of the Issue Of The Cause Of Action Under 42 USC 1983;

(xii) Plaintiffs' Affidavit in Support of Plaintiffs' Motion For Partial Summary Judgment/Adjudication of the Issue Of The Cause Of Action Under 42 USC 1983;

(xiii) Plaintiffs' Memorandum In Support Of Plaintiffs' Motion For Partial Summary Judgment/Adjudication of the Issue Of The Cause Of Action Under 42 USC 1983;

(xiv) 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;

(xv) Plaintiffs' Second Record Supplement in Support of Plaintiffs' Motion For Partial Summary Judgment/Adjudication of the Issue Of The Cause Of Action Under 42 USC 1983;

(xvi) Plaintiffs' Interrogatories and Requests For Admissions and Defendants' Responses (PIRADR);

(xvii) Plaintiffs' Objection to Defendants' First Motion For Protective Orders, For the Enlargement Of Time and for Attorney Fees and Brief;

(xviii) Plaintiffs' First Certificate of Compliance With IRCP Rule 37(a);

(xix) Plaintiffs' Motion to Strike;

(xx) Ed Swanson's First Affidavit;

(xxi) Ole Hanson's First Affidavit;

(xxii) Joe Yockey's First Affidavit;

(xxiii) Plaintiffs' Motion For Partial Summary Judgments and Other Motions Submitted January 26, 2009, and Brief

(xxiv) Plaintiffs' Answering Brief To Defendants' Motion For Summary Judgment and Reply To Defendants' Answering Brief and Objection to Plaintiffs' Motion For Partial Summary Judgments and Other Motions Submitted January 26, 2009;

(xxv) Plaintiffs' Affidavit in Support of Plaintiffs' Motions For Partial Summary Judgments and Other Motions Submitted January 26, 2009;

(xxvi) Plaintiffs' Affidavit in 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;

(xxvii) Plaintiffs' Third Record Supplement;

(xxviii) Plaintiffs' Fourth Record Supplement;

(xxix) Affidavit of Dan Payne in Opposition to Plaintiffs' Motions For Partial Summary Judgments Filed September 19, October 6, and October 21, 2008;

(xxx) Second Affidavit of Dan Payne;

(xxxi) Third Affidavit of Dan Payne;

(xxxii) Affidavit of Orland Arneberg in Opposition to Plaintiffs' Motions For Partial Summary Judgments Filed September 19, October 6, and October 21, 2008;

(xxxiii) Affidavit of Dan Carscallen in Opposition to Plaintiffs' Motions For Partial Summary Judgments Filed September 19, October 6, and October 21, 2008;

(xxxiv) Defendants' Reply In support of Defendants' Motion For Summary Judgment;

(xxxv) Defendants' Second Record Supplement in Support of Defendants' Motion for Summary Judgment;

(xxxvi) Defendants' Answering Brief to Plaintiffs' Motions For Partial Summary Judgments Filed September 19, October 6, and October 21, 2008, Defendants' Motion To Strike and Defendants' Motion For Attorney Fees.

7. I certify:

(a) That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Name and address: Nez Perce County Court Reporter Nancy Towler, District Court of the Second Judicial Court for the State of Idaho in and for the County of Nez Perce, Lewiston, Idaho; 235 Larkspur, Lewiston, Idaho, 83501.

(b) (1) That the clerk of the district court or administrative agency has been paid the estimated fee for preparation of the reporter's transcript.

(c) (1) That the estimated fee for preparation of the clerk's or agency's record has been paid.

In the alternative Appellants state that they have been to Lewiston (Nez Perce County Courthouse) and have made several calls to the same to obtain an estimate of this cost and have been told that this is a Latah County Case and that Latah County Court needs to make the estimate. Likewise Appellants have been to Moscow (the Latah County Courthouse) and have made several calls to the same to obtain an estimate of these costs and have been told that the Nez Perce County Court has the records and therefore they need to make the estimate. As of this filing Nez Perce County Court says they will send the record back to Latah County and Latah County says they haven't got the records. Appellants have offered to pay Latah County in excess of \$1000 to cover the duplication costs and/or whatever amount this would take so that Appellants could certify

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

COURT MINUTES

Presiding Judge
CARL B. KERRICK
Reporter
NANCY TOWLER
Date JUNE 23, 2009
Time: 9:11 a.m.

