12-31-2009

Halvorson v. North Latah County Highway Appellant's Brief Dckt. 36825

IN THE SUPREME COURT OF THE STATE OF IDAHO

DON HALVORSON, Plaintiff-Appellant and CHARLOTTE HALVORSON, Plaintiff 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-Respondents	)	Supreme Court Docket No. 36825-2009 Latah County District Court No. 2008-180

APPELLANT'S BRIEF

Appeal from the District Court of the Second Judicial District for Latah County.
Honorable Carl Kerrick, District Judge.
Don and Charlotte Halvorson, pro se
1290 American Ridge Road, Kendrick, Idaho, 83537, for Plaintiffs/Appellant
Ronald Landeck, attorney
Moscow, Idaho, for Respondents/Defendants

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STATEMENT OF THE CASE

Plaintiffs filed notice of appeal on 6/19/2009 of the District Court's 5/11/2009 granting of cross summary judgment in favor of Defendants on all elements of Plaintiffs' complaint. Plaintiffs appeal the District Court's final judgment of granting summary judgment and attorney fees and costs of $78,678.50 to the Defendants and of denying partial summary judgment to Plaintiffs under 42 USC § 1983 (hereafter § 1983) for the liability of Defendants for the deprivation of Plaintiffs' property rights and violations of Plaintiffs' due process (procedural and substantive) and equal protection of the law rights. At cross summary judgment Defendants asserted that they had conducted all their activities on Camps Canyon Road (hereafter CCR), a public highway, established by user, within a minimum 50 foot width mandated by Idaho law (R, Vol. VII, p. 1429, par. 1). Plaintiffs disputed all of Defendants jurisdictional "facts" as the agency record evidenced no governmental action to have legally established Defendants' claims; and asserted Defendants had no immunity for their constitutional and statutory violations.

The undisputed material facts of this case include the following. Plaintiffs obtained deed to all the lands in the SENE Section 15 T39N R3WBM, with the exception of the 3+/- acre parcel[1], recorded under instrument No. 424411 (R., Vol. IV, p. 670-71), Latah County, Idaho in December of 1996. Plaintiffs' deed cites a county and public road with the road forming the NE

[1] The 3+/- acre parcel was purchased by Eli Harris, predecessor in the land to the Wagners from Per and Anna Johanson, predecessors in the land to the Plaintiffs in 1911 for all intents and purposes for a driveway access to CCR (R, Vol. VI, p. 1152). The historic Harris driveway followed the south property line of the 3+/- acre parcel then turned north along the east property line to access CCR. Although CCR crossed the Harris farm the crossing was beyond the breaks of the canyon. The 3+/- acre parcel accorded Harris a ridge top access to CCR. No one lived on the Harris farm after the 1960's.

boundary between the 3+/- acre parcel and Plaintiffs' land (R, Vol. IV, p. 671 (deed description); R., Vol. VI, pp. 1155-1156 (survey and amended survey)). No survey was recorded with the purchase of the 3+/- acre parcel in 1911 (R., Vol. V, p. 1152 (Latah County Instrument No. 57421)). CCR in the SENE Section 15 has never been laid out and recorded by orders of the commissioners of the NLCHD (R. Vol. V, pp. 883-84, (Chairman Arneberg's response to Request for Admission No. 2—Chairman Arneberg does not know if CCR has ever been laid out and recorded)). CCR remained stable from its earliest beginnings until the fall of 1996 (R, Vol. V, pp.797-798, Interrogatory No. 6 (no changes were noted until beginning in 1996)). In 1996 alterations were made to the location and width of CCR (R., Vol. V, pp. 867-68, Defendant Arneberg's Response to Plaintiffs' Interrogatories 16 (Defendant Arneberg responds to what he told Mr. Wagner of the 1996 alterations); R., Vol. V., p. 786, Defendant Arneberg's response to Request for Admission No. 3, subpart c. (Defendant Arneberg admits that the physical location of CCR was altered in 1996); R., Vol. V, pp. 803-04 Request for Admission Nos. 42, and 43 (Defendant Payne admits that the centerline and width of CCR were altered in 1996); R., Vol. VII, pp. 1401-02, (Ed Swanson speaks of the 1996 alteration to CCR and affirms he gave permission for the alteration in the "surface of the roadway")). After the 1996 alteration CCR remained stable until the fall of 2005 when the activities of this dispute began. CCR has had no official dedication to the public (R, Vol. IV, p. 642, L. 10-12, par. 4 (No deed had been recorded for CCR); Tr., Vol. I, p. 126, L. 17 through p. 127, L. 6 (there is no such recorded instrument)).

In the latter part of 2005 neighbors to Plaintiffs' property, the Wagners, sought to re-establish the old 3+/- acre parcel driveway and Mr. Wagner called Plaintiffs to confirm his

proposed driveway and access to CCR. Plaintiffs met with and explained to the Wagners that the historic driveway followed the east property line marked by the farm line which was 40 feet to the west their proposed access; even though there was an 8' embankment where the east property line intersected CCR. Plaintiffs told the Wagners that the NLCHD had altered the road in 1996 (R., Vol. VI, pp. 1351-52, par. 9).

A short time later, in the late fall of 2005, the NLCHD began again to alter the "surface of the roadway[2]" and without notice (R, Vol. V, p. 858, L. 1-4, Interrogatory No. 26) the NLCHD pushed 6 inches of gravel into Plaintiffs' buffer[3] (R, Vol. II, p. 407, L. 1-5, par. 2). On or about 4/8/06 Plaintiffs discovered that the Wagners had constructed their driveway across the east property line to an access wholly on Plaintiffs' land. On 4/10/06 Plaintiff, Don Halvorson, called Defendant Dan Payne, NLCHD foreman, and informed him that the driveway access was wholly on Plaintiffs' land and asked Mr. Payne if he had issued a permit (R., Vol. VI, pp. 1352, pars. 10 and 11) (R, Vol. VII, p. 1429, L. 13-23, par. 3). Mr. Payne said that he had.

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[2]To help eliminate obfuscation, Plaintiffs will use the District Court's definitions. The definitions of "right of way", "surface of the roadway", and "statutory authority" are as the District Court defines them. R, Vol. VII, p. 1462, L. 15-19) ("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 the 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"). Thus, "Surface of the roadway" + "right of way"="Statutory authority".

[3] Plaintiffs' buffer was the undeveloped area between the edge of the "surface of the roadway" and Plaintiffs' fence left when Plaintiffs rebuilt the fence to the NE of CCR in 1997 after the 1996 alteration to CCR to avoid interference with snow storage in the winter with Plaintiffs' fence.

Procedurally, Plaintiffs began to try to resolve the problems. On 4/12/06 Don Halvorson attended the regular meeting of the NLCHD Commissioners and found that the Wagners were also in attendance (R., Vol. V, pp. 864-866 Defendant Arneberg's Response to Interrogatories No. 12 (Defendant Arneberg explains the circumstances of the 4/12/06 NLCHD meeting)). Plaintiff Don Halvorson told the Commissioners that the first Wagner driveway access permit was issued for an access wholly on Plaintiffs' land and that the NLCHD had no "right of way" or authority to widen the road or issue the permit (R., Vol. VI, pp. 1352-1355, par. 13). The Commissioners said there was a public road so therefore they had prescriptive rights to a 50-foot—25-feet from centerline right of way and that right of way justified Defendants' issuance of the permit (R, Vol. V, p. 854, L. 13-22, Interrogatory No. 18). Plaintiffs rebutted the Commissioners' claims stating that there was no deed of record for a "right of way" for CCR in the Latah County records and that their easement was limited to the width of the road. Plaintiff asked the Commissioners to call for a survey, ie. to join the Wagners in a survey to resolve the situation (R, Vol. V, p.842, L. 14-16). Commissioners refused to call for a survey or to have the Wagners obtain a professional survey. Plaintiff stated he would call for a survey (R, Vol. VI, pp. 1348-1358). In early June 2006 Rimrock Consultants set the stakes for their survey, revealing the first Wagner driveway access to be wholly on Plaintiffs land. The Wagners sought a second permit and constructed a second driveway west of the east property line.

However, Plaintiffs' problems with the NLCHD did not go away; they escalated. Beginning in the summer of 2006, Defendants without notice (R, Vol. V, p. 858, Interrogatory No. 27) started to add large amounts of dirt and gravel to the "surface of the roadway" and since

the winter of 2007 the Defendants have piled snow on Plaintiffs' fence and continued to impact Plaintiffs' buffer and fence with additions of rock and gravel throughout 2008 and 2009 resulting in significant injuries and repairs to Plaintiffs' fence (Tr. Vol. I, p. 46, L. 13-17; p. 47, L. 10-23). The width of, the slope of, or the "surface of the roadway" of CCR is not 50 feet (R., Vol. IV, p. 638, par. 7 (after the 2006 additions of width the average width is 21 feet); nor do either the Defendants or the District Court claim the "surface of the roadway" to be 50 feet (R., Vol. VII, p. 1460-63, par.2). Defendants added at least 6 to 8 feet of width in 2005/2006 (R., Vol. IV, p. 638, par. 6; R., Vol. VI, p. 1210, par. 4 and 5) encroaching on Plaintiffs' buffer—the area Plaintiffs left in 1997 between the road's edge and their fence—and damaging Plaintiffs' fence.

Beginning in the winter of 2006 and throughout 2007 Plaintiffs sought agency remedy of the problems with the NLCHD concerning Defendants' jurisdiction, the legal establishment of public rights in CCR, and Defendants' policies/customs to widen the road, to issue driveway access permits, to damage Plaintiffs' fence and to determine their claimed encroachment of Plaintiffs' fence, including seeking hearings (R, Vol. V, p. 816-817 (On 3/21/07 Plaintiffs sought a post deprivation hearing trying to resolve the issues and were denied a meaningful informal or formal hearing or resolution)). Plaintiffs requested that Defendants validate the easement under their own resolution under I.C. § 40-203a (R, Vol. V, p.806-814 (prior to the 3/21/07 meeting Plaintiffs sent Defendants a letter requesting that the Commissioners validate CCR and bringing evidence of the permission granting factors for them to do so)); hired a lawyer and sought an informal meeting at CCR with Defendants and Plaintiffs' predecessor in the land, Ed Swanson (R., Vol. V, p. 877-878, Defendant Hansen's response to Interrogatories Nos. 7, 8, and 9

(Commissioner Hansen acknowledges Plaintiffs' attempts to resolve the issues)). Plaintiffs requested that Defendants evaluate their actions for possible due process violations under the Idaho Regulatory Takings Act (IRTA) (R, Vol. V, p. 828-837). Defendants not only denied Plaintiffs a meaningful predeprivational inquiry into the legal establishment of public rights in the road, but also denied post deprivational remedy of exhaustion of agency remedies on the grounds that the easement is a public road therefore it is 50 feet wide (R, Vol. V, p. 827 (Commissioner Hansen expresses his indifference to Plaintiffs' protected property rights—"Richard Hansen said the property line issues have nothing to do with the highway district"—and that there is "an existing road with a 50 foot prescriptive right of way"; p. 823, L. 20-33 (both Commissioners Hansen and Clyde express their disregard of the issues—there is no reason for them to initiate validation proceedings)). On 8/8/07 Plaintiffs presented a proposal for settlement (R, Vol. V, p. 902-908) and the Commissioners refused to allow Plaintiffs to represent themselves as Plaintiffs would not have the expense of an attorney (R, Vol. V, p. 839, L. 29-41). Plaintiffs requested that the Defendants give them a declaratory ruling on the applicability of I.C. § 40-203a (R, Vol. V, p. 826) and Defendants did not respond. On 9/15/07 Defendants told Plaintiffs they had two choices—pay $750 fee for a hearing to regain their land or to get a lawyer (R, Vol. V, p. 819-823). On 11/6/07 Plaintiffs filed a tort claim notice (R, Vol. VII, p. 1429, L. 12, par. 2) and on 3/3/08 Plaintiffs filed for action under 42 USC § 1983 for the wrongful taking of their land and in the alternative tort, trespass, inverse condemnation and nuisance.