DON & CHARLOTTE HALVORSON)
(Husband and Wife),)
)
Plaintiffs,)
)
vs.)
)
NORTH LATAH COUNTY HIGHWAY)
DISTRICT; BOARD OF)
COMMISSIONERS FOR THE NORTH)
LATAH COUNTY HIGHWAY DISTRICT)
ORLAND ARNEGERG, 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.)
)
)

Docket No. CV-2008-180

APPEARANCES:
CHARLOTTE HALVORSON
DON HALVORSON
For, Plaintiff

RONALD LANDECK
For, Defendant

SUBJECT OF PROCEEDINGS: MOTION FOR ATTORNEY FEES AND COSTS

BE IT KNOWN, THAT THE FOLLOWING PROCEEDINGS WERE HAD, TO-WIT:
COURTROOM #1

91149 Don and Charlotte Halvorson present.

Ronald Landeck present.

91222 Mr. Landeck presents argument re: motion for attorney fees and costs.

91808 Mr. Halvorson presents argument re: motion for attorney fees and costs.

93041 Mr. Landeck presents rebuttal argument.

93502 Court takes matter under advisement and will issue a written decision.

1 Page of 2 Pages

COURT MINUTES JUNE 23, 2009

93523 Mr. Halvorson addresses Court re: jurisdiction for this matter now that they have filed an appeal.

93554 Court responds.

93604 Mr. Halvorson questions Court further.

93615 Court responds.


JENNY LANDRUS

Deputy Clerk

2 Page of 2 Pages

COURT MINUTES JUNE 23, 2009

APPROVED:



Presiding Judge

FILED August 3, 2009
 P.M. LEWISTON, IDAHO

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))
)
 Plaintiffs,)
)
 v.)
)
 NORTH LARAH 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.)
)

CASE NO. CV 2008-00180

**OPINION AND ORDER ON
 DEFENDANTS' MOTION FOR
 ATTORNEY FEES AND COSTS**

This matter came before the Court on the Defendants' Motion for Attorney Fees and Costs. The Court heard oral argument on June 23, 2009. The Plaintiffs proceeded *pro se* in the matter, and Mr. Halvorson presented argument. The Defendants were represented by Ronald

Landeck, of the firm Landeck, Westberg, Judge & Graham. The Court, having heard argument and being fully advised in these matters, hereby renders its decision.

BACKGROUND

A comprehensive background of this matter is located within the *Opinion and Order on Plaintiffs' Motions for Partial Summary Judgment and Defendants' Motion for Summary Judgment*, filed on May 11, 2009 (hereinafter "May 11, 2009 Opinion and Order"). At that time, this Court denied the Plaintiffs' motions for partial summary judgment, as well as other various motions contained within the Plaintiffs' filings. The Court also granted summary judgment in favor of the Defendants and summarily dismissed all causes of action found in the Complaint. Following the grant of summary judgment, the Defendants filed a motion for attorney fees and costs, seeking recovery for costs and attorney's fees incurred defending the underlying civil action.

ANALYSIS

The Defendants are seeking an award of attorney's fees and costs associated with defending the underlying civil action. The Defendants argue they are the prevailing party on the matter, and as such, attorney's fees and costs should be granted in their favor.

1. Prevailing party

It is within the sound discretion of the trial court to determine which party is the prevailing party for purposes of an award of attorney's fees. *Costa v. Borges*, 145 Idaho 353, 359, 179 P.3d 316, 322 (2008), citing *Hughes v. Fisher*, 142 Idaho 474, 484, 129 P.3d 1223, 1233 (2006). I.R.C.P. 54(d)(1)(B) sets forth criteria to guide the Court in making such a determination.

In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

I.R.C.P. 54(d)(1)(B). In conjunction with this rule, the Court is guided by three principal factors:

[T]here are three principal factors a trial court must consider when determining which party, if any, prevailed: (1) the final judgment or result obtained in relation to the relief sought; (2) whether there were multiple claims or issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues.

Nguyen v. Bui, 146 Idaho 187, 192, 191 P.3d 1107, 1112 (Ct. App. 2008), *see also Sanders v. Lankford*, 134 Idaho 322, 1 P.3d 823 (Ct. App. 2000).

In the case at hand, the Defendants are the prevailing party on all accounts. In the May 11, 2009 Opinion and Order, this Court granted summary judgment in favor of the Defendants on all claims filed in the Complaint, summarily dismissing the case. The Plaintiffs also filed partial motions for summary judgment, plus various other motions, which were all summarily denied. There were multiple claims and issues filed by the Plaintiffs against the Defendants. At summary judgment, the Defendants prevailed on each of the claims. Thus, when considering the extent to which each of the parties prevailed on each of the claims or issues, the Defendants prevailed in full. Based upon I.R.C.P. 54(d)(1)(B) and the three factors set forth above, the Defendants are the prevailing party in the matter.

2. Attorney's fees

As the prevailing party, the Defendants filed a motion seeking attorney's fees to reimburse the Highway District for the money spent defending the action. The Defendants are

seeking attorney's fees pursuant to I.C. § 12-121, or in the alternative, I.C. § 12-117. In addition, the Defendants have renewed their motion for attorney's fees sought when the Defendants filed their First Motion for Protective Orders in October, 2008. Based upon the foregoing analysis, the Court finds that an award of attorney's fees is appropriate in this matter.

a. I.C. § 12-121

I.C. § 12-121 allows a court to award reasonable attorney's fees to the prevailing party in any civil action.

In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

I.C. § 12-121. I.R.C.P. 54(e)(1) narrows the scope of this statute by providing that "attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation." I.R.C.P. 54(e)(1).¹

In *Nampa & Meridian Irr. Dist. v. Washington Federal Sav.*, 135 Idaho 518, 20 P.3d 702 (2001), the Idaho Supreme Court provided guidance regarding awards of attorney's fees pursuant to I.C. § 12-121.

This Court has held that an award of attorney fees under I.C. § 12-121 is not a matter of right, and is appropriate only when the Court, in its discretion, "is left with the abiding belief that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation." *Owner-Operator Ind. Drivers Assoc. v. Idaho Public Util. Comm'n*, 125 Idaho 401, 408, 871 P.2d 818, 825 (1994). When deciding whether the case was brought or defended frivolously, unreasonably, or without foundation, the entire course of the litigation must be taken into account. Thus, if there is a legitimate, triable issue of fact, attorney fees

¹ In addition, I.R.C.P. 54(e)(1) does not allow a court to award attorney's fees pursuant to I.C. § 12-121 where a case is resolved with a default judgment.

may not be awarded under I.C. § 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation. *See Turner v. Willis*, 119 Idaho 1023, 812 P.2d 737 (1991). The award of attorney fees rests in the sound discretion of the trial court and the burden is on the person disputing the award to show an abuse of discretion. *See Anderson v. Ethington*, 103 Idaho 658, 651 P.2d 923 (1982). In determining whether the trial court has abused its discretion, we again turn to the three-factor test articulated in *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho at 94, 803 P.2d at 1000.

Id. at 524-525, 20 P.3d at 708 - 709.

It is noted that an award of attorney's fees under I.C. § 12-121 is not a matter of right. This Court must take into account the entire course of the litigation. When considering the entire course of litigation in the case at hand, this Court is left with the abiding belief that the action was pursued or brought frivolously, unreasonably, or without foundation. During the early stages of the case, when the Plaintiffs were seeking declaratory judgment, the Court considered there may potentially be a question of fact regarding the status of Camps Canyon Road as a public right of way. However, as the litigation progressed, it became clear that there was no dispute regarding the status of the roadway, and further, no dispute that the actions taken by the Defendants fell well within the scope of the right of way of the road. Throughout the litigation the Plaintiffs continued to press novel and unsupported legal arguments regarding the status of the road. The Plaintiffs conceded the roadway was a public highway, yet pursued claims for relief which were inconsistent with this position.

In addition to claims regarding the status of the roadway, a significant portion of the complaint is based on claims of violations of due process and equal protection. These claims were unsupported in fact and failed as a matter of law. Finally, the Plaintiffs set forth a myriad of remaining issues, including tort claims, claims for criminal offenses, as well as assorted and miscellaneous statements of conduct which did not support any cognizable claim.