Procedurally, in District Court, Plaintiffs filed initial motions for declaratory judgments under I.C. § 67-8003(3) (R, Vol. I, p. 68-100) and under I.C. § 40-203a (R, Vol. I, p. 176-183) as

Plaintiffs had sought agency remedies and were denied a response by the Defendants. These requests for declaratory relief were denied; under I.C. § 40-203a as "advisory" (R, Vol. II, p. 255-256); and under both I.C. § 67-8003(3) and I.C. § 40-203a as a matter of judicial economy as the facts needed to be determined in the up coming litigation (R, Vol. II, p. 258, L. 2-6). Subsequently, Plaintiffs then filed three motions for partial summary judgments[4] indicating to the District Court that CCR had not been laid out and recorded by orders of the commissioners. Therefore the width of the easement was limited to the "surface of the roadway"; that the burden of proof of the legal establishment of public rights in CCR rested with the Defendants or the Defendants needed to validate the legally established public rights in CCR; as they claimed CCR was a public road and the location of CCR did not correspond to the location in the public record of Plaintiffs' deed description and due to numerous alterations in CCR Defendants could no longer accurately determine the legally established width and location of CCR; that Defendants' policy/custom for widening a highway, presently existing at a lesser width than 50 feet, was facially invalid as they had not legally established a "right of way" under I.C.§§ 40-605 and/or 1310 to widen the highway; and that Defendants' invasions of and permitting third parties

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[4]*Plaintiffs' September 19, 2008 Motion* is the same as *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 the Legally Established Right of Way* (R. Vol. II, p. 313-321 (motion, brief and affidavit)); *Plaintiffs' Motion for Partial Summary Judgment/Adjudication of the issue of the Facial Validity of the NLCHD's Standing Operating Procedure/Policy/Custom of Widening a Prescriptive Right of Way* is the same as *Plaintiffs' October 6, 2008 Motion* (R Vol. II, p. 324-334 (motion and brief)); *Plaintiffs' Motion for Partial Summary Judgment/Adjudication of the issue of the Cause For Action Under 42 USC* 1983 is the same as *Plaintiffs' October21, 2008 Motion* (R. Vol. II, pp. 387-409 (motion, brief and affidavit).

invasions of Plaintiffs' land and damages to Plaintiffs' fence were final decisions and deprivations of Plaintiffs property rights and violations of Plaintiffs 14th Amendment rights, regardless of the final determination of acquisition by the users of the road as the Defendants had enveloped of more of Plaintiffs' land since the late fall of 2005 and after. Plaintiffs asserted that their right to due process was absolute. All Plaintiffs' interlocutory motions were denied on the basis that the width of the easement needed to be factually determined (R, Vol. IV, pp. 766-771 (Plaintiffs' motions for relief as a matter of law are denied as the width of the right of way of CCR needed to be factually determined).

STATEMENT OF THE ISSUES PRESENTED

1. Whether Plaintiffs have property/liberty rights in the fee of the land, including the right to peacefully enjoy their land, their fence, and/or to a jury trial to determine of all the facts necessary to establish their § 1983 case and/or to determine the location, width, and character of the easement of CCR as it traverses their land covered by the 14th Amendment.

2. Whether Defendants deprived Plaintiffs of their property rights when Defendants failed the I.C.§40-202 requirement to show five years of public use and maintenance of the lands used to widen the surface of CCR or to provide driveway access for the Wagners under their first permit and/or when they increase the burden on Plaintiffs, the servient estate, by enveloping more land.

3. Whether Defendants denied Plaintiffs due process (procedural and substantive) and equal protection of the law when they failed to acquire "right of way" under I.C.§§ 40-605 or 1310 or eminent domain or condemnation proceedings, when they were given fair warning they had issued the first Wagner driveway access permit for a trespass and failed to respond in a

meaningful way, when they failed to give notice to Plaintiffs concerning the Defendants claims that Plaintiffs' buffer and/or fence were encroaching , or when they failed to respond to Plaintiffs' attempts to exhaust agency remedies.

4. Whether the District Court erred in granting Defendants summary judgment and attorney fees and costs and in denying Plaintiffs declaratory relief, relief as a matter of law, leave to amend their complaint, and/or in not sanctioning Defendants for spoliation of the evidence.

5. Whether Plaintiffs have, as a matter of right, a right to challenge Commissioners'/Defendants' and/or the District Court's final decisions which substantially prejudice Plaintiffs' property and 14th Amendment rights.

6. Whether CCR was legally established as a public highway.

7. Whether I.C.§40-2312 adjudicates public rights to a 50 foot prescriptive "right of way".

8. Whether the identical strip of land for which Defendants claim prescriptive acquisition can be accurately identified after Defendants' numerous unrecorded alterations.

9. Whether Defendants' affidavits were made in bad faith; or whether Defendants were improperly augmenting the agency record with their affidavits.

10. Whether Defendants could lawfully issue a driveway access permit to a third party across Plaintiffs' land; or repeatedly damage Plaintiffs' fence and add width to CCR with maintenance.

11. Whether Defendants' failures to allow exhaustion of remedies displayed callous disregard and deliberate indifference to Plaintiffs' complaints of deprivation of their constitutional rights.

12. Whether the District Court had subject matter jurisdiction to rule on Defendants' motion for summary judgment when the District Court's ruling was not based on the agency record, when Plaintiffs sought to exhaust agency remedies.

ATTORNEY FEES AND COSTS

Plaintiffs request attorney fees and costs pursuant to 42 USC § 1988, I.C. §§ 12-121, 117, and 40-2013 and costs pursuant to I.A.R. 40 as prevailing party on all issues in this appeal.

ARGUMENT

Plaintiffs appeal the District Court granting summary judgment and attorney fees and costs to the Defendants and the denying of partial summary judgments to Plaintiffs as Plaintiffs disputed Defendants' jurisdictional "facts" that CCR is "a public highway", "established by user" and has "a minimum width of 50 feet mandated by Idaho law" (Tr. Vol. I, pp. 101-113; p. 146, beginning at L. 12 through p. 151, L. 10). As already previously stated in the statement of this case, that at cross summary judgment the undisputed material facts show: (i) an easement, CCR, exists across Plaintiffs' land; (ii) the "surface of the roadway" of CCR has undergone alterations in its width and location in 1996 and again starting in 2005 (Tr. Vol. I, p. 121, L. 22-24) (Tr. Vol. I, p. 125, L. 15-24); R, Vol. VII, p. 1432, L. 5-7 (Defendants' brief states that the record does establish that CCR was widened in 1996 and 2005/2006 (emphasis placed by Defendants); R, Vol. VI, p. 1210-1211, pars. 4 and 5 (Defendant Payne's affidavit describes widening and that since the late fall of 2005 Defendants have added at least 6-8 feet of width to the "surface of the roadway"); (iii) the first Wagner driveway access permit was issued for an access wholly on Plaintiffs' land (Tr. Vol. I, p. 122, L. 20-25; p. 123, L. 1-4); (iv) no "right of

way" has been laid out and recorded by orders of the commissioners for CCR; (v) CCR has had no official dedication to the public interest; (vi) Defendants have never given Plaintiffs notice of encroachment or hearings on these issues; and procedurally (vii) Plaintiffs sought agency remedies and were denied a meaningful response by Defendants. Further, factual disputes continued as to: (i) the actual location and width of the acquisition of the users of the "surface of the roadway" of CCR and (ii) the character of the easement of CCR; as the permission given by the previous owner of Plaintiffs' land for the 1996 alterations was disputed by the Defendants. These factual disputes were repeatedly pointed out by the District Court through its interlocutory rulings (R., Vol. II, pp. 251-259; R., Vol. II, pp. 307-312; R., Vol. II, pp. 763-774) that the width of the easement needed to be factually determined. Plaintiffs assert that the undisputed and disputed facts show that Defendants have deprived Plaintiffs of their property rights covered by the 5th and 14th Amendments of the US Constitution; as Defendants conducted their activities of widening CCR and issuing the first Wagner driveway access permit into lands unencumbered by any easement or part of the Defendants' legally established highway system. Furthermore, the disputed facts, the accurate location and width and the character of the easement, are not fatal to Plaintiffs' partial summary judgment motion on the Defendants liability for Plaintiffs' due process and equal protection violation claims. The very presence of a protected property right is sufficient to rise to the protection of the 14th Amendment. The undisputed and disputed evidence both show doubt of the legal establishment of public rights in CCR as Defendants claim; that due to numerous alterations it can no longer be accurately located; and that its present location does not agree with the public records. Furthermore, Defendants' activities under their policies are

proscribed by law—the issuance of a permit for a trespass and/or the wrongful conversion of Plaintiffs' land to a private party, not for public use; and encroachment on Plaintiffs' land and fence requires notice by law and Plaintiffs have a right of private action to seek agency remedy. At cross summary judgment Defendants dropped their factual claim—the prescriptive 50 foot width of CCR—and claimed the 50 foot width under statutory [I.C.§40-2312] authority (Tr. Vol. I, p. 114, starting at line 21 through p. 115, L. 22) with the caveats that the "surface of the roadway" of CCR had been widened and was located approximately the same as it was in 1974.

Standard of Review: Plaintiffs assert that the District Court was acting in an appellate role in its determination of the legal establishment of the public rights in CCR and the standard of review must incorporate a review of the agency record as is found in I.C. § 40-208; as such, this appeal would be a matter of right (see I.A.R. 11(f). Plaintiffs have challenged Defendants' decisions, actions and/or failures to act in regards to Defendants' claims to have established public rights in the easement which traverses their land under Idaho Code Title 40. See *Homestead Farms, Inc. v. B'rd of County Comm'rs of Teton County,* 141 Idaho 855, 858, 119 P.3d 630, 633-634 (2005) (I.C. § 40-208 contains standard of review for challenges of Commissioners decisions).

> Where opposing parties both move for summary judgment based on the same evidentiary facts and on the same theories and issues, the parties effectively stipulate that there is no genuine issue of material fact. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982). Summary judgment is appropriate only when there are no genuine issues of material fact and the case can be decided as a matter of law. I.R.C.P. 56(c); *Moss v. Mid-American Fire and Marine Ins. Co.,* 103 Idaho 298, 302, 647 P.2d 754, 758 (1982). The construction and application of a legislative act are pure questions of law as to which the Supreme Court exercises free review. *Idaho State Ins. Fund v. Van Tine*, 132 Idaho 902, 980 P.2d 566 (1999).

Roeder Holdings, LLC v. Board of Equalization of Ada County, 136 Idaho 809, 812, 41 P.3d 237, 240 (2001).

1. The District Court erred in granting Defendants summary judgment and attorney fees and costs and denying Plaintiffs partial summary, as Plaintiffs have a valid claim under § 1983 (see Addendum, at xvi) with damages to be determined. In *Monell v. Dept. of Soc. Svcs. of N.Y.*, 436 U.S. 658, 690-700 (1978) the US Supreme Court stated that a governmental entity is liable for its actions under its policies or customs.

The undisputed evidence in this case finds Defendants acting and failing to act under the color of state law in its activities on CCR. The matters of the issuance of the first Wagner driveway access permit and the NLCHD maintenance and improvement activities are under the policies/customs of and/or the expressed approval of the final policy makers of the NLCHD (R. Vol. IV, p. 632, L. 17-22 (Defendants' policies for maintenance and improvement—jurisdictional claims—is based on I.C.§40-2312); Tr., Vol. I, p. 120, L. 14-21 (Defendants asserted that I.C.§40-2312 mandates a minimum width of public highways established by user is 50 feet except for those which had a lesser width in 1887); R. Vol. IV, p. 638, par. 10 (Defendant Payne states that there are special circumstances in which I.C.§40-2312 is not the basis for the District's public road and maintenance activities—"such as when the District has been deeded a public right of way of less than fifty feet wide or when the improvement predated the establishment of a public road"); R. Vol. VI, p. 1210, par. 3 (Defendant Payne states that there are no special circumstances on CCR); Tr. Vol. I, p. 126, L. 9-16 (Defendants' maintenance

functions are a matter of right within a 50 foot right of way); R, Vol. VII, p. 1429 pars. 1 and 3 (the District's activities on CCR are based on Idaho law [I.C.§ 40-2312])).

In sum, notwithstanding Defendants' own policy statements negate their legal policy thesis—that I.C.§40-2312 "mandates" the minimum width of public highways to be 50 feet wide—as special circumstances exist, such as highways presently existing at a lesser width—a deeded right of way of less than fifty feet is not required to meet the 50 foot standard; Defendants also testify that CCR fails to fulfill their cornerstone prerequisite—that CCR is a legally established "public" highway/road. As was previously stated Defendants deny that any official public dedication has ever taken place. Further, Chairman Arneberg , under oath, confirms the claimed legal status of CCR—that CCR is a public road, established by prescription, 50 feet-25 feet from centerline wide (R. Vol. IV, p. 861, Response to Second Interrogatories No. 4). Chairman Arneberg denies that a prescriptive right of way/highway could be less than 50 feet wide (R. Vol. IV, p. 885, Response to Request for Admission No. 5).

Defendants did not express a rational basis of a legitimate governmental interest to require that Plaintiffs or abutting landowners to a prescriptive claim of a lesser width than 50 feet must sustain a greater burden on the servient estate than those abutting and deeding a right of way to the county. Furthermore, their "right of way" claim was a result not of user acquisition but was necessitated by the maintenance and improvement requirements of the NLCHD (R. Vol. IV, p. 637, par. 6 (in 2005-06 the NLCHD widened CCR for increased vehicular traffic and road safety)). Clearly, the envelopment of Plaintiffs' land was for a public benefit and not as a regulated harm to the public resultant from Plaintiffs' use of their land.

Both the agency record and the record initially made in District Court show Plaintiffs sought and were denied exhaustion of agency remedies under I.C.§§40-203a and 67-8003(3) (R., Vol. V, pp. 828-837 (Plaintiffs Regulatory Takings filings)), as well as pre-(R., Vol. V, p. 842 (the 4/12/06 NLCHD meeting)) and post- (R., Vol. V, pp. 816-17 (the 3/21/07 NLCHD meeting); R., Vol. V, pp. 819-824 (the 9/12/07 NLCHD meeting)) deprivational hearings.

The overriding issues in this case are Plaintiffs' challenges of Defendants' decisions, inferences, findings, and conclusions to physically invade and to allow third parties to physically invade Plaintiffs' land and Defendants' failures to apply and/or to correctly apply statutes with provisions of constitutional guarantees and remedies for erroneous deprivations. In *Maresh v. State of Idaho, Dept. of Health and Welfare*, 132 Idaho221, 970 P.2d 14 (1999) the Idaho Supreme Court outlined a two step analysis to determine whether a person's 14th Amendment constitutional guarantees have been violated. First decide whether the individual's threatened interest is a liberty or property interest under the Fourteenth Amendment. *Id.*, at 226, 970 P.3d, at 19. And 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. *Id.*, at 226, 970 P.3d, at 19. At cross summary judgment, Plaintiffs asserted that governmental action is required to legally establish public rights in CCR. Plaintiffs asserted that Defendants perjurious affidavits and claims are at best arbitrary and capricious—without any evidence in their records to support their findings, conclusions, decisions, actions and failures to act (Tr. Vol. I, starting at p. 103, L.21 through p. 104, L. 4).

A. The District Court erred when it concluded that Plaintiffs did not have property rights protected by the 14th Amendment; CCR does not have a 50 foot width as mandated by law.

Property rights are created or given by state law. *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, at 577 (1972). Plaintiffs' deed, instrument No. 424411 (R, Vol. VI, p. 1150-1151), Latah County, Idaho, provides substantial evidence for the factual finding to support the conclusion that Plaintiffs have a constitutionally protected right created by state laws. Defendants agree that Plaintiffs' land and property are constitutionally protected (Tr. Vol. I, p.142, L. 16 and 17). In Idaho, real property includes land, possessor's rights to land, ditch and water rights, mining claims (lode and placer), and free standing timber. See I.C §§55-101, and 63-108. In *Hughes v. State*, 80 Idaho 286, 293-296, 328 P.2d 397, 400-402 (1958) the Idaho Supreme Court held that private property of all classifications is protected under the Idaho Constitution just compensation clause. Plaintiffs' deed description gives Plaintiffs fee title to all lands in the SENE Section 15 T39N R3WBM except for the 3+/- acre parcel with its NE boundary being the centerline of CCR. Plaintiffs have a lawful fence. See I.C. Title 35.

Defendants' legal jurisdiction is a strip of land, an easement, and Plaintiffs' ownership rights extend to this easement as well. See *Meservey v. Gulliford*, 14 Idaho 133, 137, 93 P. 780, 783 (1908) (The legal title to said land remains in the owner of the adjoining land or the land over which the road runs). The District Court erred when it reduced Plaintiffs' due process claim to a tautology. If I.C.§ 40-2312 mandates a 50 foot prescriptive "right of way" for CCR it must contain appropriate procedural constitutional safeguards. See *Cleveland Brd. Of Ed. V. Loudermill*, 470 U.S. 532, 541 (1985) ("'While the legislature may elect not to confer a property

interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.' Citing *Arnett v. Kennedy*, at 416 U. S. 167). Defendants' ad hoc policy/custom interpretations of I.C.§40-2312—that a public highway established by user has an adjudicated minimum 50 foot width mandated by Idaho law—are invalid at their inception. I.C.§40-2312 does not adjudicate public rights to a 50 foot width to a highway presently existing at a lesser width, whether the highway is public, established by user, dedicated at a lesser width, or otherwise. It has no appropriate, constitutionally adequate, procedural safeguards to do so. Further, I.C.§40-2312 (see *Addendum*, at xix) does not mention the word "public" (see I.C.§40-117, at *Addendum*, p. iii). The District Court abused its discretion by seeking an unconstitutional construction when the plain meaning was not ambiguous. An appellate court is obligated to seek an interpretation of a statute that upholds its constitutionality. See *American Falls Reservoir Dist. No. 2. v. Idaho Dep't of Water Resources*, 143 Idaho 862, at 869, 154 P.3d 433, at 440 (2007). Where the statutory language is unambiguous, the clearly expressed intent of the legislature must be given effect and there is no occasion for the District Court to consider the rules of statutory construction. See *Payette River Property Owners Ass'n v. Bd. of County Comm'rs,* 132 Idaho 551, 557, 976 P.2d 477, 383 (1999). Plaintiffs' have substantial ownership rights in the lands underlying and abutting to CCR, and their fence and these are protected by the 14th Amendment.

B. Defendants have deprived Plaintiffs of their property protected by the 14th Amendment.

The highway district has the burden of proving by a preponderance of the evidence that public rights were established in its entire claim. See *ACHD v. TSI, LLC,* 145 Idaho 360, 365-

66, 179 P.3d 323, 328-29 (2008) citing *Floyd*, 137 Idaho at 724, 52 P.3d at 869. The legal establishment of the public rights in the easement and Plaintiffs' protected property rights are inextricably intertwined. An easement is the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property by the owner. See *Hodgins v. Sales,* 139 Idaho 225, 229, 76 P.3d 969, 973 (2003). The use of the "surface of the roadway" by the users of the road, whether the users are public or private, has not interfered with Plaintiffs' use of their land for a buffer to protect their fence, to permit reasonable snow storage, to grow trees and raise livestock until the late fall of 2005, if at all then. However, since that time the Defendants have invaded and permitted third parties to invade Plaintiffs' land (Tr., Vol. I, p. 105, from L. 18 through p. 106, L. 15). It is the Defendants' exertion of their governmental authority at which Plaintiffs' *Complaint* is directed.

The commissioners of a highway district have exclusive general supervision and jurisdiction over all highways and public rights-of-way within their highway system. See Idaho Code § 40-1310(1) (*Addendum,* at p. xvi). Defendants have no jurisdiction beyond the extent of the easement and have no authority to regulate Plaintiffs' use of their land. The power to establish highways rests in the State legislature and the exertion of governmental authority in laying out a highway is only valid as legislature provides. See *Gooding Hwy. Dist. v. Idaho Irrigation Co.*, 30 Idaho 232, 236-37, 164 P 99, 100 (1917). The requirements for determining if a highway exists and what lands are within the Defendants' highway system are set forth in I.C. § 40-202 (see *Addendum*, at p. iv). I. C. § 40-202(3) states that there are specific ways in which a public highway may be created and provides in part:

> Highways laid out, recorded and opened as described in subsection (2) of this section [by acquiring real property and then adopting a resolution establishing as interest in the property as a highway], by order of a board of commissioners, and all highways used for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of a board of commissioners, are highways.

Homestead Farms, Inc., at 860,110P.3d 630, 635. As has been stated no "right of way", 50 foot wide, 25 feet from centerline wide, or otherwise has been laid out or located and recorded by orders of the commissioners on CCR. Thus any highway which exists across Plaintiffs' land is limited to what land has been used for a period of five years and kept up at the public expense—the "surface of the roadway", the slope of CCR. These procedures are well established and reasonably understood. See *Cox v. Cox*, 84 Idaho 513, 518-519, 373 P.2d 929, 932 (1962), citing *Ross v. Swearingen*, 39 Idaho 35, 225 P. 1021 (Appellants had the burden of establishing the existence of the public road described in the petition to prove that the road had been laid out and recorded as a highway by order of the board of commissioners, or that it had been used as such for a period of five years). An easement by prescription requires a showing by claimant of the line of travel without material change or variation. See *Roberts v. Swim*, 117 Idaho 9, 15, 784 P.2d 339, 345 (Ct. App. 1989). The undisputed material facts—that material changes in the location and width of the "surface of the roadway" of CCR have occurred within the last five years—provide substantial evidence in the District Court record to support a finding and a conclusion that Defendants have enveloped more of Plaintiffs' land as Defendants have not legally acquired a "right of way" for their maintenance and improvement activities.

A judgment determining the existence of an easement must also specify the character, width, length, and location. See *Schneider v. Howe,* 142 Idaho 767, 774, 133 P.3d 1232, 1239

(2006). The disputed evidence in this case amounts not to whether there is a 50 foot-25 feet from centerline "right of way" but rather what is the legal width and location of the "surface of the roadway"—where does the identical strip of land used and maintained for five years lie? See *ACHD,* at 365-66,179 P.3d 323, 328-29 (citing *Aztec, Ltd., Inc. v. Creekside Investment Co.*, 100 Idaho 566, 602 P.2d 64 (1979) (the case was decided on the failure to meet the requirement to show use for five years). Defendants acknowledge the alterations in the surface of the road and also acknowledge the inadequacies of their procedures to fulfill constitutional guarantees (Tr., Vol. I, pp. 133, L. 21-25; 134, L. 1-9 (Defendants acknowledge that they have altered the CCR centerline and cannot even by survey, after the fact, ascertain the accurate location of CCR).

The District Court erred when it ruled that CCR could be accurately located by a moveable—fixed centerline. Defendants' counsel changed and/or misstated (Tr. Vol. I, p. 121, L. 19-21) the evidence that the centerline of CCR is the same now as it was in 1974[5]. Plaintiffs hotly dispute this conclusion and Defendants do not dispute the alterations in the centerline (Tr. Vol. I, p. 133, L. 21-23). (Tr. Vol. I, p. 121, L. 15-21) and the statement that the centerline or the width of CCR is the same now as in 1974 is unsubstantiated by any evidence in the agency or District Court record.

[5] Defendants' counsel tries to paint a picture that CCR over the years has been altered symmetrically when in fact it hasn't. There are no public or agency records that CCR occupies the identical strip of land it did prior to the 1996 alteration or the 2005-2006 alterations or any alterations since. Defendants' counsel misstates the record. CCR rests on a steep canyon wall with a large rock outcropping on the SE (Wagner) side of the road. This large rock outcropping, the reason for the 1996 realignment of CCR, was blasted with little success in 2006 and remains as an obstacle for widening CCR symmetrically even if Defendants had a 50 foot right of way to do so (R., Vol. IV, p.637, par. 6; and R., Vol. VI, pp. 1210-11, pars. 4 and 5).