Further, the Plaintiffs unreasonable construction of highway laws and relentless and misguided insistence on legal principles that had no application to the facts of this case became more pronounced with continued litigation. The Plaintiffs continually filed motions to reconsider, taking the same stance as they had taken in the original motions. In total, the Plaintiffs pursued a relatively simple underlying case in a manner that was unreasonable, without legal basis or factual support, and ultimately, frivolous. Taking the entire course of litigation into account, this Court finds that an award of attorney's fees is proper under I.C. § 12-121 and I.R.C.P. 54(e)(1).

b. I.C. § 12-117

In addition to seeking attorney's fees pursuant to I.C. § 12-121, the Defendants argue an award is appropriate based upon I.C. § 12-117. For purposes of a complete record, this Court will consider whether attorney's fees are appropriate pursuant to this statute, even though the Court has already concluded that attorney's fees should be awarded pursuant to I.C. § 12-121.

The pertinent portion of I.C. § 12-117 states:

Unless otherwise provided by statute, in any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the court shall award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.

If the Court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law, an award of attorney's fees, witness fees and reasonable expenses is permitted. *See Castrigno v. McQuade*, 141 Idaho 93, 98, 106 P.3d 419, 424 (2005). I.C. § 12-117 applies both to proceedings brought by the litigant, as well as those brought against the litigant by a governmental entity. *See Cox v. Dept. of Ins., State of Idaho*, 121 Idaho 143, 823

P.2d 177 (Ct. App. 1991). Thus, in the case at hand, the Defendants may pursue an award of attorney's fees pursuant to this statute.

This Court notes “[t]he purpose of I.C. § 12-117 is to serve as a deterrent to groundless or arbitrary action and to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never have made.” *In re Daniel W.*, 145 Idaho 677, 682, 183 P.3d 765, 770 (2008), *see also Rincover v. State*, 132 Idaho 547, 549, 976 P.2d 473, 475 (1999). It also follows that tax payers should not be expected to bear the burden when a litigant brings a case against a governmental entity, such as the Highway District, where the Highway District has borne an unfair and unjustified financial burden in defending against groundless charges made by the Plaintiffs. The Defendants have borne significant costs in defending the action before this Court because the Plaintiffs pursued the underlying lawsuit without a reasonable basis in fact or law.

Similar to the analysis regarding I.C. § 12-121, this Court finds that the Plaintiffs' actions in the underlying lawsuit were without a reasonable basis in fact or law. Based upon this conclusion, an award of attorney's fees is also appropriate pursuant to I.C. § 12-117.

c. Amount of attorney fees allowed pursuant I.R.C.P. 54(e)(3)

When making an award of attorney's fees, the Court must consider the criteria set forth in I.R.C.P. 54(e)(3).

- (A) The time and labor required.
- (B) The novelty and difficulty of the questions.
- (C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.
- (D) The prevailing charges for like work.
- (E) Whether the fee is fixed or contingent.
- (F) The time limitations imposed by the client or the circumstances of the case.

- (G) The amount involved and the results obtained.
- (H) The undesirability of the case.
- (I) The nature and length of the professional relationship with the client.
- (J) Awards in similar cases.
- (K) The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.
- (L) Any other factor which the court deems appropriate in the particular case.

I.R.C.P. 53(e)(3), *see also Building Concepts, Ltd. v. Pickering*, 114 Idaho 640, 759 P.2d 931

(Ct. App. 1988). Based upon these factors, this Court finds the amount of attorney's fees requested by the Defendants is reasonable and appropriate in the case at hand.

This Court notes that the request for attorney's fees adequately reflects the time and labor⁸ required to defend the action. The Complaint filed in this matter was of great length. A myriad of issues were presented, and further, as the litigation progressed, briefing by the Plaintiffs became very lengthy. Regarding the novelty and difficulty of the questions presented, this Court is of the belief that the underlying issue, the status of the roadway, was not a complex legal matter. Even so, the novelty of the issues argued by the Plaintiffs, as well as the amount of issues set forth created difficulty in the legal analysis of the case.