Further, the Defendants were improperly augmenting the public record with their claims of measurements (R., Vol. IV, pp. 637-38, pars. 5, 6, 7, 11 and 12; R., Vol. VI, pp. 1210, pars. 3, 4, and 5) being made to accurately describe the 1996 alterations and the placement of additional width to the "surface of the roadway" in 2005 and 2006 as there was no such agency record of an accurate description of the lands as is required for any of the Defendants' alterations. See *Idaho Historic Preservation Council, Inc.* at 654, 8 P.3d 646, at 649 (when a governing body sits in a quasi-judicial capacity it must confine its decision to the record produced at the public hearing and failing to do so violates procedural due process of law). Defendants have duty to produce record of highway alterations. See I.C.§§40-604(1), (2) and (4), at *Addendum*, p. xiv and 608 at *Addendum*, p. xvi. In sum, the Defendants' unlawful intrusions into Plaintiffs' land under their policies for maintenance and improvement has not only deprived Plaintiffs of their substantial property rights, but has also put a valuable public asset, the "surface of the roadway" of CCR at risk and expense of a lawsuit. The centerline of CCR forms the NE boundary between Plaintiffs and the Wagners. Defendants' failure to lay out, describe, and record in 1996 and since the late fall of 2005 has prejudiced both Plaintiffs' and the neighbors' property rights.

C. Defendants have violated Plaintiffs procedural and substantive due process and equal protection rights. Plaintiffs' rights to procedural due process is constitutionally guaranteed as a significant property right is at stake, and is not denied as a matter of tort claim notice or regardless of the outcome of the factual determination of the width, location, use, or character of the easement. See *Carey v. Piphus*, 435 U.S. 247, 266-267 (1978). The right to due process is "absolute". *Id.* The denial of due process is actionable without proof of actual injury. *Id.*

Plaintiffs assert that their property rights have been prejudiced as Defendants decisions, conclusions, actions and/or failures to act are in violation of and/or are in excess of statutory and/or constitutional provisions; are arbitrary and capricious or characterized by abuse of discretion; are clearly erroneous based on the undisputed and disputed facts and/or the agency record; are effected by errors of law; and/or have been made upon unlawful procedure. Plaintiffs assert that Defendants have failed to circumscribe their broad authorities with statutory provisions and safeguards of constitutional guarantees and remedies for erroneous deprivations; The District Court erred in its conclusion that Plaintiffs were not denied due process when alterations in the easement were made (R., Vol. VII, pp. 1466-1472, pars. A.4. through B.1, 2, and 3). Invasions of Plaintiffs' land are final when they occur. See *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398, 1402 (1988) (*Williamson County's* final decision requirement is inapplicable in cases of physical invasion; a physical invasion is by definition a final decision). Invasions by third parties are particularly egregious. See *Loretto v. Teleprompter Manhattan, CATV Corp.*, 458 U.S. 419, 435-38 (1982). Physical takings are not determined by their size. See *The City of Coeur D' Alene v. Simpson*, 142 Idaho 839, 847, 136 P.3d 310, 318 footnote n. 5 ("The regulatory takings tests, expressed in *Loretto* (regulation approving of physical invasion, however minute, is a taking")). Absence of due process and/or not "for public use" are substantive violations. See *Lingle v. Chevron, USA Inc.*, 544 U.S. 528, 543 (2005) (" if a government action is found to be impermissible — for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process — that is the end of the inquiry. No amount of compensation can authorize such action"). Predeprivation due

process is due in substantive due process violations and in procedural due process violations when the violation is not unauthorized, foreseeable and predictable. See *Zinermon v. Burch*, 494 U.S. 113, 124-139 (1990) (predeprivational hearing is required when action is not unauthorized, foreseeable and predictable). See also *Zimmerman v. City of Oakland,* 255 F.3d 734, 737-739 (9th Cir. 2001). Post deprivational due process, while may be adequate in some cases, exhaustion of agency remedies is not required. See *Patsy v. Florida Board of Regents* 457 U.S. 496, 501 (1982) (exhaustion of administrative remedies is not a perquisite for seeking action under § 1983). See *Zinermon,* at 124-125 (exhaustion of judicial remedies is not required under § 1983). The matter of tort claim notice is not material in the issues and remedies available: Idaho Tort Claims Act does not cover the matters of trespass, nuisance, inverse condemnation and 42 USC § 1983 makes no requirement of a tort claim notice. See *Felder v. Casey*, 487 U.S. 131, 138-146 (1988). Further any time bar of Plaintiffs' actions "accrues after the full extent of the impairment of the plaintiffs use and enjoyment of [the property] becomes apparent". See *The City of Coeur D' Alene*, at 846, 136 P.3d 310, 317 citing *Tibbs v. City of Sandpoint,* 100 Idaho 667, 671, 603 P.2d 1001, 1005 (1979) (quoting *Aaron v. United States*, 311 F.2d 798, 802 (Ct.Cl. 1963)). The Defendants have no immunity for violations of the statutes or the Constitution. See *Owen v. City of Independence*, 445 U.S. 622, 635-640 (1980). Plaintiffs have a right to challenge the final decisions, inferences, conclusions, and findings of the Defendants when they adversely affect Plaintiffs' property rights and a right to appeal the District Court's rulings while acting in an appellate role. See I.A.R.Rule (11)(f). See *Homestead*, supra, at 858, 119 P.3d 630, 633-634). Further, successful claims of a "class of one" are brought about by intentional

arbitrary difference in treatment without a rational basis whether by expressed terms of statute or improper execution by officials. See *Village of Willowbrook v. Olech* 528 U.S. 562, 564 (2000) See also *The City of Coeur d'Alene* at 853, 136 P.3d 310, 324.

It is well established law in Idaho that alterations in width and/or location of an easement not only increases the burden on the servient estate, but also have the effect of enveloping more land. See *Argosy Trust Through Its Trustee, Alan Andrews v. Wininger*, 141 Idaho 570, at 573, 114 P.3d 128, at 131, (2005) (citing *Aztec Ltd., Ind. V. Creekside Investment Co.*, 100 Idaho 566, 569, 602 P.2d 64, 67 (1979), ("An increase in width does more than merely increase the burden upon the servient estate; it has the effect of enveloping additional land"). The Supreme Court says the same argument goes for alteration of location of the easement. See *Bruce Byron Bedke v. Pickett Ranch And Sheep Co., an Idaho Corporation*, 143 Idaho 36, 39, 137 P.3d 423, 426 (2006) (citing *Argosy Trust ex rel. Its Trustee* and *Aztec Ltd., Inc.* (the same is true with respect to the change in the location of an easement; it has the effect of enveloping more land). Defendants knew or should have known that the alterations of the width and/or location of the "surface of the roadway" of CCR would envelop more of Plaintiffs' land.

It is also well established law in Idaho that adverse use is one of the five elements necessary to establish a prescriptive easement. See *Hodgins*, at 231, 76 P.3d 969, at 975. The Idaho Supreme Court has characterized "adverse use", as an actual invasion or infringement made without permission of the owner. *Id.* Adverse use, hostile use and/or under a claim of right are synonymous. *Id.* Such adverse use by the Defendants is expressly prohibited by the US Constitution 5th and 14th Amendments and the Idaho State Constitution, Article I §§ 13 and 14.

Plaintiffs have not argued that Defendants cannot acquire Plaintiffs' land; they have asserted that Defendants cannot take their land without due process. Plaintiffs argue that the Defendants have no authority to create a prescriptive "right of way" and Defendants' claims are made upon unlawful procedure and/or affected by other errors of law. The Idaho State legislature has provided Defendants with authorizing statutes for altering CCR—such as I.C.§§ 40-1310 (see *Addendum* p. xvi) or 605 (see *Addendum*, p. xv)—containing procedural safeguards of Plaintiffs' constitutional guarantees to obtain and fix a strip of land, a "right of way", for their maintenance and improvement activities that is not based on an oxymoronic fixed/variable claim. The District Court acknowledged that the authorizing statute for widening a highway falls under I.C.§§ 40-605 and 1310 (R. Vol. IV, pp. 763-774, par. 2 (the District Court acknowledged that the authority to alter a road falls under I.C.§§ 40-1310 or 605)).

Predeprivation procedural safeguards would have been of value in preventing the deprivation of Plaintiffs' property. A deprivation of Plaintiffs' property rights is not unpredictable when Defendants are planning to alter a road or when Plaintiffs attended the 4/12/06 NLCHD meeting which was also attended by all necessary parties (R., Vol. V, pp. 864-66, (Chairman Arneberg's response to Interrogatory No. 12 indicating presence of the Wagners at the 4/12/06 meeting); R., Vol. V, pp. 842 (Bob Wagner speaks at the meeting)). It is foreseeable that alterations in the "surface of the roadway" and issuance of access permits across Plaintiffs' land have an adverse effect on Plaintiffs' property rights. It is predictable that deprivations of Plaintiffs' land will occur when Defendants issue driveway access permits trespass on Plaintiffs' land and add width and alter the location of the easement. The Idaho

legislature has given Defendants the broad authorities to alter CCR and to issue encroachment permits. Predeprivation due process is due when the violation is not unauthorized, foreseeable and predictable.

Defendants have never given Plaintiffs notice that their fence was encroaching on the right of way. See I.C.§§40-2317 and 2319, at *Addendum*, p. xix (notice is required for encroachment and fences). Defendants had opportunity to formalize their policies or give Plaintiffs a meaningful opportunity to challenge their inferences, findings, or conclusions at a meaningful time in a meaningful way. Defendant Payne stated that Plaintiffs' fence was within their "right of way" (R., Vol. IV, p. 639, par. 12) and that the cause of the damage to Plaintiffs' fence was that it was in the "right of way" (R., Vol. V, p. 859, Defendant Payne's response to Interrogatory No. 28). Defendant Hansen states that property line issues have nothing to do with the NLCHD (R., Vol. V, p.817, L. 5-6) and that there is an existing road with a 50 foot right of way (R., Vol. V, p.817, L. 15-16). The Defendants made legal conclusions and applied general laws to Plaintiffs' specific situation. See *Idaho Historic Preservation Council, Inc.*, at 651, 654, 8 P.3d 646, at 649 (2000) (the action is judicial if general laws are applied to specific individuals, interests, or situations citing *Cooper v. Board of County Commissioners of Ada County*, 101 Idaho 407, 614 P.2d 947 (1980) (quoting *Fasano v. Board of County Comm'rs*, 507 P.2d 23, 27 (Or, 1973))). The issuance of the first Wagner driveway access permit was unlawful—for a trespass. See *The City of Coeur D' Alene* at, 846, 136 P.3d 310, at 317 (a permit cannot be issued for an unlawful act). Plaintiffs' property right lies in the fee of their land and not in the Wagners' access permit or in Defendants' invalid interpretation of I.C.§40-2312. Further, it was

unlawful whether public rights have been legally established to 50 feet or not. The Highway District does not have title in fee simple to the easement and even if it did the Defendants could not convert Plaintiffs' land to a third party's use. See *Neider v. Shaw*, 138 Idaho 503, 507, 65 P.3d 525, 529 (2003) (even a deeded easement does not give the public the same right to sell or dispose of the same that a private party has to land for which he holds the title in fee simple (citing Idaho Code § 55-309 (2002))).

Plaintiffs sought agency remedy to resolve the issues and the continued onslaughts on their buffer and fence. Although not required to do so under § 1983, it is sometimes held that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. See *American Falls Reservoir Dist. No. 2*, at 869, 154 P.3d 433, at 440. Plaintiffs had right to remedy under the statutory provisions of I.C. §§ 40-203a (see *Addendum*, at p. x)—requesting validation of CCR initiated under the commissioners own resolution[6]—and under 67-8003(3) (see *Addendum*, at p. xxi) (R., Vol. V, pp. 828-837 (Plaintiffs' Requests for Regulatory Takings Analysis filings seeking evaluation of the Defendants' administrative actions). Defendants misrepresented I.C. §§ 40-203a as Plaintiffs' obligation to pay a $750 fee and file a petition for validation (Tr. Vol. I, p. 20, L. 10-17; p. 21, L. 13-22); (R., Vol. V, p. 820, beginning at L. 38 through p. 822, Line 13

[6]Plaintiffs presented evidence to the Defendants on 3/21/07 and requested that the Commissioners validate CCR under their own resolution (R. Vol. V, p. 806, Plaintiffs' letter to the Commissioners prior to the requested time of the agenda ("Whether this can be addressed by a process of deeded easement, highway validation, eminent domain or some other process, we submit it for your consideration")) to determine the legal establishment of the easement (R. Vol. V, pp. 806-814; pp. 816-817 (minutes of NLCHD meeting on 3/21/07).

and p. 823, L. 20 through L. 33) and as a predeprivation process (R. Vol. IV, p. 632, L. 9-15 ("...Idaho Code § 40-203 A provides a predeprivation process...")). Defendants' counsel misrepresented I.C.§ 67-8003(3) as not pertaining to the issues (R. Vol. V, p. 821, L. 20 (Landeck says the filings do not relate to the proceedings). On 9/12/07 Defendants indicated a final decision that they were not going to allow exhaustion of the remedies and gave Plaintiffs the choice to pay a $750 fee for a hearing or to get a lawyer (R., Vol. V, p. 823, L. 31-33 (Landeck said the Halvorsons' first step should be to hire a lawyer; Sherman Clyde said Mr. Halvorson should just hire a lawyer). These issues were brought up in District Court[7] as Plaintiffs initially sought declaratory relief under I.C. §§ 40-203a and 67-8003(3). Plaintiffs asserted that they had a right to private action—they were asking a private question, violation of their protected property rights—not a public one—was the road "public" or private? See *Dopp v. Idaho Commission of Pardons and Parole*, 144 Idaho 402, 406-407, 162 P.3d 781, 785-86 (Ct.App. 2007) (Court of Appeals indicates when a person, as a member of the class of persons the law was enacted to protect may seek action for violations of the statute to assure effectiveness of the statute). Defendants claimed CCR was a "public highway", 50 feet—25 feet from centerline wide. Plaintiffs sought validation of the legally established public rights in the road. The statute/s, I.C§§ 40-203a, 208, and 67-8003(3) were for Plaintiffs benefit. Plaintiffs had a vested right in the statutes. Plaintiffs asserted that Defendants had a duty to validate the easement under their own resolution (I. C.§ 40-203a) to substantiate their claims and/or to

[7] R. Vol. I, pp. 176-224 (Plaintiffs' I.C. § 40-203a motion, affidavit and brief for declaratory judgment); R. Vol. I, pp. 68-164 (Plaintiffs' I.C. § 67-8003(3) motion and brief for declaratory judgment); R., Vol. II, pp. 262-293 (Plaintiffs' motion and brief for reconsideration).

evaluate the issues under I.C.§ 67-8003(3). Defendants' defense of no final decision was frivolous. Payment of the $750 fee requirement is inappropriate as it just adds additional injury to Plaintiffs and initiation under the Commissioners' resolution is required by law. See *Harris v. County of Riverside*, 904 F.2d 497 at 501-503 (plaintiff was required to pay a fee to regain the use of his land of which he had already been deprived of was a concrete injury in and of itself). Plaintiffs asserted that declaratory judgment under I.C.§ 40-203a was proper as Plaintiffs' motion was not advisory; as Plaintiffs' *Complaint* and motion were justiciable. See *Muskrat v. United States*, 219 U.S. 346, 359-363 (1911). Plaintiffs were seeking validation of the legal establishment of CCR, not the constitutionality of I.C.§ 40-2312. There was no multiplicity of cases in the present case. See *Scott v. Agricultural Products Corp, Inc.*, 102 Idaho 147, 149, 627 P.2d 326, 328 (1981). Plaintiffs filed for declaratory relief under their civil case—two separate cases did not exist. The District Court abused its discretion to deny declaratory relief on I.C.§ 40-203a and/or on I.C.§ 67-8003(3) on the basis of judicial economy as the prolonging of the litigation (Tr., Vol. I, p. 48 beginning at L. 19 through p. 50, L. 20 (Defendants' counsel argues an evidentiary hearing is necessary)) and/or search for the facts was unwarranted and as Plaintiffs sought Defendants' liability for due process violations for alleged per se takings. If there was not doubt to the legality of the claimed established rights Defendants could have brought forth motion for summary judgment then and not a year later. If there was doubt, the District Court could have remanded the validation back to the agency. Both matters were reviewable as a matter of agency record under I.C. § 40-208 and the IAPA and therefore appealable as a matter of right under I.A.R. 11(f). See *Homestead*, at 858, 119 P.3d 630, 633-

634. Further Plaintiffs had the private right to assert statutory violations. The second prong of *Williamson Cnty. Planning v. Hamilton Bank*, 473 U.S. 172, 194-197 (1985) that Plaintiffs must seek just compensation is inapplicable as just compensation implies that due process was afforded, whether properly done or not. See *Lingle*, supra. Neither party suggests that due process was afforded, even inadequately (R., Vol. V, p. 821 (9/12/07 NLCHD meeting; Ron Landeck says no proceeding has been before the commissioners). Defendants cannot simply rule by fiat under I.C.§40-2312. Furthermore, without substantial evidence in their records to support their findings, conclusions and decisions on the width, location, use, and/or character of the "surface of the roadway" all Defendants' actions/failures to act are arbitrary and capricious, illegal and/or an abuse of Defendants' discretion. See *Enterprise, Inc. v. Nampa City*, 96 Idaho 734, 536 P.2d 729 (1975) (an action is arbitrary if it was done without a rational basis; if it was done in disregard of the facts and circumstances presented or without adequate determining principles).

In *Armstrong v. U.S.*, 364 U.S.40, at 49 (1960) the US Supreme Court held that the legitimate governmental interest in a taking was to spread the burden to the public as a whole. Defendant Payne expressed Defendants' reason for the CCR alterations since 2005 was for the benefit of the public (R., Vol. IV, p. 637, par. 6 (widened the traveled surface for reasons to improve road safety for increased vehicular travel); not a harmful Plaintiffs' use of their land. The Defendants have offered no rational basis of a legitimate governmental interest to regulate or have shown Plaintiffs' use of their land is unsafe, immoral, unhealthful, or causes a diminution the public's general welfare. Defendants have no legal authority to conclude Plaintiffs' use of

their land creates a nuisance. See I.C. § 22-4504 (*Addendum*, at ii). Defendants' jurisdiction is limited to highways and public rights of way (see I.C. § 40-1310 (1) (*Addendum*, at xvi). At best Defendants' denial of the exhaustion of agency remedies shows deliberate indifference and callous disregard for Plaintiffs' constitutional—5th Amendment (Bill of Rights) as covered by the 14th Amendment.

D. Defendants' claims to regulate the use of Plaintiffs' land as a "right of way" are not supported by the undisputed facts nor do they have any legal merit. Defendants' and the District Court's case law citations do not support such claims. Defendants' and the District Court's theory that *Meservey* and its progeny [*Bentel v. Bannock County*, 104 Idaho 130, 656 P.2d 1383 (1983)] provide a rational basis for an unconstitutional expansion of the width or alteration in the location of a prescriptive easement is without legal merit. See *Argosy Trust Through Its Trustee, Alan Andrews*, at 573, 114 P.3d 128, at 131 (There is a difference between the enlargement in the use permitted by the owner of the dominant estate and the enlargement of the physical dimensions of the easement). In *Bentel* the Bentels, conceded the public rights in the "surface of the roadway"—there is no mention of a 50 foot "right of way". The Idaho Supreme Court does not conflate use with width or location and held that the installation of sewage disposal pipelines within an existing roadway does not expand the burden to the servient estate and that such increased use could fill the entire prescriptive easement. The holdings of *Meservey* do not suggest anything comparable to a conflated notion that the alterations in the location and/or width are permissible expansions of the "uses" of an unrecorded prescriptive easement. In *Meservey* the Idaho Supreme Court cited *Whitesides v. Green*, 13 Utah 341, 44

Pac. 1032, with the contemplation of the question how the width of a public highway by prescription is determined.

> [T]he width must be determined from a consideration of the facts and circumstances peculiar to the case, because in such event the court cannot say that any highway is of a certain width "in the absence of statutory provisions.

Id, at 93 P.780, 784 (1908). The Supreme Court clearly did not see the predecessor to *2312* as demanding a specified width for a prescriptive highway. The Idaho Supreme Court held in *Meservey* that the road overseer could not enforce road encroachment statute for a prescriptive right of way which had not been laid out and recorded, *Id.*, at 146-147, 93 P. 780, 782-783.

The District Court also failed to note the obvious differences of the present case with its case citation of *ACHD*. That case differs from the present case in several significant ways. In *ACHD*. the disruptor of the status quo was the abutting landowner who built a fence in a part of an existing alleyway which had been dedicated to the public in 1906 to which the **users** had extended the width of to avoid misplaced power poles in 1957. This new usage by the public to avoid the power poles was greater than five years in duration—the users had acquired the land by time and use. In the present case, the disruptors of the status quo, the Defendants, owe Plaintiffs due process for lands not yet acquired by the users and not previously laid out and recorded.

Further the District Court failed to comprehend that *District of Columbia v. Robinson*, 180 U.S. 92[8]. follows the same well established implied course as I.C.§ 40-202(3) (R., Vol. IV,

[8] District of Columbia and I.C. § 40-202 follow the same plan: Harewood Road was a prescriptive claim as it had not been laid out and recorded; therefore the width of the easement equaled the width of the road and the determination of the width was a matter properly before the jury as a matter of adverse use of the users; the Levy was denied its defense of "good faith for its failure to survey. There are differences in the prescriptive period and the legislature required the

pp. 766-67 (District Court suggests that the width of CCR is determined by something other than (i) what has been laid out or located and recorded or (ii) been used and maintained for a given period of time; and that something other is to be factually determined as in a prescriptive or adverse use claim).

E. CCR has not been legally established as a "public" highway and Plaintiffs have a right to challenge the truthfulness of Defendants' affidavits. Public status of a roadway can be established by proof of regular maintenance and extensive public use. See *ACHD,* at 365-66,179 P.3d 323, 328-29. Defendants are not permitted to validate public rights in a highway under their own resolution except under certain circumstances. See *Galvin v. Canyon County High. Dist. No. 4,* 134 Idaho 576, 579, 6 P.3d 826, 829 (2000) ("Section 40-203A may only be used to validate an existing highway or public right of way about which there is some kind of doubt. It does not allow for the creation of new public rights"). Placing CCR on the District's map does not adjudicate public status in CCR. See *Homestead,* at 862, 119 P.3d 630, at 637 (Justice Eismann specially concurring, added that public rights are not legally established under I. C. § 40-202 and that evidence is required in the agency record to place a prescriptive highway on the map). The legal "public" status of CCR is a legal conclusion based on factual findings of substantial evidence in the agency record. See I.C.§40-203a(2)(3) (*Addendum*, at x). In summary judgment affidavits cannot be presented in bad faith—simply to delay and harass. See

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Levy to lay and record all highways in the District to determine the proper location and width; whereas in Idaho the determination of the width is left to the discretion of the authorities in charge of maintenance, and a statutory width may be acquired if the authorities choose to do so, I.C. § 40-605.

I.R.C.P. Rule 56(g). See *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978) (right to challenge the truthfulness of affidavits rests within the 14th Amendment).

Defendants brought forth affidavits in bad faith indicating that CCR had been legally established as a public road but brought forth no agency record to support their conclusory statements. The Defendants under oath state that CCR is a public road (R., Vol. VII, pp. 1458, beginning at L. 19 to p. 1459, L. 7 (District Court notes affidavits of Arneberg and Carscallen)); see also affidavits of Dan Payne (R., Vol. IV, p. 638, pars. 10 and 11 (describes CCR as a public road); R., Vol. VI, p. 1210, par. 3 (describes CCR as a public road); see also Chairman Arneberg's response to Plaintiffs' interrogatories to describe the legal establishment of CCR (R., Vol. V, p. 861, Interrogatory No. 4 (CCR is a public road, 50 feet-25 feet from centerline wide)); and Defendants' counsel at oral argument (Tr., p. 119, L. 5-8 (Defendants' counsel testifies that Dan Payne states CCR has been a public road since 1974)). The District Court erred by failing to ascertain that CCR was legally dedicated to the public and was properly put on the District's map, by not reviewing the agency record. The District Court erred when it stated that CCR was a "public" road based on Plaintiffs' failure to dispute it as it holds no value to the legal establishment of CCR.