Based upon a complete review of the factors set forth in I.R.C.P. 54(e)(3), as well a consideration of the sheer volume of briefing in this matter, this Court finds that the Defendants are entitled to the full amount of attorney's fees claimed for defending this civil action.

d. Attorney's fees for first motion for protective orders filed October 22, 2008

The Defendants are also seeking an award of attorney's fees for the Defendants' first motion for protective orders filed October 22, 2008. The Defendants requested attorney's fees

pursuant to I.R.C.P. 26(c), (f) and I.R.C.P. 37(a)(4) for dealing with Plaintiffs' unreasonable and improper discovery requests. I.R.C.P. 37(a)(4) reads in pertinent part:

If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

This Court granted the Defendant's motion for a protective order, finding that the Plaintiffs' propounded discovery requests had become oppressive and an undue burden. Further, this Court finds that the Plaintiffs' opposition to the motion was not substantially justified, nor were there circumstances that make an award of expenses unjust.

The Court is well aware that the Plaintiffs have pursued the underlying civil matter on a pro se basis; however, the rules are very clear about the methods of conducting discovery. The amount and types of discovery requests made by the Plaintiffs were well beyond the scope contemplated by the rules of discovery. Thus, based upon I.R.C.P. 37(a)(4), the Defendants are entitled to reasonable expenses, including attorney's fees, as requested in the Defendant's First Motion for Protective Orders filed on October 22, 2008.

3. Costs

In addition to attorney's fees, the Defendants are seeking certain costs associated with defending the action. There are two categories of costs: costs as a matter of right and discretionary costs.

a. Costs as a matter of right

The Defendants are seeking recovery of costs as a matter of right for the following items: court filing fees and fees for service of pleading, in the total amount of \$64.00. The prevailing

party is entitled to recover the costs for these items pursuant to I.R.C.P. 54(d)(1)(C).

Specifically, I.R.C.P. 54(d)(1)(C)(1) allows for recovery of costs associated with court filing fees and I.R.C.P. 54(d)(1)(C)(2) allows recovery for the costs associated with service of any pleading or document in the action. Thus, the Defendants' motion for costs as a matter of right is granted.

b. Discretionary costs

The Defendants are also seeking an award of discretionary costs for the cost of professional surveying services performed by Larry J. Hodge. I.R.C.P. 54(d)(1)(D) sets forth the criteria the Court must consider when determining whether an award for discretionary costs may be granted.

Additional items of cost not enumerated in, or in an amount in excess of that listed in subparagraph (C), may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party. The trial court, in ruling upon objections to such discretionary costs contained in the memorandum of costs, shall make express findings as to why such specific item of discretionary cost should or should not be allowed. In the absence of any objection to such an item of discretionary costs, the court may disallow on its own motion any such items of discretionary costs and shall make express findings supporting such disallowance.

This Court finds that the costs associated for the services of Mr. Hodge were necessary and exceptional costs which were reasonably incurred in the process of defending the civil action. Mr. Hodge provided valuable testimony in his affidavit concerning historical deeds and photographs, as well as clarifications regarding the true location of Camps Canyon Road. Thus, the recovery of the costs of fees charged by Mr. Hodge is allowed, and the Defendant's motion for these costs is granted.

CONCLUSION

The Defendants are seeking the recovery of attorney's fees and costs associated with defending the lawsuit brought by the Plaintiffs regarding issues surrounding the location of Camps Canyon Road, in Latah County, Idaho. Summary judgment was granted in favor of the Defendants on all issues within the Complaint filed by the Defendants. Based upon the foregoing analysis, this Court finds that an award of attorney's fees is granted pursuant to I.C. § 12-121, or in the alternative, based upon I.C. § 12-117. In addition, based upon the Idaho Rules of Civil Procedure, the Defendants' request for costs as a matter of right and discretionary costs is also granted.

ORDER

The Defendants' Motion for Award of Attorney Fees and Costs is hereby GRANTED. It is further ORDERED that the Defendants' counsel prepare a judgment for the Court's review consistent with the Court's foregoing Opinion and Order.

IT IS SO ORDERED.

DATED this 3rd day of August 2009.