2. The District Court erred in denying Plaintiffs' interlocutory motions for partial summary judgments on the basis that the width of CCR needed to be factually determined. The District Court's denials of declaratory relief (R., Vol. II, pp. 251-59; R., Vol. II, pp. 307-12)) and/or relief as a matter of law (R., Vol. IV, pp. 763-72) were without legal merit as Plaintiffs have a property right protected by the 14th Amendment. The factual determination of the width

of CCR is not dispositive of Plaintiffs' due process (procedural and/or substantive) and/or equal protection claims as Defendants had not laid out or located and recorded CCR or a "right of way" for CCR and/or CCR had not been officially dedicated as public. See *Evers v. County of Custer*, 745 F.2d 1196, 1201 (9th Cir. 1984) ("The issue is whether the County may make a determination that those requirements have been met and enforce its conclusion that the road is public without giving Evers prior notice and an opportunity to present argument and evidence that the road was her private property"). See *Fuentes v. Shevin*, 407 U.S. 67, 80-93 (1972) (interest of chattels was sufficient for them to invoke procedural due process safeguards).

3. Defendants are estopped from asserting and disputing the same facts or evidence.

In *Floyd v. Bd. of Comm'rs of Bonneville County*, 137 Idaho 718, 726, 52 P.3d 863, 871 (2002) the Idaho Supreme Court indicates that quasi estoppel prevents a party from asserting a right, to the detriment of another party, which is inconsistent with a position previously taken. Defendants are estopped from claiming a rational basis of the issuance of the first Wagner driveway access permit based on the accuracy of the deed description of 699 feet of road frontage and then denying the accuracy of the deed as being significant of movement of CCR in the deed's description of the intersection points of the east and west property lines of the 3+/- acre parcel with CCR. The discrepancies (R, Vol. V, p. 807-812 (Plaintiffs' letter describing the shift in the 3+/- acre parcel) between the deed disruption and the Rimrock Survey [and as Amended] Vol. VI, pp. 1155 (survey)-1156 (amended survey)) are significant—the 3+/- acre parcel had lost 200 feet of road frontage and the parcel itself had geographically shifted 50 feet to the north. Further Defendants are estopped from asserting that CCR is "a public highway" for

benefit of their specious claim of a 50 foot right of way mandated for CCR and then denying that CCR has ever been officially dedicated to the public interest for denying the permission given for the 1996 alterations to CCR by Ed Swanson. Further Defendants are estopped from claiming prescriptive acquisition to lands that Plaintiffs were denied declaratory judgment on as being unused—"no final decision" and/or "advisory"—implying that they were regulating the use of Plaintiffs' undeveloped land next to the "surface of the roadway".

4. Defendants have intentionally destroyed evidence of the legal location and width of CCR and should be sanctioned for spoliation of the evidence. In *Courtney v. Big "O" Tires, Inc.*, 139 Idaho 821, 87 P 3d. 930 (2003) the Idaho Supreme Court explained the ramifications of intentional destruction of evidence. Thus, the doctrine of spoliation provides that when a party with a duty to preserve evidence intentionally destroys it, an inference arises that the destroyed evidence was unfavorable to that party. *Id.*, at 824, 87 P 3d. 930, at 933. Spoliation is a rule of evidence applicable at the discretion of the trial court. *Id.* CCR has been altered in location and width in and since 2005. The Defendants have a duty of to purchase necessary right of way (see I.C.§ 40-604) (1)and (7) (*Addendum,* at p xiv)); a duty to ensure that no private property is taken (see I.C. § 40-605) (*Addendum*, at p xv)); a duty to accurate records of altering highways (I.C.§ 40-608) (*Addendum*, at p xvi)); a duty to convey and record (I.C.§ 40-2302) (*Addendum*, at p xviii)); and a duty to maintain a valid jurisdiction (I.C.§§1310 (*Addendum*, at p xvi)), and 203a (*Addendum*, at p x)) and the burden of proof that they are within their easement (I.C.§ 40-202) (*Addendum*, at p iv)). The centerline of the easement is the property line between the Wagners and Plaintiffs. Trespass is an intentional tort. The question of intent here being a matter of

reckless action or a high degree of probability of harm—an objective standard of constructive knowledge as opposed to a subjective state of mind. The only evidence of an unrecorded prescriptive easement is its "as is where is" precedent condition for 5 years. The District Court erred by denying Plaintiffs' motion for spoliation of evidence.

5. Plaintiffs have a right to amend their complaint as the Defendants continued their maintenance and improvement activity and repeatedly damaged Plaintiffs' fence every time Plaintiffs repaired it. Without declaratory relief or relief as a matter of law Plaintiffs are powerless to stop Defendants' continued invidious onslaughts on their property. The District Court was aware of the continuation of Defendants' activities and made no assessments as to deficiencies in Plaintiffs' *Complaint* save for the need to factually determine the width of the easement—the burden of proof which rested upon the Defendants. I.R.C.P Rule 1 in part reads, "These rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding". In *Foman v. Davis* 371 U.S. 178, 181-182 (1962) the US Supreme Court quoted *Conley v. Gibson*, 355 U. S. 41, at 48, "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome, and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." The leave sought should, as the rules require, be freely given. *Id.* Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules. *Id.* Since filing of their *Complaint* the NLCHD has continued to advance its

improvement activity and has undermined and damaged trees at the edge of the road and pushed more rock into Plaintiffs' buffer and needlessly piled snow on the fence in the winter of 2008-09. The District Court abused its discretion in denying Plaintiff leave to amend their complaint.

6. The District Court erred in granting Defendants attorney fees and costs. A final decision or order of the district court on judicial review of an agency decision is appealable as a matter of right. See I.A.R. Rule 11(f). Plaintiffs sought agency remedy and were denied on a claim of a public right of way of 50 feet. The District Court denied Plaintiffs declaratory relief in lieu of a factual determination on the Defendants' claims of "no final decision" and on a determination that Plaintiffs sought an advisory declaration of their rights. Defendants' counsel could have easily asked the State's Attorney General for advice on how to interpret I.C.§40-2312. The Constitution is intended to preserve practical and substantial rights, not to maintain theories. *United States v.Dickinson*, 331 U. S. 745, 748 (1947). Further, the right to be heard does not depend upon an advance showing that one will surely prevail at the hearing", *Fuentes*, at 86. Defendants' denial of being the direct, legal, proximate, and substantial cause of the mess on CCR and their denial that issuing the first Wagner driveway access permit was not within the scope of their responsibility with the constructive knowledge that they had altered the road and that they had not laid out and recorded a "right of way" completely under the auspices of the NLCHD attorney is juxtaposed to Plaintiffs right to peacefully enjoy their land.

> "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

Board of Reagents of State Colleges, at 574. Plaintiffs have taken no physical actions to protect their property interests and have had to continually repair the repeated damages to their fence.

Plaintiffs have relied on the promises of one of the cornerstones of U.S. Constitution, unencumbered by the legitimate questions of exigent circumstances or balances of strained individual and social rights and have supported their claims at every step with legal authority. Nothing in Plaintiffs' actions has been frivolous, even if the appellate courts say I.C.§ 40-2312 adjudicates a 50 foot public "right of way". The matter has been reduced to a statutory question and Plaintiffs maintain a right of appeal. See *Herb Hallman Chevrolet, Inc. v. Nash-Holmes*, 169 F.3d 636, 645 (9th Cir. 1999) (an action becomes frivolous, for purpose of attorney fees award under § 1988, when the result appears obvious or the arguments are wholly without merit). See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (a defendant can recover attorney's fees if the plaintiff violates the § 1988 standard at any point during the litigation, not just at its inception). Plaintiffs' loss at the summary judgment stage does not render Plaintiffs' case per se frivolous, unreasonable, or without foundation for the purpose of attorney's fees under § 1988. *Id.* At a bare minimum Plaintiffs have a nominal case under § 1983. See *Carey*, at 266-267. Further the Defendants claims for attorney fees were exorbitant and there was no indication that the Highway District had paid the fees the counsel had claimed. 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). See *Medical Recovery Services, LLC v. Jones*, 145 Idaho 106, 195 P.3d 795, 798-99 (2007).

7. The District Court had no subject matter jurisdiction, in the alternative exceeded its subject matter jurisdiction, to rule on Defendants' motion for summary judgment and vacate the jury trial. Plaintiffs' right to a jury trial is inviolate. See Idaho Const. art I, § 7. See

ACHD, at 179 P.3d 323, 332 (citing I.R.C.P. 38(a)). As the question of subject matter jurisdiction may be brought up at any time, Plaintiffs do so now and assert that the District Court lacked subject matter jurisdiction to hear Defendants' motion for summary judgment without reviewing the agency record for the fulfillment of the legal requirements of the Defendants' jurisdictional claims. See *State of Idaho v. Armstrong*, 146 Idaho 372, 374-77, 195 P.3d 731, 733-36 (Crt. App. 2008) (defense of subject matter jurisdiction is never waived; judgments in lack of subject matter jurisdiction are void; judges are liable for damages). Parties cannot consent to the court's assumption of jurisdiction through conduct or acquiescence nor be estopped from asserting its absence. *Fairway Development Co. v. Bannock County*, 119 Idaho 121, 125, 804 P.2d 294, 298 (1990)). Failure to exhaust agency remedies triggers the District Court's subject matter jurisdiction and it appears that the trigger is the importance and lack of agency record on which to rule. The matters Plaintiffs sought resolution of are largely, if not entirely, matters of the agency's and the Defendants' specialized activities. See *Owsley v. Idaho Industrial Commission*, 141 Idaho 129, 135, 106 P.3d 455, 461 (2005) (the district court does not acquire subject matter jurisdiction until all the administrative remedies have been exhausted). See *Regan v. Kootenai County*, 140 Idaho 721, 726, 100 P.3d 615, 620 (October, 2004) citing *Fairway Dev. Co. v. Bannock County,* 119 Idaho 121, at 125, 804 P.2d 294, at 298 (1990) ("the administrative remedy is as likely as the judicial remedy to provide the wanted relief")). Further, I.C.§40-208 restricts the review of the Defendants' jurisdiction to the agency record. The District Court has no subject matter jurisdiction on which to rule on a record initially made in the District Court and doing so also violates Plaintiffs due process rights as the agency record is the

focal point of the Defendants' due process violations. See *Id.*, at 725, 100 P.3d 615, at 619 ("the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court", citing *Campt* [sic] *v. Pitts*, 411 U.S. 138, 142 (1973). The issues involved simply confirm the Idaho Supreme Court's concern with the agency record, exhaustion of agency remedies, and the Court's subject matter jurisdiction and due process concerns. See *Idaho Historic Preservation Council, Inc.* at, 654 8 P.3d 646, 649 (failing to confine its decision to record produced at the public hearing violates due process).

The Idaho Court addressed a similar case in *Castrigno v. McQuade*, 141 Idaho 93, 106 P.3d 419, (2005), citing *Ware v. Idaho State Tax Comm'n,* 98 Idaho 477, at 483 (1977). Here it was not a matter of exhaustion, rather a factual difference. In *Ware*, as in the present case, the plaintiffs sought to deal with the mechanics of the law and the defendants overtly misrepresented it rendering exhaustion as a "futile and useless act". Id., at 97, 106 P.3d419, at 423. However the factual difference exists, the result is the same here as the implication of subject matter jurisdiction is still absent.

Whether CCR is a "public highway", "established by user", with "a minimum 50 foot width mandated by Idaho law" is a matter of the commissioners decisions under Idaho law (I.C.§§ 40-1310, 605, and 202), is a matter of exhaustion of agency remedies (I.C.§§ 40-203a and 67-8003(3)), or a matter of Plaintiffs' *Complaint* (property right under § 1983); all are logical subsets of the District Court's subject matter jurisdiction and all circumscribed by the subset of the agency record. The subject matter of the Defendants' motion for summary judgment lies outside of that circumscription. Defendants' assertion under I.C.§40-2312 as a

request for summary judgment is simply a veiled attempt to get in effect an "advisory" declaratory ruling. The burden of proof of the validity of the legally established public rights in CCR as well as the burden of proof that the court has subject matter jurisdiction rests with Defendants as well as with the District Court.

CONCLUSION: Defendants Motion for Summary Judgment must fail. Public rights in CCR are limited to the acquisition of the users of the road to be established by a jury to a standard of the preponderance of the evidence. The authorities in charge of maintenance and improvement have unlawfully taken Plaintiffs' land. The limits of Defendants' jurisdiction under I.C. §40-202 are well established and easily understood by a reasonable person. Defendants have no rational basis of a legitimate governmental interest to deny Plaintiffs due process and/or equal treatment of the law. Defendants' claim that I.C.§ 40-2312 adjudicates public rights to a 50 foot "right of way" without due process of law has no legal merit, or factual foundation and is frivolous. The relief sought by Plaintiffs is as follows: (a) to reverse the District Court's ruling granting summary judgment to the Defendants; (b) to enjoin the District Court from denying Plaintiffs declaratory relief in all matters of Plaintiffs' constitutional rights of due process and equal protection of the law (see § 1983); (c) to grant partial summary judgment to Plaintiffs under 42 USC § 1983 as Defendants are liable for damages in their individual and official capacities as to be determined by a jury; (d) to provide Plaintiffs with a venue of fair and impartial tribunal if any remand to a lower court is necessary (e) to grant Plaintiffs right to amend their complaint with additional damages and additional allegations of abuse of process by Defendants and Defendants' counsel; (f) to enjoin Defendants from

enforcing their invalid policies/customs actions/failures to act resulting in the improper interferences with Plaintiffs' property rights and/or an abutting landowner's property rights; (g) return of all Plaintiffs' land wrongfully taken and/or voiding of all actions resulting in the invasions of Plaintiffs' land; (h) to award full common law and/or compensatory damages to be determined to Plaintiffs for all damages to Plaintiffs' land and for the time that the Defendants were in wrongful possession of Plaintiffs' land and/or Plaintiffs were without the peaceful enjoyment of their land and without the right to restrict others from their land; and (i) to award Plaintiffs any and all attorney fees and costs that have been incurred or shall be incurred in the full settlement of this case.

RESPECTFULLY SUBMITED, on this 29th day of December, 2009 Don Halvorson

Don Halvorson, Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of December, 2009, I caused 2 true and correct copies of this document to be served on RONALD J. LANDECK, 693 Styner Avenue, Suite 9, P.O. Box 9344, Moscow, ID 83843 by hand delivery Don Halvorson

Don Halvorson, Pro Se

IN THE SUPREME COURT OF THE STATE OF IDAHO

DON HALVORSON, Plaintiff-Appellant and CHARLOTTE HALVORSON, Plaintiff 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-Respondents	)	Supreme Court Docket No. 36825-2009 Latah County District Court No. 2008-180

APPELLANT'S BRIEF ADDENDUM

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I.C. § 22-4504.LOCAL ORDINANCES. No city, county, taxing district or other political subdivision of this state shall adopt any ordinance or resolution that declares any agricultural operation operated in accordance with generally recognized agricultural practices to be a

nuisance nor shall any zoning ordinance that forces the closure of any such agricultural operation be adopted. Zoning and nuisance ordinances shall not apply to agricultural operations that were established outside the corporate limits of a municipality and then were incorporated into the municipality by annexation. The county planning and zoning authority may adopt a nuisance waiver procedure to be recorded with the county recorder or appropriate county recording authority pursuant to residential divisions of property.

I.C.§40-109.DEFINITIONS -- H.(5)"Highways" mean roads, streets, alleys and bridges laid out or established for the public or dedicated or abandoned to the public. Highways shall include necessary culverts, sluices, drains, ditches, waterways, embankments, retaining walls, bridges, tunnels, grade separation structures, roadside improvements, adjacent lands or interests lawfully acquired, pedestrian facilities, and any other structures, works or fixtures incidental to the preservation or improvement of the highways. Roads laid out and recorded as highways, by order of a board of commissioners, and all roads used as such for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of a board of commissioners, are highways.

I.C.§40-117.DEFINITIONS -- P. (5)"Public highways" means all highways open to public use in the state, whether maintained by the state or by any county, highway district, city, or other political subdivision. (Also see "Highways," section 40-109, Idaho Code).

(6)"Public right-of-way" means a right-of-way open to the public and under the jurisdiction of a public highway agency, where the public highway agency has no obligation to construct or maintain, but may expend funds for the maintenance of, said public right-of-way or post traffic signs for vehicular traffic on said public right-of-way. In addition, a public right-of-way includes a right-of-way which was originally intended for development as a highway and was accepted on behalf of the public by deed of purchase, fee simple title, authorized easement, eminent domain, by plat, prescriptive use, or abandonment of a highway pursuant to section 40-203, Idaho Code, but shall not include federal land rights-of-way, as provided in section 40-204A, Idaho Code, that resulted from the creation of a facility for the transmission of water. Public rights-of-way shall not be considered improved highways for the apportionment of funds from the highway distribution account.

I.C.§40-202. DESIGNATION OF HIGHWAYS AND PUBLIC RIGHTS-OF-WAY. (1) The initial selection of the county highway system and highway district system may be accomplished in the following manner:

(a) The board of county or highway district commissioners shall cause a map to be prepared showing the general location of each highway and public right-of-way in their jurisdiction, and the commissioners shall cause notice to be given of intention to adopt the map as the official map of that system, and shall specify the time and place at which all interested persons may be heard.

(b) After the hearing, the commissioners shall adopt the map, with any changes or revisions considered by them to be advisable in the publicinterest, as the official map of the respective highway system.

(2) If a county or highway district acquires an interest in real property for highway or public right-of-way purposes, the respective commissioners shall:

(a) Cause any order or resolution enacted, and deed or other document establishing an interest in the property for their highway system purposes to be recorded in the county records; or

(b) Cause the official map of the county or highway district system to be amended as affected by the acceptance of the highway or public right-of-way.

Provided, however, a county with highway jurisdiction or highway district may hold title to an interest in real property for public right-of-way purposes without incurring an obligation to construct or maintain a highway within the right-of-way until the county or highway district determines that the necessities of public travel justify opening a highway within the right-of-way. The lack of an opening shall not constitute an abandonment, and mere use by the public shall not constitute an opening of the public right-of-way.

(3) Highways laid out, recorded and opened as described in subsection (2)of this section, by order of a board of commissioners, and all highways used for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of a board of commissioners, are highways. If a highway created in accordance with the provisions of this subsection is not opened as described in subsection (2) ofthis section, there shall be no duty to maintain that highway, nor shall there be any liability for any injury or

damage for failure to maintain it or any highway signs, until the highway is designated as a part of the county or highway district system and opened to public travel as a highway.

(4) When a public right-of-way is created in accordance with the provisions of subsection (2) of this section, or section 40-203 or 40-203A, Idaho Code, there shall be no duty to maintain that public right-of-way, nor shall there be any liability for any injury or damage for failure to maintain it or any highway signs.

(5) Nothing in this section shall limit the power of any board of commissioners to subsequently include or exclude any highway or public right-of-way from the county or highway district system.

(6) By July 1, 2005, and every five (5) years thereafter, the board of county or highway district commissioners shall have published in map form and made readily available a map showing the general location of all public rights-of-way under its jurisdiction. Any board of county or highway district commissioners may be granted an extension of time with approval of the legislature by adoption of a concurrent resolution.

(7) Nothing in this section or in any designation of the general location of a highway or public right-of-way shall authorize the public highway agency to assert or claim rights superior to or in conflict with any rights-of-way that resulted from the creation of a facility for the transmission of water which existed before the designation of the location of a highway or public right-of-way.

I.C.§40-203.ABANDONMENT AND VACATION OF COUNTY AND HIGHWAY DISTRICT SYSTEM HIGHWAYS OR PUBLIC RIGHTS-OF-WAY. (1) A board of county or

highway district commissioners, whichever shall have jurisdiction of the highway system, shall use the following procedure to abandon and vacate any highway or public right-of-way in the county or highway district system including those which furnish public access to state and federal public lands and waters:

(a) The commissioners may by resolution declare its intention to abandon and vacate any highway or public right-of-way considered no longer to be in the public interest.

(b) Any resident, or property holder, within a county or highway district system including the state of Idaho, any of its subdivisions, or any agency of the federal government may petition the respective commissioners for abandonment and vacation of any highway or public right-of-way within their highway system. The petitioner shall pay a reasonable fee as determined by the commissioners to cover the cost of the proceedings.

(c) The commissioners shall establish a hearing date or dates on the proposed abandonment and vacation.

(d) The commissioners shall prepare a public notice stating their intention to hold a public hearing to consider the proposed abandonment and vacation of a highway or public right-of-way which shall be made available to the public not later than thirty (30) days prior to any hearing and mailed to any person requesting a copy not more than three (3) working days after any such request.

(e) At least thirty (30) days prior to any hearing scheduled by the commissioners to consider abandonment and vacation of any highway or public right-of-way, the commissioners shall mail

notice by United States mail to known owners and operators of an underground facility, as defined in section 55-2202, Idaho Code, that lies within the highway or public right-of-way.

(f) At least thirty (30) days prior to any hearing scheduled by the commissioners to consider abandonment and vacation of any highway or public right-of-way, the commissioners shall mail notice to owners of record of land abutting the portion of the highway or public right-of-way proposed to be abandoned and vacated at their addresses as shown on the county assessor's tax rolls and shall publish notice of the hearing at least two (2) times if in a weekly newspaper or three (3) times if in a daily newspaper, the last notice to be published at least five (5) days and not more than twenty-one (21) days before the hearing.

(g) At the hearing, the commissioners shall accept all information relating to the proceedings. Any person, including the state of Idaho or any of its subdivisions, or any agency of the federal government, may appear and give testimony for or against abandonment.

(h) After completion of the proceedings and consideration of all related information, the commissioners shall decide whether the abandonment and vacation of the highway or public right-of-way is in the public interest of the highway jurisdiction affected by the abandonment or vacation. The decision whether or not to abandon and vacate the highway or public right-of-way shall be written and shall be supported by findings of fact and conclusions of law.

(i) If the commissioners determine that a highway or public right-of-way parcel to be abandoned and vacated in accordance with the provisions of this section has a fair market value of twenty-five hundred dollars ($2,500) or more, a charge may be imposed upon the acquiring entity, not in excess of the fair market value of the parcel, as a condition of the abandonment and vacation;

provided, however, no such charge shall be imposed on the landowner who originally dedicated such parcel to the public for use as a highway or public right-of-way; and provided further, that if the highway or public right-of-way was originally a federal land right-of-way, said highway or public right-of-way shall revert to a federal land right-of-way.

(j) The commissioners shall cause any order or resolution to be recorded in the county records and the official map of the highway system to be amended as affected by the abandonment and vacation.

(k) From any such decision, a resident or property holder within the county or highway district system, including the state of Idaho or any of its subdivisions or any agency of the federal government, may appeal to the district court of the county in which the highway or public right-of-way is located pursuant to section 40-208, Idaho Code.

(2) No highway or public right-of-way or parts thereof shall be abandoned and vacated so as to leave any real property adjoining the highway or public right-of-way without access to an established highway or public right-of-way.

(3) In the event of abandonment and vacation, rights-of-way or easements may be reserved for the continued use of existing sewer, gas, water, or similar pipelines and appurtenances, or other underground facilities as defined in section 55-2202, Idaho Code, for ditches or canals and appurtenances, and for electric, telephone and similar lines and appurtenances.

(4) A highway abandoned and vacated under the provisions of this section may be reclassified as a public right-of-way.

(5) Until abandonment is authorized by the commissioners, public use of the highway or public right-of-way may not be restricted or impeded by encroachment or installation of any obstruction restricting public use, or by the installation of signs or notices that might tend to restrict or prohibit public use. Any person violating the provisions of this subsection shall be guilty of a misdemeanor.

(6) When a county or highway district desires the abandonment or vacation of any highway, public street or public right-of-way which was accepted as part of a platted subdivision said abandonment or vacation shall be accomplished pursuant to the provisions of chapter 13, title 50, Idaho Code.

I.C.§40-203a.VALIDATION OF COUNTY OR HIGHWAY DISTRICT SYSTEM HIGHWAY OR PUBLIC RIGHT-OF-WAY.(1) Any resident or property holder within a county or highway district system, including the state of Idaho or any of its subdivisions, or any agency of the federal government, may petition the board of county or highway district commissioners, whichever shall have jurisdiction of the highway system, to initiate public proceedings to validate a highway or public right-of-way, including those which furnish public access to state and federal public lands and waters, provided that the petitioner shall pay a reasonable fee as determined by the commissioners to cover the cost of the proceedings, or the commissioners may initiate validation proceedings on their own resolution, if any of the following conditions exist:
(a) If, through omission or defect, doubt exists as to the legal establishment or evidence of establishment of a highway or public right-of-way;

(b) If the location of the highway or public right-of-way cannot be accurately determined due to numerous alterations of the highway or public right-of-way, a defective survey of the highway, public right-of-way or adjacent property, or loss or destruction of the original survey of the highways or public rights-of-way; or

(c) If the highway or public right-of-way as traveled and used does not generally conform to the location of a highway or public right-of-way described on the official highway system map or in the public records.