CARL B. KERRICK – District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing OPINION AND ORDER ON DEFENDANT'S MOTION FOR ATTORNEY FEES AND COSTS was mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 31st day of August, 2009 on:

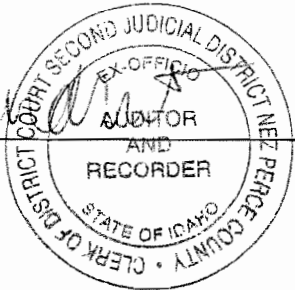
Don Halvorson
1290 American Ridge Road
Kendrick ID 83537

Ronald Landeck
LANDECK WESTBERG JUDGE & GRAHAM
P O Box 9344
Moscow ID 83843

Latah County District Court
Attn: Sue
P.O. Box 8068
Moscow, ID 83843

PATTY O. WEEKS, CLERK

By: 
Deputy



RONALD J. LANDECK, ISB No. 3001
 RONALD J. LANDECK, P.C.
 414 S. Jefferson
 P.O. Box 9344
 Moscow, ID 83843
 (208) 883-1505
 FAX (208) 883-4593
 Attorneys for Defendants

FILED August 17, 2009
 9:16 A.M.
 P.M. LEWISTON, IDAHO
 SA

**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),)
)
 Plaintiffs,)

Case No. CV 2008-180

vs.)

**JUDGMENT FOR ATTORNEY FEES
 AND COSTS**

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.)

This Court having entered an Opinion and Order on Defendants' Motion for Attorney Fees and Costs in this matter on August 3, 2009, and consistent therewith:

IT IS HEREBY ORDERED AND ADJUDGED that Judgment is entered against Plaintiffs Don and Charlotte Halvorson, husband and wife, in favor of Defendants North Latah

County Highway District, Board of Commissioners for the North Latah County Highway District, Orland Arneberg, Richard Hansen, Sherman Clyde and Dan Payne, in the amount of \$78,678.50. Interest shall accrue on money due under this Judgment at the legal rate of interest as determined under Idaho law from the date hereof.

DATED this 17th day of August, 2009.


CARL B. KERRICK
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 17th day of August, 2008, I caused a true and correct copy of this document to be served on the following individuals in the manner indicated below:

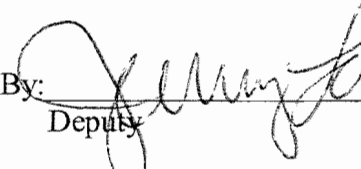
DON HALVORSON
CHARLOTTE HALVORSON
1290 AMERICAN RIDGE ROAD
KENDRICK, IDAHO 83537

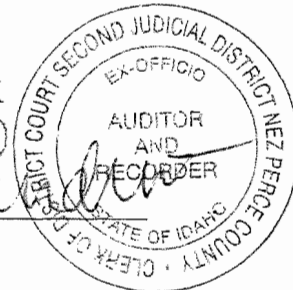
- U.S. Mail
- Federal Express Standard Overnight Mail
- FAX (208) 322-4486
- Hand Delivery

RONALD J. LANDECK
RONALD J. LANDECK, P.C.
414 S. JEFFERSON
P.O. BOX 9344
MOSCOW, ID 83843

- U.S. Mail
- Federal Express Standard Overnight Mail
- FAX (208) 883-4593
- Hand Delivery

PATTY O. WEEKS, CLERK

By: 
Deputy



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

DON HALVORSON,)
)
 Plaintiff/Appellant,)
)
 and)
)
 CHARLOTTE HALVORSON)
)
 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)
 _____)

Supreme Court Case No. 36825-2009

CLERK'S CERTIFICATE

I, Ranae Converse, Deputy Court Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Latah, do hereby certify that the above and foregoing transcript in the above entitled cause was compiled and bound under my direction as, and is a true, full, complete and correct transcript of the pleadings and documents as are automatically required under Rule 28 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Moscow, Idaho this 23rd day of September, 2009.

Susan R. Petersen, Clerk of the
District Court, Latah County, ID

By Ranae Converse
Deputy Clerk

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

DON HALVORSON)
)
 Plaintiff/Appellant)

Supreme Court Case No. 36825-2009

and

CHARLOTTE HALVORSON)
)
 Plaintiff,)

CERTIFICATE OF SERVICE

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.)

I, Ranae Converse, Deputy Court Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Latah, do hereby certify that I have mailed, by United States mail, one copy Clerk's Record to each of the attorneys of record in this cause as follows:

DON AND CHARLOTTE HALVORSON
1290 AMERICAN RIDGE ROAD
KENDRICK, ID 83537

RONALD J. LANDECK
414 SOUTH JEFFERSON
MOSCOW, ID 83843

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Moscow, Idaho this 23rd day of September 2009.

Susan R. Petersen, Clerk of the
District Court, Latah County, ID

By Ranae Converse
Deputy Clerk