(2) If proceedings for validation of a highway or public right-of-way are initiated, the commissioners shall follow the procedure set forth in section 40-203, Idaho Code, and shall:

(a) If the commissioners determine it is necessary, cause the highway or public right-of-way to be surveyed;

(b) Cause a report to be prepared, including consideration of any survey and any other information required by the commissioners;

(c) Establish a hearing date on the proceedings for validation;

(d) Cause notice of the proceedings to be provided in the same manner as for abandonment and vacation proceedings; and

(e) At the hearing, the commissioners shall consider all information relating to the proceedings and shall accept testimony from persons having an interest in the proposed validation.

(3) Upon completion of the proceedings, the commissioners shall determine whether validation of the highway or public right-of-way is in the public interest and shall enter an order validating the highway or public right-of-way as public or declaring it not to be public.

(4) From any such decision, any resident or property holder within a county or highway district system, including the state of Idaho or any of its subdivisions, or any agency of the federal government, may appeal to the district court of the county in which the highway or public right-of-way is located pursuant to section 40-208, Idaho Code.

(5) When a board of commissioners validates a highway or public right-of-way, it shall cause the order validating the highway or public right-of-way, and if surveyed, cause the survey to be recorded in the county records and shall amend the official highway system map of the respective county or highway district.

(6) The commissioners shall proceed to determine and provide just compensation for the removal of any structure that, prior to creation of the highway or public right-of-way, encroached upon a highway or public right-of-way that is the subject of a validation proceeding, or if such is not practical, the commissioners may acquire property to alter the highway or public right-of-way being validated.

(7) This section does not apply to the validation of any highway, public street or public right-of-way which is to be accepted as part of a platted subdivision pursuant to chapter 13, title 50, Idaho Code.

I.C.§40-208.JUDICIAL REVIEW (1) Any resident or property holder within the county or highway district system, including the state of Idaho or any of its subdivisions, or any agency of the federal government, who is aggrieved by a final decision of a board of county or highway

district commissioners in an abandonment and vacation or validation proceeding is entitled to judicial review under the provisions of this section.

(2) Proceedings for review are instituted by filing a petition in the district court of the county in which the commissioners have jurisdiction over the highway or public right of way within twenty-eight (28) days after the filing of the final decision of the commissioners or, if a rehearing is requested, within twenty-eight (28) days after the decision thereon.

(3) The filing of the petition does not itself stay enforcement of the commissioners' decision. The reviewing court may order a stay upon appropriate terms.

(4) Within thirty (30) days after the service of the petition, or within further time allowed by the court, the commissioners shall transmit to the reviewing court the original, or a certified copy, of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be ordered by the court to pay for additional costs. The court may require subsequent corrections to the record and may also require or permit additions to the record.

(5) If, before the date set for hearing, application is made to the court for leave to present additional information, and it is shown to the satisfaction of the court that the additional information is material and that there were good reasons for failure to present it in the proceeding before the commissioners, the court may order that the additional information shall be presented to the commissioners upon conditions determined by the court. The commissioners may modify their findings and decisions by reason of the additional information and shall file that information and any modifications, new findings, or decisions with the reviewing court.

(6) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the commissioners, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(7) The court shall not substitute its judgment for that of the commissioners as to the weight of the information on questions of fact. The court may affirm the decision of the commissioners or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the commissioners' findings, inferences, conclusions or decisions are:

(a) In violation of constitutional or statutory provisions;

(b) In excess of the statutory authority of the commissioners;

(c) Made upon unlawful procedure;

(d) Affected by other error of law;

(e) Clearly erroneous in view of the reliable, probative and substantial information on the whole record; or

(f) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

I.C.§40-604 DUTIES AND POWERS OF COMMISSIONERS. Commissioners shall:

(1) Exercise general supervision over all highways in the county highway system, including their location, design, construction, reconstruction, repair and maintenance, and develop general policies regarding highway matters.

(2) Cause to be surveyed, viewed, laid out, recorded, opened and worked, any highways or public rights-of-way as are necessary for public convenience under the provisions of sections 40-202 and 40-203A, Idaho Code.

(3) Cause to be recorded all highways and public rights-of-way within their highway system...

(7) Contract, purchase, or otherwise acquire the right-of-way over private property for the use of county highways and for this purpose may institute proceedings under the code of civil procedure...

[(13)](14) By July 1, 2000, and every five (5) years thereafter, the commissioners shall have published in map form and made readily available the location of all public rights-of-way under their jurisdiction. The commissioners of a district may be granted an extension of time with approval of the legislature by adoption of a concurrent resolution.

I.C.§40-605 LAYING OUT OF NEW HIGHWAYS—WIDENING, CHANGING, OR STRAIGHTENING EXISTING HIGHWAYS—PURCHASE OF RIGHTS-OF-WAY BY AGREEMENT. Commissioners may lay out new highways within the county as they determine to be necessary. The right-of-way of any highway shall not be less than fifty (50) feet wide, except in exceptional cases. Commissioners may also change the width or location or straighten

lines of any highway under their jurisdiction. If, in the laying out, widening, changing or straightening of any highway it shall become necessary to take private property, the commissioners or their director of highways shall cause a survey of the proposed highway to be made, together with an accurate description of the lands required. The commissioners shall endeavor to agree with each owner for the purchase of a right-of-way over his land included within the description. If they are able to agree with the owner, the commissioners may purchase the land out of the county highway fund under their control, and the land shall then be conveyed to the county for the use and purpose of highways.

I.C.§40-608 RECORD OF HIGHWAY PROCEEDINGS. The clerk of the commissioners shall keep a book in which must be recorded separately all proceedings of the commissioners relative to each highway division, including orders laying out, altering, and opening highways; and in a separate book a description of each highway division, its deputy directors of highways, its highways, contracts, and all other matters pertaining to them.

I.C. § 40-1310. POWERS AND DUTIES OF HIGHWAY DISTRICT COMMISSIONERS. (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.

(2) The highway district shall also have the right to acquire either by purchase, or other legal means, all lands and other property necessary for the construction, use, maintenance, repair and improvement of highways in their system. The highway district may change the width or location, or straighten lines of any highway in their system, and if in the constructing, laying out, widening, changing, or straightening of any highways, it shall become necessary to take private property, the district director of highways, with the consent and on order of the highway district commissioners, shall cause a survey of the proposed highway to be made, together with an accurate description of the lands required. He shall endeavor to agree with each owner of property for the purchase of a right-of-way over the lands included within the description. If the

director is able to agree with the owner of the lands, the highway district commissioners may purchase the land and pay for it out of the funds of the highway district, and the lands purchased shall then be conveyed to the highway district for the use and purpose of highways.

(3) Whenever the director of highways shall be unable to agree with any person for the purchase of land, or that person shall be unknown or a nonresident of the county in which the highway district is situated, or a minor, or an insane or incompetent person, the director shall have the right, subject to the order of the highway district commissioners, to begin action in the name of the highway district in the district court of the county in which the district is situated, to condemn the land necessary for the right-of-way for the highway, under the provisions of chapter 7, title 7, Idaho Code. An order of the highway district commissioners entered upon its minutes that the land sought to be condemned is necessary for a public highway and public use shall be prima facie evidence of the fact.

I.C.§40-2302 PUBLIC ACQUIRES FEE SIMPLE TITLE—RECORD AND DEDICATION OF HIGHWAYS. (1) By taking or accepting land for a highway, the public acquires the fee simple title to the property. The person or persons having jurisdiction of the highway may take or accept lesser estate as they may deem requisite for their purposes.

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

(3) No highway dedicated by the owner to the public shall be deemed a public highway, or be under the use or control of a county or highway district unless the dedication shall be accepted and confirmed by the commissioners of the county or highway district.

I.C.§40-2312.WIDTH OF HIGHWAYS. 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.§40-2316. PRIVATE HIGHWAYS—ESTABLISHMENT. Private highways may be opened for the convenience of one or more residents of any county highway system or highway district in the same manner as public highways are opened, whenever the appropriate commissioners may order the highway to be opened. The person for whose benefit the highway is required shall pay any damages awarded to landowners, and keep the private highway in repair.

I.C.§40-2317.REMOVAL OF FENCES. When the alteration of an old or the opening of a new highway makes it necessary to remove fences on land given, purchased or condemned by order of a court for highway purposes, notice to remove the fences shall be given by the director of highways to the owner, his occupant, or agent, or by posting the notice on the fence. If removal

is not accomplished within ten (10) days, or commenced and prosecuted as speedily as possible, the director of highways may cause it to be carefully removed at the expense of the owner, and recover from him the cost of removal. The fence material may be sold to satisfy the judgment.

I.C.§40-2319.ENCROACHMENTS--REMOVAL—NOTICE—PENALTY FOR FAILURE TO REMOVE—REMOVAL BY COUNTY OR HIGHWAY DISTRICT—ABATEMENT. (1) If any highway or public right-of-way under the jurisdiction of a county or highway district is encroached upon by gates, fences, buildings, or otherwise, the appropriate county or highway district may require the encroachment to be removed. If the encroachment is of a nature as to effectually obstruct and prevent the use of the highway or public right-of-way for vehicles, the county or highway district shall immediately cause the encroachment to be removed.

(2) Notice shall be given to the occupant or owner of the land, or person causing or owning the encroachment, or left at his place of residence if he resides in the highway jurisdiction. If not, it shall be posted on the encroachment, specifying the place and extent of the encroachment, and requiring him to remove the encroachment within ten (10) days.

(3) If the encroachment is not removed, or commenced to be removed, prior to the expiration of ten (10) days from the service or posting the notice, the person who caused, owns or controls the encroachment shall forfeit up to one hundred fifty dollars ($150) for each day the encroachment continues unremoved.

(4) If the encroachment is denied, and the owner, occupant, or person controlling the encroachment, refuses either to remove it or to permit its removal, the county or highway district

shall commence in the proper court an action to abate the encroachment as a nuisance. If the county or highway district recovers judgment, it may, in addition to having the encroachment abated, recover up to one hundred fifty dollars ($150) for every day the nuisance remained after notice, as well as costs of the legal action and removal.

(5) If the encroachment is not denied, but is not removed within five (5) days after the notice is complete, the county or highway district may remove it at the expense of the owner, occupant, or person controlling the encroachment, and the county or highway district may recover costs and expenses, as well as the sum of up to one hundred fifty dollars ($150) for each day the encroachment remained after notice was complete.

I.C.§67-8003 PROTECTION OF PRIVATE PROPERTY. (2)Upon the written request of an owner of real property that is the subject of such action, such request being filed with the clerk or the agency or entity undertaking the regulatory or administrative action not more than twenty-eight (28) days after the final decision concerning the matter at issue, a state agency or local governmental entity shall prepare a written taking analysis concerning the action. Any regulatory taking analysis prepared hereto shall comply with the process set forth in this chapter, including use of the checklist developed by the attorney general pursuant to subsection (1) of this section and shall be provided to the real property owner no longer than forty-two (42) days after the date of filing the request with the clerk or secretary of the agency whose action is questioned. A regulatory taking analysis prepared pursuant to this section shall be considered public information.

(3) A governmental action is voidable if a written taking analysis is not prepared after a request has been made pursuant to this chapter. A private real property owner, whose property is the subject of governmental action, affected by a governmental action without the preparation of a requested taking analysis as required by this section may seek judicial determination of the validity of the governmental action by initiating a declaratory judgment action or other appropriate legal procedure. A suit seeking to invalidate a governmental action for noncompliance with subsection (2) of this section must be filed in a district court in the county in which the private property owner's affected real property is located. If the affected property is located in more than one (1) county, the private property owner may file suit in any county in which the affected real property is located.

(4) During the preparation of the taking analysis, any time limitation relevant to the regulatory or administrative actions shall be tolled. Such tolling shall cease when the taking analysis has been provided to the property owner. Both the request for a taking analysis and the taking analysis shall be part of the official record regarding the regulatory or administrative action.

42 U.S.C. § 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall bc liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in

such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable...

U. S. Constitution Amend. V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Constitution Amend. XIV § 1. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.